

FTA

FEDERAL TRANSIT ADMINISTRATION

Kansas Department of Transportation Disadvantaged Business Enterprise (DBE) Compliance Review Final Report

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Federal Transit Administration

PREPARED BY
Milligan & Company, LLC



U.S. Department of Transportation
Federal Transit Administration

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Section 1 – General Information

Grant Recipient: Kansas Department of Transportation
700 S.W. Harrison Street

City/State: Topeka, KS 66603

Grantee Number: 1813

Executive Official: Deb Miller
Secretary of Transportation

On Site Liaison: Doria Watson
Civil Rights Administrator
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Site Visit Dates: April 5–7, 2011

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Section 2 – Jurisdiction and Authorities

The Federal Transit Administration (FTA) Office of Civil Rights is authorized by the Secretary of Transportation to conduct civil rights compliance reviews. The reviews are undertaken to ensure compliance of applicants, recipients, and sub-recipients with Section 12 of the Master Agreement, Federal Transit Administration M.A. (17), October 1, 2010, and 49 CFR Part 26, “Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs.”

The Kansas Department of Transportation (KDOT) 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 KDOT’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 sub-recipients 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 KDOT's DBE Program is necessary.

The primary purpose of the compliance review is to determine the extent to which KDOT 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 KDOT's DBE Program Plan and its implementation, (2) make recommendations regarding corrective actions deemed necessary and appropriate, and (3) provide technical assistance.

This compliance review is not to directly investigate whether there has been discrimination against disadvantaged businesses by the grant recipient or its sub-recipients, 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 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 with the development of firms that can compete successfully in the marketplace outside the DBE Program
- provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs

The objectives of this compliance review are to:

- determine whether KDOT 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 KDOT's DBE Program Plan against the compliance standards set forth in the regulations and to document the compliance status of each component

- gather information and data regarding the operation of KDOT's DBE Program Plan from a variety of sources—DBE program managers, other KDOT management personnel, DBEs, and prime contractors

Section 4 – Background Information

Kansas Department of Transportation (KDOT) is responsible for planning, developing, and operating the different systems and modes of transportation within the state. They also maintain the public roadways in the state. As of 2009, there were 105 counties, 627 cities, and 140,752 miles of public roads in the state of Kansas, with a population of almost 2,820,000 people.

The organization consists of the following divisions:

- Division of Administration – responsible for financial planning, equal employment opportunity, and affirmative action
- Division of Aviation – responsible for promoting aviation activities, supervising the Federal Airport Inspection Program, and updating the State Aviation System Plan
- Division of Engineering and Design – responsible for the bridge management and inspection program and the billboard and salvage yard control programs
- Division of Financial Services – responsible for providing financial support and oversight
- Division of Operations – responsible for developing and maintaining the engineering and management programs for construction and maintenance of the State Highway System, establishing operational policies, and directing research activities
- Division of Planning and Development – responsible for administering the programs and activities of the Bureaus of Program Management, Traffic Safety, and Transportation Planning

KDOT has a number of bureaus under its umbrella, which include the following:

- Bureau of Program and Project Management – responsible for developing the agency’s multi-year highway improvement program, coordinating the overall project selection, and managing the aggregate highway improvement program
- Bureau of Transportation Planning – responsible for collecting, analyzing, and reporting information to the statewide transportation system
- Bureau of Fiscal Services – responsible for financial accounting, Federal-Aid billing, procurement, and contract audit functions
- Bureau of Computer Services – responsible for developing and assisting the management of information systems
- Bureau of Personnel Services – responsible for all personnel issues
- Bureau of Design – responsible for Road Design, Bridge Design, Bridge Management, Utilities, Environmental Assessment, and Design Contracts
- Bureau of Local Projects – responsible for managing the city and county portion of KDOT’s program for road, street, and bridge projects
- Bureau of Right-of-Way – responsible for acquiring property interests needed for projects, disposing of property no longer needed for highway purposes, and administering the Highway Beautification Program

- Bureau of Construction and Maintenance – responsible for plans and proposals, specifications, special provisions, and maintenance management
- Bureau of Traffic Engineering – responsible for permanent signing, work zone traffic control, pavement markings, overhead lighting, traffic studies, safety projects, speed limits, access permits, and corridor studies

KDOT's current projects include bridge replacements, roadway preservation and maintenance, resurfacing of certain interstates and roadways, and various other interstate-related projects throughout the state.

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. You must submit 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, must be made available to the public and updated at least annually [49 CFR 26.31].
6. The recipient must determine 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 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].
9. 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].
10. 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].
11. 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].
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 KDOT by FTA's Office of Civil Rights. The agenda letter notified KDOT of the planned site visit, requested preliminary documents, and informed KDOT of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed KDOT 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, KDOT staff and the review team.

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

At the end of the review, an exit conference was held with FTA representatives, KDOT 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 KDOT.

Following the site visit, a draft and final report was compiled.

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

Rebecca E. Rand
Civil Rights Officer, Region VII
Federal Transit Administration
901 Locust Street, Room 404
Kansas City, MO 64106
Rebecca.Rand@dot.gov

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.

Kansas DOT provided a copy of its DBE program manual dated July 2010. The manual outlined the DBE program administration, goals, good faith efforts, counting, certification standards, and certification procedures. Several appendices were included to supplement program implementation. These included required contract provisions, DBE payment affidavit, and certification forms.

2. **DBE Policy Statement**

Basic Requirement (49 CFR Part 26.23): Recipients must formulate and distribute a signed and dated DBE policy, stating objectives and commitment to the DBE program. This policy must be circulated throughout the recipients' organization and to the DBE and non-DBE business communities.

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

The policy statement was signed by Secretary of Transportation Deb Miller on July 29, 2010. The policy is circulated throughout KDOT, published in the *Kansas Register*, and made known to certified DBEs, DBE organizations, non-minority businesses, and community and contractor organizations. KDOT representatives indicated that the policy statement is provided on the website, and it makes reference of the policy at pre-construction meetings with hard copies available.

3. **DBE Liaison Officer**

Basic Requirement (49 CFR Part 26.25): Recipients must have a designated DBE Liaison Officer (DBELO) who has direct and independent access to the CEO. This Liaison Officer is responsible for implementing all aspects of the DBE program and must have adequate staff to properly administer the program.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for the DBELO. However, an advisory comment was provided regarding meetings with the CEO.

The KDOT Office of Civil Rights is directed by Civil Rights Administrator Doria Watson. She reports directly to Joe Erskine, Deputy Secretary of Finance & Administration. Mr. Erskine reports directly to the KDOT Secretary, and Ms. Watson

has direct access to the Secretary for DBE matters of special concern to KDOT. Ms. Watson stated that she has direct and independent access to the Secretary regarding DBE matters and has met with the Secretary on occasion. Ms. Watson supervises a staff of six individuals, including an Internal EEO Officer, an Administrative Assistant, and four Program Consultants. It is recommended that the DBE Liaison maintain a record of meetings with the Secretary that are related to DBE matters.

Grantee Response: The KDOT Liaison Officer attends Executive Staff meetings with the Secretary and cabinet a minimum of two times a year. The next meeting is scheduled for August 16, 2011. Those dates are on the calendar and can be verified. All additional meetings with the Secretary or Deputy Secretary in reference to DBE issues will be documented and logged.

4. Financial Institutions

Basic Requirement (49 CFR Part 26.27): Recipients must investigate the existence of DBE financial institutions and make efforts to use them. Recipients must 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. However, an advisory comment was provided.

The DBE program manual states that KDOT will investigate the full extent of services offered by financial institutions owned and controlled by socially- and economically-disadvantaged individuals in Kansas and will make reasonable efforts to use these institutions within state law.

There were two banks in Kansas known to be owned and controlled by socially- and economically-disadvantaged persons: Liberty Bank and Trust Company (African-American), located in Kansas City, and Kansas and American Bank (Native-American), located in Baxter Springs, Kansas. The list is updated periodically by the DBE LO.

KDOT also encourages prime contractors to use the services of these institutions. KDOT representatives were unsure how prime contractors were made aware of DBE financial institutions. The program manual indicated that this requirement is part of each federal-aid contract in Special Provision 7-18-89-Latest Revision (Appendix K), and further information may be obtained from the DBELO.

Appendix K of the program manual includes Required Contract Provision, Federal Aid Contracts 07-18-80-R26. Part II, DBE Contract Goals, section E states that contractors are also encouraged to use the services of banks owned and controlled by disadvantaged individuals. Although this is part of the provision included in contracts, there is no indication of banks identified as owned and controlled by disadvantaged individuals and no contact information for the DBE Liaison Officer. It is recommended that KDOT include banks identified in the program manual and include contact information for DBE Liaison Officer in the contract special provisions.

Grantee Response: KDOT has added a link to the KDOT Civil Rights webpage regarding minority-owned banks and has added similar language to our special provisions for contractors. This contract provision is in every federal contract. This information will also be included in all Requests for Proposals (RFPs) to encourage the use of these companies.

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. However, an advisory comment was provided.

Kansas DOT maintains a directory identifying all firms that are eligible to participate as DBEs. The directory is separated into Construction and non-construction categories. The directory lists contact information, types of work certified to perform, and work locations. It is recommended that Kansas DOT remove expiration dates from the directory.

Grantee Response: KDOT has removed expiration dates from the DBE directory and the DBE certificates. In addition, KDOT is working with our IT support staff to add NAICS codes to the on-line DBE directory. The codes are already in the database, and we are in the process of implementing a process wherein the NAICS codes can be displayed on our website and directory as per the new Final Rule for DBE Programs.

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, no deficiencies were found with the requirement for overconcentration.

Overconcentration is periodically reviewed by Civil Rights staff. A report copy of the directory was provided to the review team, which grouped DBEs by category and areas of work. This list is generated and primarily used for public meetings; however, it also serves as a tool for overconcentration evaluation.

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, no deficiencies were found in the area of Business Development Programs (BDP).

Kansas DOT has reserved the sections of Business Development and Mentor Protégé programs in the DBE program manual for future use. It has a Supportive Services program for the Federal Highway Administration (FHWA) program administered by CBIZ, a CPA firm. A representative of CBIZ discussed outreach and technical assistance efforts in regards to the DBE program.

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 goals. However, an advisory comment was made in regards to Step 2 adjustments.

KDOT provided FTA goal methodologies for fiscal years 2007, 2008, 2009, and 2010. The goals are divided into two categories, Planning and Coordinated Transit Districts (CTDs). The Planning goal for fiscal year 2007 was 1.84%, and the CTD goal was 0.51% for FTA contracting opportunity. The 2008 goal was 6.07% for Planning and 0.37% for CTD. In 2009, KDOT began combining the two goals for Planning and CTD; the combined goal was 1.33% for 2009 and 0.72% in 2010.

The US DOT changed the goal methodology submissions from an annual to a triennial cycle in 2010. Based on the current schedule determined by FTA, KDOT's goal submission for Group A was due by August 1, 2010, for the three-year period covering FYs 201–2013. On June 25, 2010, KDOT submitted an FTA DBE goal of 0.22% for fiscal years 2011–2013.

Step 1: Determining the Base Figure

The three-year goal Step 1 process included KDOT using DBE directories, consultants' lists, and MPO bidders lists to determine the pool of bidders for planning contracts. After review of all transit grants and contracts statewide, KDOT determined that its transit district contracting opportunities were in the areas of insurance, fuel, and lubrication of vehicle, vehicle maintenance, and storage. KDOT considered the certified DBE firms compared to all businesses that had either performed work or had bid on work as ready, willing, and able to perform FTA work in Kansas.

For planning opportunities, 383 consultants were identified, of which 10 were DBE-certified. This resulted in a 2.61% base figure for Planning. KDOT identified 2,196 businesses for CTD opportunities with no DBEs. The two categories, when averaged, resulted in 0.39%, or 0.37% when weighted.

Step 2: Adjusting the Base Figure

KDOT reviewed past participation from the past four years (2006–2009). The median DBE participation was 0.067%. Because the median was significantly lower than the Step 1 base figure of 0.37%, KDOT elected to make a Step 2 adjustment to the Step 1 base figure. The median DBE participation was averaged with the base figure, resulting in a 0.22% overall DBE goal. KDOT is advised to consider no Step 2 adjustment when the base figure is significantly less than 1%.

Grantee Response: KDOT will consider not using the Step 2 adjustment during the next goal-setting process if the significance is less than 1%.

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, a deficiency was found with the requirement for Public Participation. KDOT did not consult with minority, women, and general contractor groups or community organizations for input on its triennial goal.

KDOT participates in several community events throughout the year related to DBE outreach. The Bureau of Transportation Planning and the Office of Civil Rights offer assistance on all inquiries regarding the DBE program. The Bureau of Transportation Planning discusses DBE requirements regularly at CTD meetings statewide. The Office of Civil Rights staff participates in community functions and meetings to recruit new DBE firms to the program. They attend meetings of various minority and women groups of business owners and cooperate with the Kansas Department of Commerce and local chambers of commerce. Although KDOT is active in outreach, it acknowledged during the review that the consultation process had not been conducted prior to advertising the goal.

The three-year goal methodology indicated that the goal was published in at least two newspapers, including one minority-interest newspaper. Comments were accepted for 45 days following the date of the notice.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the Region VII Civil Rights Officer a plan to conduct the consultation process prior to advertising the overall goal.

Grantee Response: KDOT has identified groups to be consulted during the next goal-setting process:

- Kansas City Kansas Area Chamber of Commerce
- Black Contractors Association of Kansas
- Kansas African American Affairs Commission

- Hispanic American Affairs Commission
- Kansas Office of Native American Affairs
- Kansas Chapter of National Association of Women in Construction

Consultation with the above groups will occur prior to submitting the goal methodology to FTA for approval.

FTA Response: FTA disagrees with KDOT’s response to the noted deficiency. Consultation must occur during the development of the DBE goal methodology. Consultation prior to submission of the goal will miss an opportunity to further refine the goal methodology based on local/regional information provided by the groups identified above. Thus, KDOT must consult with these organizations after it has developed a draft goal methodology and before it publishes its goal methodology. That being said, this deficiency is now closed.

C) Transit Vehicle Manufacturer (TVM)

Basic Requirement (49 CFR Part 26.49): The recipient must require that each transit vehicle manufacturer (TVM) certify that it has complied with the regulations.

Discussion: During this DBE Compliance review, no deficiencies were found with the requirement for transit vehicle manufacturers. However, an advisory comment was made to update the TVM certification form.

The KDOT DBE program manual requires that each transit vehicle manufacturer that quotes, bids, or proposes on procurements in Kansas must certify to KDOT that it has complied with part 26.49 of the DBE regulations. Each TVM must provide certification to KDOT that FTA has concurred in the TVM’s overall and or contract goal. Before accepting bids, KDOT confirms with FTA that the TVM has an approved DBE program and has submitted all required documentation.

KDOT provided a copy of a TVM certification for 2011 Kansas CTD Specifications for Ramp Accessible Passenger Conversion Mini-Van. KDOT verified that the TVM was on the FTA list of eligible TVMs to bid on federally-funded transit agency contracts. The TVM also signed the pre-award TVM certification. KDOT TVM certification language requires updating to appropriate Subpart A and removal of the minority business enterprise reference. Reference is made that

“the U.S. Department of Transportation issued a new Subpart D to the existing Minority Business Enterprise Regulation. Section 26.49 of Subpart D requires that every FTA recipient shall require each transit vehicle manufacturer, as a condition of being authorized to bid on vehicle procurement, to certify that it has complied with the requirements of this section.”

Grantee Response: KDOT has changed the word “minority” to “disadvantaged” as recommended.

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, a deficiency was found in the area of race-neutral participation.

KDOT described race/gender-neutral methods in every methodology submissions. This section outlined that it would meet the maximum feasible portion of the goal using race/gender-neutral methods. It provided a breakdown of race-neutral achievements for the past fiscal years. The median race-neutral past participation is considered for the portion that will be met for the upcoming goal period. For FYs 2011–2013, KDOT noted that it will meet its goal entirely through race-conscious means because the DBE goals for fiscal years 2007 and 2008 were not achieved.

KDOT outlined in its three-year methodology the race-neutral participation from fiscal years 2005–2009. For FYs 2006 and 2009, DBE participation was identified as 2.11% and 0.061%, all achieved race-neutrally. Another chart in the same methodology indicated participation at 0% for FYs 2006 and 2009. Additionally, the total dollars awarded did not correlate with the reporting forms for the applicable fiscal years. The charts in the methodology indicated that all DBE participation was achieved through race-neutral means; however, the reporting form indicated that some contracts were awarded through race-conscious means.

KDOT must review total prime dollars awarded and past race-neutral participation identified in goal submissions and reporting forms for discrepancies. For instance, if the total prime dollars awarded are incorrect, then the percentage of DBE achievement will be flawed.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the Region VII Civil Rights Officer a plan and schedule to ensure that reporting forms support information contained in goal methodologies.

Grantee Response: The current KDOT overall DBE goal methodology for FTA is a 100% race/gender-conscious effort. This climate was as a result of KDOT's inability to achieve previously-established overall goals. Each contracting opportunity is reviewed to determine if known DBE subcontracting opportunities exist. If we are unable to identify subcontracting opportunities, there will be a zero DBE goal. However, RFPs and RFQs include language encouraging the use of women- and minority-owned companies whenever possible. When a DBE company is used on a contract that had a zero DBE goal, that participation is reported on our semi-annual DBE utilization report as Race/Gender Neutral. Therefore, while we are operating under a 100% race/gender-conscious environment, it is possible and likely that race/gender-neutral participation will occur. Neutrally-occurring DBE participation significantly aids future DBE specific project goal setting.

The reporting forms are being reviewed to determine that the correct information on race/gender-neutral and race/gender-conscious information is included. KDOT will closely monitor participation and will report it correctly on the semi-annual utilization report. The next report is due for submittal on December 1, 2012.

FTA Response: FTA agrees with KDOT's response to the noted deficiency. This deficiency is now closed.

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 may 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 on overall and contract goals.

KDOT proposed to meet its 0.22% FTA goal for FYs 2011–2013 through race-conscious means. Each advertised project is reviewed for subcontracting DBE opportunities, and DBE goals are included in projects where opportunities exist.

There were no FTA-funded race-conscious contract opportunities available during the review to examine for the beginning of FY 2011.

F) Good Faith Efforts

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for good faith efforts.

KDOT's good faith effort process is discussed in their DBE program manual. The lowest bidder that did not meet the goal has 48 hours to submit its good faith efforts documentation. The Civil Right Office and Bureau of Construction and Maintenance jointly make decisions on good faith efforts. A bidder has a right to request an administrative reconsideration within five days of its good faith efforts rejection. The bidder is given the option of submitting information in writing or appearing in person for reconsideration. The reconsideration official is the Director of Operations who is not involved in the initial GFE determination. KDOT stated that it receives approximately three administrative reconsiderations per year for FHWA-assisted contracts. However, no GFE reconsiderations occurred on FTA-funded projects.

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.

The KDOT DBE program manual outlines how DBE participation is to be counted for various forms of work performed by the DBE. The counting rules specified in 26.55 are used in the manual to describe the appropriate percentage for counting based on manufacturers, suppliers (regular dealers), brokers, and truckers.

A commercially-useful functions process is outlined in the manual to ensure that DBEs are providing a service in accordance to the rules outlined in 26.55. Civil Rights staff and field personnel assigned to the project are responsible for commercially-useful function reviews. These personnel examine three core areas related to commercially-useful function, which includes DBE management, material, and employees.

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 KDOT was found during the 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. The contracts reviewed did not contain the require contract assurances.

The DBE program manual included “Assurances” in the required contract provisions (Appendix K). The assurance language in the program manual was verbatim to the 26.13 contract assurance clause.

Several MPO contracts were reviewed for the required assurance clauses. The majority of the agreements reviewed were from Wichita Area Metropolitan Planning Organization (WAMPO). These included a Travel Time Study with Iteris, Inc., in April 2010, a Household Travel Origin-Destination Survey with ETC Institute (DBE firm) in April 2010, a Metropolitan Transportation Plan 2035 with alliance Transportation Group, Inc., in April 2009, Intelligent Transportation System services with Iteris, Inc., in May 2008, and Travel Demand Modeling services with Iteris, Inc., in December 2008. None of these agreements included the non-discrimination contract assurance clause.

Another agreement between the City of Lawrence and PB Americas, Inc., was also reviewed for the required assurances. The agreement was for on-call travel demand and

transportation modeling and related activities in July 2010. Several Kansas state laws were referenced, but it did not address assurances of 26.13 of the DBE regulations.

Two applications for Section 5311(f) for Intercity Bus Funding were reviewed for proper contract assurances. KDOT issued these in August 2009 for 1) service between Wichita and Salina (KS) via US 125 and 2) service between Wichita and Pueblo (CO) via US 400/ US 50. Exhibit E included the FTA-required clauses, with section 10 discussing DBE provisions. The section stated that the contract was subject to the requirements of 49 CFR Part 26 and went on to specify the overall goals of the participating agencies. There was no mention of contract assurance for non-discrimination in the DBE program.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the Region VII Civil Rights Officer a plan and schedule for ensuring that the appropriate language of 26.13 is included in all FTA-funded contracts, purchase orders, and subcontracts.

Grantee Response: KDOT's Urban Planning department has developed the recommended guidance for MPOs and has sent it to all MPOs for implementation effective June 2011. This process includes a KDOT oversight component.

FTA Response: FTA agrees with KDOT's response to the noted deficiency. This deficiency is now closed.

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.

KDOT requires all prime contractors to pay each subcontractor and first-tier supplier for satisfactory performance of its contract no later than 10 calendar days from the date the contractor receives payment from KDOT. Prompt pay provisions are monitored and enforced by KDOT construction engineers and managers. The *KDOT Standard Specification, 1990 Edition*, Section 109.09 outlines payments to subcontractors. The specifications also require progress payments within 10 calendar days after receiving payment from the Secretary for approved subcontract work. Contractors are required to submit to the engineer a certification for subcontract work within 15 days of receiving payment from the Secretary.

The retainage provisions are different for bonded and unbonded subcontractors. No retainage is to be withheld from bonded subcontractors. However, contractors can withhold the percentage of retainage from unbonded subcontractors if they feel is necessary. Contractors can withhold this retainage until the unbonded subcontractor has completed all its subcontract work and has furnished an affidavit that the subcontractor

has paid all indebtedness on the project. The unbonded subcontract work is considered completed when KDOT pays the contractor 100% of the items subcontracted. The retainage is to be released within seven calendar days after this affidavit if furnished.

The agreements reviewed were sub-recipient-administered contracts with consultants. One agreement was with the City of Lawrence and one was with WAMPO. No prompt payment or return of retainage provisions were included in the consultant agreements.

The existing agreement between WAMPO and ETC, Inc. (a DBE firm) was reviewed for inclusion of applicable prompt pay provisions. The agreement included a statement that the client would make payment to the consultant within 30 days of invoice receipt. Payment to the consultant is paid at 95% of the invoice amount until the final draft report is delivered and approved by the Transportation Policy Board. None of the safeguards for subcontractors from KDOT standard specifications were included in the agreement. The standard specification provisions are drafted particularly for construction-based activities. KDOT representatives advised the review team that this work is commonly self-performed by consultants with no subcontracting work. However, upon interviewing the DBE firm, ETC, it was discovered that a portion of work was subcontracted to another firm. Further information regarding this agreement is discussed in the Monitoring section of this report.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the Region VII Civil Rights Officer a plan and schedule for ensuring clear contractual language and a monitoring and enforcement plan regarding prompt payment for sub-recipient agreements.

Grantee Response: KDOT's Urban Planning department has developed the recommended guidance for MPOs and has sent it to all MPOs for implementation effective June 2011. This process includes a KDOT oversight component.

FTA Response: FTA agrees with KDOT's response to the noted deficiency. This deficiency is now closed.

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.

KDOT standard specifications include sanctions for failure to pay promptly. If a contractor fails to comply with the payment requirements without good cause, it is required to pay an interest penalty to the affected subcontractor. The interest penalty is computed at the rate of 1.5% per month on the amount of money owed the subcontractor. If the contractor fails to comply with the payment certification requirements, liquidated damages may be imposed of \$50.00 per calendar day per subcontractor for each day the certification is late.

As previously noted, these provisions are usually included in construction-related activities and were not included in the sub-recipient agreements reviewed. The agreements reviewed did not contain DBE goals and, therefore, did not include the customary non-compliance provision of the DBE program.

10. Certification Standards

Basic Requirements (49 CFR Part 26.67): The recipient must have a certification process in place 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 (PNW) with appropriate supporting documentation.

Discussion: During this DBE Compliance Review, a deficiency was found with the requirements for Certification Standards in regards to personal net worth evaluations.

The State Department of Commerce assists KDOT in evaluating DBE applicants' eligibility with subpart D of the regulations. However, KDOT makes the final determination on all of Department of Commerce's recommendations for DBE certification.

The review team examined the certification file of the DBE firm, [REDACTED]. Questions were raised related to the personal net worth exclusions of the DBE owner. The 85% DBE owner listed assets of approximately \$3.8 million and liabilities of \$1.9 million. The DBE indicated that the company mortgages were personally guaranteed by her. The Department of Commerce evaluated the application for certification and included the calculations and exclusion for home and business equity considerations as part of the file. The review team asked the Commerce representative if any other considerations were documented in the file related to specific personal assets used to guarantee the business loans. The representatives indicated that no such considerations were reviewed or included in the file.

Questions were also raised related to possible assets missing from the personal net worth form based on the personal tax return information. The personal tax returns listed capital gains of more than \$13,000 in 2007 and \$6,500 in 2008. Schedule D must be attached as part of the tax return or the box must be checked if not required. The box was not checked for either year. Schedule D was not provided for either 2007 or 2008 to explain the assets from which capital gains were collected. The Commerce representative and KDOT did not question the missing schedules in the tax returns.

KDOT representatives indicated that Kansas was a community property state and that PNWs of individuals with spouses are automatically given a 50% reduction adjustment. The review team advised KDOT representatives that Kansas was an equitable distribution state and some marital assets may not be automatically halved as in community property states. Even though both instances may constitute a 50% marital asset reduction, KDOT was advised to follow applicable state laws in regards to marital assets. The department makes the following note from the 2011 DBE program *Federal Register* in this regard:

“For example, State A may treat marital property as jointly held property, while State B is a community property state. The laws are different, but both, in a given case, may well result in each spouse having a 50 percent share of marital assets.”

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the Region VII Civil Rights Officer a plan and schedule to ensure that owners claiming social and economic disadvantage are, in fact, disadvantaged.

Grantee Response: All KDOT personnel responsible for certification decisions, including personnel from the Department of Commerce, have been informed of this requirement and are now using the correct methodology to calculate the PNW of applicants. All joint PNW calculations will be closely reviewed and correctly calculated during this year’s annual reaffirmation process, which began in June 2011. In addition, the applications of all recently-certified DBEs have been or are in the process of being checked to determine whether or not their PNW adjustments were correctly calculated.

FTA Response: FTA agrees with KDOT’s response to the noted deficiency. This deficiency is now closed.

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, no deficiencies were found for the requirements for Certification Standards. However, an advisory comment was provided in regards to the time frame for appeal hearing requests.

KDOT’s DBE program manual states that a DBE has 30 days from receipt of the written notice of intent to remove eligibility to request an informal hearing to refute the allegations. The removal letter notices reviewed indicated the firm had 10 days to request a hearing. KDOT was advised to review the letters sent to firms and ensure that all firms seeking an appeal hearing for removals have the same number of days as outlined in its program manual. The review team also noted variations in the waiting period for reapplication for firms that had their certification removed.

Grantee Response: KDOT’s DBE program manual has always included a 30-day period within which a DBE firm may seek an appeal. All form letters used to inform DBEs of their appeal rights have been verified to be consistent with the program manual’s 30-day timeframe. Form letters containing a DBE’s appeal rights, including the 30-day time period within which a request for an appeal must be filed, are accessible to all pertinent staff members. Consultants have also been advised that all future letters regarding a DBE’s appeal rights must be formatted using the required form letters

12. Record Keeping and Enforcements

Basic Requirement (49 CFR Part 26.11, 26.55): The recipient must provide data about its DBE program to 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, monitoring, and reporting. However, advisory comments were provided for monitoring and reporting.

Bidders List

KDOT requires that contractors and subcontractors complete their 49 CFR STL Compliance Form as part of their Equal Employment Opportunity (EEO) program. They have found success with making this a part of the EEO program requirements. The form and data sheet were provided during the review. The form and database contains the required fields of 26.11 of the DBE regulations. The goal-setting methodology also mentioned that bidders list information is used in the Step 1 analysis.

Monitoring

The monitoring and enforcement process is outlined in KDOT's DBE program manual, particularly in regards to FHWA activities. KDOT indicates that it will notify FHWA of any false or fraudulent conduct concerning the DBE program. Non-compliance with the DBE program by a participant will be handled under KDOT Special Provisions. It was also noted that monitoring and enforcement are joint efforts of the Civil Rights staff and Field Construction staff.

KDOT's Public Transit Office manages the monitoring process for FTA-funded activities. Sub-recipients and transportation service providers are required to submit a DBE report by the 10th of every month. For reports that are not submitted within the required timeframe, grant funding for that applicable month will be forfeited.

The DBE firm [REDACTED] had a contract with WAMPO for approximately \$575,000 for consulting services. During the review, [REDACTED] disclosed that approximately \$32,000 has been subcontracted to the non-DBE firm [REDACTED] to date. KDOT is advised to include a mechanism to capture sub-consultants on sub-recipients' prime consultant contracts and make appropriate DBE participation counting adjustments for non-DBE participation.

Grantee Response: KDOT's Urban Planning section has developed and distributed guidance to sub-recipients detailing how they are to report their monthly payments. The reporting is to show all tiers of subcontracting.

Reporting

KDOT provided semi-annual reports from 2007, 2008, 2009, and 2010. The 2009 semi-annual reports showed \$1,626,650 in prime contract awards total dollars and 101 total awards for both June 2009 and December 2009 reports. For 2010, the report showed

\$2,014,059 in prime contract total dollars and 104 total awards in both reports. KDOT is advised to review the accuracy of the information contained in the reports.

Grantee Response: To accurately reflect Awards & Commitments on the KDOT semi-annual reports, KDOT considers the annual budget established for the Coordinated Transit District's (CTD) budget and evenly distributes this amount over two reporting periods; therefore, the amounts shown are very similar for the first and second reporting periods. Variances occur when a new project or contract is awarded and reported.

FTA Response: FTA disagrees with KDOT's response to the advisory comment. KDOT's response suggests that it is partially basing its semiannual reporting on annual budget projections rather than on the actual contracting activity of the organization and its sub-recipients. A deficiency has been opened in the area of Reporting. By December 30, 2012, KDOT must submit the supporting documentation for the contracting activity for the second half of FY 2012. This submission must also include a narrative discussion that reconciles the contracting data with the semiannual DBE report.

Section 7 – Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site Visit Finding	Description of Deficiencies	Submit Corrective Action Plan and Schedule for the following:	Response Days/Date
1. Program Plan	26.21	ND			
2. Policy Statement	26.23	ND			
3. DBE Liaison Officer	26.25	AC	Consider maintaining record of meetings with CEO		
4. Financial Institutions	26.27	AC	Need process to encourage primes to use institutions		
5. DBE Directory	26.31	AC	Remove expiration dates from directory		
6. Overconcentration	26.33	ND			
7. Business Development Programs	26.35	ND			
8. Determining / Meeting Goals					
A. Calculation	26.45	ND			
B. Public Participation	26.45	D	Not conducting consultative process	Submit action plan to conduct consultative process.	Closed
C. TVM	26.49	AC	Remove references to minority business enterprise		
D. Race Neutral	26.51	D	Incorrect/inconsistent classification of RN participation in goal settings and reports	Submit action plan to ensure that calculations for race-neutral participation are correct.	Closed
E. Race Conscious	26.51	ND			
F. Good Faith Efforts	26.53	ND			
G. Counting DBE Participation	26.55	ND			

Requirement of 49 CFR Part 26	Ref.	Site Visit Finding	Description of Deficiencies	Submit Corrective Action Plan and Schedule for the following:	Response Days/Date
H. Quotas	26.43	ND			
9. Required Contract Provisions					
A. Contract Assurance	26.13	D	Sub-recipient contracts do not include the assurances	Submit action plan to ensure that sub-recipient contracts include appropriate assurance clause.	Closed
B. Prompt Payment	26.29	D	Sub-recipient contracts do not include prompt payment clauses	Submit action plan to ensure that sub-recipient contracts include appropriate prompt payment clauses.	Closed
C. Legal Remedies	26.37	ND			
10. Certification Standards	26.67	D	PNW calculations are questionable	Submit action plan to appropriately review PNWs with questionable assets and liabilities.	Closed
11. Certification Procedures	26.83	AC	Ensure timeframe for appeal hearing in letters is same as in Program Plan		
12. Record Keeping and Enforcements					
A) Bidders List	26.11	ND			
B) Monitoring	26.37, 26.55	AC	Need process to capture sub-recipient consultant subcontracted work		
C) Reporting	26.11	D	Calculations in semiannual reports are incorrect.		December 30, 2012

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

Section8 – List of Attendees

Name	Organization	Title	Phone	Email
FTA:				
Mokhtee Ahmad	FTA – Region VII	Regional Administrator	(816) 329-3930	Mokhtee.Ahmed@fta.gov
KDOT Members:				
Dennis R. Slimmer	KDOT	Bureau Chief, Bureau of Transportation Planning	(785) 296-3865	dennis@ksdot.org
Doria Watson	KDOT	Civil Right Administrator	(785) 296-6703	doriaw@ksdot.org
Debra A. Hepp	KDOT	Program Consultant II, Office of Civil Rights	(785) 296-7940	dhepp@ksdot.org
Davonna C. Moore	KDOT	Urban Planning Manager, Bureau of Transportation Planning	(785) 296-0346	davonna@ksdot.org
Joel H. Skelley	KDOT	State Multimodal Planner, Bureau of Transportation Planning	(785) 296-4209	joelsk@ksdot.org
James B. Perez	KDOT	State Public Transit Manager	(785) 296-4907	japerez@ksdot.org
Kelly Broxterman	KDOT	Public Service Administrator	(785) 291-3030	kellyb@ksdot.org
Allison L. Smith	KDOT	MPO Transportation Planner, Bureau of Transportation Planning	(785) 296-0341	allisons@ksdot.org
Deana Merryman	KDOT	Chief Procurement Officer, Bureau of Fiscal Services	(785) 296-3545	deanam@ksdot.org
Charlie Woldt	KDOT	Procurement Officer, Bureau of Fiscal Services	(785) 296-3313	charlesw@ksdot.org
Chris Herrick	KDOT	Director of Planning & Development	(785) 296-2252	chrish@ksdot.org
Oswald Dwyer	KDOT	Staff Attorney, Office of Chief Counsel	(785) 296-0653	oswald@ksdot.org
Rhonda Harris	Kansas Department of Commerce	Director, Office of Minority & Women Business	(785) 296-3425	rharris@kansascommerce.com
Sub-Recipient Representatives:				
Nancy Harvieux	Wichita Area Metro Planning	Transportation Planning Manager	(316) 352-4854	nharvieux@wichita.gov
Kimberly Spielman	Wichita Area Metro Planning	Transportation Planning Analyst	(316) 352-4860	kspielman@wichita.gov
DBE Subcontractor Representative:				
Elaine Tatham	ETC Institute	President	(913) 829-1215	etatham@etcinstitute.com

Sub-Recipient Representatives:				
Nancy Harvieux	Wichita Area Metro Planning	Transportation Planning Manager	(316) 352-4854	nharvieux@wichita.gov
Kimberly Spielman	Wichita Area Metro Planning	Transportation Planning Analyst	(316) 352-4860	kspielman@wichita.gov
DBE Subcontractor Representative:				
Elaine Tatham	ETC Institute	President	(913) 829-1215	etatham@etcinstitute.com
Interested Parties:				
Karen Wagaman	Kansas Contractors Association	Marketing Director	(785) 817-0555	kca4@ink.org
Angela Motsinger	CBIZ	CPA	(785) 272-3176	amotsinger@cbiz.com
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