



FEDERAL TRANSIT ADMINISTRATION

North County Transit District Disadvantaged Business Enterprise (DBE) Final Report

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Federal Transit Administration

CONDUCTED BY
Milligan & Company, LLC



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Section 1 – General Information

Grant Recipient:	North County Transit District 810 Mission Avenue
City/State:	Oceanside, CA 92054
Grantee Number:	1690
Executive Official:	Matthew Tucker
On Site Liaison:	Richard Hannasch Chief Financial and Administrative Officer (760) 967-2809
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Site Visit Dates:	February 22–24, 2011
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Section 2 – Jurisdiction and Authorities

The Federal Transit Administration (FTA) Office of Civil Rights is authorized by the Secretary of Transportation to conduct civil rights compliance reviews. The reviews are undertaken to ensure compliance of applicants, recipients, and sub-recipients with Section 12 of the Master Agreement, Federal Transit Administration M.A. (17), October 1, 2010, and 49 CFR Part 26, “Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs.”

The North County Transit District (NCTD) 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 NCTD’s DBE program and were the basis for the selection of compliance elements that were reviewed.

Section 3 – Purpose and Objectives

PURPOSE

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

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

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

OBJECTIVES

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

- ensure nondiscrimination in the award and 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 with 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 NCTD 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 NCTD's DBE Program Plan against the compliance standards set forth in the regulations and document the compliance status of each component; and
- gather information and data regarding the operation of NCTD's DBE Program Plan from a variety of sources—DBE program managers, other NCTD management personnel, DBEs, and prime contractors.

Section 4 – Background Information

The North San Diego County Transit Development Board (NSDCTDB) was created by California Senate Bill 802 on September 20, 1975. The Board was created to plan, construct, and operate directly, or through a contractor, public transit systems in its area of jurisdiction.

On January 1, 2003, a new state law was enacted (SB 1703) that essentially transferred future transit planning, programming, development and construction to SANDAG, San Diego's regional planning agency. The NSDCTDB, referred to as the North County Transit District (NCTD), continued to operate the Breeze, Coaster, and Sprinter services and provide integrated public transit service within the North San Diego County region.

On August 30, 2005, California Governor Arnold Schwarzenegger signed AB 1238, which amended the North County Transit District Act to rename the District to North County Transit District (NCTD), thus eliminating the full name North San Diego County Transit Development Board. Although the transit district had commonly been referred to as North County Transit District, this formal name change was effective January 1, 2006.

NCTD provides bus, light and commuter rail, and paratransit service in the cities of Carlsbad, Del Mar, Encinitas, Escondido, Oceanside, Solana Beach, San Marcos, Vista, and San Diego. NCTD's service area encompasses 1,020 square miles and serves 884,000 people. It has an average of 30,000 bus, 4,800 commuter rail, 7,800 light rail, and 475 paratransit vehicle boardings each weekday. The agency has 7 locomotives and 28 bi-level commuter rail coaches and operates service on 41 miles of track. The trains make more than 1.5 million trips annually. The light rail, SPRINTER, operates its 12 trains on 22 miles of track and makes 2.2 million trips annually.

NCTD operates a network of 36 bus routes, using 150 buses, and making 10 million trips annually. There are 34 paratransit vehicles that serve the agency's ADA-certified residents with disabilities.

Projects completed during the past year included the installation of solar panels on the roofs of the General Administrative offices, the purchase of 24 small buses, construction of the bus maintenance facility in Escondido, and the implementation of the agency's smartcard, known as the "Compass Card."

Current NCTD projects include vehicle maintenance for its fleet of trains and buses, track maintenance, and maintenance of its transit facilities.

Section 5 – Scope and Methodology

Scope

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

1. You must submit a DBE Program conforming to this part by August 31, 1999, to the concerned operating administration (OA). You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval [49 CFR 26.21].
2. A signed policy statement expressing a commitment to 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, must be made available to the public and updated at least annually [49 CFR 26.31].
6. The recipient must determine if overconcentration exists and address this problem if necessary [49 CFR 26.33].
7. Assistance provided to DBEs through Business Development Programs to help them compete successfully outside of the DBE program [49 CFR 26.35].
8. An overall goal must be based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on your DOT-assisted contracts [49 CFR 26.43 – 26.53].
9. All contracts must include a non-discrimination clause and a prompt payment clause and must implement appropriate mechanisms to ensure compliance by all participants [49 CFR 26.13, 26.29, 26.37].
10. A certification process must be in place to determine if a potential DBE is legitimately socially and economically disadvantaged. The potential DBE must submit an application, a personal net worth statement, and a statement of disadvantage, along with the proper supporting documentation [49 CFR 26.67].
11. The certification procedure must include document review and an on-site visit and must determine eligibility consistent with Subpart D of the regulations [49 CFR 26.83].

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

Methodology

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

Subsequent to the entrance conference, a review was conducted of NCTD's DBE Program Plan and other documents submitted to the review team by the DBE Liaison Officer. Interviews were then conducted with NCTD regarding DBE Program administration, record keeping and monitoring. These interviews included staff from Diversity, Procurement, and Finance. A sample of contracts was then selected and reviewed for DBE elements. Additionally, interviews with prime contractors and DBEs were performed.

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

Following the site visit, this draft report was compiled. Prior to the completion of the draft report, NCTD provided to the review team additional information on steps it has begun to take to address deficiencies discussed at the on-site exit conferences. NCTD also submitted a revised DBE Program Plan in March 2012. Those efforts are noted in applicable sections of this draft report.

Following the issuance of the draft report, NCTD supplied comments that were incorporated into this final report.

Section 6 – Issues and Recommendations

1. DBE Program Plan

Basic Requirement (49 CFR Part 26.21): Recipients must have a DBE Program that meets 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.

NCTD submitted a DBE Program Plan dated August 2005 as part of the requested documentation for the on-site review. The 2005 Program Plan had outdated personnel references; however, NCTD staff undertook an update of the DBE Program Plan and provided a draft copy dated January 2011 to the review team. A revised DBE Program dated March 2012 was officially submitted to FTA for review. The Program Plan outlines activities that NCTD will implement to administer the DBE Program that adequately address areas of compliance with Part 26, including many of the provisions from the new 2011 DBE rule. However, additional updates are needed for NCTD's DBE Program to be considered in full compliance. The recommended update areas will be discussed throughout this report but include sections on Financial Institutions, Determining and Meeting Overall Goals, and Monitoring/Reporting of NCTD's DBE Program.

Corrective Action and Schedule: Within 30 days of the issuance of the final report, submit to FTA's Office of Civil Rights an updated DBE Program that addresses the recommended revisions.

Grantee Response: NCTD will develop a new Program Plan that addresses the issues identified in the compliance report. The new Program Plan is currently being drafted, and will be completed by NCTD's DBELO, Ryan Bailey, within 30 days of the issuance of the final report. Contact Ryan Bailey for information regarding this corrective action.

FTA Response: FTA agrees with NCTD's response to the noted deficiency. This finding will be closed upon submission and concurrence with NCTD's DBE Program which incorporates the changes listed in this report.

2. DBE Policy Statement

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

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

The policy statement signed by Executive Director Matthew Tucker on June 11, 2009, indicated that the policy statement would be posted on NCTD's website but did not specify that the statement would be circulated throughout the organization and to DBEs

and non-DBEs that participate on its DOT-assisted contracts. The draft policy statement in the 2005 DBE Program Plan outlined that this policy statement would be circulated throughout NCTD, including the NCTD Board of Directors.

The DBE Liaison Officer (DBELO) at the time of the site visit was Richard Hannasch, Chief Financial and Administrative Officer. The 2009 signed policy statement identified the DBELO as Director of Administration and Finance. The policy statement in the 2005 DBE Program Plan identified the Deputy Director as the DBELO. The 2011 draft DBE Program Plan identified the DBELO as the Director of Administration and Finance. The review team advised NCTD to update the policy statement with the current title of the DBELO and information concerning circulating the statement internally and externally.

Subsequent to the on-site visit, NCTD revised its policy statement to expand on the areas that the policy statement was to be made available, including links to the signed statement for all employees on the NCTD intranet and for the public on NCTD's website. NCTD states that the policy statement will also be included in all contract and procurement solicitation documents.

The signature of the Executive Director and DBELO were added to the policy statement that accompanies NCTD's March 2012 DBE Program.

Grantee Response: The NCTD DBE policy statement identifies that the policy statement is available (1) to all employees through use of the District intranet site named "SURFNCTD", (2) to Board members and the public via the District website at www.gonctd.com, and (3) included in all Contracts and Procurement solicitation documents (RFQ, RFP and IFB). The policy statement is currently included as page 1 of the NCTD DBE Program Plan. Advisory comment has been acknowledged and implemented into the NCTD DBE Program.

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, deficiencies were found with the requirements for the DBELO.

The Chief Financial and Administrative Officer reports directly to the Executive Director and is currently designated as DBELO. In that capacity, the DBELO is responsible for implementing all aspects of the DBE Program and ensuring that NCTD complies with all provisions of 49 CFR Part 26. The 2005 DBE Program Plan stated that the DBELO delegates specific DBE functions to the Audit and Compliance Officer and the Manager of Contracts and Procurement. The Audit and Compliance Officer position was dissolved as a result of recent staff reductions. The 2011 draft DBE Program Plan

indicates the Manager of Contracts and Procurement as the individual with delegated specific DBE functions.

The Program Plan indicates that the DBELO is responsible for developing, implementing, and monitoring the DBE Program in coordination with other appropriate officials. The duties and responsibilities listed in the Program Plan include the following:

- Ensure that the DBE Program is developed pursuant to the provisions of the Department of Transportation's DBE regulations, 49 CFR Part 26, as amended.
- Implement and manage the officially-adopted DBE Program on a day-to-day basis, including revision of the Program as required.
- Analyze contracting opportunities and project priority areas for DBE efforts based on approved budgets.
- Provide information and referral assistance to DBEs that need management and technical assistance where NCTD has the competence and expertise to provide such information.
- Ensure that NCTD's business opportunities are publicized and assist DBEs in obtaining contracting opportunities.
- Set overall annual DBE goals and monitor goal compliance.
- Verify the eligibility of all firms and joint ventures who claim to be Disadvantaged Business Enterprises.
- Establish and monitor procedures to ensure DBEs have equal opportunities.
- Gather and report statistical data and other information as required by DOT.
- Participate in outreach programs sponsored by the Contracting Opportunities Center of San Diego that will benefit the DBE Program.
- Attend pre-bid conferences and pre-contract award meetings to answer questions concerning DBE requirements.

The 2011 DBE Program Plan states, "All department heads are responsible for the management and implementation of the DBE Program within their respective departments. Department heads shall ensure appropriate staff is familiar with the requirements of 49 CFR Part 26 and NCTD's DBE Program. The DBE Liaison Officer shall meet periodically with Department Heads to (1) review implementation of the Plan; (2) ascertain the progress and achievements of the Plan; and (3) identify problems and/or deficiencies. All procurement activities will be under the direction of the Manager of Contracts and Procurement, who directs NCTD's Procurement Program."

Subsequent to the on-site review, the review team concluded, in consultation with the FTA Region IX Civil Rights Officer, that the DBE program is actually administered by the NCTD's Manager of Contracts and Procurement, Larry Frum. Mr. Frum provided a self-signed letter outlining an action plan to address the preliminary findings from the DBE Compliance Review. The day-to-day implementation of the DBE Program is completed by NCTD's Contracts Administrator, Mindy Smith. The letter further states that Ms. Smith prepared a packet of information as NCTD's initial response to the findings in advance of the final report. The DBELO of record, Richard Hannasch, was an inactive participant and provided minimal insight during the DBE staff interview portion

of the on-site review to support his responsibilities listed in the Program Plan. The absence of the DBELO's coordination and signatory commitment to address the preliminary findings contradicts NCTD's DBELO duties and responsibilities to ensure that the DBE Program is developed pursuant to the regulations in addition to implementing and managing the program on a day-to-day basis, to include program revisions. The review team also advised NCTD to revise the language in the DBELO list of responsibilities regarding verifying the eligibility of joint ventures as DBEs, since joint ventures are not certified as such. NCTD should take care to avoid conflicts of interest when assigning the DBELO as a collateral duty assignment. The DBELO performs an oversight function. Therefore, if, for example, the procurement director is made the DBELO on a collateral duty basis, there may be a potential conflict of interest since the procurement director may be involved with contractor selection. A recipient of NCTD's size should have clear reporting relationships with no conflicts of interest. NCTD's March 2012 DBE Program established Chief Financial Officer Ryan Bailey as the agency's DBELO.

Corrective Action and Schedule: Within 30 days of the issuance of the final report, submit to the Region IX Civil Rights Officer documentation that DBELO duties and responsibilities listed in the NCTD's DBE Program Plan are implemented in substance and form by the DBELO and that no conflict of interests exist. This includes demonstrating that there is a direct and independent reporting relationship between the DBELO and the CEO.

Grantee's Response: Within 30 days of the issuance of the final report, NCTD will submit a plan to ensure implementation of the duties and responsibilities of the DBELO as listed on page 9 of the NCTD DBE Program. A summary of issues related to each of those responsibilities is listed as follows:

- A. Ensure that the DBE Program is developed pursuant to the provisions of the Department of Transportation's DBE regulations, 49 CFR Part 26, as amended.
 - i. A new Program Plan will be submitted to FTA within 30 days of the issuance of the final report.
- B. Implement and manage the officially adopted DBE Program on a day-to-day basis including revision of the Program as required.
 - i. During the review of the DBE Program, Richard Hannasch (a direct report to the Chief Executive Officer) was designated the DBELO as a collateral duty. Upon his departure from NCTD, Ryan Bailey (a direct report to the Chief Executive Officer) was designated the DBELO as a collateral duty. NCTD has determined, in the best interest of the DBE Program, to hire a Civil Rights Officer reporting directly to the Chief Executive Officer as the DBELO to manage the DBE Program on a day-to-day basis. Recruitment for this staff will be publicized during the week of December 3, 2012 and estimated date of hire is approximately March 4, 2013. Manager of Human Resources, Karen Tucholski, will conduct the recruitment process, and current DBELO, Ryan Bailey, will have ultimate

responsibility for the hiring of a Civil Rights Officer on behalf of the Chief Executive Officer.

- C. Analyze contracting opportunities and project priority areas for DBE efforts based on approved budgets.
 - i. Refining project management processes and procedures has been identified as a means of improving efficiencies and the availability of information. With such improvements, NCTD will have increased information regarding contracting opportunities. The first step of this refinement was the creation of a Project Management Office (PMO). A lead project manager was hired on November 13, 2012, and efforts are underway to improve project management which will assist the DBELO with analyzing contracting opportunities and project priority areas for DBE efforts.
- D. Provide information and referral assistance to DBE's that need management and technical assistance where NCTD has the competence and expertise to provide such information.
 - i. In conjunction with staffing of a Civil Rights Officer and the PMO, NCTD plans to contract consulting services by June 30, 2013 to increase communications and outreach to the DBE and small business communities. This effort is will be led by the DBELO, and provide improved visibility into information about NCTD's DBE Program Plan and how to conduct business with NCTD.
- E. Ensure that NCTD's business opportunities are publicized and assist DBE's in obtaining contracting opportunities.
 - i. In addition to increasing information about NCTD's DBE Program Plan and how to conduct business with NCTD, the DBELO will coordinate with Contracts and Procurement, PMO, and consultant services to ensure NCTD business opportunities are publicized and assist DBE's in obtaining contracting opportunities.
- F. Set overall annual DBE goals and monitor goal compliance.
 - i. DBELO will coordinate the appropriate assessments such as overconcentration and disparity study to assist in setting the overall annual DBE goals. Updates to the DBE Program Plan will set specific procedures for monitoring goal compliance.
- G. Verify the eligibility of all firms and joint ventures who claim to be Disadvantaged Business Enterprises.
 - i. NCTD will retain consulting services to verify the initial eligibility and on-going eligibility of all DBE firms. Updates to the DBE Program Plan will remove "joint ventures" from this duty and responsibility of the DBELO.
- H. Establish and monitor procedures to ensure DBE's have equal opportunities.
 - i. DBELO will ensure the policies and procedures set in the DBE Program Plan are followed, which includes monitor procedures to ensure DBE's have equal opportunities.

- I. Gather and report statistical data and other information as required by DOT.
 - i. Re-implementation of bidder's list form collected by the Contracts and Procurement staff will be provided to the DBELO for gathering and reporting of statistical data. See additional comment on this topic in item 12a of this response.
- J. Participate in outreach programs sponsored by the Contracting Opportunities Center of San Diego that will benefit the DBE Program.
 - i. DBELO and/or consulting services will work with the Contracting Opportunities Center of San Diego to participate in the outreach programs.
- K. Attend pre-bid conferences and pre-contract award meetings to answer questions concerning DBE requirements.
 - i. A duty of the Civil Rights Officer related to DBE will be to attend pre-bid conferences and pre-contract award meetings. In the meantime, DBELO Ryan Bailey has direct supervision over the Contracts and Procurement department and is provided with status updates on all procurement activity, including pre-bid conferences and pre-contract award meetings.

FTA Response: FTA partially agrees with NCTD's response to the noted deficiency. While NCTD has provided a detailed listing of items that will become the purview of a new DBELO, it has not demonstrated that these functions are actually being implemented nor whether all of these duties can be undertaken by one Civil Rights Specialist. NCTD must be careful to ensure that the new DBELO concentrates his attention on duties that are currently under his control, and not be involved in duties outside of his purview such as DBE certifications (for which NCTD is not a certifying member of the California UCP) nor misinterpret issues such as the concept of joint ventures performing in the DBE Program. To close this deficiency, within 60 days of the issuance of the final report, NCTD must further refine the duties of the DBELO, submit evidence that these duties are being performed, and demonstrate that the DBELO has adequate staff to implement NCTD's program.

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 2011 Program Plan included two sentences regarding DBE financial institutions. The sentences read, "Upon request, NCTD shall inform DBE firms of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community. NCTD shall also encourage prime contractors to use such institutions." NCTD representatives did not provide the review team with information related to recent searches for DBE financial institutions in the community that could be

used by NCTD and its prime contractors. The review team advised NCTD to document search efforts and outline the process in the Program Plan. The Program Plan should state that NCTD will make reasonable efforts to use financial institutions owned and controlled by socially and economically disadvantaged individuals. NCTD should also outline how prime contractors will be encouraged to use these institutions.

Subsequent to the site visit, NCTD provided a revised FY2011 DBE Program Plan outlining how reasonable efforts will be made to use DBE financial institutions and that NCTD will encourage prime contractors to also use these institutions; however, the strategy was not included in the March 2012 Program Plan. A link to the Federal Reserve list of minority-owned banks was included within the Program.

Corrective Action and Schedule: Within 30 days of the issuance of the final report, NCTD must amend its DBE Program to include:

- A listing of DBE financial institutions with a description of relevant services provided.
- A description of how NCTD plans to encourage prime contractors to use these institutions in the current DBE program plan.

Grantee Response: The NCTD DBE Program contains a link to the Federal Reserve website which displays a list of Minority Owned Banks. In addition to the website link, the new DBE Program Plan will also contain a description of the types of services provided by the financial institutions listed on the website, and a description of how NCTD plans to encourage prime contractors to use these institutions.

This section of the DBE Program Plan will also include a summary of language to be included in each contract, and describe the process for ensuring each contract contains such language. The new Program Plan is currently being drafted and will be completed by NCTD's DBELO, Ryan Bailey, within 30 days of the issuance of the final report. Please contact Ryan Bailey for information regarding this corrective action.

FTA Response: FTA agrees with NCTD's response to the noted deficiency. To close this finding, within 60 days of the issuance of the final report, NCTD must submit the updated DBE Program containing the agreed upon procedures as well as demonstrated implementation of the process.

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.

NCTD uses the DBE directory of the California UCP. NCTD lists in its 2011 Program Plan that the directory will include the firm's name, address, telephone number, contact person, certification expiration date, and area work specialization.

6. Overconcentration

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

Discussion: During this DBE Compliance Review, no deficiencies were found.

NCTD did not provide in its DBE Program Plan how overconcentration would be identified. Staff could not provide an explanation of how they would determine if overconcentration existed in the contracting activities. The review team advised NCTD to include a process of overconcentration evaluation and frequency of review in its Program Plan.

Subsequent to the site visit, NCTD modified its program to note that consultant services will be used on an annual basis to help determine if overconcentration exists and will perform such an analysis by the end of each fiscal year.

Grantee Response: Subsequent to the site visit, NCTD modified its program to note that consultant services will be used on an annual basis to help determine if overconcentration exists and will perform such an analysis by the end of each federal fiscal year. As such, NCTD will have a consultant conduct an analysis prior to September 30, 2013 as to whether or not overconcentration exists. This engagement will be completed under the oversight of the Civil Rights Officer joining NCTD by March 4, 2013. Until that time, please contact Ryan Bailey for information regarding NCTD's application of this advisory comment.

7. Business Development Programs

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

Discussion: During this DBE Compliance Review, no deficiencies were found in the area of BDPs.

NCTD does not implement a BDP or mentor protégé programs.

8. Determining/ Meeting Goals

A) Calculation

Basic Requirement (49 CFR Part 26.45): To begin the goal-setting process, the recipient must first develop a base figure for the relative availability of DBEs. After the base

figure is achieved, all other relative evidence must be considered in an adjustment of this figure to match the needs of the specific DBE community.

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

NCTD provided FTA goal methodologies for fiscal years 2008, 2009, and 2010 of 4.7%, 3.6%, and 7.4%, respectively. DOT changed the goal methodology submissions from an annual to a triennial cycle. Based on the current schedule determined by FTA, NCTD's goal submission for Group A was due by August 1, 2010, for the three-year period covering FYs 2011–2013. NCTD submitted its three-year goal methodology of 4.6% on July 30, 2010. The 2009–2013 fiscal year goals were prepared and submitted by current NCTD staff. The data that staff used for the step two adjustments to the base figure were calculated incorrectly in the goal methodology submission.

Step 1: Determining the Base Figure

NCTD's goal-setting process consists of reviewing anticipated contracting opportunities for the upcoming fiscal year(s); examining CUCP directory for DBE firms ready, willing, and able to work on projects; and examining the 2007 Census Bureau's County Business Pattern. Opportunities are categorized in Construction, Services, and Wholesale Durable Goods areas. The goal methodology includes a table with these three areas of work showing estimated dollars with applicable NAICS codes and percentage of work for weighting purposes.

The information in the table is compared with the firms ready, willing, and able to provide the goods and services listed in the applicable NAICS codes. The firms listed in the CUCP directory in San Diego and Riverside counties are used as the numerator, and the denominator contains the County Business Pattern data from the same counties. The FYs 2011–2013 goal methodology included data for San Diego, Imperial, and Riverside counties and resulted in a base figure of 3.6%. NCTD should conduct further analysis into whether the two counties are sufficiently representative of its contracting area.

Step 2: Adjusting the Base Figure

NCTD analyzed DBE participation on similar federally-assisted projects for the past three years. The goal methodology outlined DBE participation for FYs 2007, 2008, and 2009 as 5.1%, 6.7%, and 5.1%, respectively. NCTD noted that past participation was the result of similar contracting opportunities for Construction, Professional Services, and Durable Goods. The median was projected at 5.6% for the three years. This median (5.6%) was averaged with the base figure (3.6%), resulting in a 4.6% overall goal. The review team advised NCTD staff that the median is the middle number and not the average. The review team also mentioned that past participation should be based on awards from semi-annual reports and not from payments on the lower portion of the semi-annual report.

The review team calculated past participation from NCTD's semi-annual reports as 12.5% for FY 2007, 3.1% for FY 2008, and 15.4% for FY 2009. These numbers were ranked from lowest to highest, and 12.5% was the median or middle number. This

median (12.5%) was averaged with the base figure (3.6%), which resulted in a 8.05% overall goal. The review team's past participation calculation is outlined in the table below:

Goal	Prime Awards	DBE Awards	Participation
<u>2007</u>			
	\$ 33,190,390	\$ 3,285,862	
	\$ 24,880,933	\$ 3,979,882	
5.2%	\$ 58,071,323	\$ 7,265,744	12.5%
<u>2008</u>			
	\$ 60,576,101	\$ 89,235	
	\$ 51,153,613	\$ 3,429,726	
4.7%	\$ 111,729,714	\$ 3,518,961	3.1%
<u>2009</u>			
	\$ 12,054,657	\$ 2,094,188	
	\$ 7,994,286	\$ 997,777	
3.6%	\$ 20,048,943	\$ 3,091,965	15.4%

Subsequent to the review, NCTD submitted a revised goal methodology to the review team and Region IX Civil Rights Officer. The revised goal methodology showed that 6.7% was determined to be the median based on the same participation numbers in the previous submission. The 6.7% number was averaged with the base figure and resulted in a 5.2% overall goal. The methodology is still incorrect, as past participation based on awards was not used. The section on the Triennial Goal Setting Process included in the March 2012 DBE Program suggests that goal setting is based on the State fiscal year (July 1–June 30). NCTD is advised that the DBE goal should be based on the federal fiscal year (October 1–September 30).

Corrective Action and Schedule: By August 1, 2013, NCTD must submit within its FYs 2014–2016 goal methodology evidence that it has considered whether the past contracting opportunities are based on the level of participation achieved through the award of contracts as well as that the contracting opportunities are sufficiently similar to warrant an adjustment.

Grantee Response: NCTD goal methodology outlined DBE participation for FY 2007, 2008, and 2009 as the average of past participation based on payments rather than the median (middle number) of awards. For the goal methodology for FY 2014-2016, NCTD will calculate past participation for FY 2010, 2011, and 2012 as the median of awards. NCTD will submit the goal for FY 2014-2016 to FTA by August 1, 2013 using this revised methodology. Please contact Ryan Bailey for information regarding this corrective action.

FTA Response: FTA agrees with NCTD's response to the noted deficiency. Follow-up on this item will be handled via the regional review and approval of NCTD's DBE Goal

Methodology. FTA also acknowledges NCTD's successful DBE participation rate for FY 2012 (22.54%), and restates that NCTD should carefully evaluate the contracting area used in Step 1, as it may not be reflective of the firms actually participating in NCTD's market. NCTD is reminded that its DBE Goal must be submitted to the Regional Office by August 1, 2013.

B) Public Participation

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

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

NCTD's DBE Program Plan indicates that it will provide for public participation when establishing an overall goal. This may include consultation with minority, women's, and general contractor groups, community organizations, and other officials or organizations that could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses; the effects of discrimination on opportunities for DBEs; and NCTD's efforts to establish a level playing field for the participation of DBEs. NCTD staff advised the review team that this consultation process had not been conducted for past fiscal year goals.

Following the consultation process, the DBE Program Plan indicated that NCTD would publish the proposed overall goal for 30 days and accept comments on the goal for 45 days from the date of notice. NCTD provided notices for each of the goal submittals; however, only the FY 2010 goal had proof of publication attached to the methodology.

Corrective Action and Schedule: By August 1, 2013, NCTD must submit within its FYs 2014–2016 goal methodology evidence that it has conducted the consultation process as well as documentation of the proof of publication.

Grantee Response: With the staffing of a Civil Rights Officer by March 4, 2013 and the engagement of a DBE consulting services firm shortly thereafter, NCTD will conduct a consultation process and present for public comment the FY2014-2016 DBE goal by June 15, 2013. Please contact Ryan Bailey for information regarding this corrective action.

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

C) Transit Vehicle Manufacturer (TVM)

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

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

The review team requested the most recent bus procurement from NCTD during the on-site review. NCTD provided RFP #10024-OS 24, Cutaway Buses, from February 2010. The TVM Certification included the correct reference to 49 CFR Part 26.49 and that the goal had been approved by FTA. NCTD's procurement office collected the FTA TVM goal approval letter and included the FTA-approved TVM website list as part of the file.

The review team notes that the DBE section of this RFP references 49 CFR Part 23 and the bus procurement RFP boilerplate requires an update. See Required Contract Provisions section of this report.

Corrective Action and Schedule: Within 30 days of the issuance of the final report, NCTD must provide documentation that it has revised the vehicle procurement boilerplates to include the correct regulatory citations.

Grantee Response: The review team noted that the bus procurement RFP boilerplate references 49 CFR Part 23, and requires an update. The boilerplate has since been revised, and NCTD will provide the FTA the revised boilerplates within 30 days of the issuance of the final report. Please contact Ryan Bailey for information regarding application of this review team note.

FTA Response: FTA agrees with NCTD's response to the noted deficiency. To close this deficiency, NCTD must provide the revised transit vehicle purchase boilerplates within 30 days of the issuance of the final report.

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 Court Western States' ruling requires DOT agencies in its jurisdiction to provide anecdotal evidence that groups are subject to discrimination in order to implement a race-conscious DBE program. NCTD noted in its goal-setting methodology that it had not received nor was it aware of any anecdotal evidence or other factors that would have a material effect on DBE's availability to participate in the marketplace.

According to the goal methodology, NCTD began a race-neutral DBE program in FY 2007. The following language was provided in the FY 2011–2013 goal methodology:

“The District is not aware of any current published disparity studies within its jurisdiction and/or market area to consider in this step of the goal setting analysis. The California Department of Transportation (CalTrans) has retained an outside consulting firm to conduct an Availability and Disparity Study. To date, an Interim Report was issued with preliminary information produced from the research but final acceptance from the Federal Government has not been received.” NCTD further stated in the 2009 goal methodology that it intends to follow guidelines established by CalTrans if the disparity study is accepted.

This language has been included in previous methodologies prepared by NCTD. However, CalTrans has since received approval for implementation of a race-conscious DBE program, and several neighboring agencies have conducted similar studies in the area. The Region IX Civil Rights Officer recommended during the exit conference that NCTD research using 5307 grant eligible funds to conduct a disparity study or collaborate with other agencies on existing studies in the region. The review team further noted that with the final FY 2010 awards calculated, NCTD did not meet its overall goal using race-neutral means. DBE participation for FY 2010 was 2.1%, which is short of the 7.4% overall projected race-neutral goal. The table below outlines NCTD’s FY 2010 DBE participation, compiled from its submitted semi-annual DBE reports.

Goal	Prime Awards	DBE Awards	Participation
<u>2010</u>			
	\$ 19,443,119	\$ 1,268,680	
	\$ 43,532,567	\$ 60,886	
7.4%	\$ 62,975,686	\$ 1,329,566	2.1%

Corrective Action and Schedule: Within 30 days of receipt of the issuance of the final report, submit to the FTA Office of Civil Rights an update on the existence and applicability of disparity study data, such as any efforts that NCTD is personally conducting or relevant studies undertaken such as those used in the Southern California Regional Disparity Study, that may serve as an input to overall and contract goal setting.

Grantee Response: NCTD is participating in a regional DBE disparity study with SANDAG, Imperial County, and NCTD. NCTD's DBELO, Ryan Bailey, is part of the procurement process led by SANDAG. This engagement is currently in the procurement stage with bids in review, and the SANDAG intends to issue a contract by April 2013. The engagement would likely conclude in 2014, with implementation of findings occurring thereafter. Please contact Ryan Bailey for information regarding this corrective action.

FTA Response: FTA agrees with NCTD’s response to the noted deficiency. 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.

NCTD's March 2012 DBE Program discusses contract goals and the provisions to use them in order to meet overall goals; however, the program states that "NCTD currently does not use contract goals." NCTD informed the review team that it had not used contract goals since it converted to a race- and gender-neutral DBE program in FY 2007.

NCTD provided the review team with IFB #04046, Sprinter Cal State San Marcos Loop and Station contract file. The 2004 contract included a 10% established DBE contract goal. The engineer's estimate was used to analyze line items of work for DBE availability and establishment of a goal on the contract. The file also included a Contracts and Procurement Department DBE Form, with Part I, Establishment of Goal, signed by the DBELO and Contracts and Procurement representative. Part II of the form covered determination of responsiveness as part of Good Faith Efforts (GFE) review.

Grantee Response: NCTD DBE program is race neutral, and NCTD currently does not use contract goals. Pending the results of the DBE disparity study currently being procured, NCTD may revise the DBE Program to race conscious. No further action necessary.

F) Good Faith Efforts

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for good faith efforts.

NCTD's DBE Program Plan includes procedures for good faith effort determinations. For contracts in which contract goals are established, NCTD requires the bidder or offeror to submit DBE participation information, and award of the contract will be conditioned upon satisfaction of the requirements established for the project. NCTD provided the review team with two contracts involving good faith effort determinations from 2004 on the Sprinter projects.

The review team reviewed the GFE process for IFB #04046, Sprinter Cal State San Marcos Loop and Station project. Part II of the form, Determination of Responsiveness, identified that the low bidder and second lowest bidder made good faith efforts to meet the 10% goal, with 4.65% by lowest bidder and 3.2% by the second lowest bidder.

NCTD used a GFE checklist to measure efforts by the bidders in addition to submitted documentation from the contractors.

The review team also examined GFEs and a bid protest on IFB #04032, Sprinter Mainline Construction project. The contractor's protest was based on the lowest and second lowest bidder not meeting DBE requirements because they did not submit GFE for a 15% goal at the time of bid submittal. The General Counsel of NCTD explained that an addendum to the Invitation for Bid (IFB) allowed for GFE to be submitted up to three days after bid opening. NCTD Board Secretary later dismissed the protest due to insufficient grounds for protest.

Grantee Response: NCTD's DBE program is race neutral, and NCTD currently does not use contract goals. Therefore, NCTD has not awarded any contracts with DBE goals to bidders who have not met the goals or conducted good faith efforts to meet the goals. However, NCTD's DBE Program Plan includes procedures for good faith effort determinations for contracts in which contract goals are established. No further action necessary.

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, however an advisory comment was made.

NCTD's DBE Program Plan states it will count DBE participation toward overall and contract goal as provided in 49 CFR Part 26.55, as it may be amended from time to time. There is no discussion about counting appropriate percentages for specific industries of regular dealers, suppliers, and brokers. There is also no discussion about conducting commercially-useful function determinations to count and award appropriate credit for DBE participation on projects. NCTD staff advised the review team that payment information is maintained in an Enterprise Resource Planning (ERP) system. Staff confirmed that the ERP does not have controls in place to adjust payments to subcontractors and DBEs based on functions of works provided. The review team advised NCTD that DBE participation reports may be inaccurate absent the proper adjustments for counting rules.

Simon Wong Engineering was identified as a DBE contractor participating on several NCTD current projects. Simon Wong's DBE certification was removed in January 2009, according to NCTD staff. NCTD was advised to obtain reasons for removal from the certification authority and apply counting rules in 49 CFR Part 26.87 following removal of a DBE participating on a project.

Following the site visit, NCTD has identified a method to code its ERP data entry to identify dollars committed and paid to brokers, freight companies, and others in order to accurately collect DBE information. NCTD suggests that this will result in a change to

the way it writes internal and external purchase orders, which will allow for tracking of commitments and payments.

NCTD has revised the contract boilerplate with Section 8.03, DBE Reporting and Certification. Contractors are required to have proof of payment to a DBE subcontractor by having the subcontractor initial the form and verify that the payment was received. Contractors must also verify that the subcontractor's DBE certification is current at time of payment.

The review team also advised NCTD to obtain reasons for the removal from the certification authority and apply counting rules in 49 CFR Part 26.87 following removal of a DBE participating on a project. NCTD has since revised the contract boilerplate with Section 8.03, DBE Reporting and Certification. No further action necessary on this advisory comment.

Grantee Response: The review team advised NCTD that DBE participation reports may be inaccurate absent the proper adjustments for counting rules. NCTD has identified a method to code its ERP data entry to identify dollars committed and paid to brokers, freight companies, and others in order to accurately collect DBE information. No further action necessary on this advisory comment.

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 NCTD was found during the site visit.

Grantee Response: NCTD is not permitted to use quotas or set-aside contracts. No further action necessary.

9. Required Contract Provisions

A) Contract Assurance

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

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

NCTD's DBE Program Plan includes correct non-discrimination language as described in 49 CFR Part 26.13 and requires that subcontracts contain the same. NCTD must remove sentences preceding the non-discrimination assurance language in the Program Plan in regards to ensuring that DBEs have maximum opportunity to participate, compete for, and be awarded contracts. This language is synonymous with outdated 49 CFR Part 23 requirements. The non-discrimination clause found in RFP #10024-OS for 24 Cutaway

Buses referenced 49 CFR Part 23 and ensured that DBEs have maximum opportunity to participate in the performance of contracts and subcontracts.

The review team reviewed two construction contract files for the Sprinter projects prior to NCTD race-neutral DBE program: IFB #04046, Sprinter Cal State San Marcos Loop and Station Project, and IFB #04032, Sprinter Mainline Construction Project. Non-discrimination clauses from Part 26.13 were included in both Invitations for Bid (IFBs); however, the preliminary language from the DBE Program Plan with regard to maximizing opportunity was included in the bid documents.

The NCTD professional service contracts examined by the review team included an agreement for Construction Management Services with Simon Wong Engineering (RFP #02012), executed January 2003; Agreement #2012B for Construction Management Services with Simon Wong Engineering, executed May 2007; and Agreement #06029 for On-Call Engineering and Signal Drawing Maintenance with Pacific Railway Enterprises, Inc. (a DBE prime), executed in April 2006.

The two Simon Wong prime contracts did not contain any non-discrimination references and included a DBE clause that “compliance with 49 CFR Part 26 was required.” The Pacific Railway contract referenced 49 CFR Part 23 concerning maximizing opportunity to DBEs. Pacific Railway’s non-DBE subcontractor, Convergent Communications, Inc., subcontract agreement was executed in June 2008 and did not contain the non-discrimination clause. Subsequent to the review, NCTD indicated that it revised the DBE section of IFB/RFP boilerplates to include the correct language. The updated boilerplate includes unnecessary language from 49 CFR Part 23 regarding maximizing opportunity to DBEs.

Corrective Action and Schedule: Within 30 days of the issuance of the final report, NCTD must submit to FTA’s Office of Civil Rights an update to its DBE Program that includes a mechanism for monitoring and tracking that the appropriate language of Part 26.13 has been included in the DBE program and that these assurances are included in all FTA-funded contracts and subcontracts. Also within 30 days of the issuance of the final report, NCTD must submit 5 contracts issued subsequent to the site visit proving that it has implemented its written policies.

Grantee Response: NCTD has removed sentences preceding the non-discrimination assurance language in the Program Plan in regards to ensuring that DBE's have maximum opportunity to participate, compete for, and be awarded contracts. NCTD will submit five contracts issued subsequent to the site visit proving this change has been implemented within 30 days of the issuance of the final report. Please contact Ryan Bailey for information regarding this corrective action.

NCTD's DBE Program Plan states that NCTD will ensure that the clause required by 26.13(b) is included in every DOT-assisted contract and subcontract. NCTD will update the DBE Program Plan to include a mechanism for monitoring and tracking that the appropriate language of Part 26.13. The new Program Plan is currently being drafted, and will be completed by NCTD's DBELO, Ryan Bailey, within 30 days of the issuance of

the final report. Please contact Ryan Bailey for information regarding this corrective action.

FTA Response: FTA agrees with NCTD's response to the noted deficiency. Within 30 days of the issuance of the final report, NCTD must submit an updated DBE Program that incorporates the new procedures as well as the 5 requested contracts. This deficiency will be closed based on review and acceptance of the materials.

B) Prompt Payment

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

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

Prompt Payment

NCTD's DBE Program Plan states that it will include the following clause in each DOT-assisted prime contract on which there are subcontracting possibilities: "Not later than 10 days after receipt of each progress payment from the District, the Contractor shall pay to any subcontractor performing work for the Project the respective amounts allowed to the Contractor for work performed by the subcontractors, to the extent of each subcontractor's interest therein, unless otherwise agreed to in writing." NCTD provided the review team with an electronic version of IFB #04046, Sprinter Cal State San Marcos Loop and Station Project. The 10-day prompt payment requirement was included in the Sprinter document.

The professional service prime contracts with Simon Wong did not include prompt payment provisions. Simon Wong failed to respond to NCTD requests to participate in interviews during the on-site visit or to provide financial documents. The DBE subcontractor on the Simon Wong RFP #02012, Gonzalez White Consulting, participated in the review; however, the actual number days for prompt payment on the contract could not be calculated based on the information on hand.

The Pacific Railway prime contract for on-call engineering services also did not contain prompt payment provisions. Pacific Railway, a DBE prime, participated in the on-site compliance review and provided financial documents and a subcontract agreement with Convergent Communications, a non-DBE firm. The Convergent Communications' agreement stated that it must submit invoice information to the prime within 10 days and that payment to the subcontractor will be promptly paid upon payment from the owner. The review team calculated, based on the financial documents reviewed, that Pacific Railway paid its subcontractor, Convergent Communications, on average of 12 days from receipt of payment from the owner, NCTD.

Return of Retainage

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

NCTD's DBE Program Plan stated, "Within 7 days of the Contractor's receipt of released retention from the District upon completion of the Project as defined in California Public Contract Code section 7107, or upon incremental acceptance of any portion of the work by the District, the Contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received, in accordance with the provisions of California Public Contract Code section 7107."

The Sprinter IFB document contained the exact seven-day release-of-retention language from the DBE Program Plan. NCTD withholds 10% retention on construction projects with a reduction of retainage after 50% of the work has been completed. The review team collected information concerning California Code Section 7107, which also states the seven-day return of retainage requirement. NCTD does not typically withhold retention on professional service contracts, and the contracts reviewed did not reference retention.

The DBE Program Plan indicates that regular audit of prompt payments to subcontractors will be performed by the responsible Contract Administrator. NCTD did not provide evidence during the on-site review to support that prompt payment or return of retainage had been monitored for subcontractors participating on NCTD DOT-assisted contracts. The review team was advised that NCTD gets involved if an issue is brought to their attention by the subcontractor. Subsequent to the review, NCTD submitted the revised DBE section of IFB/RFP boilerplates with corrected language. The boilerplate requires the submittal of a Monthly Subcontractor Payment/Balance Sheet, which is used by NCTD to verify payments to DBE and non-DBE subcontractors. NCTD also incorporated reporting requirements for the contractor/subcontractor to verify that DBEs received payment.

Corrective Action and Schedule: Within 30 days of the issuance of the final report, NCTD must submit to FTA's Office of Civil Rights an update within its DBE Program that includes affirmative steps that will be taken to enforce compliance with the prompt payment and retainage requirements when contractors are found out of compliance with NCTD's established policies. Also within 30 days of the issuance of the final report, NCTD must submit the Monthly Subcontractor Payment/Balance Sheets for the 5 contracts submitted in response to the previous section proving that it has implemented its written policies.

Grantee Response: NCTD's DBE Program Plan states that NCTD will include the clause regarding prompt payment in each DOT-assisted prime contract on which there are

subcontracting possibilities. NCTD will update the DBE Program Plan to include affirmative steps that will be taken to enforce compliance with the prompt payment and retainage requirements when contractors are found out of compliance with NCTD's established policies. The new Program Plan is currently being drafted, and will be completed by NCTD's DBELO, Ryan Bailey, within 30 days of the issuance of the final report. Please contact Ryan Bailey for information regarding this corrective action.

NCTD will also submit the monthly subcontractor payment/balance sheets for the five contracts submitted in section 9a within 30 days of the issuance of the final report. Please contact Ryan Bailey for information regarding this corrective action.

FTA Response: FTA agrees with NCTD's response to the noted deficiency. Within 30 days of the issuance of the final report, NCTD must provide the updated DBE Program containing the newly established policies and procedures as well as the 5 balance sheets. This deficiency will be closed based on review and acceptance of the materials.

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. However, an advisory comment was provided.

The Sprinter construction project contained language that non-compliance with requirements listed in the DBE obligation section was a breach of contract. Now that NCTD has a race-neutral program, it still considers non-compliance with DBE requirements as a breach of contract. Although it no longer includes DBE-specific language in its current contracts, NCTD should get approval from its general counsel and the DOT operating administration prior to incorporating former language used in the Sprinter project in current contracts without race-conscious goals.

Subsequent to the site visit, NCTD stated that it is re-writing parts of the bid documents, and legal counsel's review of the re-written and proposed language must take care that the revised boilerplate DBE provisions remove outdated references to maximizing opportunities to DBEs. References to legal remedies subject to non-compliance must not be tied to failure to meet DBE obligations absent DOT's approval of NCTD's use of race-conscious measures; legal remedies should be attributed to other areas of non-compliance with Part 26.

Grantee Response: - NCTD will verify that references to legal remedies subject to non-compliance are not tied to failure to meet DBE obligations, and rather legal remedies are attributed to other areas of non-compliance with Part 26. No further action necessary regarding this advisory comment.

10. Certification Standards

Basic Requirements (49 CFR Part 26.67): The recipient must have a certification process in place 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, the area of Certification Standards was not reviewed. NCTD is not a certifying member in the California UCP.

11. Certification Procedures

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

Discussion: During this DBE Compliance Review, no deficiency was found in the area of Certification Standards. NCTD is a non-certifying member of the CUCP. The review team secured a signed copy of NCTD CUCP Agreement/Declaration of Status Letter. The agreement was signed in 2006 by then DBELO Rick Howard and both the Secretary and Chair of the CUCP.

12. Record Keeping and Enforcements

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

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

Bidders List

The DBE Program Plan states NCTD "will maintain a bidders list in accordance with section 26.11(c). Data will be collected at time of quote, bid, or proposal submittal by use of a form specific for this purpose and required in order for a firm to be determined as 'responsible and responsive' to the solicitation. This form will be transmitted by the Contracts and Procurement Department staff member responsible for the procurement, to the administration staff supporting the DBELO who will enter all pertinent information into the bidders' list data base." NCTD confirmed with the review team that this bidders' list information is not collected.

Subsequent to the review, NCTD provided information to the review team that discusses the maintenance of a bidders list in accordance with Section 26.11(c). NCTD intends to collect data at the time of quote, bid, or proposal submittal by requiring the submission of a bidder's list form in order for a firm to be determined as an eligible "responsible and

responsive” bidder to the solicitation. NCTD intends for the form to be transmitted to the administration staff supporting the DBELO, who will manually enter all pertinent information into the bidders list data base.

NCTD revised its vendor information sheet to include NAICS codes, which will require modification of service codes in the ERP system. A copy of the bidders list form was included in the packet that requested all the required elements of Section 26.11. There was no mention of bidders list requirements in NCTD’s March 2012 DBE Program.

Monitoring

The DBE Program Plan describes the monitoring and enforcement mechanisms employed by NCTD. The plan states that NCTD will include DBE program clauses, contract remedies for violations, and an enforcement mechanism in its contracts with contractors. These include suspension or debarment, enforcement actions, or prosecution. The NCTD General Counsel advised the review team that NCTD has never pursued any enforcement action for non-compliance with the DBE program.

NCTD’s Plan also indicated that a monthly certification from the prime contractors for every payment request submission will be collected to verify that work committed to DBEs is actually performed by DBEs. A running tally of actual payment to DBE firms is kept by NCTD, according to the Program Plan. Regular audit of prompt payments to subcontractors is described in the Program Plan as being performed by the Audit and Compliance Officer. This position was terminated in 2007 as part of NCTD budget cuts. Staff advised the review team that monthly reports are still collected from prime contractors; however, after the Sprinter project completion and moving to a race-neutral program, its monitoring efforts have diminished. The payment information is tracked in the ERP system for primes and subcontractors; however, prompt payment and return of retainage information is not tracked in the system. NCTD staff indicated that in its race-neutral program, it gets involved in DBE issues only if problems surface. Recent regulatory changes added in the 2011 DBE Final Rule require recipients to include written certification of work site monitoring on all in State contracts that DBEs are performing work.

Subsequent to the review, NCTD stated that it is undergoing a review and revision of Contract Administration for Construction Project policies and procedures to incorporate a better monitoring process and will incorporate similar process for non-construction contracts as well. The new process will involve project managers and field supervision personnel to a greater level than has been done to date. It will also require the use of contractor-submitted forms at the time of bid, accompanied by monthly submissions during the performance of the contract. NCTD also revised contract language requiring the contractor/subcontractor to verify that the DBE was paid and still has current certification status at time of payment.

Reporting

NCTD provided copies of semi-annual reports for FYs 2007–2010. The June 2009 semi-annual report was missing from the submission. A copy of the missing report was recreated and given to the review team for review. With the exception of one 2008 report,

the reports were submitted in a timely fashion. Two issues were discovered with the reports prepared by NCTD: 1) NCTD is not reporting only the federal share of awards and payments, and 2) NCTD staff modified the bottom portion of the form in 2007 and 2008 reports to read “actual payment on contracts this reporting period.” The 2009 and 2010 reports were worded correctly for “actual payments on contracts completed this reporting period.” Despite the language being corrected, the staff continued to follow the former language of “payments this reporting period.” NCTD staff were also incorrectly using the payment information for past participation in the Step 2 adjustment process in goal setting.

Subsequent to the review, NCTD began using the electronic reporting form through TEAM to submit its semiannual reports. NCTD stated that it will use “completed” versus “payments” in future submissions.

Corrective Action and Schedule: Within 30 days of the issuance of the final report, NCTD must submit an updated DBE Program to FTA’s Office of Civil Rights that includes:

- updated policies, procedures, and forms for monitoring work sites
- updated policies, procedures, and forms for collecting and maintaining a bidders list
- effective monitoring mechanisms in place and performed by staff to monitor and report work on FTA-funded contracts
- procedures and an implementation plan for accurate and complete reporting of data for semi-annual reports to FTA

Grantee Response: NCTD will update the DBE Program Plan with bidders list requirements language as follows, "NCTD will maintain a bidders list in accordance with section 26.11(c). Data will be collected at time of quote, bid, or proposal submittal by requiring the submission of a bidder's list form in order for a firm to be determined as an eligible 'responsible and responsive' bidder to the solicitation. This form will be transmitted to the DBELO, who will enter all pertinent information into the bidder's list data base." The revised Program Plan will also include the form for collecting and maintaining a bidders list as an Attachment to the Plan. NCTD will update the DBE Program Plan to include a policy, procedures, and forms for monitoring work sites. NCTD will also update the DBE Program Plan to include mechanisms to effectively monitor and report work on FTA-funded contracts. NCTD will update the DBE Program Plan with procedures and an implementation plan for accurate and complete reporting of data for semi-annual reports to FTA. The new Program Plan is currently being drafted, and will be completed by NCTD's DBELO, Ryan Bailey, within 30 days of the issuance of the final report. Please contact Ryan Bailey for information regarding this corrective action.

FTA Response: FTA agrees with NCTD’s response to the noted deficiencies. Within 30 days of the issuance of the final report, NCTD must submit the updated DBE Program Plan containing the newly revised policies, procedures and forms. Also within 30 days of the issuance of the final report, NCTD must submit documents that demonstrate the implementation of the collection of the bidder’s list, worksite monitoring and supporting

documentation for the contracting data submitted in the December 1, 2012 semiannual report. This deficiency will be closed pending the review and approval of the submitted materials.

Section 7 – Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Submit Corrective Action for the following:	Response Days/Date
1. Program Plan	26.21	D	Program needs additional updates	Submit an updated DBE Program Plan that incorporates the recommended policy and procedural revisions.	March 25, 2013
2. Policy Statement	26.23	ND			
3. DBE Liaison Officer	26.25	D	Activities listed in plan are not implemented by DBELO	Submit an updated DBE Program Plan that further refines the duties of the DBELO, evidence that these duties are being implemented and demonstrate that the DBELO has adequate staff	March 25, 2013
4. Financial Institutions	26.27	D	Program does not discuss services provided by financial institutions, how institutions may be used for services or recommended to primes	Submit an updated program containing the procedures and the language for the contracts encouraging use of DBE financial institutions.	March 25, 2013
5. DBE Directory	26.31	ND			
6. Overconcentration	26.33	AC	Did not conduct routine analysis	Addressed in response letter	
7. Business Development Programs	26.35	N/A			
8. Determining / Meeting Goals A. Calculation	26.45	D	Using incorrect past participation data for Step 2 adjustment.	Goal methodology for FY 2014 – 2016 must justify the use of past participation and use awards data.	Closed in lieu of goal submission due: August 1, 2013
B. Public Participation	26.45	D	Not conducting consultation process	Submit well-documented proof of consultation of minority and other interest groups in FY 2014–2016 goal.	Closed in lieu of goal submission due: August 1, 2013

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Submit Corrective Action for the following:	Response Days/Date
C. TVM	26.49	ND	Using the wrong language in contracts	Submit the updated contract boilerplates.	March 25, 2013
D. Race Neutral	26.51	D	Not meeting goals through RN measures	Submit update on process of conducting a disparity study or collaborating with or using other agencies' data.	Closed
E. Race Conscious	26.51	ND			
F. Good Faith Efforts	26.53	ND			
G. Counting DBE Participation	26.55	AC	Not accounting for counting rule adjustments for DBE attainments	Update DBE Program and internal tracking policies to account for eligibility of DBEs in relation to counting participation on FTA-funded projects.	
H. Quotas	26.43	ND			
9. Required Contract Provisions A. Contract Assurance	26.13	D	Non-discrimination clause in contracts has no or incorrect DBE program language	Submit updated DBE Program containing updated procedures for monitoring and tracking the inclusion of non-discrimination clause in prime & subcontracts. Submit proof of implementation in 5 recently issued contracts.	March 25, 2013

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Submit Corrective Action for the following:	Response Days/Date
B. Prompt Payment	26.29	D	Prompt payment provisions not included in contracts and subcontracts	Submit updated DBE Program that includes updated prompt payment procedures. Submit proof of monitoring for compliance in 5 recently issued contracts.	March 25, 2013
C. Legal Remedies	26.37	AC	Need to verify legal remedy language in contracts to complement race-neutral program		
10. Certification Standards	26.67	N/A			
11. Certification Procedures	26.83	N/A			
12. Record Keeping and Enforcements					
A) Bidders List	26.11	D	No bidders list is collected or maintained	Submit updated DBE Program containing new bidder's list procedures and contract clauses.	March 25, 2013
B) Monitoring	26.37, 26.55	D	Monitoring process diminished after RN implemented. No monitoring of prompt payment/return of retainage	Submit updated DBE Program containing updated monitoring procedures. Submit proof of implementation.	March 25, 2013
C) Reporting	26.11	D	Reports do not reflect only federal share and payments for completed contracts	Submit updated DBE program containing updated reporting procedures. Submit supporting data for December 1, 2012 semiannual report.	March 25, 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
FTA				
Derrin Jourdan	FTA – Region IX (via teleconference)	Regional Civil Rights Officer	(415) 744- 2729	Derrin.jourdan@dot.gov
Chris MacNeith	FTA – Region IX (via teleconference)	Regional Civil Rights Officer	(415) 744- 3133	Chris.macneith@dot.gov
NCTD Members				
Matthew Tucker	NCTD	Executive Director	(760) 966- 6793	Mtucker@nctd.org
Richard Hannasch	NCTD	Chief Financial Officer/ DBELO	(760) 967- 2809	Rhannasch@nctd.org
Larry Frum	NCTD	Manager, Contracts & Procurement	(760) 967- 2864	Lfrum@nctd.org
Mindy Smith	NCTD	Contracts Administrator	(760) 967- 2834	Msmith@nctd.org
Diane E. Hessler	NCTD	Chief Management Accountant	(760) 966- 6550	Dhessler@nctd.org
Paula de Sousa	Best, Best & Krieger	Partner–External General Counsel	(619) 525- 1300	Paula.desousa@bbklaw.com
Prime Contractor Representatives				
Cathy Hirsch	Pacific Railway Enterprises, Inc.	President	(951) 784- 4630	Clhirsch@pacrail.com
DBE Subcontractor Representative				
Teresa Gonzalez- White	Gonzalez-White Consulting Services, Inc.	President	(619) 518- 1821	Tgwhite@sprintmail.com
Milligan & Co., LLC				
Benjamin Sumpter	Milligan & Co., LLC	Lead Reviewer	(215) 496- 9100	Bsumpter@milligancpa.com
Habibatu Atta	Milligan & Co., LLC	Reviewer	(215) 496- 9100	Hatta@milligancpa.com
Kristin Szwajkowski	Milligan & Co., LLC	Reviewer	(215) 496- 9100	Kszwajkowski@milligancpa.com