

COMPLIANCE REVIEW REPORT
OF THE
Oregon Department of Transportation
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM
FINAL REPORT

May 2012

Prepared for the
Federal Transit Administration
Office of Civil Rights

by

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Table of Contents

Section 1 – General Information.....	1
Section 2 – Jurisdiction and Authorities	2
Section 3 – Purpose and Objectives.....	3
Section 4 – Background Information.....	5
Section 5 – Scope and Methodology	6
Section 6 – Issues and Recommendations	9
1. DBE Program Plan.....	9
2. DBE Policy Statement	10
3. DBE Liaison Officer.....	11
4. Financial Institutions.....	13
5. DBE Directory	14
6. Overconcentration.....	15
7. Business Development Programs	16
8. Determining/Meeting Goals.....	17
9. Required Contract Provisions	24
10. Certification Standards.....	28
11. Certification Procedures.....	28
12. Record Keeping and Enforcements	28
13 January 2011 DBE Program Rulemaking.....	31
Section 7 – Summary of Findings.....	33
Section 8 – List of Attendees	36

Section 1 – General Information

Grant Recipient: Oregon Department of Transportation
355 Capitol Street, NE

City/State: Salem, OR 97301

Grantee Number: 1723

Executive Official: Matthew Garrett
Director

On Site Liaison: Michael A. Cobb
Manager, Office of Civil Rights
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Site Visit Dates: September 13 - 15, 2011

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Section 2 – Jurisdiction and Authorities

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

The Oregon Department of Transportation (ODOT) 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 ODOT's DBE program and were the basis for the selection of compliance elements that were reviewed.

Section 3 – Purpose and Objectives

PURPOSE

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

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

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

OBJECTIVES

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

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

The objectives of this compliance review are to:

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

Section 4 – Background Information

Oregon Department of Transportation (ODOT) was first established in 1969 to be responsible for the transportation systems within the state. The agency works with the Oregon Transportation Commission, made up of five governor appointed members, which is responsible for managing the state highway system and other transportation systems in the state.

The organization consists of the following 11 divisions:

- Office of the Director – Includes the offices of Civil Rights, Communications, Employee Safety, Government Relations, Sustainability, and Workforce Development and Small Business Support;
- Operations – Includes the Office of Innovative Partnerships and the Transportation Program Office, both of which are responsible for funding and financing for ODOT;
- Central Services – Includes Audits, Financial Services, Human Resources, Information Systems, and Support Services;
- Communication – Responsible for the agency’s public relations, citizens’ representatives staff, and media affiliations;
- Driver and Motor Vehicles - Responsible for administering the driver’s license program, motor vehicle registration and other vehicle related programs and activities;
- Highway Division – Includes Major Projects, Maintenance, Technical Services, and many regional and area facilities and services throughout the state;
- Motor Carrier Transportation – Responsible for regulating and enforcing regulations for the statewide commercial trucking industry;
- Public Transit Division – Responsible for administering programs that provide support for the state’s public transit agencies and related activities;
- Rail Division – Responsible for the planning, operations, safety, and maintenance of the state’s freight and passenger rails;
- Transportation Development Division – Responsible for providing planning services and analysis for all aspects and modes of the transportation system; and
- Transportation Safety Division – Responsible for providing support services, information, and grants and contracts to partnering agencies that focus on improving safety.

ODOT’s current projects include resurfacing certain interstates and roadways, roadway preservation and maintenance, construction and/or preservation of bike – pedestrian pathways, roadway safety upgrades, and the OTIA III Bridge Delivery Program, which repairs and replaces aging bridges, in several regions of the state.

Section 5 – Scope and Methodology

Scope

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

1. A 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 made available to the public and updated at least annually [49 CFR 26.31].
6. Determination 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 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. Inclusion of a contract non-discrimination clause, a prompt payment clause and implementation of appropriate mechanisms to ensure compliance by all participants [49 CFR 26.13, 26.29, 26.37].
10. A certification process 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. A certification procedure to include document review and an on-site visit and determination of 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 ODOT by FTA's Office of Civil Rights. The agenda letter notified ODOT of the planned site visit, requested preliminary documents, and informed ODOT of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed ODOT 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, ODOT staff, and the review team.

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

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

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

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

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Section 6 – Issues and Recommendations

1. **DBE Program Plan**

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

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

In response to the requested DBE program plan in the notification letter, ODOT referred to their website for the latest version. The document was downloaded and indicated that the last update to the program plan was December 2007. The new regulations were issued January 28, 2011 and effective one month later. The ODOT DBE program plan is in need of revisions and updates. Additional program plan areas in need of update are noted in other sections of this report. No working draft was provided to the review team during the onsite review. The DBE Liaison Officer (DBELO) indicated that ODOT is working with the FHWA regional office to update the plan and get it approved.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a corrective action plan and schedule to update DBE program plan to be consistent with 2011 DBE program requirements.

ODOT Response: The interim DBE Program Manager is in the process of updating the DBE Program plan and will work with FHWA Oregon Division to ensure approval of an updated plan. A number of the compliance review observations are addressed in as an update to the DBE Program plan. A copy of the working DBE Program Plan draft is appended to this response.

Action Plan: The following revisions related to the FTA audit observations will be included in the updated plan:

- Reference and append the current 49 CFR Part 26 issued January 28, 2011.
- An explanation of how the signed DBE Policy will be circulated to agency personnel and the business community.
- The DBE Liaison Officer's name and contact information will be added.
- The DBE Liaison Officer's reporting relationship to the Director on DBE matters will be clarified and updated.
- An updated OCR organizational chart will be appended to report the name of the current DBE Program Manager.
- A clarification and expansion of the ODOT DBE Liaison Officer's role in providing oversight to the ODOT Transit Division on DBE Program matters, including goal setting and data reporting.
- An explanation of who is responsible for administering DBE activities related to FTA requirements.
- An accurate explanation of the DBE counting and certification rules.

- Include the number of days (10 days) Contractors have to meet prompt payment requirements to subcontractors after receipt of payment from the agency.
- Include the number of days (10 days) Contractors have to return retainage to subcontractors after satisfactory completion of the work in accordance with the release of retainage procedure.
- A description of the Bidders List data gathering process.

Schedule: An updated plan will be submitted to FHWA by February 28, 2012.

FTA Response:

The working draft DBE Program plan was reviewed along with additional areas above to be included in the updated program plan. By July 1, 2012, submit the final DBE program plan to FTA Office of Civil Rights.

2. DBE Policy Statement

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

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

The DBE policy statement included in the program plan was signed by the Director of ODOT, Matthew Garrett on December 10, 2007. The policy statement indicates that the policy is available to all ODOT personnel involved with U.S. DOT assisted work and to members of the community that perform or are interested in performing work on such ODOT contracts. The policy further states that the complete DBE program and goal analysis are available at ODOT's Office of Civil Rights. The DBE requirements state that the policy must be circulated throughout the organization and distributed to business organizations and business communities. ODOT representatives indicated during the onsite review that the policy is available on their website and in their State Management Plan. Neither the policy nor ODOT representative's statements to the review team addresses how ODOT will circulate and disseminate this policy statement to its personnel or to the business community.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a corrective action plan and schedule to provide an updated policy statement describing how ODOT will circulate and distribute the statement to personnel and the business community.

ODOT Response: ODOT's DBE Program plan is available on the agency's Office of Civil Rights (OCR) webpage for viewing by both ODOT personnel and the business community. At agency stakeholder meetings and small business training events OCR staff direct agency personnel and business stakeholders (DBE and non-DBE) to the webpage for DBE Program information, which includes the DBE Policy. However, ODOT will more proactively

circulate the DBE Policy by working with the ODOT Communications Division to develop a strategy to utilize ODOT's vast direct mail, electronic listservs, and public media resources.

Action Plan:

1. *Business Community* - OCR will circulate the DBE Policy statement at key stakeholder events. Examples of key events include, the annual ODOT-AGC (Association of General Contractors) meeting, and "Doing Business with ODOT" small business workshops. Additionally, when the DBE Program plan update is posted to the OCR webpage, OCR will announce the plan update to the OCR list-serve and include the DBE Policy statement in the announcement. The policy will also be sent electronically to all subrecipients of FTA-funded grants and included in the FTA required State Management Plan. Also, OCR will work with the Office of Procurement (OPO and Office of Project Letting (OPL) to include the policy statement with project and proposal DBE provisions, see also Issue #9, C below.
2. *ODOT Personnel* - OCR will coordinate an annual update on Inside ODOT (the agency's internal newsletter) and periodic updates in the agency's monthly Diversity Newsletter. OCR will also circulate the DBE Policy statement at OCR / DBE-related training sessions.

Schedule:

1. By the end of June 2012, OCR will have circulated the DBE Policy statement to its stakeholders at several small business workshops conducted in the Portland and Salem areas. On February 3, 2012 OCR presented the policy statement at the Annual ODOT-AGC Conference with approximately 200 prime and sub-contractors in attendance. By the end of December 2012 the policy will have been circulated at small business workshops across the state. The policy will also be sent electronically to all subrecipients of FTA-funded grants and will be included in the FTA required State Management Plan.
2. By the end of June 2012, OCR will coordinate with Inside ODOT and the ODOT Diversity Committee to schedule periodic circulation of the DBE Policy statement.

FTA Response:

FTA has reviewed the information for circulating the policy statement internally and externally and accepts the action plan and schedule. By July 15, 2012 submit to FTA Office of Civil Rights a listing of accomplished and planned circulation efforts within ODOT, and to the ODOT Diversity Committee and other external groups.

3. DBE Liaison Officer

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

Discussion: During this DBE Compliance Review, deficiencies were found with the requirements for the DBELO concerning oversight of FTA-assisted activities.

The Manager of ODOT Office of Civil Rights serves as the DBELO. The policy statement identifies Michael A. Cobb as the Office of Civil Rights (OCR) Manager and includes his contact information. However, the program plan does not include Mr.

Cobb's name or contact information as the DBELO. The program plan also indicates "the OCR Manager, who reports to the Director, has responsibility for the day-to-day operation of the DBE Program." The DBELO advised the review team that the Director moved OCR into the Office of the Director. He also indicated during the onsite review that he actually reports to the Chief of Staff and not the Director, but has independent and direct access to the Director regarding DBE matters. Mr. Cobbs indicated that he has access to the Director at any time and schedules meetings regarding DBE matters with the Administrative Assistant of the Director.

The organization-wide and Office of Civil Rights organizational charts are exhibits to their DBE program plan and were downloaded from ODOT's website. The organization-wide chart indicates that Michael Cobb reports to Joan Plank in the Office of the Director and Joan Plank reports to the Director. The program plan needs to be updated to reflect the current reporting relationship for the DBELO.

The OCR organizational chart indicates that Jill Miller is responsible for Small Business/DBE Program and reports to the DBELO, Michael Cobb. Ms. Miller was not present during the onsite review; however, the DBELO indicated that she administers the DBE program for FHWA and FTA activities. The program plan states that the DBE Program Manager develops and implements program functions based on federal rules and regulations to provide opportunities for DBEs. The program plan continued that this position establishes the overall annual ODOT goal along with other functions as required by the Federal Highway Administration. The program plan does not mention who is responsible for FTA activities.

The review team additionally requested and received a copy of the Transit Office organizational chart. Sherrin Coleman is listed as the Transit Planning Program Manager and reports to the Public Transit Administrator Michael R. Ward. Ms. Coleman described her DBE responsibilities as preparing FTA goals, with assistance from the DBE Program Manager, Jill Miller, and reporting to FTA DBE activity of ODOT and its subrecipients. It appeared to the review team that there was no DBELO oversight of FTA activities. The DBELO agreed that more DBE program oversight is needed of the Transit Officer for FTA related activities.

The Authority and Applicable Laws of ODOT's program plan states the (DBE) regulations are applicable both to ODOT's Federal-aid construction and to its non-construction activities including Transit and personal service contracts. Based on the number of FTA program related 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 Office with goal setting, monitoring, tracking and reporting subrecipients' and other ODOT FTA-assisted activities.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a corrective action plan and schedule for the DBELO to provide additional oversight of FTA-assisted activities in ODOT's DBE program. The DBE program plan should also be updated to reflect the accurate DBELO reporting relationship.

ODOT Response: DBE Liaison Officer and OCR Manager, Michael Cobb currently has direct and independent authority to independently contact ODOT Director, Matthew Garrett on DBE Program-related as well as any other business matters. However, ODOT will clarify this in a Civil Rights Reporting Policy statement, and an updated organizational chart. This will also be clarified in the DBE Program plan as per Issue #1, Actions #4 and #5 above. With respect to FTA-related DBE program oversight and administrative activities, see Issue #1, Actions #6 and #7 above. Additionally, DBE Program Manager Jill Miller retired from ODOT in November 2011. The interim DBE Program Manager is Tiffany Hamilton.

Action:

A Civil Rights Reporting Policy will be developed and signed by the Director of ODOT that clarifies that on matters related to the DBE Program, Title VI, and EEO matters the respective program liaison and coordinators may directly and independently contact the Director on their program related matters. The organizational chart will be updated with the dotted-line reporting on DBE Program matters between the DBE Liaison Officer and the Director.

Schedule:

The Civil Rights Reporting Policy will be issued by the end of March 2012. The organizational chart will be updated by February 28, 2012.

FTA Response:

FTA has reviewed the response to the noted deficiencies. The action plan and schedule is accepted as stated. By July 1, 2012, submit the Civil Rights Reporting Policy and organizational chart to FTA Office of Civil Rights.

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, a deficiency was found with the requirements for financial institutions.

The program plan states that it is the policy of ODOT to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals. It further states that information on the availability of such institutions can be obtained from the DBELO. The review team requested information regarding financial institutions during the review and no information or documents were produced by the DBELO. The review team advised the DBELO to search the Federal Reserve website for such financial institutions and maintain the search results, along with any actions taken to evaluate if they can be used. The DBELO should also be ready to provide information regarding these institutions since he is referenced in the program plan as having such information. The review team also recommended to further detail in the program plan how prime contractors will be made aware of and encouraged to make use of these institutions.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a corrective action plan and schedule to update the DBE financial institutions section in the ODOT DBE program plan.

ODOT Response: The DBE Liaison Officer and OCR staff are in the process of identifying and developing financial institution relationships to better serve the financial and credit needs of DBEs and small business firms. Additionally, ODOT hired consultant Probity Builders LLC to do a study on the availability of small business supportive services and publish the ODOT Small Business Resources Guide dated June 2010, which is available on the OCR web page at

http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/sbe/dbe/docs/ODOT_Small_Business_Resource_Guide.pdf. Within the resource guide is Section I, "Access to Capital."

Action:

1. Conduct a search of the Federal Reserve website for financial institutions owned and controlled by socially and economically disadvantaged individuals in Oregon. Maintain and be prepared to provide this information.
2. Michael Cobb and DBE Program staff will meet with Tim Jones from Umpqua Bank, Sam Brooks from OAME, and Lily Keefe of the Small Business Transportation Resource Center in Washington state to develop strategies on how to provide DBE firms with better financial and credit information and services.

Schedule:

1. This task was completed February 9, 2012. As of September 30, 2011, there are no minority-owned financial institutions or branches in Oregon. A copy of the Federal Reserve search results is appended to this response.
2. A meeting was initially scheduled to meet February 2, 2012, but due to scheduling issues the meeting is being rescheduled. ODOT anticipates meeting with this group in March 2012. ODOT anticipates the group to have developed strategies to better serve the financial and credit needs of DBEs and small business firms by December 2012.

FTA Response:

FTA has reviewed the appended minority owned financial institutions search conducted by ODOT. The action plan and schedule is accepted as stated. By July 1, 2012, submit to FTA Office of Civil Rights, the results of the March 2012 meeting in addition to a plan for periodic review of the availability of these financial institutions.

5. DBE Directory

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

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

The DBE directory is available on ODOT's website using a link to the Office of Minority, Women, and Emerging Small Business. The program plan also states that the

directory is online and available in hard copy by request to the OMWESB, which includes contact information and applicable industry work codes.

6. Overconcentration

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

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

The program plan indicates that ODOT Office of Civil Rights (OCR) develops appropriate measures if it is determined that DBE participation is over-concentrated. It further stated that ODOT is unaware of any types of work that have a burdensome over-concentration of DBE participation. The review team inquired about the frequency of over-concentration analysis. The DBELO indicated that he recalled prime contractors mentioning over-concentration in the areas of flagging and trucking. Information on the status was deferred to the DBE Program Manager, Jill Miller who was not present during the onsite review.

Subsequent the onsite review, on October 4, 2011, the review team requested from Jill Miller information regarding the status of ODOT over-concentration analysis. No information has been provided as of the draft report submittal.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights information on ODOT's over-concentration analysis.

ODOT Response: The 2011 ODOT Disparity Study Update performed by MGT of America, Inc. analyzes overconcentration of DBE firms. The study is on the OCR website at:

http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/sbe/dbe/docs/DisparityUpdate2011_FinalReport.pdf, see page 5-13.

The study found overconcentration for African-American-owned firms in trucking and flagging in Region 1.

Action:

To address the problem of overconcentration, the DBE Program Manager and OCR staff will do the following:

- Determine the feasibility of tracking overconcentration data in the OCR CRCT database.
- Continue and enhance our outreach plan to make ODOT's construction contracting community aware of overconcentration issues.
- Monitor overconcentration and take into account overconcentration issues when assigning contract goals if overconcentration continues. This may be accomplished by identifying and strategically assigning contract goals on projects that include more subcontractable work in the types of work that have high DBE availability but no overconcentration of DBE utilization.

Schedule:

By the end of May 2012, OCR will determine the feasibility of tracking overconcentration in CRCT and enhance outreach to contractors on the issue of overconcentration. If overconcentration is still evident in September 2012, the DBE Program Manager will make adjustments in how contract goals are assigned.

FTA Response:

FTA has reviewed the responses to the noted deficiencies. The ODOT disparity study has identified overconcentration in trucking and flagging for Black Americans in a specified region of Oregon. Steps to address this overconcentration are part of the action plan stated in ODOT's response. FTA accepts the action plan and schedule as stated. By June 30, 2012, submit to FTA Office of Civil Rights, the feasibility review of trucking overconcentration. Additionally, submit by September 30, 2012, status of overconcentration analysis to be conducted in September 2012.

7. Business Development Programs

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

Discussion: During this DBE Compliance Review, the area of Business Development Programs (BDP) was not applicable. There was no formal BDP or Mentor Protégé Program developed by ODOT. The program plan did discuss the activities of the DBE supportive services provider contingent upon the funding availability of the Federal Highway Administration.

The review team also inquired about ODOT's status of submitting their program element in February 2012 regarding fostering small business participation. The question was deferred to DBE Program Manager, Jill Miller who was not present during the onsite review.

ODOT Response: ODOT and the Port of Portland have partnered in a Mentor Protégé program through an interagency agreement since December 2007. ODOT also manages an ESB project-specific mentor protégé program that was expanded to include DBE firms that are currently working on ODOT contracts. Additionally, ODOT already has a race-neutral Small Contracting Program (SCP) for Construction Contracts under \$100,000, A&E and Related Services contracts under \$150,000, and Other Services Contracts under \$150,000. OCR will coordinate with ODOT's Office of Procurement to ensure the SCP meets the small business set-aside strategy identified in 49 CFR 26.39 and consider ways to implement some of the other strategies identified in the regulation. Interim DBE Program Manager Tiffany Hamilton will submit a small business participation program element to FHWA for approval and forward to Transit Planning Program Manager Sherrin Coleman to be attached in FTA's TEAM Web by February 28, 2012

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 review team analyzed ODOT's FTA goal methodology submissions for Federal Fiscal Year (FFY) 2008 (overall goal of 3.46%), FFY 2009 (overall goal of 2%), FFY 2010 (overall of .0189%, rounded to 1%), and the FFY 2012-2014 overall triennial goal of 1%. The Transit Office is responsible for developing the FTA goal methodology with assistance from the DBE Program Manager.

Step 1: Determining the Base Figure

For the past four goal submissions, ODOT indicated they previously used data from the Oregon Corporation Division because it was updated nightly and was timelier than the Census Bureau Data. However, the Oregon Corporation Division changed from the SIC and NAICS category system to another category system that proved difficult to convert data into NAICS categories.

The following categories were identified as possible contracting opportunities for the 2012 -2014 fiscal years: 54310 Architectural Services; 423430 Computer & Computer Peripheral Equipment; 485999 Transit & Ground Passenger Transportation; 541614 Consulting; 811118 Other Automotive Mechanical and Electrical Repair and Maintenance. Using these categories, ODOT determined that there were 23 DBEs providing these services based on information in the Oregon UCP DBE directory. The same categories were used for the Census Bureau Data for DBEs and Non-DBEs which resulted in 1930 firms. The numerator of 23 firms was divided by the denominator of 1930 firms, resulting in a step one base figure of one percent (1%). The review team advised the Transit Office that if the numerator is not reflective of the DBE community, to consider supplementing the numerator with M/WBEs as recommended in the Tips for Goal Setting guidance.

Step 2: Adjusting the Base Figure

Total projected expenditures were discussed in the step two adjustment section in ODOT's triennial and the previous goal submissions. In 2009, ODOT described their weighting calculation based on the projected fiscal year expenditures and provided a spreadsheet showing the figures. There was no information or discussion on weighting or calculations to indicate if any weighting was taken into consideration for goals in all other goal submissions to FTA, except for the FFY 2012-2014 goal. Additionally, reviewing expenditures and considering weighting should take place during the step one base figure determination.

For their FFY 2012-2014 goal, ODOT indicated they used information from the Public Transit Division to project the amount of federal grants for the State of Oregon in the amount of \$11,357,460 for FYs 2012-2013. The estimated FY 2014 grant funding was projected at \$5,678,730. The total in grant funding of \$17,036,190 was used to determine ODOT's FFY 2012 - FFY 2014 goal. These grants included FTA 5310, STP, New Freedom, Statewide Planning and Research (5304) funds.

The review team advises ODOT that the amount of contracting opportunities in the total grant funding should be determined for a more accurate projection of DBE opportunities in the goal setting process. The spreadsheet ODOT provided weighted the grant information above against the availability calculation by the applicable industry codes. This calculation resulted in a base figure of 3.17% or 3% when rounded. It was unclear why ODOT used 1% in the narrative goal submission instead of the 3% number for the base figure calculation which resulted in the overall goal.

Other factors ODOT considered were capacity of firms to complete the projected work, which also included surveying the prime contractors for any concerns of capacity. ODOT also determined that no adjustment would be based on certification volume or the fact that no complaints were filed with ODOT Office of Civil Rights alleging discrimination or disparity in bonding or financing. The review team also suggested that past participation or information from the recent disparity study be considered in the step two adjustment process.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a corrective action plan and schedule to review the 2012-2014 goal submission for consideration of the weighted information and make necessary amendments. Also consider and/or incorporate additional steps in the step one figure and step two adjustments into the goal setting process. These considerations include, supplementing the numerator, weighting based on contracting opportunities, and adjusting base figure due to past participation or disparity study results.

ODOT Response: ODOT is carefully reviewing the 2012-2014 DBE Goal submitted via TEAM-Web in July 2011. Attention is being paid to supplementing the numerator, weighting the contracting opportunities, and adjusting base figures based on past participation or, should they apply, disparity study results.

Action: ODOT will submit an amended/revised 2012-2014 DBE goal to FTA. ODOT will publish the goal, receive any comments and make necessary adjustments prior to submitting the goal to FTA via TEAM-Web.

Schedule: The revised goal will be submitted on or before July 1, 2012. This time line allows adequate time for the 45 day comment period.

FTA Response:

FTA accepts the action plan and schedule as stated. By July 1, 2012, submit to FTA Office of Civil Rights the revised FY 2012-2014 DBE goal methodology.

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 2008 goal methodology included a public participation section which stated that the goal was advertised June 15, 2007 and no comments were received. There was no mention of a consultation process prior to advertising the goal. The 2009 goal methodology indicated that the goal was advertised on ODOT's website on July 15, 2008 and in various newspapers on July 8 and July 17, 2008 and any comments would be considered. The 2010 goal included an outreach calendar that detailed meetings, trade shows, and forums with chambers, and community and professional organizations involved with small businesses. These meetings took place prior to the goal being advertised and ODOT mentioned that no written comments regarding the goal methodology were received. Legal notices soliciting comments were included in various circulation media on June 26 and June 30, 2009. The 2012-2014 goal submission reiterated the meetings and dates that occurred during the 2008 and 2009 calendar year for the FFY 2010 goal submission. Additionally, ODOT indicated that the three-year goal would be published in various circulation media prior to September 30, 2011.

The review team advised ODOT that the consultation process should occur prior to advertising the goal and goals should be advertised by June 15th to allow 45 days of comments to meet the August 1st submission deadline. The review team asked if the consultation process and advertisement were done in conjunction with the highway goal. The question was deferred to the DBE Program Manager who was not present during the onsite review. Subsequent to the onsite review, information regarding the consultation and public participation process for the FTA FFY 2012-2014 goal was requested from the DBE Program Manager on October 4, 2011. No information has been provided as of the draft report submittal.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights information on the consultation process for the 2012-2014 goal.

ODOT Response: ODOT has documentation showing that the notice of the FTA-related DBE goal for FFYs 2012-2014 was advertised and public comment sought on August 10, 2011. No public comments were received in response to the notice.

Action: ODOT will advertise notice of goal setting and seek public comment in accordance with 49 CFR Part 26.45 and include documentation and a summary of public participation and responses in the goal calculation report. These activities will occur prior to submission of the goal calculation reports to FTA and FHWA. To ensure timeliness, OCR will develop a

program calendar of events and deadlines to include public participation and notification at ODOT's multiple outreach and networking venues.

Schedule: A DBE Program Outlook calendar has already been created and will be populated with key submission and notice deadlines by the end of June 2012.

FTA Response:

FTA reiterates that before the overall goal is submitted, grantees are required to publish a notice of the proposed goal and accept comments for 45 days. ODOT's response that the DBE goal for FFYs 2012-2014 was advertised and public comment sought on August 10, 2011 was not in compliance. The April 10, 2008 FTA Dear Colleague letter from the Acting Director of Civil Rights recommends publishing the required notice by June 15th to ensure that goals are submitted by the August 1st due date. By July 15, 2012, submit to FTA Office of Civil Rights the ODOT key submission and notice schedule dates developed for goal setting.

C) Transit Vehicle Manufacturer (TVM)

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

Discussion: During this DBE Compliance review, no deficiencies were found with the requirement for transit vehicle manufacturers. However, an advisory comment was made regarding the language used in ODOT's TVM certification boilerplate.

The Department of Administrative Services State Procurement Office provided documents during the onsite review that are collected during transit vehicle manufacturer procurements. Their process includes collecting the TVM's certification that they are in compliance with DBE requirements and their program has been approved or not disapproved by FTA. The goal methodology approval letter and screen prints of the TVM approved website by FTA was also provided to the review team.

Approval letters from FTA and TVM certification were collected from Supreme Corporation/Startrans Bus, The Braun Corporation, and Eldorado National. The Braun Corporation and Eldorado both submitted TVM certifications with their company logos from what appeared to be their stationary. The language used in the TVM certification correctly referenced that they complied with the requirements of Section 26.49 of 49 CFR Part 26. However, the TVM certification submitted by Supreme Corporation on August 13, 2010, was part of what appeared to be ODOT's Form 8 contract boilerplate. The TVM certified that it has complied with the requirements of Section 26.67 of 49 CFR Part 26. Section 26.67 of 49 CFR Part 26 are rules that govern socially and economically disadvantaged individuals rather than section 26.49 that includes rules for transit vehicle manufacturers. The TVM certification used in ODOT's procurement boilerplate should be reviewed for accurate reference to 49 CFR Part 26.49.

ODOT Response: See response to Issue #9, C below.

FTA Response:

FTA has reviewed the responses and action plan regarding the stated deficiencies. By June 1, 2012, submit to FTA Office of Civil Rights sample Form 8 boilerplate and subrecipient agreement that includes DBE compliance language.

D) Race Neutral DBE Participation

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

Discussion: During this DBE Compliance Review, deficiencies were found in the area of race neutral participation.

As a result of the Ninth Circuit Court decision, ODOT suspended their use of race conscious goals until a disparity study was conducted. In 2007, ODOT released results of its disparity study showing a disparity in African American, Sub-Continent Asian American, and Asian Pacific American owned firms in construction subcontracting. A waiver was granted for ODOT to set group specific goals for African and Asian-owned firms. The study did not show that there were significant disparities in contracting which would affect ODOT Transit Grants. Therefore, it was determined that all DBE participation for transit activities would be achieved through race- and gender-neutral means.

The study was updated and the results were released in September 2011. The scope of the disparity study update was to include additional years of data and also activities for Architectural and Engineering (A&E) services. One of the key study findings was that group specific goals resulted in an increase with Asian Pacific-owned firms in construction awards. The results also still showed a substantial disparity in construction awards to African American and Sub-Continent Asian American-owned businesses. There was also a substantial disparity in A&E/professional services work for most groups: African American, Hispanic, Sub-Continent Asian American, Native American, and nonminority women-owned businesses.

Several of the FTA-assisted contracts provided to the review team included a DBE provision Exhibit E that outlined all of the DBE program requirements. There was also language in Exhibit E referencing that the contract had an assigned goal for AFDDBE and ASDDBE which is defined in the provisions as African American and Asian American (which includes Sub-Continent and Asian Pacific) DBE. The Exhibit E provision does not specify the actual goal percentage but the goal is identified in the actual contract, which was zero percent in the contracts reviewed. The disparity study from 2007 did not show significant disparities in contracting that would affect ODOT Transit grants. If the current disparity study supports this same conclusion, then all the information contained in the DBE provision Exhibit E would not be applicable for transit contracts and should be revised.

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

provisions included in Public Transit contracts that support a race and gender neutral FTA goal.

ODOT Response: See response to Issue #9, C below.

FTA Response:

FTA has reviewed the responses and action plan regarding the stated deficiencies. By June 1, 2012, submit to FTA Office of Civil Rights sample Form 8 boilerplate and subrecipient agreement that includes DBE compliance language.

E) Race Conscious DBE Participation

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

Discussion: During this DBE Compliance Review, deficiencies were found with the requirements for race conscious participation on overall and contract goals.

The past four goal methodology submissions to FTA all indicated that overall goals would be achieved through race and gender neutral means. The Public Transit Division has not set any race conscious goals since the Ninth Circuit Decision in 2005. Even though no contract goals were established in the contracts provided to the review team, there continues to be language in some contracts that give the appearance of a race conscious element in ODOT's DBE for FTA-assisted activities. These issues are detailed in the previous section, where it appears that ODOT uses race conscious language in their solicitations that should be removed. The corrective actions and schedules are noted in the *Race Neutral* section of the report.

ODOT Response: See response to Issue #9, C below.

FTA Response:

FTA has reviewed the responses and action plan regarding the stated deficiencies. By June 1, 2012, submit to FTA Office of Civil Rights sample Form 8 boilerplate and subrecipient agreement that includes DBE compliance language.

F) Good Faith Efforts

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

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

The FTA-assisted contracts provided to the review team that included the DBE provision Exhibit E contained good faith effort requirements. This provision indicated that contractors must document steps taken to obtain DBE participation which demonstrate the good faith efforts outlined in the document. Information concerning administrative reconsideration was also included in the DBE provision. Since the Public Transit Division does not set contract goals, then there is no requirement to make good faith efforts and the provision requirement should be removed from no-goal contracts and procurements.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a corrective action plan and schedule to remove the good faith effort requirement from the DBE provisions included in FTA-assisted contracts with no goals.

ODOT Response: See response to Issue #9, C below.

FTA Response:

FTA has reviewed the responses and action plan regarding the stated deficiencies. By June 1, 2012, submit to FTA Office of Civil Rights sample Form 8 boilerplate and subrecipient agreement that includes DBE compliance language.

G) Counting DBE Participation

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

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

The ODOT DBE program plan states the following in regards to counting DBE participation, "Only the work actually performed by a DBE, (in accordance with section 4.3.3 of this document) will be counted toward the DBE goal. All work performed by a certified DBE firm, regardless of the type of work in which they are certified, will be counted as long as the DBE performs a Commercially Useful Function (CUF). The cost of supplies and materials obtained by the DBE or equipment leased (except from prime contractor or its affiliate) may also be counted." The DBE program plan is on ODOT's website and this particular section was highlighted in yellow. The DBELO was unsure why this section was highlighted but stated that this statement did not reflect ODOT's current counting rules. He indicated that as of July 2009, based on guidance from FHWA, that have required that DBEs be certified in the category of work that is performed in order have their participation counted.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the FTA's Office of Civil Rights a corrective action plan and schedule to revise the DBE program plan to accurately reflect counting and certification rules.

ODOT Response: Based on FHWA guidance, ODOT changed its policy on counting DBE participation effective March 1, 2010. The policy is on the OCR website at:

http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/sbe/dbe/docs/DBE_Program_Notice.pdf. The revised policy is in accordance with federal regulations and will be included in the DBE Program plan update as stated in the response to Issue #1, Action #8.

FTA Response: Inclusion of the DBE counting policy will be reviewed upon submission of the DBE program plan as requested by July 1, 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. The DBELO advised the review team that they have no DBE quotas or set-aside contracts. The review team found no evidence of the use of quotas or set-aside in the ODOT contracts provided 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.

Prior to and during the onsite review, the Public Transit Division provided approximately sixteen (16) proposals and contracts let by ODOT or their subrecipients. These contracts were reviewed to ascertain if the appropriate contract assurance clause was included in the documents. The review team found inconsistencies in the contract assurance language used in the contracts.

The Federal boilerplate used in agreements with subrecipients indicated that each contract the recipient signed with the contractor (and each subcontract the prime contractor signed with a subcontractor) must include the contract assurance clause. The verbatim language of 49 CFR Part 26.13 was used in this document.

Most ODOT proposals/contracts included or referenced the DBE contract provisions in Exhibit E which outlined the DBE Policy, DBE Obligation, and DBE Applicability sections. Neither section contained the correct verbatim language of 49 CFR Part 26.13. The correct contract assurance clause was also not found in the DBE program plan.

Other contracts stated that “the contractor, if subcontracts are to be let, will take all necessary affirmative steps to assure that minority firms, women’s business enterprises, and labor surplus area firms are used when possible.” It went on to describe several affirmative steps the contractor could take to include minority and women business enterprises. The remaining contracts had no reference to DBE regulations but only

required the proposer to complete and submit a subcontractor/supplier solicitation and utilization form.

FTA-assisted contracts provided to review team include the following:

Type	Number	Description	Contracting Agency
Contract 10/8/10	#26577	Van Replacement – 5310 JTA	City of Albany
Contract 6/28/11	#27321	Park and Ride Facility (5311)	Hood River Transit
Contract 6/28/11	#27792	Operations/Marketing of Hood River to The Dalles Intercity Bus (5311)	Hood River Transit
Contract 9/21/10	#26885	Unified Planning Work Program	Central Lane Council of Governments
Contract 2/24/10	#26590	NW Point by Oregon Coachways	ODOT
RFP 3/17/10 Contract 6/28/11	#730-24075-10/ #28582	Drive Less Save More and Rideshare Marketing Campaigns	ODOT
Contract 2006/ Amended 12/2010	#22360	Drug and Alcohol Compliance review	ODT
RFP 6/2011	#09843	Park-N-Ride and Bus Storage (ARRA)	South Clackamas Transportation District/
RFP Aug 09 Contract 1/26/11	#730-23408-10/ #28982	Eastern Point Bus Service	ODOT
RFP 1/18/10 Contract 2/24/10	#730-23853-09/ PA28277	Central Oregon Thruway Bus Service	ODOT
RFP 1/16/09 Contract 3/23/09	#730-23450-08/ #27559	Southern Oregon Bus Service	ODOT
IFB 2-12-07	#22871	Thruway Motorcoach Services	ODOT

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA’s Office of Civil Rights a corrective action plan and schedule to ensure that the appropriate contract assurance clause is included in the DBE program plan and in subrecipient, contract and subcontract agreements.

ODOT Response: *See response to Issue #9, C below.*

FTA Response:

FTA has reviewed the responses and action plan regarding the stated deficiencies. By June 1, 2012, submit to FTA Office of Civil Rights sample Form 8 boilerplate and subrecipient agreement that includes DBE compliance language.

B) Prompt Payment

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

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

Prompt Payment

The DBE program plan states that contractor must promptly pay each subcontractor. There was no mention of the number of days to promptly pay subcontractors. The DBELO was unsure why the number of days was not included in the program plan. The contracts reviewed, which included the DBE contract provisions of Exhibit E, specified 10 days for the prime contractor to pay the subcontractor after they received payment from ODOT. The other contracts without Exhibit E did not include prompt payment provisions.

Return of Retainage

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

The DBE program plan states that the contractor must return any retainage held, after the subcontractor's work is satisfactorily completed. The plan did not specify a number of days to return retainage to the subcontractors. The contracts that included the DBE provisions Exhibit E identified that contractors must return retainage within 10 days of satisfactorily completion of the subcontractor's work. The contracts without the DBE provisions did not include a return of retainage clause.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a corrective action plan and schedule to ensure that appropriate prompt payment and return of retainage clauses are included in the DBE program plan and in contract and subcontract agreements.

ODOT Response: State law requires ODOT to include contract and subcontract provisions on prompt payment and release of retainage that state the "within 10 days" payment requirements. Additionally, ODOT is considering discontinuing retainage requirement and has established a Retainage Committee made up of internal and external stakeholders to review the feasibility of discontinuing retainage. The committee expects to come up with a

recommendation by the end of June 2012. Also, see response to Issue #9, C below and Issue #1, Actions #9 and #10 above.

FTA Response:

By August 1, 2012, submit to FTA Office of Civil Rights the status of the Retainage Committee recommendations and ODOT consideration of recommendations.

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. However, advisory comments were made.

The DBE program plan and DBE provisions in Exhibit E contain extensive legal remedies for non compliance with DBE program rules. These clauses are outlined in the DBE Supplemental Required Contract Provisions and the Administrative Sanctions sections of the DBE program plan. Both sections make reference to referring any evidence of criminal conduct to the FHWA Inspector General for criminal investigation, and if warranted, prosecution. The review team advised the ODOT legal representative to make sure that criminal conduct is referred to the proper authorities also for FTA-assisted activities. The review team also suggests that ODOT review the legal remedy language found in the Exhibit E DBE provision that is commonly used in FHWA group-specific race conscious contracts for applicability in ODOT's FTA-assisted race neutral contracts.

ODOT Response: ODOT will review the DBE-related specification and boilerplate provisions through the OCR, OPO, OPL Coordination Committee, including attendance by Sherrin Coleman, Transit Planning Program Manager, Tiffany Hamilton, Interim DBE Program Manager, and ODOT's DOJ counsel.

Action: Include the following specification and boilerplate language issues on the next OCR/OPO/OPL Committee Agenda for discussion, review and decision regarding revisions to the DBE-related provisions:

- Form 8 Boilerplate – ensure accurate citation to 49 CFR Part 26.49.
- Race Neutral and Race Conscious DBE Participation specific language on FTA contracts – consider whether or how this language should differ from highway construction contracts.
- Good Faith Efforts goals –review the boilerplate language for contracts and proposals without race conscious goals.
- Contract Assurances – ensure correct verbatim language is included in contract and proposal provisions.
- Prompt Payment and Retainage Provisions – ensure the provisions are included even when DBE provisions are not included.
- Legal Remedy Language in Exhibit E and FHWA contracts with group-specific race conscious language.

- Inclusion of the DBE Policy statement signed by the Director in the solicitation documents.
- FTA-related Subrecipient Agreements - modify to require DBE reports to be submitted with other reports in order for the subrecipient to get reimbursed and a provision that states periodic sampling of back-up data may be requested from the subrecipient DBE forms to verify the accuracy of information provided.

Schedule: The review items will be included on the March 2012 OCR/OPO/OPL Committee Agenda.

FTA Response:

FTA has reviewed the responses and action plan regarding the stated deficiencies. By June 1, 2012, submit to FTA Office of Civil Rights, sample Form 8 boilerplate and subrecipient agreement that includes DBE compliance language.

10. Certification Standards

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

Discussion: During this DBE Compliance Review, the area of Certification Standards was not applicable. This section is addressed in the Oregon Unified Certification Program Report.

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 was not applicable. This section is addressed in the Oregon Unified Certification Program Report.

12. Record Keeping and Enforcements

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

Discussion: During this DBE Compliance Review, deficiencies were found with the DBE requirements for maintaining the bidders list, monitoring and reporting.

Bidders List

The bidders list process is described in the DBE program plan and includes the firm's name, address, DBE status, and annual gross receipts. The Civil Rights Compliance Tracking (CRCT) system provides tracking and reporting capabilities on companies that bid or respond on projects and the tracking of actual utilization. The program plan indicates that contract/vendor information is validated with the subcontractor solicitation and utilization form provided by all bidders within 10 calendar days of the bid opening. If information is not contained in the CRCT system, a profile sheet is forwarded to the firm in question and the tracking system is updated when the information is received.

The review team requested documentation regarding this process described in the program plan. The information provided to the review team was pre-qualification forms and database screen shots of contact information from firms pre-qualified to perform on ODOT projects. The DBELO was unsure if the bidders list process described in the program plan was actually being implemented.

Monitoring

The DBE program plan states that ODOT project management personnel, in conjunction with the Office of Civil Rights, are responsible for monitoring compliance with commercially useful function provisions of the contract. It further states, procedures such as those described in the plan pertaining to highway construction projects will be followed in monitoring compliance on all U.S. DOT funded contracts.

The program plan also includes a section for monitoring payments to DBEs. It says that ODOT will maintain a running tally of payments actually made to DBE firms and require prime contractors and DBE subcontractors and suppliers to provide appropriate documentation to verify such payments. According to the program plan, contract payment information on prime contractors and subcontractors is entered by the OCR Field Coordinators into CRCT system.

The Transit Office collects a Report of DBE Awards and Payments form from their subrecipients, however; this process is independent of the monitoring process described in the program plan. The plan does reference subrecipient oversight, however; it appears to be for FHWA related activities. The Transit Office had no formal process to provide oversight of subrecipient's contracting activity in regards to prompt payment clauses or written certification that DBEs actually performed work on ODOT and subrecipient FTA-assisted contracts. The review team suggested the Transit Office consider modifying their subrecipient agreements to require that DBE reports be submitted with other reports in order for the subrecipient to get reimbursed. It was also recommended that periodic sampling of back-up data be requested from the subrecipient DBE forms to verify the accuracy of information.

Reporting

The semi-annual and ARRA reports were provided to the review team for 2008 through 2011 reporting periods. The Transit representative has begun completing reports in FTA's TEAM system. The ODOT Transit representative indicated that in preparation for the onsite review, it was discovered that the DBEs listed in several of the semi-annual

reports were actually M/WBEs and not DBEs. These reports were completed based on information collected from the subrecipient Report of DBE Awards and Payment forms.

Several of the reports did not include the ethnic breakdown of the DBEs that received awards. The Transit representative will include such breakdowns in future reports to FTA. Additionally, the number and dollar amounts of awards at the top of the report equaled the number and dollar amounts for completed contracts at the bottom of report in several reports examined by the review team. The Transit representative indicated that this was the result of a large number of purchase orders from subrecipients that were awarded and completed in the same reporting period. Lastly, the review team explained how to determine past participation from the reporting forms and to be ready to provide an analysis when goals are not achieved.

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

- Collect and maintain a bidders list in accordance to 49 CFR Part 26.11
- implement monitoring mechanisms for subrecipients with FTA-assisted contracts, and
- provide procedures for accurate and complete collection and reporting of data for semi-annual/ARRA reports to FTA.

ODOT Response:

Bidders List - The DBE Program currently requires all (prime) bidders to submit the Subcontractor Solicitation and Utilization Report (SSUR form) to ODOT within 10 days of bid-opening to gather most of information required for the Bidders List. The SSUR form does not include fields for gathering all of the CFR-required information such as age of firm, average gross receipts, or firm address. However, 49 CFR 26.11(c)(3) states that ODOT "may acquire the information for [our] bidders list in a variety of ways." Examples include collecting the data from all bidders before or after bids are due, conducting a statistically sound survey of DBE and non-DBE firms, or a combination of the two approaches.

Action: The DBE Program Manager will coordinate with the ODOT Office of Civil Rights (OCR) and Procurement (OPO) to determine the best approach for establishing a process to ensure all CFR-required Bidders List data is collected and maintained.

Establishing the process is likely to involve the following tasks:

- Adding data fields on the SSUR form to gather additional CFR-required information.
- Adding data fields within the CRCT database to track and report the additional CFR-required information.
- Determining how to best gather the required information from subcontractors directly and independent of the prime contractor.
- Determining how to best gather the required information in the RFP process and other methods of procurement.
- Conducting a survey with respect to Firm Age and Average Gross Receipts.

Schedule: This will be added as an agenda item to be tracked by the OPO/OCR/OPL Coordination Committee, which meets bi-monthly. The process should be able to be established and implemented by the end of December 2012.

FTA Response:

FTA has reviewed the action plan and schedule to address this deficiency. By June 1, 2012, submit to FTA Office of Civil Rights a status update on establishing a bidders list collection and maintenance process.

Monitoring Mechanism – ODOT agrees with the review team’s suggestion that the Transit Office consider modifying their subrecipient agreements to require that DBE reports be submitted with other reports in order for the subrecipient to get reimbursed . Additionally, ODOT will consider adding a provision that allows ODOT to periodically request back-up data to verify the accuracy of information provided by subrecipients.

Action: As per Issue #9, C above this issue will be reviewed along with other specification and boilerplate revisions. Additionally, an internal process will be established for managing the received reports and to establish the criteria for periodic back-up data review.

Schedule: This will tracked by the OPO/OCR/OPL Coordination Committee. The process should be able to be established and implemented by the end of September 2012.

FTA Response:

FTA has reviewed the action plan and schedule to address this deficiency. By June 1, 2012, submit to FTA Office of Civil Rights, a status update on establishing procedures for monitoring subrecipient DBE activity.

Collection and Reporting of Data: ODOT is currently making extensive modifications to the Office of Civil Rights Compliance Tracking database, with linkages to other in-house systems, to enable the collection and tracking of A&E subcontracting, the Emerging Small Business, and the Small Contracting programs. The ability for these computer systems to effectively interface is critical to the collection and reporting of DBE utilization. These modifications are expected to be complete by the end of September 2012.

FTA Response:

FTA has reviewed the action plan and schedule to address this deficiency. By June 1, 2012, submit to FTA Office of Civil Rights, a status update on modifications to the tracking database.

13. January 2011 DBE Program Rulemaking

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

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

amended requirement will be incorporated into ODOT's DBE program plan by the time the compliance review process is complete.

ODOT Response: As noted in the response to Issue #1, ODOT will incorporate the amended regulatory requirements in the updated DBE Program plan to be submitted to FHWA by February 28, 2012. ODOT will seek appropriate FTA and FHWA technical guidance as ODOT implements new policies and procedures to implement the amended regulations.

Section 7 – Summary of Findings

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

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action:	Response Days/Date
1. Program Plan	26.21	D	Program plan last updated 12/07.	Submit final draft of DBE program plan	July 1, 2012
2. Policy Statement	26.23	D	Does not discuss how policy is circulated to business community	Verification that policy was circulated internally and externally	July 15, 2012
3. DBE Liaison Officer	26.25	D	No/limited oversight of FTA activities. Program plan has incorrect DBELO reporting relationship	Provide Civil Rights Reporting Policy and revised organizational chart	July 1, 2012
4. Financial Institutions	26.27	D	No documentation provided for efforts to identify financial institutions	Provide results of financial institution availability meetings and plan for periodic review	May 1, 2012
5. DBE Directory	26.31	ND			
6. Overconcentration	26.33	D	No evidence of analysis provided	<ul style="list-style-type: none"> Provide the feasibility review of trucking OC OC analysis results 	Jun. 30, 2012 Sep. 30, 2012
7. Business Development Programs	26.35	ND			
8. Determining / Meeting Goals					
A. Calculation	26.45	D	Not considering supplementing numerator, weighting, past participation or disparity study information in step one and two process	Provide revised FY 2012-2014 DBE goal methodology	July 15, 2012
B. Public Participation	26.45	D	Goal advertised after August 1 st . No proof of publication provided. Outdated documentation of consultation process	Provide the submission and notice schedule adopted by ODOT for future goal setting	July 1, 2012
C. TVM	26.45	AC	Boilerplate in contracts incorrect reference. Ensure that all TVM certifications references 49 CFR Part 26.49		

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action:	Response Days/Date
D. Race Neutral	26.51	D	DBE provisions included that has race conscious elements	Provide Form 8 boilerplate document and subrecipient agreement with DBE compliance language and procedures	June 1, 2012
E. Race Conscious	26.51	ND			
F. Good Faith Efforts	26.53	D	DBE provisions contain GFE requirements in RN contracts	Provide Form 8 boilerplate document and subrecipient agreement with DBE compliance language and procedures	June 1, 2012
G. Counting DBE Participation	26.55	D	Incorrect statement in program plan concerning counting rules	Counting policy to be provided with DBE program plan	July 1, 2012
H. Quotas	26.43	ND			
9. Required Contract Provisions					
A. Contract Assurance	26.13	D	Assurance missing or incorrect in several contracts and DBE provision	Provide Form 8 boilerplate document and subrecipient agreement with DBE compliance language and procedures	June 1, 2012
B. Prompt Payment	26.29	D	Contracts missing prompt payment and retainage provisions	Provide status of the retainage committee recommendations and ODOT considerations	August 1, 2012
C. Legal Remedies	26.37	AC	Revise legal remedy language to be more reflective of RN program. Amend actions for criminal conduct to also include FTA activities	Provide Form 8 boilerplate document and subrecipient agreement with DBE compliance language and procedures	June 1, 2012
10. Certification Standards	26.67	N/A			
11. Certification Procedures	26.83	N/A			
12. Record Keeping and Enforcements					

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action:	Response Days/Date
A. Bidders List	26.11	D	Pre-qualification list provided that did not contain 26.11 information	Provide status on establishing a bidder list process	June 1, 2012
B. Monitoring	26,37 26.55	D	Need mechanism to verify accuracy of information collected from subrecipients	Provide status on establishing monitoring procedures for subrecipients	June 1, 2012
C. Reporting	26.11	D	Report included M/WBEs. Portion of report not completed	Provide status on modification to tracking database	June 1, 2012
13. January 2011 DBE Program Rulemaking	NA	NA			

Section 8 – List of Attendees

Name	Organization	Title	Phone	Email
FTA:				
Randelle Ripton	FTA - Office of Civil Rights	EO Specialist, DBE Technical Lead	202-366-5086	Randelle.Ripton@fta.gov
ODOT Members:				
Susan Edmonds	Oregon Dept of Consumer & Business Services	Certification Specialist, Office of Minority, Women & Emerging Business	503-986-0068	susan.a.edmonds@state.or.us
Sherrin K. Coleman	ODOT	Transit Planning Program Manager	503-986-4305	sherrin.k.coleman@odot.state.or.us
Michael R. Ward	ODOT	Administrator, Public Transit Division	503-986-3413	michael.r.ward2@odot.state.or.us
Michael A. Cobb	ODOT	Manager, Office of Civil Rights	503-986-5753	michael.a.COBB@state.or.us
John Saris	Oregon Business Development Department	Business Services Manager	503-581-5115	John.saris@state.or.us
Carrie Hulse	Oregon Dept of Consumer & Business Services	Certification Specialist, Office of Minority, Women & Emerging Business	503-986-0078	carrie.hulse@state.or.us
Michelle Remmy	ODOT	Chief Procurement Officer, Public Transit	503-986-2819	michelle.remmy@odot.state.or.us
Robin Bjurstrom	ODOT	Support Operations Manager, Public Transit	503-986-6579	Robin.e.bjurstrom@odot.state.or.us
Joni Bramlett	ODOT	Capital Program Manager, Public Transit	503-986-3416	joni.d.bramlett@odot.state.or.us
Matthew Barnes	ODOT	Transit Network Program Manager, Public Transit	503-986-4051	matthew.m.barnes@odot.state.or.us
Dale Hormann	Oregon Dept. of Justice	Senior Assistant Attorney General	503-947-4538	dale.hormann@doj.state.or.us
Jenny Erickson	ODOT	Transportation Analyst, Public Transit	503-986-3408	jenny.erickson@odot.state.or.us
Subrecipient Representatives:				
Dan Schwanz	Hood River County Transportation District	Executive Director	541-386-4202	
Chris Bailey	Albany Transit, City of Albany	Airport and Transit Manager	541-917-7629	chris.bailey@cityofalbany.net
Stacy Klausen	Central Lane MPO		541-682-3177	

DBE Subcontractor Representative				
Katherine Kinsella	Pegastian Press	President/Owner	541-928-3533	pegastianpress@comcast.net
Interested Parties				
Penny Painter	Oregon Native American Chamber	Vice Chair	503-894-4525	
Jonath Colon	Hispanic Metropolitan Chamber	Business Development Coordinator	503-222-0280	jcolon@hmccoregon.com
Milligan & Co LLC:				
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