

FTA

FEDERAL TRANSIT ADMINISTRATION

Bi-State Development Agency (Metro) Disadvantaged Business Enterprise Program Final Compliance Review Report

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PREPARED BY

Milligan & Company, LLC



U.S. Department of Transportation
Federal Transit Administration

COMPLIANCE REVIEW
OF THE

Bi-State Development Agency

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

FINAL REPORT

July 2012

**Prepared for the
Federal Transit Administration
Office of Civil Rights**

by

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Table of Contents

Section 1 – General Information.....	2
Section 2 – Jurisdiction and Authorities.....	3
Section 3 – Purpose and Objectives.....	4
Section 4 – Background Information.....	6
Section 5 – Scope and Methodology.....	7
Section 6 – Issues and Recommendations.....	9
1. DBE Program Plan.....	9
2. DBE Policy Statement.....	9
3. DBE Liaison Officer.....	10
4. Financial Institutions.....	11
5. DBE Directory.....	11
6. Overconcentration.....	12
7. Business Development Programs.....	13
8. Determining/ Meeting Goals.....	14
9. Required Contract Provisions.....	22
10. Certification Standards.....	25
11. Certification Procedures.....	27
12. Record Keeping and Enforcements.....	30
Section 7 – Summary of Findings.....	35 <u>5</u>
Section 8 – List of Attendees.....	38

Section 1 – General Information

Grant Recipient: Bi-State Development Agency
707 North First Street

City/State: St. Louis, MO 63102

Grantee Number: 1830

Executive Official: John Nations
Chief Executive Officer

On Site Liaison: Elke Campbell
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Site Visit Dates: November 15 - 17, 2011

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Section 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 12 of the Master Agreement, Federal Transit Administration M.A., (18), October 1, 2011 and 49 CFR Part 26, “Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs.”

The Bi-State Development Agency (Metro) is a recipient of FTA funding assistance and is therefore subject to the Disadvantaged Business Enterprise (DBE) compliance conditions associated with the use of these funds pursuant to 49 CFR Part 26. These regulations define the components that must be addressed and incorporated in Metro's DBE program and were the basis for the selection of compliance elements that were reviewed.

Section 3 – Purpose and Objectives

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 recipients' annual certification and assurances to FTA, to comply with their responsibilities under 49 CFR Part 26. In keeping with its regulations and guidelines, FTA has determined that a compliance review of the Bi-State Development Agency's (Metro) Disadvantaged Business Enterprise (DBE) program is necessary.

The primary purpose of the compliance review is to determine the extent to which Metro has implemented 49 CFR Part 26, as represented to FTA in its DBE Program Plan. This compliance review is intended to be a fact-finding process to: (1) examine Metro's Disadvantaged Business Enterprise 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 to directly investigate whether there has been discrimination against disadvantaged businesses by the grant recipient or its subrecipients, nor to adjudicate these issues in behalf of any party.

OBJECTIVES

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

- ensure nondiscrimination in the award and the administration of DOT-assisted contracts in the Department's 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 this part's eligibility standards are permitted to participate as DBEs;
- help remove barriers to the participation of DBEs in DOT-assisted contracts;
- assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- 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 Metro is honoring its commitment represented by its annual certification and assurances to FTA that it is complying with its responsibilities under 49 CFR Part 26, “Participation by Disadvantaged Business Enterprises in DOT Programs”;
- examine the required components of Metro’s DBE Program Plan against the compliance standards set forth in the regulations and to document the compliance status of each component; and
- gather information and data regarding the operation of Metro’s Disadvantaged Business Enterprise Program Plan from a variety of sources – DBE program managers, other Metro management personnel, DBEs, and prime contractors.

Section 4 – Background Information

Bi-State Development Agency (Metro) is an organization that was formed by an agreement between the States of Missouri and Illinois in 1949. The agency not only owns and operates the region's public transportation system, which includes bus, light rail, and paratransit service, but also owns and operates the St. Louis Downtown Airport and the adjoining business park, the tram system for the Gateway Arch, the landmark's parking garage, and river boats. Metro has a daily ridership of over 143,000 people.

Metro's board of directors consists of five members from Missouri and five members from Illinois who provide the overall direction and leadership to the agency. Members have five year terms and are required to be resident voters of their state and must reside within the bi-state metropolitan area.

Metro's bus and express bus service (MetroBus) consists of 75 routes with 9,000 stops. The fleet consists of 443 Gillig Phantom and Gillig Low Floor buses. The fleet also includes Neoplan Compressed Natural Gas (CNG) buses. MetroBus has an average weekday ridership of over 89,000 passengers. The agency's paratransit service, Metro Call-A-Ride offers picked up and drop off service to disabled patrons in Missouri. They have a fleet of 136 paratransit buses.

The agency's light rail system, MetroLink, started their operations in 1993. The service consists of two lines, the Red Line and the Blue Line, which connects the Lambert – St. Louis International Airport with the Scott Air Force base in Illinois. The service runs on 46 miles through 37 stations and carries almost 53,000 passengers each weekday. The rolling stock includes 87 ninety foot light rail vehicles. There are two rail yards, Ewing Yard and 29th Street Yard, for storage and maintenance of the vehicles.

Metro has several projects that are currently under construction. Some of the current projects include:

- Eads Bridge Rehabilitation – a three-year ARRA funded project to repair and upgrade St. Louis' 130 year old historic bridge;
- Grand Metrolink Station – replacement of the Grand Boulevard Viaduct, construction of a new parking lot for passengers, and construction of a new Metrolink plaza station;
- Freedom Grant Bus Stop Upgrades – ADA upgrades to over 300 bus stops. One hundred stations have been completed so far. More are scheduled to be upgraded soon; and
- UMSL Interlocking – creation of new interlocking system, a signal house, sidewalk, and drainage improvements near the University of Missouri – St. Louis (UMSL) Station.

Section 5 – Scope and Methodology

Scope

Implementation of the following twelve required DBE program components specified by the FTA are reviewed in this report.

1. A DBE program conforming to this part by August 31, 1999 to the concerned operating administration (OA). You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval. [49 CFR 26.21]
2. A signed policy statement expressing a commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation [49 CFR 26.23].
3. Designation of a 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].
4. Efforts made to use DBE financial institutions, by the recipient as well as prime contractors, if such institutions exist [49 CFR 26.27].
5. 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].
6. Determination if overconcentration exists and address this problem if necessary [49 CFR 26.33].
7. Assistance provided to DBEs through Business Development Programs to help them compete successfully outside of the DBE program [49 CFR 26.35].
8. 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 a recipient's DOT-assisted contracts [49 CFR 26.43 – 26.53].
9. Inclusion of a contract non-discrimination clause, a prompt payment clause and implementation of appropriate mechanisms to ensure compliance by all participants [49 CFR 26.13, 26.29, 26.37].
10. A certification process to determine if a potential DBE is legitimately socially and economically disadvantaged. The potential DBE must submit an application, a personal net worth statement and a statement of disadvantage, along with the proper supporting documentation [49 CFR 26.67].
11. A certification procedure to include document review and an on-site visit and determination of eligibility consistent with Subpart D of the regulations [49 CFR 26.83].
12. Implementation of appropriate mechanisms to ensure compliance with the part's requirements by all program participants. The DBE program must also include a

monitoring and enforcement mechanism 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].

Methodology

The initial step in the scope 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. Subsequent to this review, potential dates for the site visit were coordinated.

An agenda letter was then compiled and sent to Metro by FTA's Office of Civil Rights. The agenda letter notified Metro of the planned site visit, requested preliminary documents, and informed Metro of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed Metro of staff and other parties that would potentially be interviewed.

The documents received prior to the on-site portion of the review were examined and an itinerary for the site visit was developed. An entrance conference was conducted at the beginning of the Compliance Review with FTA representatives, Metro staff, and the review team.

Subsequent to the entrance conference, a review was conducted of Metro's DBE Program Plan and other documents submitted to the review team by the DBE Liaison Officer. Interviews were then conducted with Metro regarding DBE program administration, record keeping and monitoring. These interviews included staff from diversity, procurement, and finance. A sample of contracts were then selected and reviewed for their DBE elements. Additionally, interviews with prime contractors, subcontractors, and interested parties were conducted.

At the end of the review, an exit conference was held with FTA representatives, Metro staff, and the review team. A list of attendees is included at the end of this report. At the exit conference, initial findings and corrective actions were discussed with Metro.

Following the site visit, the review team prepared the draft report based on the desk review and site visit. Subsequently the recipient's responses to the draft report were incorporated into this final compliance review report.

NOTE: Materials and information to address the findings and corrective actions in the report should be sent to the attention of:

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Section 6 – Issues and Recommendations

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. 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 DBE Compliance Review, deficiencies were found with the requirements for a program plan.

Metro provided the review team with a copy of their DBE program plan that was revised May 20, 2011. Metro requires additional updates in their program plan. The recommended update areas will be discussed throughout this report, but include the areas of financial institutions, over-concentration, public participation, and certification sections of Metro's DBE program.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the FTA's Office of Civil Rights a plan to update the DBE program with recommended changes.

Grantee Response: Metro revised and updated its DBE program document and filed with the FTA on February 24, 2012. Specific changes related to issues raised in this document will be discussed in each section.

FTA Response: FTA partially concurs with Metro's corrective action. FTA has identified the need for additional revisions in the areas of DBE Liaison Officer, Financial Institutions, Overconcentration, Required Contract Provisions, Recordkeeping and Enforcements, and Certification based on our review of Metro's February 24, 2012 DBE Program Plan. All DBE program revisions must be submitted by September 30, 2012.

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 DBE Compliance Review, no deficiencies were found with the requirements for a policy statement.

The DBE policy statement is included in Metro's DBE program and is also found on their website. The policy statement outlines the objectives of the DBE program, responsibilities of the DBE Liaison Officer, and how the policy is disseminated internally and externally. The statement in Metro's DBE program was signed by the Chief Executive Officer, John M. Nations, on July 29, 2011.

3. DBE Liaison Officer

Basic Requirement: (49 CFR Part 26.25) Recipients must have a designated DBE liaison officer 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 DBE Compliance Review, deficiencies were found with the requirements for the DBE Liaison Officer (DBELO).

The DBE program identifies the DBELO duties and responsibilities to implement the DBE program. Ms. Elke Campbell, Supplier Diversity Program Manager, is identified as the DBELO for Metro and her contact information is provided.

Metro provided the review team with a copy of their organizational chart. Reporting to the CEO is the Vice President, Larry Jackson, and then the DBELO. No line or connection between the CEO and the DBELO was evident on the chart concerning DBE matters. Metro's DBE program states that the DBELO has direct, independent access to the CEO, John M. Nations. The review team requested documentation of attempted interactions with the CEO. The DBELO provided a copy of an email request from July 12, 2011 for a meeting with the CEO regarding a DBE matter. After the request was made, the CEO's secretary contacted the DBELO's supervisor, Larry Jackson, who then became involved and was later invited to the meeting. This demonstrates that the DBELO's direct and independent access to the CEO is not effectively implemented.

Metro's DBE program states that the DBELO has a staff of two to assist in administration of the DBE program. The DBELO advised the review team that she did not have adequate staff to administer the program. The review team reviewed the organizational chart and staff job descriptions, which were included in the DBE program. Aside from performing the job duties required of the DBELO, Ms. Campbell, along with the recently hired Supplier Diversity Specialist, conduct desk reviews of incoming certification applications and a number of other tasks regarding certification file updates and maintenance, and contract compliance and monitoring functions. The organizational chart indicates that the DBELO also supervises an administrative assistant. The DBELO has a pending budget request for an additional staff member.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan demonstrating on the organizational chart and in practice DBELO direct and independent access to the CEO. The plan should include how this information will be disseminated and communicated throughout the organization for implementation. Additionally, outline steps to ensure adequate staff for administration of the DBE program.

Grantee Response: Metro's DBE Program Document states that the DBELO has direct and independent access to the President & CEO on all matters related to the DBE program. To further evidence this fact, the organizational chart has been updated to include a dotted line relationship between the DBELO and the President. Additionally,

regularly scheduled meetings between the DBELO and President have been scheduled to ensure a direct and independent dialogue.

As noted by the reviewer, a request for an additional staff member has been submitted for approval in the budget year beginning July 1, 2012. This budget received approval from the Board of Commissioners on March 30, 2012 and is pending appropriation from the City of St Louis and St Louis County.

FTA Response: FTA partially concurs with Metro's corrective action plan. The organization chart included in Attachment 3 of Metro's February 24, 2012 DBE Program Plan does not include a dotted line relationship between the DBELO and the agency President. To close this deficiency, by September 30, 2012 update the DBE Program Plan organization chart, provide documentation of meetings planned and held between the CEO and the DBELO. If by September 30, 2012 you have not received the appropriation from the City and County, provide the anticipated date of appropriation's determination, and within 10 business days of that determination provide to FTA evidence of appropriation, or if denied, provide documentation as to how the agency will address the resource deficiency

4. Financial Institutions

Basic Requirement: (49 CFR Part 26.27) Recipients must investigate the existence of DBE financial institutions and make efforts to utilize them. Recipients must encourage prime contractors to use these DBE financial institutions.

Discussion: During this DBE Compliance Review, deficiencies were found with the requirements for financial institutions.

Metro indicated in their DBE program plan that it is their policy to research the existence of DBE-owned financial institutions. The plan discussed that they annually review the market for the institutions, but had not identified any to date. There was no documentation available during the review to document the efforts undertaken by Metro to identify these institutions. Metro was also advised that one source is the Federal Reserve website for minority owned financial institutions.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the FTA's Office of Civil Rights a plan to document and maintain information on the investigation efforts to identify DBE financial institutions.

Grantee Response: Metro has updated its Program Document to include how it plans to document and maintain information on the investigation efforts to identify DBE financial institutions.

"It is the policy of Metro to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions. Metro annually reviews the Federal Reserve Bank - Minority Bank Depository,

(<http://www.fms.treas.gov/mbdp/current-listhtml#MO>) for financial institutions owned, controlled, and managed by socially and economically disadvantaged individuals. For a listing of identified DBE financial institutions contact the Supplier Diversity Program Office."

FTA Response: FTA partially concurs with Metro's corrective action plan. To close this deficiency, by September 30, 2012 provide FTA with the results of the most recent search conducted for these institutions, along with how the results were disseminated in the agency for potential usage of these institutions. Also by September 30, 2012, Metro's DBE Program Plan should be updated to state the frequency of when these institutions will be researched, along with how this information will be used.

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 DBE Compliance Review, no deficiencies were found with the requirement for a DBE directory.

Metro maintains a directory identifying all firms eligible to participate as DBEs. This directory is also available on the Missouri Department of Transportation's website. Vendors can be found through a search of NAICS codes, NAICS code descriptions, or by a direct search of a vendor's name. The directory lists the firm's contact information, and the type of work that the firm has been certified to perform as a DBE. The directory is updated monthly and is available to the public via the internet. More is discussed regarding updating the directory in the Certification Procedures of this report. A print copy of the directory is updated annually and available through a request to the DBELO.

The directory is in compliance with new 2011 DBE Final Rule requirements to list DBEs by the appropriate NAICS codes for the types of work in which they are certified.

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 DBE Compliance Review, deficiencies were found with the requirement for overconcentration.

According to Metro's DBE program, they have not identified that overconcentration exists in the types of work that DBE firms tend to perform; however they will continue to monitor this and will take appropriate action in the case that an overconcentration issue arises. The review team determined that documentation was needed outlining the analysis performed for overconcentration and describing the

frequency of such analyses.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan outlining how overconcentration is analyzed and how often it is reviewed.

Grantee Response: Metro has not identified that overconcentration exists in the types of work that DBEs perform. Metro will review DBE participation reports and statistical reports annually to determine whether there is an over concentration of DBEs.

If Metro determines that DBE firms are over concentrated in certain types of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, Metro will consider appropriate measures to address over concentration and submit to Federal Transit Administration a plan on how to address over concentration (49 CFR Part 23.33(c)).

(a) Measures considered may include the use of incentives, technical assistance, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field.

Metro will update its DBE Program Document.

FTA Response: FTA does not concur with Metro's corrective action plan. There has been no evidence provided to justify a statement of no overconcentration. By September 30, 2012 provide an update within the DBE Program that clearly defines the steps for conducting an overconcentration analysis. Also by September 30, 2012, Metro's February 24, 2012 DBE Program Plan should be updated to state the frequency of when overconcentration analysis will be conducted.

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 DBE Compliance Review, the area of area of Business Development Programs (BDP) did not apply.

Metro does not participate in a Business Development Program in accordance with Appendix C of the DBE regulations requiring term limits in developmental and transitional stages.

New DBE regulations require that the recipient must include an element to structure contracting requirements to allow competition by small businesses. Reasonable steps should be made to eliminate obstacles to the participation of small businesses, including unnecessary bundling of contracting requirements which may preclude them from participating as prime or subcontractors. Metro included this element in their revised DBE Program Plan dated February 24, 2012.

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 achieved, all other relative evidence must be considered in an adjustment of this figure to match the needs of the specific DBE community.

Discussion: During this DBE Compliance Review, deficiencies were found with the requirements for calculation of goal.

Metro provided goal methodologies for fiscal years 2009, 2010, and the 2011 – 2013 period. Letters were also provided of FTA's acceptance of Metro's 2009 and 2010 goal methodologies. The goal methodology for Metro's FFY 2011 – 2013 three-year goal was analyzed for compliance with DBE regulations.

Metro submitted a three-year goal for fiscal years 2011 – 2013. The DBELO indicated that the Civil Rights Officer for Region 7 at that time advised Metro that they were in group A, which required a three-year goal submittal to FTA by August 1, 2010. Metro provided the review team with the generic dear colleague letter that went out to recipients advising them if they were in group A, B, or C. The review team could not verify if Metro was advised to submit goal information in group A because the letter was not specifically addressed to Metro. However, the official FTA goal submittal schedule on FTA's website has Metro in group C which requires the 2013 – 2015 goal methodology to be submitted by August 1, 2012. Metro will incorporate the corrective actions listed in this section for the next goal submission due on August 1, 2012.

Step 1: Determining the Base Figure

In preparation for the 2011 – 2013 goal, the DBELO obtained capital budget information from the grants department. The Director of Program Development and Grants informed the review team that three-year capital budget information is provided to the DBELO for review. The information is reviewed for contracting opportunities for inclusion in the goal setting methodology.

The methodology included a spreadsheet of all the contracting opportunities spanning many NAICS codes that were considered. These included construction, professional services, electric, operating (CMAQ, JARC, ARRA, PM), consulting, security, vehicles (non revenue passenger), material/supplies, and other areas such as IT equipment. These opportunities totaled \$216 million over the three-year period. Using the Census business data, Metro calculated 12,595 firms in the area with the corresponding NAICS codes that could participate in the contracting opportunities. The availability of DBE vendors was derived from the Missouri Regional Certification Committee (MRCC) directory which Metro calculated 429 DBEs.

The number of DBEs divided by the number of all firms resulted in an un-weighted base figure of 3.41%. Metro weighted the availability of firms based on the dollars spent in each category line item which resulted in a weighted step one base figure of 2.85%.

Metro had DBE awards in excess of 16% for the past two fiscal years; however, the base figure calculation of 2.85% was not reflective of the availability DBE firms. The *USDOT Tips for Goal Setting* advises recipients to look to relevant data sources to supplement your DBE directory. When using the DBE directory and census data in goal setting and there is concern that the directory does not accurately reflect the number of potential DBEs in your area, you should seriously consider supplementing the number of firms in your DBE directory for the purposes of goal-setting. One of the listed tips is to examine lists of other DBEs and MBE/WBEs from other sources to ensure your list of DBEs and potential DBEs is accurate.

Step 2: Adjusting the Base Figure

Metro determined that an adjustment to the step one base figure was necessary. Past participation was the method used to adjust the base figure. The methodology included past participation for the 2007, 2008 and 2009 goals. Metro indicated that the 2007 annual goal was 18.52% and they achieved 18.10%, followed by the 2008 goal of 18% and achievement of 96.3%, and lastly the 2009 goal of 18.2% with an achievement of 18.17%. Metro determined that the median number was 18.17% and averaged this number with the step one base figure resulting in 10.51% or 11% when rounded.

The review team discussed how past participation is determined from the semi-annual *Uniform Report of DBE Commitments/Awards and Payments*. Metro had used figures from the payments section of the report, which only reflects payments on projects completed during the reporting periods rather than awards made during the reporting period. Annual goals are based on projections in DBE awards and the results of these awards are derived from the upper portion of the Uniform report, commitments/awards made during the reporting period. Using this philosophy, the past participation numbers Metro used in its goal setting methodology were incorrect. The correct past participation numbers were 26% for 2007, 8% for 2008 and 17.8% for 2009. Metro will use this evaluation process when using past three-year participation for the next goal submission on August 1, 2012.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA Office of Civil Rights a plan to provide a three-year 2013-2015 DBE goal methodology properly outlining past participation figures, if applicable, and considerations made to ensure that the Step One methodology is sound.

Grantee Response: Metro will ensure that the Step One methodology in the three-year (2013 - 2015) DBE goal is sound by utilizing the most refined data available. Since Metro uses the MRCC's (Missouri Regional Certification Committee) DBE directory and census data in setting its goal, there is concern that the DBE directory does not accurately reflect the number of potential DBEs in our local market area (SMSA - St. Louis Metropolitan Statistical Area). To supplement the number of firms in the DBE directory, for the purposes of goal-setting only, we will examine MBE / WBE (Minority Business Enterprises / Women Business Enterprises) from other sources, such as other state or local transportation agencies (considering contracting opportunities are comparable) to determine whether they contain firms which should be considered ready, willing, and able DBEs. Additionally, Metro will examine its vendor data base, bidder's lists, pre-bid

and pre-proposal conference attendance lists, and outreach session's attendance lists to determine whether these sources might reveal firms that should also be included as ready, willing, and able DBEs.

Once the Step One Base Figure is calculated, we will examine all of the evidence (i.e. current capacity of DBEs to perform work and input from interested parties) available in our area to determine what adjustment, if any, is needed to the base figure to arrive at the overall goal. Past participation will be used since contracting opportunities are similar to past years. Annual goals are based on projections in DBE awards and the results of these awards are derived from the upper portion of the Uniform report, commitments/awards made during the reporting period.

FTA Response: FTA partially concurs with Metro's corrective action plan. Metro must incorporate the proposed changes within its FY2013-2015 goal methodology, due August 1, 2012. This finding will be closed upon approval of the goal methodology. Please be advised that simply stating "that past participation will be used since contracting opportunities are similar," does not provide sufficient evidence that the performance of DBEs on past contracts was considered consciously and therefore an adjustment was necessary. Include further detail in your next goal submission to substantiate the use of past participation as a Step 2 Adjustment.

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 published notice announcing the overall goal must be available for 30 days. The public must be notified that the recipient is accepting comments on the goal for 45 days following the date of the notice.

Discussion: During this DBE Compliance Review, deficiencies were found with the requirement for Public Participation and Outreach.

During the review, MOKAN Construction Contractors Assistance Center and National Association of Women in Construction (NAWIC) were contacted to provide feedback on how Metro interacts with and involves organizations in their goal setting and outreach. Representatives of both agencies said that Metro did not notify them to comment on their goals. The representative of the NAWIC also said that they had very limited interaction with Metro and was not alerted to procurement opportunities. Representatives from MOKAN identified several problem areas in Metro which included, inadequate staffing for their DBE program, insufficient on-site monitoring, compliance, and oversight of prime contractors. Concerns about eligibility of DBE companies and misusing DBEs on projects throughout the state were also expressed.

From the interviews with the organizations and the DBELO, the review team determined that Metro was not conducting a consultation process regarding their goals. Metro's DBE Program plan states that they will adhere to the regulation set forth in 49 CFR Part 26.45; however the review team found their efforts deficient.

The review team referred the DBELO representative to the *USDOT Official Questions and Answers* regarding the consultation process.

The goal setting process used by recipients to establish their annual overall goal submitted to the operating administrations for approval must include “consultation with minority, women’s and general contractor groups, community organizations, and other officials or organizations” which could be expected to have information concerning the availability of DBEs and non-DBEs. This consultation process is also intended to gather information concerning the effects of discrimination on opportunities for DBEs, if present, and establishing a level playing field for the participation of DBEs.

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.

Consultation is expected to occur before the proposed goal is established and prior to publication of the proposed overall goal for inspection and comment by the general public.

The consultation process must be documented in the recipient’s annual goal submission.

Metro advertised the goal on its website and in publications in Missouri and Illinois for 30 days and provided the opportunity for public comment for 45 days. Proof of publication documents were included in the 2011 – 2013 goal submittal with run dates of June 17, 2010 and June 24, 2010 for the St. Louis American and publication on June 17, 2010 in the News-Democrat in the County of St. Clair, Illinois.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA Office of Civil Rights a plan to conduct and document the consultation process in the next goal submission in August 2012.

Grantee Response: A meeting was held on March 15, 2012 to discuss the goal setting process and gather input from interested parties. We are continuing the dialogue with the attendees as we prepare our goal submission.

FTA Response: FTA concurs with Metro’s corrective action plan. To close this deficiency, by August 1, 2012 submit to FTA’s Office of Civil Rights the attendee list from the March 15, 2012 meeting with the 2013 – 2015 DBE goal methodology. Include in your methodology whether the input received during the consultation portion affected your overall goal value or process.

C) Transit Vehicle Manufacturer (TVM)

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.

Discussion: During this DBE Compliance review, no deficiencies were found with the requirement for transit vehicle manufacturers.

Metro provided DBE information collected for the purchase of 30, 35 and 40 foot diesel buses and support equipment on Contract No. 07-RFP-5228-CE. At the time of bid, Gillig Corporation submitted a September 2007 document entitled Minority Business Enterprise (MBE) Certification that they complied with the requirements of 49 CFR, Section 26 of the Transportation Assistance of 1982, and submitted the required documents to the FTA. The contract was an indefinite delivery and indefinite quantity from December 7, 2007 to December 6, 2012. Metro collected an updated TVM DBE certification from Gillig upon execution of a task order in April 2010. Gillig provided a DBE/MBE Certification document stating their compliance with 49 CFR Section 26 and referenced Cynthia Phifer for verification of FTA approval. Metro also provided a printout of the FTA TVM approved list.

D) Race Neutral DBE Participation

Basic Requirement: (49 CFR Part 26.51) The recipient must meet the maximum feasible portion of the overall goal by using race neutral means of facilitating DBE participation. Examples of how to reach this goal amount are listed in the regulations.

Discussion: During this DBE Compliance Review, deficiencies were found in the area of race neutral participation.

Metro projected meeting its 2011 – 2013 Fiscal Years overall 11% goal through 8% race-neutral means. Metro stated in their goal submission that it had committed to DBE participation through race-neutral means at 77% (the ratio of actual payments percentage of total DBE participation via RN and total payment to DBE or 14% divided by the goal of 18.2%). The report stated that historical race-neutral participation in the December 2009 semi-annual report was used to determine the goal splits.

The review team attempted to recreate the formula used to determine Metro's race-neutral projections. The December 2009 semi-annual report had zero dollars in payments during the reporting period. The June 2009 report included payment dollars with a total of 14.2% DBE participation on projects completed during the reporting period. This appears to correlate with the 14% used in Metro's formula for race-neutral projections. Metro should use DBE awards in the upper portion of the semi-annual reports similar to the process that should be used to derive past participation.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA Office of Civil Rights a plan to include an accurate methodology for projecting race-neutral participation for the next goal submission.

Grantee Response: Metro will rely on its past experience to break down the overall goal into the race-neutral and race-conscious components. In calculating the 2013-2015 goal, Metro will look at the achievements of the goals for FY2009 through FY2011. The race neutral and race conscious components will be determined by analyzing the DBE achievements against the actual goals set for FTA funded projects. The median

achievement above the assigned goal, or the median under-achievements, are used to get a breakdown of race neutral and race conscious components of the goal. The median over-achievement can reasonably be used to determine the race-neutral component of the overall goal. Underachievement is an indication that the race-conscious portion should constitute a larger component of the overall goal.

Using the rationale described above, the final overall goal will be adjusted to show the race-conscious and race-neutral components. Metro will adjust the estimated breakout of race-neutral and race-conscious participation as needed to reflect actual DBE participation in accordance with Section 26.51(f). Metro will track and report race neutral and race-conscious separately. For reporting purposes race-neutral includes, but is not limited to, the following: DBE participation through a prime contract a DBE obtains through customary competitive procurement procedures; DBE participation through a subcontract on a prime contract that does not carry a goal; DBE participation on a prime contract exceeding a contract goal; and DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in making the award.

FTA Response: FTA concurs with Metro's corrective action plan. Metro must incorporate the proposed changes within its FY2013-2015 goal methodology, due August 1, 2012. This finding will be closed upon approval of the goal methodology.

E) Race Conscious DBE Participation

Basic Requirement: (49 CFR Part 26.51) The recipient must project a percentage of its overall goal that will be met through race conscious means. These contracts may have varying DBE goals, and be made on an individual basis, depending on conclusions of the studies performed.

Discussion: During this DBE Compliance Review, deficiencies were found with the requirements for race conscious participation on overall and contract goals.

Metro discusses in their DBE program document that contract goals will be established only on those DOT-assisted contracts that have subcontracting possibilities. The DBELO indicated that the independent cost estimates are reviewed for DBE subcontracting opportunities. Then a goal setting analysis is conducted to determine the DBE availability for the particular contract. The DBELO mentioned that contracts under \$100,000 are not reviewed for DBE opportunities. The procurement representatives stated during the review that contracts over \$100,000 require that DBE subcontracting opportunities are examined for setting contract goal; however, they may look at a contract less than this amount if possibilities exist. The review team determined that Metro need not establish a contract goal on every contract; however, a contract threshold should not preclude Metro from examining DBE subcontract opportunities.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA Office of Civil Rights a plan to review all DOT-assisted contracts for DBE subcontracting possibilities and set contract goals if needed to meet the overall agency DBE goal.

Grantee Response: Metro encourages DBE participation on all contracts including those where no goal has been established. Contracts with values of less than \$100,000 are deemed to be excellent opportunities for SBEs (including DBEs) to pursue as the prime contractor. The value of DOT-assisted contracts with values under \$100,000 issued by Metro last fiscal year totaled less than 5% of all DOT-assisted contracts issued and many of them were for products or services where subcontracting opportunities did not exist. The overall impact of including small contract opportunities in the Race Conscious pool is negligible. Metro will continue to monitor all DOT-assisted contracts for DBE participation but we do not believe it is necessary or appropriate to establish contract goals on small contracts at this time.

FTA Response: FTA concurs with Metro's corrective action plan.

F) Good Faith Efforts

Basic Requirement: (49 CFR Part 26.53) The recipient may only award contracts, with DBE goals, to bidders who have either met the goals or conducted good faith efforts (GFE) to meet the goals. The bidders must provide documentation of these efforts for review by the recipient.

Discussion: During this DBE Compliance Review, deficiencies were found in the area of good faith efforts requirements.

The DBE program document indicates that the DBELO is responsible for determining whether a bidder that has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive. Metro describes how bidders can demonstrate that they have made good faith efforts to meet the DBE goal in their DBE program and also includes a *Guidance Concerning Good Faith Efforts* section in bid documents. The review team was provided with a DBE Affidavit of Commitment, which must be signed and submitted by the prime proposer as part of their bid package. The bidder must also submit the schedule of DBE subcontractors and a letter of *Intent to Perform*, signed by the intended subcontractor.

Bidders may request an administrative reconsideration within two working days of being informed by Metro that it is not responsive because sufficient good faith efforts were not properly documented. The reconsideration official in Metro's DBE program is listed as Kathy Hunt. The reconsideration official is listed as the Director of Material Management and Procurement in Attachment 7 of the DBE program and in the initial good faith efforts determination letter. This position on the *Procurement and Inventory Management* organizational chart and in Ms. Hunt's email was identified as Director, Materials Management. Clarification or updates are needed on all documents for consistent reflection of Kathy Hunt's position. Attachment 7 of Metro's DBE program further explains the good faith efforts guidelines. It states the reconsideration official will not have rendered the decision or participated in the original determination that the bidder did not document sufficient good faith efforts.

Metro provided the review team a good faith efforts review for project #11-SB-5710-DGR, Grand ML Station Temporary Platform. The contract's DBE goal was 15% and the bidder submitted 7% DBE participation on the project for consideration. The

DBELO conducted a good faith effort analysis and determined that the contractor did not make a good faith effort to meet the established goal. A letter signed by the Diane Wright, Director of Procurement Engineering, Construction Service Contracts & Legal was emailed to the contractor on January 21, 2011 informing the contractor that Metro initially determined that a good faith effort was not made to meet the contract goal and the bid was non-responsive. The contractor was advised of their opportunity for an administrative reconsideration hearing by submitting a written request to Kathy Hunt, Director of Materials Management & Procurement. The contractor did not request a reconsideration hearing but sent Metro a letter on January 21, 2011 explaining their efforts and offered to reach out to DBE firms that did not bid to increase the amount of participation. Ms. Wright forwarded the information to Ms. Hunt for reconsideration. Ms. Hunt performed a desk review of the information on February 3, 2011 and emailed Ms. Wright of her decision supporting the lack of good faith efforts determination. Ms. Wright sent the contractor a letter the same day advising that the reconsideration official upheld the decision to deem the bid non-responsive.

The organizational structure of Metro creates the potential for conflicts between the Supplier Diversity and Procurement departments. The Vice President of Procurement, Inventory Management and Supplier Diversity, Larry Jackson, indicated that neither he nor the Director of Inventory Management is involved in the procurement process. However, the review team noted that Mr. Jackson oversees three divisions of procurement for Metro which includes the *Procurement Engineering, Construction Service Contracts & Legal* division headed by Ms. Diane Wright who drafted the initial and final good faith effort determination letters to the contractor. While it appears that the correct determination was made regarding the good faith effort reconsideration, it is still unclear how and why one of the Directors of Procurement is involved in the determination process.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA Office of Civil Rights a plan to review the good faith effort procedures and implementation process and document how safeguards can be included to eliminate the potential for conflicts with supplier diversity and procurement functions.

Grantee Response: Metro management contends that the current organizational structure provides the most efficient and effective use of resources and that existing procedures provide sufficient safeguards to control potential conflicts of interest. As Vice President of Procurement, Inventory Management and Supplier Diversity, Larry Jackson is responsible for developing and implementing efficient and effective vendor relationship and supply management strategies and processes throughout the organization. The focus of DBE function fits well within this framework as its primary goal is to drive improvement in the participation of DBE firms through direct contracting with Metro or as subcontractors to our prime contractors. This goal is best achieved through close cooperation with the Procurement and Contracting groups. By combining these functions under one leader, we have been successful in creating an environment where shared goals are created and achieved.

The reviewer raises a question of why letters were written by the Director of Procurement in the situation where a bidder sought reconsideration and whether there was a potential

for conflict of interest in this situation. In this case, the bid documents stated that any request for consideration should be sent to the Director of Procurement for handling. As the recipient of the request, the final determination letter in response to the request was sent by the Director of Procurement as the official point of contact. The Director had no involvement in the initial determination or the reconsideration. The Director's role was solely that of the official point of contact. We believe this to be consistent with FTA requirements and does not pose a significant risk of conflict of interest.

Metro has also previously considered whether or not it was a potential conflict of interest for Ms. Hunt to serve as reconsideration officer but determined that the situation poses no serious risk. Ms. Hunt's prior work experience and knowledge of contracting and DBE requirements make her uniquely qualified to perform this function. Although she reports to Mr. Jackson, she is physically located in a different facility and has no direct involvement in the DBE or Procurement functions at this time.

FTA Response: FTA concurs with Metro's response.

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 toward actual DBE goals.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for counting DBE participation.

Metro's DBE program indicates that they will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55. No other information is provided in this DBE program section. However, Metro includes specific information in their contracts regarding counting DBE participation from regular dealers, manufacturers, and brokers. The bidder must submit a separate schedule and intent to perform for each group of regular dealers, brokers, and subcontractors participating on the contract.

H) Quotas

Basic Requirements: (49 CFR Part 26.43) The recipient is not permitted to use quotas or set-aside contracts.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirement for quotas.

No evidence of the use of quotas or set-aside contracts by Metro was found during the site visit.

9. Required Contract Provisions

A) Contract Assurance

Basic Requirements: (49 CFR Part 26.13) Each contract signed with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include a non-discrimination clause detailed by the regulations.

Discussion: During this DBE Compliance Review, deficiencies were found with the requirements for Contract Assurances.

Metro states in their DBE program 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 three prime contracts and two DBE subcontracts for compliance with contract assurance clause inclusion.

The Invitation for Bid boilerplate has the correct nondiscrimination clause in *Section 100-Information to Bidders*; however, the conformed contract boilerplate has an incorrect contract assurance clause in *Section 710-Federal Clauses* and maximizing DBE utilization is mentioned in this section.

The correct clause was not found in the three prime contracts nor was it found in the two subcontracts examined. The prime contracts with Illinois Excavators, Gershenson Construction, and Kilian Corporation did not include the correct contract assurance language and excluded language for material breach if the requirements of 49 CFR Part 26 are not carried out by contractor. The appropriate contract assurance clause was not found in the subcontract agreements for PJR & Associates and MJK Turf.

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

Prime Contractor	Project	Contract No.	DBE Subcontractor
Illinois Excavators, Incorporated	Illinois Bike Trails Phase 2	10-SB5651-DGR (IFB and conformed contract)	PRJ & Associates
Gershenson Construction	Phase 2 ADA Missouri MetroBus Stops	10-SB-5578-CB (IFB and conformed contract)	MJK Turf
Kilian Corporation	Illinois Slope Stabilization and Scour Protection	10-SB-5620-MM (IFB and conformed contract)	None available for review

Metro indicated that the contracts reviewed during the compliance review were not the most current procurement boilerplates. Subsequent to the review, Metro provided updated contract clauses in the general conditions and federal clauses. Upon review of these documents, the federal clause section still did not have the correct assurance clause as included for section 100. This new information was insufficient to remove the deficiency at this time.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA Office of Civil Rights a plan to ensure that the contract assurance clause is placed in every DOT-assisted contract and subcontract.

Grantee Response: Standard contract templates have been updated to include the

required clause as part of the "Federal Clauses" section. This change will ensure that the conformed contracts will include the appropriate language.

FTA Response: FTA partially concurs with Metro's corrective action plan. To close this deficiency, by September 30, 2012 submit a copy of the revised boilerplate language to FTA's Office of Civil Rights. Metro's February 24, 2012 DBE Program states that reviewing "third party contracts and purchase requisitions for compliance with" the DBE Program as one of the responsibilities of the DBELO. Metro has also stated in its *Monitoring and Enforcement Mechanisms* section of the DBE Program, that it will "require prime contractors to provide copies of any agreements or executed contracts to verify that required clauses are included in all contracts with subcontractors." However, no mechanism or strategy has been provided to detail how the DBELO will implement a contract review process to ascertain whether the appropriate clauses are included within prime and subcontracts. By September 30, 2012, update the DBE Program to include a more detailed method for monitoring prime and sub contracts for the contract assurance language.

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 to the subcontractor within 30 days after the subcontractors' work is satisfactorily completed.

Discussion: During this DBE Compliance Review, deficiencies were found with regard to the requirements for prompt payment and return of retainage.

Prompt Payment

The DBE program states that Metro will include a prompt payment clause in each DOT-assisted prime contract. Metro has a ten (10) day prompt payment clause and further states that *if the contractor fails or refuses to comply with the terms of this Program, as it is set forth in such contractor's contract, Metro will issue an order stopping all or part of payment and/or work until satisfactory action has been taken. If the contractor still fails to comply, Metro may issue a termination for default proceeding.* The prompt payment clause was included in the prime contracts and the MJK Turf subcontract agreement reviewed. However, the PJR & Associates subcontract did not include the ten (10) day prompt payment clause. The PJR & Associates subcontract states that *such payments to subcontractor will be made within two weeks of Contractor's receipt of payment from the owner.*

Return of 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.

Metro continues to hold retainage on projects and requires the prime contractors to return retainage payments to each subcontractor within 30 days after the subcontractors' work is satisfactorily completed. The DBE plan further states that *any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of Metro*. The prime contracts state that Metro will return retainage to prime contractors within 30 days. Retainage was not withheld from the PJR & Associates subcontract and no other language for return of retainage was included in the contract. The MJK Turf contract stated that retainage would be returned in 10 days after the prime has received full payment from the owner, which is less than the prime contract return of retainage clause of 30 days. However, the MJK Turf subcontract did not include language for incremental acceptance of work in the prime contract.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA Office of Civil Rights a plan to ensure that:

- no conflicting language exists in subcontracts regarding prompt payment;
- prompt return of retainage clauses are included in subcontract agreements; and
- incremental acceptance of portions of work is described in DBE program and implemented.

Grantee Response: Standard contract templates have been updated as follows:

Prompt Payment:

The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than ten (10) working days from the receipt of each payment the prime contractor receives from Metro. Further, the subcontractor agrees, within three (3) working days of receipt of payment from Contractor, to pay fully all payments due to lower tier subcontractors and suppliers of subcontractor for all work and materials.

Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of Metro.

This clause applies to both DBE and non-DBE subcontracts.

Retainage Payments:

The contractor agrees to return retainage payments to each subcontractor within 10 days after the subcontractor's work is satisfactorily completed.

To facilitate prompt and full payment of retainage, Metro will conduct prompt and regular incremental acceptances of portions of the prime contract and pay retainage to prime contractors based on the acceptance of satisfactorily completed work. The prime contractors will pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 10 days after it receives payment from Metro.

If the prime contractor fails or refuses to comply with the terms of this section, as it is set forth in the contractor's contract, Metro will issue an order stopping all or part of payment

and / or work until satisfactory action has been taken. If the contractor still fails to comply, Metro may issue a termination for default proceeding.

Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of Metro.

This clause applies to both DBE and non-DBE subcontracts.

FTA Response: FTA partially concurs with Metro's corrective action plan. To close this deficiency, by September 30, 2012 submit a copy a revised boilerplate to FTA's Office of Civil Rights. Also by September 30, 2012, Metro's February 24, 2012 DBE Program Plan should be updated to include this revised prompt payment and return of retainage language. Metro's February 24, 2012 DBE Program states that reviewing "third party contracts and purchase requisitions for compliance with" the DBE Program as one of the responsibilities of the DBELO. Metro has also stated in its *Monitoring and Enforcement Mechanisms* section of the DBE Program, that it will "require prime contractors to provide copies of any agreements or executed contracts to verify that required clauses are included in all contracts with subcontractors." However, no mechanism or strategy has been provided to detail how the DBELO will implement a contract review process to ascertain whether the appropriate clauses are included within prime and sub contracts. By September 30, 2012, update the DBE Program to include a more detailed method for monitoring prime and sub contracts for the prompt payment and retainage language.

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.

Discussion: During this DBE Compliance Review, deficiencies were found with the requirement for legal remedies.

Attachment 4 of the DBE plan describes remedies that Metro can take to enforce DBE requirements. This includes assessing liquidated damages for failure to achieve DBE contract goals. However, the contracts examined did not include this liquidated damage clause.

Subsequent the review, Metro stated that they have updated their procurement boilerplates and provided updated procurement boilerplate that included the legal remedies described in the DBE program plan. This information was satisfactory to close this deficiency.

10. Certification Standards

Basic Requirements: (49 CFR Part 26.67) The recipient must have a certification process intact to determine if a potential DBE firm is legitimately socially and economically disadvantaged according to the regulations. The DBE applicant must submit the required

application and a signed and notarized statement of personal net worth with appropriate supporting documentation.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for Certification Standards.

The review team examined the following Metro certification files for compliance with certification requirements:

Firm Name	Status	Deficient-Area
[REDACTED]	Denied	No
[REDACTED]	Denied	Yes – Procedures
[REDACTED]	New certification	Yes – Procedures
[REDACTED] Inc.	Existing certification	Yes – Procedures
[REDACTED]	Removal	Yes – Procedures
[REDACTED]	Removal	Yes – Procedures

11. Certification Procedures

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 DBE Compliance Review, deficiencies were found with the requirements for Certification Procedures.

Metro is one of five certifying agencies in the Missouri Regional Certification Committee (MRCC). Metro submitted a copy of the MRCC Unified Certification Program (UCP) Agreement, Policies, and Procedures. The review team found several deficiencies on how Metro staff implemented the Certification Procedures requirements found in Subpart E of the DBE regulations.

Missing Documents

The review team reviewed six certification files during the review. A one-page Annual “No Change” Affidavit is collected from the DBE firm along with the most recent business tax return. [REDACTED] had been certified with the agency for over five years; however all of the files were missing the annual affidavits for a number of years. The review team advised Metro to ensure that all files contain the required annual no change affidavits.

Onsite visits

The MRCC Agreement, Policies, and Procedures manual indicates that the certifying partner will perform onsite visits for certification determinations that include interviewing the owner and reviewing their resumes and/or work histories. The review team found that the certification files for [REDACTED] and [REDACTED].

contained incomplete site visit reports. The review team found that there were a number of unanswered questions on the reports. The site visit report for [REDACTED] was also undated and did not include the name of the staff member who conducted the interview.

Personal Net Worth Statements

The review team found that personal net worth statements for [REDACTED] were incomplete and there appeared to be no follow up documentation in the file that showed that the Metro did further investigation or corrected the PNW statements to get an accurate and complete financial snapshot. There was \$30,000 in the "Other Assets" box on the PNW statement for the owner of [REDACTED]. Section 4 of the PNW statement describing the other assets was not completed and it did not appear that Metro questioned the number.

Denial of Certification

The certification file record of [REDACTED] was reviewed for initial denial of certification requirements. The Metro *DBE Eligibility Findings* document states that the firm should be denied on the basis of control, ownership, and personal net worth. However, the denial letter only mentioned the control and ownership issues. It did not include that the majority owner exceeded the personal net worth threshold. All of the applicable reasons for denial should be included in the denial letter.

Removal of Certification

[REDACTED] received a final removal determination letter on September 9, 2010. An *Intent to Remove* letter was not included in the file. According to 49 CFR 26.87(a)(3), the grantee must provide a written notice that they propose to find the firm ineligible.

The review team also noted that the removal letter mostly discussed the regulation to substantiate the reasons that the firm was being removed; however Metro did not give the specific reasons for removing the firm. The regulations state that the grantee must set forth the reasons for the proposed determination.

DBE Directory

The review team examined the certification file for [REDACTED], whose certification was approved on November 14, 2011. The review team performed an electronic search in the UCP DBE Directory on November 16, 2011 and on December 19, 2011. It was noted that the directory had not been updated with the new firm. According to 49 CFR Part 26.81(g), the UCP must update the electronic DBE directory as soon as changes such as additions, removals, and other changes are made.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA Office of Civil Rights a plan to address the categorized deficiencies listed in this section.

Grantee Response: Many of the files reviewed during the Compliance Review were firms that had been certified longer than five (5) years. The Reviewer's examination of certain files, ([REDACTED]), did reveal missing documentation, specifically annual affidavits; however not for last seven (7) years. The site visit report for [REDACTED]

Group that was noted as undated and did not include the name of the staff member who conducted the interview was from 1992. Clearly, the last 20 years have brought about change in policies, procedures, and updated forms.

To address the deficiencies in this area, Metro has developed a DBE Program Attribute Checklist to be completed by the Specialist during review the file. By completing the Checklist during the review process will help the Specialist to conduct a more thorough and complete review and to ensure that the file is properly documented. This Checklist will have to be signed off by the manager to verify that all components of the file are complete. Metro believes that this approach will address the deficiencies noted, specifically:

- Complete certification files to include annual no-change affidavits
- Complete documentation of onsite certification visits
- Complete documentation of denial reasoning

Correct conduct and documentation of certification removals:

The Reviewer's comments regarding Avian, Inc. are completely false. An initial "Notice of Decertification and Removal from the DBE Program" letter was sent to applicant firm on September 9, 2010. Included with this letter was Metro's "Statement of reason for the finding of reasonable cause for decertifying" [REDACTED], that included the specific reasons for removing the firm, as set forth by the regulation. The letter also informed the applicant firm of their right to appeal Metro's decision. On October 12, 2010, a letter was sent to the applicant firm acknowledging receipt of their request for administrative reconsideration on the determination of eligibility. This letter informed the applicant firm that an informal hearing was scheduled for December 14, 2010. The applicant firm did not show up for the hearing and on December 22, 2010, a final removal determination letter was sent to the applicant firm.

Documentation of thorough analysis of PNW statements:

Specialists are required to conduct a thorough analysis of PNW statements and this should be documented by the completion of a DBE Certification Personal Net Worth Worksheet. This worksheet should be completed for each owner claiming disadvantaged status and placed in the file. More complex PNW Statements are forwarded to Metro's Internal Audit division for analysis. As part of the DBE Program Attribute Checklist, PNW statements will be thoroughly analyzed during the review process and documented.

Updating of the UCP directory as changes occur:

Metro's policies and procedures on updating the UCP directory have been updated. Metro will update the UCP directory as changes occur, but within at least five (5) days.

FTA Response: FTA concurs with Metro's corrective action plan. To close this deficiency, by September 30, 2012 submit to FTA's Office of Civil Rights a copy of the DBE Program Attribute Checklist. This checklist should be incorporated into Metro's DBE Program Plan. The new 2011 DBE Final Rule in 49 CFR §26.83(1) requires certifying agencies to "advise each applicant within 30 days from receipt of the application whether the application is complete and suitable for evaluation and, if not,

what additional information or action is required.” By September 30, 2012 Metro should also submit an amendment within its DBE Program that details how the Office of Supplier Diversity will monitor and track that its certification decisions are in compliance with 49 CFR §26.83.

12. Record Keeping and Enforcements

Basic Requirement: (49 CFR Part 26.11, 26.55) The recipient must provide data about its DBE program to the FTA on a regular basis. This information must include monitoring of DBE participation on projects through payments made to DBE firms for work performed. 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 DBE Compliance Review, deficiencies were found with the FTA requirement for maintaining the bidders list, monitoring, and reporting.

Bidders List

The regulations require that you must create and maintain a bidders list. The purpose of this list is to provide you as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on your Federally-assisted contracts for use in helping you set your overall goals.

Metro provided a *Supplier Diversity Data Collection* form from the required bid forms section in a current solicitation. The form includes the required bidders list information in Part 26.11. The form is forwarded to the Supplier Diversity department where the data is entered into an Access database. A printout of the database fields was provided to the review team; however, the DBELO indicated that the bidders list is not effectively maintained in the system due to the staff concentration in other areas of the DBE program. The procurement representatives described a procurement list beta software system that could encompass the information captured in the *Supplier Diversity Data Collection* form. These representatives will review the bidders list requirements for compatibility with the new system so that the information can be collected, maintained and queried to assist Supplier Diversity with goal setting.

Monitoring

The DBE program plan includes several methods employed by Metro to monitor DBE participation. Metro states in the program plan that they will request prime contractors to provide copies of executed subcontract agreements for verification that required clauses are included. However, subcontract agreements were not included in all of the compliance files examined during the compliance review. The subcontract agreements the review team requested from the DBEs did not include the appropriate contract clauses.

The contracts reviewed during the compliance review indicated that the contractor must submit a monthly participation Form E. These forms were not consistently included in the compliance files examined by the review team. Metro has procured a contractor compliance software system that monitors DBE participation and payments. If this system replaced the requirement to submit paper forms, then the contract should be revised to reflect this in the contract boilerplate. The system allows the DBELO to

monitor prompt payments to DBEs and she also verifies payments through telephone contacts with the DBEs.

Metro provided a *Jobsite Review* form used to monitor DBE activity on projects. The DBELO described the frequency of jobsite reviews as sporadic and is currently training the new Supplier Diversity Specialist to conduct these reviews. The Specialist conducted a jobsite review on October 19, 2011 and a copy of the report was provided to the review team.

49 CFR Part 26.37 states that “*Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. This mechanism must include a written certification that you have reviewed contracting records and monitored work sites in your state for this purpose. The monitoring to which this paragraph refers may be conducted in conjunction with monitoring of contract performance for other purposes (e.g., close-out reviews for a contract).*”

Metro was advised to include the written certification requirement in their DBE program plan. Metro provided a *Contract Closeout* form that includes a final DBE report item that has to be approved by the DBELO. The DBELO mentioned that the close-out form would be used to meet the written certification requirement.

Reporting

The 2009, 2010, and 2011 reporting forms for semi-annual activities and ARRA funds were downloaded from TEAM. The 2008 semi-annual report was also requested and reviewed. The reviewed team noted that the reports used by Metro had been altered to reflect that the June 1st report was for period October 1 – March 31 and the December 1st report was for period October 1 – September 30. Metro had the understanding that the December report should reflect activities for the entire fiscal year. This error appeared to be corrected once the compliance software was used to complete the semi-annual reports. The review team also reminded Metro to update the goals for the applicable year in the reports, as the 2009 and 2010 reports both had the same goal amounts.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA’s Office of Civil Rights a plan and schedule for ensuring that:

- bidders list information is maintained to assist in goal setting;
- effective monitoring and enforcement mechanisms are in place and performed by staff to monitor work on FTA funded contracts, and
- procedures are implemented for accurate completion of data for semi-annual and ARRA DBE reports to FTA.

Grantee Response:

Bidders List:

Metro will update its DBE Program Document to include the following:

Metro will create a bidders list, consisting of information about all DBE and non-DBE

firms that bid or quote on U.S.DOT-assisted contracts. The purpose of this requirement is to allow use of the bidder's list approach to calculating its overall goal. The bidders list will include the name, address, DBE / non-DBE status, age, and annual gross receipts of firms.

Metro will collect this information in the following ways:

Metro will require all prime contractors bidding on U.S.DOT-assisted contracts to return, at the time of bid opening (options apply as to the time this information is required so long as it is prior to the award of the contract), the following information about the prime contractor and all subcontractors who provided a bid or were contracted by the prime:

1. Firm name
2. Firm Address
3. Firm's status as a DBE or non-DBE
4. Age of the firm
5. Annual Gross Receipts for the firm

Maintaining this Bidders List information allows Metro to use of the bidder's list approach to calculating its overall goal.

Contracting Officers shall be required to forward all Supplier Diversity Data Collection forms to the Supplier Diversity Program Office within five (5) days of the bid opening date so that the data may be entered into the Access database for storage and retrieval.

Monitoring:

Metro updated its DBE Program Document on 2/24/2012 to include the following Monitoring and Enforcement mechanisms:

Metro will use the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26.

1. We will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program so that the proper steps can be taken (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, or actions such as, suspension or debarment proceedings as provided for in 2 CFR 180 and 1200).
2. We will consider similar action under our own legal authorities, including responsibility determinations in future contracts. Attachment 5 lists the contract remedies available to Metro in the event of non-compliance with the DBE regulation by a participant in our procurement activities.
3. We will monitor worksites and review contracting records regularly. We will provide written verification that work committed to DBEs at contract award is actually performed by the DBEs. Metro's personnel will review all elements of the work to be performed, including supervision of employees, employee payroll, and equipment used by the DBE firm.
4. We will keep a running tally of actual payments to DBE firms for work committed to

them at the time of contract award. Metro uses the web-based system B2GNow Compliance Monitoring System (Metro DBE Supplier Diversity System) to accomplish this task. The system captures payments made by Metro to the contractor and payments actually made by the contractor to the subcontractor(s). This system provides Metro a means of comparing attainments to commitments for reporting purposes and verifying prompt payment.

5. We will monitor payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation and that payments are being made in a timely manner.

6. We require prime contractors to provide copies of any agreements or executed contracts to verify that required clauses are included in all contracts with subcontractors.

7. We require prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of Metro or DOT. This reporting requirement also extends to any certified DBE subcontractor. Additional staff was requested in the FY2013 budget to ensure that adequate resources are available to carry out the requirements of the part.

Reporting:

Metro's DBE Program Document has been updated with the following language:

Metro will report its DBE Commitments/Awards and Payments in T.E.A.M. semiannually (on or before June 1 and December 1) and as otherwise instructed. These reports will reflect awards/commitments made and actual payments on contracts completed during stated period. The web-based reporting system allows for the semiannual and ARRA DBE reports to FTA to be submitted more accurately.

FTA Response: FTA partially concurs with Metro's corrective action plan. To close this deficiency, by September 30, 2012 submit:

- information on how the bidders' list will be incorporated into the goal-setting process;
- a staffing plan for the monitoring activities described, along with an anticipated date that a decision on the additional staffing request will be made;
- additional information on remedies and enforcements. Metro's February 24, 2012 DBE Program Plan has a Section F entitled "Compliance and Enforcement" However it primarily covers *Information, Confidentiality, and Cooperation*. Section 26.37 of the Plan notes that responsibility determinations may be considered for future contracts and references Attachment 5 for additional remedies. Attachment 5 only describes liquidated damages. Please clarify where other enforcement mechanisms are described and how they will be implemented. FTA recommends that to be most effective, all of the available remedies should be contained in one section of the Plan and be appropriately labeled.
- revised DBE Program Plan incorporating the above stated actions
- supporting documentation depicting what FTA-assisted contracts and sub

contracts were awarded between FY 2011 and the first half of FY 2012.

- A schedule and plan to update DBE reporting submissions for accuracy.

Section 7 – Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action:	Response Days/Date
1. Program Plan	26.21	D	Program in need of updates	Update DBE program with recommended changes	September 30, 2012
2. Policy Statement	26.23	ND			
3. DBE Liaison Officer	26.25	D	Direct and Independent Access Inadequate number of staff	Update organizational chart to reflect that DBELO has direct and independent access Address the staffing needs for the DEO Department	September 30, 2012
4. Financial Institutions	26.27	D	Additional effort and documentation needed to satisfy requirement	Document and maintain investigation and search efforts made to locate DBE financial institutions	September 30, 2012
5. DBE Directory	26.31	ND			
6. Overconcentration	26.33	D	OC analysis not documented	Add more language on OC process, analysis, and frequency of analysis Submit schedule for analysis	September 30, 2012
7. Business Development Programs	26.35	N/A			
9. Determining / Meeting Goals					
A. Calculation	26.45	D	Base figure numbers not reflective of DBE community Incorrect past participation numbers used for past participation	Consideration of supplementing DBEs in numerator for goal setting. To use correct past participation number for step two adjustment.	August 1, 2012
B. Public Participation	26.45	D	Not conducting consultation and minimal outreach to interested parties	Send proof of March 15, 2012 meeting.	August 1, 2012
C. TVM	26.45	ND			
D. Race Neutral	26.51	D	Methodology to determine RN split unclear	Submit properly calculated RN split for overall goal	August 1, 2012
E. Race Conscious	26.51	ND			
F. Good Faith Efforts	26.53	ND			

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action:	Response Days/Date
G. Counting DBE Participation	26.55	ND			
H. Quotas	26.43	ND			
10. Required Contract Provisions A. Contract Assurance	26.13	D	Incorrect/missing assurance language in contracts and subcontracts	Update boilerplates to include contract assurance clauses and ensure clause flow down to subcontractors Update DBE Program to include a method for monitoring prime & sub contracts for contract assurance clauses.	September 30, 2012
B. Prompt Payment	26.29	D	Conflicting language in subcontract No incremental process/language included in program/contracts	Update DBE program to include a method for monitoring prime & sub contracts for prompt payment & retainage clauses Implement incremental acceptance process	September 30, 2012
C. Legal Remedies	26.37	ND			
11. Certification Standards	26.67	ND			
12. Certification Procedures	26.83	D	Missing documents and incomplete analysis/review of Onsite visits, denials, removals	Submit DBE Program Attribute Checklist. Incorporate checklist into DBE Program. Update DBE Program to include a method for	September 30, 2012
13. Record Keeping and Enforcements A. Bidders List	26.11	D	Bidders list collected but not maintained	Submit information on how the bidder's list will be used for goal setting	September 30, 2012
B. Monitoring	26,37 26.55	D	More monitoring needed on projects	Submit staffing plan for monitoring activities Update monitoring and enforcement actions	September 30, 2012

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action:	Response Days/Date
C. Reporting	26.11	D	Modified reporting forms and incorrect reporting periods	Submit supporting documentation on contracting activity for FY 2011 to 1 st Half of FY 2012 Submit schedule and plan to update previously submitted DBE reports for accuracy	September 30, 2012

Findings at the time of final report: ND = No deficiencies found; D = Deficiency; NA = Not Applicable; AC = Advisory Comment

Section 8 – List of Attendees

Name	Organization	Title	Phone	Email
FTA:				
Randelle Ripton	FTA - Office of Civil Rights	EO Specialist, DBE Technical Lead	202-366-5086	randelle.ripton@fta.gov
Mokhtee Ahmad	FTA – Region VII	Regional Administrator	816-329-3930	mokhtee.ahmed@fta.gov
Rebecca Rand	FTA, Region VII	Civil Rights Officer	816-329-3928	rebecca.rand@fta.gov
Metro Members:				
Elke Campbell	Metro	Manager Supplier Diversity Program	314-982-1398 Ext. 1398	ecampbell@metroslouis.org
Gerard Hutchinson	Metro	Supplier Diversity Specialist	314-982-1400 Ext. 1487	Gkhutchinson@metroslouis.org
James J. Cali	Metro	Internal Audit, Director	314-923-3001	Jjcali@metroslouis.org
Dee Joyce-Hayes	Metro	General Counsel	314-982-1532	Dljoycehayes@metroslouis.org
David G. Ramsay	Metro	Contracting Officer	314-982-1400 Ext. 1886	Dramsay@metroslouis.org
Larry B. Jackson	Metro	Vice President, Procurement	314-982-1560	Lbjackson@metroslouis.org
Tracy Beidleman	Metro	Director, Program Development & Grants	314-982-1568	Tbeidleman@metroslouis.org
Kent Swagler	Metro	Director, Corporate Compliance	314-923-3097	kswagler@metroslouis.org
Chris Poehler	Metro	Vice President, Engineering		cpoehler@metroslouis.org
John Nations	Metro	CEO		jnations@metroslouis.org
Sally Bender	Metro	Internal Auditor	314-982-1400 x 1802	sabender@metroslouis.org
Chris Rimsky	Metro	Director, Capital Projects	314-982-1400 x 3088	crimsky@metroslouis.org
Fred Bakarich	Metro	Director, Capital Projects	314-982-1400 x 1306	fjbakarich@metroslouis.org
Prime Contractor Representative				
Penny Stewart	Gershenson Construction Co., Inc.	Accounts Receivable	636-938-9595	Pstewart@gershenson.com
Ron Lindenberg	Illinois Excavators, Inc.	Estimator/Project Manager	618-282-3844	ron.illinoisexcavators@htc.net

DBE Subcontractor Representative				
Patricia Reiman	PJR & Associates, Inc.	President	618-426-3325	Pjr@egyptian.net
Megan Bertelsman	Ray LaFore Truck Service, Inc.	President	618-398-1108	Laforetruckservice@gmail.com
Interested Parties				
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Yaphett El-Amin	MOKAN	Executive Director	314-807-7590	Elamin@mokanccac.org
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Carmell Macklin	Macklin Hauling, Inc	Owner	314-534-7050	macklin_hauling@sbcglobal.net
Milligan & Co LLC:				
Benjamin Sumpter	Milligan & Co., LLC	Lead Reviewer	215-496-9100	Bsumpter@milligancpa.com
Habibatu Atta	Milligan & Co., LLC	Reviewer	215-496-9100	Hatta@milligancpa.com
Kristin Szwajkowski	Milligan & Co., LLC	Reviewer	215-496-9100	Kszwajkowski@milligancpa.com