



# DBE Program Plan

Arizona Department of Transportation

Administered by: Business Engagement and Compliance Office

*Updated November 2016*

Applicable to FHWA, FTA and FAA US DOT-Assisted Projects

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Douglas A. Ducey, Governor  
John S. Halikowski, Director

**Arizona Department of Transportation**  
**Disadvantaged Business Enterprise Objectives and Policy Statement (49 CFR 26.1, 26.23)**

The Arizona Department of Transportation (ADOT) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. ADOT has received Federal financial assistance from the U.S. Department of Transportation, and as a condition of receipt of funding, ADOT has signed an assurance that it will 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 DOT-assisted contracts. ADOT's objectives for its DBE program are to:

- Ensure nondiscrimination in the award and administration of DOT-assisted contracts ADOT and its Subrecipient's construction, procurement, and professional service highway, transit, and airport contracts;
- Create a level playing field on which DBEs can compete fairly for DOT assisted contracts;
- Ensure that the DBE program is narrowly tailored in accordance with applicable law;
- Ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are counted as DBEs;
- Help remove barriers to the participation of DBEs in USDOT-assisted contracts;
- Promote the use of DBEs in all types of DOT-assisted contracts and procurement activities.
- Assist in the development of firms that can compete successfully in the market place outside the DBE program;
- Provide appropriate flexibility in establishing and providing opportunities for DBEs to participate on DOT-assisted contracts as outlines in the DBE Program Plan, ADOT DBE Policy, contract specifications and other DBE program related processes and procedures.

It is also ADOT's policy to facilitate and encourage participation of Small Business Concerns (SBCs), as defined herein in DOT-assisted contracts, as a component of its DBE program. ADOT encourages contractors to take reasonable steps to eliminate obstacles to SBCs' participation and to utilize SBCs in performing contracts.

ADOT conducts DBE Availability and Disparity Studies at regular intervals and has established a narrowly-tailored DBE program in accordance with applicable laws. The ADOT DBE program is managed and administered by the Business Engagement & Compliance Office (BECO) in collaboration with all ADOT departments and units that executes and/or manages DOT-assisted projects. As such, ADOT has established Disadvantaged Business Enterprise Policy SUP-3.05, which provides guidelines for the implementation of the DBE program.

ADOT will take all necessary and reasonable steps under 49 CFR Part 26, its DBE Policy SUP-3.05 and this DBE Program Plan to implement the DBE Program within its applicable Departments and with its subrecipients, consultants, contractors, subcontractors and DBEs in a manner that shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of DOT-assisted contracts or in the administration of its DBE program or the requirements 49 CFR part 26.

Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by ADOT in its financial assistance agreements with the U.S. Department of Transportation.

This policy statement shall be posted on the ADOT website and distributed to all affected ADOT divisions, and all Arizona Subrecipient/Subgrantees and Local Public Agencies (LPAs). This policy statement will also be made available on the ADOT website for consultants, contractors, DBE and non-DBE companies that perform on DOT-assisted contracts.

  
John S. Halikowski, Director  
Arizona Department of Transportation

  
Date

## I. GENERAL REQUIREMENTS – SUBPART A

### 1. Applicability (49 CFR Part 26.3)

As a recipient of Federal funds ADOT is required to administer a DBE Program in compliance with all laws, regulations, Executive Orders, and guidance. ADOT's DBE program applies to ADOT and all its Subrecipients that directly or indirectly receive the following:

- a) Federal-aid highway funds authorized under Titles I and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21, Pub. L. 105-178, 112 Stat. 107.
- b) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178; and
- c) Federal Aviation funds authorized by 49 U.S.C. 47101, et seq.

The program covers all US DOT-assisted projects. ADOT distributes federal transportation funds to Certification Acceptance Agencies, Self-Administration Agencies and other Subrecipients/Grantees throughout the state of Arizona. As a condition of receipt of funding, these Subrecipients/Subgrantees and LPAs must adopt the ADOT DBE Program Plan and follow the same guidelines and procedures developed by ADOT to implement its DBE program.

The DBE program does not apply to non-US DOT assisted projects.

### 2. Definitions (49 CFR Part 26.5)

***ADOT*** means Arizona Department of Transportation.

***ADOT Contracting Departments*** means Departments/Groups within ADOT that are responsible for procurement and or contract administration function of DOT-assisted contracts.

***Affiliation*** has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121.

- (1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:
  - (i) One concern controls or has the power to control the other; or
  - (ii) A third party or parties controls or has the power to control both; or
  - (iii) An identity of interest between or among parties exists such that affiliation may be found.

- (2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

***Alaska Native*** means a citizen of the United States who is a person of one-fourth degree or more Alaskan

Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

**Alaska Native Corporation (ANC)** means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.).

**Assets** mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

**Business, Business Concern or Business Enterprise** means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

**Business Engagement and Compliance Office (BECO)** means the ADOT office responsible for the overall development, management and implementation of the DBE program in coordination with other ADOT Departments and units.

**Certification** means the process whereby an Arizona Unified Certification Program (UCP) member agency determines if an applicant firm meets the disadvantaged business enterprise criteria set forth in 49 CFR 26.

**Certification Acceptance Agency** means an LPA has been approved under the ADOT Certification Acceptance Program to independently manage most aspects of the project development process, with ADOT oversight. A certified LPA retains a significant degree of approval authority at the local level when developing federally funded transportation projects.

**Commercially Useful Function** means a DBE performs a "Commercially Useful Function" when it is responsible for the execution of the work of a contract and is carrying out its responsibility by actually performing, managing and supervising the work involved. With respect to furnishing materials and supplies as part of the DBE contract, the DBE also performs a "Commercially Useful Function" when the DBE is responsible for negotiating price, determining quality and quantity, ordering materials and installing (where applicable) and paying for the material itself. A DBE does not 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. See also 49 CFR 26.55.

**Compliance** means that a recipient has correctly implemented the requirements of 49 CFR 26.

**Contingent Liability** means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

**Contract** means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services, engineering design, planning, etc.) and the buyer to pay for them. A lease is considered to be a contract.

**Contractor** means a construction, engineering design, professional services or other type of firm that participates, through a contract or subcontract (at any tier), in an US DOT-assisted highway, transit or airport program.

**Days** mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

**Department or DOT** means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA) and the Federal Aviation Administration (FAA).

**Disadvantaged Business Enterprise or DBE** means a for-profit small business concern;

- That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

**DOT-Assisted Contract** means any contract between ADOT or its Subrecipient and a contractor (at any tier) funded in whole or in part with DOT (Federal Aviation Administration, Federal Highway Administration, and Federal Transit Administration) financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

**Good Faith Efforts** means efforts to achieve a DBE goal or other DBE Program requirements, which by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

**Home State** means the state in which a DBE firm or applicant for DBE certification maintains its principal place of business

**Immediate family member** means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

**Indian Tribe** means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of “tribally-owned concern” in this section.

**Joint Venture** means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

**Liabilities** mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable,

notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

**Local Public Agency** means any city, county, township, municipality, or other political subdivision that may be empowered to cooperate with the State transportation department in highway matters (23 CFR 635.102).

**NAICS Code** means the North American Industry Classification System (NAICS), the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the US business economy.

**Native Hawaiian** means any individual whose ancestors were natives, prior to 1778, of the area, which now comprises the State of Hawaii.

**Native Hawaiian Organization** means any community service organization serving Native Hawaiians in the State of Hawaii, which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

**Noncompliance** means that a recipient, DBE, non-DBE or contractor has not correctly implemented the requirements of this part.

**Non-DBE** means any firm that is not certified as a DBE.

**Operating Administration or OA** means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The “Administrator” of an operating administration includes his or her designees.

**Personal Net Worth** means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

**Primary Industry Classification** means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau Web site: <http://www.census.gov/eos/www/naics/>.

**Primary Recipient** means a recipient, which receives DOT financial assistance and passes some or all of it on to another recipient.

**Principal Place of Business** means the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business.

**Program** means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

**Race-Conscious** means a measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

**Race-Neutral** means a measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender-neutrality.

**Recipient** is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

**Reportable Contracts** means any subcontract, of any tier, DBE or non-DBE, by which work shall be performed on behalf of the contractor and any contract of any tier with a DBE material supplier.

**Secretary** means the Secretary of Transportation or his/her designee.

**Set-Aside** means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

**Small Business Administration or SBA** means the United States Small Business Administration.

**SBA Certified Firm** means firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

**Small Business Concern** means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in §26.65(b).

**Socially and Economically Disadvantaged Individuals** mean any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

Any individual that ADOT finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if ADOT requires it.

Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

- "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
- "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;
- "Native Americans," which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
- "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), Republic of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;

- “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
- Women;
- 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.

Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

**Set-Aside** means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

**Spouse** means a married person, including a person in a domestic partnership or a civil union recognized under State law.

**Subcontractor** means an individual firm, or corporation who, with the written consent of ADOT or its Subrecipient/Subgrantee, subcontracts any part of the contract (including, but not limited to, construction and professional services, engineering design, planning etc.). First tier subcontractors are those to whom a contractor subcontracts a portion of the work. Second tier subcontractors are those to whom a first tier subcontractor subcontracts a portion of the work.

**Subrecipient/Subgrantee**: Any legal entity to which a sub-award of federal financial assistance is made and which is accountable to ADOT for the use of the funds provided (49 CFR 19.2), such as Certification Acceptance Agencies, Self-Administration Agencies, Subgrantees and other Local Public Agencies.

**Transit Vehicle Manufacturer** means any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include, but are not limited to: Buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle manufacturers. Businesses that manufacture mass-produce, or distribute vehicles solely for personal use and for sale “off the lot” are not considered transit vehicle manufacturers.

**Tribally-Owned Concern** means any concern at least 51 percent owned by an Indian tribe as defined in this section.

### 3. Non-Discrimination Requirements (49 CFR Part 26.7)

ADOT and its Subrecipients/Subgrantees will not exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, national origin, age, or disability.

In administering its DBE program, ADOT will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, national origin, age, or disability.

## 4. Record Keeping and Reporting Requirements (49 CFR Part 26.11)

### A. Reporting to DOT (§26.11(a))

ADOT will report DBE participation data outlined on the Uniform Report of DBE Awards/Commitments and Payments Form, as outlined in Appendix B of 49 CFR Part 26, to the appropriate DOT operating administration as follows:

- FHWA and FTA- DBE activity from October 1<sup>st</sup> through March 31<sup>st</sup> will be submitted by June 1<sup>st</sup>
- FHWA and FTA - DBE activity from April 1<sup>st</sup> through September 31<sup>st</sup> will be submitted by December 1<sup>st</sup>
- FAA - DBE activity from October 1<sup>st</sup> through September 31<sup>st</sup> will be submitted by December 1<sup>st</sup>

Uniform Report of DBE Awards/Commitments and Payments data will include:

- Awards and Commitments made during the reporting period
- Breakdown by Ethnicity & Gender of Contracts Awarded to DBEs during the period
- Payments on Ongoing Contracts
- Actual Payments on Contracts Completed during the reporting period

ADOT Contracting Departments and Subrecipients/Subgrantees must report its contract awards, DBE commitments, prime and subcontract payments, including lower-tier activity, and other requested information monthly to ADOT Business Engagement & Compliance Office (BECO). ADOT BECO will aggregate all data into semi-annual and annual reports that will be submitted to the various DOT operating administrations within the prescribed timeframes noted above.

### B. Bidders Lists (§26.11(c))

ADOT and its Subrecipients/Subgrantees are required by 49 CFR 26.11, to collect and submit Bidder's List information, regarding all DBE and non-DBE firms that bid and quote on DOT-assisted contracts. ADOT uses its overall agency Bidder's List information to help calculate the agency's triennial overall FHWA, FTA and FAA DBE goal, as well as individual contract DBE goals for FHWA race-conscious contracts.

ADOT collects and maintains its overall agency bidder's list information by having all firms interested in working on DOT-assisted contracts register online in the Arizona Unified Transportation Registration and Certification System (AZ UTRACS) database, which can be accessed at <http://www.azdot.gov/azutracs>.

The registration system is a database, which is part of a centralized web portal that contains information about companies that are interested in doing business with ADOT and its Subrecipients. Information collected in the AZ UTRACS registration database from firms seeking work on DOT-assisted contracts includes the following required bidder's list information:

- Firm name;
- Firm address;

- Firm's status as a DBE or non-DBE;
- The age of the firm; and
- The annual gross receipts of the firm by bracket (less than \$500,000; \$500,000 - \$1 million; \$1 - 2 million; \$2 - 5 million; etc.).

Firms must update this information at least every three years.

For each DOT-assisted contract that is let, all Bidders must also complete and submit an online contract-specific Bidders/Proposers' List form containing a list of names and AZ UTRACS registration numbers or the required information above (if a firm is not registered in AZ UTRACS) for DBEs and non-DBE firms that expressed interest in working on each specific contract. Bidders must submit the online contract-specific Bidders/Proposers' List form, whether or not they are the apparent low bidder or awardee, no later than 4:00 PM on the seventh calendar day following the bid opening, or as otherwise stated in the contract advertisement and specifications. The 7 days will be reduced to 5 days beginning January 1, 2017.

For each DOT-assisted engineering design, professional services or goods and services contract that is let, all Bidders must complete and submit an online Bidders/Proposers' List form containing a list of names and AZ UTRACS registration numbers and/or the required information above (if a firm is not registered in AZ UTRACS) for DBEs and non-DBE firms that expressed interest in working on each specific contract. Bidders/Proposers or Offerors must submit the online or paper Bidder/Proposers' List form, whether or not they are the apparent awardee, with Statement of Qualifications Proposal or Request for Proposal or as outlined in the contract specifications.

ADOT Contracting Departments and Subrecipients/Subgrantees are required to ensure that consultants, subconsultants, contractors, subcontractors (including DBEs) that are awarded contracts are registered in AZ UTRACS and that Bidders/Proposers' List form from all bidders/offerors for each contract is submit online to ADOT Business Engagement and Compliance Office in accordance with contract specifications.

### **C. Maintenance and Retention of Records (§26.11(d))**

ADOT maintains records documenting a firm's compliance with DBE Program requirements. ADOT keeps and maintains a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews in a secured and confidential online DBE System. Older files prior to use of the online DBE System have been scanned and are stored electronically on ADOT secured server. Only authorized Certification staff has access to view or review certification records. These records are retained in accordance with applicable record retention requirements in accordance with ADOT's financial assistance agreement with DOT. Other certification or compliance related records are retained for a minimum of three (3) years.

### **D. Arizona Unified Certification Program (AZ UCP) Directory Reporting (§26.11(e))**

ADOT, as the lead agency for the AZ UCP will submit to the Department of Transportation, Office of Civil Rights, a DBE "FAST Act" report by January 1<sup>st</sup> of each year. The report will detail the statistical information related to the number and percentages of minority, women, and out of state firms in the AZ UCP Directory of DBE firms in compliance with the November 2014 DBE Final Rule Making.

### **E. Assurances/Financial Assistance Agreements (49 CFR Part 26.13)**

Each financial assistance agreement ADOT signs with a DOT operating administration will include the following assurance:

*The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, ADOT may impose sanctions as provided for under 49 CFR part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).*

This language will also appear in all financial assistance agreements with Subrecipients/Subgrantees.

Every DOT-assisted contract and subcontract ADOT and its Subrecipients/Subgrantees let and sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) will include the following assurance:

*The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor 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 recipient deems appropriate, which may include, but is not limited to:*

- (1) Withholding monthly progress payments;*
- (2) Assessing sanctions;*
- (3) Liquidated damages; and/or*
- (4) Disqualifying the contractor from future bidding as non-responsible.*

Contractors must also include DBE Subcontract Compliance Assurance contract language in their DBE subcontracts to ensure that applicable DBE requirements flow down from contracts to subcontracts. DBE Subcontract Compliance Assurance contract language, which address issues such as prompt payment is attached as Attachment A.

### **F. Exemptions or Waivers (49 CFR Part 26.15)**

ADOT is not currently operating under any exemptions or waivers to 49 CFR Part 26. If ADOT determines that any exemptions or waivers become necessary, ADOT will apply through the concerned operating administration using the procedures outlined in 49 CFR Part 26.15.

## II. ADMINISTRATIVE REQUIREMENTS – SUBPART B

### 1. DBE Program Requirement (49 CFR Part 26.21)

ADOT is a primary recipient of funds from FHWA, receives more than \$250,000 in FTA funds and receives FAA airport funds exceeding \$250,00 each federal fiscal year, and has therefore, developed a DBE Program to be in compliance with 49 CFR Part 26.21. ADOT and its Subrecipients/Subgrantees will continue to carry out the requirements defined in 49 CFR Part 26 and this Program Plan as a condition of receiving federal funds. All ADOT Subrecipients/Subgrantees of DOT funds must comply with ADOT's DBE Program Plan and may not have a plan independent from ADOT.

Furthermore, as rules pertaining to 49 CFR Part 26 are changed or significant procedures within ADOT changes that affect implementation of this DBE Program Plan as written, ADOT will update its Plan and secure approval from DOT pertaining to any changes to the Plan. Any changes in rules pertaining to 49 CFR Part 26 made by DOT, that are not a part of this DBE Plan, will become effective on the date of the change by DOT, whether or not ADOT has updated its DBE Program Plan with those changes, as long as the changes have been incorporated into DBE contract specifications and/or are widely communicated and disseminated to DBEs, contractors, Subrecipients/Subgrantees, and other affected stakeholders. ADOT's DBE Program Plan will be updated as soon as possible to reflect any changes to 49 CFR Part 26 or guidance from DOT related to DBE regulations.

Forms, programs, training and other procedures related to the DBE Program are available on the ADOT Business Engagement & Compliance Office website at <http://www.azdot.gov/business/business-engagement-and-compliance> and are subject to modification from time to time. Customers are encouraged to check the website periodically for the most current versions of forms to be used for business pertaining to the DBE program or contact the ADOT Business Engagement and Compliance Office at 602-712-7761.

#### 1. Policy Statement (49 CFR Part 26.23)

ADOT's Policy Statement that expresses its commitment to the DBE program, states its objectives, and outlines responsibilities for its implementation is incorporated as the first page of this DBE Program Plan. This policy statement will be posted on the ADOT website and distributed to all affected ADOT divisions, and all Arizona Subrecipient/Subgrantees. This policy statement will also be made available to consultants, contractors, DBE and non-DBE companies that perform on DOT-assisted contracts via the ADOT website.

#### 2. DBE Liaison Officer (DBELO) (49 CFR Part 26.25)

ADOT has designated Vivien H. Lattibeaudiere, Ph.D., Manager of its Business Engagement & Compliance Office, as its DBE Liaison Officer (DBELO)

[Vlattibeaudiere@azdot.gov](mailto:Vlattibeaudiere@azdot.gov)

1801 W. Jefferson St., Suite 101, Mail Drop 154

Phoenix, AZ 85007

(602) 712-4071

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that ADOT and its Subrecipients/Subgrantees comply with all provision of 49 CFR Part 26. The DBELO reports to the Policy Director who reports to the ADOT Director. However, the DBELO has access to the ADOT Director

on DBE related matters, as needed. An organization chart displaying the DBELO's position in the organization is found in Section IX (Attachment B) to this program.

The DBELO is responsible for developing, implementing and monitoring ADOT's DBE program, in coordination with other appropriate ADOT officials listed below in accordance with 49 CFR Part 26, ADOT's DBE Policy SUP-3.05 (Attachment C) and this DBE Program Plan. The duties of the ADOT DBELO include, but are not limited to:

- Advising the ADOT Director regarding DBE matters and achievement.
- Communicating with the concerning DOT operating administration, Federal Highway Administration Arizona Division Office and other external stakeholders concerning the operation of ADOT's DBE program.
- Supervising the activities of DBE Program Managers and Technicians.
- Compiling DBE reports required by each DOT operating administration.
- Coordinating ADOT DBE Task Forces and Subcommittees to reduce barriers to entry to DBE firms.
- Serving as approver and mediator for DBE issues that require escalation.
- Coordinating the Arizona Unified Certification Program (UCP).
- Coordinating Disparity Studies and DBE triennial and project goals setting process, as required.
- Ensuring compliance with 49 CFR Part 26, ADOT DBE Policy SUP-3.05 and this DBE Program Plan.

The DBELO manages more than 15 professional and technical staff and works with other key ADOT Division staff to administer the DBE program. Primary staff duties and responsibilities include the following:

Compliance & Training Officer, DBE Compliance Program Managers & Support Technician(s)

- Gather and reports statistical data and other information as required by DOT.
- Review third-party contracts and purchase requisitions for compliance with DBE program.
- Ensure that bid notices and requests for proposals are available to DBEs in a timely manner.
- Identify contracts and procurements so that DBE goals are included in solicitations via race-neutral and race-conscious methods.
- Oversee the DBE goal-setting process for ADOT and Subrecipient/Subgrantee/Certification Acceptance Agencies/LPA federal-aid projects.
- Monitor project-specific goal/commitment attainment and identifies ways to improve process.
- Analyze ADOT's progress toward overall goal attainment and identifies ways to improve progress.

- Participate in pre-bid meetings.
- Develop comprehensive training programs to address the compliance education needs of internal and external ADOT customers, major program areas, and Subrecipients/Subgrantees.

Small Business & Workforce Development Officer, DBE Supportive Services Program Manager & Support Technician(s)

- Manage the ADOT DBE Supportive Services Program.
- Provide DBE with information and assistance in preparing bids, obtaining bonding and insurance.
- Plan and participate in DBE training activities.
- Provide outreach to DBEs and community organizations to advise them of contracting opportunities.
- Address overconcentration of DBEs in specific trades.
- Address underrepresentation of specific gender/ethnicities to ensure that pool of certified DBEs accurately reflects the demographics of the state.
- Coordinate dissemination of bid notices, plans, and requests for proposals to DBEs.
- Research and maintain information regarding financial institutions owned by socially and economically disadvantaged individuals and disseminates information to affected parties.

Contractor & Field Compliance Program Manager and Specialist(s)

- Establish procedures to ensure DBE requirements are met on design and construction projects.
- Train ADOT construction field office staff and Subrecipients/Subgrantees related to DBE program requirements, Commercially Useful Function (CUF) and Trucking related regulations and procedures.
- Attend Pre-Construction Meetings to ensure contractors and subcontractors are aware of DBE requirements.
- Manage Regional Field Compliance staff that conducts onsite CUF and Truck reviews of all DBEs on all construction contracts statewide.
- Assist with ensuring that all required DBE data is entered in DBE tracking system.
- Investigate and facilitates resolution of DBE Prompt Pay related issues identified in the field.

Small Business Development Officer, Certification Program Manager & Support Technician(s)

- Certify DBEs according to the criteria set by DOT and acts as liaison to the Uniform Certification Program (UCP) in Arizona.

- Certify SBEs according to the criteria contained herein and in accordance with guidance provided by 49 CFR Part 26.
- Maintain and updates ADOT's directory of certified DBEs.
- Serve as the ADOT representative as a lead agency in the Arizona UCP.
- Manage the content of the Arizona UCP website.
- Conduct certification training, workshops, and presentations.

Subrecipient/Subgrantee/Local Public Agency Program Manager

- Ensures Subrecipients/Subgrantees compliance with DBE requirements.
- Provides training to Subrecipients/Subgrantees related to DBE program regulations and requirements.
- Ensures that all Subrecipient/Subgrantee FHWA projects are assessed for DBE goals.
- Works with Subrecipients/Subgrantees to ensure required DBE contract language is included in their project solicitations and contracts.
- Ensures that Subrecipient/Subgrantees submit all required pre and post award DBE Affidavits, Bidders List forms and other required documents to the Business Engagement and Compliance Office.
- Trains and coordinate with Subrecipients/Subgrantees to ensure that they report DBE commitments and payments and enter required DBE utilization data in the LPA DBE tracking system.

State Engineer's Office and District Offices, including all Deputy State Engineers, Project Managers, Program Area Managers, and District Engineers are responsible for ensuring compliance with DBE contract requirements, including Commercially Useful Function reviews and prompt payment enforcement, on federal-aid design and construction projects. This includes Subrecipient/Subgrantee DBE compliance through ADOT's Local Public Agency Section.

Contracts and Specifications (C&S) Manager is responsible for assisting in the development of DBE construction specifications for FHWA funded-contracts, ensuring that all federal-aid projects are submitted to ADOT Business Engagement and Compliance Office for DBE goal assessment, construction contracts bidding process meets requirements of 49 CFR Part 26 as outlined in the DBE Program Plan and ADOT DBE Policy SUP-3.05, ensuring that the appropriate DBE contract specifications are included in all construction bid letting and contracts, and data collection and monthly reporting related to DBE participation.

Field Reports Manager is responsible for receiving, processing and approving subcontracts from prime contractors and ensuring all subcontracts are in compliance with DBE requirements. Certification Acceptance Agencies have a similar process to review, ensure contract provision compliance with Form FHWA 1273 and provide written approval to prime contractors.

Engineering Consultant Services (ECS) Manager is responsible for assisting in the development and implementation of DBE contract requirements for US-DOT assisted engineering, design-related and professional services consulting contracts as required by 49 CFR Part 26 and as outlined in the ADOT DBE Program Plan and Policy SUP-3.05. This includes ensuring compliance with applicable DBE contract provisions and ensuring data collection and monthly reporting related to DBE participation. This individual is also responsible for assisting with enforcing Subrecipient/Subgrantee DBE compliance for the pre-award phase of engineering design projects. For Certification Acceptance Agencies and for Self-Administration projects, this individual also reviews and approves the agencies' written procurement of consultant procedures to ensure the incorporation of DBE contract requirements for FHWA funded engineering and design-related consulting contracts as required by 49 CFR Part 26.

ADOT Chief Procurement Officer is responsible for assisting in the development and implementation of DBE contract requirements and ensuring compliance with 49 CFR Part 26 as outlined in the ADOT DBE Program Plan and Policy SUP-3.05 related to FHWA, FTA and FAA-funded contracts that are governed by the State of Arizona Procurement Code. This includes ensuring that appropriate DBE contract language is included in all DOT-assisted procurement contracts, compliance with DBE contract provisions, and data collection and monthly reporting related to DBE participation.

Grand Canyon Airport Manager is responsible for the Grand Canyon National Park Airport and for ensuring compliance with 49 CFR Part 26 as outlined in the ADOT DBE Program Plan and Policy SUP-3.05, that appropriate DBE contract language and requirements are included in Grand /Canyon Airport construction, professional services, procurement, and concessionaire contracts and data collection and monthly reporting related to DBE participation.

Aeronautics Group Manager is responsible for FAA-assisted contracts and for ensuring compliance with 49 CFR Part 26 as outlined in the ADOT DBE Program Plan and Policy SUP-3.05, that appropriate DBE contract language and requirements are included in FHWA and FAA airport construction, professional services, procurement contracts and data collection and monthly reporting related to DBE participation. This individual is also responsible for enforcing ADOT DBE program plan compliance for Subrecipients/Subgrantees of FAA funds (i.e., they have adopted the ADOT DBE program plan and are in compliance or have separate FAA approved DBE program plans).

Multi-Modal Planning Division (MPD) Director is responsible for ensuring DBE compliance with 49 CFR Part 26 as outlined in the ADOT DBE Program Plan, Policy SUP-3.05 and DBE Contract Specifications on all federal-aid transportation projects related to long-range transportation planning, public transportation, Elderly and Persons with Disabilities Transportation, and Rural Public Transportation Programs (Section 5310 and 5311 grant programs, respectively). This individual is also responsible for ensuring that appropriate DBE contract language is included in all DOT-assisted contracts, compliance with DBE provisions, data collection and monthly reporting related to DBE participation and enforcing FHWA, FTA and FAA Subrecipient/Subgrantee DBE compliance.

Assistant Attorney(s) General (one or more) from the Transportation Division of the State Attorney General's Office has been assigned to the Business Engagement & Compliance Office and other ADOT Departments to provide counsel on the DBE program.

Subrecipients/Subgrantees are responsible for following the same guidelines and procedures developed by ADOT to implement its DBE program and ensuring that DBE program requirements are met on its DOT-assisted contracts in accordance with 49 CFR Part 26, as outlined in the ADOT DBE Program Plan and Policy SUP-3.05. This includes ensuring compliance with applicable DBE contract provisions and ensuring data collection and monthly reporting related to DBE participation is submitted to ADOT as prescribed in this Section VIII of this DBE Program Plan.

ADOT Local Public Agency Section Manager is responsible for providing oversight and monitoring to help ensure that Subrecipients/Subgrantees operate in compliance with the ADOT DBE Program Plan, Policy and DBE EPRISE contract specifications.

## 2. DBE Financial Institutions (49 CFR Part 26.27)

ADOT 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. ADOT encourages prime contractors to use such institutions on US DOT assisted contracts. However, use of DBE financial institutions will not be counted toward the DBE contract goal.

Although no such banks exist in Arizona at this time, ADOT encourages prime contractors to continually research for the availability of such institutions through the Business Programs Office at [www.osdbu.dot.gov/financial/stlp.cfm](http://www.osdbu.dot.gov/financial/stlp.cfm). Another source is the Federal Reserve Board website at [www.federalreserve.gov](http://www.federalreserve.gov), which can be used 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.

## 3. Prompt Payment Mechanisms (49 CFR Part 26.29)

### A. Prompt Payment (§26.29(a))

ADOT and Subrecipient/Subgrantee contract specifications require that prime contractors and each subcontractor of any tier must make prompt partial payment to their subcontractors within seven (7) days from receipt of payment by ADOT. The contractor and each subcontractor of any tier must make prompt final payment of all monies due to its subcontractor within seven (7) days of receipt of payment by ADOT or Subrecipients/Subgrantees. Information contained in the ADOT DBE System online reporting and tracking tool is used as a mechanism to help monitor and enforce prompt pay requirements.

### B. Retainage and Completion of Work (§26.29(b-c))

As a general practice, ADOT and its Subrecipient/Subgrantees will not hold retainage from prime contractors and prime contractors must not hold retainage from subcontractors.

However, if, in the opinion of the Engineer, progress is unsatisfactory after 75 percent of the contract time has expired, the Department reserves the right to withhold 10 percent of payments due the contractor until progress is determined to be satisfactory. If retention is withheld from the prime contract in this circumstance, the prime contractor and each subcontractor of any tier shall not retain a higher percentage than the Department retains under the prime contract. The contractor and each subcontractor of any tier shall pay all monies, due to its subcontractor within seven (7) days of receipt of payment from ADOT or its Subrecipient/Subgrantees for work that is satisfactorily completed.

If satisfactory progress is being made on a project, a construction contractor will receive a payment each month based on the amount of work completed during the preceding month. ADOT will prepare a draft monthly estimate for review by the contractor. The contractor must work with the Engineer to finalize the monthly estimate. When the Engineer and the contractor have reached agreement, the final monthly estimate will be prepared and signed by the contractor and the Engineer. The contractor's signature constitutes a certification that the work was satisfactorily performed, meets the specifications, and the quantities reported are accurate regardless of whether the work was performed by the contractor or a subcontractor. A subcontractor's work for all types of ADOT contracts is satisfactorily completed when all the tasks called for in the subcontract have been accomplished, documented, and accepted by ADOT.

### **C. DBE Payment Reporting and Sanctions (§26.29(d))**

ADOT requires contractors to electronically report payments to all subcontractors, including DBEs, in its online DBE System (accessible at AZUTRACS.com) on a monthly basis indicating the amounts actually paid to subcontractors of any tier, including each DBE subcontractor, DBE material supplier and non-DBE subcontractor working on a project. Contractors for Subrecipient/Subgrantee projects report this information in the Local Public Agency DBE System (accessible at AZUTRACS.com).

No later than 15 calendar days after the preconstruction conference, the contractor must log into the appropriate DBE System and enter or verify the name, contact information, and subcontract amounts for Reportable Contracts (see definition in Section I(2) ) on each project. As Reportable Contracts are approved over the course of the contract, the contractor must enter the contract information in the system. Reportable contract information must be entered into the system no later than five calendar days after approval by ADOT or the Subrecipient/Subgrantee.

The contractor must report on a monthly basis indicating the amounts actually paid and the dates of each payment under any Reportable Contract on the project. The contractor must also ensure that all Reportable Contract activity is reported, including all lower-tier Reportable Contracts. In addition, the contractor must require that all subcontractors/participants in any Reportable Contract electronically verify receipt of payment on the contract in the DBE System by the last day of the month. The contractor must actively monitor the DBE System to ensure that the subcontractor verifications are made. The contractor is also responsible for proactively working to resolve any payment discrepancies in the DBE System between payment amounts it reports and payment confirmation amounts reported by subcontractors/participants. The contractor must ensure that all Reportable Contract activity is reported to ADOT or Subrecipients/Subgrantees, including all lower-tier Reportable Contracts.

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

The contractor must report information for payments made on all Reportable Contracts during the previous month by the 15th day of the current month; or for Certification Acceptance Agencies, contractor payment information must be reported by the last day of the current month. In the event that no payments were made during a given month, the contractor shall identify that by entering a dollar value of zero. If the contractor does not pay the full amount of any invoice from a subcontractor, the contractor shall note that and provide the reasons in the comment section of the Monthly Payment Audit of the DBE System.

For each Reportable Contract on which the contractor fails to submit timely and complete payment information, \$1,000.00 will be retained as liquidated damages, from the monies due to the contractor. Liquidated damages will be deducted each month for each Reportable Contract on which the contractor fails to submit payment information until the contractor provides the required information. 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 contractor fails to report until the information is provided. These liquidated damages will be in addition to all other liquidated damages provided for elsewhere in the contract.

The contractor must ensure that a copy of these payment reporting and prompt payment requirements is included in every Reportable subcontract of every tier.

#### **D. Prompt Payment Monitoring, Disputes Resolution and Sanctions (§26.29(e))**

ADOT and its Subrecipients/Subgrantees will not rely only on DBE complaints to monitor and enforce prompt payment. ADOT Resident Engineers, Engineering Consultants Section, Procurement Group, Field Reports Section, Multi Planning Division or other applicable contract administration staff or equivalent staff of Certification Acceptance Agencies or other Subrecipients/Subgrantees that procures and/or manages DOT-assisted contracts will monitor the applicable DBE System for discrepancies between payment reported by prime contractors and verification of payments made by DBE and other subcontractors. These staff/entities will investigate any prompt payment discrepancies in the DBE System and any complaint regarding prompt payment to DBEs and other subcontractors.

If there is a discrepancy between what is reported by the contractor in the ADOT DBE System and what the subcontractor indicates in its payment verification, an alert email will automatically be sent to the contractor. The email will be sent to the email address provided by the contractor in DBE System. The contractor must provide a verifiable explanation of the discrepancy in the DBE System as early as practicable. It is the contractor's responsibility to ensure that the email address in the DBE System is kept current.

The Engineer or other applicable ADOT contract administration staff or equivalent staff of Subrecipients/Subgrantees will determine whether the contractor has acted in good faith concerning any such explanations. ADOT reserves the right to request and receive documents from the contractor and all subcontractors of any tier, in order to determine whether prompt payment requirements are met.

The contractor must implement and use the dispute resolution process outlined in the subcontract, as described in ADOT Standard Specifications, Subsection 108.01, to resolve payment disputes. Certification Acceptance Agencies and other Subrecipient/Subgrantee contractors may use the Subrecipients/Subgrantees' dispute resolution process.

Additional monitoring and enforcement mechanisms to ensure prompt payment and retainage requirements, include ADOT contract administration staff in the Engineering Consultant Section, Field Reports and Procurement groups randomly reviewing at least 20% of DOT-assisted subcontracts after they are awarded to ensure that subcontracts contain the appropriate prompt payment, retention language and other federally required language.

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

- a) Liquidated Damages. These liquidated damages will be in addition to all other retention or liquidated damages provided for elsewhere in the contract.

- (i) ADOT or its Subrecipients/Subgrantees will withhold two times the dollar amount not paid to each subcontractor.
  - (ii) If full payment is made within 30 days of ADOT or its Subrecipients/Subgrantees payment to the contractor, the amount withheld by ADOT or its Subrecipients/Subgrantees will be released.
  - (iii) If full payment is made after 30 days of ADOT or its Subrecipients/Subgrantee payment to the contractor, ADOT or its Subrecipients/Subgrantees will release 75 percent of the funds withheld. ADOT will retain 25 percent of the monies withheld as liquidated damages.
- b) Additional Remedies. If the contractor fails to make prompt payment for three consecutive months, or any four months over the course of one project, or if the contractor fails to make prompt payment on two or more projects within 24 months, ADOT or its Subrecipients/Subgrantee 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 subcontractors, subject to the liquidated damages described in paragraph (a) above,
  - (ii) Terminate the contract for default in accordance with Subsection 108.10 of the Standard Contract Specifications or according to ADOT's Subrecipient/Subgrantee specifications, and/or
  - (iii) Disqualify the contractor from future bidding, temporarily or permanently, depending on the number and severity of violations.

In determining whether liquidated damages will be assessed, the extent of the liquidated damages, or additional remedies assessed, ADOT staff will make recommendations to the ADOT State Construction and Materials Engineer, who will consider whether there have been other violations on the contract in question or other contracts, whether the failure to make prompt payment was due to circumstances beyond the contractor's control, and other circumstances. The contractor may, within 15 calendar days of receipt of the decision of the State Construction and Materials Engineer, escalate the decision to the State Engineer. If the contractor does not escalate the decision of the State Construction and Materials Engineer, in writing to the State Engineer, within 15 calendar days of receipt of the decision, the contractor will be deemed to have accepted the decision and there will be no further remedy for the contractor. If the contractor escalates the decision to the State Engineer, and the contractor does not agree with the State Engineer's decision, the contractor may initiate litigation, arbitration or mediation pursuant to Subsection 105.21(D) and (E) of the Standard Contract Specifications.

In determining whether liquidated damages will be assessed, the extent of the liquidated damages, or additional remedies assessed, the Certification Acceptance Agency will consider whether there have been other violations on this or other federal-aid contracts, whether the failure to make prompt payment was due to circumstances beyond the contractor's control, and other circumstances. The contractor may, within 15 calendar days of receipt of the decision of the Certification Acceptance Agency, escalate the decision according to the contract's escalation process.

#### **E. Set-Offs Arising from Other Contracts**

If a subcontractor is performing work on multiple contracts for the same contractor or subcontractor of any tier, the contractor or subcontractor of any tier shall not withhold or reduce payment from its subcontractors on the contract because of disputes or claims on another contract.

### **4. DBE Directory/Arizona Unified Transportation Registration and Certification System (AZ UTRACS) Web Portal (49 CFR Part 26.31)**

#### **A. DBE Directory**

ADOT serves as the lead agency for the Arizona Unified Certification Program (AZUCP). In this role, the agency maintains the statewide DBE directory as one feature of its Arizona Unified Transportation Registration and Certification System (AZ UTRACS) web portal. The DBE Directory contains an online searchable list of all certified DBE firms, from all AZUCP certifying agencies, including the firm's name, address, phone number, fax number, email address, gender, ethnicity, certification source, type of work the firm has been certified to perform as a DBE, and the most specific NAICS codes available to describe each type of work. The directory is available online at [www.AZUTRACS.com](http://www.AZUTRACS.com). Paper copies of the DBE directory are available upon request by contacting the ADOT Business Engagement & Compliance Office at (602) 712-7761 or via email at [dbesupportiveservices@azdot.gov](mailto:dbesupportiveservices@azdot.gov).

#### **B. Arizona Unified Transportation Registration and Certification System (AZ UTRACS)**

The AZ UTRACS transportation web portal serves as ADOT's and the AZUCP's centralized "one-stop shop," which allows companies to perform a variety of transactions, including:

- a) Completing AZ UTRACS Registration – ADOT's overall agency Bidder's List of companies that are interested in performing work on DOT-assisted transportation projects in Arizona. All companies must register and have an AZ UTRACS registration number to bid on or work on ADOT and its Subrecipient/Subgrantee agency DOT-assisted projects. All companies must update their AZ UTRACS Registration every three (3) years or their registration will be deactivated.
- b) Completing contract-specific Online Bidder's/Proposer's Lists – to ensure all bidders on each DOT-assisted contracts are reported and maintained by ADOT for use in overall and contract DBE goal setting.
- c) Applying online for Disadvantaged Business Enterprise (DBE) Certification - For companies that meet the requirement found in 49 CFR Part 26. Certified DBEs are automatically AZ UTRACS registered and meet the requirements to be registered as Small Business Concerns (SBCs).
- d) Submitting DBE Annual Update/No-Change Affidavits - For companies that are certified DBEs and need to complete an annual update to maintain their DBE certification.
- e) Registering online as a Small Business Concern (SBC) - For companies that meet the Small Business Administration size standard average annual income criteria for their primary North American Industry Classification System (NAICS) code.
- f) Searching for Certified DBE firms – DBE Directory to locate and identify DBEs certified in Arizona.

- g) Searching for Register SBCs firms – SBC Directory to locate and identify registered SBCs registered in Arizona.
- h) Searching for AZ UTRACS registered firms - To locate and identify ADOT's Bidder's List of registered prime consultants, contractors and other interesting in doing business with ADOT and its Subrecipients/Subgrantees.
- i) Reporting DBE Awards and Payments - Planning, Engineering Design and Construction companies that have DOT-assisted contracts with ADOT or its Subrecipients/Subgrantees are required to report DBE awards, utilization, and payments in the system.
- j) Reporting Certified Payroll – Constructions companies that have contracts with ADOT are required to upload and track required certified payroll through LCP tracker and meet other labor compliance requirements. Subrecipients are not required to utilize the LCP tracker software for certified payroll; however, all Subrecipients/Subgrantees are required to adhere to the Davis-Bacon and related Acts regulations for certified payroll.

## 5. Overconcentration (49 CFR Part 26.33)

ADOT conducts Disparity Studies approximately every 5 years in which sophisticated statistical analysis is done to determine and identified whether overconcentration exists in certain types of work in a manner that causes undue burden to the opportunity of non-DBE firms to participate in these types of work. The Disparity Study completed in 2015 found no overconcentration of DBEs in any categories.

However, ADOT will continue to monitor its contracts and its Subrecipients/Subgrantee contracts for any overconcentration. If ADOT determines that DBE overconcentration has occurred to such an extent as to unduly burden the opportunity of non-DBE firms to participate in the highway design or construction program, or any allegations of overconcentration is substantiated, ADOT will develop appropriate measures and procedures to address the overconcentration, such as business, supportive services and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which it has been determined that non-DBEs are unduly burdened. ADOT will forward any allegations or determination of overconcentration to the applicable US DOT Operating Administration for consultation and seek approval prior to implementation of any countermeasures.

## 6. ADOT Business Development & Mentor Protégé Programs (49 CFR Part 26.33)

ADOT DBE Supportive Services Program provides outreach and educational programs regarding the benefits of DBE certification for minority and women-owned businesses. The purpose of the program is to provide education, access, and visibility for the DBE community to aid in business development and eventual self-sufficiency. Training, conferences, and workshops are open to any interested party. Business technical assistance is provided on a case-by-cases basis with priority given to DBEs working directly on federal-aid heavy highway projects.

### A. Business Development Program (49 CFR Part 26.33(a))

As part of its DBE Supportive Services Program, ADOT has developed and implemented a multi-tiered Business Development Program framework to provide new and emerging, developmental and transitional

DBEs with general and firm-specific training and technical assistance to help them to become competitive and successful within and outside of the transportation industry. The program was approved by FHWA in 2014.

The process for selecting DBE participant firms for each tier of the Business Development Program include targeted recruitment and a detailed application/selection process based on the following general criteria:

<b>Selection Criteria</b>	<b>New &amp; Emerging DBEs (Orientation Program)</b>	<b>Developmental DBEs (Pacesetters Program)</b>	<b>Transitional DBEs (Masters Program)</b>
Total ADOT Projects awarded over last 2 years	0-1	2-9	10+
Gross Receipts	n/a	\$100,000-\$750,000	Above \$750,000
Total number of employees (FTE)	n/a	Less than 10	10+
Years DBE certified	Less than 1 year	2-10	10+

Selection of DBE firms for the Developmental Pacesetter’s Program and the Transitional Master’s Program is done by a panel of ADOT DBE Supportive Services Staff and Consultants and DBE Task Force members with consultation with representatives from small business stakeholder groups, as needed. Selection criteria include: DBE certification, completion of a preliminary business assessment, lack of a written business plan, and expressed commitment to attend class sessions and complete the program. Preference is given to highway construction and engineering design DBE firms.

Program elements for each tier of the program may include, but are not limited to:

<b>New &amp; Emerging DBEs (Orientation Program)</b>	<b>Developmental DBEs (Pacesetters Program)</b>	<b>Transitional DBEs (Masters Program)</b>
<ul style="list-style-type: none"> <li>• New DBE Packet</li> <li>• New DBE Orientation Workshop (quarterly)</li> <li>• Working with ADOT Workshop Series- featuring meetings with key ADOT Departments and Staff</li> <li>• Bidding Opportunities website</li> <li>• Business Workshops</li> <li>• Networking events for large projects</li> <li>• Elevator Pitch Basics</li> <li>• One-Page Company Bio Marketing Flyer</li> <li>• Participation in Expo to market DBE firms to Prime Contractors</li> <li>• Regional Conferences</li> </ul>	<ul style="list-style-type: none"> <li>• Participation in a variety of business related workshops such as bidding &amp; estimating, marketing, employee recruitment and retention and financial management</li> <li>• Development of firm specific goals</li> <li>• Working with ADOT Workshop Series- featuring meetings with key ADOT Departments and Staff</li> <li>• In-Depth Small Group Business Workshops</li> <li>• Panel Discussions</li> <li>• Business Plan Development</li> <li>• On-on-One Meetings with Prime Contractors</li> <li>• Intensive targeted One-on-One Coaching and Technical Assistance</li> <li>• Expo to market DBE firms to Prime Contractors</li> <li>• Regional Conferences</li> <li>• Company Marketing Video as incentive for participating in 65% of activities and completing the program</li> <li>• Formal Graduation Ceremony</li> </ul>	<ul style="list-style-type: none"> <li>• Participation in a variety of business related workshops such as bidding &amp; estimating, marketing, employee recruitment and retention and financial management</li> <li>• Develop firm specific goals</li> <li>• Explore business expansion/growth into other NAICs codes, other states, etc.</li> <li>• Explore what it takes to successfully compete outside DBE program</li> <li>• Mentor Protégé relationships with Prime Contractors and/or with other DBEs</li> <li>• All other services provide to Pace setters in a more individualized and targeted manner</li> </ul>

ADOT follows-up quarterly with graduating firms to provide additional technical assistance, assess number of bids/contracts won and increase in gross receipts since graduation from program.

#### **B. Mentor-Protégé Program (49 CFR Part 26.33(b))**

The elements of the Mentor-Protégé program guidelines in 49 CFR Part 26, Appendix D, are incorporated in the Business Development program Master's level to help DBEs build their capacity to compete for, win and perform on transportation projects. ADOT also has a previously approved Mentor-Protégé program in compliance with 49 CFR Part 26.33(b). However, that program is in the process of being updated and will be submitted to the appropriate concerning operating administration for approval in 2017.

### **7. Monitoring and Enforcement Mechanisms (49 CFR Part 26.37)**

ADOT will implement appropriate mechanisms, including sanctions, suspension, debarment, and application of legal and contractual remedies available under Federal, state, and local laws, as deemed appropriate and necessary, to ensure compliance with the requirements by all program participants. Such monitoring and enforcement mechanisms also apply to Subrecipients/Subgrantees, Certification Acceptance Agencies and LPAs. ADOT works collaboratively with Subrecipients/Subgrantees, Certification Acceptance Agencies and LPAs to ensure monitoring and enforcement mechanisms take place on each federal-aid project. See Section VII of this DBE Program Plan for Subrecipient/Subgrantee monitoring and enforcement mechanisms.

Specifically, ADOT takes the following monitoring and enforcement steps to ensure compliance with 49 CFR Part 26:

- Implement enforcement and monitoring processes/procedures outlined in DBE Contract Provisions (Attachment D) contained in all engineering design/professional services, construction, transit and aviation DOT-assisted contracts and this DBE Program Plan. This includes processes for Good Faith Efforts review and approval, counting DBE participation, monitoring and enforcing prompt payment, review and approval of substitutions and termination of DBEs on projects, requiring payment certifications from DBEs and Prime contractors attesting to total amounts paid to DBE firms, and contract closeout procedures that evaluate whether DBE goals have been met on each contract.
- Implement procedures to verify that work committed to DBEs at contract award is actually performed by the DBEs through Commercially Useful Function (CUF) reviews. These reviews are accomplished via document reviews of contracting records, project onsite visits and interviews conducted by ADOT staff and construction inspectors. CUF data for construction contracts is captured via a paper form (Attachment E) or online in the ADOT PEN Inspector Diaries. ADOT BECO Staff utilizes that data and other contract/subcontract records to make written determination of CUF and document the information in the ADOT DBE System. ADOT Subrecipients/Subgrantees perform their own monitoring following a process similar to ADOT's process.
- Implement CUF reviews for DBEs awarded Engineering Design/Professional Services based on a risk assessment model including contract size and length, past unfavorable CUF findings, pattern of contractor using the same DBE, non-compliance history, and history of no previous CUF reviews performed.
- Perform Performance Review audits and monitor Subrecipients/Subgrantees to ensure compliance with DBE requirement.

- Additional monitoring and enforcement mechanisms to ensure prompt payment and retainage requirements, include ADOT contract administration staff in the Engineering Consultant Section, Field Reports and Procurement groups randomly reviewing at least 20% of DOT-assisted subcontracts after they are awarded to ensure that subcontracts contain the appropriate prompt payment, retention language and other federally required language.
- Compile and maintain a monthly report of awards/commitments and attainment, which is reported monthly to the ADOT Director's Office, ADOT divisions, DBE Task Forces, and at various regular transportation industry meetings and reported semi-annually to FHWA and FTA and annually to FAA. A list of projects awarded with DBE commitment amounts are posted monthly on the ADOT Business Engagement & Compliance website at <http://www.azdot.gov/business/business-engagement-and-compliance/dbe-goals>.
- Keep a running tally in the ADOT online DBE System of DBE utilization/attainment, including race-neutral DBE participation, as well as payments to DBE firms for work committed to them at the time of contract award. Crosschecks of DBE System reports with contracting department's databases are conducted monthly to ensure data integrity.
- Track and delineate state/federal funding split to ensure that only the federal share is reported on Uniform Reports to US. DOT. This information is tracked in the ADOT DBE System.
- Compare DBE commitment Affidavits submitted at the beginning of each project with DBE Certification of Final Payment forms at the end of the project to determine if DBE goal was met.
- Bring to the attention of DOT any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109. Consider similar action under its own legal authorities, including responsibility determinations in future contracts.

## 8. Fostering Small Business Participation (49 CFR Part 26.39)

ADOT has implemented strategies to foster small business participation and recognizes this as a requirement of good faith implementation of its DBE program.

ADOT shall require all Subrecipients/Subgrantees adhere to any Small Business Concern (SBC) participation requirements set forth in contract specifications and other documents.

### A. Small Business Concern (SBC) Participation Strategies

ADOT has identified and/or implemented the following strategies in response to the Final Rulemaking issued January 28, 2011, which modified 49 CFR Part 26 and states that all recipients must include "an element to structure contracting requirements to facilitate competition by small business concerns" in their DBE Program Plans.

ADOT has implemented the Small Business participation requirement as a component of its DBE program aimed at helping to foster additional race-neutral participation and not as a standalone program.

- a) The SBC component of the DBE program was implemented jointly with UCP partners; the cities of Phoenix and Tucson.
- b) ADOT, in conjunction with its UCP Partners, has implemented a Small Business Concern (SBC) registration process to verify that a firm is in fact a small business concern and to minimize fraud and abuse (see “Small Business Registration Requirement” below).
- c) ADOT has taken reasonable steps to eliminate obstacles to SBC participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors. ADOT Business Engagement & Compliance Office has and will continue to work with affected program areas to ensure that technical staff members are aware of and have given consideration to eliminating obstacles to small business participation.
- d) ADOT has included language in its contract solicitations and contracts to encourage prime consultants and contractors to foster small business inclusion. ADOT’s Subrecipients/Subgrantees are required to include similar language in their contract solicitations and contracts.
- e) ADOT will conduct outreach to SBCs and encouraged them to participate in DBE related business development, training, bidding and matchmaking program opportunities, with the exception of expending DOT financial assistance for direct business technical assistance for SBCs.
- f) ADOT will encourage SBCs to be part of its Mentor-Protégé Program.

### **B. Small Business Concern (SBC) Registration**

ADOT has implemented a simplified registration process for SBCs. Registration requirement include conditions that a firm must be:

- a) For-profit business registered to conduct business in Arizona
- b) Independently owned and operated
- c) Not dominant in its field on a national basis
- d) Meets the Small Business Administration (SBA) size standard for annual income for its primary North American Industry Classification System (NAICS) code

Firms can register online via the AZ UTRACS web portal at [www.AZUTRACS.com](http://www.AZUTRACS.com).

ADOT does not conduct site visits as a condition of SBC registration. In-depth desk reviews and/or onsite audit reviews are conducted on a random basis, at ADOT’s discretion or as circumstances warrant. ADOT will make its registration decisions based on self-verification and the facts as a whole. Registered SBCs must update their registration every three years.

ADOT has published an online directory of available SBCs as part of the AZ UTRACS web portal, similar to the DBE Directory.

### III. GOALS, GOOD FAITH EFFORT, AND COUNTING – SUBPART C

#### 1. Role of Statutory 10% National DBE Goal (49 CFR Part 26.41)

The statutes authorizing the federal DBE program provide that, except to the extent the Secretary of Transportation determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs on a national level. This 10 percent goal is an aspirational goal at the national level, used by DOT as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts nationwide. The national 10 percent goal does not authorize or require ADOT to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

#### 2. Set-Asides or Quotas (49 CFR Part 26.43)

ADOT does not use set-asides or quotas in any way in the administration of its DBE program.

#### 3. Overall Goals (49 CFR Part 26.45)

ADOT sets a separate and distinct overall DBE goal for each DOT operating administration: Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and Federal Aviation Administration (FAA). Given the significant differences between the distribution and utilization of these funds, separation of the DBE goals allows ADOT to appropriately tailor the DBE program to the relative industry.

ADOT's current DBE goals for the three Operating Administrations are as follows:

Funding Agency	Federal Fiscal Year	Overall DBE Goal	Race-Conscious	Race-Neutral
FTA	2014-2016	3.82%	N/A	3.82%
FHWA	2015-2017	8.90%	4.90%	5.00%
FAA	2016-2018	4.87%	N/A	4.87%

ADOT is required to submit overall goals for the next several years to each Operating Administration on the following time schedule:

Funding Agency	Submission Due Date	Effective Date of Overall DBE Goal
FTA	August 1, 2016	Federal Fiscal Years 2017-2019

	August 1, 2019 August 1, 2022	Federal Fiscal Years 2020-2022 Federal Fiscal Years 2023-2025
FHWA	August 1, 2017 August 1, 2020 August 1, 2023	Federal Fiscal Years 2018-2020 Federal Fiscal Years 2021-2023 Federal Fiscal Years 2024-2026
FAA	August 1, 2018 August 1, 2021 August 1, 2024	Federal Fiscal Years 2019-2021 Federal Fiscal Years 2022-2024 Federal Fiscal Years 2025-2027

ADOT sets its overall goals based upon the relative availability of DBEs in an attempt to generate the DBE participation one would expect absent the effects of discrimination. ADOT reviews, sets and submits its overall DBE goals triennially on August 1<sup>st</sup> of the three-year cycles established by FHWA, FTA and FAA.

Attachment F is a detailed description of ADOT’s methodology for establishing its FHWA, FTA, and FAA overall goals.

#### 4. Failure to meet Overall Goals (49 CFR Part 26.47)

ADOT cannot be penalized or treated by DOT as being in noncompliance with the 49 CFR Part 26 if ADOT’s annual DBE participation falls short of the overall goal set by ADOT and approved by the relevant Operating Administration, unless:

- a) ADOT has failed to implement and administer the DBE program in good faith;
- b) ADOT does not have an approved DBE program; or
- c) ADOT does not have an overall DBE goal.

If the awards and commitments shown on ADOT’s Uniform Report of Awards or Commitments and Payments at the end of any federal fiscal year are less than the overall goal applicable to that fiscal year, ADOT will do the following in order to be regarded by the DOT as implementing its DBE program in good faith:

- a) Analyze in detail the reasons for the difference between the overall goal and awards and commitments in that fiscal year by reviewing factors such as: effectiveness of its DBE contract goal methodology, i.e., percentage of goal set compared to goal achieved; effectiveness of efforts to promote race neutral participation; efficacy of training and outreach efforts for contractors, DBE, and other stakeholders; percentage of contracts not meeting DBE goals; percentage of good faith efforts awards approved; DBE termination and substitutions approved; and new DBE certification and retention rates.
- b) Establish specific steps and milestones to correct the problems ADOT identifies in its analysis and to enable it to meet fully its goal for the new fiscal year;
- c) Submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed in accordance with sections (a) and (b) above to the appropriate OA for approval. If

the OA approves the report, ADOT will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

FHWA, FTA or FAA may impose conditions on ADOT as part of its approval of ADOT's analysis and corrective actions including, but not limited to, modifications to its overall goal methodology, changes in its race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.

ADOT may be regarded as being in noncompliance with 49 CFR Part 26 and therefore subject to the remedies in 49 CFR 26.103 or 26.105 and other applicable regulations, for failing to implement its DBE Program in good faith if any of the following occurs:

- a) ADOT did not submit its analysis and corrective actions to the OA in a timely manner as required under paragraph (c)(3) of this section;
- b) The OA disapproves ADOT's analysis or corrective actions; or
- c) ADOT does not fully implement the corrective actions to which it has committed or conditions that the OA has imposed following review of ADOT's analysis and corrective actions.

If ADOT's Uniform Report of DBE Awards or Commitments and Payments or other information coming to the attention of the OA, demonstrates that current trends make it unlikely that ADOT will achieve DBE awards and commitments that would be necessary to allow it to meet its overall goal at the end of the fiscal year, the OA may require ADOT to make further good faith efforts, such as by modifying its race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

## 5. Establishment of Overall Goals for Transit Vehicle Manufacturers (49 CFR Part 26.49)

ADOT will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Alternatively, ADOT may, at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program.

## 6. Meeting Annual Overall Goals (49 CFR Part 26.51(a-c))

ADOT's overall annual goals provide for participation by all certified DBEs and are not limited to specific groups. ADOT endeavors to meet the maximum feasible portion of its overall goals using race-neutral methods. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts). The race-neutral means ADOT intends to use include, but are not limited to, the following:

- a) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation;

- b) Requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces;
- c) Providing DBEs, through ADOT's DBE Supportive Services Programs, with assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as, providing education and services to help DBEs, and other small businesses to obtain bonding and financing, developing and improving immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;
- d) Disseminating information and implementing communications programs on contracting procedures, specific contract opportunities and details on how to do business with ADOT;
- e) Providing services to help DBEs and other small businesses improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;
- f) Ensuring distribution of ADOT's DBE directory, through electronic means, to the widest feasible universe of potential prime contractors; and
- g) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

Each time ADOT submits its overall goal for review and approval by each OA, it will submit its projection of the portion of the goal that it expects to meet through race-neutral means and the basis for that projection. Current race-neutral projections for each OA are listed in Section C above.

## 7. Contract Goals (49 CFR Part 26.51(d-g))

Based on the results of its 2015 Disparity Study, overall DBE participation goals for ADOT's FTA and FAA DOT-assisted contracts will be met through race-neutral means and are not currently subject to contract goals. For FHWA DOT-assisted contracts, overall DBE participation goals will be met through race-conscious and race-neutral means and are subject to the utilization of contract goals. (See Section 3 above)

ADOT will use contract goals to meet any portion of the overall goal for FHWA DOT-assisted contracts that it does not project being able to meet using race-neutral means. All ADOT FHWA DOT-assisted contracts are assessed for DBE contract goals, including but not limited to architectural/engineering, construction, professional services, and procurement projects/contracts. DBE contract goals are only set on contracts with subcontracting opportunities.

Prior to contract advertisement, ADOT and Subrecipient/Subgrantee staff must submit a request for each FHWA DOT-assisted contract to be assessed for a DBE goal through ADOT's Online DBE Goal Setting System at: <http://www.azdot.gov/business/business-engagement-and-compliance/dbe-compliance/dbe-contract-goal-assessments>. The online DBE Contract goal setting system calculates preliminary project goals based on subcontracting opportunities, DBE availability, and location of the project. A DBE Contract Goal Setting Committee comprised of DBE Compliance staff from the ADOT Business Engagement and Compliance Office meet weekly to evaluate goals generated by the online goal setting system and make any adjustments based

on historical data and other factors. The DBE Contract Goal Setting Committee often consults engineering, construction and planning staff for technical expertise as needed to help set contract goals. See Attachment G for DBE contract goal methodology. DBE contract goals provide for participation by all certified DBEs and are not subdivided into group-specific goals.

ADOT and its Subrecipients/Subgrantees must state assessed DBE contract goals determined by the DBE Contract Goal Setting Committee in applicable FHWA DOT-assisted contract advertisement and contracts that are let, as a percentage of the total amount of the contract.

ADOT will not establish a contract goal on every DOT-assisted contract and will not set each contract goal at the same percentage level as the overall goal. The goal set for a specific contract may be higher or lower than that percentage level of the overall goal, taking into consideration such factors as the size of the contract, type and location of work, availability of DBEs to perform the particular type of work.

If ADOT determines that the contractor has, without justification, not met the established DBE goal set for a project, ADOT will, at its discretion, deduct up to two times the amount of the unattained portion of established DBE goal from monies due or becoming due the contractor as liquidated damages, based on the circumstances of the noncompliance.

In determining whether liquidated damages will be assessed and the amount of the liquidated damages, the ADOT State Construction and Materials Engineer or Subrecipient/Subgrantee will consider whether there have been other violations of the contract or on other DOT-assisted contracts, whether the failure was due to circumstances beyond the control of the contractor, whether the contractor has made good faith efforts to meet the goal, and other appropriate circumstances.

In addition to any other sanctions, willful failure of the contractor, DBE or other subcontractor to comply with DBE contract terms and conditions or with the Federal DBE regulations may result in disqualification from further contracting, subcontracting, or other participation in DOT-assisted projects.

The contractor may, within 15 calendar days of receipt of the decision of the ADOT State Construction and Materials Engineer or Subrecipient/Subgrantee, escalate the decision to the State Engineer. If the contractor does not escalate the decision of the State Construction and Materials Engineer, in writing, within 15 calendar days of receipt of the decision, the contractor will be deemed to have accepted the decision and there will be no further remedy for the contractor. If the contractor escalates the decision to the State Engineer, and the contractor does not agree with the State Engineer's decision, the contractor may initiate litigation, arbitration or mediation pursuant to Subsection 105.21(D) and (E) of the Standard Contract Specifications.

To help ensure that ADOT's DBE program continues to be narrowly tailored to overcome the effects of discrimination, ADOT will adjust its use of contract goals as follows:

- a) For FTA and FAA contracts, if ADOT's approved DBE goal projection estimates that it can meet its entire overall goal for a given year through race-neutral means, ADOT will implement its program for those given operating administration DOT-assisted contracts without setting contract goals during that year, unless it becomes necessary in order meet its overall goal.

- b) For FHWA contracts, if during the course of any year in which ADOT is using contract goals ADOT determines that it will exceed its overall goal, ADOT will reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If ADOT determines that it will fall short of its overall goal, then ADOT will make appropriate modifications in its use of race-neutral and/or race-conscious measures to allow it to meet the overall goal.
- c) If the DBE participation ADOT has obtained by race-neutral means alone meets or exceeds its overall goals for two consecutive years, ADOT is not required to make a projection of the amount of its goal it can meet using such means in the next year. ADOT will not set contract goals on any contracts in the next year. ADOT will continue using only race-neutral means to meet its overall goals unless and until it does not meet its overall goal for one year.

If ADOT obtains DBE participation that exceeds its overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), it will reduce its use of contract goals proportionately in the following year.

In any year in which ADOT projects that it will meet part of its DBE goal through race-neutral means and the remainder through contract goals, ADOT will maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. ADOT will report this data to the concerned OA as provided in 49 CFR Part 26.11.

## 8. Good Faith Efforts Procedures (49 CFR Part 26.53)

### A. Pre-Award Good Faith Effort (49 CFR Part 26.53(a))

ADOT will only award a contract with an established contract DBE goal to a responsible and/or responsive bidder/offeror that has demonstrated good faith efforts to meet the goal. ADOT will determine that a bidder/offeror is responsible and/or responsive if the bidder/offeror does either of the following:

1. Document that it has obtained enough DBE participation to meet the goal; or
2. Document that it made adequate good faith efforts to meet the goal, even though it did not obtain enough DBE participation to do so.

ADOT will not deny award to a bidder/offeror that documents adequate good faith efforts.

ADOT has adopted the examples of good faith efforts found in 49 CFR Appendix A to Part 26. A full explanation of Good Faith Effort requirements and details about how good faith effort will be determined by ADOT and its Subrecipients/Subgrantees is detailed in the applicable contract specifications, which are attached as Attachment D.

ADOT is responsible for determining whether a bidder/offeror has not met the contract goal or has documented sufficient good faith efforts to be regarded as responsive. The Business Engagement and Compliance Office (BECO) will conduct the initial review and make a final recommendation to the applicable contracting department for ADOT contracts. Subrecipients/Subgrantees will confer with ADOT in making good faith effort determinations when a bidder/offeror has indicated that it will not meet a DBE contract goal.

## B. Information to be Submitted (49 CFR Part 26.53(b))

Under sealed bid procedures for which a contract goal has been established for construction and procurement contracts, the lowest three bidders must submit the following information on the DBE Intended Participation Affidavit (one for each DBE firm) and the DBE Intended Participation Affidavit Summary Form, as a matter of responsibility, no later than 5 calendar days after bid opening, to be considered eligible for contract award:

- The names and contact information of certified DBE firms that will participate in the contract;
- A description of the work that each DBE will perform and its corresponding NAICS code;
- The final dollar amount of the participation of each DBE firm participating;
- Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
- Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractors commitment and
- If the contract goal is not met, evidence of good faith efforts. The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract.

Copies of the forms are available on the ADOT BECO website at: <http://www.azdot.gov/business/business-engagement-and-compliance/dbe-compliance/adot>.

All Bidders are encouraged to submit the information above. In the event that the low bid is rejected, ADOT or its Subrecipients/Subgrantees will consider award of the contract to the next responsible and responsive bidder. To be considered responsive, the bidder must have submitted the above information no later than five calendar days after bid opening. Failure by any bidder to submit the required information within the specified timeframe will cause a firm to be ineligible for contract award.

For engineering design, professional services or other negotiated procurements, this information must be submitted as a matter of responsibility with the cost proposal and is evaluated during the contract negotiations phase of the selection process.

In some negotiated procurement, including design-build and Public-Private Partnership procurement, multiple DBE contract goals maybe set on a project for the different components of the project, such as engineering design/professional services and construction. In these types of contracts, as well as On-Call engineering/professional services negotiated procurements, the bidder/offeror may make a contractually binding commitment to meet the goal or make good faith efforts at the time of bid submission or the presentation of initial proposals but provide the information required in Section B above during contract negotiations or before the final selection or execution of the contract or task order/task assignment is made by ADOT and its Subrecipients/Subgrantees, as stated in the advertisement/solicitation documents.

ADOT and its Subrecipients/Subgrantees will apply the requirements of this section to DBE bidders for prime contracts. In determining whether a DBE bidder for a prime contract has met a contract goal, ADOT and its

Subrecipients /Subgrantees will count the work the DBE has committed to performing with its own forces as well as any work that it has committed to be performed by DBE subcontractors and DBE suppliers.

ADOT and its Subrecipients/Subgrantees will ensure that all information is complete, accurate, adequately documented and the bidder/offer's good faith efforts are approved before a contract award and commitment to the performance of the contract by the bidder/offeror is made.

### **C. Good Faith Efforts Determination (49 CFR Part 26.53(c))**

If the top three bidders indicate in its bid or proposal that they are unable to meet the advertised DBE goal for a contract, they must submit good faith effort documentation to ADOT within the time frame above in Section 8(B) above. Good faith effort documentation may be submitted electronically through email to the Business Engagement and Compliance Office (BECO), which is responsible for evaluating and making written good faith effort determinations. Good faith effort documentation submitted after the time specified will not be accepted. For Subrecipients/Subgrantees, the good faith effort documentation is submitted to the agency.

In order to be awarded a contract on the basis of good faith efforts, a bidder 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. ADOT will consider the quality, quantity, and intensity of the different kinds of efforts the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to make if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE goal. Mere pro forma efforts are not sufficient good faith efforts to meet the DBE contract requirements and 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 bidder shall, at a minimum, seek DBEs in the same geographic area in which it generally seeks subcontractors for a given project. If the bidder cannot meet the goals using DBEs from this geographic area, the bidder, 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 bidder must address when submitting good faith effort documentation:

- Contacting ADOT BECO prior to the submission of bids, 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 bidder 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 contact must be made in sufficient time before bid submission to allow BECO to provide effective assistance. The bidder will not be considered to have made good faith efforts if the bidder failed to contact BECO.
- Conducting market research to identify small business contractors 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-bid 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 contractor's website, written notices or emails to all DBEs listed in the AZ UTRACS 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 bidder 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 bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow-up initial solicitations.

- Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals 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 contractor 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.
- Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist DBEs in responding to solicitations.
- Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to the DBE subcontractors and suppliers, and to select those portions of work or material needs consistent with the available DBE subcontractors 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. Mailings to DBEs requesting bids are not alone sufficient to constitute good faith effort.
- A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, 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 bidder's failure to meet the DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. However, prime contractors are not required to accept higher quotes from DBEs if the price difference is excessive or unreasonable. Documentation, such as copies of all other bids or quotes, must be submitted.
- Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor'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 bids in the contractor's efforts to meet the project goal.
- Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
- Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

- Effectively using the services of available minority/women community organizations; minority/women contractors' 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.

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 contractor must submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract. A generalized assertion that the contractor has received multiple quotes is not sufficient unless copies of those quotes are provided. ADOT may contact rejected DBEs as part of its investigation. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.

In determining whether a bidder has made good faith efforts, BECO will review and analyze the documented efforts of the contractor in accordance with the criteria stated above and of those found in 49 CFR Part 26 Appendix A, and will also take into account the ability of other bidders in meeting the contract DBE goal. The BECO will send a written memo of determination related to good faith efforts to the ADOT or Subrecipient department that advertised or procured the contract.

#### **D. Administrative Reconsideration (49 CFR Part 26.53(d))**

The bidder/offeror or any interested party for an ADOT or Subrecipient/Subgrantee contract may appeal the Business Engagement and Compliance Office (BECO) determination regarding good faith effort to the State Engineer Office. That appeal must be in writing and personally delivered or sent by certified mail, return-receipt requested, to the State Engineer Office. The State Engineer Office must receive the protest no later than seven calendar days after the initial decision was made by BECO. Copies of the protest shall be sent by the protestant to every bidder, at the same time the protest is submitted to the State Engineer Office. Any other interested party may submit a response to the appeal no later than seven calendar days after the appeal is requested. Responses from other interested parties must also be in writing and personally delivered or sent by certified mail, return-receipt requested, to the State Engineer Office. Any interested party submitting such response shall also provide a copy of its response to every bidder, at the same time the protest is submitted to the State Engineer Office.

The bidder/offeror has the opportunity to meet in person with the State Engineer to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The State Engineer Office shall promptly consider any appeals under this subsection and notify all bidders in writing of its findings and decision. In accordance with 49 CFR 26.53(d)(5), the result of the State Engineer's decision is not subject to administrative appeal to the US DOT.

For ADOT construction contracts only, any interested party may protest the State Engineer's Office decision to the State Transportation Board, pursuant to the requirements of Subsection 103.10 of the ADOT Standard Specifications. In accordance with 49 CFR 26.53(d)(5), the result of the Board's Decision is not subject to administrative appeal to the US DOT.

#### **E. Design-Build or Turn Key Contract (49 CFR Part 26.53(e))**

In a "design-build," "turnkey" or Public-Private Partnership (P3) contracting situation, in which ADOT lets a master contract to a contractor, developer or joint venture, who in turn lets subsequent subcontracts for the

work of the project, ADOT may establish one or more DBE goals for the project. The contractor, developer or joint venture may then establish contract goals, as appropriate, for the subcontracts it lets as part of the project. ADOT will maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this section and 49 CFR Part 25.53. These contracts, if they are FHWA-assisted contracts may have one DBE goal or multiple DBE goals for work elements such as Professional Services, Construction and/or Maintenance, which are tracked separately to determine goal attainment of each element.

The letting process for these contracts often follow a two-step qualification based selection process. The first phase involves requesting a Statement of Qualifications (SOQ) or issuing a Request for Qualifications (RFQ) from all interested Proposers and developing a short-list of (three, but no more than five) Proposers from all the responsive submittals. The second phase involves requesting Technical and Price Proposals from the short-list of Proposers, and selecting a Design-Builder based on evaluation of each Technical Proposal and Price Proposal. Contract award, good faith efforts, compliance oversight and monitoring for “design-build,” “turnkey” projects are done in a similar manner as traditional contracts. Good faith efforts to meet DBE goals on these contracts are required throughout the entire course of these projects in accordance with stated contract specifications.

For some large and complex P3 or design-build contracts, contractors/developers will be required to submit a DBE Utilization Plan with their proposal that must be approved by ADOT prior to contract execution. This plan outlines how contractors/developers propose to meet the DBE goal throughout the life of the project. More oversight and monitoring, including submission of monthly DBE utilization report and good faith efforts documentation, and monthly compliance meetings with ADOT and the contractor, are built into these often long and complex contracts to ensure compliance with DBE regulations.

#### **F. Good Faith Effort Pertaining to DBE Substitution/Termination (49 CFR Part 26.53(f-h))**

ADOT and its Subrecipient/Subgrantee require that prime contractors not terminate a committed DBE subcontractor listed on the DBE Affidavits for convenience, in whole or in part, without the prior written consent of ADOT’s Business Engagement & Compliance Office (BECO). This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

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

ADOT’s BECO must approve in writing all terminations, substitutions, and reductions in scope of work to be performed by DBEs committed to the project at time of contract award to meet the contract goal on ADOT and all Subrecipient//Subgrantees contracts.

Before submitting a formal request to ADOT for DBE termination/substitution, the contractor shall give written notice to the DBE subcontractor with a copy to ADOT BECO of its intent to terminate or substitute the DBE identifying the reason for the action. The notice shall include the deadline for the DBE to submit a written response advising the contractor and BECO of its position, which shall be a minimum of five calendar

days after the notice is given. Notice is deemed to have been given on the date of hand delivery or email to the DBE, or five calendar days after deposit in the mail. ADOT will consider both the contractor's request and the DBE firm's response before approving the contractor's termination and substitution request.

The contractor must formally request the termination or substitution of a DBE listed on the DBE Intended Participation Affidavit Summary to meet the contract goal by submitting the DBE Termination/Substitution Request form, available from the ADOT BECO website, along with other supporting documentation to BECO or the applicable Subrecipient/Subgrantee. The submission shall include the following information:

- a) The date the contractor determined the DBE to be unwilling, unable or ineligible to perform.
- b) A brief statement of facts describing the situation and citing specific actions or inaction by the DBE firm giving rise to contractor's assertion that the DBE firm is unwilling, unable, or ineligible to perform.
- c) A brief statement of the good faith efforts undertaken by the contractor to enable the DBE firm to perform.
- d) The total dollar amount currently paid for work performed by the DBE firm.
- e) 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 contractor and the DBE firm have no dispute.
- f) The projected date that the contractor requires a substitution or replacement DBE to commence work, if consent is granted to the request.
- g) A copy of the DBE's response to the notice of intent to terminate. If there is no response from the DBE within the time allowed in the notice of intent to terminate, the contractor shall explain the circumstances.

Written consent for terminating the performance of any DBE listed on the DBE Intended Participation Affidavit Summary will be granted only where the contractor 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 Affidavit Summary will not be allowed based solely on a contractor's ability to negotiate a more advantageous contract with another subcontractor.

ADOT BECO will consider both the contractor's request and DBE's response before approving the contractor's termination or substitution request. ADOT BECO will make the determination of good cause by providing written consent to the contractor after evaluating the contractor's good cause to terminate or substitute a DBE firm. Good cause for this purpose includes the following in relation to the listed DBE subcontractor:

- a) Fails or refuses to execute a written contract.

- b) 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 subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor.
- c) Fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond/insurance requirements.
- d) Becomes bankrupt, insolvent, or exhibits credit unworthiness.
- e) Is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to federal or state law.
- f) Is not a responsible contractor.
- g) Voluntarily withdraws from the project and provides written notice of its withdrawal to ADOT or the applicable Subrecipient/Subgrantee.
- h) Is ineligible to receive DBE credit for the type of work required.
- i) A DBE owner dies or becomes disabled with the result that the firm is unable to complete its work on the contract.
- j) Other documented good cause that ADOT determines compels the termination or substitution of the DBE subcontractor.

If ADOT BECO approves the termination of a DBE, the contractor must make good faith efforts to find another DBE subcontractor to substitute for the original DBE. The good faith efforts as identified in DBE contract provisions must 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 must be documented and provided to ADOT, as an attachment along with the request, within seven (7) calendar days from the date of the request.

A prime contractor'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 contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor 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 will not relieve the contractor of its obligations to meet the DBE goal, but the unpaid portion of the terminated DBE firm's subcontract will not be counted toward the DBE goal. If for any reason it becomes apparent that the DBE goal will not be met then the contractor shall: (1) immediately notify the ADOT Engineer, BECO or the applicable Subrecipient/Subgrantee 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 evaluate the circumstances in consultation with the applicable Engineer, Field

Office, Procurement Group, Engineering Consultants Section or Subrecipient/Subgrantee staff and approve or deny the contractor's good faith efforts. Good faith efforts required may vary, depending on the time left in the contract, the nature of the change, who initiated the change (including ADOT), and other factors as determined by BECO. The contractor is not required to take work already committed to another subcontractor and assign it to a DBE subcontractor in order to meet the committed DBE percentage.

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

When a DBE substitution is necessary, the contractor shall submit an amended DBE Intended Participation Affidavit and Intended Participation Affidavit Summary to ADOT BECO or the applicable Subrecipient/Subgrantees for approval with the substitute DBE's name, description of work, NAICS code, AZ UTRACS registration number, and dollar value of work to the Engineer, applicable Subrecipient/Subgrantee and ADOT's BECO. Approval from BECO must be obtained prior to the substituted DBE beginning work.

The contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the committed DBE without ADOT's written consent. Furthermore, failure by the contractor to carry out the requirements of ADOT or Subrecipient/Subgrantee's DBE Termination/Substitution contract specifications is a material breach of contract and will result in such remedies as ADOT or Subrecipient/Subgrantee deems appropriate, which will include, but are not limited to the assessment of liquidated damages. ADOT or Subrecipient/Subgrantee will deduct from monies due or becoming due to the contractor, the dollar amount of the wrongfully substituted/replaced DBE subcontract plus 25 percent 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.

#### **G. DBE Bidders/Offers for Prime Contracts (49 CFR Part 26.53(i))**

The requirement in Section 8 above pertaining to good faith efforts also applies to DBE bidders/proposers. When a certified DBE firm bids 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 bidder. In most cases, a DBE bidder on a contract will meet the DBE goal by virtue of the work it performs on the contract with its own forces. The DBE bidder shall list itself along with any DBE subcontractors and suppliers, on the DBE Intended Participation Affidavit and Summary in order to receive credit toward the DBE goal.

#### **H. DBE Subcontracts (49 CFR Part 26.53(j))**

Contractors must also include DBE Subcontract Compliance Assurance contract language in their DBE subcontracts to ensure that applicable DBE requirements flow down from contracts to subcontracts and that all subcontracts be performed in accordance with 49 CFR Part 26. DBE Subcontract Compliance Assurance contract language, which address issues such as prompt payment is attached as Attachment A.

Contractors awarded ADOT and Subrecipients/Subgrantees construction contracts are required to provide to the Engineer, at the Pre-Construction conference, copies of all completed and signed subcontracts, purchase orders, invoices, etc., for all committed DBEs. For engineering design, professional services, planning, transit, aviation and other DOT-assisted contracts awarded by ADOT and Subrecipients/Subgrantees, firms are required to upload executed DBE subcontractor in the ADOT DBE System before the first payment is made to the DBE. ADOT and Subrecipients/Subgrantees also reserve the right to inspect all records pertaining to DBEs subcontract. Contractors must ensure that all subcontracts or an agreement with DBEs to supply labor

or materials require that the subcontract and all lower tier subcontractors be performed in accordance with these requirements.

Contractors executing agreements with subcontractors, 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 Engineer deems appropriate which may include, but not limited to:

- (1) Withholding monthly progress payments;
- (2) Assessing sanctions;
- (3) Liquidated damages; and/or
- (4) Disqualifying the contractor from future bidding as non-responsible.

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

All above mentioned Good Faith Efforts, pre and post award must also be implemented by ADOT's Subrecipients/Subgrantees.

## 9. Counting DBE Participation Towards Goal (29 CFR Part 26.55)

### A. Commercially Useful Function (49 CFR Part 26.55(a-d))

When a DBE participates in a DOT-assisted construction, engineering design, professional services or any other contract, ADOT will count only the value of the work actually performed by the DBE toward DBE goals. ADOT will count the entire amount of that portion of a contract that is performed by the DBE's own forces and will include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

ADOT will count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided ADOT determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.

A prime contractor can credit expenditures to a DBE subcontractor 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, ADOT 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, ADOT 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, ADOT 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. ADOT will determine if the firm is performing a CUF given the type of work involved and normal industry practices.

ADOT/Subrecipient field compliance, inspection staff and /or consultants will monitor worksites and conduct project site visits on the contract to confirm that DBEs are performing a CUF. The contractor shall cooperate during the site visits and ADOT/Subrecipient staff will make every effort not to disrupt work on the project. A Sample Construction CUF form/information reviewed to determine CUF is included as Attachment E. Engineering Design/Professional Services CUF form and procedures are currently being developed and will be implemented in 2017.

ADOT BECO staff or the applicable Subrecipient/Subgrantee will review field compliance or inspection staff CUF reports and contract documents, including DBE Commitment Affidavits and payments, and make written CUF determinations. ADOT BECO or the applicable Subrecipient/Subgrantee will notify the contractor, in writing, if it determines that the contractor's DBE subcontractor is not performing a CUF. The contractor will be notified within seven calendar days of ADOT/Subrecipient/Subgrantee decision. CUF determinations will be documented in the ADOT and LPA DBE Systems.

ADOT BECO's decisions on CUF may be appealed to the 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. The State Engineer will promptly consider any appeals and notify the contractor of the State Engineer's findings and decisions. Appeal of Subrecipient/Subgrantee staff CUF decisions may be appealed to the ADOT BECO Manager and follow the same general process as above. Decisions on CUF matters are not administratively appealable to US DOT.

## **B. Trucking (49 CFR Part 26.55(d))**

For construction contracts, ADOT will use the following factors in determining whether a DBE trucking company is performing a commercially useful function. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract on every day that credit is to be given for trucking.

The contractor will receive credit for the total value of transportation services provided by the DBE using trucks it owns, insures and operates, and using drivers it employs.

The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services.

The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks with drivers from a non-DBE is entitled to credit for the total value of the transportation services provided by non-DBE leased trucks with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks with drivers receives credit only for the fee or commission paid to the DBE as a result of the lease agreement.

Example: DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks from non-DBE firm Z. DBE credit would only be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. DBE credit could be awarded only for the fees or commissions pertaining to the remaining trucks Firm X receives as a result of the lease with Firm Z.

The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

Example: DBE Firm X uses two of its own trucks on a contract. It leases three additional trucks from non-DBE Firm Z. Firm X uses its own employees to drive the trucks leased from Firm Z. DBE credit would be awarded for the total value of the transportation services provided by all five trucks.

A lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE. Credit will be allowed only for those lease costs related to the time each truck is devoted to the project.

DBE credit for supplying paving grade asphalt and other asphalt products will only be permitted for standard industry hauling costs, and only if the DBE is owner or lessee of the equipment and trucks. Leases for trucks must be long term (extending for a fixed time period and not related to time for contract performance) and

must include all attendant responsibilities such as insurance, titling, hazardous waste requirements, and payment of drivers.

A general trucking plan is submitted by contractors on DBE Commitment Affidavit forms prior to contract execution, including number of trucks owned by the DBE, number to be used on the contracts, number to be subcontracted to DBE and non-DBE firms and dollar amounts. Inspectors working on projects monitor DBE trucking participation to ensure compliance with CUF requirements.

### **C. Materials and Supplies (29 CFR Part 26.55(e))**

ADOT will credit expenditures with DBEs for construction material and supplies towards the DBE goal as follows:

- a) If the materials or supplies are obtained from a DBE manufacturer, 100 percent of the cost of the materials or supplies is credited. A manufacturer is defined as a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract, and of the general character described by the specifications.
- b) If the materials or supplies are purchased from a DBE regular dealer, 60 percent of the cost of the materials or supplies is credited. A DBE regular dealer is defined as a firm that owns, operates, or maintains a store or warehouse or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A firm may be a DBE regular dealer in such bulk items as petroleum products, steel, cement, stone or asphalt without owning, operating, or maintaining a place of business, as provided above, if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement, and not on an ad-hoc or contract-by-contract basis. Packers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph and the paragraph above.
- c) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, ADOT will credit the entire amount of the fees or commissions charged by the DBE for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided the fees are determined to be reasonable and not excessive as compared with fees customarily allowed for similar services. The cost of the materials and supplies themselves may not be counted toward the DBE goal.

ADOT will credit expenditures with DBEs for material and supplies (e.g. whether a firm is acting as a regular dealer or a transaction expeditor) towards the DBE goal on a contract-by-contract basis. The fact that a DBE firm qualifies under a classification (manufacturer, regular dealer or supplier) for one contract does not

mean it will qualify for the same classification on another contract. The bidder shall be responsible for verifying whether a DBE qualifies as a DBE manufacturer, regular dealer or supplier. The bidder may contact ADOT BECO for assistance in this determination.

#### **D. D. Police Officers**

DBE credit will not be permitted for procuring Arizona Department of Public Safety Police 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.

#### **E. Counting DBE Participation in Joint Check Situations**

The DOT has provided guidance concerning counting DBE participation in Joint Checks situations. A DBE subcontractor and a material supplier (or equipment supplier) may request ADOT permission for the use of joint checks for payments from the prime contractor to the DBE subcontractor and the supplier. Joint checks may be issued only if all the conditions in this subsection are met.

- a) The DBE subcontractor must be independent from the prime contractor and the supplier, and must perform a commercially useful function. The DBE subcontractor must be responsible for negotiating the price of the material, determining quality and quantity, ordering the materials, installing (where applicable), and paying for the material. The DBE subcontractor may not be utilized as an extra participant in a transaction, contract, or project in order to obtain the appearance of DBE participation.
- b) The use of joint checks will be allowed only if the prime contractor, DBE subcontractor, and material supplier establish that the use of joint checks in similar transactions is a commonly recognized business practice in the industry, particularly with respect to similar transactions in which DBE's do not participate.
- c) A material or supply contract may not bear an excessive ratio relative to the DBE subcontractor's normal capacity.
- d) There may not be any exclusive arrangement between one prime and one DBE in the use of joint checks that may bring into question whether the DBE is independent of the prime contractor.
- e) Any arrangement for joint checks must be in writing, and for a specific term (for example, one year, or a specified number of months) that does not exceed a reasonable time to establish a suitable credit line with the supplier.
- f) The prime contractor may act solely as the payer of the joint check, and may not have responsibility for establishing the terms of the agreement between the DBE subcontractor and the supplier.
- g) The DBE must be responsible for receiving the check from the prime contractor and delivering the check to the supplier.

- h) The prime contractor cannot require the DBE subcontractor to use a specific supplier, and the prime contractor may not participate in the negotiation of unit prices between the DBE subcontractor and the supplier.

ADOT BECO must approve the agreement for the use of joint checks in writing before any joint checks are issued. The prime contractor must submit a DBE joint check request form, available from the BECO website, along with the joint check agreement, to BECO through email within seven calendar days from the time the subcontract is executed. ADOT BECO must also approve joint check agreement for Subrecipient/Subgrantee contracts.

After obtaining authorization for the use of joint checks, the prime contractor, the DBE, and the supplier must retain documentation to allow for efficient monitoring of the agreement. Copies of canceled checks must be submitted, with the payment information for the period in which the joint check was issued, electronically through email to BECO, and made available for review at the time of the onsite CUF review. The prime contractor, DBE, and supplier each have an independent duty to report to ADOT in the case of any change from the approved joint check arrangement.

Any failure to comply will result in loss of DBE credit and will be considered by the ADOT to be a material breach of this contract and will subject the prime contractor, DBE, and supplier to contract remedies and, in the case of serious violations, a potential for termination of the contract, reduction or loss of prequalification, debarment, or other remedies which may prevent future participation by the offending party. A similar process is monitored and followed by Certification Acceptance Agencies and or Subrecipients/Subgrantees for joint checks agreements.

#### **F. DBE Decertification (29 CFR Part 26.55(f-g))**

If a firm is not currently certified as a DBE in accordance with the standards of 49 CFR Part 26, subpart D, at the time of the execution of the contract, ADOT will not count the firm's participation toward any DBE goals, except as provided for in 49 CFR Part 26.87(i) and Section V. 5(g) of this DBE Program Plan.

ADOT will not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward its overall DBE goal.

#### **G. Certification of Final DBE Payments (29 CFR Part 26.55(h))**

ADOT will not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE. The contractor must submit the "Certification of Final DBE Payments" form for each DBE firm working on the contract within 30 days of the DBE completing work on the project. This form shall be signed by the contractor and each relevant DBE, and submitted to the Engineer at the end of the DBE's work on the contract or as otherwise stated in the contract specifications.

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

## IV. DBE CERTIFICATION STANDARDS – SUBPART D

### 1. Burdens of Proof in Certification Process (49 CFR Part 26.61)

In determining whether to certify a firm as eligible to participate as a DBE, ADOT and its UCP Partner Agencies will apply the following standards:

- a) The firm seeking certification has the burden of demonstrating to ADOT and its UCP Partner Agencies, by a preponderance of the evidence, that it meets the requirements of 49 CFR Part 26, Subpart D concerning group membership or individual disadvantage, business size, ownership, and control.
- b) ADOT and its UCP Partner Agencies will rebuttably presume that members of the designated groups identified in 49 CFR Part 26.67(a) are socially and economically disadvantaged, which means they do not have the burden of proving to ADOT and its UCP Partner Agencies that they are socially and economically disadvantaged. In order to obtain the benefit of the rebuttable presumption, individuals must submit a signed, notarized statement that they are a member of one of the groups in 49 CFR Part 26.67(a). These applicants do have the obligation to provide ADOT and its UCP Partner Agencies with information concerning their economic disadvantage in accordance with 49 CFR Part 26.67 (a).
- c) Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving to ADOT and its UCP Partner Agencies, by a preponderance of the evidence, that they are socially and economically disadvantaged. In making such determination ADOT and its UCP Partner Agencies will request documentation to prove group membership such as but not limited to, tribal membership cards, membership in women or minority organizations that demonstrates that the person has held himself/herself out to be a member of the group over a long period of time prior to application for certification and that the applicant is regarded as a member of the group by the relevant community. Other documentation requested will include proof of desperate treatment of the applicant found in 49 CFR Part 26, Appendix E, in areas such as education, employment, business, and diminished capital or credit opportunities.
- d) ADOT and its UCP Partner Agencies will make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

### 2. Rules Governing Group Membership Determinations (49 CFR Part 26.63)

If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group (49 CFR Part 26.61(c)), ADOT and its UCP Partner Agencies has a well-founded reason to question the individual's claim of membership in that group, ADOT and its UCP Partner Agencies will require the individual to present additional evidence that he or she is a member of the group. ADOT and its UCP Partner Agencies

will provide the individual a written explanation of your reasons for questioning his or her group membership and a written request for additional evidence.

ADOT and its UCP Partner Agencies will not impose a disproportionate burden on members of any particular designated group. In making such a determination about an individual's claim of membership in a presumptively disadvantaged group, ADOT and its UCP Partner Agencies will consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. ADOT and its UCP Partner Agencies may require the applicant to produce appropriate documentation of group membership such as a Tribal card or other membership certificate in a presumptively disadvantaged group organization.

If ADOT and its UCP Partner Agencies determines that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis to granted DBE certification.

ADOT and its UCP Partner Agencies' decisions concerning membership in a designated group are subject to the certification appeals procedure outlined in Section VII, E, 4-5.

### **3. Rules Governing Business Size Determinations (49 CFR Part 26.65)**

Firm applying for DBE certification (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. ADOT and its UCP Partner Agencies will apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts, including the primary industry classification of the applicant. Even if it meets this requirement, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of \$23.98 million.

ADOT and its UCP Partners will utilize the Small Business Administration (SBA) guidance provided in 13 CFR 121.103 to determine affiliation. ADOT and its UCP Partners will determine if an affiliation exists in instances such as when one firm controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. ADOT and its UCP Partners will evaluate stock certificates, taxes, contracts and operating agreements to determine if an affiliation exists. In determining the concern's size, ADOT and its UCP Partners will count the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.

### **4. Rules Governing Social and Economic Disadvantage Determinations (49 CFR Part 26.67)**

#### **A. Presumption of Disadvantage (49 CFR Part 26.67(a))**

ADOT and its UCP Partner Agencies will rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. To determine DBE eligibility ADOT and its UCP Partner Agencies will:

- a) Require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.
- b) Require each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification, to provide a written certification that he or she has a personal net worth that does not exceed \$1.32 million.
- c) Require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. To meet this requirement, ADOT and its UCP Partner Agencies will use the DOT personal net worth form provided in 49 CFR Part 26, Appendix G, without change or revision.
- d) Where necessary to accurately determine an individual's personal net worth, on a case-by-case basis, require additional financial information from the owner of an applicant firm (e.g., information concerning the assets of the owner's spouse, where needed to clarify whether assets have been transferred to the spouse or when the owner's spouse is involved in the operation of the company). ADOT and its UCP Partner Agencies will make every effort not to make requests for additional information unduly burdensome or intrusive.

In determining an individual's net worth, ADOT and its UCP Partner Agencies will:

- a) Exclude an individual's ownership interest in the applicant firm.
- b) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. ADOT and its UCP Partner Agencies will ensure that home equity loan balances are included in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.
- c) Not use a contingent liability to reduce an individual's net worth.
- d) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, ADOT and its UCP Partner Agencies will include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

Notwithstanding any provision of Federal or State law, ADOT and its UCP Partner Agencies will not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. However, ADOT and its UCP Partner Agencies will transmit this information to DOT in any certification appeal proceeding 49 CFR part 26.89 or to any other State to which the individual's firm has applied for certification under 49 CFR Part 26.85.

## B. Rebuttal of Presumption of Disadvantage (49 CFR Part 26.67(b))

An individual's presumption of economic disadvantage may be rebutted by ADOT and its UCP Partner Agencies in two ways:

- 1) If the statement of personal net worth and supporting documentation that an individual submits shows that the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted. ADOT and its UCP Partner Agencies will not conduct a proceeding in order to rebut the presumption of economic disadvantage in this case.

*For example to paragraph: An individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than \$1.32 million. However, the person's assets collectively (e.g., high income level, a very expensive house, a yacht, extensive real or personal property holdings) may lead a reasonable person to conclude that he or she is not economically disadvantaged. ADOT and its UCP Partner Agencies will rebut the individual's presumption of economic disadvantage under these circumstances, as provided in this section, even though the individual's PNW is less than \$1.32 million.*

- 2) If the statement of personal net worth and supporting documentation that an individual submits demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted.

In making this determination, ADOT and its UCP Partner Agencies will consider factors that include, but are not limited to, the following:

- a) Whether the average adjusted gross income of the owner over the most recent three year period exceeds \$350,000;
- b) Whether the income was unusual and not likely to occur in the future;
- c) Whether the earnings were offset by losses;
- d) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;
- e) Other evidence that income is not indicative of lack of economic disadvantage; and
- f) Whether the total fair market value of the owner's assets exceed \$6 million.

ADOT and its UCP Partner Agencies will provide the firm the opportunity to request an Informal Hearing if it decides to rebut the presumption of economic disadvantage in this case.

If at any time ADOT and its UCP Partner Agencies has a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged, ADOT and its UCP Partner Agencies will start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. ADOT and its UCP Partner Agencies' proceeding will

follow the procedures of 49 CFR Part 26.87, as outlined in Certification Procedures, Subpart E, Section 5 of this document.

In such a proceeding, ADOT and its UCP Partner Agencies have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. ADOT and its UCP Partner Agencies will require the individual to produce information relevant to the determination of his or her disadvantage.

When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage, so long as his or her PNW remains above that amount.

### **C. Transfer within Two Years (49 CFR Part 26.67(c))**

ADOT and its UCP Partner Agencies will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, to a trust a beneficiary of which is an immediate family member, or to the applicant firm for less than fair market value, within two years prior to a concern's application for participation in the DBE program or within two years of ADOT and its UCP Partner Agencies' review of the firm's annual affidavit, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support. ADOT and its UCP Partner Agencies will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements. Other rules outlined in 49 CFR Part 26, Appendix E, Section D also apply to transfers within two years.

### **D. Rules Governing Individual Determination of Social and Economic Disadvantage (49 CFR Part 26.67(d))**

Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. ADOT and its UCP Partner Agencies will make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to ADOT and its UCP Partner Agencies, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, ADOT and its UCP Partner Agencies will use the guidance found in 49 CFR Part 26, Appendix E. Applicant will be required to provide ADOT and its UCP Partner Agencies with sufficient information to permit determinations under the guidance of 49 CFR Part 26, Appendix E.

## **5. Rules Governing Ownership Determinations (49 CFR Part 26.69)**

To determine ownership ADOT and its UCP Partners will evaluate contributions of capital or expertise to acquire ownership interests. ADOT and its UCP Partners will ensure that the contribution is real, substantial,

and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. ADOT and its UCP Partners will examine documents such as cancelled checks, receipts, and loan documentation. When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, ADOT and its UCP Partners will deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. ADOT and its UCP Partners will require a copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

ADOT and its UCP Partners will review and analyze the following information for the various types of corporation structures:

- a) Limited Liability Corporations - To establish ownership of an LLC ADOT and its UCP Partners will examine documents such as operating agreements and capital contribution for the firm. ADOT and its UCP Partners will ensure that the socially and economically disadvantaged is not limited in decision-making and control of the firm through provisions of the operating agreement.
- b) Corporation - To determine ownership in a corporation ADOT and its UCP Partners will examine documents such as Articles of Incorporation, by laws and stock certificates. ADOT and its UCP Partners will ensure that the socially and economically disadvantaged is not limited in decision-making and control of the firm through provisions of the operating agreement.
- c) Sole Proprietorship - To determine ownership for a sole proprietorship ADOT and its UCP Partners will examine documents such as receipt and loan documentation, titles and registration documents for equipment. ADOT and its UCP Partners will ensure that the socially and economically disadvantaged is not limited in decision-making and control of the firm through provisions of the operating agreement.

In determining whether the socially and economically disadvantaged participants in a firm own the firm, ADOT and its UCP Partner Agencies will consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.

To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals, as follows:

- a) In the case of a corporation, such individuals must own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.
- b) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.

- c) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital must be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.

Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. No securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if:

- a) The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or
- b) The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.

The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

The individual whose expertise is relied upon must have a significant financial investment in the firm. ADOT and its UCP Partner Agencies will apply the following requirements to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership. The owner's expertise must be:

- a) In a specialized field;
- b) Of outstanding quality;
- c) In areas critical to the firm's operations;
- d) Indispensable to the firm's potential success
- e) Specific to the type of work the firm performs; and
- f) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

ADOT and its UCP Partner Agencies will deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual:

- a) As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or
- b) Through inheritance, or otherwise because of the death of the former owner.

ADOT and its UCP Partner Agencies will presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is:

- a) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
- b) Involved in the same or a similar line of business; or
- c) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to ADOT or the UCP Partner Agency by clear and convincing evidence, that:

- a) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- b) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

ADOT and its UCP Partner Agencies will apply the following rules in situations in which marital assets form a basis for ownership of a firm:

- a) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, ADOT and its UCP Partner Agencies will deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. ADOT and its UCP Partner Agencies will not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.
- b) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

ADOT and its UCP Partner Agencies will consider the following factors in determining the ownership of a firm. However, ADOT and its UCP Partner Agencies will not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because:

- a) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types described in this section;
- b) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
- c) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, you must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

## 6. Rules Governing Control Determinations (49 CFR Part 26.71)

To evaluate whether socially and economically disadvantaged individual(s) control the firm ADOT and its UCP Partners will request and analyze documentation such as operating agreements, corporate-by-laws, shareholder agreements, and official certificates of formation with any amendments. ADOT and its UCP Partners will also request and evaluate resumes of the socially and economically disadvantaged owners to ensure possess an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations.

In determining whether socially and economically disadvantaged owners control a firm, ADOT and its UCP Partner Agencies will consider all the facts in the record, viewed as a whole. Only an independent business

may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

In determining whether a potential DBE is an independent business, ADOT and its UCP Partner Agencies will:

- a) Scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources;
- b) Consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm;
- c) Examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.
- d) Consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

ADOT and its UCP Partner Agencies will request documentation as needed to determine that a DBE firm is not subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in 49 CFR Part 26.69(j)(2).

The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations. For example:

- a) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).
- b) In a corporation, disadvantaged owners must control the board of directors.
- c) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.
- d) The disadvantaged owner must control financial and other company decisions and sign contracts.

Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

If the state of Arizona or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, such as professional engineers and landscape architects, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state of Arizona or local law does not require such a person to have such a license or credential to own and/or control a firm, ADOT and its UCP Partner Agencies will not deny certification solely on the ground that the person lacks the license or credential. However, ADOT and its UCP Partner Agencies will take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm. To determine if a the state requires an owner to hold a professional license to own a firm, ADOT and its UCP Partners will consult state regulations, the Arizona Registrar of Contractors and the Arizona State Board of Technical Registration records.

ADOT and its UCP Partner Agencies will consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences provided by the firm.

In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, ADOT and its UCP Partner Agencies will consider a difference

between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, ADOT and its UCP Partner Agencies will make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as it does in other situations, without regard to whether or not the other persons are immediate family members.

If ADOT and its UCP Partner Agencies cannot clearly determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners will have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, there is a rebuttable presumption of control by the non-disadvantaged individual unless the disadvantaged individual now owning the firm demonstrates to ADOT and its UCP Partner Agencies, by clear and convincing evidence, that:

- a) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- b) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

In determining whether its socially and economically disadvantaged owners control a firm, ADOT and its UCP Partner Agencies will consider whether the firm owns equipment necessary to perform its work. However, ADOT and its UCP Partner Agencies will not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

ADOT and its UCP Partners will assign North American Industry Classification System (NAICS) codes in terms of the most specific NAICS Code that best describes the type of work DBE owners can control and will perform on DOT-assisted contracts. A firm may be assigned more than one NAICS Code when necessary. When assigning NAICS codes, ADOT and its UCP Partners will rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification. When applying for certification, a firm may provide ADOT and its UCP Partners with suggested NAICS Code that describes their type of work in the most specific details. ADOT and its UCP Partners will evaluate the recommended code as well as utilize the United States Census Bureau NAICS Code search function.

ADOT and its UCP Partner Agencies will grant certification to a firm in a NAICS code(s) that most narrowly describes the work the disadvantaged owner is able to control and the work the firm performs or intends to perform on DOT-assisted contracts. To become certified for additional types of work, the firm must demonstrate to ADOT and its UCP Partner Agencies that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. ADOT and its UCP Partner Agencies will not require that the firm be recertified or submit a new application for certification, but will verify the disadvantaged owner's control of the firm in the additional type of work. If a firm seeks additional classifications they must submit the request in writing through the DBE System, in email or letter to ADOT or its applicable UCP Partner Agency. The DBE firm must provide written documentation, such as copies of past contracts or intent letter for pending contracts related to the requested work code, or provide other proof that the disadvantaged owner has expertise in the area(s) to make controlling decisions about the work. ADOT and its UCP Partner Agencies will then review the documentation and may conduct an on-site visit, if needed, to make a determination if the NAICS code should be added.

ADOT and its UCP Partner Agencies will list the types of work a firm can perform in its DBE Directory based on the most specific available NAICS code for that type of work. ADOT and its UCP Partner Agencies may assign multiple NAICS codes where appropriate.

DBE firms must check carefully to make sure that the NAICS codes cited in its certification letter and in the DBE Directory are kept up-to-date and accurately reflect work, which ADOT and its UCP Partner Agencies have determined the firm's owners can control. DBE firms should notify ADOT and its UCP Partner Agencies or its certifying UCP member if the information is inaccurate. DBE firms also bear the burden of providing detailed company information to ADOT and its UCP Partner Agencies or their certifying UCP agency so that they will make an appropriate NAICS code designation.

ADOT and its UCP Partner Agencies or other UCP members are not precluded from changing a certification classification or description if there is a factual basis in the record. However, ADOT and its UCP Partner Agencies or other UCP members will not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

A business operating under a franchise or license agreement may be certified if it meets the standards in 49 CFR Part 26, Subpart D and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, ADOT and its UCP Partner Agencies will generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively,

even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

## 7. Other Rules Affecting Certification Determinations (49 CFR Part 26.73)

ADOT and its UCP Partner agencies consideration of whether a firm performs a commercially useful function or is a regular dealer will pertain solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. ADOT and its UCP Partner Agencies will not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE. However, ADOT and its UCP Partner Agencies will consider in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.

ADOT and its UCP Partner Agencies will evaluate the eligibility of a firm on the basis of present circumstances. ADOT and its UCP Partner Agencies will not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards in 49 CFR Part 26.69 and 26.71.

ADOT and its UCP Partner Agencies will not refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. If the firm meets disadvantaged, size, ownership, and control requirements of 49 CFR Part 26, Subpart D, the firm is eligible for certification.

DBE firms and firms seeking DBE certification shall cooperate fully with ADOT and its UCP Partner Agencies' requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.

An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm, even a DBE firm, cannot be an eligible DBE.

If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, ADOT and its UCP Partner Agencies may certify the subsidiary if it otherwise meets all requirements of 49 CFR Part 26, Subpart D. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company. ADOT and its UCP Partner Agencies will certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. Examples to illustrate how this cumulative ownership provision works can be found in 49 CFR Part 26.73(e).

Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.

ADOT and its UCP Partner Agencies does not require a DBE firm to be prequalified to do business with and its UCP Partner Agencies as a condition for certification.

A firm that is owned by an Indian tribe or Native Hawaiian organization, rather than by Indians or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of 49 CFR Part 26.65. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in 49 CFR Part 26.71. See 49 CFR Part 26.73(i) for specific rules that ADOT and its UCP Partner Agencies will apply to Alaska Native Corporations (ANCs).

## V. CERTIFICATION PROCEDURES – SUBPART E

A firm applying for DBE and Airport Concessions DBE (ACDBE) certification through ADOT and its Unified Certification Program (UCP) partner agencies is required to submit an online DBE Certification Application. The online application form is identical to the one provided in 49 CFR Part 26, Appendix F without change or revision.

Access to certification application forms and documentation requirements for each UCP partner agency can be found at [www.AZUTRACS.com](http://www.AZUTRACS.com). ADOT and the AZUCP do not currently charge an application fee to process DBE certification.

ADOT will not process DBE certification applications for firms that do not conduct work on highway, transit, and aviation transportation related DOT-assisted contracts. ADOT reserves the right to request information from applicant firms to prove that they have performed past services or have future business plans to bid or perform work on highway, transit and aviation related DOT-assisted contracts. Other AZUCP certifying agencies (Cities of Phoenix and Tucson) will process certification applications for all firms that apply because they also review those applications for certification in their local preference Small Business Enterprise (SBE) programs funded with local city monies.

For information about the ADOT DBE certification process or to apply for certification through ADOT, firms should contact ADOT DBE Certification Program Manager at (602) 712-7761.

## 1. Arizona Unified Certification Program (49 CFR Part 26.81)

ADOT is the lead agency for the Arizona Unified Certification Program (AZUCP). The AZUCP is comprised of ADOT, City of Phoenix, and City of Tucson. AZUCP Partners have assigned statewide DBE certification application processing as follows:

- City of Phoenix – Firms located in Phoenix and greater Maricopa County, AZ
- City of Tucson - Firms located in Tucson and greater Pima County, AZ
- ADOT – All other cities and counties in the state of Arizona and all interstate certifications

The City of Phoenix has been assigned to process and approve Airport Concessions DBE (ACDBE) certifications and ADOT has been assigned to process and approve Interstate DBE certifications.

All three AZUCP certifying entities have a signed Operating Agreement to manage its certification program in a consistent manner. Agreements have been updated over time, with the last revision to the agreement signed and approved in April 2012. The agreement will be updated in 2017.

Certification staffs of each UCP Partner agency meet no less than three times each year, or more often as needed, to collaborate on certification issues. ADOT's Small Business & Workforce Development Officer (or DBE Certification Program Manager in his/her absence) coordinates the meeting agendas and chairs the meetings on behalf of the ADOT DBELO.

The AZUCP provides "one-stop shopping" to applicants for certification, such that an applicant is required to apply only once for a DBE certification that is honored by all recipient agencies in the state. Therefore, certifications by all AZUCP Partner agencies are binding on all DOT recipients in the State of Arizona.

The AZUCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The "home state" UCP must share its information and documents concerning the firm with the AZUCP in order for it to consider the firm's application.

Subject to DOT approval, the AZUCP may enter into written reciprocity agreements with other state UCPs to approve and accept DBE firms certified in other states as part of the AZUCP. Such an agreement must outline the specific responsibilities of each participant.

All certifications by AZUCP are pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract (for firms committed to meet a DBE goal) or the signing of a subcontract (for alternative delivery contracts and race-neutral DBEs on contracts) on which a firm seeks to participate as a DBE.

The AZUCP maintains a unified DBE directory, administered by ADOT, containing all DBE firms certified by AZUCP partners agencies (including those from other states that have been certification in Arizona) and contains the information required by 49 CFR Part 26.31. The UCP will make the directory available to the public electronically, on the Internet at [www.AZUTRACS.com](http://www.AZUTRACS.com) , as well as in print, upon request. The UCP will

update the electronic and any print versions of the directory by including additions, deletions, and other changes when they are made by AZUCP certifying agencies.

Except as otherwise specified in this section, all provisions of 29 CFR Part 26 Subpart D and E pertaining to ADOT also apply to the AZUCP.

## 2. Procedures for Making Certification Decisions (49 CFR Part 26.83)

ADOT and its UCP Partner agencies will ensure that only firms certified as eligible DBEs participate as DBEs in its program and will determine the eligibility of firms as DBEs consistent with the standards of 49 CFR Part 26, Subpart D. DBE Certification decisions are made independently by each UCP Partner agency's DBE certification staff within its assigned geographic areas (see Section V 1) as to which firms qualify for DBE certification. Certification decisions are made in accordance with 49 CFR Part 26, Subpart D & E, this DBE Program Plan and the UCP Operating Agreement, and are binding on all UCP members.

### A. Initial Certifications (49 CFR Part 26.83(a-g))

ADOT and its UCP Partner agencies will take all of the following steps in determining whether a DBE firm meets the standards of 49 CFR Part 26, Subpart D:

- a) Require potential DBEs to complete and submit an appropriate application form found at [www.AZUTRACS.com](http://www.AZUTRACS.com), which is provided in Appendix F of 49 CFR Part 26, without change or revision.
- b) Perform an on-site visit to the firm's principal place of business. ADOT and its UCP Partner agencies certification staff use a standardized On-Site Review Form agreed to by all UCP Partner agencies to interview the principal officers of applicant firms and review their résumés and/or work histories. ADOT and its UCP Partner agencies may also interview other key personnel of the firm if necessary. ADOT and its UCP Partner agencies may also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. ADOT may rely upon the site visit report of any other recipient with respect to a firm applying for certification. Site visits are analyzed by comparing the information gained in the in person interview to documentation submitted with the application. Assertions made during the onsite are verified utilizing submitted documentation. The interviewer's observations from the onsite are used in helping to determine whether a firm meets the criteria for DBE certification, such as whether the socially and economically disadvantaged person(s) can adequately answer questions regarding the business and field of work.
- c) Analyze certification application and documentation to determine the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued Certificates of Good Standing;
- d) Analyze the bonding and financial capacity of the firm; lease and loan agreements; bank account signature cards;

- e) Determine the work history of the firm, including contracts it has received, work it has completed; and payroll records.
- f) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any.
- g) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;
- h) Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 3 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service.

ADOT and its UCP Partner agencies require applicants for DBE certification to attest to the accuracy and truthfulness of the information on the application form. This is to be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by State law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

ADOT and its UCP Partner agencies review all information on the form and any supplemental information prior to making a decision about the eligibility of the firm. ADOT and its UCP Partner agencies may request written clarification of information contained in the application at any time in the application process. Applicants are required to submit requested information within 15 calendar days from the date of the request. If the requested information is not received within the 15-day time period, a letter shall be sent to the applicant notifying it of ADOT and its UCP Partner agency's determination to deny certification based on a "failure to cooperate," as cited in 49 CFR Part 26.73 (c). The denial letter is to be sent certified mail, return receipt, and will provide the firm with a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. The letter shall also include the firm's appeal rights to DOT. All documents and information on which the denial is based will be made available to the applicant upon request.

ADOT and its UCP Partner agencies will make decisions on applications for certification within 90 days of receiving from the applicant firm all information required as described in this section. ADOT and its UCP Partner agencies may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. ADOT and its UCP Partner agencies' failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under 49 CFR Part 6.89.

ADOT and its UCP Partner agencies will advise each applicant within 21 calendar days from their receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

If an applicant for DBE certification withdraws its application before ADOT or and its UCP Partner agencies have issued a decision on the application, the applicant can resubmit the application at any time. ADOT and its UCP Partner agencies will not apply the waiting period provided under 49 CFR Part 26.86(c) before allowing the applicant to resubmit its application. However, ADOT and its UCP Partner agencies may place the reapplication at the “end of the line,” behind other applications that have been made since the firm's previous application was withdrawn. ADOT and its UCP Partner agencies will apply the waiting period provided under 49 CFR Part 26.86(c) to a firm that has established a pattern of frequently withdrawing applications before a certification decision is made.

When another recipient/state DOT, in connection with its consideration of the eligibility of a firm, makes a written request for certification information ADOT and its UCP Partner agencies has obtained about that firm (e.g., including application materials or the report of a site visit), ADOT and its UCP Partner agencies will promptly make the information available to the other recipient/state DOT.

ADOT and its UCP Partner agencies will safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.

#### **B. Changed Circumstances After Initial Certification (49 CFR Part 26.83(h-i))**

Once ADOT or its UCP Partner agencies have certified a DBE, it shall remain certified until and unless ADOT or UCP Partner agencies removes its certification, in whole or in part, through the procedures outlined in Section 5 of this document, except if the individual's presumption of economic disadvantage is rebutted, as provided in 49 CFR Part 26.67(b)(1).

ADOT or its UCP Partner agencies will not require DBEs to reapply for certification or undergo a recertification process. However, ADOT or its UCP Partner agencies may conduct a certification review of a certified DBE firm, including a new on-site review, if appropriate in light of changed circumstances (e.g., of the kind requiring notice described below or relating to suspension of certification under 49 CFR Part 26.88), a complaint, or other information concerning the firm's eligibility. If information comes to ADOT's attention that leads it to question the firm's eligibility, ADOT or its UCP Partner agencies may conduct an on-site review on an unannounced basis, at the firm's offices and/or job sites. These reviews will include collection and evaluation of the following information, as related to the changed circumstance, compliant or eligibility criteria:

- a) The most recent company taxes to ensure that the company continues to meet the size standard requirement.
- b) The most recent Personal taxes and Personal Financial Statement for the qualifying DBE(s) to ensure the Personal Net Worth requirement continues to be met.
- c) Companies will be required to submit any contact information changes or structural changes that may affect eligibility requirements. In addition, certified DBE companies will be required to submit any major purchase agreements or loan agreements entered into after the initial certification review was conducted.

- d) Other information related to the changed circumstance, compliant or eligibility criteria.

DBE firms must inform the ADOT or its UCP certifying agency in writing within 30 days of any change in circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements or any material change in the information provided in its application for certification. Such changes include, but are not limited to changes in management responsibility among members of a limited liability company. DBE firms must attach supporting documentation describing in detail the nature of such changes.

The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. If a DBE firm fails to make timely notification of such a change, it will be deemed to have failed to cooperate under 49 CFR Part 26.109(c).

DBE firms can also request to add additional NAICS Code(s) after certification as a changed circumstance. To request certification in new NAICS code(s), the certified DBE firm must submit a written request to add additional NAICS code(s) online through the DBE System, in email or letter to ADOT or its UCP Partner agencies. The firm must submit documentation that demonstrates that its socially and economically disadvantaged owner(s) is able to control the firm with respect to that type of work. The DBE firm must provide written documentation, such as copies of past contracts or intent letter for pending contracts related to the requested work code, or provide other proof that the disadvantaged owner has expertise in the area(s) to make controlling decisions about the work. ADOT and its UCP Partner Agencies will then review the documentation and may conduct an on-site visit, if needed, to make a determination if the NAICS code should be added.

### **C. No Change Affidavit (49 CFR Part 26.83(j))**

On an annual basis, ADOT and its UCP Partner agencies will require all certified DBE firms to provide, an affidavit of “no change” sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. The affidavit of “No Change/Annual DBE Update” is submitted online and included the following text:

*I swear (or affirm) that there have been no changes in the circumstances of [name of DBE firm] affecting its ability to meet the size, disadvantaged status, ownership, or control requirements of 49 CFR part 26. There have been no material changes in the information provided with [name of DBE]'s application for certification, except for any changes about which you have provided written notice to [Certifying Entity] under 26.83(j). [Name of firm] affirms that it meets Small Business Administration (SBA) criteria for being a small business concern and its average annual gross receipts (as defined by SBA rules) over the firm's previous three fiscal years does not exceed \$23.98 million.”*

Along with the affidavit, ADOT and its UCP Partner agencies only required DBE firms to submit their most current federal taxes documenting the firm's size and annual gross receipts. ADOT's annual No Change/Annual DBE Update process is completed via its online process at [www.AZUTRACS.com](http://www.AZUTRACS.com). DBEs are required to log with their user account, provide the necessary information, and certify that the information is complete and accurate. Instruction for completing ADOT's online “No Change/Annual DBE Update” form is available at: <http://www.azdot.gov/business/business-engagement-and-compliance/disadvantaged-business-enterprise-program/dbe-certification/annual-dbe-update>.

If after reviewing the Annual No Change Affidavit information, ADOT and its UCP Partner agencies find evidence to believe that the firm may no longer meet the eligibility requirements, additional information may be requested to refute or verify this evidence.

While other AZUCP Partner agencies require “no change” affidavits on the certification anniversary date, ADOT received approval from FHWA in 2014 to divide its annual review of DBE firms into two groups. Firms with names starting with A-J must submit an Annual “No Change/Update” Affidavit by April 1 of the current year. DBE firms with names starting with K-Z must submit Annual Update by Oct. 1 of the current year. Email reminders are sent by ADOT to DBE firms 45, 30 and 15 days prior to each deadline.

If the DBE firm fails to submit its Annual “No Change/Update” Affidavit by the specified deadline, ADOT will send a letter notifying the firm that that it may be decertified if it does not respond within 10 business days. If the DBE firm does not respond within the specified time frame, a final warning letter will be sent informing the firm that it will be decertified, if it does not respond within 10 business days. If the firms still fails to respond to the final warning letter within the specified timeframe, ADOT we send a letter decertifying the firm for failure to cooperate under 49 CFR Part 26.109(c).

### 3. Interstate Certification (49 CFR Part 26.85)

ADOT is the designated AZUCP Partner agency responsible for processing Interstate DBE certifications. Firms must be certified in their home state before seeking certification through ADOT.

When a firm currently certified in its home state applies for certification in Arizona, ADOT will require the applicant to provide:

- a) A complete copy of the original DBE application form, all supporting documents, and any other information submitted to the home state or any other state related to the firms certification. This includes affidavits of no change and any notices of changes that the firm has submitted to its home state, as well as any correspondence the firm has had with its home state’s UCP or any other recipient concerning its application or status as a DBE.
- b) Any notices or correspondence from states other than the home state relating to its status as an applicant or certified DBE in those states. For example, if the firm has been denied certification or decertified in another state, or subject to a decertification action there, the firm must inform ADOT of this fact and provide all documentation concerning this action to ADOT.
- c) The letter of appeal and DOT’s response if the firm has filed a certification appeal with US DOT.
- d) An affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States, affirming that the firm has submitted all the information required by 49 CFR 26.85(c). ADOT will make this affidavit available online. The affidavit must be submitted with all other require documents. The firm can submit the required documentation in electronic or paper format. ADOT will not request any additional information beyond what is identified in 49 CFR 26.85(c). ADOT’s decision will be based on the evaluation of information delineated in the 49 CFR 26.85(c).

If the on-site report from the home state is more than three years old, as of the date of the application to the home state, ADOT may require that the firm’s affidavit also affirm that the facts in the on-site report remain true and correct.

ADOT will request a copy of the home-state onsite report and any evaluation of the firm based on the on-site within seven days of receipt of the application. If ADOT does not received a copy of the site visit review report from the firm's home state by a date 14 days after it has made a timely request for it, ADOT may hold action required by paragraphs (d)(2) through (4) of 49 CFR Part 26.85 in abeyance pending receipt of the site visit review report. In this event, ADOT will, no later than 30 days from the date on which it received from an applicant firm all the information required, notify the firm in writing of the delay in the process and the reason for it.

If after reviewing the required documentation ADOT agrees with the home-state determination, ADOT must send the applicant firm a notice that it is certified and place the firm on the AZUCP directory of DBE certified firms within 60 days from the date on which ADOT received all the requested information.

When ADOT grants interstate certification to an out of state DBE firm, it will recognize and certify the firm in all NAICS codes assigned to the DBE firm's home state. The DBE may seek certification in Arizona in additional NAICS codes it believes apply to the work it may perform already or seek to perform in the future. Recipients should make their request for an expansion or augmentation of their assigned NAICS codes by submitting their request for additional NAICS codes in writing in the ADOT DBE System Certification file or emailing the request to the ADOT DBE Certification Program Manager. The firm must demonstrate to ADOT that it's socially and economically disadvantaged owners are able to control the firm with respect to that type of work. ADOT will review the resume and prior performed work to determine if the socially and economically disadvantaged owner(s) is able to control the firm in the additional type of work.

If ADOT determines that there is good cause to believe the home state's certification is erroneous or should not apply, ADOT will send a notification to the applicant company within 60 days stating the reasons why ADOT is denying certification. This ineligibility notice must state the specific reasons why ADOT believes that the firm does not meet the DBE requirements. ADOT will only deny an interstate application for one of the following five reasons delineated in 49 CFR 26.85(d)(2):

- a) Evidence that the home state's certification was obtained by fraud;
- b) New information, not available to the home state at the time of its certification, showing that the firm does not meet all eligibility criteria;
- c) The home state's certification was factually erroneous or was inconsistent with the requirements of 49 CFR Part 26;
- d) Arizona State law requires a result different from that of the State law of the home state.
- e) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section.

The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the certification requirements of 49 CFR Part 26 with respect to the specific issues raised by ADOT's notice. The firm is not otherwise responsible for further demonstrating its eligibility to ADOT.

ADOT will offer the applicant firm an opportunity to respond to ADOT with respect to the reasons. The applicant may submit a written request for a telephonically or in-person meeting with ADOT's Certification Program Manager to discuss the denial. The request must be received within 30 calendar days from the date of the ineligibility notice and must include the reasons why the firm believes that ADOT's certification decision is erroneous. If the firm does not respond within that time frame, ADOT will notify the firm in writing that the denial determination is final and the firm may appeal to the Department of Transportation Office of Civil Rights (DOCR)

If the applicant firm elects to request a telephonic or in-person meeting with ADOT's Certification Program Manager to discuss ADOT's objections to the firm's eligibility, ADOT will schedule the meeting to take place within 30 days of receiving the firm's written request. The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the DBE eligibility requirements, with respect to the issues outlined in the notice.

ADOT will issue a written decision within 30 days of the receipt of the written response from the applicant firm or the meeting with the Certification Program Manager, whichever is later. The firm's application for certification is stayed pending the outcome of this process. A decision may be appealed to the Department of Transportation Office of Civil Rights (DOCR)

When ADOT denies a firm's application, rejects the application of a firm certified in another state, or decertifies a firm, ADOT will make an entry in the Department of Transportation Office of Civil Rights Ineligibility Determination Online Database. The following information will be submitted:

1. The name of the firm
2. The name of the firm's owner(s)
3. The type and date of this action
4. The reason for the action

ADOT will check the website at least once every month to determine whether any firm that is applying for certification by ADOT, or that ADOT has already certified, is in the database. For any such firm that is in the database, ADOT will promptly request a copy of the listed decision from the UCP that made it. ADOT will then consider the information in the decision in determining what, if any, action to take with respect to the certified DBE firm or applicant.

If ADOT receives such a request, ADOT will provide a copy of the decision within seven days of receiving the request. Notwithstanding any provision of Federal or state law, ADOT will not release any information that may reasonably be construed as confidential business information. This includes application for DBE certification and supporting information. However, ADOT will transmit this information to DOT in any certification appeal proceeding or to any other state to which the individual's firm has applied for certification.

#### 4. Denial for Initial Certification (49 CFR Part 26.86)

If ADOT or its UCP Partner agencies denies a request by a firm, which is not currently certified, it will provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in 49 CFR Part 26, Subpart D, that supports each reason for the denial. All documents and other information on which the denial is based will be made available to the applicant, upon request.

If ADOT or its UCP Partner agencies denies a firm DBE certification, the firm may not re-apply until 12 months have passed from the date of the denial letter. An applicant's appeal of ADOT or its UCP Partner agencies' decision to DOT pursuant to 49 CFR Part 26.89 does not extend this period.

If a firm submits and then withdraws its DBE application prior to ADOT or its UCP Partner agencies' decision, the firm may reapply for certification at any time and does not have to wait 12 months.

When ADOT or its UCP Partner agencies makes an administratively final denial of certification concerning a firm, the firm may appeal the denial to DOT in accordance with 49 CFR Part 26.89.

#### 5. Removal of DBE Eligibility (49 CFR Part 26.87)

A certified DBE firm's eligibility may be removed for the following reasons:

#### **A. Ineligibility Complaints (49 CFR Part 26.87(a))**

Any individual may file a written complaint to ADOT or its UCP Partner agencies alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. However, ADOT or its UCP Partner agencies will not accept a general verbal allegation that a firm is ineligible or an anonymous complaint. Any written complaint must be signed and include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities will be protected as provided in 49 CFR Part 26.109(b).

Upon receiving a written complaint, ADOT or its UCP Partner agencies certification staff will review its records concerning the firm, any material provided by the firm and the complainant, and other available information. ADOT or its UCP Partner agencies may also request additional information from the firm and conduct an on-site review of the firm or other inquiry methods as may be warranted to investigate the complaint. Investigations will be conducted and a determination made within 90 days.

If ADOT or its UCP Partner agencies determines, based on this review, that there is reasonable cause to believe that the firm is ineligible, ADOT or its UCP Partner agencies will provide written notice to the firm that it propose to find the firm ineligible, setting forth the reasons for the proposed determination citing the related regulations. If ADOT or its UCP Partner agencies determines that such reasonable cause does not exist, it will notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause will specifically reference the evidence in the regulation upon which each reason is based.

#### **B. ADOT/UCP Partner Initiated Proceedings (49 CFR Part 26.87(b))**

If based on notification by any DBE firm of a change in its circumstances or other information that comes to ADOT or its UCP Partner agency's attention and ADOT or its UCP Partner agencies determines that there is reasonable cause to believe that a currently certified firm is ineligible, ADOT or its UCP Partner agency will provide written notice to the firm that it proposes to find the firm ineligible. The written notification will include the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause will specifically reference the evidence in the regulations upon which each reason is based.

#### **C. DOT Directive to Initiate Proceedings (49 CFR Part 26.87(c))**

If a DOT operating administration determines that information in ADOT or its UCP Partner agencies' certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm ADOT or its UCP Partner agency's certified does not meet the eligibility criteria of this part, the DOT operating administration may direct ADOT to initiate a proceeding to remove the firm's certification. The DOT operating administration will provide ADOT or its UCP Partner agencies and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information. ADOT or its UCP Partner agency will immediately commence and prosecute a proceeding to remove eligibility as provided by Section 2 above.

#### **D. Decertification Hearing (49 CFR Part 26.87(d-e))**

When a determination has been made to remove a DBE firm's existing certification for reasonable cause, as provided in (1), (2), or (3) of this section, a "propose to remove eligibility" letter will be sent to the firm by ADOT or the UCP Partner agency. The letter will be sent certified mail, return receipt. The letter will outline the firm's options to request an informal hearing, in writing, with ADOT or the UCP Partner agency.

The DBE business owner will have 10 business days from the date of the letter to respond in writing to the “propose to remove eligibility” letter. The DBE firm’s written response must indicate whether it disputes ADOT or the AZUCP Partner agency decision to remove eligibility, request either to present information and arguments in writing without attending a hearing or, or it wishes to attend a hearing in person or by telephone. If the firm disputes ADOT or the AZUCP Partner agency decision to remove eligibility, the written response must also include reasons why the firm believes ADOT or its UCP Partner agency’s decision was erroneous and present fact/arguments concerning why the firms eligibility should not be removed.

If the DBE firm fails to respond, does not present information and arguments in writing to dispute the decision to remove its eligibility and/or does not request a hearing within the stated 10 day timeframe, ADOT or the UCP Partner agency will send a letter to the DBE firm notifying the business owner that its certification has been removed. The notification will be sent certified mail, return receipt.

If the DBE firm disputes ADOT or its UCP Partner Agency’s decision to remove eligibility in writing and/or requests an Informal Hearing, ADOT or the AZUCP Partner agency will designate a Hearing Officer within 5 business days of receipt of request from the firm. ADOT or the AZUCP Partner agency will notify the firm of the Hearing Officer’s name, address and contact telephone number.

To ensure separation of functions in the de-certification informal hearing, ADOT or the AZUCP Partner agency will identify Hearing Officers to serve as the decision-makers in de-certification proceedings that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and is not subject to direction from the office or personnel who took part in the decertification decision. The Hearing Officer will be an individual who is knowledgeable about the certification requirements of the DBE program and will be selected in the following order:

- a) Certification Managers or staff from other AZUCP Partner agencies;
- b) Former DBE Certification Program Managers or Civil Rights staff in other ADOT departments, AZUCP Partner agencies or other public agencies who are knowledgeable about the DBE program and are not subject to the direction of the office that took part in making certification decisions;
- c) State of Arizona Hearing Officers secured externally by contract, who are knowledgeable about the DBE program; or
- d) DBE Program Managers/Certification Managers/Officials from a regional certification agency or UCP.

If the DBE firm chooses to present information and arguments in writing without attending a hearing, ADOT or its UCP Partner agency will send the Hearing Officer a copy of the removal letter and the evidence ADOT or the AZUCP Partner agency used to make the decision, as well as the DBE firm’s response/rebuttal letter with reasons and evidence as to why it should remain certified. The Hearing Officer may request additional relevant information from ADOT or the AZUCP Partner agency or the firm, will review all information submitted and consider all relevant factors in rendering a decision. ADOT or the AZUCP Partner agency bears

the burden of proving to the Hearing Officer by a preponderance of the evidence, that the firm does not meet the certification standards

When a request for an informal hearing by telephone or in person is received from a firm, ADOT or the AZUCP Partner agency will use the procedures below to conduct an Informal Hearing:

- a) If the DBE firm requests an Informal Hearing, telephonically or in person, ADOT or the AZUCP Partner agency will work with the firm and Hearing Officer to determine a mutually acceptable date, time and location for the Informal Hearing.
- b) ADOT or the AZUCP Partner agency will send a “Notice of Hearing” to the firm and Hearing Officer that will include:
  - i. Date, time and location of the Informal Hearing;
  - ii. Copy of the removal letter and statement of reasons for the removal;
  - iii. Evidence ADOT or the AZUCP Partner agency used to make the decision; and
  - iv. DBE firm response/rebuttal letter with reasons as to why it should remain certified.

The Hearing date will be at least 20 days after the date of the “Notice of Hearing” letter unless the DBE firm requests an earlier date.

- c) An attorney may represent the firm at the hearing. The firm must notify ADOT or the AZUCP Partner agency in its written request for an Informal Hearing if it will be represented by an attorney. ADOT or its UCP Agency reserves the right to be represented in the Hearing by its own legal counsel whether or the firm is represented by an attorney.
- d) ADOT or its UCP Partner agency certification staff (and legal counsel, if applicable) will attend the hearing proceedings, in-person or telephonically, to present the evidence supporting the proposal to remove the firm’s DBE certification. The DBE firm will also attend (and legal counsel, if applicable) to provide information and arguments concerning why it should remain certified.
- e) The Hearing Officer will preside over the Hearing. During the hearing, ADOT or the AZUCP Partner agency shall present its case and evidence for decertification, followed by the DBE firm. The DBE firm may submit relevant documentation that supports their case for certification and provides information contrary to the findings of ADOT or its UCP Partner agency. This information becomes part of the record. New information submitted by the DBE firm that was not available at the time the decision to remove eligibility was made by ADOT or its UCP Partner agency, may be part of the record but cannot be used by the Hearing Officer in the decision making process.
- f) The evidence and arguments provided by ADOT or its UCP Partner agency and the DBE firm must be focused only on the facts pertaining to the reason the firm’s eligibility is in question and why ADOT or its UCP partner agency’s decision is erroneous. Both parties will be provided the opportunity for a rebuttal/closing statement, with ADOT or the AZUCP Partner agency

presenting its closing statement last since it has the burden of proving, by preponderance of the evidence, why the firm no longer meets the certification standards in the DBE regulations. Informal Hearings will generally last no more than a few hours to one day depending on the complexity of the issues. The Hearing Officer will review all information presented and consider all relevant factors in rendering a decision.

- g) The hearing will be recorded and a verbatim record of the transcript provided to DOT if there is a subsequent appeal by the firm. The transcript will also be available to the firm by request at its own cost for copying the records. ADOT or the AZUCP Partner agency will retain the original record of the hearing.

The firm shall maintain its DBE certification status until the informal hearing process is concluded. The firm does not become ineligible until the issuance of the notice provided for in section 6 below.

#### **E. Grounds for Decision (49 CFR Part 26.87(f))**

The decision to remove a firm's eligibility will be based only on one or more of the following grounds:

- a) Changes in the firm's circumstances since the certification of the firm that render the firm unable to meet the eligibility standards;
- b) Information or evidence not available to ADOT or the AZUCP Partner agency at the time the firm was certified;
- c) Information relevant to eligibility that has been concealed or misrepresented by the firm;
- d) A change in the certification standards or requirements of the Department since the firm was certified;
- e) ADOT or the AZUCP Partner agency's decision to certify the firm was clearly erroneous;
- f) Failure to cooperate (see 49 CFR Part 26.109(c));
- g) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see §26.73(a)(2)); or
- h) The firm has been suspended or debarred for conduct related to the DBE program. The notice of decision will include a copy of the suspension or debarment action. A decision to remove a firm for this reason is automatic and is not subject to the hearing procedures described in this section.

The Hearing Officer will provide its decision in writing to ADOT or AZUCP Partner agency within ten business days of the day of the hearing. ADOT or AZUCP Partner agencies will abide by the Hearing Officer's decision.

#### **F. Notice of Decision (49 CFR Part 26.87(g-i))**

Following the Hearing Officer's decision, ADOT or the AZUCP Partner agency will provide the firm written notice of the Hearing Officer's decision and the reasons for it within 10 business days of receiving the decision of the Hearing Office. The written notice will include specific references to the evidence in the DBE regulations that support each reason for the decision. The notice will inform the firm of the consequences of the decision and of the availability of an appeal to the Department of Transportation under 49 CFR Part 26.89 if the decision is to remove the DBE eligibility.

If the proposal to remove certification is upheld by the Hearing Officer, the firm's status as a DBE will be removed effective the date ADOT or the AZUCP Partner agency sends the decertification letter. If the proposal to remove certification is overturned, the DBE will maintain its DBE status.

Any firm whose certification has been removed may not reapply for certification for a period of twelve (12) months from the date of the decertification letter.

ADOT or the AZUCP Partner agency will send copies of the notice to the complainant in an ineligibility complaint or the concerned DOT operating administration that had directed it to initiate the proceeding. When sending such a notice to a complainant other than a DOT operating administration, ADOT or the AZUCP Partner agency will not include information that could reasonably be construed as confidential business information without the written consent of the firm that submitted the information.

#### **G. Effects of Removal of Eligibility (49 CFR Part 26.87(j-k))**

When ADOT or its AZUCP Partner agencies remove a firm's eligibility, the following action will be taken relative to the decertified firm:

- a) When a prime contractor has made a commitment to using the ineligible firm, or a commitment has been made to use a DBE prime contractor, but a subcontract or contract has not been executed before decertification notice was issued, the ineligible firm does not count toward the contract DBE goal or ADOT's overall DBE goal. The prime contractor must meet the contract goal with an eligible DBE firm or demonstrate that it has made a good faith effort to do so.
- b) If a prime contractor has executed a subcontract with the firm before a firm is notified of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where ADOT or its Subrecipient/Subgrantees has let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the notice of its ineligibility was issued will not count toward ADOT's overall goal, but may count toward the contract goal.
- c) For On-Call Task Order contracts/procurements, if a DBE is deemed ineligible (decertified) or suspended by ADOT or one of its UCP Partner Agencies in accordance with 49 CFR 26.87 and 26.88, the DBE may not be considered to meet the contract goal on a new Task Order, but may be considered to meet the contract/Task Order goal if a subcontract or contract modification for the work to be completed on the Task Order was executed before the DBE suspension or decertification is effective.

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

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

- d) If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, ADOT or its Subrecipient/Subgrantees may continue to count its participation on that contract toward overall and contract goals.

## 6. Summary Suspension of Certification (49 CFR Part 26.88)

ADOT or the AZUCP Partner agencies will immediately suspend a DBE's certification without adhering to the requirements in 29 CFR Part 26.87(d) when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.

ADOT or the AZUCP Partner agencies may immediately suspend a DBE's certification without adhering to the requirements in 49 CFR Part 26.87(d) when there is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified, or when the DBE fails to notify ADOT or the AZUCP Partner agencies in writing of any material change in circumstances as required by 49 CFR Part 6.83(i) or fails to timely file an affidavit of no change under 49 CFR Part 26.83(j).

In determining the adequacy of the evidence to issue a summary suspension, ADOT or the AZUCP Partner agencies will consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.

The concerned DOT operating administration may also direct ADOT or the AZUCP Partner agencies to take action to make a summary suspension of DBE certification if it determines that information available to it is sufficient to warrant immediate suspension.

When a firm is suspended, ADOT or the AZUCP Partner agencies will immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

Suspension is a temporary status of ineligibility pending an expedited show cause informal hearing/proceeding under Section D above, to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.

While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward ADOT's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a commercially useful function under the existing contract.

Following receipt of the Notice of Suspension from ADOT or an AZUCP Partner agency, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide to ADOT or its AZUCP Partner agency information demonstrating that the firm is eligible despite its changed circumstances. Within 30 days of receiving this information, ADOT or an AZUCP Partner agency will either lift the suspension and reinstate the firm's certification or commence a decertification action outlined in Section E, 4-6 above ( 49 CFR Part 26.87). If ADOT or an AZUCP Partner agency commences a decertification proceeding, the suspension remains in effect during the proceeding.

The decision to immediately suspend a DBE outlined in this section is not appealable to the US Department of Transportation. The failure of ADOT or an AZUCP Partner agency to either lift the suspension and reinstate the firm or commence a decertification proceeding, as described above, is appealable to the U.S. Department of Transportation as described in section G below (49 CFR Part 26.89), as a constructive decertification.

## 7. Certification Appeals to the US Department of Transportation (49 CFR Part 26.89)

Any firm or complainant may appeal ADOT or its AZUCP Partner agency's decision in a certification matter to DOT in accordance with 49 CFR Part 26.89. To file an appeal a firm must send a letter to DOT within 90 days of the date of ADOT's final decision, including information and setting forth a full and specific statement as to why the decision is erroneous, what significant fact ADOT or the AZUCP Partner agency failed to consider, or what provisions of the DBE regulations ADOT or the AZUCP Partner agency did not properly apply. Such appeals may be sent to:

U.S. Department of Transportation  
Departmental Office of Civil Rights  
External Civil Rights Programs Division (S-33)  
1200 New Jersey Ave., S.E.  
Washington, DC 20590  
Phone: (202) 366-4754  
TTY: (202) 366-9696  
Fax: (202) 366-5575

ADOT or the AZUCP Partner agency will provide the administrative record, including a hearing transcript, within 20 days of DOT request. To facilitate the DOT's review of ADOT or an AZUCP Partner agency's decision, such administrative records will be well organized, indexed, and paginated. All decisions made by DOT are administratively final, and are not subject to petitions for reconsideration.

## 8. Action Taken After DOT Certification Appeal Decision (49 CFR Part 26.91)

DOT's decisions on certification appeals derived from actions taken by ADOT or the AZUCP Partner agencies will be binding on the AZUCP, but are not binding on other states. ADOT will promptly implement any DOT certification appeal decisions affecting the eligibility of DBEs on DOT-assisted contracting.

When DOT makes a decision on a certification appeal, ADOT or the AZUCP Partner agencies will take the following action:

- a) If DOT determines that ADOT or an AZUCP Partner agency erroneously certified a firm, ADOT or the AZUCP Partner agency must remove the firm's eligibility on receipt of the determination, without further any proceedings. Effective on the date of ADOT or a AZUCP Partner agency receipt of the DOT's determination, the consequences of a removal of eligibility set forth in Section 7 above and 49 CFR Part 26.87(i) will take effect.
- b) If DOT determines that ADOT or a AZUCP Partner agency erroneously failed to find reasonable cause to remove the firm's eligibility, ADOT or a AZUCP Partner agency will expeditiously commence an Informal Hearing as outlined in Section 4 above (49 CFR Part 26.87) to determine whether the firm's eligibility should be removed.
- c) If DOT determines that ADOT or one of its AZUCP Partner agencies erroneously declined to certify or removed the eligibility of the firm, ADOT or the AZUCP Partner agency must certify the firm, effective on the date of it receives written notice of DOT's determination.
- d) If DOT determines that ADOT or one of its AZUCP Partner agencies erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, ADOT or the AZUCP Partner agency must take appropriate corrective action as determined by DOT.
- e) If DOT affirms ADOT or the AZUCP Partner agency determination, no further action is necessary. The firm may not reapply for certification for a period of twelve (12) months from the date of the decertification letter.

Where DOT has upheld ADOT or a AZUCP Partner agency's denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other State DOT or UCPs with whom the firm is certified may commence a proceeding to remove the firm's eligibility under 49 CFR Part 26.87.

## VI. COMPLIANCE AND ENFORCEMENT – SUBPART F

### 1. Compliance Procedures That Apply to ADOT (49 CFR Part 26.101)

If ADOT fails to comply with any requirement of 49 CFR part 26, it may be subject to formal enforcement action under §26.103 or §26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23 CFR 1.36; in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.

ADOT will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because ADOT has been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

### 2. Enforcement Actions under FHWA and FTA Programs (49 CFR Part 26.103)

There are a number of enforcement actions that can be taken against ADOT related to FHWA and FTA-assisted contracts:

- a) Any person who believes that ADOT has failed to comply with its obligations under 49 CFR Part 26 may file a written complaint with the concerned operating administration's Office of Civil Rights. An individual wishing to file a complaint must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of DBE regulations. In response to a written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of the complainant's identity as provided in 49 CFR Part 26.109(b). Complaints are limited to allegations of violation of the provisions of 49 CFR Part 26.
- b) The concerned DOT OA may review ADOT's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the OA to initiate a compliance review based on complaints received.
- c) If it appears, from the investigation of a complaint or the results of a compliance review, that ADOT is in noncompliance with 49 CFR Part 26, the appropriate DOT office promptly notify ADOT in writing advising it that there is reasonable cause to find it in noncompliance. The notice will state the reasons for this finding and will direct ADOT to reply within 30 days concerning whether it wishes to begin conciliation.
- d) If ADOT request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of ADOT's request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes. If ADOT and the appropriate DOT office sign a conciliation agreement, then the matter is regarded as closed and ADOT will be regarded as being in compliance. The conciliation agreement will set forth the

measures ADOT has taken or will take to ensure compliance. While a conciliation agreement is in effect, ADOT will remain eligible for FHWA or FTA financial assistance.

- e) The concerned OA will monitor ADOT's implementation of the conciliation agreement and ensure that its terms are complied with. If ADOT fails to carry out the terms of a conciliation agreement, ADOT will be found to be in noncompliance.
- f) If ADOT does not request conciliation, or a conciliation agreement is not signed within the time provided in paragraph in the timeframe listed above, then enforcement proceedings may begin. Enforcement actions may be taken as provided in 40 CFR Part 26, Subpart F. Applicable findings in enforcement proceedings are binding on all DOT offices.

### 3. Enforcement Actions under FAA Programs (49 CFR Part 26.105)

Compliance with all requirements of 49 CFR Part 26 by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them. The provisions of §26.103(b) and this section apply to enforcement actions in FAA programs. Any person who knows of a violation 49 CFR Part 26 by ADOT as any recipient of FAA funds may file a complaint under 14 CFR Part 16 with the Federal Aviation Administration Office of Chief Counsel.

### 4. Enforcement Actions for Firms Participating in DBE Programs (49 CFR Part 26.107)

If a firm that does not meet the DBE eligibility criteria outlined in 49 CFR Part 26, Subpart D, attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the DOT may initiate suspension or debarment proceedings against the firm under 2 CFR parts 180 and 1200.

If it comes to ADOT's attention that a firm, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the DBE eligibility criteria, ADOT will bring the matter to the attention of DOT, which may initiate suspension or debarment proceedings against the firm under 2 CFR parts 180 and 1200.

In a suspension or debarment proceeding brought against a firm, the concerned operating administration may consider the fact that a purported DBE has been certified by ADOT, an AZUCP member agency or another DOT recipient. Such certification does not preclude the DOT from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

DOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31. DOT may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

## 5. Information, Confidentiality, Cooperation, Intimidation/Retaliation (49 CFR Part 26.109)

Notwithstanding any provision of Federal or Arizona Freedom of Information law and statutes, ADOT will not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, ADOT must transmit this information to DOT in any certification appeal proceeding under 40 CFR Part 26.89 or to any other state to which the individual's firm has applied for DBE certification.

The identity of complainants shall be kept confidential, at their request. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant will be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. For FAA-funded contracts, ADOT will follow the procedures of 14 CFR Part 16 with respect to confidentiality of information in complaints.

All participants in the DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and ADOT compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to ADOT, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

ADOT, Subrecipient/Subgrantees, contractor, consultant or any other participant in the DBE program will not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured 49 CFR Part 26 or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the DBE regulations. If ADOT, contractor, consultant, or any other participants in the DBE program violate this prohibition, it will be in noncompliance of 49 CFR Part 26.

## VII. SUBRECIPIENT/SUBGRANTEE COMPLIANCE – SUBPART G

### 1. Policy

Subrecipients/Subgrantees receiving DOT-assisted transportation funds through ADOT must adopt and implement ADOT's DBE Program Plan, ADOT's DBE policy, DBE contract specifications and forms as a condition of receiving federal funds. ADOT Subrecipients/Subgrantees of federal funds must comply with ADOT DBE Plan and may not have a plan independent from ADOT.

### 2. Objectives

Subrecipients/Subgrantees must commit to supporting the following ADOT DBE Program objectives to:

- Ensure nondiscrimination in the award and administration of DOT-assisted contracts in ADOT and its Subrecipient/Subgrantee construction, procurement, and professional services contracts in the areas of highway, transit, and airport financial assistance;
- Ensure nondiscrimination in the award and administration of US DOT-assisted contracts;
- Create a level playing field on which DBEs can compete fairly for US DOT assisted contracts;
- Ensure that the DBE program is narrowly tailored in accordance with applicable law;
- Ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are counted as DBEs;
- Help remove barriers to the participation of DBEs in US DOT-assisted contracts;
- Promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by Subrecipients/Subgrantees; and
- Assist in the development of firms that can compete successfully in the market place outside the DBE program.

### 3. Non-Discrimination

Subrecipients/Subgrantees will not exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, national origin, age, or disability.

In compliance with the ADOT DBE Program Plan, Subrecipients/Subgrantees will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, national origin, age, or disability.

### 4. DBE Program Compliance Required Activities

In accordance with the Subrecipient/Subgrantee DBE Program Plan Compliance Statement, all ADOT Subrecipients/Subgrantees shall designate a Disadvantaged Business Enterprise Liaison Officer (DBELO), responsible for adopting and implementing ADOT's DBE Program Plan, related procedures and contract specifications. Each Subrecipient/Subgrantee must do a minimum of the following:

- 1) Affirm and consent by signing ADOT's Subrecipient/Subgrantee DBE Compliance Statement, or Certification Acceptance Agreement, assuring its adherence to ADOT DBE Program Plan and concomitant procedures.
- 2) Follow the same guidelines, procedures, and use the contract specifications and forms developed by ADOT to implement its DBE the program.
- 3) Participate in training conducted by ADOT related to DBE requirements and program regulations
- 4) Require firms that work on DOT-assisted contracts to register and secure an AZ UTRACS registration number via the AZ UTRACS web portal.

- 5) Encourage small firms to register as an SBC via the AZ UTRACS web portal.
- 6) Utilized certified DBEs found in the AZ UTRACS web portal.
- 7) Submit all FHWA DOT-assisted contracts to ADOT to be assessed for a DBE goal.
- 8) Include DBE contract goal as provided by ADOT in FHWA contract bid advertisement, bid package, statement of qualification, request for proposal or other solicitation documents.
- 9) Include applicable DBE contract specifications as provided by ADOT in all DOT-assisted contract bid advertisement, bid package, statement of qualification, request for proposal or other solicitation documents.
- 10) Notify the ADOT PM and ADOT BECO in writing immediately following bid opening of a DOT-assisted design or construction project if the apparent low bidder or selected consultant indicates on the DBE Assurance Form that the DBE contract goal cannot be met.
- 11) Submit all Good Faith Effort documentation to ADOT BECO for review and concurrence prior to awarding of DOT-assisted contracts.
- 12) Collect DBE Affidavits (FHWA-funded contracts only), bidder/proposer list confirmation email and all other ADOT required forms and submit to ADOT Business Engagement and Compliance Office in accordance with the applicable FHWA Subrecipient/Subgrantee Compliance Checklist available at: <http://azdot.gov/business/business-engagement-and-compliance/lpa-subrecipients>
- 13) Ensure the receipt of Bid Verification Notice from ADOT BECO prior to contract award.
- 14) Enter contract award, DBE commitment/information, prime payments, and other requested data in the LPA DBE tracking system in accordance with the applicable FHWA Subrecipient/Subgrantee Compliance Checklist available at: <http://azdot.gov/business/business-engagement-and-compliance/lpa-subrecipients>
- 15) Submit contract data in support of monthly, semi-annual and annual federal reporting submission made by ADOT. Subrecipients/Subgrantees, Certification Acceptance Agencies and LPAs are required to use the ADOT Local Public Agencies DBE Reporting System, via [www.arizonalpa.dbesystem.com](http://www.arizonalpa.dbesystem.com).
- 16) Monitor and enforce that contractors enter and report payments monthly in the LPA DBE System and that Prompt Payment of DBEs and other subcontractors are monitored and enforced.
- 17) Implement monitoring and enforcement mechanisms to enforce the terms of the contract, including application of applicable sanctions, as needed, for payment reporting, prompt payment, DBE termination/substitution and not meeting the DBE contract goal.
- 18) Conduct site reviews to ensure all DBEs are meeting a Commercially Useful Function on each DOT-assisted contract.

19) Follow DBE contract specification to notify ADOT BECO and ADOT PM in writing to secure ADOT BECO's approval prior to any termination, substitution, or reduction of work of a committed DBE firm used to meet the contract goal.

20) Monitor DBE utilization on projects and notifying ADOT BECO as soon as Subrecipient/Subgrantee is aware of a potential issue that may affect DBE commitments made at award.

21) Ensure that all DBE Certification of Final Payment Forms are submitted by contractors and submit a copy of the agency's Final Acceptance Letter to ADOT BECO.

22) Provide ADOT with monthly reports on awards, payments and DBE utilization. Monthly Reports must be submitted for the previous month by the 7<sup>th</sup> day of each month.

23) Ensure timely contract closeout by ensuring all subcontractor payments are reported in the DBE System, closeout contracts in the LPA DBE reporting system, and complete all mandatory reporting requirements in the LPA DBE system by April 1<sup>st</sup> and October 1<sup>st</sup> of each year in order for ADOT to prepare for the Semi-Annual report.

ADOT reserves the right to audit Subrecipients/Subgrantees contract compliance procedures and project files and conduct onsite reviews to ensure compliance with DBE regulations.

## VIII. ATTACHMENTS

1. [Attachment A - DBE Subcontract Compliance Assurances \(All\)](#)
  - [A.1 DBE Subcontract Compliance Assurances – Construction](#)
  - [A.2 DBE Subcontract Compliance Assurances – Professional Services](#)
2. [Attachment B - Business Engagement & Compliance Office Organizational Chart](#)
3. [Attachment C - ADOT DBE Policy SUP-3.05](#)
4. [Attachment D – DBE Construction, Professional Services, and On Call Contract Language \(All\)](#)
  - [D.1 DBE Contract Language – Construction – With Goal](#)
  - [D.2 DBE Contract Language – Construction – Without Goal](#)
  - [D.3 DBE Contract Language – Professional Services – With Goal](#)
  - [D.4 DBE Contract Language – Professional Services – Without Goal](#)
  - [D.5 DBE Contract Language – On Call – With Goal](#)
  - [D.6 DBE Contract Language – On Call – Without Goal](#)
5. [Attachment E - Construction Commercially Useful Function \(CUF\) Review Checklist](#)
6. [Attachment F – ADOT’s Approach to Setting Overall DBE Goals](#)
7. [Attachment G – DBE Contract Goal Setting Methodology](#)