



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

**Regional Transportation District (RTD)  
Disadvantaged Business Enterprise Program  
Draft Compliance Review Report**

**September 2012**

FTA Report No. 0000  
Federal Transit Administration

**PREPARED BY**

Jack Faucett Associates and  
Ken Weeden & Associates



U.S. Department of Transportation  
**Federal Transit Administration**

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## Contents

Executive Summary .....	5
1. General Information.....	6
2. Jurisdiction and Authorities .....	7
3. Purpose and Objectives .....	8
3.1 Purpose .....	8
3.2 Objectives .....	8
4. Introduction to RTD.....	10
4.1 Introduction to Transit Services and Organizational Structure .....	10
4.2 Budget.....	11
4.3 DBE Program .....	12
5. Scope and Methodology .....	15
5.1 Scope .....	15
5.2 Methodology.....	16
6. Issues and Recommendations .....	17
6.1 DBE Program Plan .....	17
6.2 DBE Policy Statement.....	17
6.3 DBE Liaison Officer.....	18
6.4 Minority and Women Owned Financial Institutions .....	19
6.5 DBE Directory.....	19
6.6 Overconcentration .....	20
6.7 Business Development Programs .....	20
6.8 Fostering Small Business Participation.....	21
6.9 Determining/Meeting Goals .....	21
6.10 Required Contract Provisions .....	29
6.11 Certification Standards .....	31
6.12 Certification Procedures .....	32
6.13 Record Keeping and Enforcements .....	32

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## Executive Summary

<b>Agency:</b>	<b>Regional Transportation District (RTD) - Denver</b>
<b>Date:</b>	<b>March 20 to 22, 2012</b>
<b>Reviewer:</b>	<b>Jack Faucett Associates and Ken Weeden &amp; Associates</b>

**Objective and Methodology** - This report details the findings of a Compliance Review of the Disadvantaged Business Enterprise (DBE) program operated by the Regional Transportation District (RTD) in Denver, Colorado. The Compliance Review was based on an examination of RTD's procedures, management structures, actions, and documentation. Documents and information were collected from the Federal Transit Administration (FTA) and RTD. Interviews were held with officials from RTD, local chambers of commerce, and RTD contractors. This included interviews with the Hispanic Contractors of Colorado and the Associated General Contractors of Colorado. The 3-day review included interviews, review of data collection systems, and analysis of contract documents.

**RTD's DBE Program has Many Effective Elements** – RTD has demonstrated a dedication to administering an effective DBE program. ES-1 documents some of the positive program elements observed by the JFA Team.

<b>ES-1: Positive Program Elements</b>
<ul style="list-style-type: none"> <li>➤ Strong program leadership</li> <li>➤ Direct DBELO access to executive leadership</li> <li>➤ Collection of subcontract agreements from prime contractors</li> </ul>

**The Program has Administrative Deficiencies that are Easily Correctable** - Several administrative corrections remain to be addressed. ES-2 lists administrative deficiencies RTD can quickly address to bring their program into increased compliance with 49 CFR Part 26.

<b>ES-2: Administrative Deficiencies</b>
<ul style="list-style-type: none"> <li>➤ Elaborate on how overconcentration might be assessed and addressed in the program plan</li> <li>➤ Formalize how and when scans for minority and women owned financial institutions will be performed</li> <li>➤ Ensure DBE contract clauses flow down into subcontract agreements</li> <li>➤ Obtain signed and dated copies of TVM certificate</li> <li>➤ Expand language on counting DBE participation in Program Plan and solicitation documents</li> <li>➤ Add fields for firm DBE status, age, and annual revenues to bidders list</li> </ul>

**The RTD DBE Program Exhibits Several Substantive Deficiencies** – RTD has not met its DBE participation goals in recent years. Levels of race conscious and race neutral attainment have varied substantially from one semi-annual period to another. RTD has failed to meet race conscious goals by a wide margin. Subcontracting by both DBE and non-DBE firms is particularly low. RTD should consider reviewing individual solicitations for DBE subcontracting opportunities and higher race conscious goals. RTD should consider increasing race neutral awards through breaking out contracts and improving business development programs.

<b>ES-3: Substantive Deficiencies</b>
<ul style="list-style-type: none"> <li>➤ RTD did not meet DBE goals</li> <li>➤ Misclassification of race conscious and race neutral attainment in reporting to FTA</li> <li>➤ Insufficient and fluctuating race neutral attainment may require additional effort to break out contracts and improve business development programs</li> </ul>

## 1. General Information

This chapter provides basic information concerning this compliance review of RTD. Information on RTD, the JFA/KWA review team, and the dates of the review is presented below.

<b>Grant Recipient:</b>	Denver Regional Transportation District (RTD)
<b>City/State:</b>	Denver, Colorado
<b>Grantee Number:</b>	1136
<b>Executive Official:</b>	Philip Washington, General Manager
<b>On-site Liaison:</b>	James Cook - Acting DBELO
<b>Report Prepared By:</b>	<p>Jack Faucett Associates (JFA)  4550 Montgomery Ave. Suite 300N  Bethesda, Maryland 20814</p> <p><i>And</i></p> <p>Ken Weeden &amp; Associates (KWA)  3955 Market St. Suite A  Wilmington, North Carolina 28403</p>
<b>Dates of On-site Visit:</b>	March 20 – March 22, 2012
<b>Review Team Members:</b>	<p>Rebecca Tanrath, Region VIII RCRO, FTA  Aida Douglas, Region VI RCRO, FTA  Rami Chami, Lead Reviewer, JFA  Mike Brooks, Reviewer, JFA  Wilfred Nixon, Reviewer, KWA</p>

## 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."

RTD is a recipient of FTA funding assistance, including funding from the American Recovery and Reinvestment Act of 2009 (ARRA), and is therefore subject to the Disadvantaged Business Enterprise (DBE) compliance conditions associated with the use of these funds pursuant to 49 CFR Part 26. These regulations define the components that must be addressed and incorporated in RTD's DBE program and were the basis for the selection of compliance elements that were reviewed.

### 3. Purpose and Objectives

This chapter discusses the purposes and objectives of the DBE program and the compliance review process.

#### 3.1 Purpose

The FTA Office of Civil Rights periodically conducts discretionary reviews of grant recipients and 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. The FTA decided to conduct one such review of RTD.

The primary purpose of the compliance review is to determine the extent to which RTD 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 RTD's Disadvantaged Business Enterprise Program Plan and its implementation, (2) make recommendations regarding corrective actions deemed necessary and appropriate, and (3) provide technical assistance. This compliance review is not intended to directly investigate whether there has been discrimination against disadvantaged businesses by the grant recipient or its sub-recipients, or to adjudicate these issues in behalf of any party.

#### 3.2 Objectives

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

- Ensure nondiscrimination in the award and the administration of DOT-assisted contracts in the Department's financial assistance programs.
- Create a level playing field on which DBEs can compete fairly for DOT-assisted contracts.
- Ensure that the Department's DBE program is narrowly tailored in accordance with applicable laws.
- Ensure that only firms that fully meet 49 CFR Part 26's eligibility standards are permitted to participate as DBEs.
- Help remove barriers to the participation of DBEs in DOT-assisted contracts.
- Assist the development of firms that can compete successfully in the marketplace outside the DBE program.
- Provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.



The objectives of this compliance review are to:

- Determine whether RTD 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 RTD's DBE Program Plan against the compliance standards set forth in the regulations and to document the compliance status of each component.
- Gather information and data regarding the operation of RTD's Disadvantaged Business Enterprise Program Plan from a variety of sources, including DBE program managers, other RTD management personnel, DBEs, and prime contractors.

## 4. Introduction to RTD

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

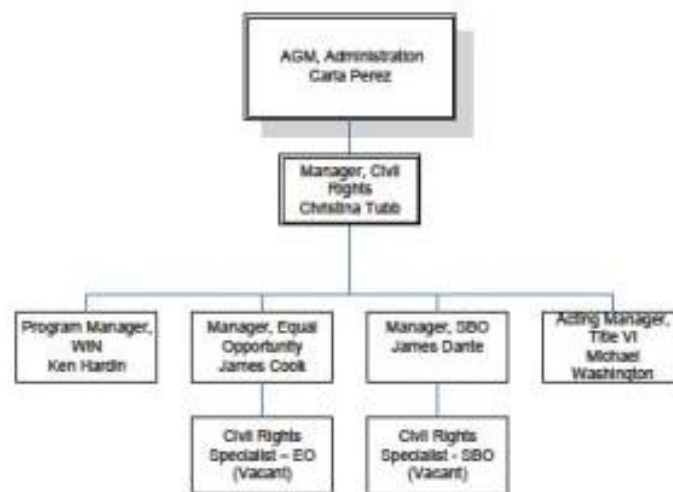
### 4.1 Introduction to Transit Services and Organizational Structure

The Regional Transportation District, or RTD, was organized in 1969 and is the regional authority operating public transit services in eight of the twelve counties in the Denver-Aurora-Boulder Combined Statistical Area in Colorado. RTD is governed by a 15-member, publicly elected Board of Directors. Directors are elected to a four-year term and represent a specific district. Elections are staggered so that eight seats are open in one general election, seven in the next.

RTD currently operates a bus and light rail system that has a service area of 2,348 square miles. It has 696 salaried employees and reported about 97 million boardings between October 2009 and September 2010. It had a \$373 million budget in 2010 and a \$377 million budget in 2011.<sup>1</sup>

Exhibit 1 presents the organizational chart for RTD.

**Exhibit 1: RTD Civil Rights Division Organizational Chart**

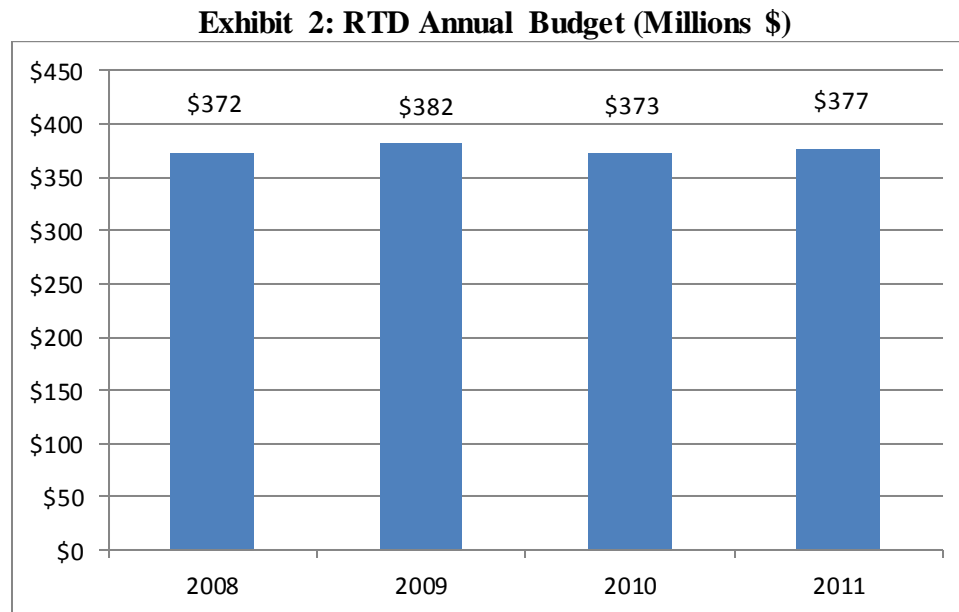


Source: Email from Dante James, former Manager of the RTD Small Business Office on Feb. 28, 2012.

<sup>1</sup> RTD website, "Facts & Figures" <http://www.rtd-denver.com/factsAndFigures.shtml>

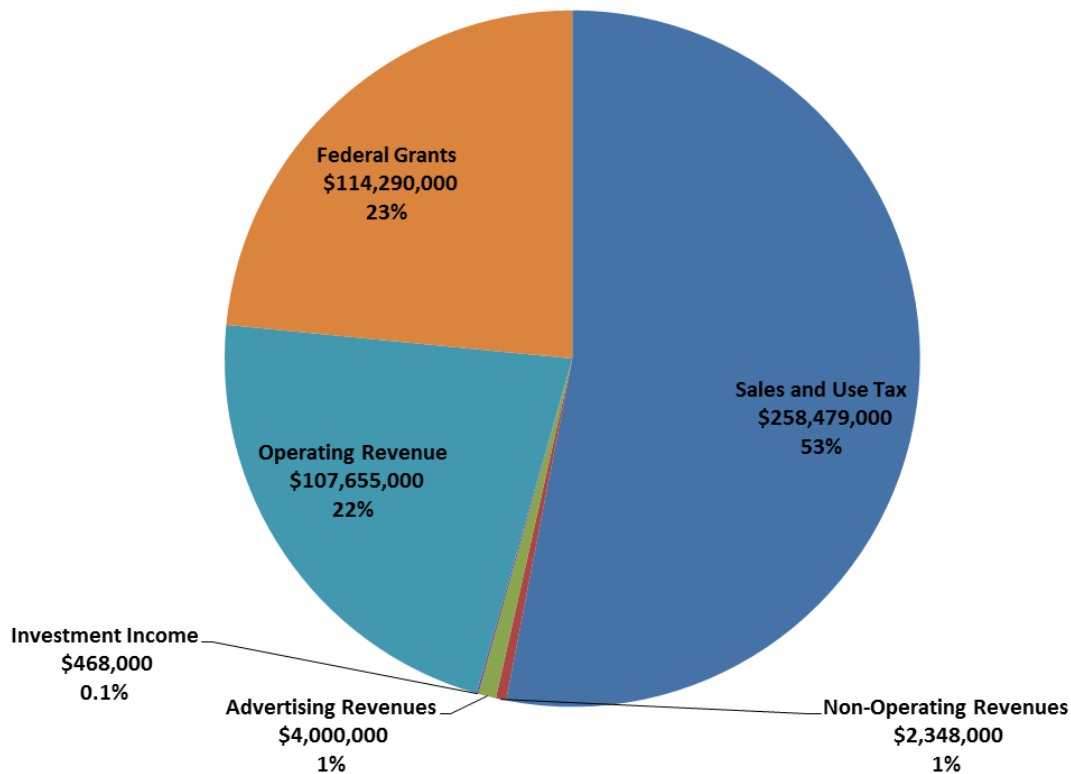
## 4.2 Budget

RTD's budget is comprised of state and federal funds, as well as revenue from fares and other sources. Exhibit 2 displays a time series of RTD's annual budget between 2008 and 2011. During those years, RTD's annual budget ranged between a low of \$372 million in 2008 and a high of \$382 million in 2009.



Source: RTD website, "Facts & Figures" <http://www.rtd-denver.com/factsAndFigures.shtml>

Exhibit 3 provides an examination of RTD's adopted budget in 2012 by source. Sales and use taxes provide 53 percent of RTD's budget. Federal grants constitute nearly a quarter of the budget.

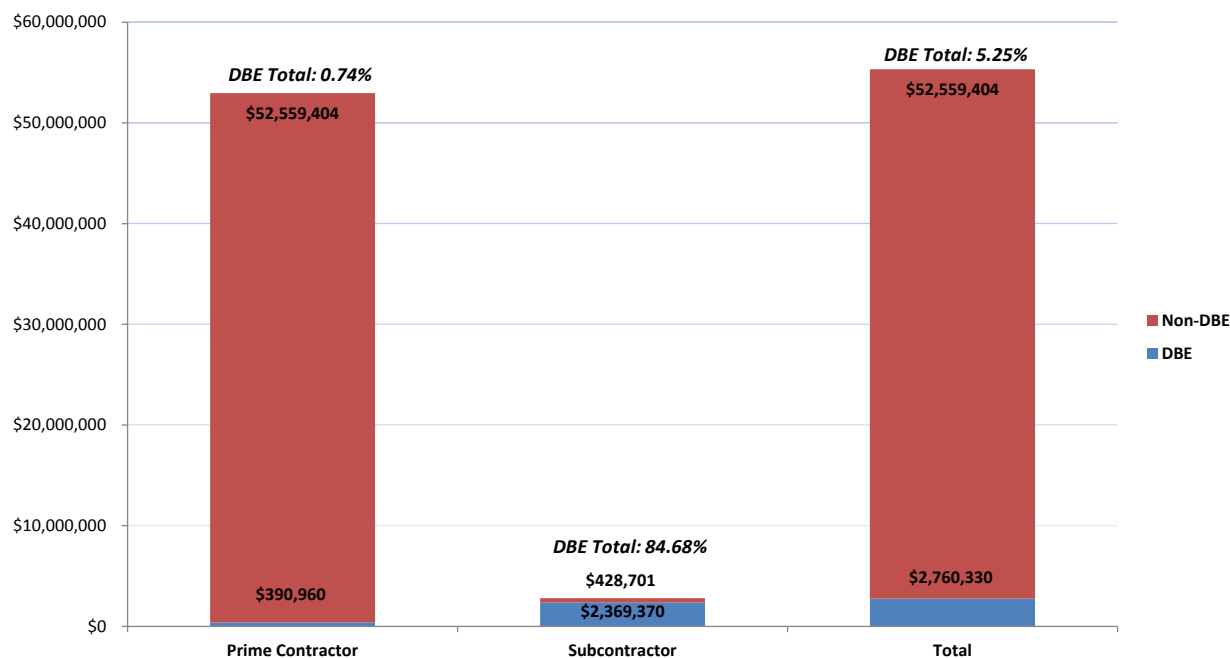
**Exhibit 3: RTD Funding by Source, 2012**

Source: RTD Adopted Budget 2012, Page 28, [http://www.rtd-denver.com/PDF\\_Files/Financial\\_Reports/Adopted\\_2012.pdf](http://www.rtd-denver.com/PDF_Files/Financial_Reports/Adopted_2012.pdf)

**4.3 DBE Program**

The RTD DBE liaison officer (DBELO) is responsible for monitoring and enforcing RTD's internal and external DBE programs to ensure compliance with appropriate federal and state laws and regulations. The DBELO has direct access to the RTD Administrator and other members of the executive leadership.

Exhibit 4 provides information on the contracts awarded to DBE and non-DBE contractors. The exhibit also highlights the share of contracts that DBEs won either as prime contractors or subcontractors. During federal fiscal years 2010 and 2011, DBE contractors were awarded less than one percent of all prime contract dollars, 84.7 percent of all subcontract dollars, and 5.3 percent of all contract dollars. RTD's race conscious goal for FY 2011 to 2013 is 3.04 percent and its race neutral goal for that period is 4.26 percent. As a result, RTD fell short of its 7.3 percent DBE participation goal for the period.

**Exhibit 4: RTD Funded Contracts Awarded to Contractors (FY 2010-2011)**

Source: RTD's Uniform Report of DBE Commitments/Awards and Payments

The Denver-Aurora region contains a sizable number of minority and women owned firms, although these firms account for a small percentage of economic activity in the region. Exhibit 6 provides U.S. Census Bureau information about the availability of women and minority owned firms in the Denver-Aurora, Colorado metropolitan area in 2007. The Denver-Aurora region contains 35,848 minority-owned firms and 79,547 female owned firms. Minority owned firms account for 13.4 percent of all firms but only 2.4 percent of sales. Women owned firms account for 29.7 percent of all firms and 4.0 percent of all sales. It must be noted that Census Bureau definitions for minority and women owned businesses do not correlate exactly with DBE status qualifications. For example, a woman or minority business owner might have a personal net worth above \$1.32 million, the threshold for DBE qualification. Exhibit 5 also presents the combined number and sales of minority and women owned firms. This metric may contain some double-counting (a minority women owned business for example) but is included to provide an approximation of total availability. The review team also examined data on the statewide level, which does break out such figure, but the observed difference is negligible.

**Exhibit 5: Firms in the Denver-Aurora Metro Area (2007)**

	Number of firms with or without paid employees	Sales, receipts, or value of shipments of firms with or without paid employees (\$1,000)	Number of firms with paid employees	Sales, receipts, or value of shipments of firms with paid employees (\$1,000)
All firms	268,242	\$297,500,430	60,125	\$287,359,619
All minority owned firms	35,848	\$8,058,198	5,382	\$6,957,998
All women owned firms	79,547	\$13,528,376	10,741	\$11,535,716
Combined minority and women owned	115,395	\$21,586,574	16,123	\$18,493,714
Percent share of minority owned firms	13.4%	2.7%	8.9%	2.4%
Percent share of women owned firms	29.7%	4.5%	17.9%	4.0%
Percent share of minority and women owned firms	<b>43.0%</b>	<b>7.3%</b>	<b>26.8%</b>	<b>6.4%</b>

Source: U.S. Census Bureau website, American FactFinder, 2007 Survey of Business Owners,  
<http://www.census.gov/econ/sbo/>

## 5. Scope and Methodology

This chapter describes the scope of the FTA regulations that the review team considered during its compliance review as well as the methodology employed for the compliance review.

### 5.1 Scope

Implementation of the following 13 required DBE program components specified by the FTA are reviewed in this report:

1. A DBE program plan signed by a concerned operating administration (OA) [49 CFR 26.21].
2. A signed policy statement that expresses a commitment to the agency's DBE program, states its objectives, and outlines responsibilities for its implementation [49 CFR 26.23].
3. Designation of a liaison officer and support staff as necessary to administer the program, and a description of the authority, responsibility, and duties of the officer and the staff [49 CFR 26.25].
4. Efforts made to use DBE financial institutions, by the recipient as well as prime contractors, if such institutions exist [49 CFR 26.27].
5. A DBE directory including addresses, phone numbers and types of work performed made available to the public and updated at least annually [49 CFR 26.31].
6. Determination if overconcentration exists and address this problem if necessary [49 CFR 26.33].
7. Assistance provided to DBEs through Business Development Programs to help them compete successfully outside of the DBE program [49 CFR 26.35].
8. A small business participation element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements [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]. Additionally, in establishing an overall goal, the recipient must provide for public participation and then provide information on this goal to the public through published notices [49 CFR 26.45].
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 26.37]. Reporting must include information on payments made to DBE firms [49 CFR 26.11, 26.55].

## 5.2 Methodology

The initial step in the scope of this Compliance Review consisted of consultation with the FTA Office of Civil Rights and a review of available information from FTA's TEAM System and other sources. Subsequent to this review, potential dates for the site visit were coordinated.

An agenda letter was then compiled and sent to RTD by FTA's Office of Civil Rights. The agenda letter notified RTD of the planned site visit, requested preliminary documents, and informed RTD of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed RTD 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 opening conference was conducted at the beginning of the Compliance Review with FTA representatives, RTD staff and the review team.

Subsequent to the opening conference, a review was conducted of RTD's DBE Program Plan and other documents submitted to the review team by the DBE Liaison Officer or equivalent. The review team then conducted interviews with RTD officials regarding DBE program administration, project procurement, grant administration record keeping, monitoring, and legal remedies. The review team also selected a sample of FTA funded contracts, which were then reviewed for their DBE elements. The review team interviewed personnel from RTD, local contractor associations, and recent RTD contractors.

At the end of the review, an exit conference was held with FTA Regional Civil Rights Officers, RTD staff, and the review team. At the exit conference, initial findings and potential corrective actions were discussed with RTD.

Following the site visit, this draft report was compiled. This report will be amended and resubmitted as a final report after allowing RTD to respond to the report findings and corrective actions.



## 6. Issues and Recommendations

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

### 6.1 DBE Program Plan

**Basic Requirement:** (49 CFR 26.21) Recipients must have a DBE program 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. In recent years because of changes in DBE program rules, an updated DBE program, while not required, is strongly recommended.

**Discussion:** During this DBE Compliance Review, deficiencies were found with the Program Plan requirements. RTD completed a Revised DBE Program Plan on February 28, 2012 and submitted it to the review team. The Program Plan has many elements required by 49 CFR Part 26, but there are some deficiencies in various subsections of the Program Plan. Some deficiencies include insufficient information about procedures for identifying financial institutions, evaluating overconcentration, and assessing good faith efforts.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, RTD must develop a revised Program Plan that addresses the issues identified in this compliance review report.

**RTD Response:** RTD agrees with the proposed corrective action as scheduled. RTD will develop a revised DBE Program Plan that addresses the issues identified in the compliance review report within 60 days of issuance of the final report.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit to FTA a copy of their new DBE Program Plan within 60 days of receipt of the Final DBE Program Compliance Review Report.

### 6.2 DBE Policy Statement

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

**Discussion:** During the DBE Compliance Review a deficiency was found with RTD's Policy Statement. The Policy Statement identifies Christina Tubb as the DBELO. Ms. Tubb left RTD in March 2012. The Policy Statement will have to be updated to include the new DBELO.

RTD has included a Policy Statement signed by RTD General Manager/CEO Phillip Washington in its latest DBE Program Plan. RTD posts this statement on its website and in many of its facilities. RTD also disseminates the Policy Statement to outside stakeholders and will include it in future procurement and solicitation documents. Although RTD disseminates its Policy Statement widely, where and how RTD disseminates its Policy Statement should be described in greater detail.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, RTD must develop a new Policy Statement that identifies the agency's new DBELO. RTD must also disseminate the Policy Statement throughout their organization and to minority, female, and non-minority community and business organizations. The Program Plan should describe in detail the distribution procedures for the Policy Statement.

**RTD Response:** RTD agrees with the proposed corrective action as scheduled. RTD will disseminate the Policy Statement throughout its organization, to minority, female, and non-minority communities and business organizations. The revised DBE Program Plan will describe in detail the distribution procedures for the Policy Statement within 60 days of issuance of the final report.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit to FTA a copy of their new DBE Policy Statement within 60 days of receipt of the Final DBE Program Compliance Review Report.

### 6.3 DBE Liaison Officer

**Basic Requirement:** (49 CFR 26.25) Recipient/Grantees must have a designated DBE Liaison Officer (DBELO) who has direct and independent access to the CEO of the recipient organization. The DBELO is responsible for implementing all aspects of the DBE program and must have adequate staff to properly administer the program.

**Discussion:** During this DBE Compliance Review, a deficiency was found with the requirements for the DBE Liaison Officer (DBELO). The former DBELO, Christina Tubb, resigned from RTD in March 2012. As the DBELO, Christina Tubb, appeared to have had direct access to RTD's CEO, Philip Washington regarding DBE matters.

James Cook has assumed the DBELO duties on an interim basis. Within RTD's Civil Rights Division, Michael Washington appears to be the most knowledgeable and involved person regarding the DBE program.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, RTD should formally designate the agency's DBELO. The Program Plan and Policy Statement should accurately identify the individual whose responsibility it is to implement the DBE program as the DBELO. The DBELO does not have to report directly to the CEO in general as long as he or she has direct and independent access to the CEO regarding DBE matters.

**RTD Response:** RTD agrees with the proposed corrective action as scheduled. On June 10, 2012, RTD designated Carla Perez as the DBELO whose responsibility it is to implement the DBE Program. The revised DBE Program Plan and Policy Statement will accurately identify her responsibility to implement the DBE program as the DBELO and detail her direct and independent access to the CEO regarding DBE matters within 60 days of issuance of the final report.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit to FTA a copy of their new DBE Program Plan and Policy Statement within 60 days of receipt of the Final DBE Program Compliance Review Report.

## 6.4 Minority and Women Owned Financial Institutions

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

**Discussion:** During this DBE Compliance Review, no deficiency was found within the Financial Institutions section of the DBE Program Plan. RTD has identified two women or minority owned financial institutions in the Denver area: the Solano National Bank and the Native American Bank. RTD should continue to scan sources such as the Federal Reserve Bank's Minority-Owned Financial Institutions list for additional women or minority owned financial institutions. RTD should elaborate in its Program Plan how it will perform this scan and with what frequency. RTD should also formulate a plan to encourage use of these institutions

**Advisory Comment:** RTD should expand the Financial Institutions section of their DBE Program Plan to include information how and how often RTD will identify relevant financial institutions and how they will promote their use.

## 6.5 DBE Directory

**Basic Requirement:** (49 CFR 26.31) A DBE directory must be available to interested parties including addresses, phone numbers, and types of work each DBE is certified to perform. This directory must be updated at least annually and must be available to contractors and the public upon request.

**Discussion:** During this DBE Compliance Review, no deficiency was found within the DBE Directory section of the DBE Program Plan. The Colorado UCP (CO UCP) DBE directory is maintained by the Colorado Department of Transportation (CDOT). RTD's Program Plan (page 19) and website have links to the DBE Directory.

The review team viewed the web-based directory during the site visit. The directory includes the information required by 49 CFR Part 26 regulations. The directory provides the following information for each certified firm: the firm's name, mailing address, telephone number, and the type of work the firm has been certified to perform as a DBE. CDOT updates their online directory with firm additions and deletions as changes are reported, in real time.

## 6.6 Overconcentration

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

**Discussion:** During this DBE Compliance Review, a deficiency was found in the procedures for determining overconcentration. RTD states on page 8 of the Program Plan that, “RTD has not identified that overconcentration exists in the types of work that DBEs perform;” however, the document does not provide a set of procedures for evaluating whether overconcentration exists and what steps RTD would take if overconcentration was observed.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final DBE Compliance Review Report, RTD must enhance the Overconcentration section of the Program Plan and include discussion of overconcentration identification procedure, how frequently RTD will investigate this issue, and what actions they would take if an overconcentration is identified.

**RTD Response:** RTD accepts the proposed corrective action as scheduled. RTD will enhance the “Overconcentration” section of the revised DBE Program Plan and include discussion of overconcentration identification procedure, how frequently RTD will investigate this issue, and what actions RTD will take if an overconcentration is identified within 60 days of issuance of the final report.

**FTA Response:** FTA agrees with RTD’s response. To close this deficiency, RTD must submit to FTA a copy of their new DBE Program Plan that includes an enhanced overconcentration section within 60 days of receipt of the Final DBE Program Compliance Review Report.

## 6.7 Business Development Programs

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

**Discussion:** During this DBE Compliance Review, no deficiencies were found in the area of Business Development Programs. Page 9 of the Program Plan contains a list of 11 initiatives designed to foster the growth and development of local DBE firms. Some of the initiatives include: training sessions, networking workshops, mentor-protégé, bonding assistance, insurance assistance, etc. RTD’s website includes a calendar of upcoming business development programs offered by RTD.<sup>2</sup>

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<sup>2</sup> RTD website, “RTD DBE/SBE Events Calendar” [http://www.rtd-denver.com/Biz\\_Events.shtml](http://www.rtd-denver.com/Biz_Events.shtml)

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Additionally, Denver Transit Partners (DTP), the concessionaire for the Eagle P3 Project, provides various outreach and business development programs to facilitate DBE/SBE participation. These program events are announced on DTP's website.<sup>3</sup>

**Advisory Comment:** Although information about Business Development Programs is provided on online calendars on RTD and DTP's websites, RTD should describe in greater detail DBE business development efforts they provide or recommend in their Program Plan. It would be particularly useful to DBEs to help them identify business development programs offered by other organizations and entities in the Denver region. RTD should provide formal names of the programs, web links to more information, typical meeting times, and contact person(s) in the Program Plan and on their website.

## 6.8 Fostering Small Business Participation

**Basic Requirement:** (49 CFR 26.39) The recipient must include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.

**Discussion:** During this DBE Compliance Review, potential deficiencies were found in the area of Fostering Small Business Participation. At the time of the DBE Compliance Review RTD's Regional Civil Rights Officer (RCRO) had not completed the review of RTD's element to Foster Small Business Participation. RTD submitted their small business element as part of their revised DBE Program to the FTA on February 28, 2012. Initial findings of the review team were that the small business participation write up in the Program Plan (page 10) did not have comprehensive information about the program's certification, oversight, and reporting mechanisms.

**Advisory Comment:** RTD should wait for their RCRO to complete the review of the Small Business Participation plan. Once the review is complete, RTD should work with their RCRO to enhance the plan as needed.

## 6.9 Determining/Meeting Goals

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

### A. Calculation

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

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<sup>3</sup> Denver Transit Partners website, "Calendar" [http://denvertransitpartners.com/?page\\_id=15](http://denvertransitpartners.com/?page_id=15)

**Discussion:** During this DBE Compliance Review, deficiencies were found with the requirements for calculation of an overall DBE goal. RTD's goal methodology documents a two-step process to determine their FY2011-2013 goal of 7.30 percent.

The Regional Civil Rights Officer for Region 8 has recommended RTD not include major projects such as the Eagle Project when setting their triennial goal. The RCRO recommended that major projects should have standalone goals.

The paragraphs below describe RTD's Step 1 and 2 methodologies.

***Step 1:***

RTD's goal methodology documents a two-step process to determine their FY2011-2013 goal of 7.30 percent. In the first step they use the ratio of DBEs with appropriate NAICS codes in the Colorado UCP database to all firms under the appropriate NAICS codes in the 2007 Economic Census. The ratio is 3.05 percent. However, in their step one process, it is not documented how the market area was determined.

***Step 2:***

RTD's step two adjustment section of the goal methodology appears to contain the actual step one and step two calculations. The step one figure of 3.05 percent is not used to calculate the overall goal. First, the percent that DBEs make up of all firms available in the construction industry in Colorado was determined (i.e. 9.70 percent). Second, the step one result of 9.70 percent was added to the average DBE participation rate between 2006 and 2009 (i.e. 9.70 percent + 4.91 percent = 14.61 percent). Third, 14.61 percent was divided in two (14.61 percent / 2 = 7.30 percent). The DBE goal was expressed as 7.30% or \$28,448,342 of the total federal expenditures of \$389,703,865. RTD should clearly explain why this division method is used.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final DBE Compliance Review Report, RTD should develop a new DBE participation goal and document and explain their methodology thoroughly. The explanation of the methodology should include a definition of the market area in the step one process. RTD should use FTA's guidance and exclude major projects such as the Eagle Project for the triennial goal development process.

**RTD Response:** RTD accepts the proposed corrective action as scheduled. As stated in RTD's shortfall analysis (submitted December 29, 2011), we will develop a new DBE participation goal documenting and explaining the methodology thoroughly. RTD will use FTA's guidance and exclude major projects such as the Eagle Project for the triennial goal development process, submitting a correct methodology within 60 days of issuance of the final report.

We would also like to make note of the fact that through RTD's large contracts, we have paid substantial amounts of federal dollars to DBEs. However, due to the regulations regarding semi-annual reporting of DBE participation, RTD is unable to count this participation until these contracts close. In fact, as of July 2012 on the Eagle P3 contract, we've paid out \$45.3 million dollars (18% of payments made to the Prime) to small businesses; on the West Rail Line

Construction contract, we've paid out \$80.1 million dollars (23.79% of payments made to the prime) to DBEs; and on the Denver Union Station contract, we've paid out \$37.4 million dollars (17.44% of payments made to the prime) to DBEs.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit to FTA a copy of their new DBE Program Plan and DBE participation goal methodology within 60 days of receipt of the Final DBE Program Compliance Review Report.

## **B. Public Participation and Outreach**

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

**Discussion:** During this DBE Compliance Review, no deficiency was found with the requirements for public participation and outreach. RTD's Overall DBE Goal was published in the Denver Post, Daily Camera, and Passenger Transport. RTD documented in their goal methodology that it has been able to engage the DBE community by providing multiple opportunities for public interaction and input. Examples listed included quarterly Disadvantaged Business Enterprise Advisory Committee (DBEAC) meetings hosted by RTD. The DBEAC includes minority and women owned business advocacy groups and chambers of commerce within the Denver Metro Area.

**Advisory Comment:** RTD is encouraged to continue to involve outside organizations in its DBE goal setting process. For example, members interviewed from the Hispanic Contractors of Colorado and the Associated General Contractors of Colorado were not aware that RTD solicits stakeholder input in determining its triennial DBE participation goals.

## **C. Goal Attainment**

**Basic Requirement:** (49 CFR 26.47) This subpart explains the ramifications of failing to meet yearly overall DBE participation goals. FTA may not punish an agency or consider it to be noncompliant if the agency's DBE program has been administered in good faith. If an agency's awards and commitments fall short of the overall DBE goal as reflected in the semi-annual Uniform Report of Awards or Commitments and Payments, the agency must take proper steps to demonstrate that they are operating their DBE program in good faith.

**Discussion:** During this DBE Compliance Review, a deficiency was found regarding RTD's goal attainment. The four Uniform Reports obtained by the compliance review team (fiscal years 2010 and 2011) indicate that RTD has not met its overall DBE participation goals. RTD established a 7.3 percent DBE goal for fiscal years 2011 through 2013 during its latest triennial review. During FY 2011, RTD achieved 4.25 percent total DBE attainment, including 3.35 percent race neutral and 0.9 percent race conscious. This attainment falls below the 7.3 percent total, 4.26 percent race neutral, and 3.04 percent race conscious annual goals.



**Corrective Action and Schedule:** If RTD can take certain steps to prove that it has operated in good faith, there will be no penalty for failing to meet the annual goals, nor will the agency be considered noncompliant. To demonstrate good faith, RTD must conduct a shortfall analysis that:

- (1) Analyzes in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;
- (2) Establishes 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.

As RTD is one of the top 50 largest transit agencies as determined by the FTA, RTD must submit this analysis within 60 days of receipt of the Final DBE Program Compliance Review Report. If the analysis is satisfactory, FTA will determine that RTD has acted in good faith and will be classified as being in compliance.

**RTD Response:** RTD accepts the proposed corrective action as scheduled. On December 29, 2011 RTD submitted to FTA our short fall analysis and demonstration of good faith efforts and we are still awaiting response. This document was provided to the Audit team during the site visit. As RTD moves toward establishing an overall goal as well as project goals per FTA guidance, it is our expectation that goal attainment will be better tracked and achieved.

Again, we would also like to make note of the fact that through RTD's large contracts, we have paid substantial amounts of federal dollars to DBEs. However, due to the regulations regarding semi-annual reporting of DBE participation, RTD is unable to count this participation until these contracts close. In fact, as of July 2012 on the Eagle P3 contract, we've paid out \$45.3 million dollars (18% of payments made to the Prime) to small businesses; on the West Rail Line Construction contract, we've paid out \$80.1 million dollars (23.79% of payments made to the prime) to DBEs; and on the Denver Union Station contract, we've paid out \$37.4 million dollars (17.44% of payments made to the prime) to DBEs.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit a new short fall analysis within 60 days of receipt of the Final DBE Program Compliance Review Report. If the short fall analysis is satisfactory, FTA will determine that RTD has acted in good faith and will be classified as being in compliance.

#### **D. Transit Vehicle Manufacturers (TVM)**

**Basic Requirement:** (49 CFR 26.49) The recipient must ensure that each transit vehicle manufacturer (TVM) has complied with the DBE Program regulations.

**Discussion:** During this DBE Compliance Review, a deficiency was found with the requirements for Transit Vehicle Manufactures. The Program Plan states RTD will ensure each transit vehicle manufacturer has complied with DBE Program requirements (page 12). For completeness the Program Plan should also state RTD will obtain FTA's list of approved transit vehicle manufacturers.



The review team examined two transit vehicle purchase contracts. In the first contract, which was for the procurement of two Design Line buses, RTD had a signed TVM certificate and had obtained a timely FTA list of approved transit vehicle manufacturers. In the second contract, the TVM certificate for the 6 MCI Coach vehicles obtained through a piggy back arrangement with Yolo County, CA was not signed. However, RTD did have an FTA list of approved transit vehicle manufacturers that was current at the time of the procurement. RTD should obtain a signed copy of the TVM certificate for the MCI contract and all other contracts that do not have a signed TVM certificate, if any.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final DBE Compliance Review Report, RTD must update its Program Plan to state that RTD will obtain FTA's list of approved transit vehicle manufacturers and a signed TVM Certificate as verification of a TVM being authorized to bid or propose on FTA-assisted transit vehicle procurement. Both the certificate and the list should be current at the time the purchase contract is executed. RTD should obtain a signed copy of the TVM certificate for the MCI contract and all other contracts that do not have a signed TVM certificate, if any.

**RTD Response:** RTD agrees with the proposed corrective action as scheduled. RTD will update its DBE Program Plan to state that RTD will obtain FTA's list of certified transit vehicle manufacturers on a periodic basis and obtain a signed TVM Certificate as verification of a TVM being authorized to bid or propose on FTA-assisted transit vehicle procurement. RTD will also obtain a signed copy of the TVM certificate for the MCI contract and all other contracts that do not have a signed TVM certificate, if any within 60 days of issuance of the final report.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit to FTA a copy of their new DBE Program Plan and TVM certificates for the MCI contract and all other contracts that do not have a signed TVM certificate within 60 days of receipt of the Final DBE Program Compliance Review Report.

## **E. Race Neutral**

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

**Discussion:** During this DBE Compliance Review, no deficiency was found with the calculation of the race-neutral DBE participation goal. RTD's race-neutral goal was determined in a multistep process. RTD's average percent of race-neutral participation for FY 2006 to FY 2009 (58.36%) was multiplied by RTD's Overall DBE Goal in dollars (\$28,448,382.15) to yield a race-neutral value of (\$16,602,475.82). This race-neutral value (\$16,602,475.82) was divided by the total federal expenditures (\$389,703,865) to yield a race-neutral percentage of 4.26%

RTD's race conscious goal for FY 2011 to 2013 is 3.04 percent and its race neutral goal for that period is 4.26 percent. All of RTD DBE participation in FY 2011 was attained through race conscious contract attainments. The transit agency did not achieve any race neutral DBE participation in FY 2011.

## F. Race Conscious

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

**Discussion:** During this DBE Compliance Review, no deficiency was found with the calculation of the race-conscious DBE participation goal. RTD's race-conscious goal was determined in a multistep process. RTD's average percent of race-conscious participation for FY 2006 to FY 2009 (41.64%) was multiplied by RTD's Overall DBE Goal in dollars (\$28,448,382.15) to yield a race-conscious value of (\$11,845,906.33). This race-conscious value (\$11,845,906.33) was divided by the total federal expenditures (\$389,703,865) to yield a race-conscious percentage of 3.04%

RTD's race conscious goal for FY 2011 to 2013 is 3.04 percent and its race neutral goal for that period is 4.26 percent. All of RTD DBE participation in FY 2011 was attained through race conscious contract attainments. The transit agency did not achieve any race neutral DBE participation in FY 2011.

## G. Good Faith Efforts

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

**Discussion:** During this DBE Compliance Review, a deficiency was found with the requirements for good faith efforts. RTD's guidance to contractors regarding how to perform a good faith effort (GFE) is clearly described in the solicitation documents the review team examined. However, the GFE process described in the Program Plan does not describe the steps contractors should take to demonstrate a good faith effort (Program Plan, page 12).

The current GFE reconsideration official is Brian Iacono, Manager of the Materials Management Contracts and Procurements division of RTD. Having a senior member of the procurement department in this role may represent a conflict of interest. As a relatively large transit agency, RTD should consider selecting a different reconsideration official who is not involved in the procurement process so as to eliminate the possibility of a conflict of interest.

According to Michael Washington, the Manager of RTD's Small Business Office, RTD has received good faith effort documentation from prime contractors who have been unable to find DBE subcontractors for projects with DBE participation goals. He added that RTD has

sometimes awarded contracts to prime contractors who have submitted good faith effort documentation for projects with DBE participation goals.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, RTD must provide instructions in both the Program Plan and in bid solicitation documents that outline the steps prime contractors can take to perform and document good faith efforts.

**RTD Response:** RTD accepts the proposed corrective action as scheduled. RTD will provide instructions in both the Program Plan and in bid solicitation documents that outline the steps prime contractors can take to perform and document good faith efforts within 60 days of issuance of the final report.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit to FTA a copy of their new DBE Program Plan and RFP templates within 60 days of receipt of the Final DBE Program Compliance Review Report.

## **H. Protecting Against Termination for Convenience**

**Basic Requirements:** (49 CFR 26.53 (f)(1)) Recipients must implement appropriate mechanisms to ensure prime contractors do not terminate for convenience a DBE subcontractor and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without the transit agency's prior written consent. This requirement only applies to contracts with DBE participation goals.

**Discussion:** During this compliance review, deficiencies were found with regard to termination for convenience. Although RTD's Program Plan addresses protection against termination for convenience, the issue is not sufficiently described. The Program Plan does not mention that the prime contractor must give DBE subcontractors five days to respond to the prime contractor's notice and advise RTD and the prime contractor of the reasons, if any, why a subcontractor objects to the proposed termination of its subcontract.

Additionally, it is not known how RTD communicates the termination for convenience requirement to contractors. For example, the review team examined a number of contracts that did not mention the need to ensure against termination for convenience. These contracts include:

One, the subcontract agreement between Tower One Construction and L.O.S.T. Construction does not mention requirements and obligations related to termination for convenience.

Two, the prime contract agreement between Denver Transit Partners and RTD for the Eagle Project does not mention requirements and obligations related to termination for convenience.

Three, the subcontract agreement between Apex Design, a DBE prime contract, and All Traffic Data, a DBE subcontract, explicitly states "Apex Design may terminate this agreement for convenience." The Apex and All Traffic Data subcontract agreement does not state that RTD must approve termination of the DBE subcontract agreement.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, the Program Plan's discussion of termination for convenience issues must describe in greater detail how RTD will ensure against termination for convenience. The Program Plan must state that the prime contractor must give DBE subcontractors five days to respond to the prime contractor's notice. The Program Plan must also describe how and when subcontractors can challenge a prime contractor's termination request. Additionally, RTD must describe how it will ensure this information is shared with both prime contractors and subcontractors.

**RTD Response:** RTD accepts the proposed corrective action as scheduled. The revised DBE Program Plan will state that the prime contractor must give DBE subcontractors five days to respond to the prime contractor's notice. The revised DBE Program Plan will also describe how and when subcontractors can challenge a prime contractor's termination request. Additionally, RTD will describe how it will ensure this information is shared with both prime contractors and subcontractors within 60 days of issuance of the final report.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit to FTA a copy of their new DBE Program Plan within 60 days of receipt of the Final DBE Program Compliance Review Report.

## **I. Counting DBE Participation**

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

**Discussion:** During this DBE Compliance Review, a deficiency was found with the requirements for counting DBE participation. RTD states on page 14 of its Program Plan that it will monitor DBE participation as provided in 49 CFR 26.55. RTD should use information from 49 CFR 26.55 and describe how it counts DBE participation in narrative format in its Program Plan. This information was also not observed in the solicitation documents the review team examined. The lack of explicit guidance on counting DBE participation increases the difficulty for prime contractors and subcontractors to form responsive bids on projects.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, RTD must include basic, but expanded language on counting DBE participation, extracted from parts of the rule, in 26.55 in its Program Plan and solicitation documents.

**RTD Response:** RTD accepts the proposed corrective action as scheduled. To close this deficiency, RTD must submit a revised DBE Program Plan and solicitation document template that include expanded language on counting DBE participation within 60 days of issuance of the final report.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit to FTA a copy of their new DBE Program Plan and RFP templates within 60 days of receipt of the Final DBE Program Compliance Review Report.

## J. Quotas

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

**Discussion:** During this DBE Compliance Review, no deficiency was found with the requirement for quotas. The RTD Program Plan explicitly states on page 11 that the agency does not use quotas or set-asides.

## 6.10 Required Contract Provisions

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

### A. Non-discrimination

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

**Discussion:** During this compliance review, a deficiency was found with regard to contract assurance. The review team examined a number of subcontracts that did not include a non-discrimination clause. For example, the subcontract agreement between Tower One Construction and L.O.S.T. Construction does not have a non-discrimination clause. Additionally, the subcontract agreements for San Engineering and MEP Engineering included in RTD's "DBE Compliance Review Reports" for the Eagle Project did not include non-discrimination clauses. In fact, the San Engineering and MEP Engineering subcontract agreements did not include any of the required contract clauses (non-discrimination, prompt payment, return of retainage, legal remedies, and termination for convenience.)

Some RTD related prime contractor and subcontractor contracts have the non-discrimination clause included in the main body of the contract. Other RTD related contracts, such as the RTD and Apex Design contract, include RTD's "Appendix A," which is a standalone template document that covers DBE Program related issues and includes the required clauses.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final DBE Compliance Review Report, RTD must include the following statement in all its solicitation and contract documents:

"The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate."

Additionally, RTD must include language in their Program Plan that assures that this and other contract provisions flow down to sub-recipient contracts and subcontractor contracts.

**RTD Response:** RTD accepts the corrective action and proposed schedule. On the front side of the compliance monitoring process, RTD checks every contract/subcontract to ensure that the mandatory contract provisions are contained therein or are contained by reference and that the subcontractor received the master contract. While the contracts reviewed were the actual base subcontract agreement for the DBE firm only, every subcontract on the Eagle P3 Project (and in contracts with lower tier subcontracting) incorporates the mandatory contract provisions by reference and were/are verified by the compliance officer.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit to FTA a copy of their new DBE Program Plan within 60 days of receipt of the Final DBE Program Compliance Review Report.

## **B. Prompt Payment and Return of Retainage**

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

**Discussion:** During this compliance review, a deficiency was found with regard to prompt payment and return of retainage. Prompt payment and return of retainage are included in the standard contract template (i.e. "Appendix A") and in all the prime contracts the review team examined. However some subcontract agreements associated with the Eagle Project did not include the appropriate contract clauses based on a review of the "DBE Compliance Review Reports."

**Corrective Action and Schedule:** Within 60 days of the issuance of the final DBE Compliance Review Report, RTD must create a mechanism that ensures that a prompt payment and return of retainage clauses flow down to subcontractor contract documents. Additionally, RTD must document in their Program Plan how they ensure flow-down of required clauses in subcontract agreements.

**RTD Response:** RTD accepts the proposed corrective action as scheduled. RTD will create a mechanism that ensures that a prompt payment and return of retainage clauses flow down to subcontractor contract documents. Additionally, RTD will document in its revised DBE Program Plan how RTD ensures flow-down of required clauses in subcontract agreements within 60 days of issuance of the final report.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit to FTA a copy of their new DBE Program Plan that describes the procedures RTD will follow to ensure that prompt payment and return of retainage clauses flow down to subcontractor contract



documents. RTD must submit the new DBE Program Plan within 60 days of receipt of the Final DBE Program Compliance Review Report.

### C. Legal Remedies

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

**Discussion:** During this compliance review, a deficiency was found with regard to legal remedies. RTD's Program Plan legal remedies section (Attachment 3 on page 20) is not comprehensive and should be expanded. Additionally, the standard contract template (i.e. "Attachment A") does not describe what legal remedies are available to RTD in the event of contractor noncompliance with the DBE program.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final DBE Compliance Review Report, RTD should revise its Program Plan to describe in detail legal remedies available to RTD in the event of contractor noncompliance with the DBE program. These legal remedies should be included in RTD's standard contract template and in all printed and signed contracts. RTD should also develop procedures that ensure that these clauses are also included in subcontractor agreements.

**RTD Response:** RTD agrees with the proposed corrective action as scheduled. RTD will revise its DBE Program Plan to describe in detail legal remedies available to RTD in the event of contractor noncompliance with the DBE program. These legal remedies will be included in RTD's standard contract template and in all printed and signed contracts. RTD will also develop procedures that ensure that these clauses are also included in subcontractor agreement within 60 days of issuance of the final report.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit to FTA a copy of their new DBE Program Plan that describes in detail legal remedies available to RTD in the event of contractor noncompliance with the DBE program. RTD must submit the new DBE Program Plan within 60 days of receipt of the Final DBE Program Compliance Review Report.

### 6.11 Certification Standards

**Basic Requirement:** (49 CFR 26.67) All grantees are required to be part of a statewide Unified Certification Program (UCP). The recipient, if a certifying member of the UCP, must have a certification process intact to determine if a potential DBE firm is legitimately socially and economically disadvantaged according to the regulations. The DBE applicant must submit the required application and a signed and notarized statement of personal net worth with appropriate supporting documentation as part of this process.

**Discussion:** RTD is not a certifying agency. The Colorado Department of Transportation (CDOT) and the City and County of Denver (through the Division of Small Business Opportunity, or DBSO) certify DBEs in Colorado. No deficiencies were found.

**Advisory Comment:** RTD could include background information on certifying standards, such as a description of DBE qualifications, along with the contact information presented on page 15 of the Program Plan.

## 6.12 Certification Procedures

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

**Discussion:** As noted in Section 6.11, above, RTD is a non-certifying member of the CO UCP and therefore does not directly apply the standards and procedures of Part 26 of the DBE regulations. No deficiencies were found.

## 6.13 Record Keeping and Enforcements

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

### A. Bidders List

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

**Discussion:** During this compliance review, a deficiency was found with regard to the bidders list requirement. RTD maintains a bidders list that includes the names and addresses of relevant firms. However, the bidders list does not include the DBE or non-DBE status, age, and annual receipts of relevant firms as 49 CFR 26.11 requires. RTD plans to implement a technical platform by May 2012 that will allow them to capture the relevant information and maintain a compliant bidders list. RTD's current bidders list application form is available at <http://www.rtd-denver.com/BiddersList.shtml>.

Additionally, RTD maintains a Plans Holders List for all its solicitations. RTD informs contractors that a Plan Holders List is available upon request for individual solicitations, but this information is not stated in the Program Plan or in solicitation documents the review team examined. Contractors, particularly DBEs, that are unable to attend pre-bid conferences would benefit from direct information in solicitation documents concerning how they can access the Plan Holders List.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, RTD must collect additional information required in order for the bidders list to be compliant with 49 CFR 26.11.



**RTD Response:** RTD accepts the proposed corrective action as scheduled. RTD will develop a mechanism to collect the additional information required in order for the bidders list to be compliant with 49 CFR 26.11 within 60 days of issuance of the final report.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit to FTA evidence of procedures to collect the additional contractor information required in order for the bidders list to be compliant with 49 CFR 26.11. These procedures must be described in RTD's new DBE Program Plan, which must be submitted to FTA within 60 days of receipt of the Final DBE Program Compliance Review Report.

## **B. Monitoring**

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

**Discussion:** RTD has a strong monitoring system to ensure compliance with 49 CFR Part 26, but the review team found some deficiencies were found. RTD has strong monitoring and enforcement procedures that are described in its Program Plan on page 9 and in Attachment 3 on page 20. The project managers the review team interviewed also described RTD's frequent site visit by inspectors and their careful review of submitted "E1" invoice reports from prime contractors and "E2" invoice reports from subcontractors.

RTD has performed in-depth DBE Program compliance reviews for every DBE participating in the Eagle Project. The review team examined the San Engineering, LLC and MEP Engineering, Inc. reports. The reports include a thorough review of the DBE certificates of the firms, their invoices and checks, site visits, change orders, and statements regarding equipment use. However, in both reports the included subcontract agreement did not include required clauses regarding non-discrimination, prompt payment, return of retainage, legal remedies, and termination for convenience. The fact that the monitoring reports did not highlight the missing required contract clauses raises questions about the sufficiency of RTD's monitoring efforts.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, RTD should develop procedures that ensure that review of required contract clauses are included in their monitoring plan and check list.

**RTD Response:** RTD accepts the corrective action and proposed schedule. As observed, RTD does have a very comprehensive and aggressive compliance monitoring and reporting program. RTD takes compliance monitoring very serious. On the front end of the compliance monitoring process, RTD checks every contract/subcontract to ensure that the mandatory contract provisions are contained therein or are contained by reference and that the subcontractor received the master contract. While the two reports reviewed only contained the actual subcontract agreement for the DBE firm, every subcontract on the Eagle P3 Project incorporates the mandatory contract provisions by reference and were verified by the compliance officer.

**FTA Response:** FTA agrees with RTD's response. To close this deficiency, RTD must submit to FTA a copy of their new DBE Program Plan that includes a monitoring plan and check list that requires RTD to check prime contracts and subcontracts for required contract clauses. These steps must be taken within 60 days of receipt of the Final DBE Program Compliance Review Report.

### **C. Reporting to DOT**

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

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

**Exhibit 6: Summary Table of Compliance Review Findings**

Item	Requirement of 49 CFR Part 26	Reference	Site Visit Finding	Description of Findings	Suggested Corrective Action	Response Days/Date
1	DBE Program Plan	26.21	Deficiency	RTD completed a Revised DBE Program Plan on February 28, 2012. The Program Plan has many elements required by 49 CFR Part 26, but there are some deficiencies in various subsections of the Program Plan, including an outdated DBELO reference, procedures for identifying financial institutions, evaluating overconcentration, and good faith efforts.  Additionally, the Region 8 RCRO encourages RTD to include a copy of the MOU with the UCP in their Program Plan	RTD must develop a new Program Plan that addresses the issues identified in this compliance review report.	Within 60 days of issuance of the final compliance review report
2	Policy Statement	26.23	Deficiency	RTD has included a Policy Statement signed by RTD General Manager/CEO Phillip Washington in its latest DBE Program Plan. RTD posts this statement on its website and in many of its facilities. RTD also disseminates the Policy Statement to outside stakeholders and will include it in future procurement and solicitation documents. The Policy Statement identifies Christina Tubb as the DBELO. Ms. Tubb no longer works for RTD. The Policy Statement will have to be updated to include the new DBELO once that person is selected. RTD should also describe in more detail how and where the Policy Statement will be distributed.	RTD must develop a new Policy Statement that identifies the agency's new DBELO and describes in more detail how and where the Policy Statement will be distributed.	Within 60 days of issuance of the final compliance review report
3	DBE Liaison Officer	26.25	Deficiency	The former DBELO, Christina Tubb, left RTD before the compliance review. RTD will need to select and designate a new DBELO. James Cook has assumed the DBELO duties on an interim basis. The former DBELO, Christina Tubb, appears to have had direct access to RTD's CEO, Philip Washington regarding DBE matters. The same direct access should be granted to the new DBELO.	RTD should formally designate the agency's DBELO. The Program Plan and Policy Statement should accurately identify the individual whose responsibility it is to implement the DBE program as the DBELO.	Within 60 days of issuance of the final compliance review report
4	Financial Institutions	26.27	Advisory Comment	RTD has identified two women or minority owned financial institutions in the Denver area: the Solano National Bank and the Native American Bank. RTD should continue to scan sources such as the Federal Reserve Bank's Minority-Owned Financial Institutions list for additional women or minority owned financial institutions. RTD should elaborate in its Program Plan how it will perform this scan and with what frequency. RTD should also formulate a plan to encourage use of these institutions.	RTD should expand the Financial Institutions section of their DBE Program Plan to include information how and how often RTD will identify relevant financial institutions and how they will promote their use.	Not applicable
5	DBE Directory	26.31	No Deficiency	During this DBE Compliance Review, no deficiency was found within the DBE Directory section of the DBE Program Plan. The Colorado UCP (CO UCP) DBE directory is maintained by the Colorado Department of Transportation (CDOT). RTD's Program Plan (page 19) and website have links to the DBE Directory.	Not applicable	Not applicable

6	Overconcentration	26.33	Deficiency	The Program Plan states on page 8 that, "RTD has not identified that overconcentration exists in the types of work that DBEs perform." However, RTD should describe how they evaluate overconcentration and how frequently they will perform such evaluations. They should also identify steps they would take if overconcentration were ever observed.	RTD must enhance the Overconcentration section of the Program Plan. The Program Plan should describe overconcentration identification procedures, how frequently RTD will investigate this issue, and what actions RTD would take if an overconcentration is identified.	Within 60 days of issuance of the final compliance review report
7	Business Development Programs	26.35	Advisory Comment	Information about business development programs is provided on online calendars on RTD and DTP's websites. However, RTD should describe in greater detail DBE business development efforts they provide or recommend in their Program Plan (page 9). It would be particularly useful to DBEs to help them identify business development programs offered by other organizations and entities in the Denver region. RTD should provide formal names of the programs, web links to more information, typical meeting times, and contact person(s) in the Program Plan and on their website.	RTD should describe in greater detail DBE business development efforts they provide or recommend in their Program Plan and websites.	Not applicable
8	Fostering Small Business Participation	26.39	Advisory Comment	The Fostering Small Business Participation section in the Program Plan is not comprehensive enough. Detailed information about the certification mechanism, program oversight, and reporting mechanism are needed. The Region 8 RCRO was reviewing the Plan at the time of the compliance review.	RTD should wait for their RCRO to complete the review of the Small Business Participation plan. Once the review is complete, RTD should work with their RCRO to enhance the plan as needed.	Not applicable
9	Determining/Meeting Goals					
	A) Calculation	26.45	Deficiency	<p>Three deficiencies were identified with regard to the calculation of the overall goal:</p> <p>One, the step one process does not document how the market area was determined.</p> <p>Two, the step-two goal is calculated in a multistep process that is not clearly explained.</p> <p>Three, the Regional Civil Rights Officer for Region 8 has recommended RTD not include major projects such as the Eagle Project when setting their triennial goal. The RCRO recommended that major projects should have standalone goals.</p>	RTD should develop a new DBE participation goal and document and explain their methodology thoroughly. RTD should use FTA's guidance and exclude major projects such as the Eagle Project for the triennial goal development process.	Within 60 days of issuance of the final compliance review report

	B) Public Participation and Outreach	26.45	Advisory Comment	RTD describes its public participation methodology on page 11 of their Program Plan. Their presented plan complies with 49 CFR 26.45. RTD is encouraged to continue to involve outside organizations in its DBE goal setting process. For example, the Hispanic Contractors of Colorado and the Associated General Contractors of Colorado were not aware that RTD solicits stakeholder input in determining its triennial DBE participation goals.	RTD is encouraged to continue to involve outside organizations in its DBE goal setting process.	Not applicable
	C) Goal Attainment		Deficiency	RTD's four most recent Uniform Reports obtained by the compliance review team (fiscal years 2010 and 2011) indicate that RTD has not met its overall DBE participation goals. RTD established a 7.3 percent DBE goal for fiscal years 2011 through 2013 during its latest triennial review. During FY 2011, RTD achieved 4.25 percent total DBE attainment, including 3.35 percent race neutral and 0.9 percent race conscious. This attainment falls below the 7.3 percent total, 4.26 percent race neutral, and 3.04 percent race conscious annual goals.	RTD must conduct a shortfall analysis to demonstrate that it has operated in good faith. This analysis must include the reasons for the difference between the overall goal and your awards and commitments in that fiscal year and establish specific steps and milestones to correct the problems identified.	Within 60 days of issuance of the final compliance review report
	D) Transit Vehicle Manufacturers (TVM)	26.49	Deficiency	<p>The Program Plan states RTD will require transit vehicle manufacturers to certify they have complied with DBE Program requirements (page 12). For completeness the Program Plan should also state RTD will obtain FTA's list of certified transit vehicle manufacturers. Both the certificate and the list should be current at the time the purchase contract is executed.</p> <p>The review team examined two transit vehicle purchase contracts. In the first contract, which involved RTD's procurement of two Design Line buses, the transit agency had a signed TVM certificate and had obtained a timely FTA list of certified transit vehicle manufacturers. In the second contract, the TVM certificate for the 6 MCI Coach vehicles obtained through a piggy back arrangement with Yolo County, CA was not signed. However, RTD did have an FTA list of certified transit vehicle manufacturers that was current at the time of the procurement.</p>	RTD should update its Program Plan to state that RTD will obtain FTA's list of certified transit vehicle manufacturers and a signed TVM Certificate as verification of a TVM being authorized to bid or propose on FTA-assisted transit vehicle procurement. RTD should obtain a signed copy of the TVM certificate for the MCI contract and all other contracts that do not have a signed TVM certificate, if any.	Within 60 days of issuance of the final compliance review report
	E) Race Neutral	26.51	No Deficiency	RTD's race neutral goal was reasonably determined and is primarily based on the agency's race neutral achievement between FY2006 and FY2009.	Not applicable	Not applicable
	F) Race Conscious	26.51	No Deficiency	RTD's race conscious goal was reasonably determined and is primarily based on the agency's race conscious achievement between FY 2006 and FY 2009.	Not applicable	Not applicable

	G) Good Faith Efforts	26.53	Deficiency	RTD's guidance to contractors regarding how to perform a good faith effort (GFE) is clearly described in the solicitation documents the review team examined. However, the GFE process described in the Program Plan does not describe the steps contractors should take to demonstrate a good faith effort (page 12)	RTD must provide instructions in both the Program Plan and in bid solicitation documents that outline the steps prime contractors can take to perform and document good faith efforts.	Within 60 days of issuance of the final compliance review report
	H) Protecting Against Termination for Convenience	26.53	Deficiency	Although RTD's Program Plan addresses protection against termination for convenience, the issue is not sufficiently described. The Program Plan does not mention that the prime contractor must give DBE subcontractors five days to respond to the prime contractor's notice and advise RTD and the prime contractor of the reasons, if any, why a subcontractor objects to the proposed termination of its subcontract.	The Program Plan's discussion of termination for convenience issues must describe in greater detail how RTD will ensure against termination for convenience.	Within 60 days of issuance of the final compliance review report
	I) Counting DBE Participation	26.55	Deficiency	RTD states on page 14 of its Program Plan that it will monitor DBE participation as provided in 49 CFR 26.55. RTD should use information from 49 CFR 26.55 and describe how it counts DBE participation in narrative format. This information was also not observed in the solicitation documents the review team examined.	RTD must include basic, but expanded language on counting DBE participation, extracted from parts of the rule, in 26.55 in its Program Plan and solicitation documents.	Within 60 days of issuance of the final compliance review report
	J) Quotas	26.43	No Deficiency	RTD does not use quotas and states as much on page 11 of its Program Plan.	Not applicable	Not applicable
10	Required Contract Provisions					
	A) Non-discrimination	26.13	Deficiency	The review team examined a number of subcontracts that did not include a non-discrimination clause. For example, the subcontract agreement between Tower One Construction and L.O.S.T. Construction does not have a non-discrimination clause. Additionally, the subcontract agreements for San Engineering and MEP Engineering included in RTD's "DBE Compliance Review Reports" for the Eagle Project did not include non-discrimination clauses. In fact, the San Engineering and MEP Engineering subcontract agreements did not include any of the required contract clauses (prompt payment, return of retainage, legal remedies, and termination for convenience.)	RTD should include the latest non-discrimination clause language in all its solicitation and ensure the clause is included in all contract documents, including subcontract agreements.	Within 60 days of issuance of the final compliance review report
	B) Prompt Payment and Return of Retainage	26.29	Deficiency	Prompt payment and return of retainage clauses are included in RTD's standard contract template (i.e. Appendix A). The clauses are also included in all but two of the prime and subcontract agreements the review team examined. The subcontracts that do not include the clauses are the Eagle Project subcontract agreements for San Engineering and MEP Engineering.	RTD must develop and implement a mechanism that ensures that a prompt payment and return of retainage clauses flow down to subcontractor contract documents.	Within 60 days of issuance of the final compliance review report

	C) Legal Remedies	26.37	Deficiency	Program Plan: Legal remedies section is not comprehensive (Attachment 3 on page 20). Additionally, the RTD's standard contract template (i.e. "Attachment A") does not include a legal remedies section.	RTD should revise its Program Plan to describe in detail legal remedies available to the agency in the event of contractor noncompliance with the DBE program. These legal remedies should be included in RTD's standard contract template and in all printed and signed contracts. RTD should also develop procedures that ensure that these clauses are also included in subcontractor agreements.	Within 60 days of issuance of the final compliance review report
11	Certification Standards	26.67	Advisory Comment	RTD is not a certifying agency. The Colorado Department of Transportation (CDOT) and the City and County of Denver (through the Division of Small Business Opportunity, or DBSO) certify DBEs in Colorado. However, RTD could include background information, such as a description of DBE qualifications, along with the contact information presented on page 15 of the Program Plan.	Not applicable	Not applicable
12	Certification Procedures	26.83	No Deficiency	RTD is not a certifying agency. The Colorado Department of Transportation (CDOT) and the City and County of Denver (through the Division of Small Business Opportunity, or DBSO) certify DBEs in Colorado.	Not applicable	Not applicable
13	Record Keeping and Enforcements					
	A) Bidders List	26.11	Deficiency	RTD maintains a bidders list. The Program Plan states on page 5 that the bidders list will contain each of the necessary elements contained within 49 CFR 26.11, including the firm name, address, DBE or non-DBE status, age, and annual receipts. However, firm DBE status, age, and annual receipts information has not been collected by RTD historically. The agency plans to implement a technical platform by May 2012 that will allow them to capture this information and maintain a compliant bidders list.	RTD must collect the additional information required in order for the bidders list to be compliant with 49 CFR 26.11.	Within 60 days of issuance of the final compliance review report

	B) Monitoring	26.37/26.55	Deficiency	<p>RTD has a strong monitoring system to ensure compliance with 49 CFR Part 26, but the review team found some deficiencies. RTD has strong monitoring and enforcement procedures that are described in its Program Plan on page 9 and in Attachment 3 on page 20.</p> <p>RTD has performed in-depth DBE Program compliance reviews for every DBE participating in the Eagle Project. The review team reviewed the San Engineering, LLC and MEP Engineering, Inc. reports. The reports include a thorough review of the DBE certificates of the firms, their invoices and checks, site visits, change orders, and statements regarding equipment use. However, in both reports the included subcontract agreement did not include required clauses regarding non-discrimination, prompt payment, return of retainage, legal remedies, and termination for convenience. The fact that the monitoring reports did not highlight the missing required contract clauses raises questions about the sufficiency of RTD's monitoring efforts.</p>	RTD should develop procedures that ensure that review of required contract clauses are included in their monitoring plan and check list.	Within 60 days of issuance of the final compliance review report
	C) Reporting to DOT	26.11	No Deficiency	RTD's accomplishment reports, including the ARRA reports, appear to have been developed and submitted in a timely and accurate manner	Not applicable	Not applicable