

# FTA

FEDERAL TRANSIT ADMINISTRATION

## Los Angeles County MTA (Metro) Disadvantaged Business Enterprise (DBE) Program Final Compliance Review Report

June 2013

Federal Transit Administration



Federal Transit Administration

**FINAL**

**COMPLIANCE REVIEW REPORT**

**OF THE**

Los Angeles County Metropolitan Transit Authority

**DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

June 2013

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## **Section 1 – General Information**

Grant Recipient: Los Angeles County Metropolitan Transit Authority  
1 Gateway Plaza

City/State: Los Angeles, CA

Grantee Number: 5566

Executive Official: Art Leahy  
Chief Executive Officer

On Site Liaison: Tashai Smith  
Director, Small Business Programs  
213-922-2128

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Site Visit Dates: September 27 - 29, 2011

Compliance Review Team  
Members: Benjamin Sumpter, Lead Reviewer  
Habibatu Atta  
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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 Los Angeles County Metropolitan Transportation Authority (LACMTA) 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 LACMTA'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 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 Los Angeles County Metropolitan Transportation Authority's (LACMTA) Disadvantaged Business Enterprise (DBE) program is necessary.

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

## Section 4 – Background Information

In 1993, the Los Angeles County Metropolitan Transportation Authority (LACMTA) was formed through the merger of the Southern California Rapid Transit District and the Los Angeles County Transportation Commission. The agency is responsible for operating the public transportation system and acts as the chartered regional transportation planning agency for the state of California. LACMTA also operates two transitways for express bus service, carpool lanes almost 650 miles in distance, 475 miles of bike pathways, and Metro Freeway Service Patrol, a joint venture with the California Department of Transportation (Caltrans) and the California Highway Patrol (CHP) to provide free simple repairs and towings from freeways. The agency partly funds Metrolink, the commuter rail service for Southern California. LACMTA's service area encompasses 1,433 miles and is the 3<sup>rd</sup> largest transit agency in the country. It has a daily ridership of over 1.16 million people.

The board of directors that govern the agency has 13 members. They include the mayor of Los Angeles; five Los Angeles County Supervisors; three mayor-appointed members from Los Angeles, with at least one being a LA City Council member; one governor of California non-voting appointee; and four city council members within Los Angeles County who represent the 87 cities other than Los Angeles.

LACMTA operates bus services, (Metro Bus), and bus rapid transit, (Metro Liner), throughout the Los Angeles County area. Metro Local, Metro Rapid, and Metro Express comprise the bus service. The service consists of 191 routes operating over 1,433 miles, with over 18,500 stops. There are currently two Metro Liner services: the Orange Line and the Silver Line. The Orange Line is a 14-mile route that connects the San Fernando Valley to Hollywood. The Silver Line is a 26-mile route that connects San Gabriel Valley and Downtown Los Angeles. The fleet consists of 45-foot buses and 60-foot articulated buses.

The agency's rapid transit system, Metro Rail, started their operations in 1990. The service consists of five lines, including light and heavy rail service, that operate on 79.1 miles through 70 stations. Of the five lines, two are considered heavy rail lines. The Red and Purple lines have an average of over 149,000 weekday riders, which ranks ninth of all such systems in the United States.

LACMTA has a number of projects that are currently under construction and in line for the future. Some of the current projects include:

- Phase 1 of the Exposition Transit Corridor – An 8.5-mile Metro Rail project that will connect Downtown Los Angeles with the Westside and Culver City;
- El Monte Station – Station will be rebuilt and expanded to increase passenger capacity and support additional bus service;
- Extension of the Orange Line – Four-mile extension from Canoga Station to the Chatsworth Metrolink Station with four new stations along the route;
- I-405 Sepulveda Pass Improvements – Addition of a 10-mile carpool lane and repair and improvements of infrastructure on the San Diego Freeway; and
- Extension of the Gold Line – Extension of the Metro Rail Gold Line a total of 23 miles from Pasadena to Montclair.



Upcoming projects include:

- High Desert Corridor – Construction of a 63-mile freeway that links State Route 14 in Los Angeles to State Route 18 in San Bernadino County;
- Exposition Transit Corridor Stations – The construction of 10 Metro Rail stations along the 8.5-project; and Phase 2 of the Exposition Transt Corridor – Metro Rail line project that will extend westward towards Santa Monica from the Culver City Station.

## Section 5 – Scope and Methodology

### Scope

Implementation of the following thirteen 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. The recipient's DBE Program Plan must include an element to structure contracting requirements to allow competition by small businesses [49 CFR 26.39].
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 LACMTA by FTA's Office of Civil Rights. The agenda letter notified LACMTA of the planned site visit, requested preliminary documents, and informed LACMTA of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed LACMTA 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, LACMTA staff and the review team.

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

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

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

Derrin J. Jourdan  
Civil Rights Officer  
FTA, Office of Civil Rights  
201 Mission, Suite 1650  
San Francisco, CA 94105  
[Derrin.Jourdan@dot.gov](mailto:Derrin.Jourdan@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, **deficiencies** were found with the requirements for a program plan.

The Diversity and Economic Opportunity Department of Los Angeles County Metropolitan Transportation Authority (Metro) provided a copy of their DBE program revised May 2011. Metro's DBE program is also on their website and includes the policy statement along with other areas for the DBE program.

The review team noted that Metro has included the provisions from the new 2011 DBE rule in their DBE program; however, some updates in other areas were still required. The recommended update areas will be discussed throughout this report, but include the financial institutions, over-concentration, public participation, and certification sections of Metro's DBE program.

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

**MTA Response:** Los Angeles County Metropolitan Transportation Authority (MTA) will update the DBE Program Plan (Plan) with recommended changes. The updated Plan will be submitted to the MTA Board for adoption in March 2013. The Plan will be submitted to FTA after Board adoption.

**FTA Response:** MTA's response is acceptable, however, please ensure that an updated program has been submitted to FTA no later than April 30, 2013.

**FTA Response:** MTA submitted an updated program to on April 8, 2013. This finding is now closed.

### 2. **DBE Policy Statement**

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

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

The DBE policy statement is included in Metro's DBE program and is also found on their website. The policy statement outlines the objectives of the DBE program, responsibilities of the DBE Liaison Officer, and how the policy is disseminated internally and externally. The statement in Metro's DBE program was signed by the Chief Executive Officer, Arthur T. Leahy, on May 23, 2011. The review team brought to Metro's attention that the website link to their DBE policy statement had the July 30, 2002 signature of Roger Snoble, Metro's previous CEO. Metro replaced the outdated DBE policy on their website with the current policy statement found in their DBE program prior to the review's exit conference.

### **3. DBE Liaison Officer**

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

**Discussion:** During this DBE Compliance Review, **deficiencies** were found with the requirements for the DBE Liaison Officer (DBELO).

The DBE program identifies the DBELO duties and responsibilities to implement the DBE program. Ms. Linda Wright, Deputy Executive Officer is identified as the DBELO for Metro and includes her contact information. Metro's DBE program states that the DBELO has direct, independent access to the CEO, Arthur T. Leahy concerning DBE program matters. Ms. Wright advised the review team that she meets with the CEO when needed as part of their Shared Responsibility Program. She reported that the Shared Responsibility Program is tied to their performance review. The DBELO stated she "will often go in" [to the CEO's office] on an "informal basis." The DBE section of the most current Triennial Review noted that Ms. Wright reports to Michelle Lopes Caldwell, Chief Administrative Services Officer concerning DBE matters. Clarification was sought subsequent the compliance review from the DBELO regarding reporting relationships; however, no response was received as of the date of the draft report.

Metro's DBE program states that the DBELO has a technical staff of six to assist in administration of the DBE program. The DBELO advised the review team that she did not have adequate staff to administer the DBE program. Ms. Wright indicated during the compliance review that a resource analysis was conducted and the Diversity and Economic Opportunity (DEO) Department requested nine additional staff members/consultants. They anticipate issuing an RFP for consultants to assist the department. She would like four additional personnel in the contract compliance department and the remaining in labor compliance.

The Metro organizational chart is included in the DBE program and the review team requested and received a FY 2012 organizational chart for the DEO Department. The DEO chart indicates that the DBELO oversees four units to include the SBE/Certs/Compliance, Labor Compliance, Outreach, and Program Development. The SBE/Certs/Compliance unit is supervised by the Director, Diversity and Economic Opportunity, Ms. Tashai Smith. Ms. Smith supervises one Assistant DEO

Representative, three personnel under certification and four under contract compliance. The DBE program listed only six technical staff members while the department's organization chart listed more than six. Metro's DBE program was updated in May 2011 and should coincide with the DEO Department organizational chart.

Corrective Action and Schedule: Within 30 days of the issuance of the final report, Metro must an updated organizational chart for its DBE program. Also within 30 days of the final report, Metro must submit a plan outlining steps to provide adequate staff for administration of the DBE program.

MTA Response: Completed. Attached is the updated organizational chart for the DBE Program, showing Linda Wright, Executive Officer, of the Diversity & Economic Opportunity Department (DEOD) as the DBE Liaison Officer. The DEOD organizational chart is posted on the MTA website at:

[http://www.metro.net/about\\_us/deod/images/DEOD\\_Organization.pdf](http://www.metro.net/about_us/deod/images/DEOD_Organization.pdf). The MTA organizational chart can be found on the MTA website (Note: The organizational chart is on page 3 of Introduction page) at:

[http://www.metro.net/about\\_us/deod/images/DEOD\\_Organization.pdf](http://www.metro.net/about_us/deod/images/DEOD_Organization.pdf).

MTA will complete an analysis of all resources required to provide adequate staff to administer the DBE program. This analysis will be completed by May 2013 for consideration by the MTA Board as part of the Fiscal Year 2014 budget request.

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

#### **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.

Metro indicated in their DBE program that they had not identified any DBE-owned financial institutions. However, they encourage contractors to use the services of minority and women owned financial institutions identified from listings posted on the website of the Financial Management Service, US Department of the Treasury, Minority Bank Deposit Program. Metro identified approximately 22 minority and women owned financial institutions and listed their contact information in Attachment 2 of their May 2011 revised DBE program. Metro was also advised to review the Federal Reserve website for minority owned financial institutions.

MTA Response: MTA will review the Federal Reserve website for minority owned financial institutions.

## **5. DBE Directory**

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

**Discussion:** During this DBE Compliance Review, **no deficiencies** were found with the requirement for a DBE directory, however, an advisory comment was made.

The California Unified Certification Program (CUCP) maintains a directory identifying all firms eligible to participate as DBEs. The directory lists the firm's contact information, preferred work locations, and the type of work the firm has been certified to perform as a DBE. The directory is updated daily and is available to the public via the internet. The directory can be sorted by NAICS code, work code, work location and physical location. This feature is in compliance with new 2011 DBE Final Rule requirements to list DBEs by the appropriate NAICS codes for the types of work in which they are certified. Metro's DBE program describes the directory contents to include DBE certification expiration date which is actually not included in the CUCP directory and not authorized under the DBE regulations. Metro is advised to remove the language of "certification expiration date" in this section of Metro's DBE program.

**MTA Response:** Completed. This section was removed in the February 28, 2012, submission of the DBE Plan with the Small Business Element.

## **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, a **deficiency** was found with the requirement for overconcentration.

The overconcentration section of Metro's DBE program included a one sentence statement that read, "In the event overconcentration is identified, Metro will remove the overconcentration of work and corresponding DBE availability from the race conscious DBE goal setting calculation." However, Metro's DBE program does not describe how they evaluate overconcentration or how frequently they perform such evaluations. Furthermore, Metro has indicated that it has a race-neutral program as it relates to transit funding, so the corrective action outlined above is not consistent with Metro's overall program.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final DBE Compliance Review Report, Metro must complete an overconcentration analysis of its current DBE contracts. In addition, Metro must enhance the overconcentration section of their Program Plan. The Program Plan must describe overconcentration identification procedures, how frequently Metro will investigate this issue, and what actions Metro would take if an overconcentration is identified.

**MTA Response:** MTA will complete an overconcentration analysis of its current DBE contracts and will enhance the overconcentration section on the Plan. MTA will hire a

consultant to determine best approach to conduct the analysis, define procedures, frequency and actions to be taken if overconcentration is identified. The overconcentration analysis will be completed by September 2013.

FTA Response: MTA's response is acceptable. MTA must submit an updated DBE program plan with the new overconcentration procedures by October 15, 2013.

## **7. Business Development Programs**

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

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

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

New DBE regulations require that the recipient must include an element to structure contracting requirements to allow competition by small businesses. Reasonable steps should be made to eliminate obstacles to the participation of small businesses, including unnecessary bundling of contracting requirements which may preclude them from participating as prime or subcontractors. This element section must be submitted to FTA by February 28, 2012. Metro has included this section in their DBE program.

## **8. Fostering Small Business Participation**

Basic Requirement: (49 CFR 26.39) Grantees are required to develop a Fostering Small Business Participation Element pursuant to *49 CFR Part 26*, "Participation by Disadvantaged Business Enterprises in Department of Transportation Programs," particularly the Final Rule set forth in the Federal Register [76 FR 5083 – Disadvantaged Business Enterprise: Program Improvements] published January 28, 2011. The Small Business Element was to be developed for incorporation into a revised DBE Program Plan and submitted to the FTA by February 28, 2012.

Discussion: During this DBE Compliance Review, **no deficiencies** were found in the Metro submission of its Fostering Small Business Participation Element. Metro had an already existing Small Business Enterprise (SBE) Program for contracts without federal funds. This program was first adopted in 1997 and set a goal 15 percent SBE utilization with an annual average of about 10 percent. The program has some admirable components such as its "Shared Responsibility Program", the Transportation Business Advisory Council, requiring identification of subcontracting opportunities in large design-build contracts, providing training and outreach to small businesses. While it is not required given everything else in Metro's SBE program, the unbundling section is vague and of little value because it has no specifics. Further, the section on "Target Market Element" appears to track race and gender of SBEs, which is something a race neutral program should not do. It is also unclear whether this element gives the impression of geographic preferences by only allowing "Metro-certified SBEs." Other



areas of the SBE program make clear statements that there are no geographic preferences, so a simple statement of clarification in the “Target Market Element” section would clear up any possible confusion of Metro’s intent.

## **9. 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. Advisory comments, however, were made regarding the goal setting process.

Metro provided their Federal fiscal year 2010, 2009 and 2008 goal methodologies to the review team. The goals were 8%, 7% and 6%, respectively. Metro’s next goal submittal will be due on August 1, 2012. A request for a two-month extension to submit FFY 2010 goal was sent by Metro to the FTA Region IX Civil Rights Officer (CRO) on September 10, 2009. Metro noted that additional administrative review was required of its FFY 2010 budget and upcoming FTA assisted contracts. FTA’s Region IX CRO granted the extension on October 23, 2009. Metro submitted their FFY 2010 goal methodology to FTA on December 1, 2009.

#### **Step 1: Determining the Base Figure**

The FFY 2010 goal methodology was reviewed for compliance with Part 26.45 requirements. Metro noted in their methodology that they anticipated awarding approximately \$100 million in FTA dollars with the potential for DBE opportunities in “FFY 2008.” The review team advises Metro to update their methodology boilerplate because the FFYs 2008, 2009 and 2010 methodologies discussed awarding dollars in FFY 2008.

Metro used the California UCP directory and County Business Pattern data for the relative availability of DBE firms and all businesses. The geographic market area was determined to be a five county area that was used for the numerator and denominator. Metro chose three NAICS sector codes for professional services-54, construction-23 and material supplies-42 and weighted the FTA funding in the appropriate availability codes categories. The DBE directory totaled 1,471 firms for the prescribe code sectors and 34,573 for all businesses in the sector codes identified by the 2007 County Business Pattern data. The resulting calculation was 4.6% or 5% when rounded.

The DEO Department utilizes information from the fiscal year budget to incorporate into the goal setting methodology. In preparation for their upcoming three-year goal, DEO will rely on the grants representative to outline grant funded activity for the three-year goal period. The Director of Regional Programs Management for Metro has FTA grant responsibility and will assist DEO in determining opportunities for the FFY 2013-2015 DBE goal. This individual provided the review team a draft version of FFY 2011 federally funded projects, which a similar format is anticipated to be used for the next

goal submittal. This list included anticipated contracting activities of Metro and its sub-recipients, excluding vehicle purchases from transit vehicle manufacturers. By DEO obtaining this contracting opportunity information, they will not need future extension requests due to their budget cycle not coinciding with the federal fiscal year. The grant information will be utilized for project activities three years out for the next goal submittal and DEO anticipates having the information necessary to submit their three-year goal by August 1, 2012.

#### Step 2: Adjusting the Base Figure

Metro decided to adjust the base figure of 5% by reviewing the median past DBE goal attainment over the last four years. Metro, however, failed to include in its step 2 adjustment any mention of whether past DBE participation will be similar to future DBE participation. In other words, a step 2 adjustment based on historic participation levels can only be accomplished if the historic contracting opportunities are substantially similar to future contracting opportunities. In addition, the review noted that Metro's goal methodology states that "*this resulted in a calculated average of 7.25% which was added to the 5% base figure, divided by two resulting in an upward adjustment to the base figure by 2.75% or 7.75 percent or 8%*" when rounded. The review team requested and was provided the mathematical equation for this calculation. Metro determined that the past participation for FFY 2005 was 14%, 9% for FFY 2006, 10% for FFY 2007 and 11% for FFY 2008. The median was determined to be 10.5% when the two middle numbers of 10 and 11 percent were averaged. The 10.5% median number was averaged with the base figure of 5%, which calculated to 7.75%. The review team advised the DEO department to use proper mathematical verbiage and describe increases to the base figure as percentage points rather than percentages, i.e., the base figure increases 2.5 percentage points rather than by 2.5 percent. Metro was advised to review their past participation numbers for accuracy. The review team calculated FFY 2008 past participation at 15% rather than the 11% calculated by Metro.

MTA Response: MTA will review the past participation numbers for accuracy.

#### **B) Public Participation**

Basic Requirement: (49 CFR Part 26.45) In establishing an overall goal, the recipient must provide for public participation through consultation with minority, women and contractor groups regarding efforts to establish a level playing field for the participation of DBEs. A published notice announcing the overall goal must be available for 30 days. The public must be notified that the recipient is accepting comments on the goal for 45 days following the date of the notice.

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

The Metro FFY 2010 goal methodology included a public participation section that discussed the consultation and published notice process. Metro indicated in their goal methodology that they invite public participation and input from certified DBE firms and individuals who will provide general comments concerning the DBE goal methodology and race-neutral measures. The review team referred the DEO representatives to the USDOT Official Questions and Answers regarding the consultation process.

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

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

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

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

Metro’s DBE program mentions that the overall goal recommendation will be presented to the Transportation Business Advisory Council (TBAC) and other small business resource organizations. The review team requested more information regarding the consultation process for the FFY 2010 goal methodology. Prior to the exit meeting, Metro provided an agenda from the TBAC meeting dated November 5, 2009. The fiscal year 2010 FTA overall goal and methodology was an agenda item for the meeting.

Metro noted in their December 1, 2009, goal submittal letter that the public comment period began on October 26, 2009, and will end on December 10, 2009, for the FFY 2010 goal. The review team referenced an FTA Dear Colleague letter recommending that the goal be advertised by June 15<sup>th</sup> to allow sufficient time for comments prior to the August 1<sup>st</sup> deadline. Metro explained to the review team that their budget cycle did not coincide with the federal fiscal year and the budget is not approved in time to advertise and allow for comments by the August 1<sup>st</sup> submittal deadline. Based on the discussions to take place on the upcoming three-year goal submittal, Metro should be able to advertise by June 15<sup>th</sup> and make the August 1<sup>st</sup> submittal.

Corrective Action and Schedule: Within 30 days of the issuance of the final report, submit to FTA Office of Civil Rights a plan to document information about the consultation process in the goal methodology and advertise the goal no later than June 15<sup>th</sup> to meet the required August 1st submission date.

MTA Response: Completed. MTA advertised its FFY 2013 – 2015 overall DBE goal beginning June 7, 2012, prior to the June 15<sup>th</sup> deadline. MTA’s consultation process was conducted June 7, 2012, with the MTA Transportation Business Advisory Council (TBAC), comprised of sixteen minority and women organizations, which could be relied

upon to have information concerning the availability of DBEs and non-DBEs and disadvantaged and non-disadvantaged business. In its future overall DBE goal submissions, MTA will begin its consultation process in the month of April, to obtain input to the recommended goal methodology, prior to advertisement. The updated DBE Plan will reflect this new timeframe.

FTA Response: FTA agrees with MTA's response to the noted deficiency. 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, **deficiencies** were found with the requirement for transit vehicle manufacturers.

The review team discussed the vehicle procurement process with Metro's Director of Contract Administration for Bus and Rail Procurement. The Contract Administration Director described that DBE certifications are collected and checked against the FTA list of approval TVM programs. Subsequent to the compliance review, Metro provided the TVM DBE approval certification from North American Bus Industries, Inc. for bus vehicle procurement OP33202082 on May 15, 2008. Metro also included a TVM certification by AnsaldoBreda S.p.A. on Contract No. P2550 for a light rail vehicle procurement in 2003.

The Director of Contract Administration indicated he was not responsible for verifying TVM certifications for sub-recipients vehicle purchases. The Director of Regional Program Management believed that the Manager for Transportation Planning, Richard Christie, monitored TVM DBE certification requirements for subrecipient vehicle purchases. The review team did not receive evidence that vehicle purchases by sub-recipients were monitored for TVM compliance with DBE requirements.

Metro also provided RFP No. P3010 for New Light Rail Vehicles from November 1, 2010. Section IP-17 of the RFP outlines DBE goal requirements. The RFP states, prior to award of any resulting contract; proposers will be required to furnish their certifications of compliance with the provisions of 49 CFR Section 23.67 TVM certification of compliance with DBE regulations. The review team advises Metro to update their procurement boilerplate to reference 49 CFR Part 26.49 for TVM program requirements.

Metro sent a letter to FTA's Chief Counsel on July 21, 2010, requesting to include project specific DBE goals in the New Light Rail Vehicles P3010 RFP along with other requests to include employment plans, local hiring evaluation, environmental and Buy America modifications. Metro sent another letter to FTA on April 25, 2011, requesting FTA's position on proposed modifications for the RFP respondent to prepare and present an employment plan to help with access to new jobs created by the manufacture. FTA's Chief Counsel responded to the April 2011 letter on May 6, 2011, regarding the job creation proposal and addressed some other issues requested by Metro. Metro's Director

of Contract Administration advised the review team that they did not receive a response regarding setting project specific DBE goals for the New Light Rail Vehicle RFP.

Corrective Action and Schedule: Within 30 days of the issuance of the final report, submit to FTA's Office of Civil Rights a plan to verify TVM DBE certifications for sub-recipient bus purchases and update Metro's TVM DBE Certification boilerplate.

MTA Response: Completed. In March 2012, MTA hired a consultant to perform sub-recipient DBE semi-annual reporting. MTA conducted two workshops in April and October 2012 to inform sub-recipients of DBE Program requirements, mandate to report DBE participation semi-annually and the requirement to submit copies of TVM DBE certificates as part of the sub-recipients' procurement process.

FTA Response: FTA agrees with MTA's response to the noted deficiency. 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, however, an advisory comment is being made.

Metro stated in their methodology that they would meet their overall FFY 2010 8% goal solely using race-and gender neutral means. The strategy to encourage race neutral participation was discussed in the goal methodology to include providing look-ahead notices of upcoming procurements, assistance in overcoming bonding and financing limitations, and technical assistance.

A disparity study was commissioned for the Southern California Region by Metro in November 2007. Four additional agencies partnered with Metro to include Orange County Transportation Authority, Southern California Regional Rail Authority, San Diego Association of Governments, and San Diego Metropolitan Transit System. The disparity study results and comment period were targeted for completion in December 2009 and Metro indicated that they would make any necessary amendments as required. No information was provided during the review regarding any amendment to the FFY 2010 DBE goal.

A memo dated January 20, 2011, to the Executive Management and Audit Committee was provided to the review team. The memo was for approval of additional expenditures to prepare an update to the disparity study for inclusion of procurements completed during fiscal years 2008 through 2010. The previous study analyzed procurements from January 2003 through December 2007. The previous study was finalized in January 2010 and the evidence supported use of contract goals for two minority groups: Hispanic Americans and Women. The consultant for the disparity study update had not been

selected as of the compliance review date. Metro plans to attempt to include the disparity study update results prior to the three-year DBE goal due of August 1, 2012.

Advisory Comment: Subsequent to the site visit, Metro submitted its FFY11 DBE Goal Accountability Report, which suggests that failure to meet its overall DBE goal, as a 9<sup>th</sup> Circuit participant in the DBE program, is partially attributable to being restricted to the use of race-neutral measures. Please note that the application of the best and most relevant data available may be used as evidence to substantiate the need for a narrowly tailored race conscious program.

MTA Response: MTA will consider in future reviews of its goal performance, the application of the best and most relevant data available, among other evidence, to substantiate the need for a narrowly tailored race-conscious program.

### **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, a **deficiency** was found with the requirements for race conscious participation on overall and contract goals. Metro has operated a race neutral program since October 2006 as a result of the Ninth Circuit Court decision. Contract specific goals are not placed on FTA-assisted contracts; however, Metro has Disadvantaged Business Enterprise Anticipated Level of Participation (DALP) language in contracts. The Contract Compliance Manual included in IFB and RFP documents defines DALP as *the level of DBE participation the contractor listed in its bid in which it will strive to achieve by providing DBE firms a maximum opportunity to perform during the performance of the contract. The contractor has no contractual obligation to meet the DALP.* The review team advised Metro to revisit their DALP definition regarding maximum opportunity to DBE firms since this language is synonymous with DBE language in the former Part 23. Metro should also be advised that quantifying a level of DBE participation in relation to solicitations for business could be interpreted as a race-conscious measure.

Corrective Action and Schedule: Within thirty days of the issuance of the final report, Metro must remove DALP contract goal language from its solicitation documents, the Contract Compliance Manual and the DBE program. Further, upon completion of the Disparity Study, Metro must provide a copy of the disparity study, provide documentation of LACMTA's recommended changes to its DBE Program/Goal, if any, resulting from the findings of the study to the FTA within thirty days of its completion. Metro must inform the FTA Office of Civil Rights immediately if the disparity study will be delayed beyond December 31, 2012.

MTA Response: MTA response will be provided at a later date.

FTA Response: MTA must remove numeric DALP goals from all future contracts. While it is acceptable for MTA to have an overall policy of a 10 percent aspirational

goal, it is unacceptable for MTA to set individual DALP goals on individual contracts. This practice must be discontinued immediately if MTA intends to receive future Federal funding from FTA.

FTA Response: MTA submitted a Disparity Study and updated goal on April 8, 2013. The Secretary of the Department of Transportation is reviewing that submission. Agencies are not required to obtain concurrence prior to implementing the overall goal. If the Department has concerns with the revised goal, it will inform MTA directly. MTA must begin using its revised DBE goal as of the date of submission. This deficiency is now closed.

#### **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, **no deficiencies** were found in the area of good faith efforts requirements, however, an advisory comment was made.

In their May 2011 revised DBE program, Metro describes the GFE process based on the type of contract funding. For FHWA funds, Metro will follow a GFE process outlined in part 26.53 of the DBE regulations. For FTA funds, Metro indicates they will operate a strictly race-neutral program. Therefore, this section was not applicable to Metro for the FTA DBE compliance review.

Advisory Comment: Because GFE only applies to race-conscious programs, Metro should remove the GFE discussion from its DBE program so it does not give the impression that it is pursuing a race-conscious program. In the future, if Metro can justify a race-conscious element to its race-neutral program, then the GFE section can be added back into its DBE program.

MTA Response: All references to good faith efforts will be removed from the current race-neutral DBE Plan.

#### **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, however, an advisory comment was made.

Metro's DBE program indicates that they will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55. No other information is provided in this DBE program section.

The DEO Department has a Contract Compliance Manual that is included in procurements and contracts. Section 200 of the manual goes into detail about counting DALP participation on contracts when a DBE performs as a prime, in a joint venture, as a subcontractor, material supplier or broker or as a trucker. There is also information concerning commercially useful function violations. The review team recommended that the DEO Department include more information in the DBE program concerning counting participation and how it relates to their DALP program.

Advisory Comment: Metro is cautioned to ensure that counting for a race-neutral program focuses primarily on ensuring accurate counting for reporting purposes and not for enforcement and sanctions related to a race-conscious program.

MTA Response: MTA acknowledges FTA's caution. MTA's counting language is for race-neutral reporting only and will ensure updated DBE plan reflects this language.

## **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 LACMTA was found during the site visit.

## **10. Required Contract Provisions**

### **A) Contract Assurance**

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

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

Metro states in their DBE program that they will ensure that the contract assurance clause found in 26.13 of the DBE regulations is placed in every DOT-assisted contract and subcontract. The assurance clause is also placed in the Contract Compliance Manual included in Metro contracts. The review team examined three prime contracts and three DBE subcontracts for compliance with contract assurance clause inclusion. The clause was found in the prime contracts through incorporation of the Contract Compliance Manual. However, the subcontract agreement for **Redacted** did not include the contract assurance clause. The only reference to DBE requirements in this subcontract was a paragraph that the *subcontractor if not a certified DBE firm shall for each task order authorized, assist HMM and client in compliance with the United States Code of Federal Regulations Title 49-Transportation, Subtitle A, Part 26 (49 CFR 26)*. The subcontract agreements for **Redacted** and **Redacted** included the appropriate contract assurance clause.



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

Prime Contractor	Project	Contract No.	DBE Subcontractor
Redacted	Crenshaw Transit Corridor Advanced Conceptual / Preliminary Engineering	EO117	Redacted
Redacted	Graffiti Abatement Services	OP-3344-2421	Redacted
Redacted	CNG Upgrade	OP-3343-2475	Redacted

Corrective Action and Schedule: Within 30 days of the issuance of the final report, Metro must submit to FTA Office of Civil Rights an update within the DBE Program that details the process for ensuring that the contract assurance clause is placed in every DOT-assisted contract and subcontract.

MTA Response: Completed. MTA makes every effort to inform both contractors and subcontractors of the requirement to include the contract assurance clause in accordance with 49 CFR Part 26.13 verbatim in FTA funded contracts and subcontracts. Metro includes the contract assurance language in the Contract Compliance Manual for Metro awarded contracts and includes the contract assurance language in kick-off letters to the prime contractor to be incorporated in subcontract agreements.

MTA will also include in its Contract Compliance Manual language that if a contractor fails or refuses to include the contract assurance language its subcontract agreement as required by MTA, the contractor may be subject to an imposed penalty for non-compliance. This new language will be updated in the updated DBE Plan.

FTA Response: MTA’s response is partially acceptable. While including the requirement in the Contract Compliance Manual and in kick-off letters is a good practice, MTA failed to describe how it will monitor compliance with this requirement. As a result, this deficiency will remain open until MTA can provide details as to how it plans to ensure that these required contract clauses are included in contracts and subcontracts. MTA must submit these procedures to FTA by February 28, 2013.

FTA Response: MTA’s updated DBE program provided sufficient detail regarding contract clauses. 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, a **deficiency** was found with regard to the requirements for prompt payment and return of retainage.

#### *Prompt Payment*

The DBE program states that Metro will include a prompt payment clause in each DOT-assisted prime contract. Metro has a ten (10) day prompt payment clause. The Contract Compliance Manual requires the prime contractor to incorporate the prompt payment clause in all subcontract, broker, dealer, vendor, supplier or other source agreements or purchase orders issued to both DBE and Non-DBE firms. The prompt payment clause was included in the prime and subcontract agreements reviewed. The review team noted that the **Redacted** subcontract included the Metro prompt payment clause; however, a method of payment section was also included that the sub shall be paid by the 10<sup>th</sup> of each succeeding month for which an invoice was received. These two clauses could have the potential for a conflict in payment provisions.

During the compliance review, one of the Metro Contract Compliance representatives discussed how prompt payment is monitored. He stated that a Form 103 is collected that includes payment information. A letter is also sent out at 50%, 75% and 100% completion to verify payment receipt by the DBE firm. The DEO Department may also collect a sample of DBE invoices and cancelled checks from primes to verify prompt payment. The review team reviewed payment information from the DBE firm, **Redacted** and determined that the DBE was paid, on average, six days from when the prime received payment from Metro.

Metro's compliance manual requires the prime to include the prompt payment clause in DBE and non-DBE subcontract agreements. The review team asked how prompt payment was monitored for the non-DBE firms. The DEO representatives indicated that if an issue arose regarding non-DBEs, the matter would be referred to Contract Administration.

#### *Return of Retainage*

In June 2003, USDOT issued a Final Rule on DBE that contained new requirements for prompt return of retainage. According to the Final Rule, if an agency chooses to hold retainage from a prime contractor, they must have prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after payment to the prime contractor.

Metro continues to hold retainage on projects and requires the prime contractors to return retainage payments to each subcontractor within ten day after the subcontractors' work is satisfactorily completed. The Contract Compliance Manual in prime contracts further defines satisfactory completion as when all the tasks called for in the subcontract have been accomplished and documented as required by Metro. The subcontract agreement for **Redacted** did not include the appropriate number of days for return of retainage.

The subcontract stated that *final payment shall be made upon completion and acceptance of the work under each task order by HMM and client.*

The review team discussed with the DEO Department how satisfactory completion is assessed for return of retainage. They indicated that the project managers are onsite to determine when a subcontractor's work is completed. The review team advised the DEO Department that their DBE program and Contract Compliance Manual does not outline how regular incremental acceptances of portions of the prime contract are completed.

Prior to the exit meeting, Metro provided *Verification of Subcontractor Payment* letter that allows the DBE to verify reported payments by the prime. This report also included verification that a final payment was made and if retention was included.

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

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

MTA Response: Completed. MTA makes every effort to inform both contractors and subcontractors of the requirement to include the MTA prompt payment and prompt return of retainage in FTA funded contracts and subcontracts. Metro publishes prompt payment and prompt return of retainage language in the Contract and Contract Compliance Manual. MTA also provide prompt payment and prompt return of retainage language in kick-off letters to the prime contractor to be incorporated in subcontract agreements.

MTA will also include in its Contract Compliance Manual language that if a contractor fails or refuses to include prompt payment or prompt return of retainage language in its subcontracts that is inconsistent or conflicting with MTA prompt payment and retainage provisions, the contractor may be subject to an imposed penalty for non-compliance. This new language will be updated in the updated DBE Plan.

The Payment Certification, Contract Exhibit 1, which is a required form to be submitted by the Contractor for all payments, has been modified to include an explicit affirmation that 1) all subcontractors have received prompt payment and 2) all subcontractors who have completed all contract work have been paid a proportionate share of retainage. This revised form will allow the Project Manager and Contract Administrator to monitor prompt payment of progress, milestone, and retainage payments to all subcontractors.

FTA Response: MTA's response is partially acceptable. While including the requirement in the Contract Compliance Manual and in kick-off letters is a good practice, MTA failed to describe how it will monitor compliance with this requirement. As a result, this deficiency will remain open until MTA can provide details as to how it plans to ensure that these required contract clauses are included in contracts and subcontracts. MTA must submit these procedures to FTA by February 28, 2013.

FTA Response: MTA's revised DBE program contained sufficient detail regarding how it will monitor prompt payment and retainage. 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, **deficiencies** were found with the requirement for legal remedies.

The review team discussed Metro's contract legal remedies with Principal Deputy County Counsel Transportation Division during the compliance review. He explained that he was brought on board primarily for the disparity study but does assist with contract clauses review and certification issues. He indicated that the Contract Compliance Manual incorporates the appropriate legal remedies for their race-and gender neutral program.

The Contract Compliance Manual includes suspension or debarment proceedings that may be initiated against any firm that attempts to participate in a DOT-assisted program as a DBE if the firm does not meet the eligibility criteria and attempts to participate or meet DALP participation on the basis of false, fraudulent or deceitful statements. Metro states it may take action itself through its Fraud and Civil Remedies Program or refer the matter to the Department of Justice for prosecution under appropriate criminal statutes. Violations of commercial useful function are also discussed in the Compliance Manual. The manual states, *if after review of the evidence presented by the DBE does not meet the CUF provisions of the Compliance Manual, the contractor will be required to cure deficiencies found.*

Metro's DBE program discusses the monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26. The DBE program notes that *prior to execution of all contracts containing DBE goals the prime contractor shall be verbally directed to Metro's Compliance Manual for specific requirements of the DBE program.* Attachment 4 of Metro's DBE program lists the contract remedies available to Metro in the events of non-compliance with the DBE regulation by a participant in Metro's procurement activities. The attachment 4, *Findings of Non-Compliance and Administrative Sanctions* section states Metro may choose to impose sanctions including, but not limited to, mandatory DBE training, assessment for non-compliance (up to \$5,000 per day), suspension of payment, termination of the contract for default, and suspension and debarment.

These sanctions found in Attachment 4 of Metro's DBE program were not included in the Contract Compliance Manual of the contract files reviewed during the compliance review; however, Metro is cautioned to draw a distinction between its former race conscious program and its current race neutral program in its DBE program and all other contract documents.

Corrective Action and Schedule: Within 30 days of the issuance of the final report, Metro must submit to FTA Office of Civil Rights evidence that the legal remedies contained within the DBE program, corresponds to the legal remedies contained in the Contract Compliance Manual.

MTA Response: Completed. Attachment 4 is removed from the Plan.

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

**11. Certification Standards**

Basic Requirements: (49 CFR Part 26.67) The recipient must have a certification process intact to determine if a potential DBE firm is legitimately socially and economically disadvantaged according to the regulations. The DBE applicant must submit the required application and a signed and notarized statement of personal net worth with appropriate supporting documentation.

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

The review team requested the following Metro certification records to review for compliance with certification requirements:

<b>Firm Name</b>	<b>Status</b>	<b>Deficient-Area</b>
Redacted	Denied	Yes- Procedures
Redacted	Denied	No
Redacted	New certification	No
Redacted	Existing certification	No
Redacted	Removal	Yes- Procedures
Redacted	Removal	Yes- Procedures
Redacted	Removal	Yes- Procedures
Redacted	Removal	Yes- Procedures
Redacted	Removal	Yes- Procedures

**12. 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 California Unified Certification Program (CUCP) includes a northern cluster and southern cluster of certifying agencies. Metro is a certifying member of the CUCP and the clusters meet monthly to discuss certification issues. Meeting minutes from the previous two meetings were provided to the review team. The review team suggested that the CUCP discuss several issues which included developing interstate certification

procedures by January 1, 2012, developing dispute resolution procedures for UCP members that does not include USDOT appeals, and consider circulating a list of removed firms to UCP members for counting purposes.

The review team found several deficiencies on how Metro staff implemented the Certification Procedures requirements found in Subpart E of the DBE regulations.

#### *Onsite visits*

The certification staff representatives indicated that they perform onsite visits for certification determinations that include interviewing the owner, taking pictures and walkthrough of the offices at the applicant firm. The staff indicated during the compliance review that due to resource issues worksite visits are not conducted. The review team noted that DBE regulations require a visit to the applicant firm's jobsite if applicable and within the local area.

MTA Response: Completed. Since the FTA compliance review, Metro awarded contracts to two consultant firms to perform DBE certification eligibility reviews to include standard onsite reviews and to visit accessible job-sites located within 10 miles of the certification applicant's applicant firm's offices.

FTA Response: MTA response is acceptable. That being said, please submit to FTA by January 30, 2013, the on-site reports completed by the contractors for the two contracts noted in MTA's response. This deficiency is now closed.

FTA Response: MTA's revised DBE program notes that it will conduct on-site visits only where there is a contract goal. FTA's letter to MTA regarding its revised DBE program requires MTA to correct that statement to ensure that all federally assisted projects where DBEs have been awarded contracts receive on-site visits.

#### *Personal Net Worth Statements/Proof of Group Membership*

The certification staff indicated that they require the majority owner to complete a personal net worth statement. The staff also advised the review team that they will also request a PNW statement from both owners with 60/40 percent ownership interest. The review team advised the certification staff that PNW statements are required for individuals whose disadvantaged status is relied upon for ownership and control requirements. The review team also noted that Metro requested additional information from **Redacted** which included a request for **Redacted** to submit a PNW statement even though the certification staff noted that **Redacted** had 100% ownership interest in the firm. The document also requested proof of ethnicity/gender from both **Redacted** and **Redacted**.

In response to the new PNW size standards, Metro sent out letters to DBE firms informing them of the adjustment to the PNW limits.

MTA Response: Completed. The certification file noted in the draft Compliance Report referenced a Personal Net Worth (PNW) Statement and proof of ethnicity/gender from a business owner's spouse collected in 2001. This procedure is not a standard practice. MTA will continue to ensure that certification staff and consultants only request PNW

statements and supporting documentation, only from the owner(s) who own(s) at least 51% of the firm and is/are the group member(s) on whom Metro will rely on for making ownership and control determinations.

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

#### *Certification Determinations*

The certification file for [Redacted] was denied on May 24, 2011 for several issues that were documented by Metro staff. The staff sufficiently explained the reasons for denial, however; the determination appeared to have been past the 90 day timeframe to make a determination. The review team could not specifically detail when the file was deemed complete for eligibility evaluation, but the time from certification application receipt to denial was approximately nine months.

MTA Response: Agree. MTA will ensure that certification denials are completed within 90 days of the eligibility certification date reported on MTA's Certification Summary Report, revised to include the eligibility determination date to be used to track completion of the denial within the required timeframe.

#### *Removal of Certification*

The review team examined five files Metro categorized as removals of certifications. JFL Electric was initially certified in 2005 and was sent a denial of certification letter on January 30, 2009, for exceeding the PNW requirement after collection of a *DBE Renewal Application*. The review team advised the certification staff that the letter should have been a removal of certification rather than a denial even though a renewal application was sent to Metro. Metro was also advised that the *DBE Renewal Application* will need to be revised to conform to the new DBE rule.

The partner in the DBE firm of [Redacted] sent Metro staff an email on May 13, 2011 advising Metro that the firm would not renew their DBE status due to a transfer of ownership. Metro sent [Redacted] a *Written Notice of Reasonable Cause to Believe [Redacted] is No Longer Eligible for DBE Certification* by email on May 16, 2011. The email included an opportunity for an informal hearing set for May 26, 2011 and requested that a written response to the reasons for removal be received by May 20, 2011, if the firm chose to contest the action. The firm was also given the option of presenting information and/or arguments in writing without going to the hearing. A letter of *Written Notice of Decision to Remove Certification as DBE* was sent to the firm by Metro on May 20, 2011. The letter explained the reasons for removal of certification to include the firm informing Metro that they transferred ownership and would not seek continued DBE certification. The review team advised Metro that the removal letter should also contain USDOT appeal information to appropriately follow 26.87(g) *Notice of Decision* requirements.

The DBE firms of [Redacted], [Redacted], and [Redacted] received letters from Metro that their certification file would be closed as a result of non-responsiveness to previous request for information. The firms were sent an *Intent to Close Certification File* letter, a *Final Request for Annual DBE Declaration* letter,

followed by a *Closure of DBE Certification File* letter. None of the letters included an opportunity for an informal hearing or USDOT appeal information in the *Closure* letter.

MTA Response: Agree. MTA will ensure that the appropriate removal letters will be issued when a DBE firm is slated for a removal. Noted removal letters have been revised to include the US DOT Appeal Information consistent with 26.87(g).

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

#### *DBE Directory*

Metro certification staff explained that they maintain an internal database which certification and removal information is manually updated in the UCP directory. The review team advised Metro that the firms of Redacted, Redacted and Redacted, that Metro considered removed from the DBE program, were listed in the UCP directory as DBEs as of the compliance review date. The review team subsequently requested a list of removed firms for the past two fiscal years. Six files were randomly selected to see if they were still listed in the UCP directory and the results are listed below:

1. Redacted – listed (removed 7/28/10)
2. Redacted – not listed
3. Redacted – not listed
4. Redacted – listed (removed 10/2/09)
5. Redacted – not listed
6. Redacted – not listed

MTA Response: Agree. MTA will ensure its DBE database and the California Unified Certification Program (CUCP) DBE database are timely and accurately updated to reflect all removals of DBE certifications, in whole or in part. Further, MTA's log to track certifications and removals has been revised to monitor database removals. In the course of updating its DBE Plan, MTA will ensure appropriate revisions to the Certification Standards are included.

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

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

FTA Response: The deficiencies in this section are now closed.

### **13. 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. Deficiencies were found in the area of monitoring and reporting.

#### *Bidders List*

A bidders list is collected by Metro as part of meeting 26.11 requirements. The *Bidders List Form* is included in procurement solicitations and collected by Contract Compliance personnel. The forms are maintained in compliance files with all procurements.

The *Bidders List Form* instructions mention that the information will be used to determine the relative availability of DBE and non-DBEs and will assist with establishing Metro's DBE goal. The review team advised Metro that the data information should also be maintained in electronic format for data mining purposes. Metro advised the review team that they are working to transpose the information into a database in order to manipulate the information. The database was in the testing phase during the compliance review. Prior to the exit meeting, Metro provided the review team screen shots of the bidders list demo-database that included a sign-in page, information page, business data page which included all the required data for 26.11 compliance, and project information.

#### *Monitoring*

##### Metro Contracts

Metro referred the review team to the Contract Compliance Manual for information concerning their monitoring procedures. The contractor is encouraged to strive to attain the contractor's proposed DALP participation. The manual notes that although the DALP is purely voluntary, it becomes a statement of record in the Special Provisions section of the contract and shall be monitored as outlined in the compliance manual.

The Metro DBE Program has a Shared Responsibility Program to achieve the overall goal and ensure compliance with the DBE Program. In addition to the DBELO, the Chief Executive Officer, the Chief Administrative Officer, the Chief Financial Officer and other personnel such as Project Managers, Vendor Relations and Risk Management share in DBE compliance.

The program provides that Metro will institute monitoring and enforcement mechanism to verify that work committed to DBEs at contract award is actually performed by the DBEs. This is done by notifying the contractor of reporting requirements, pre-kickoff meetings, monthly expenditure plans, submission of executed DBE subcontracts, on-site performance monitoring and written certification of compliance monitoring. Prime contractors are also required to submit *Form 103, Summary of Subcontractors Paid Report* on a monthly basis and impose a penalty of \$1,000 per day for late reports.

Metro has Contract Compliance personnel that maintain a file for each project with DALP participation. The Compliance representative advised the review team that onsite visits are conducted approximately once per month. They also perform commercially

useful function (CUF) reviews that include collecting invoices and cancelled checks. Completed CUF review reports were provided to the review team. The review team advised Metro that their monitoring process was sufficient to meet the DBE requirements; however, more analysis should be performed on the information collected. This is apparent with the deficiencies found in the contract provisions section of this report.

#### Subrecipient Contracts

Metro noted in the DBE section of their most current Triennial Review that they do not report activities of subrecipients. Metro noted that more improvement is needed with monitoring and reporting subrecipient activities. A *DBE Implementation Agreement for Subrecipients* document was provided to the review team. The agreement is an assurance that sub-recipients will comply with Metro's DBE Program and DBE requirements. The review team recommended that this agreement be incorporated with existing agreements that sub-recipients sign with Metro. Metro anticipates that this program will commence on October 1, 2011.

Metro also provided copies of the letters sent to sub-recipients concerning the DBE agreement. The letter included a statement that, "Direct Federal recipients and sub-recipients receiving pass-through funds that receive \$250,000 or more in FTA funds, who let FTA-assisted contracts must have a DBE program and establish an overall DBE goal every three years if awarding \$250,000 or more in a Federal fiscal year." Metro advised the review team that sub-recipient who received less than \$250,000 from Metro are not monitored. The Director of Regional Program Management indicated that she does review the contracts for incorporation of federal provisions listed in FTA Circular 4220 for sub-recipients receiving greater than \$250,000.

#### *Reporting*

Metro indicated that they will begin including sub-recipient activities in semi-annual reports starting June 1, 2012. As part of an effort to monitor and report sub-recipient information, Metro will require sub-recipients to submit the *Uniform Report* biannually for each Federal fiscal year. Sub-recipients will also be required to report ARRA funds on a quarterly basis. The review team advised Metro to amend agreements and documents to include DBE contracting activities for all sub-recipients rather than only the ones receiving more than \$250,000 from Metro.

The review team also noted that Metro was not including ARRA activities in the semi-annual reports. Metro noted that they were advised to separate ARRA from the semi-annual reports since an ARRA report is also completed.

Lastly, the review team advised Metro regarding their past participation numbers from semi-annual reports in their overall goal-setting methodology. As noted in the goal setting section of this report, Metro noted that their past participation for FFY 2008 was 11%, while the review team calculated 15% DBE participation. This 15% calculation was derived by dividing the total DBE awards by the total prime awards for the two semi-annual reports in FFY 2008. Metro will need to verify the accuracy of goal attainment since the new DBE requirements will look to semi-annual reports to determine if recipients have met their overall goal as well as justify adjustments by ensuring it is

comparing past participation activities by DBEs as being substantially similar to future activities by DBEs.

Corrective Action and Schedule: Within 30 days of the issuance of the final report, Metro must submit to FTA's Office of Civil Rights an update within the DBE program that contains:

- A mechanism to monitor and report work on sub-recipients' FTA funded contracts, and
- Procedures that are implemented to ensure accurate and complete collection and reporting of data for semi-annual and ARRA DBE reports to FTA.

MTA Response: Completed. Since the FTA compliance review, MTA incorporated ARRA DBE reports in our December 1, 2011 second semi-annual and in the June 1, 2012, first semi-annual reports. MTA will prepare a methodology on how to monitor sub-recipients' DBE compliance on FTA funded contracts by September 2013.

FTA Response: MTA's response is partially acceptable. Inclusion of the ARRA DBE reports is acceptable, however, a plan to monitor sub-recipient DBE compliance is a condition of assistance. Thus, MTA is not in compliance with the DBE regulations if it is not monitoring sub-recipient DBE compliance. MTA must submit to FTA by February 28, 2013, a plan to monitor sub-recipient compliance in the interim while it develops its methodology.

FTA Response: MTA's revised DBE program contains sufficient detail regarding how MTA plans to monitor its subrecipients. This deficiency is now closed.

## 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	D	Program in need of updates	Update DBE program with recommended changes	Closed
2. Policy Statement	26.23	ND			
3. DBE Liaison Officer	26.25	D	Inadequate number of staff	Address the staffing needs for the DEO Department	Closed
4. Financial Institutions	26.27	ND			
5. DBE Directory	26.31	AC	Remove reference to expiration in directory section of DBE program		
6. Overconcentration	26.33	D	Add more language on OC process and analysis		October 15, 2013
7. Business Development Programs	26.35	N/A			
8. Fostering Small Business Participation	26.39	ND			
9. Determining / Meeting Goals			Update calculation language and other typos in methodology		
A. Calculation	26.45	AC			
B. Public Participation	26.45	D	Conducting consultation and advertising goal late	Incorporate grant information to timely conduct consultation and advertise goal	Closed
C. TVM	26.45	D	No verification that subrecipient bus purchases are monitored Incorrect reference to DBE regs	Verify that TVM DBE certifications are collected  Correct language in Metro TVM DBE certification to part 26	Closed
D. Race Neutral	26.51	AC	Best available evidence may be used to justify race conscious means		
E. Race Conscious	26.51	D	DALP language uses maximum opportunity for DBEs, includes quantified value of DBE participation	Remove DALP contract goal language from DBE program, Contract Compliance Manual and solicitation documents	Closed
F. Good Faith Efforts	26.53	ND			
G. Counting DBE	26.55	AC	Additional language needed to outline		

<b>Requirement of 49 CFR Part 26</b>	<b>Ref.</b>	<b>Site visit Finding</b>	<b>Description of Deficiencies</b>	<b>Submit Corrective Action Plan and Schedule for the following:</b>	<b>Response Days/Date</b>
Participation			counting procedures in DBE program		
H. Quotas	26.43	ND			
10. Required Contract Provisions					
A. Contract Assurance	26.13	D	Contract assurance not in all subcontract agreements	Submit procedures for monitoring inclusion of assurance language in subcontracts	Closed
B. Prompt Payment	26.29	D	Payment and retainage language not included in all subcontracts	Submit procedures for monitoring prompt payment and retainage language	Closed
C. Legal Remedies	26.37	D	RC language and actions in a RN program	Ensure that language and actions compliment a RN program	Closed
11. Certification Standards	26.67	ND			
12. Certification Procedures	26.83	D	Issues with onsite visits, PNW and membership requests, removals	Submit –on-site reports	Closed
13. Record Keeping and Enforcements					
A. Bidders List	26.11	ND			
B. Monitoring	26,37 26.55	D	No oversight of subrecipients	Provide monitoring mechanism to track/monitor subrecipient activities	Closed
C. Reporting	26.11	D	Not including subrecipient activity, ARRA activity	Include mechanism to monitor and report all sub-recipient activity	Closed

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
<b>FTA:</b>				
Christopher MacNeith	FTA, Office of Civil Rights	Equal Opportunity Specialist	415-744-2614	Christopher.macneith@dot.gov
Britney Berry	FTA, Office of Civil Rights	Equal Opportunity Specialist	202-366-1065	Britney.berry@dot.gov
<b>LACMTA Members:</b>				
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Tashai R. Smith	LACMTA	Director, Small Business Programs	213-922-2128	Smitht@metro.net
Linda Wright	LACMTA	Deputy Executive Officer	213-922-2638	Wrightl@metro.net
Jay Figus	LACMTA	Senior Representative, Special Projects	213-922-3443	Figusj@metro.net
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Linda Perryman	LACMTA	Contract Compliance Administrator	213-922-2626	Perrymanl@metro.net
Gladys Lowe	LACMTA	Director, Regional Programs Management	213-922-2459	Loweg@metro.net
Richard Christie	LACMTA	Manager, Transportation Planning	213-922-6022	Christier@metro.net
Diego Ramirez	LACMTA	Manager, Transportation Planning	213-922-2460	Ramirezd@metro.net
Donald Dwyer	LACMTA	Director, Contract Administration	213-922-6387	Dwyerd@metro.net
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Bud Boyd	LACMTA	Contract Compliance Officer	213-922-7393	Boydb@metro.net
Richard Chastang	County of Los Angeles	Principal Deputy County Counsel	213-922-2503	Chastangr@metro.net
<b>Prime Contractor Representative</b>				
Redacted				

<b>DBE Subcontractor Representative</b>				
Redacted				
<b>Interested Parties</b>				
Frank Villalobos	Latin Business Chamber of Greater Los Angeles	Representative	213-347-0008	
Lynn Chen	Asian Business Association	Representative	213-628-1222	
<b>Milligan &amp; Co LLC:</b>				
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