

**Arizona Department of Transportation**

**ENGINEERING CONSULTANTS SECTION CONTRACT**

**Lump Sum – Multi - Phase**

**Contract Number:** \_\_\_\_\_

**Project Description:** \_\_\_\_\_



**Agreement Between**

**The**

**Arizona Department of Transportation**

**And**

**(Firm Name)**

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## SECTION 1.0 CONTRACT INFORMATION

### STATE OF ARIZONA ARIZONA DEPARTMENT OF TRANSPORTATION ENGINEERING CONSULTANTS SECTION CONTRACT

Contract No.: \_\_\_\_\_ Compensation Type: \_\_\_\_\_  
Project/TRACS No.: \_\_\_\_\_ Federal ID No.: \_\_\_\_\_  
Effective Date: NTP

1. **CONTRACTING PARTIES:** This contract is between the Arizona Department of Transportation (ADOT), also referred to as the Department, State or ADOT (administered by ADOT Engineering Consultants Section [ECS]) and,

**Consultant**  
Address  
City, State, Zip

Referred to as the Consultant.

2. **CONTRACT DESCRIPTION:** The Description and Location of the Contract and related project(s) are as follows.
3. **PROJECT/CONTRACT PERIOD:** The project/contract will terminate on (**Date**), unless otherwise extended or canceled in accordance with the terms and conditions of this Contract.
4. **CONTRACT COST:** The Consultant will be paid a maximum of Contract Amount for costs authorized by this Contract as further described in detail in the APPROVED COST PROPOSAL SUMMARY (**APPENDIX B**) or as amended by a Contract Modification.

#### RECITALS

1. The State desires that \_\_\_\_\_ be provided for ADOT \_\_\_\_\_ location. The trained personnel needed for the Contract and related project(s) are not currently available within its own organization.
2. The Consultant, principals, project team, and Subconsultants listed in the Consultant's Statement of Qualifications (SOQs), licensed in the State of Arizona, are qualified and capable of performing the work required by this Contract in the time allotted.
3. Therefore, pursuant to A.R.S. §28-6922(A)(5), it is deemed to be in the public interest to enter into this Contract.

The parties below hereto agree to abide by all the provisions of this Contract. IN WITNESS WHEREOF, the parties sign and cause this Contract to be executed.

#### AGREEMENT

Therefore, in consideration of these premises and of the mutual clauses and agreements herein contained, and the faithful performance thereof, the Consultant and the State contract and agree.

## SECTION 2.0 SCOPE OF WORK

### 2.01 CONTRACT SCHEDULE AND COMPLETION DATE

Work on this Contract is scheduled to commence on (**Date**). Work shall be completed within \_\_\_\_\_ calendar days from Notice to Proceed (NTP) for an estimated completion date of (**Date**). The State assumes no liability for work performed or costs incurred prior to the beginning date or subsequent to the Contract completion date. Time extensions for completing the Contract may be granted by the Department under appropriate circumstances.

### 2.02 SCOPE OF WORK (WITH STANDARDIZED DICTIONARY OF WORK TASKS) (APPENDIX A)

## SECTION 3.0 CONSULTANT'S COMPENSATION

### 3.01 CONSULTANT'S COMPENSATION – LUMP SUM (LS) – MULTI - PHASE

1. The method of compensation for this Contract is Lump Sum (LS). Costs shall be derived from the rates as shown in this Contract.

#### **PHASE I – DESIGN**

#### **SELECT ONE:**

- a. **Negotiated Overhead (if overhead rate is determined before contract execution)**

The total compensation for the work performed shall not exceed the sum of \$\_\_\_\_\_ plus any adjustments approved by the Department. The Negotiated Overhead rate of \_\_\_\_\_%, which is based on the result of the Pre-Award Review, has been established and shall be set for the term of this Contract. At each renewal year(s) of the Contract, if new Negotiated Overhead rates have been provided to and approved by ADOT Office of Audit & Analysis, a Contract Modification shall be executed to revise the Negotiated Overhead rate. The Contract Modification execution date shall be the effective date for all redetermination of costs.

**OR**

- b. **Negotiated Provisional Overhead (if overhead rate is determined after contract execution)**

The total compensation for the work performed shall not exceed the sum of \$\_\_\_\_\_ plus any adjustments approved by the Department. The Negotiated Provisional overhead rate shall be set at \_\_\_\_\_%. The Overhead rate, Direct Expenses and Fixed Fee are subject to change pending the result of the Pre-Award Review. Upon receipt of the Pre-award Review, a Contract Modification shall be executed to establish the Negotiated Overhead for the term of this Contract. A one-time redetermination adjustment in the total amount paid or to be paid on all payment reports shall be made to reflect the established Negotiated Overhead rate and any resulting additional payments, refunds, or credits shall be made promptly by the State or Consultant. The Contract NTP date shall be the effective date for all redetermination of costs. At each renewal year(s) of the Contract, if new Negotiated Overhead rates have been provided to and approved by ADOT Office of Audit & Analysis, a Contract Modification shall be executed to revise the Negotiated Overhead rate. The Contract Modification execution date shall be the effective date for determination of costs.

## 2. PHASE II – POST DESIGN

The CONSULTANT'S compensation for work on Phase II, Post-Design Services, shall begin after the ADOT Board approves the Construction contract and shall be at specific hourly rates (direct labor, overhead and fixed fee) plus FAR-allowable direct expenses approved by the DEPARTMENT. Rates may be subject to negotiation prior to execution of this phase. Identification of personnel within each classification may be required by ADOT. Authorization for Post-Design Services shall be executed by Contract Modification.

3. The State shall pay the Consultant in installments based upon the Monthly Progress Reports and Progress and/or Final Payment Reports submitted by the Consultant, with payments subject to the following limitations:
  - a. Prior to approval of the Stage II Design Submittal, the billed amount shall not exceed \_\_\_\_% of the total Contract amount.
  - b. Prior to approval of the Stage III Design Submittal, the billed amount shall not exceed \_\_\_\_% of the total Contract amount.
  - c. Prior to approval of the Final Design Submittal, the billed amount shall not exceed \_\_\_\_% of the total Contract amount.
4. The State, at its discretion may, by written notification, waive the above limitations. Approval authority shall be the same as for progress payments.
5. Costs shall be identified separately for each project number and shall not exceed the amounts budgeted for those specific categories during the Contract timeframe without prior written approval by the State.
6. The Consultant shall submit a Monthly Progress Report in a format furnished by the State showing the status of the work and the degree of completion.
7. The State shall not withhold retention on progress payments. However, if satisfactory progress has not been made, the State may first retain a maximum of 10% of the current and subsequent billings, or secondly, the State may refuse to make full progress payment(s) of such sums which are considered necessary.
8. The Consultant shall submit invoices on a regular (monthly) basis in accordance with a timetable agreed to during contract negotiations. Invoices shall be sent directly to ADOT Project Manager (ADOT PM).
9. The Consultant shall submit invoices for work performed by their Subconsultants even though the Consultant may not have performed any work during the preceding month.
10. On or before the **seventh day** after the State makes a progress payment to the Consultant, the Consultant shall pay the Subconsultant for the work performed to the extent of each Subconsultant contractual interest in the progress payment.
11. When all work is delivered, accepted and approved as complete by the State, ADOT Office of Audit & Analysis may prepare a report showing allowable costs incurred. Preparation of this report may require an audit of the Consultant's records and may also include an audit of Subconsultants or subcontractors records.
12. Final payment shall be made as soon as possible after 60 days from the date of acceptance of audit findings, if applicable, by the State and the Consultant.

13. In the event the State requires substantial changes in the scope, character, or complexity of the work on the Contract, the total compensation as well as the fixed fee may be re-evaluated and adjusted to a greater or lesser amount by mutual agreement between the Consultant and the State.
14. In the event this Contract is terminated by the State as herein provided, the Consultant may be paid all the allowable costs incurred, including mobilization and demobilization expense, plus that portion of the fixed fee earned to date of termination as determined by the State.
15. Mobilization and demobilization expenses shall include only reasonable costs of marshaling personnel (and equipment if specifically provided for in the Contract) for performing this work and of terminating employment of such personnel. No costs shall be allowable in connection with termination of employment if incurred 15 days after the date of termination. Costs shall be determined as provided in the Federal Acquisition Regulation (FAR) 48 CFR Part 31 and may be verified by an audit.
16. Lump Sum contracts shall not be subject to audit except on a sample bases to determine the efficiency of ADOT negotiation process for its own internal control purposes.

### 3.02 APPROVED COST PROPOSAL SUMMARY (APPENDIX B)

Cost Proposal back-up documents are available online in the electronic Contract Management System (eCMS) Cost Proposal Module.

## SECTION 4.0 UNIFORM TERMS AND CONDITIONS

### 4.01 GENERAL COMPLIANCE WITH LAWS

The Consultant shall comply with all Federal, State laws and regulations, and local ordinances, as they relate to the performance of work under this Contract.

### 4.02 GOVERNING LAW – ARIZONA

The interpretation of this Contract and the rights and duties of the parties shall be governed by Arizona law.

### 4.03 MONTHLY PROGRESS AND WORK-HOUR REPORTS

The Consultant is required to submit monthly Progress Reports with all Payment Reports to the ADOT PM. The form and format to be utilized are provided in the Post-Award Instruction Package, on the Engineering Consultants Section (ECS) website or in eCMS. The Consultant, unless notified otherwise, is required to submit a monthly Progress Report and Work-Hour Report, expended to date on the project by labor category and design elements. The ADOT PM or ECS Contract Specialist (ECS Specialist) may request further breakdown by personnel name and labor classification. Failure to meet this requirement may result in delay in processing the monthly payments to the Consultant.

### 4.04 PAYMENT REPORTS/INVOICES

The Consultant shall invoice ADOT on or before the end of each month for work performed under this Contract or no later than \_\_\_\_th day of the month. The Consultant shall report its monthly costs on the Payment Report (PR) form provided by ECS. If no work has been performed in any month, the Consultant shall still submit a zero (\$0.00) PR indicating that no work has been performed for that month. The Consultant shall submit PR for reimbursement to ADOT for work performed by its Subconsultants within 30 days of receipt of invoice from the Subconsultant, even though the Consultant may not have performed any work during the preceding month.

A monthly summary of costs billed by category or subcategory shall be included with the monthly PR submitted. The PR shall be formatted to permit comparison of actual to proposed costs and shall be submitted with the required information and supporting documentation based on the Contract compensation type. The PR shall also include a breakdown of costs incurred by each Subconsultant who completed work for the time period requested. The PR shall be submitted for reimbursement to the ADOT PM, electronically or on forms provided by ECS. The PRs shall be approved by the ADOT PM and ECS Specialist.

If satisfactory progress is being made, the invoiced amount is approved, and the required documentation has been submitted, the consultant will receive a payment each month based on the amount of work completed during the preceding month. If the consultant submits work to the Department for partial or final payment, that submittal constitutes a representation by the consultant to the Department that the work was satisfactorily performed, regardless of whether the work was performed by the consultant or a subconsultant. Except as herein provided, the Department will not retain monies from the monthly payments.

#### 4.05 LATE SUBMITTAL OF PAYMENT REPORTS

Unless waived by the Department in writing, all PRs for work performed under this Contract shall be submitted within 30 days from date of acceptance of the completed portion of the work performed. The Department, in its sole option, may refuse to pay any late invoices or may deduct a reasonable amount for damages. The Consultant is made aware that late submission of PRs may cause substantial damages to the Department, including but not limited to, difficulty in obtaining or inability to obtain federal reimbursement, budget allocations and inability to verify work and hours. If work performed or costs incurred during the State fiscal year-end (June 30) is not invoiced by the following August 31<sup>st</sup>, the Department shall not pay for work or costs incurred.

Repeated violation of the requirement to submit timely PR in accordance with the terms of this Contract shall result in sanctions including and up to liquidated damages, Contract termination and removal of the offending party or disqualification of the offending Consultant or Subconsultant from participation in future ADOT projects. ADOT shall not be obligated to pay invoices that are submitted more than 60 calendar days after the end of the State fiscal year in which costs were incurred.

#### 4.06 PROMPT PAY

ADOT shall issue payments to Consultants within 21 calendar days after receipt of complete and accurate PR unless proper objection is made under the statute. The Consultant shall pay their Subconsultants within seven (7) calendar days after receiving payment from ADOT, to the extent of each Subconsultant's contractual interest in the payment. Payment is considered made when deposited in the US mail or for direct deposit, when it is deposited into the Consultant's account.

Incomplete or incorrect PR shall be returned to the Consultant within seven (7) calendar days of receipt by ADOT. The 21-calendar-day payment timeframe shall begin anew upon receipt of the complete and corrected PR.

The Department shall not withhold retention on progress payments; however, if satisfactory progress has not been made on the project, the Department may first retain a maximum of 10% of the current and subsequent billings. If unsatisfactory progress continues for a second subsequent month, the Department may, at its sole option, refuse to make progress payment(s) of such sums, which the Department considers necessary. This provision shall not limit the Department's rights to terminate the Contract for default. Retainage shall be paid to the Subconsultant within 7 days of satisfactory completion of the work performed by the Subconsultant.

The Consultants shall not withhold the Subconsultant's payment if ADOT has paid the full value of services rendered. Failure by the Consultant to invoice ADOT in accordance with the terms of this Contract and/or pay its Subconsultants in accordance with the Arizona Prompt Pay Law is a material breach of this Contract and the Consultant shall be subject to disqualification in accordance with Section 2.02 of ECS Manual (Revised June 2016). ADOT reserves the right to request that Consultant provides proof of payment to its Subconsultants.



The Consultant shall be found to be in breach of this Contract if it executes subcontract agreements with Subconsultants, DBE and non-DBE, which materially change the Prompt Pay requirement. This action may result in termination of the Contract, or any other such remedy as deemed appropriate by the Department.

Failure to make prompt partial payment, or prompt final payment including any retention, within the time frames established above, will result in remedies, as the Department deems appropriate, which may include but are not limited to:

- a. Withholding monthly progress payments;
- b. Assessing sanctions;
- c. Liquidated damages;
- d. Disqualifying the consultant from submitting SOQs, or any other forms of proposals, as non-responsible;
- e. Cancellation, termination, or suspension of the Contract, in whole or in part.

See Section 4.33 (b)(8) of this contract for specific remedies for prompt payment non-compliance.

#### 4.07 CONTRACT MODIFICATIONS

The Contract Modifications (CM), which define, limit or change the terms of the Contract, such as Consultant compensation, shall be approved in writing by the Department, and shall be submitted in the form and format provided by the Department. The Consultant shall be compensated only with prior written authorization by the Department. Any administrative/technical costs associated with the preparation of said modifications are solely the responsibility of the Consultant.

##### a. BILATERAL MODIFICATIONS

Significant changes in the scope, character, or complexity of the work may be negotiated if it is mutually agreed that such changes are desirable and necessary. Contract changes defining and limiting the work and compensation shall be authorized by the Department. Such bilateral modifications shall be made in writing, and it is expressly understood and agreed that no claim for extra work performed or materials furnished shall be made by the Consultant until authorization to proceed is granted, in writing, by the Department.

##### b. UNILATERAL (CHANGE ORDERS)

The Department may at any time, by written order, and without notice to sureties, if any, make or direct changes within the general scope of this Contract in the services to be performed.

#### 4.08 CONTRACT TIME EXTENSIONS

A Contract Time Extension may be granted as determined by ADOT. A time extension is valid only if approved in writing as a modification to this Contract. Time extensions for projects using Federal-aid Highway funds over five (5) years after the original Contract completion date shall be approved by the Federal Highway Administration (FHWA).

#### 4.09 DISPUTE ESCALATION

The following dispute escalation levels shall be utilized to resolve disputes during the course of this Contract. The following dispute escalation levels shall be utilized in the event the ADOT PM, Consultant PM or ECS Specialist are unable to agree on the scope, level of effort, cost, payments, or any other issues related to this Contract. It is the

intent of the Department to resolve disputes at the lowest level possible. If agreement cannot be reached at that level, then the matter is escalated to the next higher level of management. Failure to agree at any level constitutes escalation to the next level.

Failure by the Consultant to utilize the escalation process shall constitute a waiver of any claims for additional compensation or any other relief.

The following table depicts the dispute resolution escalation levels for Contract issues:

<u>Level</u>	<u>ADOT</u>	<u>CONSULTANT</u>	<u>ECS</u>
Level 1	Project Manager/ Resident Engineer	Project Manager	Contract Specialist
Level 2	Project Manager/ Section Manager/ District Engineer	Project Principal/ Project Manager	Contract Manager
Level 3	Assistant State Engineer/ Deputy State Engineer/ District Engineer	Project Principal	ECS Assistant Manager
Level 4	Sr. Deputy State Engineer/ State Engineer	Project Principal	ECS Manager

**The decision of the State Engineer is final.**

#### 4.10 FORCE MAJEURE

For delays that are beyond the Consultant's control, such as a force majeure, and upon written request from the Consultant, the Department's authorized representative shall negotiate an adjustment to the project schedule set forth in the SOQ and Scope of Work (**APPENDIX A**) of this Contract. A "force majeure event" is an event beyond the Consultant's reasonable control, including but not limited to, unusually severe weather, fire, floods, acts of God, labor disputes, acts of war or terrorism. The Consultant shall use all reasonable efforts to minimize the duration and consequences or any delay resulting from a force majeure and shall give the Department prompt notice of the occurrence of such an event. It shall be the Consultant's responsibility to promptly notify, in writing, the ADOT PM and other ADOT representatives if the project cannot be completed as scheduled for any reason. The ADOT PM shall have the authority to adjust the schedule, in writing, within the term of this Contract.

#### 4.11 ELECTRONIC PLAN DOCUMENTATION

The Consultant shall adhere to the current Department development standards and As-Built Policy (ENG10-1) on the ADOT website on the date the plans or data are submitted. It is the Consultant's responsibility to provide all plans, specifications, surveys, and associated data in the Department's acceptable electronic format through a File Transfer Protocol (FTP) site; alternatively, two (2) copies of the electronic files shall be submitted on one or more CD-ROM/DVD.

All project data shall be organized in the Department's project directory structure (all files in one folder with no subfolders). It is the Consultant's responsibility to be aware of all current Department requirements and formats. The Department's CADD requirements and formats can be found at <http://azdot.gov/business/engineering-and-construction/CADD>. Redline and As-Built Procedures and Guidelines can be found at <http://www.azdot.gov/docs/business/redlines-and-as-built-procedures-and-guidelines.pdf?sfvrsn=0>.

#### 4.12 ERRORS AND OMISSIONS

Contract No.:

Consultant:

Project Description:

Revised 5~17

If ADOT determines that the Consultant had made any errors and/or omissions (E&O) in the work product delivered to the Department under the terms of this Contract, the Consultant shall make all necessary revisions or corrections resulting from E&O without additional cost to ADOT. Errors and Omissions is defined as a deviation from the standard of care on the part of a design engineering consultant in the performance of architectural and/or engineering services under this Contract. ADOT shall actively pursue the resolution of E&Os at the lowest possible level within a reasonable timeframe in accordance with the most current version of ADOT's Errors & Omissions Policy (MGT 00-2 Consultant Errors and Omissions by Consultant).

If ADOT determines that the Consultant had made any Errors and/or Omissions (E&Os), previously perceived by the District, in the work product delivered to the Department under the terms of this Contract, the Consultant is immediately notified of the E&O, verbally and followed up in writing, and invited to participate in corrective actions in order to mitigate the cost. The consultant notification process is initiated at the District level and forwarded to ADOT Project Manager. Consistent with MGT 00-2, the following steps will be utilized to facilitate the review and processing of E&O claims:

1. Errors or omissions are identified, normally at the Project Level.
2. An initial review is conducted by the Department to determine the validity, responsibility, and extent of the problem.
3. Notification is given to the consultant.
4. If the value of the errors/omissions is determined to be less than five percent of the construction contractor's bid, or \$20,000 (whichever is less), the Engineering Consultants Section will maintain the documentation for a possible future claim.
5. If the errors/omissions exceeds five percent of the construction contractor's bid, or \$20,000 (whichever is less); or if the cumulative total of claims held by Engineering Consultants Section exceeds five percent of the construction contractor's bid, or \$20,000 (whichever is less), the Department may file a formal claim. The Project Manager and the Resident Engineer will review the data and reconcile the costs to determine if the Agency should pursue a claim.
6. The amount of the initial claim will be the cost as determined by the Department less five percent of the construction contractor's bid, or \$20,000 (whichever is less). Any future claims will not be subject to this reduction.
7. The claim will, at minimum, cover the following areas:
  - Statement of circumstances: brief description of who, what, where, when, and why;
  - ADOT's intention: dollar amount of consultant's liability for the claim
  - A copy of the construction force accounts and/or construction change orders, and
  - An explanation of the Department's administrative review process.
8. The Consultant may pay the claim or may request an administrative review. There will be two levels of administrative review. The claim review shall not escalate to the second level without an attempt to resolve it at a lower level. The first level administrative review shall involve the Project Manager, the Resident Engineer, the Assistant State Engineer – Construction Group, and an Assistant State Engineer from Development.
9. If the claim is not resolved at a lower level, the Department will appoint a review panel, which will be chaired by the Deputy State Engineer for Project Delivery and consist of the Deputy State Engineer for Operations and a third party selected by the Chairman. The panel will review all documents and conduct such

investigations and interviews as necessary to make a determination on the validity and extent of the claim. Engineering Consultants Section will provide administrative support to this process.

10. If the review process does not resolve the claim, the Department may pursue the claim through arbitration or litigation, as appropriate.
11. For all unresolved claims of \$100,000 or less, the ADOT Construction Group will file a Demand for Arbitration with the American Arbitration Association. The Arbitration will follow the guidelines set forth in the latest version of the ADOT Construction Manual at the time of contract. Unresolved claims in excess of \$100,000 will be forwarded by the Construction Group to the Office of the Attorney General.
12. When claims are resolved, Engineering Consultants Section will notify all parties in writing.

#### 4.13 CONSULTANT OR SUBCONSULTANT ENDORSEMENT OF PLANS

Pursuant to the Arizona Administrative Code (A.A.C.) R4-30-304 (Use of Seals), which is incorporated herein by reference and hereby made a part of this Contract, the Consultant shall affix a proper engineer's seal to all plans, reports and engineering data furnished under this Contract.

#### 4.14 ARBITRATION

The parties agree to use arbitration, after exhausting applicable administrative reviews, to resolve disputes arising out of this agreement where the sole relief sought is monetary damages of \$500,000 or less, exclusive of interest and costs.

The arbitration shall be submitted under the relevant rules of the American Arbitration Association (AAA) in effect as of the date of the demand for arbitration. The matter disputed shall be submitted to an arbitrator mutually selected by the Department and the Consultant.

#### 4.15 LITIGATION

In the event of litigation between the Consultant and the Department involving this Contract, the laws and decisions of the State of Arizona shall apply and any such litigation shall be commenced and prosecuted in the Maricopa County Superior Court, State of Arizona.

#### 4.16 SUSPENSION OF WORK

Work on this Contract may be suspended by written order at the Department's sole discretion. The Consultant is not entitled to any compensation when work is suspended.

#### 4.17 PROJECT DELAYS, POSTPONEMENTS AND EXTENSIONS

The Consultant agrees that no charges or claims for damages shall be made against the Department for any delays or hindrances during the progress of this Contract unless delays are caused by the Department. Such delays or hindrances, if any, shall be covered by an extension of time for a reasonable period as mutually agreed upon between the parties. It is agreed and understood, however that permission to proceed with the Contract after the established completion date, shall not be construed as a waiver by the Department of any of its rights under this Contract.

#### 4.18 TERMINATION FOR DEFAULT OR CONVENIENCE

- a. Termination for Default

The Department may terminate this Contract for default under the following circumstances:

1. Consultant's failure to perform the services as detailed herein and in any modifications to this Contract.
2. Consultant's failure to complete this Contract within the timeframe specified herein and in any modifications to this Contract.
3. Consultant's failure to comply with any of the material terms of this Contract.

If the Department contemplates termination under the provisions of Subsections a.1., a.2., or a.3. above, the Department shall issue a written notice of default describing the deficiency. The Consultant shall have five (5) business days to cure such deficiency. In the event the Consultant does not cure such deficiency, the Department may terminate the Contract without further consideration by issuing a Notice of Termination for Default and may recover compensation for damages.

If, after the Notice of Termination for Default has been issued, it is determined that the Consultant was not in default or the termination for default was otherwise improper, the termination shall be deemed to have been a Termination for Convenience.

b. Termination for Convenience

The Department may terminate the Contract for convenience, in whole or in part, when, for any reason, the Department determines that such termination is in its best interest. The Contract termination is effected by notifying the Consultant, in writing, specifying that all or a portion of the Contract is terminated for convenience and the termination effective date. The Consultant shall be compensated only for work satisfactorily completed prior to the termination of the Contract. The Consultant is not entitled to loss or profit. The amount due to the Consultant is determined by ADOT.

In the event of termination for convenience, the Department shall be liable to the Consultant only for Consultant's work performed prior to termination and only to the extent and as provided in SECTION 3.0 (CONSULTANT'S COMPENSATION) of this Contract.

c. The Department's Right to Proceed with Work

In the event this Contract is terminated, the Department shall have the option of completing the Contract or entering into an agreement with another party to complete services outlined in the Contract.

#### 4.19 CANCELLATION

In accordance with A.R.S. §38-511 (A), the Department may cancel the Contract without penalty or further obligation, if any person significantly involved in initiating, negotiating, securing, drafting or creating the Contract on behalf of the Department or any of its departments or agencies is, at any time while the Contract or any extension of the Contract is in effect, either (1) an employee of the Consultant in any capacity, or (2) a consultant to the Consultant or an employee or consultant to a Subconsultant with respect to the subject matter of the Contract. The cancellation shall be effective when written notice from the Department is received by all other parties to the Contract unless the notice specifies a later timeframe.

#### 4.20 INSURANCE

The Consultant and all Subconsultants shall provide their insurance agent/producer with a copy of the insurance requirements within this section.

The Consultant and all Subconsultants shall procure and maintain until all of their obligations have been discharged, including any warranty periods under this Contract, are satisfied, insurance against claims for injury to persons or

damage to property which may arise from or in connection with the performance of the work hereunder by the Consultant, his agents, representatives, employees or Subconsultants.

The insurance requirements herein are minimum requirements for this Contract and in no way limit the indemnity covenants contained in this Contract. The State of Arizona in no way warrants that the minimum limits contained herein are sufficient to protect the Consultant from liabilities that might arise out of the performance of the work under this Contract by the Consultant, its agents, representatives, employees or Subconsultants, and the Consultant is free to purchase additional insurance.

The Consultant may purchase an excess or umbrella policy to secure these limits. If the Consultant or Subconsultant uses any excess or umbrella insurance to meet the required limits then this excess or umbrella insurance must be "follow form" equal to or broader in coverage than the underlying insurance requirements, including but not limited to, additional insured endorsements and waiver of subrogation endorsements.

**A. MINIMUM SCOPE AND LIMITS OF INSURANCE:** The Consultant shall provide coverage with limits of liability not less than those stated below.

**1. *Commercial General Liability – Occurrence Form***

The policy shall include bodily injury, property damage, personal injury and broad form contractual liability coverage.

• General Aggregate	\$2,000,000
• Products – Completed Operations Aggregate	\$1,000,000
Products and completed operations coverage shall be maintained for three (3) years after completion of design	
• Personal and Advertising Injury	\$1,000,000
• Blanket Contractual Liability – Written and Oral	\$1,000,000
• Damage to Rented Premises	\$50,000
• Each Occurrence	\$1,000,000

<u>Contract Value</u>	<u>Required Insurance</u>			
\$0 to \$5,000,000	\$1,000,000	Each Occurrence;	\$2,000,000	Aggregate
\$5,000,001 to \$15,000,000	\$5,000,000	Each Occurrence;	\$5,000,000	Aggregate
\$15,000,001 to \$50,000,000	\$5,000,000	Each Occurrence;	\$10,000,000	Aggregate
\$50,000,001 & up	\$25,000,000	Each Occurrence;	\$25,000,000	Aggregate

- a. The Consultant shall be responsible for monitoring the Contract value as it increases and the Consultant shall be responsible for purchasing additional insurance to be in compliance with this Contract should the increase in Contract value require a higher limit of insurance. The Consultant shall provide a new certificate of insurance that reflects the increase in limits as required in 4.20 (E) below
- b. The policy shall be endorsed to include the following additional insured language: ***"The State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees shall be named as additional insureds with respect to liability arising out of the activities performed by or on behalf of the Consultant."*** Such additional insured shall be covered to the full limits of liability purchased by the Consultant, even if those limits of liability are in excess of those required by this Contract.

- c. The policy shall contain a waiver of subrogation endorsement in favor of the State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees for losses arising from work performed by or on behalf of the Consultant.

## 2. **Business Automobile Liability**

Bodily Injury and Property Damage for any owned, hired, and/or non-owned vehicles used in the performance of this Contract.

Combined Single Limit (CSL)

\$1,000,000

If work is performed on the active roadway then Consultant or Subconsultant shall provide a minimum of \$5,000,000 Combined Single Limit coverage.

- a. The policy shall be endorsed to include the following additional insured language: ***"The State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees shall be named as additional insureds with respect to liability arising out of the activities performed by or on behalf of the Consultant, involving automobiles owned, leased, hired or borrowed by the Consultant."*** Such additional insured shall be covered to the full limits of liability purchased by the Consultant, even if those limits of liability are in excess of those required by this Contract.
- b. The policy shall contain a waiver of subrogation endorsement in favor of the State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees for losses arising from work performed by or on behalf of the Consultant.
- c. Policy shall contain a severability of interest provision.

## 3. **Worker's Compensation and Employers' Liability**

Workers' Compensation	Statutory
Employers' Liability	
Each Accident	\$1,000,000
Disease – Each Employee	\$1,000,000
Disease – Policy Limit	\$1,000,000

- a. The policy shall contain a waiver of subrogation endorsement in favor of the State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees for losses arising from work performed by or on behalf of the Consultant.
- b. This requirement shall not apply to: Separately, EACH Consultant or Subconsultant exempt under A.R.S. §23-901, AND when such Consultant or Subconsultant executes the appropriate waiver (Sole Proprietor/Independent Consultant) form.

## 4. **Professional Liability (Errors and Omissions Liability)**

Each Claim	\$1,000,000
Annual Aggregate	\$2,000,000

<u>Contract Value</u>	<u>Required Insurance</u>			
\$0 to \$5,000,000	\$1,000,000	Each Occurrence;	\$2,000,000	Aggregate
\$5,000,001 to \$15,000,000	\$5,000,000	Each Occurrence;	\$5,000,000	Aggregate

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\$15,000,001 to \$50,000,000	\$5,000,000	Each Occurrence;	\$10,000,000	Aggregate
\$50,000,001 & up	\$25,000,000	Each Occurrence;	\$25,000,000	Aggregate

- a. The Consultant shall be responsible for monitoring the Contract value as it increases and the Consultant shall be responsible for purchasing additional insurance to be in compliance with this Contract should the increased value of the Contract require a higher limit of insurance. The Department reserves the right to request that the Consultant provide proof of increased insurance coverage corresponding to increased contract value. The Consultant shall provide a new certificate of insurance that reflects the increase in limits as required in 4.20 (E) below.
- b. In the event that the liability insurance required by this Contract is written on a claims-made basis, the Consultant warrants that any retroactive date under the policy shall precede the effective date of this Contract; and that either continuous coverage will be maintained or an extended discovery period will be exercised for a period of three (3) years beginning at the time work under this Contract is completed.
- c. The policy shall cover professional misconduct or negligent acts for those positions defined in the Scope of Work (**APPENDIX A**) of this Contract.
- d. Consultant is required to carry professional liability insurance regardless of the type of contract or the scope of work and it shall not be waived without prior approval from Risk Management.

#### **5. Aircraft Liability – Per Occurrence Form (if applicable)**

If the Consultant or their Subconsultant will be using aircraft to perform any portion of this Contract then aircraft liability shall be provided. The policy shall include bodily injury, property damage, personal injury and broad form contractual liability.

- Products – Completed Operations Aggregate \$1,000,000
- Personal and Advertising Injury \$1,000,000
- Hangarkeepers Liability \$1,000,000
- Per Seat Limit \$1,000,000
- Blanket Contractual Liability – Written and Oral \$1,000,000
- Fire Legal Liability \$50,000
- Each Occurrence \$5,000,000

- a. The policy shall be endorsed to include the following additional insured language: ***“The State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees shall be named as additional insureds with respect to liability arising out of the activities performed by or on behalf of the Consultant.”*** Such additional insured shall be covered to the full limits of liability purchased by the Consultant, even if those limits of liability are in excess of those required by this Contract.
- b. The policy shall contain a waiver of subrogation endorsement in favor of the State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees for losses arising from work performed by or on behalf of the Consultant.

#### **6. Valuable Papers Coverage**

Valuable papers insurance shall be included in the policy for a minimum of \$25,000 or in a higher amount sufficient to assure the restoration of any document, memoranda, plans, specifications, drawings, media, computer files, data or other information related to the work of the Consultant in the completion of this Contract.



**B. ADDITIONAL INSURANCE REQUIREMENTS:** The policies shall include, or be endorsed to include, the following provisions:

1. The Consultant's policies shall stipulate that the insurance afforded the consultant shall be primary insurance and that any insurance carried by the Department, its agents, officials, employees or the State of Arizona shall be excess and not contributory insurance, as provided by A.R.S. § 41-621 (E).
2. Coverage provided by the Consultant shall not be limited to the liability assumed under the indemnification provisions of this Contract.

**C. NOTICE OF CANCELLATION:** With the exception of the 10-day notice of cancellation for non-payment of premium, any changes material to compliance with this Contract in the insurance policies above shall require a 30-day written notice to the State of Arizona. Such notice shall be sent directly to ECS and shall be sent by certified mail, return receipt requested.

**D. ACCEPTABILITY OF INSURERS:** Consultants insurance shall be placed with companies duly licensed in the State of Arizona or hold approved non-admitted status on the Arizona Department of Insurance List of Qualified Unauthorized Insurers. Insurers shall have an "A.M. Best" rating of not less than A- VII or duly authorized to transact Workers' Compensation insurance in the State of Arizona. The State of Arizona in no way warrants that the above-required minimum insurer rating is sufficient to protect the Consultant from potential insurer insolvency.

**E. VERIFICATION OF COVERAGE:** The Consultant shall furnish the Department (ECS) with certificates of insurance (ACORD form or equivalent approved by the State of Arizona) as required by this Contract. The certificates for each insurance policy shall be signed by an authorized representative.

All certificates and endorsements shall be received and approved by the Department (ECS) before work commences. Each insurance policy required by this Contract shall be in effect at or prior to commencement of work under this Contract and remain in effect for the duration of this Contract. Failure to maintain the insurance policies as required by this Contract, or to provide evidence of renewal, is a material breach of Contract.

All certificates required by this Contract shall be sent directly to ECS. The ECS Contract number and project description shall be noted on the certificate of insurance. The Department reserves the right to require complete, certified copies of all insurance policies required by this Contract at any time.

**F. SUBCONSULTANTS:** The Consultant is responsible for ensuring and/or verifying that all Subconsultants have current, valid, and collectable certificates of insurance that are consistent with the minimum requirements within the Consultant Contract. This is applicable to all lines of insurance within the Contract. The Department reserves the right to request that the Consultant provide proof that its Subconsultants have the required insurance coverage at any time.

**G. EXCEPTIONS:** Requests for exceptions to insurance requirements for Subconsultant(s) shall be provided in writing to ECS and the ADOT Risk Manager prior to the start of work and will be reviewed for any risks to the Department. No work by the involved Subconsultant shall proceed until ADOT makes a decision regarding the request.

#### 4.21 INDEMNIFICATION (RESPONSIBILITY FOR CLAIMS AND LIABILITIES)

To the extent permitted by law, consultant shall indemnify and hold harmless the State of Arizona, its departments, agencies, boards, commissions and their officers and employees from all liabilities, damages, losses and costs, including reasonable attorney fees and court cost, but only to the extent caused by the negligence, recklessness or

intentional wrongful conduct of the consultant or other persons employed or used by the consultant in the performance of the contract or subcontract. "Other persons employed or used" means a subconsultant to a consultant or design professional in any tier, or any other person or entity who performs work or design professional services, or provides labor, services, materials or equipment in connection with the contract.

#### 4.22 PERMITS FOR WORK ON ADOT RIGHT-OF-WAY

The Consultant and all Subconsultants shall obtain a permit from ADOT for any and all encroachments into ADOT Right-of-Way, and shall comply with the obligations in such permit. The Consultant understands and agrees that additional insurance may be required by ADOT for activities within ADOT Right-of-Way that presents exposure to risk not anticipated in this Contract. The Consultant shall contact the appropriate ADOT District Permit Office for more details or visit <http://www.azdot.gov/business/Permits> for more details on how to secure proper permits.

#### 4.23 ANTI-TRUST VIOLATIONS

The Consultant and the Department recognize that in actual economic practice, overcharges resulting from anti-trust violations are in fact borne by Purchaser or ultimate user which in this case is the Department. Therefore, the Consultant, acting as a vendor, hereby assigns to the Department any and all claims for such overcharges.

#### 4.24 CONSULTANT'S RESPONSIBILITY FOR PLANS AND DATA

The Consultant has total responsibility for the accuracy and comprehensiveness of plans and related data prepared under the terms of this Contract and shall check all such material accordingly for completeness, missing items, correct multipliers and consistency. ADOT may review the plans and other documents for conformity with ADOT standards and Contract terms, but is not required to do so. ADOT's review does not include detailed review or checking of design of major components and related details or the accuracy with which such designs are depicted on the plans. ADOT's review shall not relieve the Consultant of any of its duties.

#### 4.25 PROFESSIONAL CONDUCT AND PROFESSIONAL REGISTRATION

The Consultant shall comply with the "Rules of Professional Conduct" provision pursuant to A.A.C. R4-30-301, which is incorporated herein by reference and hereby made a part of this Contract.

The Consultant shall comply with the "Registration as an Architect, Assayer, Engineer, Geologist, Landscape Architect, or Land Surveyor" provision pursuant to A.A.C. R4-30-201, which is incorporated herein by reference and hereby made a part of this Contract.

#### 4.26 IMPROPER EXERCISE OF AUTHORITY

It is further understood and agreed that the Consultant shall not, in any way, exercise any portion of the authority or powers of the Department, and shall not make a contract or commitment, or in any way represent itself as an agent of the Department beyond the scope of this Contract unless expressly authorized, in writing, by the Department.

#### 4.27 CONFLICTS OF INTEREST

- a. The Consultant shall not engage the services on this Contract of any present or former Department employee who was involved as a decision maker in the selection or approval processes or who negotiated and/or approved billings or Contract modifications for this Contract.
- b. The Consultant agrees that no public or private interest exists and none shall be acquired directly or indirectly which would conflict in any manner with the performance of this Contract.

#### 4.28 CONSULTANT/CONTRACTOR CONFLICTS OF INTEREST

- a. No Contract for the construction of a project shall be awarded to the Consultant that designed the project, or its subsidiaries, affiliates, parent company or Subconsultants, except with the written approval by the Department.
- b. The applicability of the above also applies to a Management and/or General Consultant or any of its subsidiaries, affiliates, parent company or Subconsultants that were involved in any aspect of the design phase.
- c. The Consultant agrees that it shall not perform services on this project for the contractor, subcontractor or any supplier in accordance with the most current Consultant Participation in ADOT Contract policy available on the ECS website (<http://www.azdot.gov/business/engineering-consultants/PoliciesandLinks>).
- d. The Consultant shall not negotiate, contract, or make any agreement with the contractor, subcontractor or any supplier with regard to any of the work under this Contract, or any services, equipment or facilities to be used on this Contract.

#### 4.29 ORGANIZATION EMPLOYMENT DISCLAIMER

- a. This Contract is not intended to constitute, create, give to, or otherwise recognize a joint venture agreement or relationship, partnership, or formal business organization of any kind, and the rights and obligations of the parties shall be only those expressly set forth in this Contract.
- b. The parties agree that no persons supplied by the Consultant in the performance of Consultant obligations under this Contract are considered to be Department employees, and that no rights of State civil service, retirement or personnel rules accrue to such persons. The Consultant shall have total responsibility for all salaries, wages, bonuses, retirement, withholdings, workmen's compensation, occupational disease compensation, unemployment compensation, other employee benefits and all taxes and premiums appurtenant thereto concerning such persons, and shall save and hold the Department harmless with respect thereto.

#### 4.30 FEDERAL DEBARMENT AND SUSPENSION

- a. By signature on this Contract, the Consultant certifies its compliance, and the compliance of its Subconsultants or subcontractors, present or future, by stating that any person associated therewith in the capacity of owner, partner, director, officer, principal investor, project director, manager, auditor, or any position of authority involving federal funds:
  - 1. Is not currently under suspension, debarment, voluntary exclusion, or determination of ineligibility by any Federal Agency;
  - 2. Does not have a proposed debarment pending;
  - 3. Has not been suspended, debarred, voluntarily excluded or determined ineligible by any Federal Agency within the past three (3) years; and
  - 4. Has not been indicted, convicted, or had a civil judgment rendered against the firm by a court of competent jurisdiction in any matter involving fraud or official misconduct within the past three (3) years as specified by Code of Federal Regulations 49 CFR paragraph 29.305(a).
- b. Where the Consultant or its Subconsultant is unable to certify to the statement in Section a.1. above, the Consultant or its Subconsultant shall be declared ineligible to enter into Contract or participate in the project.

- c. Where the Consultant or Subconsultant is unable to certify to any of the statements as listed in Sections a.2., a.3., or a.4. above, the Consultant or its Subconsultant shall submit a written explanation to the Department. The certification or explanation shall be considered in connection with the Department's determination whether to enter into Contract.
- d. The Consultant shall provide immediate written notice to the Department if, at any time, the Consultant or its Subconsultant, learn that its Debarment and Suspension certification has become erroneous by reason of changed circumstances.

#### 4.31 CONTINGENT FEES

The Consultant warrants that it has not employed or retained any company or person, other than bona fide employee working solely for the Consultant, to solicit or secure this Contract, and that it has not paid or agreed to pay any company or person, other than bona fide employee working solely for the Consultant, any fee, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or making of this Contract. For breach or violation of this warranty, the Department shall have the right to annul this Contract without liability, or in its discretion, deduct from the Contract price or consideration, or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fees.

#### 4.32 SUBLETTING, ASSIGNMENTS AND TRANSFERS

- a. The Consultant team and key personnel was chosen to perform the work on this Contract based on the training and qualifications of its members. Therefore, subletting, assignment or transfer of any work to its Subconsultant(s) and lower-tier Subconsultants, unless approved in writing by the Department prior to performance of work, is expressly prohibited. The dollar amount of work performed by the Subconsultants shall not exceed **49%** of the total Contract dollar value unless waived, in writing, by the Department.
- b. The use of Subconsultants shall not relieve the Consultant of any of its duties under this Contract.

#### 4.33 SUBCONTRACTS

- a. Sub-Contract Terms:

The Consultant agrees to execute a written Contract with all Subconsultants for work to be completed under this Contract. The executed Contract shall include Subconsultant's Scope of Work and all the Uniform Terms and Conditions set forth in Section 3.0 and 4.0 of this Contract.

The Consultant shall provide electronic copies of signed subcontract agreements with all Subconsultants to ADOT Business Engagement and Compliance Office (BECO) by uploading them to the ADOT DBE System at <https://adot.dbesystem.com>. Subcontract agreements shall include all required assurances and required clauses as outlined in Section 3.0 and 4.0 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.

The Consultant shall be in breach of this Contract if the Consultant materially modifies the federal regulations and State statutes in its subcontract agreements terms and conditions with its Subconsultants. Deviations from the terms of this Contract may result in termination of the Contract, or any other such remedy as deemed appropriate by the Department.

- b. Sub-Contract Payments

- 1. Retention: If the prime contract does not provide for retention, the consultant and each subconsultant of any tier shall not withhold retention on any subcontract. If retention is held in the circumstances listed under 4.06 above, the Consultant and each Subconsultant of any tier shall not

retain a higher percentage from Subconsultants than the Department retained under the Prime contract.

2. No Set-offs Arising from Other Contracts: If a subconsultant is performing work on multiple contracts for the same consultant or subconsultant of any tier, the consultant or subconsultant of any tier shall not withhold or reduce payment from its subconsultants on the contract because of disputes or claims on another contract.
3. Partial Payment: The consultant and each subconsultant of any tier shall make prompt partial payments to its subconsultants within seven days of receipt of payment from the Department. Notwithstanding any provision of Arizona Revised Statutes Section 28-411, the parties may not agree otherwise.
4. Final Payment: The consultant and each subconsultant of any tier shall make prompt final payment to each of its subconsultants. The consultant and each subconsultant of any tier shall pay all monies, including retention, due to its subconsultant within seven days of receipt of payment. Notwithstanding any provision of Arizona Revised Statutes Section 28-411, the parties may not agree otherwise.
5. Payment Reporting: For the purposes of this subsection "Reportable Contracts" means any subcontract, of any tier, DBE or non-DBE, by which work shall be performed on behalf of the consultant and any contract of any tier with a DBE material or service supplier.

The requirements of this subsection apply to all Reportable Contracts.

Payment Reporting for all Reportable Contracts shall be done through ADOT's web-based DBE System. The ADOT DBE System can be accessed from the Department's BECO website. No later than fifteen calendar days after the Notice to Proceed is issued, the consultant shall log into ADOT's web based DBE System and enter or verify the name, contact information, and subcontract amounts for Reportable Contracts on the project. As Reportable Contracts are approved over the course of the contract, the consultant shall enter them in the system. Reportable contracts shall be entered into the system no later than five calendar days after approval by the Department.

The consultant shall report on a monthly basis indicating the amounts actually paid and the dates of each payment under any Reportable Contract on the project. In addition, the consultant shall require that all participants in any Reportable Contract electronically verify receipt of payment on the contract by the last day of the month and the consultant shall actively monitor ADOT's DBE System to ensure that the verifications are input. The consultant shall proactively work to resolve any payment discrepancies in the ADOT DBE System between payment amounts it reports and payment confirmation amounts reported by others.

The consultant shall ensure that all Reportable Contract activity is reported to the Department. This includes all lower-tier Reportable Contracts, regardless of whether a DBE is involved or not.

The consultant shall maintain records for each payment explaining the amount requested by the subconsultant, and the amount actually paid pursuant to the request, which may include but are not limited to, estimates, invoices, pay requests, copies of checks or wire transfers, and lien waivers in support of the monthly payments in the ADOT DBE System.

The consultant shall provide information for payments made on all Reportable Contracts during the previous month by the 15th day of the current month. In the event that no payments were made during a given month, the consultant shall identify that by entering a dollar value of zero. If the consultant does not pay the full amount of any invoice from a subconsultant, the consultant shall

note that and provide the reasons in the comment section of the Monthly Payment Audit of the ADOT DBE System.

For each Reportable Contract on which the consultant fails to submit timely payment information the Department will retain \$1,000.00 as liquidated damages, from the monies due to the consultant. Liquidated damages will be deducted each month for each Reportable Contract on which the consultant fails to submit payment information until the consultant provides the required information as described herein. After 90 consecutive days of non-reporting, the liquidated damages will increase to \$2,000.00 for each subsequent month, for each Reportable Contract on which the consultant fails to report until the information is provided. These liquidated damages shall be in addition to all other retention or liquidated damages provided for elsewhere in the contract.

Payment reporting requirements apply to all contracts, federal and non-federal funded.

The consultant shall ensure that a copy of this Subsection is included in every Reportable Contract of every tier.

(a) Sanctions for Inadequate Reporting:

For each Reportable Contract on which the consultant fails to submit timely and complete payment information the Department will retain \$1,000.00 as liquidated damages, from the monies due to the consultant. Liquidated damages will be deducted each month for each Reportable Contract on which the consultant fails to submit payment information until the consultant provides the required information as described herein. After 90 consecutive days of non-reporting, the liquidated damages will increase to \$2,000.00 for each subsequent month, for each Reportable Contract on which the consultant fails to report until the information is provided. These liquidated damages shall be in addition to all other retention or liquidated damages provided for elsewhere in the contract.

6. Completion of Work: A subconsultant's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished, documented, and accepted by the Department.

7. Disputes: If disputes arise regarding payment of subconsultants, the consultant shall immediately provide the ADOT Project Manager with a written, verifiable explanation if:
- The consultant does not pay the full amount of any invoice from a subconsultant within seven days of receipt of a progress payment from the Department, or
  - The monthly estimate does not include all work claimed by a subconsultant to have been performed.

The Department will determine whether the consultant has acted in good faith concerning any such explanations. The Department reserves the right to request and receive documents from the consultant and all subconsultants of any tier, in order to determine whether prompt payment requirements were met. The consultant shall implement and use the dispute resolution process outlined in the subcontract, as described in Section 4.09 of this contract, to resolve payment disputes.

8. Non-Compliance: Failure to make prompt partial payment or prompt final payment including any retention, within the time frames established in this contract, will result in remedies, as the Department deems appropriate, which may include, but are not limited to:
- Liquidated Damages: These liquidated damages shall be in addition to all other retention or liquidated damages provided for elsewhere in the contract.
    - (i) The Department will withhold two times the disputed dollar amount not paid to each subconsultant.

- (ii) If full payment is made within 30 days of the Department's payment to the consultant, the amount withheld by the Department will be released.
- (iii) If full payment is made after 30 days of the Department's payment to the consultant, the Department will release 75 percent of the funds withheld. The Department will retain 25 percent of the monies withheld as liquidated damages.
- Additional Remedies: If the consultant fails to make prompt payment for three consecutive months, or any four months over the course of one project, or if the consultant fails to make prompt payment on two or more contracts within 24 months, the Department may, in addition, invoke the following remedies:
  - (i) Withhold monthly progress payments until the issue is resolved and full payment has been made to all subconsultants and vendors subject to the requirements outlined under "Liquidated Damages" above,
  - (ii) Terminate the contract for default in accordance with Section 4.18 of this Contract, and/or
  - (iii) Disqualify the consultant from future bidding temporarily or permanently, depending on the number and severity of violation.
  - (iv) Reflect the consultant's performance in submitting payment reports and making subconsultant payments in the consultant's Annual and Contract Completion Performance Evaluation.

#### 4.34 KEY PERSONNEL

- a. No substitution or transfer of personnel, specifically identified in the approved Key Personnel list, shall be made without prior written approval by the Department.
- b. Key Personnel are those individuals whose qualifications were highly significant and appropriate in evaluating the overall qualifications of the project team Key Personnel includes, at a minimum:
  - 1) The Consultant's registered Project Principal/Owner responsible for the overall technical and administration aspects of this Contract;
  - 2) The person in direct charge of the overall project work (Project Manager);
  - 3) The person in charge of each major engineering disciplines/component of the work (e.g., bridge, pavement design, environmental, etc.);
  - 4) Where applicable, the person in charge of overall scheduling of the project work.

Key Personnel may also include, but are not limited to, Project Engineer, Subconsultants' Team members and any other Key Personnel deemed vital to the completion of the project, and whose qualifications were evaluated by the Selection Panel.

- c. The Department will review the Consultant's proposed list of Key Personnel presented during contract negotiations and will approve the list of Key Personnel assigned to the Contract. The Department's decision as to Key Personnel composition shall be final.
- d. The Consultant shall not change any of the Key Personnel assigned to this Contract until it has obtained written approval from the ADOT PM and ECS through a Contract Modification. The Consultant shall notify the Department in advance of an anticipated change in the Key Personnel no later than 10 calendar days prior to the change, and shall inform the Department of the reasons the change must be made and shall certify that the overall intent of the Contract shall not be impaired by the change. The advance notice requesting a Key Personnel change shall include the name(s) of the Key Personnel, date of departure, the proposed replacement and his/her credentials/resume. Qualifications of any Key Personnel proposed in a change shall be equal to or greater than the original qualifications of the person being replaced.

The Department shall have the right to approve or reject the proposed successor. The Department will consider any change in Key Personnel, and at its discretion may decide to terminate the Contract for convenience if, in the Department's sole discretion, the Department believes that the project team is materially different because of the change. The Department shall make its decision within 30 days of the Consultant's request to change Key Personnel.

Failure to provide the Department with advanced notification may result in termination of the Contract, award of damages to the Department or loss of prequalification status.

#### 4.35 EMPLOYMENT OF PERSONNEL OF PUBLIC AGENCIES

The Consultant shall not engage the service of any person or persons employed by the Department for work covered by the terms of this Contract without prior written approval by the Department.

#### 4.36 SUCCESSORS AND ASSIGNS

The Consultant and all successors, executors, administrators and assigns of Consultant's interest in the work or the compensation herein provided shall be bound to the Department to the full legal extent to which the Consultant is bound with respect to each of the terms and agreements of this Contract.

#### 4.37 CONTINUING OBLIGATION

The Consultant agrees that if due to death or any other occurrence it becomes impossible for any principal or employee of the Consultant to render the services required under this Contract, neither the Consultant nor the surviving principals shall be relieved of any obligation to render complete performance. However, in such event, the Department may terminate this Contract if it considers the death or incapacity of such principal or employee to be a loss of such magnitude as to (1) affect the Consultant's ability to satisfactorily complete the performance of this Contract, or (2) materially affect the evaluation of the Consultant's qualifications.

#### 4.38 NAME CHANGE, MERGER, ACQUISITION, CONSOLIDATION AND/OR TRANSFER OF OWNERSHIP

- a. In cases where a firm changes its name, acquires, or merges with another company, the firm under Contract with ADOT shall notify ADOT of name or ownership changes within **10 business days** from the date when the name or ownership change is legally signed/approved **before** the new Consultant begins any work on acquired firm's contract(s). The Consultant changing its name due to merger, acquisition, consolidation and/or transfer of ownership shall be responsible for fulfilling all obligations, liabilities, and contract terms/conditions for all ADOT Contracts of the acquired firm. The new/acquiring firm shall provide ECS with the required information to approve the name change, including but not limited to the following:
  1. A letter, on company letterhead, indicating the new name and reason for the change. The letter shall also include:
    - i. Effective date of the change.
    - ii. List of active and pending closeout ADOT Contracts affected by the change with contract description. Indicate which contract(s) the firm served as a Consultant or Subconsultant.
    - iii. A statement certifying that the new/acquiring Consultant shall assume all obligations and liabilities set forth in the respective contracts for all listed contracts between the new/acquiring Consultant and ADOT.
    - iv. A statement certifying that no changes have been made in the Key Personnel responsible for the affected contracts. If a Key Personnel change occurs resulting from the merger, acquisition, consolidation and/or transfers of ownership, the Consultant shall submit a separate request to



obtain ADOT's approval for the Key Personnel change in accordance with Section 4.34 (KEY PERSONNEL) of this Contract.

2. A copy of Arizona Corporation Commission (ACC) or home-state equivalent Corporation Commission approval documentation of the new/acquiring Consultant
  3. Updated professional license(s) of the new/acquiring Consultant
  4. Updated W-9 Form of the new/acquiring Consultant
- b. If the acquiring firm is approved by ADOT to take over the merged or acquired Contracts, the Contracts shall be modified to include the acquiring firm's name by a Contract Modification. The Consultant shall also re-qualify with ECS under the new entity/firm name.
- c. If a Subconsultant listed in the Contract changes its name due to merger, acquisition, consolidation and/or transfer of ownership, the **Subconsultant shall notify the Consultant** of the name or ownership changes within **10 business days** when the name or ownership change is legally signed/approved **before** the new/acquiring Subconsultant begins any work on the acquired Subconsultant contract(s). The Consultant shall request ADOT's written approval within 10 calendar days from the Subconsultant notification. The name-change request shall include, at a minimum, the following:
1. A letter, on company letterhead, indicating the new Subconsultant(s) name and reason for the change. The letter shall also include:
    - i. Effective date of the change
    - ii. List of active and pending closeout ADOT Contracts affected by the change with contract description. Indicate which contract(s) the firm served as a Consultant or Subconsultant.
    - iii. A statement certifying that the new/acquiring Subconsultant shall continue to provide quality work under the Contract
    - iv. A statement certifying that no changes have been made in the Key Personnel responsible for the affected contracts. If a Key Personnel change occurs resulting from the merger, acquisition, consolidation and/or transfers of ownership, the Subconsultant shall submit a separate request through the Consultant, to obtain ADOT's approval for the Key Personnel change in accordance with Section 4.34 (KEY PERSONNEL) of this Contract.
  2. A copy of the new/acquiring Subconsultant's ACC or home-state equivalent Corporation Commission approval documentation related to the change.

#### 4.39 ANTI-LOBBYING

The Consultant certifies, by signing and submitting the SOQ, to the best of his/her knowledge and belief, that:

- a. No federal appropriated funds have been paid or shall be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence any officer or employee of any State or Federal Agency, a Member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the awarding of any Federal contract, the making of any federal grant, the making of any federal loan, the entering into any cooperative agreement, and the extension, continuation, renewal amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- b. If any funds other than federally appropriated funds have been paid or shall be paid to any person for influencing or attempting to influence an officer or employee of any Federal Agency, a Member of Congress, and officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit the "Disclosure of Lobbying Activities" form in accordance with its instructions (<http://www.azdot.gov/docs/business/lobby-certification.pdf?sfvrsn=0>).

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- c. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making and entering into this transaction imposed by Section 1352, Title 31 and U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.
- d. The Consultant also agrees, by submitting its SOQ that it shall require that the language of this certification be included in subcontracts with all Subconsultant(s) and lower-tier Subconsultants which exceed \$100,000 and that all such Subconsultants and lower-tier Subconsultants shall certify and disclose accordingly.
- e. The Department shall keep the firm's certification on file as part of its original SOQ. The Consultant shall keep individual certifications from all Subconsultants and lower-tier Subconsultants on file. Certification shall be retained for three (3) years following completion and acceptance of any given project.
- f. Disclosure forms for the Consultant and its Subconsultants and lower-tier Subconsultants shall be submitted to the ECS Contract Specialist assigned to this Contract on the date the Statement of Qualifications are due. The Consultant and each Subconsultant and lower-tier Subconsultant shall file revised disclosure forms at the end of each calendar quarter in which events occur that materially affect the accuracy of any previously filed disclosure form. The Disclosure forms shall be submitted by the ECS Manager to the FHWA for further review.

#### 4.40 ADOT PRODUCTS

- a. ADOT shall provide the Consultant with the ADOT-developed software for the sole purpose of completing this Contract, as set forth in the Site License Contract, which includes a detailed list of software that shall be provided to the Consultant. The software shall be provided to the Consultant solely for the purpose of completing this Contract and for no other purposes. ADOT-developed software including manuals, electronic information, programs, and associated materials remains the property of ADOT.
- b. Any use of this software for purposes other than the fulfillment of this Contract is strictly prohibited. The Consultant shall not copy the software or provide, distribute or demonstrate the software to other entities. Upon completion of this Contract or when otherwise notified by ADOT, the Consultant shall return all software, backup copies, manuals, electronic information and associated materials to ADOT.

#### 4.41 RECORDS RETENTION, MAINTENANCE AND AUDIT

- a. Pursuant to A.R.S. §35-214, the Consultant and its Subconsultant(s) shall keep and maintain all books, papers, records, accounting records, files, accounts, expenditure records, reports, cost proposals with backup data and all other such materials related to the Contract and other related project(s). The Consultant shall make all such materials related to the project(s) available at any reasonable time and place during the term of the Contract and for five (5) years from the date the Initial Closeout Letter is sent to the Consultant after ADOT indicates that work on the Contract has been completed to the satisfaction of the Department (Contract Status Form). All Documents shall be retained for auditing, inspection and copying upon the Department's or at FHWA's request, or any other authorized representative of the Federal Government.
- b. Pursuant to A.R.S. §35-215, the Consultant and its Subconsultant(s) with intent to defraud, deceive, improperly influence, obstruct or impair an audit being conducted or about to be conducted in relation to any Contract or subcontract with the Department is guilty of a Class 5 Felony.
- c. In case of an audit and the Consultant has failed to retain records in accordance with the applicable Contract provision, it shall be presumed that the documents would not have supported the Consultant's position. Therefore, failure to retain such records shall result in the Consultant being required to reimburse ADOT for

unsupported costs. The Consultant may also be disqualified per revised ECS Manual Section 2.02 from submitting future SOQ proposals.

- d. Upon completion and final closeout of the Contract, physical/paper or electronic Contract files and any supporting materials shall be maintained in accordance with ADOT and State Record Retention Center Records Retention/Destruction Policy and Schedules.

#### 4.42 FINAL/INCURRED COST AUDIT

- a. Final/Incurred Cost Audit (ICA) of the Consultant's costs may be performed by ADOT Office of Audit & Analysis to determine the Contract costs' allowability, allocability, and reasonableness in accordance with the terms of this Contract. Information related to final audits can be found in ADOT Consultant Audit Guideline (<http://www.azdot.gov/business/engineering-consultants/FormsandTemplates>).
- b. A CPA-prepared overhead schedule or a Cognizant Audit Report that meets ADOT/AASHTO/FHWA guidelines is acceptable for establishing a given year's overhead rate with the concurrence of ADOT Office of Audit & Analysis.
- c. Upon receipt of an ICA draft report, the Consultant has 14 calendar days to respond to the Incurred Cost Auditor with any disagreements, questions, or request for additional supporting documentation. A time extension may be allowed, if requested in writing within the 14-day timeframe, by the appropriate parties. Disagreements related to the results of the ICA draft report shall be addressed or resolved with the Incurred Cost Auditor on or before the date of the formal Exit Conference with the Incurred Cost Auditor and the Consultant. Non-response to the draft audit report after the 14-day timeframe and after the Exit Conference will be deemed by ADOT as the Consultant's acceptance of the findings in the draft report. The ICA report shall be issued by ECS to the Consultant after ADOT Office of Audit & Analysis' review and approval. Once the audit report is issued to ECS by ADOT Office of Audit & Analysis, ADOT shall not re-examine any new issues not addressed in the draft report and/or formal Exit Conference. The Consultants disagreeing with the ICA report has the option of escalating the matter in accordance with the ECS Pre-Award/ICA Escalation Guidelines (<http://www.azdot.gov/business/engineering-consultants/PoliciesandLinks>).
- d. ADOT or the Consultant shall reimburse either party in accordance with the ICA results. Failure of the Consultant to reimburse ADOT for over-billed charges based on the results of the Pre-award Reviews or ICAs shall result in disqualification of the Consultant in accordance with the revised ECS Manual Section 2.02.

#### 4.43 REVIEWS AND INSPECTIONS

Representatives from the Department and FHWA are authorized to review and inspect the Contract activities and facilities during the Consultant's and its Subconsultants normal business hours.

#### 4.44 PROPERTY OR EQUIPMENT

Except as otherwise provided in this Contract, computer or other special equipment needed to fulfill this Contract, shall be purchased through the ADOT Procurement Group and considered as ADOT property. The control, utilization and disposition of property or equipment acquired using Federal/State funds shall be determined in accordance with the property management standards set forth in 2 CFR 200 and ADOT Policy – FIN 11.02 and shall follow ADOT's Fixed Assets procedures in both property identification and inventory control processes.

#### 4.45 NONDISCRIMINATION

1. During the performance of this Contract, the Consultant, for itself, its Subconsultants, assignees and successors shall:

- a. 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 this contract. 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 State deems appropriate, which may include, but are not limited to:
  - i. Withholding monthly progress payments;
  - ii. Assessing sanctions;
  - iii. Liquidated damages;
  - iv. Disqualifying the consultant from submitting SOQs, or any other forms of proposals, as non-responsible;
  - v. Cancellation, termination, or suspension of the Contract, in whole or in part.

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

- b. Comply with Executive Order 2009-09, "Prohibition of Discrimination in Employment by Government consultants and Subconsultants," which is hereby included in its entirety by reference and considered a part of this Contract.
  - c. Comply with the provisions of Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor Regulations (41 CFR Part 60). Said provisions are made applicable by reference and are hereinafter considered a part of this Contract.
  - d. Post in conspicuous places available to employees and applicants for employment, the following notice:
 

***"It is the policy of this company not to discriminate against any employee, or applicant for employment, because of race, color, religion, creed, national origin, sex, age, handicapped, or disabled veterans and Vietnam era veterans. Such actions shall include, but are not limited to: employment, upgrading, demotion, transfer, recruitment, or recruitment advertising; laying-off or termination; rates of pay or other compensation; and selection for training, and on-the-job training. Also, it is the policy to ensure and maintain a working environment free of harassment, intimidation and coercion."***
  - e. Comply with Appendix A and E of the Arizona Department of Transportation "Title VI/Non-Discrimination Assurances," as found in **APPENDIX E** of this Contract.
2. The Consultant shall include the provisions of Section 4.45 of this Contract paragraph 1.a. through 1.e. and **APPENDIX E** of this Contract in every subcontract with Subconsultants, DBEs and Non-DBEs, including procurement of materials and equipment leases, unless exempt by the Regulations or directives issued pursuant thereto.
  3. The Consultant shall take such action with respect to any Subconsultants or procurement as the State or the Federal Aviation Administration (FAA), FHWA and the Federal Transit Administration (FTA) may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, however, that in the event the Consultant becomes involved in or is threatened with litigation with a Subconsultant or supplier as a result of such direction, the Consultant may request the State to enter into such litigation to protect the

interests of the State, and in addition, the Consultant may request the United States to enter into such litigation to protect the interests of the United States.

#### 4.46 AFFIRMATIVE ACTION (FOR FEDERAL – AID CONTRACTS)

The Consultant shall take the following affirmative action steps with respect to securing supplies, equipment or services under the terms of this Contract:

1. Include qualified firms owned by socially and economically disadvantaged individuals on solicitation lists.
2. Assure that firms owned by socially and economically disadvantaged individuals are solicited whenever they are potential sources.
3. When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum participation by firms owned by socially and economically disadvantaged individuals.
4. Where the requirement permits, establish delivery schedules which shall encourage participation by firms owned by socially and economically disadvantaged individuals.
5. Use the services and assistance of ADOT DBE Supportive Services Program, the Small Business Administration, the Office of Minority Business Enterprise of the Department of Commerce and the Community Services Administration as needed.

#### 4.47 PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES

##### **SELECT ONE**

##### **Race Conscious Contract (With DBE Goal)**

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. ADOT has received federal financial assistance from the USDOT and as a condition of receiving this assistance, ADOT has signed an assurance that it shall comply with 49 CFR Part 26.

It is ADOT's policy to ensure that DBEs, as defined in 49 CFR Part 26, have an equal opportunity to receive and participate in federally-funded contracts.

A DBE GOAL OF \_\_\_\_% HAS BEEN ESTABLISHED ON THIS CONTRACT. THE CONSULTANT IS ENCOURAGED TO OBTAIN DBE PARTICIPATION ABOVE AND BEYOND THE GOAL ON THIS CONTRACT.

The contract terms, conditions and special provisions associated with the administration of the ADOT DBE Program related to this contract is documented in **APPENDIX C** of this contract.

**OR**

##### **Race Neutral Contract (With No DBE Goal)**

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. ADOT has received federal financial assistance from the USDOT and as a condition of receiving this assistance, ADOT has signed an assurance that it shall comply with 49 CFR Part 26.

It is ADOT's policy to ensure that DBEs, as defined in 49 CFR Part 26, have an equal opportunity to receive and participate in federally-funded contracts.

NO CONTRACT DBE GOAL HAS BEEN ESTABLISHED FOR DBE PARTICIPATION ON THIS CONTRACT.

Consultants are still encouraged to employ reasonable means to obtain DBE participation. Consultants must retain records in accordance with these DBE specifications. The consultant is notified that this record keeping is important to the Department so that it can track DBE participation where only race neutral efforts are employed.

The contract terms, conditions and special provisions associated with the administration of the ADOT DBE Program related to this contract is documented in **APPENDIX C** of this contract.

#### 4.48 ENVIRONMENTAL PROTECTION

(This clause is applicable if this Contract exceeds \$100,000. It applies to Federal-aid contracts only.)

The Consultant is required to comply with all applicable standards, orders or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. 1857 (h)), Section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency (EPA) regulations (40 CFR Part 15) which prohibit the use under non-exempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. Violations shall be reported to the FHWA and to the U.S. EPA Assistant Administrator for Enforcement (EN-329).

#### 4.49 ENERGY CONSERVATION

(This clause is applicable to Federal-aid contracts only.)

The Consultant is required to comply with mandatory standards and policies, as applicable, relating to energy efficiency, which is contained in the State Energy Conservation Plan issued by the Department in compliance with the Energy Policy Conservation Act (Public Law. 94-163).

#### 4.50 PUBLICITY AND ENDORSEMENTS

The Consultant shall obtain the Department's approval prior to releasing any publicity regarding the subject matter of this Contract. Publicity includes, but not limited to, notices, informational pamphlets, press releases, research, reports, signs and similar public notices prepared by or for the Consultant or its employees or its Subconsultants. Publicity does not include notices of the Contract award or identification of the project in the SOQ or proposal made to government agencies. The Consultant shall not claim that Department endorses its products and services.

#### 4.51 OWNERSHIP OF DATA

- a. The Consultant agrees to maintain (in sufficient detail as shall properly reflect all work done and results achieved in the performance of this Contract) tracings, plans, specifications and maps, basic survey notes and sketches, books, records, reports, research notes, charts, graphs, comments, computations, analyses, recordings, photographs, computer programs and documentation thereof, and other graphic or written data generated in connection with the work required in the Contract; all such information and documentation to be termed "Data" under this Contract.
- b. All Data procured hereunder for the work funded by ADOT shall become the property of ADOT and delivered to ADOT upon request, and shall not be used or released by the Consultant or any other person except with the prior written approval by the Department; provided that the Consultant shall not be required to retain any Data not requested by ADOT within five (5) years from the date of final payment (*see Initial Closeout Letter, Section 4.41(.a)*) to the Consultant hereunder; and provided further that until such delivery to ADOT, the

Consultant agrees to permit ADOT and FHWA representatives to examine and review at reasonable times all Data still in the possession of the Consultant.

- c. All services, information, computer program elements, reports and other deliverables which may be patented or copyrighted and created under this Contract are the property of the Department and shall not be used or released by the Consultant or any other person except with the prior written approval by the Department.

#### 4.52 PATENTS AND COPYRIGHTS

All services, information, computer program elements, reports and other deliverables which might be patented or copyrighted and created under this Contract are the property of the Department and shall not be used or released by the Consultant or any other person except with the prior written approval by the Department.

#### 4.53 FRAUD AND FALSE STATEMENTS

The Consultant understands that, if the project which is the subject of this Contract is financed in whole or in part by federal funds, that if the undersigned, the company that the Consultant represents, or any employee or agent thereof, knowingly makes any false statement, representation, report or claim as to the character, quality, quantity, or cost of material used or to be used, or quantity or quality work performed or to be performed, or makes any false statement or representation of a material fact in any statement, certificate, or report, the Consultant and any company that the Consultant represents may be subject to prosecution under the provision of 18 USC §1001 and §1020.

#### 4.54 FEDERAL IMMIGRATION AND NATIONALITY ACT

##### a. **GENERAL**

The Consultant, including all Subconsultants, shall comply with all federal, state and local immigration laws and regulations, as set forth in Arizona Executive Order 2005-30, relating to the immigration status of their employees who perform services on the Contract during the duration of the Contract. The Department shall retain the right to perform random audits of Consultant and Subconsultants' records or to inspect papers of any employee thereof to ensure compliance.

The Consultant shall include the provisions of this Section in all its subcontracts. In addition, the Consultant shall require that all Subconsultants comply with the provisions of this Section, monitor such Subconsultants' compliance, and assist the Department in any compliance verification regarding its Subconsultant(s).

##### b. **COMPLIANCE REQUIREMENTS**

The Department retains the legal right to inspect the papers or records of the Consultant and its Subconsultants who works on this Contract to ensure compliance with A.R.S. §41-4401, Government Procurement, E-Verify Requirements; Sanctions.

By submission of an SOQ proposal, the Consultant warrants that the Consultant and all proposed Subconsultant(s) are and shall remain in compliance with:

1. All federal, state and local immigration laws and regulations relating to the immigration status of their employees who perform services on the Contract; and
2. A.R.S. §23-214 (A) which states "After December 31, 2007, every employer, after hiring an employee, shall verify the employment eligibility of the employee through the e-verify program and shall keep a record of the verification for the duration of the employee's employment or at least three years, whichever is longer."

A breach of a warranty regarding compliance with immigration laws and regulations shall be deemed a material breach of the Contract, and the Consultant and its Subconsultant(s) are subject to sanctions specified in Section D below.

Failure to comply with a Department audit process to randomly verify the employment records of Consultant and Subconsultants shall be deemed a material breach of the Contract, and the Consultant and Subconsultants are subject to sanctions specified in Section D below.

c. **COMPLIANCE VERIFICATION**

The State may, at its sole discretion, require evidence of compliance from the Consultant and its Subconsultant(s).

Should the Department request evidence of compliance, the Consultant shall complete and return the Consultant Employment Record Verification Form and Employee Verification Worksheet provided by the Department, no later than 21 days from receipt of the request for such information.

Listing of the compliance verification procedure specified above does not preclude the Department from utilizing other means to determine compliance.

The Department retains the legal right to inspect the papers of any employee who works on the Contract to ensure that the Consultant and its Subconsultant(s) is/are complying with the warranty specified in this Section.

d. **SANCTIONS FOR NONCOMPLIANCE**

For purposes of this paragraph, noncompliance refers to either the Consultants or its Subconsultants' failure to follow the immigration laws or to the Consultant's failure to provide records when requested. Failure to comply with the immigration laws or to submit proof of compliance constitutes a material breach of Contract. At a minimum, the Department shall reduce the Consultant's compensation by \$10,000 for the initial instance of noncompliance by the Consultant or its Subconsultant(s). If the same Consultant or its Subconsultant(s) is in noncompliance within two (2) years from the initial noncompliance, the Consultant's compensation shall be reduced by a minimum of \$10,000 for each instance of noncompliance. The third instance by the same Consultant or its Subconsultant(s) within a two (2) year period may result in addition to the minimum \$50,000 reduction in compensation, in removal of the offending Consultant or its Subconsultant(s), suspension of work in whole or in part or, in the case of a third violation by the Consultant, termination of the Contract for default. Instances of noncompliance are counted on a firm-wide basis, not on a contract-by-contract basis.

In addition, the Department may declare the Consultant or its Subconsultant(s) who is in noncompliance three times within a two (2) year period ineligible to perform on any Department Contract for up to one (1) year. For purposes of considering a declaration of ineligibility: (1) noncompliance by a Subconsultant does not count as a violation by the Consultant; and (2) the Department shall count instances of noncompliance on other Department Contracts.

The sanctions described herein are the minimum sanctions. In case of major violations, the Department reserves the right to impose any sanctions including and up to termination and debarment, regardless of the number of instances of non-compliance.

Any delay resulting from compliance verification or a sanction under this subsection is a non-excusable delay. The Consultant is not entitled to any compensation or extension of time for any delays or additional costs resulting from compliance verification or a sanction under this Section.



An example of the minimum sanctions under this subsection is presented in the table below:

Offense by:			Minimum Reduction in Compensation
Consultant	Subconsultant A	Subconsultant B	
First			\$10,000
	First		\$10,000
	Second		\$50,000
		First	\$10,000
	Third		\$50,000*
* May, in addition, result in removal and debarment of the Subconsultant.			

#### 4.55 PANDEMIC CONTRACTUAL PERFORMANCE

- a. The Department shall require a written plan that illustrates how the Consultant shall perform up to contractual standards in the event of a pandemic. The Department may require a copy of the plan at any time prior to or at post-award phase of the Contract. At a minimum, the pandemic performance plan shall include:
  1. Key succession and performance planning if there is a sudden significant decrease in the Consultant's workforce.
  2. Alternative methods to ensure adequate work force.
  3. An updated list of the Consultant's contacts and organizational chart.
- b. In the event of a pandemic, as declared by the Governor of Arizona, U.S. Government or the World Health Organization (WHO), which makes performance of any term under this Contract impossible or impracticable, the Department shall have the following rights:
  1. After the official declaration of a pandemic, the Department may temporarily place the Contract(S) on "HOLD," in whole or in part, if the Consultant cannot perform to the standards agreed upon in the initial terms.
  2. The Department shall not incur any liability if a pandemic is declared and emergency procurements are authorized by ADOT Director pursuant to §41-2537 of the Arizona Procurement Code (APC).
  3. Once the pandemic is officially declared over or the Consultant can demonstrate the ability to perform, the Department, at its sole discretion may reinstate the temporarily voided Contract(S).
- c. The Department, at any time, may request to see a copy of the written plan from the Consultant. The Consultant shall produce the written plan within 72 hours of the request.

#### 4.56 PERFORMANCE EVALUATIONS

The Consultant's performance shall be evaluated periodically in accordance with the schedule set forth in **APPENDIX D** of this Contract. Final Consultant evaluations for Contracts executed after **July 1, 2010**, shall be considered in the future Consultant selection process as outlined in the **APPENDIX D**.

#### 4.57 CONTRACT COMPLETION

When technical review establishes that all phases of the Contract have been completed to the satisfaction of the Department, a written concurrence is completed and signed by the ADOT PM and ADOT Group Manager to initiate the Contract closeout phase. The Consultant is notified, in writing, (Initial Closeout Letter) of the final closeout procedure which may include submittal of the final Payment Report, deliverables and the final audit, if applicable, of the Consultant and all Subconsultant's records. The Consultant shall submit all required deliverables as detailed in the Contract.

SECTION 5.0 SIGNATURE PAGE

FOR THE DEPARTMENT

ARIZONA DEPARTMENT OF TRANSPORTATION

Date

By:

*Signature*

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title



FOR THE CONSULTANT

FIRM NAME

\_\_\_\_\_  
Date

By:

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title

"By signing this document, the Consultant declares that the Contract was reviewed and to the best of the Consultant's knowledge and belief, it is true, correct, and approved. Both parties agree that manually or electronically signing and submitting the Contract via a PDF document by email is acceptable and constitutes a binding agreement."

## SECTION 6.0 APPENDICES

### APPENDIX A – Scope of Work (With Standardized Dictionary of Work Tasks)

*(Insert a cover page/divider for Standardized Dictionary of Work Tasks)*

## APPENDIX B – Approved Cost Proposal Summary

*Insert Appendix C Professional Services DBE Special Provisions – Race Conscious*

*OR*

*Appendix C Professional Services DBE Special Provisions – Race Neutral  
To reflect contract type (See Section 4.47)*

## **PROFESSIONAL SERVICES DBE SPECIAL PROVISIONS – RACE CONSCIOUS**

### **FOR USE ON FEDERAL AID PROJECTS WITH DBE GOALS**

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**Contract No.:**

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**Project Description:**

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- 18.0 Effect of Contract Changes
- 19.0 DBE Participation Above the Goal (Race Neutral Participation)
- 20.0 Required Provisions for DBE Subcontracts
- 21.0 Contract Performance
- 22.0 DBE Termination/Substitution
  - 22.01 General Requirements
  - 22.02 Consultant Notice of Termination/Substitution
  - 22.03 Consultant Request of Termination/Substitution
  - 22.04 Good Cause
  - 22.05 DBE Replacement Good Faith Effort
  - 22.06 Sanctions
- 23.0 Certification of Final DBE Payments
- 24.0 Sanctions for Not Meeting Contract DBE Goal
- 25.0 False, Fraudulent and Dishonest Conduct



## **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.

### **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 Department 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 consultant, subrecipient, or subconsultant shall ensure that all subcontract 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 as 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 (RC):** 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 AZ 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 to 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 the 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 Department's offices are closed for all or part of the last day, the period extends to the next day on which the Department'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:

XX Percent

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

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 Contract Modifications that are executed post-award. The DBE goal requirements extend to additional dollars added by Contract Modification to help ensure that the overall DBE goal is met on the contract. Indicating there is no DBE firm on a prime proposer's team to meet the DBE goal on Contract Modifications does not meet the criteria for Good Faith Efforts in 49 CFR 26.53, and will not be accepted by the Department as Good Faith Efforts when Contract Modifications are issued. Since proposers have been notified of the DBE goal prior to the submittal of their Statement of Qualifications (SOQ) they are required to do their due diligence to secure enough DBE participation to meet the goal or make good faith efforts on the contract and each subsequent Contract Modification. Firms will be required to locate DBEs to meet the goal on each Contract Modification even if these DBEs were not originally included as part of their team, if ADOT determines there are qualified DBEs available to complete portions of the work of the Contract Modification.

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

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

In order to be awarded this contract, in addition to all other pre-award requirements, all proposers are required to certify on the ECS online Consultant Information Page that:

The proposer will meet the established DBE goal or will make good faith efforts to meet the goal and that arrangements with certified DBEs have been made prior to the SOQ and/or cost proposal submission.

Failure to affirmatively make this declaration/certification in the manner outlined in the Request for Qualifications (RFQ) furnished by the Department will cause a Proposer's SOQ to be considered nonresponsive.

### **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 BECO.

All proposers shall create a Bidders/Proposers list in the AZ UTRACS System (<https://utracs.azdot.gov/>) 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 those firms on the project.

All proposers must complete and submit the Bidders/Proposers List online at <https://utracs.azdot.gov/> prior to SOQ proposal submittal. A confirmation email will be generated by the system. This email confirmation shall be submitted with the SOQ proposal submittal.

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

### **13.0 DBE Cost Proposal Submissions:**

#### **13.01 DBE Intended Participation Affidavits:**

If the proposer indicates in the Cost Proposal submittal 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 Engineering Consultants Section (ECS) with each 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 the project. A copy of this form is available from BECO at the address, phone number, or website listed in DBE Subsection 4.0 or on the internet at <http://azdot.gov/business/business-engagement-and-compliance/dbe-compliance/adot>.
- (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 Cost Proposal to the Engineering Consultants Section (ECS). 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 BECO at the address, phone number, or website listed in DBE Subsection 4.0 or on the internet at <http://azdot.gov/business/business-engagement-and-compliance/dbe-compliance/adot>.
- (3) The DBE Intended Participation Affidavits Forms and the DBE Intended Participation Affidavit Summary Form must be submitted with the original cost proposal documents. The same documents must be submitted as part of the Contract Modification documentation submittals reflecting any change in the contract amount associated with the Contract Modification.
- (4) A proposer 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 ECS.
- (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.
- (6) 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 contract goals. Reduction of DBE commitments after affidavit submittal and prior to execution of the contract without good cause may be grounds for the proposer 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 Cost Proposal to meet the contract goal, so the consultant is responsible for ensuring the DBEs listed in the SOQ and submitted with the Cost Proposal are available to meet those requirements at the time of contract execution.

- (7) Cost proposals without affidavits shall be considered non-responsive and cost negotiations shall not be finalized nor will the contract be executed until affidavits are submitted and approved.

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

##### **14.01 General:**

If the selected proposer has indicated in its cost proposal submittal that it will be unable to meet the DBE goal, that proposer 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 cost proposal.

Failure to demonstrate good faith efforts to the satisfaction of ADOT will result in ADOT denying the award and moving to the next highest ranked consultant.

The selected proposer who cannot meet the DBE goal at the time the cost proposal is due must submit its documentation of good faith efforts to ECS with the cost proposal. Contract negotiations will not be finalized nor will the contract 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 proposer 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 Department's "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 contract on the basis of good faith efforts, a proposer 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 Department 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 was 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 proposer must address when submitting good faith effort documentation.

- (1) Contacting the Department's BECO prior to the submission of proposals, either by e-mail, or by telephone, to inform BECO of the firm's difficulty in meeting the DBE goals on a given project, and requesting assistance. The proposer must document its contact with 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 telephone number for BECO is (602) 712-7761 and the email address is [contractorcompliance@azdot.gov](mailto:contractorcompliance@azdot.gov). The contact must be made in sufficient time before proposal submission to allow BECO to provide effective assistance. The consultant will not be considered to have made good faith efforts if the consultant failed to contact 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 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. 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 plans, specifications, and requirements of the contract 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 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 proposer'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 an 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 proposer when a non-DBE subconsultant was selected over a DBE for work on the contract. The Department 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 Department will review the documented efforts of the consultant and will review the performance of other consultants in meeting the contract goal.

A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts.

The Department 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 Department determines that the consultant failed to make adequate good faith efforts, the consultant may protest the determination of the Department by submitting an appeal in writing to the ADOT State Engineer. The decision of the ADOT State Engineer is administratively final.

The consultant whose proposal 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 included in the protest, 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 all consultants in writing on 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 proposer's GFE is rejected or contract negotiations fail, ADOT will proceed with negotiating with the second highest ranked firm. The Department will notify the second 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:**

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 Section 4.33 of the contract.

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

##### **17.01 General Requirements:**

To count toward meeting the goal, the DBE firms must be certified at the time of 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 and equipment leased by the DBE will be credited toward DBE participation. 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 the PM, ECS Contract Specialist and BECO 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.

DBE credit may be obtained only for specific work done for the project, supply of equipment specifically for physical work on the project, 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. Any second-tier subcontract to a DBE used to meet the goal must meet the requirements of a first-tier DBE subcontract.

A prime consultant may credit the entire amount of that portion of a contract 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's 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 prime 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 that contains a DBE goal, the DBE firm is responsible for meeting the DBE goal on the contract or making good faith efforts to meet the goal, just like any other proposer. In most cases, a

DBE proposer 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:**

If a DBE is deemed ineligible (decertified) or suspended by the Department in accordance with 49 CFR 26.87 and 26.88, the DBE may not be considered to meet a contract goal on a new contract, but may be considered to meet the contract goal under a subcontract that was executed before the DBE suspension or decertification is effective.

When the consultant makes a commitment to use an ineligible DBE firm or the Department made a commitment to use an ineligible DBE prime consultant, but a subcontract or contract 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 consultant must meet the contract goal with an eligible DBE firm or demonstrate good faith effort. When a subcontract is executed with the DBE firm before the Department notified the firm of its ineligibility, the consultant may continue to use the firm on the contract and may continue to receive credit toward the DBE 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 Department 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 Department 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 Department 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 Department will determine if the firm is performing a CUF given the type of work involved and normal industry practices.

The Department 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 Department's decision.

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

The BECO 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 BECO's staff will make every effort not to disrupt work on the project.

#### **18.0 Effect of Contract 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 then the consultant shall: (1) immediately notify the PM, ECS Contract Specialist and BECO of the potential or actual decrease in DBE compensation, and (2) make good faith efforts to obtain DBE participation to meet or exceed the project DBE goal.

BECO will approve or deny the consultant's good faith efforts. Good faith efforts required under the provisions of this section may vary, depending on the time available, the nature of the change, and other factors as determined by BECO.

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 DBE goal is an important aspect of the Department's DBE program. The consultant is strongly encouraged to use additional DBEs above the DBE goal requirement in the contract to assist the Department in meeting its 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 on BECO website and all of the Uniform Terms and Conditions set forth in Section 3.0 and 4.0 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 deemed appropriate as outlined in DBE Subsection 2.0.

The Department 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 signed subcontract agreements with all Subconsultants by uploading them within 15 calendar days of an executed contract to the ADOT DBE System. Subcontract agreements shall include all required assurances and clauses as outlined in Section 3.0 and 4.0 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.

The Consultant shall be in breach of this Contract if the Consultant materially modifies the federal regulations and State statutes in its subcontract agreements terms and conditions with its Subconsultants. Deviations from the terms of this Contract may result in termination of the Contract, or any other such remedy as deemed appropriate by the Department.

#### **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 Department-approved DBE substitute. The Consultant or a non-DBE Subconsultant shall not perform DBE contract work items without prior approval by BECO and execution of the Contract Modification by ECS. 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 to meet the contract goal, so the prime consultant is responsible for ensuring that the DBEs are available to meet scheduling, work and other requirements on the contract. The Department will 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 PM and BECO in advance when each DBE will be working on the project to help facilitate reviews.

The Department reserves the right to request and inspect all records of the consultant and all records of the DBEs and non-DBE subconsultants concerning this contract. The consultant must make available a copy of all documents related to all contracts to ADOT upon request.

Use of every DBE listed on the DBE Intended Participation Affidavit Summary is a condition of this contract. 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 the Department's written consent. Absent consent from the Department, the consultant shall not be entitled to any payment for work or material that is not performed or supplied by the listed DBE.

#### **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 Department. Reasonable methods to resolve performance disputes must be applied and documentation provided to the Department 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 BECO and by means of the executed contract modification from ECS. The consultant shall contact the BECO and ECS promptly at 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 written consent from BECO and ECS. Before submitting a formal request to the BECO and ECS for DBE termination/substitution, the consultant shall give written notice to the DBE subconsultant with a copy to BECO 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 BECO of its position. BECO and ECS 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 ECS. 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. The Department will consider both the consultant's request and DBE's response and explanation before approving the consultant's termination and substitution request.

Any requests for substitutions or terminations of DBEs shall be made on the forms provided online by ECS.

### **22.04 Good Cause:**

**Contract No.:**

**Consultant:**

**Project Description:**

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The Department will make the determination of 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 Department.
- (8) Is ineligible to receive DBE credit for the type of work required by its NAICS code.
- (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 Department determines compels the termination or substitution of the DBE subconsultant.

If good cause is determined, the Department 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 Department 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 17.0 shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal. The good faith efforts shall be documented and provided, upon request, to the Department within seven calendar days from the date of the request.

A prime 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 perspective 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 Department has eliminated items of work subcontracted to 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 Department will review the quality, thoroughness, and intensity of those efforts.

When a DBE substitution is necessary, the consultant shall submit an amended DBE Intended Participation Affidavit and Intended Participation Affidavit Summary to ECS for processing and to BECO for approval with the substitute DBE's name, description of work, NAICS code, AZ UTRACS registration number, and dollar value of work to the PM, ECS Contract Specialist and BECO. Approval from BECO must be obtained prior to the execution of Contract Modification by ECS and before substituted DBE can begin work.

#### **22.06 Sanctions:**



Failure by the consultant to carry out the requirements of the Department's DBE Termination/Substitution specifications is a material breach of contract and will result in such remedies as the Department deems appropriate, which will include, but are not limited to the assessment of liquidated damages. The Department 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 ECS no later than 30 days after the DBE completes its work.

ADOT will use this certification and other information available to determine applicable DBE credit allowed to date by the Prime 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 ECS and BECO.

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

If the Department determines that the consultant has not met the DBE goal at the end of the contract, the Department 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.

In determining whether liquidated damages will be assessed and the amount of the liquidated damages, the Department 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 Department's projects.

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

In addition to any other remedies or actions, the Department 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.

## **PROFESSIONAL SERVICES DBE SPECIAL PROVISIONS – RACE NEUTRAL**

### **FOR USE ON FEDERAL AID PROJECTS WITHOUT DBE GOALS**

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## **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.

### **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 Department 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 consultant, subrecipient, or subconsultant shall ensure that all subcontract 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) **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.
- (C) **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.
- (D) **Non-DBE:** any firm that is not a DBE.
- (E) **Race-Conscious (RC):** a measure or program focused specifically on assisting only DBEs, including women-owned DBEs.
- (F) **Race-Neutral (RN):** a measure or program used to assist all small businesses. For the purposes of this part, race-neutral includes gender-neutrality.
- (G) **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.
- (H) **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 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:

**Contract No.:**

**Consultant:**

**Project Description:**

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- (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 AZ 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 to 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 DBE participation.

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 the 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 DBE participation.

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 Department's offices are closed for all or part of the last day, the period extends to the next day on which the Department'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 Department has not established contract goals for DBE participation in this contract.

Consultants are still encouraged to employ reasonable means to obtain DBE participation. Consultants must retain records in accordance with these DBE specifications. The consultant is notified that this record keeping is important to the Department so that it can track DBE participation where only race neutral efforts are employed.

## **12.0 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 AZUTRACS. Proposers may verify that their firm and each subconsultant is registered using the AZUTRACS website.

Proposers may obtain additional information at the AZ UTRACS website or by contacting BECO.

All proposers shall create a Bidders/Proposers list in the AZ UTRACS System (<https://utracs.azdot.gov/>) 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 <https://utracs.azdot.gov/> prior to SOQ proposal submittal. A confirmation email will be generated by the system. This email confirmation shall be submitted with the SOQ proposal submittal.

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

### **13.0 Payment Reporting:**

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 Section 4.33 of the contract.

### **14.0 Crediting DBE Participation:**

#### **14.01 General Requirements:**

To count toward DBE participation, the DBE firms must be certified at the time of 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 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 and equipment leased by the DBE will be credited toward DBE participation. 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.

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.

DBE credit may be obtained only for specific work done for the project, supply of equipment specifically for physical work on the project, 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. Any second-tier subcontract to a DBE must meet the requirements of a first-tier DBE subcontract.



A prime consultant may credit the entire amount of that portion of a contract 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 DBE participation only if the DBE's 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 DBE participation.

A prime 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.

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

If a DBE is deemed ineligible (decertified) or suspended by the Department in accordance with 49 CFR 26.87 and 26.88, the DBE may not be considered to count toward DBE participation on a new contract, but may be considered to count toward DBE participation under a subcontract that was executed before the DBE suspension or decertification is effective.

When a DBE firm or a DBE prime consultant loses its DBE eligibility and a subcontract or contract 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 DBE participation.

When a subcontract is executed with the DBE firm before the Department notified the firm of its ineligibility, the consultant may continue to use the firm on the contract and may continue to receive DBE participation credit for the firm's work.

#### **14.03 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.

#### **14.04 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.

#### **14.05 Commercially Useful Function:**

A prime consultant can credit expenditures to a DBE subconsultant 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 Department 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 Department 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 Department 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 Department will determine if the firm is performing a CUF given the type of work involved and normal industry practices.

The Department 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 Department's decision.

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

The BECO 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 BECO's staff will make every effort not to disrupt work on the project.

#### **15.0 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 on BECO website and all of the Uniform Terms and Conditions set forth in Section 3.0 and 4.0 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 deemed appropriate as outlined in DBE Subsection 2.0.

The Department 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 with all Subconsultants by uploading them within 15 calendar days of an executed contract to the ADOT DBE System. Subcontract agreements shall include all required assurances and clauses as outlined in Section 3.0 and 4.0 of the Contract. Each agreement and required attachment shall be dated and signed by the Subconsultant in order for the subcontract to be considered valid.

The Consultant shall be in breach of this Contract if the Consultant materially modifies the federal regulations and State statutes in its subcontract agreements terms and conditions with its Subconsultants. Deviations from the terms of this Contract may result in termination of the Contract, or any other such remedy as deemed appropriate by the Department.

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

DBE participation on the contract 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 ECS no later than 30 days after the DBE completes its work.

ADOT will use this certification and other information available to determine applicable DBE credit allowed to date by the Prime 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 ECS and BECO.

#### **17.0 False, Fraudulent, or Dishonest Conduct:**

In addition to any other remedies or actions, the Department 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.

## APPENDIX D – ECS Consultant Evaluation Program Guidelines

## **ENGINEERING CONSULTANTS SECTION (ECS) CONSULTANT EVALUATION PROGRAM GUIDELINES**

### **Introduction & Purpose**

The Consultant Evaluation Program is a program administered by ECS as a means to monitor and evaluate the quality of work performed on engineering consultant contracts. A positive approach to the program assures that project schedule, cost and quality of design and construction are attainable. This assures that potential problems, which may impact other projects or the 5-Year Construction Program, are identified and resolved in a timely manner.

All engineering consultant contracts shall be evaluated annually based on the Contract's Notice to Proceed (NTP) anniversary date by the ADOT staff assigned to the contract, including the ADOT PM, other Technical groups, ECS staff, etc., in accordance with applicable contract provisions. In addition to annual evaluations, a final consultant evaluation shall be conducted at the end of all engineering consultant contracts.

### **Implementation Timeline**

This evaluation program will be effective for all ECS contracts with a Notice to Proceed (NTP) date of July 1, 2010, or later. Annual evaluation using this program will be conducted on contracts which were NTP'd before July 1, 2010, but the results shall not affect the consultant selection.

### **Uses for Consultant Evaluation**

The Consultant Evaluations shall be used for the following purposes:

1. To identify the Consultant performance strengths and weaknesses, as well as help identify, document and resolve performance issues, as needed.
2. As one factor or criterion in the selection process for subsequent contracts. Final evaluations for Contracts executed after July 1, 2010, shall be used as part of the selection process. Up to five (5) points may be deducted from the Consultant's score during the selection process for final evaluation ratings of less than three (3) (average performance) on performance factors of evaluation for projects a firm has completed for ADOT over a three-year time period.

Evaluation history to be used for selection shall include evaluation scores encompassing the most current three-year period at any given time. The three-year evaluation history shall be maintained for firm contracts executed after July 1, 2010. For example, a firm's evaluation history in FY 2013 would include scores from FY 2011 through FY 2013, in FY 2014, the evaluation history would include FY 2012 through FY 2014.

ECS will deduct points from the scores of submitted Statements of Qualifications (SOQ) for each firm based on performance rating as follows:

Performance rating of 1 or 2 on 1-2 evaluation factors	-1 Point
Performance rating of 1 or 2 on 3-4 evaluation factors	-2 Points
Performance rating of 1 or 2 on 5-6 evaluation factors	-3 Points
Performance rating of 1 or 2 on 7-8 evaluation factors	-4 Points
Performance rating of 1 or 2 on 9 or more evaluation factors	-5 Points

3. As documentation to justify disqualification of the Consultant or Subconsultant from submitting Statement of Qualifications (SOQ) proposals. In order for ECS to take action that could lead to Consultant disqualification from submitting SOQs, the ADOT PM or staff shall complete a Consultant Evaluation by initiating the process through the ECS Specialist. When an evaluation form is used to document issues which could lead to the Consultant disqualification from submitting SOQ proposals (as outlined in Section 2.02 of the ECS Manual and Procedures), the ECS Specialist shall initiate consultant evaluation type "Other" in eCMS.

4. As documentation to justify the declaration of a breach of contract for the Consultant's failure to fulfill terms of the Contract or to address problems identified by ADOT in the performance of the Contract. In order for ECS to take action that could lead ADOT to declare a breach of contract, the ADOT PM or staff shall complete a Consultant Evaluation by initiating the process through the ECS Specialist. When an evaluation form is used to document issues which could lead to a breach of contract being declared (as outlined in Section 4.17 of the ECS Manual and Procedures), the ECS Specialist shall select "Other" as the evaluation type in eCMS.

## **Procedures**

ECS Specialist initiates the completion of consultant evaluation forms for Contracts annually on the Contract's NTP anniversary date.

Since evaluations will be used as a factor in the consultant selection process, it is important for ADOT PMs, Resident Engineers or other appropriate staff to complete evaluations in a timely manner.

Please adhere to the following general guidelines in completing the electronic consultant evaluation in eCMS.

1. All consultant evaluations (Annual, Final or Other) shall be initiated by the ECS Specialist. ADOT PMs, who wish to conduct a consultant evaluation outside of the normal annual or final cycle should contact the ECS Specialist to initiate consultant evaluation type "Other" in eCMS.
2. Section I (Items 1-4) of the evaluation form shall be completed by ECS staff in eCMS and forwarded to the ADOT PM through automatic email notification.
3. The ADOT PM shall confer with other ADOT Project Team members involved in the Contract and complete Section II of the evaluation form (Items 5-11) in eCMS. The ADOT PM shall forward the fully completed evaluation to the Consultant electronically through eCMS within 14 calendar days from the receipt of notification from the ECS Specialist.

If the ADOT PM is a Supplemental Services (SS) Consultant, the PM portion of the evaluation shall be completed in eCMS by the SS Consultant's Supervisor or Manager.

4. Section II, Item 12 (Post-Design) shall be forwarded to the ADOT Resident Engineer (RE) by the ADOT PM for completion, as applicable. The ADOT RE shall confer with the ADOT PM and other ADOT Project Team members involved in the project and shall complete Section II, Item 12 within five (5) calendar days.
5. When totally completed, the ADOT PM shall discuss the evaluation with the Consultant (telephonically or in-person) and "publish" it to the Consultant through eCMS. The Consultant shall complete Section III by indicating their agreement or disagreement with the ratings, type comments and "publish" the evaluation back to ADOT through eCMS within 10 calendar days, with the goal of completing the entire evaluation process within 30 calendar days.

ADOT PMs should encourage the Consultants to share the results of the Subconsultant's portion of the evaluation with their Subconsultants.

## **General Guidelines**

1. Each individual line item in the evaluation constitutes a performance factor.
2. ECS shall assign negative points based on individual factor scores, not on an overall composite score.
3. Each individual performance factor and category on the form shall be treated equally.
4. General comments are highly recommended to support scores in each major performance category.
5. Documentation and specific comments shall be included to justify any performance factor receiving a score of 2 or less.

**Contract No.:**

**Consultant:**

**Project Description:**

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6. The ADOT PM, ECS and other appropriate ADOT staff are encouraged to take appropriate steps to resolve performance issues with the Consultants, as they arise, in a timely manner, and to document these issues in the eCMS Evaluation tab for that particular Contract. This information shall be used as a means of documenting issues for future evaluation ratings.
7. If performance issues arise, ADOT PMs and ECS Contract Managers should expeditiously inform the Consultants, in writing, that they are performing unsatisfactorily (using the Issues Resolution form in eCMS) to provide them the opportunity to take corrective action to cure the deficiency before they are formally evaluated (Annual or Final evaluation). The following steps shall be taken if there are performance issues with the Consultant, which could potentially lead to an evaluation score of less than three (3) (average):
  - a) If communicating to resolve the matter with the Consultant informally does not resolve the issue, the ADOT PM, ECS Specialist, ECS Manager or other appropriate ADOT employee shall notify the Consultant, in writing, of the deficient performance, identify the required solutions and establish a deadline to resolve the issues. The Consultant Performance Issues Resolution form in eCMS should be completed by the appropriate ADOT staff and forwarded to the Consultant for further action, as needed.
  - b) If the Consultant does not respond within 10 business days or other timeframe specified on the form and/or the matter is still unresolved after the deadline set for the cure, it is appropriate for the ADOT staff to rate the Consultant a two (2) or less on the applicable evaluation criteria on the consultant evaluation form.
8. The Consultant should take the initiative to expeditiously contact the ADOT PM or ECS if they are experiencing difficulties which could result in a score of less than three (3) on any performance factor. The Consultant should identify any problems, state proposed resolutions and specify dates the Consultant expects to resolve the issues.
9. Subconsultant performance will affect the scores of the Consultant as it relates to performance factors in item #9, "Utilization of Key Subconsultants." Therefore, it is important for the Consultant to closely oversee the work of their Subconsultants.
10. The Subconsultant scores on Item #10 of the evaluation will not affect the scores of the Consultant. ECS will maintain an evaluation history on Subconsultants.
11. If the Consultant or Subconsultant receives 10 or more scores of two (2) or less on evaluations within a two-year time period, these firms may be evaluated as candidates for disqualification from submitting future SOQs to ECS, and may not be eligible for work as a Consultant or Subconsultant on ECS contracts for a minimum of one (1) year. A list of Consultants that are pre-qualified and/or disqualified from submitting SOQs will be posted on the ECS website. Individual consultant evaluation scores will not be posted.
12. New Consultants with no ADOT contracts or evaluation history shall be evaluated according to the criteria outlined in the SOQ Package and shall not be evaluated based on past performance.
13. Consultants' ratings shall not be adversely affected if ADOT reduces the scope of work or in some way delays or impacts the ability of the Consultant to reasonably meet a performance factor.
14. There is no formal escalation process for consultant evaluation issues at this time. However, if the Consultant believes that the firm has been unfairly evaluated and rated, the firm can indicate its points of disagreement on the evaluation form itself or submit a letter to ECS, which shall be included as an official part of the evaluation file and may be considered by ECS as a mitigating factor.

## APPENDIX E – Arizona Department of Transportation Title VI/Non-Discrimination Assurances



## APPENDIX A

During the performance of this contract, the contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the "contractor") agrees as follows:

1. **Compliance with Regulations:** The contractor (hereinafter includes consultants) will comply with the Acts and the Regulations relative to Non-discrimination in Federally-assisted programs of the U.S. Department of Transportation, the *Federal Highway Administration*, as they may be amended from time to time, which are herein incorporated by reference and made a part of this contract.
2. **Non-discrimination:** The contractor, with regard to the work performance by it during the contract, will not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The contractor will not participate directly or indirectly in the discrimination prohibited by the Acts and the Regulations, including employment practices when the contract covers any activity, project, or program set forth in Appendix B of 49 CFR Part 21.
3. **Solicitations for Subcontracts, Including Procurements of Materials and Equipment:** In all solicitations, either by competitive bidding, or negotiation made by the contractor for work to be performed under a subcontract, including procurements of materials, or leases of equipment, each potential subcontractor or supplier will be notified by the contractor of the contractor's obligations under this contract and the Acts and Regulations relative to Non-discrimination on the grounds of race, color, or national origin.
4. **Information and Reports:** The contractor will provide all information and reports required by the Acts, the Regulations, and directives issued pursuant thereto and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the Recipient or the *Federal Highway Administration* to be pertinent to ascertain compliance with such Acts, Regulations, and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish the information, the contractor will so certify to the Recipient or the *Federal Highway Administration*, as appropriate, and will set forth what efforts it has made to obtain the information.
5. **Sanctions for Noncompliance:** In the event of a contractor's noncompliance with the Non-discrimination provisions of this contract, the Recipient will impose such contract sanctions as it or the *Federal Highway Administration* may determine to be appropriate, including, but not limited to:
  - a. withholding payments to the contractor under the contract until the contractor complies; and/or
  - b. cancelling, terminating, or suspending a contract, in whole or in part.
6. **Incorporation of Provisions:** The contractor will include the provisions of paragraphs one through six in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations and directives issued pursuant thereto. The contractor will take action with request to any subcontract or procurement as the Recipient or the *Federal Highway Administration* may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the contractor becomes involved in, or is threatened with litigation by a subcontractor or supplier because of such direction, the contractor may request the Recipient to enter into any litigation to protect the interests of the Recipient. In addition, the contractor may request the United States to enter into the litigation to protect the interests of the United States.

**APPENDIX E**

During the performance of this contract, the contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the "contractor") agrees to comply with the following non-discrimination statutes and authorities; including but not limited to:

**Pertinent Non-Discrimination Authorities:**

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*, 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin); and 49 CFR Part 21.
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Federal-Aid Highway Act of 1973, (23 U.S.C. § 324 *et seq.*), (prohibits discrimination on the basis of sex);
- Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 *et seq.*), as amended, (prohibits discrimination on the basis of disability); and 49 CFR Part 27;
- The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 *et seq.*), (prohibits discrimination on the basis of age);
- Airport and Airway Improvement Act of 1982, (49 USC § 471, Section 47123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);
- The Civil Rights Restoration Act of 1987, (PL 100-209), (Broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms "programs or activities" to include all of the programs or activities of the Federal-aid recipients, sub-recipients and contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131-12189) as implemented by Department of Transportation regulations at 49 C.F.R. parts 37 and 38;
- The Federal Aviation Administration's Non-discrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which ensures discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;
- Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of limited English proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);
- Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S.C. 1687 *et. seq.*).