

FTA

FEDERAL TRANSIT ADMINISTRATION

Mendocino Transit Authority (MTA)
DBE Program Compliance Review

FINAL REPORT
March 2016

Federal Transit Administration



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Executive Summary

Objective and Methodology – This report details the findings of a Compliance Review of Mendocino Transit Authority's (MTA) Disadvantaged Business Enterprise (DBE) program implementation. The Compliance Review examined this agency's DBE program procedures, management structures, actions, and documentation. Documents and information were collected from the Federal Transit Administration (FTA) and MTA. In addition, the following entities were interviewed as part of this review: MTA officials, Mendocino Council of Governments, City of Ukiah Economic Development Department, Mendocino Economic Development Corporation, Mendocino County Development Board, Greater Ukiah Chamber of Commerce, Arcata Economic Development Corporation, West Company – Mendocino Small Business Development Center, Small Business California, California Hispanic Chambers of Commerce, California Asian American Chamber of Commerce, California Department of General Services Business Development Program, California Office of Business and Economic Opportunity, Associated General Contractors of San Diego, Arntz Builders, Wipf Construction, SHN Consulting Engineers and Geologists, AE Nelson, Pacific Coast Drilling, Innerspace Engineering, Ahlborn Fence and Steel, Inc., Bouthillier's Construction Inc., Gregg Simpson Trucking, Force Traffic Control Inc., and Scheduling & Information Services Inc. The three-day review included interviews, assessments of data collection systems, and review of program and contract documents.

MTA's DBE Program includes the following positive program elements –

Positive Program Elements

- Standard checklists are used to document good faith efforts.
- Prime contracts and subcontracts include required DBE contract assurance clauses.

The Program has the following administrative deficiencies –

Administrative Deficiencies

- The list of DBELO responsibilities included in the MTA DBE program plan includes areas that are not being performed by the DBELO at this time. The DBELO's current job description does not reflect the DBELO responsibilities contained in the MTA DBE program plan as required by 49 CFR Part 26.25 (6.3 DBE Liaison Officer).
- The DBELO has not attended any FTA DBE training and has a limited understanding of the DBE program requirements (6.3 DBE Liaison Officer).

The Program has the following substantive deficiencies –**Substantive Deficiencies**

- The MTA DBE program plan is missing the following elements: definitions, bidder's list, reporting requirements, DBELO responsibilities, small business element, legal remedies, and monitoring responsibilities sections of MTA's DBE program plan as required by 49 CFR Part 26.21 (6.1 DBE Program Plan).
- There is no dissemination of the policy statement to new employees, the public, or to DBE and non-DBE business communities. The DBE policy statement has not been updated to reflect the current General Manager and has not been signed by the current General Manager as required by 49 CFR Part 26.23 (6.2 DBE Policy Statement).
- No efforts have been made to encourage prime contractors to use DBE financial institutions as required by 49 CFR Part 26.27 (6.4 DBE Financial Institutions).
- MTA staff was unable to demonstrate that an overconcentration analysis was conducted as part of its DBE program as required by 49 CFR Part 26.33. (6.6 Overconcentration).
- MTA did not determine whether an adjustment to the base figure for the DBE goal was warranted to address the availability of DBE firms in the area as required by 49 CFR 26.45 (6.8 Determining/Meeting Goals: A. Calculation).
- MTA did not engage in a consultative process with minority, women, and contractor groups or publish the DBE goal once it was adopted as required by 49 CFR Part 26.45(g)(1) (6.8 Determining/Meeting Goals: B. Public Participation).
- MTA's DBE program plan does not include specific race-neutral measures and no race-neutral measures were undertaken by MTA on FTA-assisted projects. The MTA DBE program plan does not contain the small business element as required by 49 CFR Part 26.39 (6.8 Determining/Meeting Goals: C. Race-Neutral DBE Participation).
- MTA does not have a methodology to determine the DBE contract goals assigned on race-conscious contracts. MTA did not provide a justification for the use of race-conscious goals in two construction contracts as required by 49 CFR Part 26.51(f)(1) and the 9th Circuit Court Western States Paving decision (6.8 Determining/Meeting Goals: D. Race-Conscious DBE Participation).
- MTA does not evaluate the reasons why specific DBE firms chose not to participate in contracting opportunities. MTA did not reject a bid that did not include the required good faith efforts documentation as non-responsive in accordance with the solicitation requirements (6.8 Determining/Meeting Goals: E. Good Faith Efforts).
- MTA did not complete a shortfall analysis in FY2011, FY2012, or FY2013 as required by 49 CFR Part 26.47(c)(1) and 26.47(c)(2) (6.9 Shortfall Analysis and Corrective Action Plan).
- MTA does not have a formal process to review subcontracts for required contract assurance clauses as required by 49 CFR Part 26.13 (6.11 Required Contract Provisions: A. Contract Assurance).
- MTA does not have a process in place to verify the payment clauses included in subcontracts or to verify prompt payment and release of retainage to subcontractors in accordance with their DBE program plan and standard prime contract clauses as required by 49 CFR Part 26.29 (6.11 Required Contract Provisions: B. Prompt Payment).
- MTA does not have a formal process to review subcontracts for required legal remedies provisions as required by 49 CFR Part 26.37 (6.11 Required Contract Provisions: C. Legal Remedies).
- MTA did not provide the memorandum of understanding confirming its relationship with the CUCP as required by 49 CFR Part 26.67-26.71 (6.12 Certification Standards).

- MTA has not developed an internal bidders list as required by 49 CFR Part 26.11. MTA has not submitted the required semi-annual reports to FTA as required by 49 CFR Part 26.11. MTA does not have a process to verify work committed to DBEs is being performed by DBEs as required by 49 CFR Part 26.37 (6.14 Record Keeping and Enforcement).

MTA's DBE participation has not changed over the past three fiscal years: MTA's reported DBE participation data reflects no DBE participation was attained from FY2012 – FY2014. According to MTA's management, a number of factors contribute to its history of low DBE participation, such as a lack of certified DBE firms in the area. Notwithstanding, this report highlights several steps to help ensure the DBE program is implemented in good faith.

I. General Information

This chapter provides basic information concerning this Compliance Review of the Mendocino Transit Authority (MTA). Information on MTA, the review team, and the dates of the review are presented below.

Grant Recipient:	Mendocino Transit Authority (MTA)
City/State:	Ukiah, CA
Grantee Number:	5723
Executive Official:	Daniel Baxter
On-site Liaison:	Sally Webster
Report Prepared By:	Calyptus Consulting Group, Inc.
Dates of On-site Visit:	August 24 – 26, 2015
Compliance Review Team Members:	George Harris Jameson Beekman Rachel Saint-Firmin

2. Jurisdiction and Authorities

The Federal Transit Administration (FTA) Office of Civil Rights is authorized by the Secretary of Transportation to conduct Civil Rights Compliance Reviews. The reviews are undertaken to ensure compliance of applicants, recipients, and subrecipients with Section 13 of the Master Agreement, Federal Transit Administration M.A. (21), October 1, 2014, and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs."

Mendocino Transit Authority (MTA) is the recipient of one or more federal transit grants, loans, and/or contracts that exceed \$250,000. Hence, MTA is subject to the Disadvantaged Business Enterprise (DBE) compliance conditions associated with the use of FTA financial assistance pursuant to 49 CFR Part 26. These regulations define the components that must be addressed and incorporated in MTA's DBE program and were the basis for this Compliance Review.

3. Purpose and Objectives

3.1 Purpose

The FTA Office of Civil Rights periodically conducts discretionary reviews of grant recipients and subrecipients to determine whether they are honoring their commitment, as represented by certification to FTA, to comply with 49 CFR Part 26. FTA has determined that a Compliance Review of the Mendocino Transit Authority's (MTA) DBE Program is necessary.

The primary purpose of the Compliance Review is to determine the extent MTA has implemented 49 CFR Part 26, as represented in its DBE Program Plan. This Compliance Review is intended to be a fact-finding process to: (1) assess MTA's DBE Program Plan and its implementation; (2) make recommendations regarding corrective actions deemed necessary and appropriate; and (3) provide technical assistance.

This Compliance Review is not solely designed to investigate discrimination against individual DBE firms or complainants; or to adjudicate these issues on behalf of any party.

3.2 Objectives

The objectives of DOT's DBE regulations, as specified in 49 CFR Part 26, are to:

- Ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's transit financial assistance programs.
- Create a level playing field on which DBEs can compete fairly for DOT-assisted contracts.
- Ensure that the Department's DBE Program is narrowly tailored in accordance with applicable law.
- Ensure that only firms that fully meet the regulatory eligibility standards are permitted to participate as DBEs.
- Help remove barriers to the participation of DBEs in DOT-assisted contracts.
- Promote the use of DBEs on all types of federally-assisted contracts and procurement activities conducted by recipients.
- Assist with the development of firms that can compete successfully in the marketplace outside the DBE Program.
- Provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

The objectives of this Compliance Review are to:

- Determine whether MTA is honoring its commitment to comply with 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in DOT Programs."
- Examine the required components of MTA's DBE Program Plan against the compliance standards set forth in the regulations, DOT guidance, and FTA policies; and document the compliance status of each component.

- Gather information and data regarding the operation of MTA's DBE Program Plan from a variety of sources, including DBE program managers, other MTA management personnel, DBEs, prime contractors, and other stakeholders.

4. Background Information

The purpose of this section is to provide an understanding of MTA's operations and scale. The section highlights MTA's services, budget, and the history of its DBE program.

4.1 Introduction to Mendocino Transit Authority (MTA) and Organizational Structure

The Mendocino Transit Authority was established in April 1976 as a Joint Powers Agreement (JPA) between the County of Mendocino and the four incorporated cities of Fort Bragg, Point Arena, Ukiah, and Willits, California. MTA is governed by a seven (7) member Board of Directors. The county appoints three (3) representatives and each city appoints one (1) representative to the MTA Board of Directors. Appointees need not be elected officials, but traditionally three (3) or four (4) board members are elected officials. MTA transit service provides a base service between the county seat, Ukiah, and the outlying valleys, Covelo, Fort Bragg, Mendocino, Point Arena, and Gualala. MTA is operated as a county-wide transit system providing a base of transit service within the County as well as regional links to Santa Rosa.

MTA is operated primarily as an in-house transit system with the exception of six (6) individually contracted senior center paratransit services. MTA is directly responsible for the administration and operation of all its local fixed route, general public Dial-a-Ride, and intercity routes. The MTA General Manager reports to the Mendocino Transit Authority Board of Directors. MTA has four (4) management level staff positions in addition to the General Manager. These positions include the Transportation Manager, Finance/Personnel Manager, Marketing/Planning Manager, and Maintenance Manager. MTA has approximately sixty (60) staff overall including drivers and mechanics.

The primary funding source for MTA is the Transportation Development Act (TDA 1971). TDA revenue comes from a 0.25% sales tax collected in Mendocino County, and allocated annually to transit and other transportation programs by the Mendocino Council of Governments (MCOG). MCOG serves as the Regional Transportation Planning Agency for MTA. MTA also receives FTA 5311 grant funds as a subrecipient to Caltrans. MTA currently reports DBE contracting activity to Caltrans via email on a semi-annual basis. MTA has not reported upcoming DBE contracting opportunities to Caltrans for goal setting purposes and does not communicate with Caltrans on DBE matters. MTA has not submitted DBE reports to FTA on FTA-funded grants. MTA has no subrecipients under the FTA program.

MTA operates ten (10) fixed routes, two (2) Dial-a-Ride routes, and one (1) flex route for evening service. There are forty-two (42) vehicles in the MTA fleet.

4.2 Budget and FTA-Assisted Projects

MTA's budget comprises local, state, and federal funds, as well as revenue from fares and other sources. In FY2015 - 2016, MTA's budget is as follows:

Funding Source	Funding Amount	
Federal – FTA (Non-ARRA) (through Caltrans)	Total:	\$676,000
	Planning:	\$ 0
	Capital:	\$496,000
	Operating:	\$180,000
State:		\$175,000
Local:		\$3,506,223
Total:		\$4,357,223

In October 2010, FTA awarded MTA a \$5 million grant for construction of a new maintenance facility. Phase 1 of the project was to construct the new facility. Phase 1 was completed and the new facility became operational in April 2012. Phase 2 of the project involved designing and constructing a Solar Canopy above the north end of the vehicle storage location. MTA was awarded a TIGGER grant in 2010 for \$470,000 for this phase of the project. Phase 2 was completed in March 2014.

MTA anticipates beginning Phase 3 of the project once FTA financial assistance has been obtained. Phase 3 will focus primarily on constructing a new Administrative/Operations building. To date, no FTA grants have been awarded for this phase and there is no anticipated start date.

MTA does not have any FTA-assisted projects currently underway. The last FTA grant expired on September 23, 2014.

4.3 DBE Program

MTA's Finance/Personnel Manager is responsible for monitoring and enforcing the DBE program to ensure compliance with appropriate federal and state laws and regulations. The Finance/Personnel Manager is the DBELO and has a direct reporting relationship to the General Manager. The DBELO is responsible for implementing all aspects of MTA's DBE program and ensuring that MTA complies with all provisions of 49 CFR part 26. The DBELO is responsible for developing, implementing, and monitoring the DBE program in coordination with other agency staff. MTA has two additional finance staff members who can assist the DBELO as needed but are not dedicated to supporting the DBE program. These finance staff are asked to assist in identifying DBE participation when developing semi-annual reports. The DBELO completed the following key duties and responsibilities:

1. Gathers and reports statistical data and other information as required by DOT.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Works with all departments to set overall annual goals.
4. Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.

5. Identifies contracts and procurements so that DBE goals are included in solicitations, both race-neutral methods and contract specific goal attainment, and identifies ways to improve progress.
6. Analyzes MTA's progress toward attainment of program goals and identifies ways to improve progress.
7. Participates in pre-bid meetings.
8. Advises the General Manager and governing body on DBE matters and achievement.
9. Provides DBEs with information in preparing bids, and obtaining bonding and insurance.
10. Plans and participates in DBE training seminars.
11. Acts as liaison to the Uniform Certification Process in California.
12. Provides outreach to DBEs and community organizations to advise them of opportunities.
13. Maintains MTA's updated list of DBEs.

MTA developed a DBE program and goal in FY2011 when it was awarded two (2) FTA capital grants, CA-04-0200 and CA-88-0003. Prior to FY2011, MTA did not receive FTA planning, capital, and/or operating assistance with contracting opportunities exceeding \$250,000 and was not required to implement a DBE program. MTA staff has not participated in any FTA DBE training since the DBE program was established in FY2011.

MTA chose to adopt the California Department of Transportation's (Caltrans) 100% race-neutral DBE goal of 4%. This goal expired in September 2013 and MTA did not submit a triennial goal in August 2013 for fiscal years 2014-2016. MTA staff could not explain how they determined a wholly race-neutral program was the most narrowly tailored method for implementing the program, and MTA has not conducted a disparity study. MTA did not achieve its DBE goal in FY2011, FY2012, or FY2013. MTA staff stated they had limited knowledge of DBE requirements and relied on guidance from Mendocino County to use the Caltrans goal methodology for its program.

MTA does not have internal legal counsel, but does have access to the County of Mendocino legal counsel if needed. During the site visit, MTA staff stated no formal legal review was conducted of solicitations or contracts to ensure compliance with DBE requirements prior to award. Staff reported there were no formal complaints or bid protests related to the DBE program.

5. Scope and Methodology

5.1 Scope

Implementation of the following DBE program components specified by the FTA are reviewed in this report:

- A DBE program in conformance with 49 CFR Part 26 that has been submitted to FTA
- A signed policy statement expressing a commitment to MTA's DBE program, states its objectives, and outlines responsibilities for implementation [49 CFR 26.23]
- Designation of a DBE liaison officer and support staff as necessary to administer the program, and a description of the authority, responsibility, and duties of the officer and the staff [49 CFR 26.25]
- Efforts made to use DBE financial institutions, by MTA as well as prime contractors, if such institutions exist [49 CFR 26.27]
- A DBE directory including addresses, phone numbers and types of work performed, made available to the public and updated at least annually [49 CFR 26.31]
- Determination that overconcentration does (not) exist and address this problem, if necessary [49 CFR 26.33]
- Assistance provided to DBEs through Business Development Programs to help them compete successfully outside of the DBE program [49 CFR 26.35]
- An overall goal based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on DOT-assisted contracts; and proper mechanisms to implement the DBE goal [49 CFR 26.43 – 26.53]
- A shortfall analysis and corrective action plan when MTA did not achieve its DBE goal [49 CFR 26.47]
- A process that ensures transit vehicle manufacturers (TVMs) comply with the DBE requirements before bidding on FTA-assisted vehicle procurements. The process may include MTA seeking FTA approval to establish a project specific goal for vehicle purchases. [49 CFR 26.49]
- A non-discrimination and a prompt payment clause is in all FTA-assisted contracts and a prompt payment verification process. [49 CFR 26.7, 26.13, and 26.29]
- A certification process to determine whether potential DBE firms are socially and economically disadvantaged according to the regulatory requirements. The potential DBE firms must submit the standard DOT application, the standard DOT personal net worth form, along with the proper supporting documentation [49 CFR 26.65 -26.71].
- The certification procedure includes document review, on-site visit(s), eligibility determinations consistent with Subpart D of the regulations, interstate certification review process, and a certification appeals process [49 CFR 26.83 and 26.86].
- Implementation of appropriate mechanisms to ensure compliance with the DBE requirements by all program participants and appropriate breach of contract remedies. [49 CFR Part 13]. The DBE program must also include monitoring and enforcement

mechanisms to ensure that work committed to DBEs at contract award is actually performed by DBEs [49 CFR Part 26.37]. Reporting must include information on payments made to DBE firms [49 CFR 26.11, 26.55].

5.2 Methodology

The initial step of this Compliance Review consisted of consultation with the FTA Office of Civil Rights, and a review of available information from FTA's TEAM System and other sources such as the MTA's website. After reviewing this information, potential dates for the site visit were coordinated.

The FTA Office of Civil Rights sent a notification letter to MTA that informed the agency of the upcoming visit, requested necessary review documents, and explained the areas that would be covered during the on-site visit. The letter also informed MTA of staff and other parties that would potentially be interviewed.

Before conducting the on-site visit, MTA was asked to provide the following documents:

- Most current DBE Program plan
- DBE goal methodology submissions
- DBE semi-annual reports and/or quarterly ARRA reports for the past three years
- A Memorandum of Understanding or similar documents indicating MTA's participation in the Unified Certification Program (UCP)
- Any certification criteria/guidelines used by MTA in determining DBE eligibility, if applicable
- A list of firms, if any, that have worked on MTA's projects and have graduated from the DBE program, i.e., exceeded the threshold dollar amounts and are no longer certified as a DBE
- A list of FTA-assisted contracts awarded during the current and previous fiscal years
- A list of DBE firms that have worked on FTA-assisted projects sponsored by MTA
- Documentation showing the "Good Faith Efforts" criteria and review procedures established by MTA
- Procedures for monitoring all DBE program participants to ensure compliance with the DBE requirements, including but not limited to, a prompt payment verification process, a process for ensuring work committed to DBEs is actually performed by DBEs, and any DBE complaints against the agency or its prime contractors during a specified time period
- Small business element as implemented by MTA
- FTA-assisted transit vehicle procurements/contracts for the last five (5) years. This information to include the complete/executed contract between the agency and the transit vehicle manufacturer
- FTA-assisted transit vehicle requests for proposals (RFPs) for the last five (5) years
- List of all transit vehicle manufacturers that submitted bids for the RFPs
- Shortfall analysis and corrective action plan for the last three (3) years

- Names of interested parties (external organizations) with which MTA has interacted on DBE program issues
- Any complaints received concerning MTA's DBE program over the past five (5) years
- The DBELO's official position description
- Other pertinent information determined by MTA staff to shed light on its DBE compliance efforts

An opening conference was conducted at the beginning of the Compliance Review with FTA representatives, MTA staff and the review team. The following people attended the meeting:

- Dan Baxter, MTA, General Manager
- Sally Webster, MTA, Finance/Personnel Manager
- Marisa Appleton, FTA, Acting RCRO Region IX (by teleconference)
- Jennifer Riess, FTA, Office of Civil Rights (by teleconference)
- Antoinette Davis, FTA, Office of Civil Rights (by teleconference)
- Janelle Hinton, FTA, Office of Civil Rights (by teleconference)
- Brian Whitehead, FTA, Office of Civil Rights (by teleconference)
- George Harris, Calyptus Consulting Group, Team Lead/SME
- Jameson Beekman, Calyptus Consulting Group, Consultant
- Rachel Saint-Firmin, Calyptus Consulting Group, Analyst

Following the opening conference, the review team examined MTA's DBE Program Plan and other documents submitted by the DBE Liaison Officer. The team then conducted interviews with MTA regarding DBE program administration, DBE goal implementation, record keeping, monitoring, and enforcement. Interviews were conducted with the General Manager and Finance/Personnel Manager. A sample of contracts and subcontracts was then selected and reviewed for their DBE elements. Additional interviews with prime contractors, subcontractors, and interested parties were also conducted.

At the end of the review, FTA representatives, MTA staff and the review team convened for the final exit conference. At the exit conference, initial findings and corrective actions were discussed with MTA. Attending the conference were:

- Dan Baxter, MTA, General Manager
- Sally Webster, MTA, Finance/Personnel Manager
- Marisa Appleton, FTA, Acting RCRO Region IX (by teleconference)
- Britney Berry, FTA, Office of Civil Rights (by teleconference)
- Jennifer Riess, FTA, Office of Civil Rights (by teleconference)
- Antoinette Davis, FTA, Office of Civil Rights (by teleconference)
- Janelle Hinton, FTA, Office of Civil Rights (by teleconference)
- Brian Whitehead, FTA, Office of Civil Rights (by teleconference)
- George Harris, Calyptus Consulting Group, Team Lead/SME
- Jameson Beekman, Calyptus Consulting Group, Consultant
- Rachel Saint-Firmin, Calyptus Consulting Group, Analyst

Following the site visit, a draft report was compiled and transmitted to MTA for comments on December 28, 2015. No comments were received from the grantee regarding the draft report.

5.3 Stakeholder Interviews

The review team interviewed the following thirteen (13) community representatives and stakeholder groups: Mendocino Council of Governments, City of Ukiah Economic Development Department, Mendocino Economic Development Corporation, Mendocino County Development Board, Greater Ukiah Chamber of Commerce, Arcata Economic Development Corporation, West Company – Mendocino Small Business Development Center, Small Business California, California Hispanic Chambers of Commerce, California Asian American Chamber of Commerce, California Department of General Services Business Development Program, California Office of Business and Economic Opportunity, and the Associated General Contractors of San Diego. The review team also interviewed four (4) non-DBE prime contractors: Arntz Builders, Wipf Construction, SHN Consulting Engineers and Geologists, and AE Nelson, and three (3) non-DBE subcontractors, Pacific Coast Drilling, Innerspace Engineering, and Ahlborn Fence and Steel, Inc. MTA did not have any DBE contractors or subcontractors perform work on FTA-assisted projects; however, the review team interviewed four DBE contractors performing work in the Mendocino market area: Bouthillier's Construction Inc., Gregg Simpson Trucking, Force Traffic Control Inc., and Scheduling & Information Services Inc.

Complaints

None of the community representatives, stakeholder groups, or contractors reported any known complaints regarding MTA's DBE program.

DBE Contractors

The interviews with DBE contractors included questions on the type of work performed, outreach efforts, participation in goal development, the use of contract goals, and concerns with DBE programs.

MTA did not have any DBE contractors perform work on FTA-assisted projects.

Type of Work Performed

Two (2) of the four (4) DBE contractors interviewed are certified to perform construction work, and one firm is certified in construction management. One firm is certified to provide traffic control services on two-lane highways.

Outreach Efforts

All four (4) DBE contractors interviewed stated they are not aware of MTA's DBE program or any outreach efforts MTA may have undertaken. One (1) DBE contractor noted that they were contacted by a prime contractor bidding on a project but were only given two days' notice before the proposal was due and were unable to respond. All four (4) DBE contractors indicated they are made aware of contracting opportunities through bidding websites or from prime contractors.

Two firms stated it would be helpful if agencies provided advance notice of upcoming contracting opportunities as a way of conducting outreach to DBE contractors while one firm stated additional training for DBE firms could increase their participation on federal projects.

Participation in Goal Development

None of the DBE contractors interviewed have participated in the development of DBE goals for any transit agencies or provided comments on DBE goals.

Use of Contract Goals

Three (3) of the DBE contractors interviewed stated that prime contracts typically contain race-conscious contract goals. One firm noted that the prime contractors typically self-perform the work if there are no DBE contract goals. One firm stated that there are no race-conscious goals on prime contracts under which they are subcontractors.

Concerns with DBE programs

None of the DBE contractors interviewed expressed major concerns regarding the work they receive under federal programs. One contractor stated there should be separate goals established for field work and management work while another firm noted it is difficult to track federal programs due to the number that exist.

Non-DBE Contractors

The interviews with non-DBE contractors included questions on how contractors solicited DBE work, if contractors experienced performance issues with DBE subcontractors, if any subcontractor substitutions occurred, if the contractor leased or lent equipment to DBE subcontractors, on-site monitoring activities, DBE participation reports submitted, payment terms and prompt payment, retainage, and considering DBE work for change orders.

How Contractors Solicited DBE Work

Two (2) of the prime contractors interviewed indicated they had subcontractors performing work on projects for MTA. Both stated that they review the scope of work to identify subcontracting opportunities and then solicit work through a bidding process based on the type of work to be performed. Both contractors stated they review the CUCP listing specified in the solicitation documents to identify potential DBE subcontractors and solicit firms on the list if there are DBE requirements in the solicitation. The other two (2) prime contractors interviewed stated that they rarely use subcontractors due to the specialized nature of the services they perform, and had no subcontractors on projects for MTA.

The subcontractors interviewed reported different means by which they were solicited for work on projects for MTA. One firm stated they were contacted directly by the prime contractor and were sent the solicitation documents, while two firms stated they responded to an open invitation for bid posted by the prime contractor. Both firms stated this is the standard way they are made aware of contracting opportunities.

Performance Issues with DBE Subcontractors

None of the prime contractors interviewed reported having DBE subcontractors on projects for MTA. Two (2) prime contractors had non-DBE subcontractors perform work on projects for MTA; both reported there were no performance issues.

All three (3) subcontractors interviewed stated they performed the complete scope of work in their subcontract and were paid in full.

Subcontractor Substitutions

Two firms reported that there were no subcontractor substitutions made. The remaining two (2) prime contractors interviewed reported they did not have subcontractors performing work on projects for MTA.

All three (3) subcontractors interviewed stated they performed the complete scope of work in their subcontract and were paid in full.

Equipment Leased or Lent to DBE Subcontractors

None of the prime contractors interviewed reported having DBE subcontractors on projects for MTA. Two firms reported that no equipment was leased or lent to subcontractors on projects for MTA.

All three (3) subcontractors interviewed stated they owned all the equipment used on projects for MTA and did not lease or borrow equipment from the prime contractor.

On-Site Monitoring Activities

One firm stated MTA checked to make sure the subcontractors included in the proposal were being utilized on the project; however, the contractor had no documentation of these monitoring activities. One firm did not indicate whether or not MTA conducted monitoring activities of their subcontractors. The remaining two prime contractors interviewed reported they did not have subcontractors performing work on projects for MTA.

All three (3) subcontractors interviewed stated they were unaware of any specific monitoring activities conducted by MTA.

DBE Participation Reports Submitted

One firm stated daily site reports were kept and may have been submitted to MTA but had no record of such submissions. Another firm stated no reports were submitted as there were no DBE subcontractors performing work on projects for MTA. The remaining two prime contractors interviewed reported they did not have any subcontractors performing work on projects for MTA.

Payment Terms and Prompt Payment

During the interviews, one firm stated that subcontractors were paid within seven (7) days while another firm stated subcontractors were paid within ten (10) days from the time they receive payment from MTA. The remaining two (2) prime contractors interviewed reported they did not have subcontractors performing work on projects for MTA.

All three (3) subcontractors interviewed stated they were paid in accordance with the payment terms in their subcontract with the prime contractor.

Retainage

One firm stated retainage was withheld from subcontractors on a case by case basis. In cases where retainage is withheld, it is returned as part of the final payment once all work has been successfully performed. Another firm noted that there were no DBE subcontractors on projects for MTA. One firm stated no retainage was held from DBE firms on projects for MTA. Two firms reported no joint checks were issued on projects for MTA. The remaining two (2) prime contractors interviewed reported they did not have subcontractors performing work on projects for MTA.

One firm stated no retainage was held on projects for MTA. Two firms reported a 10% retainage was held and paid out in accordance with the terms in their contract with the prime contractor. Neither firm reported any issues regarding receiving payment on retainage in a timely manner.

Considering DBE Work for Change Orders

None of the prime contractors interviewed reported having DBE subcontractors on projects for MTA. Two firms reported that when changes are needed, subcontractors are required to submit a price proposal for the change and work is assigned based on the type of work needed and subcontractor expertise.

Two firms stated there were no change orders executed on projects for MTA. One firm reported there was a change order to add funds totaling approximately 6% of the total contract value, but was unable to provide information on the specific reasons for the change.

Major Issues and Concerns

None of the community representatives, stakeholder groups, or contractors reported any major issues and concerns regarding MTA's DBE program.

Community Representatives and Stakeholder Groups

The interviews with community representatives and stakeholder groups included questions on the organization's familiarity with MTA's DBE program, level of participation during the development of MTA's DBE goal, communication with MTA regarding contracting opportunities, outreach efforts conducted by MTA, known concerns about MTA's DBE program, suggestions for improving MTA's DBE program, and whether the organization or its members have worked on FTA-assisted projects for MTA or have participated in providing input on MTA's DBE goals or improvements to MTA's DBE program.

Familiarity with MTA's DBE Program

One (1) of the thirteen (13) external stakeholders interviewed was aware that MTA had a DBE program. The firm stated they knew of the DBE program through regular communications with MTA as the firm is the regional transportation planning agency.

Participation during the Development of MTA's DBE Goal

None of the external stakeholders interviewed were involved in the development of MTA's DBE goal, although one firm indicated they could be involved in that type of activity if they were contacted to provide assistance. Another firm stated they were not contacted to provide input on either the MTA DBE program plan or goal.

Communication with MTA Regarding Contracting Opportunities

One (1) stakeholder stated they were aware of the Solar Canopy project through MTA's membership, which was an FTA-assisted project. No other stakeholders reported being aware of potential contracting opportunities at MTA. Three firms did state that other organizations do contact them about contracting opportunities for their members at times and that they are able to alert their members to potential opportunities through email alerts.

Outreach Efforts Conducted by MTA

One firm stated they provided information to the community regarding the Solar Canopy project, including general information about the existence of the project and potential contracting opportunities for area businesses. No other stakeholders reported being contacted by MTA or assisting MTA in outreach to the small and DBE business communities.

Known Concerns about MTA's DBE Program

No external stakeholders reported any known concerns regarding MTA's DBE program.

Suggestions for Improving MTA's DBE Program

Five firms stated they could assist MTA in providing information related to contracting opportunities to their member businesses. One firm noted MTA could provide more networking opportunities to assist firms in obtaining DBE certification. No other stakeholders had any suggestions for how to improve the DBE program; several stakeholders noted that this was due to a lack of knowledge of MTA's program.

Work on FTA-Assisted Projects at MTA

One firm indicated they had one member business which participated on the Solar Canopy project. No other stakeholders reported being aware of member firms performing work for MTA.

6. Findings and Advisory Comments

This section details the findings for each area pertinent to the DBE regulations (49 CFR Part 26) outlined in the Scope and Methodology section above. For each area, an overview of the relevant regulations and a discussion of the regulations as they apply to the Mendocino Transit Authority's (MTA) DBE program is provided below. Corrective actions and a timetable to correct deficiencies for each of the requirements and sub-requirements are also presented below.

Findings are expressed in terms of "deficiency" or "no deficiency." Findings of deficiency denote policies or practices that are contrary to the DBE regulations or matters for which FTA requires additional reporting to determine whether DBE compliance issues exist.

Findings of deficiency always require corrective action and/or additional reporting, and will always be expressed as:

- A statement concerning the policy or practice in question at the time of the review.
- A statement concerning the DBE requirements being violated or potentially being violated.
- A statement concerning the required corrective action to resolve the issue.

Advisory comments are statements detailing recommended changes to existing policies or practices. The recommendations are designed to ensure effective DBE programmatic practices or otherwise assist the entity in achieving or maintaining compliance.

6.1 DBE Program Plan

Basic Requirement (49 CFR Part 26.21)

Recipients must have a DBE program meeting the requirements of 49 CFR Part 26. The DBE Program Plan outlines the agency's implementation of the DBE Program. Recipients do not have to submit regular updates of DBE programs. However, significant changes in the program must be submitted for approval.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

MTA provided a copy of their DBE program plan dated June 29, 2011. MTA's DBE program plan includes the policy statement along with other areas for the DBE program.

The review team noted that several areas were not included in MTA's DBE program plan to meet the requirements of 49 CFR Part 26.21. The recommended update areas will be discussed throughout this report, but include the bidder's list, reporting requirements, DBELO responsibilities, small business element, legal remedies, and monitoring responsibilities sections of MTA's DBE program plan.

Corrective Actions and Schedule

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must revise their program plan to include the missing elements noted throughout this report. The revised program plan must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

6.2 DBE Policy Statement

Basic Requirement (49 CFR Part 26.23)

Recipients must formulate and distribute a signed and dated DBE policy, stating objectives and commitment to the DBE program. This policy must be circulated throughout the recipients' organization and to the DBE and non-DBE business communities.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

The DBE policy statement is included in MTA's DBE program plan and contains all the required elements. The policy statement includes the objectives of the DBE program, names the DBELO, and indicated the policy statement has been disseminated to the Board of Directors, all components of the organization, and will be distributed to DBE and non-DBE business communities. MTA staff stated the policy statement was discussed during staff meetings as it was being developed. No further internal dissemination efforts were undertaken. There is no evidence of dissemination of the policy statement to new employees, the public, or to DBE and non-DBE business communities.

The DBE policy statement was signed by the General Manager, Mr. Bruce Richard, on June 29, 2011. Mr. Dan Baxter was installed as the MTA General Manager in July 2013. To date, the DBE policy statement has not been updated to reflect the current General Manager and has not been signed by Mr. Baxter.

There is no dissemination of the policy statement throughout MTA's organization, including to new employees, or to the public, DBE, and non-DBE business communities. The DBE policy statement has not been updated to reflect the current General Manager and has not been signed by the current General Manager (6.2 DBE Policy Statement).

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must update the policy statement with the current General Manager and formally disseminate the statement to internal and external stakeholders. The policy statement should be revised and signed by the new General Manager, and affirmed by the Board. The updated policy statement and evidence of dissemination must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

6.3 DBE Liaison Officer

Basic Requirement (49 CFR Part 26.25)

Recipients must have a designated DBE Liaison Officer (DBELO) who has direct and independent access to the CEO. This Liaison Officer is responsible for implementing all aspects of the DBE program and must have adequate staff to properly administer the program.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

MTA's DBE program plan identifies the DBELO duties and responsibilities to implement the DBE program. Ms. Sally Webster, Finance/Personnel Manager is identified as the DBELO for MTA and the DBE program plan includes her contact information. She has been the DBELO since the program was implemented in FY2011. MTA's DBE program plan states that the DBELO has direct and independent access to the General Manager concerning DBE program matters. The organizational chart included in the MTA DBE program plan demonstrates that the Finance/Personnel manager reports directly to the General Manager. Ms. Webster stated that she communicates with the General Manager regarding DBE requirements. She stated that these communications are informal and are not documented.

Based on staff interviews, the DBELO is responsible for developing and submitting required DBE reports, analyzing goal attainment, reviewing solicitation documents for compliance with DBE requirements, reviewing good faith efforts documentation, working with staff to set overall triennial goals, ensuring solicitations are available to DBEs, providing DBEs with information, advising the General Manager on DBE matters, and maintaining MTA's bidders list. The list of DBELO responsibilities included in the MTA DBE program plan includes areas that are not being performed by the DBELO at this time. The responsibilities listed in the program plan that are not being performed by the DBELO are chairing the DBE advisory committee and certifying DBEs according to criteria set by DOT. In addition, the job description for the Finance/Personnel Manager position does not reflect the DBELO responsibilities contained in the MTA DBE program plan.

The MTA has two additional finance staff available to assist with MTA's DBE program implementation on an as-needed basis. These staff members are asked to assist in identifying DBE participation and tracking payments when developing semi-annual reports.

The DBELO expressed some difficulty in carrying out these roles due to her limited understanding of the DBE program requirements. The DBELO has not attended any FTA DBE training. The DBELO indicated that the DBELO responsibilities are collateral duties. The DBELO's primary function is that of the Finance/Personnel Manager. In this capacity, she is responsible for managing accounts receivable and accounts payable, maintaining all financial transaction journal entries, maintaining depreciation schedules, receiving and recording cash collected from fare boxes, requesting reimbursement for capital and operating assistance, developing financial reports and financial statements, assisting in the annual budget development process, managing payroll and employee benefits, maintaining personnel records, preparing and revising job descriptions as needed, coordinating employee recruitment activities, and addressing personnel issues. Ms. Webster is not responsible for project management

activities or for ensuring projects are completed on time so she does not have any apparent conflicts of interest in performing her duties as the DBELO.

The list of DBELO responsibilities included in the MTA DBE program plan includes areas that are not being performed by the DBELO at this time and the DBELO's current job description does not reflect the DBELO responsibilities contained in the MTA DBE program plan. The DBELO has not attended any FTA DBE training and has a limited understanding of the DBE program requirements.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must revise the DBELO designation section of the program plan and DBELO job description to align with the current DBELO responsibilities. MTA staff must also utilize the available FTA and USDOT DBE training resources to enhance their understanding of the DBE program requirements. The updated responsibilities, and job description, and a list of DBE training attended by MTA staff must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

6.4 DBE Financial Institutions

Basic Requirement (49 CFR Part 26.27)

Recipients must investigate the existence of DBE financial institutions and make efforts to use them. Recipients must also encourage prime contractors to use these DBE financial institutions.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

MTA indicated in their DBE program plan that they had not identified any DBE-owned financial institutions. MTA's DBE program plan states that the agency investigates the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community and indicates efforts used to identify and use such institutions.

In 2011, MTA staff spoke with four area organizations, WIB, the West Company, the Economic Development Finance Corporation, and Mendocino Works and Savings Bank, and researched the CUCP website in an attempt to identify DBE financial institutions; however, no efforts have been made to encourage prime contractors to such institutions as required by 49 CFR Part 26.27.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must develop and implement a procedure to add

information on the use of DBE financial institutions to FTA-assisted solicitation documents and to encourage prime contractors to use DBE financial institutions. The procedure and sample solicitation language must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

6.5 DBE Directory

Basic Requirement (49 CFR Part 26.31)

A DBE directory must be available to interested parties, including addresses, phone numbers, and types of work each DBE is certified to perform. This directory must be updated at least annually and must be available to contractors and the public upon request.

Discussion

During this compliance review, **no deficiencies** were found with this requirement.

The California Unified Certification Program (CUCP) maintains a directory identifying all firms eligible to participate as DBEs. The directory lists the firm's contact information, preferred work locations, and the type of work the firm has been certified to perform as a DBE. The directory is available to the public via the internet. The directory can be searched by NAICS code, work code, Caltrans district, and county. This feature is in compliance with the 2011 DBE Final Rule requirements. MTA's DBE program states the agency is relying on the California Unified Certification Program (CUCP) DBE directory for identifying all firms eligible to participate as DBEs by NAICS code and that only DBE firms certified in the current CUCP directory will be eligible to participate as DBEs in any contract.

6.6 Overconcentration

Basic Requirement (49 CFR Part 26.33)

The recipient must determine if overconcentration of DBE firms exists and address the problem, if necessary.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

The overconcentration section of MTA's DBE program plan consisted of one statement that MTA has not identified that overconcentration exists in the types of work that DBEs perform. Step one of MTA's submitted goal methodology staff indicated they relied on the analysis discussed in the 2007 Caltrans disparity study when establishing DBE goals. The Caltrans 2007 disparity study does not include a discussion of overconcentration. Caltrans 2007 DBE program plan states the Department has determined that no over-concentration of DBE firms exists.

During the review, MTA staff was unable to demonstrate that an overconcentration analysis was conducted as part of its DBE program as required by 49 CFR Part 26.33. **Corrective Actions and Schedules**

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must develop a process to conduct an overconcentration analysis before developing its next DBE triennial goal. The process must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

6.7 Business Development Programs

Basic Requirement (49 CFR Part 26.35)

The recipient may establish a Business Development Program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program.

Discussion

During this compliance review the area of Business Development Programs (BDP) did not apply and thus **no deficiencies** were found with this requirement.

The Business Development Program section of MTA's DBE program states the agency has chosen not to implement a Business Development Program. MTA staff confirmed that the agency has not created or implemented a Business Development Program.

6.8 Determining/Meeting Goals

A) Calculation

Basic Requirement (49 CFR Part 26.45)

To begin the goal-setting process, the recipient must first develop a base figure for the relative availability of DBEs. After the base figure is calculated, the recipient must examine all other available evidence to determine whether an adjustment is warranted. Adjustments are not required and should not be made without supporting evidence.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

Prior to FY2011, MTA had no experience establishing a three-year DBE goal. Staff indicated that they reached out to the Mendocino County Department of Transportation for assistance and were advised to adopt the goals developed by Caltrans. MTA elected to do this and included the Caltrans goal methodology and three-year goal in its DBE program plan. The goal was 4% race-neutral for the three-year period FY2011-2013. The MTA DBE program plan states this goal was wholly race-neutral.

While the DBE regulations at 49 CFR 26.45(c)(4) allow MTA to use the goal of another DOT recipient, MTA must determine whether a Step 2 adjustment is warranted. MTA did not determine whether a Step 2 adjustment was warranted to account for the current capacity of DBEs to perform work on FTA-assisted contracts for MTA or the availability of DBE firms in the area.

MTA submitted Caltrans goal methodology as part of its DBE program plan submission in June 2011 and it expired on 9/30/2013. MTA could not provide evidence that the Caltrans DBE goal methodology was concurred by FTA. Grant CA-88-0003 remained open until September 23, 2014. MTA did make payments to contractors and request reimbursement from FTA after the FY2011 – FY2013 goals expired; however no contract awards were made after MTA's goals expired and they did not have any additional contracting opportunities exceeding the \$250,000 threshold. The DBE regulations require MTA to maintain its DBE program, so long as federal funds are in use, even when it does not meet the \$250,000 threshold in accordance with 49 C.F.R. 26.21(c) and 26.45(a)(2)¹.

MTA did not determine whether an adjustment to the base figure for the DBE goal was warranted to address the availability of DBE firms in the area as required by 49 CFR 26.45.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must develop a triennial goal methodology that covers anticipated MTA contracting activity, identifies the appropriate geographic market area, performs the necessary Step 2 adjustments if warranted, and otherwise complies with the DBE requirements. The goal methodology must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

B) Public Participation

Basic Requirement (49 CFR Part 26.45)

In establishing an overall goal, the recipient must provide for public participation through consultation with minority, women, and contractor groups regarding efforts to establish a level playing field for the participation of DBEs. A notice announcing the overall goal must be published on the recipient's official website and may be published in other media outlets with an optional 30-day public comment period.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

MTA's DBE program plan states that MTA chose to adopt the DBE goals and goal methodology developed by Caltrans. The Caltrans goal methodology is included as an attachment to the MTA DBE program plan and includes Caltrans' efforts to consult the general public and DBE stakeholders when developing its goal. During the review, MTA staff stated they relied on the Caltrans process and did not engage in a consultative process with the local community, request comments, or publish the DBE goal once it was adopted. MTA did not publicize the DBE goal percentage on the agency website or in any media outlets.

¹ [I]f you have an existing DBE program, it must remain in effect and you must seek to fulfill the objectives outlined in 26.1.(49 C.F.R. 26.45(a)(2)) (November 2014). This requirement applies to recipients that no longer meet the \$250,000 threshold and are, thus, not required to establish a triennial goal but are required to continue implementing their program for as so long as they receive FTA financial assistance. Recipients who no longer meet the threshold should submit a notice, signed by the agency's highest ranking official, to the Regional Civil Rights Officer.

The USDOT DBE Questions and Answers note that,

By definition, the process of consultation involves a scheduled face-to-face conference or meeting of some kind with individuals or groups of interested persons for the purpose of developing and/or assessing a proposed goal and methodology and seeking information or advice before a decision is made. Publication of the proposed goal to the general public is not synonymous with, or a substitute for, consultation with interested or affected groups.

Recipients should identify groups within their contracting market that are likely to have information relevant to the goal setting process or that have a stake in the outcome of the process. Those groups should be contacted and invited to participate in a face-to-face exchange (which may occur at a public meeting) aimed at obtaining the kind of information set out in the regulation regarding establishing the overall DBE goal. Efforts should be made to engage in a dialogue with as many interested stakeholders as possible. An advisory committee may be one method of consultation (but not the exclusive method, since this could lead to a recipient talking only to the same people all the time). A description of the consultation process and its purpose should be provided to all invitees.

The review team interviewed the following thirteen (13) stakeholder groups: Mendocino Council of Governments, City of Ukiah Economic Development Department, Mendocino Economic Development Corporation, Mendocino County Development Board, Greater Ukiah Chamber of Commerce, Arcata Economic Development Corporation, West Company – Mendocino Small Business Development Center, Small Business California, California Hispanic Chambers of Commerce, California Asian American Chamber of Commerce, California Department of General Services Business Development Program, California Office of Business and Economic Opportunity, and the Associated General Contractors of San Diego. Of these, only one (1), the Mendocino Council of Governments, stated they were aware MTA has a DBE program; however, they have not been requested to comment on MTA's goals and have not been involved in their development or implementation.

MTA did not engage in a consultative process including a scheduled, direct, or interactive exchange with minority, women, and contractor groups, or publish the DBE goal once it was adopted, as required by 49 CFR Part 26.45(g)(1).

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must develop a public participation process for its next DBE goal methodology and include it in the DBE program plan. The public participation process must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

C) Race-Neutral DBE Participation

Basic Requirement (49 CFR Part 26.51)

The recipient must meet the maximum feasible portion of the overall goal using race-neutral means of facilitating DBE participation. As of 2011, the small business element described in 49 CFR 26.39 is a mandatory race-neutral measure. Additional examples of how to reach this goal amount are listed in the DBE regulations.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

MTA adopted the Caltrans FY2011-2013 DBE goals. Caltrans anticipated achieving its 4% goal through wholly race-neutral measures. Caltrans goal methodology did not provide an explanation for the decision to use a 100% race-neutral measure program.

MTA, in turn, committed to also implement a 100% race-neutral DBE program. MTA did not include specific race-neutral measures as part of its DBE program plan and goal. Caltrans listed the following race-neutral measures as part of its goal which was adopted by MTA: business outreach and communication, technical assistance, improved contracting processes, and data collection, monitoring, and reporting. MTA did not provide evidence that any of the Caltrans race-neutral measures were implemented. No race-neutral measures were used on the Maintenance Facility or Solar Canopy projects.

The USDOT DBE Questions and Answers note that,

Recipients know their own markets and the types of contracts most likely to be let. In determining the level of participation to be achieved through race-neutral means, the recipient should use its experience concerning the availability of DBEs in particular types of contracts in their market.

Here are some examples of questions recipients could ask in making this analysis:

- *What is the participation of DBEs in the recipient's contracts that do not have contract goals?*
- *There may be information about state, local, or private contracting in analogous areas where contract goals are not used (e.g., in situations where a prior state/local affirmative action program was ended). What is the extent of participation of minority and women's businesses in programs without goals?*
- *What is the extent of race neutral efforts that the recipient will have in place for the next fiscal year?*
- *Are there firm, written, detailed commitments in place from contractors to take concrete steps sufficient to generate a certain amount of DBE participation through race-neutral means?*
- *To what extent have DBE primes participated in the recipient's programs in the past?*
- *To what extent has the recipient oversubscribed its DBE goals in the past?*

Where there is not systematic data in existence, recipients could conduct quick, informal surveys and use the results as part of the basis for their projections.

Recipients should closely monitor DBE participation relative to their projections to determine whether mid-course corrections are needed.

Small Business Element

The MTA DBE program plan does not contain the required small business element. The small business element is designed to increase DBE participation using innovative techniques, such as small business set-asides, where size standards are the primary qualifying criteria.

MTA's DBE program plan does not include specific race-neutral measures and no race-neutral measures were undertaken by MTA on FTA-assisted projects. In addition, the MTA DBE program plan does not contain the small business element as required by 49 CFR Part 26.39.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must identify race-neutral measures that are most appropriate for its DBE program and small business population. MTA must also develop a small business element to be included in the program plan. The plan to achieve goals through race-neutral means and the small business element must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

D) Race-Conscious DBE Participation

Basic Requirement (49 CFR Part 26.51)

The recipient must establish contract goals to meet any portion of the goal if it does not project being able to meet using race-neutral measures.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

MTA anticipated using only race-neutral measures to achieve its 4% goal; however, the solicitation documents for the two general construction contractors under the FTA-assisted Maintenance Facility and Solar Canopy projects included 4% DBE goals and mandatory evidence of good faith efforts. MTA staff stated they do not have a process for calculating individual contract goals and included the entire 4% DBE goal in solicitations as contract goals. No justification for using race-conscious goals in light of their 100% race-neutral goal was completed by MTA. Additional solicitation documents for architectural services, testing and inspection, sampling and analysis, geotechnical services, soil removal, and the solar system related to FTA-assisted projects did not include contract goals. MTA achieved 0% DBE participation in FY2013 based on these contract goals as good faith efforts indicating 0% DBE participation was submitted by the prime contractors awarded to the two construction projects. MTA achieved 0% DBE participation using race-neutral measures. MTA does not have a

methodology to determine the DBE contract goals assigned to race-conscious contracts in its DBE program plan.

The Western States Paving 9th circuit case ruled that the race-conscious elements of the DBE program be narrowly tailored and the use of race-based measures must depend on the presence or absence of discrimination. The case requires federal grant recipients, such as MTA, to conduct statistical studies to establish the existence of discrimination prior to implementing race-conscious measures. There are recipients in MTA's geographic market area, such as San Francisco Bay Area Rapid Transit District (BART) who have implemented race-conscious measures. BART's FY2012 DBE program plan indicated they would use contract specific goals on construction contracts with subcontracting opportunities to the extent that the District cannot achieve its annual overall DBE goal with race-neutral measures.

MTA does not have a methodology to determine the DBE contract goals assigned on race-conscious contracts. MTA did not provide a justification for the use of race-conscious goals in two construction contracts as required by 49 CFR Part 26.51(f)(1) and the 9th Circuit Court Western States Paving decision.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must develop a race-conscious/race-neutral goal methodology that assesses the need and extent of race-conscious measures as part of MTA's DBE program. MTA must also establish a process to determine the appropriate contract goal percentage for future FTA-assisted contracts. MTA staff must utilize the available FTA and USDOT DBE training tools and resources to enhance their understanding of the DBE program requirements in this area. The next goal methodology must include the race-conscious/race-neutral methodology and the process to determine when contract goals will be used and must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

E) Good Faith Efforts

Basic Requirement (49 CFR Part 26.53)

The recipient may award contracts with DBE goals only to bidders who have either met the goals or conducted good faith efforts (GFE) to meet the goals. Bidders must submit the names and addresses of the DBE firms that will participate on the contract; a description of the work each DBE will perform; the dollar amount of DBE participation; written commitment to use DBE submitted in response to the contract goal; written confirmation from each DBE listed; or good faith efforts as explained in Appendix A of 49 CFR Part 26. The bidders must submit documentation of these efforts as part of the initial bid proposal—as a matter of responsiveness; or no later than 7 days after bid opening—as a matter of responsibility. The recipient must review bids using either the responsiveness or responsibility approach and document which approach will be used in its DBE program plan.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

MTA's DBE program states that bidders are obligated to make good faith efforts to meet MTA's contract goals and requires that prime contractors submit the following information with bids as a matter of responsiveness:

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 contractors commitment; and
6. If the contract goal is not met, evidence of good faith efforts.

The specific good faith effort requirements included in the program plan require bidders to show all necessary and reasonable steps to achieve the goal that could reasonably be expected to obtain sufficient DBE participation. To further assist the DBELO when reviewing DBE Utilization Plans and good faith efforts, the solicitation required bidders to submit forms documenting the total DBE participation to be utilized on the contract and letters of intent for each DBE firm to be utilized on the contract (See Attachment 1). It is MTA's practice to evaluate the good faith efforts of all bids as part of a responsiveness determination once bids are opened. Failure to provide this information would therefore result in rejection of the bid.

MTA has also created a standard checklist to use in the evaluation of good faith efforts (See Attachment 2). The review team noted the checklist was used in all procurements that included a contract goal and followed their Good Faith Efforts procedures. The checklist includes an evaluation of whether contractors solicited DBE participation through all reasonable and available means, how contractors selected portions of the work to be performed by DBEs, and whether contractors negotiated in good faith with interested DBEs. Specific areas addressed include:

1. Breaking out the work into economically feasible units to facilitate DBE participation
2. Providing interested DBEs with adequate information about the plans in a timely manner
3. Not rejecting DBEs as being unqualified without sound reasons
4. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance
5. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, and materials
6. Effectively using services of available community organizations

These good faith efforts are also required when DBEs are replaced on subcontracts. MTA's DBE program plan indicated that prime contractors should notify the DBELO immediately and document that the replacement firm is a DBE or show that good faith efforts were made to find a DBE replacement firm. This requirement is also included in MTA's standard prime contract clauses.

Good faith efforts demonstrate that a bidder took all necessary and reasonable steps to achieve a DBE goal, by their scope, intensity, and appropriateness. Despite the abovementioned documents, MTA does not evaluate the reasons why specific DBE firms chose not to participate in contracting opportunities as required by 49 CFR Part 26 Appendix A Section D.(1). This data is not presently required as part of the good faith efforts documentation bidders/offerors must submit.

The USDOT DBE Questions and Answers note that,

A bidder/offeror is deemed to have made a good faith effort to meet a contract goal if it: (1) documents that it has obtained enough DBE participation to meet the goal; or (2) documents that it made adequate good faith efforts to meet the goal even though it did not succeed in obtaining enough DBE participation to meet the goal. 49 CFR 26.53(a). Recipients have an obligation to make sure all information is complete and accurate (e.g., all needed DBE certifications have been timely completed) and adequately documents the bidder/offeror's good faith efforts before committing itself to the performance of the contract by the bidder/offeror. 49 CFR Part 26.53(c).

MTA solicited two contracts with associated race-conscious contract goals. In both solicitations bidders were required to submit evidence that DBEs were solicited through all reasonable and available means, they selected portions of the work to be performed by DBEs, they provided interested DBEs with adequate information about the plans in a timely manner, they negotiated in good faith with interested DBEs, they did not reject DBEs as being unqualified without sound reasons, they made efforts to assist interested DBEs in obtaining bonding, lines or credit, or insurance, they made efforts to assist interested DBEs in obtaining necessary equipment, supplies, and materials, and they effectively used the services of available community organizations.

MTA received five (5) bids in response to a solicitation for construction services for their Maintenance Facility project. None of the bidders met the 4% DBE goal included in the solicitation. All five (5) bidders submitted the required good faith effort documentation indicating 0% DBE participation. MTA completed the agency's standard good faith efforts checklist to evaluate the submissions.

MTA received two (2) bids in response to a solicitation for construction services for their Solar Canopy project. Neither bidder met the 4% DBE goal included in the solicitation. One (1) bidder submitted the required good faith effort documentation indicating 0% DBE participation and MTA did complete the agency's standard good faith efforts checklist to evaluate this submission. The second bidder did not submit good faith efforts documentation, MTA did not reject this bid as non-responsive in accordance with the solicitation requirements.

The MTA DBE program plan identifies Ms. Sally Webster, Finance/Personnel Manager as the reconsideration official and describes the reconsideration process. The DBE program plan states that bidders/offerors may request administrative reconsideration in writing within three (3) working days of being informed by MTA that they are not responsive because they have not documented sufficient good faith efforts. The program plan also states that the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so and have the opportunity to

meet in person with MTA's reconsideration official. MTA will then send the bidder/offeror a written decision on reconsideration, explaining the basis for the finding.

MTA did not evaluate the reasons why specific DBE firms chose not to participate in contracting opportunities. MTA did not reject a bid that did not include the required good faith efforts documentation as non-responsive in accordance with the solicitation requirements.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must revise the procedure for reviewing good faith efforts to reflect the guidance located in 49 C.F.R. 26 Appendix A. The revised procedure should include the process for evaluating the reasons why specific DBE firms chose not to participate in contracting opportunities and cover when bids will be rejected if good faith efforts information is not submitted. The revised procedure for reviewing DBE Utilization Plans and good faith efforts must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

F) Protecting Against Termination for Convenience

Basic Requirements (49 CFR 26.53 and 26.13)

Recipients must implement appropriate mechanisms to ensure that prime contractors do not terminate DBE subcontractors for convenience (e.g., to perform the work of the terminated subcontract with its own forces or those of an affiliate, or reducing the scope of DBE contract) without the transit agency's prior written consent. Failure to obtain written consent is a material breach of contract.

Discussion

During this compliance review, **no deficiencies** were found with this requirement.

The MTA DBE program plan states that MTA will require the prime contractor to notify the DBELO immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation. It also states that under these circumstances, MTA will require the prime contractor to obtain prior approval of the substitute contractor and to provide copies of new or amended documentation of good faith efforts to replace the DBE. Prime contractors are required to notify MTA if a DBE contractor is terminated.

During the site visit, eight (8) FTA-funded prime contracts were reviewed for this requirement as shown in the table below:

Contractor	Work Performed
A.E. Nelson	General Construction
Arntz Builders, Inc.	General Construction
Kleinfelder West, Inc.	Geotechnical Services
Jim Lacy	Construction Management
North Coast Resource Management	Sampling and Analysis

Contractor	Work Performed
SHN Consulting Engineers and Geologists	Testing and Inspection
TLCD Architecture	Architect
Hise Architects	Architect

All required clauses regarding termination for convenience of subcontractors were included in the contracts reviewed. MTA included the appropriate contract mechanisms in prime contracts and no DBE subcontractors were terminated for convenience.

G) Counting DBE Participation

Basic Requirement (49 CFR Part 26.55)

The recipient must count only the value of work actually performed by the DBE when assessing the adequacy of DBE participation submitted in response to a contract. The recipient must review a bidder's submission to ensure the type and amount of participation is consistent with the items of work and quantities in the contract and that the bidder is only counting work performed by the DBE's own forces in accordance with the DBE requirements.

Discussion

During this compliance review, **no deficiencies** were found with this requirement.

MTA's DBE program plan indicates that they will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55 and will take reasonable steps to ensure contractors provide accurate information for counting.

MTA included contract goals in two (2) construction project solicitations. In both solicitations bidders were required to submit a DBE participation list with the name and address of each DBE subcontractor, as well as a description of the work to be performed and dollar amount. The solicitation documents also required bidders to submit a written confirmation from each DBE subcontractor that it is participating in the contract as provided in the prime contractor's commitment. Both prime contractors submitted good faith efforts documentation that resulted in the establishment of contracts with 0% DBE participation.

MTA did not obtain any DBE participation on FTA-funded procurement actions.

H) Quotas

Basic Requirements (49 CFR Part 26.43)

The recipient is not permitted to use quotas. The recipient may not use set-aside contracts unless no other method could be reasonably expected to redress egregious instances of discrimination.

Discussion

During this compliance review, **no deficiencies** were found with this requirement.

MTA's DBE program plan indicates MTA does not use quotas in administering the DBE program. The review team did not note any evidence that MTA had used quotas or set-asides.

6.9 Shortfall Analysis and Corrective Action Plan

Basic Requirement (49 CFR Part 26.47)

The recipient must conduct a shortfall analysis and implement a corrective action plan in any fiscal year it does not meet its overall DBE goal.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

MTA's DBE program plan does not contain requirements to conduct a shortfall analysis if it does not meet its DBE goals. MTA's FY2011-2013 DBE goal was 4% and it failed to submit a goal in FY2014. MTA has not submitted any Semi-Annual reports to reflect its FTA-assisted contracting activity from FY2011 through FY2014.

During the site visit, MTA staff provided data on the value of all FTA-assisted contract awards. In FY2011, MTA awarded \$6,449,800.00 through FTA-assisted procurement actions and attained 0% DBE participation. In FY2012, MTA awarded \$2,767,464.00 in FTA-funded procurements and attained 0% DBE participation. In FY2013, MTA awarded \$801,643.81 in FTA-funded procurements and attained 0% DBE participation. MTA had no FTA-funded procurement actions completed in FY2014. MTA did not achieve its stated 4% DBE goal in FY2011, FY2012, or FY2013; however, no shortfall analysis has been completed by MTA for those years.

MTA did not meet its goals due to the following reasons:

- Lack of race-neutral measures, including the small business element
- Lack of performance tracking for DBE participation
- Inadequate staff training in DBE requirements

MTA did not complete a shortfall analysis in FY2011, FY2012, or FY2013 as required by 49 CFR Part 26.47(c)(1) and 26.47(c)(2).

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must complete the required shortfall analysis for FY2011 through FY2013. MTA must also develop a procedure to complete a shortfall analysis when required in the future and include it in the DBE program update. The required shortfall analyses and procedure must be submitted to the FTA's Office of Civil Rights within 30 days of

submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

6.10 Transit Vehicle Manufacturers (TVMs)

Basic Requirement (49 CFR Part 26.49)

The recipient must require that each transit vehicle manufacturer (TVM) certify that it has complied with the regulations before accepting bids on FTA-assisted vehicle purchases. The recipient should not include vehicle procurements in its DBE goal calculations and must receive prior FTA approval before establishing project goals for vehicle purchases. The recipient is also required to submit, to FTA, the names of the successful TVM bidder and the amount of the vehicle procurement within 30 days of awarding a FTA-assisted vehicle contract.

Discussion

During this compliance review, **no deficiencies** were found with this requirement.

The MTA DBE program states MTA will require each TVM to certify that it has complied with the requirements of this section. Agency staff indicated that FTA funds were not used to purchase rolling stock. The review team noted that MTA has purchased four (4) medium duty buses, ten (10) 35-40 foot buses, and 18 large passenger vans, but none of these procurements had federal participation.

6.11 Required Contract Provisions and Enforcement

A) Contract Assurance

Basic Requirements (49 CFR Part 26.13)

Each FTA-assisted contract signed with a prime contractor (and each subcontract the prime contractor signs with a subcontractor) must include non-discrimination clauses detailed by the DBE regulations.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

MTA states in their DBE program plan that they will ensure that the contract assurance clause found in 26.13 of the DBE regulations is placed in every DOT-assisted contract and subcontract. The review team examined eight (8) prime contracts and four (4) subcontracts for compliance with contract assurance clause inclusion. The clause was found in all prime contracts reviewed and was included by reference in all subcontracts reviewed.

The prime contracts and subcontracts reviewed are listed in the chart below:

Prime Contractor	Project	Subcontractors Used
A.E. Nelson	Solar Canopy	Pacific Coast Drilling
Arntz Builders, Inc.	Maintenance Facility	Ahlborn Fence and Steel, Inc. Gaia Energy Systems Innerspace Engineering
Kleinfelder West, Inc.	Maintenance Facility	None
Jim Lacy	Maintenance Facility Solar Canopy	None
North Coast Resource Management	Maintenance Facility	None
SHN Consulting Engineers and Geologists	Maintenance Facility Solar Canopy	None
TLCD Architecture	Maintenance Facility	None
Hise Architects	Solar Canopy	None

MTA did not provide evidence of formal enforcement policies or procedures to ensure compliance with this contract assurance requirement. MTA does not have a formal process to review subcontracts for required contract assurance clauses.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must develop a formal process to ensure all required clauses are included in both prime contracts and subcontracts. The required corrective action measures must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

B) Prompt Payment

Basic Requirements (49 CFR Part 26.29)

The recipient must establish a contract clause to require prime contractors to pay subcontractors for satisfactory performance on their contracts no later than 30 days from receipt of each payment made by the recipient. This clause must also address prompt return of retainage payments from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

Prompt Payment

MTA's DBE program plan states they will include a prompt payment clause in each DOT-assisted prime contract. MTA has a fifteen (15) day prompt payment clause. The prompt

payment clause was included in the prime contracts reviewed and was included by reference in the subcontracts reviewed. The review team noted that the Pacific Coast Drilling subcontract included the MTA prompt payment clause by reference; however, a payment section included in the subcontract states progress payments are to be made at approximate 30 day intervals. These two (2) clauses conflicted in the time frame for payment.

The review team reviewed payment information from four (4) subcontractors and determined that subcontractors were paid, on average, fourteen (14) days from when the prime contractor received payment from MTA; however, there were three payments made to subcontractors more than fifteen (15) days after payment was made to the prime contractor.

MTA was not able to verify that payment was made to subcontractors within fifteen (15) days.

Retainage

In June 2003, USDOT issued a Final Rule on DBE that contained new requirements for prompt return of retainage. According to the Final Rule, if an agency chooses to hold retainage from a prime contractor, they must have 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 payment to the prime contractor.

The USDOT DBE Questions and Answers note that,

Recipient's DBE programs must include contractual provisions that unambiguously require contractors to make retainage payments to their subcontractors as soon as the subcontractor's work has been satisfactorily completed. This is a race-neutral feature that applies to all subcontractors, not just DBEs.

MTA's DBE program plan and standard prime contract clauses state that prime contractors must return retainage payments to each subcontractor within fifteen (15) calendar days after incremental acceptance of the subcontractor's work by MTA and the contractor's receipt of partial retainage payment related to the subcontractor's work. MTA does hold retainage on projects and included a contract clause that required the prime contractors to return retainage payments to each subcontractor within fifteen (15) calendar days after incremental acceptance of the subcontractor's work by MTA and Contractor's receipt of the partial retainage payment related to the subcontractor's work. Three (3) of the subcontract agreements reviewed stated that 10% of the total contract value shall be retained until seven (7) days after receipt of final payment from Owner. One (1) subcontract reviewed did not include a payment clause that addressed retainage.

MTA does not have a process to verify that payment of retainage was made to subcontractors within fifteen (15) days after incremental acceptance of the subcontractor's work by MTA and prime contractor's receipt of the partial retainage payment related to the subcontractor's work. However; the review team independently collected payment information from three (3) subcontractors and determined that retainage was paid, on average, within five (5) days from when the prime contractor received final payment from MTA.

MTA does not have a process in place to verify that payment clauses are included in subcontracts or to verify prompt payment and release of retainage to subcontractors in accordance with their DBE program plan and standard contract clauses.

Corrective Actions and Schedules:

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must develop a formal process to verify prime contractors are making payments to DBE subcontractors in accordance with the prompt payment clause in the prime contract, including the return of retainage. The required corrective action measures must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

C) Legal Remedies

Basic Requirements (49 CFR Part 26.37)

Recipients must implement appropriate mechanisms to ensure compliance by all participants, applying legal and contract remedies under Federal, state, and local law. Breach of contract remedies should be used as appropriate.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

MTA's DBE program plan states MTA will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps provided in 26.109. This statement is also included in MTA's standard DBE contract clause. MTA's DBE program plan also discusses the monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26. The DBE program plan notes that MTA will verify that work committed to DBEs at contract award is actually performed by the DBEs through an analysis of invoices. The program plan also states MTA will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award.

The review team examined eight (8) prime contracts and four (4) subcontracts for contract clauses covering legal remedies. In all cases the required contract clause was contained in the documentation reviewed. MTA was unable to provide evidence demonstrating a formal review of subcontracts was conducted.

MTA staff stated that no legal remedies have been used in regard to any of the prime contractors or subcontractors participating on FTA-assisted projects. The reviewer verified that no legal remedies were applied.

MTA does not have a formal process to review subcontracts for required legal remedies provisions.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must develop a formal process to ensure all required clauses are included in subcontracts. The required corrective action measures must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

6.12 Certification Standards

Basic Requirements (49 CFR Part 26.67- 26.71)

The recipient must have a certification process in place to determine whether a potential DBE firm is legitimately socially and economically disadvantaged according to the regulatory standards. The DBE applicant must submit the required DOT application and personal net worth (PNW) form with appropriate supporting documentation, as needed.

Discussion

During this compliance review, **deficiencies** were found with this requirement.

MTA's DBE program plan states they will rely on the certification standards used by the California Unified Certification Program (CUCP). MTA is a non-certifying agency but is a member of the CUCP as validated on the CUCP website.

MTA did not provide the memorandum of understanding confirming its relationship with the CUCP.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must provide a copy of the MOU with the CUCP. The required corrective action measures must be submitted to the FTA's Office of Civil Rights within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

6.13 Certification Procedures

A) Onsite Visits and Document Review

Basic Requirements (49 CFR Part 26.83)

The recipient must determine the eligibility of firms as DBEs consistent with the standards of Subpart D of the regulations. The recipient's review must include performing an on-site visit and analyzing the proper documentation.

Discussion

During this compliance review, **no deficiencies** were found with this requirement.

MTA's DBE program plan states they will rely on the certification standards used by the California Unified Certification Program (CUCP). MTA is a non-certifying agency but is a member of the CUCP as validated on the CUCP website.

B) Annual Affidavit**Basic Requirement (49 CFR Part 83)**

During this compliance review, **no deficiencies** were found with this requirement.

MTA's DBE program plan states they will rely on the certification standards used by the California Unified Certification Program (CUCP). MTA is a non-certifying agency but is a member of the CUCP as validated on the CUCP website.

C) Interstate Certification**Basic Requirement (49 CFR 26.85)**

The recipient may accept out-of-state certifications and certify DBE firms without further procedures. Otherwise, DBEs certified in one or more states and certifying entities should follow the procedure outlined in 49 CFR 26.85(c)-(g).

Discussion

During this compliance review, **no deficiencies** were found with this requirement.

MTA's DBE program plan states they will rely on the certification standards used by the California Unified Certification Program (CUCP). MTA is a non-certifying agency but is a member of the CUCP as validated on the CUCP website.

D) Certification Appeals**Basic Requirements (49 CFR 26.86)**

The recipient must provide a written explanation for all DBE certification denials. The document must explain the reasons for the denial and specifically reference evidence in the record to support the denial. The recipient must allow the firm to reapply for certification within 12 months or less of the initial denial. The DBE firm may appeal the certification decision to the DOT.

Discussion:

During this compliance review, **no deficiencies** were found with this requirement.

MTA's DBE program plan states they will rely on the certification standards used by the California Unified Certification Program (CUCP). MTA is a non-certifying agency but is a member of the CUCP as validated on the CUCP website.

6.14 Record Keeping and Enforcements

Basic Requirement (49 CFR Part 26.11 and 26.37):

The recipient must provide data about its DBE program to FTA on a regular basis to FTA. The recipient must submit Semi-Annual Uniform Reports on June 1st and December 1st of each fiscal year using the FTA electronic grants management system, unless otherwise notified by FTA. (State Departments of Transportation must also report the percentage of DBE minority women, non-minority women, and minority men to the DOT Office of Civil Rights by January 1st of each year.) In addition, the recipient must implement appropriate monitoring mechanisms to ensure overall compliance by all program participants. The monitoring and enforcement measures must be conducted in conjunction with monitoring contract performance for purposes such as close-out reviews for contracts.

Lastly, the recipient must maintain a bidders list complete with subcontractor firm names, addresses, DBE status, age of firm, and annual gross receipts of the firm.

Discussion:

During this compliance review, **deficiencies** were found with this requirement.

Bidder's List

The MTA DBE program plan states they will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. MTA has not developed the required bidders list.

Semi-Annual Reporting

MTA's program plan states they will report data to FTA on a semi-annual basis.

The Finance/Personnel Manager is responsible for developing the Semi-Annual Uniform Reports. Data related to contract awards is obtained from the grant/procurement files and payment information is gathered from the accounts payable system and through manual requests for information from prime contractors on payments to subcontractors.

MTA did not submit any reports to FTA but reported its DBE participation to Caltrans from FY2011 through FY2014 via email. MTA submitted the required reports to Caltrans but did not include prime contract and subcontract values; the submitted reports indicated 0% DBE participation.

No reports have been submitted to FTA for those grants in which MTA is a direct recipient.

Monitoring DBE Participation

The MTA DBE program plan states the agency will provide a monitoring and enforcement mechanism to verify that work committed to DBEs at contract award is actually performed by DBEs and will keep a running tally of actual payments to DBE firms for work committed at the time of contract award. The DBE program plan states this is done through an analysis of invoices. MTA did not provide evidence of a procedure or practice of monitoring DBE

participation under FTA-assisted projects to verify work committed to DBEs is being performed by DBEs.

MTA has not developed an internal bidders list. MTA has not submitted the required semi-annual reports to FTA. MTA does not have a process to verify work committed to DBEs is being performed by DBEs.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, MTA must submit a statement, signed by the General Manager, committing to address all deficiencies in this report before applying for future FTA financial assistance. As such, MTA must develop a bidders list, complete and submit the required Semi-Annual Uniform Reports of DBE participation for FY2012, FY2013, and FY2014 in TEAM, and develop on-site reviews and other monitoring procedures to ensure DBEs are performing work they are committed to perform. MTA must also develop a mechanism to track DBE participation to ensure accurate and timely reporting. MTA must notify the FTA's Office of Civil Rights when the required reports have been submitted within 30 days of receiving the final DBE Compliance Review Report; and must submit all other information within 30 days of submitting a grant application for FTA funds exceeding \$250,000 in capital, planning, and/or operating assistance.

7. Summary of Findings

Item	Requirement of 49 CFR Part 26.	Ref.	Site Visit Finding(s)	Finding(s) of Deficiency	Response Days/Date
1.	Program Plan	26.21	D	The MTA DBE program plan is missing the following elements: definitions, bidder's list, reporting requirements, DBELO responsibilities, small business element, legal remedies, and monitoring responsibilities sections of MTA's DBE program plan	90 Days
2.	Policy Statement	26.23	D	There is no dissemination of the policy statement to new employees, the public, or to DBE and non-DBE business communities. The DBE policy statement has not been updated to reflect the current General Manager and has not been signed by the current General Manager	90 Days
3.	DBE Liaison Officer	26.25	D	The list of DBELO responsibilities included in the MTA DBE program plan includes areas that are not being performed by the DBELO at this time. The DBELO's current job description does not reflect the DBELO responsibilities contained in the MTA DBE program plan. The DBELO has not attended any FTA DBE training and has a limited understanding of the DBE program requirements.	90 Days
4.	Financial Institutions	26.27	D	No efforts have been made to encourage prime contractors to use DBE financial institutions.	90 Days
5.	DBE Directory	26.31	ND		
6.	Overconcentration	26.33	D	MTA staff was unable to demonstrate that an overconcentration analysis was conducted as part of its DBE program.	90 Days
7.	Business Development Programs	26.35	ND		
8. Determining / Meeting Goals					
8.a	Calculation	26.45	D	MTA did not determine whether an adjustment to the	90 Days

				base figure for the DBE goal was warranted to address the availability of DBE firms in the area.	
8.b	Public Participation	26.45	D	MTA did not engage in a consultative process with minority, women, and contractor groups or publish the DBE goal once it was adopted.	90 Days
8.c	Race-Neutral	26.51	D	MTA's DBE program plan does not include specific race-neutral measures and no race-neutral measures were undertaken by MTA on FTA-assisted projects. The MTA DBE program plan does not contain the small business element.	90 Days
8.d	Race-Conscious	26.51	D	MTA does not have a methodology to determine the DBE contract goals assigned on race-conscious contracts. MTA did not provide a justification for the use of race-conscious goals in two construction contracts.	90Days
8.e	Good Faith Efforts	26.53	D	MTA does not evaluate the reasons why specific DBE firms chose not to participate in contracting opportunities. MTA did not reject a bid that did not include the required good faith efforts documentation as non-responsive in accordance with the solicitation requirements.	90 Days
8.f	Counting DBE Participation	26.55	ND		
8.g	Protecting Against Termination for Convenience	26.53	ND		
8.h	Quotas	26.43	ND		
9.	Shortfall Analysis and Corrective Action Plan	26.47	D	MTA did not complete a shortfall analysis in FY2011, FY2012, or FY2013.	90 Days
10.	TVM	26.49	ND		
11.Required Contract Provisions and Enforcement					
11.a	Contract Assurance	26.13	D	MTA does not have a formal process to review subcontracts for required contract assurance clauses.	90 Days
11.b	Prompt Payment	26.29	D	MTA does not have a process in place to verify the	90 Days

				payment clauses included in subcontracts or to verify prompt payment and release of retainage to subcontractors in accordance with their DBE program plan and standard contract clauses.	
11.c	Legal Remedies	26.37	D	MTA does not have a formal process to review subcontracts for required legal remedies provisions.	90 Days
12. Certification Standards		26.67-26.71	D	MTA did not provide the memorandum of understanding confirming its relationship with the CUCP.	90 Days
13. Certification Procedures					
13.a	Onsite Visit	26.83	ND		
13.b	Annual Affidavit	26.83	ND		
13.c	Interstate Certification	26.85	ND		
13.d	Certification Appeals	26.86	ND		
14. Record Keeping and Enforcements					
14.a	Bidders List and Reporting DBE Participation	26.11	D	MTA has not developed an internal bidders list. MTA has not submitted the required semi-annual reports to FTA.	90 Days
14.b	Monitoring	26.37	D	MTA does not have a process to verify work committed to DBEs is being performed by DBEs.	90 Days

Findings at the time of the site visit: ND = No Deficiencies Found; D = Deficiency;

NA = Not Applicable; AC = Advisory Comment

8. Attachments

Attachment 1 – Good Faith Efforts Documentation

Good Faith Efforts DBE Utilization Form

Forms 1 & 2 for Demonstration of Good Faith Efforts *[Forms 1 and 2 should be provided as part of the solicitation documents.]*

FORM 1: DISADVANTAGED BUSINESS ENTERPRISE (DBE) UTILIZATION The undersigned bidder/offeror has satisfied the requirements of the bid specification in the following manner (please check the appropriate space): The bidder/offeror is committed to a minimum of % DBE utilization on this contract. ___ The bidder/offeror (if unable to meet the DBE goal of ___%) is committed to a minimum of ___% DBE utilization on this contract a submits documentation demonstrating good faith efforts. Name of bidder/offeror's firm: ___. State Registration No. _____

By _____ (Signature) Title

Good Faith Efforts Letter of Intent Form**FORM 2: LETTER OF INTENT**

Name of bidder/offeror's firm: _____ Address: _____ City: _____

State: ____ Zip: ____

Name of DBE firm: _____ Address: _____ City: _____ State: _____

____ Zip: ____ Telephone: _____

Description of work to be performed by DBE firm :

The bidder/offeror is committed to utilizing the above-named DBE firm for the work described above. The estimated dollar value of this work is \$ _____

Affirmation

The above-named DBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above.

By ____ ~~~~~

(Signature) (Title)

If the bidder/offeror does not receive award of the prime contract, any and all representations in this Letter of Intent and Affirmation shall be null and void.

(Submit this page for each DBE subcontractor.)

Attachment 2 – Good Faith Efforts Evaluation Checklist

Mendocino Transit Authority

Guidance Concerning Good Faith Efforts

	Quality	Quantity	Intensity	Unknown
Soliciting through all reasonable & available means				
Attendance at pre-bid meetings				
Advertising and/or written notices				
Solicited with sufficient time to allow DBEs to respond				
Follow up with initial solicitation				
Selecting portions of the work to be performed by DBEs:				
breaking out contract work items into economically feasible units to facilitate DBE participation				
Providing interested DBEs w/adequate info about the plans in a timely manner to assist them in responding to a solicitation				
Negotiating in good faith with interested DBEs:				
Includes names, addresses, telephone #s of DBEs that were considered				
Not rejecting DBEs as being unqualified w/o sound reasons				
Make efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance				
Make efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, etc				
Effectively use the services of available minority/women community organizations, contractors groups, local, state, & Federal minority/women bus offices				
Performance of other bidders in meeting the contract				