



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) Program Compliance Review

Final Report
April 2019



U.S. Department of Transportation
Federal Transit Administration

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Executive Summary

Objective and Methodology – This report details the findings of a compliance review of the Washington Metropolitan Area Transit Authority’s (WMATA) Disadvantaged Business Enterprise (DBE) program implementation. The compliance review team (1) examined this agency’s DBE program procedures, management structures, actions, and documentation; (2) collected and analyzed documents and information from the Federal Transit Administration (FTA) and WMATA; and (3) interviewed WMATA officials, DBE firm representatives, prime contractor representatives, and community-based organizations that advocate on behalf of minority- and woman-owned businesses. The four-day review included interviews, assessments of data collection systems, and a review of program and contract documents.

WMATA’s DBE program includes the following positive program elements –

Positive Program Elements

- **Good Faith Compliance** - WMATA conducted two internal audits to improve the program and was continuing to work internally to comply with DBE regulations.
- **Legal Remedies** – WMATA implemented comprehensive legal remedies to program noncompliance.

The Program has the following administrative deficiencies –

Administrative Deficiencies

- **DBE Policy Statement** – WMATA did not adequately distribute its DBE Policy Statement to the DBE and non-DBE communities, as required.
- **Contract Assurance** – WMATA did not include the required nondiscrimination assurance in its entirety in its FTA-assisted contracts or subcontracts.
- **Transit Vehicle Manufacturers (TVMs)** – WMATA did not have procedures in place to confirm TVM eligibility prior to contract award or procedures to report TVM awards to FTA within 30 days after awarding a TVM contract.
- **Protections Against Termination for Convenience** – Provisions in subcontractor agreements conflicted with recipient and U.S. Department of Transportation (DOT) requirements.

The Program has the following substantive deficiencies –**Substantive Deficiencies**

- **DBE Program Plan** – WMATA's DBE Program Plan was out of date.
- **Disadvantaged Business Enterprise Liaison Officer (DBELO)** – The DBELO's direct and independent access to the CEO was not documented. WMATA's staffing and funding to administer the DBE program was inadequate, and the program's location in the Office of Procurement and Materials made it vulnerable to apparent or actual conflicts of interest.
- **Goal Calculation** – WMATA did not consider all potential FTA-funded contracting opportunities in its FY 2017–19 goal methodology.
- **Race-Neutral Measures** – WMATA's race-neutral measures did not include several of the measures described in 49 CFR Part 26.51.
- **Small Business Element (SBE)** – WMATA's SBE and SBE implementation were lacking and did not include several of the measures recommended in 49 CFR Part 26.39.
- **Counting DBE Participation** – WMATA did not accurately count DBE participation.
- **Shortfall Analysis and Corrective Action Plan** – WMATA's shortfall analyses and corrective action plans for shortfalls in FY 2015, FY 2016, and FY 2017 were not conducted, prepared, and implemented, as required.
- **Prompt Payment** – WMATA did not have procedures for confirming subcontracts included the required prompt payment clause or for verifying that prime contractors paid subcontractors as required.
- **Record Keeping and Enforcements** – WMATA did not submit semi-annual reports on time, monitor program compliance, or use and maintain a compliant bidders list, as required.

WMATA did not meet its DBE goals in FY 2015, FY 2016, or FY 2017, reporting overall goal attainment of 18.6 percent, 10.8 percent, and 21.9 percent, respectively. WMATA's DBE participation fluctuated over the past three fiscal years, achieving a three-year high in FY 2017. WMATA lacked sufficient analysis to determine the circumstances and actions taken on its part to cause the fluctuations in DBE participation. To encourage the attainment of future goals and the implementation of WMATA's DBE program in good faith, this report highlights several steps to help ensure WMATA's compliance with 49 CFR Part 26 and the overall success of its DBE program.

I. General Information

This chapter provides basic information concerning this compliance review of WMATA. Information on WMATA, the review team, and the dates of the on-site portion of the review are in the table below.

Grant Recipient:	Washington Metropolitan Area Transit Authority
City/State:	Washington, DC
Grantee Number:	1398
Executive Official:	Paul J. Wiedefeld
On-site Liaison:	Sylvia Edwards
Dates of On-site Visit:	June 5–8, 2018
Site Visit Location:	600 5th Street, NW Washington, DC 20001

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2. Jurisdiction and Authorities

The Secretary of Transportation authorized the Federal Transit Administration (FTA) Office of Civil Rights to conduct Civil Rights Compliance Reviews. FTA conducts compliance reviews to ensure compliance of applicants, recipients, and subrecipients with Section 13 of the Master Agreement, Federal Transit Administration M.A. (21), October 1, 2014, and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs."

WMATA is the recipient of one or more federal transit grants, loans, and/or contracts that result in contracting opportunities exceeding \$250,000. Hence, WMATA is subject to the Disadvantaged Business Enterprise (DBE) compliance conditions associated with the use of FTA financial assistance 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 this compliance review.

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3. Purpose and Objectives

3.1 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 49 CFR Part 26. FTA has determined that a compliance review of WMATA's 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 in its DBE Program Plan. FTA intends this compliance review to be a fact-finding process to (1) assess 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 discrimination against individual DBE firms or complainants or to adjudicate these issues on behalf of any party.

3.2 Objectives

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

- Ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's transit financial assistance programs.
- Create a level playing field on which DBEs can compete fairly for DOT-assisted contracts.
- Ensure that the Department narrowly tailors its DBE program in accordance with applicable law.
- Ensure that only firms that fully meet the regulatory eligibility standards participate as DBEs.
- Help remove barriers to the participation of DBEs in DOT-assisted contracts.
- Promote the use of DBEs on all types of federally assisted contracts and procurement activities conducted by recipients.
- 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 to comply with 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, DOT guidance, and FTA policies and 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, including DBE program managers, other WMATA management personnel, DBEs, prime contractors, and other stakeholders.

4. Background Information

The purpose of this chapter is to provide an understanding of WMATA's operations and scale. The subsections below highlight WMATA's organizational structure and services; its budget, FTA-assisted projects, and open grants; and the history of its DBE program.

4.1 Introduction to WMATA and Organizational Structure

The Washington Metropolitan Area Transit Authority (WMATA) was created in 1967 as an Interstate Compact Agency 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 nation's capital and surrounding area. WMATA began building its rail system in 1969. It acquired the four area bus systems and began operating bus service in 1972. Rail operations started in 1976, and paratransit services originated in 1994.

WMATA provides Metrorail (rapid rail), Metrobus, and MetroAccess (ADA complementary paratransit) in a service area of approximately 1,500 square miles with a population of over 3.7 million. The jurisdictions served include Washington, DC; Montgomery and Prince George's Counties in Maryland; and Arlington, Fairfax, and Loudon Counties and the Cities of Alexandria, Fairfax, and Falls Church in Virginia.

The WMATA Board of Directors determines agency policy and provides oversight for the funding, operation, and expansion of transit facilities within the Interstate transit zone. The Board of Directors is composed of eight voting and eight alternate directors. Maryland, the District of Columbia, Virginia, and the federal government appoint two voting and two alternate directors each. The WMATA General Manager (GM), who also functioned as the agency's Chief Executive Officer (CEO), reports to the Board of Directors.

WMATA operates Metrorail and Metrobus services in-house. MetroAccess is contracted out through five private, for-profit companies. Diamond Transportation, First Transit, and Transdev (formerly Veolia) provide the paratransit trips. Medical Transportation Management provides quality assurance and monitoring. MV Transportation operates the MetroAccess Operations Control Center and dispatches and schedules all paratransit trips.

The Metrorail system has 117 miles of track and provides more than 270 million annual passenger trips. Metrorail operates service through 91 stations with 1,206 rail cars on six rail lines: Red, Green, Yellow, Blue, Orange, and Silver. The first revenue-operating segment of the Silver Line, a new Metrorail line in Virginia, opened on July 26, 2014, and included five stations and approximately 11.5 miles of track. Metrorail operates 618 escalators and 278 elevators used by over 3 million passengers each weekday.

The Metrobus system operates a fleet of 1,583 buses on 170 lines with around 269 route variations throughout the greater Washington, DC, metropolitan area. Metrobus is the sixth-largest bus system in the nation, providing over 134 million annual passenger trips. WMATA owns and maintains 91 transit centers. Additional transit centers throughout the Metrobus system are owned and operated by the jurisdictional governments where the centers are located.

MetroAccess, the ADA complementary paratransit service, operates a fleet of 675 vans and sedans. It provides over 2 million annual passenger trips. Rides are offered in the same service areas and during the same hours of operation as Metrorail and Metrobus.

WMATA has eight service and inspection rail yards and nine operating bus garages located throughout its service area. WMATA headquarters are in the Jackson Graham Building, 600 Fifth Street NW, Washington, DC. WMATA also has administrative staff located at the Carmen Turner Facility in Landover, Maryland.

4.2 Budget and FTA-Assisted Projects

According to the WMATA's *FY2017 Approved Budget Effective July 1, 2016* and *FY2018 Approved Budget Effective July 1, 2017*, WMATA's transit operating and capital budgets for FY 2017 and FY 2018 were as follows:

Transit Budget	FY 2017	FY 2018
Operating Budget	(Dollars in Thousands)	
Passenger Fares and Parking	\$839.0	\$755.4
State and Local Funds	\$900.7	\$1,031.5
Non-Transit Funds	\$47.0	\$47.6
Other Services	\$14.0	\$11.3
Subtotal	\$1,800.7	\$1,845.7
Capital Budget		
Federal Formula/Other Grants	\$317.3	\$311.9
Federal Dedicated Funds (PRIIA)	\$172.0	\$148.5
State and Local Funds	\$394.8	\$374.4
Other Sources	\$59.7	\$124.2
Planned Long-Term Financing	\$58.3	\$291.0
Subtotal	\$1,002.0	\$1,250.0
Grand Total	\$2,802.7	\$3,095.7

Note: PRIIA = Passenger Rail Investment and Improvement Act of 2008.

In the past few years, WMATA completed the following noteworthy projects:

- On July 26, 2014, WMATA opened the first phase of the Silver Line, a new Metrorail line in Virginia, with five stations and approximately 11.5 miles of track.
- On September 20, 2015, WMATA opened the Paul S. Sarbanes Silver Spring Transit Center, a new three-tiered, urban, multimodal transit facility adjacent to the Silver Spring Metro Station located in Downtown Silver Spring, Maryland. The facility features over 30 bus bays serving 26 kiss-and-ride and taxi spaces and connections to regional hiking, biking, and local trails.
- Significant investments have been made to replace, rehabilitate, and repair rail cars and buses; replace approximately 150 MetroAccess vehicles; replace obsolete bus garages; and rehabilitate rail maintenance facilities and tracks. Starting in FY 2015, WMATA inaugurated the first of its 7000 Series rail cars into service, replacing the oldest cars in the system. Improvements also include new software to improve train prediction

information for displays and internet applications, the release of real-time data for third-party application developers and upgrading and/or replacing elevators and escalators.

WMATA is currently implementing the following noteworthy projects:

- *1000 Series rail car replacement*: This project replaces all 300 of the 1000 Series railcars, which were purchased between 1974 and 1978, with new 7000 Series railcars.
- *Rail Car Rehabilitation Program*: Approximately one-fifth of the fleet (225 cars) is subject to heavy overhaul annually. Major heavy overhaul components include replacement of wheels, brake systems, traction motors, and trucks.
- *Rail preventive maintenance*: This project will provide preventive maintenance to keep the WMATA rail fleet in a state of good repair. Funding from this project provides the labor required to provide upgrades, repairs, and maintenance to capital assets that have a useful life of over one year.
- *Radio and Cellular Infrastructure Replacement Program*: In response to the Federal Communications Commission's new T-Band relocation requirement, this project will replace the existing comprehensive radio communications system, which operates in a 450- to 490-MHz frequency band (also referred to as a T-Band), with a new system operating in a 700-MHz band.
- *Track rehabilitation*: This project rehabilitates the track structure by replacing deteriorated running rail, crossties, direct fixation fasteners, third-rail insulators, and switches annually in addition to track stabilization and tamping.
- *Bus replacement*: This project replaces an average of 100 buses per year to maintain an average fleet age of 7.5 years. This goal is based on a fleet size of approximately 1,500 buses that range in size from 26 to 62 feet.
- *Bus Rehabilitation Program*: Under this project, a comprehensive rehabilitation program is performed at approximately 7.5 years of age and provides for the complete rehabilitation of bus mechanical, electrical, and structural systems. Additionally, this capital improvement program supports rebuilding of major components and subcomponents.
- *Bus preventative maintenance*: Preventive maintenance programs include accessibility equipment, destination signs, coolant systems, service lane activities, fluid analysis, powertrains, filter maintenance, safety-related items, bus batteries, and wheel and tire maintenance.
- *Orange and Blue Lines Rehabilitation Stage One*: In the first stage a comprehensive rehabilitation of the Orange and Blue Lines is focused on rebuilding systems and infrastructure to extend useful life and improve reliability of the Metro system.
- *Escalator replacement*: This program will result in the replacement of approximately 128 escalators at 34 stations. Fourteen of the originally planned replacements under this project will be completed as major rehabilitations.
- *Cinder Bed Road Bus Garage*: This project replaces the Royal Street Bus Garage with a fully modern Leadership in Energy and Environmental Design (LEED) Silver facility at Cinder Bed Road, with a capacity of 160 buses.
- *Andrews Federal Campus Bus Garage*: This project will replace the existing Southern Avenue Bus Garage with a fully modern Leadership in Energy and Environmental Design (LEED) Silver facility that can hold 175 buses. Project also includes the construction of a new heavy repair and overhaul facility.
- *Rail Yard Facility Repairs (Yard 1)*: This project is for the rehabilitation of Alexandria, Brentwood and New Carrollton Rail yards that were put into service between 1976 and

1983. The scope of work varies across the facilities and rehabilitation work will include all systems and infrastructure to increase overall efficiency.

WMATA plans to pursue the following noteworthy projects in the next three to five years:

- *Rail car acquisition:* WMATA plans to procure 220 new rail cars.
- *Automatic train control state of good repair:* The automatic train control rooms and associated train control rooms and wayside equipment are aging. Obsolete and/or worn-out equipment need to be replaced on various life cycles varying from 20 to 40 years.
- *Fare collection modernization:* This project will replace and upgrade the existing fare collection system.
- *Station Platform Rehabilitation:* This project will rehabilitate 20 of WMATA's outdoor rail stations.
- *Railcar Heavy Repair and Overhaul Facility:* The purpose of the project is to centralize Metrorail car heavy repair and mid-life overhaul activities at a single facility.
- *Rail Yard Facility Repairs (Yard 2):* This project is for the next phase in rehabilitation of yard facilities. The scope of work will vary across facilities and rehabilitation work will include all systems and infrastructure to increase overall efficiency.
- *Tunnel Leak Mitigation:* This project will address the water infiltration into the tunnel system by addressing leaking and provide a fix to help mitigate water intrusion and increase the reliability of rail service.

Below is a list of WMATA's open grants at the time of the review.

Grant Number	Grant Amount	Year Executed	Description
DC-2017-006-01	\$148,500,000	2017	FFY 2017 PRIIA Appropriation
DC-2017-014-00	\$150,972,989	2017	FFY 2017 5307/5340 Formula Funding
DC-2017-005-01	\$163,254,554	2017	WMATA Safety Preventive Maintenance
DC-2017-011-00	\$1,884,992	2017	Track Inspector Location Awareness with Enhanced Transit Worker Protection
DC-2017-007-01	\$145,511,301	2017	FFY 2017 5337 State of Good Repair
DC-2017-004-01	\$8,423,763	2017	FFY 2017 5339 Bus Program
DC-2016-010-00	\$148,500,000	2016	FFY 2016 PRIIA Appropriation
DC-2016-009-00	\$147,233,881	2016	FFY 2016 5337 State of Good Repair
DC-2016-008-00	\$146,989,325	2016	FFY 2016 5307/5340 Formula Funding
DC-44-X001-00	\$16,001,250	2015	FFY 2013 Hurricane Sandy Resilience
DC-90-X089-01	\$146,753,447	2015	FFY 2015 5307/5340 Formula

Grant Number	Grant Amount	Year Executed	Description
DC-75-0006-01	\$133,012,500	2015	FFY 2015 PRIIA Appropriation
DC-04-0008-01	\$1,499,999	2014	Bus Livability: Bus Stop Improvements
DC-57-X007-00	\$996,200	2012	NEW FREEDOM: Bus Stop Improvements
DC-04-0007-02	\$2,400,000	2011	FFY 2010 SGR Asset Management

Note: FFY = Federal fiscal year.

4.3 DBE Program

FTA determined WMATA to be one of the 50 largest transit authorities receiving federal financial assistance from the U.S. Department of Transportation (DOT). As a condition of receiving this assistance, WMATA is responsible for complying with the regulations set forth in 49 CFR Part 26. Accordingly, WMATA developed a DBE Policy Statement that outlined its goals and mission for the program and a DBE Program Plan that described its efforts pursuant to compliance with the regulations. WMATA submitted its most recent DBE Program Plan to FTA on June 29, 2017, and at the time of the site visit it had an updated draft DBE Program Plan dated April 2018. WMATA's Disadvantaged Business Enterprise Liaison Officer (DBELO), five full-time staff, and three temporary contractor staff were responsible for the administration of its FTA DBE program. WMATA reported that it would discontinue the use of contractor staff by June 30, 2018, and that it was in the process of recruiting and hiring two additional full-time staff.

Since the fall of 2017, WMATA's DBE program had undergone major changes in leadership, staff, and organizational structure. The majority of the full-time staff responsible for the management and administration of the DBE program, including the DBELO, were hired in the eight months prior to this compliance review. Beginning in FY 2017, WMATA's DBE program was reviewed by FTA during its FY 2017 Triennial Review and internally by its own Management, Audit, Risk, and Compliance staff and Office of Inspector General. At the time of the site visit, WMATA's DBE program staff was working on improving the DBE program by implementing recommendations and corrective actions resulting from these reviews, including implementing needed improvements to its monitoring procedures (e.g., prompt payment and counting DBE participation). WMATA improvement efforts are ongoing.

WMATA's FY 2014–16 and FY 2017–19 overall DBE goals were 25 percent and 22 percent, respectively. WMATA used both race-neutral and race-conscious means to attain its overall goals. WMATA did not meet its DBE goals in FY 2015, FY 2016, and FY 2017, and it needed to improve how it analyzed program performance and implemented race-neutral and race-conscious measures to attain its overall goals.

WMATA was a certifying partner in the Metropolitan Washington Unified Certification Program (MWUCP) administered in conjunction with the District of Columbia Department of Transportation. FTA conducted a Unified Certified Program (UCP) compliance review separate from and concurrent with this DBE program compliance review. WMATA DBE Certification and

DBE Directory program compliance are discussed in the WMATA UCP compliance review report.

5. Scope and Methodology

5.1 Scope

FTA specifies a review of the implementation of the following DBE program components in this report:

- A DBE program in conformance with 49 CFR Part 26 that has been submitted to FTA
- A signed policy statement expressing a commitment to the WMATA DBE program, states its objectives, and outlines responsibilities for implementation [49 CFR 26.23]
- Designation of a DBE 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]
- Efforts made to use DBE financial institutions by WMATA as well as by prime contractors, if such institutions exist [49 CFR 26.27]
- A DBE directory including addresses, phone numbers, and types of work performed, made available to the public and updated at least annually [49 CFR 26.31]
- Determination that overconcentration does (or does not) exist and efforts to address this problem, if necessary [49 CFR 26.33]
- Assistance provided to DBEs through Business Development Programs to help them compete successfully outside of the DBE program [49 CFR 26.35]
- An overall goal based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on DOT-assisted contracts and proper mechanisms to implement the DBE goal [49 CFR 26.43–26.53]
- A shortfall analysis and corrective action plan when WMATA did not achieve its DBE goal [49 CFR 26.47]
- A process that ensures transit vehicle manufacturers (TVMs) comply with the DBE requirements before bidding on FTA-assisted vehicle procurements. The process may include WMATA seeking FTA approval to establish a project-specific goal for vehicle purchases [49 CFR 26.49].
- A nondiscrimination and a prompt payment clause included in all FTA-assisted contracts and a prompt payment verification process [49 CFR 26.7, 26.13, and 26.29].
- A certification process to determine whether potential DBE firms are socially and economically disadvantaged according to the regulatory requirements. The potential DBE firms must submit the standard DOT application, the standard DOT personal net worth form, and the proper supporting documentation [49 CFR 26.65–26.71].
- The certification procedure includes document review, on-site visit(s), eligibility determinations consistent with Subpart D of the regulations, an interstate certification review process, and a certification appeals process [49 CFR 26.83 and 26.86].
- Implementation of appropriate mechanisms to ensure compliance with the DBE requirements by all program participants and appropriate breach of contract remedies [49 CFR Part 26.13]. The DBE program must also include monitoring and enforcement

mechanisms to ensure DBEs actually perform the work committed to DBEs at contract award [49 CFR 26.37]. Reporting must include information on payments made to DBE firms [49 CFR 26.11 and 26.55].

5.2 Methodology

The initial step of this compliance review consisted of consultation with the FTA Office of Civil Rights and a review of available information from FTA's Transit Award Management System (TrAMS) and other sources. After reviewing this information, potential dates for the site visit were coordinated.

The FTA Office of Civil Rights sent a notification letter to WMATA that informed the agency of the upcoming visit, requested necessary review documents, and explained the areas to be covered during the on-site visit. The letter also informed WMATA of staff and other parties whom the review team would interview.

Before conducting the on-site visit, FTA asked WMATA to provide the following documents:

- Most current DBE Program Plan;
- DBE goal methodology submissions;
- DBE semi-annual reports and/or quarterly reports as required by the American Recovery and Reinvestment Act of 2009 for the past three years;
- A Memorandum of Understanding or similar documents indicating WMATA's participation in the Unified Certification Program;
- A list of FTA-assisted contracts awarded during the current and previous fiscal years;
- A list of DBE firms that have worked on FTA-assisted projects sponsored by WMATA;
- Documentation showing the "Good Faith Efforts" criteria and review procedures established by WMATA; and
- Procedures for monitoring all DBE program participants to ensure compliance with the DBE requirements, including but not limited to a prompt payment verification process, a process for ensuring work committed to DBEs is actually performed by DBEs, and any DBE complaints against the agency or its prime contractors during a specified time period.

The review team conducted an opening conference at the beginning of the compliance review with FTA representatives and WMATA staff.

Following the opening conference, the review team examined WMATA's DBE Program Plan and other documents submitted by WMATA's DBELO. The team then conducted interviews with the DBELO regarding DBE program administration, DBE goal implementation, record keeping, monitoring, and enforcement. The review team selected a sample of contracts and reviewed them for their DBE elements. The review team also conducted interviews with prime contractors, subcontractors, and interested parties.

At the end of the review, FTA representatives, WMATA staff, and the review team convened for the exit conference, during which FTA and the review team discussed initial findings and corrective actions with WMATA.

Participants in the compliance review are listed below.

Washington Metropolitan Area Transit Authority

Paul Wiedefeld, General Manager and CEO
John Kuo, Chief Information Business Operations
Elizabeth Sullivan, Chief Risk and Audit Officer
Suzette Moore, Chief Procurement Officer
Sylvia Edwards, Director Small Business Programs Office and DBELO
Thomas Turner, Senior Auditor
Carl Farmer, Senior Auditor
Lilliette Rivera, Small Business Analyst
Rashida Reid, Small Business Auditor
Bekwele Amadi, Performance Analyst
Araina Wallace, Small Business Administration Assistant
Jay Johnson, Policy Supervisor
Nicole Brewer, Special Projects Coordinator
Judy-Ann Davis, Procurement
Daniel G. Smith, Deputy Chief Procurement Officer
Chris Hoadley, Assistant General Counsel
Mike Riess, Counsel
Katrina Welch Smith, Management Audits, Risk, and Compliance (MARC) Internal Control Officer
Vanita King, MARC Internal Compliance Director
Gary Owens, MARC Consultant

Federal Transit Administration

John Day, Program Manager, Policy and Technical Assistance
Terry Garcia Crews, Regional Administrator – Region 3
Janelle Hinton, Equal Opportunity Specialist
Lynn Bailey, Regional Civil Rights Officer – Region 3
Guljed Birce, Equal Opportunity Specialist
Samira Louis, Financial Analyst – Region 3
Corey Walker, General Engineer – DC Metropolitan Office
Monique Myatt Galloway, Regional Counsel – Region 3

The DMP Group

Maxine Marshall, Lead Reviewer
Donald Lucas, Reviewer
Gregory Campbell, Reviewer
John Potts, Lead Reviewer WMATA UCP Review Team
Dana Lucas, Reviewer WMATA UCP Review Team
Khalique Davis, Reviewer WMATA UCP Review Team

5.3 Stakeholder Interviews

During this DBE compliance review, the review team attempted to contact six DBEs, two non-DBE prime contractors, and 10 minority- and/or woman-owned business advocacy organizations (other interested parties) between April 24, 2018 and July 3, 2018. The purpose of the interviews was to get feedback from WMATA DBE program stakeholders concerning WMATA's FTA-assisted DBE program, actual experiences, positive program elements, and any issues, concerns, and complaints. The following is a description of the interview questions asked of each interviewee and a summary of the interview results.

Disadvantaged Business Enterprises

Seven DBEs awarded FTA-assisted WMATA prime contracts or subcontracts since October 2014 were selected to be interviewed during this compliance review. Five of the DBE firms were interviewed. Interviewees were asked the following questions:

1. *How were you solicited for this project?*
2. *What type of equipment was required for scope of work performed?*
3. *Do you own this equipment? If leased/borrowed, identify company and arrangement?*
4. *Does the prime lease/lend equipment to you?*
5. *Has WMATA conduct any on-site monitoring regarding your firm's participation on the contract?*
6. *Has your firm subcontracted any work on this project? If yes, what work was subcontracted? What is the name of the subcontractor? What is the amount of the subcontracted work?*
7. *Was retainage being withheld?*
8. *How was retainage addressed in your subcontract? If yes, what is the rate of retainage? Is WMATA withholding retainage from prime? What is your firm's understanding of when you will be paid retainage amount withheld?*
9. *Has your original contract amount changed (additions or deletions)? If so, explain?*
10. *Have these changes been documented in writing?*
11. *Are there any disputes regarding work performance or payment? If so, describe?*
12. *Does prime pay you through third party/joint checks?*
13. *Have you experienced any issues while working on this contract? Prompt payment? Retaliation, etc.? If yes, how was the issue resolved?*
14. *How many FTA-assisted projects has your firm worked on with the WMATA? Estimated of how many projects and the amounts of projects?*
15. *How many years has your firm been certified?*
16. *Has your firm expanded its business since becoming certified?*
17. *How many years has your firm been working on WMATA's FTA-assisted contracts?*

The DBEs interviewed reported they responded to procurement solicitations directly from WMATA or from prime contractors. The DBEs' experience working on FTA-assisted WMATA contracts varied. One DBE reported it was working on its first WMATA contract. Another DBE had been awarded one contract as a prime contractor and three contracts as a subcontractor to WMATA prime contractors. The third DBE received several dozen contracts from WMATA both as a prime contractor and a subcontractor of varying amounts. One of the DBEs interviewed leased equipment for the scope of work it was contracted to completed. One of the DBEs interviewed confirmed WMATA had conducted onsite monitoring of its activities. None of the DBEs interviewed subcontracted out any of their work. None of the DBEs interviewed reported

issues with prompt payment from prime contractors, however, one DBE reported that WMATA did not pay promptly. Only one of the DBEs interviewed had retainage withheld but did not report issues with the release of that retainage. Two of the DBEs interviewed reported the issuance of contract changes orders resulting in more work, not less. None of the DBEs interviewed reported complaints or issues with WMATA's DBE program.

Prime Contractors

Two non-DBE prime contractors currently working on FTA-assisted contracts were interviewed during this compliance review. Interviewees were asked the following questions:

1. *How does prime solicit DBE work?*
2. *Has prime had any work performance issues with DBEs?*
3. *Has the prime substituted a DBE with another non-DBE subcontractor?*
4. *Does the prime lease/lend equipment to DBEs?*
5. *Has WMATA conducted any on-site monitoring regarding DBE participation on the contract?*
6. *How soon does prime pay subcontractor after receipt of payment from WMATA?*
7. *Is the prime withholding retainage from DBEs on this project? If yes, what percentage?*
8. *At what point will that retainage be reduced and/or returned to the DBEs?*
9. *How is DBE work considered when submitting change order requests?*
10. *Has prime made any joint check payments DBE?*

Both prime contractors interviewed solicited DBE subcontractors from internal pre-approved DBE subcontractor lists and industry- and WMATA-hosted outreach events. Both prime contractors interviewed reported infrequent and minor DBE performance issues. Neither prime contractor interviewed reported substituting DBEs on contracts, however, one prime contractor reported removing a DBE staff member from a project at the request of WMATA. Neither prime contractor interviewed reported leasing equipment to DBEs to perform work. One prime contractor reported it communicated project-related information with WMATA during scheduled bi-weekly meetings, however, it was unaware of WMATA onsite monitoring activities. One prime contractor reported a regular WMATA presence on its project. Neither prime contractor interviewed reported holding retainage from DBEs or making joint check payments to DBEs. One prime contractor reported it paid DBEs within 10 days of receiving payment from WMATA, and one prime contractor was unable to confirm the timing of payments to DBEs. When submitting change orders, both prime contractors reported they considered DBE participation subject to the scope of the change.

Interested Parties

Ten stakeholder organizations were contacted for an interview to gain insight into how the WMATA works with external organizations and the small minority and women-owned business community. The organizations contacted were:

- U.S. Pan Asian American Chamber of Commerce
- Greater Washington Hispanic Chamber of Commerce
- National Black Chamber of Commerce
- Greater Washington Urban League

- Washington DC Women's Business Center
- National Association of Women's Business Owners
- U.S. Black Chamber, Inc.
- National Association of Minority Contractors
- Council of Minority Transportation Officials
- Association of General Contractors

The interview questions included:

1. *Is your organization familiar with WMATA's DBE program?*
2. *Have you been requested to participate in the development of, or comment on WMATA's DBE goal?*
3. *Is your organization made aware of contracting/subcontracting opportunities on WMATA's contracts? If so, how?*
4. *How often is your organization contacted to provide referrals for WMATA's contracting opportunities?*
5. *Does your organization participate in any outreach activities organized by WMATA?*
6. *What is your agency's view of the effectiveness of WMATA's DBE program?*
7. *Are you aware of any concern(s) about WMATA's DBE program from members?*
8. *Do you have any suggestions for WMATA to improve their DBE program?*
9. *Have any members of your organization ever worked on an FTA-assisted project for WMATA?*

Three stakeholders responded to the interview request. One of the agencies was familiar with WMATA's DBE program, however, none of the agencies had been requested to participate in the development of or comment on WMATA's DBE goals. Two of the agencies had interacted with WMATA in several ways, but not specifically with its DBE program. One agency reported participating in outreach events hosted by WMATA. At those events, the agency reported WMATA provided information about contracting opportunities available and explained the process and requirements for competing on WMATA contracts. None of the agencies interviewed reported being asked by WMATA to provide DBE and small business referrals. The agencies interviewed generally felt WMATA's DBE program was effective and were not aware of any concerns with the program. One agency expressed an interest in seeing WMATA provided more business development and contract administration training to DBEs.

6. Findings and Advisory Comments

This chapter details the findings for each area pertinent to the DBE regulations (49 CFR Part 26) outlined in the Scope and Methodology sections above. Included in each area is an overview of the relevant regulations and a discussion of the regulations as they apply to WMATA's DBE program. Each area also includes corrective actions, if needed, and a timetable to correct deficiencies for each of the requirements and subrequirements.

FTA reports findings in terms of "deficiency" or "no deficiency." Findings of deficiency denote policies or practices that are contrary to the DBE regulations or matters for which FTA requires additional reporting to determine whether DBE compliance issues exist.

Findings of deficiency always require corrective action and/or additional reporting and are expressed as follows:

- A statement concerning the policy or practice in question at the time of the review,
- A statement concerning the DBE requirements that are unsatisfied or potentially unsatisfied, and
- A statement concerning the required corrective action to resolve the issue.

Advisory comments are statements detailing recommended changes to existing policies or practices. The purpose of the recommendations is to ensure effective DBE programmatic practices or otherwise assist the entity in achieving or maintaining compliance.

6.1 DBE Program Plan

Basic Requirement (49 CFR Part 26.21)

Recipients must have a DBE program meeting the requirements of 49 CFR Part 26. The DBE Program Plan outlines the agency's implementation of the DBE program. Recipients do not have to submit regular updates of DBE programs. However, recipients must submit significant changes in the program for approval.

Discussion

During this compliance review, deficiencies were found with this requirement. FTA also issued an advisory comment with this requirement. U.S. DOT DBE regulations required WMATA to develop and submit a DBE Program Plan that complies with 49 CFR Part 26 requirements and to update its plan when it made significant changes to its program. WMATA's most recent DBE Program Plan was submitted to FTA on June 29, 2017 and obtained FTA concurrence on July 27, 2017. Since the submission of its June 2017 plan, WMATA hired all new DBE program staff, established a new Disadvantaged Business Enterprise Liaison Officer (DBELO), changed the name of the operational unit responsible for managing the FTA DBE program from the "DBE & Compliance Office" to the "Small Business Programs Office" (SBPO), and moved the SBPO from within the Department of Fair Practice to the Office of Procurement and Materials. At the time of the site visit, WMATA provided an updated draft DBE Program Plan dated April 2018 that reflected these changes; however, WMATA had not submitted its updated plan to FTA.

WMATA's current plan (June 2017) and its updated draft plan (April 2018) contained all required elements, in form. WMATA's draft April 2018 DBE Program Plan was reviewed for substantive compliance with 49 CFR Part 26 requirements. The results of this review are discussed in detail later in this report by section.

In preparation for this FTA DBE program compliance review, WMATA's Office of Management Audits, Risk, and Compliance performed an audit readiness assessment (ARA) at the request of WMATA's executive management to identify program strengths, deficiencies, and gaps, as well as management actions designed to enhance operational processes. WMATA provided the results of the ARA in connection with this review. Management actions designed to enhance operational processes included the development and implementation of DBE standard operating procedures (SOPs) and a DBE Handbook. During the site visit, WMATA confirmed the SOPs and DBE Handbook were not separate documents, but one and the same. The ARA report referenced content that would be included in the SOPs over 30 times.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, WMATA must submit to the FTA Office of Civil Rights an updated DBE Program Plan that reflects current DBE program organization and implementation, as required by 49 CFR Part 26. WMATA must also replace its current DBE Program Plan with its updated DBE Program Plan in all places where the plan is made available, including on its website.

Advisory Comment

In its updated DBE Program Plan WMATA should clearly define the relationship between the DBE Program Plan and the DBE SOPs it is developing. To enhance its updated DBE Program Plan, WMATA's plan should reference its SOPs when appropriate to provide detailed descriptions of how WMATA implements its FTA DBE program. WMATA may also consider integrating its SOPs into its DBE Program Plan to eliminate the need for two procedural documents.

6.2 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. Recipients must circulate this policy throughout the recipients' organization and to the DBE and non-DBE business communities.

Discussion

During this compliance review, no deficiencies were found with this requirement. FTA issued an advisory comment with this requirement. WMATA's DBE Policy Statement contained all the required elements and was signed by its GM/CEO. WMATA stated in its policy statement that *"this policy shall be disseminated to the Board of Directors and Executive Officers of WMATA. WMATA shall make its DBE Program Plan available to the public through its website."* Although WMATA's policy statement was included in its DBE Program Plan, which was available on its website, WMATA did not specify in its policy statement that it distributed its policy statement

specifically to the DBE and non-DBE business communities or provide documentation confirming it distributed its policy to these communities.

Advisory Comments

WMATA was advised to update its policy statement by adding language communicating it would distribute its statement specifically to the DBE and non-DBE business communities. In addition, WMATA was advised to post its policy statement on the procurement and vendor portal sections of its website and email its policy statement to the firms on its bidders list and in the MWUCP DBE directory. WMATA was advised to document all attempts to distribute its policy statement.

6.3 DBE Liaison Officer

Basic Requirement (49 CFR Part 26.25)

Recipients must have a designated DBE Liaison Officer (DBELO) 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 compliance review deficiencies were found with this requirement. WMATA does not appear to have adequate staff and funding to administer the program in compliance with 49 CFR Part 26. FTA issued two advisory comments regarding this requirement. First, although the DBELO had a dotted-line relationship to the GM/CEO, there was no documentation of the DBELO's direct and independent access to the GM/CEO for DBE matters. Second, the DBE program was located within the Office of Procurement and Materials (PRMT), and no procedures were in place to mitigate any apparent or actual conflicts of interest in this organizational alignment.

In the nine months prior to the compliance review site visit, WMATA had hired all new staff to fill vacancies in its Small Business Programs Office (SBPO), where the DBE program was administered. The DBELO was transferred from PRMT to this position in November 2017 following a competitive recruitment. This individual had worked for WMATA since 2000 in the PRMT. The DBELO was supported by outside contractors for DBE program activities while permanent staff was recruited and hired. At the time of the compliance review site visit, WMATA had recently hired six new SBPO employees: a program performance analyst, two senior small business auditors, a senior small business analyst, a small business auditor and a small business program manager. Only one of these new hires had prior experience administering a DBE program. Two vacancies remained in SBPO.

As shown in the following table, WMATA did not provide documentation to support that the DBELO performed all the duties as identified in its current DBE program and listed in the SBPO functional Team Organization Table, dated April 16, 2018.

DBELO Duties and Responsibilities per WMATA DBE Program	Included in Functional Team Organization Table?
Gathers and reports statistical data and other information required by U.S. DOT.	Yes
Reviews third-party contracts and purchase requisitions for compliance with the DBE program.	No
Works with all departments to set overall goals.	Yes
Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.	No
Identifies federally funded contracts and procurements so that DBE goals are included in solicitations and monitors results.	No
Analyzes WMATA's progress toward goal attainment and identifies ways to improve progress.	No
Participates in pre-bid meetings.	No
Advises the General Manager/CEO on DBE matters and achievement.	No
During bid/proposal review, participates with legal counsel and project directors to determine contractor compliance with good-faith efforts.	No
Provides DBEs with information and assistance in preparing bids and obtaining bonding and insurance.	No
Plans and participates in DBE training seminars.	No
Certifies DBEs according to the criteria set by U.S. DOT and acts as liaison to the Unified Certification Program in the Metropolitan Washington area.	Yes
Provides outreach to DBEs and community organizations to advise them of opportunities.	Yes
Maintains WMATA's updated directory on certified DBEs.	Yes

WMATA provided documentation that it budgeted \$797,000 in FY 2018 for the SBPO. This budget covered the administration of the DBE program, including updating and maintaining the DBE certification process, as well as the administration of a Small Business Enterprise (SBE) Program and a Small Business Local Preference Program. The SBPO budget reflected less than 10 percent of the total budget for PRMT of \$9.7 million. The current budget appeared to reflect a reduction from that which was included in the June 2017 position description for the Director of Small Business Programs (Job code 1442), which indicated budgetary responsibility of between \$1,000,000 and \$5,000,000. According to WMATA's SBPO Updates to the Board (MEAD Numbers 201941 and 201984), WMATA administered approximately \$400 million in FTA-funded contracts in FY 2017. Given the large size of FTA-funded procurements and the size of its PRMT budget, WMATA should assess whether it was allocating adequate resources to administer the DBE program.

The DBELO reported to the Chief Procurement Officer, who in turn reported to the Chief of the Office of Internal Business Operations (IBOP), who was a direct report to WMATA's General Manager (GM)/CEO. For the nine months prior to the compliance review site visit, the DBELO provided documentation of three meetings with the WMATA GM/CEO. The DBELO was accompanied to all three meetings by the Chief Procurement Officer and the Chief of IBOP. These meetings focused on preparing updates for the WMATA Board Business Oversight Committee on the status of WMATA's DBE program, particularly DBE program deficiencies identified in FTA's FY 2017 Triennial Review of WMATA. Although the DBELO had a dotted-line reporting relationship to the GM/CEO, no regular meetings were planned for the foreseeable future. WMATA did not provide documentation to support the direct line of communication with the GM/CEO.

In December 2017, WMATA's SBPO was transferred from WMATA's Department of Fair Practices to PRMT. WMATA asserted that this reorganization facilitated access to contracting information. As an example, the DBELO provided documentation that she participated in regular contract goal-setting meetings with a newly formed Procurement Review Committee, designed to determine which solicitations would include DBE goals. This process seemed useful, but it should not be dependent on the SBPO being located within PRMT.

The reorganization resulted in the DBELO reporting directly to the Chief Procurement Officer, which presented, at a minimum, the appearance of a conflict of interest. The DBELO could be limited in her ability to advocate for the inclusion of DBE contracting goals based on a determination by the Chief Procurement Officer that the need to expedite the procurement outweighed the need to provide a level playing field for DBEs. In addition, the DBELO may be hesitant to challenge the Chief Procurement Officer since this is the person who conducts her performance evaluations and determines her salary. WMATA should reconsider the reorganization of SBPO to PRMT or develop procedures for mitigating conflicts between procurement and DBE.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, WMATA must submit to the FTA Office of Civil Rights documentation that it has retained adequate staff to administer the DBE Program, as required by 49 CFR Part 26. This must include:

- Confirmation that it has filled the remaining two vacancies with experienced small and disadvantaged business program managers.
- Confirmation that the existing SBPO staff has received formal training in US DOT DBE Program administration.
- Updated position descriptions for all SBPO staff showing current reporting relationships and containing all of the duties and responsibilities contained in WMATA's DBE Program
- A written assessment that WMATA has budgeted sufficient resources to administer its DBE program.

Advisory Comments

WMATA was advised to develop effective procedures for the DBELO to have ongoing direct and independent access to the GM/CEO on DBE matters. WMATA was also advised to develop internal procedures to mitigate conflicts of interest or the appearance of conflicts of interests between DBE program administration and the Office of Procurement and Materials Management.

6.4 DBE Financial Institutions

Basic Requirement (49 CFR Part 26.27)

Recipients must investigate the existence of DBE financial institutions and make efforts to use them. Recipients must also encourage prime contractors to use these DBE financial institutions.

Discussion

During this compliance review, deficiencies were found with this requirement. In its DBE Program Plan, WMATA described the following:

WMATA will continue to fully investigate services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the Transit Zone, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions.

WMATA's review of the National Bankers Association (NBA) membership list, an agency which tracks minority-owned banks, indicates that there is one bank in the Transit Zone, Industrial Bank, which is owned by socially and economically disadvantaged individuals. Industrial Bank is located at 4812 Georgia Avenue, N.W. Washington, D.C. 20011 - (202) 722-2000. WMATA uses Industrial Bank, N.A., to provide payroll services for WMATA.

Additionally, WMATA will provide notification of DBE financial institutions to prime contractors in the bid documents, and encourage prime contractors to use such institutions. WMATA will re-evaluate the availability of DBE financial institutions every twelve months.

During the site visit, the review team found that while WMATA determined Industrial Bank, N.A., to be the only DBE financial institution in its transit zone, it did not use Industrial Bank “to provide payroll services for WMATA” as claimed in its DBE Program Plan or for any other purpose. WMATA also did not notify prime contractors of DBE financial institutions in its bid documents or encourage prime contractors to use these institutions as noted in its plan. WMATA provided a copy of a memorandum dated March 20, 2018 titled *Research on Minority Owned Banks*. The stated purpose of the memorandum was to list minority-owned banks in America, where they are located, how many millions they hold in assets and deposits, and how they serve their community. The memorandum did not address the above referenced goal in the DBE program of making reasonable efforts to use these institutions. During the site visit, after WMATA indicated it was unaware of the availability of the Federal Reserve Statistical Release (FRSR) on Minority-Owned Depository Institutions as another resource for researching

existing minority-owned banks, the review team demonstrated how to access and use the FRSR.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, WMATA must submit to the FTA Office of Civil Rights an updated DBE Program Plan that accurately describes its use of DBE financial institutions and describes in detail its procedures for researching the availability of DBE financial institutions. WMATA must also provide documentation that it has researched the availability of DBE financial institutions and that it has encouraged prime contractors to use such institutions.

6.5 DBE Directory

Basic Requirement (49 CFR Part 26.31)

A DBE directory must be available to interested parties that includes the addresses, phone numbers, and types of work each DBE is certified to perform. The recipient must update the directory at least annually, and it must be available to contractors and the public upon request.

Discussion

At the time of this FTA DBE program compliance review, WMATA was a certifying partner in the MWUCP and underwent a concurrent and separate UCP compliance review. DBE certification-related and directory-related observations and findings were documented in a separate UCP compliance review report.

6.6 Overconcentration

Basic Requirement (49 CFR Part 26.33)

Recipients must determine if overconcentration of DBE firms exists and address the problem, if necessary.

Discussion

During this compliance review, deficiencies were found with this requirement. WMATA's DBE Program Plan stated that "*WMATA has not identified overconcentration in the types of work that DBEs perform. WMATA will reexamine whether overconcentration exists on an annual basis.*" However, the plan did not describe the measures WMATA would take to address overconcentration should it occur, nor was documentation provided confirming WMATA conducted an annual overconcentration analysis.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, WMATA must submit to the FTA Office of Civil Rights an updated DBE Program Plan that describes its procedures for analyzing and determining if overconcentration exists, the frequency with which an analysis of overconcentration will be conducted, and the measures taken to address the occurrence of overconcentration should it exist (e.g., use of incentives, technical assistance, business development programs, and mentor-protégé programs).

6.7 Business Development Programs

Basic Requirement (49 CFR Part 26.35)

Recipients 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 compliance review, no deficiencies were found with this requirement. FTA issued an advisory comment with this requirement. Although not required by 49 CFR Part 26.35, WMATA had not developed a BDP.

Advisory Comment

Based on the number of DBE firms in the Washington, DC, metropolitan area and the number and amounts of FTA-funded WMATA contracting opportunities eligible for DBE participation, WMATA's DBE program could benefit from the development and implementation of a BDP. In addition, the number of prime contractors available to participate in a mentor-protégé program (elemental to a BDP) is significant. Accordingly, WMATA was advised to familiarize itself with 49 CFR Part 26.35 and 49 CFR Part 26 Appendix C and consider implementing a BDP.

6.8 Determining/Meeting Goals

A) Calculation

Basic Requirement (49 CFR Part 26.45)

To begin the goal-setting process, recipients must first develop a base figure for the relative availability of DBEs. After the base figure is calculated, recipients must examine all other available evidence to determine whether goals warrant an adjustment. Adjustments are not required, and recipients should not make adjustments without supporting evidence.

Discussion

During this compliance review, deficiencies were found with this requirement. FTA also made an advisory comment regarding this requirement. WMATA did not appear to include all FTA-funded contracting opportunities in its *Triennial DBE Goal Setting Methodology for Federal Fiscal Years (FFYs) 2017-2019*. For example, during the compliance review site visit, numerous FTA-funded contracts for non-TVM vehicles were examined. WMATA did not include any FTA-funded vehicles or support equipment in its contracting opportunities for FFY 2017–19. Further, WMATA identified \$329 million in total FTA-assisted contract funds for the three-year period in its goal-setting methodology. This amounted to approximately \$110 million per year, which was significantly lower than the \$400 million previously noted as having been awarded in FFY 2017. Further, meeting minutes from the July 20, 2016, DBE Goal public participation teleconference included the special note, “*Then [sic] next 3 years \$1.6 Billion will be received by the Federal Government to spend.*” Neither of these numbers was consistent with the projection used to set DBE goals, which suggests that some contracting opportunities were not considered.

WMATA identified the Washington metropolitan statistical area as the geographic market where it awarded a substantial majority of its contracts. WMATA used the Step One and Step Two method of developing its goals as described in the DBE regulations. For Step One, WMATA used the businesses certified in the Metropolitan Washington Unified Certification Program (MWUCP) directory as the numerator and the Census Bureau's County Business Pattern database as its denominator, resulting in a relative availability of 14.71 percent. WMATA was advised to use its vendor registry as the denominator because the vendor registry population is more comparable to the MWUCP businesses represented by the numerator. Registered businesses have expressed an interest in doing business with WMATA, as have the businesses that were registered as DBEs. Next, WMATA weighted the base figure according to the projected amount of contracting opportunities in each North American Industry Classification System (NAICS) code, resulting in a weighted base figure of 19.94 percent. For Step Two, WMATA adjusted the base figure primarily by using past DBE participation for an adjusted goal of 22 percent.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, WMATA must submit to the FTA Office of Civil Rights a revised Triennial DBE Goal Setting Methodology for Federal Fiscal Years (FFYs) 2017-2019, reflecting the volume and type of FTA-funded contracting opportunities for the three-year period.

Advisory Comment

WMATA is advised to use its vendor registry (bidders list) as the denominator in its relative availability calculation.

B) Public Participation

Basic Requirement (49 CFR Part 26.45)

In establishing an overall goal, recipients 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. Recipients must publish a notice announcing the overall goal on the recipients' official websites and may publish the notice in other media outlets with an optional 30-day public comment period.

Discussion

During this compliance review, no deficiencies were found with this requirement. An advisory comment, however, was made regarding the requirement.

WMATA posted its notice announcing its overall goal on its website on May 15, 2016 and the notice remained posted on its website at the time of the site visit. WMATA did not report public comments submitted to the WMATA contact included in its notice, however, comments were received by the participants on its July 20, 2016 conference call described below and reported in its goal methodology.

On July 20, 2016, 12 days before the goal submission deadline of August 1, 2016, WMATA hosted a conference call with members of the National Association of Minority Contractors, the

U.S. Women's Chamber of Commerce, the Capital Region Minority Supplier Development Council, the Arlington County Small Business Program, the Capital Regional Small Business Transportation Resource Center, and the U.S. Black Chamber of Commerce. During this conference call, WMATA discussed and solicited feedback from the stakeholders on how WMATA can establish a robust DBE goal and address DBE concerns. Comments received included:

unbundling contracts, reaching out to small and minority firms about upcoming solicitations, tying DBE participation to WMATA employees' performance plans, establishing mechanisms for prime contractors to post and forecast DBE firm opportunities, and holding informational sessions for DBEs.

WMATA incorporated these comments as race-neutral measures in its goal methodology.

WMATA did not consult with nonminority contractor groups, such as the Association of General Contractors, to obtain input on DBE goal setting, as described in 49 CFR Part 26.45.

Advisory Comment

WMATA was advised to provide more opportunities for public input into its goal-setting process to ensure DBE goals were developed in consultation with all stakeholders.

C) Race-Neutral DBE Participation

Basic Requirement (49 CFR Part 26.51)

Recipients must meet the maximum feasible portion of the overall goal using race-neutral means of facilitating DBE participation. As of 2011, the Small Business Element described in 49 CFR Part 26.39 is a mandatory race-neutral measure. The regulations provide additional examples of how to reach this goal amount.

Discussion

During this compliance review, deficiencies were found with this requirement. FTA also issued advisory comments with this requirement. WMATA's race-neutral measures, including its measures to foster small business participation, were lacking when compared to 49 CFR Part 26.51 and 26.39 requirements and recommendations. In addition, WMATA did not adequately document and monitor the effectiveness of its race-neutral measures (adjusting as necessary), as required by FTA and pursuant to its statement in its DBE Program Plan that it "will meet the maximum feasible portion of its overall goal by using race-neutral means."

Based on the information provided for this review, the following table represents WMATA's compliance with 49 CFR Part 26.51 requirements.

49 CFR Part 26.51 Race-Neutral Measures	Included as WMATA Race-Neutral Measure?	Race-Neutral Measure Text from WMATA DBE Program Plan	Documentation Confirming WMATA Implementation
1. Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under §26.39 of this part.	Partial	<p><i>Coordinate effectively with its internal offices to unbundle large contracts and present opportunities for DBEs to secure prime contracts</i></p> <p><i>Use race-neutral small business set asides and unbundle large contracts</i></p>	FTA provided information submitted by WMATA in FFY 2016 in response to its FFY 2015 Shortfall Analysis and Corrective Action Plan. Included was an example of the unbundling of three large contracts (FQ11287, FQ11288, FQ11289). WMATA did not provide more recent examples of unbundling.
2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing).	Yes	<p><i>Conduct more effective outreach by providing training and partnering opportunities for DBEs and small businesses, such as training DBEs and small businesses on financing, banking, lending, and bonding</i></p>	No documentation of recent technical assistance activity. FTA provided information submitted by WMATA in FFY 2016 in response to its FFY 2015 Shortfall Analysis and Corrective Action Plan. Included was a <i>Doing Business with WMATA</i> newsletter dated June 2016. The newsletter contained information on weekly WMATA and other third-party business development and training opportunities.

49 CFR Part 26.51 Race-Neutral Measures	Included as WMATA Race-Neutral Measure?	Race-Neutral Measure Text from WMATA DBE Program Plan	Documentation Confirming WMATA Implementation
3. Providing technical assistance and other services.	Yes	<i>Establish regularly-scheduled training for DBEs and potential DBEs (e.g., training on certification process, business management, recordkeeping, and financial and accounting capability; assistance in overcoming bonding and insurance requirements)</i>	No documentation of recent technical assistance activity. See comments in measure 2, above.
4. Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate).	Yes	<i>Improve communication with DBEs by providing more advanced notice of upcoming contracting opportunities.</i>	WMATA provided contracting opportunities on its online Vender Portal. No recent documentation of advanced notice of upcoming contracting opportunities provided.
5. Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses.	No	See measure 2 above for WMATA's description of its business development activities.	WMATA did not implement a DBE supportive service program.
6. Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to	No See comments in Section 6.7		

49 CFR Part 26.51 Race-Neutral Measures	Included as WMATA Race-Neutral Measure?	Race-Neutral Measure Text from WMATA DBE Program Plan	Documentation Confirming WMATA Implementation
participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency.	<i>Business Development Programs</i> , of this report.		
7. Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low.	No See comments in <i>Section 6.7 Business Development Programs</i> , of this report.		
8. Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors.	Yes		WMATA's DBE directory was available online and could be exported to MS Excel and printed. WMATA did distribute a printed version of its DBE directory.
9. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.	No See comments in <i>Section 6.7 Business Development Programs</i> , of this report.		

In addition to the race-neutral measures described in the table above, WMATA included the following additional race-neutral measures in its DBE Program Plan:

1. *Work with other WMATA departments to target contracting opportunities in technical areas;*
2. *Conduct listening sessions to focus on receiving DBE input to address DBE concerns;*
3. *Work with potential prime contractors to set up outreach events to network with DBE firms;*
4. *Make the DBE page more prominent on the wmata.com website;*
5. *Institute an email hotline address dedicated to assisting DBEs and potential DBEs.*

During the site visit, WMATA provided documentation confirming implementation of items 3, 4 and 5 above.

Based on the information provided for this review, the following table represents WMATA's implementation of measures to foster small business participation recommended in 49 CFR Part 26.39.

49 CFR Part 26.39 Fostering Small Business Participation	Included as WMATA Small Business Element Measure?	WMATA Small Business Element Measure Text	Documentation Confirming WMATA Implementation
1. To facilitate competition by small business concerns, take all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contracts	Yes	<i>Avoid unnecessary and unjustified bundling of contracts.</i>	FTA provided information submitted by WMATA in FFY 2016 in response to its FFY 2015 Shortfall Analysis and Corrective Action Plan. Included was an example of the unbundling of three large contracts (FQ11287, FQ11288, FQ11289). WMATA did not provide more recent examples of unbundling.
2. Establishing a race-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million)	No	<i>Use race-neutral small business set asides and unbundle large contracts.</i> WMATA listed this measure in its DBE Program Plan as a race-neutral measure but did not include it in its list of measures to foster small business participation.	WMATA provided contract FQ15140 - Inspection Contract for Property Acquisition Due Diligence, dated April 29, 2015 for \$210,000 as an example of a set-aside award to a firm certified as both a small business and DBE. WMATA was asked but did not provide other examples of small business/DBE firms

49 CFR Part 26.39 Fostering Small Business Participation	Included as WMATA Small Business Element Measure?	WMATA Small Business Element Measure Text	Documentation Confirming WMATA Implementation
			that have been awarded small business set-aside contracts.
3. In multi-year design-build contracts or other large contracts (e.g., for “megaprojects”) requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.	No		
4. On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.	No		
5. Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.	No		
6. To meet the portion of your overall goal you project to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small	Yes	Utilize WMATA's fiscal year budgetary planning to develop potential upcoming contracting opportunities for small businesses.	Notwithstanding WMATA's 2011 contract unbundling examples described in measure 1 above, WMATA did not provide documentation

49 CFR Part 26.39 Fostering Small Business Participation	Included as WMATA Small Business Element Measure?	WMATA Small Business Element Measure Text	Documentation Confirming WMATA Implementation
businesses, including DBEs, can reasonably perform.			confirming implementation of this measure.

In addition to the Small Business Element measures described in the table above, WMATA included the following additional Small Business Element measures in its DBE Program Plan:

1. *Establish a team to diligently facilitate contracting opportunities and increase awareness and recognition of the critical role that small businesses play in advancing WMATA's procurement activities.*
2. *Equip relevant WMATA employees with the skills needed to be an integral part of WMATA's procurement practices, acting in partnership to develop strategies to increase small business participation in support of WMATA's mission.*
3. *Foster an environment that encourages commitment, the use of integrated systems, professional management tools, and pursues innovative solutions in support of small business concerns.*
4. *Coordinate with the Small Business Program Office and/or Contracting Officers' Technical Representatives to monitor payments to small business contractors. Obligations for monitoring will include: (a) reviewing letters of intent and SBE subcontractor schedules of participation to assess the tasks awarded and dollar value involved; (b) maintaining a reconciled running tally of payments for the duration of the work to be performed by subcontractors; (c) requiring prime contractors to submit to the Small Business Program Office notification of payments to their subcontractors on a monthly basis or as is appropriate considering the type of work being performed and the relevant length of the contract in question. In any event, the notification shall be made to the DBE Liaison Officer at the time of the actual payment by the prime contractors to subcontractors; (d) requiring all subcontractors to provide notification to the DBE Liaison Officer of receipt of payment from the prime business contractors at the time that payment is actually received; (e) reviewing the prime business contractors' payment documents and subcontractor receipt of payment documents; (f) verifying payments and receipt of payment; and (g) crediting small business concern participation only when payments are actually made to small businesses.*

As the following table illustrates, despite WMATA's lack of inclusion or implementation of several required and recommended race-neutral and Small Business Element measures, and its recent overall DBE goal shortfalls, it has reported that it exceeded race-neutral goal attainment in FFY 2015 – FFY 2018 (FFY 2016 excepted).

Goal				Attainment		
Year	Overall	Race-Conscious	Race-Neutral	Overall	Race-Conscious	Race-Neutral
2015	25%	19%	6%	16.7%	5.6%	11.1%
2016	25%	19%	6%	10.9%	6.4%	4.5%
2017	22%	14%	8%	21.4%	8.6%	12.8
2018*	22%	14%	8%	18%	5.6%	12.4%

*Includes June 2018 only

However, as discussed in additional detail in section 6.8(G) *Counting DBE Participation* of this report, it was difficult for the review team to determine how WMATA counted race-neutral participation. WMATA provided a list of FTA-funded contract activity from October 2014 to March 2018 that contained 230 new contracts awarded during this period. None of these 230 contracts that did not have a stated DBE goal showed any DBE participation. Several of the contracts with DBE goals were reported to have exceeded the contract goal, but it was not clear that the amount in excess of the goal was achieved by race-neutral means, such as submission of a low bid to the prime, or if the excess was a result of the race-conscious contract goal. Additionally, in WMATA's June 2018 Semi-annual Uniform Report of DBE Commitments/Awards and Payments, WMATA did not report any race-neutral awards or payments.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, WMATA must submit the following to the FTA Office of Civil Rights:

- An updated DBE Program Plan that includes the race-neutral measures described in 49 CFR Part 26.51 and a plan for implementing said measures. The plan must include a detailed description of how WMATA will periodically review the effectiveness of its race-neutral measures, and accordingly make adjustments to meet the maximum feasible portion of its overall goal by using race-neutral means. The implementation plan must include an implementation timeline.
- An updated DBE Program Plan that includes a detailed description of its process for unbundling large FTA-assisted contracts. Examples of large FTA-assisted contracts it has unbundled in the last three years that have resulted in contracts for small businesses (if available). Examples of large FTA-assisted contracts in the foreseeable future it will unbundle per its unbundling process.
- An updated DBE Program Plan that includes a detailed description of its process for creating Small Business Reserve Procurements (set-asides). A list of Small Business Reserve Procurements it plans to implement in the foreseeable future, estimates of when those procurements will occur, and how small businesses will be made aware of those procurements. WMATA must also include a description of how it will track the

effectiveness of its Small Business Reserve Procurements in the attainment of its race-neutral and overall DBE goals.

Advisory Comments

Because WMATA has already demonstrated a commitment to creating small business set-aside contracting opportunities, it should add “Establishing a race-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million),” as recommended by 49 CFR Part 26.39(b)(1), to its list of measures to foster small business participation. In addition, WMATA should consider implementing one or more of the measures in 49 CFR Part 26.39(b)(2-5), in particular the following:

- *In multiyear design-build contracts or other large contracts (e.g., for “megaprojects”) requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.*
- *On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.*
- *To meet the portion of [its] overall goal [it] project[s] to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.*

D) Race-Conscious DBE Participation

Basic Requirement (49 CFR Part 26.51)

The recipient must establish contract goals to meet any portion of the goal it does not project being able to meet using race-neutral measures.

Discussion

During this compliance review, no deficiencies were found with this requirement. WMATA effectively used race-conscious contract goals to meet its overall DBE goal. According to its Triennial Goal Methodology document, WMATA believed that a Maryland DOT disparity study reported strong evidence of large, adverse, and frequently statistically significant disparities between minority and female participation in business activity in the area. WMATA had seen a reduction in the use of race-conscious goals in the past four years. For FFY 2017–19 WMATA had a 22 percent DBE goal (14 percent race-conscious and 8 percent race-neutral).

WMATA recently created a Procurement Review Committee comprising staff from PRMT, SBPO, and the department initiating the procurement request. According to the DBELO, a meeting was held with these participants to determine if contract goals would be established.

As previously noted, WMATA provided a list of FTA-funded contract activity from October 2014 to March 2018. The list contained 230 new contracts awarded during this period. Forty-five (19 percent) of those contracts were identified as having a DBE goal. The goals ranged from 2 percent to 29 percent. It was unclear from the data provided if the DBE goals were achieved.

Nineteen of the 45 contracts (42 percent) identified as having DBE goals did not identify a DBE firm. The columns where DBEs were identified and where actual amounts awarded to DBEs were listed contained the initials TBD. Some of these contracts dated back to 2016. WMATA was unable to explain the reason for the lack of information for these contract awards.

While it did not appear that WMATA was overusing contract goals, WMATA was encouraged to improve its monitoring of this area by using more complete and accurate data.

Corrective Actions and Schedules

FTA requires no corrective actions for the Race-Conscious DBE Participation requirement at this time.

E) Good Faith Efforts

Basic Requirement (49 CFR Part 26.53)

Recipients may award contracts with DBE goals only to bidders who have either met the goals or conducted good faith efforts (GFEs) to meet the goals. Bidders must submit the names and addresses of the DBE firms that will participate on the contract, a description of the work each DBE will perform, the dollar amount of DBE participation, written commitment to use the DBE(s) submitted in response to the contract goal, written confirmation from each DBE listed, or GFEs as explained in Appendix A of 49 CFR Part 26. The bidders must submit documentation of these efforts as part of the initial bid proposal—as a matter of responsiveness; or no later than five days after bid opening—as a matter of responsibility. The recipient must review bids by using either the responsiveness or responsibility approach and document which approach it uses in its DBE Program Plan.

Discussion

During this compliance review, no deficiencies were found with this requirement. FTA issued advisory comments with this requirement. WMATA described its GFE requirements in its DBE Program Plan, Chapter 7 of its Procurement Manual, Policy Memorandum No. 18-03 *Procedures for Substitution of DBE Vendor* (PM18-03), and Policy Memorandum No. 18-02 *Procedures for Establishing Good Faith Efforts When Requesting a Waiver* (PM18-02). WMATA's GFE requirements applied to all prime contractors bidding on FTA-assisted procurements with DBE contract goals, and WMATA required bidders to submit GFEs as a matter of responsiveness at the time of bid. During the site visit, it was noted that although WMATA's DBE Program Plan described a policy of responsiveness, once in its DBE Program Plan it used the word "responsibility" to describe its policy of responsiveness. WMATA confirmed it understood the difference between responsiveness and responsibility and acknowledged that the use of the word "responsibility" was a mistake.

GFEs required by WMATA were consistent with those required in 49 CFR Part 26.53(b)(2)(i-vi). A review of contracts FQ15206 (construction), FQ16148 (labor contract for electricians), and FQ17148 (nonrevenue fleet vehicles) confirmed WMATA documented GFEs on its *Schedule of DBE Participation* form, completed by prime contractors at the time of bid, and *Letter of Intent to Perform as a Subcontractor/Joint Venture*, completed by participating DBE subcontractors at the time of bid. WMATA did not reference these two forms in its DBE Program Plan, PM18-02, or PM18-03.

Although WMATA did not report instances of bidders requesting administrative reconsideration after being disqualified for failing to demonstrate GFEs, WMATA's DBE Program Plan satisfactorily addressed procedures for administrative reconsideration of bids initially determined nonresponsive. Contract FQ17148 included a request from the only bidder to respond to the solicitation to waive a 1 percent DBE goal based on the unavailability of DBEs to perform the required work. The bidder WMATA's *DBE Unavailability Certification* form, which documented the bidder's efforts to identify ready, willing, and able DBE. WMATA approved the waiver request.

WMATA's DBE Program Plan satisfactorily addressed GFE requirements for prime contractors when substituting or terminating a DBE firm already under contract. Substitution and termination of DBE subcontractors by prime contractors required prior written approval from WMATA's DBELO. WMATA's DBE Program Plan and PM18-03 were substantially consistent and required either the substitution or replacement of a DBE firm with another DBE firm or the demonstration of GFEs. PM18-03 included a Termination/Substitution/Reduction Request Form that documented the requested change and required the signatures of the prime contractor, DBE contractor, and WMATA contracting officer.

Advisory Comments

WMATA should review its DBE Program Plan to confirm it correctly describes its policy for submitting GFEs as a matter of responsiveness. WMATA should reference its *Schedule of DBE Participation* form and *Letter of Intent to Perform as a Subcontractor/Joint Venture* when describing its GFE requirements in its DBE Program Plan.

F) Protecting Against Termination for Convenience

Basic Requirements (49 CFR Parts 26.53 and 26.13)

Recipients must implement appropriate mechanisms to ensure prime contractors do not terminate DBE subcontractors for convenience (e.g., to perform the work of the terminated subcontractor with its own forces or those of an affiliate, or reducing the scope of DBE contract) without the transit agency's prior written consent. Failure to obtain written consent is a material breach of contract.

Discussion

During this compliance review, a deficiency was found with this requirement. FTA issued advisory comments with this requirement. In the Good Faith Efforts section of its DBE Program Plan, WMATA stated, "*The prime contractor may not terminate the agreement for the convenience of the prime contractor.*" 49 CFR Part 26.53(f)(1)(i) states the following:

You must require that a prime contractor not terminate a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) without your prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

WMATA provided invitation for bid (IFB) and request for proposal (RFP) contract templates (dated April 2018) that it developed and indicated it would use for all future FTA-assisted

contracts. However, these templates only addressed prime contractor requirements when substituting an existing DBE subcontractor with a new DBE subcontractor. Neither template specifically addressed protecting against DBE subcontracts being terminated for convenience by a prime contractor for something other than subcontractor substitutions. For example, a DBE subconsultant professional services agreement between prime contractor Gannett Fleming/Parsons Joint Venture and DBE subcontractor Kumi Construction Management Corporation dated August 26, 2016, contained the following language:

GC 14. TERMINATION AND SUSPENSION - The Consultant may terminate or suspend this Agreement (i) for Cause (as defined below), (ii) for convenience, (iii) as a result of the termination or suspension (as the case might be) of the Prime Contract, or (iv) at the direction of the Client.

Although this DBE subconsultant agreement was executed before the development of the April 2018 IFB and RFP contract templates, the agreement was ongoing at the time of the site visit. In addition, the participating prime contractor had other ongoing FTA-assisted WMATA contracts that involved DBE contract goals and related DBE subcontracts. WMATA should ensure it communicates and monitors compliance with the required protections against terminating DBE subcontracts for convenience as described in 49 CFR Part 26.53(f)(1)(i).

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, WMATA must submit to the FTA Office of Civil Rights documentation confirming it has notified all prime contractors working on FTA-assisted WMATA contracts with DBE contract goals that DBE subcontracts cannot be terminated for convenience without WMATA's prior written consent. WMATA's notification should also include a requirement for all prime contractors to ensure all existing and future DBE subcontract agreements do not conflict with the requirements found at 49 CFR Part 26.53(f)(1)(i).

Advisory Comments

WMATA is advised to update its DBE Program Plan to include language that fully complies with 49 CFR Part 26.53(f)(1)(i). WMATA is advised to update its IFB and RFP FTA-assisted contract templates to include language that enforces the requirements found at 49 CFR Part 26.53(f)(1)(i).

G) Counting DBE Participation

Basic Requirement (49 CFR Part 26.55)

Recipients must count only the value of work actually performed by the DBE when assessing the adequacy of DBE participation submitted in response to a contract. Recipients must review a bidder's submission to ensure the type and amount of participation are consistent with the items of work and quantities in the contract and that the bidder is only counting work performed by the DBE's own forces in accordance with the DBE requirements.

Discussion

During this compliance review, deficiencies were found with this requirement. WMATA reported that its prime contractors were required to submit evidence of prompt payment to DBE subcontractors. However, it was uncertain how WMATA verified the payments and subsequently how it counted DBE participation on its Uniform Report of DBE Awards/Commitments and Payments (Uniform Report). As mentioned above, WMATA's SBPO had recently undergone a reorganization and a complete change of staff. Prior to this transition, WMATA reported issues with accurately counting DBE participation and the accuracy of the Uniform Report. In communication with the WMATA Board and FTA's Office of Civil Rights, WMATA noted it had developed an automated system to capture and report these data to reduce such errors. During the compliance review site visit, the review team requested a demonstration of the new system and requested that WMATA provide the basis for the numbers on the June 2018 Semi-annual Uniform Report. During this demonstration, the review team learned that the amounts reported in column A (total dollars awarded) included both local and federal funding. The regulations require that only the FTA share should be reported in this column. The FTA participation percentage on awards could vary significantly depending on the type of funds in the award and based on the availability of FTA funding for a specific project. Additionally, the detail for the payments reported in column C of the report included payments to SBEs, instead of limiting this report to DBEs. Finally, WMATA was unable to document how it verified actual payments reported on rows 18, 19, and 20 of the Uniform Report. As previously described, WMATA had not fully implemented its prompt payment monitoring system and was not able to demonstrate how it verified when payments were made to DBEs.

Following the site visit, WMATA provided a spreadsheet that generated the Uniform Report. A review of this spreadsheet identified other questions, including the fact that the report amounted in cell 8A, did not appear to include the prime contracts awarded to DBEs in cell 8C. Further, the total number of DBE contracts shown in cell 8D was 41 (number of contracts), while on the spreadsheet, the total DBE prime dollars reported consisted of only five contracts. This discrepancy may be due to counting contracts awarded separate from task orders. The Uniform Report showed a total of 35 DBE Firms paid in cell 18E, while the spreadsheet listed only 31 firms. The spreadsheet did not provide any detail for data in cells 18A or 18B, therefore the review team could not confirm if total dollars paid included payments to DBE firms.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, WMATA must submit the following to the FTA Office of Civil Rights:

- A timeline for correcting the calculation inaccuracies in its prompt payment system.
- An updated DBE Program Plan that describes in detail its procedures for verifying the accuracy of race-conscious and race-neutral DBE payments.
- A revised June 2018 Semi-annual Uniform Report to reflect the following corrections:
 - Report only the actual FTA share of contracting opportunities in Column A, total dollars awarded
 - Report only the actual payments to DBEs (do not include SBEs) in column C,
 - Provide documentation of payments to DBEs, shown in rows 18, 19 and 20 (payments to DBEs)

- Verify or correct the total contracts reported in cell 8C and total firms reported in cell 18E

H) Quotas

Basic Requirements (49 CFR Part 26.43)

Recipients cannot use quotas. Recipients may not use set-aside contracts unless they do not reasonably expect other methods to redress egregious instances of discrimination.

Discussion

During this compliance review, no deficiencies were found with this requirement. In its DBE Program Plan, WMATA stated that it does not use quotas in any way in the administration of its DBE program. A review of several recent contracts, along with interviews with WMATA staff, confirmed that WMATA did not use quotas in its contracting practices related to FTA-funded projects.

Corrective Actions and Schedules

FTA requires no corrective actions for the Quotas requirement at this time.

6.9 Shortfall Analysis and Corrective Action Plan

Basic Requirement (49 CFR Part 26.47)

Recipients must conduct a shortfall analysis and implement a corrective action plan in any fiscal year they do not meet their overall DBE goal.

Discussion

During this compliance review, deficiencies were found with this requirement. FTA issued an advisory comment with this requirement. WMATA's overall DBE goal for the triennial period FY 2014–16 was 25 percent. WMATA's overall DBE goal for the triennial period FY 2017–19 was 22 percent. WMATA did not meet its DBE goals in FY 2015, FY 2016 or FY 2017, reporting overall goal attainment in TrAMS of 18.6 percent, 10.8 percent, and 21.9 percent, respectively. WMATA submitted its FY 2016 shortfall analysis and corrective action plan late on January 6, 2017. WMATA submitted its FY 2017 shortfall analysis and corrective action plan late on May 29, 2018.

WMATA's FY 2015, FY 2016, and FY 2017 shortfall analyses did not sufficiently analyze and describe in detail the reasons for its shortfalls, including the race-neutral and race-conscious measures implemented in each year and an analysis of their effectiveness. For example, beginning in FY 2015 and through FY 2017, WMATA attributed its annual shortfalls to a change in spending emphasis from capital projects to system maintenance projects primarily associated with WMATA's rail system. WMATA asserted in its FY 2015 analysis that it lacked certified DBEs capable of performing rail system maintenance work. This claim was not substantiated in WMATA's analyses. In the same analysis, WMATA identified its then current and foreseeable areas of procurement emphasis as electronic safety and security, fencing and barriers, power and communication services, roofing services, installation of underground tanks, and

underground tank monitoring. However, WMATA did not include a report of related NAICS codes and the number of DBEs (or lack thereof) certified to perform work in one or more of those industry classifications. In addition, when WMATA attributed its FY 2015 shortfall to reduced FTA spending in areas negatively affecting DBE participation, it did not identify specific procurement opportunities previously identified during its goal-setting and/or goal-attainment planning processes that were affected by the referenced FTA spending reductions.

Although from FY 2015 to FY 2017 WMATA identified several DOT-recommended corrective actions it would prospectively implement (including some designed to address the lack of DBEs WMATA claims are available to perform rail system maintenance work), WMATA's efforts as documented were too prospective; lacked sufficient planning, coordination, focus, and specificity; did not include implementation timelines; and were unmeasured for effectiveness and corrective action planning refinement. For example, in its FY 2015 corrective action plan WMATA stated:

In an effort to combat any future shortfalls in contracting opportunities for DBEs, WMATA will implement the following business process improvements:

- Unbundle large contracts to enable DBEs to serve as prime contractors. The DBE/Compliance team has begun to work with applicable offices to review the procurements to evaluate potential contracting opportunities and determine an acceptable level of proposed DBE participation. We will target specific contract opportunities in the technical areas of Electronic Safety & Security; Fencing & Barriers; Power & Communications Services; Roofing Services; Installation of Underground Tanks; and Underground Tank Monitoring.*
- Conduct outreach programs to foster training and partnering opportunities for the DBEs with non-DBE firms. The DBE/Compliance Team continues to increase outreach efforts.*
- Provide advance notification of upcoming solicitations to notify the business community of opportunities to bid or market. The DBE/Compliance Team will actively solicit all known certified business enterprises of providing the product(s) or service(s) to be solicited.*

Absent in WMATA's FY 2016 analysis, or any other document made available for this review, was a record of activities related to each of the FY 2015 corrective actions, a detailed analysis of the results of these efforts, or a determination of their effectiveness. Moreover, WMATA's FY 2016 corrective action plan stated it would do the following as corrective action for its FY 2016 shortfall:

- Beginning January 1, 2017, the DBE office started working with potential prime contractors and WMATA's Procurement Office to set up outreach events to meet DBE firms interested in performing rail system maintenance services for WMATA. These efforts will place an emphasis on the requirements for becoming certified as a DBE firm, upcoming rail maintenance projects, and the skills required to successfully perform rail system maintenance work.*
- The DBE Office will monitor any future emergency rail maintenance contracts if the need arises to determine whether DBE goals can be established on subcontracting opportunities or whether any race-neutral opportunities exist.*
- WMATA will continue to improve its communication with DBEs by providing more advanced notice of upcoming contracting opportunities. In particular, beginning*

February 1, 2017, WMATA's DBE Office will expand these efforts by placing a greater emphasis on WMATA's need for DBE firms that are able to perform rail system maintenance services. WMATA will accomplish this by emphasizing in its upcoming solicitations, email notifications, and DBE newsletters of the need for DBEs to become certified in performing rail maintenance work.

- *These communications will include contact information for assistance with becoming DBE certified. WMATA will also track the number of DBE firms that become certified in rail industry-related NAICS codes in 2017 in order to monitor the success of its efforts.*

Absent in its FY 2017 analysis, or any other document made available for this review, was a record of activities related to each of the FY 2016 corrective actions, a detailed analysis of the results of these efforts, or a determination of their effectiveness. WMATA was ineffective, as documented in its shortfall analyses and corrective action plans, in analyzing, determining, and implementing measures that result in overall goal attainment.

In response to WMATA's FY 2015 shortfall analysis and corrective action plan, FTA required the following of WMATA:

1. *Provide a detailed overview of the race neutral measures that your agency implemented over FY 2015. The status report must include a detailed description of the methods utilized, an analysis of their effectiveness, and a timeline for past implementation.*
2. *Based on your agency's Uniform Report submissions, FTA's records indicate you have a DBE attainment of 18.60%. Your shortfall analysis indicates an attainment of 17.00%. Please provide a detailed description of this discrepancy. This description must include a thorough analysis of your process for calculating your attainment as well as a detailed account of your process used for the collection of the information required by the Uniform Report.*
3. *Provide a detailed description of how each corrective action you plan to implement in FY 2016 will meet your goal and are different from those implemented in FY 2015. The description should include a breakdown of the race neutral and race conscious portions of your overall goal. Provide a timeline for implementing each corrective action in FY 2016. The status report must include a detailed analysis of the progress made on each individual action, including all relevant dates.*

In response to WMATA's FY 2016 shortfall analysis and corrective action plan, FTA required the following of WMATA:

1. *List all FTA-assisted projects your agency commenced in FY 2016 and track the DBE participation on each project. The status report must include the list of projects and the DBE participation achieved.*
2. *Track the race-neutral and race-conscious participation used to achieve your overall DBE goal. The status report must include this race-neutral/race-conscious breakdown and explain how the race-neutral measures impacted your DBE program.*

3. *Provide a timeline for implementing each corrective action as submitted in your agency's FY 2016 shortfall analysis and corrective action plan. The status report must include a detailed analysis of the progress made on each individual action, including all relevant dates.*
4. *Provide a detailed overview of the race neutral measures that your agency implemented over FY 2016. The status report must include a detailed description of the methods utilized, an analysis of their effectiveness, and a timeline for past implementation.*

Both responses notified WMATA that each corrective action must be completed in the manner prescribed by FTA, and that failure to do so may result in FTA determining that WMATA is in noncompliance with DOT DBE regulations. To avoid such determination, WMATA must implement these corrective actions as prescribed. FTA provided WMATA's corrective actions to its FY 2015 shortfall analysis and corrective action plan for this review, however, no corrective actions were provided for its FY 2016 shortfall analysis and corrective action plan. WMATA did not adequately document or implement, monitor, and adjust corrective actions over time to attain its DBE program goals.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, WMATA must submit the following to the FTA Office of Civil Rights:

- A revised shortfall analysis and corrective action plan for its FY 2017 DBE participation goal shortfall. WMATA's revised shortfall analysis and corrective action plan must be completed in accordance with and substantially responsive to the manner prescribed in the addenda to FTA's letters dated March 8, 2016, and March 27, 2017, in response to WMATA's FY 2015 and FY 2016 shortfall analyses and corrective action plans, respectively.
- An updated DBE Program Plan that describes in detail WMATA's procedures for conducting and submitting shortfall analyses and corrective action plans on time and as required by 49 CFR Part 26.47(c)(1-2).

Advisory Comment

WMATA is advised to research and consider developing and implementing a Business Development Program, as described in 49 CFR Part 26.35 and 49 CFR Part 26 Appendices C and D, to assist DBE firms with developing new capabilities (e.g., rail system maintenance services) that will enable them to compete for more FTA-assisted WMATA contracting opportunities. As a corrective action, WMATA's investment in a Business Development Program could help WMATA with future goal attainment and further demonstrate WMATA's efforts to implement its FTA DBE program in good faith.

6.10 Transit Vehicle Manufacturers (TVMs)

Basic Requirement (49 CFR Part 26.49)

Recipients must require that each transit vehicle manufacturer (TVM) certify it has complied with the regulations before accepting bids on FTA-assisted vehicle purchases. Recipients should not include vehicle procurements in their DBE goal calculations and must receive prior FTA approval before establishing project goals for vehicle purchases. Recipients are also required to submit to FTA the name of the successful TVM bidder and the amount of the vehicle procurement within 30 days of awarding an FTA-assisted vehicle contract.

Discussion

During this compliance review, deficiencies were found with this requirement. WMATA's DBE Program Plan did not address the requirements found at 49 CFR Part 26.49(a)(1) and 26.49(a)(4), as follows:

- (1) Only those transit vehicle manufacturers listed on FTA's certified list of Transit Vehicle Manufacturers, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved, at the time of solicitation are eligible to bid.*
- (4) FTA recipients are required to submit within 30 days of making an award, the name of the successful bidder, and the total dollar value of the contract in the manner prescribed in the grant agreement*

In addition, WMATA could not provide documentation confirming it had checked the FTA's certified list of Transit Vehicle Manufacturers prior to awarding TVM contracts or documentation confirming it had submitted the information required in 49 CFR Part 26.49(a)(4) to FTA. FTA confirmed WMATA had not submitted the required TVM contract award documentation.

During the site visit, the review team confirmed WMATA understood it must check FTA's certified list of TVMs posted on the FTA website at <https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/eligible-transit-vehicle-manufacturers> to confirm TVMs are certified prior to award, and that WMATA should do a "print screen" of the certified TVM list and keep a copy of the list in the procurement file. In addition, the review team confirmed WMATA understood that within 30 days of TVM contract award, it must enter the information required in 49 CFR Part 26.49(a)(4) to FTA via its online Transit Vehicle Award Reporting Form at <https://www.surveymonkey.com/r/vehicleawardreportsurvey>.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, WMATA must submit the following to the FTA Office of Civil Rights:

- An updated DBE Program Plan that includes procedures for confirming TVM eligibility prior to awarding contracts for transit vehicle purchases. WMATA must also include procedures for notifying FTA within 30 days of making an award, the name of the successful bidder, and the total dollar value of the contract, as required by 49 CFR Part 26.49(a)(4). Notification must be made by entering all required information into FTA's

online Transit Vehicle Award Reporting Form at <https://www.surveymonkey.com/r/vehicleawardreportsurvey>.

- Notification of all TVM contract awards for the last three years via FTA's online Transit Vehicle Award Reporting Form.

6.1.1 Required Contract Provisions

A) Contract Assurance

Basic Requirement (49 CFR Part 26.13)

Each FTA-assisted contract signed with a prime contractor (and each subcontract the prime contractor signs with a subcontractor) must include nondiscrimination clauses detailed by the DBE regulations.

Discussion

During this compliance review, deficiencies were found with this requirement. WMATA's DBE Program Plan stated the following regarding contract assurance:

WMATA will ensure that the following clause is placed in every DOT-assisted contract and subcontract:

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

(1) Withholding monthly progress payments;

(2) Assessing sanctions;

(3) Liquidated damages; and/or

(4) Disqualifying the contractor from future bidding as non-responsible."

A review of four active procurements (FQ18214/RLJ, FQ18203/LP, FQ18184, and FQ18186) and three closed procurements (FQ18078/L, FQ18061, and FQ18083/LP) revealed that WMATA's FTA-assisted contracts did not include the entire nondiscrimination assurance as described in its DBE Program Plan and as required by 49 CFR Part 26.13. The nondiscrimination assurance included in its contracts omitted the four remedies available to address noncompliance. Likewise, WMATA's IFB and RFP contract templates did not contain the required nondiscrimination assurance in its entirety.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, WMATA must submit to the FTA Office of Civil Rights an updated DBE Program Plan that describes in detail how it will ensure the required nondiscrimination assurance is included in all future contractor, subrecipient, and subcontractor agreements. WMATA must also provide documentation confirming it has updated its IFB and RFP contract templates to include the required nondiscrimination assurance, as described in 49 CFR Part 26.13.

B) Prompt Payment

Basic Requirement (49 CFR Part 26.29)

Recipients 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 subcontractor's work is satisfactorily completed.

Discussion

During this compliance review, deficiencies were found with this requirement. WMATA's DBE Program Plan stated the following regarding prompt payment:

The following clause will be included in each DOT-assisted prime contract:

The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than ten (10) work days from the receipt of each payment the prime contractor receives from WMATA. 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. This provision applies to both DBE and non-DBE subcontractors.

During the site visit, the review team reviewed several prime contracts and found that the DBE Program Plan clause quoted above was included in each one as required by 49 CFR Part 26.29. However, WMATA did not demonstrate that it had procedures in place for determining whether subcontracts contained the required language. Neither WMATA's *DBE Site Visit Checklist* nor its newly revised *Small Business Programs Office Compliance Review* form contained questions designed to confirm compliance with this requirement. Further, included in a subcontractor agreement between Gannet Fleming/Parsons (prime contractor) and Kumi Construction Management Corporation (subcontractor), dated August 29, 2016, was the following prompt payment language:

Prompt payment shall be made to the Subconsultant upon and subject to the Consultant's receipt of payment from the Client for those Services less any amount retained pursuant to this Agreement and/or the Prime Contract.

The subcontract agreement did not specify that retainage payments would be returned within 10 days of receipt of payment from WMATA, as described in WMATA's prompt payment clause. Another older (but still in effect) contract dated August 7, 2013, between Kone, Inc. (prime contractor) and Admiral Elevator Company, Inc. (subcontractor) contained the following language:

ARTICLE 11 PROGRESS PAYMENTS

11.1 It is the intent of the Parties that as an absolute condition precedent to Progress Payments to Subcontractor, Contractor must receive corresponding payment from the Owner for Subcontractor work. Payment shall be within 15 days of receipt of payment from Owner.

Although the review team was not made aware of any prompt payment issues by way of subcontractor complaints or otherwise, WMATA was not adequately monitoring payments to DBEs for compliance with the prompt payment requirements described in its DBE Program Plan. WMATA recently developed an electronic prompt payment system to aid in tracking prime contractor prompt payment compliance; however, at the time of the site visit, only contractors that had been trained on the new system were using it. Contractors that had not received training submitted a monthly prompt payment report form created by WMATA. Neither the electronic prompt payment system nor the WMATA prompt payment report form reported the date on which WMATA paid the prime contractor or the date the prime contractor paid the DBE subcontractor. Without these dates, both methods were ineffective in tracking compliance with WMATA's prompt payment requirements. WMATA did not provide confirmation that it was verifying prime contractor prompt payment compliance.

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, WMATA must submit to the FTA Office of Civil Rights an updated DBE Program Plan that includes procedures for verifying compliance with the Prompt Payment requirements found at 49 CFR Part 26.29. WMATA's procedures must include a verification and comparison of the date WMATA paid the prime contractor and the date the prime contractor paid the subcontractor. WMATA's updated DBE Program Plan must also include procedures for monitoring subcontracts for the required prompt payment language.

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. Recipients should use breach of contract remedies as appropriate.

Discussion

During this compliance review, no deficiencies were found with this requirement. FTA issued an advisory comment with this requirement. In Attachment F of its DBE Program Plan, WMATA provided for the following legal remedies:

WMATA has available several remedies to enforce the DBE requirements contained in its contracts, including, but not limited to, the following:

- 1. Breach of contract action, pursuant to the terms of the contract;*
- 2. Breach of contract reporting to the Office of Inspector General;*
- 3. Breach of contract reporting to the USDOT's Office of Civil Rights*
- 4. Rescission of contract awards (in whole or in part);*
- 5. Administrative fines;*
- 6. Debarment from bidders lists; and*
- 7. Suspensions from awards and other applicable sanctions.*

In addition, the federal government has available several enforcement mechanisms that it may apply to firms participating in the DBE problem, including, but not limited to, the following:

- 1. Suspension or debarment proceedings pursuant to 49 CFR part 26;*
- 2. Enforcement action pursuant to 49 CFR part 31;*
- 3. Prosecution pursuant to 18 USC 1001.*

During the site visit, SBPO staff stated it was not aware of an instance in which it applied one or more of its legal remedies.

The legal remedies described in WMATA's DBE Program Plan were substantially included in its IFB and RFP FTA-assisted contract templates. A review of WMATA contracts FQ16020 and FQ17148 confirmed the substantial inclusion of the referenced legal remedies.

Advisory Comment

WMATA was advised to ensure that prime contractors included WMATA's legal remedies in all FTA-funded subcontracts.

6.12 Certification Standards

Basic Requirements (49 CFR Parts 26.67–26.71)

The recipient must have a certification process in place to determine whether a potential DBE firm is legitimately socially and economically disadvantaged according to the regulatory standards. The DBE applicant must submit the required DOT application and personal net worth (PNW) form with appropriate supporting documentation, as needed.

Discussion

At the time of this DBE program compliance review, WMATA was a certifying partner in the MWUCP and underwent a separate UCP compliance review concurrent with the conduct of the review reported here. DBE certification-related and directory-related observations and findings were documented in a separate UCP compliance review report.

6.13 Certification Procedures

Basic Requirements (49 CFR Parts 26.83–26.86)

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. DBE firms must submit an annual affidavit affirming their DBE status. Recipients may not require DBE firms to reapply for certification or undergo a recertification process. The recipient may accept out-of-state certifications and certify DBE firms without further procedures. Otherwise, DBEs certified in one or more states and certifying entities should follow the procedure outlined in 49 CFR Parts 26.85(c)–(g). The recipient must provide a written explanation for all DBE certification denials. The document must explain the reasons for the denial and specifically reference evidence in the record to support the denial. The recipient must allow the firm to reapply for certification within 12 months or less of the initial denial. The DBE firm may appeal the certification decision to the DOT.

Discussion

At the time of this DBE program compliance review, WMATA was a certifying partner in the MWUCP and underwent a separate UCP compliance review concurrent with the conduct of the review reported here. DBE certification-related and directory-related observations and findings were documented in a separate UCP compliance review report.

6.14 Record Keeping and Enforcements

Basic Requirements (49 CFR Parts 26.11 and 26.37)

Recipients must provide data about their DBE program to FTA on a regular basis. Recipients must submit Semi-Annual Uniform Reports on June 1 and December 1 of each fiscal year by using the FTA electronic grants management system, unless otherwise notified by FTA. (State Departments of Transportation must also report the percentage of DBE minority women, nonminority women, and minority men to the DOT Office of Civil Rights by January 1 of each year.) In addition, recipients must implement appropriate monitoring mechanisms to ensure overall compliance by all program participants. Recipients must conduct enforcement measures in conjunction with monitoring contract performance for purposes such as closeout reviews for contracts.

Lastly, recipients 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 compliance review, deficiencies were found with this requirement. A review of WMATA's DBE semi-annual reports in TrAMS from FY 2016 through FY 2018 showed that WMATA submitted its June and December FY 2017 semi-annual reports late. Although WMATA submitted the semi-annual report due June 1, 2017, only one day late, on June 2, 2017, it did not submit the semi-annual report due December 1, 2017, until March 1, 2018.

On May 29, 2018, WMATA transmitted its FY 2017 shortfall analysis and corrective action plan, in which WMATA communicated an adjustment to its December 1, 2017, semi-annual report (originally submitted on March 1, 2018). According to WMATA, the adjustment corrected an underreporting of \$21,926,037 in prime contracts awarded and an underreporting of \$14,944,320 in DBE prime and subcontracts awarded during the period. This adjustment resulted in an FY 2017 goal attainment of 21.94 percent, just under its 22 percent overall goal. At the time of the site visit, this adjustment was not documented in TrAMS.

WMATA's monitoring mechanisms were described in its DBE Program Plan as periodic compliance reviews of prime contractors and DBE subcontractors, as well as monthly receipt and monitoring of prompt payment reports submitted by prime contractors and verified by DBE subcontractors. WMATA's DBE Program Plan stated that WMATA's SBPO staff were responsible for conducting prime contractor and DBE subcontractor compliance reviews and prompt payment monitoring. At the time of the site visit, WMATA communicated that due to recent and substantial changes in the management of its DBE program (i.e., changes to organization structure, leadership, staff, and procedures), SBPO had not conducted compliance reviews as described in its plan. However, during the site visit, WMATA reported that MARC staff had conducted six compliance reviews in late May 2018. WMATA provided the results of these compliance reviews, which were documented on WMATA's newly developed compliance monitoring forms for prime contractors and DBE subcontractors. The DBE monitoring form contained four pages of questions designed to confirm DBE participation and that DBEs performed a commercially useful function per 49 CFR 26.55(c). The prime contractor monitoring form contained three pages of questions designed to confirm that DBEs were managing, supervising, and performing the work they were contracted to perform.

WMATA documented its enforcement measures in its DBE Program Plan as follows:

Enforcement measures may include rescission of contract awards (in whole or in part), administrative fines, debarment from bidders lists, suspensions from awards, sanctions, referral to appropriate federal authorities in instances of suspected fraud, misrepresentation, misappropriation of funds, theft of services and other activities that warrant criminal referrals or other action, and other appropriate administrative actions.

WMATA stated the following in its DBE Program Plan in response to the requirement in 49 CFR Part 26.11(c) to create and maintain a bidders list:

WMATA has created a bidders list consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The purpose of this requirement is to allow use of the Bidders List approach to calculating overall goals. The bidders list will include the name, address, DBE/non-DBE status, age, and annual gross receipts of firms.

WMATA will collect this information through a contract clause requiring prime bidders to report the necessary information regarding all firms that quote to them on subcontracts.

During the compliance review, WMATA was asked to provide the bidders list referenced in its DBE Program Plan and in its ARA report. In its ARA report, WMATA stated it had created an online application, the WMATA Supplier Portal (designed with PeopleSoft), for collecting and maintaining a bidders list. The portal requires all actual and prospective vendors to register to do business with WMATA. In response, WMATA's SBPO provided an export of its DBE Directory, but it did not provide a bidders list produced from WMATA's Supplier Portal. The list of firms exported from WMATA's DBE Directory did not include non-DBE firms, nor did it include the age, or annual gross receipts of DBE firms. A review of the portal's registration requirements revealed that registrants were not required to enter their annual gross receipts.

As presented, WMATA's bidders list did not meet the requirements described in 49 CFR Part 26.11(c).

Corrective Actions and Schedules

Within 60 days of the issuance of the final report, WMATA must submit the following to the FTA Office of Civil Rights:

- A detailed description of how SBPO will organize and conduct prime contractor and DBE subcontractor compliance reviews, including a draft schedule of reviews.
- A bidders list that meets the requirements of 49 CFR Part 26.11(c) along with timelines for operationalizing its bidders list. Before developing its bidders list, WMATA must reference guidance located at <https://www.transit.dot.gov/funding/procurement/bppm-disadvantaged-business-enterprise> (Section 7.2.6) and <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>.
- An updated DBE Program Plan that includes updated procedures for submitting semi-annual Uniform Reports of Commitments and Payments accurately and on time and procedures for maintaining and updating its bidders list.

7. Summary of Findings

Item	Requirement of 49 CFR Part 26	Ref.	Site Visit Finding(s)	Findings, Corrective Actions, Advisory Comments	Response Days/Date
1.	DBE Program Plan	26.21	D AC	<p>Findings: WMATA's DBE Program Plan was out of date.</p> <p>Corrective Actions: WMATA must submit to the FTA Office of Civil Rights an updated DBE Program Plan that reflects current DBE program organization and implementation, as required by 49 CFR Part 26. WMATA must also replace its current DBE Program Plan with its updated DBE Program Plan in all places where the plan is made available, including on its website.</p> <p>Advisory Comment: In its updated DBE Program Plan WMATA should clearly define the relationship between the DBE Program Plan and the DBE SOPs it is developing. To enhance its updated DBE Program Plan, WMATA's plan should reference its SOPs when appropriate to provide detailed descriptions of how WMATA implements its FTA DBE program. WMATA may also consider integrating its SOPs into its DBE Program Plan to eliminate the need for two procedural documents.</p>	60 Days
2.	DBE Policy Statement	26.23	AC	<p>Advisory Comment: WMATA was advised to update its policy statement by adding language communicating it would distribute its statement specifically to the DBE and non-DBE business communities. In addition, WMATA was advised to post its policy statement on the procurement and vendor portal sections of its website and email its policy statement to the firms on its bidders list and in the MWUCP DBE directory. WMATA was advised to document all attempts to distribute its policy statement.</p>	

Item	Requirement of 49 CFR Part 26	Ref.	Site Visit Finding(s)	Findings, Corrective Actions, Advisory Comments	Response Days/Date
3.	DBE Liaison Officer	26.25	D AC	<p>Findings: WMATA had inadequate staff and funding to administer its DBE program.</p> <p>Corrective Actions: WMATA must submit to the FTA Office of Civil Rights documentation that it has retained adequate staff to administer the DBE Program, as required by 49 CFR Part 26. This must include:</p> <ul style="list-style-type: none"> • Confirmation that it has filled the remaining two vacancies with experienced small and disadvantaged business program managers. • Confirmation that the existing SBPO staff has received formal training in US DOT DBE Program administration. • Updated position descriptions for all SBPO staff showing current reporting relationships and containing al of the duties and responsibilities contained in WMATA's DBE Program • A written assessment that WMATA has budgeted sufficient resources to administer its DBE program. <p>Advisory Comments WMATA was advised to develop effective procedures for the DBELO to have ongoing direct and independent access to the GM/CEO on DBE matters. WMATA was also advised to develop internal procedures to mitigate conflicts of interest or the appearance of conflicts of interests between DBE program administration and the Office of Procurement and Materials Management.</p>	60 Days
4.	DBE Financial Institutions	26.27	D	<p>Findings: Information in the DBE Program Plan was inaccurate. Procedures for researching the availability of DBE financial institutions and encouraging prime contractors to use such institutions were lacking.</p> <p>Corrective Actions: WMATA must submit to the FTA Office of Civil Rights an updated DBE Program Plan that accurately describes its use of DBE financial institutions and describes in detail its procedures for researching the</p>	60 Days

Item	Requirement of 49 CFR Part 26	Ref.	Site Visit Finding(s)	Findings, Corrective Actions, Advisory Comments	Response Days/Date
				availability of DBE financial institutions. WMATA must also provide documentation that it has researched the availability of DBE financial institutions and that it has encouraged prime contractors to use such institutions.	
5.	DBE Directory	26.31	—	Covered under separate and concurrent Unified Certification Program review.	
6.	Overconcentration	26.33	D	<p>Findings: WMATA's DBE Program Plan did not describe the measures WMATA would take to address overconcentration should it occur, nor was documentation provided confirming WMATA conducted an annual overconcentration analysis.</p> <p>Corrective Actions: WMATA must submit to the FTA Office of Civil Rights an updated DBE Program Plan that describes its procedures for analyzing and determining if overconcentration exists, the frequency with which an analysis of overconcentration will be conducted, and the measures taken to address the occurrence of overconcentration should it exist (e.g., use of incentives, technical assistance, business development programs, and mentor-protégé programs).</p>	60 Days
7.	Business Development Programs	26.35	AC	<p>Advisory Comment: Based on the number of DBE firms in the Washington, DC, metropolitan area and the number and amounts of FTA-funded WMATA contracting opportunities eligible for DBE participation, WMATA's DBE program could benefit from the development and implementation of a BDP. In addition, the number of prime contractors available to participate in a mentor-protégé program (elemental to a BDP) is significant. Accordingly, WMATA was advised to familiarize itself with 49 CFR Part 26.35 and 49 CFR Part 26 Appendix C and consider implementing a BDP.</p>	

8.	Determining/Meeting Goals				
8.a	Calculation	26.45	D	<p>Findings: WMATA did not appear to include all FTA-funded contracting opportunities in its <i>Triennial DBE Goal Setting Methodology for Federal Fiscal Years (FFYs) 2017-2019</i>.</p> <p>Corrective Actions: WMATA must submit to the FTA Office of Civil Rights a revised Triennial DBE Goal Setting Methodology for FFY 2017-2019, reflecting the volume and type of FTA-funded contracting opportunities for the three-year period.</p> <p>Advisory Comment WMATA is advised to use its vendor registry (bidders list) as the denominator in its relative availability calculation.</p>	60 Days
8.b	Public Participation	26.45	AC	<p>Advisory Comment: WMATA was advised to provide more opportunities for public input into its goal-setting process to ensure DBE goals were developed in consultation with all stakeholders.</p>	
8.c	Race-Neutral DBE Participation	26.51	D	<p>Findings: WMATA's race-neutral and Small Business Element measures were lacking.</p> <p>Corrective Actions and Schedules Within 60 days of the issuance of the final report, WMATA must submit the following to the FTA Office of Civil Rights:</p> <ul style="list-style-type: none"> An updated DBE Program Plan that includes the race-neutral measures described in 49 CFR Part 26.51 and a plan for implementing said measures. The plan must include a detailed description of how WMATA will periodically review the effectiveness of its race-neutral measures, and accordingly make adjustments to meet the maximum feasible portion of its overall goal by using race-neutral means. The implementation plan must include an implementation timeline. 	60 Days

			AC	<ul style="list-style-type: none"> • An updated DBE Program Plan that includes a detailed description of its process for unbundling large FTA-assisted contracts. Examples of large FTA-assisted contracts it has unbundled in the last three years that have resulted in contracts for small businesses (if available). Examples of large FTA-assisted contracts in the foreseeable future it will unbundle per its unbundling process. • An updated DBE Program Plan that includes a detailed description of its process for creating Small Business Reserve Procurements (set-asides). A list of Small Business Reserve Procurements it plans to implement in the foreseeable future, estimates of when those procurements will occur, and how small businesses will be made aware of those procurements. WMATA must also include a description of how it will track the effectiveness of its Small Business Reserve Procurements in the attainment of its race-neutral and overall DBE goals. <p>Advisory Comments Because WMATA has already demonstrated a commitment to creating small business set-aside contracting opportunities, it should add “Establishing a race-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million),” as recommended by 49 CFR Part 26.39(b)(1), to its list of measures to foster small business participation. In addition, WMATA should consider implementing one or more of the measures in 49 CFR Part 26.39(b)(2-5), in particular the following:</p> <ul style="list-style-type: none"> • <i>In multiyear design-build contracts or other large contracts (e.g., for “megaprojects”) requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.</i> • <i>On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.</i> 	
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				<ul style="list-style-type: none"> • A timeline for correcting the calculation inaccuracies in its prompt payment system. • An updated DBE Program Plan that describes in detail its procedures for verifying the accuracy of race-conscious and race-neutral DBE payments. • A revised June 2018 Semi-annual Uniform Report to reflect the following corrections: <ul style="list-style-type: none"> ○ Report only the actual FTA share of contracting opportunities in Column A, total dollars awarded ○ Report only the actual payments to DBEs (do not include SBEs) in column C, ○ Provide documentation of payments to DBEs, shown in rows 18, 19 and 20 (payments to DBEs) ○ Verify or correct the total contracts reported in cell 8C and total firms reported in cell 18E 	
8.h	Quotas	26.43	ND		
9.	Shortfall Analysis and Corrective Action Plan	26.47	D	<p>Findings: Shortfall analyses and corrective action plans lacked adequate detail and were not submitted in a timely manner.</p> <p>Corrective Actions: WMATA must submit the following to the FTA Office of Civil Rights:</p> <ul style="list-style-type: none"> • A revised shortfall analysis and corrective action plan for its FY 2017 DBE participation goal shortfall. WMATA's revised shortfall analysis and corrective action plan must be completed in accordance with and substantially responsive to the manner prescribed in the addenda to FTA's letters dated March 8, 2016, and March 27, 2017, in response to WMATA's FY 2015 and FY 2016 shortfall analyses and corrective action plans, respectively. • An updated DBE Program Plan that describes in detail WMATA's procedures for conducting and submitting shortfall analyses and corrective action plans on time and as required by 49 CFR Part 26.47(c)(1-2). <p>Advisory Comment WMATA is advised to research and consider developing and implementing a Business Development Program, as described in 49</p>	60 Days
			AC		

				CFR Part 26.35 and 49 CFR Part 26 Appendices C and D, to assist DBE firms with developing new capabilities (e.g., rail system maintenance services) that will enable them to compete for more FTA-assisted WMATA contracting opportunities. As a corrective action, WMATA's investment in a Business Development Program could help WMATA with future goal attainment and further demonstrate WMATA's efforts to implement its FTA DBE program in good faith.	
10.	Transit Vehicle Manufacturers (TVMs)	26.49	D	<p>Findings: WMATA did not document that it confirmed it awarded transit vehicle contracts to FTA-approved TVMs. WMATA did not submit post award TVM reports to FTA, as required. WMATA did not document required TVM award procedures in its DBE Program Plan.</p> <p>Corrective Actions: WMATA must submit the following to the FTA Office of Civil Rights:</p> <ul style="list-style-type: none"> An updated DBE Program Plan that includes procedures for confirming TVM eligibility prior to awarding contracts for transit vehicle purchases. WMATA must also include procedures for notifying FTA within 30 days of making an award, the name of the successful bidder, and the total dollar value of the contract, as required by 49 CFR Part 26.49(a)(4). Notification must be made by entering all required information into FTA's online Transit Vehicle Award Reporting Form at https://www.surveymonkey.com/r/vehicleawardreportsurvey. Notification of all TVM contract awards for the last three years via FTA's online Transit Vehicle Award Reporting Form. 	60 Days
11.	Required Contract Provisions				
11.a	Contract Assurance	26.13	D	<p>Findings: Required nondiscrimination assurance was not included in prime contractor and subcontractor agreements.</p> <p>Corrective Actions: WMATA must submit to the FTA Office of Civil Rights an updated DBE Program Plan that describes in detail how it will ensure the required nondiscrimination assurance is included in all future contractor, subrecipient, and subcontractor agreements. WMATA must also provide documentation confirming it has updated its IFB and RFP</p>	60 Days

				contract templates to include the required nondiscrimination assurance, as described in 49 CFR Part 26.13.	
11.b	Prompt Payment	26.29	D	<p>Findings: A prompt payment clause was not included in subcontracts. No verification of compliance with prompt payment requirements was provided.</p> <p>Corrective Actions: WMATA must submit to the FTA Office of Civil Rights an updated DBE Program Plan that includes procedures for verifying compliance with the Prompt Payment requirements found at 49 CFR Part 26.29. WMATA's procedures must include a verification and comparison of the date WMATA paid the prime contractor and the date the prime contractor paid the subcontractor. WMATA's updated DBE Program Plan must also include procedures for monitoring subcontracts for the required prompt payment language.</p>	60 Days
11.c	Legal Remedies	26.37	AC	<p>Advisory Comment: WMATA was advised to ensure that prime contractors included WMATA's legal remedies in all FTA-funded subcontracts.</p>	
12.	Certification Standards	26.67-26.71	—	Covered under separate and concurrent Unified Certification Program review.	
13.	Certification Procedures	26.83-26.86	—	Covered under separate and concurrent Unified Certification Program review.	
14.	Record Keeping and Enforcements	26.11 and 26.37	D	<p>Findings: Semi-annual reports were not submitted on time. Prime contractor and DBE subcontractor monitoring was lacking. The bidders list not in compliance with 49 CFR Part 26.11(c).</p> <p>Corrective Actions: WMATA must submit the following to the FTA Office of Civil Rights:</p> <ul style="list-style-type: none"> • A detailed description of how SBPO will organize and conduct prime contractor and DBE subcontractor compliance reviews, including a draft schedule of reviews. • A bidders list that meets the requirements of 49 CFR Part 26.11(c) along with timelines for operationalizing its bidders list. Before developing its bidders list, WMATA must reference guidance located at https://www.transit.dot.gov/funding/procurement/bppm- 	60 Days

				disadvantaged-business-enterprise (Section 7.2.6) and https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise . <ul style="list-style-type: none"> An updated DBE Program Plan that includes updated procedures for submitting semi-annual Uniform Reports of Commitments and Payments accurately and on time and procedures for maintaining and updating its bidders list. 	
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Findings at the time of the site visit: ND = no deficiencies found; D = deficiency; AC = advisory comment.

8. Attendee List

Name	Title
<i>Washington Metropolitan Area Transportation Authority</i>	
Paul Wiedefeld	General Manager
John Kuo	Chief Information Business Operations
Elizabeth Sullivan	Chief Risk and Audit Officer
Suzette Moore	Chief Procurement Officer
Sylvia Edwards	Director DBELO
Thomas Turner	Senior Auditor
Carl Farmer	Senior Auditor
Lilliette Rivera	Small Business Analyst
Rashida Reid	Small Business Auditor
Bekwele Amadi	Performance Analyst
Jay Johnson	Policy Supervisor
Nicole Brewer	Special Projects Coordinator
Judy-Ann Davis	Procurement
Daniel G. Smith	Deputy Chief Procurement Officer
Vinay Kaushik	IT/Apps
Chris Hoadley	Assistant General Counsel
Mike Riess	Counsel
Katrina Welch Smith	Management Audits, Risk and Compliance (MARC) Internal Control Officer
Vanita King	MARC Internal Compliance Director
Gary Owens	MARC Consultant
<i>Federal Transit Administration</i>	
John Day	Program Manager, Policy and Technical Assistance
Terry Garcia Crews	Regional Administrator
Janelle Hinton	Equal Opportunity Specialist
Lynn Bailey	Regional Civil Rights Officer
Guljed Birce	Equal Opportunity Specialist
Samira Louis	Financial Analyst
Corey Walker	General Engineer
Monique Myatt Galloway	Regional Counsel – Region 3
<i>Prime Contractor</i>	
Brad Mason	Gannet Fleming/Parsons Transit Rail Systems – Vice President

Name	Title
<i>Subcontractor</i>	
Oday Alhaddad	Kumi Construction Management – Construction Manager
<i>The DMP Group – DBE Program Compliance Reviewers</i>	
Maxine Marshall	Lead Reviewer
Donald Lucas	Reviewer
Gregory Campbell	Reviewer
<i>The DMP Group – UCP Compliance Reviewers</i>	
John Potts	Lead Reviewer
Dana Lucas	Reviewer
Khalique Davis	Reviewer

Attachment A – FTA Notification Letter to WMATA



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

Headquarters

East Building, 5th Floor, TCR
1200 New Jersey Ave., SE
Washington, D.C. 20590

April 12, 2018

Paul J. Wiedefeld
General Manager and CEO
Washington Metropolitan Area Transit Authority
600 5th Street, NW
Washington, DC 20001

Dear Mr. Wiedefeld:

The Federal Transit Administration (FTA) Office of Civil Rights is responsible for ensuring compliance with 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs" by its grant recipients and subrecipients. As part of its ongoing oversight efforts, the FTA Office of Civil Rights conducts a number of on-site DBE compliance reviews of these grant recipients. For this reason, the Washington Metropolitan Area Transit Authority (WMATA) has been selected for a review of its overall DBE program to take place June 5-8, 2018. This review will be conducted concurrently with a compliance review of WMATA's Unified Certification Program (UCP).

The purpose of this review is to determine whether WMATA is honoring its commitment, as represented by certification to FTA, to comply with the applicable provisions of 49 CFR Part 26.

The review process includes data collection before the on-site visit, an opening conference, an on-site review of DBE program implementation (including, but not limited to discussions to clarify items previously reviewed, work-site visits, and interviews with staff), interviews with participating prime and DBE contractors and external interested parties, possible work-site visits and an exit conference. The reviewers will complete the on-site portion of the review within a four-day period. FTA has engaged the services of The DMP Group, LLC (DMP) of Washington, D.C. to conduct this compliance review. As part of the review, the following FTA contractor personnel will be granted temporary access to your TrAMS account: Maxine Marshall, John Potts, Donald Lucas, Khalique Davis, Gregory Campbell, and Dana Lucas. Please do not remove these individuals. FTA will do so at the close of the review. The DMP and FTA representatives will participate in the opening and exit conferences, with FTA participating by telephone.

We request your attendance at an opening conference scheduled for Tuesday, June 5, 2018 at 9:00 a.m. Eastern Standard Time, to introduce the DMP team and FTA representatives to WMATA. Attendees should include you, the DBE Liaison Officer (DBELO), and other key staff. During the opening conference, the review team members will present an overview of the on-site activities.

Because review team members will spend considerable time on site during the week, please provide them with temporary identification and a workspace within or near your offices for the duration of their visit. The review team will need adequate working space and the use of

privately controlled offices with internet access to conduct interviews and review documents. Please let us know if you will designate a member of your staff to serve as WMATA's liaison with the review team and will coordinate the on-site review and address questions that may arise during the visit.

So that we may properly prepare for the site visit, we request that you provide the information described in Enclosure 1, which consists of items that the review team must receive within 21 days of the date of this letter. Please forward electronic (softcopy) versions of these materials to the following contact person, who is available to discuss material transmission options with you:

Donald G. Lucas
The DMP Group, LLC
2233 Wisconsin Avenue NW, Suite 228
(202) 726-2630
donald.lucas@thedmpgroup.com

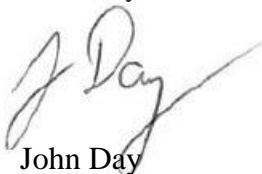
We request the exit conference be scheduled for Friday, June 8, 2018 at 11:00 a.m. Eastern Standard Time, to afford an opportunity for the reviewers to discuss their observations with you and your agency. We request that you, the DBELO, and other key staff attend the exit conference.

The FTA Office of Civil Rights will make findings and will provide a draft report. You will have an opportunity to correct any factual inconsistencies before FTA finalizes the report. The draft and final report, when issued to WMATA, will be considered public documents subject to release under the Freedom of Information Act, upon request.

WMATA representatives are welcome to accompany the review team during the on-site activities, if you so choose. If you have any questions or concerns before the opening conference, please contact me at 202-366-1671, or via e-mail at *john.day@dot.gov*.

Thank you in advance for your assistance and cooperation as we undertake this process. We look forward to working with your staff.

Sincerely,



John Day
Program Manager for Policy
and Technical Assistance

Enclosure

cc: Terry Garcia Crews, Regional Administrator, FTA Region III
Lynn Bailey, Regional Civil Rights Officer, FTA Region III
Anita Heard, Equal Opportunity Specialist, FTA
Janelle Hinton, Equal Opportunity Specialist, FTA
Sylvia Edwards, Director Small Business Programs Office, WMATA
Lucia Butts, TrAMS User Manager, WMATA
Maxine Marshall, Lead Reviewer, The DMP Group, LLC

Washington Metropolitan Area Transit Authority
Disadvantaged Business Enterprise Program Compliance Review

Enclosure 1

You must submit the following information to the DMP contact person within 21 calendar days from the date of this letter.

1. Current DBE Program Plan (which should include WMATA's organization chart).
2. A narrative that describes the WMATA individuals and resources dedicated to implementing the DBE program requirements, handling DBE program inquiries, and educating WMATA staff on DBE program requirements. The narrative should include an organization chart showing WMATA's DBE staff and a budget showing funds allocated to the DBE program.
3. FY 2017 – FY 2019 DBE goal setting methodology submission and semiannual reports of DBE attainment (fiscal years 2015, 2016, 2017, and 2018), and/or quarterly reports of ARRA DBE attainment.
4. DBE goal shortfall analyses and corrective action plans for the most recent three Federal fiscal years (FY 2015- FY 2017) in which WMATA did not meet its DBE goal.
5. Any additional certification criteria/guidelines used by WMATA in determining DBE eligibility, if applicable.
6. Provide the number of DBE applications WMATA has reviewed, approved, and denied each year from FY2015 through FY2018 to date. Include the number of DBE applications and the names of applicants that are currently pending review.
7. Provide a list of ongoing FTA-assisted contracts, the names of DBE firms that are currently working on those contracts, and worksite locations, where applicable.
8. Provide contract records to include:
 - a) the last 15 FTA-assisted contracts awarded by WMATA from FY 2017 – current
 - b) the last 15 FTA-assisted contracts completed by WMATA from FY 2017 – current
 - c) the last 15 FTA-assisted contracts with DBE goals awarded by WMATA from FY 2017 – current
 - d) the last 15 FTA-assisted contracts with DBE goals completed by WMATA from FY 2017 – current.
9. The identification of firms, if any, that have worked on WMATA's projects and have graduated from WMATA's DBE program in the last three years, i.e.,

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exceeded the threshold dollar amounts and are no longer certified.

10. Information identifying FTA-funded contracts awarded during Federal FYs 2015 to present by WMATA and its subrecipients, if applicable. The federal fiscal year begins October 1 and ends September 30. The information should identify the names of Prime and DBE participants, the DBE schedule of participation or good faith efforts submitted by the prime, the scope of work, and the amounts awarded and actually paid to each DBE.
11. Good Faith Effort criteria established by WMATA.
12. Procedures for monitoring that work committed to DBEs is actually performed by those DBEs (e.g., prompt payment procedures and monitoring and enforcement mechanisms).
13. Small Business element as implemented by WMATA.
14. FTA-assisted transit vehicle procurements/contracts for the last five (5) years. This information should include the entire contract between your agency and the transit vehicle manufacturer.
15. FTA-assisted transit vehicle request for proposals (RFPs) for the last five (5) years.
16. List of all bids accepted for the RFPs provided in response to Item 13.
17. List of all subrecipients and the amount of FTA funds allocated to each subrecipient from 2015 through present, if applicable.
18. Names of interested parties (external organizations) with which WMATA has interacted on the DBE program issues.
19. Any complaints or lawsuits received concerning WMATA's DBE program or its prime contractors over the past three (3) years.
20. The DBELO official position description and position descriptions for other WMATA staff or contractors responsible for implementing the DBE Program.
21. Current DBE staff positions filled and vacant.
22. Prompt payment verification process.
23. WMATA Office of Inspector General Report referenced in the WMATA January 2018 and February 2018 Board Action/Information Summary Reports.
24. WMATA Management Audits, Risks and Compliance Office Report referenced

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in the WMATA January 2018 and February 2018 Board Action/Information
Summary Reports.

25. Name and Statement of Work for contractor hired to write most recent standard operating procedures for WMATA's DBE program and to address DBE program and WMATA-related UCP compliance issues.
26. Other pertinent information determined by WMATA's staff to further demonstrate WMATA's DBE compliance efforts.

Attachment B – WMATA Response to Draft Report



August 24, 2018

Mr. John Day
Program Manager for Policy and Technical Assistance
Office of Civil Rights, Federal Transit Administration
U.S. Department of Transportation
1200 New Jersey Avenue SE
Room E-54-310
Washington, DC 20590

Dear Mr. Day,

Enclosed are WMATA's corrections to factual errors found in the Federal Transit Administration's (FTA) draft of the Washington Metropolitan Area Transit Authority, Disadvantaged Business Enterprise (DBE) Program Compliance Report of August 2018. We have also included documentation in support of our corrections. Pursuant to your instructions this response does not include corrective actions.

Sincerely,

Paul J. Wiedefeld
General Manager/CEO

**Washington
Metropolitan Area
Transit Authority**

600 Fifth Street, NW
Washington, D.C. 20001
202/962-1234

*By Metrorail:
Judiciary Square-Red Line
Gallery Place-Chinatown
Red, Green and
Yellow Lines*

*A District of Columbia
Maryland and Virginia
Transit Partnership*

CC: Terry Garcia Crews
Corey Walker
Lynn Bailey
Anita Heard
Janelle Hinton
Lucia Butts
Yolanda Mitchell
Donald Lucas

**Washington Metropolitan Area Transit Authority
Disadvantaged Business Enterprise (DBE) Program
Compliance Review**

MANAGEMENT RESPONSE TO DRAFT REPORT



**Washington Metropolitan Area Transit Authority
Disadvantaged Business Enterprise (DBE) Program
Compliance Review**

MANAGEMENT RESPONSE TO DRAFT REPORT

Compliance Review Area and Findings:

Compliance Review Area: Disadvantage Business Enterprise (DBE) Program

4.3 DBE Program

Page 13, 4.3 DBE Program, Paragraph 2:

The report states the following: **"All the full-time staff responsible for the management and administration of the DBE program, including the DBELO, were hired in the eight months prior to this compliance review."**

Response Incorrect Factual Statement

This is factually incorrect. The SBPO staff were employed five months before the audit. As stated in the paragraph above, Mr. Carl Farmer and Mr. Thomas Turner, Senior Small Business Auditors, reported for work on March 19, 2018. Ms. Rashida Reid, Small Business Auditor, reported for work on March 26, 2018. Mr. Bekwele Amadi, Performance Analyst, reported for duty on January 22, 2018. Ms. Lilliette River, Small Business Program Analyst, reported for duty on April 16, 2018. The Disadvantaged Business Enterprise program was reorganized, however, the reorganization included redrafting the position descriptions; hiring of qualified staff to manage the program; and developing new procedures for the implementation of the program.

Page 13, 4.3 DBE Program, Paragraph 3:

The report states the following: **"WMATA did not meet its DBE goals in FY 2015, FY 2016, and FY 2017, and it needed to improve how it analyzed program performance and implemented race-neutral and race-conscious measures to both attain its overall goals and more narrowly tailor its DBE program."**

Response Incorrect Factual Statement

This is an incorrect statement. The corrective actions were not designed to **"more narrowly tailor its DBE program"** as stated by the auditors. The shortfall submission of WMATA was designed to remedy low levels of DBE participation and to demonstrate good faith efforts required by 49 C.F.R. 26.47(c).

6.3 DBE Liaison Officer

Basic Requirement (49 CFR Part 26.25)

Recipients must have a designated DBE Liaison Officer (DBELO) 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.

Incorrect Factual Statement

On page 23 of the draft report, the FTA auditors stated the following: **“DBELO was transferred from PRMT to this position in November 2017. This individual had worked for WMATA since 2000 in the PRMT, but she lacked any prior DBE experience.”**

Response Incorrect Factual Statement

This statement is factually incorrect. The DBELO did not transfer from PRMT. WMATA conducted a competitive recruitment for the position for the position of Director Small Business Program Office. The current DBELO submitted an application and was granted an interview based on her qualifications. After the interviews were conducted, it was determined that the current DBELO was the best qualified applicant for the position. The current DBELO has 20 years of DBE experience. The DBELO was employed by WMATA in 2000 as a DBE Compliance Specialist. While in this position, she processed DBE Certifications applications, presented evidence at decertification hearings, and drafted WMATA's responses to FTA for appeals for denial of certification. She remained in the position for five years. She then applied for the position of Procurement Analyst. While in this position, she was WMATA's representative to the Washington Metropolitan Unified Certification Program (MWUCP) which reviewed and approved applications for DBE certification with the MWUCP. The current DBELO also was the hearing examiner for informal de-certification hearings for the MWUCP. She also prepared DBE responses FTA for the Triennials conducted in 2011 and 2014. Attached is a copy of her resume which was submitted to WMATA Human Resources in application for the position of DBELO. **See 6.3.A.** In October 2017, the current DBELO attended DBE Training course given by National Training Institute (NTI) in Providence Rhode Island.

Incorrect Factual Statement

On page 23 of the draft report, the FTA auditors stated the following: **“At the time of the compliance review site visit, WMATA had recently hired six new SBPO employees: a program performance analyst, two senior small business auditors, a senior small business analyst, a small business analyst, and an administrative assistant. Only one of these new hires had prior experience administering a DBE program.”**

Response Incorrect Factual Statement

This statement is factually incorrect. WMATA did not hire an administrative assistant. 49 CFR part 26 establishes the requirements for the DBE program. It is WMATA's responsibility to draft position descriptions and hire the personnel to implement the program. The DBE program is not based on certification of DBE alone. DBE programs are susceptible to fraudulent practices. One common abuse has featured non-DBE firms who partner with, and sometimes create, sham firms who meet DBE eligibility criteria on paper but who perform no actual work—or, in the words of DBE regulations, perform no “commercially useful function”.

Contract compliance monitoring is important because it is a way to verify who is performing the work on WMATA's federally-funded and large business contracts. Additionally, it allows WMATA to verify whether the subcontractor(s) are actually performing the work that they have been committed to and that they are certified to perform the work. Finally, WMATA must keep adequate

records and submit timely and accurate reports to FTA. WMATA drafted its position descriptions and hired staff with the requisite technical and analytical skills to effectively implement the DBE program. Copies See 6.3.B

On April 16, 2018, Ms. Lilliette Rivera was hired as a Small Business Analyst and has 19 years of experience in DBE. It is her responsibility to review certification applications, conduct on-site reviews maintain the DBE database. See 6.3.C On March 19, 2018, Mr. Thomas Turner was hired as a Senior Small Business Auditor and has 22 years of experience in Minority Business Enterprise. He was a senior minority business manager at the Washington Suburban Sanitary Commission. He has experience in contract and procurement administration and business development. See 6.3.D On March 19, 2018, Mr. Carl Farmer was hired as a Senior Small Business Auditor and has experience in federal regulations and financial analysis for fraud. His expertise is invaluable for DBE contract compliance and prompt payment. See 6.3.E On March 26, 2018, Ms. Rashida Reid was hired as a Small Business Auditor and has six years of experience in revenue auditing, financial discrepancies and accounts reconciliation. Her expertise is invaluable for DBE contract compliance and prompt payment. See 6.3.F On January 26, 2018, Mr. Bekwele Amadi was hired as a Program Performance Analyst and has eight years of experience in capital program, financial management and analysis. His expertise is necessary to ensure that the WMATA prepares accurate and timely semi-annual reports to FTA. See 6.3.G

On June 25, 2018, Mr. Clemon Hammie reported for work as the Small Business Program Manager. He has six years of DBE experience was manager of the Maryland State Highway Administration, DBE Program. He also has 18 years of experience in compliance. See 6.3. H

Incorrect Factual Statement

On page 23 of the draft report, the FTA auditors stated the following: **"As shown in the following table, the review team noted that the DBELO did not appear to perform all the duties and responsibilities identified in WMATA's current DBE program and listed in the SBPO functional Team Organization Table, dated April 16, 2018."**

WMATA disagrees with each of the following because they are factually incorrect.

DBELO Duties and Responsibilities per WMATA DBE Program	Included in Functional Team Organization Table?
1. Reviews third-party contracts and purchase requisitions for compliance with the DBE program.	No
2. Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.	No
3. Identifies federally funded contracts and procurements so that DBE goals are included in solicitations and monitors results.	No
4. Analyzes WMATA's progress toward goal attainment and identifies ways to improve progress.	No
5. Participates in pre-bid meetings.	No
6. Advises the General Manager/CEO on DBE matters and achievement.	No
7. During bid/proposal review, participates with legal counsel and project directors to determine contractor compliance with good-faith efforts.	No
8. Provides DBEs with information and assistance in preparing bids and obtaining bonding and insurance.	No

9. Plans and participates in DBE training seminars.	No
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1. Reviews third-party contracts and purchase requisitions for compliance with the DBE program.

Response Incorrect Factual Statement

The DBLEO conducts a goal setting for every contract that has a DBE goal established. The Contract Administrator submits a verification request for DBE certification and additional information to ensure that only MWUCP DBE's are working on the contract. Attached are examples. WMATA conducts announced and unannounced site visits. If non-compliance is found a letter is sent to the DBE of the non-compliance with corrective actions. Attached are examples review documents. **See Attachment 6.3.I**

2. Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.

Response Incorrect Factual Statement

The DBELO is a member of the Procurement Review Committee (PRC) which establishes DBE goals and Small Business Enterprise set-a-sides. The DBELO reviews the statement of work; assists in establishing a DBE goal; and issues a final written report. The DBELO works with the Contract Administrator to ensure that the DBE goal is in the solicitation that is placed on the WMATA website. The proposals are made available to the DBEs when they are placed on the WMATA Website. Moreover, DBEs are informed of upcoming solicitations at outreach programs. Attached is a copies of the PRC report prepared by the DBELO submitted by WMATA to the auditors. **See Attachment 6.3.J**

3. Identifies federally funded contracts and procurements so that DBE goals are included in solicitations and monitors results.

Response Incorrect Factual Statement

The DBELO is a member of the Procurement Review Committee (PRC) establishes DBE goals and Small Business Enterprise set-a-sides. The DBELO reviews the statement of work; assists in establishing a DBE goal; and issues a final written report. The DBELO works with the Contract Administrator to ensure that the DBE goal is in the solicitation that is placed on the WMATA website. The proposals are available to the DBEs when they are placed on the WMATA Website. Attached is a copy of the PRC report prepared by the DBELO. **See Attachment 6.3.J** SBOP has assigned each contract with a DBE goal to a Small Business Auditor. It is the responsibility of the auditor to monitor the procurement to ensure that the DBE goal has been attained. The auditor put the relevant contract information on the SBOP tracking tool. **See the response to number 4 below.**

4. Analyzes WMATA's progress toward goal attainment and identifies ways to improve progress.

Response Incorrect Factual Statement

SBPO has a DBE Prompt Payment Tool. Every contract and Task Order with a DBE Goal is recorded on the Tracking Tool. The Tracking Tool contains the following information: the contract number, the prime contractor, all of the subcontractors, the amount of the contract, the amount of the subcontract, the invoice number and dates, and completion towards the established goal. The Prime Contractor and the subcontractor are required to go the WMATA website and upload the prompt payment information into the Prompt Payment Tool. They are also required to forward a paper copy of the form to the DBELO. The Performance Analyst reviews the information contained on the prompt payment tools to determine if the DBE goal have been attained. During the audit, the FTA Auditors made suggestions concerning the dates of invoices submitted, and they were implemented. Attached is a copy of the prompt payment and tracking form. Attached is a copy of the Prompt payment tool. **See Attachment 6.3.K** Also, WMATA has hired staff with audit backgrounds. The purpose of hiring staff with auditing background was to analyze WMATA's progress toward goal attainment and identify ways to improve progress. **See Attachments 6.3.D, 6.3.E, and 6.3.F**

Response Incorrect Factual Statement

The current DBELO or designee participates in every pre-bid meeting for solicitations where a DBE goal has been established. During these meetings, a brief discussion is held regarding the scope of the DBE program, prompt payment responsibilities; Good Faith Efforts; and the requirements for contract compliance.

5. Advises the General Manager/CEO on DBE matters and achievement.

Response Incorrect Factual Statement

The DBELO has direct access to the General Manager. Attached is a copy of the Organization Chart which was given to the FTA auditors. **See Attachment 6.3.L**

6. During bid/proposal review, participates with legal counsel and project directors to determine contractor compliance with good-faith efforts.

Response Incorrect Factual Statement

The DBELO plays an integral part with determining the contractor's compliance with good faith efforts. Attached are two policy memoranda which establishes the criteria for good faith efforts for Appendix B waivers and substitutions. The prime contractor is required to notify the DBE vendor of his request for substitution with supporting documentation such as failure to perform the work. This notification must be in writing and sets forth the reasons for substitution with examples of nonperformance by the DBE vendor. A copy of this written notification must be given to the Contract Administrator (CA) who will forward it to the DBELO or designee. The DBE vendor will be given ten (10) days to respond and provide examples of his adequate performance. The CA and the DBELO will meet to discuss the facts at issue. An informal hearing may be held if necessary for clarification of any facts or issues. A written response of their determination will be issued within ten (10) days. If the request for substitution is approved, the prime contractor must replace

the DBE vendor with another DBE firm, or document the Good Faith Efforts as to why he could not. **See Attachment 6.3.M**

7. Provides DBEs with information and assistance in preparing bids and obtaining bonding and insurance.

Response Incomplete Factual Statement

WMATA has held programs for DBEs. They took place on September 23-25, 2014 and February 9, 2017. A three day workshop was held in 2014. This workshop focused on banking (financial literacy; micro-loan and crowdfunding); insurance; and bonding. Attached is documentation that the training and outreach for DBE contracting opportunities. The February 2017 workshop focused on bonding. WMATA also published a newsletter. **See Attachment 6.3.N**

8. Plans and participates in DBE training seminars.

Response Incorrect Factual Statement

This statement is factually incorrect. In October 2017, the current DBELO attended DBE Training course given by National Training Institute (NTI) in Providence Rhode Island. The DBELO also spoke a Conference of Minority transportation Officials (COMTO) held at WMATA in October 2018. **See response to Basic Requirement (49 CFR Part 26.25) above and Attachment 6.3.O**

Incorrect Factual Statement

On page 25 of the report, the FTA auditors stated:

In December 2017, WMATA's SBPO was transferred from WMATA's Department of Fair Practices to PRMT. WMATA asserted that this reorganization facilitated access to contracting information. As an example, the DBELO provided documentation that she participated in regular contract goal-setting meetings with a newly formed Procurement Review Committee, designed to determine which solicitations would include DBE goals. This process seemed useful, but it should not be dependent on the SBPO being located within PRMT.

The reorganization resulted in the DBELO reporting directly to the Chief Procurement Officer, which presented, at a minimum, the appearance of a conflict of interest. The DBELO could be limited in her ability to advocate for the inclusion of DBE contracting goals based on a determination by the Chief Procurement Officer that the need to expedite the procurement outweighed the need to provide a level playing field for DBEs. In addition, the DBELO may be hesitant to challenge the Chief Procurement Officer since this is the person who conducts her performance evaluations and determines her salary. WMATA should reconsider the reorganization of SBPO to PRMT or develop procedures for mitigating conflicts between procurement and DBE.

Response Incomplete Factual Statement

These are incomplete factual statements. The DBELO has a direct line of communication to the General Manager/CEO to mitigate conflicts of interest or the appearance of conflicts of interests between DBE program administration and the Office of Procurement and Materials Management. **See Attachment 6.2.L** The Procurement Review Committee (PRC) is comprised of the Chief Procurement Officer (CPRO), DBELO and representatives from the Program Offices. Counsel is requested to attend and give guidance on legal issues. The purpose of the PRC Committee is to approve of the DBE goal and SBE set-aside. The CPRO is the Chair of the PRC. The Program

Office is responsible for completing the DBE Goal-Setting Form for federally assisted contracts with a DBE goal and submits it to PRMT. The DBELO coordinates preparation of contract goal documentation; reviews the Goal-Setting form prepared by the Program Office; query the DBE data base to determine if there are sufficient DBE vendors to support the establishment of the goal and issues a report on the findings of the PRC meeting. All DBE goals are established with the advice and consent of the DBELO.

The language drafted by the FTA Auditors indicates that **“there is an appearance of a conflict of interest because the SBPO is under PRMT.”** However, the auditors did not provide instances where conflicts of interest occurred. During the FTA Audit, the DBELO was specifically asked whether there were any conflicts with CPRO. The DBELO stated that there were no conflicts of interests and that she had direct access to the General Manager/CEO to mitigate conflicts of interest or the appearance of conflicts of interests between DBE program administration and the Office of Procurement and Materials Management. **See Attachment 6.3.L**

Incorrect Factual Statement

On page 26 in the Advisory Comments, the Auditors states “WMATA was advised to develop effective procedures for the DBELO to have ongoing direct and independent access to the GM/CEO on DBE matters. WMATA was also advised to develop internal procedures to mitigate conflicts of interest or the appearance of conflicts of interests between DBE program administration and the Office of Procurement and Materials Management.

Response Incorrect Factual Statement

WMATA disagrees with this advisory comment. There is an internal procedure available to the DBELO to mitigate conflicts of interest or the appearance of conflicts of interests between DBE program administration and the Office of Procurement and Materials Management. There are monthly management meeting where the General Manager/CEO is present. I can also request private meetings to discuss any issues. The DBELO has a direct line of communication with and access to the General Manager/CEO. **See Attachment 6.3.L**

6.4 DBE Financial Institutions.

Incorrect Factual Statement

On page 26 of the report concerning financial institutions, 49 CFR Part 26.27 was cited incorrectly by the auditors. It should read: **“You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in your community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.”**

Response Incorrect Factual Statement

This is an incorrect factual statement. It is WMATA's policy to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contract to make use of these institutions. WMATA made efforts to identify and use such institutions by reviewing financial institutions owned and controlled by socially and economically disadvantaged individuals in metropolitan Washington. WMATA submitted this research to the auditor. **See 6.4.A** The sole minority owned bank found in

the District of Columbia is the Industrial Bank. A second minority owned bank is the Bank of Hope located in Virginia. WMATA is not required to research out of state banks; however, we did. Although WMATA didn't consult the Federal Reserve Statistical Release (FRSR), its research was as thorough and contained the same information identified in the FRSR for the District of Columbia.

6.8 Determining/Meeting Goals

A) Calculation

Incorrect Factual Statement

On page 28, of the report, Calculation, the Auditors states **"WMATA did not appear to include all FTA-funded contracting opportunities in its *Triennial DBE Goal Setting Methodology for Federal Fiscal Years (FFYs) 2017-2019*. For example, during the compliance review site visit, numerous FTA-funded contracts for non-TVM vehicles were examined. WMATA did not include any FTA-funded vehicles or support equipment in its contracting opportunities for FFY 2017-19."**

Response Incorrect Factual Statement

This is incorrect. FTA reviewed the proposed goal setting methodology and gave its concurrence. In a letter dated January 4, 2017, FTA stated that "We have reviewed your goal, including a review of the methodology and public participation requirements, and determined that it meets the requirements set out in DOT's DBE regulations." **See Attachment 6.8.A**

C) Race-Neutral DBE Participation

Incorrect Factual Statement

On page 31 of the report, number 1, The recipient should arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under §26.39 of this part. The auditors stated that **"WMATA had partially implemented this race-neutral measure and listed on three unbundled contracts, and that WMATA listed three task order contracts but did not provide more recent examples of unbundling."**

Response Incorrect Factual Statement

This is factually incorrect. WMATA has unbundled the following contracts and issues Tasks Orders: FQ14114, FQ15191, FQ15192, FQ10065, FQ15124, FQ15194, FQ15205, FQ14085, FQ12232, FQ16036, FQ16148, FQ10060, FQ10218, FQ9205, FQ15005, and FQ16045. They are reported as Task Orders. **See 6.8.B.**

Incorrect Factual Statement

On page 34 of the report number 2, (Establishing a race-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million)). The auditors stated that **"WMATA listed this measure in its DBE Program Plan as a race-neutral measure but did not include it in its list of measures to foster small business participation."**

Response Incorrect Factual Statement

The semi-annual report for June 2018 indicated there were 41 prime contracts awarded. The majority of which were DBE vendors on task order contracts. **See 6.8.B.** There were 57 subcontracts awarded. The fact that there were 57 subcontracts indicates that WMATA does foster small business participation.

Incorrect Factual Statement

This is factually incorrect. On page 35 of the report number 3, In multi-year design-build contracts or other large contracts (e.g., for "megaprojects") requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform. Moreover, the auditors stated "no" without comment or justification.

Response

This is an incorrect statement. WMATA is not required by FTA to develop design build projects for the sole purpose foster DBEs. There must be a justified business need for such projects. WMATA has two design build projects. They are FQ9206 which will be completed in September 2018, and FQ13087, Andrews Federal Center Bus Garage. The contract value of FQ9206 is \$272,772,000. There was a 26% DBE goal on it. Contract FQ13087 has a contract value 140,321,000 and a DBE goal of 30%. The DBELO participated in the verification of the DBE vendors and establishing the DBE contract goal **See 6.8.C.**

Incorrect Factual Statement Incorrect Factual Statement

On page 35 of the report, number 4, on prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved. The auditors stated "no" without comments or justification.

Response

This is an incorrect statement. The Auditor didn't provide specific contracts. WMATA is not able to formulate a complete response. **However, the purpose of the Procurement Contract Review Committee (PRC) is to analyze each procurement to determine if there are subcontracting opportunities for DBEs. The PRC reviews all contracts for the transportation subcontracting opportunities. A 2% or 5% DBE goal for transportation is assigned to these solicitations. This is documented in the PRC meeting reports. See 6.3.J**

F) Protecting Against Termination for Convenience

Basic Requirements (49 CFR Parts 26.53 and 26.13)

Recipients must implement appropriate mechanisms to ensure prime contractors do not terminate DBE subcontractors for convenience (e.g., to perform the work of the terminated subcontractor with its own forces or those of an affiliate, or reducing the scope of DBE contract) without the transit agency's prior written consent. Failure to obtain written consent is a material breach of contract.

Incorrect Factual Statement

On page 41 of the report, the auditor stated **"these templates only addressed prime contractor requirements when substituting an existing DBE subcontractor with a new DBE subcontractor. Neither template specifically addressed protecting against DBE subcontracts being terminated for convenience by a prime contractor for something other than subcontractor substitutions."**

Response Incorrect Factual Statement

This is an incorrect assessment of the template. This is a WMATA solicitation template. The criteria for substitution of a DBE vendor is set forth in the conformed contract. Attached are pages from contract FQ16036-A establishing the procedure which the prime contractor must follow for substitution of a DBE vendor. **See Attachment 6.8.D**

Incorrect Factual Statement

On page 41 of the report, the auditor states, "In addition, the participating prime contractor had other ongoing FTA-assisted WMATA contracts that involved DBE contract goals and related DBE subcontracts."

Response Incomplete Factual Statement

The Auditor didn't provide specific contracts that did not contain the requisite clauses. WMATA is not able to formulate a response.

G) Counting DBE Participation

Basic Requirement (49 CFR Part 26.55)

Incorrect Factual Statement

On page 41 of the report, the auditor states "Following the site visit, WMATA provided a spreadsheet that generated the Uniform Report. A review of this spreadsheet identified other questions, including the fact that the report amounted in cell 8A, did not appear to include the prime contracts awarded to DBEs in cell 8C."

Response Incorrect Factual Statement

This is factually incorrect. WMATA submitted correct information to FTA in its semiannual report. The auditors should have added the number of regular contracts (5) from sheet "8C Contract" to the number of task orders (36) from "8C Task Orders" sheet for a total of 41. **See 6.8.E**