

COMPLIANCE REVIEW REPORT
OF THE
State of Utah Department of Transportation (UDOT)
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

Final Report

August 2010

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

by

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Table of Contents

Section 1 - General Information	2
Section 2 - Jurisdiction and Authorities	3
Section 3 – Purpose and Objectives.....	4
Section 4 – Background Information	6
Section 5 – Scope and Methodology	8
Section 6 – Issues and Recommendations	10
1. DBE Policy Statement.....	10
2. DBE Liaison Officer	10
3. Financial Institutions	11
4. DBE Directory.....	12
5. Overconcentration	12
6. Business Development Programs	13
7. Determining/Meeting Goals	13
8. Required Contract Provisions.....	19
9. Certification Standards	21
10. Certification Procedures	21
11. Record Keeping and Enforcements	22
12. Public Participation and Outreach.....	23
Section 7 – Summary of Findings.....	25
SECTION 8 - LIST OF ATTENDEES.....	27

SECTION 1 - GENERAL INFORMATION

Grant Recipient: Utah Department of Transportation
4501 South 2700 West

City/State: Salt Lake City, UT 84114-3600

Grantee Number: 1164

Executive Official: John Njord
Executive Director

On Site Liaison: Denice Graham
Civil Rights Manager
801-965-4695

B. Leone Gibson
UDOT Transit Project & Plans Director
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Site visit Dates: April 27-30, 2009

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., (15), October 1, 2008 and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs."

The Utah Unified Certification Program (UDOT) 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 UDOT'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 Utah Department of Transportation’s (UDOT) “Disadvantaged Business Program Plan” is necessary.

The primary purpose of the compliance review is to determine the extent to which Utah Department of Transportation (UDOT) has met its DBE program goals and objectives, as represented to FTA in its Disadvantaged Business Enterprise Program Plan. This compliance review is intended to be a fact-finding process to: (1) examine UDOT’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 UDOT 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 UDOT’s Disadvantaged Business Enterprise 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 UDOT’s Disadvantaged Business Enterprise Program Plan from a variety of sources – DBE program managers, other UDOT management personnel, DBEs, and prime contractors.

SECTION 4 – BACKGROUND INFORMATION

UDOT is responsible for over 6,000 miles of highways—14% of the state's total highway road system of 40,707 miles. This responsibility includes snow removal, signage, bridges, repairs, building, and maintenance as well as the Traffic Operations Center with live camera coverage for monitoring road conditions, accidents, and safety.

UDOT has offices throughout the state. The main office is the Calvin Rampton Building in Salt Lake City. This office houses general administration, community relations, port of entry administration, labs, and vehicle maintenance. UDOT also has four region offices and three district offices from Ogden to Cedar City. Personnel in each region or district office oversee administration, construction, and maintenance of all state roads, highways, and freeways within their areas.

The Utah Transportation Commission works in partnership with UDOT to provide a quality transportation system for all of Utah. The commission is comprised of seven members, each representing several counties in Utah with one at-large member. Their roles and responsibilities as defined in Utah Code 72-1-303, include:

- Annually determine priorities and funding levels of projects in the state transportation system based on prioritization of needs provided by the department.
- Determine additions and deletions to the state highway system.
- Hold public hearings and otherwise provide for public input in transportation matters.
- Make policies and rules under the Rulemaking Act, §63-46a, necessary to perform the Commission's duties.
- Approve establishment of tollways for new state highways or new capacity lanes under §72-6-188.
- Advise the department in state transportation systems policy.
- Review administrative rules made, amended or repealed by the department.
- Approve settlement agreements of condemnation cases.
- Annually review public transit plans. In addition, one commissioner must serve as a non-voting member of the Board of Trustees for the Utah Transit Authority.

Projects under construction include:

- Northern Utah-27 construction projects
- Wasatch Front-28 construction projects
- Southern Wasatch Front-8 construction projects
- Wasatch County & Uintah Basin- 3 construction projects
- Southern Utah-14 construction projects
- Interstates-5 construction projects on I-15, I-70, I-80, I-84, I-215

Public Transit

The Public Transit Team (PTT), with funding from the federal government, administers federal transportation programs that fund agencies providing transportation services to people living in Utah. This includes transportation programs for agencies serving rural communities, elderly people, and people with disabilities. It also includes van pool programs and programs assisting agencies that provide these transportation services. Money for these programs comes from the Federal Transit Administration (FTA), which is part of the United States Department of Transportation. The PTT administers FTA dollars on a competitive basis to assist local agencies in purchasing rolling stock (vans, buses, and related equipment).

- Online Letter of Intent (LOI) and Application
- Statewide Transit Coordination
- FTA Section 5303 & 5313 Planning
- FTA Section 5310 Paratransit
- FTA Section 5311 Rural
- FTA Section 5316 - Job Access and Reverse Commute (JARC)
- FTA Section 5317 - New Freedom
- Rural Transit Assistance Program (RTAP)
- Transit Special Studies
- Transit Program Compliance Forms
- Transit Library

Public transit services are locally operated throughout the state of Utah.

- Utah Transit Authority (UTA)
- Park City Transit
- Cedar Area Transit System
- SunTran (St. George Area)
- Cache Valley Transit District
- URSTA – State Transportation Association

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. A signed policy statement expressing a commitment to use DBEs in all aspects of contracting to the maximum extent feasible must be signed, dated and distributed [49 CFR 26.23].
2. 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].
3. Efforts made to use DBE financial institutions, by the recipient as well as prime contractors, if such institutions exist [49 CFR 26.27].
4. 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].
5. The recipient must determine if overconcentration exists and address this problem if necessary [49 CFR 26.33].
6. Assistance provided to DBEs through Business Development Programs to help them compete successfully outside of the DBE program [49 CFR 26.35].
7. 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].
8. 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].
9. 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].
10. 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].
11. 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].

12. 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].

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 UDOT by FTA's Office of Civil Rights. The agenda letter notified UDOT of the planned site visit, requested preliminary documents, and informed UDOT of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed UDOT 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 UDOT staff and the review team.

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

At the end of the review, an exit conference was held with UDOT 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 UDOT.

Following the site visit, draft and final reports were compiled.

SECTION 6 – ISSUES AND RECOMMENDATIONS

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 review, deficiencies were found with requirements for a policy statement. UDOT has a policy statement outlining the DBE program and responsibilities of the Civil Rights Manager and Resident Engineer. The policy statement is posted on UDOT's website on the Civil Rights page in Portable Document Format. Neither the policy statement in the DBE program plan nor on the website includes a signature from the Executive Director. The UDOT DBE Program Plan effective October 1, 2004 was submitted for the review. The policy statement in the DBE program contained the date October 1, 2004 in the heading and March 17, 2005 above the Executive Director's name. The policy statement on the website was not dated.

The DBE program plan indicated that the policy statement is a part of the DBE Special Provisions and is distributed to every potential contractor, subcontractor, supplier, or service provider that examines the specifications and bidding documents on DOT-assisted projects.

Corrective Action and Schedule: Within 60 days, UDOT must submit to Region VIII Civil Rights Officer evidence that UDOTs has a signed and dated policy statement.

Recipient Response: UDOT will update the DBE Policy Statement and submit a signed copy to the Region VIII Civil Rights Officer. Response projected completion date 7/31/09.

DOT Response: DOT partially concurs with recipient response. The Region VIII Civil Rights Officer has not received information. For finding to be closed, submit signed and dated DBE Policy Statement to Region VIII Civil Rights Officer by November 1, 2010.

DBE Liaison Officer

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

Discussion: During this DBE Compliance Review, deficiencies were found with the requirement for the DBE Liaison Officer. The DBE Program Plan states the DBE Liaison Officer is the Civil Rights Manager, who has direct, independent access to the Executive Director concerning DBE program matters. Denice Graham is identified as the DBE Liaison Officer for UDOT. An organizational chart was provided to the review

team to identify reporting relationships in the organization. Denice Graham reports directly to Kris Peterson, Director for Construction & Materials. Kris Peterson reports directly to Jim McMinimee, Director of Project Development. Jim McMinimee reports directly to the Deputy Director, Carlos Braceras who reports directly to John Njord, Executive Director of UDOT. The organizational chart did not include a dotted line reporting access to the Executive Director concerning DBE matters. The Civil Rights Manager, Denice Graham, indicated that she did not have direct independent access to the Executive Director regarding DBE matters.

Her responsibilities include implementing all aspects of UDOT's DBE program and ensuring that UDOT complies with all provisions of 49 CFR Part 26. The program plan states that UDOT will have adequate staff to administer the program in compliance with this part. The Civil Rights Manager has a staff of two (2) professional employees assigned to the DBE program on a full-time basis. There is at least one Contract Specialist in the four regions of UDOT who devote a portion of their time monitoring the DBE Program. The Resident Engineer or the Consulting Engineer is responsible to enforce the specifications of the project.

Corrective Action and Schedule: Within 60 days, UDOT must submit to Region VIII Civil Rights Officer evidence that the DBE Liaison Officer has direct and independent access to the Executive Director in form and substance.

Recipient Response: UDOT will provide a letter from the Executive Director, John Njord as evidence of his open door policy at any time for independent access for the DBE Liaison Officer/Civil Rights Manager, Denice Graham to the Executive Director. In addition, UDOT will submit confirmation that a meeting concerning DBE issues was accomplished.

DOT Response: DOT partially concurs with recipient response. The Region VIII Civil Rights Officer has not received noted information. For this finding to be closed, submit information evidencing Executive Director's open door policy for DBE Liaison Officer concerning DBE matters to Region VIII Civil Rights Officer by November 1, 2010.

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, an advisory comment was made with the requirements for financial institutions. The UDOT DBE Program Plan states they will investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in its community and make reasonable efforts to use these institutions. It also states that UDOT will encourage prime contractors to use such institutions. The plan stated that UDOT contacted the Division of Financial Institutions to determine the firms that may be owned and controlled by minorities and women. Only State chartered financial institutions were

evaluated. It was determined that federally chartered financial institution would not meet the ownership and control criteria. No full service DBE financial institution has been identified. One financial institution had a minority president; however, the CEO was a non-minority.

The review team explained these DBE financial institutions need not be certified by UDOT for ownership and control requirements of 49 CFR Part 26 as typical DBEs. Resource information was shared for UDOT to periodically update the search for DBE financial institutions. UDOT was not aware of any current review for financial institutions meeting this criterion.

Recommended Action: UDOT should conduct this investigation on a periodic basis and documents its efforts. UDOT also should encourage prime contractors to use financial institutions owned and controlled by socially and economical disadvantaged individuals in their solicitation documents.

Recipient Response: UDOT will evaluate the existence of DBE financial institutions with each new Federal Fiscal Year and document its efforts.

DOT Response: DOT concurs with recipient response.

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. UDOT is part of the Utah Unified Certification Program (UCP) and hosts the directory of DBE firms. The directory includes the information required by the regulations. It lists the firm's name, mailing address, telephone number, and the type of work the firm has been certified to perform as a DBE. In addition to the web-based electronic version, the directory is available in hard copy format upon request. According to the UCP Agreement, the directory is updated as changes occur.

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, an advisory comment was found with the requirement for overconcentration. The DBE Program Plan indicated that no areas of overconcentration were identified and if they did exist, appropriate measures would be addressed. During the site visit, UDOT representatives were not aware if any overconcentration reviews had actually been conducted. UDOT was advised that it

would be an effective practice to periodically document an analysis of overconcentration based on data that it has on areas in which DBE are performing work for the agency.

Recommended Action: UDOT should conduct overconcentration reviews periodically, document their analysis results and take appropriate action if it does exist.

Recipient Response: UDOT evaluates possible overconcentration in the DBE Program on a bi-annual basis in conjunction with the Utilization Report submittal to the FHWA. In addition, overconcentration is also analyzed during the preparation of the DBE Annual Goal submission. UDOT has not formally documented the overconcentration efforts in the past but, will document all future analyses as they are accomplished.

DOT Response: DOT concurs with recipient response.

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). UDOT does not currently have a formal Business Development Program in place. However, UDOT participates in a number of programs to provide information to various organizations regarding contracting opportunities and how to do business with UDOT. These include various procurement fairs and technical assistance events.

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. During the compliance review, UDOT described their process for determining the amount of federal funds that will be available for contracting opportunities in the upcoming fiscal year. Although Denise Graham is the DBE Liaison Officer, Leone Gibson is responsible for developing the goal submitted to FTA. The review team analyzed UDOT's goal submittals to FTA for the past three fiscal years. During these periods, UDOT stated that although they received apportionments for Section 5311 funds of \$4,958,542 and RTAP apportionments of \$89,147, they don't meet the \$250,000 threshold because the majority of the money is used for capital and salaries.

A key component to goal setting is to identify all FTA-funded contracting opportunities. After review of FTA's TEAM system, it was discovered that UDOT received JARC and New Freedom funding for FY 2006 and FY 2007. The Public Transit staff at UDOT provided a listing of those funds during the period. Over \$600,000 was awarded to government organizations for Mobility Management Studies, expanding transportation services, and other transportation related services. UDOT executed Interagency Contract Agreements with these agencies for the appropriate services according to the grant. UDOT staff told the review team that they were told that JARC and New Freedom monies are not to be included in the goal setting process. UDOT staff will need to verify if these government organizations are actually performing the services or facilitating the contracting process. If the agency is contracting out the services, then UDOT should capture these monies as contracting opportunities in the goal setting process.

UDOT also needs to communicate with their three subrecipients, Park City, Cedar City and Cache County which apply for and receive FTA funds through UDOT. According to TEAM, Park City is also a direct recipient to FTA and submits its own goal. UDOT and Park City need to have a discussion as to who will capture the dollars in the goal setting process and ultimately report to FTA awards, commitments, and payments. For FY 2009, UDOT provided Appendix A-FTA Section 5311/RTAP to the review team. UDOT identified \$888,299 in total DBE opportunities which identified money passed through to their three subrecipients. The spreadsheet also included \$667,000 for Auto Vehicle Location System for Park City Transit. This same line item appeared in Park City's FY 2009 goal submission to FTA. This means that UDOT and Park City could possibly count the same line items in both of their goal setting process.

UDOT also needs to consider that the \$250,000 applies to all contracting opportunities in a given fiscal year. Some of the information contained in UDOT's documents state that funded expenditures for DBE opportunities, rather than all contracting opportunities, will not exceed the threshold of \$250,000. It was also revealed to the review team that UDOT does not include consulting services as DBE contracting opportunities in the FHWA funding activities. The review team advised UDOT that all contracting opportunities, including consulting services, should be considered in the goal setting process.

Step 1: Determining the Base Figure

The base figure is determined by the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on DOT-assisted contracts. UDOT identified \$888,299 in DBE opportunities in FY 2009, \$728,954 in FY 2008, and \$249,983 in FY 2007 according to the Appendix A provided to the review team. UDOT indicated in all three submissions that they did not have to develop a goal because the money would be used for capital and salaries. UDOT stated in their goal submission that they looked at all options for developing a base figure for the goal setting process. They explored the goal of another DOT recipient, data from a disparity study, bidders list, and Census data. UDOT concluded that a 0% goal was appropriate in each of the three years. The only attempt by UDOT to conduct a step one base figure was for the FY 2008 DBE goal submittal. UDOT took the \$728,954 in DBE contracting opportunities and the weights of each contracting activity. Then they identified the number of DBEs for each

industry and number of total firms. From this information, the relative availability was determined for each contracting activity, but no total was provided. The review team completed the math in the template provided and determined that the base figure could have been approximately 1.62%.

Step 2: Adjusting the Base Figure

The goal methodology UDOT submitted to FTA did not contain any base figure. Therefore, no adjustments were able to be examined.

Corrective Action and Schedule: By August 1, 2009, UDOT must submit a DBE goal methodology for FY 2010 to Region VIII Civil Rights Officer that incorporates the following:

- All FTA funded contracting opportunities including their dollar value and scope of work, and consulting services
- JARC and New Freedom funds as appropriate in the goal setting process
- Accurate base figure determination and calculation
- Consideration of any adjustments to the base figure

Recipient Response: UDOT will work with the DBE Liaison/Civil Rights Manager, Denice Graham, to ensure the correct methodology for goal setting and all recommendations from the review team are applied as the FY2010 DBE Goal is prepared and submitted to the FTA Region VIII Officer.

DOT Response: DOT concurs with recipient response. Finding is now closed.

B) Transit Vehicle Manufacturer (TVM)

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

Discussion: During this DBE Compliance review, deficiencies were found with the requirement for transit vehicle manufacturers. The review team examined the TVM certification for a federally- funded vehicle procurement. Starcraft Bus and Mobility submitted a TVM experience certification to Utah DOT Public Transportation Team on September 8, 2006. The TVM certification submitted to UDOT indicated it had 8 years experience manufacturing paratransit vehicles but did not make any reference to the DBE program or 49 CFR Part 26.

The review team reviewed a procurement for buses from Park City Corporation, a subrecipient of UDOT. The agreement was between Park City Corporation and Gillig Corporation for fifteen 35-foot low floor buses on October 17, 2007. Gillig submitted a TVM certification that it has complied with the requirements of 49 CFR, Section 26 of the Transportation Assistance Act of 1982, and submitted the required documents to the FTA. The TVM did not specifically reference 49 CFR Part 26.49. Another TVM certification was reviewed by the review team that was submitted to Park City. This particular TVM certification was submitted by Young Chevrolet Company. Young

Chevrolet is not a TVM but a car dealership and would not have a DBE program submitted to FTA.

Corrective Action and Schedule: Within 60 days, UDOT must submit to Region VIII Civil Rights Officer evidence that the certification provided by UDOT and their subrecipients to TVMs to complete for vehicle procurements include the appropriate references to 49 CFR Part 26.49.

Recipient Response: UDOT and its subrecipients will submit evidence to the Region VIII Civil Rights Officer of updated TVM certifications. UDOT indicated the certification boilerplate was completed on June 25, 2009. A copy will be submitted to Region VIII Civil Rights Officer by 7/31/09.

DOT Response: DOT partially concurs with recipient response. The Region VIII Civil Rights Officer has not received information. For this finding to be closed, submit evidence of updated TVM certifications to Region VIII Civil Rights Officer by November 1, 2010.

C) 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, a deficiency was found in the area of race neutral participation. UDOT has determined that they did not meet the threshold for FTA contracting opportunities to set an overall goal. Therefore, UDOT did not project a portion of the goal for race neutral participation. The review team found opportunities that should have been included in the goal setting process and a consideration of race neutral participation should have therefore been considered.

Corrective Action and Schedule: By August 1, 2009, UDOT must evaluate its race-neutral projections for FY2010 and provide support to Region VIII Civil Rights Officer.

Recipient Response: UDOT will include Race Neutral projections in the FY 2010 goal. Response complete date: 8/1/09.

DOT Response: DOT concurs with recipient response. Finding is now closed.

D) 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. As mentioned in the race neutral section, UDOT did not accurately conduct the goal setting process. No projections of race conscious participation were made for FTA funded opportunities. The review team noted

that their subrecipient, Park City, submitted a goal to FTA as a direct grantee. Park City was able to develop a goal of 3%, which included a race conscious and race neutral split.

Corrective Action and Schedule: By August 1, 2009, UDOT must evaluate its race-conscious projections for FY2010 and provide support to Region VIII Civil Rights Officer.

Recipient Response: UDOT will evaluate Race Conscious projections for FY 2010 and provide support to the Region VIII Civil Rights Officer. Response complete date: 8/1/09.

DOT Response: DOT concurs with recipient response. Finding is now closed.

E) Good Faith Efforts

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

Discussion: During this DBE Compliance Review, deficiencies were found with the requirements for good faith efforts. UDOT's DBE Program Plan contains procedures for determining good faith efforts. It explains that UDOT treats bidders' compliance with good faith efforts requirements as a matter of responsiveness at bid opening. Bidders must submit, at the time of bid, the DBE firms that will participate as subcontractors in the contract, descriptions of the work each DBE will perform and the dollar amount of participation of each DBE firm. Three days after the bid, the responsive low bidder must submit to the Civil Rights Staff written confirmation from the DBE that the DBE is participating in the contract as provided in the prime contractor's commitment.

On a bid with a race neutral goal (0%), if the bidder intends to sublet work that a DBE is qualified to perform, the bidder must document good faith efforts for each type of work a DBE is qualified to perform if the bidder does not use a DBE. The Civil Rights staff is responsible for determining whether a bidder who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive.

Contractors are required to complete DBE Bid Assurance Part A for race conscious DBE participation and Part B for race neutral participation. An example of a DBE Bid Assurance was provided on a race neutral contract. The contractor had to specify if they would sublet any work. If the contractor intends to sublet work, they must confirm that their firm has taken the following equal opportunity action to allow DBEs to compete for and perform on subcontracts. The firm commits to DBE participation as per the DBE commitment which was submitted with the bid proposal and to continue equal opportunity efforts throughout the performance of the project. Documentation of race neutral efforts is submitted with the bid proposal, including race neutral DBE commitment percent, DBE contract log report and quote comparison report.

The review team discussed with the recipient about good faith efforts and when they should be considered. The regulations refer to good faith efforts when a contractor fails to meet a contract goal and during replacement of a DBE firm on a contract. Good faith

efforts reviews should not be conducted on contracts with no goals and a contractor should not be required to make good faith efforts on these types of contracts. The process exercised by UDOT could be considered a race conscious process on contracts with no goal requirements.

Corrective Action and Schedule: Within 60 days, UDOT must submit to the Region VIII Civil Rights Officer evidence that the current good faith effort process is removed for contracts with no goals.

Recipient Response: UDOT will submit an updated specification removing the good faith effort process from contracts with no goals. Response complete date: 8/1/09.

DOT Response: DOT partially concurs with recipient response. The Region VIII Civil Rights Officer has not received information. For this finding to be closed, submit updated specification removing GFE evaluation from contracts with no goals to Region VIII Civil Rights Officer by November 1, 2010.

F) 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, deficiencies were found with the requirements for counting DBE participation. The DBE Program Plan of UDOT states they will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55. UDOT had reported for the past three fiscal years that the FTA funds received did not exceed \$250,000 in contracting opportunities and subsequently was not required to submit DBE goals. During the site visit, it was determined that UDOT had contract opportunities exceeding \$250,000 in FTA funds and had executed FTA funded contracts. There were no goals associated with these contracts, however, there was no running tally or system developed to track awards, commitments or payments for FTA funded contracts. UDOT had a well developed system for tracking and counting FHWA funded contracts.

Corrective Action and Schedule: Within 60 days, UDOT must submit to the Region VIII Civil Rights Officer evidence that a mechanism is in place to track and count appropriate DBE participation for its FTA projects.

Recipient Response: UDOT will provide to the Region VIII Civil Rights Officer evidence that a mechanism is in place to track and count appropriate DBE participation for its FTA projects. Coordination will be accomplished through the UDOT Civil Rights Office, and FTA. Response complete date: 8/10/09.

DOT Response: DOT partially concurs with recipient response. The Region VIII Civil Rights Officer has not received information. For this finding to be closed, submit evidence of counting mechanism for DBE participation to Region VIII Civil Rights Officer by November 1, 2010.

G) 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 UDOT was found during the site visit.

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. UDOT's DBE Program Plan contains the required contract assurance clause as prescribed by the DOT regulations. The review team examined a FHWA funded contract because the Public Transit staff of UDOT indicated they would use the same boilerplate for future FTA funded contracts. The DBE Bid Conditions in prime contractor's Staker & Parson agreement and its subcontractors was provided. The assurances were included in the agreements provided to the review team.

The review team was also provided two FTA funded consulting contracts, which UDOT typically did not factor in DBE considerations or requirements. UDOT contracted with WCEC Engineers to conduct a statewide intercity bus study and assist UDOT in PTT policies and procedures. These contracts did not include the non discrimination provisions as stated in UDOT's DBE program and the regulations.

Corrective Action and Schedule: Within 60 days, UDOT must submit to Region VIII Civil Rights Officer evidence that non discrimination assurances from 26.13 are included in all contracts and subcontracts.

Recipient Response: UDOT will provide evidence to the Region VIII Civil Rights Officer that all non discrimination assurances from 26.13 are included in all Federal-aid contracts and subcontracts. Response complete date: 8/10/09.

DOT Response: DOT partially concurs with recipient response. This Region VIII Civil Rights Officer has not received information. For this finding to be closed, submit evidence of non discrimination assurances included in Federally funded contracts to Region VIII Civil Rights Officer by November 1, 2010.

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 a specific number of 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 a specific number of days after the subcontractors' work is satisfactorily completed.

Discussion: During this DBE Compliance Review, advisory comments were made with the requirements for Prompt Payment and Return of Retainage.

Prompt Payment

UDOT's DBE Program Plan advises that the policies concerning prompt payment are applicable to contractors, subcontractors, service providers, material suppliers, and all tier subcontractors, service providers, and supplies. It's noted that the prompt payment provisions are to be included in subcontract, service, or purchase agreement language agreeing to pay promptly as required in the specifications. According to the specifications, subcontractors are paid no later than 10 working days after receipt of payment by the Department. Prime pay material suppliers and service suppliers within 30 days after receipt of payment of work that includes materials and or services.

The FHWA funded prime contract between Staker & Parson and UDOT included the Bid Conditions for DBE which outlines the prompt payment requirements. However, the FTA funded contracts between WCEC Engineers and UDOT reviewed during the site visit included retainage information but no prompt payment information.

Return of Retainage

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

UDOT is withholding retainage from its prime contractors on DOT assisted contracts. The DBE Program Plan indicates that upon acceptance of the work, the Department releases an amount equal to the subcontractor's retainage. The contractor must then submit a certified statement to the Engineer certifying that the total amount due is the total retention. Retained money owed to the subcontractor for satisfactory completion of the accepted work must be paid no later than 30 calendar days after receipt of payment from the Department. The Bid Conditions for DBE did not contain any information concerning return of retained money. Upon review of the full consulting agreement between WCEC Engineers and UDOT, the progress payment information included provisions for 5% of the invoice amount be retained until all of the services are completed. The Civil Right Officer, Denise Graham indicated that retained money is withheld down to one and a half percent from the prime until the job is completed. All of the subcontractors' retainage is released upon satisfactory completion of their scope of work. No FTA funded contracts with subcontractors were available for review to examine release of retainage to subcontractors that had completed their portion of work.

For information on monitoring of subcontractor payments, see discussion in *Item 11, Record Keeping and Enforcements* of this section.

Recommended Action: UDOT should provide documentation that it has implemented procedures to ensure that the clauses addressing prompt payment and prompt return of retainage are included in the contracts with its prime contractors and that they are passed through to the subcontractors participating on FTA-assisted projects.

Recipient Response: Effective immediately (7/6/09) FTA contracts and subcontracts will incorporate the prompt payment special provision included in all Federal aid construction contracts and subcontracts. The special provision includes a provision for return of retainage. As contracts are prepared, the prompt payment provision will be included.

DOT Response: DOT concurs with recipient response.

C) Legal Remedies

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirement for legal remedies. In its DBE Program Plan, UDOT imposes liquidated damages in the amount of \$250 per each working day, per violation for failure to resolve prompt payment results. The Bid Conditions for DBE included in contracts state the applicable sanctions for non compliance. If the contractor fails to achieve the minimum goal, established in the contract at the time of the award of the contract, the contract payments shall be reduced as a liquidated damage and as a penalty by an amount equal to the dollar amount of work not performed by the DBE. No FTA funded contracts with goals were available to review at the time of the site visit.

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: UDOT is a certifying recipient in the Utah Unified Certification Program (UUCP). Information concerning the UUCP is contained in the report from the UUCP review conducted the same week as this review.

10. 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: UDOT is a certifying recipient in the Utah Unified Certification Program (UUCP). Information concerning the UUCP is contained in the report from the UUCP review conducted the same week as this review.

11. Record Keeping and Enforcements

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

Discussion: During this DBE Compliance Review, deficiencies were found with the FTA requirement for Record Keeping and Enforcements.

Bidders List

UDOT's Project Development Business System collects information on companies participating or interested in participating in UDOT DOT assisted contracts. The review team examined the system and it included the required elements of the firm's name, address, DBE status, age of firm and annual gross receipts.

Monitoring

The UDOT DBE Program Plan requires prime contractors and subcontractors to maintain records and documents of payments to DBE subcontractors and lower tier subcontractors for three years following the performance of the contract. UDOT's plan indicates that interim audits of contract payment to DBEs will be performed. 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.

UDOT also utilizes Contract Specialists in the four regions to devote a portion of their time monitoring the DBE program. The Resident Engineer or the Consulting Engineer is responsible to enforce the specifications of the project. It appeared to the review team that these procedures applied to FHWA funded activities and no formal process existed for FTA funded activities.

In regards to monitoring payments, UDOT uses the Project Development Business System (PDBS). Contractors must enter all subcontractor payment into PDBS Subcontractor Payment Screen within 10 days of receipt of payment by the Department. The date entered is to reflect the actual date payment was sent to subcontractor. The entry of payments into PDBS serves as the Prompt Payment Affidavit. The actual date of entry is tied to the date the pay estimate is sent to the Comptroller. If the entry date exceeds 15 days from the Comptroller date, the entry will be red flagged indicating non-compliance with the Prompt Payment Provision.

Reporting

UDOT's DBE Program Plan explains that participation will be reported to the DOT in several ways. For FHWA, UDOT will report DBE participation on a semi-annual basis, using DOT's semi-annual reporting form. For FAA, UDOT will submit annually DOT Form 4630. For FTA, UDOT will report DBE participation on a quarterly basis, using DOT Form 4630. Leone Gibson and staff are responsible for completing the semi-annual reports to FTA. No reports had been completed for the past three fiscal years reviewed. The review team advised UDOT to update their plan information to include the appropriate FTA semi-annual reporting form.

Corrective Action and Schedule: Within 60 days, UDOT must submit to the Region VIII Civil Rights Officer the following information:

- Evidence that mechanism are in place to monitor work performed on FTA-assisted contracts
- Procedures for accurate and complete collection and reporting of data for semi-annual reports for FTA funded activities.

Recipient Response (Monitoring): UDOT will submit to the Region VIII Civil Rights Officer evidence of a mechanism to monitor work performed on FTA- assisted contracts. Coordination will be accomplished through the UDOT Civil Rights Office, and FTA. Response complete date: 8/10/09.

DOT Response (Monitoring): DOT concurs with recipient response.

Recipient Response (Reporting): UDOT has implemented this correction immediately (6/1/09) and reported on the correct form for the June 1, 2009 submission.

DOT Response: DOT concurs with recipient response. Finding is now closed.

Public Participation and Outreach

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

Discussion: During this DBE Compliance Review, deficiencies were found with the FTA requirement for Public Participation and Outreach. Leone Gibson indicated during the onsite review that UDOT does not conduct the required public participation by consulting with minority, women and contractor groups for feedback on the goal setting process. UDOT included in their goals submissions that they work closely with the Associated General Contractors, the Unions, SBA and Minority and Female Organizations to assist in the development and mentoring of minority and female business within the construction industry. UDOT is required to submit proof of

advertisement to the Regional Civil Rights Officer of the overall goal by submitting a notarized copy of the advertisement in the local media.

Corrective Action and Schedule: For FY 2010 goal submission, UDOT must submit to the Region VIII Civil Rights Officer evidence that consultation with interested parties was conducted during the goal setting process.

Recipient Response: UDOT will submit evidence that public participation was accomplished as part of the goal setting process. Response complete date: 8/1/09.

DOT Response: DOT concurs with recipient response. Finding is now closed.

SECTION 7 – SUMMARY OF FINDINGS

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action(s)	Current Status
1. Policy Statement	26.23	D	Policy Statement not signed by Executive Director	Have Executive Director sign and date the DBE Policy Statement	Submit to CRO by 11/1/10
2. DBE Liaison Officer	26.25	D	DBE Liaison does not have independent direct access to ED	Evidence in form and substance the DBE Liaison has access to ED concerning DBE matters	Submit to CRO by 11/1/10
3. Financial Institutions	26.27	AC	Not periodically reviewing financial institutions	Evaluate existence periodically of DBE financial institutions	Concur
4. DBE Directory	26.31	ND			
5. Overconcentration	26.33	AC	Not periodically reviewing financial institutions	Evaluate and document overconcentration reviews	Concur
6. Business Development Programs	26.35	ND			
7. Determining / Meeting Goals					
A) Calculation	26.45	D	Goal setting methodology is incorrect. Does not include consulting services in process. Not capturing all the contracting opportunities	Use correct methodology of step 1 base figure determination and make step 2 adjust if necessary. Evaluate all contracting opportunities in the goal setting process and set appropriate goals for FY 2010	Closed
B) TVM	26.49	D	Incorrect TVM certification	Update TVM certification boilerplate	Submit to CRO by 11/1/10
C) Race Neutral	26.51	D	No RN projections due to inaccurate 0% goal.	Make RN projections on FY 2010 goal submission	Closed
D) Race Conscious	26.51	D	No RC projections due to inaccurate 0% goal.	Make RC projections on FY 2010 goal submission	Closed
E) Good Faith Efforts	26.53	D	Require GFE on no goal contracts	Remove GFE requirements on contracts with no goals	Submit to CRO by 11/1/10
F) Counting DBE Participation	26.55	D	Not keeping running tally of DBE participation	Adopt system to track awards, commitments and payments for DBE in FTA assisted contracts	Submit to CRO by 11/1/10
G) Quotas	26.43	ND			

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action(s)	Current Status
8. Required Contract Provisions A) Contract Assurance	26.13	D	Non discrimination clause not in all contracts.	Evidence that assurance clause in 26.13 are included in contracts	Submit to CRO by 11/1/10
B) Prompt Payment	26.29	AC	Inconsistent with including prompt payment and return of retainage.	Ensure that FTA contracts and subcontracts include prompt payment and return of retainage information	Concur
C) Legal Remedies	26.37	ND			
9. Certification Standards	26.67	ND			
10. Certification Procedures	26.83	ND			
11. Record Keeping and Enforcements A) Bidders List	26.11	ND			
B) Monitoring	26.37, 26.55	AC	Not monitoring mechanism for FTA funded contracts.	Adopt mechanism for monitoring FTA funded activities	Concur
C) Reporting to DOT	26.11	D	No reporting forms submitted to FTA	Submit accurate reporting forms on a semi-annual basis on June 1 st and December 1 st	Closed
12. Public Participation and Outreach	26.45	D	Not conducting consultation process	Involve interested parties in the goal setting process	Closed

Findings at the time of the site visit: ND = No deficiencies found; D = Deficiency; NA = Not Applicable; NR = Not Reviewed

SECTION 8 - LIST OF ATTENDEES

Name	Organization	Title	Phone	Email
UDOT Members:				
Beverly Crawford	UDOT Civil Rights Office	DBE Coordinator/ UUCP Certifying Official	801-965-4100	bcrawford@utah.gov
Kathi Wilcox	UDOT Civil Rights Office	DBE Coordinator/ UUCP Certifying Official	801-965-4102	kathiwilcox@utah.gov
Denice Graham	UDOT Civil Rights Office	Civil Rights Manager	801-965-4695	dgraham@utah.gov
Leone Gibson	UDOT	Transit Plans & Program Director	801-964-4508	lgibson@utah.gov
Tracy Young	UDOT	Rural Public Transit Program Manager	801-965-4360	tracyyoung@utah.gov
Christopher Meredith	UDOT	Specialized Transit Program Manager	801-964-4591	cmeredith@utah.gov
Kris T. Peterson, P.E.	UDOT	Dir. Of Construction & Materials	801-965-4111	krispeterson@utah.gov
SLCDA Members:				
Paul Marshall	Salt Lake City Airport	DBE Liaison Officer	801-575-2945	paul.marshall@slcgov.com
UTA Members:				
Raymond Christy	Utah Transit Authority	DBE Liaison Officer	801-287-3537	rchristy@rideuta.com
FHWA:				
Bryan Cawley, P.E.	FWHA	Asst. Div. Administrator	801-963-0182	Bryan.cawley@dot.gov
Bernetta Collins	FHWA	National DBE Coordinator	720-963-3243	Bernetta.collins@fhwa.dot.gov
Conference Call				
Ryan Inman	FTA	HQ Office of Civil Rights	202-366-5017	Ryan.Inman@dot.gov
Milligan & Co LLC:				
Benjamin Sumpter	Milligan & Co., LLC	Lead Reviewer	215-496-9100	bsumpter@milligancpa.com
John Caruolo	Milligan & Co., LLC	Reviewer	610-983-3694	Jcaruolo@aol.com
Renee E. Moore	Milligan & Co., LLC	Reviewer	215-496-9100	rmoore@milligancpa.com