



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

# Washington Metropolitan Area Transit Authority Disadvantaged Business Enterprise (DBE) Compliance Review Final Report

NOVEMBER 2012

Federal Transit Administration

PREPARED BY  
Milligan & Company, LLC



U.S. Department of Transportation  
Federal Transit Administration

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## **Section 1 – General Information**

Grant Recipient:	Washington Metropolitan Area Transit Authority (WMATA) 600 5th Street, NW
City/State:	Washington, DC 20001
Grantee Number:	1398
Executive Official:	Richard Sarles General Manger
On Site Liaison:	Debra Farrar-Dyke Manager–Administrative Services and DBE Liaison (202) 962-1168
Report Prepared by:	MILLIGAN AND CO., LLC 105 N. 22 <sup>nd</sup> Street, 2 <sup>nd</sup> Floor Philadelphia, PA 19103 (215) 496-9100
Site Visit Dates:	April 10–12, 2012
Compliance Review Team Members:	Benjamin Sumpter, Lead Reviewer Kristin Szwajkowski Ketnah Parchment

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

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

The Washington Metropolitan Area Transit Authority (WMATA) 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 WMATA’s DBE Program and were the basis for the selection of compliance elements that were reviewed.

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

### **PURPOSE**

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

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

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

### **OBJECTIVES**

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

- ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's financial assistance programs
- create a level playing field on which DBEs can compete fairly for DOT-assisted contracts
- ensure that the Department's DBE Program is narrowly tailored in accordance with applicable law
- ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs
- help remove barriers to the participation of DBEs in DOT-assisted contracts
- assist with the development of firms that can compete successfully in the marketplace outside the DBE Program
- 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 WMATA 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 WMATA's DBE Program Plan against the compliance standards set forth in the regulations and to document the compliance status of each component
- gather information and data regarding the operation of WMATA's DBE Program Plan from a variety of sources—DBE Program managers, other WMATA management personnel, DBEs, and prime contractors

## **Section 4 – Background Information**

The Washington Metropolitan Area Transit Authority (WMATA) was created in 1967 as an Interstate Compact Agency and an instrumentality of the District of Columbia, the State of Maryland, and the Commonwealth of Virginia to plan, develop, build, finance, and operate a balanced regional transportation system for the national capital area. The Authority began building the rail system in 1969, acquired the four area bus systems, and began operating bus service in 1973 and rail service in 1976.

WMATA provides Metrorail (rapid rail), Metrobus, and MetroAccess to a service area of 3.5 million people. MetroAccess is a complementary paratransit service operated in accordance with the Americans with Disabilities Act (ADA). The service area is approximately 1,500 square miles and is called the Washington Metropolitan Area Transit Zone. The transit zone includes Washington, DC; Montgomery and Prince George's counties in Maryland; and Arlington and Fairfax counties and the cities of Alexandria, Fairfax, and Falls Church in Virginia.

WMATA operates Metrorail and Metrobus service in-house. Its ADA complementary paratransit service, MetroAccess, is provided through a contractor, MV Transportation. MV provides service through subcontractors that operate the service using vans and sedans, supplemented with taxi service.



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

### **Scope**

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

1. A DBE program conforming to this part by August 31, 1999, to the concerned operating administration (OA). You do not have to submit regular updates of your DBE Programs as long as you remain in compliance. However, you must submit significant changes in the program for approval [49 CFR 26.21].
2. A signed policy statement expressing a commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation [49 CFR 26.23].
3. Designation of a liaison officer and support staff as necessary to administer the program, and a description of the authority, responsibility, and duties of the officer and the staff [49 CFR 26.25].
4. Efforts made to use DBE financial institutions, by the recipient as well as prime contractors, if such institutions exist [49 CFR 26.27].
5. A DBE directory including addresses, phone numbers, and types of work performed 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. The recipient may provide assistance to DBEs through Business Development Programs to help them compete successfully outside of the DBE Program [49 CFR 26.35].
8. The recipient's DBE Program Plan must include an element to structure contracting requirements to allow competition by small businesses [49 CFR 26.39].
9. The overall goal of the recipient's program 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 its DOT-assisted contracts [49 CFR 26.43 – 26.53].
10. All contracts must include a non-discrimination clause and a prompt payment clause and must implement appropriate mechanisms to ensure compliance by all participants [49 CFR 26.13, 26.29, 26.37].
11. A certification process must be in place to determine if a potential DBE is legitimately socially and economically disadvantaged. The potential DBE must submit an application, a personal net worth statement, and a statement of disadvantage, along with the proper supporting documentation [49 CFR 26.67].
12. A certification procedure must include document review and an on-site visit and must determine eligibility consistent with Subpart D of the regulations [49 CFR 26.83].

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

### **Methodology**

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

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

Subsequent to the entrance conference, a review was conducted of WMATA's DBE Program Plan and other documents submitted to the review team by the DBE Liaison Officer. Interviews were then conducted with WMATA 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 DBE elements. Additionally, interviews with prime contractors, subcontractors, and interested parties were conducted.

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

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

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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1760 Market St., Suite 500  
Philadelphia, PA 19103  
(215) 656-7255, [michael.riess@dot.gov](mailto:michael.riess@dot.gov)

## **Section 6 – Issues and Recommendations**

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

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for a Program Plan. However, an advisory comment was provided.

The current DBE Program Plan was requested prior to the review. WMATA provided a copy of its DBE Program Plan that outlined the areas of responsibility to administer the program. The Small Business element was also included in the plan. The electronic file name included 2012 in the title; however, there was no revision date in the document. The DBE Liaison Officer (DBELO) indicated during the review that the Program Plan was updated and submitted to FTA on February 28, 2012.

Advisory Comment: The review team advised WMATA to include a revision date in its Program Plan. Additionally, reference is made to deficiencies noted in Section 8, Fostering Small Business Participation that, once addressed, will need to be incorporated into WMATA's overall DBE Program Plan. Several other deficiencies from this report will also necessitate revisions or additions to the current DBE Program Plan. Those requirements are detailed in the specific review areas below.

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

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

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

The DBE Policy Statement was included in the WMATA DBE Program Plan. The policy statement discussed "maximum utilization for DBEs," which is consistent with objectives of 49 CFR Part 23 instead of language more appropriate for 49 CFR Part 26, such as "leveling the playing field." The statement was signed on February 28, 2012, by the Assist General Manager for the General Manager. The DBELO stated that because the General Manager was not available on that particular date, the Assistant General Manager signed the document so that the program could be submitted to meet the Small Business Element due date.

The document states that the policy shall be disseminated to the Board of Directors and Executive Officers of Metro, and training will be provided in its application, as

necessary. It was also stated that the DBE Program Plan would be posted on the procurement and contracting website to disseminate it to the business community. The review team advised the DBELO that the DBE Plan and the Policy Statement were not on the website as stated in the policy statement. The DBELO indicated that it will include the policy statement on the website.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the FTA's Office of Civil Rights a schedule and plan to:

- remove maximizing DBE utilization reference and replace with language consistent with 49 CFR Part 26
- have the General Manager sign Policy Statement
- verify that the policy statement was disseminated internally and externally

WMATA Response: WMATA accepts the comments made by the review team and has taken the following steps to correct the deficiency: WMATA has removed the maximizing reference from its DBE Policy Statement and replaced it with language consistent with 49 CFR Part 26. The General Manager has reviewed the statement and approved the changes via his signature. A copy of the signed Policy Statement and the DBE Program Plan will be placed on the WMATA website within 15 days of FTA approval for this corrective action.

FTA Response: FTA agrees with WMATA's response to the noted deficiency. By December 30, 2012, submit to the FTA's Office of Civil Rights evidence that WMATA has posted a copy of the policy statement on the procurement and contracting website in order to disseminate it to the business community as stated in the Policy Statement.

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

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

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

The DBE Program Plan designates the "Manager—Administrative Services" as the DBELO. The name and contact information were not included in the Program Plan as recommended by FTA. The Policy Statement does have an address and phone number to the DBE & Compliance Office, but it does not identify the DBELO by name. The review team recommended that the DBELO be referenced by name in the Program Plan.

The Program Plan also states that the DBE Compliance Program consists of a staff of four persons: a Manager and three DBE & Compliance Specialists. The Office of Procurement & Materials organization chart as of April 2012 lists positions of Coordinator, Small Business Preference; Management Analyst; and three DBE Specialists, one of which was listed as vacant. The DBELO indicated that the vacant

position was currently advertised and a request had been made for three to four new professionals. Based on the number of DBE findings during the review, it appears that the DBELO does not have adequate resources to properly administer the DBE Program.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the FTA's Office of Civil Rights a schedule and plan to:

- update the DBE Program Plan to include the name and contact information for the DBELO
- address resource issues in administering the DBE Program

WMATA Response: WMATA accepts the comments made by the review team and have taken the following steps to correct the deficiency: On June 1, 2012, WMATA updated the DBE Program Plan to include the name and contact information for the DBELO. On June 11, 2012, WMATA filled the vacant DBE and Compliance Specialist position. WMATA is currently benchmarking its staffing levels for the DBE Program against other large transit agencies to better determine appropriate staffing levels. It will be fully staffed and deployed by January 2013.

FTA Response: FTA agrees with WMATA's response to the noted deficiency. By December 30, 2012, submit to the FTA's Office of Civil Rights additional information on projected staffing, such as number of positions and deployment schedule to meet the January 2013 deadline.

#### **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. However, an advisory comment was made.

The Program Plan stated that WMATA uses Industrial Bank, N.A., a minority-owned institution located in Washington, DC, to provide payroll services. The DBELO indicated that WMATA changed payroll systems and no longer uses Industrial Bank. The plan also stated that prime contractors are encouraged to use these institutions through its offices of Procurement.

Advisory Comment: The review team recommended that WMATA conduct another search for DBE financial institutions and state how often searches would be conducted for current institutions. Additionally, WMATA should identify how primes are encouraged to use these institutions.

#### **5. DBE Directory**

Basic Requirement (49 CFR Part 26.31): A DBE directory must be available to interested parties including addresses, phone numbers, and types of work each DBE is

certified to perform. This directory must be updated as soon as changes are made 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 DBE directory link is included on WMATA's procurement and contracting website. The directory includes the required information for compliance with this part. The contact information, along with the applicable NAICS codes, is included in the DBE's description.

## **6. Overconcentration**

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

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

The DBE Program Plan states that "none exist" in relation to overconcentration. The DBE LO was advised to develop a schedule for analyzing overconcentration and to describe the process of examining overconcentration.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a schedule and plan outlining the process and frequency of reviewing overconcentration.

WMATA Response: WMATA accepts the comments made by the review team and has taken the following steps to correct the deficiency: The WMATA DBE Plan concerning the overconcentration of DBEs has been amended to read as follows:

Pursuant to 49 CFR Part 26.33, if WMATA determines that DBE firms are so overconcentrated in one or more types of work as to unduly burden the opportunity of non-DBE firms to participate in that type of work, it will devise appropriate measures to address this overconcentration. These measures may include: (1) technical assistance programs; (2) business development programs; (3) mentor-protégé programs; and (4) any other measures to assist DBEs in performing in other types of work.

By January 2013, the DBELO will complete an overconcentration analysis and, if necessary, provide a plan and schedule for remediation. This process will be completed prior to and in accordance with the triennial review schedule. If approved, this schedule will continue and will be included in the DBE Program Plan.

FTA Response: FTA agrees with WMATA's response to the noted deficiency. By December 30, 2012, submit to the FTA's Office of Civil Rights an updated DBE Program Plan reflecting the revised overconcentration analysis procedures. By January 30, 2013,

submit the results from the overconcentration analysis.

## **7. Business Development Programs**

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

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

WMATA has a Small Business and Local Preference Program for non-FTA funded projects. There was no formal business development or Mentor Protégé program as described in the DBE regulations.

## **8. Fostering Small Business Participation**

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

Discussion: WMATA's small business element submission has been reviewed. The following are areas need to be clarified and/or revised in order for FTA to approve the plan.

- *Structuring of contracting requirements.* The plan notes the following, but does not give specific information on who will be involved, when and how often this will happen, or what the process will be:
  - *Avoid unnecessary and unjustified bundling of contract requirements.*
  - *Establish a team to diligently facilitate contracting opportunities, awareness, and recognition of the critical role that small businesses play in advancing WMATA's procurement activities.*
  - *Foster through the team an environment that encourages commitment, the use of integrated systems, and professional management tools and pursues innovative solutions in support of small business concerns.*
  - *Provide training to all WMATA officers, managers, and supervisors to fully cooperate with the Office of Procurement's DBE Liaison Officer in the implementation of the Program. All individuals shall be held accountable for their performance in this area. This function will ensure that representatives from WMATA's DBE team, Office of the General Counsel, Office of Finance, and Department of Engineering will be included in the process for potential contracting opportunities. An additional observance for this item is that the measurements for methods of holding individuals "accountable" is not described.*

- *Identify alternative acquisition strategies and structure procurements to facilitate the ability of consortia or joint ventures by allowing small businesses, including DBEs, to compete for and perform as prime contracts.*

The items above serve to confuse the reader (and possibly the implementer) about what WMATA will actual be doing. It also serves to detract from the following WMATA policies in Items 2, 6, and 14 of the plan:

- *Utilize WMATA's fiscal year budgetary planning to develop small business utilization for potential upcoming contracting opportunities. Does this imply that WMATA will be setting an overall small business goal?*
- *Assign small business participation within the established threshold on a contract-by-contract basis on USDOT-assisted construction contracts and on non-construction procurements (i.e., contracts for services, supplies, and equipment) having a total value not to exceed \$500,000);*
- *On contracts that do not include DBE contract goals, small business concerns will be used in contracting opportunities as prime contractors who will also provide subcontracting opportunities to small business concerns that meet the designated size standard requirements and can reasonably perform, rather than self-perform, all the work involved. It is unclear if this means that WMATA will have small business set-asides, and small business goals within them, for contracts that do not have DBE goals.*
- *Method to verify business size. It is not clear in the plan what will be classified as a small business. For instance:*
  - *A small business is defined as meeting four criteria, one of which is does not exceed the numerical size standard set by SBA. Please refer to USDOT's Office of Small and Disadvantaged Business Utilization Questions and Answers in 49 CFR Part 26, which contain guidance on the small business element, including guidance to use size standards in line with 49 CFR Part 26 and to have more than a self-certification process. This guidance can be found via the following link: <http://www.osdbu.dot.gov/DBEProgram/dbeqna.cfm#26.39>*
  - *Eligible firms are those small business concerns that have been certified by the SBA. It is our understanding that SBA's Small Business certification is a self-certification. Is WMATA referring to SBA Small Disadvantaged Business (SDB) or 8(a)?*
  - *Threshold utilization will be used only when three or more self-certified small businesses are classified by the NAICS code for the required contract solicitation. What is the system WMATA has in place to gather self-certified firms?*
  - *The program will work to combine and consolidate with WMATA's currently-established Small Business & Local Preference Program. The criteria for inclusion in this program are to meet the SBA small business size standards, to be a local business, and to complete, sign, and notarize a Declaration of Certification form. Except for the local business*



*preference portion (which is not allowed for FTA-funded procurement), it appears that WMATA already has a mechanism for classifying businesses as small; however, no time frame is given for consolidating these programs.*

- *Timeframe for implementation.* Except for the notation that WMATA anticipates implementing the Program within the required nine-month time frame, no specific milestones are given for items such as revision of procurement policies, training, development of an electronic monitoring and reporting system, update of the on-line directory, collaboration of staff on unbundling, or consolidating of this program with the existing Small Business and Local Preference Program.
- *Demonstration of steps to increase small business participation.* Outreach activities with The Industrial Bank of Washington, the National Community Reinvestment Coalition, and the U.S. Small Business–Small Business Resource Centers are noted but with no implementation time frames or further description.
- *Monitoring.* Please clarify if more than just small business prime contractors will be monitored for small business utilization. In Items 13 and 14, it appears that prime contractors that are not small will not have monitoring and enforcement actions.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the FTA’s Office of Civil Rights a schedule and plan revise the submitted Small Business Program Element to address above-noted issues with:

- Structuring of contracting requirements
- Method to verify business size
- Time frame for implementation
- Demonstration of steps to increase small business participation
- Monitoring

WMATA Response: WMATA accepts the comments made by the review team. A thorough review of the proposed Small Business Participation Plan previously submitted to FTA will be performed immediately to ensure that all issues identified in the audit are remediated by December 31, 2012.

FTA Response: FTA agrees with the response to the noted deficiencies. By January 15, 2013, submit to FTA’s Office of Civil Rights a revised Small Business Participation Plan addressing the issues noted in the compliance review report.

## **9. Determining/ Meeting Goals**

### **A) Calculation**

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

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

WMATA submitted the overall FY 2011 goal on July 30, 2010. Due to USDOT's goal-setting rule changes, the goal was expanded to cover FYs 2011–2013. The goal calculation was 25%, with 19% to be achieved through race-conscious measures and 6% through race-neutral measures.

The estimated dollars for each work category were projected by a chart in the methodology. The Construction category was estimated at \$160,780,415; Goods and Equipment at \$202,281,771; and Professional Services at \$28,349,810—for a total of \$391,412,000. The estimated expenditure percentages for each category were 41%, 52%, and 7%, respectively. The local market was identified as Washington, DC and sections of Maryland and Virginia.

#### Step 1: Determining the Base Figure

The step one determination identified the number of ready, willing, and able DBEs and all firms able to do business with WMATA. The 2002 census data was used for the numerator and denominator, which resulted in 112,899 for DBEs and 320,947 for all firms. The division of DBEs by all firms resulted in 35.2%, or 35% when rounded. The DBE Program Plan indicated that, “The numerator of the base figure is calculated from the current DBE directory of certified firms filtered to represent only DBE firms within WMATA's relevant market area supplemented by census bureau data on minority firms within WMATA's transit zone.” The review team recommended that WMATA use more refined data sources for ready, willing, and able firms in goal-setting, which may include the UCP directory and bidders' list data.

WMATA decided to use weighting to further refine the base figure. WMATA used the weighted percentage (41%, 52%, and 7%) divided by the availability for each category. The weighted base figure equated to 26.78%, or 26.8% when rounded.

#### Step 2: Adjusting the Base Figure

The goal achievements from FYs 2004–2009 were used for past participation. The achievements were as follows: FY 2004–19%, FY 2005–22.7%, FY 2006–18.5%, FY 2007–25.9%, FY 2008–26.4%, and FY 2009–22.3%. The numbers were arranged from lowest to highest, and the median was determined to be 22.5% (22.3% + 22.7% divided by 2). The review team advised WMATA to verify its past participation numbers. For instance, based on the 2009 semi annual report, the review team calculated DBE awards (past participation) at 31% rather than the 22.3% identified in the goal-setting methodology. The weighted base figure (26.8%) was averaged with the past participation median (22.5%), which equated to 24.65, or 25% when rounded. The review team additionally has deficiencies in this report on the 2011 reports.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the FTA's Office of Civil Rights a schedule and plan to:

- Refine the numerator and denominator in step one to reflect firms in market area.
- Verify accurate past participation percentages in Step 2.

WMATA Response: WMATA concurs with the deficiency found during the audit. The next DBE Goal will be established for FY 2014 through FY 2016. WMATA agrees to use the criteria established in 49 CFR 26.45. The following is an example of the process that WMATA may use in establishing the DBE Goal.

For Step 1, pursuant to 49 CFR 26.45(c) (I), to arrive at the Base Figure, WMATA will use the “weighing method” by groups of NAICS codes to determine the relative availability of DBE’s in various fields. Additionally, WMATA will examine its contracting program to determine the subcategories in which it uses the majority of its contracts and subcontracts and establish that the majority of its contractors are drawn from the Washington Metropolitan Area. Finally, WMATA will divide the total number of DBE firms in the respective NAICS codes in our DBE Directory that were deemed ready, willing, and able by the total number of firms obtained from United States Census data, with emphasis on the Washington Metropolitan Area (Compact Zone). As an example: Base Figure = 702 (DBE Directory) divided into 3588 (Census data) would equal 19.

For Step 2, to adjust the Base Figure in Step 1, WMATA will consider the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years by using the following:

(a) Past DBE participation. This will be done by adding the total value of DBE contracts and the total value over the past five years and averaging of the Total Federally Funded contracts.

(b) Arriving at the median past participation. WMATA will arrive at the median by arranging the percentages of past participation above from low to high, such as 12%, 19.7%, 22%, 22%, 23%, and 35% and, after excluding all outliers such as 12%, 19.7%, 23%, and 35%, we will add together 22% and 22% and divide the sum by 2 to obtain the following:

$$\frac{22+22}{2} = 22\%$$

(c) Adjusting Step 1 Base figure. WMATA will add the Step 1 Base Figure to the median and divide the sum by 2, as illustrated in the calculation below, resulting in the overall goal:

$$\frac{19\% + 22\%}{2} = 20.5\%$$

FTA Response: FTA agrees with WMATA’s response to the noted deficiencies, with the following exceptions. WMATA must provide information regarding the appropriateness of using past participation as a Step 2 adjustment. Reference is made to the Tips for Goal Setting:

*4. What if the types of contracts that you will let this year are very different from the types of contracts that you have let in the past?*

*If the types of projects you are letting this year are very different from the types of projects let in recent years, you should not assume that your past rates of DBE participation are an accurate reflection of DBE capacity in the type of work you will perform this year. In this scenario, you should seriously consider not making an adjustment for past participation.*

The goal methodology for FY 2014–2016, due August 1, 2013, must demonstrate that the contracting activities being used for an adjustment are similar if used in Step 2.

In addition, while WMATA identified its market area as D.C., Maryland, and Virginia, it must demonstrate that the majority of its contracting is, in fact, done in those areas. If not, WMATA needs to analyze where the majority of its contracting is done and utilize additional markets, if appropriate, for its DBE availability analysis.

## **B) Public Participation**

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

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

The 45-day public comment period for the FY 2011 DBE goal was from May 28–July 12, 2010. The goal and public meeting notices were advertised in the *Washington Post* and through a series of weekly emails and faxes to WMATA’s DBEs and area business organizations and civic associations. A public meeting was held on June 30, 2010, from 10:00 AM to 3:00 PM in the Jackson Graham Building. The comments received from the comment period and public meeting were included in the goal methodology. WMATA received 23 responses, of which 22 were received from DBEs. Five comments came from attendees at the public meeting, 6 were written comments, and 12 were comments received by phone.

The USDOT Official Questions & Answers provides the following guidance regarding the consultation process:

*By definition, the process of consultation involves a scheduled face-to-face conference or meeting of some kind with individuals or groups of interested persons for the purpose of developing and/or assessing a proposed goal and methodology and seeking information or advice before a decision is made. Publication of the proposed goal to the general public is not synonymous with, or a substitute for, consultation with interested or*

*affected groups.*

*Consultation is expected to occur before the proposed goal is established and prior to publication of the proposed overall goal for inspection and comment by the general public.*

The DBELO mentioned that this type of consultation process was not followed for the FY 2011 goal period. Therefore, the review team did not interview any external parties during the Compliance Review for feedback on their participation in the consultation process. WMATA was advised to identify, schedule, and meet with the appropriate individuals or groups prior to publication of the next proposed overall goal.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the FTA's Office of Civil Rights a schedule and plan to identify minority groups and contractor associations for face-to-face meetings prior to publicizing the overall goal for comment.

WMATA Response: WMATA concurs with the deficiency found during the audit. To correct this deficiency, WMATA will develop a list of minority, women, community, and business organizations to seek their input for the establishment of the DBE Goal for FYs 2014–2016. Representatives from these groups will be invited to an outreach conference to discuss topics such as (1) the availability of disadvantaged and non-disadvantaged businesses, (2) the effects of discrimination on opportunities for DBEs, and (3) the efforts necessary to establish a level playing field for the participation of DBEs on WMATA contracts. WMATA will prepare a written report concerning the use of this information in the establishment and submission of the FY 2014–2016 DBE goal. This will be completed by February 2013.

FTA Response: FTA agrees with WMATA's response to the noted deficiency. By March 1, 2013, submit to the FTA's Office of Civil Rights a written report of how consultation efforts will be incorporated into the FY 2014–2016 goal.

### **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 TVMs.

The review team requested the most recent transit vehicle procurement during the Compliance Review. The 7000 Series Rapid Transit Railcars Request for Proposal (RFP No. RC7000/RAM), dated January 2009, was provided to the review team. The DBE requirements stated that, "The offeror must provide a certification that is in compliance with 49 CFR Part, Section 26.49 and must furnish a copy of its current FTA approval of its annual overall percentage goal."

The Contract Manager indicated that an actual TVM DBE certification is not collected

for rail car procurements; rather, WMATA requires the TVM to provide its FTA approval letter. Documentation was secured during the review showing that the Contract Manager received an FTA approval letter for Kawasaki Rail Car, Inc., in 2009 and requested an updated FTA approval letter in 2011. Verification of the TVM approval on the FTA website was also part of the process described by the Contract Manager.

The review team requested a bus procurement to see if a TVM certification was collected for compliance with DBE requirements. However, the bus procurements are handled by a different division, were archived offsite, and were not available during the review period. The review team forwarded a copy of a TVM certification document for compliance with DBE requirements for WMATA's consideration in the verification 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, no deficiencies were found in the area of race-neutral participation.

The FY 2011 25% overall goal was to be met by 6% race-neutral means. WMATA reviewed the past DBE participation from the FYs 2006, 2007, and 2008. FYs 2009 and 2010 were excluded because the ARRA funding would have skewed the calculation. During the 2006–2008 periods, the DBE goal was exceeded. The percent by which the goal was exceeded was added with the race-neutral goal in each year. The sum was divided by the total achievement in each year, resulting in the percent of total race-neutral achievement. The median number for the three-year achievements (24.2%) was multiplied by the 25% goal, resulting in 6.05. Therefore, WMATA rounded down the 6.05% to 6% for the race-neutral portion of the 25% DBE goal.

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

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for race-conscious participation on overall and contract goals.

The DBE Program Plan states that, "If during the course of any year in which contract goals are used, and WMATA determines that the overall goal will be exceeded, the use of contract goals will be reduced or eliminated to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If it is determined that it will fall short of its overall goal, appropriate modifications will be implemented in the use of race-neutral and race-conscious measures to allow the overall goal to be met."

The 2011 semi-annual reports reflected 25.8% DBE achievement with less than 1%

achieved race-neutrally. This means that 25% was achieved through race-conscious efforts, rather than the 6% as projected. The two 2011 semi-annual reports indicated that \$178,973,613 in DBE participation was achieved from the \$694,655,358 in total contract awarded. All of the race neutral DBE participation was achieved through the award of prime contracts which amounted to \$496,862. WMATA fell short of their projected 6% race neutral participation; however, in lieu of falling short of its overall goal, WMATA followed its procedures and issued additional contract goals in order to meet the overall goal.

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

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

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

The DBE Program Plan states that the DBE Program Manager is responsible for determining whether a bidder/proposer who has indicated that it will be unable to meet the contract goal has made sufficient good faith efforts. The Program Plan states that bidders can make good faith effort reconsideration requests to the reconsideration official, the DBELO. It further states the reconsideration official will not have played any role in the original determination that the bidder did not make sufficient good faith efforts. The review team advised the DBELO to designate a reconsideration official not involved in the original good faith effort determination.

The review team received memoranda that WMATA completed for evaluation of primes' DBE goals/good faith efforts for contracts FN5088–Traction Power Installation, FQ8133–SE Bus Garage Replacement, and FQ9098–Bus Facility Rehabilitation. The DBE goal for FN5088 was 17% of the \$23,558,950 contract amount, 25% of \$50,395,000 for FQ8133, and 24.83% of \$75,331,922 for FQ9098. WMATA evaluated the prime contractors' Schedule of Pre-Certified DBE Participation for these projects and determined that all the contractors met the DBE goal. Therefore, no good faith effort information was submitted on the part of the primes.

Contractors must provide the DBE with due process and receive prior written approval from WMATA to substitute or terminate a DBE subcontractor regardless of reason. For complete information on this requirement, see the full text of 49 CFR Part 26.53(f). WMATA includes termination/substitution requirements in Appendix B–DBE in the bids, proposals, and executed contracts. The contractor must notify WMATA within 10 days of the occurrence and provide a list of reasons for replacement of a DBE that is listed. Within 30 days after approval of termination, the contractor shall, if necessary to achieve the Appendix B DBE goal, make every reasonable effort to subcontract the same or other work to DBE firms. The Appendix B language does not include the provision that the prime contractor give the DBE five days to respond to the prime's notice of termination.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the FTA's Office of Civil Rights a schedule and plan to properly identify the good faith effort reconsideration official.

WMATA Response: WMATA concurs with the deficiency found during the audit. WMATA has identified the Chief Procurement Officer, Ms. Heather Obora, to perform the responsibilities of the good faith effort reconsideration official effective August 1, 2012. Once approved, revisions to the DBE Program plan will be submitted.

FTA Response: FTA partially agrees with WMATA's response to the noted deficiency. By December 30, 2012, WMATA must demonstrate that 1) Ms. Obora has adequate experience or training directly related to the assessment of good faith efforts submissions in response to contract goals, as well as 2) that Ms. Obora's duties as the Chief Procurement Officer do not represent an inherent conflict of interest with the added responsibilities required for acting as WMATA's good faith efforts reconsideration official. Based on the analysis provided, WMATA may need to update its DBE Program Plan to reflect a newly designated good faith efforts reconsideration official. WMATA must also update the termination clause found in Appendix B of its contracts for consistency with 49 CFR Part 26.53(f) and address reduction of a firm's work. See also the USDOT Official Question and Answer regarding work reduction below:

*Section 26.53(f) – Can a prime contractor reduce the amount of work committed to a DBE firm at contract award without good cause? (Posted 12/09/11)*

- *No. The Department views such a reduction as a partial termination of the DBE's contract with the prime contractor. Recipients should dissuade contractors from reducing amounts of work committed to DBEs.*
- *Reducing the amount of work committed to a DBE at contract award, where this commitment was part of the prime contractor's good faith efforts to meet a contract goal, is subject to the requirements of section 26.53(f). This means that the prime contractor can reduce the amount of work committed to the DBE only for good cause and only with the written concurrence of the recipient.*
- *This is true even if the contractor continues to meet its contract goal through other means.*
- *For example, suppose a prime contractor commits \$500,000 to each of two DBE subcontractors, thereby meeting a 10 percent goal on a \$10 million prime contract. Part way through the performance of the contract, the prime contractor finds it necessary to expend an additional \$100,000 in the work being performed by DBE subcontractor #1. The contractor then wishes to reduce the work assigned to DBE subcontractor #2 by \$100,000, reasoning that the 10 percent goal will still be met. In such a situation, the prime contractor cannot act on its own to reduce the work assigned DBE subcontractor #2. It would have to comply*



*with Section 26.53(f).*

### **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, deficiencies were found with the requirements for counting DBE participation.

The review team questioned the DBE participation on the Replacement of Southeastern Bus Garage project (Contract No. FQ8133) with [REDACTED] as the prime contractor. [REDACTED] was awarded a subcontract to provide ready-mix concrete according to the DBE Prompt Payment Report. The DBE's subcontract's scope stated that it was to furnish all ready-mix concrete materials in the amount of \$562,126. [REDACTED] is certified as a DBE in 236220–Commercial & Industrial Building Construction, 541330–Engineering Services, 238910–Site Preparation, and 237110–Water & Sewer Line & Related Structure Construction categories. The DBE firm was not certified in the applicable code, 327320–Ready-Mix Concrete Manufacturing and Distributing for the type of work provided on the contract.

The DBE representative for [REDACTED] was interviewed during the Compliance Review. The DBE stated that [REDACTED] provides mix design services on the project. The DBE also stated that the concrete mix was subcontracted to Superior Concrete (a non-DBE firm). WMATA was advised to review the DBE's scope of work for appropriate participation credit and certification classification for possible broker or consulting services.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the FTA's Office of Civil Rights a schedule and plan to verify that DBE participation credit is granted only in certified work categories.

WMATA Response: WMATA accepts the deficiency found during the audit. Based on the determination of the staffing levels, a position will be identified to be responsible for tracking commitments and change orders for every contract with a DBE goal. A database will be maintained outlining the appropriate counting credit given, based on certified area of work and commercially-useful function requirements. A monthly analysis will be conducted that may use prompt payment reports and daily work reports to guarantee and verify actual work completed. These actions will be implemented based on the hiring of additional personnel estimated to occur by January 2013.

FTA Response: FTA agrees with WMATA's response to the noted deficiency. By December 30, 2012, submit to the FTA's Office of Civil Rights additional information on projected staffing, such as number of positions and deployment schedule to meet the January 2013 deadline. Also, by February 15, 2013, provide information for the personnel, along with job descriptions and procedures to address counting DBE participation and commercially useful function requirements.

Additionally, WMATA is to submit evidence to FTA's Office of Civil Rights by

December 30, 2012, demonstrating that DBE participation on Contract No FQ8133 was accurately counted and reported.

#### **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.

The review team found no evidence of quotas or set-asides for DBE firms during the compliance review.

#### **I) Meeting Goals**

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

Discussion: During the DBE Compliance Review, no deficiencies were found with the requirement for meeting goals.

Based on WMATA's FY 2011 semi-annual report, DBE achievement was 25.8% and the FY 2011-2013 goal is 25%. No analysis was required since the overall goal was achieved for the fiscal year.

### **10. Required Contract Provisions**

#### **A) Contract Assurance**

Basic Requirements: (49 CFR Part 26.13) Each contract that is 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.

WMATA states in its DBE Program Plan that it will ensure that the contract assurance clause found in 49 CFR Part 26 is placed in every DOT-assisted contract and subcontract. The review team examined four prime contracts and three DBE subcontracts for compliance with contract assurance clause inclusion. The contract assurance language was included in the four prime contracts, but was missing from the three subcontracts reviewed.

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

<b>Prime Contractor</b>	<b>Project</b>	<b>Contract No.</b>	<b>DBE Subcontractor</b>
Truland/Walker Seal JV	Installation of Traction Power Equipment	FN 5088	████████████████████ ████████

Hensel Phelps	Replacement of Southeastern Bus Garage	FQ 8133	██████████ ██████████
Potomac Construction, Inc.	Rehabilitation of Bus Maintenance Facilities (Landover, Northern, Western, Metro Supply and Landover Supply)	FQ 9098	████████████████████  
LTK Engineering	Railcar Vehicle Engineering Consultant Services	CQ 9025	████████████████████ ████████████████████

\*A subcontract was not available for review for this subcontractor.

The contract assurance clause is included in Appendix B and outlines all the DBE requirements for a contract. The 7000 Series Rapid Transit Railcars RFP did not include Appendix B and, therefore, did not have the appropriate non-discrimination clause. The Contract Manager indicated that Appendix B is usually not part of TVM contracts. The Manager advised the review team that the federal provisions will be updated to include the contract assurance, DBE non-discrimination clause.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA Office of Civil Rights a schedule and plan to ensure that the contract assurance clause is placed in every DOT-assisted contract and subcontract.

WMATA Response: WMATA accepts the deficiency found during the audit. WMATA will issue a Policy Memorandum requiring that a copy of every subcontract be reviewed to ensure that the Assurance Clause is contained therein. A copy of the subcontract will be maintained in the Procurement contract file.

FTA Response: FTA agrees with WMATA's response to the noted deficiency. By December 30, 2012, submit to FTA's Office of Civil Rights a sample contract with the correct clauses and an implementation schedule to collect subcontracts and track that the non-discrimination clauses are included.

## **B) Prompt Payment**

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

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

### *Prompt Payment*

The WMATA DBE Plan includes a 10-day prompt payment clause. The prompt payment clause was included in all four of the prime contracts. The subcontracts with ██████████ and ██████████ also included the correct prompt payment language. The subcontract with ██████████p did not include the 10-day prompt payment clause and, instead, stated that the payments terms are net 30 days.

The review team was able to track the payments from WMATA to Potomac Construction to the subcontractor, [REDACTED]. On average, [REDACTED] was paid 15 days in advance of Potomac receiving payment from WMATA. Payment between WMATA, LTK Engineering, and the subcontractor, [REDACTED], were also tracked. On average, LTK paid [REDACTED] one-half day after receiving payment from WMATA.

#### *Return of Retainage*

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

WMATA's DBE Plan states that, "The prime contractor agrees further to return retainage payments to each subcontractor within ten (10) work days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of WMATA." The DBE Plan does not include a provision for incremental acceptance of subcontractor's work. Two of the prime contracts, Potomac Construction and LTK Engineering, did not include language for return of retention or for incremental acceptance of work. The prime contract with [REDACTED] and [REDACTED] include the 10-day return of retainage but did not include language for incremental acceptance. The [REDACTED] and [REDACTED] subcontracts did not contain provisions for the return of retainage or for incremental acceptance. The subcontract with [REDACTED] contained the correct 10-day return of retainage but did not include a provision for incremental acceptance.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA Office of Civil Rights schedule a plan to ensure the following:

- No conflicting language exists in subcontracts regarding prompt payment.
- Non-DBE prompt payment and return of retainage is monitored.
- Prompt return of retainage clauses are included in subcontract agreements.
- Incremental acceptance of portions of work is described in DBE Program and implemented.

WMATA Response: WMATA accepts the deficiencies found during the audit. A thorough review of all active federally-funded files will commence immediately to ensure that all issues identified are remediated by December 31, 2012.

FTA Response: FTA agrees with WMATA's response to the noted deficiency. By January 15, 2013, submit to FTA's Office of Civil Rights the results of the review of contract files, along with evidence that the issues identified in this section have been remediated.

### **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 laws.

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

The Contract Administration Requirements found in Appendix B, DBE provisions, include appropriate legal remedies for non-compliance with DBE requirements. Contractors are required to submit DBE Participation Status Reports on a monthly basis. Failure to submit these reports may result in suspension of contract payments. If the contractor fails to comply with provisions in Appendix B, corrective action must be taken. A stop work order may be issued if the contractor fails or refuses to comply promptly. The legal representatives could not recall any instances when non-compliance resulted in the legal remedies mentioned in Appendix B.

### **11. Certification Standards**

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for Certification Standards

The WMATA DBE Program Plan included language that the certification standards of Subpart D of Part 26 would be used to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts. WMATA is a certifying member of the Metropolitan Washington Unified Certification Program (MWUCP). The MWUCP consists of the District Department of Transportation (DDOT) and WMATA.

### **12. Certification Procedures**

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

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

The review team examined the following WMATA certification files to ascertain the level of compliance with certification procedures:

Firm Name	Status	Deficient-Area
██████████ ██████	Existing certification	Yes – annual No-Change Affidavit collected and certification determination
██████████████████	Existing certification	No
██████████████████	Existing certification	No
██████████	Existing certification	Yes – no on-site visit conducted, annual No-Change Affidavit collected and certification determination

The review team discussed the certification process with the DBELO and staff. There were two DBE Specialists at the time of the review that had certification responsibilities in addition to other DBE Program responsibilities. WMATA and the District DOT (DDOT) make up the Unified Certification Program (UCP). DDOT covers only the Washington, DC area, while WMATA is responsible for DC, parts of Maryland, and Virginia. WMATA advised the review team that approximately 10 certification applications are received per week. The review team cited the following deficiencies regarding WMATA certification procedures:

- missing no-change affidavits
- onsite visit missing – Unified Industries
- no mechanism to track 30-day notification requirement
- no mechanism to track 90-day determination requirement
- no interstate certification process
- no removals completed in years (self-reported); recently sent out hundreds of removal letters
- directory not updated with new/removed firms in timely manner

**Corrective Action and Schedule:** Within 30 days of receipt of the draft report, submit to FTA Office of Civil Rights a schedule and plan address the certification deficiencies outlined above.

**WMATA Response:** WMATA accepts the deficiencies found during the audit.

1. *Missing no change affidavits:* A review will be conducted of each certified DBE file to determine if the current yearly No Change Affidavit is present. If the document is not present, a notice and a No-Change Affidavit will be sent to the DBE indicating that the affidavit is required to be in compliance with DBE regulations. This notarized affidavit should be returned within 10 days. If the notarized form has not been received within the allotted 10-day period, a second notice will be sent stating that the identified entity is not in compliance and not eligible as a DBE and maybe removed pursuant to 49 CFR 26.109(c). The second notice will provide 10 additional days for compliance. If compliance is not met, the DBE vendor will be notified of the non-compliance with 49 CFR Part 26 and will be removed from the DBE directory until compliance is met.

2. *Onsite visit missing – Unified Industries:* This certification is currently being reviewed for annual review. An updated on-site visit will be conducted in accordance to the regulations. All other certifications will be reviewed for completeness on the annual anniversary.

3. *No mechanism to track 30-day notification requirement:* Based on the determination of the staffing levels, a position will be identified to be responsible for this function. This position will maintain all entries and maintain the 30-day notification requirement. Based on the hiring of additional personnel – January 2013.

4. *No mechanism to track 90-day notification requirement:* Based on the determination of the staffing levels a position will be identified to be responsible for this function. This position will maintain all entries and maintain the 90-day notification requirement. Based on the hiring of additional personnel – January 2013.

5. *No interstate certification process:* Interstate certification guidelines have been implemented (attachment B).

6. *No removals completed in years:* Letters were distributed on April 20, 2012, to approximately 250 companies. Effective September 2012, the non-responsive companies will be removed from the database.

7. *Directory not updated with newly-removed firms in timely manner:* Based on the determination of the staffing levels, a position will be identified to be responsible for this function. This position will update all approved certifications/de-certifications in the database. The database updates the DBE registry immediately. Based on the hiring of additional personnel – January 2013.

FTA Response: FTA partially agrees with WMATA's response to the noted deficiencies with the following comments:

1. By December 30, 2012, submit an implementation schedule to FTA's Office of Civil Rights for the No-Change Affidavit review. Additionally, WMATA must follow the removal process outlined in Section 26.87 for failure to cooperate with No-Change Affidavit requests.
2. By December 30, 2012, submit to FTA's Office of Civil Rights a status of the certification review actions described.
3. By December 30, 2012, submit to the FTA's Office of Civil Rights additional information on projected staffing, such as number of positions and deployment schedule to meet the January 2013 deadline. Also, by February 15, 2013, provide information for the personnel along with job descriptions and procedures to address the 30-day notification requirement.
4. By December 30, 2012, submit to the FTA's Office of Civil Rights additional information on projected staffing, such as number of positions and deployment schedule to meet the January 2013 deadline. Also by February 15, 2013, provide

information for the personnel along with job descriptions and procedures to address the 90-day determination requirement.

5. FTA partially concurs with WMATA's proposed actions in Attachment B. The Washington Metropolitan Uniform Certification Program (WMUCP) states that out-of-state DBE firms will provide documents as provided in 49 CFR 26.85(c). However, the checklist did not include items listed in 26.85(c)(2), (3), and (4). By December 30, 2012, submit to FTA's Office of Civil Rights revised interstate certification procedures that include sections 26.85(c)(2), (3), and (4) in the document checklist for out-of-state DBE firms.
6. WMATA must follow the removal process outlined in Section 26.87 for failure to cooperate with requests. By December 30, 2012, submit to FTA's Office of Civil Rights acknowledgement that this will be followed.
7. By December 30, 2012, submit to the FTA's Office of Civil Rights additional information on projected staffing, such as number of positions and deployment schedule to meet the January 2013 deadline. Also, by February 15, 2013, provide information for the personnel along with job descriptions and procedures to address directory updates.

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

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

**Discussion:** During this DBE Compliance Review, deficiencies were found with the FTA requirements for monitoring and reporting. An advisory comment was made regarding the bidders' list.

#### ***Bidders' List***

WMATA initiated a new software system for supplier registration. The PeopleSoft Supplier Registration system captures the essential information for a firm to do business with WMATA. The registration process requires suppliers to complete certain fields, while others are optional. WMATA provided a demonstration of the system, which has the capability to capture all the bidders' list requirements of Part 26.11. Some of the bidders' list fields were optional for the registrant. WMATA was advised to make these applicable fields required to complete registration.

It was also recommended to WMATA that it consider using bidders' list generated from this system during the goal-setting process. The past methodology indicated that WMATA wanted to use "apples to apples" when determining availability of DBEs and all firms in the MSA. This resulted in an unrealistically high DBE numerator (112k – DBEs) and denominator (320k – all firms). The registration system had approximately 24,405 firms during the compliance review period. Using data from this system would be



more reflective of firms ready, willing, and able to do business with WMATA.

Advisory Comment: The review team advised WMATA to make bidders' list applicable fields required to complete the registration process. The review team also recommended that WMATA consider using data from the registration system during the goal setting process.

#### *Monitoring*

The DBE Program Plan outlines a number of monitoring mechanisms to be implemented by WMATA. These mechanisms included verifying that DBEs actually completed the work and were paid appropriately and promptly. Prime contractors are required to complete monthly participation forms as outlined in Appendix B of the contract.

The DBE LO indicated that the Compliance Department is beginning to collect the Prompt Payment Reports more consistently and will also begin collecting cancelled checks to verify prompt payment. No current process was in place to verify if subcontractors are paid promptly. The review team received email copies of the Compliance Department requesting copies of Prompt Payment Reports and cancelled checks for contracts selected in preparation for the DBE compliance review. Several Prompt Payment Reports were provided to the Compliance Review team. These reports did not measure promptness of payments; rather, it was a compilation of payments to DBEs similar to a monthly DBE Participation Report.

The reviewers sampled DBE compliance files maintained by WMATA to verify that the monitoring and enforcement process was followed. The compliance files were incomplete or missing documents and payment verifications. The review team also cited the following issues with WMATA's monitoring process:

- Not collecting subcontracts as stated in WMATA contract provisions.
- No mechanism to ensure that DBEs actually complete work.
- No worksite visits in files reviewed.
- No mechanism to track, report, and maintain a running tally of DBE participation/achievement.
- No mechanism to know if DBE subcontracted work to non-DBEs.
- No written certification process that contracts were reviewed and worksites monitored.

#### *Reporting*

The semi-annual/ARRA reports completed by WMATA from 2009–2011 were reviewed for compliance. None of the reports during this period had the payments on contracts completed during the reporting period. WMATA representatives from several departments indicated that projects are not closed out. This resulted in no payments reported in the DBE semi-annual reports.

DBE awards were identical to all subcontract awards in the 2011 semi-annual reports for both June and December. Although possible in smaller awards, it speaks to reporting flaws when both periods have \$74 million and \$104 million, respectively, in subcontract awards, all to DBEs.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan and schedule for ensuring that:

- Monitoring and enforcement procedures are implemented appropriately.
- Projects are closed out when all work is satisfactory completed.
- Semi-annual DBE reports are completed accurately.

WMATA Response: WMATA accepts the deficiencies found during the audit.

1. *Monitoring and enforcement procedures are implemented appropriately:* A thorough review of all active federally-funded files will commence immediately to ensure that all issues identified are remediated by December 31, 2012.

2. *Projects are closed-out when work is completed:* A thorough review of all active federally-funded files will commence immediately to ensure that all issues identified are remediated by December 31, 2012.

3. *Semi-annual DBE reports are completed accurately:* The corrected semi-annual DBE report for the second half of FY 2011 was included in the response to the draft report.

FTA Response:

FTA partially agrees with WMATA's response to the noted deficiencies. By January 15, 2013, submit to FTA's Office of Civil Rights a revised DBE Program Plan outlining monitoring and enforcement procedures addressing the issues noted in the compliance review report. Subsequent to the review, FTA's Office of Civil Rights obtained the 2011 contract activity report submitted by WMATA in response to a *Procurement Systems Review*. The activity report directly contradicts WMATA's assertion that "no projects are closed out," as it provided details on a significant number of contracts which had been completed during the previous fiscal years. By December 30, 2012, submit to FTA's Office of Civil Rights, reconciled agency definitions and procedures for documenting project closeout and contract completion, including a method for ensuring that data on completed contracts are included within the semiannual DBE reports. Review of active files should be completed to allow the reports for the second half of FY 2012, to be accurate and complete. Also, by January 15, 2013, provide information detailing the affect that any past, unidentified closeouts may have had on previously-submitted reports. FTA also notes that the contract dollars in the resubmitted December 2011 semi-annual report are significantly less than the values from the initial report. These numbers could not be verified based on the information submitted. By December 30, 2012, submit to FTA's Office of Civil Rights procedures for reporting awards of prime contracts and subcontracts in the semi-annual reports. Also, by January 15, 2013, provide a revised semi-annual report for the first half of FY 2011. The result of these revised reports could affect the determination by WMATA that the FY 2011 goal was met and that a shortfall analysis was not required.

## Section 7 – Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action Plan	Response Date
1. Program Plan	26.21	AC	Include revision date on Program Plan		
2. Policy Statement	26.23	D	Policy statement not signed by GM Lacking verification of dissemination	Submit evidence of policy on website as stated in policy statement.	December 30, 2012
3. DBE Liaison Officer	26.25	D	Number of staff inadequate No DBE LO name/contact info in plan	Submit information on projected staffing and deployment schedule to meet the January 2013 deadline.	December 30, 2012
4. Financial Institutions	26.27	AC	Update list of institutions, identify frequency of updates, encourage primes to use them if applicable		
5. DBE Directory	26.31	ND			
6. Overconcentration	26.33	D	No process for examining OC	Submit updated DBE Program Plan reflecting revised overconcentration analysis procedures.  Submit results of overconcentration analysis	December 30, 2012  February 15, 2013
7. Business Development Programs	26.35	N/A			
8. Fostering Small Business Participation	26.39	D	Lacking information and details in small business element of DBE Program Plan	Submit revised small business participation plan.	January 15, 2013
9. Determining / Meeting Goals					
A. Calculation	26.45	D	DBE numbers are inflated Past participation number not accurate	Incorporate demonstration of correct procedure in FY 2014-2016 goal methodology.	August 1, 2013
B. Public Participation	26.45	D	Consultation process not completed prior comment period	Submit written report of how consultation efforts will be incorporated into next goal.	March 1, 2013
C. TVM	26.45	ND			
D. Race Neutral	26.51	ND			
E. Race Conscious	26.51	ND			

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action Plan	Response Date
F. Good Faith Efforts	26.53	D	DBE LO makes GFE determination and reconsideration official	<p>Submit documentation that good faith efforts reconsideration official has understanding of DBE requirements.</p> <p>Submit documentation that there is no conflict of interest with good faith efforts reconsideration official</p> <p>Submit an update within the DBE Program Plan that addresses good faith efforts in relation to the reduction of work to DBEs</p>	<p>December 30, 2012</p> <p>December 30, 2012</p> <p>December 30, 2012</p>
G. Counting DBE Participation	26.55	D	DBE firm not certified in scope of work	<p>Submit additional information on projected staffing and deployment schedule.</p> <p>Provide information on personnel and procedures to address counting DBE participation and CUF requirements.</p>	<p>December 30, 2012</p> <p>February 15, 2013</p>
H. Quotas	26.43	ND			
I. Meeting Goals	26.47	ND			
10. Required Contract Provisions					
A. Contract Assurance	26.13	D	Contract assurance language missing in contract and subcontract agreements	Submit implementation schedule to collect subcontracts.	December 30, 2012
B. Prompt Payment	26.29	D	Conflicting language in subcontracts No retention incremental provision	Submit results of review of contract files along with evidence that issues have been remediated.	January 15, 2013
C. Legal Remedies	26.37	ND			
11. Certification Standards	26.67	ND			
12. Certification Procedures	26.83	D	Missing: Annual updates Onsite visit 30 Notification requirement	Address all certification procedure issues listed.	December 30, 2012

<b>Requirement of 49 CFR Part 26</b>	<b>Ref.</b>	<b>Site visit Finding</b>	<b>Description of Deficiencies</b>	<b>Corrective Action Plan</b>	<b>Response Date</b>
13. Record Keeping and Enforcements  A. Bidders List	26.11	AC	Make bidders' list fields required in PeopleSoft system		
B. Monitoring	26,37 26.55	D	Monitoring mechanisms insufficient	Submit plan outlining monitoring and enforcement procedures addressing issues.	January 15, 2013
C. Reporting	26.11	D	Report errors No project close-outs	Submit agency definitions and procedures for project closeout.  Provide information detailing the affect that any past unidentified closeouts had on previously submitted reports.  Submit procedures for reporting awards of prime contracts and subcontracts in the semi-annual reports.  Submit revised semi-annual report for first half of FY 2011	December 30, 2012  January 15, 2013  December 30, 2012  January 15, 2013

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

## Section 8 – List of Attendees

Name	Organization	Title	Phone	Email
<b>FTA</b>				
Randelle Ripton	FTA - Office of Civil Rights	DBE Technical Lead	(202) 366-5086	<a href="mailto:Randelle.Ripton@dot.gov">Randelle.Ripton@dot.gov</a>
Jonathan Ocana	FTA - Office of Civil Rights	Equal Opportunity Specialist	(202) 493-0314	<a href="mailto:Jonathan.Ocana@dot.gov">Jonathan.Ocana@dot.gov</a>
<b>WMATA Members</b>				
Heather A. Obora	WMATA	Chief Procurement Officer	(202) 962-1579	<a href="mailto:hobora@wmata.com">hobora@wmata.com</a>
Kevin A. Green	WMATA	Procurement Manager	(202) 962-1331	<a href="mailto:kgreen1@wmata.com">kgreen1@wmata.com</a>
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Debra Farrar-Dyke	WMATA	Manager– Administrative Services and DBE Liaison	(202) 962-1168	<a href="mailto:dfarrardyke@wmata.com">dfarrardyke@wmata.com</a>
Andrew Clemmons	WMATA	Asst. Inspector General for Audits, Office of Inspector General	(202) 962-1014	<a href="mailto:aclemmons@wmata.com">aclemmons@wmata.com</a>
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Yogesh Patel	Potomac Construction Co. Inc.	Project Manager	(301) 386-3030	<a href="mailto:Ypatel@pccimd.com">Ypatel@pccimd.com</a>
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