

# FTA

F E D E R A L T R A N S I T A D M I N I S T R A T I O N

**Piedmont Authority for Regional Transportation**  
Disadvantaged Business Enterprise  
Final Compliance Review Report

January 2013

Federal Transit Administration



U.S. Department of Transportation  
Federal Transit Administration

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## **Section 1 – General Information**

Grant Recipient: Piedmont Authority for Regional Transportation  
7800 Airport Center Drive, Suite 102

City/State: Greensboro, NC 27409

Grantee Identification Number: 5841

Executive Official: Brent McKinney  
Executive Director

On Site Liaison: Scott Rhine  
Programs Manager  
(336) 662-0002

Site Visit Dates: December 20–22, 2011

Compliance Review Team  
Members: Randelle Ripton  
Britney Berry

## **Section 2 – Jurisdiction and Authorities**

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

The Piedmont Authority for Regional Transportation (PART) 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 PART's DBE Program and were the basis for the selection of compliance elements that were reviewed.

## **Section 3 – Purpose and Objectives**

### **Purpose**

The FTA Office of Civil Rights periodically conducts discretionary reviews of grant recipients and sub-recipients to determine whether they are honoring their commitment, as represented by certification to FTA, to comply with their responsibilities under 49 CFR Part 26. In keeping with its regulations and guidelines, FTA has determined that a compliance review of the Piedmont Authority for Regional Transportation's (PART) Disadvantaged Business Enterprise (DBE) Program is necessary.

The primary purpose of the compliance review is to determine the extent to which PART 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 PART'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 sub-recipients, nor to adjudicate these issues in behalf of any party.

### **Objectives**

The objectives of DOT's DBE regulations, as specified in 49 CFR Part 26, are to:

- ensure nondiscrimination in the award and 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
- 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 PART 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 PART's DBE Program Plan against the compliance standards set forth in the regulations and to document the compliance status of each component

- gather information and data regarding the operation of PART's Disadvantaged Business Enterprise Program Plan from a variety of sources – DBE Program managers, other PART management personnel, DBEs, and prime contractors

## Section 4 – Background Information

PART was established as a result of legislation passed in 1997 by the North Carolina General Assembly authorizing the formation of a regional transportation authority in the Triad Region, which encompasses the cities of Burlington, Greensboro, High Point, and Winston-Salem. PART's mission is to enhance the quality of all forms of transportation through the efficient use and protection of our natural, economic, and human resources. The goal for PART is improving transportation through regional cooperation. PART's territorial jurisdiction encompasses 10 counties including Rockingham, Forsyth, Guilford, Alamance, Davidson, Surry, Stokes, Yadkin, Davie, and Randolph, four MPOs, and additional rural areas.

The population of the PART territorial jurisdiction is in excess of 1,200,000. PART's Executive Director reports to a 23-member Board of Directors. The members' jurisdictions provide administrative support for regional planning efforts undertaken by PART.

PART provides public transportation services throughout the service area. These services include:

- Express bus service, established in 2002, connecting the PART Regional Transfer Facility (the Hub) with Greensboro, High Point, and Winston-Salem. American Charters, Ltd., a Coach America company, operates this service under contract.
- Express bus services connecting to various employment and medical centers from outlying rural areas to the urban core of the Triad Region.
- Shuttle service in and around the Piedmont Center and Piedmont Triad International Airport (PTIA) area, also operated by American Charters, Ltd.
- Guilford County human services transportation for medical, work, and general public services to the citizens of Guilford County, NC.
- Coordinated human service transportation with 10 counties to provide Medicaid patients with transportation to 5 major hospitals from gathering points served by vans to and from out-of-county medical facilities.
- Ridesharing administered by PART, and vanpool programs managed by PART staff.

PART's administrative offices are located in Greensboro, NC, at 7800 Airport Center Dr. They operate one bus garage located at 3636 Glenn Ave. in Winston-Salem, NC, and one Transit Center located at 602 S. Regional Rd. in Greensboro, NC. In addition, PART has 23 park-and-ride facilities located throughout the Triad area. PART is also responsible for regional transportation planning.

PART's primary funding source is a 5% tax levied on the short-term rental of private vehicles in Davidson, Davie, Forsyth, Guilford, Stokes, and Surry counties. Additionally, PART receives a vehicle registration tax of \$1 from Randolph County. PART also receives funding from the North Carolina Department of Transportation.

PART operates a total of 14 routes in the Triad area with service hours Monday through Friday from 6:00 AM to 7:00 PM. Saturday and Sunday service is very limited, with some service beginning at 8:00 AM and ending at 10:00 PM. Weekend service is only on one route, with five hours of service on the Amtrak line.



The basic adult fare for express bus service on PART is \$2.40. A reduced fare of \$1.20 is offered to older adults, persons with disabilities, Medicare cardholders, and students at all times. Shuttle service is free. PART operates a fleet of 44 vehicles including Cutaways, low-floor transit coaches, and vans. Vehicles range in length from 14–40 ft.

PART has one project that is currently under construction. The current project includes:

- Interior rehabilitation of Administrative / Call Center facility
  - Development of office space for PART and Regional Call Center staff
  - Exterior civil engineering for parking and passenger access

## Section 5 – Scope and Methodology

### Scope

Implementation of the following 12 required DBE Program components specified by the FTA are reviewed in this report.

1. A DBE Program conforming to this part by August 31, 1999 to the concerned operating administration (OA). You do not have to submit regular updates of your DBE Programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval [49 CFR § 26.21].
2. A signed policy statement expressing a commitment to your DBE Program, states its objectives, and outlines responsibilities for its implementation [49 CFR § 26.23].
3. Designation of a liaison officer and support staff as necessary to administer the program, and a description of the authority, responsibility, and duties of the officer and the staff [49 CFR § 26.25].
4. Efforts made to use DBE financial institutions, by the recipient as well as prime contractors, if such institutions exist [49 CFR § 26.27].
5. A DBE directory including addresses, phone numbers and types of work performed made available to the public and updated at least annually [49 CFR § 26.31].
6. Determination if overconcentration exists and address this problem if necessary [49 CFR § 26.33].
7. Assistance provided to DBEs through Business Development Programs to help them compete successfully outside of the DBE Program [49 CFR § 26.35].
8. An overall goal based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on a recipient's DOT-assisted contracts [49 CFR §§ 26.43 – 26.53].
9. Inclusion of a contract non-discrimination clause, a prompt payment clause and implementation of appropriate mechanisms to ensure compliance by all participants [49 CFR §§ 26.13, 26.29, 26.37].
10. A certification process to determine if a potential DBE is legitimately socially and economically disadvantaged. The potential DBE must submit an application, a personal net worth statement and a statement of disadvantage, along with the proper supporting documentation [49 CFR § 26.67].
11. A certification procedure to include document review and an on-site visit and determination of eligibility consistent with Subpart D of the regulations [49 CFR § 26.83].
12. Implementation of appropriate mechanisms to ensure compliance with the part's requirements by all program participants. The DBE Program must also include a monitoring and enforcement

mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs. [49 CFR § Part 26.37] Reporting must include information on payments made to DBE firms [49 CFR §§ 26.11, 26.55].

## **Methodology**

FTA's Office of Civil Rights commenced this Compliance Review by speaking with PART representatives, scheduling the site visit, and reviewing PART DBE documentation located in FTA's TEAM System and other sources.

FTA then transmitted formal correspondence detailing the agenda for the Compliance Review and identifying the necessary PART attendees. This correspondence notified PART of the planned site visit, requested preliminary documents, and informed PART of additional documents needed and areas that would be covered during the on-site portion of the review. FTA also informed PART of staff and other parties that potentially would 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 review team members and PART staff that detailed the review process.

Subsequent to the entrance conference, a review was conducted of PART's DBE Program Plan and other documents submitted to the review team by PART's Program Manager. Interviews were then conducted with PART regarding DBE Program administration, record keeping and monitoring. These interviews included staff from diversity, procurement, and finance. A sample of contracts were then selected and reviewed to ensure contract clauses were included and other DBE requirements were met. Additionally, interviews with prime contractors, subcontractors and interested parties were conducted.

At the end of the review, an exit conference was held with FTA representatives and PART. A list of attendees is included at the end of this report. At the exit conference, initial findings, and corrective actions were discussed with PART.

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

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

Carlos Gonzalez  
Regional Civil Rights Officer, FTA Region IV  
230 Peachtree NW, Suite 800, Atlanta, GA 30303  
[Carlos.Gonzalez3@dot.gov](mailto:Carlos.Gonzalez3@dot.gov)

## Section 6 – Issues and Recommendations

### 1. **DBE Program Plan**

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

**Discussion:** During this DBE Compliance Review, deficiencies were found with the requirements for a program plan.

PART provided a DBE Program dated May 2004 to FTA prior to the on-site visit. The May 2004 plan did not take into consideration many recent DBE regulatory changes. However, during the site visit, PART provided the review team with a copy of an updated DBE Program that was revised December 2011. While the new submission significantly updates various provisions found from the 2004 iteration, PART requires additional updates within its program plan. The required updates are discussed within the specific finding areas of the report.

**Corrective Action and Schedule:** Within 60 days of the Final Report, PART must establish a policy for regular review of its DBE Program to ensure compliance with regulatory changes implemented by the Department, as well as structural and programmatic changes to PART's policies for carrying out 49 CFR Part 26. PART should also include as appendices within its DBE Program to include supplemental documents provided as responses to this compliance review (i.e., Subcontractor Payment Information, Federal Good Faith Criteria, etc.).

**PART Response:** PART will establish a policy that is approved by the PART Board of Trustees that specifically speaks to the review of the DBE Program on a minimum annual basis to ensure all statutory and regulatory changes are included in the PART DBE Program. This activity will occur at the November 14, 2012 PART Board of Trustee's meeting.

The primary person responsible for this action to occur is the PART Acting Director.

**FTA Response:** FTA agrees with the response to the noted deficiency. To close this deficiency, within 60 days of the issuance of this final report, PART must submit an updated DBE Program which reflects the new policies and addresses the findings as outlined in this report.

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

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

**Discussion:** During this DBE Compliance Review, a deficiency was found with the requirement for a policy statement.

The DBE policy statement is included in PART's DBE Program and is also found on its website. The policy statement outlines the objectives of the DBE Program and the responsibilities of the DBE Liaison Officer (DBELO) and how the policy is disseminated internally and externally. Neither the version hosted on the public site nor the statements within PART's DBE Program

were signed by the Executive Director, Brent McKinney, although signature lines have been added for the Executive Director as well as the Chair of the PART Board.

Corrective Action and Schedule: Within 30 days of the Final Report, PART must update the Policy Statement with current signatures and send proof of dissemination to the DBE and non-DBE business communities of the newly signed Policy Statement to FTA.

PART Response: PART has included as attachment to this response the signed policy statement. This policy statement will be updated with appropriate signature during the same time frame for establishing a policy on regulatory changes to the PART DBE Program.

The primary person responsible for this action to occur is the PART Acting Director.

In addition, PART will place an advertisement in the minority-owned news publications and conduct a direct mailing to local Chambers of Commerce and City and County Governments notifying all parties of the updated policy and PART DBE Program update.

FTA Response: FTA agrees with PART's response to the noted deficiency. To close this deficiency, within 60 days of the issuance of the final report, PART must submit evidence of the distribution of the policy statement.

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

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

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

The 2004 iteration of PART's DBE Program identifies the Executive Director as the person responsible for implementing the DBELO's duties and responsibilities to implement the DBE Program. During the site visit, the review team discussed the vast range of duties required by the DBELO. While an Executive Director supportive of the DBE Program is an encouraging sign, it is unlikely that the Executive Director could undertake these roles on his own due to the large amount of administrative duties the DBELO must undertake. During the site visit, PART's Program Manager, Mr. Scott Rhine, acted as the on-site liaison and had a relatively strong grasp of federal requirements. PART was not inclined to establish Mr. Rhine as the *de facto* DBELO, as his skills were needed in more areas of the organization.

PART's 2011 DBE Program alludes to an organizational structure with multiple DBELOs, though no organizational chart was provided. PART's DBE Program states on page eight that "each DBELO shall be responsible for implementing all aspects of the DBE Program and ensuring that PART complies with all provisions of 49 CFR Part 26 in their respective departments." However, given the limitations on staffing within the agency, it is questionable whether multiple DBELOs are available for this designation. The DBE Program alludes to a "per department DBELO directory" in Appendix 3; the appendix suggests that the Executive Director will continue to undertake the duties of the DBELO. While the DBELO responsibilities can be

assigned as collateral duties, it is strongly advised that one central DBELO is designated as the main point of contact and implementer of the program, while support can be provided by offices with similar functions (i.e., finance and procurement personnel should help with reporting requirements; grants management and planning should help with goal setting).

Corrective Action and Schedule: Within 30 days of receipt of the final report, submit to FTA's Office of Civil Rights:

- An update within the DBE Program detailing the delegation of DBELOs duties to particular staff members, offices or positions.
- Identification of the DBELO, provision of his/her contact information (name, email address, telephone number), and a listing of the DBELO's collateral duties, if any.
- An organization chart showing the personnel responsible for DBE-related duties.
- An organization chart for the agency that shows the DBELO's position within the agency and that also depicts the DBELO's direct and independent access to the CEO.
- An update within the DBE Program that outlines the steps taken to ensure that adequate staff for administering the program is maintained.

PART Response: PART is requesting additional time to accomplish the corrective action for portions of this identified deficiency. Specifically, the identification of a designated DBELO may require the development of a job description, advertisement for job opportunity, budget revision, and an updated organization chart. This is also an activity that should be performed under the direction of the Executive Director. At the time of this response, the PART Board of Trustees has advertised for a new Executive Director; Brent McKinney has announced his retirement.

PART is requesting 90 days from the time of the final report to fulfill the requirement identified in having a designated DBELO for the organization.

PART will move forward to accomplish corrective actions for the following specific actions within 30 days of the final report:

- An update of the DBE Program detailing the delegation of the DBELO's duties to particular staff members, offices or positions.
- An update within the DBE Program that outlines the steps taken to ensure that adequate staff for administering the program is maintained.

The primary person responsible for this action to occur is the PART Acting Director.

Subsequent to PART's initial response to the draft report, FTA was informed that PART has carried out the development of a job description, advertised the job opportunity and secured the budget for the new position that would retain the responsibilities of a DBELO. PART has hired a new employee to handle the duties of the DBELO. In conversations with PART, it was clarified that the deficiency findings will be implemented by the newly-hired DBELO with the support of PART's staff, in lieu of the Acting Director.

FTA Response: FTA agrees with PART's response to the noted deficiency. To close this deficiency, within 60 days of the issuance of the final report, PART must submit an updated DBE Program containing the items outlined in the original corrective action.

#### **4. Financial Institutions**

Basic Requirement: (9 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.

PART indicated in its 2004 DBE Program that it has a policy to "thoroughly investigate the full extent of services offered by banks owned and controlled by socially and economically disadvantaged individuals in the Triad community and make reasonable methods for the use of these banks." The Mechanics & Farmers Bank and United Nations Bank were listed in response to this provision. However, the review team found that these institutions had not been used in recent years, and PART staff had no knowledge of whether either bank is still operational. The updated 2011 Program removes the United Nations Bank and inserts the Lumbee Guaranty Bank in Pembroke. Neither program details how these financial institutions may be used or recommended for use by prime contractors.

Advisory Comment: While PART's updated program proves that new searches for minority- and women-owned financial institutions occurs, it does not identify how these institutions may be used, and how often the search to update this information will occur. FTA suggests that PART memorialize the process.

PART Response: PART recognizes this advisory comment and will take these comments into consideration when updates are performed to the DBE Program.

#### **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.

PART's 2004 DBE Program states that it maintains an annually-updated directory that identifies all firms eligible to participate as DBEs. The review team advised PART that a directory independent of the North Carolina Unified Certification Programs (UCP) was unnecessary for PART to maintain; instead, PART should consider using and sharing the North Carolina UCP directory with bidders. The 2011 DBE Program removes mention of the DBE Directory all together.

Advisory Comment: Bidders on PART projects will still seek firsthand knowledge of the availability of DBE firms from PART. Therefore, PART should reinsert language into its DBE

Program identifying how the DBE Directory may be obtained, even if it does not have an independent directory. Many recipients provide hyperlinks to the directory and certification forms within the digital versions of its programs. FTA also suggests that PART provide more clarifying instruction to prime bidders regarding the difference between DBEs, MBEs, WBEs and any other certified small business that are assisted by programs that PART must participate in.

PART Response: PART recognizes this advisory comment and will take these comments into consideration when updates are performed to the DBE Program.

## **6. Overconcentration**

Basic Requirement: (9 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.

PART's 2004 DBE Program did not contain a section addressing the need to evaluate overconcentration of DBE firms in the work areas they perform; however PART's 2011 DBE Program adds this element. The 2011 DBE Program states that PART has not identified any "overconcentration exists in the types of work at the organization." The Program states that PART will "annually review" a comparison of work performed by DBEs and non-DBEs and then assess whether DBEs are performing on contracts at a disproportionate rate. During the site visit, it was difficult to determine whether an overconcentration analysis had been conducted. As of the date of the on-site visit, PART had not used "DBE contract specific goals." Thus, it may be presumed that PART's actions did not lead to overconcentration.

However, PART often uses M/WBE goals within its State-funded procurements, and the review team found similar contract language in the FTA-assisted contracts. One of the interviewees hinted that the existence of contract goals may be causing an undue burden on non-minority firms in certain contracting areas. No additional information, outside of this comment, was proffered despite the urgings of the review team.

Advisory Comment: PART should further enhance the Overconcentration section within its DBE Program. PART should also conduct an overconcentration analysis with the understanding that the analysis may have an effect on the future usage of DBE contract specific goals.

PART Response: PART recognizes this advisory comment and will take these comments into consideration when updates are performed to the DBE Program.

## **7. Business Development Programs**

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

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



PART does not participate in a Business Development Program as described by §26.35 and Appendix C of the DBE regulations. The review team advised PART staff that while it may not participate in Business Development Programs as described in the regulation, other business development efforts engaged with outside agencies should be mentioned and advertised to firms who would benefit from participating.

PART Response: PART recognizes this advisory comment and will take these comments into consideration when updates are performed to the DBE Program.

## **8. Determining/ Meeting Goals**

### **A) Calculation**

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

Discussion: During this DBE Compliance Review, deficiencies were found with the requirements for calculation of goal.

PART provided goal methodologies for fiscal years 2008, 2009, 2010, and the 2011–2013 goal cycle. FTA’s acceptance letters approving PART’s goal methodologies were also provided. The goal methodology for PART’s FFY 2011–2013 three-year goal was analyzed for compliance with DBE regulations. However, PART’s newly-updated 2011 DBE Program details a more thorough process for establishing an overall DBE goal.

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

When establishing PART’s 2011–2013 goal, the Program Manager worked in conjunction with other personnel to identify nine different areas of contracting areas: “Appraisals,” “Environmental Consultants,” “Land Acquisition,” “Passenger Amenities,” “Engineering Design Services,” “Lot Construction,” “Vehicle Manufacturing,” “Transportation Planning Firms” and “Other.” The information is compiled into a spreadsheet and a NAICS code is assigned for each area.

Since PART does not receive direct urbanized area formula funding, it is difficult to predict the number of direct FTA-assisted contracting opportunities. The breakdown of opportunities based on agency need provides a variety of contracting options, resulting in almost \$20 million worth of contracting opportunities covering the three-year period. Each contracting area is assigned an approximate dollar value, which is then given a percentage “weight.” The “weight” is the equivalent to the proportion of dollars devoted to one category in comparison to the whole. The NAICS codes were then used to search the North Carolina UCP database for certified DBE firms and compared to the Census Bureau’s County Business Patterns index to identify “All Firms” with the same NAICS codes. These data sources yielded PART’s calculation of 612 firms that could participate in its contracting opportunities, of which 45 were DBE firms.

The number of DBEs divided by the number of all firms resulted in an unweighted base figure of 7.35%. PART weighted the availability of firms based on the dollars spent in each category line item, which resulted in a weighted Step 1 base figure of 5.84%.

A more thorough analysis of PART's goal reveals that another contracting area, "Facility Construction," has been used in the Step 1 table, which contains the availability calculations, but it was not used in the prior table that established NAICS codes. This massive facility construction project, totaling \$17 million, makes up more than 86% of the total contracting opportunities. The Step 1 table is missing the category "Lot Construction." It might be assumed that the two contracting areas are related or interchangeable, but it is extremely important to note that both types of activities would generate opportunities in multiple NAICS codes rather than the "234411" assigned for "Lot Construction."

Also, "Vehicle Manufacturing" contracting opportunities are impermissibly listed within PART's goal calculation. The DBE regulations in 49 C.F.R. §26.45(a)(2) specifically exclude "transit vehicle purchases" from the FTA goal-setting process. These two contracting areas make up the majority proportion of contracting opportunities (88.34%), which may significantly influence the weighted and unweighted goal values.

#### *Step 2: Adjusting the Base Figure*

PART determined that an adjustment to the Step 1 base figure was necessary. PART indicated that it will use past participation to adjust the base figure. The methodology included past participation for the 2008, 2009, and 2010 goals. PART indicated that the 2008 achievement was 3.00%, followed by the 2009 achievement of 4.00% and the 2010 achievement of 8.00%. The values were placed in sequential order, then the numerical median value (4.00%) was averaged with the Step 1 base figure value (5.84%). However, instead of calculating a value of 4.92%, PART came up with 7.84%, which is made by taking the average of the Step 1 base figure (5.84%) and the Step 1 base figure + past participation (9.84%).

In addition, PART's Step 2 table reveals that the figures used to make the adjustment are the DBE goals for the past fiscal years rather than the actual DBE participation. Typically, past goal values are not sufficient evidence of DBE performance, nor does it reflect its ability to successfully bid and work as prime or subcontractors. The review team was able to examine the actual contract award data by viewing PART's DBE reports for the same time periods. This examination showed participation of 30.5% for 2008, 13.4% for 2009, and 7.72% for 2010. Using the proper data and calculations for both Steps 1 and 2 would produce a significantly different overall goal value. PART has been reassigned to the FFY 2012–2014 goal-setting group. As such, PART should revisit its methodology to ensure that it is consistent with the DBE regulations as well as Official USDOT Guidance on the subject.

Corrective Action and Schedule: Within 60 days of receipt of the final report, submit to FTA Office of Civil Rights a three-year 2012–2014 DBE goal methodology that follows the basic goal setting principles. PART's updated submission must:

- Not include transit vehicle procurements for newly manufactured vehicles.
- Take into consideration additional NAICS categories for "Facility Construction" and "Lot Construction."
- Only use a past participation adjustment if the contracting activity correlates to the work that will be performed in the upcoming cycle.

- Contain a more descriptive narrative that instructs the reader on the decision making processes that went into goal setting and also describes the relevant market area and how it was chosen.
- Explores other evidence supporting an adjustment to the base figure including information from disparity studies conducted in the area.

PART Response: PART will follow the recommendations and update a new goal-setting methodology for the DBE program. PART respectfully requests that its three-year interval remain on the current schedule. Staying on the current schedule means that the process begins in the spring of 2013, with documentation due to FTA for review/ comment/approval in July 2013.

This request is being presented with PART's understanding of the organization changes that need to occur at PART with the placement of a designated DBELO. In addition, the need to incorporate public participation and the overall time needed to accomplish the other elements that have been identified as part of this DBE Program update may require more than 60 days to fulfill this deficiency.

PART will communicate directly with FTA for establishing new goals for the period 2013–2015. Moreover, PART is cognizant of the limited number of FTA contract commitments for the remainder of the current federal fiscal year. PART will follow the process as described to the best of our ability, and request FTA assistance to provide direction and insight to ensure completion is accomplished within an acceptable time frame for FTA.

PART will work directly with FTA to update its goals, but seeks assistance and understanding with the limitation we have with staff resources and administrative and operational activities currently underway.

The primary person responsible for this action to occur is the PART Acting Director.

Subsequent to PART's initial response to the draft report, in conversations with PART it was agreed that PART's current DBE goal methodology will expire on September 30, 2013. This is consistent with the current TEAM expiration date. The next submission will apply to FY's 2014–2016 (October 1, 2013, to September 30, 2016).

FTA Response: FTA agrees with the response to the noted deficiency. This deficiency is now closed. Follow-up on this item will be handled via the regional review and approval of PART's DBE Goal Methodology. PART is reminded that its DBE Goal must be submitted to the Regional Office by August 1, 2013.

## **B) Public Participation**

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

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

Based on the information contained in the 2011–2013 DBE goal methodology, the review team was unable to determine if PART conducted the consultation process when establishing its goals. While PART’s goal methodology includes a memorandum to “Small, Minority- and Women-Owned Business Organizations” and “Area Chambers of Commerce,” the memorandum is essentially a reissuance of PART’s Policy Statement. There is no mention of a meeting between PART and these organizations within the memorandum. Moreover, the document is dated June 17, 2009, which, if accurate, would mean that this memo was transmitted a year in advance of goal setting, perhaps for a previous fiscal year’s goal. PART’s 2011 DBE Program states that the agency will consult “with a variety of resource agencies and persons in developing the overall goal” including, “but not limited to local minority, women’s and general contractors groups.” PART should refer to the “USDOT Official Questions and Answers” document regarding the consultation process.

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

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

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

The consultation process **must be** documented in the recipient’s annual (**now triennial**) goal submission.[emphasis added]

As proof of publication, PART provided the advertisement invoices for the *Winston-Salem Journal* and the *News & Record*. The receipts verify that the notices were billed for the 30-day period of July 1 to 31. The review team suggested that PART should assess the effectiveness of its public notice selections.

Corrective Action and Schedule: Within 60 days of the Final Report, PART’s DBE Goal Methodology for 2012–2014 must show documentation of consultation with minority, women and/or general contractor groups per the requirements of §26.45(g)(1).

PART Response: Dependent on the final decision of FTA for maintaining its current goal setting schedule, PART will follow through on the public participation outreach. Either goal setting date

(2013–2015 or 2012–2014) will require more time than 60 days for this action to be finalized. The advertising and outreach extends past the goal-setting stage. With the update of the DBE program, internal placement of new PART personnel, amended budgets, goal setting, advertising, etc., this action will take longer than 60 days following the final report.

PART will do everything within its ability to accomplish this task within 90 days of the final report.

The primary person responsible for this action to occur is the PART Acting Director.

FTA Response: FTA partially agrees with the response to the noted deficiency. PART has been assigned to the 2014–2016 goal-setting schedule, and the documentation of the necessary public participation items for that submission will be monitored in the regional goal review process. However, to close this deficiency, within 60 days of the issuance of the final report, PART must submit an updated DBE Program that outlines the method for engaging and the timeline for conducting the public participation process.

### **C) Transit Vehicle Manufacturer (TVM)**

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

Discussion: During this DBE Compliance review, deficiencies were found with the requirement for transit vehicle manufacturers.

PART’s 2011–2013 Goal Methodology included the values related to transit vehicle procurements within its calculation. This item is discussed in a preceding section of this report. While PART’s bid documents correctly state that Transit Vehicle Manufacturers (TVMs) must comply with the DBE regulations, it incorrectly included the amounts related to vehicle purchases within its goal calculation. The review team examined the bid documents for the purchase of “Express Buses,” RFP #03-070740. The bid document contained incorrect references to DBE regulatory requirements for TVMs such as:

- Requiring TVMs to comply with 49 CFR §23.67, which has been replaced by §26.49. (See RFP #03-070740, page 10.)
- Citing outdated provisions Part 23 (i.e., stating that “[a] TVM goal of less than 10% must be supported by the additional documentation.”) (See RFP #03-070740, page 50.)
- Creating a definition for TVMs that has not been authorized/adopted by the USDOT.

Corrective Action and Schedule: Within 60 days of the final report, submit a sample transit vehicle bid document that correctly cites 49 CFR §26.49, and removes all language referencing the former DBE Regulations at 49 CFR Part 23.

PART Response: PART will submit a sample transit vehicle bid document as requested. This sample will be accomplished within 60 days of the final report. It should be noted that PART does not have any heavy-duty vehicle procurement activity scheduled until 2017. All other smaller vehicle procurements will utilize the NCDOT state contracting procurement process. However, PART will comply with the required corrective action as indicated and respond

accordingly.

The primary person responsible for this action to occur is the PART Acting Director.

Subsequent to the initial response, PART submitted a sample transit vehicle bid document incorporating the recommended changes.

FTA Response: FTA agrees with the response to the noted deficiency. Based on the review of subsequent documentation, this deficiency is now closed.

#### **D) Race-Neutral DBE Calculation/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. A non-exhaustive list of suggested race neutral measures are located in 49 C.F.R. § 26.51(b).

Discussion: During this DBE Compliance Review, deficiencies were found in the area of race neutral participation.

PART anticipates using only race-neutral measures to meet its 2011–2013 fiscal years' overall 7.84% goal. PART indicated that it has not faced any difficulty meeting its goals using neutral means; therefore, it does not see the need to include race-conscious measures (i.e., contract goals). Although this affirmation is not supported by the goal methodology, a review of the December 2011 DBE Report shows contracts awarded to DBE firms at a rate of nearly 9.4%.

During the contract review and subsequent interviews, the review team discovered that PART includes DBE contract goal language within its Professional Services contracts. This may be construed as a race-conscious method of facilitating DBE participation. The team also discovered PART's use of North Carolina Minority Business Enterprise (MBE) goal language within FTA-assisted construction contracts. While the construction contracts did not include specific DBE contract goal language, the requirement of participation by MBEs is equivalent to using race-conscious elements. In both cases, it is probable that participation levels were influenced by the included MBE and DBE goal language.

Corrective Action and Schedule: Within 60 days of the final report, PART's DBE Goal Methodology must include an updated race-conscious/race-neutral (RC/RN) breakdown that acknowledges that the joint DBE and MBE contract language may have influenced participation levels. The goal methodology narrative must fully explain why and how the RC/RN split was established as well as what race-neutral means will be used to facilitate participation absent the usage of contract goals.

PART Response: PART will update the methodology as detailed within the compliance report. We will update the methodology within the 60 day period.

PART will communicate with FTA on the best approach for determining the RC/RN methodology based on contracting opportunities in upcoming years.

The primary person responsible for this action to occur is the PART Acting Director.

FTA Response: FTA agrees with the response to the noted deficiency. This deficiency is now closed. Follow up on this item will be handled via the regional review and approval of PART's DBE Goal Methodology that will be submitted on August 1, 2013.

**E) Race-Conscious DBE Calculation/Participation**

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

Discussion: During this DBE Compliance Review, deficiencies were found with the requirements for race-conscious participation on overall goals.

PART notes, in its 2004 DBE Program, that it “will not use contract goals in the goal setting process.” However, PART’s inclusion of DBE contract goal language in Professional Services contracts and MBE contract goal language in Construction contracts is contrary to PART’s intended policy.

The review team emphasized that many of the most effective DBE Programs include both race-neutral and race-conscious elements, and that PART must use Part 26 language and procedures for setting contract goals if it wishes to use race-conscious measures on future contracting.

The 2011 DBE Program establishes that PART “will use contract goals to meet any portion of the overall goal PART does not project being able to meet using race-neutral means.” FTA will continue to monitor PART’s use of contract goals to ensure proper application to future procurements. Subsequent to the compliance review, PART’s Program Manager submitted the document “FTA Contract Clauses for Construction Services,” which was revised in January 2012. While this document captures many of the elements required for a race-conscious program, the necessary DBE Program contract clauses are not included. Also, any language referring to “the maximum opportunity to participate” derives from the former 49 CFR Part 23 and should be replaced with language from 49 CFR Part 26 (i.e., “creating a level playing field for the participation of DBEs”).

Corrective Action and Schedule: Within 60 days of receipt of the final report, submit to FTA Office of Civil Rights updated procurement/contract governing documents that include appropriate DBE contract goal language. The language in these documents should also be reflected in PART’s updated DBE Program.

PART Response: PART will update the governing document as detailed within the compliance report. We will update the methodology within the 60-day period.

PART will communicate with FTA on the best approach for determining the RC/RN methodology based on contracting opportunities in upcoming years.

The primary person responsible for this action to occur is the PART Acting Director.

Subsequent to the initial response, PART submitted an updated version of “FTA Contract Clauses for Construction Services,” which incorporated the recommended changes.

FTA Response: FTA agrees with the response to the noted deficiency. To close this deficiency, within 60 days of the issuance of the final report, PART must submit updated contract boilerplate language for professional services contracts as well as an updated DBE Program reflecting the recommended changes outlined in the original corrective action.

#### **F) Good Faith Efforts**

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

Discussion: During this DBE Compliance Review, deficiencies were found in the area of good faith efforts requirements.

The 2004 DBE Program indicated that race-conscious measures would not be used but included a section for Good Faith Efforts (GFEs). GFEs are inapplicable in the absence of contract goals. PART's 2011 DBE Program remedies this inconsistency by permitting the use of contract goal and resurrecting the need for GFEs. The 2011 DBE Program document indicates that the DBELO is responsible for determining whether a bidder that has not met the contract goal has documented sufficient GFEs to be regarded as responsive. However, it must be noted that within this DBE Program, the Executive Director is still named as the DBELO. PART describes how bidders can demonstrate that they have made good faith efforts to meet the DBE goal in its DBE Program and also includes a "Guidance Concerning Good Faith Efforts" section in bid documents.

Bidders may request an administrative reconsideration within three working days of being informed by PART that it is not responsive because sufficient GFEs were not properly documented. The reconsideration official in PART's DBE Program is listed as also listed as Brent McKinney, PART's Executive Director. The 2011 DBE Program correctly reflects language from §26.53(d)(2), PART's Program states that "the reconsideration official will not have rendered the decision or participated in the original determination that the bidder did not document sufficient good faith efforts." Unfortunately, the designation of the Executive Director as the DBELO does not support this statement. Prior to 2011, PART had not operated a race-conscious program as defined by Part 26, so there were no GFE documents to evaluate. The review team advised PART staff that a written policy for GFE determinations should be created to support newly-implemented race-conscious methods. Subsequent to the site visit, PART's Program Manager provided the document "Federal Good Faith Criteria," which attempts to memorialize and provide guidance for its GFE review process.

PART's 2011 DBE Program correctly identifies that prime contractors performing on contracts where GFEs are applicable must obtain approval from PART before attempting to remove the DBE firm and that prime contractors must exercise good faith efforts to replace that firm. However, given the content of PART's 2004 DBE Program, it should be clearly stated that the Good Faith Efforts portion of this program applies only when race-conscious goals are being used. Furthermore, this new language does not take into consideration FY 2011's DBE Program regulatory update, which requires "written approval" of replacement by the recipient as well as a "five-day" period for the DBE to provide a response to the proposed termination.



Corrective Action and Schedule: Within 60 days of receipt of the draft report, submit to the FTA Office of Civil Rights an updated DBE Program that identifies a person responsible for making reconsideration determinations who is not involved in the original process. PART's new DBE Program and governing contractual documents should include appropriate language prohibiting prime contractors who have won contracts where good faith efforts apply from terminating DBE firms for convenience or without written approval. PART's Program should also document how it will enforce the five-day period of rebuttal for DBEs that are removed on these contracts.

PART Response: This activity will occur within 60 days of the issuance of the draft report. The updated DBE Program will identify a departmental person that will take on the responsibility that is required to address the "contracting reconsideration" issue should one ever occur.

The primary person responsible for this action to occur is the PART Acting Director.

Subsequent to the initial response, PART submitted an updated version of "FTA Contract Clauses for Construction Services" that incorporated the recommended changes

FTA Response: FTA agrees with the response to the noted deficiency. To close this deficiency, within 60 days of the issuance of the final report, PART must submit updated contract boilerplate language for professional services contracts as well as an updated DBE Program reflecting the recommended changes outlined in the original corrective action.

### **G) Counting DBE Participation**

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

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

PART's DBE Program indicates that it will count DBE participation toward overall and contract goals as provided in 49 CFR §26.55. No other information is provided in this DBE Program section. PART is in the process of procuring an electronic contracts management/ accounting system in response to FTA's Procurement and Financial Management Review. PART staff indicated that reporting directly to FTA appeared to be less burdensome than reporting as a sub-recipient to NCDOT.

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

## 9. Required Contract Provisions

### A) Contract Assurance

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

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

PART's 2011 DBE Program states that it will ensure that the contract assurance clause found in §26.13(b) of the DBE regulations is placed in every DOT-assisted contract and subcontract. The review team examined three contracts for compliance with contract assurance clause inclusion.

The Professional Services Agreement for Strategic Corridors Analysis issued on January 14, 2010, and awarded to PB Services incorporated all of the DBE clauses by reference. The review team suggested that the nature of the DBE clauses and their applicability to subcontractors made it essential that the actual contract clauses are included within the bid documents and the resulting contracts.

The Professional Services for Regional Transit Plan issued on January 14, 2010, and awarded to [REDACTED] included the appropriate nondiscrimination contract assurance language within the actual document.

The Yadkinville Park and Ride Lot contract, #27201.00 issued on June 29, 2010, and awarded to [REDACTED], who subcontracted with [REDACTED], included anti-discrimination and equal opportunity section of the American Recovery and Reinvestment Act (ARRA) contract provisions. However, these provisions did not address non-discrimination within contracting between businesses as relevant to Part 26. PART maintains that this project was not initially funded with FTA assistance, but later was converted to FTA assistance with the inclusion of ARRA funds.

PART's 2011 DBE Program does not identify a process for identifying how it will verify that the appropriate clauses are included within subcontracts. PART's document "FTA Contract Clauses Construction Services" does not include the §26.13 nondiscrimination contract clause. It is unknown whether PART has created separate documentation governing FTA-assisted Professional Services contracts.

Corrective Action and Schedule: Within 60 days of receipt of the final report, submit to FTA Office of Civil Rights an update within the DBE Program that identifies PART's process for ensuring that the contract assurance clause is placed in every DOT-assisted contract and subcontract. PART must also update the appropriate documents that govern contract clauses/procurements so that it is in alignment with 49 CFR Part 26.

PART Response: PART will include in an updated DBE Program the identification of a process for ensuring that contract assurance clause is in place for all DOT-assisted contracts and subcontracts. This update will occur within 60 days of the final report.

In addition, PART will include the appropriate language as specified within 49 CFR Part 26 into the supplemental Federal Contract Clause document.

The primary person responsible for this action to occur is the PART Acting Director.

FTA Response: FTA agrees with the response to the noted deficiency. To close this deficiency, within 60 days of the final report, PART must submit an updated DBE Program containing the agreed upon changes.

## **B) Prompt Payment**

Basic Requirements: (49 CFR Part 26.29) The recipient must establish a contract clause to require prime contractors to pay subcontractors for satisfactory performance on their contracts no later than 30 days from receipt of each payment made by the recipient. This clause must also address prompt return of retainage payments from the prime to the subcontractor within 30 days after the subcontractors' work is satisfactorily completed.

Discussion: During this DBE Compliance Review, deficiencies were found with regard to the requirements for prompt payment and return of retainage.

### *Prompt Payment*

The 2004 DBE Program included language suggesting that subcontractors must be paid by primes for satisfactory performance no later than 30 days from receipt of each payment to the prime. The 2011 DBE Program updates the prompt payment section by stating that PART will include a prompt payment clause "in each USDOT-assisted prime contract" that subcontractors must now be paid "no later than seven (7) days." The clause further states that "any delay or postponement of payment from the above referenced time frame may result in liquidated damages and/or sanctions as stipulated in bid/contract documents. Exceptions may occur only for good cause following written approval by PART." The Regional Transit Plan contract contained a prompt payment clause referencing the 30-day timeframe, whereas the Yadkinville Park and Ride did not include any reference to subcontractor payment. Part 26 establishes that the prompt payment clause must be included, although it does not state that differing payment terms could be established based on the type of contract.

██████████, the prime contractor on the Yadkinville Park and Ride contract, stated that it pays subcontractors on the 25<sup>th</sup> of the month following requests made for payment on the 20<sup>th</sup> of the preceding month (i.e., June 25 payment for request made on May 20), which is in excess of the 30 day limitation. It is unclear how this payment aligns with ██████████ own payment from PART. ██████████ stated that it has been paid 30 to 45 days after invoicing when performing as a subcontractor. No complaints have been filed due to consistent payment. It is also unclear how these payments align with the prime contractor's payment terms.

The review team advised PART staff that payment terms and processes should be formalized and consistently applied. The review team also advised PART to ascertain whether North Carolina state law mandated certain payment time frames, and if so, PART should adopt those standards to the extent that it does not exceed the federally-mandated 30 days.

### *Return of Retainage*

In June 2003, USDOT issued a Final Rule on DBE that contained new requirements for prompt return of retainage. According to the Final Rule, if an agency chooses to hold retainage from a prime contractor, it 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.

PART's 2004 DBE Program required return of retainage within 45 days of the subcontractor satisfactorily completing its work. The 2011 DBE Program does not contain information on the return of retainage. Neither the Regional Transit Plan nor the Yadkinville Park and Ride contracts reference PART's retainage policy. Several of the contractors interviewed (including [REDACTED], [REDACTED] and [REDACTED]) stated that it withholds retainage when PART withholds retainage.

Subsequent to the on-site visit PART's Program Manager provided a Subcontractor Payment Information form, which tracks ongoing payments to DBE and non-DBE subcontractors. This document should help in tracking timeliness of payments to subcontractors. However, since it is submitted in a scanned format to PART, extra burden may be placed on the staff responsible for manually tracking this information. Criteria defining who is responsible for submitting and when a submission should be made are not included within the document or its instructions. The document also does not include a method for tracking retainage held.

Corrective Action and Schedule: Within 60 days of receipt of the final report, submit to FTA Office of Civil Rights an update within the DBE Program that identifies PART's process for ensuring that the contract assurance clause is placed in every DOT-assisted contract and subcontract. PART must also update the appropriate documents that govern contract clauses/procurements so that it is in alignment with 49 CFR Part 26. PART should also update the Subcontractor Payment Information form.

PART must also submit to FTA Office of Civil Rights an update within the DBE Program that:

- remedies conflicting language in prime and subcontracts regarding prompt payment
- addresses prompt return of retainage clauses are included in prime and subcontract agreements if retainage will be withheld
- addresses how incremental acceptance of portions of work will be implemented if retainage is held

PART Response: PART will include within an updated DBE Program the appropriate language that assures prompt payment, prompt return of retainage, and how incremental acceptance of portions of work will be implemented if retainage is held.

PART will update the DBE Program to include these modifications within 60 days of the final report.

The primary person responsible for this action to occur is the PART Acting Director.

FTA Response: FTA agrees with the response to the noted deficiency. To close this deficiency, within 60 days of the final report, PART must submit an updated DBE Program containing the agreed upon changes.

### **C) Legal Remedies**

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

Discussion: During this DBE Compliance Review, no deficiency was found with the requirement for legal remedies.

PART's contract documents contained reference to legal remedies that may be enforced if impropriety occurs. PART's 2011 DBE Program also contains several contractual remedies for violation of 49 CFR Part 26.

Advisory Comment: PART must ensure that contract governing documents reflect the legal remedies identified in the DBE Program.

PART Response: PART recognizes this advisory comment. The agency will take these comments into consideration when updates are performed to the DBE Program.

## **10. Certification Standards**

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

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

PART is not a certifying member of the North Carolina Unified Certification Program (NC UCP); therefore, this section is not applicable.

Advisory Comment: PART should include within its DBE Program the memorandum of understanding with the NC UCP that proves acceptance of the certifying process implemented by the State.

PART Response: PART recognizes this advisory comment. The agency will take these comments into consideration when updates are performed to the DBE Program.

## **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 requirements for Certification Procedures.

PART is not a certifying agency within the NC UCP; therefore, this section is not applicable.

## **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 FTA requirement for maintaining the bidders list, monitoring and reporting.

### *Bidders List*

The regulations require that recipients must create and maintain a bidders list. The purpose of this list is to provide an accurate data source that shows the universe of DBE and non-DBE contractors who seek to work on a particular recipient's federally-assisted contracts when establishing overall goals.

During the site visit, the review team learned that PART staff collect much of the information needed to create a bidders list required by §26.11 but it cannot be found in one cohesive document (i.e., a bidders list). PART's 2011 DBE Program contains a section related to the bidders list that identifies means for data collection. It does not appear that PART adheres to the means defined in its DBE Program.

### *Monitoring*

The 2011 DBE Program includes several methods employed by PART to monitor DBE participation. PART states in the program plan that it will review all subcontract awards made to DBEs and non-DBEs as well as conduct desk audits. However, this process had not been implemented during the time of the site visit.

PART's Subcontractor Payment Information form seeks to provide a uniform means of monitoring payments to subs. While the aforementioned items satisfy §26.37(b)'s requirement for the monitoring of contract files, PART's method for conducting site visits and "making written certification" of these "monitored work sites" is not readily apparent. During the interviews, several contractors provided conflicting descriptions of PART's monitoring procedures. For example, ██████████ stated that it was "unaware of any on-site monitoring," while ██████████ stated that "Program Manager ██████████ came to visit the worksite [and] the engineering firm [representing PART] comes out monthly to holds job site meetings." Interviews with PART staff suggested that professional services engineers conduct on-site visits on behalf of the agency. The review team suggested that PART memorialize its process for conducting on-site visits and create standardized forms to document the review.

### *Reporting*

DBE reports from FY 2007 to the first half of FY 2011 were reviewed in preparation for this compliance review. The original submissions included awards and payments to TVMs, which result in an unnecessarily reduced level of participation. The PDF versions of the semiannual DBE reports for FYs 2007, 2008, and 2009 provided to the review team prior to the site visit,

were dated to reflect the full year's contracting activity. Subsequent to the review, FTA revisited documents submitted to the Region IV office for FY 2009 to verify that the information submitted at the reporting deadline reflected the same information as the reports submitted during the review.

PART's Annual Report for FY 2009 included seven total prime contracts awarded worth \$5.7 million, with two of the seven being awarded to DBE firms. PART submitted semiannual reports to the regional office that included one contract to a non-DBE prime contractor for the first half of the fiscal year at \$389,000; and for the second half of the fiscal year PART shows 5 prime contracts at \$3.6 million. The Annual Report also shows that all of the contracts awarded during FY 2009 closed within the same year as well. None of the documents show awards to subcontractors. It is unlikely that no subcontracts (DBE or non-DBE) were awarded/committed contracts during these periods, considering that much of PART's DBE participation on construction contracts comes from subcontractors.

The December 2011 DBE report submitted through TEAM Web shows two total prime contracts awarded for a value of \$501,310 while also showing two total DBE prime contracts awarded for only \$47,208. DBE dollars should be documented as a subset of total dollars; therefore, either the two DBE prime contractors have subcontracted the majority of the work (upwards of \$450,000), calling into question their ability to perform a commercially useful function, or one or both of these firms are actually subcontractors of the prime contractors.

Corrective Action and Schedule: Within 60 days of receipt of the final report, submit to FTA's Office of Civil Rights:

- Evidence that a bidders list is being compiled in accordance with §26.11(c).
- An update within the DBE Program memorializing PART's process for on-site monitoring for FTA-assisted contracts where DBEs are performing work. This should include any forms, checklists or other tools an on-site reviewer may use to document the site visit.
- Supporting documentation depicting what FTA-assisted contracts and subcontracts were awarded between FY 2009 and FY 2011.
- A schedule and plan to update DBE reporting submissions for accuracy.

PART Response: PART has one FTA-funded project presently underway. This project has included updated DBE compliance and reviews that staff members were aware of during the December 2011 site visit from FTA. PART is anticipating that our requirements are within the regulations as described within this document.

PART will provide a bidders list for the current project that is at the final stage of close-out. This information will be provided within 60 days of the final report. In addition, PART will update the DBE Program to address on-site monitoring and provide the review documentation for the project previously discussed within 60 days of the final report.

PART will compile and provide to FTA a listing of FTA-assisted contracts and subcontracts for the period requested, FY2009–FY2011. PART will review and provide an update to FTA for any reporting modifications that are needed. PART will communicate directly with FTA should such an amendment to the submitted reporting will be required.

The primary person responsible for this action to occur is the PART Acting Director.

FTA Response: FTA agrees with the response to the noted deficiency. To close this deficiency, within 60 days of the issuance of the final report PART must submit an updated DBE Program that addresses the recommended changes. Also within 60 days of the issuance of the final report, PART must submit the bidders list and documentation of its on-site monitoring.



## Section 7 – Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site Visit Finding	Description of Deficiencies	Corrective Action Plan/Submissions Needed	Response Days/Date
1. Program Plan	26.21	D	Program not regularly updated	Submit updated DBE program containing the policy for regular updates and addresses individual areas of deficiency.	March 18, 2013
2. Policy Statement	26.23	D	Policy Statement not signed	Submit signed policy statement to FTA	Closed
				Update publicly-posted statements with signed version	Closed
			Proof of dissemination	Send proof of dissemination	March 18, 2013
3. DBE Liaison Officer	26.25	D	Designation of DBELO	Identify DBELO and responsibilities assigned	Closed
				Submit PART's Organization Charts showing DBE responsibilities	March 18, 2013
				Submit PART's Organization Chart showing the DBELOs position within the agency + access to Executive Director	March 18, 2013
4. Financial Institutions	26.27	AC	Add more details to financial institutions section		
5. DBE Directory	26.31	AC	Ensure that DBE directory is available to interested parties		
6. Overconcentration (OC)	26.33	AC	Enhance Overconcentration section within DBE Program for future use		
7. Business Development Programs	26.35	N/A			
8. Determining / Meeting Goals	26.45	D	Base figure numbers not reflective of DBE community		Closed
			Incorrect past participation numbers used		
B. Public Participation	26.45	D	No proof of conducting consultation	Submit timeline for conducting consultation and public notice as amendment in DBE Program	March 18, 2013
C. TVM	26.45	D	Wrong language in TVM contract	Submit sample transit vehicle bid documents/contracts with	Closed

<b>Requirement of 49 CFR Part 26</b>	<b>Ref.</b>	<b>Site Visit Finding</b>	<b>Description of Deficiencies</b>	<b>Corrective Action Plan/Submissions Needed</b>	<b>Response Days/Date</b>
			documents	updated language	
D. Race Neutral	26.51	D	Methodology to determine RN split unclear	Re-evaluate RC/RN split in new goal methodology. Clearly define RN elements to be used.	Closed
E. Race Conscious	26.51	D	Used MBE contract goal language, not DBE contract goal language	Update DBE Program & procurement documents with contract goal language	March 18, 2013
F. Good Faith Efforts	26.53	D	Potential conflict on GFE determinations	Update DBE Program to include separation of duties for reconsideration of GFEs	March 18, 2013
			Unclear application of pre & post-award GFE process	Update DBE Program to clearly define when GFEs will be considered	March 18, 2013
			No written approval of DBE terminations, no rebuttal	DBE Program and contract governing documents must include correct language on removal/replacement of DBEs + 5 day rebuttal	March 18, 2013
G. Counting DBE Participation	26.55	ND			
H. Quotas	26.43	ND			
9. Required Contract Provisions					
A. Contract Assurance	26.13	D	Incorrect/missing assurance language in contracts and subcontracts	Update DBE Program on monitoring of clauses in contracts to ensure clause flow down to subcontractors Update procurement documents to include appropriate contract assurance clause	March 18, 2013
B. Prompt Payment	26.29	D	Conflicting language in subcontract	Update DBE Program on monitoring of clauses in contracts to ensure clause flow down to subcontractors	March 18, 2013
			No defined retainage process/language included in program/contracts	Ensure that subcontracts include exact prompt pay language Update DBE Program and contract language with retainage policy	March 18, 2013
C. Legal Remedies	26.37	AC	Make sure related documents language does not contradict information in DBE Program.		

<b>Requirement of 49 CFR Part 26</b>	<b>Ref.</b>	<b>Site Visit Finding</b>	<b>Description of Deficiencies</b>	<b>Corrective Action Plan/Submissions Needed</b>	<b>Response Days/Date</b>
10. Certification Standards	26.67	AC	Include UCP MOU/MOA in DBE Program		
11. Certification Procedures	26.83	NA			
12. Record Keeping and Enforcements					
A. Bidders List	26.11	D	Bidders list collected but not maintained	Submit evidence of bidders list (cohesive document showing information being compiled)	March 18, 2013
B. Monitoring	26.37 26.55	D	On-site monitoring not defined	Update DBE Program with methods/tools for conducting on-site monitoring	March 18, 2013
C. Reporting	26.11	D	Inconsistencies within DBE Reports	Supporting documentation of FTA-assisted contracts awarded/completed between FY 2009 – 2011 Schedule and plan to update semiannual reports if inconsistencies are found.	March 18, 2013

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

## Section 8 – List of Attendees

Name	Organization	Title	Phone	Email
<b>FTA</b>				
Randelle Ripton	FTA Office of Civil Rights	DBE Technical Lead	(202) 366-5086	<a href="mailto:randelle.ripton@fta.gov">randelle.ripton@fta.gov</a>
Britney Berry	FTA Region VII	EO Specialist	(816) 329-3930	<a href="mailto:britney.berry@dot.gov">britney.berry@dot.gov</a>
<b>PART Members</b>				
Brent McKinney	PART	Executive Director	(336) 662-0001 ext. 222	<a href="mailto:brentm@partnc.org">brentm@partnc.org</a>
Scott Rhine	PART	Programs Manager	(336) 662-0002	<a href="mailto:scottr@partnc.org">scottr@partnc.org</a>
Mark E. Kirstner, AICP	PART	Senior Transportation Planner	(336) 235-6651	<a href="mailto:markk@partnc.org">markk@partnc.org</a>
Tonya Dupree	PART	Chief Financial Officer	(336) 662-0002	<a href="mailto:tonyad@partnc.org">tonyad@partnc.org</a>
Loris R. Colclough	PART	Financial Consultant	(336) 306-6926	
<b>Contractors</b>				
[REDACTED]	[REDACTED]	Project Manager	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	Vice President	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	Project Engineer	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	Project Manager	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]			
[REDACTED]	[REDACTED]			
[REDACTED]	[REDACTED]			