

FTA

FEDERAL TRANSIT ADMINISTRATION

Amarillo City Transit (ACT) Disadvantaged Business Enterprise Program Compliance Review Final Report

January 2013

Federal Transit Administration

PREPARED BY

Jack Faucett Associates
Ken Weeden & Associates



U.S. Department of Transportation
Federal Transit Administration

This page has been intentionally left blank to facilitate duplex printing

Contents

Executive Summary	5
1. General Information.....	6
2. Jurisdiction and Authorities	7
3. Purpose and Objectives.....	8
3.1 Purpose.....	8
3.2 Objectives.....	8
4. Introduction to ACT.....	10
4.1 Introduction to Transit Services and Organizational Structure	10
4.2 Budget	10
4.3 DBE Program	10
5. Scope and Methodology	11
5.1 Scope	11
5.2 Methodology	12
6. Issues and Recommendations	13
6.1 DBE Program Plan	13
6.2 DBE Policy Statement.....	13
6.3 DBE Liaison Officer	14
6.4 Minority- and Women-Owned Financial Institutions	15
6.5 DBE Directory.....	15
6.6 Overconcentration	16
6.7 Business Development Programs.....	16
6.8 Determining/Meeting Goals.....	18
6.9 Required Contract Provisions.....	33
6.10 Certification Standards.....	38
6.11 Certification Procedures.....	38
6.12 Recordkeeping and Enforcements.....	38
Schedule of Interviews.....	47

This page has been intentionally left blank to facilitate duplex printing

Executive Summary

Agency:	Amarillo City Transit
Date:	February 13–14, 2012
Reviewer:	Jack Faucett Associates and Ken Weeden & Associates

Objective and Methodology – This report details the findings of a Compliance Review of the Disadvantaged Business Enterprise (DBE) program operated by Amarillo City Transit (ACT). The Compliance Review was based on an examination of ACT’s DBE program procedures, management structures, actions, and documentation. Documents and information were collected from the Federal Transit Administration (FTA) and ACT. Interviews were held with officials from ACT, the City of Amarillo, and the Amarillo Chamber of Commerce. The two-day review included interviews, assessments of data collection systems, and review of program and contract documents.

ACT’s DBE Program has many effective elements – ACT has demonstrated a dedication to administering an effective DBE program. ES-1 documents some of the positive program elements observed by the JFA Team.

ES-1: Positive Program Elements
<ul style="list-style-type: none"> ➤ Strong program leadership ➤ Necessary contract clauses included in ACT FY 2011 Program Plan ➤ Careful scans for minority- and women-owned financial institutions

The Program has some minor deficiencies that are easily correctable – Several administrative corrections remain to be addressed. ES-2 lists administrative deficiencies ACT can quickly address to bring their program into increased compliance with 49 CFR Part 26.

ES-2: Administrative Deficiencies
<ul style="list-style-type: none"> ➤ Officially designate ACT’s Manager as the DBE LO ➤ Elaborate on how overconcentration might be assessed and addressed in the Program Plan ➤ Make several minor adjustments to contract clause language

The Level of DBE Participation in Amarillo is Limited – ACT has not had DBE participation in its contracts in the past. According to ACT’s management, a number of factors contribute to their history of low DBE participation attainment. One, ACT is a relatively small and self-reliant transit agency that rarely issues contracts for goods and services. Two, Amarillo is a relatively small and isolated city that has few minority- and women-owned businesses that provide goods and services needed by the transit agency. Three, some local minority- and women-owned business contractors that work with ACT have expressed a lack of interest in registering as DBEs. This environment may influence future goal attainment. Nevertheless, there are a number of steps the agency can take to improve their DBE participation potential that are highlighted in this report. These steps include increased outreach to the business community and tailoring their DBE program and solicitation efforts to be more user-friendly for contractors.

1. General Information

This section provides basic information concerning this Compliance Review of ACT. Information on ACT, the Jack Faucett Associates (JFA) and Ken Weeden & Associates (KWA) review team, and the dates of the review is presented below.

Grant Recipient:	Amarillo City Transit
City/State:	Amarillo, TX
Grantee Number:	1530
Executive Official:	Jarrett Atkinson, City Manager, City of Amarillo
On-site Liaison:	Judy Phelps, Transit Manager, ACT
Report Prepared By:	Jack Faucett Associates (JFA) 4550 Montgomery Ave. Suite 300N Bethesda, MD 20814 <i>and</i> Ken Weeden & Associates (KWA) 3955 Market St. Suite A Wilmington, NC 28403
Dates of On-site Visit:	February 13 and–14, 2012
Review Team Members:	Aida Douglas, Acting RCRO, FTA Region VI Rami Chami, Lead Reviewer, JFA Mike Brooks, Reviewer, JFA Kenneth Weeden, Reviewer, KWA

2. Jurisdiction and Authorities

The 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 Federal Transit Administration Master Agreement and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs."

ACT is a recipient of FTA funding assistance, including funding from the American Recovery and Reinvestment Act of 2009 (ARRA), 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 ACT's DBE program and were the basis for the selection of compliance elements that were reviewed.

3. Purpose and Objectives

This section discusses the purposes and objectives of the DBE program and the Compliance Review process.

3.1 Purpose

The FTA Office of Civil Rights periodically conducts discretionary reviews of grant recipients and subrecipients to determine if they are honoring their commitment, as represented by certification to FTA, to comply with their responsibilities under 49 CFR Part 26. FTA decided to conduct one such review of ACT.

The primary purpose of the Compliance Review is to determine the extent to which ACT 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 ACT'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 intended to directly investigate whether there has been discrimination against disadvantaged businesses by the grant recipient or its subrecipients or to adjudicate these issues in behalf of any party.

3.2 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 laws.
- Ensure that only firms that fully meet 49 CFR Part 26'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 ACT 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 ACT’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 ACT’s Disadvantaged Business Enterprise Program Plan from a variety of sources, including DBE program managers, other ACT management personnel, DBEs, and prime contractors.

4. Introduction to ACT

This section provides an introduction to ACT and highlights its services, budget, and DBE program. The purpose of this section is to provide an understanding of ACT's operations and scale.

4.1 Introduction to Transit Services and Organizational Structure

ACT provides fixed-route and paratransit services for the residents of Amarillo. Private transit services began operation in 1925 and operated until 1966, when ACT came under the purview of the City of Amarillo. Within the City of Amarillo, ACT (Transit), is part of the Community Services Department. The ACT Transit Manager is the sole administrative employee within ACT.

ACT's bus service consists of eight fixed bus routes. ACT also operates a paratransit service, referred to as Spec-Trans, that provides on-call trips for persons with disabilities. This service commenced in 1987.

4.2 Budget

ACT's budget comprises local, state, and federal funds, as well as revenue from fares and other sources. In FY2010-11 ACT's budget was as follows:

- Federal – FTA (Non-ARRA): \$2,702,544 (Operating \$1,735,242, Capital \$967,302)
- Federal – FTA (ARRA): \$ 553,342
- State: \$ 396,940
- Local: \$1,057,916
- TOTAL: \$4,710,742

The ARRA funds were used for preventative maintenance.

4.3 DBE Program

ACT's Transit Manager is responsible for monitoring and enforcing ACT's internal and external DBE programs to ensure compliance with appropriate federal and state laws and regulations. The Transit Manager has direct access to the Amarillo City Manager and assistant city managers. Although the executive of the Amarillo Metropolitan Planning Organization (MPO) is currently designated as the DBE Liaison Officer (DBELO) for ACT, the Transit Manager is the *de facto* DBE LO and carries out all of the associated duties.

ACT has not awarded contracts to DBEs in the recent past. ACT's Uniform Report for federal FY 2010–11 indicates that ACT awarded 23 prime contracts with a total value of approximately \$61,500. No awards were granted to certified DBEs, and no contract money was assigned to subcontractors, DBE or otherwise.

5. Scope and Methodology

This section describes the scope of the FTA regulations considered by the review team during the Compliance Review as well as the methodology employed.

5.1 Scope

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

1. A DBE program plan signed by a concerned operating administration (OA) [49 CFR 26.21].
2. A signed policy statement that expresses a commitment to the agency's 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]. Additionally, in establishing an overall goal, the recipient must provide for public participation and then provide information on this goal to the public through published notices [49 CFR 26.45].
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 26.37]. Reporting must include information on payments made to DBE firms [49 CFR 26.11, 26.55].

5.2 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 ACT by FTA's Office of Civil Rights. The agenda letter notified ACT of the planned site visit, requested preliminary documents, and informed ACT of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed ACT staff and other parties who might potentially be interviewed as part of the Compliance Review.

The documents received prior to the on-site portion of the review were examined, and an itinerary for the site visit was developed. An opening conference was conducted at the beginning of the Compliance Review with FTA representatives, ACT staff, and the review team.

Subsequent to the opening conference, a review was conducted of ACT's DBE Program Plan and other documents submitted to the review team by the DBELO or equivalent. The review team then conducted interviews with ACT officials regarding DBE program administration, project procurement, grant administration record keeping, monitoring, and legal remedies. The review team also selected a sample of FTA-funded contracts, which were then reviewed for their DBE elements. The review team interviewed people from FTA, ACT, the City of Amarillo, and the Amarillo Chamber of Commerce.

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

Following the site visit, a draft report was compiled.

This report incorporates ACT's response to the draft report findings and outlines the remaining corrective actions.

6. Issues and Recommendations

This section details the review team's findings for each of the areas pertinent to the 49 CFR Section 26 regulations outlined in the Scope and Methodology section above. The Compliance Review team has provided an overview of the relevant regulations, a discussion of the regulations as they apply to ACT's DBE program, and a suggested corrective action and timetable for each of the requirements and sub-requirements where necessary.

6.1 DBE Program Plan

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

Discussion: During this DBE Compliance Review, deficiencies were found with the Program Plan requirements. The Program Plan does not identify the appropriate DBELO and does not sufficiently address issues related to overconcentration evaluation procedures and options available to ACT if prime contractors do not comply with the requirements of the DBE program. These issues are discussed in more detail in other parts of this chapter.

Corrective Action and Schedule: Within 60 days of the issuance of the final report, ACT must update their DBE Program Plan addressing the issues identified in this compliance review report.

ACT Response: As of July 6, 2012, Section 26.25 in the DBE Plan has been updated to reflect Judy Phelps as ACT's DBELO. Attached is a copy of the updated City of Amarillo Organizational Chart.

FTA Response: ACT's DBE Program Plan dated July 17, 2012 and their response to FTA's initial comments addresses many, but not all, of the comments and concerns raised by FTA. FTA's responses in the subsequent sections of this report highlight where FTA agrees with corrective actions already taken by ACT and where ACT needs to take further actions to address outstanding issues. These findings will remain open until these issues are resolved.

6.2 DBE Policy Statement

Basic Requirement: (49 CFR 26.23) Recipients must formulate and distribute a signed and dated DBE policy statement that states the objectives and the entity's commitment to the DBE program. This policy must also be circulated throughout the recipient's organization and to the DBE and non-DBE business communities.

Discussion: During this DBE Compliance Review, deficiencies were found with the requirement regarding ACT's Policy Statement. The Policy Statement identifies the DBELO as the "Director of the MPO". However, ACT's Manager, Judy Phelps, actually functions as the transit agency's DBELO; the Director of the local MPO does not perform the functions of the DBE LO. Accordingly, Ms. Phelps should be identified as the DBE LO in the Policy Statement.

The Policy Statement states that the document has been distributed to “*the Amarillo City Commission and all of the components of our organization.*” The Policy further states: “*We have distributed this statement to DBE and non-DBE business communities that perform work for us on DOT-assisted contracts. This information is included on all bid packages.*” However, there was insufficient evidence that the Policy Statement is being circulated throughout the recipient’s organization and to minority, female, and non-minority community and business organizations.

Corrective Action and Schedule: Within 60 days of the issuance of the final report, ACT must develop a new Policy Statement that identifies the individual that serves as the agency’s DBELO. ACT must also distribute the Policy Statement throughout their organization and to minority, female, and non-minority community and business organizations.

ACT Response: On July 6, 2012 the Policy Statement was updated, and is included in the revised DBE Program Plan. The Policy Statement was distributed to internal and external stakeholders.

FTA Response: FTA agrees with ACT’s response. The revised DBE Policy Statement and finds that it identifies the Transit Manager as the DBELO and that it has been distributed to the following entities: Amarillo Chamber of Commerce, Hispanic Chamber of Commerce, Women’s Council Chamber of Commerce, Contract Procurement Center, NAACP, Panhandle Builders Association, and Amarillo United Citizens Forum. The updated Policy Statement and ACT’s distribution of the document sufficiently address the requested corrective action and schedule.

This finding is now closed.

6.3 DBE Liaison Officer

Basic Requirement: (49 CFR 26.25) Recipients/grantees must have a designated DBELO who has direct and independent access to the CEO of the recipient organization. The DBELO 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, a deficiency was found with the requirements for the DBELO. The ACT program plan identifies Gary Holwick, the MPO Director, as the DBELO. However, Mr. Holwick does not perform the 13 duties and responsibilities of the DBELO identified in the Program Plan (page 5).¹ These DBE LO functions are, in fact, carried out by Judy Phelps, Manager of the Transit Department. It is recommended that the DBE LO be changed from Mr. Holwick to Ms. Phelps. The ACT organizational chart that is provided as an appendix in the DBE Program Plan also does not illustrate the DBE LO’s direct access to the City Manager. The functional DBE LO (Phelps) reports directly to the Director of Community Services, who reports to the Deputy City Manager.

Corrective Action and Schedule: Within 60 days of the issuance of the final report, ACT should formally designate Ms. Phelps as the agency’s DBELO or shift the program’s responsibilities to another individual and designate him or her as the DBELO. The Program Plan

¹ Page number references in this report assume that the Policy Statement in ACT’s Program Plan FY 2011 is page 1 of the Program Plan document. The actual document does not include page numbers.

and Policy Statement should accurately identify the individual whose responsibility it is to implement the DBE program as the DBELO.

ACT Response: The Policy Statement is updated in the revised DBE Plan. The Policy Statement was distributed to internal and external stakeholders. The City of Amarillo has designated Judy Phelps, Transit Manager, as the City of Amarillo's DBELO. Attached [to our response] is a copy.

FTA Response: FTA agrees with ACT's response. FTA has reviewed the revised DBE Policy Statement and Program Plan and finds that it identifies the Transit Manager, Judy Phelps, as the DBELO and includes an organizational chart that shows her direct access to the City Manager. The updated Policy Statement and Program Plan sufficiently address the requested corrective action and schedule. **This finding is now closed.**

6.4 Minority- and Women-Owned Financial Institutions

Basic Requirement: (49 CFR 26.27) Recipients must investigate the existence of minority- and women-owned financial institutions and make efforts to use them. Recipients must encourage prime contractors to use these minority- and women-owned financial institutions.

Discussion: During this DBE program Compliance Review, no deficiency was found with respect to minority financial institutions. According to the ACT Program Plan, ACT conducts a search every three years for financial institutions using the Federal Reserve Bank's Minority-Owned Financial Institutions list and the Minority Bank Deposit Program for Financial Institutions list. According to the ACT Program Plan, the nearest applicable financial institution is 363 miles away, which ACT considers too far to be practical for local use or recommendation to local firms. The review team considers ACT's financial institutions identification and promotion procedures to be reasonable.

6.5 DBE Directory

Basic Requirement: (49 CFR 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 program Compliance Review, no deficiencies were found with the requirement for a DBE directory. Amarillo City Transit is a non-certifying member of the Texas Unified Certification Program (UCP), and the DBE Directory is maintained by TXDOT. Detailed instructions on accessing and registering on the directory are provided on page 6 of the ACT DBE Program Plan dated July 17, 2012. The review team viewed the Web-based directory during the site visit, and found the directory included the information required by 49 CFR Part 26 regulations. The directory provides the following information for each certified firm: the firm's name, mailing address, telephone number, and the type of work the firm has been certified to perform as a DBE. TXDOT updates its online directory as changes are reported, in real time.

6.6 Overconcentration

Basic Requirement: (49 CFR 26.33) If the transit agency determines that overconcentration exists in a certain type of work (for DBEs) as to unduly burden the opportunity of non-DBE firms to participate in this type of work, the agency must devise appropriate measures to address this overconcentration.

Discussion: The Program Plan states, “*The City of Amarillo has not identified that overconcentration exists,*” but the document does not provide a set of procedures for evaluating and addressing overconcentration. These procedures would be necessary if ACT institutes race-conscious measures to meet its DBE goals in the future.

Advisory Comment: The ACT Program Plan should describe how the agency would evaluate overconcentration in the future and steps they would take to address overconcentration if it were observed.

ACT Response: Section 26.33, Overconcentration, is updated in the revised DBE Plan, stating,

“If overconcentration occurs, Amarillo City Transit staff will refer business owners to Amarillo’s Contract Procurement Center. The Contract Procurement Center will assist DBE’s in performing work outside of the specific field in which the City of Amarillo have determined that non-DBE’s are unduly burdened. Amarillo City Transit has not, at this time, identified any overconcentration in one or more types of work. The City will annually review the number of DBE firms in the areas of work most frequently awarded to those DBE firms and compare those figures to the total number of non-DBE firms in the respected work areas. If the number of DBE firms is determined to be disproportionately high, then overconcentration may exist. The City will then propose appropriate measures to remedy the concerns, and submit the measures to the appropriate USDOT agency for review.”

6.7 Business Development Programs

Basic Requirement: (49 CFR 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: The ACT DBE Program Plan contains only one sentence stating that ACT does not have a BDP (page 7). While it not a requirement to have a BDP, ACT should consider assisting DBE firms by identify existing BDPs offered by the State, other transit agencies, educational institutions, etc. One resource the review team learned about was the Procurement Center at the local campus of West Texas A&M University.

Advisory Comment: ACT should either start their own Business Development Programs or identify existing programs offered by the State of Texas, other transit agencies, and educational institutions. ACT should commit to making referrals to these services for both the existing DBE

program and the new small business element. The Program Plan should describe how and when ACT will inform the DBE community about relevant BDPs.

ACT Response: Section 26.35, Business Development Program, was updated in the revised DBE Plan. ACT works with the Contract Procurement Center. Businesses are notified of business development opportunities via the website, conferences, lunch & learn, and one-on-one meetings. ACT sent out a letter dated July 17, 2012, notifying internal and external stakeholders that the Contract Procurement Center is available to assist them with their business development and contracting needs. Section 26.35 from the DBE Program Plan is provided below.

Section 26.35 Business Development Programs

The City of Amarillo has not established a business development program and will re-evaluate the need for such program every three years. The City of Amarillo–Transit Department works with the Contract Procurement Center to inform the business community that the City has DBE funds to spend and the center has resources to assist businesses.

The Contract Procurement Program was authorized by Congress in 1985 to expand the number of businesses capable of participating in the government marketplace. The Contract Center’s mission is building a strong economy, by helping private companies do business with federal, state and local governmental agencies.

The Contract Procurement Center in Amarillo is the bridge between businesses and government agencies who want to buy goods and services. Procurement consultants bring knowledge of government contracting together with information about businesses to create new opportunities to sell and for government buyers to get better quality at lower costs.

While some specialized services and seminars may have a charge, all basic services such as identifying bidding opportunities, assistance completing paperwork and submitting competitive bids are free.

The Center’s services include:

<i>*Consulting</i>	<i>*Bid Match</i>	<i>*Seminars</i>	<i>*Project Plans</i>
<i>*Market Research</i>	<i>*Reference Materials</i>	<i>*Workshops</i>	<i>*Bid Database</i>

The Contract Procurement Center also hosts quarterly meetings that focus on small business contracting opportunities throughout the Texas panhandle. The Texas Department of Transportation, Pantex, regional school districts, both Potter and Randall counties and the City of Amarillo participate in the meetings on a regular basis.

Each organization discusses contracting opportunities, how to bid on a project, and provide contact information. These meetings are advertised on the Contract

Procurement Center's website and thru a mass e-mail with over 1000 registered participants.

*For additional information:
The Contract Procurement Center
701 S. Taylor, Suite 118
Amarillo, Texas 79101
806-372-5151
www.contractprocurementcenter.com*

6.8 Determining/Meeting Goals

This requirement includes seven sub-requirements related to determining and meeting goals.

A. Calculation

Basic Requirement: (49 CFR 26.45) In 2010, 49 CFR Part 26 was amended concerning the old requirement for an annual overall DBE goal, which had in previous years coincided with the annual federal fiscal year and typical grant year. Instead, beginning with FY 2011, based on a schedule determined by FTA, overall goal documents are now required on a triennial basis.

Discussion: ACT has set an overall goal for October 1, 2011, through September 30, 2014, at 8.62%. Historically, ACT has set higher DBE participation goals. For example, their DBE participation goals in fiscal years 2008, 2009, and 2010 were 29.37 %, 29.24%, and 33.38%, respectively. Despite these high goals, ACT did not have any DBE participation in any of those years. The current lower overall DBE participation goal increases the likelihood that ACT can reach their goal. However, ACT does not have a history of awarding contracts to DBE's using race-neutral means and does not have a strong Business Development Program. Accordingly, the ACT race-neutral program may not achieve sufficient DBE participation without significant improvement to the race-neutral program.. The paragraphs below explain ACT's Step 1 and Step 2 processes in determining their current triennial DBE participation goal.

Step 1

ACT defines their market area as "businesses residing in the state of Texas". ACT states that its contractors usually used are based in Amarillo, Lubbock, Midland/Odessa, Louisville, and the Dallas–Ft. Worth area. ACT's Step 1 base figure was determined using the Texas UCP directory to establish the availability of ready, willing, and able DBEs in the NAICS code categories used by ACT, which determined the numerator. The Census Bureau's Country Business Pattern database (<http://www.census.gov/econ/cbp/index.html>) was used to determine the number of businesses in those same NAICS code categories used by ACT, which determined the denominator. The base figure for the relative availability of DBE's was calculated as:

$$\begin{aligned} \text{Base Figure / Relative Availability} = \\ \text{Ready, Willing, and Able DBEs / All Firms Ready, Willing, and Able} \\ \text{or } 209 / 2554 = 0.0818 \end{aligned}$$

ACT divided the numerator of 209 DBE Firms with the denominator of 2,554 All Firms to arrive at an 8.18% base figure. ACT then weighted that base figure according to the dollar amounts representing its contracting opportunities in each relevant NAICS code category. After weighting, ACT's result was an increase of 0.88%, leading to a weighted base figure of 9.06%. ACT then took an average of its base figure of 8.18% and its weighted base figure of 9.06% to arrive at a Step 1 goal of 8.62%.

Step 2

ACT did not use a Step 2 adjustment. Their current triennial DBE participation goal is determined entirely from their Step 1 process. ACT states they did not use a Step 2 adjustment because their lack of past DBE participation was not useful for determining an adjustment.

Advisory Comment: ACT should consider adding a race-conscious element to their overall DBE participation goal, develop procedures to identify race conscious goals for individual projects, and update the Program Plan and goal methodology to reflect these changes at their next triennial DBE Goal Methodology submittal.

ACT Response: The City has awarded three bus bench contracts to the following minority-owned companies; Cruz Construction, \$172,842.95; Cruz Construction, \$171,988.00; and M&H Civil Engineering, \$208,000.00. Although they will qualify as DBEs, none are interested in becoming a program participant. The City of Amarillo has a strong Business Development Program, and the Contract Procurement Center and the City has a history of doing business with minorities and women. ACT will continue to work with the Contract Procurement Center, the business community, and the Hispanic and Women's Chambers of Commerce to encourage businesses to sign up as a DBE.

B. Public Participation and Outreach

Basic Requirement: (49 CFR 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: ACT provided evidence that they engaged in public outreach to seek input related to the development of goals. This was achieved by members of the City of Amarillo's Purchasing Department who attended meetings held by Texas Public Purchasing Association and Make a Connection. Additionally, the DBE goal was included on the Amarillo City Commission's agenda for a public hearing open to the public.

Advisory Comment: Although ACT sought some public participation and outreach in its goal-setting process, an advisory comment is included because ACT did not directly solicit input from local chambers of commerce as well as women, minority, and general contractor groups when determining its goals.

ACT Response: ACT held public meetings and advertised the plan, but no one from the public made a comment or attended the meetings. ACT sent a letter on July 17, 2012, to internal and external stakeholders in an effort to encourage businesses to sign up as a DBE and to notify the business community that ACT has established a goal to spend \$128,649 with DBEs and \$50,000 with small businesses. ACT did not receive any inquiries.

The City has awarded three bus bench contracts to the following minority-owned companies; Cruz Construction, \$172,842.95; Cruz Construction, \$171,988.00; and M&H Civil Engineering, \$208,000.00. Although they will qualify as DBEs, and Transit Department staff members encouraged each business to apply for the DBE program, none are interested in becoming a program participant. Amarillo has a strong business development program, and the Contract Procurement Center and the City have a history of doing business with minorities and women.

On August 14, 2012, Amarillo City Transit, the City of Amarillo's Purchasing and Facilities Departments and the Contract Procurement Center held a public meeting. The benefits of the DBE program were explained as were purchasing opportunities with the City of Amarillo. There were 60 participants present at the meeting and, despite staff and Contract Procurement Center's efforts, no one showed an interest in applying for the DBE program.

ACT will continue to work with the Contract Procurement Center to encourage businesses to sign up as a DBE.

Below is the section found in ACT's DBE Program Plan and solicitation documents that describe how race-neutral attainment is counted.

DBE Program Plan
Section 26.55 Counting DBE Participation

The City of Amarillo will count race-neutral DBE participation toward overall and contract goals as provided in 49 CFR 26.55. The City of Amarillo will not count the participation of a DBE subcontract toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE. Supplies purchased from a DBE count at 60%.

C. Transit Vehicle Manufacturers (TVM)

Basic Requirement: (49 CFR 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. ACT provided TVM certifications for recent vehicle purchases.

Advisory Comment: The TVM certificate provided for the 7200 Series bus purchase was five years old at the time of the acquisition. The TVM provided is dated June 13, 2005, but the contract was signed in June 2009. FTA does not consider the dated certificate to be a deficiency,

but ACT is encouraged to solicit the most up-to-date certificate they can obtain for future purchases.

ACT Response: ACT updated the Certifications and Assurances to include a request for the most update certificate. Changes to the Certifications and Assurances are indicated below and attached to this document.

Certifications and Assurances

TRANSIT VEHICLE MANUFACTURER (TVM) CERTIFICATION

26.49 Overall Goals for Transit Vehicle Manufacturers

(a) The City of Amarillo is an FTA recipient and must require each transit vehicle manufacturer as a condition of being authorized to bid or propose on FTA assisted transit vehicle procurements to certify that it has complied with the requirements in 49 CFR Part 26 – Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs.

(b) If you are a transit vehicle manufacturer, you must establish and submit for FTA’s approval an annual overall percentage goal. In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying 26.45 How do recipients set overall goals.

(c) As a transit vehicle manufacturer, you may make the certification required by this section if you have submitted the goal this section requires and FTA has approved it or not disapproved it.

Please indicate the date when your DBE Program was submitted to FTA.

Please indicate the date when your DBE Program approved by FTA.

Transit Department Staff – TVM Verification

Go to www.fta.gov website and check the TVM Manufacturers list.

Is the apparent low bidder on the list? Yes or No

When was their DBE Program approved?

DBE Program approval dates.

Does the TVM Certificate submitted by the apparent low bidder fall within the approval dates? Yes or No If no, describe action taken.

D. Race-Neutral

Basic Requirement: (49 CFR 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: No deficiency was found with respect to the requirements for calculation of the race-neutral DBE participation goal. ACT has a new three-year goal of 8.62%. This includes a projection of 0.00% race-conscious and 8.62% race-neutral attainment. However, between 2008 and 2011, ACT’s DBE participation goal was always higher than 29.34%, but it had 0% attainment each year. In addition, ACT does not explicitly state how it will count race-neutral

DBE participation in projects in the Program Plan. The Program Plan states only that the agency will do so “*as provided in 49 CFR 26.55*” (page 10). The Program Plan and solicitation documents should give more guidance to contractors about how DBE participation is counted.

Advisory Comment: ACT will have to strengthen their race neutral programs to achieve their current goal. This may require ACT to improve their business development program partnerships, increase their outreach to minority and women owned businesses, and further unbundle contracting opportunities. Additionally, ACT should narratively describe how they will count race neutral attainment in their Program Plan and solicitation documents. ACT should also consider developing a set of procedures and a goal for a race-conscious element to help them in reaching their overall DBE goal.

ACT Response: The City of Amarillo does not subcontract out any part of public transportation services or services needed by each department. The City of Amarillo has internal departments such as Facilities, Street, Legal, Accounting and Human Resources, just to name a few. As a result, there are few contracting opportunities.

The City has awarded three bus bench contracts to the following minority-owned companies: Cruz Construction, \$172,842.95; Cruz Construction, \$171,988.00; and M&H Civil Engineering, \$208,000.00. Although each company would qualify as a DBE and Transit Department staff encouraged each business to apply for the DBE program, none are interested in becoming a program participant. This is because there is no incentive to sign up; each is already doing business with the City of Amarillo and view the DBE program as a negative. One minority business owner said, “I do not want to be picked for a job because I am a Mexican—I want to be picked because I am the best.”

Amarillo has a strong Business Development Program in the Contract Procurement Center. ACT will continue to work with the Contract Procurement Center and the business community to encourage businesses to sign up as a DBE.

On August 14, 2012, Amarillo City Transit, the City of Amarillo’s Purchasing and Facilities departments, and the Contract Procurement Center held a public meeting. The benefits of the DBE program were explained as were purchasing opportunities with the City of Amarillo. There were 60 participants present at the meeting, and despite staff and the Contract Procurement Centers efforts, no one showed an interest in applying for the DBE program. Although this meeting was not successful, the Transit Department will continue to work with the Contract Procurement and Purchasing departments to encourage Amarillo’s businesses to sign up for the DBE program.

Below are Section 26.51 from the DBE Plan and page 48 from the Certifications and Assurances that discuss counting DBE participation.

DBE Program Plan***Section 26.51 Meeting Overall Goals/Contract Goals***

In accordance with Section 26.51(a-c), the breakout of estimated race-neutral and race conscious participation can be found in Attachment 4 to this program. This section of the program will be updated every three years or as mandated by the FTA.

In accordance with Section 26.51(d-g), the City of Amarillo will use contract goals to meet any portion of the overall goal the City of Amarillo does not project being able to meet using race-neutral means. Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.

The City of Amarillo will establish contract goals only on those DOT-assisted contracts that have subcontracting possibilities. The City of Amarillo will not establish a contract goal on every contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work.).

The City of Amarillo will express the contract goals as a percentage of the Federal share of a DOT assisted contract.

Certifications and Assurances

c. The City of Amarillo will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55. The City of Amarillo will not count the participation of a DBE subcontract toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE. Supplies will count at 60%.

E. Race-Conscious

Basic Requirement: (49 CFR 26.51) The recipient must establish contract goals to meet any portion of its overall goals it does not project to be met using race-neutral means. The recipient must also project a percentage of its overall goal that will be met through race-conscious means, as part of the goal methodology. Race-conscious goals may only be established on contracts with subcontracting opportunities and are not required to be set on each individual contract.

Discussion: ACT's DBE participation triennial goal may need to be reevaluated. ACT's new three-year overall DBE participation goal is 8.62%. This includes a projection of 0.00% race-conscious and 8.62% race-neutral attainment. However, between 2008 and 2011, ACT's DBE participation goal was always higher than 29.34%, but it had 0% attainment each year. As ACT has historically not made any awards to DBEs, the review team considers the lack of a race-conscious goal to be an issue of concern.

Advisory Comment: ACT should consider adding a race-conscious element to its overall DBE participation goal, develop procedures to identify race-conscious goals for individual projects, and update the Program Plan to reflect these changes. If ACT develops a race-conscious program in the future, it should have contract goals only on projects with subcontracting possibilities.

ACT Response: The City awarded three bus bench contracts to the following minority-owned companies: Cruz Construction, \$172,842.95; Cruz Construction, \$171,988.00; and M&H Civil Engineering, \$208,000.00. Although they qualify as DBEs, none are interested in becoming a program participant. There are 13 DBEs in Potter and Randall counties, including trucking, barricade, interior design, and wind/solar companies. To further complicate matters, Amarillo is isolated in the Texas panhandle—Denver is 431 miles away, Dallas is 367 miles away, Oklahoma City is 259 miles away, and Albuquerque is 288 miles away. Amarillo City Transit will continue to work with the Contract Procurement Center and the Hispanic and Women’s Chambers of Commerce to encourage business to sign us as a DBE.

F. Good Faith Efforts

Basic Requirement: (49 CFR 26.53) The recipient may award contracts that contain DBE contract goals to bidders who either meet the stated goals or who document sufficient good faith efforts (GFE) to meet the goals. The bidders must provide documentation of these efforts to the recipient. The recipient should have a written GFE procedure, including an administrative reconsideration process for cases in which apparent a successful bidder does not meet requirement.

Discussion: During this DBE Compliance Review, it was identified that the requirements for good faith efforts outlined in ACT’s DBE Program Plan did not include sufficient detailed guidance on how contractors can demonstrate a good faith effort. This may be because their GFE procedures apply only to contract bid opportunities with established DBE participation goals, and ACT has not historical used DBE participation goals on contract opportunities.

Advisory Comment: ACT must provide instructions in both its Program Plan and its bid solicitation documents that outline the steps prime contractors can take to perform and document good faith efforts when it establishes a Race-Conscious DBE Goal in its methodology. It should be noted that GFE procedures apply only to projects with DBE participation goals.

ACT Response: Demonstration of good faith effort was added to the updated DBE Plan in Section 26.53, Demonstration of Good Faith Effort Procedures when a DBE is terminated/replaced on a contract with contract goals. The DBE Program Plan and the Certifications and Assurances include the following detailed instructions if a DBE is terminated/replaced on a contract with contract goals:

Section 26.53 Good Faith Efforts Procedures

Award of Contracts with a DBE Contract Goal: 26.53

In those instances where a contract-specific DBE goal is included in a procurement/solicitation, The City of Amarillo will not award the contract to a bidder who does not either: (1) meet the contract goal with verified, countable DBE participation; or (2) documents it has made adequate good faith efforts to meet the DBE contract goal. It is the obligation of the bidder to demonstrate it has made sufficient good faith efforts.

Evaluation of Good Faith Efforts: 26.53

The DBE Liaison Officer is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts. Only the apparent successful bidder will submit the DBE information.

The process used to determine whether good faith efforts have been made by a bidder are as follows: the City of Amarillo will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before the City can commit to the performance of the contract by the bidder. Examples of information the City will consider from the successful bidder before the contract is executed are found below under the section Demonstration of Good Faith Effort.

Information to be Submitted: 26.53

The City of Amarillo treats the bidder's compliance with good faith efforts' requirements as a matter of Responsibility – only the apparent successful bidder will submit the DBE information.

Each solicitation for which a contract goal is established will require the bidder to submit the following information within 5 business days of being notified that they are the successful bidders, before the contract is executed:

- 1. The company's name, address, and contact information;*
- 2. A description of the work that each DBE will perform;*
- 3. The dollar amount of the participation of each DBE firm participating;*
- 4. Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;*
- 5. Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractors commitment and*
- 6. If the contract goal is not met, evidence of good faith efforts.*

Demonstration of Good Faith Effort: 49 CFR Part 26 Appendix A

If a contractor does not meet the DBE goals, it shall be eligible for award of the contract if it can demonstrate to the satisfaction of the City of Amarillo that it has made a good faith effort to meet the DBE goal.

In the event a firm submitted by a contractor is not able to become certified by the Texas Unified Certification Program, the contractor will be notified and given an opportunity to substitute that firm with another DBE firm. The contractor will be given a deadline to accomplish the substitution.

In the event the contractor is unable to contract with a substitute DBE firm, the good faith efforts that the contractor made in attempting to contract with a substitute DBE firm must be documented and the information submitted to the DBE Liaison Officer. Documentation submitted according to this document is the only exception to the DBE requirement that the City of Amarillo will consider in determining whether the contractor made a good faith effort.

The contractor shall furnish with their bid package DBE utilization information that documents the steps the contractor has taken to obtain DBE participation.

Whether the contractor solicited through all available means the interest of all certified DBEs who have the capability to perform the work required in the contract. The bidder must solicit interest in a manner that allows the DBEs sufficient time to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up on initial solicitations.

Whether the contractor selected portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform this work with its own forces.

Whether the contractor provided interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

Whether the contractor negotiated in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, to facilitate DBE participation. Evidence of such negotiation includes the names, addresses and telephone numbers of DBEs that were considered, a description of the information provided regarding the plans and specifications for the work

selected for subcontracting and evidence as to why additional agreements could not be reached for DBEs to perform the work.

A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

Whether the contractor rejected DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations or associations and political or social affiliations (for example union vs non-union employee status) are not legitimate causes for the rejection or non solicitation of bids in the contractor's efforts to meet the project goal.

Whether the contractor made efforts to assist interested DBEs in obtaining bonding, lines of credit or insurance as required by the contractor.

Whether the contractor made efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials or related assistance or services.

Whether the contractor effectively used the services of available minority/women community organizations, minority/women contractors' groups, local, state, and Federal minority/women business assistance offices, and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs. The Amarillo Contract Procurement Center provides these services to the Texas panhandle.

Administrative Reconsideration: 26.53

Within 5 business days of being informed by City of Amarillo that the contractor did not document sufficient good faith efforts, a bidder may request administrative reconsideration.

The bidder should make this request in writing to the following reconsideration official: City of Amarillo, City Manager, Jarrett Atkinson, jarrett.atkinson@amarillo.gov, P.O. Box 1971, Amarillo, Texas 79102 806-378-3000. The reconsideration official will not have played any role in the original determination that the bidder did not document sufficient good faith efforts.

As part of this reconsideration, the bidder will have the opportunity to provide written documentation concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder will have the opportunity to meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.

The City of Amarillo will send the bidder a written decision, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

Demonstration of Good Faith Efforts when a DBE is Terminated/Replaced on a Contract with Contract Goals

The City of Amarillo requires that prime contractors may not terminate a DBE subcontractor listed on a bid/contract with a DBE contract goal without the City of Amarillo's prior written consent. Prior written consent will only be provided where there is "good cause" for termination of the DBE firm, as established by Section 26.53(f)(3) of the DBE regulation.

Before transmitting to The City of Amarillo its request to terminate, the prime contractor must give notice in writing to the DBE of its intent to do so. A copy of this notice must be provided to the City of Amarillo prior to consideration of the request to terminate. The DBE will then have five (5) business days to respond and advise the City of Amarillo of why it objects to the proposed termination.

In those instances where "good cause" exists to terminate a DBE's contract, the City of Amarillo will require the prime contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. The City of Amarillo will require the prime contractor to notify the DBE Liaison Officer immediately of the DBE's inability or unwillingness to perform and provide documentation that relates to the circumstances.

The City of Amarillo will require the prime contractor to submit in writing a request to the DBE Liaison Officer to replace the DBE. After the DBE Liaison Officer reviews the information, an approval or disapproval letter will be mailed to the contractor within five (5) business days. If the DBE Liaison Officer approves the substitution, the contractor must provide copies of new or amended subcontracts.

If the contractor fails or refuses to comply in the time specified, the City of Amarillo will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the City of Amarillo may issue a termination for default proceeding.

Sample Bid Specification:

The requirements of 49 CFR Part 26, Regulations of the U.S. Department of Transportation, apply to this contract. It is the policy of the City of Amarillo to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this contract will be conditioned upon satisfying the requirements of this bid specification. These requirements apply to all bidders/offers, including those who qualify as a DBE. A DBE contract goal of 8.62 percent has been established for FY 2012-2014. The bidder/offers shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26 (Attachment 1), to meet the contract goal for DBE participation in the performance of this contract.

In the event a contract goal is set, the bidder/offers will be required to submit the following information: (1) the names and addresses of DBE firms that will participate in the contract; (2) a description of the work that each DBE firm will perform; (3) the dollar amount of the participation of each DBE firm participating; (4) written documentation of the bidder/offers' commitment to use a DBE subcontractor whose participation it submits to meet the contract goal; (5) written confirmation from the DBE that it is participating in the contract as provided in the commitment made under (4); and (5) if the contract goal is not met, evidence of good faith efforts.

G. Protecting Against Termination for Convenience

Basic Requirement: (49 CFR 26.53) Recipients must implement appropriate mechanisms to ensure prime contractors do not terminate for convenience a DBE subcontractor and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without the transit agency's prior written consent.

Discussion: During this compliance review, there was a deficiency found in the area of termination for convenience. The ACT Program Plan does not provide current regulatory guidance for modifying or terminating DBE subcontractors on contracts and language protecting against termination for convenience was not included in subcontract agreements examined by the review team. However, ACT's standard contract template does provide protections against termination for convenience.

Corrective Action and Schedule: Within 60 days of the issuance of the final report, ACT should explain in their Program Plan how they will ensure that prime contractors do not terminate for convenience a DBE subcontractor and then perform the work of the terminated subcontract with its own forces or those of an affiliate without the transit agency's prior written consent.

ACT Response: Section 26.29, Termination for Convenience, is updated in the DBE Plan and Certifications and Assurances on page 48 to reflect a contractor requirement to obtain the City of Amarillo's prior written consent before a DBE subcontractor may be terminated (see below).

DBE Program Plan

Termination for Convenience

Contractors may not terminate for convenience a DBE subcontractor or an approved substitute DBE firm and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without the City of Amarillo's prior written consent. Good cause includes the following circumstances,

- 1. The DBE subcontractor fails or refuses to execute a written contract.*
- 2. The DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor.*
- 3. The DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.*
- 4. The DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness.*
- 5. The DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to DFR Parts 180, 215 and 1200 or applicable state law.*
- 6. The City of Amarillo determined that the DBE subcontractor is not a responsible contractor.*
- 7. The DBE subcontractor voluntarily withdraws from the project and provides to the City of Amarillo a written notice of withdrawal.*
- 8. The DBE is ineligible to receive DBE credit for the type of work required.*
- 9. The DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete the work on the contract.*
- 10. Other documented good cause that the City of Amarillo determines compels the termination of the DBE subcontractor. Provided that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which*

-
- the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non DBE contractor after contract award.*
- 11. Before transmitting to the City of Amarillo the request to terminate and or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to the City, of its intent to request to terminate and or substitute and the reason for the request.*
 - 12. The Prime Contractor must give the DBE five days to respond to the prime contractor's notice and advise the City of Amarillo and the contractor of the reasons why it objects to the proposed termination of its subcontract and why you should not approve the prime contractors action. If required in a particular case as a matter of public necessity (for example safety) you may provide a response period shorter than five days.*
 - 13. In addition to post award terminations, the provisions of this section apply to pre-award deletions of or substitutions for DBE firms put forward by offerors in negotiated procurements.*

Certifications and Assurances

Termination for Convenience

- g. Termination for Convenience –Contractors may not terminate for convenience a DBE subcontractor or an approved substitute DBE firm and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without the City of Amarillo's prior written consent.*

Good cause includes the following circumstances:

- 14. The DBE subcontractor fails or refuses to execute a written contract.*
 - 15. The DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor.*
 - 16. The DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.*
 - 17. The DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness.*
 - 18. The DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to DFR Parts 180, 215 and 1200 or applicable state law*
 - 19. The City of Amarillo determined that the DBE subcontractor is not a responsible contractor*
 - 20. The DBE subcontractor voluntarily withdraws from the project and provides to the City of Amarillo a written notice of withdrawal*
 - 21. The DBE is ineligible to receive DBE credit for the type of work required*
-

22. *The DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete the work on the contract*
23. *Other documented good cause that the City of Amarillo determines compels the termination of the DBE subcontractor. Provided that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non DBE contractor after contract award.*
24. *Before transmitting to the City of Amarillo the request to terminate and or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to the City, of its intent to request to terminate and or substitute and the reason for the request.*
25. *The Prime Contractor must give the DBE five days to respond to the prime contractor's notice and advise the City of Amarillo and the contractor of the reasons why it objects to the proposed termination of its subcontract and why you should not approve the prime contractors action. If required in a particular case as a matter of public necessity (for example safety) you may provide a response period shorter than five days.*

FTA Response: FTA agrees with ACT's response. FTA has reviewed the contract clauses protecting against termination for convenience and finds them to sufficiently address the requested corrective action and schedule. This finding is now closed.

H. Counting DBE Participation

Basic Requirement: (49 CFR 26.55) The recipient must count only the value of work actually performed by a DBE with its own forces or a DBE subcontractor toward actual DBE goals. The DBE must be certified at the time of award and work can be counted only if the DBE is performing a commercially-useful function, as described in 26.55 c 1-5.

Discussion: During this DBE Compliance Review, while no deficiencies were found with the requirements for counting DBE participation, there was insufficient information provided to potential bidders in the Program Plan as well as bid solicitation and contract documents about how DBE participation would be counted.

Advisory Comment: It is recommended that the Program Plan include basic, but expanded, language on counting DBE participation, extracted from parts of the rule in 26.55.

ACT Response: ACT updated Section 26.55, Counting DBE Participation, in the DBE Plan and in the Certifications and Assurances, page 48.

DBE Plan

Section 26.55 Counting DBE Participation

The City of Amarillo will count race neutral DBE participation toward overall and contract goals as provided in 49 CFR 26.55. The City of Amarillo will not

count the participation of a DBE subcontract toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE. Supplies purchased from a DBE count at 60%.

Certifications and Assurances

c. The City of Amarillo will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55. The City of Amarillo will not count the participation of a DBE subcontract toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE. Supplies will count at 60%.

I. Quotas

Basic Requirement: (49 CFR 26.43) The recipient is not permitted to use quotas or set-aside contracts.

Discussion: During this DBE Compliance Review, no deficiency was found with the requirement for quotas. The ACT Program Plan explicitly states that the agency does not use quotas or set-asides (page 7).

6.9 Required Contract Provisions

This requirement includes three sub-requirements related to the inclusion of contract provisions.

A. Non-discrimination Clause

Basic Requirement: (49 CFR 26.13) Each contract signed with a contractor (and each subcontract prime contractors sign with a subcontractor) must include the non-discrimination clause specified by the regulations.

Discussion: During the DBE program compliance review of ACT, a deficiency was found with regard to non-discrimination clauses. The non-discrimination clause that is included in ACT's Program Plan meets regulatory requirements (page 4) but needs to be updated in ACT's standard contract template to include the latest language used in 49 CFR 26.13. Additionally, the standard contract template should state that the non-discrimination clause must be included in contracts between ACT and the prime contractor and in all subcontracts. ACT should also state in the Program Plan and solicitation documents how they will ensure flow-down of required contract clauses into subcontract agreements.

Corrective Action and Schedule: Within 60 days of the issuance of the final report, the most up-to-date non-discrimination clause must be included in the Program Plan, solicitation documents, and standard contract template document. ACT should also state in their Program Plan and solicitation documents how they will ensure flow-down of required contract clauses into subcontract agreements.

ACT Response: Section 26.13 in the DBE Plan and page 47 in the Certifications and Assurances were updated to include the non-discrimination clause in all contracts between the City of Amarillo, prime contractors and all subcontractors as follows:

DBE Program Plan

The following clause language is mandatory. It incorporates the payment terms and conditions applicable to all prime contracts and subcontractors based in Part 26 as well as those related only to DBE subcontractors. The language allows for the options available to grantees concerning retainage, specific contract goals, and evaluation of DBE subcontracting participation when specific contract goals have been established. These clauses must appear in all contracts between ACT and the prime contracts and in all subcontracts.

“The contractor, sub-recipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts.”

Certifications and Assurances

To ensure flow down of required contract clauses into subcontract agreements, ACT included a signature on page 49 the contractors must sign acknowledging the following:

“Failure by the contractor, sub-recipient or subcontractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.”

A signature below signifies the contractor will ensure flow down of required contract clauses into subcontract agreements.

Date _____

Signature _____

Company Name _____

Title _____

FTA Response: FTA partially agrees with ACT’s response, the intent is recognized, however it is unclear which pieces mentioned in the response are included in the certification to ensure non-discrimination and appropriate flow down of contract clauses. To close this deficiency, within 60 days of issuance of the DBE Compliance Review Final Report, ACT must update its Program Plan, provide documentation of the implemented changes to the boilerplate contract language for certifications and assurances, includes language that specifies the timeframe prime contractors

have to submit copies of all subcontract agreements, and document how they will ensure flow-down of required contract clauses into subcontract agreements to ACT.

B. Prompt Payment

Basic Requirement: (49 CFR 26.29) The recipient/grantee must include a contract clause requiring prime contractors to pay subcontractors for satisfactory performance on their contracts no later than a specific number of days from the time it receives payment from the grantee. This clause must also address prompt return of retainage payments from the prime to the subcontractor (i.e., within a specific number of days after the subcontractor's work is satisfactorily completed).

Discussion: During the DBE program Compliance Review of ACT, a deficiency was found with regard to the prompt payment clause. The prompt payment and return on retention clauses are included in ACT Program Plan and in the standard contract template. However, neither the Program Plan nor the standard contract template state that the clause must be included in all subcontract agreements. ACT should also state in its Program Plan and solicitation documents how they will ensure flow-down of required contract clauses into subcontract agreements.

Corrective Action and Schedule: Within 60 days of the issuance of the final report, the Program Plan and the standard contract template should be changed to state that the prompt payment and return of retention clauses must be included in all subcontract agreements. This information should also be stated in project solicitation documents. ACT should also state in their Program Plan and solicitation documents how they will ensure flow down of required contract clauses into subcontract agreements.

ACT Response: The DBE Plan now includes return of retention as stated in Section 26.29:

DBE Program Plan

Section 26.29 Prompt Payment Mechanisms

Retainage: 26.29(b)

The prime contractor agrees to return retainage payments to each subcontractor within 30 days after the subcontractors work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the City of Amarillo. This clause applies to both DBE and non-DBE subcontracts.

“Failure of the Contractor to carry out the City of Amarillo’s DBE Program provision shall constitute a breach of contract and may result in termination of the contract for default or such remedy as the City of Amarillo may deem appropriate. The willful making of false statements or providing incorrect information will be referred for appropriate legal action.”

Further action was taken to include legal remedies on page 48 of the Certifications and Assurances, as follows:

“The recipient’s DBE Program, as required by 49 CFR Part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the City of Amarillo of its failure to carry out its approved program, the Department may impose sanction as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.). This language will appear in financial agreements between the City of Amarillo, the prime contractor and all subcontractors and sub-recipients.”

Certifications and Assurances

- e. Retainage – The prime contractor agrees to return retainage payments to each subcontractor within 30 days after the subcontractors work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the City of Amarillo. This clause applies to both DBE and non-DBE subcontracts.*

A signature below signifies the contractor will ensure flow down of required contract clauses into subcontract agreements.

Date _____

Signature _____

Company Name _____

Title _____

FTA Response: FTA partially agrees with ACT’s response. To close this deficiency, ACT must submit to FTA an updated copy of its DBE Program Plan that addresses the appropriate flow-down of contract clauses, provide FTA with documentation that ACT has implemented the language such that it has been incorporated into its boilerplate contract clauses and that it defines the timeframe for when prime contracts must submit subcontract agreements to ACT. ACT must update their Program Plan to include information about the mechanism for monitoring this requirement within 60 days of issuance of the DBE Program Compliance Review Final Report.

C. Legal Remedies

Basic Requirement: (49 CFR 26.37) Recipients must implement appropriate mechanisms to ensure compliance by all participants, applying the legal and contract remedies under both federal as well as state and local laws.

Discussion: During this Compliance Review, a deficiency was found with regard to legal remedies. ACT's Program Plan, solicitation documents, and standard contract template do not describe what legal remedies are available to ACT in the event of contractor noncompliance with the DBE program. ACT should also state in its Program Plan and solicitation documents how it will ensure flow-down of required contract clauses into subcontract agreements.

Corrective Action and Schedule: Within 60 days of the issuance of the final report, ACT must include a description of legal remedies available to it in their DBE Program Plan, solicitation documents, and standard contract template. ACT should also state in their Program Plan and solicitation documents how they will ensure flow-down of required contract clauses into subcontract agreements.

ACT Response: The DBE Plan now includes legal remedies in Section 26.29, and the Certifications and Assurances include legal remedies on page 48. Contractors must sign on page 49; their signature acknowledges they will ensure flow-down of required contract clauses into subcontract agreements, including the following:

DBE Program Plan

Legal Remedies

Failure of the Contractor to carry out the City of Amarillo's DBE Program provision shall constitute a breach of contract and may result in termination of the contract for default or such remedy as the City of Amarillo may deem appropriate. The willful making of false statements or providing incorrect information will be referred for appropriate legal action.

"The City of Amarillo will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment of Program Fraud and Civil Penalties rules) provided in 26.107.

The City of Amarillo will also implement a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by the DBEs. This mechanism will provide for a running tally of actual DBE attainments (e.g., payment actually made to DBE firms), including a means of comparing these attainments to commitments. This will be accomplished by contacting the DBE to make sure the contractor is paying them correct amounts in a timely manner.

In our reports of DBE participation to DOT, we will show both commitments and attainments, as required by the DOT reporting form."

Certifications and Assurances

f. Legal Remedies – Failure of the Contractor to carry out the City of Amarillo’s DBE Program provision shall constitute a breach of contract and may result in termination of the contract for default or such remedy as the City of Amarillo may deem appropriate. The willful making of false statements or providing incorrect information will be referred for appropriate legal action. The legal remedies clause must be included in contracts between the City of Amarillo and the prime contractor and in all subcontracts.

FTA Response: FTA partially agrees with ACT’s response. ACT must ensure appropriate flow-down of contract clauses. Accordingly, ACT must receive copies of subcontract agreements with the required clauses from prime contractors within a defined time from the time of prime contract award. ACT’s Program Plan must provide a timeframe for when prime contractors must submit subcontract agreements to ACT. To close this deficiency, ACT must submit to FTA a copy of its DBE Program Plan that specifies the timeframe prime contractors have to submit copies of all subcontract agreements to ACT within 60 days of issuance of the Final DBE Program Compliance Review Report.

6.10 Certification Standards

Basic Requirement: (49 CFR 26.67) All grantees are required to be part of a statewide Unified Certification Program (UCP). The recipient, if a certifying member of the UCP, 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 (PNW) with appropriate supporting documentation as part of this process.

Discussion: This section is not applicable to ACT, since it is not a certifying member of the Texas UCP (TUCP). No deficiencies were found. A copy of a TUCP Letter of Agreement signed on September 12, 2011, was reviewed during the site visit. This document adequately describes the certification standards and procedures used by the TUCP.

6.11 Certification Procedures

Basic Requirement: (49 CFR 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: As noted in Section 6.10 above, ACT is a non-certifying member of the TUCP and, therefore, does not directly apply the standards and procedures of Part 26 of the DBE regulations. No deficiencies were found.

6.12 Recordkeeping and Enforcements

The requirement includes three sub-requirements related to recordkeeping and enforcement.

A. Bidders List

Basic Requirement: (49 CFR 26.11) The recipient must maintain a bidders list complete with subcontractor firm names, addresses, DBE status, and age of firm and annual gross receipts of the firm.

Discussion: During this compliance review, a deficiency was found with regard to the bidders list requirement. The City of Amarillo Purchasing Department maintains a bidders list that consists of information about firms that request City of Amarillo related request for proposals, which includes transit related solicitations. This information is collected through the City of Amarillo Vender Application form, which must be submitted by any firm interested in doing business with ACT. According to ACT's Manager, the list of interested bidders is not proactively shared with contractors, but can be made available if contractors request it. The availability of the bidders list to contracts is not mentioned in the program plan or solicitation documents. Additionally, the form only asks about the name, address, and contact information of interested firms. It does not include information about a firm's DBE status, age, and annual gross receipts. The form is included in ACT's bid documents and the Program Plan.

Corrective Action and Schedule: Within 60 days of the issuance of the final report, ACT must modify their interested bidders form to include information about firm DBE status, age, and annual gross receipts. Additionally, ACT must document in their Program Plan and solicitation documents how contractors can obtain a copy of the bidders list.

ACT Response: In Attachment 10 (of our response), you will find an updated Bidders List Information form that includes DBE information. The DBE Plan contains information in Section 26.31 that describes how to obtain a copy of the bidders list. Page 49 in the Certification and Assurances contains information how to obtain a copy of the bidders list. ACT sent out a letter notifying internal and external stakeholders with information describing how to obtain a copy of the bidders list.

Certifications and Assurances

City of Amarillo Bidders List – The City Purchasing Department has a bidders list available to contractors upon request. The list contains contact information for DBE's who may be interested in working with contractors. Contractors may obtain a copy of the bidders list by contacting:

*City of Amarillo – Purchasing Department
P.O. Box 1971
Amarillo, Texas 79105
806-378-3028
purchasing2@amarillo.gov*

FTA Response: FTA agrees with ACT's response. FTA has reviewed the updated Bidders List and finds that it sufficiently addresses the requested corrective action and schedule. **This finding is now closed.**

B. Monitoring

Basic Requirement: (49 CFR 26.37, 26.55) The recipient must include a monitoring and enforcement mechanism to ensure that work allocated to DBEs (at contract award or subsequently) is actually performed by the DBEs to which the work was allocated.

Discussion: During this Compliance Review, there were no deficiencies found with regard to the monitoring requirement. During the review, ACT outlined its monitoring processes. From a financial point of view, projects are monitored through the collection of lien waivers from subcontractors to ensure prompt payment. ACT monitoring and enforcement mechanism are explained in detail in the Program Plan dated July 17, 2012.

C. Reporting to DOT

Basic Requirement: (49 CFR 26.11) The recipient must transmit the Uniform Report of DBE Awards or Commitments and Payments at the time intervals stated on the form. In addition, for ARRA funds, the recipient must transmit the ARRA Uniform Report of DBE Commitments/Awards and Payments.

Discussion: During this Compliance Review, there were no deficiencies found with regard to the requirement for reporting to DOT. All of the accomplishments reports, including the ARRA reports, appear to have been developed and submitted in a timely and accurate manner.

Exhibit 6: Summary Table of Compliance Review Findings

Page number references in this report assume the Policy Statement in ACT’s Program Plan is page 1 of the Program Plan document. The actual document does not include page numbers.

Item	Requirement of 49 CFR Part 26	Reference	Site Visit Finding	Preliminary Description of Findings	Suggested Corrective Action	Response Days/Date
1	DBE Program Plan	26.21	Deficiency	The Program Plan does not identify the appropriate person who should be designated as the DBELO and does not sufficiently address issues related to overconcentration evaluation procedures and options available to ACT if prime contractors do not comply with the requirements of the DBE program. These issues are discussed in more detail in other parts of this table.	ACT must update the DBE Program Plan to comply with the requirements of 49 CFR Part 26, and addresses the deficiencies identified herein.	Due 4/1/2013
2	Policy Statement	26.23	Deficiency	ACT’s 2011 DBE Program Plan contains a deficient Policy Statement. The Policy Statement identifies the DBELO as the “Director of the MPO.” However, ACT’s Manager, Judy Phelps, actually functions as the transit agency’s DBELO. Accordingly, she should be identified as the DBELO in the policy statement. Additionally, there was insufficient evidence presented to the review team that the Policy Statement is widely circulated among the recipient’s organization as well as minority, female, and non-minority community and business organizations.	ACT must develop a new Policy Statement that identifies the individual that serves as the agency’s DBELO. ACT must also distribute the Policy Statement throughout their organization and to external stakeholders.	Deficiency Addressed Closed 1/31/2013
3	DBE Liaison Officer	26.25	Deficiency	ACT’s Program Plan identifies Gary Holwick, the MPO Director, as the DBELO (page 4). However, Mr. Holwick does not perform the 13 duties and responsibilities of the DBELO identified on page 5 of ACT’s Program Plan and actually had little involvement in the DBE program. These DBELO functions are actually carried out by Judy Phelps, ACT’s Manager. It is recommended that the DBELO be changed from Mr. Holwick to Ms. Phelps.	ACT should formally designate Judy Phelps as the agency’s DBELO and update the Program Plan and Policy Statement documents with this information.	Deficiency Addressed Closed 1/31/2013
4	Financial Institutions	26.27	No Deficiency	ACT’s robust process of identifying minority and women owned financial institutions is described on page 5 of the Program Plan. ACT search every 3 years for applicable financial institutions using the Federal Reserve Bank’s Minority-Owned Financial Institutions list and the Minority Bank Deposit Program for Financial Institutions list. ACT most recent search determined that the nearest applicable financial institution was 363 miles away, which ACT considers too far to be practical for local firms and so it does not actively encourage contractors to use applicable financial institutions.	Not Applicable	Not Applicable
5	DBE Directory	26.31	No Deficiency	A DBE Directory is maintained by TXDOT. ACT is not a certifying member of the UCP. Instructions on accessing and registering on the directory are provided on page 6 of ACT’s Program Plan.	Not Applicable	Not Applicable

Item	Requirement of 49 CFR Part 26	Reference	Site Visit Finding	Preliminary Description of Findings	Suggested Corrective Action	Response Days/Date
6	Over-concentration	26.33	Advisory Comment	ACT has not had DBE participation for at least the last 10 years, so overconcentration is not currently an issue. Nevertheless, ACT's Program Plan should describe how they would evaluate overconcentration in the future and identify what steps they would take to address it if it were observed.	The Program Plan should describe how ACT will evaluate overconcentration in the future and steps they would take to try to address it if it were observed.	Not Applicable
7	Business Development Programs	26.35	Advisory Comment	ACT's Program Plan contains only one sentence stating that ACT does not have a business development program (page 7). While it not a requirement to have a business development program, ACT should consider helping DBE firms by identify existing business development programs offered by the State, other transit agencies, educational institutions, etc. One resource the review team learned about was the "Procurement Center" at the local campus of West Texas A&M University. The Program Plan should describe how and when ACT will inform the DBE community about relevant business development programs.	ACT should identify existing business development programs offered by the State of Texas, other transit agencies, and educational institutions, and commit to making referrals to these services for both the existing DBE program and the new small business element. The Program Plan should describe how ACT will inform the DBE community about relevant business development programs.	Not Applicable
8	Determining and Meeting Goals					
	A) Calculation	26.45	Advisory Comment	ACT's has a three-year overall goal of 8.62 % DBE participation. Between 2008 and 2010, ACT's DBE participation goal was always higher than 29.34 %, but the agency had 0.00 % attainment in each of those years. The new lower overall DBE goal increases the likelihood that ACT can reach the goal. However, ACT does not have a history of awarding contracts to DBE's using race neutral means and does not have a strong business development program. Accordingly, ACT's race neutral program may be unlikely to achieve sufficient DBE participation.	ACT should consider adding a race conscious element to their overall DBE participation goal, develop procedures to identify race conscious goals for individual projects, and update the Program Plan and goal methodology to reflect these changes.	Not Applicable
	B) Public Participation and Outreach		Advisory Comment	ACT provided evidence that they engaged in some public outreach to seek input in development of goals. This was achieved by members of the Amarillo's Purchasing Department attending Texas Public Purchasing Association and Make a Connection meetings. Additionally, the DBE goal was included on the Amarillo City Commission's agenda for a public hearing open to the public. However, an advisory comment is included because ACT did not directly solicit input from local chambers of commerce and women, minority, and general contractor groups when determining their goals.	Not Applicable	Not Applicable

Item	Requirement of 49 CFR Part 26	Reference	Site Visit Finding	Preliminary Description of Findings	Suggested Corrective Action	Response Days/Date
	C) Transit Vehicle Manufacturers (TVM)	26.49	Advisory Comment	ACT provided TVM certificates for recent transit vehicle purchases. The TVM certificate provided for the 7200 Series bus purchase was 5-years old at the time of the acquisition. The TVM provided is dated June 13, 2005, but the contract was signed in June 2009.	FTA does not consider the dated certificate to be a deficiency, but ACT is encouraged to solicit the most up-to-date certificate they can obtain for future purchases.	Not Applicable
	D) Race Neutral	26.51	Advisory Comment	ACT has a new three-year overall goal of 8.62 %. This includes a projection of 0.00 % race-conscious and 8.62 % race-neutral attainment. However, between 2008 and 2011, ACT's DBE participation goal was always higher than 29.34 %, but they had 0.0% attainment each year. The new lower overall DBE goal increases the likelihood that ACT can reach the goal. However, ACT does not have a history of awarding contracts to DBE's using race neutral means and does not have a strong business development program. Accordingly, ACT's race neutral program may be unlikely to achieve sufficient DBE participation. In addition, ACT does not explicitly state how it will count race neutral DBE participation in projects in its Program Plan and solicitation documents. The Program Plan only states the agency will do so "as provided in 49 CFR 26.55" (page 10).	ACT will have to strengthen their race neutral programs to achieve their new goal. This may require ACT to improve their business development program partnerships, increase their outreach to minority and women owned businesses, and further unbundle contracting opportunities. Additionally, ACT should narratively describe how they will count race neutral attainment in their Program Plan and solicitation documents.	Not Applicable
	E) Race Conscious	26.51	Advisory Comment	ACT's new three-year overall DBE participation goal is 8.62 %. This includes a projection of 0.00 % race-conscious and 8.62 % race-neutral attainment. However, between 2008 and 2011, ACT's DBE participation goal was always higher than 29.34 %, but they had zero % attainment each year.	ACT should add a race conscious element to their overall DBE participation goal, develop procedures to identify race conscious goals for individual projects, and update the Program Plan to reflect these changes.	Not Applicable
	F) Good Faith Efforts	26.53	Advisory Comment	ACT's DBE Program Plan and solicitation documents do not include detailed guidance on how contractors can demonstrate a good faith effort. This could be occurring because ACT's good faith effort procedures only apply to contract bid opportunities with established DBE participation goals, and ACT has not historical used DBE participation goals on projects.	ACT should provide instructions in both the Program Plan and in bid solicitation documents that outline the steps prime contractors can take to perform and document good faith efforts when it establishes a Race Conscious DBE Goal in their methodology. It should be noted that good faith effort procedures only apply to contract opportunities with DBE participation goals.	Not Applicable

Item	Requirement of 49 CFR Part 26	Reference	Site Visit Finding	Preliminary Description of Findings	Suggested Corrective Action	Response Days/Date
	G) Protecting Against Termination for Convenience.	26.53	Deficiency	ACT's Program Plan does not provide guidance for modifying or terminating DBE subcontract agreements.	ACT should explain in their Program Plan how they will ensure prime contractors do not terminate for convenience DBE subcontractors	Deficiency Addressed Closed 1/31/2013
	H) Counting DBE Participation	26.55	Advisory Comment	ACT's program plan states ACT will count participation "as provided in 49 CFR 26.55 ..." (page 10). ACT should include basic, but expanded language on counting DBE participation, extracted from part 26.55, in their Program Plan and solicitation documents.	ACT's Program Plan and solicitation documents should include basic, but expanded language on counting DBE participation, extracted from parts of the rule, in 26.55.	Not Applicable
	I) Quotas	26.43	No Deficiency	ACT program plan explicitly states quotas and set asides are prohibited on page 7 of their Program Plan.	Not Applicable	Not Applicable
9						
	A) Contract Assurance	26.13	Deficiency	<p>The non-discrimination clause that is included in ACT's Program Plan meets regulatory requirements (page 4), but needs to be updated in ACT's standard contract template to include the latest language used in 49 CFR 26.13. ACT should also state in the Program Plan and solicitation documents how they will ensure flow down of required contract clauses into subcontract agreements.</p> <p>In the standard contract template (page 47) needs to be updated to include the latest language in the regulations. Additionally, the standard contract template should state the non-discrimination clause must be included in contracts between ACT and the prime contractor and in all subcontracts. ACT should also state in the Program Plan and solicitation documents how they will ensure flow down of required contract clauses into subcontract agreements.</p>	ACT must document in their Program Plan and demonstrate implementation, the changes reflecting these requirements (e.g. boilerplate contract language for certifications and assurances) that also includes language that specifies the timeframe prime contractors have to submit copies of all subcontract agreements, and document how they will ensure flow-down of required contract clauses into subcontract agreements	Due 4/1/ 2013

Item	Requirement of 49 CFR Part 26	Reference	Site Visit Finding	Preliminary Description of Findings	Suggested Corrective Action	Response Days/Date
	B) Prompt Payment	26.29	Deficiency	Prompt payment clause is included in ACT's program plan (page 5). However, ACT should state in their standard contract template that the prompt payment clause must be included in contracts between ACT and the prime contractor and in all subcontracts.	ACT must document in their Program Plan and demonstrate implementation, the changes reflecting these requirements (e.g. has been incorporated into its boilerplate contract clauses) and that it defines the timeframe for when prime contracts must submit subcontract agreements to ACT, and ensures follow down of required clauses in subcontract agreements.	Due 4/1/ 2013
	C) Prompt Payment	26.29	Deficiency	Return of retention clause is included in ACT's Program Plan (page 5). However, the standard contract template should state the return of retention clause must be included in contracts between ACT and the prime contractor and in all subcontracts.	ACT must document in their Program Plan and demonstrate implementation, the changes reflecting these requirements (e.g. has been incorporated into its boilerplate contract clauses), and ensures follow down of required clauses in subcontract agreements.	Due 4/1/ 2013
	D) Legal Remedies	26.37	Deficiency	The legal remedies clause is not mentioned in ACT's Program Plan or used in solicitation documents and contract agreements.	ACT must document legal remedies available to ACT in the event of contractor noncompliance with the DBE program in their Program Plan and solicitation documents. ACT also state in the Program Plan and solicitation documents how they will ensure flow down of required contract clauses into subcontract agreements.	Due 4/1/ 2013
10	Certification Standards	26.67	No Deficiency	Not applicable. ACT is a non-certifying member of the Texas UCP and as such does not certify DBEs. Information about DBE certification is provided on page 6 of ACT's Program Plan.	Not Applicable	Not Applicable
11	Certification Procedures	26.83	No Deficiency	Not applicable. ACT is a non-certifying member of the Texas UCP and as such does not certify DBEs. Information about DBE certification is provided on page 6 of ACT's Program Plan.	Not Applicable	Not Applicable
12						

Item	Requirement of 49 CFR Part 26	Reference	Site Visit Finding	Preliminary Description of Findings	Suggested Corrective Action	Response Days/Date
	A) Bidders List	26.11	Deficiency	ACT does not sufficiently distribute their plan holder's list to contractors. Additionally, the plan holders list does not include information about a firm's DBE status, age, and annual gross receipts.	ACT must modify their interested bidders form to include information about firm DBE status, age, and annual gross receipts. Additionally, ACT must document in their program plan and solicitation documents how contractors can obtain a copy of the bidders list.	Deficiency Addressed Closed 1/31/2013
	B) Monitoring	26.37 / 26.55	No Deficiency	During the DBE program compliance review ACT outlined their monitoring processes. From a financial point of view, projects are monitored through the collection of lien waivers from subcontractors to ensure prompt payment. ACT tracks both prime and subcontractor dollars billed to projects on a monthly basis.	Not Applicable	Not Applicable
	C) Reporting to DOT	26.11	No Deficiency	During this compliance review, there were no deficiencies found with regard to the reporting to DOT requirement. All of the accomplishment reports, including the ARRA reports, appear to have been developed and submitted in a timely and accurate manner.	Not Applicable	Not Applicable

Schedule of Interviews

The tables below provide the schedule of interviews conducted during the site visit on February 13 and 14, 2012.

Monday, February 13, 2012 – City Hall, Amarillo, TX

9:00am - 9:30am Room 306- <ul style="list-style-type: none"> • Rami Chami, • Ken Weeden –KWA, Inc. • Mike Brooks 	Introductions and Entrance Conference Judy Phelps, Transit Manager; Trent Davis, Purchasing Agent Marcus Norris, Atty. Vickie Covey Asst. City Mgr. Jerry Atkinson, City Manager (maybe)
9:30am -10:30am--- Room 306 <ul style="list-style-type: none"> • Rami Chami, • Ken Weeden –KWA, Inc. • Mike Brooks 	Review DBE Program Elements & Other Documents Assembled for Compliance Review Judy Phelps, Transit Manager
10:30am - 11:30am-- Room 306 <ul style="list-style-type: none"> • Rami Chami, • Ken Weeden –KWA, Inc. • Mike Brooks 	Interviews-Purchasing Manager Trent Davis, Purchasing Agent
11:30am – 12:30 pm- Room 306 <ul style="list-style-type: none"> • Rami Chami, • Ken Weeden –KWA, Inc. • Mike Brooks 	Interviews-Grants Manager Judy Phelps, Transit Manager
1:30 pm - 2:30pm--- Room 205 <ul style="list-style-type: none"> • Rami Chami, • Ken Weeden –KWA, Inc. • Mike Brooks 	Interviews-Bus Bench Project: Judy Phelps, Transit Manager, and Minority Contractors
2:30pm – 3:30pm--- Room 205 <ul style="list-style-type: none"> • Rami Chami, • Ken Weeden –KWA, Inc. • Mike Brooks 	Interview-Legal Counsel Marcus Norris, City Attorney
3:30pm – 5:00pm--- Room 205	Review-Files-Contracts <ul style="list-style-type: none"> • Rami Chami, • Ken Weeden –KWA, Inc. • Mike Brooks

Tuesday, February 14, 2012 – City Hall, Amarillo, TX

9: 00 – 10:00 -Room 205	Exit Conference
10:15 a.m. – 11:15 a.m.	Amarillo Chamber of Commerce Gary Molberg, Exec. Director
11:30 - 12:30pm- Room 205	Review-Files-Contracts (Additional, If needed)