

FTA

FEDERAL TRANSIT ADMINISTRATION

Metropolitan Atlanta Rapid Transit Authority Disadvantaged Business Enterprise (DBE) Program Final Compliance Review Report

September 2012

Federal Transit Administration

Conducted by
Milligan & Company, LLC



U.S. Department of Transportation
Federal Transit Administration

COMPLIANCE REVIEW REPORT
OF THE
Metropolitan Atlanta Rapid Transit Authority (MARTA)
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

September 2012

Prepared for the
Federal Transit Administration
Office of Civil Rights

by

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Section 1 - General Information

Grant Recipient: Metropolitan Atlanta Rapid Transit Authority
2424 Piedmont Road, NE

City/State: Atlanta, GA 30324-3311

Grantee Number: 1101

Executive Official: Dr. Beverly A. Scott
General Manager / Chief Executive Officer

On Site Liaison: Reginald Diamond,
Executive Director, DEO
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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., (17), October 1, 2010 and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs."

The Metropolitan Atlanta Rapid Transit Authority (MARTA) 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 MARTA'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 Metropolitan Atlanta Rapid Transit Authority's (MARTA) Disadvantaged Business Enterprise (DBE) program is necessary.

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

Section 4 – Background Information

The Metropolitan Atlanta Rapid Transit Authority (MARTA) was created in 1965 when the state legislature passed the Metropolitan Atlanta Rapid Transit Authority Act. MARTA provides bus and rail service in DeKalb, Fulton, Cobb, and Clay counties, with most of the bus and rail service operating primarily in DeKalb and Fulton counties.

As of September 2010, MARTA had an average of 485,200 riders per weekday. The agency has 318 rail cars and operates rail service with four lines through 38 stations on 104 miles of track. The trains make over 2,100 trips each day. The bus fleet is comprised of 590 buses for fixed-route service. MARTA operates a network of 132 bus routes. Service is provided 24 hours a day, seven days a week.

Current projects include expansion project studies and analyses for the Beltline Corridor, Clifton Corridor, and the I-20 East Corridor. The Beltline Corridor involves the construction of a 22-mile facility around the center area of Atlanta. The Clifton Corridor project involves investigating the need for more transit connections from the north-central area of Atlanta to the employment centers along Clifton Road and Decatur, Georgia. The I-20 East Corridor project involves identifying the impact of the development of transit service between downtown Atlanta and southeastern DeKalb County.

MARTA's current projects also include system and facility improvements for the Brady Mobility Paratransit Facility, Hamilton Boulevard Garage, and the Automatic Train Control System. The Brady Mobility Facility, used to operate and maintain MARTA's paratransit fleet, is being upgraded for the first time since it was built in 1974. The Hamilton Bus Facility, located in southeast Atlanta, is being improved and modernized. MARTA is currently in the vendor selection phase for upgrading the Automatic Train Control System and consolidating and replacing a number of their control centers.

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 use DBEs in all aspects of contracting to the maximum extent feasible must be signed, dated and distributed [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 MARTA by FTA's Office of Civil Rights. The agenda letter notified MARTA of the planned site visit, requested preliminary documents, and informed MARTA of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed MARTA 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, MARTA staff and the review team.

Subsequent to the entrance conference, a review was conducted of MARTA's DBE Program Plan and other documents submitted to the review team by the DBE Liaison Officer. Interviews were then conducted with MARTA 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 DBE elements. Additionally, interviews with prime contractors, DBEs and interested parties were performed.

At the end of the review, an exit conference was held with FTA representatives, MARTA 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 MARTA. Following the site visit, a draft report was issued to MARTA.

This final report incorporates MARTA's comments to the initial draft report.

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

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Section 6 – Issues and Recommendations

1. DBE Program Plan

Basic Requirement: (49 CFR Part 26.21) Recipients must have a DBE program meeting the requirements of 49 CFR Part 26. Recipients do not have to submit regular updates of DBE programs. However, significant changes in the program must be submitted for approval.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for a Program Plan. MARTA provided a detailed DBE program that addressed the requirements of 49 CFR Part 26. The plan covered DBE policy; definitions; responsibilities; administration requirements; determining, meeting and counting overall annual goals; required contract provisions; certification standards and procedures; recordkeeping, monitoring and enforcements; and public participation and outreach. The Office of Diversity and Equal Opportunity (DEO) prepared several specific procedures for implementation of various areas of the program. These procedures were approved by either the Director of DEO or Legal Services.

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 current General Manager/CEO of MARTA, Dr. Beverly Scott, signed the DBE policy statement in 2007. The policy statement was included in their DBE program and on MARTA's website. The policy emphasized MARTA's commitment to utilizing small, minority, women and socio-economically disadvantaged businesses in the award of its contracts and procurements. This commitment was further expressed by the Dr. Scott during the entrance conference of the DBE review. She expounded on her experiences in the small business community and civil rights emphasizing her commitment of MARTA resources to achieve a level playing field for all businesses.

3. DBE Liaison Officer

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for the DBE Liaison Officer (DBELO). MARTA's DBE program indicated

that the General Manager/CEO was directed by MARTA Board of Directors to delegate implementation of the DBE program to the Office of Diversity and Equal Opportunity (DEO). Mr. Reginald Diamond serves as Executive Director of DEO and is the DBELO of record. According to the DBE program, Mr. Diamond reports directly to the Assistant General Manager for Human Resources and has a dotted line reporting to the General Manager/CEO. Mr. Diamond indicated he has direct and independent access to the General Manager at any time. This was substantiated by the General Manager/CEO during the entrance conference as she explained her and Mr. Diamond's prior work history and their longtime commitment to civil rights.

The DBELO is assisted by Ms. Antoine Smith. Ms. Smith is the Manager of Economic Opportunity and handles the day-to-day responsibilities of managing the DBE program. Ms. Smith is assisted by four DBE/EEO Analysts and one DBE Coordinator according to the organizational chart in the DBE program. Regarding adequate staff to administer the program, Mr. Diamond noted that they could always use more staff; however, he felt that MARTA had mastered using available resources to accomplish program objectives.

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. MARTA maintains a listing of DBE financial institutions and encourages their use by prime contractors and subcontractors in bid solicitations. MARTA's DBE program includes a listing of Minority-owned banks to include Capital City Bank and Trust Company, Carver State Bank, Citizens Trust Bank, Global Commerce Bank, Metro City Bank, Quantum National Bank, State Bank of Georgia, and United Americas Bank, NA. These financial institutions were promoted in current solicitations examined by the review team.

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, a deficiency was found with the requirement for a DBE directory. The DBE regulations require that each UCP maintain a unified DBE directory containing, for all firms certified by the UCP the information required by 26.31. The UCP must update the directory by including additions, deletions, and other changes as soon as they are made. Currently the Georgia Unified Certification Program (GA UCP) directory is not unified or updated regularly. Georgia DOT and MARTA maintain separate directories of firms certified in the GA UCP as verified in DBE Analysts' emails and review of directories from the two agencies. MARTA

maintains an internal directory of DBEs processed by their Office of Diversity and Equal Opportunity. Their directory includes the information required by the regulations. It lists the firm's name, mailing address, telephone number, and the type of work the firm has been certified to perform as a DBE. While this review is not of the GA UCP; as MARTA is a certifying entity with the GA UCP, it does have a role to play in ensuring the comprehensiveness of the GA UCP directory.

During the on-site review, S.L. King & Associates was listed in the latest DBE directory (March 2010) posted on MARTA's website, however the firm was not listed in the GDOT DBE directory. The review team subsequently discovered that S.L. King & Associates' certification had been removed in November 2009, but continued to be listed in MARTA's directory. S.L. King Technologies was listed in the latest DBE directory (October 2010) on GDOT's website, however it was not listed in MARTA's DBE directory. Both firms were listed on MARTA projects examined by the review team. This illustrates some of the structural issues that can occur by not having one comprehensive UCP directory.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the Region IV Civil Rights Officer a plan and schedule for working with the GA UCP to accomplish one comprehensive DBE directory for the state.

Grantee Response: MARTA will utilize the UCP DBE Directory administered by GDOT as the directory of record. MARTA will also include a link on the public web site that will direct all inquiries on certified DBEs to the UCP.

FTA Response: FTA partially concurs with this response. While MARTA's transition to the State DBE directory creates a single point of reference for prime contractors and other concerned parties, the response does not address what is to become of the internal DBE directory used by MARTA's employees. Also, while MARTA has changed the DBE directory listed on its website to the Georgia State BizNet UCP Directory (<http://biznet.gdot.us/>) the link was broken at the time of this writing. To close this finding, by October 15, 2012, MARTA must:

- Update the hyperlink to the DBE Directory on the public site. Update the DBE program to include the current policy on how the DBE directory will be used by staff and distributed to contractors and other interested parties.

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. However, an advisory comment was provided. MARTA indicated in its DBE program that over-concentration of DBEs had not been identified in any aspects of its contract and procurement activities. It is recommended that MARTA conduct and document periodic reviews for DBE overconcentration. This could possibly occur during the overall goal setting process, with results included in their methodology.

Grantee Response: The Metropolitan Atlanta Rapid Transit Authority (MARTA) will review all of its contract and procurement activities on an annual basis to determine any area where DBE over-concentration exists, if any. This will be done by the Manager of Economic Opportunity and the findings of the review will be reported to the Executive Director, Diversity and Equal Opportunity for required action.

This will be done as an integral part of the Authority's DBE program and this annual review of DBE over-concentration will be considered during the triennial establishment of DBE goals. Where over-concentration of DBE participation exists, no DBE goal will be established for the areas identified. In addition, DBEs in areas of concentration will be encouraged to consider other areas of service where DBE availability is minuscule or non-existent. The specific place where this process will be denoted is in the DBE Program Triennial Update.

FTA Response: While no deficiency was listed at the time of the issuance of the draft report, FTA finds it necessary to open a finding in this final report. The overconcentration of DBE firms in certain work categories has been an issue continuously raised by skeptics of the DBE program. Regular analysis of contracting is necessary to ensure that the DBE program is being implemented in a manner that does not bear an undue burden on non-DBE firms. In order to close this finding, MARTA must submit to FTA by December 31, 2012 the overconcentration analysis conducted for FFY 2012.

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). MARTA 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. However, MARTA provided extensive information in its DBE program and attachments of its commitment to assisting DBEs become successful in MARTA and DOT-assisted contracts and procurements.

The DBE program includes a Business Development Program section outlining various outreach programs and technical assistance provided to DBEs through partnerships developed in the Greater Atlanta Area. MARTA has partnerships with the Greater Atlanta Economic Alliance, Minority Business Development Agency, Women's Economic Development Agency and the Georgia Minority Supplier Development Council as identified in their DBE program. Mr. Diamond and his department have conducted presentations on Business Intelligence, Doing Business with MARTA and other topics to inform small businesses of common pitfalls. MARTA also provided the review team flyers and information on collaborative efforts with partner organizations on various areas of business development.

8. Determining/ Meeting Goals

A) Calculation

Basic Requirement: (49 CFR Part 26.45) To begin the goal setting process, the recipient must first develop a base figure for the relative availability of DBEs. After the base figure is achieved, all other relative evidence must be considered in an adjustment of this figure to match the needs of the specific DBE community.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for calculation of goal. MARTA provided goal methodologies for fiscal years 2007, 2008, 2009 and 2010 of 29.18 percent, 29.67 percent, 27.19 percent and 26.25 percent respectively. The USDOT changed the goal methodology submissions from an annual to a triennial cycle. Based on the current schedule determined by FTA, MARTA's next goal submission is due by August 1, 2011 and will be for the three-year period covering FYs 2012-2014. Until such time, MARTA FY 2010 goal remains in effect.

MARTA gave explicit detail in their DBE program of the method used to calculate their overall DBE goals for the past fiscal years. The method outlined in the DBE program was determined by the review team to be consistent throughout all submission from 2007 to 2010 and in accordance to the DBE regulation and tips for goal setting. MARTA also included approval letters from FTA's Region IV, Regional Civil Rights Officer, Frank Billue.

Step 1: Determining the Base Figure

In its FY 2010 goal methodology, MARTA described its Step One process with an attempt to come up with actual measurements of relative availability of DBEs to perform the types of contracts, both prime and sub, that they intended to let. Mr. Diamond indicated to the review team that DEO uses bidders list information to assist in the goal setting process. The methodology stated that MARTA's availability data obtained in June 2009 reflected the most current number of all firms ready, willing and able to compete for Federal DOT-assisted contracting within specific categories. These categories are aligned by DEO staff with appropriate corresponding North American Industry Classification System (NAICS) codes. MARTA DEO staff then weighted categories proportionate to the funding amounts to calculate a based figure of 40.51 percent.

Step 2: Adjusting the Base Figure

After establishing the base figure of DBE availability, MARTA examined other evidence pertinent to establishing an overall goal. DEO staff considered DBE participation for the past several years and determined a median number of 22 percent. MARTA noted in the methodology that anticipated DBE participation had been achieved unconsecutively three

times over the past seven years. Adjustments were made to the Step One base figure by averaging 40.51 percent and 22 percent, totaling 31.25 percent. MARTA further adjusted this number with consideration in variances of 2 percent to 5 percent in the four years the overall goal was not achieved and performance to date in FY 2009 to conclude that 26.25 percent was more appropriate.

B) Public Participation

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the FTA requirement for Public Participation and Outreach. However, an advisory comment was made regarding the timing of goal advertisement. The DBE regulations requires, “a published notice announcing your proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at your principal office for 30 days following the date of the notice, and informing the public that you and the Department will accept comments on the goals for 45 days from the date of the notice. The notice must include addresses to which comments may be sent, and you must publish it in general circulation media and available minority-focused media and trade association publications.”

The review team analyzed the past three goal submissions of MARTA for compliance with publication requirements. The FY 2008 goal methodology included press release information for the goal methodology and inspection to run in the Atlanta Journal – Constitution on July 1, 2007. With annual goals due on August 1st, there was insufficient time to receive comments for 45 days from the date of notice. MARTA published the FY 2009 goal on July 2, 2008. They did mention however in the goal submission letter that the goal was advertised 17 days behind schedule and comments would be received up until August 18, 2008. MARTA also stated in the letter that if they received pertinent information to change the goal they would amend the goal documentation and resubmit it to the FTA Region IV Civil Rights Officer by August 21, 2008. The review team could not determine from the FY 2010 goal methodology packet when the advertisement period commenced.

MARTA indicated in the FY 2010 goal submission that their methodology was shared with 12 members of the Metropolitan Atlanta Interagency Association of Equal Opportunity Officers organization for comment. This was supplemented by a survey of thirty-five small business & technical assistance organizations, trade associations and changers of commerce that MARTA says it coordinates with throughout the year when they participate in procurement and trade fairs, workshops and sponsored one-on-one technical assistance meetings.

As part of their outreach efforts, MARTA noted in the goal methodology the issuance of a monthly DBE newsletter called the MARTA Connector. This newsletter has a distribution of over 1,500 interested parties highlighting management and technical assistance information. The newsletter also encourages DBEs to pursue upcoming contracts, informs them of regulatory requirements, and apprises them of upcoming events of interest.

Grantee Response: MARTA will utilize the content of its proposed budget to develop its three year DBE goal. The proposed budget is usually issued in May or June. Two (2) public meetings will be scheduled so that certified DBEs, and other agencies can offer comments on the proposed three year DBE goal. In addition, the proposed DBE goal will be sent via email to all certified DBEs in the GUCP DBE Directory. All of this will be done so that any and all entities will have more than 45 days to comment.

FTA Response: FTA concurs with this response. To close this finding by October 30, 2012 MARTA must submit as an update within its DBE goal methodology, a summary of the comments received during the consultation portion of MARTA's FFY 2012 – 2014 goal setting process and an assessment as to whether the comments were or were not used to adjust the overall goal.

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. MARTA included procedures for verification that each transit vehicle manufacturer (TVM) has complied with the regulations. These procedures indicated that as a condition of being authorized to bid or propose on FTA-assisted TVM procurements, each TVM will certify that it has submitted the required annual percentage overall goal to the FTA; and FTA has either approved its annual percentage overall goal or has not disapproved the goal.

A distributor or dealer must provide a copy of documentation which verifies that the manufacturer has complied with the provisions of 49 CFR Parts 23 and 26 for any vehicle the distributor or dealer seeks to provide. MARTA made provisions in its bid specifications requiring this information from TVMs, distributors, or dealers, as a condition of permission to bid. The review team verified this process through review of the procurement of New Style, Low Floor CNG, Hybrid and Diesel Buses (CP B13282). MARTA collected the DBE program and most recent FTA goal approval letter from the low bidder, New Flyer of America. The review team recommended that MARTA also document that they reviewed FTA's website for an approved list of TVMs that are in compliance with the DBE regulations.

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 was made. The review team examined goal methodology submittals from FY 2007, FY 2008, FY 2009 and FY 2010 to determine MARTA's approach concerning race neutral DBE participation. From fiscal years 2007 to 2009, MARTA's race neutral projection for their overall goals was two percent every year. Despite a number of race neutral efforts included in the goal setting methodology, MARTA noted that maximum race neutral attainment had only been 1 percent over the previous several years. To aggressively address their race neutral goals, MARTA indicated that contractors would be encouraged to use DBEs on all contracts that did not have a DBE goal at all pre-bid conference, in applicable bid solicitation documents and through the identification of DBE technical assistance organizations for the prime contractor's referral.

The race neutral projection was increased to nine percent in MARTA's FY 2010 goal setting methodology. Although MARTA indicated again that race neutral participation was one percent the previous years, the projection was increased by seven percentage points. The race neutral efforts were slated to significantly increase by placing more emphasis on race neutral "requirements" in contracts and procurements. MARTA also noted in the FY 2010 goal methodology that NAICS codes would be highlighted in contracts and prime contractors would be encouraged to more aggressively expand their best efforts. While it is good for MARTA to encourage the use of DBEs through race neutral means, there should be no race neutral "requirements" or for contractors to show good faith efforts on contracts with no DBE goals. MARTA is cautioned against using race neutral requirements in contracts, as it may give the appearance of being a race conscious contract.

The review team noted that MARTA should review the information in the semi-annual reporting forms for accuracy when examining the DBE participation rate on past contracting activity. The reporting forms had a number of completion errors. Therefore, the review team could not verify the accuracy of the race neutral attainments in the semi-annual reports. (See section 12.C. Record Keeping and Enforcements-Reporting).

Advisory Comment: MARTA is advised to provide detailed analysis on the race-neutral portion projection of their overall goal in their upcoming three-year submission, which is due by August 1, 2011.

Grantee Response: MARTA will no longer use race neutral language "requirements" or for contractors to show good faith efforts on contracts with no DBE goals.

FTA Response: FTA partially concurs with MARTA's response. MARTA's FFY 2012 – 2014 DBE goal methodology relies heavily on the use of race neutral requirements/contract goals for DBE participation to substantiate its race conscious/race neutral split. MARTA has accepted FTA's determination that contract goals are a race conscious means of facilitating DBE participation; however MARTA has not adjusted its race conscious/race neutral background based on this information. FTA is opening a deficiency finding in this area. In order to close this finding, by October 30, 2012,

MARTA must submit to FTA an updated FFY 2012 – 2014 DBE goal methodology which contains a newly substantiated race conscious/race neutral split.

E) Race Conscious DBE Participation

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for race conscious participation overall and contract goals. However, an advisory comment was made regarding pre-determined race conscious projections in MARTA's DBE program. MARTA's DBE program notes that *while the race neutral approach will always be used to address at least 1/4 of the annual percentage at a minimum, the Authority will look at the sum total of all of the projected project activities from a long range and short range planning vantage point. MARTA indicates this will be done to ensure that they maximize windows of opportunity to capture DBE participation through race conscious means that would be missed otherwise, when the race neutral approach has not worked. As MARTA exceeds that aspect of the annual overall DBE goal that is targeted for the race conscious approach, an increased emphasis will be placed on the achievements and maintenance of the goal through race neutral means until there is a decline below the annual overall DBE goal target. At that time, the use of the race conscious approach will be instituted to bring the Authority back up to the established DBE goal level. Accordingly, MARTA will have a race neutral and race conscious overall DBE goal split of 1/4 of the goal race neutral and 3/4 of the goal race conscious. Where the DBE goal can be achieved at a higher percentage using race neutral means, this approach will be aggressively pursued.* The review team advises MARTA to remove language used in the DBE program regarding maximizing race conscious efforts at any level or purpose and rely on empirical data to support goal split projections.

MARTA provided an analysis for establishing a contract goal for the Roof Replacement of MARTA Annex Building contract. The process includes the DBE Analyst completing and providing the Manager of Economic Opportunity a Review of Contract Offering check list document. The check list included specific information on the contract details, engineer's estimate and DBE availability leading to the contract goal of 15 percent for the project.

Advisory Comment: MARTA is advised to provide detailed analysis on the race-conscious portion projection of their overall goal in their upcoming three-year submission, which is due by August 1, 2011. This would be in lieu of the language from their Program Plan (highlighted above) which appears to predetermine what the race neutral and race conscious split will be for their overall goal.

Grantee Response: MARTA did not have the DBE Review Report prior to submission of 2012-2014 DBE goals. However, we commit to providing a detailed analysis of the race-conscious portion projection of the overall goal in the 2015-2017 goal submission.

FTA Response: The creation of a race conscious/race neutral split is an exceedingly important component of any DBE goal methodology; the RC/RN split is one of the key factors in ensuring that Part 26 is being implemented in a narrowly tailored manner. Subsequent to the review MARTA submitted its goal methodology for FFYs 2012 – 2014. MARTA’s goal methodology states:

“Because the Race Neutral approach to acquiring DBE participation is an important component of the goal setting process, MARTA will significantly increase its effort in this vain. This will be done by placing more emphasis on Race Neutral requirements in contracts and procurements. In addition, the Authority will highlight NAICS codes called for in contracts and encourage prime contractors to more aggressively expand their Best Efforts. This will be done because MARTA’s maximum obtainment on Race Neutral participation has only been 2% to 3# over the previous several years for DBE utilization, when contract specific goals for generally grouped categories of activity are not applied. Notwithstanding the above, the Authority will meet its overall three year DBE goal of 27.75% percent for contracting opportunities in the following manner:

5% by race neutral means
22.75% by race conscious means

The above reflects a doubling of our efforts to achieve DBE participation through Race Neutral means.”

Based on MARTA’s low rates of participation using race neutral means, and the fact that “race neutral requirements” are not actually Race Neutral methods, MARTA’s intended RC/RN split has not been properly substantiated. Therefore FTA is opening a finding in this area. To close this finding, by October 30, 2012, MARTA must re-examine and document a new RC/RN split for its FFYs 2012 – 2014 DBE goal.

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, a deficiency was found with the requirements for good faith efforts. MARTA requires the apparent low bidder to increase DBE participation prior to award even if GFEs are shown.

MARTA’s DBE program and procedures outline the process concerning good faith efforts. The November 2010 procedures state that when a contract goal has been established on a DOT-assisted contract, a bidder/proponent must, in order to be responsible and/or responsive, make a good faith effort to meet the goal. The goal can be made in one of two ways; to meet the goal or document adequate good faith efforts in the event the goal is not met. Mr. Diamond explained to the review team that DBE is a condition of both responsiveness and responsibility in the contracting process. The review team suggests that MARTA select if DBE requirements are part of responsiveness or responsibility in the contracting process and draft procedures reflecting this distinction.

The review team examined a letter dated January 20, 2009, written by one of MARTA's DBE Analyst to Cooper and Company General Contractors, Inc. The Analyst indicated in the letter that the contractor's schedule B of DBE participation for CP B13049 Stonecrest Park and Ride Lot was received with only 20.04 percent participation. The Analyst submitted that the contractor did not meet MARTA's DBE goal requirement of 30 percent on the contract and was therefore not acceptable to the office. The contractor was instructed to increase the participation by a total of 9.6 percentage points in order to meet the 30 percent contract goal requirement. The contractor responded in a letter dated January 22, 2009, explaining that their original bid proposal contained DBE participation from 3 firms equaling 8.55 percent of the bid amount. The contractor stated they worked after the bid to determine if any of the DBE vendors were able to provide additional work and as a result increased the participation to 20.04 percent of the bid amount. The contractor also provided documentation to show their efforts taken to provide DBE participation on the contract. The contractor finally increased their DBE commitment to approximately 27 percent by the March 2009 presentation to MARTA's Board for contract award. The review team advised that this process could welcome bid protests from bidders with higher bids and more DBE participation since the contract was awarded based on a low bidder system. It could also make it appear that the DBE goal is in actuality a quota.

It is acknowledged that MARTA did submit additional information on this topic subsequent to the site visit. This information was not incorporated into the draft report, but will be considered during MARTA's official response to the draft report.

An additional issue that may impact MARTA's GFE determinations is discussed in the *Pre-Certification* portion of the *Certification* section in this report. It appears that MARTA would allow the counting of a firm not certified at the time of the bid opening towards its GFE determination.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the Region IV Civil Rights Officer a plan and schedule for ensuring that good faith efforts are being made adequately and are based on the actions a bidder took during the bidding process. This includes ensuring that that if a bidder does document and submit adequate good faith efforts, that award of the contract is not denied on the basis that the bidder failed to meet the goal. It also includes re-examining the issue regarding "pre-certifications" noted in the *Certification* section of this report.

Grantee Response: MARTA conducts a GFE review to determine responsiveness or responsibility by utilizing the attached GFE forms and certification. This will be included in the EEO/DBE Bid Specifications for all contracts. It reflects a well defined process that will have to be adhered to by the contractors that do not fully meet defined DBE contract goals.

FTA Response: FTA partially concurs with this response.

G) Counting DBE Participation

Basic Requirement: (49 CFR Part 26.55) The recipient must count only the value of work actually performed by the DBE toward actual DBE goals.

Discussion: During this DBE Compliance Review, deficiencies were found with the requirements for counting DBE participation. MARTA needs to verify that DBEs in joint ventures for professional services contracts are performing a commercially useful function.

The review team chose two contracts from the FTA funded contracts list provide by MARTA. The first contract was a joint venture, MATT (Metro Atlanta Transit Team), responsible for General Engineering and Consulting Services for Building and Structures in the amount of \$14,648,000. Gude Management Group, LLC, a DBE firm, has 15 percent ownership interest in the JV. The MATT proposal-contract listed Tom Walker, a Gude employee, as Project Control Lead. MARTA's FTA funded contract spreadsheet listed Gude's scope of work as Project Controls & Construction Management. Mr. Walker contacted the review team leader prior to the on-site review to inform that another Gude representative would attend the scheduled meeting at MARTA. Mr. Walker indicated that he is responsible for maintaining and reporting the affirmative action requirements on the project. The review team secured a copy of the MATT joint venture agreement from MATT representatives during the review. The review team did not find an analysis or commercially useful function review by MARTA to determine the clearly defined portion of work that Gude would provide on the contract.

The second contract reviewed was also a joint venture with LTK/PTG/S.L. King JV for a Rail Car Maintenance and Rehab Oversight Consultant contract in the amount of \$3,927,338. S.L. King was the DBE firm participating in the joint venture on the project. MARTA's contract compliance file did not contain any analysis or commercially useful function review to determine if the DBE performed a clearly defined portion of work. The review team also did not find a joint venture agreement in the compliance file.

MARTA's DBE program states when a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals. MARTA's DBE program and counting provisions define what constitutes commercially useful function and how they are to be evaluated.

Mr. Diamond informed the review team that MARTA rarely had joint ventures participate on professional services contracts and did not have the monitoring controls in place as for construction projects (see Section 12, Record Keeping and Enforcements-Monitoring).

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the Region IV Civil Rights Officer a plan and schedule for instituting a mechanism to appropriately count joint venture DBE participation and monitor professional service contracts on all FTA funded projects.

Grantee Response: MARTA has revised its Joint Venture Disclosure form. This form will be made a permanent and integral part of Construction, A/E, Equipment, Installation, Supply and Services and Non-Construction EEO/DBE Bid Specifications. This will

ensure that a more detailed depiction of DBE involvement in Joint Ventures is clearly provided along with the bid/proposal submission. (**Attachment B**)

FTA Response: FTA concurs with this response. This finding is now closed.

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 MARTA was found during the site visit.

9. Required Contract Provisions

A) Contract Assurance

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

Discussion: During this DBE Compliance Review, deficiencies were found with the requirements for Contract Assurances. The non-discrimination clause included in contracts does not reference the current language required in the regulations. MARTA's DBE program contains partial non-discrimination language in 26.13 for federal financial assistance agreements but does not reference the required assurance language to be included in all contracts and subcontracts.

The review team examined several contracts let by MARTA over the past few years. Each of the prime contracts reviewed included DBE Special Conditions. However, the DBE Special Conditions referenced Part 23 and contained a slightly modified version of the contract assurance language of 26.13. These contracts included the MATT joint venture for contract P5420 and LTK/PTG/SL King joint venture for contract C200004967. There was also no evidence that the nondiscrimination clause was passed on in subcontracts from prime contractors to subcontractors.

MARTA's DEO office provided updated DBE provisions (revised 12/2008) for construction and non-construction contracts at the conclusion of the review. Upon review of these provisions, the deficiency remains. The provisions reference Parts 23 and 26 but still contain outdated language from 49 CFR Part 23, ensuring that DBEs have maximum opportunity to participate in MARTA contracts and procurements. The contract assurance language remained unchanged from previous contracts examined by the review team.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the Region IV Civil Rights Officer a plan and schedule for ensuring that the appropriate language of 26.13 has been included in the DBE program and that these assurances are included in all contracts, purchase orders, and subcontracts.

Grantee Response: MARTA submits the document: *MARTA Equal Employment Opportunity and Disadvantaged Business Enterprise Requirements for Negotiated Non-Construction Contracts and Agreements* in response to this finding. The section on Contract Assurance (item # 13 on page 16) contains the current contract assurance clause language found in §26.13.

FTA Response: FTA partially concurs with this response. While MARTA has addressed the contract assurance language as required by §26.13(b) by including it verbatim in this document, the document is intended for “Non-Construction Contracts and Agreements” alone, whereas this requirement applies to construction contracts as well. Page 6 of the document still contains the language “disadvantaged business enterprises have the maximum opportunity to participate in the contract” which is synonymous with the former Part 23 language rather than the current Part 26’s objective of “leveling the playing field.” MARTA has not directly addressed the requirement to verify that the contract assurance clause is included in sub contracts. In a related section of the document, item # 3 of section C, *Miscellaneous Requirements*, states that prime contractors “will be required to submit signed contract agreements with all subcontractors they will use.” Collecting the sub-contracting agreements is the first step in verification. The document does not identify a mechanism for tracking whether the sub contracts have been submitted, or reviewed to ensure that the proper clauses are contained within. To close this finding, by October 30, 2012, MARTA must submit to FTA:

- evidence that it has updated its DBE program and contract governing documents to reflect the proper contract assurance clause language,
- evidence that language related to providing “the maximum opportunity” is removed from the DBE program and all contract governing documents and
- an update within the DBE program that details who is responsible for ensuring that the contract assurance clause is included in sub contracts and sub recipient agreements
- an update within the DBE program that describes how compliance with this requirement is tracked.

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 the requirements for Prompt Payment and Return of Retainage.

Prompt Payment

MARTA must ensure that prompt payment and return of retainage language appears in all contracts and subcontracts and that prompt payment and return of retainage clauses included in all contracts are consistent with MARTA’s DBE program. MARTA’s DBE program advises that the policies concerning prompt payment are applicable to all prime contractors entering into subcontractor agreements. According to their DBE Program, each prime contractor agrees to pay all of its subcontractors no later than five days after

receipt of each payment from MARTA. The prime contract for the MATT joint venture (contract P5420) states 14 days. The LTK/PTG/SL King joint venture contract C200004967 did not contain a prompt payment clause.

Mr. Diamond explained that the MATT and LTK contracts originally were procured in 2007 and 2008 while MARTA was experimenting with the prompt payment timeframe. The updated DBE Special Conditions provided to the review team at the conclusion of the review contained a 5 day prompt payment clause.

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.

MARTA's prompt payment procedure issued November 2008 states that contractors must return retainage to any subcontractor within five days of satisfactory completion of work. MARTA states they will hold retainage from the prime contractor but make prompt and regular inspections and approvals of the primes work at various stages of the project. The prime in turn will be required to promptly pay all retainage owed to the subcontractor for satisfactory completion of approved work.

MARTA's prompt payment procedures also include penalties for non-compliance. It states, "All payments due from a prime contractor and not made within the specified time of five (5) days bear interest at the rate of 1 percent per month on the unpaid balance. The subcontractor must invoice the prime contractor for any interest accrued in order to receive the interest payment."

The DBE special conditions attached to the contracts for MATT and LTK/PTG/SL King did not contain provisions for the return of retention. However, no retainage was withheld for either MATT or LTK/PTG/SL King. Only one subcontract reviewed, New South/Circle D. joint venture (Surveying RFP P19232) included a return of retainage clause that states that 10 percent retainage would be withheld; however, this subcontract did not contain provisions for the return of retainage or the incremental acceptance for the satisfactory completion of work.

The updated DBE special conditions (revised December 2008) indicate that the contractor must return any retainage payment to those subcontractors within 14 days after the subcontractor's work related to this contract is satisfactorily completed; or any payments after incremental acceptance of the subcontractor's work by MARTA and contractor's receipt of the partial retainage payment related to the subcontractor's work.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the Region IV Civil Rights Officer a plan and schedule for

- inclusion of consistent language regarding prompt payment in the DBE program plan and all prime contracts,
- requiring that prompt payment language is included in subcontracts,
- including appropriate contract language and administrative procedures for prompt return of retainage in all prime and subcontracts, and
- including a mechanism for monitoring prompt payment and return of retainage.

Grantee Response: MARTA submits the document: *MARTA Equal Employment Opportunity and Disadvantaged Business Enterprise Requirements for Negotiated Non-Construction Contracts and Agreements* in response to this finding. Prompt payment and retainage is addressed in Attachment C; items #4 and 5 on page 11 through 12.

FTA Response: FTA partially concurs with MARTA's submission. Similar to the previous section on the contract assurance clause, MARTA has updated one aspect of its program to reflect their current prompt payment and return of retainage requirements; however MARTA has not demonstrated how these requirements will apply across all of the FTA-assisted opportunities such as construction contracts. MARTA submitted an additional document, *Onsite Contract Monitoring and Compliance Review Procedures for Construction and Non-Construction Contracts*, which addresses the manner in which prompt payment and return of retainage will be monitored. To close this deficiency, by October 30, 2012, MARTA must reconcile its DBE program with the various procurement governing documents to reflect compliance with prompt payment and return of retainage requirements of the DBE program.

C) Legal Remedies

Basic Requirements: (49 CFR Part 26.37) Recipients must implement appropriate mechanisms to ensure compliance by all participants, applying legal and contract remedies under Federal, state and local law.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirement for legal remedies. Legal remedies for non-compliance were included in contracts reviewed. There were no issues of non-compliance. MARTA's DBE program outlines the process which should be followed if a contractor or subcontractor is found non-compliant with the provisions of their DBE program. Sanctions can include withholding progress payments in whole or in part, denial to the contractor or subcontractor of the right to participate in any future contracts awarded by MARTA and other actions as appropriate, within the discretion of MARTA. MARTA's legal representative indicated during the review that they have not had any issues of DBE program non-compliance.

10. Certification Standards

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

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

The Georgia UCP certifying members consists of Georgia DOT (GDOT) and MARTA. MARTA’s certification procedures indicate that GDOT is responsible for serving as the independent objective source that reviews all recommended certification denials to ensure that the requirements of 49 CFR parts 23 and 26 have been properly met. MARTA completes recommendations for certification and re-certification determinations and forwards these to GDOT for concurrence. All correspondence regarding certification status is sent by GDOT on behalf of the GA UCP.

The burden of proof requirements in MARTA’s certification procedure state that if after reviewing the signed notarized statement of membership in a presumptively disadvantaged group, there are well founded reasons to questions the individual’s claim of membership in that group, individuals will be required to present additional evidence that he or she is a member of the group. Individuals will be provided a written explanation of the reasons for questioning his or her group membership and a written request for additional evidence. Special care will be taken to ensure that MARTA does not impose a disproportionate burden on members of any particular designated group.

11. Certification Procedures

Basic Requirements: (49 CFR Part 26.83) The recipient must determine the eligibility of firms as DBEs consistent with the standards of Subpart D of the regulations. The recipient’s review must include performing an on-site visit and analyzing the proper documentation.

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

The review team requested the following certification files to review for adherence to DBE certification procedures and MARTA’s standards and procedures:

Name	Listed in Directory	Accurate NAICS	Onsite Visit	PNW	Tax Returns	Annual Affidavit	Size Standards	Removal Process	Denial
Graphic Ventures	Yes	Yes	Yes	Yes	Yes	N/A	Yes	N/A	N/A
Gude Management	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N/A	N/A
Red Bridge Consulting	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N/A	N/A
S.L. King & Associates	Yes(MARTA) (removal)	Yes	Yes	Yes	Yes	Yes	Yes	No	N/A
S.L. King Technologies	Yes (GDOT)	Yes	Yes	Yes	Yes	Yes	Yes	N/A	N/A
Smith Pipeline	No (denial)	N/A	Yes	Yes	Yes	N/A (denial)	N/A	No	Yes

Pre-certifications

The review team observed certification applications included in bid packages and email correspondence indicating that MARTA would process certification applications and count that participation towards a contract goal subsequent to bid opening. Mr. Diamond confirmed that MARTA has processed certification applications for firms seeking to participate on a contract as a DBE after the bid opening but prior to prime contract award, only if it is completed in the normal certification timeframe.

The DBE regulations state in part 26.81 the all certifications by UCPs shall be pre-certifications: i.e. certification that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

It appeared that MARTA has interpreted the word “offers” in part 26.81 as an “offer” or “award” of a contract. That interpretation is that you can count DBE participation as long as the certification is complete by the time of prime contract award and not the due date of bid. The review team advised MARTA that the term “offers” refers to proposals and would be synonymous with “bids.”

The review team discussed with MARTA their interpretation of parts 26.55 and 26.81 regarding counting DBE participation and pre-certification, respectively. MARTA is also asked to address this in the *Good Faith Efforts* section of this report. The DBELO stated that he has referred to the USDOT Official Questions & Answers (Q&A’s) for interpretation of the regulations at times. The review team referenced the Q&A’s regarding pre-certifications and counting DBE participation, which state the following:

Q. 26.53(a); 26.71(n); 26.81(c)

Can a recipient count DBE participation for a firm toward contract and overall goals if the firm has not been certified to perform the particular type of work that it intends to perform on a given contract?

** No.*

** The DBE rule requires all certification actions, including those expanding the types of work a firm is authorized to perform as a DBE, to be made final before the date on which bidders or offerors on a prime contract must respond to a solicitation. See 49 CFR 26.81(c). The rule refers to such timely certification actions as “pre-certifications.”*

** If a DBE firm has not been certified in a timely manner for the type of work it is intending to perform on a given contract, then recipients cannot count the firm’s participation on that contract toward DBE contract or overall goals.*

Q. Section 26.55(f); 26.81(c)

IF A DBE FIRM IS CERTIFIED AFTER THE EXECUTION OF A PRIME CONTRACT, ARE THERE ANY CIRCUMSTANCES IN WHICH ITS USE ON THE CONTRACT CAN BE COUNTED TOWARD DBE GOALS? (Posted - 6/18/08)

*A. * Section 26.55(f) provides that if “a firm is not currently certified as a DBE...at the time of the execution of the contract, do not count the firm’s participation toward any DBE goals...”*

** To receive DBE credit toward meeting a contract goal in the context of the prime contract award process, a DBE firm must be certified before the due date for bids or offers on the prime contract. 49 CFR 26.81(c).*

** There may be situations after the award of the prime contract, however, in which it is appropriate to count DBE credit for the use of a DBE subcontractor certified after the prime contract is executed. To be eligible to obtain DBE credit, a DBE subcontractor must be certified before the subcontract on which it is working is executed.*

Certification Expirations

The DBE regulations state that once you have certified a DBE, it shall remain certified for a period of at least three years unless and until the certification has been removed through procedures of part 26.87. MARTA's understanding was that certification lasted three years and the DBE must re-apply or re-certify to remain a DBE in the program.

Q. Section 26.83 (h)

MUST RECIPIENTS RECERTIFY FIRMS EVERY THREE YEARS?

A. *No. The rule does not say that recipients must recertify firms every three years. It says that recipients cannot require a firm to go through a recertification process (i.e., involving a reapplication for certification) more frequently than once every three years.*

Q. WHAT ACTIONS DOES A RECIPIENT TAKE AFTER IT REQUESTS A CURRENTLY CERTIFIED FIRM TO REAPPLY FOR CERTIFICATION?

A. *When a recipient requires a currently certified firm to reapply for certification, the recipient should not treat the firm as though it were a new applicant.*

That is, while the firm must provide all requested information, the firm does not bear the burden of proving its eligibility, as it would upon initial application.

If the recipient determines, based on the information in the reapplication for certification, that there is reasonable cause to believe that the firm is no longer an eligible DBE, the recipient would begin a 26.87 proceeding to remove the firm's eligibility.

If the firm does not provide the requested information in a timely manner, the recipient could begin a 26.87 proceeding to remove the firm's eligibility on the ground of failure to cooperate (see 26.109(c)).

Based on MARTA's interpretation of the certification procedures, the review team requested additional files to examine the DBE re-certification and removal process. The review team discovered that Analytical Environmental Services, Inc. was a previously-certified DBE that was denied certification upon re-certification due to determining that the business was not independent. The firm had been certified dating back to approximately 2003. MARTA sent a denial memorandum to GDOT on May 6, 2010, and GDOT sent a denial letter to the firm on June 8, 2010, outlining the reasons for denial as if it was a new applicant. The firm's certification should have been removed following part 26.87 removal of certification procedures.

Removal Process

The review team examined the certification removal letter for M.A.R. Trucking. GDOT sent a letter to the firm on August 12, 2010, indicating that the EEO office had attempted to obtain the required information through contracts on January 8, and February 19, 2010. The applicant failed to provide re-certification/annual update information and was de-

certified. GDOT indicated that the decision may be appealed by following the GDOT de-certification and denial appeal procedures. Subsequently, GDOT sent a letter to the firm on September 15, 2010, advising that M.A.R. Trucking had been placed back on the DBE directory effective September 3, 2010. GA UCP scheduled an administrative de-certification hearing for September 30, 2010. MARTA advised the review team on December 6, 2010, that the firm's status was pending as per GDOT. It appeared that firms are not given an opportunity for an informal hearing as required by the DBE regulations until after the firm's certification has been removed. The review team did not find in the letters examined that GA UCP gave the firm an opportunity for an informal hearing in the proposal to remove eligibility notices sent by GDOT.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the Region IV Civil Rights Officer a plan and schedule for ensuring that DBE procedures are followed for:

- pre-certifications,
- certification terms, and
- the informal hearing removal process.

Grantee Response: MARTA will utilize the UCP DBE Directory administered by GDOT as the directory of record; and include a link on MARTA's web site that will direct all inquiries on certified DBEs to the UCP.

MARTA will ensure that only firms certified as a DBE at the time of bid closing will be utilized towards DBE participation on contracts with goals.

MARTA will follow the process of removing firms from certification eligibility in accordance with 26.87; and procedures established by the GUCP. (**Attachment D**).

Hearing. When GUCP notifies a firm that there is reasonable cause to remove its eligibility, the GUCP will give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

GUCP will maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing.

The firm may elect to present information and arguments in writing, without going to a hearing.

FTA Response: FTA partially concurs with this response. Subsequent to this review, FTA conducted a Unified Certification Program (UCP) review of the Georgia UCP, a deficiency finding was issued for the state of Georgia's process of conducting informal hearings. Georgia UCP's response estimates that items related to the removal of firms will be completed by September 30, 2012. To close this deficiency, by October 30, 2012 MARTA must update their DBE program to reflect the UCP's changes in regards to informal hearings.

12. Record Keeping and Enforcements

Basic Requirement: (49 CFR Part 26.11, 26.55) The recipient must provide data about its DBE program to the FTA on a regular basis. This information must include monitoring of DBE participation on projects through payments made to DBE firms for work performed. The recipient must maintain a bidders list complete with subcontractor firm names, addresses, DBE status, age of firm, and annual gross receipts of the firm.

Discussion: During this DBE Compliance Review, deficiencies were found in the areas of monitoring and reporting.

Bidders List

MARTA provided procedures that outlined the bidders list process. The procedures were said to be *offered as guidance on the preparation and maintenance of a detailed, informational and descriptive bidders list, which can be used in the development and refinement of the Authority's DBE program. The said bidders list will consist of information about all DBE and non-DBE firms that bid or quote as either a prime and/or subcontractor on DOT assisted contracts.*

MARTA maintains a bidders list in spreadsheets in a binder. They informed the review team this information is used to assist in goal setting. The list contained all required information to meet the requirements of part 26.11. The gross receipts fields from the binder list of firms were usually blank. MARTA Bidders List procedures issued November 2010 asks for a range of gross receipts in lieu of asking for exact figures to increase responses. MARTA may want to consider automation of the bidders list or merging with the Procurement Department's vendors list for easier manipulation of data.

Monitoring

MARTA provided Contractor EEO/DBE Monitoring & Compliance procedures dated 11/2010. The procedure outlined detailed procedures of the responsibilities of DEO staff for monitoring EEO and DBE compliance from all potential contractors, subcontractors, vendors, supplies, consultants, lessors, and all others doing business with MARTA. Procedures were written for construction and non-construction contractors as flexible courses of action available to the DEO. The procedures also included forms, such as a mail merge letters to contractors for submitting a quarterly reports, prime contractor quarterly reports on DBE subcontracts, prime contractor reports on suppliers, vendors and service firms, minority-owned banking, EEO forms, and prompt payment verification forms.

MARTA did not have any construction projects for the fiscal years requested by the review team. The review team was informed that no construction is projected in MARTA's comprehensive plan over the next five years. The review team examined DEO compliance files for the two professional service joint venture contracts (MATT and LTK). The DEO staff informed the review team that they obtain quarterly reports and attend weekly status report meetings for professional services contracts. Even though MARTA had very detailed procedures, the compliance files did not contain forms to demonstrate implementation of procedures outlined on a routine basis. In addition, joint ventures usually require an initial and ongoing analysis to determine the clearly

defined portion of work for the DBE firm. Documentation of these analysis reviews were also absent from DEO staff compliance files.

It appeared that DEO staff followed their written procedures and used applicable forms on some of the older construction contracts let by MARTA. The review team suggested that MARTA consider implementing the same procedures and forms for professional service contracts as those used on construction contracts, especially given the current forecast of limited construction for the upcoming years.

Reporting

MARTA provided semi-annual reports for FY 2007, FY 2008, FY 2009, and first half of 2010. Semi-annual reports are completed by the DEO Manager, Antoine Smith. Ms. Smith provided the review team requested back-up documentation for FY 2009 and first half of FY 2010. The back-up documentation for data contained in the reports was maintained on a spreadsheet on 11" x 17" paper. Ms. Smith advised the review team that the contract data is collected from the DBE Analyst and manually input into fields in the spreadsheet. The fields contained all the required elements to accurately complete the semi-annual report. However, the data transfer from the spreadsheet to the semi-annual report was incorrect. The review team suggested that MARTA consider the feasibility of incorporating software or automation of the contract data for completion of the semi-annual reports.

The following areas were identified with MARTA as areas that need to be correctly reported on their semi-annual reports:

- **Federal share** for all dollars reported. The back-up spreadsheet indicated the total amount and federal share of contracts and payment dollars. However, the total share and not only the federal share was reported on the semi-annual reports.
- **Row 9**, Subcontracts committed/awarded this period. Cells 9A and 9C; 9B and 9D both had the same numbers in the semi-annual reports. This was because MARTA was not including non-DBE subcontractors also in cells 9A and 9B in reports.
- **Rows 10 and 11**, column H MARTA reported cumulative DBE numbers and dollars instead of only the reporting period. FY 2009 June report cell 9C was \$98,000 and cell 11H was \$28,542,776. FY 2009 December report cell 9C was \$825,098 and cell 11H was \$34,289,327. The cells 9C and 11H were both the same in the FY 2010 June report.
- **Row 13, and row 9G** included no race neutral participation. MARTA's goal setting methodologies indicated that race neutral achievements were approximately one percent for the past several years.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the Region IV Civil Rights Officer a plan and schedule for ensuring that:

- effective monitoring mechanisms are in place and performed by staff to monitor work on professional services contracts, and
- procedures are implemented for accurate and complete collection and reporting of data for semi-annual reports to FTA.

Grantee Response: MARTA will monitor professional services projects in accordance with the attached procedures. (**Attachment E**).

MARTA will ensure that semi-annual reports are accurately prepared in accordance with the instructions prescribed by the Operating Administration. Only the federal dollars in contracts will be reported as prescribed.

FTA Response: FTA partially concurs with this response. Additional comments to MARTA's document, *Onsite Contract Monitoring and Compliance Review Procedures for Construction and Non-Construction Contracts*, will be provided outside of this report. However, MARTA must work on reconciling all related contract monitoring activities with its DBE program. MARTA's submission did not include a means for ensuring that the Semiannual DBE Uniform Reports would be completed accurately. To close this finding, by November 31, 2012, MARTA must:

- Submit an updated DBE program that reflects the monitoring process as it applies to FTA-assisted contracts.
- Correct the Semiannual DBE reports for FY 2009 in FTA's TEAMWeb
- Verify that the DBE reports for FFYs 2010, 2011 and 2012 are completed accurately within TEAMWeb
- Submit supporting contracting data for FFYS 2010, 2011 and 2012.

13. January 2011 DBE Program Rulemaking

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

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

Section 7 – Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action 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	ND			
4. Financial Institutions	26.27	ND			
5. DBE Directory	26.31	D	DBE directory differs from UCP's DBE directory.		
6. Overconcentration	26.33	AC	No documentation for current review of overconcentration	Review overconcentration annually and make note to file	
7. Business Development Programs	26.35	ND			
8. Determining / Meeting Goals					
A. Calculation	26.45	ND			
B. Public Participation	26.45	AC	Not giving sufficient time to receive comments on goals prior to August 1st	Allow at least 45 days to receive comments prior to next goal submittal	
C. TVM	26.49	ND			
D. Race Neutral	26.51	ND			
E. Race Conscious	26.51	AC	DBE program makes pre-determine amount of race conscious projections	Make race neutral/conscious projections based on statistical data	
F. Good Faith Efforts	26.53	AC	Require low bidder to increase DBE participation prior to award if below goal	Determine if DBE is part of responsiveness or responsibility and conduct GFE reviews accordingly.	

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action Plan and Schedule for the following:	Response Days/Date
G. Counting DBE Participation	26.55	D	No verification documentation of DBE participation in joint ventures	Need to verify that DBEs in joint ventures for professional services contracts are performing a commercially useful function	30 days
H. Quotas	26.43	ND			
9. Required Contract Provisions					
A. Contract Assurance	26.13	D	Contracts/subcontracts reviewed did not contain update assurances.	Update non-discrimination clause and assurances inserted in contracts and subcontracts with current language in DBE regulations	30 days
B. Prompt Payment	26.29	D	Prompt payment and return of retainage not in all contracts and subcontracts	Ensure prompt payment and return of retainage language appears in contracts and subcontracts	30 days
C. Legal Remedies	26.37	ND			
10. Certification Standards	26.67	ND			
11. Certification Procedures	26.83	D	<ul style="list-style-type: none"> UCP Directory not unified (MARTA & GADOT maintains separate directories) MARTA will count DBEs certified after due date of bid towards DBE participation Certification expirations- MARTA will follow denial process for existing 	<ul style="list-style-type: none"> Unify UCP directory Ensure all certification are pre-certifications Only remove certification through 26.87, unless allowed by regulations 	30 days

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action Plan and Schedule for the following:	Response Days/Date
			<p>firms who do not meet eligibility standards after 3rd year review rather than initiating removal process</p> <ul style="list-style-type: none"> No opportunity for informal hearings (due process) for removal of firms who fail to cooperate with requests, i.e. annual update forms 	<ul style="list-style-type: none"> Provide opportunity for informal hearing prior to removal 	
12. Record Keeping and Enforcements					
A) Bidders List	26.11	ND			
B) Monitoring	26.37, 26.55	D	Insufficient monitoring of professional services contracts	<p>Should implement similar process and forms used on construction projects for monitoring professional services projects</p> <p>These include forms used for monitoring construction projects</p>	30 days
C) Reporting	26.11	D	Inaccuracies in semi-annual report data	Ensure data contained in semi-annual reports are accurate	30 days

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
MARTA:				
Dr. Beverly Scott	MARTA	GM/CEO	404-848-5000	bscott@itsmarta.com
Reginald Diamond	MARTA - DEO	Executive Director, DEO	404-848-4639	rdiamond@itsmarta.com
Antoine Smith	MARTA - DEO	Manager of Economic Opportunity	404-848-5270	asmith1@itsmarta.com
Pamelia T. Smith	MARTA - DEO	EEO/DBE Analyst	404-848-4646	ptsmith@itsmarta.com
Miriam D. Lancaster	MARTA - Law	Chief, Corporate Law	404-848-5220	mdlancaster@itsmarta.com
Lisa DeGrace	MARTA	Director, Contracts & Procurement and Material	404-848-5467	ldegrace@itsmarta.com
Kevin L. Hurley	MARTA	Manager, Financial Planning & Analysis	404-848-5774	khurley@itsmarta.com
Cathy Gesick	MARTA – Treasury Services	Revenue Forecasting Analyst	404-848-5123	cgesick@itsmarta.com
Deborah Dawson	MARTA	AGM HR, Labor, Training & DEO	404-848-5778	dadawson@itsmarta.com
Shelandra Cornick	MARTA - DEO	DBE Analyst	404-848-5077	scornick@itsmarta.com
Stephen Alexander	MARTA	Project Manager	404-848-4587	salexander@itsmarta.com
Rhonda Allen	MARTA	Project Manager I	404-848-4438	rnallen@itsmarta.com
FTA:				
Frank Billue	FTA – Region IV	Regional Civil Rights Officer	404-865-5628	frank.billue@dot.gov
Jimmy Moore	FTA – Region IV	Equal Opportunity Specialist (ARRA)	404-865-5471	jimmy.moore@dot.gov
Prime Contractor Representatives:				
David Gaillard	Metro Atlanta Transit Team (MATT JV)	Accounting Manager	404-848-6080	dgaillard@gecmatt.com
Pamela E. Alexander	LTK Engineering Services / Rail Vehicle Consultants (RVC JV)	Project Consultant	404-846-6814	palexander@ltk.com
Raymond N. Carini	LTK Engineering Services / Rail Vehicle Consultants (RVC JV)	Program Manager	404-846-6811	rcarini@ltk.com

DBE Joint Venture Representatives:				
Samuel L. Gude	Gude Management Group (GMG)	Chief Executive Officer	404-856-4400	slgude@gmgcpm.com
Stanley L. King	SL King & Associates	President and CEO	404-524-5800	stan@slking.com
Interested Parties:				
Arthur Queen	National Association of Minority Contractors/ EGM Services, Inc		404-288-9521	ajqueen@egmatlanta.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