

COMPLIANCE REVIEW REPORT
OF THE
Tri-County Metropolitan District of Oregon
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

Final Report

November 2011

**Prepared for the
Federal Transit Administration
Office of Civil Rights**

by

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Section 1 – General Information

Grant Recipient: Tri-County Metropolitan District of Oregon
4012 Southeast 17th Avenue

City/State: Portland, OR 97202

Grantee Number: 1728

Executive Official: Neil McFarlane

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Site Visit Dates: March 8 - 10, 2011

Compliance Review Team
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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 subrecipients 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 Tri-County Metropolitan Transportation District of Oregon (TriMet) 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 TriMet'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 subrecipients to determine whether they are honoring their commitment, as represented by certification to FTA, to comply with their responsibilities under 49 CFR Part 26. In keeping with its regulations and guidelines, FTA has determined that a compliance review of the Tri-County Metropolitan Transportation District of Oregon's (TriMet) Disadvantaged Business Enterprise (DBE) program is necessary.

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

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

OBJECTIVES

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

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

The objectives of this compliance review are to:

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

Section 4 – Background Information

The Tri-County Metropolitan Transportation District of Oregon (TriMet) was created in 1969 by Oregon legislature to provide mass transportation in Multnomah, Washington, and Clackamas counties. TriMet provides bus, commuter and light rail, streetcar, and paratransit service throughout most of the Portland metropolitan area.

TriMet's service area encompasses 570 square miles and serves the 23rd largest metropolitan area in the country. It has an average of 1,200 commuter rail, 117,000 light rail, and 197,000 bus boardings each weekday. The agency's light rail line, (MAX), operates its trains on 52 miles of track through 85 stations. It was boarded 38.4 million times in 2010. The agency's commuter rail line, WES, operates on 14.7 miles of track and, in 2010, was boarded almost 306,000 times.

The bus fleet is comprised of almost 650 buses for fixed-route service. TriMet operates a network of 79 bus routes with 7,050 bus stops. In 2010, the bus was boarded by residents and visitors 60.6 million times. There are 252 paratransit vehicles and 15 sedans that serve the senior citizens over 65 years old and people with disabilities.

Through over \$53 million in federal funding from the American Recovery and Reinvestment Act (ARRA), TriMet completed a number of projects including repairs, improvements, and construction at various stations and transit locations throughout Portland. Past projects include brick repair work at bus stops along Yamhill and Morrison Streets, street and bus stop repairs in downtown Portland, improvements at Gresham Central Transit Center, improvements to the bike and pedestrian pathway along I-205, and the replacement of the storm drain at Tigard Transit Center and the underground storage tank at the Center Street bus facility.

TriMet is currently involved with the Portland Streetcar Loop project and the Columbia River Crossing projects. The Portland Streetcar Loop project is a 3.3 mile double track extension of the existing Portland Streetcar Loop, which will add 28 new streetcar stops to the existing line. TriMet is the recipient of federal grant funds for the Portland Streetcar Loop project and passes those funds to the City of Portland which is the subrecipient. The project is expected to open in September 2012. The Columbia River Crossing project is a five mile expansion project which will extend the light rail line to Vancouver, Washington, as well as replace the I-5 bridge and make improvements to five interchanges and the pedestrian/bike path. The Washington State Department of Transportation is the lead agency for the Columbia River Crossing project. Under an intergovernmental agreement, TriMet is reimbursed for the technical support provided. Currently the project is slated to be complete in 2018.

TriMet has applied for a Full Funding Grant Agreement for the Portland-Milwaukie Light Rail project. Construction activities are underway through authority granted under a Letter of No Prejudice. This project is a 7.3 mile light rail line that will connect Portland State University in the downtown area to Southeastern Portland, Milwaukie, and North Clackamas County. Service is scheduled to start in 2015.

Section 5 – Scope and Methodology

Scope

Implementation of the following twelve required DBE program components specified by the 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 a recipient's DOT-assisted contracts [49 CFR 26.43 – 26.53].
9. All contracts must include a non-discrimination clause, 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 intact 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 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 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 TriMet by FTA's Office of Civil Rights. The agenda letter notified TriMet of the planned site visit, requested preliminary documents, and informed TriMet of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed TriMet 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, TriMet staff, and the review team.

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

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

Following the site visit, a draft report was compiled. Responses to the draft report were incorporated into this final report.

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

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Section 6 – Issues and Recommendations

1. **DBE Program Plan**

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for a program plan.

TriMet reviews and updates, if necessary, its DBE program plan with every goal submission. The latest program plan was submitted with the 2011 – 2013 fiscal year goal methodology. The program plan outlined all the components of the DBE regulations and how they would be implemented by TriMet. TriMet will continue to review their program plan for changes on an annual basis.

FTA Comment: TriMet’s current program plan was not noted as deficient in this review. However, in order to address some of the other areas of deficiencies, FTA has directed TriMet in other sections of this report to incorporate additional procedures into an update of their program plan.

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 with the requirements for a policy statement.

The DBE program plan included a signed policy statement from the General Manager. The policy statement is updated and signed annually by the General Manager. TriMet disseminates the policy to all components of the organization. They also distribute the policy to DBE and non-DBE business communities that perform work for TriMet on U.S. DOT-assisted contracts.

3. **DBE Liaison Officer**

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for the DBE Liaison Officer (DBELO).

The program plan named Mr. Bruce M. Watts as the DBELO of record. Mr. Watts' responsibilities are also listed in the program plan which states that he has direct and independent access to the TriMet General Manager. The review team examined a copy of the organizational chart that identified Mr. Watts as Senior Director, Diversity & Transit Equity with a reporting relationship directly to the General Manager. The program plan also outlines responsibilities for contract administration, project management staff, and other support staff. The Director of Procurement & Contracts has responsibility for procurement related functions in relation to ensuring DBE provisions are included in solicitations. This position also participates in the overall agency goal-setting process and has reporting responsibilities.

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, no deficiencies were found with the requirements for financial institutions.

The program plan outlines that TriMet will investigate services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community. TriMet identified the Oregon Association of Minority Entrepreneurs Credit Corporation (OAMECC) as a DBE financial institution. The plan states that TriMet makes reasonable efforts to use OAMECC and encourage prime contractors participating on U.S. DOT contracts to also use these types of institutions. The DBELO informed the review team that they are continuously searching for DBE financial institutions.

5. DBE Directory

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

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

The State of Oregon's Office of Minority, Women and Emerging Small Business (OMWESB) of the Department of Consumer and Business Services maintains the main directory. The directory contains all the requirements of part 26.31, to include the type(s) of work that firms have been certified to perform as a DBE.

TriMet also maintains an in-house directory that contains additional information such as the company's philosophy, core values, previous projects and other company background information. The DBELO advised the review team that DBEs can update their profile directly online, which basically serves as a resume to prime contractors. OMWESB and

TriMet directory information is included in procurement solicitations, with the in-house directory serving as a supplement to the UCP directory.

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 with the requirement for overconcentration. However, an advisory comment was made regarding overconcentration analysis.

TriMet indicated in their program plan that no issues of overconcentration had been identified in any of the types of work that are the subject of its procurements. The potential for overconcentration is a standard component of TriMet's analysis of the availability of minority contractors within the relevant trade groups and within the relevant market area.

The DBELO indicated that overconcentration is reviewed annually during the goal setting process by looking at "gaps" in DBE participation. No documentation of the overconcentration analysis was provided to the review team. TriMet was advised to maintain documentation of their overconcentration analysis.

FTA Comment: As part of documentation of TriMet's efforts in this regard, by January 20, 2012, provide FTA's Office of Civil Rights with the most recent overconcentration analysis performed.

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 Business Development Programs (BDP).

The program plan describes a DBE Supportive Services Program that is to increase the number of DBE firms participating in construction project. The DBELO advised the review team that the Supportive Services Program was not active at the time.

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.

TriMet provided FTA goal methodologies for fiscal years 2008, 2009, and 2010 of 14.56%, 11.15%, and 5.81%, respectively. The USDOT changed the goal methodology submissions from an annual to a triennial cycle in 2010. Based on the current schedule determined by FTA, TriMet's goal submission for Group A was due by August 1, 2010 for the three-year period covering FYs 2011 – 2013. TriMet provided the review team their three-year FTA goal submission of 6.77% for fiscal years 2011 – 2013.

TriMet's goal setting process is a collaborative effort between the Diversity Office and Procurement Department. The Diversity Office performs a breakout of the applicable scopes of work for the goal fiscal years and forwards this information to the Procurement Department for preparation of the goal methodology.

TriMet's goal submissions have historically been submitted in September rather than the 1st of August. Their program plan states they will submit the overall goal by September 1st of each year. The Procurement representative, Jim Fronk, advised the review team the late submissions are largely because TriMet's budget cycle does not synchronize with the Federal fiscal year. The review team discussed the budget cycle with TriMet's Finance Administrator, Allison Langton. Ms. Langton discussed the budget approval process with the board of directors. She provides the board a proposed budget by April 7th of each fiscal year, which is approved at the June board of directors meeting. The review team asked if Ms. Langton could provide the Procurement Department the proposed budget information so that the goal setting process could commence by April 15th. It was resolved that the Finance Administrator would provide the Procurement Director with the appropriate budget information by April 15th of each budget cycle.

Step 1: Determining the Base Figure

TriMet's goal methodology for fiscal years 2011 – 2013 was analyzed by the review team. The applicable NAICS codes were listed for the forecasted projects during the next three fiscal years. Contract opportunities were separated into three categories: Federal Capital & Rail Fund, Federal Operating Fund, and Preventive Maintenance. The availability of DBE and non-DBE firms was categorized for the numerator and denominator, respectively. The Oregon UCP directory, from the Oregon Office of Minority, Women and Emerging Small Business (OMWESB), was used as the numerator for ready, willing, and able DBE firms to provide the services identified. The Oregon Employment Department in its Oregon Labor Market information System (OLMIS) was utilized for the denominator. Both sources provide for analysis of labor concentration in specific business categories as designated by NAICS code. TriMet's analysis of the above factors resulted in a 6.77% base figure.

Step 2: Adjusting the Base Figure

TriMet noted in the past several fiscal year methodologies that no Step 2 adjustment was made. They noted that previous Step 2 adjustments were based on an outdated (1996) disparity study. TriMet stated they could make a Step 2 adjustment in the future pending major contracts closeouts in March 2011. This statement was based on TriMet's incorrect interpretation of past participation from semi-annual reports.

49 CFR Part 26.45(d) states, “Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.” The absence of any Step 2 adjustment in recent goal submissions has been a concern of FTA’s Region X Civil Rights Officer. The review team asked the procurement representative about the rationale for not including any Step 2 adjustment in recent submissions. Although a Step 2 is not required, it is usually based on a recipient’s DBE past participation, quite frequently recipients do determine that past participation is examined and determined to be relevant for a Step 2 adjustment.

The procurement representative was attempting to use the information from Lines 12-14 of the semiannual reporting forms (payments on contracts completed) as a measure of past participation. The review team advised that past participation should be measured from the upper portion of the semi-annual form, contract awards and commitments. The past participation for fiscal years 2007, 2008, 2009 and 2010 were 13.24%, 7.62%, 14.40%, and 19.68% respectively. The median number of 13.82%, when averaged with the base figure, 6.77%, could have resulted in an adjusted overall goal of 10.29%. The procurement representative will examine past participation to determine if a Step 2 adjustment for similar or same contracting opportunities is warranted for the previously submitted overall 2011 – 2013 goal.

Corrective Action and Schedule: Within 14 days of receipt of the draft report, submit to the Region X Civil Rights Officer a plan to document the examination of all of evidence available (including past participation) to determine what adjustment, if any, is needed to the base figure in order to arrive at TriMet’s overall goal. Additionally, provide a plan to amend the goal methodology if applicable.

TriMet Response: Utilizing the suggested methodology for a step 2 adjustment, TriMet submitted a revised goal for FFY 2011-2013 to Region 10. Region 10 approved that revised goal in March of this year. The revised goal has also been updated within the TEAM system. (March 15, 2011 letter was attached).

FTA Response: This finding is now closed.

B) Public Participation

Basic Requirement: (49 CFR Part 26.45) In establishing an overall goal, the recipient must provide for public participation through consultation with minority, women and contractor groups regarding efforts to establish a level playing field for the participation of DBEs. A published notice announcing the overall goal must be available for 14 days. The public must be notified that the recipient is accepting comments on the goal for 45 days following the date of the notice.

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

The TriMet DBE program plan indicated that a notice of the proposed overall goal would be published by August 19th of each year of the overall goal. The listed media in the

program plan are: The Oregonian, Daily Journal of Commerce, El Hispanic news, Skanner Newspaper, The Portland Observer, and The Asian Reporter. The notice is also added to TriMet's website.

The review team advised TriMet of FTA's dear colleague letter encouraging recipients to advertise their proposed goal by June 15th of each fiscal in order to allow adequate time for the 45-day comment period prior to the August 1st submission deadline. As noted in the section above, TriMet's budget cycle has contributed to late advertising date in the past. Due to the remedied goal setting methodology commencement date of no later than April 15th, for future notices; TriMet should be able to advertise by June 15th.

The review team inquired about the consultative process with minority, women and general contracting groups and/or local community organizations. The DBELO mentioned that TriMet had not engaged in the consultative process and would incorporate this requirement in future goal setting procedures.

Corrective Action and Schedule: Within 14 days of receipt of the draft report, submit to the Region X Civil Rights Officer a plan to consult with contractor groups and community organization prior to advertising the overall goal and to advertise goals by June 15th for each submission year.

TriMet Response: In response to the audit findings and CFR 49 part 26, the public participation requirement procedures that the agency will utilize to announce our proposed overall DBE goal, will now include presentations at our local minority contractors groups such as the National Association of Minority Contractors and the Oregon association of Minority Entrepreneurs. These actions will be in addition to the 45 day published notice announcing our proposed overall goal.

FTA Response: By February 28, 2012, provide to the FTA Office of Civil Rights a revised DBE program plan that includes procedures to reflect incorporation of consultation with the groups noted above in the overall goal-setting process. Included in this procedure must also be information on how this constitutes a consultative process, beyond a presentation, and how general contractor groups and community organizations will be incorporated. This deficiency will be closed upon FTA's review and acceptance of this information.

C) Transit Vehicle Manufacturer (TVM)

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

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

A copy of TriMet latest transit vehicle procurement was requested during the on-site review. A contract with New Flyer of America for 40-foot buses was provided to the review team. The TVM certification referencing the requirement of 49 CFR Part 26.67 was included in the contract. The review team advised TriMet to include the review of FTA's approved TVM list on their website as part of their process for TVM verification

of DBE compliance and to collect the FTA approval letter provided to the TVM as part of this process.

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.

Upon review of solicitation and contract information, it appears that the current language and procedures used in scoring and evaluating proposals constitute race conscious approaches rather than race neutral means to achieve DBE participation. The TriMet records reviewed for the DBE compliance review reflected the following:

TriMet's goal methodology states that the maximum feasible portion of the overall goal will be met by using race-neutral methods. This portion is determined by the DBELO and Director of Procurement analyzing and projecting the maximum feasible portion of the goal that can be achieved by using race-neutral methods.

The Ninth Circuit Court of Appeals decision prohibited race conscious DBE programs in its jurisdiction absent evidence from a disparity study. TriMet noted in its goal methodology that, in prior years, the base figure for DBE availability was derived from baseline data from the 1996 Oregon Regional Consortium Disparity Study. This study was conducted by local governments in the Portland metropolitan area. TriMet stated they reviewed local disparity studies performed in Oregon in the last four years and a Port of Portland disparity study final report conducted in 2007. The studies did not support TriMet's use of race conscious methods to meet their overall goal, therefore, TriMet proposed to meet their overall goal through race neutral measures.

The review team analyzed contract number RH050506LE, Construction Management/General Contractor (CM/GC) Services for the Portland Mall Segment of the South Corridor Light Rail Extension project issued in March 2005. The project had a 16% DBE participation contract goal. The CM/GC procurement method chosen by TriMet allowed for DBE Narrative (5 points) and DBE Utilization (5 points) to be incorporated as a weighted factor in the evaluation criteria for selection. DBE and Workforce utilization consisted of a combined 25 points out of 150 total points. This was the procurement and DBE evaluation process prior to TriMet's institution of a race neutral program.

The review team analyzed recent procurements to compare current evaluation criteria to those used when TriMet operated race conscious methods of obtaining DBE participation. The procurements reviewed included: Contract number RH100544JB, Portland-Milwaukie Light Rail Project Final Design Services from May 2010; and RFP number RH110162JB, Portland-Milwaukie Light Rail Project Construction Manager/General Contractor Services East Segment from August 2010.

Portland-Milwaukie Light Rail Project Final Design Services

The Portland-Milwaukie Light Rail Project Final Design Services RFP from May 2010 included a Work Plan and Management Contracting Plan worth 75 points out of a total of 200 possible evaluation points. The management/contracting plan required the proposer to incorporate and address: diversity of offeror's workforce, subcontractor utilization, and project subcontracting plan in narrative form. Even though TriMet has a race neutral program, this section's language included: "DBE Commitment: Proposers are required to state what DBE participation percentage they will achieve on this project for Final Design activities. On past TriMet projects, successful contractors have generally achieved between 16% - 22% DBE participation based on the total value of design work. This commitment will be added to the contract between TriMet and the successful proposer as part of the DBE Form 2 in Appendix F."

The Subcontracting Utilization Plan read, "The offeror shall provide a narrative description of its experiences in encouraging participation on the part of DBEs as contractors, consultants, or suppliers on previous projects. Discuss any innovative or particularly successful measures that the Offeror has undertaken. Include a list of those certified DBE firms with which it has had a contractual relationship during the last 24 months."

The Project Subcontracting Plan section stated, "The offeror shall provide a detailed outreach program or plan for obtaining utilization of DBE firms on this project. Include in the plan documentation of the results achieved by Offeror's past DBE outreach efforts, a detailed schedule of events, and those steps that will or have been taken to support DBE participation."

The Utilization Commitments section states, "During negotiations with the selected contractor, TriMet and the contractor will agree on a firm commitment for the contractor's DBE utilization for the contract. Once committed, TriMet will monitor ongoing utilization to ensure that the commitment is being achieved."

Lastly, TriMet includes a *Resources Available* section in the RFP, which encourages the use of the OMWESB directory and TriMet's local DBE directory.

Portland-Milwaukie Light Rail Project Construction Manager/General Contractor Services East Segment

The Portland-Milwaukie Light Rail Project RFP from August 2010 had similar language as in the above procurement for Subcontractor Utilization, Project Subcontracting Plan, and Utilization Comments sections. However, the proposed scoring actually listed DBE Program as being worth 20 points out of a total 240 possible points. This section included, "The proposer's plan for Workforce utilization and utilization of DBE firms to complete this project is part of the evaluation. The information provided by the selected proposer, as accepted by TriMet is contractual, and may not be altered without the express approval of TriMet."

The anticipated scope of pre-construction services includes in task 3, DBE Contracting Plan. The pre-construction task says to, "Work with TriMet to finalize and submit a contracting plan that maximizes DBE opportunities, in accordance with the DBE program identified in Appendix F. Develop final proposed management plan to oversee DBE

program implementation and to ensure DBE program consideration during change management activities.”

Pre-construction task 13, Construction Contracting Plan, requires proposer to “work with TriMet to finalize and submit a contracting plan for accomplishment of all construction. Recommend packaging of the work to facilitate competitive bidding and award of trade contracts. Recommend which work, if any, should be procured through best value selection, in lieu of low bid. Identify work which the general contractor proposes to self perform, and how competitive pricing will be accomplished for that work. Coordinate this product with DBE utilization products and objectives and local resources use.”

TriMet also lists Construction tasks in the Request for Proposal. Task 10, DBE and Workforce Training Plan Implementation, is included. This task states to, “Implement the DBE and Workforce Training programs, in accordance with the plans developed during the pre-construction phase. Identify a Coordinator to monitor and implement the programs. Provide monthly status reports and attend monthly meetings to confirm program compliance.” The review team met with one the coordinators during the on-site review. Ms. Faye Burch, President of FM Burch & Associates, stated that she has worked on several TriMet projects as a contractor team coordinator in charge of the DBE and workforce diversity program.

Corrective Action and Schedule: Within 14 days of receipt of the draft report, submit to the Region X Civil Rights Officer a plan to achieve DBE participation through FTA approved race neutral means in all procurement and contracting activities, unless the use of race conscious methods have been supported through a disparity study and approved by FTA and USDOT.

TriMet Response: On April 29, 2011, TriMet sent an email to Benjamin Sumpter of Milligan & Company explaining that it believes that the language included in TriMet’s Requests for Proposal (and cited in Milligan & Company’s compliance Review Report) is race neutral, and does not constitute a prohibited race conscious measure under the Ninth Circuit Court of Appeals case of *Western States Paving Co. v. Washington State Department of Transportation, et. al.*, 407 F.3d 983 (2005). That email still accurately reflects TriMet’s position.

During the audit of TriMet’s DBE program conducted the week of March 7, the question was raised as to whether TriMet is complying with the race neutral requirements of Western States Paving Co. v. Washington State Department of Transportation, et. al., 407 F.3d 983 (2005). In the Western States case, the Ninth Circuit Court of Appeals held that, as applied, the Washington State DOT policy of using quotas in its low bid process to obtain a certain DBE subcontractor percentage on its construction contracts was unconstitutional, absent evidence of discrimination.

Unlike the Washington DOT at the time of Western States, TriMet does not set DBE quotas or mandates in its procurement process. TriMet procures most contracts for its large construction projects through the use of a Request for Proposal process. As part of this process, TriMet asks its proposers to provide certain information related to DBE, including a description of any DBE program it might have and the percentage of DBE

participation it expects to achieve on the project. By asking for this information, TriMet intends to encourage proposers to voluntarily implement a DBE program. However, failure to do so will not disqualify a proposer from contract award. Likewise, a commitment of very low or no DBE participation will not disqualify a proposer from award. This distinguishes TriMet's process from the quota system that the Court of Appeals found unacceptable in Western States.

For example, TriMet received four proposals in response to its procurement for construction of the East Segment of its Portland-Milwaukie Light Rail Project. The proposers listed their expected DBE participation percentage, which varied from 22 percent to 27 percent. The successful proposer for the contract turned out to be the firm that submitted lowest DBE percentage.

FTA Response: FTA appreciates the information conveyed in TriMet's response. However, the language in the citations of this report, call into question the race-neutral implementation of TriMet's program. If points for use of DBEs are used as evaluation criteria and those commitments become contractual in nature, TriMet will have difficulty demonstrating that they are implementing a race neutral program. Prior to the advertisement of the TriMet's next FTA-funded solicitation, provide an advance copy of the entire solicitation and internal evaluation criteria to FTA's Office of Civil Rights for review as well as verification that points are not assigned for DBE use. Additionally, by February 28, 2012, include a revision to the DBE program plan to address the above in order to ensure elimination of any race-conscious elements in TriMet's program, unless or until TriMet is authorized to utilize race conscious measures. This deficiency will be closed upon FTA's review and acceptance of this information.

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, deficiencies were found with the requirements for race conscious participation on overall and contract goals.

TriMet did not project meeting any portion of their fiscal years 2011 – 2013 overall goal through race conscious means. The program plan does not address race conscious participation. However reference is made to the discussion in the previous section, where it appears that TriMet is utilizing race conscious means of obtaining DBE goals. The corrective actions and schedules for closing this deficiency are noted in *Race Neutral* section of the report.

F) Good Faith Efforts

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

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

TriMet has a race neutral program and GFEs are not a requirement in their current contracts and procurements. However reference is made to the discussion in the previous section, where it appears that TriMet is utilizing race conscious means of obtaining DBE goals. The program plan outlines requirements for GFE, when applicable. The Director of Procurement & Contracts, Jim Fronk, initially is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive. The administrative reconsideration for bids under \$100,000 is the Senior Director Diversity & Transit Equity, Bruce Watts. For bids over \$100,000, TriMet's General Manager or his designees will review reconsideration. The program plan also describes a process for GFE when a DBE is replaced on a contract.

FTA Comment: Because TriMet is only authorized to operate a race neutral program, references to good faith efforts should be eliminated from its DBE program plan unless and until it is authorized to use race conscious measures. This revision should be included in TriMet's revision to its DBE program plan (references in several areas of this report) which is due to be submitted to FTA's Office of Civil Rights by February 28, 2012.

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.

TriMet's program plan describes their process for counting participation from manufacturers at one hundred percent of the cost and regular dealers at sixty percent of the cost. Expenditures are only counted when the DBE is performing a commercially useful function and perform at least thirty percent of the total costs of its contract with its own work force. TriMet also requires the prime contractors to designate a DBE coordinator for their projects. This coordinator usually serves in the form as a subcontractor with monitoring responsibilities to ensure that DBEs are performing the work and commercially useful functions. More information about the DBE coordinator responsibilities is discussed in the monitoring section of this report. TriMet conducted a demonstration of the database software (Elations Reporting System) used to track DBE participation with the review team.

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 TriMet was found during the site visit. However reference is made to the discussion in the previous section, where it appears that TriMet is utilizing race conscious means of obtaining DBE goals.

9. Required Contract Provisions

A) Contract Assurance

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

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

The DBE program plan indicates that TriMet will ensure that the contract assurance clause is placed in every U.S. DOT-assisted contract and subcontract. The review team found the assurance clauses in the prime contracts (South Corridor Constructors and Stacy/Kiewit) reviewed; however, the clauses were not included in any subcontract agreements. The review team examined the subcontract agreement between Faison Construction (SC. No. 4361-2656) and South Corridor Constructors, executed in July 2008 for the I-205 LRT Extension project. Subcontract agreement SC No. 4361-2558 between O'Neill Electric and South Corridor Constructors, executed in July 2007, was reviewed. Another subcontract with O'Neill Electric and Tice Electric (Subcontract #3.3.929-3855), a first tier subcontractor to Stacy & Witbeck/Kiewit Pacific, executed in July 2007, was also examined.

Corrective Action and Schedule: Within 14 days of receipt of the draft report, submit to the Region X Civil Rights Officer a plan and schedule for ensuring that the appropriate assurances are included in all FTA funded contracts and subcontracts.

TriMet Response: All DOT-assisted TriMet contracts contain the Contract Assurance clause required by 49 CFR Part 26.13. Furthermore, all TriMet contracts contain a clause requiring the prime contractor to include the Contract Assurance clause in all subcontracts. However, the Compliance Review notes that in several instances, the prime contractor did not include this clause in its subcontracts. Therefore, TriMet understands that it must provide better oversight of its prime contractors in this regard. To do so, TriMet proposes to develop a contracting checklist which will be discussed with its prime contractor at the pre-construction meeting. This checklist will contain the requirement to include the Contract Assurance clause in all subcontracts. TriMet also proposes to assign a staff member to review subcontracts on DOT-assisted contracts to ensure compliance with this requirement.

FTA Response: By January 20, 2012, submit to the FTA Office of Civil Rights the referenced checklist and staff member duties. Additionally, incorporate this information into the revised DBE program plan, which is to be submitted by February 28, 2012. This deficiency will be closed upon FTA's review and acceptance of this information.

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 14 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 14 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

TriMet's DBE program requires the prime contractor to pay each subcontractor within 10 days of payment receipt from the owner. The prompt payment language in South Corridor's subcontracts with Faison Construction and O'Neill both had the 10-day prompt payment requirement. The review team analyzed financial documentation from TriMet, South Corridor, and Faison to determine if payments were being made in accordance to TriMet's 10-day prompt payment policy. The analysis concluded that South Corridor paid Faison between two and seven days, for an average of five days from receipt of payment from TriMet. The O'Neill second tier subcontract with Tice Electric also included the 10-day prompt payment language.

Return of Retainage

In June 2003, USDOT issued a Final Rule on DBE that contained new requirements for prompt return of retainage. According to the Final Rule, if an agency chooses to hold retainage from a prime contractor, they must have prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 14 days after payment to the prime contractor.

TriMet withholds 5% retainage on most construction activities. It is often reduced at 50% completion of the project. Their DBE program plan requires that primes return retainage to each subcontractor within 10 working days after the subcontractor's work is satisfactorily completed. The contractor must also submit to the Project Manager's office an affidavit certifying that payment was made to the DBE subcontractor, to be signed by both the prime and DBE. The affidavit must be submitted during the project any time a progress or final payment is made to a DBE, and when any retainage held is returned.

The review team interviewed representatives of DBE firms Faison Construction and O'Neill Electric. Their subcontract agreements were also reviewed for retainage information. Faison Construction and O'Neill Electric subcontracts with South Corridor included a 5% retainage requirement. The agreements stated the final payment would be due in accordance with the final payment as a whole and acceptance thereof by Owner. It further states that final payment will be due in accordance with the final payment provisions of the prime contract, which are incorporated by reference.

The O'Neill 2nd tier subcontract with Tice Electric indicated that program payments would be paid at 95% of all labor and in-place materials. The remaining 5% would be retained by the contractor until 14 days after the work was fully completed according to the contract, and delivered to (and accepted by) the Owner, Architect, or Contractor.

The two South Corridor subcontract agreements did not include a specified number of days for return of retainage, but did refer back to the prime contract requirements. The O'Neill 2nd tier contract specified 14 days for return of retainage, which is longer than the 10-day timeframe in TriMet's DBE program plan. The representative of DBE firm Faison Construction indicated during the interview with the review team that their retainage was held for over a year after they successfully completed their portion of work on the project.

Corrective Action and Schedule: Within 14 days of receipt of the draft report, submit to the Region X Civil Rights Officer a plan and schedule for ensuring prompt return of retainage for subcontractors' satisfactorily completed work.

TriMet Response: All DOT-assisted TriMet contracts contain a clause requiring the prime contractor to release retainage to its subcontractors within 10 days of the subcontractor's satisfactory completion of its work. However, the Compliance Review notes that in several instances the prime contractor did not include this language in its subcontracts, and in a least one instance did not release retainage to its subcontractor in a timely manner. Therefore, TriMet understands that it must provide better oversight of its prime contractors in this regard. To do so, TriMet has recently begun to utilize a contract monitoring system called Elations, which, among other things, tracks when payments to subcontractors are made, including final payment. Through this system, TriMet will monitor that the prime contractor complies with its obligations regarding release of retainage to its subcontractors. TriMet also proposes to include this item on the contracting checklist which will be discussed with the prime contractor at the pre-construction meeting.

FTA Response: By January 20, 2012, provide a written description to the FTA Office of Civil Rights detailing how TriMet will ensure that retention language is incorporated into subcontracts. Provide checklist elements to discuss with prime contractor at pre-construction meetings. Additionally, incorporate this information into the revised DBE program plan, which is to be submitted by February 28, 2012. This deficiency will be closed upon FTA review and acceptance of this information

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.

TriMet outlines in their DBE program plan that they will bring to the attention of the U.S. DOT any false, fraudulent, or dishonest conduct in connection with the program, so that

U.S. DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the U.S. DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in Part 26.109. TriMet will also consider similar action under its own legal authorities, including responsibility determinations in future contracts.

The I-205 Portland Mall LRT Extension project was let when TriMet had a race conscious program prior to the Ninth Circuit ruling and had a DBE contract goal of 16% participation. Appendix 4 Part 1 was included in the contract that outlined the DBE program elements. Proposers were encouraged to review the DBE regulations when preparing proposal. The appendix states, "Failure by the contractor to fulfill the DBE requirements is deemed a material breach of contract, which may result in the termination of the contracts, or such other remedy as TriMet deems appropriate, such a withholding payments or liquidated damages." The legal representatives interviewed during the review stated that contracts without DBE goals include a broader reference, as non-compliance with (overall) contract requirements can be a material breach of contract.

10. Certification Standards

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

Discussion: TriMet is not a certifying member in the Unified Certification Program; therefore, the area of Certification Standards did not apply.

11. Certification Procedures

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for certification procedures. However, an advisory comment was made.

TriMet states in their DBE program plan that while they retain responsibility for assuring certification of DBEs is performed consistent with 49 CFR 26 standards; the certification agency for the State of Oregon is the Office of Minority, Women and Emerging Small Businesses (OMWESB). The program plan describes a joint venture application certification process approval by TriMet. Since joint ventures are not to be DBE certified, TriMet was advised to clarify or remove statements made in this regard.

TriMet includes a statement in their Request for Proposals in the DBE *Resources Available* section to find DBEs in the OMWESB or TriMet local DBE directory. The RFP states, "Offerors may propose the participation of DBE firms that are not certified in

Oregon, but are otherwise certified as DBEs by another agency pursuant to 49 CFR Part 26.” The review team advised TriMet that DBEs must be certified by the Oregon UCP prior to the bid due date. DBEs always had to be certified by the recipient’s state UCP prior to counting their participation. The OMWESB will also be required to implement a formal Inter State Certification procedure by 2012.

Lastly, the review team received feedback on the certification process from the DBEs, prime contractors, and external organizations interviewed during the review. There was a stated belief among these groups that “front” companies owned by non-minority women had increased on DOT projects. The review team shared these concerns with TriMet for further exploration with the UCP.

FTA Comment: FTA conducted a separate review of the Oregon Unified Certification Program in September 2011. Because TriMet relies on certification determinations of the OMWESB, FTA expects TriMet to follow up with that agency when the report is issued to understand any outstanding findings, what impact they may have on TriMet’s DBE program, and any role that TriMet can take to provide resources or additional oversight.

12. Record Keeping and Enforcements

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

Discussion: During this DBE Compliance Review, deficiencies were found with the requirement for maintaining the bidders list. No deficiencies were found with monitoring and reporting.

Bidders List

TriMet DBE program plan appropriately describes what and how they will collect information for a bidders list. Prime contractors are required to return information concerning their contact information, DBE status, age of firm and annual gross receipts at the time of bid opening. They also define that the purpose of this requirement is to allow use of the bidder’s list approach to calculating overall goals. TriMet advised the review team that they are not collecting bidders list information as outlined in the program plan, however, will implement procedures to come into compliance with this part.

Monitoring

TriMet’s DBE Supplemental Required Contract Provision requires the contractor to designate a DBE Coordinator to administer the contractor’s DBE Program. The name of this individual is to be provided to TriMet Project Management staff at the pre-construction conference. The DBE Coordinator is responsible for implementation of the contractor’s DBE and workforce training programs in accordance with the plans developed during the pre-construction phase. The TriMet DBELO indicated that there were only a few firms that perform services as DBE Coordinators on TriMet projects. He is familiar with the Coordinators and mentioned that these firms understand the DBE

requirements and TriMet expectations for DBE compliance. The DBELO maintains that project monitoring responsibility still lies with TriMet and the Coordinators implement contractor's utilization plans.

In addition to these procedures listed in their program plan, TriMet also requires the contractor to submit monthly utilization forms and attend monthly meetings with the contractor's DBE Coordinator and TriMet staff to discuss DBE participation at the prime's location. To supplement monitoring by the DBE Coordinator and TriMet DBE Office, Contract Administration and Project Management staff will also alert the Diversity Office of any potential problems concerning DBE utilization during contract administration.

The contractor must enter into subcontracts with the DBEs identified in the contractor's Committed DBE Breakdown and Certification Form for the bid items and amounts specified therein. These agreements must be submitted for consent prior to the start of work under the subcontract.

TriMet requires prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of TriMet or US DOT. This reporting requirement also extends to any certified DBE subcontractor.

TriMet maintains a database tracking system (Elations Reporting System) to monitor and report actual payments to DBE firms for work committed to them at the time of contract award. TriMet's plan indicates they perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation

Reporting

TriMet submitted semi-annual reports for 2007, 2008, 2009 and 2010 fiscal years. The latter reports were completed using the Elations database system and appeared to be correct. The review team provided TriMet with technical assistance in use of the semi-annual report to determine past participation for possible step two adjustments in the goal setting process.

Corrective Action and Schedule: Within 14 days of receipt of the draft report, submit to the Region X Civil Rights Officer a plan and schedule for ensuring that a bidders list is collected and maintained.

TriMet Response: TriMet will start requiring the submission and will collect the following information via all formal quotes, bid and proposal submission forms starting January 1, 2012: Contact Information, DBE status, age of firm, and gross receipts. TriMet will collect gross receipts information according to the "bracket" or "survey" methodologies described in 49 CFR 26.11.

FTA Response: By January 20, 2012, provide to the FTA Office of Civil Rights a copy of the bidders list form, along with a description of the process of collection and how information will be used and stored. FTA understands that TriMet requires prime contractors to engage the services of project coordinators to monitor and implement certain aspects of the DBE program. FTA wants TriMet to be clear that the new requirement of 26.37 to provide a written certification of reviewing contracting records and monitoring work sites is completed by TriMet staff. This should avoid any appearance of a conflict by that function being performed by an agent of the contractor. Include clarifying information on the bidders list and the 26.37 certification in the revised DBE program plan, due to the FTA Office of Civil Rights by February 28, 2012. This deficiency will be closed upon FTA review and acceptance of this information.

13. January 2011 DBE Program Rulemaking

On January 28, 2011, USDOT issued a new “Final Rule” for its DBE program. Subject areas affected by the new provisions include, but are not limited to: DBE terminations; Personal Net Worth; interstate certification and other certification issues; accountability and DBE goal submission; DBE program oversight; and small business provisions.

With the notable exception of some of the certification-related provisions, the new rules became effective on February 28, 2011. That being the case, certain areas identified in this report will be affected by the changes. While none of the rule changes will result in a finding for the purposes of this review, FTA does hope to use the opportunity presented by the timing of the new rule to provide technical assistance and guidance as TriMet develops and implements any new policies and procedures required to ensure full compliance with the new provisions. Ultimately, FTA anticipates that any new or amended requirement will be incorporated into TriMet’s DBE program plan by the time the compliance review process is complete.

Section 7 – Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action	Response Date
1. Program Plan	26.21	ND		Provide revised DBE program plan based on deficiencies in other areas	February 28, 2012
2. Policy Statement	26.23	ND			
3. DBE Liaison Officer	26.25	ND			
4. Financial Institutions	26.27	ND			
5. DBE Directory	26.31	ND			
6. Overconcentration	26.33	AC	No documentation regarding OC analysis	Provide most recent analysis conducted	January 20, 2012
7. Business Development Programs	26.35	ND			
8. Determining / Meeting Goals					
A. Calculation	26.45	D	Late goal submissions	Submit plan to ensure that goals are submitted by August 1 st of the applicable year	Closed
B. Public Participation	26.45	D	No consultative process conducted	Submit additional information on consultative process and include procedures in revised DBE program plan	February 28, 2012
C. TVM	26.49	AC	Need to include review of FTA TVM approved list		
D. Race Neutral	26.51	D	RN program has elements of RC	Provide next solicitation for review	Prior to advertisement of next solicitation
E. Race Conscious	26.51	D	RN program has elements of RC	Provide revised DBE program Plan	February 28, 2012
F. Good Faith Efforts	26.53	ND		See corrective actions for Race Neutral	
G. Counting DBE Participation	26.55	ND		Provide revised DBE program plan	February 28, 2012
H. Quotas	26.43	ND			
9. Required Contract					

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action	Response Date
Provisions A. Contract Assurance	26.13	D	Nondiscrimination clauses not included in subcontracts	Submit referenced checklist and staff member duties.	January 20, 2012
B. Prompt Payment	26.29	D	Return of retainage language in subcontracts is incorrect Retainage returned to subcontractors later than 14 days	Submit revised DBE program plan Submit information on how retention language is incorporated in subcontracts. Provide checklist elements.	February 28, 2012 January 20, 2012
C. Legal Remedies	26.37	ND		Submit revised DBE program plan	February 28, 2012
10. Certification Standards	26.67	N/A			
11. Certification Procedures	26.83	A/C	Remove language in RFPs stating acceptance of DBE certifications outside the Oregon's UCP	Review Oregon UCP report	When issued
12. Record Keeping and Enforcements A) Bidders List	26.11	D	Not collected or maintained	Submit copy of the bidders list form, describe the process of collection, and how information will be used and stored.	January 20, 2012
B) Monitoring	26.37, 26.55	ND		Submit revised DBE program plan. Submit clarifying information on complying with certification portion of 26.37.	February 28, 2012 February 28, 2012
C) Reporting	26.11	ND			
13. January 2011 DBE Program Rulemaking	NA	NA			

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:				
Amber Ontiveros	FTA – Office of Civil Rights (via teleconference)	Equal Opportunity Specialist	202-366-5130	Amber.ontiveros@dot.gov
Monica McCallum	FTA – Region X (via teleconference)	Regional Civil Rights Officer	202-220-4462	Monica.mccallum@dot.gov
TriMet Members:				
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Beth deHamel	TriMet	Exec. Director, Finance & Administration	503-962-4804	Dehamelb@trimet.org
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		Communications		
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Alan Lehto	TriMet	Director, Project Planning	503-962-2136	Lehtoa@trimet.org
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Maxine Marshall	DMP Group	Principal	202-726-2630	Maxine.marshall@thedmpgroup.com
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Prime Contractor Representatives:				
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Bill Bruce	Stacy and Witbeck, Inc.	Vice President	503-231-5300	Bbruce@stacywitbeck.com
DBE Representatives:				
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Maurice Rahming	O'Neill Electric, Inc.	President	503-493-6045	Maurice@oneillelectricinc.com
Interested Parties:				
Faye Burch	FM Burch & Associates, Inc.	President	503-735-9455	Fmburchpr@aol.com
Tony Jones	Metropolitan Contractor Improvement Partnership	Executive Director	503-288-1211	Tony@mcip-pdx.org
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Benjamin Sumpter	Milligan & Co., LLC	Lead Reviewer	215-496-9100	Bsumpter@milligancpa.com
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