

COMPLIANCE REVIEW REPORT
OF THE
CHARLOTTE AREA TRANSIT SYSTEM
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

**Final Report
September 2011**

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

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SECTION 1 - GENERAL INFORMATION

Grant Recipient: Charlotte Area Transit System
600 East Fourth Street
Charlotte, NC 28202

City/State: Charlotte, NC

Grantee Number: 1111

Executive Official: Carolyn Flowers
Chief Executive Officer/
Director of Public Transit
Phone: 704-336-3855

On Site Liaison: Arlanda Rouse
Civil Rights Officer
Phone: 704-432-2566

Site visit Dates: March 22-24, 2011

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., (14), October 1, 2007 and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs."

The Charlotte Area Transit System (CATS) 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 CATS' 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 certification 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 Charlotte Area Transit System’s (CATS) “Disadvantaged Business Program Plan” is necessary.

The primary purpose of the compliance review is to determine the extent to which Charlotte Area Transit System (CATS) has met its DBE program goals and objectives, as represented to FTA in its Disadvantaged Business Enterprise Program Plan. This compliance review is intended to be a fact-finding process to: (1) examine CATS’ 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 on 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 CATS is honoring its commitment represented by its certification 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 CATS’ Disadvantaged Business Enterprise 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 CATS’ Disadvantaged Business Enterprise Program Plan from a variety of sources – DBE program managers, other CATS management personnel, DBEs, and prime contractors.

SECTION 4 – BACKGROUND INFORMATION

CATS provides transit service in the City of Charlotte, serving all of the City and six towns in Mecklenburg County, five surrounding cities, and portions of six surrounding counties. CATS is the public transit department of the City of Charlotte. CATS operates service through a combination of direct operation and third-party contracting. CATS contracts with McDonald Transit, Inc. (d.b.a. Transit Management of Charlotte) to provide fixed route services. Demand response services are operated in-house.

CATS operates a network of 74 fixed routes. Service is provided from 4:49 a.m. to 2:00 a.m., Monday through Saturday, and 5:25 a.m. to 2:00 a.m. on Sundays. CATS' complementary paratransit service, known as Special Transportation Service (STS), operates during the same days and hours of service as the fixed routes. CATS also operates a vanpool service utilizing 95 vehicles. Three deviated routes are operated in the Northern portion of CATS' service area in the communities of Davidson, Cornelius, and Huntersville.

CATS also operates light rail service. The Lynx Blue Line is the Charlotte region's first light rail service. It is 9.6 miles long and operates from I-485 at South Boulevard to Uptown Charlotte. With 15 stations including seven park and ride locations, the LYNX Blue Line provides a congestion free commute with a consistent travel time. LYNX operates seven days a week. Weekday service operates from 5:26 a.m. to 1:26 a.m. and service is available every 10 minutes during weekday rush hour and every 15 minutes during non-peak hours. Weekend service operates every 20 minutes during the day and every 30 minutes during late night hours.

On November 15, 2006, the Metropolitan Transit Commission (MTC) adopted the 2030 Transit Corridor System Plan. This updated, long-range plan consists of multiple rapid transit improvements in five corridors, a series of Center City improvements, and bus service and facility improvements throughout the region. The implementation plan for the 2030 Transit Corridor System Plan includes the North and Northeast corridors seeing early implementation followed by the streetcar project. Once complete, the 2030 Transit Corridor System Plan will consist of 25 miles of commuter rail, 21 miles of light rail, 16 miles of streetcar, 14 miles of bus rapid transit and an expanded network of buses and other transit services.

Through the 2025 Integrated Transit/Land Use Plan and the 2030 Transit Corridor System Plan, many improvements have been made including the enhancement of customer amenities, expanded bus routes, improved services and advancements in the rapid transit program and construction of the LYNX light rail line. Some of the upcoming projects include:

- Northeast Corridor (LYNX Blue Line Extension) – The Blue Line Extension (Northeast Corridor) is an extension of the successful LYNX Blue Line light rail service. The 9.4-mile alignment extends from Ninth Street in Center City through the North Davidson

(NoDa) and University areas, terminating on the UNC Charlotte campus. By including the LYNX Blue Line Extension in a comprehensive transportation system that includes roads, buses, bus rapid transit and commuter rail, we can offer more choices and alternatives to congestion on I-85.

- North Corridor (Red Line Project) – The proposed North Corridor Commuter Rail Project will operate along 30 miles of the existing Norfolk Southern rail line (the "O" line) from Center City Charlotte to Mooresville in southern Iredell County. The alignment parallels Graham Street in the south and Old Statesville Road (NC-115) in the north.
- Southeast Corridor Rapid Transit and Highway Project (LYNX Silver Line) – The proposed Southeast Corridor Rapid Transit Project is one of Charlotte's five rapid transit corridors. The Southeast Corridor extends approximately 13.5 miles from Charlotte's Center City to the border of Mecklenburg and Union Counties, terminating at Central Piedmont Community College's Levine Campus.
- The Center City (Charlotte Streetcar Project) – The Charlotte Streetcar Project is a key recommendation of the 2025 Corridor System Plan. The alignment will serve the central business district (CBD) and provide connectivity to surrounding communities and institutions. The proposed streetcar line will run 10 miles along Beatties Ford Road near I-85 through the CBD along Trade Street, traveling up Elizabeth Avenue by Central Piedmont Community College and out to Central Avenue at Eastland Transit Center. The streetcar is key component to implementing the Center City 2010 Vision Plan, helping to create "a livable and memorable Center City." Further, the streetcar will be critical in creating a transit focused and pedestrian oriented center city through developing an integrated transportation system of pedestrians, bikes, motor vehicles, transit, parking, and land development.
- Charlotte Gateway Station Project – The Charlotte Gateway Station, located at Graham, 4th and West Trade streets in Center City Charlotte, is the southern terminus for the North Corridor Commuter Rail Project. The new station will provide seamless integration of various rapid transit modes, including commuter rail, Amtrak, Greyhound, Center City Streetcar and Southeast/West Corridor rapid transit.
- West Corridor Rapid Transit Project- The proposed West Corridor project is a 6.4 miles alignment with Streetcars proposed to operate from Trade St. to Cedar St. to West Morehead St., then along Wilkinson Blvd to Harlee Ave., terminating at the airport employee parking lot on Harlee Ave.

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 signed policy statement expressing a commitment to use DBEs in all aspects of contracting to the maximum extent feasible must be signed, dated and distributed [49 CFR 26.23].
2. 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].
3. Efforts made to use DBE financial institutions, by the recipient as well as prime contractors, if such institutions exist [49 CFR 26.27].
4. A DBE directory including addresses, phone numbers and types of work performed, must be made available to the public and updated at least annually [49 CFR 26.31].
5. The recipient must determine if overconcentration exists and address this problem if necessary [49 CFR 26.33].
6. Assistance provided to DBEs through Business Development Programs to help them compete successfully outside of the DBE program [49 CFR 26.35].
7. An overall goal must be 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].
8. All contracts must include a non-discrimination clause, a prompt payment clause and must implement appropriate mechanisms to ensure compliance by all participants [49 CFR 26.13, 26.29, 26.37].
9. A certification process must be intact 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].
10. The certification procedure must include document review and an on-site visit and determine eligibility consistent with Subpart D of the regulations [49 CFR 26.83].
11. 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].

12. In establishing an overall goal, the recipient must provide for public participation and then provide information on this goal to the public through published notices [49 CFR 26.45].

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 CATS by FTA's Office of Civil Rights. The agenda letter notified CATS of the planned site visit, requested preliminary documents, and informed CATS of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed CATS 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 CATS staff and the review team.

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

At the end of the review, an exit conference was held with CATS 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 CATS.

Following the site visit, this report was compiled.

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. The DBE program document provided to the review team by CATS staff appears to have been most recently amended in 2000, and is consequently seriously outdated. Among other things, it does not refer to the appropriate individuals within the organization responsible for implementing the DBE program, and generally fails to reflect many of CATS' current DBE program policies or practices. CATS staff informed the review team that the organization is currently in the process of updating the program to better reflect the DBE program as it presently exists, and that they expect the revision to be complete at some point during calendar year 2011.

Corrective Action and Schedule: Within 60 days, CATS must submit to the Region IV Civil Rights Officer an updated DBE program plan in a manner that both reflects its current DBE program practices and addresses any and all deficiencies identified by this compliance review. Closure of this finding is subject to FTA's approval of CATS's updated DBE program plan.

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 recipient's organization and to the DBE and non-DBE business communities.

Discussion: During this review, no deficiency was found with requirements for a policy statement. CATS provided the review team with its most recent policy statement, signed on March 7, 2011, by its current Chief Executive Officer, Carolyn Flowers. The updated policy statement is currently posted on CATS' website¹, and CATS staff provided additional evidence provided to the review team that the revised policy has been circulated throughout the organization and to DBE and non-DBE business communities.

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.

¹ <http://charmeck.org/city/charlotte/cats/about/Business/procurement/Pages/dbesbe.aspx>

Discussion: During this DBE Compliance Review, deficiencies were found with the requirement for the DBE Liaison Officer (DBELO). In CATS' revised DBE Program Plan dated August 2000, the DBELO was noted as Dee P. Pereira who holds the position of Chief Financial Officer/Manager of Transit Administration. However, in reality and practice CATS' current DBELO is Arlanda Rouse. At the time of the review CATS was undergoing an organizational restructuring, and was thus unable to provide a finalized organizational chart to demonstrate Mr. Rouse's current positioning within the agency. The organization chart that was provided showed a "dotted line" relationship between the DBELO and CEO.

As DBELO, Mr. Rouse is responsible for implementing all aspects of the DBE Program and ensuring that the CATS complies with all provisions of the regulations, as well as coordinating the administrative functions associated with CATS' DBE Program. This includes developing annual goals for approval, coordinating procurement and contracting activities, conducting outreach programs, developing reports, and performing/oversight monitoring functions. He collaborates with and receives auxiliary support from other offices and individuals within CATS, including the legal counsel's office, procurement, grants and project management. He also meets regularly and has access to CATS' CEO, Ms. Flowers, though was unable to provide any documentation showing the access had been utilized (e.g., in the form of meeting notes, calendar appointments, etc.).

Corrective Action and Schedule: Within 60 days, CATS must submit to the Region IV Civil Rights Officer evidence that it has updated its DBE program plan to accurately reflect its current DBELO, who must have full responsibility for program implementation, direct and independent access to the Chief Executive Officer concerning DBE program matters, and adequate resources to implement the DBE Program. CATS must also provide to the Region IV Civil Rights Officer an updated organizational chart that clearly establishes where within the organization the DBELO is located, and is advised to begin documenting those instances when the DBELO exercises his direct and independent access to the CEO.

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 review, no deficiency was found with requirements for financial institutions; however, an advisory comment was made. According to the DBE Program Plan, revised August 2000, CATS identified one minority-owned financial institution, Mechanics and Farmers Bank (MFB), headquartered in Durham, North Carolina. MFB is a full-service commercial bank and operates nine branches in Durham, Raleigh, Charlotte and Winston-Salem, North Carolina. At the present time, CATS is not utilizing their financial services.

During the on-site visit, the review team advised CATS that it should incorporate into its DBE program document a schedule and process for investigating the availability of DBE financial institutions.

5. DBE Directory

Basic Requirement: (49 CFR Part 26.31) A DBE directory must be available to interested parties including addresses, phone numbers and types of work each DBE is certified to perform. This directory must be updated at least annually and must be available to contractors and the public upon request.

Discussion: During this compliance review, no deficiencies were found with the requirement for a DBE directory; however, an advisory comment was made. The North Carolina Department of Transportation (NCDOT) processes all DBE certification applications for the State of North Carolina and maintains the directory. The DBE directory is located at <https://apps.dot.state.nc.us/vendor/directory>. A link to this directory is also included on CATS' website. FTA recently conducted a compliance review of the North Carolina UCP, so UCP-specific information was not considered during the course of this review. However, during the on-site visit the review team noted that the DBE directory was not consistently provided to prospective bidders/contractors, and advised CATS staff to begin doing so.

6. Overconcentration

Basic Requirement: (49 CFR Part 26.33) The recipient must determine if overconcentration of DBE firms exists and address the problem, if necessary.

Discussion: During this compliance review, a deficiency was found with the requirement to prevent overconcentration. During the on-site visit, CATS personnel stated that the organization had previously performed an analysis to determine if any areas of overconcentration exist, but could not provide any information or documentation that the analysis had indeed occurred. Staff did state that to the best of their knowledge, no areas of overconcentration for DBE firms had ever been identified. CATS also noted that if any areas of overconcentration are identified, they would take appropriate steps in accordance with the regulations to address them. Interviews with prime and subcontractors and contractor organizations conducted during the review did not reveal any issues or concerns in this area.

Corrective Action and Schedule: Within 60 days, CATS must submit to the Region IV Civil Rights Officer evidence that it has incorporated into its DBE program a process and schedule and for analyzing whether overconcentration exists, including a mechanism to remedy any identified overconcentration.

7. Business Development Programs

Basic Requirement: (49 CFR Part 26.35) The recipient may establish a Business Development Program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program.

Discussion: During this compliance review, no deficiencies were found in the area of Business Development Programs (BDP). Charlotte Area Transit System does not currently have a formal Business Development Program in place. However, CATS does organize and/or participate in a number of outreach programs to provide information to various organizations regarding contracting opportunities and how to do business with CATS.

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 compliance review, deficiencies were found with the requirements for calculation of goal. The review team examined the FY 2007, FY 2008 and FY2009/2010 goal submissions provided by CATS. To initiate the goal-setting process, the DBELO works in conjunction with the Capital Budget and Grants Manager to identify the projected types and amounts of contracting opportunities CATS would have for the upcoming goal setting period. The process then continues as follows:

Step 1: Determining the Base Figure

The base figure is determined by the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on DOT-assisted contracts. CATS utilizes the most current MSA Business Patterns data from the U.S. Census Bureau consisting of Charlotte, Gastonia, Concord, North Carolina and South Carolina Metropolitan Statistical Area (the Charlotte MSA), the NCDOT DBE Directory and, CATS' bidders list and vendor information within the Charlotte Mecklenburg County to determine the percentage of DBEs in relation to all firms that are ready, willing, and able to compete for its DOT-assisted contracts. It is unclear, however, whether CATS uniformly applied the Charlotte MSA as its geographic area when developing DBE goals—even within individual goal setting processes.

The number of DBE and non-DBE firms was identified using six digit NAICS codes. Weights were also applied to two specific categories, architectural and engineering and construction, based on the anticipated expenditures. For the FY 2008 goal, this assessment yielded a Step One DBE availability of 8.12%. The methodology noted that the base figure is an adjustment to the 6% previously published in the public notice. In 2009/2010, the assessment yielded a 12.61% base figure.

Step 2: Adjusting the Base Figure

CATS' DBE Program Plan notes several factors that will be considered in their Step 2 adjustment. These include the current capacity of DBEs to perform work in the DOT-assisted contracting program as measured by the volume of work DBEs have performed in recent years and evidence of disparity studies conducted within the jurisdiction. For FY 2008, CATS determined that it would use the Step One base figure of 8.12% as its overall goal without any adjustment. This was based on the fact that 95% of the federal funds to be expended in FY 2008 were in the architectural and engineering category and CATS had no historical data regarding DBEs' past performance in these areas to make an adjustment.

For the FY 2007 goal, CATS used DBE participation on similar type projects to make an adjustment to their step one base figure. According to the goal methodology, one of the contracts with a 19.8% DBE goal secured a 20.85% commitment. The second with a DBE goal of 15% secured a 9.9% commitment. However, it was noted that CATS utilized their actual goal achievement based on payments rather than awards to make the adjustment. The correct DBE participation should have been reflected as 15.37% rather than 8.96%. Averaging the past participation with the base figure, the DBE goal for FY 2007 may have been adjusted to 12.5% rather than the 9.2% submitted to the FTA.

For FYs2009/2010, CATS performed a past participation analysis to determine what its Step 2 adjustment would be. While the calculation performed was done correctly—arriving at an adjusted goal of 12.90%—it is unclear whether CATS considered if the contracting opportunities from prior years were the same or similar to those included. The review team notified CATS staff that where a past participation analysis is performed, it is important to ensure contracting opportunities are similar in order to ensure the information being considered and compared for the adjustment is both relevant and related.

Corrective Action and Schedule: Within 60 days, CATS must develop and submit to the Region IV Civil Rights Officer a process to ensure all relevant information is considered and included in goal submission, and that the final goal is calculated correctly. In addition, CATS must amend its program plan so it more fully reflects the current goal setting process.

B) Public Participation and Outreach

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 compliance review, no deficiencies were found with the FTA requirement for Public Participation and Outreach; however, an advisory comment was made. CATS' DBE Program Plan indicates that it would consult with the Metrolina

Association of Minority Contractors, the Charlotte Minority Business Development Center, the Carolinas Minority Supplier Development Councils, the Women Business Owners Association and the Association of General Contractors concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and efforts to establish a level playing field for the participation of DBEs.

For the FY2009/2010 goal, CATS provided the review team with documentation, including sign-in sheets, to substantiate its consultative process—namely, using public meetings—as it developed its DBE goal. It also provided evidence that the goal was published in the Charlotte Observer. Given the low amount of input, however, the review team advised CATS to consider involving the public, outside groups, contracting associations, etc., earlier in the goal setting process, and to consider changing the times for the public meetings, increasing their frequency, etc. The review team also suggested CATS consider increasing the frequency, range and number of media outlets used to publish its DBE goal and methodology.

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 compliance review, a deficiency was found with the requirement for transit vehicle manufacturer. The review team examined the documentation for two federally funded vehicle contracts. In one contract with Siemens Transportation Systems, Inc., the TVM self-certified that it had complied with FTA's TVM requirements, but without providing any other documentation. In another with the Gillig Corporation, CATS collected the TVM certification from the bidders for these procurements; however, the contract incorrectly referenced 49 CFR Part 23 as governing, instead of 49 CFR Part 26.

Corrective Action and Schedule: Within 60 days, CATS must provide the Region IV Civil Rights Officer with evidence that it collects the correct TVM certification prior to allowing any TVM to bid on federally funded vehicle procurements. Specifically, CATS should include a mechanism in its DBE program to include the review of FTA's approved TVM list (from FTA's website) as part of their process for TVM verification of DBE compliance, and to collect the FTA approval letter provided to the TVM as part of this process. CATS should also ensure that all future contracts reference the appropriate TVM-related provisions found in 49 CFR Part 26.

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 compliance review, deficiencies were found in the area of race neutral participation. For FY 2007 and FY 2008, CATS indicated in their goal methodology that the overall goal would be met totally through race conscious means. The rationale for this decision was based on an underutilization of DBE participation for

similar projects in the past. In those methodologies, CATS indicated that the estimated breakout of race-neutral and race-conscious participation would be adjusted to reflect actual DBE participation and both would be tracked and reported separately to maintain program integrity.

According to the FYs2009/2010 methodology, CATS achieved 9.34% DBE participation in FY2008, or 1.22% higher than the 8.12% overall goal. In FY 2007, CATS achieved 12.06% DBE participation, 2.86% over the established goal of 9.2 percent. For FY 2006, DBE achievement was reflected at 14.3% that represented 3.3% over the established goal of 11 percent. However there was no evidence that CATS captured any race-neutral participation to use for future projections beyond determining to what extent the overall DBE goal may have been exceeded in any given Federal fiscal year.

In the FYs2009/2010 methodology, CATS did attempt to create a race conscious/race neutral split for its overall goal based on its past participation figures. While the calculation used was technically correct, the figures used to input into the formula were incorrect.

Furthermore, CATS did not provide any documentation of how or when it evaluates its achievements, based on awards, throughout the year in order to make any adjustments for the use of contract goals, as described in 49 CFR Part 26.51(f): *“If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal, you must replace or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.”*

See additional discussion of this issue under Section 12, Record Keeping and Enforcements.

Corrective Action and Schedule: Within 60 days, CATS must submit to the Region IV Civil Rights Officer their documented procedure for tracking race-neutral participation and for incorporating the process for goal usage to demonstrate compliance with 49 CFR Part 26.51(f). It must also establish a process for analyzing ongoing DBE participation to determine whether any adjustment to the use of DBE contract goals during a DBE goal period is necessary or merited.

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, no deficiencies were found with the requirements for race conscious participation; however an advisory comment was made. During the on-site visit, the review team discussed with CATS its high usage of race conscious contract goals, and advised staff that in those instances where CATS

anticipates it will or actually exceeds its overall DBE goal, it must discontinue use of race conscious measures. See additional discussions of adjustment to the use of contract goals above in item 7.C).

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 compliance review, deficiencies were found with the requirements for good faith efforts. CATS' DBE Program Plan contains procedures for awarding contracts with contract-specific goals. The procedures note that a bidder must meet the goal or demonstrate good faith efforts to meet the goal in order to be awarded a contract. The program plan further stipulates that the DBELO, or their designee, is responsible for determining whether the bidder has documented sufficient good faith efforts. Information should be complete, accurate and adequately document the bidder's good faith efforts before CATS awards the contract. Bidders are required to submit Form A, Schedule of DBE Participation, at the time of their bid or at the very latest, within 72 hours after a request by CATS, to be considered responsive. A bidder's failure to meet the goal or to show reasonable efforts to that end constitutes sufficient ground for bid rejection. CATS also provided a document containing the good faith efforts criteria to be considered when making such determinations

However, it appears that application of this process is inconsistent. During the compliance review, the team examined several contracts where the DBE goals were not met to assess how these program elements were implemented. The review team also reviewed the documentation surrounding the administrative reconsideration of bids initially deemed to have provided insufficient good faith efforts to support an award. Both of the two good faith efforts evaluations examined (one for the RJ Griffin Davidson Street Contract C and the other for Clancy & Theys) had varying degrees of detail and specificity at both the initial good faith efforts determination level and at the administrative reconsideration level. Further, it is unclear whether the evaluation criteria established by CATS is always considered, as the evidence/documentation provided to the review team was incomplete as well. It does appear that CATS has a consistent procedure in place for handling good faith efforts evaluations and subsequent appeals/requests for reconsideration.

Corrective Action and Schedule: Within 60 days, CATS must provide to the Region IV Civil Rights Officer modifications to its DBE program to ensure greater consistency in its good faith efforts and administrative reconsideration processes. At a minimum, this should include a thorough process for evaluating good faith efforts submissions in a manner consistent with Appendix A to 49 CFR Part 26.

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 compliance review, no deficiencies were found with the requirements for counting DBE participation; however, an advisory comment was made. During the site review, the review team noted that CATS no longer counts state/local certified MBEs or SBEs for DBE credit. It also appears to be calculating DBE participation for various types of work at the correct rates, and is submitting its reports on the correct form, despite the fact that the form referenced in the DBE program no longer exists. There were instances where CATS' backup data did not fully support/match the data submitted to FTA. In those instances, however, the data was collected, but not included in the report submissions. The review team advised CATS to amend its program to reference the correct form (Appendix B to 49 CFR Part 26), and to review its internal processes to ensure all potential DBE credit is claimed.

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 CATS 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 compliance review, deficiencies were found with the requirements for Contract Assurances. CATS' revised DBE Program Plan, dated August 2000, contains the required contract assurance clause as prescribed by the DOT regulations. However, it does not appear that contractors doing business with CATS consistently include the clauses in its subcontracts.

During the site visit, the review team examined several contracts, including both prime contracts and subcontracts with DBE subcontractors. In each instance, the required contract assurance was included in the prime contract between CATS and the prime contractor; however, there were numerous instances where the required provision did not flow down to the subcontract (see, e.g., Contract No. MS-022010 between Adolphson & Peterson and AEI Painting). All of the subcontracts did incorporate the prime contract and 49 CFR Part 26 by reference, but the regulation requires that the precise language from Section 26.13(b) be include in every USDOT-assisted prime and subcontract agreement, regardless of whether DBEs are involved or not.

Corrective Action and Schedule: Within 60 days, CATS must submit to the Region IV Civil Rights Officer documentation that it has implemented procedures to ensure that the clause addressing contract assurance is included not only in its contracts with its prime

contractors, but flows down and is included in the contracts its prime contractors have with their DBE (and non-DBE) subcontractors working on FTA-assisted projects.

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 a specific number of 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 a specific number of days after the subcontractors' work is satisfactorily completed.

Discussion: During this compliance review, deficiencies were found with the requirements for Prompt Payment and Return of Retainage.

Prompt Payment

In CATS' revised DBE Program Plan, CATS advises that the prompt payment policy will be included in all DOT-assisted prime contracts. CATS' policy stipulates that, "The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than seven days from the receipt of each payment the prime contractor receives from the City of Charlotte."

In the contracts reviewed during the site visit, the prompt payment clause found in the DBE Program Plan was included in every prime contract reviewed. However, several of the subcontract agreements between prime contractors and DBE subcontractors contained contradictory prompt payment clauses. In addition, it does not appear CATS actively monitors whether its prime contractors adhere to the 7 day requirement, but rather waits to receive a complaint from DBE subcontractors to determine whether prompt payment in fact occurs. While the prompt payment policies specified in CATS contracts meets the prompt payment requirement of the regulations, it does not appear to be consistently communicated to its subcontractors, nor does it appear to be regularly monitored in a meaningful way. The review team advised CATS that including and implementing more proactive prompt payment monitoring process in its DBE program is recommended.

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.

Also included in CATS' DBE Program Plan is its policy for the return of retainage. The policy stipulates that, "The prime contractor agrees further to return retainage payments to each subcontractor within seven days after the subcontractor's work is satisfactorily completed." As was the case with prompt payment, this clause was included in all prime contracts, but was inconsistently included at the subcontract level. For example, in one

contract (the Adolphson-AEI noted above), a retainage provision was included, but did not reference the seven-day requirement established by CATS.

Corrective Action and Schedule: Within 60 days, CATS must submit to the Region IV Civil Rights Officer documentation that it has implemented the requirements of Part 26.29. Additionally, CATS must provide documentation that it has implemented procedures to ensure that the clauses addressing prompt payment and prompt return of retainage included in the prime contracts are consistently included in agreements with subcontractors participating on FTA-assisted projects, and are monitored and enforced in a meaningful way.

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 compliance review, no deficiencies were found with the requirement for legal remedies. In its DBE Program Plan, CATS indicates that all contracts between the City of Charlotte and a contractor shall contain an appropriate provision to the effect that failure by the contractors to comply with the DBE Program shall constitute a breach of the contract exposing the contractor to a potential termination of the contract or other appropriate remedy, including withholding of funds until such time as the contractor complies with the DBE requirements. This language was included in the boilerplate and was found in each of the contracts analyzed by the review team while on site.

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 compliance review, no deficiencies were found with the requirement for certification standards. CATS does not certify firms as Disadvantaged Business Enterprises. All certifications for the State of North Carolina, with the exception of airport concessions, are conducted by the North Carolina Department of Transportation. FTA recently conducted a compliance review of the North Carolina UCP, and refers to those findings with regard to certification standards.

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 compliance review, no deficiencies were found with the requirement for certification procedures. CATS does not perform DBE certifications. All certifications for the State of North Carolina, with the exception of airport concessions, are conducted by the North Carolina Department of Transportation. CATS provided a copy of their Memorandum of Agreement with the North Carolina Department of Transportation signed by CATS' former Chief Executive Officer, Ronald J. Tober, on June 11, 2004. FTA recently conducted a compliance review of the North Carolina UCP, and refers to those findings with regard to certification procedures. Given CATS is a non-certifying entity, the review team recommended it consider removing the certification procedures section from its DBE program plan (except for providing a reference and contact information to the North Carolina UCP) to eliminate the potential for confusion.

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 compliance review, deficiencies were found with the requirement for Record Keeping and Enforcements.

Bidders List

CATS has a process in place to collect statistical information for a bidders list. The information is collected on a form called "List of All Firms Bidding or Quoting as Prime/Bidder Contractor and Subcontractors on DOT-Assisted Contracts." Hard copies of the form are provided to the Civil Rights Officer for goal-setting purposes. CATS indicates in its solicitation documents that all firms bidding as primes and subcontractors for DOT-assisted projects are required to submit the form. A sampling of the data collected for the bidders list was provided to the review team. CATS captures all of the information that is required in accordance with the regulations.

Monitoring

As a supplement to its DBE Program Plan, CATS requires its procurement department to include a boilerplate document that addresses inclusion of the required contract provisions and monitoring provisions, including monthly reporting requirements for its prime contractors in its agreements. Prime contractors are required to submit the Monthly DBE Report (Form E) no later than the 10th day of each month of the contract period. The prime contractor and its subcontractors are also required to permit access to its records for periodic reviews for compliance with prompt payment requirements and other DBE program requirements. Form E captures the DBE contact information, the type of work assigned, amount of funds committed and paid for the period and total amounts paid since issuance of the notice to proceed. CATS' Civil Rights staff also performs periodic onsite reviews of its projects known as "site surveys." The site surveys provide a summary of the activities conducted by the Civil Rights Officer and the Transit

Compliance Officer. The activities include a tour of the project site and discussion with contractors on site to determine the DBEs working on the project that day and confirming the ownership of the equipment being utilized. In October 2008, CATS issued Procedure No: CivR05, which, according to the document, established a standardized process for determining the acceptability or non-acceptability of contractors, subcontractors, vendors, suppliers, or consultants doing business with CATS. Finally, CATS has implemented a system in which sign-off by the DBELO is required before payment can be made to any prime contractor working with DBE subcontractors

Although these appear to be promising and potentially effective tools in monitoring DBE participation as detailed in the contract terms and goal attainment, insufficient documentation was provided that evidences how the information gathered is used to verify compliance with the prompt payment, return of retainage and other DBE program requirements. Just as important, outside of the payment sign-off mechanism, it does not appear these tools are applied or used in a consistent manner, hampering their overall effectiveness. In addition, as discussed in *Item 9, Required Contract Provisions*, it does not appear that as part of its monitoring efforts, CATS has developed and implemented a process whereby the Civil Rights Officer or his designee reviews the contract files of the DBE subcontractors or prime contractors performing work on federally assisted projects to ensure that the DBE requirements are included.

Reporting

At the time of the site visit, CATS was submitting the required semi-annual DBE reports to the FTA providing data about the DBE program. CATS utilizes the appropriate reporting form and has been reporting on time. CATS provided the review team with several semi-annual reports and supporting documentation. Some of the forms had minor technical errors, as discussed in *Item 8-G, Counting DBE Participation*, above.

Corrective Action and Schedule: Within 60 days, CATS must submit to the Region IV Civil Rights Officer procedures for improving monitoring efforts of work committed to DBEs. This must document and incorporate many of the processes CATS has put in place, and incorporate any necessary enhancements to improve overall DBE program oversight. At a minimum, the monitoring plan must include:

- A mechanism and schedule for regular on-site monitoring of DBE participation, including review of payments made to DBEs;
- Implementation of a process to ensure DBEs are not terminated from projects on which they are working without good cause and prior written consent from CATS; and
- Review of the agreements of those prime contractors and their DBE subcontractors performing work on federally assisted projects to ensure full compliance with the various federal requirements.

13. January 2011 DBE Program Rulemaking

On January 28, 2011, USDOT issued a new “Final Rule” for its DBE program. Subject areas affected by the new provisions include, but are not limited to: DBE terminations; Personal Net Worth; interstate certification and other certification issues; accountability and DBE goal submission; DBE program oversight; and small business provisions.

With the notable exception of some of the certification-related provisions, the new rules became effective on February 28, 2011. That being the case, certain areas identified in this report will be affected by the changes. While none of the rule changes will result in a finding for the purposes of this review, FTA does hope to use the opportunity presented by the timing of the new rule to provide technical assistance and guidance as CATS develops and implements any new policies and procedures required to ensure full compliance with the new provisions. Ultimately, FTA anticipates that any new or amended requirement will be incorporated into CATS' DBE program plan by the time the compliance review process is complete.

SECTION 7 – SUMMARY OF FINDINGS

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action(s)	Response Days/Date
1. Program Plan	26.21	D	Outdated plan does not reflect current program, staff, etc.	Provide updated DBE program plan which adequately addresses all deficiencies noted throughout the compliance review.	60 days
2. Policy Statement	26.23	ND			
3. DBE Liaison Officer	26.25	D	Designation of DBE Liaison Officer in program plan, Documented Access to CEO	Provide evidence that it has designated a DBE Liaison Officer who has full responsibility for program implementation, independent access to the CEO and adequate resources to implement the DBE program.	60 days
4. Financial Institutions	26.27	AC	Investigation of DBE Financial Institutions		
5. DBE Directory	26.31	AC	DBE Directory not routinely provided to bidders and proposers		
6. Overconcentration	26.33	D	No evidence that analysis for overconcentration has occurred	Provide evidence that analysis for overconcentration will occur on a routine basis.	60 days
7. Business Development Programs	26.35	ND			
8. Determining / Meeting Goals					
A) Calculation	26.45	D	Goal Calculation	Develop process to insure all relevant information is considered and included in goal submission, and that it is calculated correctly. Amend program plan so it reflects current goal setting process.	60 days
B) Public Participation	26.45	AC	Consider earlier and broader public participation in DBE goal development		
C) TVM	26.49	D	TVM Certification	Provide evidence that collects correct TVM certification as prerequisite to bidding on FTA-assisted vehicle procurements.	60 days

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action(s)	Response Days/Date
D) Race Neutral	26.51	D	Race Neutral Projection/Goal Adjustment	Submit documented procedure for tracking race-neutral participation and for incorporating the process for goal usage. Establish process for evaluating ongoing DBE participation for use when setting DBE contract goals	60 days
E) Race Conscious	26.51	ND			
F) Good Faith Efforts	26.53	D	Good Faith Efforts Determinations	Provide written documentation that demonstrates modifications to the DBE program that ensures greater consistency in good faith efforts and administrative reconsideration processes in a manner consistent with Appendix A.	60 days
G) Counting DBE Participation	26.55	AC	Counting of certified DBEs		
H) Quotas	26.43	ND			

9. Required Contract Provisions					
A) Contract Assurance	26.13	D	Contract assurance clause not included in subcontract agreements	Submit documentation that CATS has implemented procedures to ensure that the clause addressing contract assurance is included in both contracts with its prime contractors and their DBE subcontractors working on FTA-assisted projects.	60 days
B) Prompt Payment	26.29	D	Prompt payment and return of retainage clause not included in all subcontract agreements; contract clauses inconsistent with DBE Program Plan; inconsistent monitoring	Submit documentation that CATS has implemented procedures to ensure that the clauses addressing prompt payment and prompt return of retainage included in the prime contracts are consistently included in agreements with subcontractors participating on FTA-assisted projects, including monitoring.	60 days
C) Legal Remedies	26.37	ND			
10. Certification Standards	26.67	ND			
11. Certification Procedures	26.83	ND			
12. Record Keeping and Enforcements					
A) Bidders List	26.11	ND			
B) Monitoring	26.37, 26.55	D	Monitoring of work performed by DBEs and subcontract agreements.	Submit procedures for improving monitoring efforts of work committed to DBEs. These should address on-site monitoring, review of payments made to DBEs, implementation of processes to enforce non-termination provisions, and	60 days

C) Reporting to DOT	26.11	AC	Accurate reporting to FTA	review of subcontracts to ensure compliance with federal requirements.	
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Findings at the time of the site visit: ND = No deficiencies; D = Deficiency; AC= Advisory Comment; NA = Not Applicable

SECTION 8 - LIST OF ATTENDEES

Name	Organization	Title	Phone	Email
Carolyn Flowers	CATS	Chief Executive Officer	704-336-2166	cflowers@ci.charlotte.nc.us
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