

**COMPLIANCE REVIEW REPORT**

**OF THE**

**New York  
Metropolitan Transportation Authority (MTA)  
New York, NY**

**DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

**Final Report**

**June 2011**

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

**by**

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Table of Contents

**Section 1 – General Information .....2**

**Section 2 – Jurisdiction and Authorities.....3**

**Section 3 – Purpose and Objectives.....4**

**Section 4 – Background Information .....6**

**Section 5 – Scope and Methodology .....8**

**Section 6 – Issues and Recommendations.....10**

1. DBE Program Plan ..... 10

2. DBE Policy Statement..... 10

3. DBE Liaison Officer ..... 11

4. Financial Institutions ..... 12

5. DBE Directory..... 12

6. Overconcentration ..... 13

7. Business Development Programs ..... 13

8. Determining/ Meeting Goals ..... 14

9. Required Contract Provisions..... 26

10. Certification Standards ..... 30

11. Certification Procedures ..... 31

12. Record Keeping and Enforcements ..... 33

13. January 2011 DBE Program Rulemaking .....30

**Section 7 – Summary of Findings .....40**

**Section 8 - List of Attendees .....43**

## **SECTION 1 - GENERAL INFORMATION**

Grant Recipient: Metropolitan Transportation Authority  
347 Madison Avenue

City/State: New York, NY 10017-3739

Grantee Number: 1786

Executive Official: Jay H. Walder  
Chairman and CEO

On Site Liaison: Michael Garner  
Chief Diversity Officer  
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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."

New York's Metropolitan Transportation Authority (MTA) 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 MTA'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 New York's Metropolitan Transportation Authority's (MTA) Disadvantaged Business Enterprise (DBE) program is necessary.

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

## **SECTION 4 – BACKGROUND INFORMATION**

MTA is a public benefit corporation established by the State of New York in 1968 to develop and implement a unified public transportation policy in the New York City metropolitan area. MTA acts as an umbrella organization for seven constituent agencies—Long Island Rail Road (LIRR), Metro North Railroad (MNR), New York City Transit (NYCT), MTA Bus Company, Long Island Bus, Bridge and Tunnels, and Capital Construction Company (MTACC). During this review, documents for MTA HQ, LIRR, MNR, MTACC, and NYCT were reviewed and representatives of these agencies were interviewed or otherwise involved.

MTA and its operating agencies are authorized to operate transit service in Suffolk, Nassau, Queens, Kings, Richmond (Staten Island), New York (Manhattan), the Bronx, Westchester, Putnam, Dutchess, Rockland and Orange counties in the State of New York. In addition, service extends into Fairfield and New Haven counties in the State of Connecticut. MTA and its operating agencies have over 70,000 total employees. More than 2.6 billion riders utilize the bus and rail service each year. Overall, approximately 14.6 million riders are served over 5,000 square miles, making the MTA the largest public transportation provider in the Western Hemisphere.

The operation of the MTA is overseen by a 17-member Board of Directors. Members are nominated by the Governor, with four recommended by New York City's mayor and one each by the county executives of Nassau, Suffolk, Westchester, Dutchess, Orange, Rockland, and Putnam counties. (Members representing the last four cast one collective vote.) All Board members are confirmed by the New York State Senate. The chairman and the board members serve in the same capacity for LIRR and MNR. Corporate presidents, who also serve as chief operating officers, oversee day-to-day operations.

### *LIRR*

LIRR, the largest commuter railroad in the nation, serves roughly 83 million passengers per year with over 303,000 passengers utilizing the service each weekday. It provides service from three New York City terminals through Jamaica Station, which is the major transfer point, to the eastern tip of Long Island. The outlying branches include Babylon, Far Rockaway, West Hempstead, Long Beach, Hempstead, Oyster Bay, Port Jefferson, Montauk, Ronkonkoma, Greenport and Port Washington. The Port Washington Line does not go through Jamaica Station. LIRR serves 124 stations and has a fleet of 1,177 rail cars.

### *MNR*

MNR is the second largest commuter railroad in the country, operating five lines in the New York metropolitan area over 384 directional route miles. Three main lines operate east of the Hudson River, up through Connecticut and two other lines operate west of the Hudson River down through New Jersey. MNR serves 120 stations and has a fleet of 1,194 rail cars. It also has feeder bus service and two ferry services, which are both operated by private contractors. MNR provides 2,701 square miles of service coverage. Over 257,000 passengers ride MNR each weekday.

### *NYCT*

NYCT, as the largest agency in the MTA regional transportation network, operates public

transportation throughout New York City. This includes rapid transit systems in, both, Manhattan and Staten Island and the bus network, consisting of 245 routes, which serve all of the 5 boroughs, under MTA's Regional Bus Operations. With 6,442 subway cars, NYCT has the largest fleet of subway cars in the world. The agency has 26 subway lines and 468 subway stations, as well as 63 rail cars and 22 rail stations. Over 7 million passengers ride the system each weekday.

#### *MTACC*

Formed in 2003, MTACC acts as MTA's construction management company for its expansion, mobility, and network security projects. As of February 2010, the agency had an operating budget of \$36.6 million dollars and as of April 2010, it was managing projects totaling almost \$16 billion dollars.

#### *Long Island Bus*

Long Island Bus provides service in Nassau County, western Suffolk County and into eastern Queens. The service consists of 48 routes and serves 48 Long Island Rail Road stations, in addition to colleges, museums, parks, theaters, and beaches throughout the area.

#### *MTA Bus Company*

The MTA Bus Company was created in September 2004 to assume the operations of seven bus companies that operated under franchises granted by the New York City Department of Transportation. MTA Bus operates 46 local bus routes in the Bronx, Brooklyn, and Queens; and 35 express bus routes between Manhattan and the Bronx, Brooklyn, or Queens.

#### **Organization of the DBE function**

MTA's Department of Diversity and Civil Rights (DDCR) is responsible for all MTA agency DBE responsibilities. Each of MTA's FTA-funded constituent agencies conducts its own procurement process, but the DDCR sets the overall agency goal (which incorporates each agency's projected opportunities), establishes DBE contract goals, conducts monitoring, and submits semi-annual reports that aggregate the achievements of each agency.



## **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. Submission of 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. Issuance of a signed and dated policy statement that expresses your commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation. You must circulate the statement throughout your organization and to the DBE and non-DBE business communities that perform work on your DOT-assisted contracts [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 MTA by FTA's Office of Civil Rights. The agenda letter notified MTA of the planned site visit, requested preliminary documents, and informed MTA of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed MTA 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, MTA staff and the review team.

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

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

Following the site visit, a draft report was compiled. MTA's responses to that draft report have been incorporated into this final 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 review, a deficiency was found with requirements for a program plan. MTA's last submission of its program plan was in 1999. Since that time, significant changes have occurred in how the DBE requirements are implemented in areas such as organizational structure and resources, prompt payment, contract remedies and constituent agencies. Over the past few years, MTA's DDCR has implemented a series of Standard Operating Procedures (SOP) for areas of DBE program implementation ranging from DBE certification to monitoring. SOPs can be good tools for ensuring consistent implementation of DBE requirements. In some cases, MTA's DDCR SOPs are more current and well defined than MTA's DBE Program Plan on file with FTA, and may serve as a useful input into revising the current plan.

MTA has communicated some program changes to the FTA Region II Civil Rights Officer. However, based on the findings in this review and the number of areas in the current DBE program that need to be updated, a revision to this document is necessary.

**Corrective Action and Schedule:** Within 30 days of receipt of the draft report, submit to the FTA Office of Civil Rights a corrective action plan and schedule for submission of a revised DBE program. Closure of this finding will be subject to the approval of the submitted program.

**MTA Response:** MTA Department of Diversity and Civil Rights ("DDCR") is in the process of revising MTA's DBE Plan. We expect to complete revisions to this Plan within 45 days of this response. Once revisions to the DBE Plan are completed, the revised plan will be submitted to the FTA for approval.

**FTA Response:** FTA acknowledges MTA's corrective action and schedule. Submit the revised DBE Program Plan to FTA's Office of Civil Rights by August 1, 2011.

### 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 review, a deficiency was found with requirements for a policy statement. MTA has a policy statement outlining the DBE program and responsibilities. The last policy statement was signed by then-Board Chairman, Virgil Conway, on October 19, 1999. Because the leadership of the MTA and the position of the DBE Liaison Officer have changed since 1999, an updated policy statement is warranted.

**Corrective Action and Schedule:** Within 30 days of receipt of the draft report, submit to the FTA Office of Civil Rights a plan and schedule for updating the current DBE policy statement and circulating it throughout the MTA and to DBE and non-DBE business communities. Closure of this finding will be subject to the submission of an updated policy statement, evidence of its circulation and inclusion in the revised DBE program plan.

**MTA Response:** The updated MTA Policy Statement is attached as Exhibit A. The updated Policy will be disseminated throughout the MTA and to DBE and non-DBE communities. We will submit evidence of its dissemination to FTA's Region II Civil Rights Officer by May 30, 2011. In addition, the updated Policy Statement will be included in the revised DBE Plan, a copy of which will be submitted to FTA's Region II Civil Rights Officer within 45 days of this response.

**FTA Response:** FTA acknowledges MTA's corrective action and schedule. Submit the evidence of policy dissemination to FTA's Office of Civil Rights by August 1, 2011.

### **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 requirement for the DBE Liaison Officer (DBELO). Michael Garner, MTA's Chief Diversity Officer, is the head of the Department of Diversity and Civil Rights (DDCR) and is the DBELO. In this position he reports directly to the MTA's Board Chairman and CEO, currently Jay Walder. An organizational chart and description of activities were provided to the review team to identify reporting relationships in the organization.

Mr. Garner's responsibilities include implementation of all aspects of MTA's DBE program and ensuring that MTA complies with 49 CFR Part 26. The DDCR has two main divisions, one dedicated to outreach, certification and EEO compliance, and one dedicated to contract compliance. The organizational chart dated September 1, 2010 shows 25 positions in the DDCR supporting DBE efforts (excluding EEO), with three of those positions vacant.

In addition to the resources noted above, additional coordination for implementing the DBE program is provided by MTA grants management and legal departments and the procurement offices for MTA constituent agencies. The grants management department

provides information on projected contracting activity and federal share of contracts. The legal department is available for reviewing contractual documents and to assist with enforcement actions.

#### **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. As part of its new mentoring program, MTA is initiating a loan program for MTA projects utilizing Carver Federal Savings Bank, which is advertised as the largest African-American operated bank in the United States.

Additionally, the review team noted that in the DBE section of procurement boilerplates (such as that for NYCT) contractors were encouraged to use such 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 provided. MTA is part of the New York Unified Certification Program (NYUCP). New York State DOT hosts the UCP's DBE directory through a service called *Biznet*. The 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. In addition to the web-based electronic version, the directory is available in hard copy format upon request.

While the directory itself appears to be compliant with the DBE regulation, how MTA and its constituent agencies refer to the directory could be improved. In the DBE section of the NYCT boilerplate, for example, it notes that "Any business seeking to participate on this Contract must be certified by the MTA Department of Diversity and Civil Rights or a NYSUCP Certifying Partner..." Because the MTA uses M/WBE goals for its locally funded procurements, the preferred reference would be to only the NYSUCP for FTA funded projects with a DBE goal. Additionally, references to the use of DBEs on MTA constituent agency websites varies. NYCT and MNR have a link to the NYSUCP. Long Island Bus and MTA Bus Company procurement sites do not discuss DBE. MTA's All Agency Procurement Website (<http://www.mta.info/mta/procurement>) has a direct link to the Empire State Development's M/WBE website, but not the NYSUCP site. LIRR's procurement website refers vendors to the Empire State Development's M/WBE website.

Advisory Comment: MTA’s DCCR should review the procurement websites of each of its constituent agencies and have one cohesive message about use of DBEs, where applicable, with the appropriate link to the NYSUCP directory.

**MTA Response:** Changes have been made to MTA and its constituent agencies’ websites in accordance with the advisory comment above and a direct link to the NYSUCP directory has been added.

**FTA Response:** FTA acknowledges the steps that MTA has taken related to this advisory comment. However, except for NYCT and MNR, there is still not consistency with how the DBE lists are obtained on the other websites. For instance, the following links differ from the information presented as Exhibit B of MTA’s response to the draft report:

- From LIRR’s website
  - <http://www.mta.info/lirr/about/Procurement/mbewbe.htm>
  - <http://av0.mta.info/lirr/procurement/mbewbe.htm>
  - <http://av0.mta.info/lirr/procurement/>
- From MTA’s overall website address (<http://av0.mta.info/mta/procurement/index.html>) there is a link entitled “Find Minority and Women-Owned Enterprise (M/WBE) Sub-Contractors” that is no longer active and should most likely be removed.
- Long Island Bus and MTA Bus do not have information on finding DBEs

## **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. In an attempt to monitor overconcentration, MTA captures market share information on firms. MTA also notes in the goal submissions that they review past DBE participation levels on USDOT regulated contracts and thusfar have determined that overconcentration does not pose an issue. Additionally, as corrections are made to MTA’s systems for compiling semi-annual reporting information, more analysis and documentation of overconcentration analysis should be possible.

## **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). For the 2010-2014 Capital Program, the

MTA proposes to implement a mentoring program for small businesses which will address some of the key barriers that have blocked small businesses and M/W/DBE participation in MTA's large and complex capital projects. MTA's capital program managers will select smaller, stand-alone capital projects from within larger initiatives to be candidates for this program. The mentoring program will offer construction training, technical assistance, and small business loan and surety bond assistance to program participants so they can establish the eligibility and qualifications to bid independently on MTA projects in the future. The goal of MTA's proposed Mentor Program is to create a larger pool of qualified contractors that can compete for MTA projects safely, timely and within budget. The program will be open to all small businesses and is currently focused on non-FTA funded projects.

**Additional information provided by MTA subsequent to the issuance of the draft report:** Following the enactment of supporting New York State legislation, MTA has successfully implemented a Small Business Mentoring Program ("SBMP") which helps small businesses compete for construction contracts with the MTA and its operating agencies. Although the program is currently applicable to only New York State funded projects, it does offer opportunities for DBE firms as well. Under the four-year SBMP, the MTA provides a supportive framework for firms to develop and grow long-term relationships with the MTA and its operating agencies. MTA's operating agencies have worked together to provide specific construction projects for the SBMP by de-bundling larger capital construction projects. Contracts range in value from \$100,000 to \$1 million. MTA has also finalized and implemented Surety Bond and Small Business Loan Programs. Upon successful completion of the SBMP, firms will be eligible to complete a two-year Graduate Mentor Program, and will have the opportunity to participate on projects valued at more than \$1 million. As a strategy for increasing contract awards for our pool of DBEs, we have had internal discussions and an initial conversation with the FTA about creating a Small Business Mentoring Program for our federally funded projects. We are currently preparing for submission to and approval from FTA of a Small Business Mentoring Program for federally funded projects.

## **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, deficiencies were found with the requirements for goal calculation. FY 2009's goal setting methodology was submitted on August 1, 2008 and the FY 2010 submittal date was July 30, 2009. USDOT has changed the goal methodology submissions from an annual to a triennial cycle. Based on the schedule determined by FTA, MTA's next goal submission will be due by August 1, 2011 and will be for the three-year period covering FYs 2012-2014.

During the compliance review, MTA described their process for determining the amount

of federal funds that will be available for contracting opportunities in the upcoming fiscal year. This includes FTA-funded contracting opportunities for MTA HQ, and its constituent agencies. Much of the contracting opportunity information is provided by MTA's grants department based on their knowledge of current and future FTA grants.

#### Step 1: Determining the Base Figure

The base figure is determined by the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on DOT-assisted contracts. MTA identified \$2,106,820,000 in FTA contract opportunities for FY 2010 and \$204,000,000 in FY 2009. MTA identified that the majority of the work would fall into five NAICS codes for FY2010 and six codes for FY2009. MTA utilized US Census County Business Pattern data along with DBE and state M/WBE directory information for a 14-county area. The resulting relative availability of DBEs for each NAICS code was then weighted by the projected amount of work in each category. For FY 2010, the resultant base goal was 16.4% and for FY 2009, it was 16.61%.

#### Step 2: Adjusting the Base Figure

For its 2009 and 2010 base figure adjustments, MTA determined that the following sources of information were appropriate for use:

- MTA's past DBE participation,
- goals set by other area transportation entities,
- available data from disparity studies conducted in 2004 by the Port Authority of New York and New Jersey, the City of New York and the County of Nassau,
- ability of DBEs to serve as prime contractors, and
- proposed funding allocation for MTA's FTA-funded projects.

While the MTA included a narrative discussion for each of these areas, there was no mathematical analysis showing how these considerations factored into the calculation of the overall adjusted goal. Additionally, the information provided for past participation amounts could not be verified through a review of MTA's semi-annual reports. For example, FY 2008 past participation is represented as being 16.45% and the first six months of 2009 as being 17.5%. However, information on MTA's semi-annual reports shows DBE participation (based on awards) as being 9% and 11% for those respective time periods. For FYs 2008, 2009 and 2010 (and several years previous to that), the resultant overall goal was 17%.

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

- Verification that all MTA constituent agencies' contracting opportunities are included in the goal setting process,
- Mathematical calculations demonstrating how information in the Step 2 adjustment results in the overall goal,
- If past participation is used, verification of the origin of that information, and
- To the extent that MTA is collecting a bidders' list (see section 12 of this report), information on how this will be used in goal setting.

These corrective actions are in addition to, but may be related to corrective actions



related to the accuracy of semi-annual reports noted in section 12 of this report.

**MTA Response:** DDCR has obtained initial data from MTA's Grant Management about federally-funded contract award opportunities for MTA and its constituent agencies for FYs 2012-2014. DDCR is currently reviewing and verifying this data with MTA's constituent agencies before determining subcontracting opportunities for DBEs. This information will then be used in calculating the base figure for the overall DBE goal.

DBE participation percentages for FY 2008 and the first six months of 2009 were initially reported to the FTA in the Uniform Report of DBE Awards or Commitments and Payments ("semi-annual reports") at 16.45% and 17.5%, respectively. Thus, MTA's FFY 2010 DBE Goal submitted on or about July 30, 2009 reflected these percentages. FTA consultant, Milligan & Company, LLC ("Milligan") conducted a Triennial Review of MTA in April 2010. Following this compliance review, FTA advised MTA that the semi-annual reports did not appear to be completed correctly and therefore may not accurately represent DBE participation. The FTA asked MTA to revise and resubmit these reports in accordance with the methodology provided by Milligan. Accordingly, on or about August 6, 2010, DDCR resubmitted the revised semi-annual reports to the FTA for FYs 2008 and 2009. Upon a review of these reports during a review of MTA's DBE Program in October 2010, Milligan informed DDCR that the actual DBE participation percentages were 9% and 11%, respectively. DDCR currently prepares all semi-annual reports in accordance with the methodology provided by Milligan. DDCR has also sought and obtained guidance from the FTA for using mathematical calculations to adjust the base figure in determining the overall goal for FYs 2012-2014. In accordance with this guidance, DDCR will verify data on past DBE participation in semi-annual reports with the MTA agencies before applying this data to adjust the base figure in the FY 2012-2014 DBE goal calculation.

Additionally, DDCR will verify data on its Bidders' List prior to using this data in calculating the base figure for the FYs 2012-2014 DBE goal.

**FTA Response:** FTA acknowledges the steps described by MTA to correct its goal setting methodology. This finding will be closed upon satisfactory review of the incorporation of these steps in its FY2012-2014 goal submission which is due by August 1, 2011. These procedures should also be documented in MTA's revised DBE Program Plan which is to be submitted to FTA by August 1, 2011.

## **B) Public Participation and Outreach**

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

Discussion: During this DBE Compliance Review, a deficiency was found with the requirement for Public Participation and Outreach. MTA did provide evidence that their 2010 goal was advertised in various general circulation and minority-focused media on and close to June 15, 2009. These media included The New York Times, Newsday, Minority Commerce Weekly, New York Amsterdam News, El Diario, and others.

The consultative process conducted by MTA with minority, women and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and efforts to establish a level playing field for the participation of DBEs appeared to be conducted after the goal was advertised for the most recent goal. For its FY 2009 goal, MTA held a focus group meeting of such organizations on June 17, 2008 and publicized the goal starting on June 23, 2008. For the 2010 goal, MTA started advertising the goal on June 15, 2009 and held the focus group on June 25, 2009. FTA anticipates that, in years when a goal is due, the consultative process would be conducted prior to the advertisement of the goal, and scheduled such that the goal can be published for comment by June 15 in advance of the submittal date of August 1 to FTA.

Corrective Action and Schedule: Within 30 days of the receipt of the draft report, submit to the FTA Office of Civil Rights a schedule and plan for ensuring that for goal-submittal years, the consultative process occurs before goals are advertised for public comment, such that goals can be published by June 15<sup>th</sup>.

MTA Response: DDCR will hold a series of meetings starting in May 2011, with minority, women and general contracting groups, and community organizations. DDCR will conduct a public forum in June 2011 to discuss the proposed FY 2012-2014 DBE goal, prior to advertising the proposed goal on or before June 15, 2011, and submittal of the goal first to its Board at its July meeting and to FTA by August 1, 2011.

FTA Response: FTA acknowledges the steps described by MTA. This finding will be closed upon satisfactory review of the incorporation of these steps in its FY2012-2014 goal submission which is due by August 1, 2011. Include in the goal submittal evidence of the consultations noted and proof of publication for the advertisement of the goal. These procedures should also be documented in MTA's revised DBE Program Plan which is to be submitted to FTA by August 1, 2011.

### **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. The review team examined the TVM certification for NYCT federally funded rail cars. NYCT provided signed TVM certifications from ALSTOM Transportation Inc. and Kawasaki Rail Car, Inc., both signed in October 2002. It was discussed with MTA staff that they should also review

the FTA's listing of TVMs on its Civil Rights website on the date the bids are due to ensure bidders correctly signed certifications. A good practice would also be to print this listing and include it in the procurement file.

#### **D) Race Neutral DBE Participation**

Basic Requirement: (49 CFR Part 26.51) The recipient must meet the maximum feasible portion of the overall goal by using race neutral means of facilitating DBE participation. Examples of how to reach this goal amount are listed in the regulations.

Discussion: During this DBE Compliance Review, a deficiency was found in the area of race neutral participation. For both FYs 2009 and 2010, the overall goal was projected to be met as follows: 3% Race Neutral (RN) and 14% Race Conscious (RC).

Considerations that were included in the projection of the RN portion included a four-year average of past participation received race neutrally and efforts by MTA to increase RN participation. While information and narrative were provided for these items, the mathematical analysis showing how that translated into the 3% RN projection was not included. Additionally, the review team could not match the individual years' past participation percentages provided in the semi-annual reports with the information utilized in the goal submission. For example, FY 2008 RN participation (based on awards) was listed as 1.02% in the goal submission, but was 0.53% from information on the semi-annual reports.

It was also noted that for FYs 2008, 2009, and the first half of 2010, there were no prime contracts awarded to DBEs. Additionally from the "Completed Contracts" section of the semi-annual reports for 2008 and 2009, it appears that there were no RN contracts completed, nor does it appear that there were any RN payments to DBEs. This conclusion was drawn from line 12, where DBE participation needed to meet the goal was higher than DBE payments received and line 13, where there were no RN contracts completed for any of these reports.

As discussed with MTA staff, several issues may impact the results shown for past participation and future achievements. Issues with the compilation of semi-annual reports (noted in section 12 of this report) may be providing an inaccurate summary of achievements. Additionally MTA staff felt that the implementation of their mentoring program may begin to result in more RN participation.

Because the regulation states that you must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, it is important that the MTA demonstrate that they are accurately tracking and facilitating this. 49 CFR Part 26.51 (b) includes a list of race neutral means that should be considered. Additionally, the recent Final Rule on the DBE regulation issued January 28, 2011 included a new section on fostering small business participation. This added section should also be considered in light of this area of the review.

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

- Use of mathematical analysis for RN projections

- Verification process of correct data if MTA will be using past participation in projection of future RN portion of goal submissions
- Increased accuracy of tracking and/or facilitating race neutral participation.

These corrective actions are in addition to, but may be related to corrective actions on the accuracy of semi-annual reports noted in section 12 of this report.

**MTA Response:** DDCR has sought and obtained guidance from FTA on the use of mathematical analysis for race neutral projections. The FY 2012-2014 goal to be submitted to the FTA by August 1, 2011 will be based on mathematical analysis for race neutral projections based on the guidance received from the FTA.

The implementation of the new MWDBE Contract Compliance System will assist in the tracking of race neutral DBE participation. Focused outreach to certified DBEs for admittance in the MTA's Small Business Mentoring Program will assist us in our efforts to increase DBE participation by race neutral means. Moreover, as noted above, MTA is seeking to establish a Small Business Mentoring Program for its federally funded projects in accordance with the new DBE regulation set forth in the Final Rule, dated January 28, 2011.

**FTA Response:** FTA acknowledges the steps described by MTA. This finding will be closed upon satisfactory review of the incorporation of these steps in its FY2012-2014 goal submission which is due by August 1, 2011. Include in the goal submittal evidence of the implementation of these steps. These procedures should also be documented in MTA's revised DBE Program Plan which is to be submitted to FTA by August 1, 2011.

### **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. Race conscious measures should also be monitored and adjusted based on actual DBE participation/attainment.

**Discussion:** During this DBE Compliance Review, no deficiencies were found with the requirements for race conscious participation, however an advisory comment is provided. The MTA has a well-defined process for setting contract goals. It is described in DDCR's SOP entitled *Project/Contract Goal Setting & Determination*. This procedure requires that every requisition with a value of over \$25,000 (MTA noted that they do not have many FTA-funded contracts under this level) be forwarded to DDCR for evaluation for contract goal setting. The procuring agency (such as MTA HQ, LIRR, MNR, etc.) provides the DDCR with information about an impending solicitation and requests that a goal be set on the contract. DDCR evaluates information such as the project scope and the availability of DBEs to perform, completes a Goal Determination Worksheet, and replies to the procuring agency with the contract goal. Evidence that this process was followed was provided to the review team. Additionally, representatives of DDCR described that training sessions between DDCR and procuring agencies have been held on this process to answer any questions and reinforce the process.

The following recommendations to strengthen this process are provided:

- Close communication with the grants department if the source of funding for a project changes. In a few instances, (NYCT Contract # [REDACTED], LIRR Contract # [REDACTED]) the request for a project goal was resubmitted to DDCR when the funding changed from all local (which has an M/WBE goal) to FTA (for DBE goal). Because the timing and accuracy of this change could affect implementation of DBE program elements, MTA may want to consider a feedback loop to its grants department to verify these changes.
- Emphasis in training for procuring agencies on identifying items that may restrict DBE participation. DDCR does have a process described in its SOP under section II. 2) f) which asks that the goal-setting requisition detail any requirements, restrictions or conditions that may have an impact on DBE participation. There was one instance found in an LIRR contract (# [REDACTED]) where it was required that all subcontractors had seven years experience to be used on the project. It was discussed with MTA that this type of clause may need to be factored into a contract goal calculation, as it could serve to limit both RN and RC DBE participation.
- Policy review regarding only reviewing contracts over \$25,000 for race conscious opportunity to ensure that there not FTA funded procurements or DBE opportunities that are being missed.
- In light of the deficiencies noted in Race Neutral DBE Participation area above, evaluate the procedures for setting race conscious goals to ensure that both race neutral and race conscious methods are being used appropriately.

**MTA Response:**

- DDCR will revise its Standard Operating Procedures Manual to include the following:
  - MTA Grant Management shall advise DDCR of changes in the source of funding for a contract/project within seven (7) days of the approval for the change.
  - The MTA agencies are to submit to DDCR all federally funded requisitions, regardless of value, for DBE participation review.
- In addition, the MTA is in the process of adopting an All-Agency Policy Directive – MWDBE Compliance, which will set forth, among other things, the above responsibilities. Through this directive, DDCR, together with each MTA agency, will strengthen the implementation, monitoring and enforcement of the MWDBE Program requirements through shared responsibilities and collaboration.
- Also, DDCR recently acquired an electronic data gathering system, the Online Contract Compliance System. This system will issue a pop-up alert message to DDCR, identifying those contracts where the agencies indicated a funding source change.
- In October 2009, DDCR conducted training to Procurement staff on the MWDBE

#### Goal Setting and Contract Monitoring Process.

- By the fall of 2011, DCCR will conduct additional training that will include as participants MTA agency procurement, agency project managers and DDCR compliance managers. This will be an interactive training session with instructions and oral Q/A exercises.
- DDCR will revise the Standard Operating Procedures Manual within 60 days to address these FTA's DBE Compliance Review issues and recommendations.
- DDCR will work with MTA's General Counsel's Office to ensure that references to good faith efforts in the standard contract language are in accordance with 49 CFR Part 26. DDCR will make revisions to the standard contract language as necessary to assure compliance. This process will be completed within 45 days.
- DDCR will ensure that FTA's DBE Compliance Review issues and recommendations are implemented. DDCR will review the procedures for setting race conscious goals to ensure that both race neutral and race conscious methods are being used appropriately.

**FTA Response:** FTA acknowledges the steps that MTA has described above relating to the advisory comments provided. FTA cautions MTA to ensure that their local M/WBE is completely separate from the USDOT DBE program.

#### **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 prior to award of the contract.

**Discussion:** During this DBE Compliance Review, deficiencies were found with the requirements for good faith efforts. MTA's DBE Program Plan contains procedures for determining good faith efforts. It describes that it will require the bidder/offeror to submit a DBE Utilization plan outlining the required information to submit for a contract with a DBE goal. MTA's DDCR also has SOPs entitled *Bid Evaluation-MWDBE Utilization Plan Submission* and *Partial or Total Waiver of Goals*. The first SOP describes the procedures that DDCR uses to evaluate if a bidder met the goal. The second SOP describes the procedure DDCR will use in two instances: prior to award or after contract award. The review team discussed with MTA that after award, DDCR should not be waiving a goal; rather it should be monitoring to ensure that contractual DBE commitments are met. If circumstances occur which impact the achievement of that commitment, the DDCR can (and does) address them as they occur, rather than giving the impression that a contract goal can be waived after commitments have been made.

Additionally, DDCR needs to safeguard against giving primes credit towards the DBE goal for the use of M/WBEs or awarding a contract with a DBE goal until good faith efforts have been made and/or DBE commitments have been made. In documentation for NYCT Contract # [REDACTED], the contractor asked for a partial waiver of the goal of 10%. DDCR did not grant this waiver. DDCR's evaluation of the goal submission noted that it

anticipated that when clear scopes of work were developed that the contractor could meet the goal. Additionally, the award document to the prime noted that “you must continue to meet or exceed the stated goal.” When using solicitations with contract goals, recipients are prohibited from awarding a contract to a bidder that does not either meet the goal or document sufficient good faith efforts (as established in the recipient’s DBE program plan and conforming with Appendix A) in lieu of meeting the contract goal.

This issue became complex in one contract reviewed (LIRR Contract # [REDACTED]) which appeared to initially be a locally funded project with M/WBE goals. At some point prior to award, the project was changed to an FTA-funded project with a DBE goal. When the revised utilization plan was evaluated by DDCR, there were three goals listed for the contract, a DBE, a WBE and an MBE goal. A partial goal waiver of the DBE goal was granted for the DBE goal. In the good faith efforts determination, [REDACTED] was given credit for committing to utilize M/WBE firms to make up the shortfall in DBE participation, even though they would not receive achievement credit for their use. Additionally for this contract, the contractor made monthly progress reports on DBE, MBE, and WBE achievement. Use of a local M/WBE, not also certified as a DBE cannot be used toward good faith efforts in the DBE program.

During the site visit, it was discussed with MTA that it should revisit its use of the concept of good faith efforts for items other than the award of contract or DBE substitutions. The regulation describes the use of good faith efforts procedures to determine if a contract can be awarded to a bidder or to determine if sufficient efforts were made in the event that a DBE substitution is necessary during the course of a project. MTA often refers to good faith efforts at other points during the course of a project. In its DBE program plan, MTA describes that a failure to make good faith efforts to meet contract goals will constitute a material breach of the contract for which the contractor may be held liable. This is echoed in contract language reviewed, where it also notes that a failure to make good faith efforts may result in a forfeiture of a bidder’s bid deposit or other security as provided in the bidder’s bid. If a contractor fails to make good faith efforts, it should not be awarded a contract with a DBE goal.

Once a contract is awarded, the contractor has made commitments to utilize specific DBEs for certain items of work for a certain amount of money. They should be monitored based on meeting those commitments, in lieu of using the language that they continue to make good faith efforts to meet a goal.

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

- Review and revision of contract language to ensure that references to good faith efforts are in accordance with 49 CFR Part 26, and
- Review and revision of internal contract compliance SOPs to ensure that the application of good faith efforts evaluations and monitoring of primes against their DBE commitments is distinct and in accordance with 49 CFR Part 26.

**MTA Response:** We are in the process of reviewing and revising our standard contract language. Under the revised contract language, the DBE goal will be treated as a term and condition of the contract and failure to achieve the DBE goal may be viewed as a

breach of contract.

- The MTA DBE Program Plan for 2011 will ensure that references to good faith effort provision are in accordance with 49 CFR Part 26.53.
- DDCR will ensure that the evaluation of whether the contractor has met the goal or used good faith efforts to do so on federally-funded projects only include use of certified DBEs.
- Subsequent to the DBE Compliance Review, DDCR has not processed waiver requests on contracts that had previously been awarded.
- Likewise, DDCR's Standard Operating Procedures on Partial or Total Waiver is being revised as follows in accordance with 49 CFR Part 26.53:
  - The DBE regulations provide that a request for a waiver can be considered only prior to the contract award.
  - Consideration of a contractor's good faith efforts to meet the goal requirements of a contract is restricted to pre-award waiver request determinations and where there is a DBE substitution during the project.

**FTA Response:** FTA acknowledges MTA's corrective action and schedule and cautions MTA to ensure that their local M/WBE is distinct and separate from the USDOT DBE program for areas such as good faith efforts. Submit revisions to any procedures in the revised DBE Program Plan to FTA's Office of Civil Rights by August 1, 2011. Additionally, by August 1, 2011, provide revised contract language based on the review of existing language.

### **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. The review team examined several instances that the DDCR should evaluate in order to strengthen their process to ensure accurate counting:

- NYCT Contract C-26005 for construction of part of the Second Avenue subway route 132A and 96<sup>th</sup> Street Station. [REDACTED] is the prime contractor with a current contract amount of \$325,000,000. [REDACTED]. ([REDACTED]) is a DBE subcontractor to [REDACTED] on the project providing transportation and disposal of materials from the project site to approved dump sites in the amount of \$6,650,000. According to the report provided by MTA during the review, [REDACTED] current payments have exceeded \$1.5 million.

Mr. [REDACTED], [REDACTED] representative, indicated that their subcontract agreement doesn't include a total dollar amount for services rendered but rather a unit price for a menu of services. He described their function as coordinating truckers to dispose of soil from the project site and hauling offsite at approved dumping sites. He mentioned that [REDACTED] uses its own truck to dump material outside of New York state limits, since [REDACTED] is not part of any New York based teamsters unions. Mr. [REDACTED] noted that the cost for the [REDACTED]-owned truck to



transport material to out-of-state dump sites is included in the billings to the prime contractor. MTA compliance reports and Mr. [REDACTED] indicated that he has used DBE and some non-DBE trucking firms to perform services identified in the subcontract agreement. MTA certified [REDACTED] under NAICS code 541614 - Process Physical Distribution and Logistics Consulting Services. (See Certification Procedures section of report) However, MTA credited 100% of the DBE payments made to [REDACTED] rather than only fees and commissions. [REDACTED] would need to expand their DBE certification to include hauling/trucking in order to count the actual trucking services, and only to the extent allowed by the DBE regulations.

- LIRR Contract # [REDACTED] with [REDACTED] for rehabilitation of three bridges. DBE subcontractor, [REDACTED] ([REDACTED]), has a material contract with [REDACTED] to provide pipe pile and other fabricated metal to the construction site. [REDACTED], President of [REDACTED], was interviewed by the review team. She indicated that she finds manufacturers and fabricators to meet the specifications of the contract. The work orders are dropped-shipped to the construction site. [REDACTED] indicated during the review that [REDACTED] doesn't participate in the manufacturing or fabrication of the product but coordinates delivery of the material to the site. She doesn't use any equipment relative to the project to provide the material in their contract with [REDACTED]. [REDACTED] has been paid approximately \$1.2 million of the original \$1.09 million subcontract and indicated that their contract is completed.

[REDACTED] is certified by the NYSUCP in the areas of merchant wholesalers of durable and non-durable goods. Since [REDACTED] was not certified by MTA, the certification file was not available for background information on their equipment and status as a supplier/regular dealer. It appears that [REDACTED] operated as a broker of services on the project and MTA should review the DBE participation of [REDACTED] for appropriate credit for counting purposes.

- MNR Contract # [REDACTED]. Please see discussion in *Section 12 Record Keeping and Enforcements* of this report for information on accounting for a DBE subcontracting a portion of their work to a non-DBE.

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

- Review of the contract instances noted above to evaluate if any adjustment in DBE achievement credit is warranted. This should include information on what adjustments, if any, were made, including a description explaining why or why not those adjustments were made.
- Strengthening of procedures to ensure that the items noted above will be routinely addressed in DDCR's monitoring processes.

**MTA Response:**

- DDCR has reviewed the DBE participation of [REDACTED] on Contract No. C-26005 and is taking the following actions:
  - Verifying the total final amount that will be paid to [REDACTED] upon the

- completion of its work on the project.
  - With the assistance of NYCT procurement management, determining the total fee and commission that would be reasonable for [REDACTED] efforts in coordinating leased trucks for the contract.
  - Determining the total amounts paid to any DBE trucking firm that [REDACTED] utilized on the contract. Reviewing all other contracts where [REDACTED] is performing work for DBE credit for similar corrective action.
  - Adjusting the DBE participation credit for [REDACTED] to the amount determined for its total fee and commission. This will be reflected on the prime contractor's DBE Progress Report submission. Additionally, DDCR will submit a semi-annual report for the applicable period within 60 days of this report.
- DDCR has also reviewed the DBE participation of [REDACTED] on Contract No. [REDACTED] and is taking the following actions:
  - Verifying the total final amount paid to [REDACTED].
  - Determining the total fee and commission that would be reasonable for [REDACTED] efforts in brokering the transaction for furnishing the products required on the contract.
  - Reviewing all other contracts where [REDACTED] is performing work for DBE credit for similar corrective action.
  - Adjusting the DBE participation credit for [REDACTED], to the amount determined for its total fee and commission on DDCR's latest semi-Annual Report. This will be reflected on the prime contractor's DBE Progress Report submission. Additionally, DDCR will submit a revised semi-annual report for the applicable period within 60 days of this report.
- The implementation of the MWDBE Contract Compliance System will provide DDCR's compliance managers with a better tool to identify and continuously monitor contracts with special characteristics as those noted in the DBE Compliance Review.

In accordance with 49 C.F.R. Section 26.55, DDCR's compliance managers will tag contracts for additional detailed monitoring where the calculation of a DBE firm's participation is credit for less than 100% towards the overall contract goal, including DBE firms that perform the following work:

- Subcontracting a portion of its work to a non-DBE firm.
  - Participating as a joint venturer with a non-DBE firm.
  - A supplier.
  - A packager, broker or manufacturer who simply arranges or expedites a transaction and is not a regular dealer of the product/service.
  - Providing trucking for a project.
- DDCR will undertake the following additional steps, among others, to monitor the contract in terms of crediting DBE participation:
    - Making frequent site visits to monitor DBEs performing trucking for a project. These visits will be coordinated with the agency project manager who will alert DDCR when they observe that the DBE firm approved on the contract is

- utilizing trucks from another firm;
  - Requiring a monthly payment report with copies of canceled checks from DBE firms that subcontract work to a non-DBE firm;
  - Conducting a review with the MTA agency project manager to ascertain the actual contract work performed by a DBE firm that is part of a Joint Venture with a non-DBE firm;
  - Conducting unannounced site visits to the business/warehouse locations of the DBE firms that are providing supplies for a project to determine if the DBE firm is a regular dealer of the supplies required on the project; and
  - Assessing the reasonableness of the fee and commission to be paid to DBE firms that simply arrange or expedite transactions.
- DDCR will implement these additional monitoring practices by the fall of 2011.

**FTA Response:** FTA acknowledges MTA's corrective action and schedule.

- Submit the following to FTA's Office of Civil Rights by August 1, 2011:
  - revised DBE Program Plan incorporating revised procedures to ensure accurate and consistent counting of DBE participation. Included with this should be a demonstration of adequate resources to consistently accomplish the increased monitoring.
  - an analysis showing the impact to DBE participation on the contracts noted above after further investigation by MTA.
- By November 1, 2011, submit to FTA's Office of Civil Rights evidence of the implementation of additional monitoring procedures noted, along with the results of those new monitoring procedures.

## **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 MTA was found during the site visit. MTA was advised to be careful not to convey an expectation to the prime that they meet the solicitation goal if a RC contract was awarded at a lower DBE participation level than the solicitation goal. This could be misconstrued as a quota to reach the higher solicitation goal.

## **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, a deficiency was found with the

requirements for non-discrimination clause. The review team examined contract documents from MTA constituent agencies and DBE subcontract documents. MTA's DBE Program Plan does not include the requirement to include the contract assurance language in prime and subcontracts. In NYCT and MNR contract language reviewed, the clause is included, but as more of a flowdown from the prime to the subcontractor, and not first as a requirement of the prime contractor. The language indicates that the bidder will ensure that the clause is placed in every contractor subcontract resulting from the project.

The review team examined several DBE subcontract documents from MTA constituent agencies. While the subcontracts included language that the requirements of the prime contracts were incorporated into the subcontracts, these subcontracts did not include the specific non-discrimination clause.

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

- Incorporating the requirement for inclusion of the non-discrimination clause, and its flowdown to subcontractors, in the DBE Program Plan,
- Reviewing DBE language in the solicitations of MTA and constituent agencies to ensure consistent and clear inclusion of the DBE non-discrimination clause, and
- Monitoring that the clause is included in applicable subcontracts.

**MTA Response:**

- DDCR is currently revising its DBE Plan and will include the requirement to include the contract assurance language in prime contracts and subcontracts. This will be completed within 45 days. DDCR will also work with each of the agencies and their legal departments to ensure that the DBE non-discrimination clause is clearly and consistently included in all applicable contract solicitations of MTA and its constituent agencies. DDCR will make revisions to the standard contract language as necessary to assure compliance. This process will be completed within 45 days.
- MTA will review DBE subcontract agreements on future contract awards to ensure that the Contract Assurance/Non-Discrimination Clause is included.

**FTA Response:** FTA acknowledges MTA's corrective action and schedule. Submit the revised DBE Program Plan to FTA's Office of Civil Rights by August 1, 2011. Additionally by November 1, 2011 provide a summary of the results of subcontract reviews undertaken.

**B) Prompt Payment**

**Basic Requirements:** (49 CFR Part 26.29) The recipient must establish a contract clause to require prime contractors to pay subcontractors for satisfactory performance on their contracts no later than a specific number of days from receipt of each payment made by the recipient. This clause must also address prompt return of retainage payments from the prime to the subcontractor within a specific number of days after the subcontractors' work is satisfactorily completed.

Discussion: During this DBE Compliance Review, deficiencies were made with the requirements for Prompt Payment and Return of Retainage.

*Prompt Payment*

MTA's DBE Program Plan states that each USDOT-assisted contract will include a clause that requires the prime contractor to pay each subcontractor no later than 15 days from the receipt of payment from MTA or its constituent agencies. The contract language in LIRR's and MNR's boilerplates contains the same prompt payment language. The prompt payment timeframe in NCYT's contract language is 30 days after receipt of payment from the agency.

Prompt payment timeframes noted in subcontracts reviewed ranged from five days to 15 days.

*Return of Retainage*

According to 49 CFR Part 26.09, 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.

MTA's DBE Program Plan states that each USDOT-assisted contract will include a clause that requires the prime contractor to return retainage to each subcontractor within 120 days after the subcontractor's work is satisfactorily completed. MTA and its constituent agencies withhold retainage from prime contractors. The contract language in LIRR's and MNR's boilerplate states that the proposer agrees to return all retainage owed to a subcontractor within 30 days after the subcontractor's work is satisfactorily completed. NYCT does include in its Federal Contract Provisions language that requires that primes pay subcontractors retainage due to them within 30 days of the subcontractors' work being completed. NYCT also includes in its Federal Contract Provisions Article 19, which describes how the contractor can request that NYCT inspect subcontractors' work when it is completed so that the DBE can have its retainage returned. The article requires that the prime first pay the DBE the retainage before requesting reimbursement of same from NYCT.

The majority of subcontracts reviewed included a provision for retainage and most contractors interviewed noted that they hold retainage from subcontractors. No documentation was provided demonstrating that the MTA conducted phased acceptance of work so that applicable retainage could be returned to prime contractors so that they could then return it to subcontractors promptly.

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

- Ensuring that the DBE Program Plan and agency contract documents are consistent with respect to prompt payment timeframes.
- Ensuring that one of the acceptable methods (refer to 49 CFR part 26.29) to

achieve prompt return of retainage is incorporated into MTA's DBE Program Plan and constituent agencies' contract language.

- Inclusion of monitoring procedures for ensuring prompt payment and return of retainage in the revised DBE program plan.
- Monitoring that required prompt payment and return of retainage clauses are passed through to the subcontractors participating on FTA-assisted projects.

**MTA Response:** DDCR is currently revising its DBE Plan. DDCR will also work with the agencies and their legal departments to review and revise the standard contract language. DDCR will ensure that the MTA's DBE Plan and the agency contract documents are consistent with respect to prompt payment timeframes. DDCR will also ensure that an acceptable method for prompt return of retainage is incorporated into MTA's DBE Plan and in standard contract language used by MTA and its constituent agencies. Monitoring procedures for ensuring prompt payment and return of retainage will also be included in MTA's DBE Plan. This process will be completed within 45 days.

**FTA Response:** FTA acknowledges MTA's corrective action and schedule. Submit the revised DBE Program Plan to FTA's Office of Civil Rights by August 1, 2011. Additionally by November 1, 2011 provide a summary of the results of monitoring activities regarding prompt payment and prompt return of retainage undertaken.

### **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. MTA notes various available remedies in its DBE Program Plan and in contract documents. However, it does not appear these items are presented in a cohesive way, or used uniformly. MTA's DBE Program Plan states in *Section 12. Monitoring and Enforcement Mechanisms* that it will bring false or fraudulent actions to the attention of USDOT, in *Section 9.3. Good Faith Efforts When a DBE is Replaced on a Contract*, remedies such as stop work or payment orders or termination for default procedures are noted, and in *Section 9.0 Good Faith Efforts*, a failure to make good faith efforts to meet contract goals will constitute a material breach of contract.

Remedies observed in MTA and constituent agency contract language include the following remedies in the Remedies for Contractor Default section: finding that the contractor is not responsible for future awards, assessment of damages, termination of contract, and any other available remedies. Additionally, in other sections of MTA agency contract language, there are additional remedies noted for actions such as terminating a DBE for convenience and then performing that work with its own forces, and failing to fully cooperate in MTA's DBE monitoring activities.

In interviews with MTA staff members, none could recall using any of above remedies in the recent past. When there have been questions about a prime contractor's progress

towards meeting goals, they have been called in to the MTA for a meeting on the causes of and resolutions to issues identified.

The current director of the DDCR also noted that as they have recently developed more standardization in their monitoring of DBE goal achievement, they have begun to take steps to more uniformly address remedies. These include requiring the DBELO approval of any goal-waivers on projects. The goal waiver process had been used to allow a prime contractor to reduce its DBE commitment during or at the end of a project. The DBELO noted that this had already been identified by his office as a weakness in their program. He believes that revising this process will improve not only compliance, but also allow more uniform application of applicable remedies.

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

- Ensuring that mechanisms in the DBE Program Plan and in agency contracts are consistent.
- Utilizing applicable remedies when appropriate. This should include procedures for which department/staff identify possible actions that should be remedies and which department/staff will implement utilization of appropriate remedies.
- Revising the procedures for the use of “goal waivers.”

**MTA Response:** DDCR is currently revising its DBE Plan. DDCR will work with the agencies and their legal departments to review and revise the standard contract language. DDCR will ensure that the DBE Plan and the agency contract documents are consistent with respect to remedies for a contractor’s failure to meet DBE goals and that there are appropriate and consistent mechanisms for implementing these remedies. This process will be completed within 45 days. DDCR is revising the procedures for the use of “goal waivers” as discussed in its response to Section 8 (F) Good Faith Efforts above.

**FTA Response:** FTA acknowledges MTA’s corrective action and schedule. Submit the revised DBE Program Plan to FTA’s Office of Civil Rights by August 1, 2011.

## **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 requirement for certification standards. MTA is one of four certifying agencies in the New York State Unified Certification Program (UCP). Carolyn Greene is Assistant Director, Certification Business Programs. Ms. Greene has a staff of six certification managers with responsibility for evaluating DBE certification applications.

Ms. Greene was interviewed during the review for background information on MTA's certification standards and procedures. MTA conducts an analysis of the application and all supporting documentation prior to making a determination of eligibility. An approximate 12-14 page *Eligibility Evaluation* report is drafted, summarizing if the applicant meets size standards, group membership, citizenship, PNW, ownership, independence, control requirements, and other considerations.

## **11. Certification Procedures**

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirement for certification procedures. However, an advisory comment is provided for the reference on MTA's website regarding certification eligibility. One of the *Frequently Asked Questions* regarding certification includes the following language, "Generally, your business should have been in operation for at least one year." The regulation requires that you must not refuse to certify a firm solely on the basis that it is a newly formed firm. The review team did not find any record of MTA refusing to certify a firm on the basis that it was newly formed. However, it was suggested that that MTA remove this reference since it is unsupported in the DBE regulations.

MTA provided a copy of the New York State UCP Memorandum of Understanding (MOU) to support its signatory status. The MOU was effective April 2004 and lists the certifying partners as: MTA, Niagara Frontier Transportation Authority, New York State Department of Transportation, and the Port Authority of New York & New Jersey.

MTA notes in their certification letters that the DBE certification is effective for three years. Due to proposed rules changes in the DBE regulations, MTA changed their certification letter after October 2010 to reflect that certification will remain effective as long as the DBE continues to meet certification requirements.

MTA's onsite review process consists of conducting an Eligibility Review Meeting (ERM) with the applicant at MTA offices. Every meeting is recorded with a stenographer and the record is made a part of the certification file. MTA also conducts an onsite visit at the applicant's place of business and a jobsite walk through is conducted if applicable. MTA provided a list of questions utilized by the certification manager for the ERM, onsite and job site visits. An approximate two-page typed summary of the onsite/jobsite visit is made a part of the certification record and distributed along with the *Eligibility Evaluation* report to out-of-state UCPs upon request.

The review team requested the following six certification files to review for adherence to eight certification elements and MTA's standards and procedures:



Name	Listed in Directory	Accurate NAICS	Onsite Visit	PNW	Tax Returns	Annual Affidavit	Size Standards	Removal Process
██████████ ██████████	Yes	**Yes	Yes	Yes	Yes	Yes	Yes	N/A
██████████ ██████████	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N/A
██████████ ██████████	No (denied lack of control)	Yes	Yes	Yes	Yes	N/A	Yes	N/A
██████████	No (removed)	Yes	Yes	Yes	Yes	Failure to cooperate	Yes	Yes
██████████ ██████████	No (removed)	Yes	Yes Also had job site visit	Exceeded	Yes	Yes	Yes	Yes
██████████ ██████████	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

\*\*██████████ is a DBE on one of the projects selected by the review team. ██████████ is a subcontractor to ██████████ on MTA’s Second Ave subway construction project. The firm was properly certified as a DBE for solid waste disposal consulting according to the certification letter. The NYSUCP directory had ██████████ description of services as project management handling and disposal of solid waste and was given a NAICS code of 541614 - Process Physical Distribution and Logistics Consulting Services. At the time of the onsite certification review, the firm was designated as a broker of trucking services because the firm did not own or operate any trucks. The firm schedules appropriate truckers to jobsites for removal of waste. The review team discovered that MTA counts the entire DBE participation amount of ██████████ for hauling provided on the above contract rather than only brokering fees. The ██████████ representative, ██████████, told the review team that ██████████ purchased a dump truck approximately one year ago. MTA’s contract compliance file included a picture of a truck with the ██████████ decal on the door. ██████████ has not requested an expansion of their NAICS code to include “trucking” as of the conclusion of the DBE Compliance Review. See *Counting DBE Participation* in section 7 of this report for more information.

**MTA Response:** An advisory comment was made above about removing from MTA’s website a reference to a firm being in business for at least one year, prior to being certified as a DBE. This reference has been removed from MTA’s website. See copy of pages from MTA’s website attached at Exhibit B.

**FTA Response:** FTA acknowledges MTA’s efforts taken regarding this advisory comment.

## 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 with the areas of Monitoring and Reporting.

### *Bidders List*

The review team examined contract language for MTA's constituent agencies. MTA collects bidders list information with bid submission through the collection of a form entitled Bidders/Offerors Questionnaire. The prime contractor completes this form and provides information on itself and on its potential subcontractors. While this information is collected, as noted in the *Goal Setting* section of this report, there is no evidence that it is utilized in the overall agency goal setting process.

### *Monitoring*

The Monitoring and Enforcement Mechanisms section of MTA's DBE Program Plan briefly describes monitoring by noting that it will bring any false, fraudulent, or dishonest conduct in connection with the program to the attention of USDOT and that they will consider similar action under state and local law. There is also a section in the Plan entitled Monitoring Payments to DBEs that states that MTA requires prime contractors to maintain records and documents of payments to DBE subcontractors and lower tier subcontractors for three years following the performance of the contract. MTA's plan indicates that interim audits of contract payment to DBEs will be performed. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

In a recent reorganization, the Contract Compliance department was made a division of the DDCR to facilitate more coordinated monitoring of DBE activities. That division performs activities such as onsite monitoring, payment verification, and analyzing DBE utilization reports for active projects. MTA has developed SOPs in the area of monitoring entitled *Amendments to Utilization Plans, Monthly Participation Reports, On Site Investigations, Subcontractor/Subconsultant Payment Verification, and Case Closing*. Records are kept for each individual monitoring effort, along with a master listing of all site visits accomplished. The number of monitoring site visits conducted in 2008, 2009 and through October 28, 2010 are 50, 55, and 48, respectively. As an additional measure to improve compliance, the DDCR has developed a Contract Integrity Monitoring Kick-off Package and reviews this with contractors at the start of each contract with a DBE goal. The DDCR also sends each DBE on a goal project a letter to confirm their participation as stated on the DBE Utilization Plan Form.

In addition to on-site monitoring, DDCR contract integrity monitors (CIM) track the progress of each project assigned to them. Presently, the method used to track each

project is through an extensive spreadsheet that requires manual entry and monthly updates. In addition to conducting the monitoring activities, CIMs are required to enter information into this spreadsheet from Form A (Schedule of DBE Participation), Form E (Monthly Contractor DBE Progress Reports), and payment verifications. The Deputy Director reviews these contract monitoring sheets and manually codes items within them that may need additional action. Because maintaining this form requires significant effort by compliance managers, it may be impacting their ability to conduct in-depth analysis of information received. The following are examples of items the review team discussed with MTA that may require additional monitoring:

- Review of each constituent agency’s contract language (beyond the DBE section) for items that may be restrictive. This includes items the review team observed such as the inclusion in LIRR Contract # [REDACTED] of
  - a requirement for the prime contractor to submit “unpriced” subcontracts (which will restrict DDCR’s monitoring),
  - a requirement that each subcontractor have seven year’s experience and a worksite superintendent with five year’s experience (noted above in discussion of race-conscious contract goal setting), and
  - requirements related to New York’s Omnibus Procurement Action of 1992, which relates to New York State’s policy to “maximize opportunities for participation of New York State business enterprises, including minority and women-owned business enterprises as proposed subcontractors and suppliers on its procurement contracts.”
- DBEs subcontracting a portion of their work to non-DBEs. MTA requires that prime contractors submit monthly Contract DBE Progress Reports (Form E) to demonstrate that DBEs are working and getting paid as described in Participation Schedules. A good practice incorporated into this form is the requirement to identify any work subcontracted from a DBE to a non-DBE. However, documentation could not be provided to demonstrate how this information is used to accurately monitor a contractor meeting its DBE commitment when this information is disclosed. For example in MNR Contract # [REDACTED], it was identified that \$200,000 of [REDACTED] subcontract was subcontracted to a non-DBE firm. Documentation showing how this was used to reduce the prime contractor’s achievement by the amount subcontracted from a DBE to a non-DBE was not available during the review.
- Prime contractors issuing joint checks to DBEs. Evidence of this was seen in a review of subcontract checks issued for LIRR Contract # [REDACTED]. For this project, several joint checks were issued from [REDACTED] Constructors to [REDACTED] [REDACTED]. Some checks were written jointly to [REDACTED] and [REDACTED], some to [REDACTED] and [REDACTED], and some to just [REDACTED]. While in and of itself a joint check may not indicate a compliance issue, the extent and nature of these occurrences may warrant a request for further information. MTA may want to explore not only the issuances of joint checks to DBEs, but also the inclusion of clauses in subcontracts related to the issuance of joint checks. Additional review of LIRR Contract # [REDACTED] may be warranted, as there is discussion of how [REDACTED] work has been credited on this project, as discussed in 8 G) *Counting DBE Participation* section of this report.
- Subcontract document review. Some items observed by the review team in the

sample of subcontracts reviewed may warrant additional review procedures by the DDCR. These items include

- non-inclusion of the non-discrimination clause,
  - incorporation of prompt payment and return of retainage language that differs from MTA's contract language with the prime
  - inclusion of other clauses that may be contrary to MTA's contract language. For example, MTA's DBE language in its boilerplate correctly restates 49 CFR Part 26.87 regarding counting DBE participation when a DBE loses its eligibility after being named on a project with a contract goal. However, in a review of several subcontracts with DBEs, it was noted that prime contractors have included a clause that in essence states that a DBE will be terminated if it loses its certification status. Subcontracts executed by prime contractors such as [REDACTED], [REDACTED] and [REDACTED] include this language. There were no instances seen where this clause has been enacted, and the prime contractors interviewed on the subject said this was primarily meant to protect them against a fraudulent DBE. However the language in the clause does not expand on different actions for different reasons for termination when losing DBE certification status.
- **Timing of initiation of monitoring.** DDCR noted that it relies on notification by the procuring agency to begin contract monitoring. This, and staff workload may result in a lapse in initiation of DDCR monitoring. For one project, MTACC Contract # [REDACTED], there is correspondence from DDCR in August 2009 that it had not received monthly utilization reports since the March 2009 initiation of the project. Additionally, when information was provided to DDCR, there were significant changes to the Schedule of DBE Utilization that had not been forwarded to the DDCR. Once monitoring started, the DDCR (including the DBELO) worked with the contractor and the procuring agency to address deficiencies in submissions.

MTA's DDCR has procedures for most of the above actions in their SOPs. However, the ability of the current staff to focus on these issues, along with their other responsibilities could be improved. MTA did note that they were currently in the process of obtaining an enhanced electronic system to assist in tracking projects. It is anticipated that this system will allow for more efficient and effective monitoring, with reduced need for CIMs to enter large amounts of data manually.

### *Reporting*

The review team examined MTA's semi-annual reports for FY 2008 (revised), FY 2009 (revised) and the first half of 2010. The following areas were identified with MTA as areas that need to be correctly reported on their semi-annual reports or verified for data accuracy:

- **Line 7, Annual DBE Goal.** On its 2010 report for the first half of the fiscal year, MTA lists its goal as 8.5% race conscious (RC) and 8.5% race neutral (RN), for a total of 17%. While the total goal of 17% matches its FY 2010 goal submission, the RC and RN projections differ from those in the goal submittal of 3% RN and 14% RC.

- **Federal share** for all dollars reported. MTA’s semi-annual reports combine information from MTA and its constituent agencies’ DBE achievements. Presently, the information is submitted from each individual agency to the DDCR for aggregation into the combined report. There were a few instances when an individual agency has identified a project to be 100% FTA funded when that may not be the actual funding percentage. Since every dollar represented has to be only the federal share of that dollar, MTA needs to develop a procedure that ensures that the FTA share provided by each agency is correct.
- **Line 8**, prime contracts awarded. For at least the past two fiscal years (FY 08 and 09), MTA has not reported any DBEs as prime contractors. Due to the size of MTA’s agency contracts, this may be accurate, but MTA should verify that it has a mechanism for capturing prime awards to DBEs, even if there is no goal on the contract.
- **Total Line for Lines 8 and 9, Column I**, percentage of total dollars to DBEs. The **total** percentage to DBEs is not calculated correctly. The total percentage to DBEs reported was the same as the percentage of subcontracts to DBEs for the reports reviewed. It was reviewed with MTA staff that the correct calculation to arrive at the total percentage awarded to DBEs would be the total dollars awarded to DBEs (as prime and subcontracts) divided by the total awards to primes (cell 8A on the form).
- **Line 12 Payments on Completed Contracts (Race Conscious)**. Instead of calculating the number in cell 12C (DBE participation needed to meet the goal) from awarded contracts, MTA has been multiplying the actual dollars of completed contracts by its overall annual goal of 17%. This makes a comparison of DBE participation needed (cell 12C) to actual DBE payments (cell 12D) not possible.
- **Line 13 Payments on Completed Contracts (Race Neutral)**. MTA did not report any DBE payments on race neutral projects in the reports reviewed. MTA is reviewing whether they would get that information, as presently (for contract compliance activities) a file is not opened on a contract unless there is a DBE goal.

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

- The ability of staff to provide enhanced monitoring of the items discussed in this section. This should include information on roles of compliance personnel and the average number of projects that each is typically monitoring.
- Procedures for accurate and complete collection and reporting of data for semi-annual reports for FTA-funded activities. This should include processes to ensure that all dollars represent only the FTA share, contracts (including those with no DBE goal) are tracked for DBE participation at award and payment, and that incorrect formulas have been corrected.

This plan should include information on the timing and scope of the new DBE tracking and monitoring management information system that the DDCR discussed during the review, along with its impact on the roles of compliance personnel.

### **MTA Response:**

- In addition to the steps with regard to LIRR Contract # [REDACTED] that DDCR is undertaking as stated in Section 8 (G) above, DDCR is also reviewing the issuance by [REDACTED] Constructors of joint checks to DBEs. Additionally, the inclusion of clauses in subcontract agreements related to issuance of joint checks will be discussed with the agencies and their legal departments as part of their review of the agency contract language relating to DBE participation.
- DDCR will work with the agencies and their legal departments to review and revise the standard contract language to include a provision that subcontract agreements to be executed by prime contractors are consistent with MTA's contract language, including ensuring that those subcontracts contain a non-discrimination clause, clauses relating to prompt payment and return of retainage as well as a restatement of 49 CFR Part 26.87 regarding counting DBE participation when a DBE loses its eligibility after being named on a project with contract goal.
- As noted by the review team, DDCR compliance managers perform a number of monitoring activities and DDCR has SOPs for these activities. Although DDCR monitoring has significantly improved with the adoption of these SOPs in 2008, we agree that the ability of the staff to focus on these monitoring responsibilities still needs enhancement.
- Currently, each DDCR compliance manager monitors on an average 110 contracts (both FTA and NY State-funded). Additionally, with the reorganization of DDCR in 2009, compliance managers also process requests from MTA agencies' Procurement Departments for DBE and M/WBE goal determination as well as perform reviews and evaluation of the Utilization Plans of the proposed contract awardees.
- The review team aptly noted that the current system of manual monitoring requires significant effort by DDCR compliance managers and has contributed to their difficulties in conducting in-depth analysis of information received.
- DDCR recently acquired an Online Contract Compliance System, an electronic data gathering system that is expected to be fully implemented by the fall of 2011. This system will allow for more efficient and effective monitoring by the compliance managers of their contract assignments, focusing on prime contractors' compliance or non-compliance with contract and regulatory requirements.
- Since the FTA compliance review, DDCR has made the following changes to its reporting procedures.
  - Semi-annual reports for Fiscal Years 2008 and 2009 were revised in accordance with guidance received from the FTA reflecting the FTA share on contracts with or without DBE goals for tracking of DBE participation at award and payment. DDCR now prepares all semi-annual reports in accordance with the guidance FTA provided following its Triennial Review of MTA in April 2010.

- By the fall of 2011, DDCR will have written procedures for accurate and complete collection, calculation and reporting of data for semi-annual reports for FTA-funded activities. The Online Contract Compliance System will be used as a tool in performing this function.

**FTA Response:** FTA acknowledges MTA’s corrective action and schedule. Submit the revised DBE Program Plan incorporating procedural changes noted to FTA’s Office of Civil Rights by August 1, 2011. These changes should address the resources to complete monitoring and reporting activities along with projected workload. Additionally, by November 1, 2011 provide:

- results of efforts taken to monitor the prevalence of joint checks to DBEs
- results of efforts taken to review subcontract language
- update on the full implementation of the Online Contract Compliance System
  - If the system is operational by November 1, 2011, send a copy of the reports (other than reports required by this report), or
  - If the system is not operation, a date by which it will be
- written procedures for ensuring accurate reporting to DOT.

Additionally, following up on the recent FTA Triennial Review conducted on MTA’s NYCT, by July 10, 2011 provide to FTA’s Office of Civil Rights a copy of the ARRA-specific report of DBE Awards or Commitments and Payments for the quarter ending June 30, 2011.

### **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. For the convenience of MTA staff, a copy of the Federal Register notice has been included with this report.

With the notable exception of some of the certification-related provisions, the new rules become 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 MTA 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 MTA’s DBE program plan by the time the compliance review process is complete.

**MTA Response:** DDCR is in the process of revising its DBE Plan and will work with the agencies and their legal departments to review and revise the standard contract language. DDCR will ensure that any new or amended requirements in the revised federal regulations are incorporated in MTA’s DBE Plan and in MTA’s standard contract

language.



## SECTION 7 – SUMMARY OF FINDINGS

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action(s)	Response Days/Date
1. Program Plan	26.21	D	DBE Program Plan revisions needed	Submit revised DBE program.	August 1, 2011
2. Policy Statement	26.23	D	Policy Statement outdated	Submit evidence that the revised DBE policy statement has been circulated throughout the MTA and to DBE and non-DBE business communities.	August 1, 2011
3. DBE Liaison Officer	26.25	ND			
4. Financial Institutions	26.27	ND			
5. DBE Directory	26.31	AC		Recommendation that MTA's DCCR review the procurement websites of each of its constituent agencies and have one cohesive message about use of DBEs, where applicable, with the appropriate link to the NYSUCP directory.	
6. Overconcentration	26.33	ND			
7. Business Development Programs	26.35	ND			

<b>Requirement of 49 CFR Part 26</b>	<b>Ref.</b>	<b>Site visit Finding</b>	<b>Description of Deficiencies</b>	<b>Corrective Action(s)</b>	<b>Response Days/Date</b>
8. Determining / Meeting Goals A. Calculation	26.45	D	Unsupported step 2 methodology and use of bidders list	Submit revised procedures with revised DBE plan.  Submit FY2012-2014 goal submission which includes implementation of revised procedures	August 1, 2011  August 1, 2011
B. Public Participation	26.45 (g)1	D	Consultative process conducted after the goal advertised	Include evidence of consultative process in FY2012-2014 goal submission.	August 1, 2011
C. TVM	26.49	ND			
D. Race Neutral	26.51	D	No mathematical analysis to support RN projections	Submit revised procedures with revised DBE plan.  Submit FY2012-2014 goal submission which includes implementation of revised procedures	August 1, 2011  August 1, 2011
E. Race Conscious	26.51	AC		Recommended processes to strengthen contract goal setting process	
F. Good Faith Efforts	26.53	D	GFE reviewed post contract award and credit given for use of M/WBEs	Submit revised procedures with revised DBE plan. Also submit revised contract language	August 1, 2011
G. Counting DBE Participation	26.55	D	Counting DBE participation outside of certification codes. Counting non-DBE participation	Submit revised procedures with revised DBE plan, along with resource plan. Submit impact analysis of revised DBE counting on affected projects.  Submit evidence of implementation of additional monitoring and results of monitoring.	August 1, 2011  November 1, 2011
H. Quotas	26.43	ND			

<b>Requirement of 49 CFR Part 26</b>	<b>Ref.</b>	<b>Site visit Finding</b>	<b>Description of Deficiencies</b>	<b>Corrective Action(s)</b>	<b>Response Days/Date</b>
9. Required Contract Provisions A. Contract Assurance	26.13	D	Nondiscrimination clause not in subcontracts	Submit revised procedures with revised DBE plan	August 1, 2011
B. Prompt Payment	26.29	D	Inconsistent number of days in plan and contracts. No phased acceptance documentation.	Submit results of subcontract reviews. Submit revised procedures with revised DBE plan	November 1, 2011 August 1, 2011
C. Legal Remedies	26.37	D	Inconsistent language regarding remedies between MTA agencies	Submit results of monitoring activities for prompt payment and return of retainage. Submit revised procedures with revised DBE plan	November 1, 2011 August 1, 2011
10. Certification Standards	26.67	ND			
11. Certification Procedures	26.83	AC	Reference to at least one year requirement in business	Remove reference on website	
12. Record Keeping and Enforcements A) Bidders List	26.11	ND			
B) Monitoring	26.37	D	Improvement needed in several areas of contract compliance	Submit revised procedures with revised DBE plan, along with resource plan.	August 1, 2011
C) Reporting	26.11	D	Improvements needed in reporting	Submit: <ul style="list-style-type: none"> <li>o results of efforts taken to monitor the prevalence of joint checks to DBEs</li> <li>o results of efforts taken to review subcontract language</li> <li>o update on the full implementation of the Online Contract Compliance System</li> <li>o written procedures for ensuring accurate reporting to DOT</li> <li>o ARRA-specific quarterly report</li> </ul>	November 1, 2011  July 10, 2011

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>MTA Members:</b>				
Carolyn Greene	MTA HQ	Assistant Director, Certification Business Programs	646-252-1378	Cgreene@mtahq.org
L.A. Hernandez	MTA HQ	Assistant Director, Dept. of Diversity and Civil Rights	646-252-1375	Lhernand@mtahq.org
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Michael Garner	MTA HQ	Chief Diversity Officer	646-252-1385	Mgarner@mtahq.org
Naeem Din	MTA HQ	Deputy Director, Dept. of Diversity and Civil Rights	646-252-1387	Ndin@mtahq.org
Diana Jones Ritter	MTA HQ	Managing Director	212-878-7393	Djritter@mtahq.org
Rhonda Moll	MTA Legal	Special Counsel	212-878-1036	Rmoll@mtahq.org
Marc Albrecht	MTA Grant Mgmt	Deputy Director	212-878-7082	Malbrech@mtahq.org
Stephanie DeLisle	MTA Capital Funding	Director	212-878-7403	Swilliam@mtahq.org
Anthony Bombace, Jr.	MTA – Metro North Railroad	Senior Director, Procurement & Material Mgmt. Admin.	212-340-3055	Bombace@mnr.org
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Charles S. Kuye	MTA HQ	Compliance Manager, Dept. of Diversity and Civil Rights	646-252-1372	Ckuye@mtahq.org
William S. DeSantis	MTA – New York City Transit	Chief Procurement Officer, Capital and Administrative Division of Materiel	646-252-6350	William.desantis@nyct.com
Samuel Schaffner	MTA – New York City Transit	Assistant Chief Procurement Officer, Capital and Administrative Division of Materiel	646-252-6350	William.desantis@nyct.com
Richard A. Mack	MTA – Long Island Rail Road	Director, Contracts, Planning & Construction	718-725-2621	Ramack@lirr.org
Cynthia M. Carter	MTA – Long Island Rail Road	Deputy Chief Contracts Officer	718-725-2624	Cmcarter@lirr.org
<b>FTA:</b>				
John H. Prince, Jr.	FTA	Regional Civil Rights Officer	212-668-2179	John.prince@dot.gov

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Stephen Goodman	FTA	Director, FTA – LMRO	212-668-2500	Stephen.goodman@dot.gov
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<b>Prime Contractor Representatives:</b>				
██████████	██████████	██████████	██████████	██████████
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<b>DBE Subcontractor Representatives:</b>				
██████████	██████████	██████████	██████████	██████████
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<b>Interested Parties:</b>				
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