

FTA

FEDERAL TRANSIT ADMINISTRATION

Dallas Area Rapid Transit Disadvantaged Business Enterprise Final Compliance Review Report

September 2012

Federal Transit Administration

PREPARED BY
Milligan & Company LLC



U.S. Department of Transportation
Federal Transit Administration

COMPLIANCE REVIEW REPORT
OF THE
Dallas Area Rapid Transit
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM
FINAL REPORT

September 2012

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

by

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Section 1 – General Information

Grant Recipient: Dallas Area Rapid Transit
1401 Pacific Avenue

City/State: Dallas, TX 75202

Grantee Number: 5271

Executive Official: Gary C. Thomas
President / Executive Director

On Site Liaison: Michael Muhammad
Assistant Vice President
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Site Visit Dates: December 6 - 8, 2011

Compliance Review Team
Members: Benjamin Sumpter, Lead Reviewer
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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 Dallas Area Rapid Transit (DART) 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 DART'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 your execution of the 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 Dallas Area Rapid Transit's (DART) Disadvantaged Business Enterprise (DBE) program is necessary.

The primary purpose of the compliance review is to determine the extent to which DART 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 DART'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 DART 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 DART’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 DART’s Disadvantaged Business Enterprise Program Plan from a variety of sources – DBE program managers, other DART management personnel, DBEs, and prime contractors.

Section 4 – Background Information

Dallas Area Rapid Transit (DART) was formed in 1983 and in 1988 it completed its acquisition of Dallas' mass transit service operator, Dallas Transit System (DTS), to become the region's mass transit service provider. The public transportation system includes bus, light and commuter rail, vanpool, and paratransit service, and 84 miles of high occupancy vehicle (HOV) lanes in Dallas and 12 member cities. Member cities include Addison, Carrollton, Cockrell Hill, Farmers Branch, Garland, Glenn Heights, Highland Park, Irving, Plano, Richardson, Rowlett, and University Park. DART has a daily ridership of over 205,000 people and has a service area of 700 square miles.

DART's board of directors consists of fifteen members, with eight from Dallas and seven representatives from one or more of the other member cities. Members have staggered terms and are required to be resident voters of their state. They must also reside within the boundaries of the DART service area.

DART's light rail system consists of four lines: the Red, Blue, Green, and Orange Lines. The service runs on 72 miles through 55 stations and carries almost 77,000 passengers each weekday. The commuter rail line, Trinity Railway Express, is jointly operated with the Fort Worth Transportation Authority and connects the cities of Dallas and Fort Worth. Created in 1996, the service runs over 33.8 miles and through 10 stations. Daily ridership is 8,800 people. The rolling stock includes 138 light rail vehicles and 47 rail cars for the commuter rail line. Central and Northwest Rail Operating Facilities service the light rail vehicles and the Trinity Railway Express Maintenance and Operations Facility services the commuter rail fleet.

The agency's bus service consists of 113 routes with over 12,150 stops. The fleet consists of 692 Nova and NABI 40 foot buses. The bus service has an average weekday ridership of over 125,000 passengers. The fleet also includes 186 Eldorado 25 foot paratransit vehicles.

Currently, DART is focusing their efforts on the expansion of their light rail system. They've completed a number of expansion projects. They have a few projects that are currently under construction and in line for the future. Some of the current projects include:

- Expansion of the Orange Line – the 14-mile light rail line will be expanded from northwest Dallas through the downtown area to Dallas Fort Worth Airport and will include 6 new stations; and
- Expansion of the Blue Line – the 5-mile expansion will link downtown Rowlett and downtown Garland.

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

Subsequent to the entrance conference, a review was conducted of DART's DBE Program Plan and other documents submitted to the review team by the DBE Liaison Officer. Interviews were then conducted with DART 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, DART 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 DART.

Following the site visit, draft and final reports were compiled.

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, no deficiencies were found with the requirements for a program plan.

DART provided the review team with a copy of their DBE program plan that was updated in October 2011. The program plan addressed most of the 2011 DOT regulatory changes to the DBE program to include fostering small business participation and written certification of monitoring efforts on projects with DBE participation. DART revised its DBE program to include the small business element and submitted it on February 28, 2012. DART also submitted a revised DBE Program Plan on April 25, 2012 to denote the appointment of the DBELO. The April 2012 DART DBE program plan also included several attached exhibits of forms and policies used in their DBE program implementation.

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, deficiencies were found with the requirements for a policy statement.

The DBE policy statement is included in DART's DBE program. The policy statement was originally issued on August 11, 1987, however, there was a board resolution regarding an amendment to the policy statement dated August 4, 1999. The review team noted that it was signed by Roger Snoble, the former Executive Director who held office from 1993 to 2001. It was also noted that the board members who signed the policy statement have since changed.

The policy statement outlines the objectives of the DBE program and how the policy is disseminated internally and externally. The review team was unsuccessful in finding the policy statement on the agency's website to verify how policy is disseminated.

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 policy statement and document how the policy is disseminated internally and externally.

DART Response:

DART has taken the following corrective actions: The DBE Policy statement has been signed by the President/Executive Director, Gary Thomas. The policy statement that has been signed by the president has been included within the revised DBE Program Manual. A copy of the statement signed by the president is attached hereto as **Exhibit 1**. Thus, this portion of the corrective action plan has been completed. In addition, the complete policy statement will be posted to DART's website within 30 days from the date of this submission. The policy statement will also be posted on boards throughout DART. Also, the policy statement will be mailed to all of the minority chambers of commerce and contractors associations within our service area. Historically, we have routinely discussed our DBE policy in business organizations and business owners alike. We will continue this practice.

Request for Reconsideration of Preliminary Finding: DART has a DBE Policy Statement and has had a DBE Policy statement, both before and after the review. It appears from the discussion section of the draft report that the reviewer desired that the same be signed by our current president. We would note that our DBE policy was adopted by our Board of Directors. The Board of Directors is the highest level of authority within the organization and the president reports to the Board of Directors. A policy that is adopted by our Board remains the Policy of DART unless the Board changes the policy. This holds true even if Board members change from time to time, or if the president changes from time to time. It would be unreasonable to require the adoption of new board policies every single time there is a change in the make-up of the Board.

DART went beyond what was required by having its Board adopt the DBE policy. The policy remains in effect regardless of who serves on the Board and regardless of who is the president of DART. Because the policy was adopted by the Board it is the policy, regardless of who was on the Board when it was adopted and regardless of who was president when it was adopted. Because the policy was adopted at the Board level, rather than just at the Executive level, it enjoys the greatest protection for the DBE program and the community it serves. It also demonstrates DART's commitment to the DBE program at the very highest level of the organization. The DBE policy has never been revoked or rescinded by the Board and the same remains in place.

Additionally, the DBE policy does appear on the DART website. Not in the exact language in which it appears in the policy statement, however, the same is mentioned on the website. See **Exhibit 2**. Moreover, DART has gone to great lengths to maintain constant contact with members of the business community and with organizations that represent businesses. Our DBE policy has been discussed numerous times with both individual business members and business organizations. DART's has made both its DBE program and policy well known within the community. We will continue to take steps to directly engage the business community.

Nevertheless, we will include the policy statement as signed by our president/executive director on our website within the next 30 days. We will also take the additional step of mailing the policy statement to business organizations.

In light of all of the foregoing, DART requests that you reconsider the preliminary finding that was made for this program element. DART request that no finding be made for this program element.

FTA Response:

FTA concurs with DART's proposed actions. It is important that the current CEO sign the policy statement, however, it is not necessary that the board sign the policy. The policy currently on DART's website differs from the policy submitted with this corrective action, as it is the organization's D/M/WBE Program which contains different objectives. 49 CFR Part 26.23 requires that the policy statement expresses your commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation. The current policy statement does not adequately outline responsibilities for implementation.

By October 30, 2012, provide FTA's Office of Civil Rights with documentation that the policy statement, including all components, has been posted on DART's website. This can be accomplished by revising the current policy statement to incorporate implementation responsibilities, or by referencing page 3 of the current DBE Program Plan, so long as that plan is also available on the website. Additionally, provide the listing of business associations that the policy statement was mailed to.

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, no 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. At the time of the site visit, the DBELO was Mr. Michael Muhammad, Assistant Vice President of Economic Opportunity. He was identified as the DBELO for DART and his contact information provided.

DART's DBE program states that the DBELO has direct and independent access to the Executive Director, Gary Thomas. Mr. Muhammad reported directly to Mr. Thomas and met with him on a monthly basis to discuss the DBE program, contracts and community events. Part of his responsibility as DBELO included apprising the Board of Directors and the Executive Director of progress within the DBE program and other related matters. Over the past few years, the Economic Opportunity department staff has been reduced from eighteen (18) to eight (8) personnel. While Mr. Muhammad felt as though this is adequate staff to administer the DBE program, he would welcome any additional staff.

Subsequent to the site visit, DART submitted a new DBE Program Plan, designating Jesse Oliver, Deputy Executive Director, as the DBELO. The plan describes that he has a direct reporting relationship with, and direct and independent access to, the Executive Director.

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, no deficiencies were found with the requirements for financial institutions.

DART indicated in their DBE program plan that it is their policy to look for DBE-owned financial institutions and investigate the services that they offer and their banking requirements. Part of the investigation includes determining whether or not DART is able to utilize the institutions and then meeting with bank representatives.

Exhibit 6 of the current DBE program plan lists 8 DBE owned financial institutions along with applicable services that they offer and all of the requirements necessary to sign up for the services. The agency recommends their use to prime and subcontractors. This information is also available by request from the DBELO.

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.

DART maintains a directory identifying all firms eligible to participate as DBEs. The directory lists firms that have been certified by The North Central Texas Regional Certification Agency (NCTRCA), one of the certifying members of the Texas Unified Certification Program.

Vendor information includes the firm's contact information and the type of work that the firm has been certified to perform as a DBE identified by industrial codes. A copy of the directory is available to the public, DART personnel, and contractors upon request from the Economic Opportunity Office. DART also notes on their website in the commonly asked questions link that the state-wide DBE directory is hosted by Texas Department of Transportation on the internet.

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 DART's DBE program, they have not identified that overconcentration exists with the type of work that DBE firms tend to perform, however they will take appropriate action in the case that an overconcentration issue arises. DART also lists the several ways that they intend to address this matter if they determine that it exists.

The review team found no evidence that DART conducts a periodic overconcentration analysis and determined that additional information was needed to satisfy this requirement.

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.

DART Response:

The following corrective measures will be taken: DART will analyze overconcentration by comparing the number of DBE's in construction, services and professional services work to non-DBE's who are performing work in the same categories. The review will examine those who are actually performing work for DART in these categories over the past year, and it will review the firms in these categories in the DART service area generally. This analysis will occur on an annual basis to determine whether there is an overconcentration of DBE's in either category. The first such analysis will occur by August 30, 2012.

FTA Response: FTA concurs with DART's proposed actions. By October 30, 2012 provide FTA's Office of Civil Rights with the overconcentration analysis that was 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.

DART 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. This element section must be submitted to FTA by February 28, 2012.

DART notes in its DBE program plan that it does, and will continue to, encourage, and

facilitate small business participation on DOT-assisted projects and contracts. A detailed program element will be submitted by February 28, 2012 detailing its procedures and methods for facilitating competition by small business concerns.

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, no deficiencies were found with the requirements for calculation of goal.

Information was collected on DART's DBE goals for fiscal years 2009, 2010 and the 2011 – 2013 triennial periods. The overall goal for FY 2009 was 27% with 23% projected to be met by race-conscious means. The FY 2010 goal was also 27% with a 25% race-conscious projection.

The three-year goal submission for DART was due August 1, 2010. In June 2011, DART noted that FTA asked that they review their goal methodology and resubmit a three-year goal. FTA received DART's DBE goal of 34% for years 2011 through 2013 on September 1, 2011. The goal was conditionally approved pending receipt of an updated goal methodology by November 21, 2011 that addressed several issues identified by FTA. DART provided the review team a copy of the November 18, 2011 revised goal methodology that was sent to FTA addressing weighting the base figure, calculation of the median, and race-conscious/neutral breakdowns.

Step 1: Determining the Base Figure

DART anticipated that FTA expenditures for fiscal years 2011 to 2013 would total \$451,527,387. This amount was categorized into construction, professional services, services, and commodities for contractible dollars in each year. However, no FTA expenditures were projected for the commodities category. DART determined that their internal vendor database would be more reflective of ready, willing and able DBE and non-DBE firms rather than the US Census Bureau data. The Texas UCP directory was used to determine the DBEs for the applicable NAICS codes in the anticipated contractible opportunities.

The number of DBE firms in relevant NAICS codes was 1,840 firms and 4,372 non-DBE firms for a total of 6,212 firms. DART divided the number of DBE firms (1,840) over all firms (6,212) and calculated 29.62% resulting in a rounded 30% base figure. FTA noted that DART did not address weighting considerations in its goal methodology. DART noted in their revised methodology sent to FTA that *the overall goal was not weighted by contracting opportunities, as all contracting opportunities with federal funds will be treated equally in efforts for DBE participation.*

The review team used the data in the revised methodology to calculate the weighted base

figure as follows:

Total construction (\$271,749,151) / total contractible dollars (\$451,527,387) = .6018

Total prof. svcs. (\$2,000,000) / total contractible dollars (\$451,527,387) = .0044

Total services (\$177,778,236) / total contractible dollars (\$451,527,387) = .3937

The relative availability of firms in the three major categories was as follows:

Construction DBE firms (1090) / all construction firms (3828) = .2847

Professional Svcs. DBE firms (331) / all professional svcs. firms (854) = .3876

Services DBE firms (419) / all services firms (1530) = .2738

$(.6018)(.2847) + (.0044)(.3876) + (.3937)(.2738) = .2808 \times 100 = 28.08$

This 28% weighted base figure compares to DART's un-weighted base figure of 30%.

Step 2: Adjusting the Base Figure

An adjustment to the baseline goal was used by DART based on past DBE participation for the previous four years. DART indicated that past DBE participation was 31% in 2007, 26% in 2008, 46% in 2009 and 48% in 2010. In the original DART methodology, the median past participation was determined to be 37% ($26 + 48 = 74 / 2 = 37$). The median past participation (37%) when averaged with the base line figure (30%) totalled 33.5%, which was rounded to 34% for the overall goal.

FTA advised DART to correct the median calculation, which resulted in a revised median past participation of 38.5% ($31 + 46 = 77 / 2 = 38.5$). DART averaged the revised past participation (38.5%) with the base figure (30%) resulting in 34.25 or 34% for DART's overall DBE goal. The correction to the median past participation did not have an effect on the overall DBE goal. The review team also notes that the use of a weighted base figure (28%) as opposed to DART's un-weighted base figure (30%) would have resulted in a one percentage point decrease (33%) to the overall goal.

Meeting Goals

Based on the FY 2011 semi-annual report, DBE achievement was 27.6% and the FY 2011-2013 goal is 34%. In accordance with new DBE guidelines, on December 30, 2011, DART submitted its shortfall analysis outlining the factors why the overall goal was not met in FY 2011.

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, no deficiencies were found with the requirement for Public Participation and Outreach.

DART holds quarterly meetings with representatives of DBE-owned business groups, local chamber representatives, and other interested parties to address matters concerning the DBE program, procurement opportunities, training regarding the procurement process, and concerns that members of the community may have regarding DBE opportunities and participation. During the review, representatives for the Dallas Black Chamber of Commerce and the Greater Dallas Hispanic Chamber of Commerce spoke highly about DART's DBE program and their level of involvement within the DBE community. Representatives of both agencies confirmed that DART holds regularly-scheduled meetings and that they also participate in events that the organizations sponsor as well.

The DART FFY 2011 - 2013 goal methodology included a public participation section that discussed the consultation and published notice process. DART indicated they consulted with various chambers and other business organizations to obtain and assess information concerning the availability of DBE firms and non-DBE firms, the effects of discrimination on opportunities for DBEs, and DART's efforts at establishing a level playing field for the participation of DBEs. Documentation was collected from DART during the on-site review for examples of the information discussed at the meetings.

DART published the goal on their website, in English and Spanish, and indicated that detailed goal information and methodology were available by request from the Economic Opportunity Office for 30 days from the date of the posting. The notice invites public participation and input concerning the DBE goal from its constituents for 45 days from the date of posting. The review team noted that based on FTA June 2011 notification to revise the overall goal, DART notices were advertised after August 2011 instead of the recommended June 15th date.

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, deficiencies were found with the requirement for transit vehicle manufacturers.

Information was provided to the review team concerning a contract for the purchase of small Low-Floor Compressed Natural Gas Buses through Houston-Galveston Area Council of Governments in the amount of \$23,900,952. The funding was 87% federal and 13% local. DART set a 10% MWBE goal for the locally funded portion of \$3,107,124 or \$310,712.

The review team requested information about DART's verification process that TVMs are in good standing with FTA for vehicle procurements. An FTA print-out of TVMs eligible to bid on federally funded transit agency contracts in FY 2010 was provided and a TVM certification submitted by Arboc Mobility on 12/15/09 entitled Buses, Transit, Bid instructions Maine Department of Transportation. The TVM certification referenced

49 CFR Part 23, subpart D, Section 23.67. The TVM certification for the successful proposer (National Bus Sales and Leasing, Inc.) for the above procurement was not provided. However, the Arboc Mobility TVM DBE certification referenced an outdated section of the DBE regulations rather than 49 CFR Part 26. DART should request updated TVM certifications upon execution of a vehicle task order or when piggy-backing on procurement from other grantees.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan to verify that TVM DBE certifications for vehicle purchases are up to date and cite the correct section of the DBE regulation.

DART Response:

The following corrective measures are noted here: DART has requested and received TVM certifications from Transit Vehicle Manufacturers (TVM). DART will continue to request and receive TVM certifications from Transit Vehicle Manufacturers. This process has been and currently is in place. DART has taken the additional step of reviewing the FTA's eligible to bid list for TVM. With every procurement for the purchase of vehicles DART has requested the TVM certification and we will continue to do so. If a TVM submits a certification in the future that cites the wrong legal provision, we will ask the TVM to submit a revised or updated TVM certification.

Request for Reconsideration of Preliminary Finding: It appears from the draft report that a preliminary finding was made because a Transit Vehicle Manufacturer submitted a TVM certification that cited the wrong legal provision. This finding relates to the TVM, and not to DART carrying out its program objectives. The rule requires that "each transit vehicle manufacturer, ... certify that it has complied with the requirements of this section." DART did have the TVM certify its compliance. DART also checked the FTA's eligible to bid list to ensure the TVM was in good standing. DART carried out the actions required by the rule. Additionally, the TVM certification DART received was dated December 15, 2009. The fact that the TVM cited the wrong legal section does not negate the fact that DART took the steps required by the program to receive the certification, and to ensure that the TVM was on the FTA's eligible to bid list. In the future if we notice the TVM has cited the wrong legal provision we will ask them to cite the correct provision. For these reasons we request that the FTA reconsider this preliminary finding and make no finding.

FTA Response:

FTA concurs with DART's proposed action to require resubmission of any TVM certification that cites the incorrect regulation, as it is DART's responsibility to ensure that the regulations are complied with as a condition of determining responsiveness. A best practice in this area is to include the certification that bidders are to sign in the solicitation to negate the potential that an incorrect citation is made. This deficiency is now closed.

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, no deficiencies were found in the

area of race-neutral participation.

DART noted in their FY 2011-2013 goal methodology that they would meet the maximum feasible portion of the overall goal through race-neutral means of facilitating DBE participation. These efforts are described as encouraging prime contractors to subcontract portions of work, electronic notices of contracting procedures and opportunities to DBEs, and distributing the DBE directory to prime contractors.

The FY2011 – 2013 goal methodology included the process of calculating the average race-neutral percentage for the past three years. Based on FTA recommendations, DART used aggregate totals for race-conscious and race-neutral achievements, rather than percentages, for the past four years. The aggregate race-conscious total between years 2008 – 2010 was \$73,163,294 and the race-neutral total was \$7,785,711. DART rounded the calculated amount of 10.6 to 11% for the historical race-neutral percentage achievements. The 11% was multiplied by the current 34% overall goal for a total race-neutral split of 8% (rounded up from 7.75%). Previous overall goal race-neutral projections include 4% RN for the 27% 2009 goal and 2% RN for the 27% 2010 goal.

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 race-conscious participation towards meeting overall goals and use of contract goals.

DART's DBE program plan indicates that the principal method of using race-conscious measures is by establishing contract-specific goals. It is also noted in the plan that contract-specific goals are established to meet any portion of the overall goal that DART does not expect to meet through race-neutral measures. However, DART noted in the *Contract Goals* section in the FY 2011 – 2013 goal methodology submission that individual contract goals will be used to meet any and all portions of the DBE goal. DART also indicated that contract goals will only be established on those federally assisted projects that have legitimate subcontracting opportunities. This statement does not coincide with the 8% race-neutral projected portion of the 34% overall goal and suggests that contract goals will be placed on all contracts with subcontracting opportunities.

It appears that DART is maximizing opportunities to DBEs without analyzing its use of race-conscious contracts needed to meet the overall goal or scaling back the use of contract goals if it appears that they will exceed the overall goal. For instance, DART's 2009 DBE goal was 27% with 23% to be met using race-conscious measures, i.e. contract goals. Based on the FY 2009 semi-annual reports and the FY 2011 – 2013 goal methodology, the DBE achievement or past participation was 46% for FY 2009. The review team calculated from the FY 2009 semi-annual reports that 44% was through race-conscious measures and 2% was race-neutral. The Economic Opportunity (EO) Department should have evaluated the need to continue race-conscious efforts as DART

approached meeting the overall goal. The same is true for FY 2010, where DART projected that the 25% portion of the 27% overall goal would be met using race-conscious measures. However, DART achieved 48% (47% race-consciously and 1.76% race-neutrally).

DART also has a local M/WBE program. They operate, advertise, and monitor both this and the DBE programs simultaneously. Contract goals for D/M/WBE programs are incorporated in contracts; however, the DBE and M/WBE goal are specifically and separately stated. The DBELO said that they only set DBE goals on the federally assisted portion and M/WBE goals on local portion. DART was cautioned to incorporate a firewall between the local and federal programs so that non-DBE firms do not participate as DBEs in the federally funded projects.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA Office of Civil Rights a plan to meet the maximum feasible portion of the overall goal through race-neutral means. Submit a plan to ensure that only DBE firms participate as DBEs in federally assisted projects.

DART Response:

DART will take the following corrective action: DART will closely monitor its contract specific goal setting, and limit the use of contract specific goals where the overall goal is being met or exceeded. DART will focus more on race neutral measures such as outreach and developing DBE's who can bid and be awarded contracts as primes. DART will implement these measures immediately. Note that this response may be supplemented.

Request for Reconsideration of Preliminary Finding: DART does indeed have a Minority and Woman Owned Business Enterprise Program and a Disadvantaged Business Enterprise Program. The two programs are totally separate and are operated separately. DBE goals are always separate and apart from MWBE goals. The program documents within solicitations are separately provided for the DBE Program and the MWBE program. Federal dollars are not included in the MWBE Program and local dollars are not included in the DBE Program. The monitoring of the federal dollars is separate and apart from the monitoring of local dollars. MWBE firms are not counted as DBE's and DBE's are not counted as MWBE's. Non-DBE firms do not participate as DBE's. The two programs are separate and there is a firewall between them.

FTA Response:

FTA concurs with DART's proposed actions for monitoring its use of race-conscious contract goals in conjunction with increased race neutral efforts. By October 30, 2012, provide FTA's Office of Civil Rights with a revised DBE program plan that details these procedures. In light of questions that FTA has received from DART staff subsequent to the onsite portion of the review and the FTA webinar on reporting, additional assurance is necessary that there are firewalls between the DBE and M/W/BE programs. By October 15, 2012, provide a revised DBE program plan that describes how these two programs are managed, along with details on how accurate reporting on DBE achievements will be achieved.

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.

Good faith efforts are discussed in DART's DBE program plan in detail and also a *Good Faith Effort Questionnaire* is included as an exhibit to the plan. The plan indicates that in evaluating an Offeror's good faith effort submission, DART will only consider those documented efforts that occurred prior to the good faith efforts determination. The issue of whether or not the offeror has met the established contract goal and/or demonstrated good faith efforts is considered a matter of responsibility. The EO Department makes GFE recommendations to the Contracting Officer. Administrative review of the Contracting Officer decision is the responsibility of the Vice-President of the Procurement Department. The plan states that the VP of Procurement shall consider the recommendation of the EO Department regarding the good faith issue.

The DBELO indicated that EO and Procurement departments have a good working relationship and did not express any concerns about GFE determinations. The DBELO indicated that there had not been many GFE determinations because contractors usually meet or exceed the contract goal; however, there have been GFE determinations for substituting DBEs. In separate meetings with the DBELO and VP of Procurement, it was expressed by both individuals that they work with contractors to meet the contract goal, sometimes after the best proposer or lowest responsible bidder has been determined. The DBELO said they will discuss the goal with the contractors and see how to increase DBE participation. The VP of Procurement said they will give the EO Department additional time if needed to work with the contractor to meet the goal.

DART was cautioned to evaluate GFE based on efforts made prior made by the contractor during the bidding phase. The issue of responsibility is to give contractor an allotted amount of time to get GFE documentation to grantee, not to grant additional time to increase DBE participation.

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 ensure that GFE efforts are evaluated based on activities prior to the GFE determination.

DART Response:

The following corrective measures will be taken: DART has and DART will continue to evaluate DBE good faith efforts based on activities occurring prior to making a good faith effort determination. As it relates to its DBE Program this has been DART's practice and DART will continue this practice. This measure is already in place and will remain in place.

Request for Reconsideration of Preliminary Finding as it relates to this finding, the reviewer was informed that the process of discussing minority participation with a potential prime

contractor was not a concern in the area of the DBE program. As the reviewer noted, with the vast majority of DBE contracts, prime contractors commit to meet the goal at the time their bid or response to a request for proposals is submitted. In fact, we cannot recall any instance of having to negotiate with a prime contractor to meet a DBE goal, or making a good faith effort determination on anything other than activities that occurred prior to submission of a bid or request for proposals. In any event, because DBE related contracts usually begin as a request for proposals, and because DBE participation is considered a matter of responsibility, negotiation is permissible on a number of items, including DBE participation. That is a distinguishing factor between an invitation for bids and a request for proposals. There is also a distinction between matters of responsiveness and responsibility. Nevertheless, we cannot recall an instance of making a good faith effort determination on a DBE contract on anything other than the information that was submitted at the time of the submission of the request for proposal or invitation for bids. We will continue to utilize this process for our DBE program.

With our MWBE Program, however, when we have purchased commodities (an area in which it is extremely difficult to obtain MWBE participation), we have utilized the process the reviewer described. But even then, it has been with commodity purchases and not services, professional services, construction and the like. Additionally, it has been used with our MWBE program and not our DBE program.

Because the process the reviewer described has not been applied to our DBE Program, we request reconsideration of this preliminary finding. We ask that there be no finding on this program element.

FTA Response: FTA will remove this deficiency. However, to ensure that staff understands the differences in the two programs, please prepare an SOP for your GFE process and DBE monitoring and demonstrate that this information has been communicated. Please provide FTA's Office of Civil Rights with documentation that the 'process differences' between the DBE and the M/WBE program have been communicated to all departments involved with procurements and determination of Good Faith Efforts by October 30, 2012.

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.

DART's DBE program discusses counting DBE participation toward goals in detail to include certification requirements, commercially useful functions, DBE subcontracting to other DBEs or non-DBEs, counting regular dealers, manufacturers, and joint ventures. No issues were discovered during the review with counting DBE participation on FTA-assisted projects.

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.

DART states in the program plan that no quotas and/or set-asides are used in the administration of its DBE program or in the efforts to meet the DBE program goals. Although maximizing DBE opportunities was cited in *Section 8 (F)* above, no evidence of the use of quotas or set-aside contracts by DART was found during the onsite review.

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.

DART 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 three DBE subcontracts for compliance with contract assurance clause inclusion. An additional contract was requested onsite for the Orange Line Expansion project. The clause was primarily found in Exhibit E, *Addendum to General Provisions*, of the prime contractor agreements with DART. However, the review team found that in the subcontract agreements for Alman Construction and CT&S, Inc., the clause was not included. The subcontract agreement for Rama Enterprise, however, included the appropriate contract assurance clause.

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

Prime Contractor	Project	Contract No.	DBE Subcontractor
Omega Contracting, Inc.	Parking expansion at Parker Road	1015568_1	Rama Enterprise, LLC
Journeyman Construction, Inc.	Construction of Lake Highlands Station	1016649_1	CT&S
Mass Electric	Construction and installation of CBD Traffic	1014929_1	Alman Construction Services
Kiewit, Stacey, Reyes-JV	Orange line expansion Phase IIB	P2-1014614	Reyes Group (JV member)

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 subcontract.

DART Response:

As a part of every federal prime contract issued DART requires that the prime contractor accept the contract assurance clause. DART's contracts also require the prime contractor to include the contract assurance clause in all of its subcontracts. DART will continue these practices. DART will take the additional step of ensuring that all subcontracts are reviewed by a staff person to ensure that the contract assurance clause has been included in each of them. If the clause is not present, DART will work with the prime contractor to ensure its inclusion. This measure will be implemented within 30 days of the date this response is submitted.

FTA Response:

FTA concurs with DART's proposed actions. By October 30, 2012, provide FTA's Office of Civil Rights a revision to the DBE Program Plan that details this procedure, along with documentation of its implementation for recent contracts. Documentation should demonstrate that active contracts (with subcontracts) have been amended.

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 DART will include a prompt payment clause in each DOT-assisted prime contract. DART has a ten-day prompt payment clause. The prompt payment clause was included in the prime and subcontract agreements reviewed.

In order to monitor payment efforts made on the part of the prime contractors, DART requests that Vendor Payment Reports are submitted. DART uses the report to determine whether DBE firms have been paid and if they have been paid the correct amount relative to the percentage of work that has been completed. The review team reviewed payment information from the DBE firm, CT&S, Inc. and determined that the DBE was paid, on average, thirteen days from when the prime received payment from DART. During an interview with the president of the firm, Janet Witter, she mentioned that she has had a few issues with receiving payment from the prime contractor in a timely manner. She stated that in the beginning of the job, she received payment systematically, however as the job progressed, she received a few payments much later than expected. One of the invoices examined was actually paid 38 days after the prime contractor received payment from DART.

The review team noted that DART should included a mechanism to closely monitor

prompt payment of subcontractors. The prime contractor is required to submit a Vendor Payment Report with each invoice which includes the amount allocated to be paid to the subcontractor. An additional mechanism is needed to monitor when the prime's invoice was paid by DART and when the subcontractor received payment from the prime for work identified on the Vendor Payment Report.

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.

DART holds retainage from primes and requires the prime contractors to return retainage payments to each subcontractor within ten day after the subcontractors' work is satisfactorily completed. The review team found a number of deficiencies on how the return of retention requirements were carried out with respect to the prime and subcontractor agreements.

Ensuring Prompt and Full Payment

Deficiencies were found in the Alman Construction and Rama Enterprise agreements concerning the return of retainage. The Alman subcontract states that no retainage was being withheld; however, the prime withheld 10% retainage on a change order. This contract also stated that if the "Owner reduces the retainage withheld from Contractor, Contractor may at its sole discretion, with the consent of Subcontractor's surety, reduce the retainage withheld from Subcontractor."

The subcontract for Alman and Rama Enterprises stated that retainage withheld will be returned within a reasonable amount of time after satisfactory completion of their work, however there was no timeframe given for how many days after completion of work that the retainage would be returned.

Incremental Acceptance

DBE regulation state in 49 CFR Part 26.29(3) that, "*You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after your payment to the prime contractor.*"

Although DART withholds retainage, none of the contracts reviewed contained provisions for incremental acceptance. According to 49 CFR Part 26.29(c), "*For purposes of this section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be*

satisfactorily completed.”

Inconsistent Contract Terms

In the contract agreement for Journeyman Construction, DART stated that they will withhold 5% retainage from payments to the prime contractor. When the DBE's subcontract agreement was reviewed, it was found that Journeyman Construction withheld 10% retainage from the payments made to CT&S. The review team noted that DART should review contract and subcontract language for contract term consistency with DART DBE program and DBE regulations.

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

- include a monitoring mechanism to ensure subcontractors are paid promptly;
- ensure that prompt return of retainage clauses are included in subcontract agreements; and
- initiate incremental acceptances of portions of work as described in DBE program in order to correctly implement return of retainage for contracts where DART is withholding retainage.

DART Response:

DART will take the following corrective measures: DART requires that prime contractors pay their subcontractors within 10 days after the prime contractor receives payment from DART. DART has in place a Vendor Payment Report, completed by the prime contractor to track dates of payments. In many instances DART also receives copies of checks written to subcontractors to ensure payments are being made. DART will continue to use these monitoring tools.

DART already has in place a means of identifying when prime contractors receive payment from DART. The same is simply recorded within our financial system. DART's DBE staff will begin to use this data as an additional monitoring measure to determine when subcontractors should receive their payments. Staff is also being instructed to contact the subcontractors directly to ensure payment has been timely received by them based on the date DART made payment. This measure will be implemented immediately.

Within 30 days from the date of this submission, DART will inform all future prime contractors in writing of the federal requirements that must flow down to subcontracts, including the return of retainage provision. Additionally, DART will immediately assign a staff person to review all future sub-contracts to ensure all of the required provisions, including return of retainage provisions, are included therein.

As a further corrective measure, to monitor prompt payment and return of retainage, DART's Economic Opportunity Department is in the process of procuring software that will allow for more efficiency and accuracy in this area.

Moreover, DART has also amended its return of retainage contract language as follows:

Retainage

The Authority will withhold retainage. However, the Authority will also make provision for prompt and regular incremental acceptances of portions of the contractor's work. Retainage will be paid to the contractor based on the acceptances;

and the contractor shall pay all retainage owed to subcontractors for satisfactory completion of their accepted work within 10 days after the prime contractor is paid by the authority for accepted work.

In making progress payments, unless a different percentage is specified in the Special Provisions, the Authority shall retain 5 percent of each progress payment amount. However, if the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer may authorize payment to be made in full without retention of a percentage. In every instance where a percentage is withheld, the same shall be released based on the authority's acceptance of portions of the prime contract in increments.

When the work is substantially complete, the Contracting Officer shall retain an amount that the Contracting Officer considers adequate protection of the Authority and may release to the Design-Builder all or a portion of any excess amount.

FTA Response: FTA concurs with DART's proposed actions. By October 30, 2012, provide FTA's Office of Civil Rights with the status on procuring the new software noted above and the identity of which person(s) or office will be responsible for monitoring prompt payment/prompt return of retainage and reviewing subcontracts to ensure that adequate resources are available. Additionally, provide documentation of monitoring of prompt payment and return of retainage that DART has conducted since the site visit for this review.

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, no deficiencies were found with the requirement for legal remedies.

Legal remedies are included in DART's DBE program plan and included in *Exhibit G-Disadvantaged Business Enterprise Program Provisions* section in contracts. It states that all participants in the DBE program must comply with DART requirements including, but not limited to, responsibility determinations in future contracts, and suspension and debarment procedures as outlined in 49 CFR Part 26. Failure to carry out the DART DBE program is considered a breach of contract and may result in termination of the contractor for default or such remedy as DART may deem appropriate. The DBELO or the VP or Procurement does not recall any firms being suspended or debarred for noncompliance in the DBE program during their tenure.

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

DART utilizes the North Central Texas Regional Certification Agency (NCTRCA) to certify DBEs in the Dallas/Fort Worth area. DART is not a certifying member in the Texas Unified Certification Program (TUCP). The Texas UCP Letter of Agreement, signed on September 30, 2011 by the DBELO, is included to the DBE program plan. A copy of the Memorandum of Agreement for the Texas UCP is also included.

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.

The DBE provision in Exhibit G included in contracts discuss certification procedures and requirements. Section 3(c) states that the eligibility of a DBE certified joint venture will be determined on a project-by-project basis by the EO Department. DART must revise this statement since joint ventures are not certified as DBEs. DART more accurately reflects the relationship of DBEs in joint ventures in the *Public Participation and Outreach Efforts* section of their DBE program plan where it states a joint venture is not considered a DBE regardless of the percentage of DBE participation.

Exhibit G also state in Section 3(d) that if offerors propose using a DBE not currently certified, it is strongly urged that the EO Department be contacted well in advance of the date set for receipt of offers in order to enable review of the proposed DBEs eligibility. The EO representatives advised the review team that pending certification applications are considered toward contract commitments for award of a contract. The review team advised DART of DBE requirements in 26.81 (c) All certifications by UCPs shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

During the review, representatives from Mass Electric, Inc. indicated that they have an internal policy not to use DBE firms with pending certification expiration dates. When asked for additional detail, the contractor representatives told the review team that they review the expiration dates of DBE firms who are looking to participate on upcoming projects and if the dates are too close to the start of the project, then they pass over the firm. Part 26.83(h) of the regulations state that "*Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of section 26.87. You may not require DBEs to reapply for certification or require "recertification" of currently certified firms.*" The review team

noted that DART must advise their certification agent and/or TUCP to remove expiration dates from the certificates and the TUCP DBE directory. The USDOT Official Questions & Answers state, “*While there are numerous reasons for which a firm’s certification can be lost or its DBE eligibility terminated, it is important to note that there is no such thing in the DBE program as the “expiration” of a certification (i.e., a “term limit” of a certain number of years on the firm’s eligibility). Once certified, a firm remains certified until and unless it is decertified.*”

Mass Electric also included a Subcontract Rider-DBE Program in their agreement with the DBE firm, Alman Construction Services. The provision states the prime contractor has the right to terminate the subcontract for default if the subcontractor is decertified as a DBE and/or if for any reason the owner refuses to count any portion of the subcontract toward meeting the DBE goal. DBE provision in 26.87(j) allows primes to continue to count DBE participation if they have an executed subcontract agreement prior to the removal of a DBEs certification. Therefore, this subcontractor rider provision contradicts DBE regulations. DART is advised to require that primes remove these types of termination clauses from their contract boilerplates and not add additional DBE provisions outside of DART approved DBE provisions.

The DBE regulation requires that the UCP update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made. DART notes on their website in the commonly asked questions link that the state-wide DBE directory is hosted by Texas Department of Transportation on the internet and updated monthly. DART will need to verify that the TCUP directory is updated as changes are made and revise the webpage directory information to reflect directory update procedures of the TUCP.

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

- revise joint venture language in Exhibit G-DBE Provisions;
- ensure that DBEs counted toward commitments have been certified prior to the due dates for bids or offers;
- inform DART contractors of the certification process and the affects of certification removal;
- review subcontract agreements to ensure that termination clauses are not inconsistent with DART’s DBE program; and
- update DART website information concerning directory access and updates.

DART Response:

DART will take the following corrective action: DART will clarify the language in Exhibit G-DBE provisions within 30 days. DART does and will continue to ensure that DBEs counted towards commitments have been certified prior to or on the due date for bids or offers. DART will take this measure immediately. DART will hold a training session for prime contractors to discuss the certification process within six months of the date of this submission. As part of its review of subcontracts as noted above, DART will ensure that the appropriate federal language is included. The DART website has already been updated to connect directly to the local TUCP organization.

Request for Reconsideration of Preliminary Finding: The draft report provides that DART’s Exhibit G has language in Section 3(c) that “states that the eligibility of a DBE certified joint venture will be determined on a project-by-project basis by the EO Department.” The draft report provides that “this statement must be revised because since joint ventures are not certified as a DBEs.” DART does not certify DBEs at all. We rely on entities that are a part of the Unified Certification Program to perform certification. Additionally, DART does not seek to certify joint ventures as DBEs. The language referenced in Exhibit G is for DART to determine whether DBE businesses participating in a joint venture are in fact DBEs. It is not directed towards certifying DBEs. It is directed towards making sure a company that is already a DBE has been properly certified in order to receive DBE credit for counting purposes. We request that FTA reconsider the preliminary finding made here and make no finding. DART will clarify the language, but at no point was the intent or the actual practice to certify joint ventures as being DBEs.

The draft report also provides that DART’s Exhibit G has language in Section 3(d) that states “if offerors propose using a DBE not currently certified, it is strongly urged that the EO Department be contacted well in advance of the date set for receipt of offers in order to enable review of the proposed DBEs eligibility.” The purpose of this provision is not at all what the draft report indicates. The purpose of the provision is to make the EO department aware so that we can direct the prime and the prospective subcontractor to the certification agency to apply for certification. If the application for certification is done in advance the firm can possibly be certified prior to submission of a bid or response to request for proposal. The provision is not designed to accept firms whose certification is pending. We respectfully request that there be no finding as it relates to this provision.

The expiration dates that commonly appear on certification certificates are placed there by the TUCP. The expiration dates serve more as a notice that the DBE firm needs to submit its annual affidavit than it does to terminate DBE certification. We have spoken with or TUCP regarding this issue and have been informed that they are working on including revised language on the certification certificates. **Please see Exhibit 4.**

FTA Response:

FTA concurs with DART’s proposed and completed actions. By October 30, 2012, provide to FTA’s Office of Civil Rights revised Exhibit G-DBE and the identity of which person(s) or office will be responsible for reviewing subcontracts to ensure that adequate resources are available. By January 1, 2013, provide FTA’s Office of Civil Rights with documentation that the contractor training session has been conducted.

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, no deficiencies were found with the FTA requirement for maintaining the bidders list and reporting. A deficiency was found in the area of monitoring.

Bidders List

DART states in the DBE program that a bidder's list will be maintained consisting of all firms bidding on prime contracts and information on any firms bidding or providing quotes on subcontracts. The Schedule of Subcontractors/Sub-consultants is included in contracts that include the firm's contact information, type of work, age of firm, DBE status, and annual gross receipts ranges. This information is maintained in a vendor directory and utilized in the DBE goal setting process.

Monitoring

The monitoring and enforcement mechanisms utilized by DART are outlined in the program plan. These include a completed Schedule of Subcontract/Sub-consultant Bidders and Intent to Perform as a Subcontractor for Contract Award form to be received within 10 days after contract execution by DART. DBE Payments are monitored through Vendor Payment Reports submitted by prime contractors. Site visit procedures are also included in the program plan. The EO Department contract compliance files included on-site visit reports on some of the projects requested by the review team.

The review team noted several deficient areas concerning monitoring DBE participation on DART projects. These areas include: not reviewing subcontracts agreements for flow down requirements, inadequate monitoring of prompt payment, discrepancies with DBE termination clauses and variances in how primes address reduction and return of retainage. Improvements were noted to effectively monitor prompt return of retainage upon implementation of the incremental acceptance clause and increase frequency of on-site monitoring for larger projects.

Reporting

The semi-annual reports and ARRA quarterly reports were either downloaded from TEAM or provided by DART. The semi-annual reports from fiscal years 2009, 2010, and 2011 were analyzed by the review team. The ARRA reports for 2009, 2010, and 2011 were also reviewed. FTA inquired about the participation amounts in DART's 2009 ARRA reports via an email on September 7, 2010. DART revised the 2009 ARRA reports on September 9, 2010 and forwarded to FTA. DART also provided the back-up information for the more recent semi-annual reports. The EO Department representative used spreadsheets acquired from the National Transit Institute Telephone Course on Reporting DBE Awards and Commitments. The review team found no discrepancies with the accuracy of the reporting forms submitted to FTA. The information from the reporting forms used to determine past participation in the goal setting methodology were also correct.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan for ensuring that effective monitoring mechanisms are in place and performed by staff to monitor DBE participation on FTA funded contracts.

DART Response:

DART will assign staff to provide additional monitoring in the areas of contract

assurances appearing in subcontracts, prompt payment and return of retainage. DART will implement the measures discussed throughout our response. Each of the measures we have identified will be implemented either immediately, within 30 days or within six months.

FTA Response: FTA concurs with DART's proposed actions. The deficiency will remain open until all issues are addressed. One area not addressed by the response is the frequency of on-site monitoring for large projects. By October 30, 2012, provide FTA's Office of Civil Rights with the frequency of on-site monitoring for large construction projects, along with documentation of monitoring that has occurred on projects since the site visit for this review.

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	ND			
2. Policy Statement	26.23	D	Signature on policy statement is from former CEO	Provide documentation that a revised policy statement has been posted on website along with listing of business associations that it was mailed to.	October 30, 2012
3. DBE Liaison Officer	26.25	ND			
4. Financial Institutions	26.27	ND			
5. DBE Directory	26.31	ND			
6. Overconcentration	26.33	D	Additional information needed to satisfy requirement	Provide the first overconcentration analysis will conduct.	October 30, 2012
7. Business Development Programs	26.35	N/A			
8. Determining / Meeting Goals		ND			
A. Calculation	26.45				
B. Public Participation	26.45	ND			
C. TVM	26.45	D	Incorrect reference to DBE regulations	Verify correct language in TVM DBE certification to part 26.	Closed
D. Race Neutral	26.51	ND			
E. Race Conscious	26.51	D	Use of contract goals not analyzed	Provide revised DBE program to reflect RN procedures and how the M/WBE and DBE programs are managed along with details on accurate DBE reporting is achieved.	October 30, 2012
F. Good Faith Efforts	26.53	ND		Provide documentation that differences between the DBE and M/WBE programs have been communicated to all departments involved with procurements and determinations of GFE.	October 30, 2012

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			
9. Required Contract Provisions					
A. Contract Assurance	26.13	D	Contract assurance language missing in some subcontract agreements	Provide revision to the DBE Program Plan that details this procedure, along with documentation of its implementation for recent contracts.	October 30, 2012
B. Prompt Payment	26.29	D	No policy on incremental acceptance of work. Return of retainage contract provisions in subcontract agreements inconsistent with terms in prime contract	Provide status on procuring new software noted and identity of which person(s) or office will be responsible for monitoring prompt payment/prompt retainage and reviewing subcontracts. Additionally, provide documentation of monitoring of prompt payment and return of retainage that DART has conducted since the site visit for this review.	October 30, 2012
C. Legal Remedies	26.37	ND			
10. Certification Standards	26.67	ND			

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action:	Response Days/Date
11. Certification Procedures	26.83	D	<p>Allowing prime contractors to list firms with pending certification applications towards commitments for awards.</p> <p>Prime indicated that an internal policy prevents them from awarding contracts to DBEs with impending certification expirations.</p> <p>Incorrect joint venture language</p> <p>Website mentions monthly directory updates</p>	<p>Provide revised Exhibit G-DBE and identity of which person(s) or office will be responsible for reviewing subcontracts to ensure that adequate resources are available.</p> <p>Provide documentation that the contractor training session has been conducted.</p>	<p>October 30, 2012</p> <p>January 1, 2013</p>
12. Record Keeping and Enforcements					
A. Bidders List	26.11	ND			
B. Monitoring	26,37 26.55	D	<p>Not reviewing subcontracts for flow down requirements or discrepancies with termination, retaining certification status, and discretion for reduction of retainage.</p> <p>Not effectively monitoring for prompt return of retainage.</p> <p>Compliance files show evidence in frequent on-site visits.</p>	<p>Provide the frequency of on-site monitoring for large construction projects, along with documentation of monitoring that has occurred on projects since the site visit for this review.</p>	<p>October 30, 2012</p>
C. Reporting	26.11	ND			

Findings at the time of the site visit: 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 (via teleconference)	EO Specialist, DBE Technical Lead		Randelle.ripton@dot.gov
Britney Berry	FTA - Office of Civil Rights (via teleconference)	Equal Opportunity Specialist	202-366-1065	Britney.berry@dot.gov
DART Members:				
Michael Muhammad	DART	AVP, Economic Opportunity	214-749-3268	mmuhammad@dart.org
Steve Salin	DART	VP, Rail Planning	214-749-2828	Ssalin@dart.org
Gabriel Beltran	DART	Equal Opportunity Specialist	214-749-3542	Gbeltran@dart.org
Dan Peschell	DART	Grants Manager	214-749-3146	Dpeschel@dart.org
Joe Ramirez	DART	Assistant Vice President, Procurement	214-749-2542	Jramirez1@dart.org
John Adler	DART	Vice President, Procurement	214-749-2573	Jadler@dart.org
Timothy McKay	DART	Senior Vice President, Rail Program Development	214-749-2926	Tmckay@dart.org
Beverly Adler	DART	Assistant Treasurer	214-749-3053	Badler@dart.org
Halfreda Anderson-Nelson	DART	Senior Assistant General Counsel	214-749-3049	Handerson-nelson@dart.org
Hyatte Simmons	DART	General Counsel	214-749-3192	Hsimmons@dart.org
Marcus Moore	DART	Manager, Equal Opportunity	214-749-3251	Mmoore@dart.org

Prime Contractor Representative				
Luis Spinola	Omega Contracting, Inc.	President and CEO	214-689-3815	Luiss@azteca-omega.com
Jeffrey Heimer	Omega Contracting, Inc.	Vice President	214-689-3815	Jeffh@azteca-omega.com
Chris Inglis	Mass Electric Construction Company.	Project Manager	972-905-1030	CInglis@masselec.com
Alfonso Armenta	Mass Electric Construction Company.	District Compliance Manager	972-505-4794	Aarmenta@masselec.com
Rick Mertz	Journeyman Construction, Inc.	Project Manager	512-247-7000	Rmertz@journeymanco.com
DBE Subcontractor Representative				
Luis Spinola	Rama Enterprise, LLC	President	817-303-9681	Luisrs@rama-ent.com
Nick Guzman	Alman Construction Services	Project Manager	214-240-8576	Nguzman@almanelec.com
Janet Witter	CT&S	President	972-554-9629	Jwitter@ctands.com
Interested Parties				
Charles O'Neal	Dallas Black Chamber of Commerce	President	214-421-5200	Cro@dbcc.org
Gabriella Quezada	Greater Dallas Hispanic Chamber of Commerce	President	214-523-3413	Quezada@gdhcc.org
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