

Contract No.: \_\_\_\_\_

Contract No.: XX-XX  
TRACS No.: Various  
Project No.: Various

A.G. Contract No: KR94-1408ALS

**CONSULTANT CONTRACT**

This CONTRACT is made and entered into on \_\_\_\_\_, 20\_\_ by and between the State of Arizona, Arizona Department of Transportation, Intermodal Transportation Division, acting by and through the Director, hereinafter called STATE, and

**(Consultants Name and Address Inserted Here)**

hereinafter called the CONSULTANT.

The Description and Location of the CONTRACT and related project(s) are as follows:

**Description:**

**(Contract Description Inserted Here)**

**Location:**

**(Contract Location Inserted Here)**

**RECITALS**

1. The STATE desires that \_\_\_\_\_ be prepared for the above location. The trained personnel needed for the CONTRACT and related project(s) are not currently available within its own organization.
2. The CONSULTANT firm with its principals and employees is considered to be qualified and otherwise capable of performing the work required by this contract in the time allotted.
3. Therefore, pursuant to Arizona Revised Statutes, Section 28-1803(5) it is deemed to be in the public interest to enter into this contract.

**AGREEMENT**

Therefore, in consideration of these premises and of the mutual clauses and agreements herein contained, and the faithful performance thereof, the CONSULTANT and the STATE contract and agree:

**2.01 SCOPE OF WORK**

The CONSULTANT shall perform engineering services for the satisfactory completion of the CONTRACT and related project(s) as detailed and described in the following Scope of Work **dated** \_\_\_\_\_, **20** \_\_\_\_\_ which is considered to be a part of this CONTRACT.

(Scope of Work Inserted Here)

SAMPLE

**3.01 CONTRACT SCHEDULE AND COMPLETION DATE**

Work on the CONTRACT and related project(s) is scheduled to commence on \_\_\_\_\_. Work is to be completed within \_\_\_\_ calendar days from Notice to Proceed for an estimated completion date of \_\_\_\_\_, 20\_\_\_. The STATE assumes no liability for work performed or costs incurred prior to the beginning date or subsequent to the CONTRACT completion date. The STATE retains the option of extending the CONTRACT for two additional one year periods. Extensions of time allowed for completing the CONTRACT may be granted under appropriate circumstances.

**3.02 CONSULTANT'S COMPENSATION - UNIVERSITIES**

1. The STATE agrees to reimburse the CONSULTANT for actual costs up to but not exceeding \$\_\_\_\_\_ plus approved adjustments. Expenditures are to be identified separately for each project number. Expenditures for each category (line item) and project number shown on the Progress Payment form must not exceed the amounts budgeted without the prior written approval of the STATE.
2. "Costs" as used in this context shall be construed to mean the CONSULTANT'S actual, reasonable costs, subject to any limitation set forth in this CONTRACT, attributable and properly applicable to the conduct of the CONSULTANT'S business in the performance of this CONTRACT in accordance with procedures as set forth in Part 1 of the Federal Acquisitions Regulations System, 48 CFR 31.3, as appropriate. Costs for each line item shall not exceed the maximum allowable rates set forth in the cost proposal. Such costs shall be allocated to the following categories and may include, but are not necessarily limited to:
  - a. **Direct Labor**

Salaries and wages paid to employees for work on the CONTRACT and payments to salaried students employed on the CONTRACT, such salary costs to include gross earnings in direct productive effort. Payments to individuals other than the CONSULTANT'S employees and students employed on the CONTRACT are specifically excluded as direct labor costs.
  - b. **Indirect Costs**
    - (1) Salaries and wages paid to secretarial, clerical, custodial and other employees whose time is not chargeable as direct labor to this CONTRACT or any other specific project of the CONSULTANT.
    - (2) Normal operating costs of CONSULTANT'S facilities including reasonable office rental or depreciation expense, repairs, maintenance, supplies, telephone and utilities.
    - (3) Payment to the CONSULTANT for indirect costs incurred has been established by Rate Agreement. The provisional rate shall be\_\_\_\_%, the maximum rate shall be\_\_\_\_%, of the amount shown for modified total direct costs, exclusive of items of equipment and other capital expenditures.
  - c. **Other Direct Costs**
    - (1) Reasonable costs of lodging and travel within Arizona for the actual expense incurred but not to exceed the maximum allowable for State personnel. Prior approval is required for out-of-state travel.

- (2) The cost of materials and services incurred by the CONSULTANT essential to the performance of the Contract.
- (3) Costs of renting or leasing certain items of equipment necessary to perform the work described in the attached Proposal, acquired by either purchase or rental and by either the STATE or the CONSULTANT. If purchased, Federal participation in the rental value of equipment owned by the CONSULTANT will be limited to the amount as ascertained by an audit of the CONSULTANT'S records at the completion of the Contract.
- (4) Royalties on a patent or amortization of the cost of acquiring a patent or invention or rights thereto, necessary for the proper performance of the CONTRACT and applicable to tasks or processes thereunder, are allowable unless:
  - (a) the Government has a license or the right to free use of the patent;
  - (b) the patent has been adjudicated to be invalid or has been administratively determined to be invalid;
  - (c) the patent is considered to be unenforceable; or
  - (d) the patent has expired.
- (5) Cost of preparing and printing disclosures, reports, and other documents that may be required in the performance of the work, and of searching the art to the extent necessary to make such invention disclosures, are allowable. Costs of preparing documents relating to patents and any other patent costs, in connection with the filing of a patent application where title is conveyed to the Government, are allowable.
- (6) Reimbursement for matching funds or employer's contributions paid for employees' social security, unemployment compensation, insurance, pension plans or similar employee benefits shall be at the actual cost rate estimated to be \_\_\_% of Faculty and Staff direct salary costs and \_\_\_% of Student direct salary costs.

d. Outside Services

- (1) Salaries and wages paid to individuals other than the CONSULTANT'S regular employees such as other CONSULTANT'S or sub-consultants for engineering or professional services directly attributable to the PROJECT.
  - (2) Costs of specialized services including computer services, laboratory testing, etc., and subcontract work, as described in the attached proposal.
3. The CONSULTANT shall be authorized to submit invoices on a monthly basis for payment, subject to the following limitations. Invoices shall be submitted in sufficient detail so as to show all expenditures as of the date of invoice for all costs in the categories of the authorized budget. The invoice shall also reflect the cumulative expenditures of direct labor as provided in the budget.
- a. Prior to completion of the research phase, the billed amount shall not exceed \_\_\_% of the contract amount.

- b. Prior to completion of the draft report, the billed amount shall not exceed \_\_\_% of the contract amount.
  - c. Prior to completion of the final report, the billed amount shall not exceed \_\_\_% of the contract amount.
4. The STATE, at its discretion and with the recommendation of the STATE'S monitoring engineer, may waive the above limitations. Approval authority shall be the same as for interim payments.
  5. The CONSULTANT is required to submit quarterly and monthly progress reports as detailed in Figure 2, and the Level of Effort by Tasks (Work hours and Costs) as detailed in Figure 1 of Appendix B to the Scope of Work.
  6. The STATE shall not withhold retention on progress payments. However, if satisfactory progress has not been made, the STATE may first retain a maximum of 10% of the current and subsequent billings, or secondly, the STATE may refuse to make full progress payment(s) of such sums which are considered necessary.
  7. When all work is delivered, accepted and approved as complete by the STATE, the Office of Audit and Analysis may prepare a report showing allowable costs incurred. Preparation of this report may require an audit examination of the CONSULTANT'S records. Final payment will be made as soon as possible after date of acceptance. During performance of progress or final audits, the allowability of direct costs will be contingent upon the CONSULTANT'S ability to demonstrate that these costs were excluded from the overhead cost pool.
  8. It is expressly understood and agreed that no work shall be done, nor any obligation incurred under this CONTRACT during the current fiscal year and during the succeeding fiscal years in excess of the funds appropriated, programmed and budgeted for this project for the current fiscal year and the succeeding fiscal years. In the event that no funds are appropriated or budgeted for this project for any of the succeeding fiscal years, then this CONTRACT shall be null and void, except as to that portion for which funds have now or will have been appropriated and budgeted therefore, and no right of action or damages shall accrue to the benefit of the parties hereto as to that portion of the CONTRACT that may so become null and void.
  9. Final payment shall be made as soon as possible after 60 days from the date of acceptance of the audit findings, if applicable, by the STATE and the CONSULTANT.
  10. In the event the STATE requires substantial changes in the scope, character or complexity of the work on the CONTRACT, the total compensation as well as the fixed fee portion may be reevaluated and adjusted to a greater or lesser amount by mutual agreement between the CONSULTANT and the STATE.
  11. In the event this CONTRACT is terminated by the STATE as herein provided, the CONSULTANT may be paid all the allowable costs incurred, including mobilization and demobilization expense, plus that portion of the fixed fee earned to date of termination as determined by the STATE. Mobilization and demobilization expenses shall include only reasonable costs of marshalling personnel (and equipment if specifically provided for in the contract) for performing this work and of terminating employment of such personnel. No costs will be allowable in connection with termination of employment if incurred later than fifteen (15) days after the date of termination. Costs will be determined as provided in the Federal Acquisition Regulations and may be verified by an audit.

**4.01 CONTRACT MODIFICATIONS**

1. Contract modifications, which define and limit the terms of the CONTRACT such as the Consultant's compensation, must be approved by the STATE and shall be submitted in the form and format provided by the STATE. The CONSULTANT shall be compensated only with prior written authorization by the STATE. Any administrative/technical costs associated with the preparation of said modifications are solely the responsibility of the CONSULTANT.

a. **BILATERAL MODIFICATIONS**

Significant changes in the scope, character, or complexity of the work may be negotiated if it is mutually agreed that such changes are desirable and necessary. Contract changes defining and limiting the work and compensation must be authorized by the STATE. Such supplemental agreement(s) (SAs) shall be made in writing, and shall expressly convey that no claim for extra work performed or materials furnished shall be made by the CONSULTANT until authorization to proceed is granted, in writing, by the STATE.

b. **UNILATERAL MODIFICATIONS (CHANGES ORDERS)**

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

**4.02 DELAYS AND EXTENSIONS**

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

**4.03 CONSULTANT AND SUBCONSULTANT PAYMENT**

The CONSULTANT shall submit invoices on a monthly basis in accordance with a timeframe agreed to during contract negotiations. Invoices shall be sent directly to ADOT Project Manager for review and approval. The CONSULTANT shall submit invoices for work performed by their Subconsultants even though the prime CONSULTANT may not have performed any work during the preceding month. On or before the seventh day after the STATE makes a progress payment to the CONSULTANT, the CONSULTANT shall pay the Subconsultants for the work performed to the extent of each Subconsultant's contractual interest in the progress payment.

**4.03.1 LATE SUBMITTAL OF INVOICE**

Unless waived by the STATE in writing, all invoices for work performed under this CONTRACT shall be submitted within 60 days from date of acceptance of the completed portion of the work performed. The STATE, in its sole option, may refuse to pay any late invoices or may deduct a reasonable amount of damages. The

CONSULTANT is made aware that late submission of invoices may cause substantial damages to the STATE, including but not limited to, difficulty in obtaining or inability to obtain federal reimbursement, budget allocations and inability to verify work and hours. If work performed or costs incurred during the STATE fiscal year end (June 30) has not been invoiced by the following August 31<sup>st</sup>, the STATE shall not pay for work or costs.

**4.04 PERFORMANCE EVALUATIONS**

The CONSULTANT'S performance shall be evaluated periodically in accordance with the schedule set forth in Appendix \_\_\_ of this CONTRACT. Final consultant evaluations for contracts executed after July 1, 2010, may be considered in the future consultant selection process.

**4.05 GENERAL COMPLIANCE WITH LAWS**

The CONSULTANT shall comply with all Federal and State laws, and local ordinances and regulations.

**4.06 LITIGATION**

In the event of litigation between the CONSULTANT and the STATE involving this CONTRACT, the laws and decisions of the Arizona shall apply and any such litigation shall be commenced and prosecuted in Maricopa County Superior Court.

**4.07 DISPUTE ESCALATION (Administrative Review)**

The following dispute escalation process shall be utilized to resolve disputes during the course of this CONTRACT. A Contract Modification (CM) dispute escalation levels shall be utilized in the event the ADOT Project Manager, Consultant Project Manager, and ECS Specialist are unable to agree on the scope, level of effort, or cost listed in the proposed CM. It is the intent of the Department to resolve disputes at the lowest level possible. If agreement cannot be reached at that level, then the matter is escalated to the next higher level of management.

The following is an example of the dispute resolution escalation levels for CMs:

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

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

**4.08 ARBITRATION**

The parties agree to use binding arbitration, after exhausting applicable administrative reviews, to resolve disputes arising out of this agreement where the sole relief sought is monetary damages of \$100,000 or less, exclusive of interest and costs.

**4.09 TERMINATION, POSTPONEMENT OR ABANDONMENT**

1. The STATE reserves the right to terminate, indefinitely postpone work, or abandon the CONTRACT. The STATE may terminate this CONTRACT in any one of the following circumstances:
  - a. CONSULTANT'S failure to perform the services as detailed herein and in any modifications to this CONTRACT.
  - b. CONSULTANT'S failure to complete this CONTRACT within the timeframe specified herein and in any modifications to this CONTRACT.
  - c. CONSULTANT'S failure to comply with any of the terms of this CONTRACT.
  - d. When, for any reason, the STATE determines that such termination is in its best interest.
2. If the STATE contemplates termination under the provisions of paragraphs 1.a., 1.b., or 1.c. above, the CONSULTANT shall have five (5) days in which to cure such deficiency. In the event the CONSULTANT does not cure such deficiency, the STATE may terminate the CONTRACT without further consideration and may recover compensation for liquidated damages.
3. If, after a Notice of Termination has been issued under the provisions of 1.a., 1.b. or 1.c. of this clause, it is determined that the CONSULTANT was not in violation or default, the Notice of Termination shall be deemed to have been issued under the terms of 1.d. of this clause.
4. Termination shall be effected by delivery to the CONSULTANT of a Notice of Termination specifying whether termination is for default of the CONSULTANT or for the convenience of the STATE, the extent to which performance of the CONTRACT is terminated, and the specific date upon which such termination becomes effective.
5. In the event of termination under Paragraph 1.d of this clause, the STATE shall be liable to the CONSULTANT only for CONSULTANT work performed prior to termination and only to the extent and as provided in SECTION 3.02 (CONSULTANT'S COMPENSATION) of this CONTRACT.
6. In the event this CONTRACT is terminated under paragraph 1.a, 1.b or 1.c of this clause, the STATE shall have the option of completing the work with its own forces, or entering into an agreement with another party for the completion of this CONTRACT according to the provisions and agreements herein.

7. If the STATE exercises this option, all costs and charges incurred by the STATE, together with the cost of completing the work under CONTRACT, shall be deducted from any monies due or which may become due the CONSULTANT.

#### 4.10 CANCELLATION

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

#### 4.11 SUCCESSORS AND ASSIGNS

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

#### 4.12 CONTINUING OBLIGATION

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

#### 4.13 INSURANCE

1. Without limiting any liabilities or any other obligations of the CONSULTANT, the CONSULTANT shall provide and maintain the minimum insurance coverage listed below.

Coverage shall be provided with forms and insurers acceptable to ADOT and maintained at a minimum until obligations under this CONTRACT are satisfied.

- a. If applicable, Workmen's Compensation insurance to cover obligations imposed by Federal and State statutes having jurisdiction of its employees engaged in the performance of the services, and Employers' Liability insurance with a minimum limit of one hundred thousand dollars (\$100,000). Evidence of qualified self-insured status shall suffice for this section.
- b. Architects' and Engineer's Professional Liability insurance in the amount of one million dollars (\$1,000,000) each claim, with said coverage to remain in force and effect for a minimum of one (1) year past ADOT's acceptance of the CONTRACT.

- c. **Comprehensive General Liability insurance with a minimum combined single limit of one million dollars (\$1,000,000) each occurrence. The policy shall include coverage for bodily injury, broad form property damage (including completed operations), personal injury (including coverage for contractual and employee acts), blanket contractual, contractors protective, products and completed operations. Said policy shall contain a severability of interest clause.**
- d. **Commercial Automobile Liability coverage with a combined single limit for bodily injury and property damage of not less than one million dollars (\$1,000,000) for all owned, leased, hired and non-owned vehicles. The State of Arizona and the Arizona Department of Transportation must be named as Additional Insureds and Certificate Holder on the policy.**
- e. **Valuable Papers insurance in an amount sufficient to cover the costs of restoration of any documents, memoranda, reports, or other similar data relating to the work of the CONSULTANT used in the completion of this CONTRACT.**
- f. **The policy required by Sections c. and e. above shall be endorsed to include the STATE and ADOT, its agents and officials and employees as additional insureds and shall stipulate that the insurance afforded CONSULTANT shall be primary insurance and that any insurance carried by ADOT, its agents, officials or employees shall be excess and not contributory insurance to that provided by CONSULTANT.**
- g. **A Certificate of Insurance acceptable to ADOT shall be issued to ADOT prior to commencement of the CONTRACT as evidence that policies providing the required coverages, conditions and limits are in full force and effect. Such certificate shall contain provisions that coverage afforded under the policies shall not be cancelled, terminated or materially altered until at least 30 days prior written notice has been given to ADOT.**

#### **4.14 INDEMNIFICATION - RESPONSIBILITY FOR CLAIMS AND LIABILITIES**

##### **1. Professional Liability**

**To the fullest extent permitted by law, the CONSULTANT shall indemnify and hold harmless the State of Arizona, its agents, representatives and employees from and against liability for loss or damage resulting from the negligence of the CONSULTANT, or any Subconsultant, or anyone directly or indirectly employed by the CONSULTANT or any Subconsultant, but only to the extent the loss or damage results from the negligence of the CONSULTANT, or any Subconsultant, or anyone directly or indirectly employed by the CONSULTANT or any Subconsultant.**

##### **2. Other than Professional Liability**

**To the fullest extent permitted by law, the CONSULTANT shall indemnify and hold harmless the State of Arizona, its agents, representatives and employees from and against liability for loss or damage resulting from the negligence of the CONSULTANT, or any Subconsultant, or anyone directly or indirectly employed by the CONSULTANT or any Subconsultant, but only to the extent the loss or damage results from the negligence of the CONSULTANT, or any Subconsultant, or anyone directly or indirectly employed by the CONSULTANT or any Subconsultant.**

**4.15 ANTITRUST VIOLATIONS**

The CONSULTANT and the STATE recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact borne by Purchaser or ultimate user which in this case, the STATE. Therefore, CONSULTANT, acting as a Vendor, hereby assigns to the STATE any and all claims for such overcharges.

**4.16 LIQUIDATED DAMAGES**

(This is an optional provision applied, on an exception basis, primarily to contracts initiated and administered by the Arizona Transportation Research Center. Not applicable to this contract).

**4.17 CONSULTANT'S RESPONSIBILITY**

The CONSULTANT has total responsibility for the accuracy and comprehensiveness of plans and related data prepared under the terms of this CONTRACT, and shall check all such material accordingly for completeness, missing items, correct multipliers and consistency. The plans shall be reviewed by ADOT for conformity with ADOT procedures and contract terms. Review by ADOT does not include detailed review or checking of design of major components and related details or the accuracy with which such designs are depicted on the plans.

**4.18 ACCURACY OF WORK**

Acceptance of the work by the STATE shall not relieve the CONSULTANT of its responsibility for subsequent correction of any errors and the clarification of any ambiguities. The CONSULTANT shall make all necessary revisions or corrections resulting from errors and omissions without additional compensation or cost to the STATE.

**4.19 CONSULTANT'S ENDORSEMENT OF PLANS, ETC.**

Pursuant to the Arizona Administrative Code (A.A.C.) R4-30-304 (Use of Seals), the CONSULTANT'S seal shall be endorsed and affixed to plans, reports and engineering data furnished under this CONTRACT, which is incorporated herein by reference and hereby made a part of the CONTRACT.

**4.20 PROFESSIONAL CONDUCT AND PROFESSIONAL REGISTRATION**

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

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

**4.21 IMPROPER EXERCISE OF AUTHORITY**

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

**4.22 CONFLICTS OF INTEREST**

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

**4.23 ORGANIZATIONAL CONFLICTS OF INTEREST**

1. No CONTRACT for the construction of a project shall be awarded to the firm that designed the project, or its subsidiaries, affiliates, the parent company or subconsultants, except with the written approval of the STATE.
2. The applicability of the above also applies to a Management and/or General Consultant or any of its subsidiaries, affiliates, the parent company or Subconsultants that were involved in any aspect of the design process.

**4.23.1 CONSULTANT - CONTRACTOR CONFLICTS OF INTEREST**

The CONSULTANT agrees that it shall not perform services on this project for the contractor, subcontractor or any supplier.

The CONSULTANT shall not negotiate, contract, or make any agreement with the contractor, subcontractor or any supplier with regard to any of the work under this project, or any services, equipment or facilities to be used on this project.

**4.24 ORGANIZATION EMPLOYMENT DISCLAIMER**

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

**4.25 NONPROCUREMENT DEBARMENT AND SUSPENSION**

1. In accordance with 49 CFR 29.505, and by signature on this CONTRACT, the CONSULTANT certifies its' compliance, and the compliance of any Subconsultants or subcontractors present or future, by stating that any person associated therewith in the capacity of owner, partner, director, officer, principal investor, project director, manager, auditor, or any position of authority involving Federal Funds:
  - a. Is not currently under suspension, debarment, voluntary exclusion, or determination of ineligibility by any Federal Agency;
  - b. Does not have a proposed debarment pending;
  - c. Has not been suspended, debarred, voluntarily excluded or determined ineligible by any Federal Agency within the past 3 years; and
  - d. Has not been indicted, convicted, or had a civil judgment rendered against the firm by a court of competent jurisdiction in any matter involving fraud or official misconduct within the past three (3) years as specified by 49 Code of Federal Regulations (CFR) 29.305(a).

Where the CONSULTANT or Subconsultant is unable to certify to the statement in 4.26.1(a) above, the CONSULTANT or Subconsultant shall be declared ineligible to enter into CONTRACT or participate in the project.

Where the CONSULTANT is unable to certify to any of the statements as listed in 4.25.1 (b), (c) or (d) above, the CONSULTANT shall submit a written explanation to the STATE. The certification or explanation shall be considered in connection with the STATE'S determination whether to enter into CONTRACT with the CONSULTANT.

2. The CONSULTANT shall provide immediate written notice to the Department, if at any time, the CONSULTANT or any Subconsultants, present or future, learn that its Debarment and Suspension certification has become erroneous by reason of changed circumstances.

**4.26 COVENANT AGAINST CONTINGENT FEES**

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

**4.27 SUBLETTING, ASSIGNMENTS AND TRANSFERS**

The CONSULTANT was chosen to perform the work on this CONTRACT based upon training and qualifications of its members. Therefore, subletting, assignment or transfer of any work to Subconsultants and their lower-tier Subconsultants, unless approved in writing by the STATE prior to performance of work, is expressly prohibited.

**4.28 SUBCONSULTANTS**

1. The CONSULTANT may retain Subconsultants on an "as required" basis, provided that the Subconsultants selected, and the rates to be paid, are identified on each Subconsultant's DERIVATION OF COST PROPOSAL located in the SCOPE OF WORK section 2.01 of the CONTRACT, or are approved by contract modification, or by Administrative Determination Letter, as applicable. All Subconsultants shall be required to follow the terms and conditions of this CONTRACT.

a. Subconsultants' Compensation

Each Subconsultant shall be expected to follow covenants set forth in 3.02(2). The Negotiated Overhead rate is in each Subconsultant's final DERIVATION OF COST PROPOSAL, as concurred with by the STATE. Each Subconsultant's negotiated Overhead rate is separately determined and may not be the same rate as stipulated for the CONSULTANT.

b. CONSULTANT'S Responsibility Regarding Subconsultant's Costs

The Subconsultant's allowable costs shall be governed by 3.02(2). The CONSULTANT shall monitor the billings received from the Subconsultants and ensure that all costs are documented and supported.

Regarding Indirect Costs (Overhead), the CONSULTANT is responsible for determining that the Subconsultants comply with 3.02(2) with respect to the negotiated Overhead rates. The Overhead rates for Subconsultants are "negotiated", and must be accounted for annually. A Subconsultant may not bill more than its negotiated Overhead rate.

All costs of the Subconsultants are subject to audit unless waived by the STATE.

2. The volume of work performed by the Subconsultants shall not exceed 49% of the total contract value unless waived by the STATE.

**4.29 SUBCONTRACTS**

The CONSULTANT agrees to insert in all subcontracts the clauses hereof entitled "Nondiscrimination," "Affirmative Action," "Ownership of Data," "Patents and Copyrights," "Anti-Lobbying," "Retention of Records," and "Federal Immigration and Nationality Act." The CONSULTANT further agrees to insert in any subcontract "Environmental Protection" clause for any subcontract exceeding \$100,000.

**4.30 KEY PERSONNEL**

Any substitution or transfer of personnel specifically identified in CONSULTANT'S proposal as assigned to the work of this CONTRACT shall be subject to prior written approval by the STATE.

**4.31 EMPLOYMENT OF PERSONNEL OF PUBLIC AGENCIES**

The CONSULTANT shall not engage the service of any person or persons employed by the STATE for work covered by the terms of this CONTRACT without the prior written approval of the STATE.

**4.32 ANTI-LOBBYING**

1. The CONSULTANT agrees to comply with the provisions of Section 1352 of Title 31, U.S. Code (Public Law 101.121) as codified in Title 48, Federal Acquisition Regulation (FAR) Subpart 3.8 and Subpart 52.203-11. The legislation prohibits federal funds from being expended by a recipient or any lower-tier subrecipients of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence a Federal agency or Congress in connection with the award of any Federal contract, cooperative agreement, including the extension, continuation, renewal, amendment or modification of any Federal contract, grant, loan or cooperative agreement. All disclosure statements shall be furnished to the STATE.
2. The CONSULTANT agrees to require all Subconsultants and their lower-tier Subconsultants who have agreements exceeding \$100,000 to complete and submit the "Disclosure of Lobbying Activities" form prior to execution of the CONTRACT (<http://www.whitehouse.gov/omb/grants/sfllin.pdf>). Lower-tier certifications shall be maintained by the CONSULTANT.

**4.33 OWNERSHIP OF DATA**

1. The CONSULTANT agrees to maintain (in sufficient detail as shall properly reflect all work done and results achieved in the performance of this CONTRACT) tracings, plans, specifications and maps, basic survey notes and sketches, books, records, reports, research notes, charts, graphs, comments, computations, analyses, recordings, photographs, computer programs and documentation thereof, and other graphic or written data generated in connection with the work called for in the CONTRACT; all such information and documentation to be termed "Data" under this CONTRACT.
2. All Data procured hereunder for the work funded by ADOT shall become the property of ADOT and delivered to ADOT upon request, and shall not be used or released by the CONSULTANT or any other person except with the prior written approval of the STATE; provided however, that CONSULTANT shall not be required to retain any Data not requested by ADOT within five (5) years from the date of final payment to the CONSULTANT hereunder; and provided further that until such delivery to ADOT the CONSULTANT agrees to permit representatives of ADOT and the Federal Highway Administration (FHWA) to examine and review, at reasonable times, all Data still in the possession of the CONSULTANT.
3. All services, information, computer program elements, reports and other deliverables which may be patented or copyrighted and created under this CONTRACT are the property of the STATE and shall not be used or released by the CONSULTANT or any other person except with the prior written approval of the STATE.

**4.34 ADOT PRODUCTS**

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

**4.35 RETENTION OF RECORDS**

1. Pursuant to A.R.S. §35-214, the CONSULTANT and any Subconsultant shall keep and maintain all books, papers, records, accounting records, files, accounts, reports, costs proposals with backup data and all other material relating to the CONTRACT and related project(s), and shall make all such material available at any reasonable time during the term of the CONTRACT and related project(s) for five (5) years from the date of final payment to the CONSULTANT for auditing, inspection and copying upon the STATE'S request or at FHWA'S request or any other authorized representative of the Federal Government.
2. The CONSULTANT shall insert in each of its subcontracts the above requirement and also a clause requiring its Subconsultants to include the above requirement in any lower-tier subcontracts or purchase orders.

**4.36 REVIEW AND INSPECTION**

Representatives of the STATE and the FHWA are authorized to review and inspect the CONTRACT activities and facilities during normal business hours.

**4.37 PROPERTY OR EQUIPMENT**

Except as otherwise provided in this CONTRACT, computer or other special equipment needed to fulfill this CONTRACT, shall be purchased through the ADOT Procurement Group and considered ADOT property. The control, utilization and disposition of property or equipment acquired using FEDERAL/STATE funds shall be determined in accordance with the property management standards set forth in 49 CFR Part 18, and ADOT Policy (FIN-11.02) and must follow the Fixed Assets procedures in both property identification and inventory control processes.

**4.38 NONDISCRIMINATION**

1. During the performance of this CONTRACT, the CONSULTANT, for itself, its Subconsultants, assignees and successors shall:
  - a. Not discriminate on the basis of race, color, national origin, or sex and shall carry out applicable requirements of 49 CFR Part 26 in the performance of this CONTRACT. Failure by the CONSULTANT to carry out these requirements is a material breach of this CONTRACT, which

may result in the termination of this CONTRACT, disqualification from proposing on other CONTRACTS or other remedy as the STATE deems appropriate.

- b. Comply with Executive Order 99-4, "Prohibition of Discrimination in Employment by Government contractors and Subcontractors," which is hereby included in its entirety by reference and considered a part of this CONTRACT.
- c. Comply with the provisions of Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor Regulations (41 CFR Part 60). Said provisions are made applicable by reference and are hereinafter considered a part of this CONTRACT.
- d. Post in conspicuous places available to employees and applicants for employment, the following notice:

"It is the policy of this company not to discriminate against any employee, or applicant for employment, because of race, color, religion, creed, national origin, sex, age, handicapped, or disabled veterans and Vietnam era veterans. Such actions shall include, but are not limited to: employment, upgrading, demotion, transfer, recruitment, or recruitment advertising; laying-off or termination; rates of pay or other compensation; and selection for training, and on-the-job training. Also, it is the policy to insure and maintain a working environment free of harassment, intimidation and coercion."
- e. Comply with the Regulations relative to nondiscrimination in Federally-assisted programs of the U.S. Department of Transportation (hereinafter DOT), 49 CFR Part 21, as they may be amended from time to time, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this CONTRACT.
- f. Not discriminate on the grounds of race, color, sex, or national origin in the selection and retention of Subconsultants, including procurement of materials and leases of equipment. The CONSULTANT shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices.
- g. In all solicitations either by competitive bidding or negotiations made by the CONSULTANT for work to be performed under a subcontract, including procurement of materials or leases of equipment, notify each potential Subconsultant or supplier of the CONSULTANT'S obligations under this CONTRACT and the Regulations relative to nondiscrimination on the ground of race, color, or national origin.
- h. Provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the STATE to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a CONSULTANT is in the exclusive possession of another who fails or refuses to furnish this information, the CONSULTANT shall so certify to the STATE as appropriate, and shall set forth what efforts it has made to obtain the information.

2. In the event of the CONSULTANT'S noncompliance with the nondiscrimination provisions of this CONTRACT, the STATE shall impose such CONTRACT sanctions as the STATE or FHWA may determine to be appropriate, including but not limited to:
  - a. Withholding of payments to the CONSULTANT under the CONTRACT until the CONSULTANT complies, and/or;
  - b. Cancellation, termination, or suspension of the CONTRACT, in whole or in part.
3. The CONSULTANT shall include the provisions of paragraph (1) (a) through (h) in every subcontract, including procurement of materials and leases of equipment, unless exempt by the Regulations or directives issued pursuant thereto.
4. The CONSULTANT shall take such action with respect to any Subconsultants or procurement as the STATE or the Federal Aviation Administration (FAA), FHWA and the Federal Transit Administration (FTA) may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, however, that in the event the CONSULTANT becomes involved in or is threatened with litigation with a Subconsultant or supplier as a result of such direction, the CONSULTANT may request the STATE to enter into such litigation to protect the interests of the STATE, and in addition, the CONSULTANT may request the United States to enter into such litigation to protect the interests of the United States.

#### 4.39 AFFIRMATIVE ACTION

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

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

#### 4.40 PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES - COMPLIANCE AND REPORTING

1. The Department has established a Disadvantaged Business Enterprise (DBE) program in accordance with the regulations of the U.S. Department of

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

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

- a. Ensure nondiscrimination in the award and administration of federally-funded contracts;
- b. Create a level playing field on which DBEs can compete fairly for federally-funded contracts;
- c. Ensure that the DBE program is narrowly tailored in accordance with applicable law;
- d. Ensure that only firms that fully meet 49 CFR Part 26 eligibility requirements are counted as DBEs;
- e. Help remove barriers to the participation of DBEs in federally-funded contracts; and
- f. Assist in the development of firms that can compete successfully in the marketplace.

Federal regulations require a recipient of federal highway funding to implement an approved DBE Program that consists of establishing a statewide DBE utilization goal and using race-neutral means to the maximum feasible extent to achieve the goal. Where race-neutral measures prove inadequate to achieve the goal, the STATE is required to use race-conscious measures, such as a DBE participation goal for individual contracts.

The Department has established an overall annual goal for DBE participation on Federal-aid contracts. The Department intends to meet the goal with a combination of race-conscious efforts and race-neutral efforts. Race-conscious participation occurs where the CONSULTANT uses a percentage of DBEs to meet a contract-specified goal. Race-neutral efforts are those that are, or can be, used to assist all small businesses or increase opportunities for all small businesses.

2. The CONSULTANT is required to adhere to the commitment made to utilize certified Disadvantaged Business Enterprises (DBE) as indicated in the firm's Statement of Qualifications (SOQ) or subsequently agreed to by the STATE during negotiations. The STATE, at its discretion on a case by case basis, may waive the above limitations.
3. This CONTRACT is subject to CONTRACT compliance tracking, and the CONSULTANT and any Subconsultants are required to provide any requested DBE CONTRACT compliance-related data in hard copy or electronically as determined by the STATE, including written agreements between the CONSULTANT and Subconsultant DBEs. The CONSULTANT must report the amount earned by and paid to each DBE working on the project for the preceding month on each monthly Progress Payment Report. The CONSULTANT is responsible for ensuring that the CONSULTANT and all Subconsultants have completed all requested items and that their contact information is accurate and up-to-date.

4. The CONSULTANT shall report monthly payments made to DBE Subconsultants for labor, equipment, and materials. If the CONSULTANT and its Subconsultants do not provide all required DBE usage and payment information with the monthly Progress Payment Reports submittals for the preceding month, the STATE shall deduct \$1,000 for each delinquent report, whether from the CONSULTANT or any of its Subconsultants, from the progress payment for the current month, not as a penalty but as liquidated damages. If by the following month, the required DBE payment information for the previous month has still not been provided, the STATE shall deduct an additional \$1,000 for each delinquent report. Such deductions shall continue for each subsequent month that the CONSULTANT or its Subconsultants fail to provide the required payment information.
5. At the completion of the contract, the CONSULTANT must submit a Certificate of Payment Affidavit certifying that all DBEs were paid in full for material and/or work promised and performed under the terms of the CONTRACT.
6. The CONSULTANT must not terminate a DBE Subconsultant listed in the SOQ and then perform the work of the terminated Subconsultant with its own forces, those of an affiliate or another Subconsultant without the prior consent of the STATE.
7. If a Subconsultant is terminated, or fails to complete its work on the CONTRACT for any reason, the CONSULTANT must make a good faith effort to find another DBE to perform at the least the same amount of work under the CONTRACT as the DBE that was terminated, to the extent needed to meet the DBE commitment percentage established in the CONTRACT.

#### 4.41 COUNTING DBE PARTICIPATION

In counting participation of DBEs, the Department shall apply the rules in 49 CFR 26.55 (see Appendix \_\_\_ ) as a supplement herein. The firm must count only the value of the work actually performed by the DBE toward DBE goals. No credit shall be allowed for shipping, manufacturing or supply.

1. CONTRACTS created to artificially create DBE participation are not acceptable; the arrangement must be within normal industry practices. The DBE must perform a commercially useful function.
2. Count the entire amount of that portion of a CONTRACT (or other CONTRACT not covered by paragraph (2) of this section) that is performed by the DBE's own forces. Firms should include the cost of supplies and materials obtained by the DBE for the work on the CONTRACT, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE Subconsultant purchases or leases from the CONSULTANT or its affiliate).
3. 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 specially required for the performance of a DOT-assisted contract, toward DBE goals, provided the fee is determined to be reasonable and not excessive as compared with the fees customarily allowed for similar services.

4. 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 CONSULTANT is itself a DBE. Work that a DBE subcontracts to a non-DBE does not count toward DBE goals.
5. 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, 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, it is presumed that the DBE is not performing a commercially useful function.

#### 4.42 ENVIRONMENTAL PROTECTION

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

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

#### 4.43 ENERGY CONSERVATION

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

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

#### 4.44 PUBLICATION PROVISIONS

The CONSULTANT shall provide monthly, quarterly or annual written progress reports requested by the STATE. Prior to completion of the CONTRACT and related project(s), the CONSULTANT shall prepare a final report summarizing activities, conclusions, and recommendations in a form as prescribed by the STATE, and this report shall be a prerequisite for final payment. Publication rights to all reports are reserved by the STATE. The CONSULTANT shall not release information developed under the CONTRACT prior to publication, except upon written approval of the STATE.

#### 4.45 PATENTS AND COPYRIGHTS

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

**4.46 FEDERAL IMMIGRATION AND NATIONALITY ACT:****(A) General**

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

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

**(B) Compliance Requirements for A.R.S. § 41-4401, Government Procurement, E-Verify Requirement; Sanctions**

By submission of a bid, the CONSULTANT warrants that the CONSULTANT and all proposed Subconsultants are and shall remain in compliance with:

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

A breach of a warranty regarding noncompliance with immigration laws and regulations shall be deemed a material breach of the CONTRACT, and the CONSULTANT and Subconsultants are subject to sanctions specified in Section D below.

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

**(C) Compliance Verification**

The STATE may, at its sole discretion, require evidence of compliance from the CONSULTANT or Subconsultant.

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

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

The STATE retains the legal right to inspect the papers of any employee who works on the CONTRACT to ensure that the CONSULTANT or Subconsultant is complying with the warranty specified in this Section.

**(D) Sanctions for Noncompliance**

For purposes of this paragraph, noncompliance refers to either the CONSULTANT’S or Subconsultant’s failure to follow the immigration laws or the CONSULTANT’S failure to provide records when requested. Failure to comply with the immigration laws or to submit proof of compliance constitutes a material breach of the CONTRACT. At a minimum, the Department shall reduce the CONSULTANT’S compensation by \$10,000 for the initial instance of noncompliance by the CONSULTANT or Subconsultant. If the same CONSULTANT or Subconsultant is in noncompliance within two (2) years from the initial noncompliance, the CONSULTANT’S compensation shall be reduced by a minimum of \$50,000 for each instance of noncompliance. The third instance by the same CONSULTANT or Subconsultant within a two-year period may result, in addition to the minimum \$50,000 reduction in compensation, in removal of the offending CONSULTANT or Subconsultant, suspension of work in whole or in part or, in the case of a third violation by the CONSULTANT, termination of the CONTRACT for default.

In addition, the Department may debar the CONSULTANT or Subconsultant for up to one year who is in noncompliance three times within a two-year period. For purposes of considering debarment, (1) noncompliance by a Subconsultant does not count as a violation by the CONSULTANT, and (2) the Department shall count instances of noncompliance on other Department CONTRACTS.

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

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

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

Offense by:			Minimum Reduction in Compensation
Consultant	Subconsultant A	Subconsultant B	
First			\$10,000
	First		\$10,000
	Second		\$50,000
		First	\$10,000
	Third		\$50,000 *

\* May, in addition, result in removal and debarment of the Subconsultant.

In Witness whereof the parties hereto have executed this agreement as of the day and year first herein written.

FOR THE STATE

ARIZONA DEPARTMENT OF TRANSPORTATION

\_\_\_\_\_

Date

By: \_\_\_\_\_

\_\_\_\_\_

Title

FOR THE CONSULTANT

FIRM NAME

\_\_\_\_\_

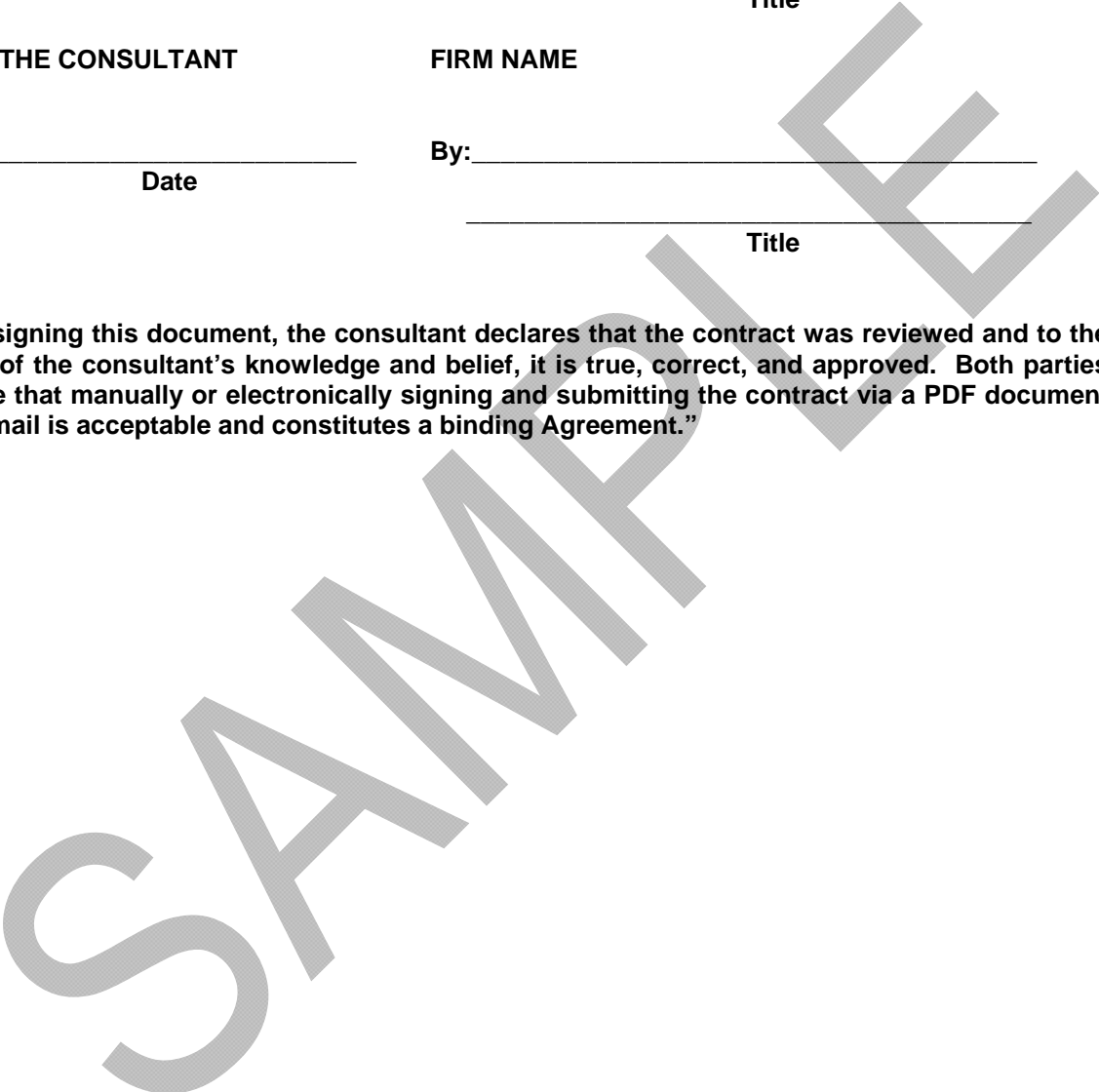
Date

By: \_\_\_\_\_

\_\_\_\_\_

Title

“By signing this document, the consultant declares that the contract was reviewed and to the best of the consultant’s knowledge and belief, it is true, correct, and approved. Both parties agree that manually or electronically signing and submitting the contract via a PDF document by email is acceptable and constitutes a binding Agreement.”



Appendix \_\_\_\_\_

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

**Introduction & Purpose**

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

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

**Implementation Timeline**

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

**Uses for Consultant Evaluation**

The Consultant Evaluations shall be used for the following purposes:

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

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

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

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

3. As documentation to justify disqualification of the CONSULTANT or Subconsultant from submitting Statement of Qualifications (SOQ) proposals. In order for ECS to take action that could lead to CONSULTANT disqualification from submitting SOQs, the ADOT PM or staff shall complete a Consultant Evaluation by initiating the process through the ECS Specialist. When

an evaluation form is used to document issues which could lead to the CONSULTANT disqualification from submitting SOQ proposals (as outlined in Section 2.02 of the ECS Rules and Procedures), the ECS Specialist shall initiate consultant evaluation type "Other" in eCMS.

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

### **Procedures**

ECS Specialist initiates the completion of consultant evaluation forms for CONTRACTS annually on the CONTRACT'S NTP anniversary date.

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

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

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

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

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

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

### **General Guidelines**

1. Each individual line item in the evaluation constitutes a performance factor.
2. ECS shall assign negative points based on individual factor scores, not on an overall composite score.

3. Each individual performance factor and category on the form shall be treated equally.
4. General comments are highly recommended to support scores in each major performance category.
5. Documentation and specific comments must be included to justify any performance factor receiving a score of 2 or less.
6. The ADOT PM, ECS and other appropriate ADOT staff are encouraged to take appropriate steps to resolve performance issues with the CONSULTANTS, as they arise, in a timely manner, and to document these issues in the eCMS Evaluation tab for that particular CONTRACT. This information shall be used as a means of documenting issues for future evaluation ratings.
7. If performance issues arise, ADOT PMs and ECS Contract Managers should expeditiously inform the CONSULTANTS, in writing, that they are performing unsatisfactorily (using the Issues Resolution form in eCMS) to provide them the opportunity to take corrective action to cure the deficiency before they are formally evaluated (Annual or Final evaluation). The following steps must be taken if there are performance issues with the CONSULTANT, which could potentially lead to an evaluation score of less than 3 (average):
  - a) If communicating to resolve the matter with the CONSULTANT informally does not resolve the issue, the ADOT PM, ECS Specialist, ECS Manager or other appropriate ADOT employee shall notify the CONSULTANT, in writing, of the deficient performance, identify the required solutions and establish a deadline to resolve the issues. The Consultant Performance Issues Resolution form in eCMS should be completed by the appropriate ADOT staff and forwarded to the CONSULTANT for further action, as needed.
  - b) If the CONSULTANT does not respond within ten (10) business days or other timeframe specified on the form and/or the matter is still unresolved after the deadline set for the cure, it is appropriate for the ADOT staff to rate the CONSULTANT a 2 or less on the applicable evaluation criteria on the consultant evaluation form.
8. The CONSULTANT should take the initiative to expeditiously contact the ADOT PM or ECS if they are experiencing difficulties which could result in a score of less than 3 on any performance factor. The CONSULTANT should identify any problems, state proposed resolutions and specify dates the CONSULTANT expects to resolve the issues.
9. Subconsultant performance will affect the scores of the CONSULTANT as it relates to performance factors in item #9, "Utilization of Key Subconsultants." Therefore, it is important for the CONSULTANT to closely oversee the work of their Subconsultants.
10. The Subconsultant scores on Item #10 of the evaluation will not affect the scores of the CONSULTANT. ECS will maintain an evaluation history on Subconsultants.
11. If the CONSULTANT or Subconsultant receives 10 or more scores of 2 or less on evaluations within a two-year time period, these firms may be evaluated as candidates for disqualification from submitting future SOQs to ECS, and may not be eligible for work as a CONSULTANT or Subconsultant on ECS contracts for a minimum of one year. A list of CONSULTANTS that are pre-qualified and/or disqualified from submitting SOQs will be posted on the ECS website. Individual consultant evaluation scores will not be posted.
12. New CONSULTANTS with no ADOT contracts or evaluation history shall be evaluated according to the criteria outlined in the SOQ Package and shall not be evaluated based on past performance.
13. CONSULTANTS' ratings shall not be adversely affected if ADOT reduces the scope of work or in some way delayed or impacted the ability of the CONSULTANT to reasonably meet a performance factor.

14. There is no formal escalation process for consultant evaluation issues at this time. However, if the CONSULTANT believes that the firm has been unfairly evaluated and rated, the firm can indicate its points of disagreement on the evaluation form itself or submit a letter to ECS, which shall be included as an official part of the evaluation file and may be considered by ECS as a mitigating factor.

SAMPLE

**APPENDIX \_\_\_\_\_****TITLE 49 - TRANSPORTATION  
Subtitle A – Office of the Secretary of Transportation****PART 26 PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT  
OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS**

[Code of Federal Regulations]; [Title 49, Volume 1]; [Revised as of October 1, 2008]  
From the U.S. Government Printing Office via GPO Access; [CITE: 49CFR26.55]; [Page 300-302]

**Subpart C Goals, Good Faith Efforts, and Counting****§26.55 - How is DBE participation counted toward goals?**

- (a) When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.
  - (1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. 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).
  - (2) 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 you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
  - (3) 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.
- (b) 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.
- (c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.
  - (1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying 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 used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must 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.
  - (2) 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. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.
  - (3) 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 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, you must presume that it is not performing a commercially useful function.
  - (4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption.

You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

- (5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.
- (d) Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:
  - (1) 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.
  - (2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
  - (3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
  - (4) 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 lessee DBE provides on the contract.
  - (5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate Department Operating Administration.

Example to this paragraph (d)(5): 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 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. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.

- (6) For purposes of this paragraph (d), 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.
- (e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:
  - (1) (i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.
  - (ii) For purposes of this paragraph (e)(1), a manufacturer is 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.
  - (2) (i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.
  - (ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, 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.
    - (A) 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.
    - (B) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) 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.

- (C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).
- (3) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged 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 you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.
- (f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in Sec. 26.87(i)).
- (g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.
- (h) Do 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.

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