

# FTA

FEDERAL TRANSIT ADMINISTRATION

## North Dakota Department of Transportation Disadvantaged Business Enterprise (DBE) Final Report

October 2012

Federal Transit Administration

CONDUCTED BY  
Milligan & Company, LLC



U.S. Department of Transportation  
Federal Transit Administration

North Dakota Department of Transportation  
Disadvantaged Business Enterprise (DBE) Program  
Final Report

October 2012

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Milligan & Company, LLC  
105 N. 22<sup>nd</sup> Street, 2<sup>nd</sup> Floor  
Philadelphia, PA 19103

PREPARED FOR

Federal Transit Administration  
Office of Civil Rights

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## **Section 1 General Information**

### **Grant Recipient**

North Dakota Department of Transportation  
608 Boulevard Avenue

### **City/State**

Bismarck, ND 58505

### **Grantee Number**

1153

### **Executive Official**

Francis G. Ziegler, P.E.  
Director

### **On Site Liaison**

Deborah Igoe  
Director, Civil Rights Division  
(701) 328-2576

### **Report Prepared by**

MILLIGAN AND CO., LLC  
105 N. 22<sup>nd</sup> Street, 2<sup>nd</sup> Floor  
Philadelphia, PA 19103  
(215) 496-9100

### **Site Visit Dates**

May 24–26, 2011

### **Compliance Review Team Members**

Benjamin Sumpter, Lead Reviewer  
Habibatu Atta  
Kristin Szwajkowski

## **Section 2 Jurisdiction and Authorities**

The Federal Transit Administration (FTA) Office of Civil Rights is authorized by the Secretary of Transportation to conduct civil rights compliance reviews. The reviews are undertaken to ensure compliance of applicants, recipients, and sub-recipients with Section 12 of the Master Agreement, Federal Transit Administration M.A. (17), October 1, 2010, and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs."

The North Dakota Department of Transportation (NDDOT) is a recipient of FTA funding assistance and is therefore subject to the Disadvantaged Business Enterprise (DBE) compliance conditions associated with the use of these funds pursuant to 49 CFR Part 26. These regulations define the components that must be addressed and incorporated in NDDOT's DBE program and were the basis for the selection of compliance elements that were reviewed.

## **Section 3 Purpose and Objectives**

### **Purpose**

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

The primary purpose of the compliance review is to determine the extent to which NDDOT has implemented 49 CFR Part 26, as represented to FTA in its DBE Program Plan. This compliance review is intended to be a fact-finding process to: (1) examine NDDOT's Disadvantaged Business Enterprise Program Plan and its implementation, (2) make recommendations regarding corrective actions deemed necessary and appropriate, and (3) provide technical assistance.

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

### **Objectives**

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

- ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's financial assistance programs
- create a level playing field on which DBEs can compete fairly for DOT-assisted contracts
- ensure that the Department's DBE program is narrowly tailored in accordance with applicable law
- ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs
- help remove barriers to the participation of DBEs in DOT-assisted contracts
- assist 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 NDDOT is honoring its commitment represented by its certification to FTA that it is complying with its responsibilities under 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in DOT Programs"
- examine the required components of NDDOT's DBE Program Plan against the compliance standards set forth in the regulations and document the compliance status of each component
- gather information and data regarding the operation of NDDOT's Disadvantaged Business Enterprise Program Plan from a variety of sources—DBE program managers, other NDDOT management personnel, DBEs, and prime contractors

## Section 4 Background Information

NDDOT was formed in 1990 with the merger of the North Dakota Highway Department and the Motor Vehicle Department. NDDOT administers and disseminates funds for the state's transportation system. It plans new and reconstruction roadway projects and operates and maintains the public highways and roadways in the state. The agency is also responsible for running the state's driver's license program.

The organization consists of the following 5 offices and 17 divisions:

- Office of Business Support Services—responsible for all of the administrative functions of running the NDDOT; divisions within this office include Communication, Financial Management, Human Resources, Information Technology, Legal, and State Fleet Services
- Office of Driver and Vehicle Services – responsible for administering the driver's license program, motor vehicle registration program, and other vehicle related programs and activities; divisions within this office include Driver's License, Traffic Safety, and Motor Vehicle
- Office of Project Development—responsible for the design, research, and operation of the state's roadways, highways, and bridges; divisions within this office include Bridge, Design, Environmental and Transportation Services, and Materials and Research
- Office of Operations—responsible for the Civil Rights, EEO, and DBE programs; also responsible for conducting the agency's highway construction-related bid openings and properties and facilities; divisions within this office include Civil Rights, Construction Services, and Maintenance and Engineering Services.

There are eight districts in NDDOT that maintain highways and roadways, manage construction projects, and clear roads of ice and snow during the winter in their designated region. The agency districts include the following:

- Bismarck
- Devils Lake
- Dickinson
- Fargo
- Grand Forks
- Minot
- Valley City
- Williston

NDDOT's current projects include resurfacing of certain interstates and roadways, roadway preservation and maintenance, and construction of a bikeway/pedestrian pathway in Grand Forks County.

## **Section 5 Scope and Methodology**

### **Scope**

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

1. You must submit a DBE program conforming to this part by August 31, 1999, to the concerned operating administration (OA). You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval [49 CFR 26.21].
2. A signed policy statement expressing a commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation [49 CFR 26.23].
3. Designation of a liaison officer and support staff as necessary to administer the program, and a description of the authority, responsibility, and duties of the officer and the staff [49 CFR 26.25].
4. Efforts made to use DBE financial institutions, by the recipient as well as prime contractors, if such institutions exist [49 CFR 26.27].
5. A DBE directory including addresses, phone numbers and types of work performed, must be made available to the public and updated at least annually [49 CFR 26.31].
6. The recipient must determine if overconcentration exists and address this problem if necessary [49 CFR 26.33].
7. Assistance provided to DBEs through Business Development Programs to help them compete successfully outside of the DBE program [49 CFR 26.35].
8. An overall goal must be based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on a recipient's DOT-assisted contracts [49 CFR 26.43 – 26.53].
9. All contracts must include a non-discrimination clause and a prompt payment clause and must implement appropriate mechanisms to ensure compliance by all participants [49 CFR 26.13, 26.29, 26.37].
10. A certification process must be intact to determine if a potential DBE is legitimately socially and economically disadvantaged. The potential DBE must submit an application, a personal net worth statement, and a statement of disadvantage, along with the proper supporting documentation [49 CFR 26.67].
11. The certification procedure must include document review and an on-site visit and determine eligibility consistent with Subpart D of the regulations [49 CFR 26.83].
12. Implementation of appropriate mechanisms to ensure compliance with the part's requirements by all program participants. The DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs [49 CFR Part 26.37]. Reporting must include information on payments made to DBE firms [49 CFR 26.11, 26.55].



## **Methodology**

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

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

The documents received prior to the on-site portion of the review were examined, and an itinerary for the site visit was developed. An entrance conference was conducted at the beginning of the Compliance Review with FTA representatives, NDDOT staff, and the review team.

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

At the end of the review, an exit conference was held with FTA representatives, NDDOT staff, and the review team. A list of attendees is included at the end of this report. At the exit conference, initial findings and corrective actions were discussed with NDDOT.

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

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

Rebecca Ubando Tanrath  
Civil Rights Officer  
FTA, Region VIII  
12300 West Dakota Avenue, Suite 310  
Lakewood, CO 80228  
[rebecca.tanrath@dot.gov](mailto:rebecca.tanrath@dot.gov)

## Section 6 Issues and Recommendations

### 1. DBE Program Plan

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

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

NDDOT's Civil Rights Division provided a DBE Program Administration Manual dated September 25, 2008. The DBE manual outlined the program requirements of 49 CFR Part 26. The DBE manual is in need of updates and should be more reflective of the activities of NDDOT Civil Rights Division and Transit Section. NDDOT representatives advised the review team that the DBE manual will be updated after completion of several compliance reviews this year. It will also incorporate 2011 DBE Final Rule program requirements.

### 2. DBE Policy Statement

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

**Discussion:** During this DBE Compliance Review, no deficiencies were found with the requirements for a policy statement. However, an advisory comment was provided concerning the language used in the policy statement.

The NDDOT DBE manual includes a policy statement signed by the Director affirming commitment to compliance with the DBE program requirements. The policy is disseminated to all department staff and to DBE and non-DBE customers in the DBE program. Circulation of the policy is accomplished by sending it to all DBE and non-DBE firms on the bidders list, publishing it in the supportive services newsletter annually, and publishing it on the department's bid information website. The DBE Liaison Officer's name and responsibilities are also identified in the policy statement.

The policy statement indicates that the DBE requirements of 49 CFR Part 26 and the Department's DBE program apply to all federally-aided highway construction contracts. The review team recommended that NDDOT revise the language in the policy statement to be more reflective of all its DOT-assisted activities since it receives funding from FHWA, FTA, and FAA.

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

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

**Discussion:** During this DBE Compliance Review, no deficiencies were found with the requirements for the DBE Liaison Officer (DBELO). However, an advisory comment was provided concerning the DBELO's oversight of FTA-assisted activities.

The DBE manual indicates that the Director has designated Ms. Deborah Igoe as the DBELO. Ms. Igoe is the Civil Rights Division Director and is responsible for implementing all aspects of the DBE program and ensuring that the Department complies with all provisions of 49 CFR Part 26. The DBE manual indicates that the DBELO has direct and independent access to the Director concerning DBE program matters. Ms. Igoe indicated that she does have direct and independent access to the Director for DBE-related matters. Semi-annual leader/manager organization meetings are held with the Director as the facilitator. Meeting agendas were provided to the review team. Ms. Igoe indicated that in addition to the semi-annual meetings, she can meet with the Director at any time due to the informal atmosphere in the organization.

The DBE manual indicated that the DBELO has a staff of two Civil Rights Officers and an Administrative Assistant assigned to the DBE program. Division Directors and District Engineers are responsible for carrying out all facets of the DBE program within their respective areas. The Division Directors and District Engineers meet periodically with the DBELO to evaluate the progress and achievements of the program and to identify program problems or deficiencies.

Based on the number program issues, the review team recommends that the DBELO, who is responsible for all aspects of the DBE program, take a more proactive role in assisting the Transit Section to develop tracking and reporting tools for sub-recipient and other FTA-assisted activities.

### **4. Financial Institutions**

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

**Discussion:** During this DBE Compliance Review, no deficiencies were found with the requirements for financial institutions. However, an advisory comment was provided to encourage prime contractors to utilize DBE financial institutions.

The DBE manual describes the process NDDOT has taken to identify financial institutions owned and controlled by socially and economically disadvantaged individuals. The Department contacted the North Dakota Bankers Association, the North Dakota Department of Banking and Financial Institutions, and the Independent Bankers Association. The DBE manual indicated that no such financial institutions had been identified to date. However, during the on-site review, NDDOT representatives stated they had identified Turtle Mountain State Bank as a DBE financial institution. Website information was provided to the review team regarding the bank. The material identified the bank as the first privately-owned Native American bank on a federally-recognized Indian Reservation.

The DBE manual indicates that it is NDDOT's policy to encourage prime contractors on USDOT-assisted contracts to make use of these institutions. The NDDOT representatives indicated to the review team that they had not provided a mechanism for prime contractors to be made aware of such institutions but will incorporate this process into their DBE program when revisions are completed.

## **5. DBE Directory**

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

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

The NDDOT Civil Rights Division maintains a DBE directory identifying all firms certified as DBEs under the UCP. The directory lists the firm's name, owner's name, address, phone number, type of DBE designation, year formed, if bonded or insured, area of work, labor force equipment, and the type of work the DBE has been certified to perform. NDDOT does not currently use NAICS codes but indicated they will incorporate that into the directory to meet 2011 DBE Final Rule requirements.

## **6. Overconcentration**

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

**Discussion:** During this DBE Compliance Review, no deficiencies were found with the requirement for overconcentration. However, an advisory comment was made.

The DBE manual indicates that NDDOT is not aware of overconcentration in any area of work. The manual includes a process for filing a complaint if a firm feels its opportunity to participate in a federal aid contract has been unduly burdened because of an overconcentration of DBE firms in a specific type of work.

The Department received a complaint in February 2009 about DBE overconcentration in the pavement marking field. The Civil Rights Division conducted an analysis of data from the Construction Division for calendar year 2008, and it was determined that overconcentration did not exist in the pavement marking area during calendar year 2008. It is advised that NDDOT conduct a multi-year analysis to determine if a pattern of overconcentration exists.

## **7. Business Development Programs**

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

**Discussion:** During this DBE Compliance Review, the area of BDP was not applicable. The Civil Rights Division has a DBE supportive service program and provided information to the review team. There was no formal BDP or Mentor Protégé Program developed by NDDOT.

## **8. Determining/ Meeting Goals**

### ***A) Calculation***

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

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

The North Dakota Transit Section provided information pertaining to its goal-setting process for Federal fiscal years 2008 through 2010 and a three-year 2011–2013 goal methodology. The 2011–2013 methodology indicates that NDDOT began determining a separate DBE goal for its transit programs five years ago. The transit program’s DBE goal has been 0% for each of those years. It also was stated that the base figure reflects the lack of activity by DBEs in the areas of research, planning, consulting, and contracting in the state of North Dakota in the years that a separate goal has been determined for transit programs.

#### *Step 1: Determining the Base Figure*

The Transit Section describes in the 2011–2013 methodology that the availability of DBEs is compiled from data gathered from the department’s consultant and contractor lists, DBE rosters, and lists of firms who submitted bids to the Metropolitan Planning Organizations from the period April 1, 2009, through March 31, 2010. The information gathered was used to establish the pool of ready, willing, and able DBEs and non-DBEs.

The Step 1 process is titled “Corridor Studies and Planning.” NDDOT identified a total of 29 prime contractors bidding in FY2010, one DBE and 28 non-DBEs. The one firm was divided by the total 29 firms, which equaled 3.45% of bidders in FY2010. A table was included describing the type of funding received, amount available for DBE participation (contracting opportunities), and description.

Of the \$20 million in FTA funding, \$1.4 million was deemed as contracting opportunities. The 3.45% of bidders was multiplied by \$1,467,924 in contracting opportunities and equaled \$50,643. It was unclear as to how this dollar figure was used to determine the Step 1 base figure or why 3.45% was not the overall goal.

There was an ARRA Bus Storage Facility Construction line item in the table for \$5 million of funding with \$0 in contract opportunities. The description indicated that these activities would be let in June (2010) with a “Race Neutral clause.” It was anticipated to expend these funds in FY2011. Six bus storage facilities were to be put out for bid June 2010. The Transit Section indicated in the methodology that no known contractors are available for the transit storage facility construction.

Typically, facility construction offers contracting opportunities in which DBEs could participate. Additionally, if the Transit Section determined there were \$0 in contract opportunities, there would be no contracts to let.

The review team advised the Transit Section that all possible contracting opportunities to include construction and architectural and engineering design work should have been considered for the bus storage facility construction in the goal-setting methodology. Other

opportunities should be explored in the non-construction activities, such as maintenance, goods, and other complementary services to transit providers. The Transit Section had begun exploring and expanding categories for opportunities during the review. A DBE List of Expenditure Categories was provided to the review team outlining several examples of contracting opportunities using FTA funds.

The NDDOT Transit Section was also advised to consider the goal of its direct FTA recipients. The Grand Fork–East Grand Forks MPO develops and report DBE goals directly to FTA. Since Grand Fork is using the same North Dakota UCP directory, a review of its goal methodology would serve as a valuable resource. The DBE regulations cite the following:

*26.45 (c)(4) Use the goal of another DOT recipient. If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.*

*Step 2: Adjusting the Base Figure*

The Step 2 analysis consisted of narrative information reiterating the unavailability of DBE firms in the transit operations of NDDOT and its sub-recipients. The Transit Section indicated that it has two DBEs in the area of corridor studies/planning but they have not submitted bids. The volume of work performed by DBEs in the past three years in this area has been 0%, as noted in the methodology. After more discussion on availability of DBE firms, it was determined that no adjustments were warranted.

There was no discussion or analysis of the DBE participation reported in the June 2008 semi-annual DBE report. DBE awards totaled \$153,600 of the \$1,280,000 in prime awards (12%) during the June 2008 reporting period. DBE payments on contracts completed during the same period were \$735,680 out of \$6,081,920 value of prime contracts.

**Corrective Action and Schedule:** Within 30 days of receipt of the draft report, submit to the Region VIII Civil Rights Officer a plan to:

- appropriately include all contracting opportunities in goal-setting methodology
- review goals of other direct recipients in the market area
- review the latest triennial goal to see if adjustments are necessary once all of the above factors are considered

**Grantee Response:** The Transit Section at this time will not make any changes to the participation due to the fact we have no new vendors to add to the list. The Transit Section will be coordinating with our Civil Rights Division to solicit new DBE opportunities out of state to improve our DBE goal for the next goal-setting methodology. The Transit Section has developed a plan of contacting two (2) new DBE firms a month to negotiate for them to become DBE vendors for the transit providers for North Dakota. The new firms will have to be certified through the Civil Rights Division of DOT. By contacting DOTs across the nation or viewing their websites and obtaining their transit DBE lists, we can access this information. The Transit Section has already spoken to our transit providers about bulk buying from an out-of-state DBE firm.

**FTA Response:** NDDOT's response does not address the noted deficiency. NDDOT's DBE goal methodology must be based on the availability of DBE firms that are able to participate on its FTA-assisted contracting opportunities. While NDDOT's next DBE goal methodology is not due for submission until August 1, 2013, FTA finds it imperative that the information

gathering process is started immediately. Therefore, FTA has deemed it necessary to require incremental updates on goal-setting-related materials. This finding area will remain open pending the completion and submission of NDDOT's FY 2014–2016 DBE goal methodology due August 1, 2013. By December 15, 2012, NDDOT must provide a spreadsheet of all direct and sub-recipient FTA-assisted contracts issued between October 1, 2010, and September 30, 2012; the values of those contracts; and indicate the type of contract (service or supply). In regards to the proposed outreach plan to out-of-state DBE firms, NDDOT must also establish a process of engaging potential DBEs within the state. By December 15, 2012, NDDOT must submit to FTA a written strategy and timeline for engaging potential DBEs within the state.

### ***B) Public Participation***

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

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

The goal methodology submitted to FTA does not include efforts for public participation. *USDOT Tips for Goal Setting* advises that recipients should make sure that their goal submission contains a clear description of their public participation process, a good summary of the comments received during that process and a summary of what, if any, changes were made based on those comments.

NDDOT's DBE manual indicates that the Department consults with minority and women's interest groups, DBEs, and non-DBEs to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses and the effects of discrimination on opportunities for DBEs.

Following the consultation, the Department publishes a notice of the proposed overall annual goal, informing the public that the proposed overall annual goal and its rationale are available for inspection during normal business hours at the Civil Right Division for 30 days following the date of the notice. They also indicate that comments would be accepted for 45 days from the date of the notice. This notice is advertised in 10 major newspapers and all tribal newspapers. Additional advertising efforts include posting on the Department's Web page, distributing to DBE and non-DBE prime contractors, subcontractors, consultants, and other minority and women's interest groups.

The DBE Liaison Officer provided agendas for liaison meetings held with interested parties on various matters. Agendas from November 2009 and April 2010 had DBE goals as topics to be discussed. The October 2010 agenda had comments on DBE Goal attainment, and the May 2010 meeting discussed DBE goal status. These meetings are available for contractors to attend via video conferencing sites in the NDDOT district offices.

The details of the meetings were not available for the review team since minutes are not maintained. There was also no record of a consultation process for the FTA FFY 2011–2013

goal submission. The DBE Liaison Office advised the review team that the consultation process described in the DBE manual did not occur for the past year's goal submittal.

**Corrective Action and Schedule:** Within 30 days of receipt of the draft report, submit to the Region VIII Civil Rights Officer a plan to conduct the consultation process prior to advertising the FTA goal and document efforts in methodology.

**Grantee Response:** The next FTA tri-annual goal will be set in FY 2014–2016. The Department will commit to notifying DBE and non-DBE prime contractors, subcontractors, suppliers, consultants, vendors and material suppliers via email, the 10 major newspapers, tribal newspapers, and our listserv and will publish an article in the DBE Supportive Services Newsletter. Prior to posting the Public Notice, all certified DBEs and the ND Association of General Contractors are provided an email notice that the goal will be published in local newspapers and is available on the NDDOT's website for comment for 45 days after the date of the notice. The proposed overall triennial goal and its rationale are available for inspection during normal business hours at the Civil Rights Division for 30 days following the date of the notice.

Currently, North Dakota does not have minority and women's groups who have expressed interest in participating in Transit programs. The current U.S. Census Bureau's *State & County Business Quick Facts* data states that as of 2007, North Dakota had 61,554 firms with ownership made up as follows: 0.3% Black, 1.6% American Indian and Alaska Native, 0.5% Asian, 0.5% Hispanic, 24.8% Women, and 0% Native Hawaiian and Other Pacific Islander. U.S. Census data indicate a North Dakota population increase of 4.7% from 2000 to 2010. With the growing North Dakota population and business growth, we will continue to encourage more minority, female, and socially and economically disadvantaged businesses to apply for DBE certification.

**FTA Response:** NDDOT's response does not address the noted deficiency. The significant discrepancy between NDDOT's overall transit goal value (0%) and the stated availability of minority- and women-owned firms from the Census Bureau's *State & County Business Quick Facts* (almost 28%) suggests that potentially-eligible firms in North Dakota do not understand the benefit of DBE certification and, therefore, do not seek certification, which perpetuates a cycle of low-to-no DBE participation. A strong consultative process should not only instruct interested parties (e.g., minority, women, and general contract groups, community organizations, etc.) of the benefits participating as a DBE firm, but also inform NDDOT about the availability of DBEs and potential DBEs along with information concerning the effects of discrimination, if present. NDDOT should begin outreach to potential consultative partners. By December 28, 2012, NDDOT must provide evidence of outreach to potential consultative partners, a summary of the responses provided to this outreach, and a schedule for when meetings will occur.

### ***C) Transit Vehicle Manufacturer (TVM)***

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

**Discussion:** During this DBE Compliance review, deficiencies were found with the requirement for transit vehicle manufacturers.



The review team received several TVM certifications from vehicle procurements. The purchases were from the following manufacturers: Elkhart Coach, Supreme Corp., Goshen Coach, and ARBOC. All were listed on the FTA-approved list of TVMs.

The TVM certification used by NDDOT states that *the manufacturer certifies it meets the DBE requirements set forth by the FTA* and includes a signature, title, and date. The review team advised the Transit Section to revise its certification to include a reference to 49 CFR Part 26 and applicable language. The TVM certifications reviewed by the review team appeared to be signed by the distributor rather than the manufacturer. Since the manufacturer is certifying compliance, it must sign the certification, not the distributor. The review team also recommended that NDDOT include a procedure verifying that the manufacturer is on the TVM approved DBE program list on FTA's website.

**Corrective Action and Schedule:** Within 30 days of receipt of the draft report, submit to the Region VIII Civil Rights Officer a plan to:

- revise the TVM certification to include reference to 49 CFR Part 26
- ensure appropriate personnel sign the certification
- develop checklist procedures for verifying TVMs are on FTA's website

**Grantee Response:** The Progress Check List for the purchase of FTA Funded Public Transit Vehicles was revised in December 2010, to include the requirement to check TVMs on FTA's website for compliance and that the manufacturer has signed the TVM Certification form. The TVM Certification form was developed by FTA and National RTAP and references compliance with 49 CFR Part 26.49. By signing the TVM Certification form, the bidder/company/manufacturer certifies that it has complied with 49 CFR Part 26.49 during the procurement of a transit vehicle. The form will be returned to the Transit Section at NDDOT. We will ensure that the proper person has signed the form.

**FTA Response:** FTA agrees with the response to the noted deficiency. This deficiency is now closed.

#### ***D) Race Neutral DBE Participation***

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

**Discussion:** During this DBE Compliance Review, no deficiencies were found in the area of race-neutral participation.

The FY 2011–2013 DBE goal methodology included a section entitled “Breakout of estimated race-neutral and race-conscious participation.” The language included NDDOT's commitment to aggressively work with the DBE consultant industry to interest them in the areas available for bidding using FTA funding. Several ways to achieve participation were mentioned, including ensuring distribution of the DBE directory to the widest feasible universe of potential prime consultants and state and federal contracting agencies.

Prior to 2006, NDDOT mentioned that data had not been kept relative to the dollars awarded to consultants to conduct corridor studies or building construction to build facilities for public transit projects. As of January 1, 2006, NDDOT developed policies regarding request for proposals. These policies include sending copies of all requests for

proposals to all qualified DBEs and non-DBEs in any relative area, including a DBE clause requesting information related to possible areas of subcontracting to either DBE or non-DBEs, if appropriate, and developing a list of DBEs and non-DBEs responding to requests for proposals.

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

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

**Discussion:** During this DBE Compliance Review, no deficiencies were found with the requirements for race-conscious participation on overall and contract goals. The overall FTA goal has been 0% for the past five years, and no contract goals have been established. Race-conscious efforts may be considered once NDDOT reevaluates its goal-setting process and determines if DBE availability exists.

***F) Good Faith Efforts***

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

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

NDDOT's Transit Section overall goal has been 0% for a number of years, and no contract goals have been included in any FTA-assisted projects. NDDOT has a bidder's compliance process for race-neutral and race-conscious contracts. A race-neutral or race-conscious Form A is required to be submitted by all bidders. This form contains the firm's name, address, and phone number of the DBE being used on the project; the specific bid item or product to be supplied; and the total dollar value of the work to be performed.

The proposal submitted by the bidder contains a clause binding the bidder to perform all the special provisions included in the contract. This is considered the bidder's written commitment to use the DBE listed on Form A.

Within five days after the bid opening, all bidders submit Form B, List of Businesses that Submitted Quotes (RN), to include all tiers of subcontracting on the project. Bidders may provide copies of all quotes received to include all tiers of subcontracting on the project in lieu of completing Form B.

Before the project is awarded to the low bidder, it must submit a written and signed confirmation (Form C) from DBEs that they are participating in the contract as provided in the prime contractor's commitment, if applicable.

A summary is completed using the DBE Participation Review (RN) form. This form summarizes the DBEs listed on Form A, additional DBE participation committed to after bid submittal, recommendation by DBE participation review committee (award, not award, or award subject to), and if the contractor submitted Forms A and B as well as Form C, if applicable.

The review team inquired about this process appearing to be a good faith effort evaluation on race-neutral contracts. The Transit Section and DBELO indicated that FTA program activities have race-neutral forms and FHWA have race-conscious forms. The race-neutral form does not require the prime contractor to justify quotes between DBEs and non-DBEs. Contractors also are not required to include outreach efforts to get DBE participation. The review team collected all the race-neutral forms submitted for the bus facility storage construction projects and a race-conscious form for an FHWA project. The FTA projects were awarded to the contractors without regard to level of DBE participation or efforts; however, submittal of the forms was required prior to award. NDDOT indicated that this process allows them to collect bidders list information and track race-neutral participation on all projects. More of the bidders list process is discussed in Section 12, Record Keeping and Enforcements.

### ***G) Counting DBE Participation***

**Basic Requirement:** (49 CFR Part 26.55) The recipient must count only the value of work actually performed by the DBE toward actual DBE goals.

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

NDDOT's DBE manual outlines all of the counting rules from 49 CFR Part 26.55 to include discussion about regular dealers, joint ventures, trucking, and commercially-useful function. The DBELO was familiar with these counting procedures used on FHWA-funded projects.

The Transit Section had very little DBE participation over the past years. The semi-annual reporting forms indicated DBE participation of \$15,000 on the December 2010 form and \$153,600 on the June 2008 form. All other reporting forms indicated no DBE participation. The review inquired about processes and procedures for capturing and counting DBE participation on FTA-assisted projects. After a brief discussion with the Transit Section representatives, training on the DBE regulations to include counting requirements was recommended. This includes setting up a formal mechanism to capture all activities of sub-recipients and service providers. A repository system is also needed to track all DBE participation and apply appropriate counting rules for accurate reporting. Currently, the Transit Section collects a quarterly operating reimbursement form for several grant-funded programs. There is no formal submission form for MPOs. More about the monitoring form and procedures used by the Transit Section is discussed in Section 12, Record Keeping and Enforcement. The review team advised NDDOT to incorporate procedures to determine if vendors and contractors should be counted at 100% , 60%, or only fees and commissions for services provided.

**Corrective Action and Schedule:** Within 30 days of receipt of the draft report, submit to the Region VIII Civil Rights Officer a plan to incorporate mechanisms to capture and count DBE participation appropriately.

**Grantee Response:** The Transit Section now uses a monthly form that was reviewed by the lead reviewer while on site during the audit in May. The Transit Section requires all North Dakota providers to fill out the form by the 10<sup>th</sup> of each month for the previous month with every check written that could be a DBE possibility. The form indicates the annual goal and what contractors are being used so NDDOT can look for more DBE opportunities.

**FTA Response:** FTA agrees with the response to the noted deficiency. To close this deficiency, by February 15, 2013, NDDOT must submit to FTA a copy of the combined monthly tracking forms that depict the contracting activity that occurred between April 1, 2012, and September 30, 2012.

#### ***H) Quotas***

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

**Discussion:** During this DBE Compliance Review, no deficiencies were found with the requirement for quotas. No evidence of the use of quotas or set-aside contracts by NDDOT was found during the site visit.

### **9. Required Contract Provisions**

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

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

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

NDDOT's DBE manual included the appropriate contract assurance clause as found in Part 26.13 of the DBE regulations. The manual also includes NDDOT's statement to ensure that this clause is placed in every USDOT-assisted contract and subcontract.

The review team evaluated several agreements executed by NDDOT with sub-recipients or service providers. These agreements included the contract assurance clause noted in the NDDOT DBE manual and DBE regulations. The agreements reviewed included Cost Participation, Construction and Maintenance Agreement with the City of Dickinson, project number-STM-BSF-0107026; Consulting Services Agreement for Preliminary Engineering and Design for Transit Bus Storage Facility in Minot with SRF Consulting, project number-STM-BSF-0107024; Cost Participation, Construction and Maintenance Agreement in Valley City with South Central Adult Services, Inc., project number -STM-BSF-0107027; and Cost Participation Agreement for Transit Storage Facility Engineering Services with Souris Basin Transportation, contract number 38-099-0210.

Two agreements executed by Bisman-Mandan MPO (Bisman) were reviewed by the review team for the contract assurance clause. The Engineering Services Agreement between Bisman and Kadrmas, Lee & Jackson, Inc., for the Mandan's Memorial Highway Corridor Study included a DBE Policy section referencing 49 CFR Part 23 regarding DBEs having maximum opportunity to participate in the project. The DBE Obligation section referenced 40 CFR Part 23 (in error) twice in the document with the same maximum opportunity language. The RFP also referenced 49 CFR Part 23 in the solicitation. The DBE firm, Agency MABU, provided website development, outreach, and other services on the project. The quote that Agency MABU provided to the prime was used as the contract. Therefore, no contract assurance language was included in the terms for the DBE firm.

Bisman executed a Master Agreement with Ulteig for the Lincoln Road Corridor Study. The agreement was an Ulteig-generated agreement, UEI No. R10.01486, that Bisman endorsed. The agreement did not include any reference to the DBE program or the contract assurance

clause. Beaver Creek Archaeology was a DBE firm that participated on the project. The quote provide by Beaver Creek was used as the contract and also did not include any contract assurance clause. More is discussed about Beaver Creek in the Monitoring and Enforcement section of this report.

The sub-recipients and service providers used standard AIA agreements with their prime contractors to perform the services. These AIA agreements did not contain the necessary contract assurance clauses.

**Corrective Action and Schedule:** Within 30 days of receipt of the draft report, submit to the Region VIII Civil Rights Officer a plan and schedule for ensuring that the appropriate language of 26.13 has been included in all FTA-funded contracts with sub-recipients and is flowed down to their contractors and subcontractors.

**Grantee Response:** The Transit Section uses a procurement site to ensure that all proper contract assurances clauses are used in each contract. The site is an FTA-approved site and was implemented by National RTAP and FTA. When any transit-related procurements begin procedures, agencies are required to go through this process and provide the Transit Section the supporting documentation.

**FTA Response:** FTA partially concurs with NDDOT's response to the noted deficiency. NDDOT has provided a means to ensure that the appropriate contract clauses are included in the direct/prime contracts of its sub-recipients. NDDOT must also identify a means for ensuring that the nondiscrimination clauses flow down to sub-contractors. To close this deficiency, by January 15, 2013, NDDOT must:

- submit to FTA a listing of prime contractors and subcontracts awarded by NDDOT's Transit Section and its sub-recipients between April 1, 2012, and September 30, 2012
- submit supporting documentation confirming that the contract assurance clause was included in the direct/prime contracts awarded between April 1, 2012, and September 30, 2012.
- submit an update within the DBE Program that details how subcontracts will be monitored for the inclusion of the contract assurance clause
- submit supporting documentation confirming that the contract assurance clause was included in any subcontracts awarded between April 1, 2012 and September 30, 2012

### ***B) Prompt Payment***

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

**Discussion:** During this DBE Compliance Review, deficiencies were found with the requirements for Prompt Payment and Return of Retainage.

#### *Prompt Payment*

NDDOT's DBE manual states that the prime contractor must pay the subcontractor the amount due for work done or services rendered, less applicable retainage not to exceed 2%,

from the current progress payment within 20 calendar days of receipt of payment from the department or owning agency. It is also stated that these prompt payment procedures apply to all tiers of subcontractors and is based on 49 CFR Part 26.29.

The participation and service agreements executed by NDDOT and Bismar MPO did not include instructions for prompt payment to subcontractors. The agreements executed by the sub-recipients with their prime contractors were standard AIA agreements with 30-day prompt payment requirements. The Ulteig Master Agreement with Bismar included net 30 payment terms from date of invoice submittal.

#### *Return of Retainage*

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

Regarding retainage, NDDOT's DBE manual states that if the prime contractor elects to use retainage on subcontract work, prompt payment shall also include the release of retainage monies that have been withheld from the subcontractor within 20 days after the subcontractor's work is satisfactorily completed.

The AIA agreements included a 10% retainage clause withheld by the owner. This amount exceeds the 2% retainage amount discussed in NDDOT's DBE manual for subcontractors. Although no subcontracts were received by the review team, mechanisms should be in place to ensure that prime contractors are not also withholding 10% retainage on its subcontractors.

**Corrective Action and Schedule:** Within 30 days of receipt of the draft report, submit to the Region VIII Civil Rights Officer a plan and schedule for ensuring clear and consistent contractual language and a monitoring and enforcement plan regarding prompt payment.

**Grantee Response:** The Transit Section has incorporated a prompt payment clause in all of its FTA contracts with an affidavit of payment status. Prompt payment clauses and an affidavit were provided for review.

**FTA Response:** FTA partially concurs with NDDOT's response to the noted deficiency. NDDOT has provided a copy of the prompt payment clause it intends to include in its direct contracting agreements; this newly-submitted contract language states that "subcontractors must be paid for satisfactory performance of work no later than 30 days after the (prime) contractor's receipt of payment for that work." NDDOT's most recent DBE program submission still states that subcontractors must be paid within 20 days. NDDOT must submit an update within its DBE program that reconciles this discrepancy; the time frame chosen must conform to Federal and State requirements. To close this deficiency, by December 28, 2012, NDDOT must:

- submit to FTA a listing of prime contracts and subcontracts awarded by NDDOT's Transit Section and its sub-recipients between April 1, 2012, and September 30, 2012

- submit supporting documentation confirming that the prompt payment and retainage clauses were included in the direct/prime contracts awarded between April 1, 2012, and September 30, 2012.

### ***C) Legal Remedies***

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

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

The contract assurance language in the NDDOT participation agreements with its sub-recipients and service providers states that *the failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate*. The absence of this language in prime contracts is already included as a deficiency in the Contract Assurance section of this report.

NDDOT's DBE manual includes sanctions for not paying subcontractor in a timely manner, not having DBE perform specific dollar amount of work, or not fulfilling the requirements of the DBE special provisions. These sanctions include withholding the prime contractor's payment, deducting from the prime contractor's payment, finding the prime contractor in default, disallowing the prime contractor to bid on one or more projects, and/or other corrective actions as determined.

### **10. Certification Standards**

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

**Discussion:** During this DBE Compliance Review, the area of Certification Standards did not apply. This section is addressed in the North Dakota Unified Certification Program Report. That review was conducted on May 24–26, 2011.

### **11. Certification Procedures**

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

**Discussion:** During this DBE Compliance Review, the area of Certification Procedures did not apply. This section is addressed in the North Dakota Unified Certification Program Report. That review was conducted on May 24–26, 2011.

### **12. Record Keeping and Enforcements**

**Basic Requirement:** (49 CFR Part 26.11, 26.55) The recipient must provide data about its DBE program to FTA on a regular basis. This information must include monitoring of DBE participation on projects through payments made to DBE firms for work performed. The

recipient must maintain a bidders list complete with subcontractor firm names, addresses, DBE status, age of firm, and annual gross receipts of the firm.

**Discussion:** During this DBE Compliance Review, no deficiencies were found with the FTA requirement for maintaining the bidders list. However, deficiencies were found in the area of monitoring and reporting.

#### *Bidders List*

A bidders list is maintained by NDDOT, consisting of information about all DBE and non-DBE firms that bid or quote on USDOT-assisted contracts. It is mentioned in NDDOT's DBE manual that the purpose of the list is to meet the requirement of this section and for use in determining the pool of ready, willing, and able bidders for Step 1 of the goal-setting methodology.

The DBE special provisions require each bidder to provide the copies of all quotes received for each project or a complete Form B within five days after each bid opening. The DBE race-conscious special provision also requires suppliers, subcontractors, vendors, manufactures, and regular dealers to submit copies of all their quotes the night before each bid opening. The information is compiled into a bidders list, which includes all firms that bid on prime contracts or quotes to subcontractors or prime contractors. The firm's name, address, and status as a DBE or non-DBE are initially collected through the bidding process. Any firm whose name is gathered as part of this process is queried by a bidders' list survey to determine the age of the firm and annual gross receipts.

#### *Monitoring*

The North Dakota Transit Section provided a Quarterly Request for Operating Reimbursement form (SFN 58544-revised 12-2010) to the review team. This information is collected for programs funded through Section 5311 Rural, Section 5316 JARC, and Section 5317 New Freedom awards. Sub-recipients are required to submit this form to the Transit Section outlining their salaries and benefits costs, general costs, vehicle costs, capital cost, and local revenue as well as a data report that includes listing any DBE expenditures.

The Transit Section allows MPOs to submit DBE information into the format deemed necessary by the MPO. The quarterly reimbursement form and MPO information are collected and included in the semi-annual reporting forms. There is no formal tracking mechanism to track participation or keep a running tally of DBE participation.

The DBELO described the monitoring process that is outlined in its DBE manual. Due to inclement weather, the DBELO mentioned that the construction season is constrained to a short period of time for the year so it does not require contractors to make monthly submissions of DBE participation. Prime contractors and subcontractors must keep a running tally of actual payments to DBEs for work committed to them at any time during the life of the contract. The contractors are required to complete the Record of DBE Project Payments (SFN 53664) on a semi-annual basis.

Consultants and sub-consultants must keep a running tally of actual payments to DBEs and non-DBEs for work performed during the life of a contract. Consultants will be required to complete the Record of Consultant Project Payments (SFN 54428) on a semi-annual basis.

Copies of approved Prime Contractor's Request to Sublet (SFN 5682) and DBE Participation Certification (SFN 14268) are forwarded to the Civil Rights Division by each district. The



DBE LO brings any noted discrepancies to the attention of the Construction Services Division, which works with the Project Manager or Project Engineer to resolve the issue.

The review team suggested that the Transit Section review the forms and procedures utilized by the Civil Rights Division on NDDOT's FHWA projects for incorporation into the FTA monitoring procedures.

### *Reporting*

The majority of the semi-annual reports identified no DBE participation. The review team had concerns that all DBE participation is not being captured on sub-recipient activities. As a result of an interview with the Bismar MPO, it was disclosed that a DBE firm had participated on a contract with Ulteig. The Master Agreement between the Bismar MPO and Ulteig was executed in February 2009. The work order cover letter was dated September 9, 2010. DBE firm Beaver Creek Archaeology provided an estimate of \$400 on August 20, 2010, for services to Ulteig on the Lincoln Road Corridor Study. Ulteig accepted the quote on September 21, 2010. Beaver Creek had its DBE certification removed on May 17, 2010, for failure to cooperate. The Transit Section had no knowledge of the DBE's participation or removal. Although the firm was no longer a DBE at the time of execution of the agreement and the amount of work was small, there was no mechanism in place to capture and report this participation if the DBE was in good standing.

The December 2010 semi-annual report included \$15,000 in DBE awards during the reporting period. The breakdown by ethnicity and gender section was blank. The review team advised that the ethnicity and gender information could be obtained from the Civil Rights Division and recorded in this section totaling the number and dollar amount of the awards listed in rows 8 and 9 of the semi-annual form.

**Corrective Action and Schedule:** Within 30 days of receipt of the draft report, submit to the Region VIII Civil Rights Officer a plan and schedule for ensuring that:

- effective monitoring mechanisms are in place and performed by staff to monitor and report work on sub-recipients' FTA funded contracts
- procedures are implemented for accurate and complete collection and reporting of data for semi-annual reports to FTA

**Grantee Response:** The Transit Section now uses a monthly form that was reviewed by the lead reviewer while on site during the audit in May. The Transit Section requires all North Dakota providers to fill out the form by the 10<sup>th</sup> of each month for the previous month with every check written that could be a DBE possibility. The form indicates the annual goal and what contractors are being used so NDDOT can look for more DBE opportunities. The Transit Section will use these forms to report in TEAM with the accurate DBE participation numbers, while trying to encourage more new minority, women, and socially and economically disadvantaged firms to apply for certification.

**FTA Response:** FTA partially agrees with the response to the noted deficiency. The monthly collection form should address the deficiency related to tracking and reporting DBE participation. To close this deficiency, by December 28, 2012, NDDOT must submit to FTA the supporting documentation for all contracting activity and how this corresponds to the semi-annual report submitted by in June 2012, in TEAM. Also by December 28, 2012 NDDOT must provide a strategy or mechanism for collecting and tracking written

certification of on-site monitoring on projects within the state in which DBEs are performing work.

## Section 7 – Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Submit Corrective Action Plan and Schedule for the following:	Response Days/Date
1. Program Plan	26.21	AC	Program manual needs updating		
2. Policy Statement	26.23	AC	Change reference from FHWA construction projects to all USDOT projects		
3. DBE Liaison Officer	26.25	AC	DBE Liaison Officer provide adequate oversight of FTA-funded DBE activities		
4. Financial Institutions	26.27	AC	Encourage prime contractors' use of institutions		
5. DBE Directory	26.31	ND			
6. Overconcentration	26.33	AC	Conduct multi-year analysis for OC		
7. Business Development Programs	26.35	N/A			
8. Determining / Meeting Goals					
A. Calculation	26.45	D	Not including all contracting opportunities	Submit a spreadsheet detailing prime contractor and subcontractor activity from 10/1/2010 to 9/30/2012	December 28, 2012
B. Public Participation	26.45	D	Not conducting consultation process	Submit 2014–2016 DBE Goal methodology for approval Submit plan for engaging potential in-state DBEs	August 1, 2013 December 28, 2012 December 28, 2012
C. TVM	26.49			Submit evidence of outreach to consultation partners and schedule of meetings	
	26.51	D	No reference to 49 CFR Part 26		Closed
D. Race-Neutral	26.51	ND	Distributor signed TVM		
E. Race-Conscious	26.53	ND			

<b>Requirement of 49 CFR Part 26</b>	<b>Ref.</b>	<b>Site visit Finding</b>	<b>Description of Deficiencies</b>	<b>Submit Corrective Action Plan and Schedule for the following:</b>	<b>Response Days/Date</b>
F. Good Faith Efforts	26.55	ND			
G. Counting DBE Participation	26.43	D	No mechanism to count/track DBE participation	Submit combined monthly contract data for activity between 4/1/2012 and 9/30/2012	December 28, 2012
H. Quotas		ND			
9. Required Contract Provisions					
A. Contract Assurance	26.13	D	Contract assurance clause not in prime contracts	Submit evidence of contract assurance and prompt payment/retainage clauses being placed in prime contracts	December 28, 2012
B. Prompt Payment	26.29	D	Incorrect prompt payment clause as in DBE manual	Submit plan to verify that contract assurance and prompt payment/retainage clauses being included in subcontracts	December 28, 2012
C. Legal Remedies	26.37	ND	No return of retainage language for satisfactorily completion of work; more retention in contracts than allowed in DBE manual	Reconcile prompt payment language in contract documents and DBE program	December 28, 2012
10. Certification Standards	26.67	N/A			
11. Certification Procedures	26.83	N/A			
12. Record Keeping and Enforcements					
A. Bidders List	26.11	ND			
B. Monitoring	26.37, 26.55	D	No formal monitoring mechanism to capture all DBE participation of sub-recipients	Submit plan to address on-site monitoring requirements	December 28, 2012
C. Reporting	26.11	D	Incorrect completion of form	Submit supporting documentation for December 1, 2012, DBE Report	December 28, 2012
			Procedure for		

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Submit Corrective Action Plan and Schedule for the following:	Response Days/Date
			collecting DBE participation for reporting purposes		

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

### Section 8 List of Attendees

Name	Organization	Title	Phone	Email
<b>FTA</b>				
Rebecca Tanrath	FTA Region VIII (via teleconference)	Regional Civil Rights Officer	(720) 963-3313	Rebecca.tanrath@dot.gov
John Ocana	FTA Office of Civil Rights (via teleconference)	EO Specialist		John.ocana@dot.gov
Ryan Inman	FTA Office of Civil Rights (via teleconference)	EO Specialist, DBE Technical Lead	(202) 366-5017	Ryan.inman@dot.gov
<b>NDDOT Members</b>				
Deborah J. Igoe	NDDOT	Director, Civil Rights	(701) 328-2576	digoe@nd.gov
Paulette Jacobsen	NDDOT	Public Transit program Section	(701) 328-2194	
Pat Kreiger	NDDOT	Civil Rights Program Administrator	(701) 328-3116	pkreiger@nd.gov
Paul Benning	NDDOT	Local Government Engineer	(701) 328-2217	pbenning@nd.gov
Paul Seado	NDDOT	General Counsel	(701) 328-2625	pseado@nd.gov
Dreaux Kautzmann	NDDOT	Special Assistant Attorney General	(701) 328-2625	dkautzmann@nd.gov
Stacey Hanson	NDDOT	Local Government Engineer	(701) 328-4469	smhanson@nd.gov
Dawn Michel	NDDOT	Transit/MPO Section	(701) 328-2191	dlmichel@nd.gov
Kim Adair	NDDOT	Transit Program Section Leader	(701) 328-2194	kadair@nd.gov
Robert Fode	NDDOT	Transportation Programs Director	(701) 328-1937	bfode@nd.gov
<b>Interested Parties &amp; Contractors</b>				
Mike Mabin	Agency MABU	President	(701) 250-0728	mmabin@agencymabu.com
Steve Saunders	Bismarck-Mandan MPO	Transportation Planner	(701) 355-1848	ssaunders@nd.gov
Ben Ehreth	Bismarck-Mandan MPO	Transportation Planner	(701) 355-1848	ssaunders@nd.gov
<b>Milligan &amp; Co, LLC</b>				
Benjamin Sumpter	Milligan & Co., LLC	Lead Reviewer	(215) 496-9100	Bsumpter@milligancpa.com
Habibatu Atta	Milligan & Co., LLC	Reviewer	(215) 496-9100	Hatta@milligancpa.com
Kristin Szwajkowski	Milligan & Co., LLC	Reviewer	(215) 496-9100	Kszwajkowski@milligancpa.com