

San Diego Association Governments

DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

For U.S. Department of Transportation Funded Projects

May 2022

Submitted in fulfillment of:

Section 1101 of the Transportation Equity Act for the 21st Century
49 Code of Federal Regulations Part 26



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I. POLICY STATEMENT AND PROGRAM OBJECTIVES

Policy Statement/Objectives (§26.3, §26.7, §26.21, §26.23)

The San Diego Association of Governments (SANDAG) has established and adopted a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), Title 49, Code of Federal Regulations (CFR), Part 26 “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs.” SANDAG has received federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, SANDAG has signed an assurance that it will comply with Title 49 CFR Part 26. The SANDAG DBE Program will be implemented immediately upon publication.

It is the policy of SANDAG to ensure that DBEs as defined in 49 CFR Part 26 have an equal opportunity to receive and participate in SANDAG’s DOT–assisted contracts. It is also our policy to:

1. Ensure non-discrimination in the award and administration of all SANDAG contracts and subcontracts;
2. Create a level playing field by which DBEs can compete for and perform in SANDAG’s DOT-assisted contracts;
3. Ensure that the SANDAG DBE Program is narrowly tailored in accordance with applicable law and current legal standards, including the Ninth Circuit Ruling in *Western States Paving vs. Washington State Department of Transportation*;
4. Ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. Help remove procurement and contracting barriers, which impede DBE participation in SANDAG DOT-assisted contracts;
6. Monitor and enforce contractor compliance in meeting established goal objectives and program requirements;
7. Assist in the development of DBEs and Small Businesses to increase their ability to compete successfully in the SANDAG contracting program; and
8. Ensure SANDAG contractors and subcontractors take all necessary and reasonable steps to comply with these policy objectives.

As evidence of SANDAG’s commitment to pursue these policy objectives, the Executive Director has designated Elaine Richardson, Director of Diversity & Equity, as the DBE Liaison Officer (DBELO). In this capacity Ms. Richardson is responsible for implementing all aspects of the DBE program. The DBELO has direct access to the Executive Director for DBE-related matters. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by SANDAG in its financial assistance agreements with DOT.



SANDAG has disseminated this policy statement to all of the departments of our organization. Additionally, SANDAG will post this policy on the SANDAG website for DBE and non-DBE businesses that are interested in performing work on SANDAG projects.

Through such efforts, SANDAG will ensure DOT-assisted contracting and procurement related processes promote equity in access, consideration and opportunity for DBEs and other small businesses in response to requirements set forth under 49 CFR Part 26; "Participation of Disadvantaged Business Enterprises in U.S. Department of Transportation Programs," effective March 4, 1999, and subsequently issued DOT Directives and Final Rules.

Elaine Richardson, Director of Diversity and Equity & DBE Liaison Officer

Elaine Richardson

(Signature)

5/6/2022

Date

II. APPLICABILITY (§26.3, §26.21)

SANDAG has an established DBE Program in accordance with Title 49 CFR Part 26 provisions, which concerns participation by DBEs DOT Programs. Since SANDAG receives funding directly from the Federal Transit Administration (FTA), it has established and implemented a distinct DBE Program for FTA-assisted projects. SANDAG also receives funds from the Federal Highway Administration (FHWA) as a subrecipient through the California Department of Transportation (Caltrans). SANDAG is required to adopt the Caltrans DBE Program for FHWA-assisted contracts, including setting goals on individual contracts.

SANDAG, as a direct recipient of federal funds from DOT (FTA), and as a condition of federal financial assistance, is required to submit for approval to the DOT Operating Administrations from which it receives the majority of its funding, a DBE Program developed in accordance with federal regulations published under Title 49 CFR Part 26 and subsequent guidance. This DBE Program sets forth the policies and procedures to be implemented by SANDAG to ensure that DBEs have an equitable opportunity to participate in DOT-assisted contracting opportunities.

In direct response to these regulatory requirements, SANDAG hereby establishes a DBE Program, which will:

1. Comply with federal regulations and financial assistance agreements;
2. Meet legal standards for narrow-tailoring requirements;
3. Ensure non-discrimination in the award of DOT-assisted contracts; and
4. Reaffirm SANDAG's commitment to fairness and the principles of equal opportunity.

In conformance with 49 CFR Part 26, SANDAG will continue to carry out its DBE Program until all DOT funds have been expended.

SANDAG additionally complies with the Caltrans DBE Program on projects on which it is a subrecipient of federal funds through Caltrans and follows the Caltrans Local Assistance Procedures Manual (LAPM).

SANDAG will advise all applicable DOT Operating Administrations of any significant updates and/or changes to this DBE Program.

SANDAG has established additional requirements for alternative delivery method projects, including design-build and construction manager / general contractor (CMGC) projects. SANDAG will comply with DOT regulations, best practices, and subsequent regulations for these projects. SANDAG has developed guidance for complying with alternative delivery projects and has included this guidance as Exhibit A - DBE Program Requirements Specific to Alternative Delivery Method Projects.

III. DEFINITION OF TERMS (§26.5)

Race-Conscious Measure or Program: A program or portion thereof that focuses specifically on assisting only DBEs, including minority and women-owned DBEs, by the development and inclusion of participation goals or Good Faith Effort activities.

Race-Neutral Measure or Program: A program or portion thereof that assists all small businesses, including DBEs, regardless of ownership status, in successfully participating in SANDAG’s procurement program. For the purposes of the DBE Program, “race-neutral” includes gender-neutrality.

Any other term used in this DBE Program shall have the meaning set forth in 49 CFR Part 26, (see Exhibit B, “DBE Program Regulations”, 49 CFR Part 26, §26.5).

IV. RESPONSIBILITIES FOR DBE PROGRAM IMPLEMENTATION

A. DBE Liaison Officer (§26.25)

SANDAG has designated the following individual as the Disadvantaged Business Enterprise Liaison Officer (DBELO):

Ms. Elaine Richardson
Director of Diversity and Equity
San Diego Association of Governments
401 B Street, Suite 800
San Diego, CA 92101
Telephone: (619) 699-6956; Fax: (619) 699-4889
Email: elaine.richardson@sandag.org

In this capacity, the DBELO is responsible for implementing all aspects of the DBE Program and ensuring that SANDAG complies with all provisions of 49 CFR Part 26 and subsequent DOT-issued directives and final rules. The DBELO has direct, independent access to the SANDAG Executive Director concerning DBE Program matters (Refer to Exhibit C, “DBE Program Organizational Chart”). The DBELO has sufficient support personnel who devote a portion of their time to implement the Program. The DBELO is responsible for developing, implementing, and monitoring the DBE Program, in coordination with other appropriate officials.

The DBELO’s and/or designee’s duties include, but are not limited to, the following activities:

1. Gathers and reports statistical data and other information as required by the DBE Program, including preparation of semi-annual DBE reports and overall Program

- DBE goals and related analysis for submission to the applicable DOT Operating Administration and management ad hoc reporting.
2. Reviews applicable contracts, purchase requisitions, advertisements, boilerplate language specifications and other related documentation specific to implementing applicable DBE requirements.
 3. Consults with all affected departments in developing overall Program DBE goals and project goals.
 4. Ensures that bid notices and requests for proposals are made available to DBEs in a timely manner.
 5. Reviews DOT-assisted contracts and procurements for purposes of applying contract-specific DBE goals, when appropriate, and/or applicable race-neutral methods.
 6. Analyzes SANDAG's progress towards meeting overall Program DBE goal commitments by monitoring individual contract DBE attainments (with the SANDAG Compliance Information System).
 7. Participates in pre-bid meetings for purposes of reviewing DBE solicitation and contract requirements with potential bidders and/or offerors.
 8. Advises the Executive Director on DBE matters and achievements.
 9. Conducts contract DBE responsiveness reviews, including assessing DBE participation eligibility towards SANDAG's overall Program DBE goal, as applicable, to both race-conscious and race-neutral methods.

Additionally, the DBELO and/or designee is/are charged with implementing the race-neutral measures defined in Section VI of this DBE Program document.

V. ADMINISTRATIVE REQUIREMENTS

A. Non-Discrimination Requirements (§26.7)

SANDAG will never 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, or national origin.

In administering its DBE program, SANDAG 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, or national origin.

B. Federal Financial Assistance Agreement Assurance (§26.13 {a})

SANDAG will sign the following assurance as a condition of financial assistance agreements with the DOT, and which is hereby made applicable to all of SANDAG's DOT-assisted contracts:

“SANDAG shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any U.S. DOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. SANDAG shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of U.S. DOT-assisted contracts. SANDAG's DBE Program, as required by 49 CFR Part 26 and as approved by U.S. 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 SANDAG of its failure to carry out its approved program, the Department may impose sanctions as provided 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.).”

C. Significant Updates to DBE Program (§26.21)

SANDAG will submit an updated DBE Program Plan for FTA approval when significant changes are made to the SANDAG DBE Program or to remain in compliance as a result of revised DBE Program regulations under 49 CFR Part 26.

D. DBE Financial Institutions (§26.27)

It is the policy of SANDAG to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to utilize these institutions, as available, and to encourage prime contractors on SANDAG's DOT-assisted contracts to make use of these institutions.

SANDAG has identified DBE-Owned financial institutions and provides this information to bidders and proposers interested in doing business with SANDAG. SANDAG also encourages contractors/consultants to use the services of minority and women-owned financial institutions identified from listings posted at the Website of the Financial Management Service, US Department of the Treasury, Minority Bank Deposit Program. The Internet address of this website is <http://www.fms.treas.gov/mbdp>.

E. DBE Directory (§26.31)

SANDAG refers interested parties to the California Unified Certification Program (CUCP) Database of Certified DBE Firms (DBE Directory) to assist in identifying certified DBEs. The DBE Directory is published at <https://caltrans.dbesystem.com/>.

F. Overconcentration (§26.33)

SANDAG has not identified any types of work that have a burdensome overconcentration of DBE participation. However, should SANDAG determine that overconcentration exists, SANDAG will obtain the approval of the concerned DOT Operating Administration of its determination and the measures devised to address it. Once these measures are approved, they will become part of SANDAG's DBE Program.

G. Business Development Programs (§26.35)

SANDAG has established a business development program and co-sponsors a mentor-protégé Architecture and Engineering (A & E) program with Caltrans. The Calmentor program is a mentoring program that pairs small businesses with large firms to enhance small business operations to achieve their growth potential. The program is guided by the applicable Appendix of 49 CFR Part 26 and has been approved by the cognizant DOT Operating Administration. SANDAG has also implemented other efforts to assist small businesses, including DBEs, participate in SANDAG DOT procurements. Each year, SANDAG participates in various small business events, which may include collaboration with other public agencies and other DOT recipients. SANDAG provides for networking opportunities at pre-proposal, pre-bid, and pre-SOQ meetings, which provide additional business development opportunities for small businesses, including DBEs.

H. Fostering Small Business Participation (§26.39)

SANDAG will structure contracting requirements to facilitate competition by small businesses by analyzing all procurements and where appropriate may require prime contractors to specify elements of work that small businesses can perform and to provide subcontract opportunities for those elements to DBEs and other small businesses.

SANDAG will take all reasonable steps to eliminate obstacles to the participation of small business concerns in its contracting program. To this end, the following strategies will be utilized as appropriate:

- Effective February 28, 2012, SANDAG has established a Small Business Element as a supplement to the existing DBE Program to facilitate competition by small business concerns.

- SANDAG will assess multi-year Design-Build contracts to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.
- SANDAG encourages prime contractors/consultants to subcontract portions of the work they might otherwise perform with their own forces to DBEs and other small businesses. SANDAG has developed small business benches for our Architectural and Engineering (A&E), Construction Management, and Planning contracts. Prime consultants are required to consider small businesses and DBEs in the Bench for subcontracting opportunities when responding to Task Order requests.
- Small business (SB) goals will be added to non-federally funded projects on a case-by-case basis. Determination of when SB goals will be placed on projects will be based on established SANDAG policies. The eligibility for a SB to qualify for credit toward a SB goal will be based on a firm's certification status at the time of bid/proposal due date. SB eligibility will be based on California Department of General Services (DGS) small business certification.
- An SB preference program will provide for preference evaluation points when SBs propose as primes and when a non-SB includes a minimum level of SB participation as determined by the solicitation.
- SANDAG has implemented a [Community Benefits Agreement \(CBA\)](#) that provides access to skilled and trained workforce and addresses the needs of underserved groups that have historically experienced significant barriers to participating in employment within the construction industry. The CBA provides provisions that promote the participation of small businesses by exempting small businesses from certain union hiring requirements.
- SANDAG will ensure that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can perform.
- SANDAG will determine small business size utilizing SBA size standards under 13 CFR §121.201. SANDAG will verify small business size by reviewing small business certifications issued by the California Department of General Services.

VI. DBE PARTICIPATION TOWARDS THE OVERALL DBE GOAL (§26.45; §26.51; §26.55)

SANDAG is currently operating a race-conscious DBE Program in accordance with DOT guidance following the Western States Paving decision of the 9th Circuit Court of Appeals.

A. Methodology for Setting Overall DBE Goals (§26.45; §26.49)

FTA-Funded Projects (Recipient)

In accordance with §26.45(e)(3), and with FTA approval, SANDAG establishes an overall program goal on a triennial basis. The overall program goal represents the amount of DOT-assisted funds SANDAG anticipates expending on DBE firms over three years and is presented as a percentage of the total DOT-assistance received.

The overall program goal is developed in accordance with the 2-step process specified in §26.45 (c) & (d). The first step is to determine the goal “base figure” based on the relative availability of DBEs in SANDAG’s market area. The second step is to adjust the goal “base figure” from Step 1 so that it reflects as accurately as possible the DBE participation SANDAG would expect in the absence of discrimination based on past participation, a disparity study, and/or information about barriers to DBE participation.

SANDAG provides for public participation in establishing an overall program goal. SANDAG publishes a notice of the proposed overall program goal, informing the public that the proposed goal and its rationale are available for 30 days following the date of the notice, and informing the public that SANDAG and DOT will accept comments on the goals for 30 days from the date of the notice. SANDAG hosts a public facilitation forum webinar to present and answer questions on the overall program goal and methodology.

Additionally, SANDAG issues a notice to minority, women’s and general contractor groups, community organizations, and other officials or organizations to solicit information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and SANDAG efforts to establish a level playing field for the participation of DBEs.

SANDAG submits the overall program goal to DOT in accordance with §26.45 (f)(2). The overall goal submission to DOT includes a summary of information and comments received during this public comment/participation process and any SANDAG responses.

SANDAG begins using the overall goal on October 1 of each year, unless otherwise instructed by DOT.

FHWA/Caltrans-Funded Projects (Subrecipient)

SANDAG, as a subrecipient of FHWA funding through Caltrans, has submitted a DBE Implementation Agreement for Local Agencies (LAPM Exhibit 9-A) to formally acknowledge SANDAG’s commitment to implement the Caltrans DBE program. SANDAG adopts Caltrans’ overall statewide DBE goal for FHWA/Caltrans funded projects. Annually, SANDAG submits to Caltrans the Local Agency DBE Annual Submittal Form (LAPM Exhibit 9-B) and the Local Agency ADA Annual Certification Form (LAPM Exhibit 9-C).

B. Goal Setting and Accountability (§26.47)

SANDAG will annually review DBE attainments in contrast to the overall DBE goal to determine if any measures need to be instituted to effectively meet the established overall DBE goal. SANDAG will further follow accountability mechanisms in instances where SANDAG has failed to meet its overall goal for a given fiscal year. SANDAG will thoroughly analyze why it fell short of meeting the overall goal for a given goal period and establish specific steps and milestones for correcting identified problems so that SANDAG will meet the overall goal in subsequent years. SANDAG will submit the proposed plan to DOT within 90 days of the end of the fiscal year, as applicable, to ensure compliance. SANDAG will additionally maintain strong outreach efforts to encourage minority- and women-owned firms to become certified as DBEs, to afford SANDAG the ability to set and meet realistic goals.

C. Transit Vehicle Manufacturers (TVM) Certifications (§26.49)

SANDAG will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on DOT-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Alternatively, SANDAG may, at its discretion and with DOT 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. TVM purchases will be reported to FTA within 30 days from the date of the award. SANDAG will report TVM purchases using the appropriate online reporting system and include all information required by FTA.

D. Race-Neutral Measures (§26.51)

SANDAG will implement the following race-neutral measures which are aimed at increasing DBE and other small business participation.

1. SANDAG will arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE and other small business participation. SANDAG will also hold conferences, which include a networking component to promote teaming opportunities between prospective prime contractors and the DBE and small business contracting community.
2. SANDAG will provide assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs and other small businesses obtain bonding and financing). Specifically, SANDAG will, through its website, refer the DBE and small business contracting community to the SBA Bonding Assistance Program.
3. SANDAG will solicit DBE and other small businesses participation by carrying out information and communication programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs and other small

businesses on recipient mailing lists of bidders; ensuring the dissemination of lists of potential subcontractors to bidders on prime contracts; provision of information in languages other than English, where appropriate).

4. As a supportive service to help develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses, SANDAG will actively promote small business conferences, programs, and support services offered by other agencies that have established DBE and small business programs.
5. SANDAG will advise its contracting community of the online directory of certified DBEs: <https://caltrans.dbesystem.com/>.

SANDAG will also advise the contracting community of the available small businesses certified by the California Department of General Services (DGS): <https://caleprocure.ca.gov/pages/PublicSearch/supplier-search.aspx>.

6. SANDAG developed three DBE and small business bench programs to assist certified small and disadvantaged businesses in their efforts to participate in A&E, Construction Management (CM), and Planning contracts. To participate in the SANDAG A&E or CM Bench, firms must be an architect or engineering firm, or a professional services firm performing services on construction management contracts. To participate in the Planning services contracts, firms must have the requisite planning services qualifications and experience. These firms must be certified as either a DBE by the California Unified Certification Program or a Small Business (SB) certified by DGS. The three Benches are open to DBE and SB firms that provide a variety of professional A&E, CM, or planning services and can serve as a pool of certified firms that prime consultants will be able to easily access to work on SANDAG projects.
7. SANDAG implemented a [Community Benefits Agreement \(CBA\)](#) that provides access to skilled and trained workforce and addresses the needs of underserved groups that have historically experienced significant barriers to participating in employment within the construction industry. The CBA provides provisions that promote the participation of DBEs by exempting DBEs from certain union hiring requirements. Further, the CBA requires that SANDAG Contractors create opportunities for Disadvantaged Businesses consistent with SANDAG goals and inclusion programs for such businesses.

E. Contract Goals (\$26.51)

FTA-Funded Projects

SANDAG will use contract DBE goals to meet any portion of the overall goal SANDAG does not project being able to meet with the use of race-neutral means. Contract goals are established so that over the period to which the overall goal applies, they will cumulatively result in meeting any portion of the overall goal that is not projected to be met through the use of race-neutral means.

Contract goals will be established only on those DOT-assisted contracts that have subcontracting possibilities. Contract goals need not be established on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work). The contract work items will be compared with eligible DBE firms willing to work on the project. A determination will also be made to decide which items are likely to be performed by the consultant and which ones are likely to be performed by the subconsultants. The goal will then be incorporated into the RFP and contract documents. Contract goals will be expressed as a percentage of the total amount of a DOT-assisted contract.

FHWA/Caltrans-Funded Projects

As a subrecipient to Caltrans, SANDAG will establish contract goals only on those FHWA/Caltrans-funded contracts that have subcontracting possibilities. The contract work items will be compared with eligible DBE firms willing to work on the project. A determination will also be made to decide which items are likely to be performed by the consultant and which ones are likely to be performed by the subconsultants. The goal will then be incorporated into the RFP and contract documents. Contract goals will be expressed as a percentage of the total amount of a DOT-assisted contract.

SANDAG will develop DBE contract goals in accordance with the Caltrans LAPM and will set the goal using LAPM Exhibit 9-D: DBE Contract Goal Methodology. As required by section 9.7 of the LAPM, SANDAG will submit LAPM Exhibit 9-D to the District 11 District Local Assistance Engineer (DLAE) for review and approval for construction contracts greater than \$2 million and consultant contracts greater than \$500,000. SANDAG will not advertise the contract for these solicitations before receiving approval from the DLAE on the DBE goal.

F. Use of Set-Asides or Quotas (\$26.43)

SANDAG shall not permit the use of quotas for DBEs on DOT-assisted contracts in accordance with 49 CFR Part 26. Further, SANDAG shall not set aside contracts for DBEs on DOT-assisted contracts subject to the regulatory provisions, except in limited and extreme circumstances where no other method could be reasonably expected to redress egregious instances of discrimination.

G. Good Faith Efforts Procedures (§26.53)

Demonstration of Good Faith Efforts (26.53(a) & (c))

The obligation of the bidder/offeror will be to make good faith efforts. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting Good Faith Efforts. Examples of Good Faith Efforts are found in Appendix A to CFR Part 26.

SANDAG is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient Good Faith Efforts to be regarded as responsive and/or responsible. Determination of DBE Good Faith Efforts compliance has been delegated to the Diversity & Equity Senior Compliance Analyst.

SANDAG will ensure that all information is complete and accurate and adequately documents the bidder/offeror's Good Faith Efforts before committing to the performance of the contract by the bidder/offeror.

Information to be submitted (26.53(b))

SANDAG treats bidders/offers' compliance with Good Faith Efforts requirements as a matter of responsiveness. A responsive bid/proposal, among other things, must meet the DBE requirements of the advertisement and solicitation.

For Public Works Construction projects, each solicitation for which a contract goal has been established will require all bidders/offerors to submit the following information to SANDAG, 401 B Street, Suite 800, San Diego, CA 92101, on or before the third day, not including Saturdays, Sundays, and legal holidays, following bid opening or the proposal due date. For all other procurements, the solicitation document will state the deadline for receipt of GFE documentation, but it is typically due at the same time as the proposal.

1. The names and addresses of DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform;
3. The dollar amount of the participation of each DBE firm participating;
4. Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
5. Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
6. If the contract goal is not met, evidence of Good Faith Efforts.

Administrative reconsideration (26.53(d))

The following procedures shall be used by SANDAG to fairly and promptly respond to any requests for Administrative Reconsideration (AR) received regarding the procurement or

contracting processes. SANDAG will only review AR requests submitted by an actual Proposer/Bidder.

SANDAG will consider all AR requests received by SANDAG by 4 P.M. on the deadlines discussed below. The effective date of the AR request filing shall be the date SANDAG electronically or physically receives the written AR request. An AR request that does not strictly comply with these procedures will be rejected.

SANDAG shall not be liable for any costs incurred by an entity filing an AR request or to any participant in the AR request process, on any basis, express or implied.

TIMING REQUIREMENTS FOR AR REQUESTS

If, after opening and evaluating all proposals/bids, a Proposer/Bidder is determined to be nonresponsible or nonresponsive for failure to meet a DBE goal or provide Good Faith Efforts, an AR request relating to any such determination must be filed with the SANDAG in writing within five (5) calendar days of receipt of notice of nonresponsiveness or nonresponsibility from SANDAG. Failure to file an AR request concerning a determination of nonresponsiveness or nonresponsibility relating to a DBE matter prior to this deadline constitutes a waiver of any AR request on these grounds by the Proposer/Bidder.

In the event a Proposer/Bidder requests AR, all requirements of the AR request materials as set forth below must be met, including the timely submission of all relevant evidence. The Proposer/Bidder will thereafter be afforded an administrative hearing upon request. Proposer/Bidder shall notify SANDAG of any such hearing request prior to SANDAG issuing the AR request decision.

The SANDAG Disadvantaged Business Enterprise Liaison Officer (DBELO) shall serve as the AR official overseeing the AR process. The DBELO or designee will not have played any role in the original determination that the Proposer/Bidder is nonresponsive or nonresponsible. The DBELO will review the administrative record concerning the request for AR, and any other materials submitted with the AR request.

Any request for reconsideration that fails to state a valid basis for reconsideration, is untimely, is based on repetition of arguments previously raised, or simply expresses disagreement with the AR request decision, will be rejected by the DBELO for failure to state a claim that is eligible for AR.

CONTENT REQUIREMENTS FOR AR REQUESTS

As part of its AR request, the Proposer/Bidder must provide written documentation concerning the issue of whether it met the DBE goal, made adequate Good Faith Efforts to do so, and/or failed to provide required

documentation. No new DBE evidence, including a revised DBE commitment form or Good Faith Effort documentation shall be considered in the reconsideration process. The Proposer/Bidder may also request a meeting with the DBELO or designee to discuss whether it met the goal or made adequate GFE to do so.

The AR request also must state the law, rule, regulation, or policy upon which the AR request is based. The scope of reconsideration shall be whether the DBE-related determination of nonresponsibility or nonresponsiveness was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. All materials submitted in an AR request shall be considered a public record unless disclosure is prohibited by law or regulation.

All AR requests and related statements must be emailed to the DBELO or physically delivered to SANDAG during its normal business hours with proof of delivery to SANDAG. AR requests shall be addressed to:

Diversity and Equity Department, Attn: DBELO
SANDAG Solicitation No. [Add Solicitation Number]
San Diego Association of Governments
401 B Street, Suite 800, San Diego, CA 92101
Elaine.Richardson@sandag.org

Communications to SANDAG concerning the AR request must only be directed through the DBELO or his/her designee. Violation of this prohibition on all other communications may result in a determination by SANDAG that the AR request process cannot proceed. Any AR requests determined to be incomplete will be rejected.

AR REQUEST REVIEW BY THE DBELO

The DBELO shall review the AR request to determine if it is in compliance with the deadline, format, content, and notice requirements set forth in these procedures. If an AR request does not meet such requirements, it may be rejected without further consideration. A notice of such rejection shall be sent to the AR requestor.

The DBELO or designee will review the AR request in a timely manner and may hold an informal meeting with other SANDAG staff if deemed necessary in order to complete the investigation. The DBELO or designee will prepare a recommendation regarding the Proposer/Bidder's AR request, in writing, to the SANDAG Chief Operations Officer or designee within ten (10) business days of the date the AR request was filed. Only materials included with the AR request at time of submittal will be considered. The Chief Operations Officer or designee will either sustain or reject the AR request in writing based upon the recommendation of the DBELO and in the best interests of SANDAG. This decision will be communicated in writing to the AR requestor.

The result of the reconsideration process is not administratively appealable to any other person within SANDAG or the federal Department of Transportation.

Good Faith Efforts when a DBE is terminated and replaced on a contract (26.53(f))

SANDAG will require that a contractor not partially or fully terminate a DBE subcontractor without prior written consent from SANDAG. Before requesting permission from SANDAG for a substitution, the contractor must give notice in writing to the DBE subcontractor, with a copy to the SANDAG Director of Diversity and Equity, of its intent to request to terminate the DBE subcontractor. The notice sent to the DBE subcontractor must include the reason the contractor is requesting the substitution. If the contractor is requesting to terminate a portion of the work or materials being provided by a DBE subcontractor, the contractor shall provide the reason for partially terminating the work committed to a DBE subcontractor. SANDAG will require a contractor to make Good Faith Efforts to replace a DBE subcontractor that is terminated or has otherwise failed to complete its work on a contract with another certified DBE subcontractor, to the extent needed to meet the contract goal. SANDAG will require the prime contractor to notify the DBELO immediately of the DBE subcontractor's inability or unwillingness to perform and provide reasonable documentation.

In this situation, SANDAG will require the prime contractor to obtain SANDAG prior approval of the substitute DBE and to provide copies upon request of new or amended subcontracts, or documentation of Good Faith Efforts.

If the contractor fails or refuses to comply in the time specified, the SANDAG contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

Sample Bid Specification:

The requirements of 49 CFR Part 26, Regulations of the U.S. Department of Transportation, apply to this contract. It is the policy of SANDAG to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this contract will be conditioned upon satisfying the requirements of this bid specification. These requirements apply to all bidders/offerors, including those who qualify as a DBE. A DBE contract goal of (as determined in the goal calculation Attachment 7) percent has been established for this contract. The bidder/offeror shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26 (Attachment 1), to meet the contract goal for DBE participation in the performance of this contract.

The bidder/offeror will be required to submit the following information: (1) the names and addresses of DBE firms that will participate in the contract; (2) a description of the work that each DBE firm will perform; (3) the dollar amount of the participation of each DBE

firm participating; (4) written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet the contract goal; (5) written confirmation from the DBE that it is participating in the contract as provided in the commitment made under (4); and (6) if the contract goal is not met, evidence of good faith efforts.

FHWA/Caltrans-Funded Projects

As required by Chapter 9 of the Caltrans LAPM, SANDAG will prepare and submit for approval to Caltrans the "Evaluation of Good Faith Efforts" form (LAPM Exhibit 9-E), that cites reasons as to why the Good Faith Efforts were found adequate. As required by section 9.8 of the LAPM, if the low bidder or the most qualified consultant did not meet or exceed the DBE contract goal, SANDAG will submit the Good Faith Efforts documentation to the District 11 DLAE for review for construction contracts greater than \$2 million and consultant contracts greater than \$500,000 that had a DBE goal approved by Caltrans.

H. Counting DBE Participation and Commercially Useful Function (§26.55)

SANDAG will count DBE participation toward overall and contract specific goals as provided in 49 CFR §26.55. SANDAG will not count the participation of a DBE subcontract 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.

I. Counting DBE Participation for Leased Trucks from Non-DBE Firms (§26.55(d)(5))

When appropriate, SANDAG will allow the counting of DBE credit for leased trucks from non-DBE firms. The objective for allowing this practice is to increase DBE trucking participation and growth for DBE truckers by utilizing the one-to-one DBE trucking credit. The SANDAG program allows the counting of DBE participation for leased trucks from non-DBE firms on FTA assisted projects. The determination of whether SANDAG will allow DBE credit for non-DBE trucking firms will be made on a case-by-case basis. Prior to approving this credit, the contractor requesting DBE credit for leased trucks from non-DBE trucking firms will be required to identify the need for additional DBE trucking firms in the SANDAG marketplace.

A. Justification of DBE Credit for Non-DBE Trucking Firm Participation

SANDAG conducted a review of DBE trucking firms available in its marketplace and identified a shortage of DBE trucking firms that are ready, willing, and able to provide the level of trucking required on SANDAG FTA-assisted projects. SANDAG learned that many DBE trucking firms in its marketplace need this program because they have only one truck and will need access to additional trucks to meet SANDAG needs. The

shortage in DBE trucking availability has presented a compelling reason for SANDAG to allow prime contractors to receive DBE credit when using a DBE firm that leases trucks from non-DBE firms equipped with drivers to the full extent allowable under 49 CFR §26.55(d)(5). SANDAG does not expect that utilizing the proposed enhanced trucking credit program, as permitted by Part §26.55(d)(5), will create difficulties for non-DBE trucking firms to find work and may enhance opportunities for non-DBE firms as well as DBE trucking firms. SANDAG will review the availability of DBE trucking firms as necessary to assess whether a shortage of DBE trucking firms continue and determine whether the policy of allowing DBE credit for non-DBE trucking firms should continue.

Allowing DBE credit for DBE use of non-DBE trucks is expected to increase DBE participation on future FTA-funded projects. DBE trucking firms will be able to expand the pool of trucking firms to collaborate and team with on future projects. This should increase DBE trucking firm capabilities and the level of their participation on future large FTA-funded projects. Allowing credit for non-DBE firms who are subcontractors to DBE firms also should enable DBE firms to increase their total volume of business activity, resulting in increased bonding and insurance thresholds. This increased volume is expected to strengthen the DBE trucking firms by expanding their business contacts, strengthening banking and vendor relationships, expanding their fleet, and generally increasing their skills and capacity.

B. SANDAG DBE Trucking Program Elements

1. Grow DBE Trucking Capabilities and Availability

SANDAG will continue to utilize measures to grow DBE trucking availability in its marketplace by carrying out the following activities:

- Canvassing the marketplace to understand whether DBE and small business trucking firms that are available, their capacities and equipment, and their interest in the FTA-funded projects.
- Continually advertising trucking opportunities through all available outreach mechanisms.
- Working closely with DBE trucking firms that are already on SANDAG FTA-funded projects to identify and mitigate obstacles to growing their participation.
- Identifying DBE trucking firms that may act as a combination of owner/operator, self-perform, and brokers to lead other trucking firms to further broaden their network and leverage current capacity into greater capacity.

2. Monitoring and Enforcement

SANDAG will perform reviews, including commercially useful function reviews, on all contracts to verify the DBE trucking firm is actually leasing and in control of the non-DBE leased truck or trucks.

If SANDAG learns that non-DBE trucks are not being leased and controlled by the DBE firm, SANDAG will request that the DBE firm immediately implement a corrective action to remedy this. Actions SANDAG will take to remedy non-compliance with non-DBE trucking credit requirements include one or more of the following:

- Impose withholding of payments up to 2 percent of the contract value or \$10,000, whichever is more, until compliance is achieved.
- Require the prime contractor to exercise Good Faith Efforts to identify DBE trucking firms to perform increased trucking work.
- Terminate the contract for material breach for not complying with DBE Program requirements.
- Other sanctions available under the contract, regulations, and law.

The DBE credit dollars for non-DBE trucking firms will be assessed no less than on a six-month basis. Monthly reporting will be required by prime contractors utilizing the non-DBE trucking credit. SANDAG will assess the overall DBE credit for non-DBE trucking firms annually during the review of the SANDAG FTA DBE Program Overall Goal. During this analysis, SANDAG will review the DBE trucking credit program to determine if there is an overconcentration of DBE truckers utilizing this program. If so, then SANDAG will evaluate every whether the program should continue at SANDAG. Based on the results of the annual review, SANDAG may remove the DBE credit for non-DBE trucking provision from its FTA DBE Program during the development of its FTA Triennial Overall DBE Goal Setting and Methodology submittal.

J. Commercially Useful Function Standards (§26.55)

SANDAG will count payments to a DBE firm for DBE credit only if the DBE is performing a commercially useful function on that contract. A DBE performs a commercially useful function when it is responsible for the execution of the work of the contract or a distinct element of the work 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, installing the material (where applicable), and paying for the material itself. To determine whether a DBE is performing a commercially useful function, SANDAG 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, the DBE credit claimed for its

performance of the work, and other relevant factors. SANDAG has developed a “Tips on Evaluating Commercial Useful Function” document that is provided to employees and consultants to assist them in determining whether a DBE is performing a commercially useful function.

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, SANDAG may examine similar transactions, particularly those in which DBEs do not participate. The firm’s role must not be a superfluous step added in an attempt to obtain credit towards the goal.

If a DBE does not perform or exercise responsibility for at least thirty percent (30%) 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, SANDAG will presume that it is not performing a commercially useful function.

If SANDAG determines that a DBE is not performing a commercially useful function, the DBE may present evidence to rebut this determination. SANDAG’s decisions on commercially useful function matters are subject to review by the U.S. DOT Operating Administration.

A DBE’s repeated failure to perform a commercially useful function may raise questions regarding the firm’s control, as it relates to independence, and perhaps ownership. If there is evidence of a pattern of failing to perform a commercially useful function that raises serious issues with the firm’s ability to control the work and its independence from a non-DBE firm, SANDAG will address this matter with the DBE firm. SANDAG may commence a proceeding under Section 26.87 to determine the continued eligibility of the DBE firm.

In cases of deliberate attempts to circumvent the intent of the DBE program, or fraud, these actions may lead to criminal prosecution of both the prime contractor and the DBE. If fraud is suspected SANDAG will contact the DOT Office of Inspector General.

K. Joint Checks

SANDAG may allow the use of joint checks on a case-by-case basis. Joint checks between a DBE subcontractor and a prime contractor must be approved by SANDAG in writing prior to the arrangement between the joint check parties takes place. A joint check is a two-party check issued by the prime contractor to the DBE subcontractor which is submitted to the DBE subcontractor’s materials supplier. The check is issued to the DBE subcontractor and the materials supplier jointly to guarantee payment to the supplier for the materials or supplies used by the DBE subcontractor. SANDAG will require that contractors requesting the use of joint checks to provide various documents prior to

approving the use of joint checks, including but not limited to a joint check request form (Exhibit E) signed by all parties subject to the joint check, including the material supplier, DBE subcontractor, and prime contractor. SANDAG will require that contractors using joint checks provide invoices, copies of checks, and other documents to allow SANDAG to review the joint check process.

VII. REQUIRED CONTRACT PROVISIONS AND ENFORCEMENT

A. Contractor's Assurance Clause Regarding Non-Discrimination (§26.13)

SANDAG will ensure that the following clause is placed in all DOT-assisted contracts and subcontracts:

"The contractor 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 Title 49, CFR, Part 26 in the award and administration of SANDAG's U.S. 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 SANDAG 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."*

B. Prompt Payment Provisions (§26.29)

SANDAG requires that all subcontractors performing work on DOT-assisted contracts shall be promptly paid for work performed pursuant to their agreements, in accordance with all relevant federal, state, and local law.

In accordance with 49 CFR §26.29, SANDAG established a contract clause implementing this requirement and requires prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from the prime contractor's receipt of each payment from SANDAG.

Under the California Business and Professions code §7108.5, SANDAG requires that a contractor or subcontractor pay any subcontractor on all public works of improvement projects, not later than seven (7) days after receipt of each progress payment, unless

otherwise agreed to in writing by the subcontractor. In the event of a good faith dispute over all or any portion of the amount due on a progress payment from the prime contractor or subcontractor, the prime contractor or subcontractor may withhold no more than 150 percent of the disputed amount.

SANDAG ensures prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. Pursuant to §26.29, SANDAG has selected the following method to comply with this requirement:

- SANDAG may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after SANDAG pays to the prime contractor.

SANDAG will include a contract clause that will require the prime to make prompt and full payment of any retainage owed to subcontractors for satisfactory completion of the subcontractor's work within 30 days after subcontractor's work has been satisfactorily completed.

Under the California Civil Code §8814, SANDAG requires that if a contractor has withheld a retention on a public works of improvement project, from one or more subcontractors, the contractor shall, within 10 days after receiving all or part of a retention payment, pay to each subcontractor from whom retention has been withheld that subcontractor's share of the payment.

Prompt Payment Dispute Resolution

SANDAG may take one or more of the following steps to resolve disputes as to whether work has been satisfactorily completed for purposes of §26.29.

1. Require dispute resolution meetings between prime contractor and subcontractor with SANDAG project manager, resident engineer (if applicable), and DBE Liaison Officer, who shall have the authority to impose enforcement action if required.
2. Include contract clause providing that disputes over prompt payment may be submitted to alternative dispute resolution through either arbitration or mediation. The parties must agree on a mediator or arbitrator within twenty-five (25) calendar days after a written complaint has been sent by the DBE subcontractor. The DBE must contact the DBELO for information on current procedures and to receive reimbursement. Outcomes of the alternative dispute resolution will be provided to the resident engineer within 10 days of the decision.

SANDAG has established, as part of its DBE program, the following mechanism(s) to ensure prompt payment and return of retainage:

- Alternative Dispute Resolution

If such a contract clause is included, one of the following or similar clauses should be used depending on the type of contract:

- Any controversy or claim arising out of or relating to prompt payment under a construction contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.
- Any controversy or claim arising out of or relating to prompt payment under a contract that is not a construction contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

- Mediation

If such a contract clause is included, the following clause or one similar should be used:

- If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures **before** resorting to arbitration, litigation, or some other dispute resolution procedure.

- A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed. The following is an example of such a contract clause:

Contractor will not be reimbursed for work performed by subcontractors unless and until the contractor ensures that the subcontractors are promptly paid for the work they have performed. Contractor shall include a prompt payment clause that complies with local, state, and federal prompt payment requirements in all subcontracts entered into under this contract. Should contractor fail to meet subcontractor prompt payment requirements for two consecutive subcontractor payments without good cause, SANDAG may impose appropriate penalties for failure to comply with prompt payment requirements.

- Other mechanisms

SANDAG may conduct regular audits of subcontractor payments to confirm payments to subcontractors comply with prompt payment provisions of SANDAG contracts.

As described under the *Monitoring Payments to DBEs and non-DBEs* section below, when SANDAG utilizes an automated system to monitor payments, it will also use this system as a mechanism to ensure prompt payment. The following clause will be included in SANDAG contracts when an automated system is used to monitor and ensure prompt payment to subcontractors:

Contractor shall report both DBE and non-DBE subcontractor payment details to SANDAG using the web-based system by the 15th of each month. The web-based system allows contractors to manage their own subcontract information, maintain accurate contract information, and report subcontractor award and payment details online. E-copies of the Vendor User Guide are available to all vendors upon request. The web-based award and payment system is mandatory for Contractor to use unless SANDAG provides written instructions otherwise. A Contractor account will be created after award, which will allow the Contractor to enter award and payment data into the web-based system. After award, Contractor will receive instructions on how to set up their account and enter required subcontractor data. Contractor is responsible for notifying subcontractors of the requirement to confirm subcontractor payments via the web-based system and shall include this requirement in any subcontracts under this contract. Contractor shall ensure subcontractors confirm payments on a timely basis.

Prompt Payment Complaints

Complaints by subcontractors regarding the prompt payment requirements are handled according to the following procedure.

- If affected subcontractor is not comfortable contacting prime directly regarding payment or unable to resolve payment discrepancies with prime after 30 days, subcontractor should contact the SANDAG DBELO to initiate complaint.
- Subcontractor shall submit prompt payment complaint in writing to DBELO and include the prime contract number, copy of subcontract or purchase order, and a summary of payment issues. Subcontractor should provide any copies of checks, and correspondence, including emails, that may assist in understanding the facts of any payment issues.
- If filing a prompt payment complaint with the DBELO does not result in meaningful action by SANDAG to resolve the prompt payment dispute within 30 days, affected subcontractor may contact the responsible FTA contact.

Monitoring Responsibilities (§26.37)

SANDAG implements and carries out appropriate mechanisms to ensure compliance with 49 CFR Part 26 program requirements by all program participants, including prompt payment, and describes and sets forth these mechanisms.

Monitoring Payments to DBEs and Non-DBEs

SANDAG undertakes ongoing monitoring of prime payments to subcontractors over the course of any covered contract. Such monitoring activities will be accomplished through the following method:

- Monthly reporting of prime contractor and subcontractor payments to subcontractors, review by SANDAG of compliance with prompt payment requirements, and follow up with prime contractors and subcontractors for explanations when prompt payment requirements are not met.
- Use of an automated system that requires real time entry of payments to and receipts by prime contractors and subcontractors and regularly monitoring of that system. SANDAG implemented the Compliance Information System (CIS) and requires prime contractors and subcontractors to report through CIS. SANDAG monitors prompt payments to subcontractors using CIS.

SANDAG requires prime contractors to maintain records and documents of payments to subcontractors, including DBEs, for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for SANDAG's financial assistance agreement. These records will be made available for inspection upon request by any authorized representative of SANDAG or DOT. This reporting requirement extends to all subcontractors, both DBE and non-DBE.

SANDAG proactively reviews contract payments to subcontractors including DBEs on a monthly basis and may conduct an annual audit of contractor invoices. Invoice payment reviews will evaluate whether the actual amount paid to DBE subcontractors is equivalent to the amounts reported to SANDAG by the prime contractor. During these reviews, SANDAG may also review whether payments to DBEs include any lower tier subcontractor payments to non-DBEs, and whether the DBE subcontractor is performing a commercially useful function.

Enforcement Actions for Noncompliance of Participants

SANDAG will provide appropriate means to enforce the requirements of §26.29. These means may include but are not limited to:

- Withholding monthly progress payments
- Assessing sanctions
- Liquidated damages, and

- Disqualifying the contractor from future bidding as non-responsible

SANDAG will actively implement the enforcement actions detailed above.

VIII. DBE CERTIFICATION STANDARDS (§26.61-§26.73; §26.81; §26.83a)

As a non-certifying member of the CUCP, SANDAG will accept DBE certifications from certifying member agencies of the CUCP.

For more information about the certification process visit the Caltrans DBE Certification Information web page at:

<https://dot.ca.gov/programs/civil-rights/dbe-certification-information>.

To apply for certification, visit <https://caltrans.dbesystem.com/>.

IX. CERTIFICATION PROCEDURES (SUBPART E) (§26.81)

A. Unified Certification Program & Procedures for Certification Decisions

SANDAG is a member of the CUCP administered by the state of California Certifying Members. The CUCP will meet all of the requirements of 49 CFR Part 26 Subpart E.

X. RECORD KEEPING AND MONITORING (§26.11, §26.37)

SANDAG has developed a detailed record keeping system as a mechanism for monitoring and tracking DBE commitments and attainments. The system includes procedures adopted by SANDAG to comply with DOT regulations and maintenance of support documentation including subcontractor commitments, contract documents for all subcontractors, and monthly Subcontractors Paid Reports from prime contractors. SANDAG has implemented a secured, web-based Compliance Information System (CIS) to monitor and report DBE commitments, payments, and attainment of DBE contract goals. CIS is used to track all SANDAG contracts, including DOT-funded contracts.

SANDAG also maintains a contract-specific project management file which thoroughly includes all DBE Program related compliance monitoring and enforcement activities.

A. Bidders List (§26.11)

SANDAG developed and maintains a Bidders List consisting of all firms bidding on prime contracts, and bidding or quoting on subcontracts on SANDAG's DOT-assisted

projects/contracts. SANDAG collects the information for its bidders list by requiring all prime contractors bidding on DOT-assisted contracts to submit, at the time of bid opening, the following information pertaining to the prime contractor and subcontractors who provided a bid whether or not they were selected by the prime contractor:

1. Firm Name;
2. Address;
3. Years in Business;
4. Status as a DBE or non-DBE;
5. Type of Work; and
6. Annual Range of Gross Receipts.

B. Reporting to DOT (§26.11)

SANDAG will submit to the applicable DOT Operating Administration the “Uniform Report of DBE Awards or Commitments and Payments” (Exhibit E) semiannually on June 1 and December 1 of each year, as required. The June 1 report will include DBE activity from October 1 through March 31. The December 1 report will include DBE activity from April 1 through September 30. This report presents a summary of U.S. DOT-assisted prime contracts and subcontracts awarded or committed to as well as actual payments for contracts completed and the associated dollar value during this reporting period. SANDAG will include non-TVM vehicle purchases and payments with each Uniform Report.

Upon request, SANDAG will compile and submit ad-hoc DBE contract award and progress reports for U.S. DOT-assisted projects. SANDAG will provide reports relative to SANDAG’s DBE Program, as directed. These reports will provide DBE participation information on SANDAG’s race-neutral and gender-neutral contracts on all U.S. DOT-assisted procurement activities.

C. Reporting to Caltrans

SANDAG will report final utilization of DBE participation on contracts using Federal Highway Administration funding to the Department of Local Assistance Engineer DLAE using “Final Report Utilization of Disadvantaged Businesses” (LAPM Exhibit 17-F).

D. Information, Confidentiality, Cooperation (§26.109)

SANDAG will safeguard from disclosure to third parties, information that may reasonably be regarded as confidential business information, consistent with Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a), California Public Records Act (Government Code §6250) state, and local law. Notwithstanding the preceding provision, SANDAG will not release any information that may reasonably be construed as confidential business information to any third party (other than DOT) without the written

consent of the firm that submitted the information. This includes applications for DBE certification and supporting information.

E. Monitoring and Enforcement Mechanisms (§26.37)

SANDAG will implement appropriate mechanisms to ensure compliance with 49 CFR Part 26 requirements by all program participants (e.g., applying legal and contract remedies available under Federal, state, and local law). SANDAG's DBE Program includes a monitoring and enforcement mechanism to ensure that work committed to DBEs is actually performed by DBEs. Such mechanism provides a running tally of actual DBE attainments (e.g., payments actually made to DBE firms), including a means of comparing these attainments to commitments.

SANDAG may perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts committed.

SANDAG will bring to the attention of the DOT any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps provided in §26.107 (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). Additionally, SANDAG will consider similar action under its own legal authorities, including responsibility determinations in future contracts.

F. Withholding, Liquidated Damages and Penalties

SANDAG will include additional clauses in DOT-assisted contracts to enforce DBE Program requirements. These will include withholding clauses that will withhold an amount or percentage of the current invoice amount when a contractor fails to submit required reports, fails to enter payment data to SANDAG's web-based CIS on a timely basis, or has failed to comply with other contractual compliance items.

If not specifically noted in the contract, the SANDAG Office of Diversity and Equity will determine whether liquidated damages will be assessed and the amount of the liquidated damages, SANDAG will consider whether there have been other violations by the contractor on other SANDAG 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 that may be included in DOT-assisted contracts, willful failure of the contractor/consultant, DBE or other subconsultant to comply with this contract or with the Federal DBE regulations may result in disqualification from further contracting, subcontracting, or other participation in SANDAG DOT-assisted projects.

LIST OF EXHIBITS

EXHIBIT A: DBE Program Requirements Specific to Alternative Delivery Method Projects

EXHIBIT B: DBE Program Regulations

EXHIBIT C: DBE Program Organizational Chart

EXHIBIT D: Uniform Report of DBE Awards or Commitments and Payments

EXHIBIT E: Joint Check Request Form

EXHIBIT A: DBE Program Requirements Specific to Alternative Delivery Method Projects

I. Policy Statement and Program Objectives (§26.1, §26.23)

SANDAG has developed modifications to its DBE Program for alternative delivery method projects, including but not limited to Design-Build and Construction Manager/General Contractor (CMGC) projects. Procedures and methods applicable to these contracts under the DBE Program have been developed. Exhibit A sets forth requirements for alternative delivery method contracts with established contract specific and overall project DBE goals. There are several codes, regulations, and procedures that address differences between traditional design-bid-build projects and alternative delivery method projects. Public Contract Code §20209.10, design-build transit projects are not subject to the Subletting and Subcontracting Fair Practices Act that requires contractors to name their major subcontractors in their bids. Instead, the requirements applicable to the Contractor's selection of major subcontractors that were not listed in the bid/proposal will be set forth in the design-build contract. The Caltrans Division of Design has developed a sample DBE Performance Plan to assist subrecipients with DBE compliance on Design-Build projects. 49 CFR §26.53(e) addresses design-build or "turnkey" contracting situations and requires that recipients maintain oversight of the contractor's activities to ensure they comply with good faith efforts throughout performance of the contract.

II. Overall DBE Project Goals (§26.45)

SANDAG has elected to establish an overall DBE project goal for its FTA-funded Mid-Coast Transit Corridor Project, a Construction Manager/General Contractor (CMGC) project, which is separate from SANDAG's annual overall goal for the rest of its FTA-assisted contracting activities. SANDAG has also established specific contract goals for other DOT-assisted Design-Build projects. SANDAG will determine whether alternative delivery method projects will include an overall project goal or a specific contract goal on a case-by-case basis. As required by 49 CFR §26.45 (f)(3), SANDAG's submission of an overall project goal shall meet the same requirements as any other overall goal, specifically including a breakout of the participation anticipated through race-neutral and race-conscious means.

III. Meeting Established DBE Project Goals on Alternative Delivery Method Projects

Bidders/Proposers for SANDAG Alternative Delivery Method contracts will be required to submit the following DBE Program documents as part of a responsive bid/proposal:

1. **DBE Performance/Subcontracting Plan:** A DBE Performance/Subcontracting Plan containing a detailed description of the bidder's/proposer's planned methodology for achieving the DBE project or contract goal stated in the contract, including a description of the Good Faith Effort(s) the contractor intends to undertake to achieve the contract or overall project goal. This plan shall include the bidder's/proposer's activities that fulfill the good faith efforts requirements and guidance in accordance with 49 CFR §26.53, and as further described in the specific solicitation. The Plan shall provide for several key requirements, including the identification of known DBE commitments, anticipated areas

of work for DBE participation, and a DBE Program Administrator whose responsibilities shall include managing and implementing the DBE Performance/ Subcontracting Plan. The Plan shall also include describe processes for DBE utilization and payments, reporting DBE activities, outreach efforts, supportive services offered, and ensuring compliance with all DBE provisions set forth in the contract and DBE regulations.

2. **Affidavit:** An affidavit that the bidder/proposer understands that a contract specific or overall project DBE goal has been set for the contract and will exercise good faith efforts throughout the project to attain the DBE goal(s) for the contract. The DBE Performance/Subcontracting Plan shall be subject to the SANDAG's approval prior to award of a contract. If requested by the SANDAG either before or after contract award, the successful bidder/proposer shall revise its DBE Performance/Subcontracting Plan to incorporate SANDAG's comments and periodic updates. The contractor shall update the Plan as required throughout the contract period. When applicable, the contractor will be responsible for establishing subsequent contract-specific DBE goals for the bid packages it lets at a level appropriate to meet the race-conscious portion of the project overall DBE goal in conformance with 49 CFR §26.53(e). SANDAG will maintain oversight of the contractor's activities to ensure full compliance with all DBE requirements.

IV. Contractor Good Faith Efforts and Reporting Obligations (Additional Reporting Requirements for SANDAG's DOT Alternative Delivery Method Contracts)

The contractor is responsible for maintaining ongoing Good Faith Efforts, as described in 49 CFR §26.53 and Exhibit A, and as further delineated in SANDAG's DBE Program. SANDAG will monitor Contractor's good faith efforts throughout the duration of the alternative delivery method project based on the following contractor submittals.

Following the award of the contract, the contractor will be required to submit a "Monthly DBE Program Report" that includes payments made to DBE firms, new DBE commitments, and other activities made by the contractor to ensure the contract specific or overall project goal will be met. SANDAG will also monitor DBE payments and commitments through its web-based Compliance Information System (CIS). Each report must include a narrative summary stating whether the contractor is on target with respect to meeting the contract specific or overall project DBE goal set forth in the contract, and whether the goal has been exceeded, or if the contractor is behind target. If the contractor is behind target or anticipates being behind target based on current DBE anticipated work planned, the report must specify additional Good Faith Efforts planned to remedy deficiencies towards meeting the approved contract specific or overall project DBE goal, changes to planned DBE participation, and any other efforts to attain the contract DBE goal. Following SANDAG's review of the monthly progress report, the contractor shall update and/or modify its DBE good faith efforts and its Performance/Subcontracting Plan, if required, for SANDAG's approval.

EXHIBIT B: DBE Program Regulations

The DBE Program regulations are continuously updated and can be found at the following url:

<https://www.ecfr.gov/cgi-bin/text-idx?SID=97896e81ef376de874f1ec2f386432a4&mc=true&node=pt49.1.26&rgn=div5>

EXHIBIT C: DBE Program Organizational Chart

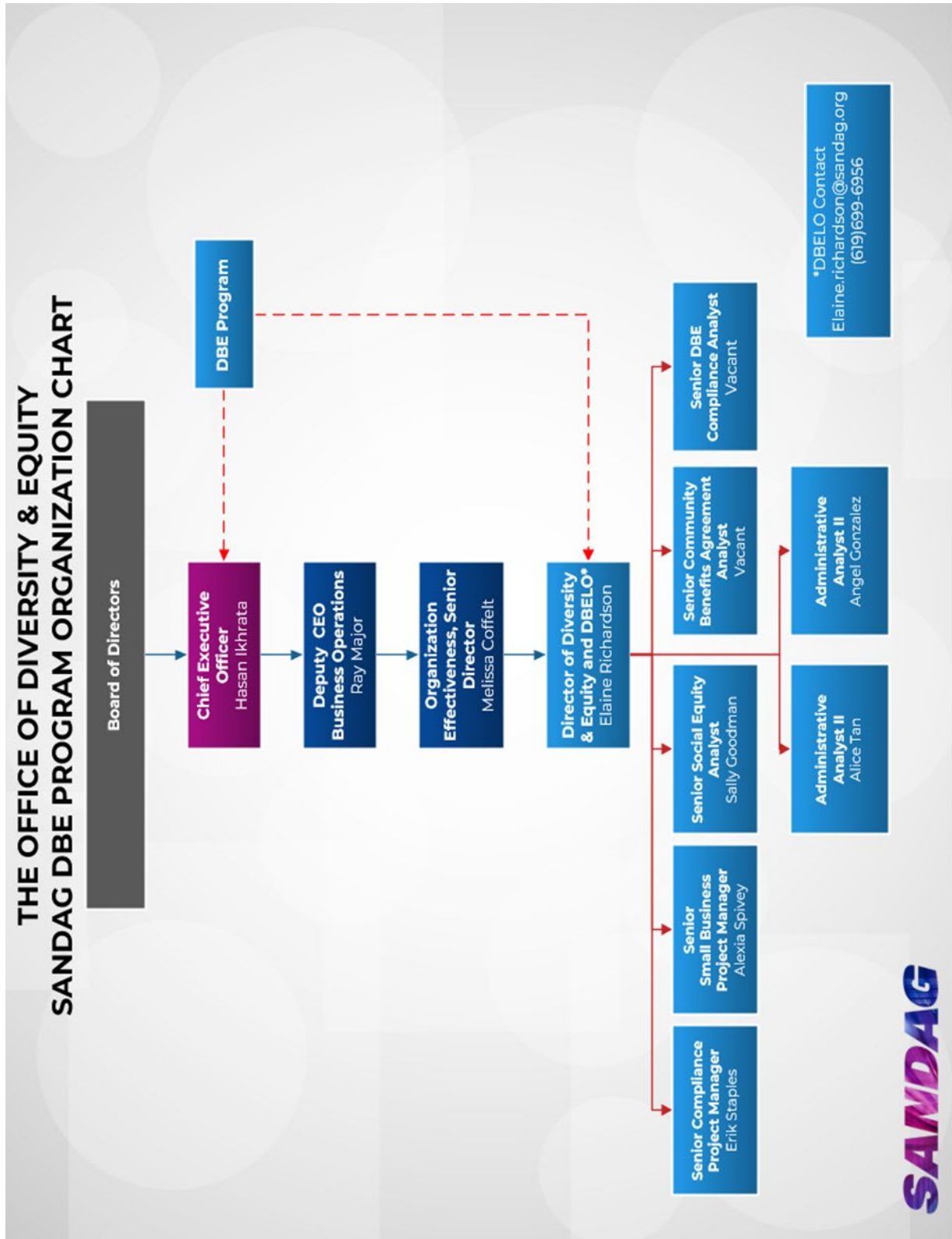




EXHIBIT D: Uniform Report of DBE Awards or Commitments and Payments

| UNIFORM REPORT OF DBE COMMITMENTS/AWARDS AND PAYMENTS | | | | | | | | | |
|--|---|---|-----------------------------------|--------------------------------|---|---------------------------------------|--------------------------------------|-------------------------------------|-------------------------------------|
| <p>1 Submitted to (check only one): <input type="checkbox"/> FHWA <input type="checkbox"/> FTA <input type="checkbox"/> FTA Recipient ID Number</p> <p>2 AIF Numbers (FAA Recipients): Grant Number (FTA Recipients):</p> <p>3 Federal fiscal year in which reporting period falls:</p> <p>4 Date This Report Submitted: [] Report due Dec. 1 (for period April 1-Sept. 30) [] FAA annual report due Dec. 1</p> <p>5 Reporting Period: [] Report due June 1 (for period Oct. 1-Mar. 31) [] Report due Dec. 1 (for period April 1-Sept. 30)</p> <p>6 Name and address of Recipient: Race Conscious Projection Race Neutral Projection OVERALL Goal</p> <p>7 Annual DBE Goal(s): Race Conscious Projection Race Neutral Projection</p> | | | | | | | | | |
| Awards/Commitments this Reporting Period | | | | | | | | | |
| A | B | C | D | E | F | G | H | I | |
| AWARDS/COMMITMENTS MADE DURING THIS REPORTING PERIOD (total contracts and subcontracts committed during this reporting period) | Total Dollars | Total Number | Total to DBEs (dollars) | Total to DBEs (number) | Total to DBEs /Race Conscious (dollars) | Total to DBEs/Race Conscious (number) | Total to DBEs/Race Neutral (dollars) | Total to DBEs/Race Neutral (number) | Percentage of total dollars to DBEs |
| 8 Prime contracts awarded this period | | | | | | | | | |
| 9 Subcontracts awarded/committed this period | | | | | | | | | |
| 10 TOTAL | | | | | | | | | |
| BREAKDOWN BY ETHNICITY & GENDER | | | | | | | | | |
| A | B | C | D | E | F | | | | |
| Total to DBE (dollar amount) | Men | Women | Total | Men | Women | | | | |
| 11 Black American | | | | | | | | | |
| 12 Hispanic American | | | | | | | | | |
| 13 Native American | | | | | | | | | |
| 14 Asian-Pacific American | | | | | | | | | |
| 15 Subcontinent Asian Americans | | | | | | | | | |
| 16 Non-Minority | | | | | | | | | |
| 17 TOTAL | | | | | | | | | |
| Payments Made this Period | | | | | | | | | |
| A | B | C | D | E | F | | | | |
| Total Number of Contracts | Total Dollars Paid | Total Number of Contracts with DBEs | Total Payments to DBE firms | Total Number of DBE firms Paid | Percent to DBEs | | | | |
| 18 Prime and sub contracts currently in progress | | | | | | | | | |
| TOTAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD | | | | | | | | | |
| A | B | C | D | E | F | | | | |
| Number of Contracts Completed | Total Dollar Value of Contracts Completed | DBE Participation Needed to Meet Goal (Dollars) | Total DBE Participation (Dollars) | Percent to DBEs | | | | | |
| 19 Race Conscious | | | | | | | | | |
| 20 Race Neutral | | | | | | | | | |
| 21 Totals | | | | | | | | | |
| 22 Submitted By: _____ | | | | 24. Signature: _____ | | | | | |
| | | | | 25. Phone Number: _____ | | | | | |



EXHIBIT E: DBE Joint Check Request Form



DBE Joint Check Request Form

Contractor Information:

Contract Information:

Name of DBE Subcontractor: _____ Contract No. _____

Name of Prime Contractor: _____ Project No. _____

Name of Material Supplier: _____ Project Name: _____

Reason for request: _____

The San Diego Association of Governments (SANDAG) will monitor the use of joint checks. To receive DBE credit for performing a commercially useful function with respect to obtaining materials and supplies a DBE must "be responsible for negotiating price, determining quality and quantity, ordering the material and installing (where applicable) and paying for the material itself". Only when a DBE meets all requirements should the DBE contract goal/commitment credit be counted for the procurement of items by the DBE.

Please refer to the attached Joint Check Policy & Procedures. If the proper procedures are not followed or SANDAG determines that the arrangement results in a lack of independence for the DBE involved, no DBE contract goal/commitment credit for the DBE's participation for the material cost will be used toward the contract goal/commitment requirement and the prime will be held responsible for not meeting this goal/commitment.

I have read and understand the above information and the attached Joint Check Policy & Procedures. I hereby acknowledge that the information provided on this form is true and accurate.

| | | |
|---|-------------|------------|
| Authorized Subcontractor Representative: | | |
| Signature _____ | Title _____ | Date _____ |
| Authorized Material Supplier Representative: | | |
| Signature _____ | Title _____ | Date _____ |
| Authorized Prime Contractor Representative: | | |
| Signature _____ | Title _____ | Date _____ |

| | |
|-------------------------|------------|
| SANDAG USE | |
| Date Received: | DBE Admin: |
| Documentation Attached: | |
| Comments: | |
| Approved: | Date: |
| Denied: | Date: |