



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

City of Honolulu  
DBE Compliance Review  
Final Report

April 2013

PREPARED BY  
Milligan & Company



U.S. Department of Transportation  
Federal Transit Administration

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## Table of Contents

Section 1 – General Information .....	1
Section 2 – Jurisdiction and Authorities .....	2
Section 3 – Purpose and Objectives.....	3
Section 4 – Background Information.....	5
Section 5 – Scope and Methodology .....	6
Section 6 – Issues and Recommendations .....	9
1. DBE Program Plan .....	9
2. DBE Policy Statement.....	9
3. DBE Liaison Officer .....	11
4. Financial Institutions .....	11
5. DBE Directory.....	12
6. Overconcentration .....	13
7. Business Development Programs .....	14
8. Fostering Small Business Participation.....	14
9. Determining/Meeting Goals .....	16
10. Required Contract Provisions.....	24
11. Certification Standards .....	27
12. Certification Procedures .....	27
13. Record Keeping and Enforcements .....	29
Section 7 – Summary of Findings.....	32
Section 8 – List of Attendees .....	36

## **Section 1 – General Information**

Grant Recipient:	City and County of Honolulu 1 South Jackson Street
City/State:	Honolulu, HI
Grantee Number:	1703
Executive Official:	Wayne Yoshioka Director, Division of Transportation Services
On Site Liaison:	Jackie Shen Planner, Federal Compliance Branch 808-768-5462
Report Prepared by:	MILLIGAN AND CO., LLC 105 N. 22 <sup>nd</sup> Street, 2 <sup>nd</sup> Floor Philadelphia, PA 19103 (215) 496-9100
Site Visit Dates:	June 26 - 28, 2012
Compliance Review Team Members:	Benjamin Sumpter, Lead Reviewer Habibatu Atta Kristin Szwajkowski

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

The Federal Transit Administration (FTA) Office of Civil Rights is authorized by the Secretary of Transportation to conduct civil rights compliance reviews. The reviews are undertaken to ensure compliance of applicants, recipients, and subrecipients with Section 12 of the Master Agreement, Federal Transit Administration M.A., (18), October 1, 2011 and 49 CFR Part 26, “Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs.”

The City and County of Honolulu (City and County) is a recipient of FTA funding assistance and is therefore subject to the Disadvantaged Business Enterprise (DBE) compliance conditions associated with the use of these funds pursuant to 49 CFR Part 26. These regulations define the components that must be addressed and incorporated in City and County's DBE program and were the basis for the selection of compliance elements that were reviewed.

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

### **PURPOSE**

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

The primary purpose of the compliance review is to determine the extent to which the City and County 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 City and County's Disadvantaged Business Enterprise Program Plan and its implementation, (2) make recommendations regarding corrective actions deemed necessary and appropriate, and (3) provide technical assistance.

This compliance review is not to directly investigate whether there has been discrimination against disadvantaged businesses by the grant recipient or its subrecipients, nor to adjudicate these issues in behalf of any party.

### **OBJECTIVES**

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

- ensure nondiscrimination in the award and the administration of DOT-assisted contracts in the Department's financial assistance programs;
- create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- help remove barriers to the participation of DBEs in DOT-assisted contracts;
- assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

The objectives of this compliance review are to:

- determine whether the City and County 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 the City and County’s DBE Program Plan against the compliance standards set forth in the regulations and to document the compliance status of each component; and
- gather information and data regarding the operation of the City and County’s Disadvantaged Business Enterprise Program Plan from a variety of sources – DBE program managers, other City and County management personnel, DBEs, and prime contractors.

## Section 4 – Background Information

The City and County of Honolulu (City and County) consists of the Executive Branch, Legislative Branch, and semi-autonomous agencies. The Executive Branch consists of the Mayor's Office, which oversees the Managing Director's Office, the Culture and the Arts Office, the Economic Development Office, the Neighborhood Commission Office, the Office of Housing, and the Royal Hawaiian Band. There are 19 other departments under this branch including the Department of Transportation Services (DTS). There are four offices within the Legislative Branch including City Council, the City Clerk's Office, the Office of Council Services, and the Office of the Auditor. The Honolulu Authority for Rapid Transportation (HART) and the Honolulu Board of Water Supply fall under the semi-autonomous agencies. This DBE review focused on projects that were conducted by DTS and HART.

### *Department of Transportation Services (DTS)*

DTS consists of five divisions: Public Transit, Rapid Transit, Traffic Engineering, Transportation Planning, and Traffic Signals and Technology. Public Transit is responsible for operating the City and County's public transit program, which includes TheBus and TheHandivan. The agency's bus service consists of 93 routes with over 4,000 stops. The fleet consists of 531 buses. The fleet also includes 139 Handivan vehicles.

Traffic Engineering is responsible for the operation of streets and intersections. They investigate traffic safety issues, conduct maintenance investigations, provide administration for traffic related projects, and conduct traffic safety campaigns. The Transportation Planning division is responsible for planning related to citywide transportation. They conduct traffic surveys, respond to data queries, and review environmental assessments. Traffic Signals and Technology is responsible for the City's traffic signal systems, the Traffic Management Center, Street Use Permits, and the traffic camera systems.

### *Honolulu Authority for Rapid Transportation (HART)*

HART was created in July 2011 as a semi-autonomous agency that is responsible for planning, constructing, operating, and extending the rail system in Honolulu. HART is currently working on creating a \$5.5 billion dollar elevated rapid transit line that will run 20 miles from Kapolei, near the University of Hawaii – West Oahu campus, to Ala Moana Center. The line will travel along southern Oahu via the Honolulu International Airport and the downtown area of the city. The project will also include the construction of 21 commuter stations including Aloha Stadium and Pearl Harbor. It is expected that the system will be completed by 2019.

The agency consists of a 10-member board of directors, including three mayor-appointed members, three members who are selected by the Honolulu City Council, and the transportation directors for the city and state. The board chooses the ninth member from the community. The city's Director of Planning and Permitting serves as a non-voting member.



## **Section 5 – Scope and Methodology**

### **Scope**

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

1. A DBE program conforming to this part by August 31, 1999 to the concerned operating administration (OA). You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval. [49 CFR 26.21]
2. A signed policy statement expressing a commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation [49 CFR 26.23].
3. Designation of a liaison officer and support staff as necessary to administer the program, and a description of the authority, responsibility, and duties of the officer and the staff [49 CFR 26.25].
4. Efforts made to use DBE financial institutions, by the recipient as well as prime contractors, if such institutions exist [49 CFR 26.27].
5. A DBE directory including addresses, phone numbers and types of work performed made available to the public and updated at least annually [49 CFR 26.31].
6. Determination if overconcentration exists and address this problem if necessary [49 CFR 26.33].
7. Assistance provided to DBEs through Business Development Programs to help them compete successfully outside of the DBE program [49 CFR 26.35].
8. Element to structure contracting requirements to allow competition by small businesses [49 CFR 26.39].
9. 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].
10. 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].
11. 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].
12. 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].

13. Implementation of appropriate mechanisms to ensure compliance with the part's requirements by all program participants. The DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs. [49 CFR Part 26.37] Reporting must include information on payments made to DBE firms [49 CFR 26.11, 26.55].

### **Methodology**

The initial step in the scope of this Compliance Review consisted of consultation with the FTA's 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 the City and County by FTA's Office of Civil Rights. The agenda letter notified the City and County of the planned site visit, requested preliminary documents, and informed the City and County of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed the City and County of staff and other parties that would potentially be interviewed.

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

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

At the end of the review, an exit conference was held with FTA representatives, City and County 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 the City and County.

Following the site visit, a draft report was compiled and sent to the Department of Transportation Services for the City and County of Honolulu on January 29, 2013. This final report incorporates the Department's responses and identifies the remaining open corrective actions.

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

Christopher C. MacNeith  
Regional Civil Right Officer  
FTA Office of Civil Rights-Region X  
915 Second Ave.  
Seattle, WA 98174  
[Christopher.macneith@dot.gov](mailto:Christopher.macneith@dot.gov)



## Section 6 – Issues and Recommendations

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

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

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

The program plan that the Department of Transportation Services (DTS) provided to the review team was dated September 1999. It included a cover letter, dated August 27, 1999, to the USDOT Regional Civil Rights Officer, the policy statement, and the DBE program plan. The review team noted that the program plan must be updated to include the current rule requirements.

HART serves as a semi-autonomous agency of the City and County of Honolulu and serves as the contracting agency for the Honolulu High Capacity Transportation Corridor Project (HHCTCP). HART petitioned FTA for approval to set a single overall goal for this project and create its own DBE program.

A draft copy of HART's 2012 DBE program plan was provided during the compliance review. The program plan was revised on June 20, 2012 and included required areas of the DBE regulation, including the Fostering Small Business Participation requirement of Part 26.39.

Subsequent to the site visit, DTS provided a revised DBE program plan dated May, 24, 2012, and where the revised program plan addresses findings found during the site visit, those corrective actions have been closed. However, certain findings remain and those corrective actions are identified within the report in the respective subject areas.

**Corrective Action and Schedule:** Submit to the Office of Civil Rights an updated DBE Program Plan that addresses the issues identified in this report within 60 days of issuance of the final report.

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

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

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

The City and County provided a copy of their policy statement, which was signed by the Mayor on December 6, 2011. The City and County's policy stated, *"This policy statement shall be circulated to agencies of the City and County of Honolulu which expend USDOT funds and to appropriate community and business organizations that perform work on USDOT-assisted contracts."* This statement from DTS indicated who the statement would go to but not how the statement would be distributed to these groups.

The policy statement for HART indicated that it would be included in all contract provisions for federal aid projects; however, the statement had not yet been signed by HART's Executive Director. The statement read, *"This policy statement shall be included in all contract provisions for federal aid projects, disseminated throughout HART and to DBE and non-DBE business communities that perform work on USDOT-assisted contracts."*

Subsequent to the compliance review, HART provided to FTA a revised DBE program which included a policy statement signed by the Executive Director on 8/13/12. The policy statement in the 6/20/12 DBE program version reviewed during the compliance review included the language, *"This policy statement shall be included in all contract provisions for federal aid projects, disseminated throughout HART and to DBE and non-DBE business communities that perform work on USDOT-assisted contracts."* This language was not included in the policy statement contained in the 8/30/12 revised DBE program.

Corrective Action and Schedule: Submit to FTA's Office of Civil Rights, within 60 days of issuance of the final report, revised policy statements (HART and DTS) to incorporate the language above and evidence that both policies have been disseminated.

Grantee Response:

*DTS*

DTS disseminated revised policy statement by the following with evidence of dissemination: DTS website, Budget and Fiscal Services website, email to purchasing bidders' list, minority chambers of commerce/business organizations, federal and state agencies, and trade and professional associations.

*HART*

HART disseminated to prime contractors on 11/15/12 and 1/24/13; disseminated to DBEs 11/14/12; and on website effective 12/1/12. It is also available upon request.

FTA Response:

FTA agrees with the response noted by DTS and HART in response to the report findings. DTS and HART shall submit to FTA's Office of Civil Rights, within 60 days of issuance of the final report, a revised DBE program plan with policy statements that incorporate the language above and evidence of both policies' dissemination.

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

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

**Discussion:** During this DBE Compliance Review, **no deficiencies** were found with the requirements for the DBE Liaison Officer (DBELO). However, an advisory comment was made regarding the DBELO's reporting relationship and contact information.

The City and County's DBE program plan states, *"The Mayor of the City and County of Honolulu ultimately is responsible for ensuring that the DBE program has a high priority and is a reality in the City. The Director of Transportation Services is responsible for seeing that the City's DBE policy is implemented throughout the City. The Chief of the Transportation Planning Division of the Department of Transportation Services has been designated as the DBE Liaison Officer."* The program plan does not address if the Chief of Transportation Planning has direct and independent access to the CEO, i.e. Mayor or Director of Transportation Services.

The Chief of Transportation Planning is Don Hamada and he reports directly to the Director of Transportation Services according to the organizational chart collected during the compliance review. The review team advised Mr. Hamada that his contact information should be included in the DBE program plan. Mr. Hamada also confirmed that he now has adequate staff to administer the DBE program after acquiring additional personnel.

HART's DBE program stated that the Executive Director has overall responsibility for HART and delegated responsibility of the DBELO to the Civil Rights Officer. The plan states that the DBELO has direct, independent access to the Executive Director concerning DBE program matters. The DBELO for HART is Charles Bayne, Labor Relations Specialist. Mr. Bayne's contact information (address, phone, fax, email) is included in the program plan. The review team advised Mr. Bayne to also include his name and title in the contact information.

**Advisory Comment:** The DBE program should reflect the reporting access that the DBELO has to the City and County's CEO. The City and County, including HART's DBE program, should reflect the full contact information of the DBELO. This comment was addressed in the most recently approved DBE Program Plan.

### **4. Financial Institutions**

**Basic Requirement:** (49 CFR Part 26.27) Recipients must investigate the existence of DBE financial institutions and make efforts to utilize them. Recipients must encourage prime contractors to use these DBE financial institutions.

**Discussion:** During this DBE Compliance Review, **deficiencies** were found with the

requirements for financial institutions.

The financial institutions section is described in the DTS DBE program plan. It states that the City and County will investigate banks and other financial institutions that are owned by socially and economically disadvantaged individuals and the services that they offer. It is their intention to also encourage primes to utilize their services.

The review team advised the City and County to expand the search for “minority owned” financial institutions to include the Department of the Treasury and Federal Reserve websites. The City and County should also describe how often they will search for these financial institutions. The City and County was advised to also describe how primes will be made aware of these institutions.

HART will also need to describe their search efforts for DBE financial institutions and provide additional information on how primes will be encouraged to use these institutions.

Corrective Action and Schedule: HART and the City and County shall submit to FTA’s Office of Civil Rights, within 60 days of issuance of the final report, a revised DBE program plan indicating specifics on the financial institutions’ research and how often this research will be conducted.

Grantee Response:

*DTS*

DTS researched and identified six financial institutions as “minority owned.” These include: Bank of the Orient; Hawaii National Bank; Finance Factors Ltd; Territorial Savings Bank; Pacific Rim Bank; and Ohana Pacific Bank. Research will be conducted semi-annually with the next review in August 2013. Lists of qualified institutions will be made available at pre-bid meetings and disseminated to all interested persons.

*HART*

The semi-annual was report last updated on 2/13/13 and will be updated on 8/13/13. Discussed with primes on 1/24/13. There are no certified DBE minority banks listed. FDIC list minority owned banks in their Minority Depository Institutions Program.

FTA Response:

FTA agrees with DT’S’ response to the noted deficiency to identify and encourage the use of DBE financial institutions. HART shall follow similar steps to identify and establish a method to encourage primes’ use of these institutions.

HART and DTS shall submit to FTA’s Office of Civil Rights, within 60 days of issuance of the final report, a revised DBE program plan indicating specifics on the financial institutions’ research, how often this research will be conducted, and methods to encourage primes to use these institutions.

**5. DBE Directory**

Basic Requirement: (49 CFR Part 26.31) A DBE directory must be available to

interested parties including addresses, phone numbers and types of work each DBE is certified to perform. This directory must be updated at least annually and must be available to contractors and the public upon request.

Discussion: During this DBE Compliance Review, **no deficiencies** were found with the requirement for a DBE directory.

The Hawaii Department of Transportation (HDOT) is the certifying body for the Hawaii Unified Certification Program. The directory is maintained by HDOT and contains all the required elements of this section.

## **6. Overconcentration**

Basic Requirement: (49 CFR Part 26.33) The recipient must determine if overconcentration of DBE firms exists and address the problem, if necessary.

Discussion: During this DBE Compliance Review, **deficiencies** were found with the requirement for overconcentration.

The City and County's DBE program plan stated that if the DBELO determined that there was an overconcentration of DBEs within certain classifications of work, they would develop appropriate measures to address it. However, the plan did not discuss the frequency with which data is evaluated to determine if overconcentration exists. The review team advised the City and County to define a timeframe for the evaluation. The plan also mentions that the City and County are unaware of overconcentration in any classifications of work.

HART's DBE program plan also stated that no overconcentration had been identified in the types of work DBEs perform. The plan included some actions HART may initiate if overconcentration arose, such as working with primes to find DBEs in other industries, discontinuing assignment of contract goals, and establishing a business development program after securing approval for USDOT. The review team advised HART to also provide information on the method and frequency of overconcentration evaluations.

HART's DBE program utilized information from the HDOT Disparity Study to support its use of race conscious elements for DBE participation. The City and County indicated that the HDOT study is also under review to support a shift from a race neutral to a race conscious DBE program. As both programs adopt these studies to use race conscious efforts, monitoring of DBE overconcentration will be necessary.

Corrective Action and Schedule: HART and the City and County shall submit to FTA's Office of Civil Rights within 60 days of issuance of the final report:

- a revised DBE program plan indicating specifics on overconcentration analyses and how often the analysis will be conducted; and
- the results of the first analysis conducted, along with any subsequent actions taken.



Grantee Response:

*DTS*

Analyze over-concentration by using the most updated and available DBE firm information and the most recent NAICS code information to compare DBE firms to all firms and a particular NAICS code. If it is determined that the DBE NAICS code exceed 50% of their proportional share of work, then appropriate action will be taken to address this overconcentration. This analysis will be done semi-annually (March and September).

*HART*

Analysis is ongoing, done as DBE reporting documents are received. Results of first analyses showed no overconcentration therefore no action was taken. An overconcentration analysis was provided.

FTA Response:

FTA agrees with the response noted by DTS and HART to the noted deficiency in response to the report findings. HART and DTS shall submit to FTA's Office of Civil Rights within 60 days of issuance of the final report, a revised DBE program plan indicating specifics on overconcentration analyses and how often the analysis will be conducted. DTS shall submit the results of the first analysis conducted, along with any subsequent actions taken.

**7. Business Development Programs**

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

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

Neither the City and County nor HART has a formal business development or mentor protégé programs as described in the DBE regulations.

**8. Fostering Small Business Participation**

Basic Requirement: (49 CFR Part 26.39) DBE regulations require that the recipient must include an element to structure contracting requirements to allow competition by small businesses. Reasonable steps should be made to eliminate obstacles to the participation of small businesses, including unnecessary bundling of contracting requirements which may preclude them from participating as primes or subcontractors. This element section must be submitted to FTA by February 28, 2012.

Discussion: During this DBE Compliance Review, **deficiencies** were found with the requirement for fostering small business participation.

The City and County submitted a separate Small Business Participation Plan to FTA addressing their approach to facilitate more small business participation. The first page

of the two-page document reiterated the requirements of Part 26.39, stated that a small business must be verified by HDOT, and that the personal net worth cap shall not exceed \$1.32 million.

The second page was an outline of their Small Business Participation Plan. The first task was to survey project managers and prime contractors to determine what types of work may be performed by small businesses and target outreach efforts to business organizations. The other areas included utilizing business assistance centers, business fairs, website links, and twitter updates for small business opportunities; reviewing feasibility of unbundling large contracts; and monitoring good faith efforts of contractors on recruitment of small businesses.

HART's Small Business Participation Plan was included in its program plan. The plan included reviewing the feasibility of initiating a mentor-protégé program as a race-neutral means to increase DBE participation, unbundling contracts, maintaining a list of DBEs and small businesses, and conducting an extensive outreach program directed to the minority small business community.

Both Small Business Participation Plans lacked details concerning implementation schedules and specifics on types of contracts to review for unbundling. The review team instructed HART and DTS to provide more detailed information concerning their implementation schedule for carrying out the Small Business Participation Plans.

Corrective Action and Schedule: Submit to FTA's Office of Civil Rights, within 60 days of issuance of the final report, the revised Small Business elements of DTS' and HART's DBE program plans to include greater detail in methods to implement this requirement and milestones to complete steps to be taken to implement the small business elements of the program.

Grantee Response:

*DTS*

The City will review those contracts which potentially can be unbundled based on the following: scope of work, contract opportunities, and balancing the needs of the DBE program with procurement requirements, accountability and monitoring. Efforts will be made to make certain no unreasonable or unnecessary steps are required of small businesses.

Methodology and milestones to address small business elements include, but not limited to: consultation with prime contractors through an annual conference held in January in cooperation with the State to determine contract opportunities and challenges when bidding on project; quarterly outreach efforts to business organizations, trade groups, and professional associations; and providing technical support in making available training opportunities for small businesses. Disseminate monthly a list of contract opportunities and offer technical assistance to questions about the bid, scope of work, and provide referrals to minority financial institutions.

*HART*

HART provided a copy of their Fostering Small Business Participation element plan.

FTA Response:

FTA agrees with the response noted by DTS and HART to the noted deficiency in response to the report findings. DTS and HART shall submit to FTA's Office of Civil Rights, within 60 days of issuance of the final report, revised DBE program plans that incorporate the Fostering Small Business Participation element plan.

**9. Determining/ Meeting Goals**

**A) Calculation**

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

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

***DTS***

The City and County submitted their FFY 2011–2013 overall DBE goal methodology to the FTA Region IX Civil Rights Officer on June 28, 2010. The methodology indicated that the City and County would meet the 3.83 percent goal through race neutral means.

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

The City and County stated that it would appropriate \$94,331,000 for FFY 2011, \$238,621,000 for FFY 2012, and \$311,220,000 for FFY 2013 in FTA funds for the Transportation Improvement Program (TIP). The projects with FTA funds included design, construction, equipment, rights of way, operating, and the HHCTCP.

The Department of Transportation Services (DTS) is responsible for implementing the DBE program and goal setting process. DTS divided the number of relevant DBE establishments found in the Hawaii DOT DBE directory (115) by the number of U.S. Census NAICS establishments for Honolulu (1,911) that could participate in contracts with the City. The base figure was calculated at 6.01%.

Approximately 32 NAICS codes were listed in the chart from the methodology. DTS representatives stated during the compliance review that contracts with no DBE opportunities are not included in the goal setting process. The review team advised DTS that the goal setting process entails projecting the percent of DBE participation based on a recipient's total contracting opportunities.

The DTS spreadsheet did not appear to include the DBEs in the denominator of the equation for total establishments. The denominator should consist of the DBEs and non-DBE establishments found in the census data. The review team also referenced the USDOT *Tips for Goal Setting*, where it is suggested to use weighting to ensure the base figure is as accurate as possible. At the time of the site visit for this review, the DTS representative had begun working on a revised goal methodology draft that would measure the contract values (weighting) with the relative availability of DBEs to provide

the services.

Step 2: Adjusting the Base Figure

The DTS reviewed its “past eight years (2003 to 2010) of DBE awards, commitments, and payments.” The spreadsheet highlighted the DBE participation for each of the two semi-annual reports for each fiscal year. The median for DBE past participation in the past 15 semi-annual reports were determined to be 1.66% (the second half report for fiscal year 2010 was not available at the time when the methodology was completed). The median of 1.66% was averaged with the base figures of 6.01% to arrive at 3.83% for the overall goal.

The review team suggested that DTS use cumulative numbers from the two semi-annual reports rather than listing DBE participation for each reporting period. It was also determined that the past participation numbers used by DTS were based on actual payments for projects completed during the reporting period, rather than awards in the reporting forms. Because errors were made on several of the reporting forms, the review team could not determine the true DBE participation for the past fiscal years.

**HART**

The goal methodology completed by HART was provided to the review team. The Hawaii DOT Disparity Study findings were considered when HART developed their goal methodology for the Honolulu High Capacity Transportation Corridor Project (HHCTCP). These findings led to HART projecting to meet 9% of their overall 13% goal through race conscious means.

*HART described the following in regards to identifying contracting opportunities, “FTA funds totaling \$1.798 billion in year of expenditure dollars (\$1.55 billion New Starts funds plus \$0.248 billion Section 5307/ARRA funds) will be expended for Project related goods and services. A project goal of 13% or \$234 million dollars has been established for awards to DBEs through Federal Fiscal Year 2018.”*

The triennial goal of the City and County of Honolulu was then used to identify similar NAICS codes for the project. Once the master list of NAICS codes was developed, the availability of DBE and non-DBE firms was determined. The HDOT DBE Directory was used for the availability of DBEs and the 2009 Census data for State Business Patterns for Hawaii was used for non-DBEs (total establishments). This information was compiled in a spreadsheet; however it was not clear if the DBEs were included in the total establishment number.

The relative availability of DBEs and non-DBEs was multiplied by approximately 153 NAICS line items of weighted contracting opportunities for the step one methodology project goal. This equation resulted in a step one base figure of 12.97% or 13% for a rounded, weighted base figure.

The information contained in the Step Two’s methodology addressed determining the portion of the project goal to meet race neutrally, rather than adjustments to the base figure. HART did not actually make any adjustment to the base figure. In this case, HART should state that no adjustment to the base figure was made and state reasons, (i.e.

no historical DBE participation, etc).

Corrective Action and Schedule: At the time of the Compliance Review, the following corrective actions were identified that the City and County's the goal methodology needed to address:

- consideration of all contracting opportunities;
- inclusion of DBEs and non-DBEs in the denominator for Step 1 and
- use of correct DBE past participation percentages.

A revised goal for DTS was submitted with the new DBE program subsequent to the Compliance Review. The revised DBE Program provided a complete consideration of all contracting opportunities, utilized DBE establishments in the denominator, and addressed past DBE percentages. **This deficiency is now closed.**

## **B) Public Participation**

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

Discussion: During this DBE Compliance Review, **deficiencies** were found with the requirement for public participation and outreach.

The DTS-developed DBE goal methodology included information about publishing the goal; however the consultation process was not conducted. The review team referred DTS to the US DOT Official Questions and Answers regarding conducting the consultation process for guidance.

Documentation was provided to support proof of publication in the general circulation newspaper in the State of Hawaii. The FFY 2011 – 2013 DBE goal was requested to be advertised on July 5, 2010 in the Star Adviser. The review team advised DTS to ensure inclusion of any minority-focused media, and to follow the April 10, 2008 FTA Dear Colleague Letter suggesting that goals should be advertised no later than June 15<sup>th</sup> to allow for the 45 day comment period to complete prior to August 1.

Corrective Action and Schedule: Submit to FTA's Office of Civil Rights, within 60 days of issuance of the final report, an updated program plan that incorporates milestones for carrying out the consultation process and for publishing a notice of the overall goal for comment. Include in the submission information on what the consultation process will entail, and what media will be used for the published notice. The consultation process must be scheduled to allow for subsequent advertisement of the overall goal by June 15<sup>th</sup> (to allow for a 45-day comment period prior to August 1).

## DTS Response:

The milestones and process:

- Identify minority, women, and contractor groups for consultation process purpose.

- Invite these groups for consultation before May 1<sup>st</sup>
- Goal calculation by June 1<sup>st</sup>
- Publish/advertise goal through Honolulu Star Advertiser by June 15<sup>th</sup>, and allow 45 day comment period
- 45 day comment period ends on July 31<sup>st</sup>

FTA Response:

FTA agrees with DT'S' response to the noted deficiency in response to the report findings. FTA verification of this process will be conducted during the review of the next goal submittal. **This deficiency is now closed.**

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

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

Discussion: During this DBE Compliance review, **no deficiencies** were found with the requirement for transit vehicle manufacturers. However, an advisory comment was made.

The review team requested DBE contract information for the latest vehicle procurements. The City and County provided TVM certifications for Contract No. CT-DTS-1100470, executed on August 10, 2011 for eight 35' heavy-duty low-floor buses and Contract CT-DTS-1100469 executed on August 4, 2011 for forty 40' heavy-duty low-floor 12-year diesel buses. Gillig, LLC was the contractor for both contracts and signed TVM certifications for compliance with 49 CFR Part 26.49. Gillig also provided their own TVM certification stating that FTA accepted their DBE goal submission and included FTA's contact information for questions.

Advisory Comment: It is advised that procurement personnel ensure verification of the TVM's DBE Goal approval by requesting a copy of the TVM's certification letter and checking FTA's website listing of approved TVMs.

**D) Race Neutral DBE Participation**

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

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

The Ninth Circuit Decision requires DOT grantees in its jurisdiction to conduct disparity studies to support use of race conscious measures to achieve DBE participation. As a result, the City and County of Honolulu has implemented a race-neutral program since the Ninth Circuit Decision. The DTS indicated that the City and County has not conducted a disparity study but they have explored use of the HDOT Disparity Study. HART already incorporated information from the HDOT study for a race conscious DBE

program and requested FTA confirmation of their DBE program, project goal, and waiver for group specific goals. FTA instructed DTS to also review the HDOT Disparity Study for evidence to support the use of race conscious efforts in meeting DBE participation.

The review team advised DTS to amend the current contract language that requires the DBE contract goal percentage to be written on the contract until such time that the program has been approved to utilize race conscious efforts.

Corrective Action and Schedule: At the time of the Compliance Review, it was found that DTS needed to revise its DBE program to incorporate evaluation of the HDOT Disparity Study to support use of race conscious means to meet the overall goal. Subsequent to the Compliance Review, a new DBE program and goal was provided to FTA for review that provided for the inclusion of the HDOT disparity study. Additionally, requests for waivers were submitted to FTA to allow DTS and HART to set DBE goals that would exclude some, but not all, DBEs from consideration towards meeting that goal. FTA, in its letter dated September 26, 2012, granted the waivers for a three-year period covering FY2013-2015. **This deficiency is now closed.**

#### **E) Race Conscious DBE Participation**

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

Discussion: During this DBE Compliance Review, **no deficiencies** were found with the requirements for race conscious participation on overall and contract goals. However, an advisory comment was made regarding the updating of contract boilerplate language.

At the time of the review, the City and County of Honolulu did not use race conscious measures to meet DBE participation on contract goals or overall goals. The DBE program plan and contract boilerplates will need to be modified to accommodate race conscious goals.

HART referenced an excerpt from the HDOT Disparity Study in their goal methodology regarding the disparity index for specific groups and concluded that Asian Pacific American males should not be counted towards race conscious DBE contract goals (see chart below used in the goal setting methodology). HART stated in their goal methodology that the study considered an index of 80 or lower to be large, or substantially significant. The total disparity index of 66.10 was multiplied with the base figure of 13% which resulted in 8.593% or 9% when rounded. HART determined that 9% of the project goal would be met by race conscious means.

*Excerpt from HDOT Disparity Study*  
*Table 7.27, Disparity Results for HDOT Contracting, Overall and by Construction Category (Dollars Paid) (Federally Assisted Projects Only)*

All Industries, Modes, and DBE Type	Utilization	Availability	Disparity Index
African American	0.16	1.08	14.60
Hispanic	0.30	2.60	11.50
Asian-Pacific American	27.20	33.25	81.80
Native American	7.52	11.75	64.00
Non-minority Female	0.55	5.41	10.20
DBE Total	35.73	54.09	66.10

Advisory Comment: In updated DBE program plans, DTS and HART are advised to ensure the appropriate boiler plate language is incorporated to accommodate the use of race conscious goals.

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

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

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

The FFY 2011–2013 DBE goal methodology developed by DTS included a good faith efforts section. DTS stated that compliance with good faith efforts requirements were a matter of responsiveness and each solicitation would require bidders to submit good faith efforts information. The information contained in the methodology detailed specifics about making good faith efforts, administrative reconsiderations, and replacement of DBEs on a contract. This information is commensurate with a race conscious program and its use will need to be suspended until the DTS obtains approval for a race conscious DBE program.

DTS will need to update its DBE program plan and procurement documents to reflect rules for termination, substitution, and reduction of work performed by DBEs when there is a DBE goal on a contract. This includes ensuring compliance with 26.53(f) which will necessitate that contracts with DBE goals contain language requiring prior written agency approval before terminating a DBE. This request for approval to terminate or substitute a DBE used to meet a contract goal must be preceded by the prime allowing the DBE an opportunity for rebuttal.

Corrective Action and Schedule: At the time of the Compliance Review, it was determined that DTS needed to provide evidence to support use of race conscious elements toward meeting the overall goal or remove good faith efforts requirements from the DBE program implementation process. Subsequent to the Compliance Review, a revised program plan was submitted that addressed good faith efforts and included information regarding DBE contract goals and termination requirements.



Corrections to address the removal and rebuttal process for DBEs that have been removed, have been sufficiently addressed in the most recently approved DBE program plan. **This deficiency is now closed.**

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

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

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

The City and County's DBE contract provisions include detailed information regarding counting DBE participation. Counting requirements for subcontracted work, joint ventures, commercially useful function guidelines, truckers, manufacturers, and regular dealers are all outlined in the *DBE Goal Calculation* section of the contract provisions.

### **H) Quotas**

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

Discussion: During this DBE Compliance Review, **no deficiencies** were found with the requirement for quotas.

No evidence of the use of quotas or set-aside contracts by City and County was found during the site visit.

### **I) Meeting Goals**

Basic Requirement: (49 CFR Part 26.47) Selected recipients must submit an analysis and corrective action plan to FTA within 90 days of the end of the fiscal year outlining the factors why the overall goal was not met.

Discussion: During this DBE Compliance Review, **deficiencies** were found with the requirement for meeting goals.

The DBE regulation cites the following in 49 CFR Part 26.47(c), *"If the awards and commitments shown on your Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your DBE program in good faith: 1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year; (2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year."*

DTS completed a shortfall analysis and corrective action plan for failure to meet their overall goal on December 20, 2011. The DTS reported DBE achievement of 1.61% which was short of the 3.83% overall DBE goal. A five-step process was outlined to address the DBE achievement shortfall. The first step lists the actions DTS will take

before a contract award. This includes collecting contact information of DBEs and non-DBE firms that will participate in the contract; description of work each will perform; written documentation of commitment to use a DBE subcontractor; and written confirmation from the DBE that is participating in the contract.

The second approach is to enforce good faith efforts after a contract is awarded. This includes requiring the contractor to solicit certified DBEs; identify portion of work that can be performed by DBEs; not reject a DBE as unqualified without sound reasons; make efforts to assist interested DBEs in obtaining bonding; make efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials; and effectively use the services of available minority/women community organizations in the placement of DBEs.

The third area discussed supplementary corrective actions to show good faith efforts to attain goals to include community outreach, education, and technical assistance. The fourth area outlines expanded policies and procedures concerning unbundling, bonding, outreach, etc. as part of their DBE program based on results from the HDOT disparity study. Lastly, a three phase timeline was included for meeting the DBE goal by September 30, 2013.

The shortfall analysis will need to be revised to focus on race-neutral efforts to correct and address the DBE shortfall, unless race conscious efforts are confirmed. Regardless of the type of DBE program approved by FTA, DTS needs to focus its shortfall analysis on what caused the actual shortfall that occurred and detail what corrective actions it will take to correct this going forward. The first step in this process is to base the shortfall amount to be analyzed on corrected reporting information for contract ‘awards’ not payments. As described in the *Reporting* section, the DBE achievement numbers will also need verification based on data errors discovered in the semi-annual reports and incorrect determination of past DBE participation.

Additionally, the review team noted that much of the analysis narrative focused on good faith efforts language that is used only in a race-conscious program. Even if operating a race conscious program the way that DTS describes some of the good faith efforts narrative needs to be addressed. Many of the post-award actions discussed in the shortfall analysis (soliciting DBEs, outreach, etc.) are activities that need to be taken by the prime contractor during the bidding phase prior to the agency determining that they made a good faith effort for a contract with a race conscious contract goal. A grantee should not allow the contractor to continue to make these efforts to demonstrate efforts to meet a contract goal after award, unless there is a need to replace a DBE that was named in the award.

Corrective Action and Schedule: Submit to FTA’s Office of Civil Rights, within 60 days of issuance of the final report, a revised shortfall analysis that correctly reports past participation figures and that considers actions appropriate for the type of DBE program approved by FTA (race-neutral or race conscious).

DTS Response:

DTS will correct past participation calculation and revise its shortfall analysis using

corrected FFY 2011 figures.

FTA Response:

FTA agrees with DT'S' response to the noted deficiency. DTS shall submit to FTA's Office of Civil Rights, within 60 days of issuance of the final report, a revised shortfall analysis using corrected FFY 2011 figures.

**10. Required Contract Provisions**

**A) Contract Assurance**

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

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

The City and County of Honolulu DBE program plan states that they will ensure that the contract assurance clause found in 49 CFR Part 26 is placed in every DOT-assisted contract and subcontract. The review team examined three prime contracts and three DBE subcontracts for compliance with contract assurance clause inclusion. The contract assurance language was included in two of the prime contracts but was missing in the T. Iida prime contract and from the three subcontracts reviewed.

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

Prime Contractor	Project	Contract No.	DBE Subcontractor
██████████	Honolulu High-Capacity Transit Corridor - West Oahu / Farrington Highway Guideway	CT-DTS-1000137	██████████
██████████	Middle Street Intermodal Center Phase 2B-3 Transit Center	CT-DTS-0900359	██████████
██████████	General Engineering Consultant II for Honolulu High-Capacity Transit Corridor	SC-DTS-1100131	██████████

At the time of the Compliance Review it was identified that the contract assurance clause was not placed in every DOT-assisted contract and subcontract. The City and County documented in its most recently approved DBE program plan implementation measures for monitoring clause inclusion in every DOT-assisted contract and subcontracts. **This deficiency is now closed.**

## **B) Prompt Payment**

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

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

### *Prompt Payment*

The City and County's DBE program plan includes a ten-day prompt payment clause. The prompt payment clause was included in two of the prime contracts. The prime contract with [REDACTED] contained conflicting prompt payment language, stating 10 days in one section and 30 days in a subsequent section. The subcontracts with [REDACTED] and [REDACTED] included the correct prompt payment language. The subcontract with [REDACTED] did not include a prompt payment clause.

The review team was able to track the payments from the City and County to [REDACTED] and then to the subcontractor, [REDACTED]. On average, [REDACTED] was paid two days after [REDACTED] received payment. Payment between the City and County, [REDACTED], and the subcontractor, [REDACTED], were also tracked. The payments tracked from [REDACTED] to [REDACTED] were pre-paid or were paid on average within two days after [REDACTED] received payment from the City and County. The payments between the City and County, [REDACTED] and [REDACTED] could not be verified with the documentation provided.

### *Return of Retainage*

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

The City and County's DBE program plan states that, "*Prompt return of retainage payments from the prime contractor to the subcontractor will be made within 10 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment among the parties may take place only for good cause and with the City's prior written approval.*" The DBE program plan does not include a provision for incremental acceptance of subcontractor's work. The prime contract with PB Americas included both the 10-day return of retainage and language for incremental acceptance. The prime contracts with [REDACTED] and [REDACTED] included the 10-day return of retainage but did not include language for incremental acceptance. The subcontracts with [REDACTED] and [REDACTED] did not include language for return of retainage or incremental acceptance. The subcontract with [REDACTED] did include the 10-day return of retainage requirement, but a provision for incremental acceptance was not found.

Corrective Action and Schedule: At the time of the Compliance Review, a number of corrective actions were identified to close the finding. Submit to FTA's Office of Civil Rights, within 60 days of issuance of the final report:

- documentation of implementation of monitoring of DBE prompt payment. The compliance Review found conflicting language in subcontracts regarding prompt payment and the updated DBE program plan addressed the prompt payment requirement and stated that it would be monitored.
- verification of the timeframe of payment from [REDACTED] to [REDACTED]
- documentation of implementation to ensure:
  - non-DBE prompt payment and return of retainage are monitored;
  - prompt payment and return of retainage clauses are included in subcontract agreements; and
  - incremental acceptance of portions of work is described in the DBE program plan and implemented.

Grantee Response:

*DTS*

Contract administration to be implemented to ensure prompt payment language included in all contracts. Clear management direction and firm control to implement prompt payment mechanisms which require primes to certify that their subcontractors were paid within 10 days. Revise DBE program and contract by removing return of retainage language and clauses.

*HART*

An additional requirement will be added to the HART DBE reporting documents requiring the prime to certify that they have paid, including retainage if applicable, all DBEs and other subcontractors within the 10 day period.

Language will be added to the HART DBE program and individual contracts to notify primes that agency retainage will be paid promptly and in regular increment acceptances as defined in the contract. Also the prime will be notified of their obligations to return retention to sub-contractors within 10 days after receiving payment for work satisfactorily completed and accepted, including incremental acceptances of portions of the contract work by the agency.

HART is awaiting a response from 2/20/13 email for verification payment request of [REDACTED] HART notified HDOT of the updating deficiency in 2/20/13 email.

FTA Response:

FTA agrees with the response submitted by DTS and HART to the noted deficiency in response to the report findings. DTS and HART shall submit to FTA's Office of Civil Rights, within 60 days of issuance of the final report, a revised DBE program plan reflecting these updates. HART shall submit verification of time frame payments from [REDACTED] to [REDACTED].

### C) Legal Remedies

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

Discussion: During this DBE Compliance Review, **no deficiencies** were found with the requirement for legal remedies.

In its DBE program plan, the City states that it “*will implement appropriate mechanisms to ensure compliance with the DBE Program by all program participants. Refer to Section 10 (Disputes on Contract and Breach of Contract Controversies) of the General Terms and Conditions for Contracts for Professional Services for the City and County of Honolulu and/or Section 8 (Remedies) of the Revised General Provisions of Construction Contracts of the City and County of Honolulu.*” Once the City and County moves to a race conscious DBE program, the assurances will need to be included in the contract with DBE goals.

### 11. Certification Standards

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

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

The HDOT performs DBE certifications as the UCP entity for the state. Although the City and County is not a certification partner in the UCP, the review team examined the following HDOT certified firms participating on an FTA-assisted contract for compliance with certification requirements during the on-site visit:

Firm Name	Status	Deficient-Area
██████████	Existing	Yes – PNW and Taxes
██████████████████	Existing	Yes – Taxes
██████████	Existing	Yes – PNW and Business Size

### 12. Certification Procedures

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

Discussion: During this DBE Compliance Review, **no deficiencies** were found with the

requirements for certification procedures since the City and County of Honolulu is not a certifying partner in the UCP. However, advisory comments were made regarding the certification procedures used to certify DBEs participating on a FTA-assisted contract.

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

#### *Personal Net Worth (PNW) Statements*

An update letter dated August 27, 2009 found in the file for [REDACTED] stated that, "Please note that the Affidavit of Personal Net Worth (Attachment VI) is no longer required." The firm had not submitted PNWs to HDOT since their 2008 submission.

For [REDACTED] the review team found that the February 5, 2008 statement listed a substantial value under "Other Personal Property," yet they failed to provide a description of the assets in "Section 5." It did not appear that further clarification was requested regarding the figures. Also, HDOT collected PNW statements in 2008 from the majority and minority owners of the firm.

#### *Tax Returns*

HDOT only collects the first page of the business tax return annually. The review team advised that the entire return should be collected to verify true ownership of the firm, affiliates or subsidiaries, and other information that may spur additional investigation.

There were no 2009, 2010, and 2011 personal tax returns in the file for [REDACTED]. The 2009 personal tax return for the owner of [REDACTED] was also not found in the file.

#### *Business Size Determinations*

Calculation to determine business size should include total income plus cost of goods sold as reported on the 1120 or 1120S business tax returns. In several returns for [REDACTED], the totals used to calculate business size did not include "Other Income," nor did HDOT investigate the figure to determine whether there was information that may not have been included on the PNW statements.

The review team determined that the correct three year average for [REDACTED] for 2008 to 2010 is \$6,791,069. The firm is certified to perform "Other Management Consulting Services," which has an SBA threshold of \$7,000,000. The review team advised that the firm should be monitored to ensure that they do not exceed the threshold on submission of their 2011 taxes.

#### *Annual Updates*

The review team found that annual update acceptance letters contained expiration language. The 2011 DBE final rule clarified that a firm is certified until removed and that certification does not expire. It was advised that this language be removed from the letters to be in compliance.

Advisory Comment: The City and County of Honolulu, as a member of the Hawaii UCP, is advised to bring the issues stated in this section to the attention of HDOT's

certification unit for correction. Evidence of this communication should be provided to FTA's Office of Civil Rights.

FTA Response:

HART submitted evidence of a 2/20/13 email sent to HDOT advising of the certification issues discovered during the compliance review. **This advisory comment has been addressed.**

### **13. Record Keeping and Enforcements**

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

Discussion: During this DBE Compliance Review, **deficiencies** were found with the FTA requirement for maintaining the bidders list, monitoring, and reporting requirements.

#### *Bidders List*

The City and County does not collect and maintain a bidders list. The review team recommended that DTS review information collected by the Procurement Department for possible inclusion of bidders list elements. The review team inquired about their vendor process and discovered that a vendor self service registration system was acquired a few years ago by the Procurement Department. The system has the capability to collect bidders list DBE requirements such as annual receipts, age, and DBE status of the firm. These fields are optional currently in the system and procurement will explore making these fields required so that DTS can comply with the bidders list requirements.

#### *Monitoring*

The DTS provided amended monitoring procedures to replace the procedures outlined in the 1999 DBE program plan. DTS representatives indicated during the compliance review that implementation of these amended procedures is still in process and will be incorporated as part of their monitoring process subsequent to the Compliance Review to incorporate any additional requirements and suggestions.

The amended monitoring procedures indicated that project managers will notify DTS of any prospective contracts involving DBE firms and when these contracts have been awarded. The review team recommended that DTS incorporate the collection and review of DBE participation schedules from primes prior to award of the contract so that DBE participation can be properly monitored and credited towards the overall goal and contract goals, if applicable, should the use of race conscious goals be approved by FTA.

Part of DTS' plan is that *DBE Participation Reports* will be collected and an analysis of each DBE firm will be conducted to compare actual payments made to the firm's contract commitments and attainments. DBE staff will also conduct on-site visits to verify actual work performed by DBEs and document written certifications. The project managers



will provide DBE staff with a “Final Report of DBE Participation” upon receipt of final invoice for payment from contractors.

HART will primarily retain responsibility to monitor the HHCTCP Project. Monitoring and enforcement mechanisms were addressed in HART’s DBE program. HART stated it, *“will adopt a monitoring and enforcement mechanism to verify that work committed to DBEs at contract award is actually performed by DBEs. This will be accomplished by requiring pre-construction meetings with the prime contractor and subcontractors to discuss scope of work and performance expectations on contracts and subcontracts. HART will conduct field inspections and written certification on every contract on which DBEs are participating to ensure that DBEs are in fact performing a commercially useful function. HART will be monitoring all payments to subcontractors.”* The review team also discussed HART’s monitoring and enforcement approach with the DBELO, project engineer, and legal counsel during the Compliance Review.

The review team noted that DTS’ and HART’s current procedures include the DBE regulatory monitoring language. However, the procedures are in the early stages or have yet to be implemented and will need to ensure that mechanisms are in place to keep a running tally of commitments and achievements, monitoring prompt progress payments and return of retainage of DBE and non-DBE firms, and reviewing subcontract agreements for flow down requirements.

#### *Reporting*

The semi-annual reports completed by DTS for periods from FFY 2009 through 2011 were downloaded from TEAM for review. The first half of FFY 2012 (June 1) was collected on-site, but was submitted in TEAM according to the DTS representative. The reports appeared to be submitted timely; however, several discrepancies were found with the data in the semi-annual reports completed by DTS.

The December report for activities in FFY 2011 (April 1 – September 30) indicated that the percentage of total DBE participation was 1.61% on line 14 in the *Actual Payments on Contracts Completed This Reporting Period* section. The 1.61% was referenced in DTS’ shortfall analysis as their DBE participation towards meeting the overall goal of 3.83%. The review team advised DTS that DBE past participation for reporting purposes is based on the *Awards and Commitments Made During this Reporting Period* section of the semi-annual report.

The DTS completes multiple reports for each project and a cumulative report that includes all the individual project achievements. The December 1<sup>st</sup> report for FFY 2011 indicated that the City and County made over \$1 billion in awards during the six month period. After reviewing supporting documentation used by the DTS representative, it was determined that cumulative information from ongoing projects, inclusive of change orders, was reported rather than only the amount awarded during the reporting period. The review also noted that the FTA funded portion of the contract was not reported consistently in the semi-annual reports.

The individual reports DTS submitted with the overall semi-annual reports were for Oahu Transit Services for city bus fixed route services, which included salaries. DTS will

discontinue reporting salaries as contract awards in future reports. Other reports included paratransit services, Middle Street Intermodal Center Phase 2B-2, Middle Street Intermodal Center Phase 2B-3, Alapai Transit Renovation Project, Wahiawa Transit Center, and two projects for the Honolulu High Capacity Transit Corridor Project (HHCTCP). With HART's request to submit project goals for HHCTCP, DTS will need to coordinate with HART on reporting instructions for this project to ensure that HART will report activities for this project to FTA and efforts are not duplicated or completely omitted in semi-annual reports.

Subsequent to the compliance review, FTA granted DTS and HART a waiver for group specific goals in a race conscious program. Additionally, the updated DBE program included bidders' list requirements. Monitoring of contracts, commitment, achievements, prompt payment and return of retainage were also addressed in the updated program.

Corrective Action and Schedule: While some of the corrective actions were addressed in the updated plan, please submit to FTA's Office of Civil Rights, within 60 days of issuance of the final report, verification, documentation, and methods for:

- collection and maintenance of bidders list; and
- ensuring that semi-annual reports contain only the FTA share, specific award amounts for the reporting period are reported, and the HHCTC Project is reported appropriately.

Grantee Response:

*DTS*

Verification and documentation of bidder's list and correct semi-annual reports with firm controls to ensure compliance and accountability.

*HART*

DBELO Charles Bayne will report HART activities as identified on page 7 of the program document item 1 of the DBELO responsibilities.

FTA Response:

FTA agrees with the response to the noted deficiency by DTS and HART in response to the report findings. DTS shall submit to FTA's Office of Civil Rights, within 60 days of issuance of the final report, a revised DBE program plan detailing the controls for verification that semi-annual reports contain only the FTA share and specific award amounts for the reporting period are reported correctly.

## Section 7 – Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action Plan:	Response Days/Date
1. Program Plan	26.21	D	Program dated September 1999	Submit an updated DBE program from DTS that includes all required areas of the DBE regulation.	June 19, 2013
2. Policy Statement	26.23	D	Policy statement lacking verification of dissemination	Submit revised DBE program with policy statements and evidence of policies' dissemination.	June 19, 2013
3. DBE Liaison Officer	26.25	AC	Program plan missing reporting access and DBELO's name and contract information		
4. Financial Institutions	26.27	D	No information pertaining to selection of DBE financial institutions	Submit a revised DBE program plan indicating specifics on conducting the financial institutions' research and how often this research will be conducted.	June 19, 2013
5. DBE Directory	26.31	ND			
6. Overconcentration	26.33	D	No process for examining OC	Submit a revised DBE program plan indicating specifics on overconcentration analyses and how often the analysis will be conducted.  DTS shall submit the results of the first analysis conducted, along with any subsequent actions taken.	June 19, 2013
7. Business Development Programs	26.35	N/A			
8. Fostering Small Business Participation	26.39	D	Small Business Element approach lacks specifics	Submit revised Small Business Elements of the DBE program plans that include milestones for completion of steps to be taken to implement the program within nine months of approval.	June 19, 2013

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action Plan:	Response Days/Date
9. Determining / Meeting Goals					
A. Calculation	26.45	D	<ul style="list-style-type: none"> <li>• Include total value of contract opportunities (not only what DBEs can perform)</li> <li>• Use weighting where possible</li> <li>• Past participation info for step two adjustment is incorrect</li> </ul>	Submit a revised DBE goal methodology that includes: <ul style="list-style-type: none"> <li>• consideration of all contracting opportunities;</li> <li>• DBE establishments in the denominator along with non-DBEs; and</li> <li>• correct DBE past participation percentages.</li> </ul>	Closed 1/28/2013
B. Public Participation	26.45	D	No consultation process conducted and advertised late	Submit a proposed timeline that will be used to conduct a consultation meeting and ensure advertisement of goals by June 15 <sup>th</sup> to allow for a 45-day comment period.	<b>Closed 3/19/13</b>
C. TVM	26.45	AC	Review FTA website for approved TVM list		
D. Race Neutral	26.51	D	Not considering disparity study information	Submit a revised DBE program that incorporates evaluation of the HDOT Disparity Study to support use of race conscious means to meet the overall goal.	Closed 1/28/2013
E. Race Conscious	26.51	ND			
F. Good Faith Efforts	26.53	D	Using good faith effort language in RN program	Submit evidence to support use of race conscious elements toward meeting the overall goal or remove good faith efforts requirements from the DBE program implementation process.	Closed 1/28/2013
G. Counting DBE Participation	26.55	ND			
H. Quotas	26.43	ND			

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action Plan:	Response Days/Date
I. Meeting Goals	26.47	D	Incorrect past participation calculation	DTS shall submit a revised shortfall analysis that correctly reports past participation figures and that considers actions appropriate for the type of DBE program approved by FTA (race-neutral or race conscious).	June 19, 2013
10. Required Contract Provisions					
A. Contract Assurance	26.13	D	Contract assurance language missing in contract and subcontract agreements	Submit to FTA's Office of Civil Rights a plan to ensure that the contract assurance clause is placed in every DOT-assisted contract and subcontract.	Closed 1/28/2013
B. Prompt Payment	26.29	D	Conflicting language in contracts  Prompt payment language missing in contracts  No language for retainage or incremental acceptance	Submit revised DBE program reflecting prompt payment updated language.  HART shall submit verification of the time frame of payments from [REDACTED] to [REDACTED];	June 19, 2013
C. Legal Remedies	26.37	ND			
11. Certification Standards	26.67	ND			
12. Certification Procedures	26.83	AC	HDOT issues with PNWs, tax returns, business size, annual updates	Provide FTA evidence that certification issues identified have been communicated to HDOT.	<b>Closed 3/19/13</b>
13. Record Keeping and Enforcements					
A. Bidders List	26.11	D	Bidders list not collected/maintained	Submit verification that: the bidders list will be collected and maintained.	Closed 1/28/2013

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action Plan:	Response Days/Date
B. Monitoring	26.37 26.55	D	<ul style="list-style-type: none"> <li>No monitoring mechanisms for contracts</li> <li>No mechanisms for keeping running tally of commitments and achievements</li> <li>No mechanisms for prompt payment or return of retainage</li> </ul>	Submit verification that mechanisms are in place for monitoring of contracts, commitment, achievements, prompt payment, and return of retainage.	Closed 1/28/2013
C. Reporting	26.11	D	<ul style="list-style-type: none"> <li>Some reports not only federal share reported</li> <li>Reporting running tally of contract value instead of value of award on specific date</li> <li>Incorrect completion of fields</li> <li>Verify who will report HART activities</li> </ul>	DTS submit revised DBE program detailing the controls for verification that semi-annual reports contain only the FTA share and specific award amounts for the reporting period are reported correctly	June 19, 2013

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

## Section 8 – List of Attendees

Name	Organization	Title	Phone	Email
<b>FTA:</b>				
Derrin Jourdan (conference call)	FTA – Region IX	Regional Civil Rights Officer	415-744-2729	Derrin.jourdan@dot.gov
Christopher MacNeith (conference call)	FTA – Region IX	Regional Civil Rights Officer	415-744-2614	Christopher.macneith@dot.gov
<b>DTS Members:</b>				
Mark Au	DTS	Chief, Federal Compliance Branch	808-768-8346	Mau@honolulu.gov
Jackie Shen	City and County	Staff, Federal Compliance Branch	808-768-5462	Jshen@honolulu.gov
Wayne Yoshioka	DTS	Director	808-768-8303	Wyoshioka@honolulu.gov
Eileen Mark	DTS	Chief, Paratransit Operations Branch	808-768-8379	Emark@honolulu.gov
Nicole Chapman	DTS	Deputy Corporation Counsel	808-768-5240	Nchapman@honolulu.gov
Wesley Kira	DTS	Fiscal Officer	808-768-8641	Wkira@honolulu.gov
Kai Kraut	DTS	Deputy Director	808-768-8304	Kkraut@honolulu.gov
Michael Hiu	DTS	Assistant Purchasing Administrator	808-768-3940	Mhiu@honolulu.gov
Don Hamada	DTS	Transportation Planning Chief	808-768-8310	Dhamada@honolulu.gov
Strather Ing	DTS	Planner	808-768-8348	Sing@honolulu.gov
Sandra Abelaye	City and County	Planner	808-768-8371	Sabelaye@honolulu.gov
<b>HART Members:</b>				
Charles Bayne	HART	Labor Relations Specialist	808-768-6223	Cbayne @honolulu.gov
Harvey Berliner	HART	Deputy Project Engineer	808-768-6123	Hberliner@honolulu.gov
Gary Takeuchi	HART	Deputy Corporation Counsel	808-768-5240	Gtakeuchi@honolulu.gov
<b>Hawaii DOT:</b>				
Melanie Martin	HDOT	DBE Program Supervisor	808-587-2023	Melanie.martin@hawaii.gov
<b>Prime Contractor Representative</b>				
		Project Manager		

[REDACTED]	[REDACTED]	Business Manager	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	Senior Project Administration	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	Vice President, Operations	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	Project Manager	[REDACTED]	[REDACTED]
<b>DBE Subcontractor Representative</b>				
[REDACTED]	[REDACTED]	President	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	Vice President	[REDACTED]	[REDACTED]
<b>Interested Parties</b>				
Dana Hauanio	Honolulu Minority Business Development Center	Director	808-956-0850	info@honolulumbdcenter.com
Erin Kanehira	Procurement Technical Assistance Center	Procurement Counselor	808-596-8990	erink@hookipaipai.org
<b>Milligan &amp; Co LLC:</b>				
Benjamin Sumpter	Milligan & Co., LLC	Lead Reviewer	215-496-9100	Bsumpter@milligancpa.com
Habibatu Atta	Milligan & Co., LLC	Reviewer	215-496-9100	Hatta@milligancpa.com
Kristin Szwajkowski	Milligan & Co., LLC	Reviewer	215-496-9100	Kszwajkowski@milligancpa.com