

FTA

FEDERAL TRANSIT ADMINISTRATION

Milwaukee Department of Public Works Disadvantaged Business Enterprise (DBE) Program Compliance Review

Final Report
June 2017



U.S. Department of Transportation
Federal Transit Administration

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Executive Summary

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

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

- | |
|---|
| Positive Program Elements |
| <ul style="list-style-type: none">➤ Semi-Annual Reports – DPW reported on time.➤ Prompt Payment – DPW included the required prompt payment language in all contracts reviewed. |

The Program has the following administrative deficiencies –

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|--|
| Administrative Deficiencies |
| <ul style="list-style-type: none">➤ DBE Policy Statement – DPW did not distribute its DBE Policy Statement as stated in its DBE Program Plan. In addition, DPW included an unsigned and undated policy statement in its DBE Program Plan. |

The Program has the following substantive deficiencies –

- | |
|--|
| Substantive Deficiencies |
| <ul style="list-style-type: none">➤ DBE Program Plan – DPW’s Program Plan did not apply to all FTA-funded projects. The plan did not address shortfall analysis and corrective action plan requirements or provisions for protecting against termination for convenience.➤ Disadvantaged Business Enterprise Liaison Officer (DBELO) – The DBELO designation was inadequate.➤ Business Development Program – DPW did not provide sufficient documentation confirming its compliance with DBE Business Development Program requirements.➤ Good Faith Efforts – DPW did not implement or enforce the Good Faith Effort requirements described in its DBE Program Plan.➤ Race-Neutral Measures – DPW’s race-neutral measures were lacking.➤ Small Business Element – DPW had not implemented a small business element.➤ Shortfall Analysis and Corrective Action Plan – DPW did not conduct a shortfall analysis and prepare a Corrective Action Plan for FY 2016.➤ Transit Vehicle Manufacturers – DPW did not submit the required TVM report to FTA within 30 days after awarding a TVM contract.➤ Required Contract Provisions and Enforcement – DPW lacked procedures to ensure it included the required nondiscrimination contract assurance and protections against termination for convenience. |

At the time of the site visit, limited DBE contracting activity had occurred on DPW's FTA-funded streetcar project. In FY 2015–16, DPW primarily engaged in preconstruction activities. DPW's first year of DBE contracting activity (FY 2016) resulted in the DBE participation shown in the table below:

Fiscal Year 2016 Goal: 20.1%		1	2	3 (1 + 2)
DBE Uniform Report		June 1	Dec. 1	Totals
A.	Total dollars awarded to DBE prime contractors (<i>Line 8C</i>)	\$0	\$0	\$0
B.	Total dollars awarded to DBE subcontractors (<i>Line 9C</i>)	\$914,263	\$243,221	\$1,157,484
C.	Total dollars awarded to DBEs (A3 + B3)			\$1,157,484
D.	Total prime contract dollars awarded (<i>Line 8A</i>)	\$5,180,258	\$1,466,689	\$6,646,947
E.	Annual percentage awarded (C3/D3)			17.4%

As the table shows, DPW did not meet its overall DBE participation goal of 20.1 percent in FY 2016, achieving 17.4 percent. At the time of the site visit, DPW had not conducted a shortfall analysis to determine the reason(s) for the FY 2016 shortfall.

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I. General Information

This chapter provides basic information concerning this compliance review of the City of Milwaukee Department of Public Works (DPW). Information on DPW, the review team, and the dates of the review are given in the table below.

Grant Recipient:	City of Milwaukee Department of Public Works
City/State:	Milwaukee, WI
Grantee Number:	7093
Executive Official:	Ghassan Korban (414) 286-3301 gkorban@milwaukee.gov
On-site Liaison:	David Windsor (414) 286-0459 david.windsor@milwaukee.gov
Report Prepared By:	The DMP Group, LLC
Dates of On-site Visit:	January 10 – 12, 2017
Compliance Review Team Members:	John Potts, Lead Reviewer Donald Lucas, Reviewer Gregory Campbell, Reviewer

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2. Jurisdiction and Authorities

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

DPW is the recipient of one or more federal transit grants, loans, and/or contracts that result in contracting opportunities exceeding \$250,000. Hence, DPW is subject to the Disadvantaged Business Enterprise (DBE) compliance conditions associated with the use of FTA financial assistance pursuant to 49 CFR Part 26. These regulations define the components that must be addressed and incorporated in DPW's DBE program and were the basis for this compliance review.

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3. Purpose and Objectives

3.1 Purpose

The FTA Office of Civil Rights periodically conducts discretionary reviews of grant recipients and subrecipients to determine whether they are honoring their commitment, as represented by certification to FTA, to comply with 49 CFR Part 26. FTA has determined that a compliance review of DPW's DBE program is necessary.

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

This compliance review is not to directly investigate discrimination against individual DBE firms or complainants or to adjudicate these issues on behalf of any party.

3.2 Objectives

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

- Ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's transit financial assistance programs.
- Create a level playing field on which DBEs can compete fairly for DOT-assisted contracts.
- Ensure that the Department narrowly tailors its DBE program in accordance with applicable law.
- Ensure that only firms that fully meet the regulatory eligibility standards participate as DBEs.
- Help remove barriers to the participation of DBEs in DOT-assisted contracts.
- Promote the use of DBEs on all types of federally assisted contracts and procurement activities conducted by recipients.
- Assist with the development of firms that can compete successfully in the marketplace outside the DBE program.
- Provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

The objectives of this compliance review are to:

- Determine whether DPW is honoring its commitment to comply with 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in DOT Programs."
- Examine the required components of DPW's DBE Program Plan against the compliance standards set forth in the regulations, DOT guidance, and FTA policies and document the compliance status of each component.

- Gather information and data regarding the operation of DPW's DBE Program Plan from a variety of sources, including DBE program managers, other DPW management personnel, DBEs, prime contractors, and other stakeholders.

4. DPW Background Information

The purpose of this chapter is to provide an understanding of the City of Milwaukee Department of Public Works' (DPW) operations and scale. The subsections below highlight DPW's organizational structure, services, and short-term initiatives; its budget and FTA-assisted projects; and the history of its DBE program.

4.1 DPW Organization and Administration

The City of Milwaukee government, led by its mayor, comprised 33 departments and divisions organized across the following five organizational units: Elected Officials and Administration; Health, Safety, and Services; Arts and Architecture; Business and Development; Judicial and Oversight; and Jobs and Employees. The Department of Public Works (DPW) was one of eight departments that collectively made up the Health, Safety, and Services unit. The Commissioner of the Department of Public Works reported to the mayor and oversaw the following four municipal functions: Administrative Services, Infrastructure, Operations, and Milwaukee Waterworks. DPW was responsible for the design, maintenance, and operation of streets, sidewalks, alleys, bridges, sewers, water mains, underground conduits, telecommunications services, traffic signals, and street lighting for the City of Milwaukee, which occupies more than 95 square miles; 221 city buildings; a fleet of over 1,500 vehicles; 476 acres of boulevards and green space; and 200,000 street trees. DPW was also responsible for the planning, design, construction, and operation of the Milwaukee Streetcar Project (MSP).

The streetcar project began with the Milwaukee Connector Study, which was initiated to implement transit recommendations from previous transportation plans during the 1990s. The study focused on land use, ridership, routes, vehicle technologies, financing, and governance. In January 2004, the City of Milwaukee approved a two-route system that would use guided bus technology. In the spring of 2007, the City of Milwaukee initiated the next phase of the study with a focus on connecting downtown with adjacent neighborhoods by using modern fixed-rail transit technology. Phase 1 of the MSP will connect the Milwaukee Intermodal Station and the dense housing in the lower East Side neighborhood of the City of Milwaukee, providing service to many residential, commercial, employment, parking, and hotel destinations. Phase 1 of the project included an operations and maintenance facility and associated yard improvements, 17 platform stops, approximately 3.7 track miles, and an overhead contact system. Phase 2 of the MSP, the Lakefront Extension, will link the new Milwaukee Bucks (professional basketball) Arena, the arena's ancillary development, and numerous destinations in the Westtown neighborhood to other parts of the streetcar line. At the time of the site visit, DPW was near the completion of its preconstruction planning and design stage and preparing to begin construction of Phase 1 in the spring of 2017. DPW estimated it would complete Phase 1 in 2018 with the Lakefront Extension launching service in 2019.

In 2012, DPW became the direct recipient of FTA funds intended to assist in the completion of the MSP. Following City approval in February 2015 and securing additional funding in October 2015, DPW hired an owner's representative, The Concord Group, to provide project management, technical support, construction management, assistance with FTA documentation, and other services associated with the streetcar project during design, construction, system testing, start-up, and project closeout. DPW also awarded a contract to Brookville Equipment Corporation to engineer, manufacturer, deliver, and commission four modern streetcar vehicles for Phase 1 of the MSP, with an option to purchase a fifth vehicle to

serve the Lakefront Extension. In addition, DPW hired a construction management (CM) and general contractor (GC) firm, Kiewit Infrastructure, to manage the construction of the MSP, and HNTB Corporation to provide infrastructure design services. Together (under the supervision of DPW staff), the CM and GC were responsible for preconstruction planning and design, full life-cycle project management, and final construction of the streetcar.

DPW was responsible for the management and administration of the DBE program. DPW designated its Commissioner as the agency’s DBE Liaison Officer (DBELO). As the DBELO, the Commissioner was responsible for implementing all aspects of DPW’s DBE program. An internal staff of three (DPW design, construction, and administration personnel) supported the DBELO, along with the owner’s representative and CM/GC contractors. The owner’s representative subcontracted DPW DBE program support to Prism Technical Management and Marketing Services (Prism). Prism was primarily responsible for managing, at the direction and under the supervision of DPW, DBE compliance in all phases of the streetcar project. This work included DBE program planning and implementation, as well as the day-to-day management of the DBE program.

4.2 Budget and FTA-Assisted Projects

DPW’s reported budget for the MSP was as follows:

Costs	Amount
Phase 1 Route: tracks/stops/systems	\$98.9 million
Lakefront Line: tracks/stops/systems	\$29.2 million
Total costs	\$128.1 million

Revenue Source	Amount
Federal: Interstate Cost Estimate funding	\$54.9 million
Federal: TIGER VII grant	\$14.2 million
Local: Cathedral Square TID	\$9.7 million
Local: Amend Erie St. TID 56 to 19 years	\$18.3 million
Local: East Michigan TID @ 19 years	\$31 million
Total costs	\$128.1 million

Note: TID = tax incremental district.

At the time of the compliance review, the City of Milwaukee Department of Public Works’ active FTA grants were as follows:

DPW Active FTA Grants

Project No.	Brief Description	Original Obligation Date	Last Disbursement Date	Total Obligation Amount	Funds Remaining (%)	Total Undisbursed Amount
WI-2017-006-00	Metropolitan Planning	3/17/2017	—	\$750,000	100%	\$750,000
WI-95-X033-01	Downtown Milwaukee Streetcar Amendment	5/3/2013	3/13/2017	\$731,107	0%	\$731,107

Project No.	Brief Description	Original Obligation Date	Last Disbursement Date	Total Obligation Amount	Funds Remaining (%)	Total Undisbursed Amount
WI-95-X033-00	Downtown Milwaukee Streetcar	1/4/2013	1/30/2017	\$51,961,696	76%	\$39,989,860

4.3 DBE Program

DPW receives federal financial assistance from the U.S. Department of Transportation (U.S. DOT), and as a condition of receiving this assistance, it is responsible for complying with the regulations set forth in 49 CFR Part 26. Accordingly, DPW developed a DBE Policy Statement that outlined its goals and mission for the program and a DBE Program Plan that described its efforts pursuant to compliance with the regulations. DPW submitted its most recent DBE Program Plan to FTA on June 11, 2015. FTA concurred with the plan on March 23, 2016. DPW’s DBELO, project engineering staff, and owner’s representative team were responsible for the administration of its FTA DBE program.

DPW did not conduct a disparity study when formulating its triennial DBE goals. DPW’s goals included race-neutral and race-conscious elements.

DPW was a non-certifying participant in the Wisconsin Unified Certification Program administered by the Wisconsin DOT.

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5. Scope and Methodology

5.1 Scope

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

- A DBE program in conformance with 49 CFR Part 26 that has been submitted to FTA
- A signed policy statement expressing a commitment to the DPW DBE program, states its objectives, and outlines responsibilities for implementation [49 CFR 26.23]
- Designation of a DBE liaison officer and support staff as necessary to administer the program and a description of the authority, responsibility, and duties of the officer and the staff [49 CFR 26.25]
- Efforts made to use DBE financial institutions by DPW as well as by prime contractors, if such institutions exist [49 CFR 26.27]
- A DBE directory including addresses, phone numbers, and types of work performed, made available to the public and updated at least annually [49 CFR 26.31]
- Determination that overconcentration does (or does not) exist and efforts to address this problem, if necessary [49 CFR 26.33]
- Assistance provided to DBEs through Business Development Programs to help them compete successfully outside of the DBE program [49 CFR 26.35]
- An overall goal based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on DOT-assisted contracts and proper mechanisms to implement the DBE goal [49 CFR 26.43–26.53]
- A shortfall analysis and corrective action plan when DPW did not achieve its DBE goal [49 CFR 26.47]
- A process that ensures transit vehicle manufacturers (TVMs) comply with the DBE requirements before bidding on FTA-assisted vehicle procurements. The process may include DPW seeking FTA approval to establish a project-specific goal for vehicle purchases [49 CFR 26.49].
- A nondiscrimination and a prompt payment clause included in all FTA-assisted contracts and a prompt payment verification process [49 CFR 26.7, 26.13, and 26.29].
- A certification process to determine whether potential DBE firms are socially and economically disadvantaged according to the regulatory requirements. The potential DBE firms must submit the standard DOT application, the standard DOT personal net worth form, and the proper supporting documentation [49 CFR 26.65–26.71].
- The certification procedure includes document review, on-site visit(s), eligibility determinations consistent with Subpart D of the regulations, an interstate certification review process, and a certification appeals process [49 CFR 26.83 and 26.86].
- Implementation of appropriate mechanisms to ensure compliance with the DBE requirements by all program participants and appropriate breach of contract remedies [49 CFR Part 13]. The DBE program must also include monitoring and enforcement

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

5.2 Methodology

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

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

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

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

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

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

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

Participants in the compliance review are listed below.

City of Milwaukee Department of Public Works

Ghassan Korban, Commissioner of Public Works
Jeffrey Polenske, City Engineer
David Windsor, Project Engineer

Contractors

The Concord Group

Patrick Flaherty, Project Manager

Kiewit Infrastructure Corporation

Mike Ethier, Project Manager

Prism Technical Management and Marketing Services

Randy Crump, Chief Executive Officer
Lafayette Crump, Chief Operating Officer
Marthia Bell, Project Manager

Federal Transit Administration

Marjorie Hughes, FTA Region 5 Regional Civil Rights Officer

Review Team – The DMP Group, LLC

John Potts, Lead Reviewer
Donald Lucas, Reviewer
Gregory Campbell, Reviewer

5.3 Stakeholder Interviews

During the DBE compliance review, the review team contacted 12 DBEs, two non-DBE prime contractors, and six minority- and woman-owned business advocacy organizations (other interested parties). The following paragraphs summarize the results of the interviews.

Disadvantaged Business Enterprises

The review team conducted interviews with eight of the 12 DBEs contacted. All the DBEs interviewed were listed in the DBE UCP Directory. All but one of the DBEs were familiar with DPW's DBE program, and none of the DBEs had been requested to participate in the development of or comment on DPW's DBE goal. All but one DBE learned about contracting opportunities through notices from prime contractors or invitations to and attendance at City events, but none were contacted by DPW to provide referrals for contracting opportunities. Five of the DBEs interviewed participated on FTA-assisted contracts, and of the five, two reported problems with retainage or prompt payment. All the DBEs noted that DPW should definitely

work to increase the effectiveness of its DBE program and also do more to reach out to DBEs to notify them about contracting and subcontracting opportunities. Three DBEs suggested that as DPW contracts out the management of its DBE program, DPW staff should be more focused on oversight to hold the contractor accountable with its management of DBE goal attainment.

Prime Contractors

The review team interviewed one of two prime contractors, who stated they were informed of the DBE goals and actively worked to meet the goals. The prime did not report any work performance issues with any DBEs on the project, nor did it report any issues with payment from DPW for work performed. The prime indicated that DPW did limited monitoring of their DBE participation, limited to verifying that payments to the DBEs by the prime are current.

Interested Parties

The review team conducted interviews with two of the six interested parties contacted. The parties were unfamiliar with DPW's DBE program and indicated that DPW had not communicated opportunities to comment on its DBE goals. None of the agencies interviewed reported awareness of DPW's contracting opportunities, that DPW contacted them to obtain a referral, or that DPW invited them to an outreach event. Both agencies believed DPW's DBE program needs to be more effective and could do more outreach and provide more information on its contracting opportunities.

6. Findings and Advisory Comments

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

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

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

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

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

6.1 DBE Program Plan

Basic Requirement (49 CFR Part 26.21)

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

Discussion

During this compliance review, FTA found deficiencies with this requirement. U.S. DOT DBE regulations require DPW to develop and submit a DBE Program Plan and to update its plan when it makes significant changes to its program. FTA's Transit Award Management System (TrAMS) showed that FTA concurred with DPW's most recent DBE Program Plan on March 23, 2016. DPW's plan did not include provisions for termination of convenience or a description of its procedures for conducting a shortfall analysis and preparing a corrective action plan when failing to meet DBE goals. In addition, DPW limited the scope of its plan to the construction, procurement, and professional services portions of its Milwaukee Streetcar Project (MSP). At the time of the site visit, DPW also had an FTA-funded planning project (grant WI-2017-006-00). In addition, during the site visit DPW confirmed its plans for using FTA funding assistance to operate the streetcar once constructed. The scope of DPW's DBE Program Plan must include all FTA-funded projects.

Corrective Action and Schedule

Within 60 days of the issuance of the final report, DPW must submit to the FTA Office of Civil Rights an updated DBE Program Plan that includes provisions for termination of convenience and addresses the requirement to conduct a shortfall analysis and prepare a corrective action plan when not meeting DBE goals. DPW's updated plan must also apply to all FTA-funded projects.

6.2 DBE Policy Statement

Basic Requirement (49 CFR Part 26.23)

Recipients must formulate and distribute a signed and dated DBE policy, stating objectives and commitment to the DBE program. Recipients must circulate this policy throughout the recipients' organization and to the DBE and non-DBE business communities.

Discussion

During this compliance review, FTA found deficiencies with this requirement. In its DBE Policy Statement, DPW stated the following:

The City of Milwaukee Department of Public Works has disseminated this policy statement to the Office of the Mayor and other appropriate governing officials. We have distributed this statement to DBE and non-DBE business communities that we anticipate could perform work for the City on DOT-assisted contracts by emailing internet links to our DBE Plan to stakeholder groups identified herein. Stakeholder groups include minority chambers and business associations, transportation and infrastructure oriented engineering and contractor associations as well as agencies serving low income populations. Hardcopy documents were made available for those requesting the Plan by Fax or US Mail.

DPW did not provide documentation confirming it distributed its policy as described in its DBE Policy Statement. The review team found DPW's DBE Policy Statement in its DBE Program Plan, and the statement included in its plan was unsigned and undated.

Corrective Actions and Schedule

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

- Documentation confirming it has distributed a DBE Policy Statement, as required by 49 CFR Part 26.23 and as stated in its DBE Program Plan.
- An updated DBE Program Plan that includes a signed and dated DBE Policy Statement.

6.3 DBE Liaison Officer

Basic Requirement (49 CFR Part 26.25)

Recipients must have a designated DBE Liaison Officer (DBELO) who has direct and independent access to the CEO. This Liaison Officer is responsible for implementing all aspects of the DBE program and must have adequate staff to properly administer the program.

Discussion

During this compliance review, FTA found deficiencies with this requirement. FTA also issued an advisory comment with this requirement. At the time of the site visit, DPW's DBELO was the Commissioner of the Department of Public Works (CPW). The CPW reported to the Mayor of the City of Milwaukee. An internal staff of three (individuals from DPW's design, construction, and procurement departments) supported the CPW, along with the owner's representative team. Prism operated as a subcontractor to the owner's representative, The Concord Group, and was primarily responsible for managing, at the direction and under the supervision of DPW, DBE compliance in DPW's streetcar project. This work included DBE program planning and implementation, as well as the day-to-day management of the program. For example, Prism led the development of DPW's DBE Program Plan, conducted outreach to the DBE community, and managed DPW's triennial goal-setting process.

After discussing the involvement of the CPW, DPW staff, and Prism in the management and administration of the DBE program, and in consideration of the CPW's other responsibilities, the review team concurred with the determination made by FTA in July 2016, when FTA conducted a DBE Technical Assistance Review of DPW. The purpose of that review was to identify if any DPW DBE program compliance concerns existed and to provide technical assistance to help address said concerns. FTA reported the following with respect to the DBELO requirement at that time:

Inadequate designation of DBE Liaison Officer (DBELO): For grantees that meet the threshold for having a DBE program, the grantee's chief executive officer (CEO) must designate the DBELO. For the City of Milwaukee, the DBE program has identified the Commissioner of Public Works (CPW) as the DBELO. During the site visit, reviewers discussed this assignment with the City staff and stated that care should be taken to avoid conflicts when assigning the DBELO as a collateral duty assignment. The current job description of the CPW and his current authority for the Streetcar Project may pose conflicts with his other assigned duties. The City of Milwaukee would need to provide an explanation of how such conflict of interest situations would be resolved and/or handled on a day-to-day basis. There should be a clear reporting relationship with no conflict of interest between the DBELO and the Commissioner. It is highly recommended not to have the Commissioner as the DBELO due to the necessity to have a person higher than the Commissioner as the Reconsideration Official. During the site visit, discussed possibly having the DBELO as someone in a lower rank than the CPW, and then making the CPW the Reconsideration Official. Reminded the City staff that the DBELO must not be required to get anyone's consent or sign-off or to "go through channels" to talk and write personally to the CEO (or CPW if changed) about DBE program matters. If the DBELO has a dotted line reporting relationship in lieu of a direct reporting relationship to the CPW for DBE matters, this direct and independent access should be verified through

job descriptions, organizational charts, and evidence of direct and independent communication between the two individuals.

In accordance with the review team's findings and the FTA concerns reported above, DPW must identify a new DBELO.

Given its reliance on contractors, DPW runs the risk of failing to adequately acquire, maintain, and transfer critical information about the DBE program internally. Additionally, given DPW's plans to use FTA assistance to operate the new streetcar service once it completes construction, DPW will likely need more internal staff to adequately manage the DBE program.

Corrective Action and Schedule

Within 60 days of the issuance of the final report, DPW must submit to the FTA Office of Civil Rights confirmation that it has established an individual other than the CPW as its DBELO. In addition, FTA advised DPW to allocate more internal staff to the management of its DBE program.

6.4 DBE Financial Institutions

Basic Requirement (49 CFR Part 26.27)

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

Discussion

During this compliance review, FTA found deficiencies with this requirement. In its DBE Program Plan, DPW stated it "will seek collaborative efforts with" North Milwaukee State Bank (NMSB) and Seaway Bank and Trust Company (SBTC). DPW further stated it would "make reasonable efforts to use these institutions and encourage prime contractors to use and work with such institutions to assist DBE contractors in pursuit of work on USDOT funded DPW projects." Finally, DPW stated its "DBELO will ensure that a formal internal review and report on financial institution participation and engagement in the Milwaukee Streetcar occurs annually, shall informally inquire and internally report quarterly, and shall report to FTA as required."

During the site visit, DPW did not provide documentation confirming it sought collaborative efforts with NMSB or SBTC or encouraged prime contractors to use NMSB and SBTC. DPW did not have an adequate process in place for investigating the existence of DBE financial institutions, as required by 49 CFR Part 26.27. For example, DPW listed NMSB as a minority-owned bank; however, the Federal Reserve Board Federal Statistical Release of Minority-Owned Depository Institutions (FSR) did not include NMSB on its list of minority-owned banks. The FSR included Columbia Savings & Loan Association (CSLA) on its list of minority-owned banks located in Milwaukee, WI; however, DPW's investigation of the existence of DBE financial institutions did not result in the identification and consideration of CSLA. During the site visit, the review team provided technical assistance to DPW on how to use the FSR as a part of its DBE financial institution investigation process.

Finally, DPW included language in its DBE Program Plan that more appropriately belonged in a description of what it did to provide supportive services to DBE contractors and subcontractors

in securing loans and other financial support. DPW's efforts to provide said resources included investigating and creating

collaborative efforts to work with and support the services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the M-7 region -- including those controlled and operated by ethnic chambers and women. The revolving loan initiatives of these organizations are intended to serve their members, which are substantially DBE firms. The ethnic Chambers have direct financial support from the Wisconsin Economic Development Corporation ("WEDC"), the City of Milwaukee through the Milwaukee Economic Development Corporation ("MEDC") and local banks. At present these organizations are:

- *The African American Chamber of Commerce*
- *The American Indian Chamber of Commerce*
- *The Hispanic Chamber of Commerce of Wisconsin*
- *The Hmong Chamber of Commerce of Wisconsin*
- *The Wisconsin Women's Business Initiative Corporation (WWBIC)*

During the site visit, the review team explained that the focus of the DBE financial institution requirement addressed supporting minority-owned banks by encouraging the deposit of FTA project and other funds in these banks by DPW and its prime contractors. The requirement is for DPW to investigate the existence of minority-owned banks and to consider supporting these banks by making deposits in them and otherwise using the banks' services, when deemed appropriate. Moreover, DPW was to encourage its prime contractors to do the same. The focus of the DBE financial institution requirement is not, necessarily, to provide financing assistance to DBE subcontractors. Although useful to its DBE program and the development of DBEs, this assistance is more appropriately included as an element of DPW's supportive services initiatives and/or Business Development Program.

Corrective Actions and Schedule

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

- Documentation confirming it has investigated and considered the services of Columbia Savings and Loan Association.
- An updated DBE Program Plan that includes referencing the FSR in its procedures for investigating the availability of DBE financial institutions that DPW and/or its contractors could use for banking services; includes an updated list of viable minority-owned banks, removing NMSB from the list; and removes language related to providing financing assistance to DBE subcontractors from the DBE Financial Institutions section of its plan.
- Documentation confirming it has disseminated information on the availability of DBE financial institutions to prime contractors encouraging them to use one or more of the DBE financial institutions identified by DPW.

6.5 DBE Directory

Basic Requirement (49 CFR Part 26.31)

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

Discussion

During this compliance review, FTA found no deficiencies with this requirement. DBE program certification and administration in Wisconsin, including DBE Directory maintenance, was the responsibility of the Wisconsin Unified Certification Program (Wisconsin UCP). The Wisconsin UCP comprised the following four certifying agencies: Wisconsin Department of Transportation (DOT), City of Madison – Department of Civil Rights, Dane County – Office of Equal Opportunity, and Milwaukee County – Community Business Development Partners. At the time of the site visit, DPW was a noncertifying member of the Wisconsin UCP.

The Wisconsin UCP DBE Directory included the information required for DBEs and was available for download from [Wisconsin UCP DBE Directory website](#). Wisconsin DOT updated the DBE directory monthly.

Corrective Action and Schedule

FTA requires no corrective actions on the part of DPW for the DBE directory requirement.

6.6 Overconcentration

Basic Requirement (49 CFR Part 26.33)

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

Discussion

During this compliance review, FTA found no deficiencies with this requirement. FTA issued an advisory comment with this requirement. In its DBE Program Plan, DPW stated it had not determined overconcentration existed and that its DBELO would conduct a review of overconcentration every 18 months. When reviewing for overconcentration, DPW looked at DBE participation in each NAICS code. If DBE participation exceeded 50 percent of the work available in any NAICS code, DPW determined overconcentration to exist. In the event DPW determined overconcentration to exist, DPW stated it would take steps to reduce the negative impact to non-DBE firms. However, DPW did not further describe in detail what steps it would take.

Corrective Actions and Schedule

FTA advised DPW to update its DBE Program Plan to include a detailed description of the steps it takes to address overconcentration.

6.7 Business Development Programs

Basic Requirement (49 CFR Part 26.35)

Recipients may establish a Business Development Program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program.

Discussion

During this compliance review, FTA found deficiencies with this requirement. At the time of the site visit, DPW had not developed a BDP, as required by 49 CFR Part 26.35 and Appendix C of the regulation. The language included in DPW's DBE Program Plan regarding its BDP was mostly aspirational and not yet implemented. For example, DPW stated it

will develop a mechanism to provide interested DBE firms, where applicable, an evaluation of their onsite work with recommendations for improvement. This process will help to verify that the DBE participant is developing or has developed the necessary technical expertise required in the industry to take on increased opportunities.

DPW further stated it

will develop a concise training course, conducive to the challenging schedule of DBE firms, to assist these firms in the bidding and scheduling process -- in an effort to increase DBE bidding and success at the Prime level.

DPW did not provide evidence that it had developed the referenced course.

DPW did state that in addition to the courses it intended to develop, it worked

in partnership with the Milwaukee Metropolitan Sewerage District in a Business Development Training Program. Businesses Certified as Small, Disadvantaged, 8a, Minority or Women by any Wisconsin government based agency may apply. Enrollment is competitive and limited to firms providing services that are useful on capital development projects. Commitment to attending classes is a requirement.

However, DPW did not provide documentation describing the Milwaukee Metropolitan Sewerage District's (MMSD) Business Development Training and the involvement of DBEs associated with its FTA DBE program. The review team could not evaluate whether the MMSD program met DBE program requirements.

Corrective Actions and Schedule

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

- Documentation confirming it has developed and implemented a BDP per 49 CFR Part 26, Appendix C.
- A plan and schedule for identifying and enrolling DBEs associated with its FTA DBE program in its BDP.

- An updated DBE Program Plan that describes in detail DPW's newly developed and implemented BDP.

6.8 Determining/Meeting Goals

A) Calculation

Basic Requirement (49 CFR Part 26.45)

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

Discussion

During this compliance review, FTA found no deficiencies with this requirement. FTA issued advisory comments with this requirement. In calculating its FY 2015–17 goal, DPW implemented the U.S. DOT–recommended two-step goal-setting process. DPW first established its market area as the southeast region of the State of Wisconsin, requiring all firms to have expressed an interest in doing business in this region in order for DPW to include them in the goal calculation. DPW then established that due to the lack of past performance data on federally funded projects, it would use a list of nonduplicated firms compiled from the City of Milwaukee's Small Business Enterprise (SBE) program and the Wisconsin UCP with relevant North American Industry Classification System (NAICS) codes to determine the number of ready, willing, and able DBE firms in the market area to work on the streetcar project for the goal period (FY 2015–17). DPW used the U.S. Census Bureau 2012 County Business Patterns NAICS codes for the Wisconsin southeast region to determine all firms ready, willing, and able to work on the streetcar project. However, when calculating the availability of ready, willing, and able DBE firms relative to all firms, DPW calculated the firms with the relevant construction services NAICS codes separately from the firms with relevant professional services NAICS codes. Effectively, DPW established two step-one goals, one for construction services (27.66 percent) and one for professional services (24.24 percent). The review team also noted that in its methodology, DPW lists the relevant construction services NAICS codes, but does not identify the relevant professional services NAICS codes it used in its calculation.

In step two of its goal calculation, DPW made two adjustments to its step one goal. DPW made its first adjustment to its construction services goal and was based on actual past performance of firms in its SBE program performing construction services under the relevant NAICS codes. Similarly, DPW applied the City of Milwaukee's SBE past estimate (not actual performance) of professional services opportunities to its step one professional services goal. This first adjustment resulted in a construction services goal of 26.43 percent (rounded by DPW to 26.5 percent) and a professional services goal of 21.67 percent (rounded by DPW to 21.7 percent).

DPW further applied the results of an online interest survey sent to all identified ready, willing, and able DBE firms and other contractors to further gauge interest from the business community in working on the streetcar project. As a result of the survey, DPW identified construction and professional service contracting opportunities previously thought to be DBE firm eligible now ineligible for DBE participation due to a lack of DBE firms qualified to perform the work projected

in FY 2015–17. For example, DPW included the following table in its goal methodology to explain its second adjustment to its step one goal:

<i>Category or Action</i>	<i>Line</i>	<i>Construction</i>	<i>Professional Services</i>
<i>Base Goal</i>	<i>A</i>	<i>26.5%</i>	<i>21.7%</i>
<i>Cost by category of work (1)</i>	<i>B</i>	<i>\$36,081,671</i>	<i>\$10,298,000</i>
<i>Construction Excluded: Value of installed rail acquisition of substation</i> <i>Professional Services Excluded: Vehicle Procurement Consultant Services</i>	<i>C</i>	<i>\$7,859,872</i>	<i>\$1,800,000</i>
<i>Available for Participation</i>	<i>D</i>	<i>\$28,221,799</i>	<i>\$8,498,000</i>
<i>DBE Expenditure Goal = Line A x Line D</i>	<i>E</i>	<i>\$7,478,777</i>	<i>\$1,844,066</i>

The reduction in projected DBE expenditures resulted in the following final construction, professional service, and overall project goals:

<i>Category or Action</i>	<i>Line</i>	<i>Construction</i>	<i>Professional Services</i>	<i>Project</i>
<i>DBE Expenditure</i>	<i>A</i>	<i>\$7,478,777</i>	<i>\$1,844,066</i>	<i>\$9,322,843</i>
<i>Total Budget</i>	<i>B</i>	<i>\$36,081,671</i>	<i>\$10,298,000</i>	<i>\$46,379,671</i>
<i>New Goal (Line C = A/B)</i>	<i>C</i>	<i>20.73%</i>	<i>17.91%</i>	<i>20.1%</i>

FTA found this step two adjustment to be reasonable for the streetcar project and concurred in the methodology.

Corrective Action and Schedule

FTA advised DPW to add all FTA-funded projects, including planning and operations projects, to its goal-setting process and to not limit its goals to those contracting opportunities associated with the construction of its streetcar project. FTA further advised that for future goal-setting processes, DPW list all relevant NAICS codes, including construction, professional service, and otherwise, and weight its step one goal accordingly per the U.S. DOT goal-setting recommendations found at www.transportation.gov.

B) Public Participation

Basic Requirement (49 CFR Part 26.45)

In establishing an overall goal, recipients must provide for public participation through consultation with minority, women, and contractor groups regarding efforts to establish a level playing field for the participation of DBEs. Recipients must publish a notice announcing the overall goal on the recipients’ official websites and may publish the notice in other media outlets with an optional 30-day public comment period.

Discussion

During this compliance review, FTA found no deficiencies with this requirement. FTA issued an advisory comment with this requirement. In its DBE Program Plan, DPW clearly described its process for facilitating public participation in the development of its DBE goals. In its plan and

during the site visit, the review team confirmed DPW engaged in a consultative process with DBE and non-DBE firms, as well as DBE and small-business advocacy groups throughout its market area, as required by 49 CFR Part 26.45. DPW had assembled and actively used its DBE Advisory Committee to get feedback on its proposed goals and other DBE program-related matters. The DBE Advisory Committee included representation from the following organizations:

- African American Chamber of Commerce
- American Council of Engineering Companies-Wisconsin
- American Indian Chamber of Commerce
- Associated Builders and Contractors of Wisconsin
- Associated General Contractors of Greater Milwaukee
- City of Milwaukee Office of Small Business Development
- Hispanic Chamber of Commerce of Wisconsin
- Hmong Chamber of Commerce of Wisconsin
- Milwaukee County Community Business Development Partners
- Milwaukee Inner City Congregations Allied for Hope
- Milwaukee Urban League
- National Association of Minority Contractors – Wisconsin
- United Community Center
- Wisconsin Transportation Builders Association
- Wisconsin Underground Contractors

In addition, following its consultation with DBE program stakeholders, DPW published a notice of the proposed overall goals, informing the public that the proposed goal and its rationale were available for inspection during normal business hours at DPW for 30 days following the date of the notice and that DPW accepted comments on the goals for 30 days from the date of the notice. DPW published the notice in local news media, including *The Daily Reporter*, *Milwaukee Community Journal*, and *El Conquistador* newspapers. In addition, DPW published the notice on the City of Milwaukee website and the website designed specifically for the Streetcar Project.

FTA advised DPW to begin its public participation process as soon as possible as its next triennial DBE goal is due on August 1, 2017.

Corrective Actions and Schedule

FTA requires no corrective actions on the part of DPW for the public participation requirement.

C) Race-Neutral DBE Participation

Basic Requirement (49 CFR Part 26.51)

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

Discussion

During this compliance review, FTA found deficiencies with this requirement. Although DPW explained its rationale for determining the percentage of its DBE goal obtained through race-neutral means (0.4 percent) given limited historical data, DPW did not describe its ongoing efforts to facilitate and maximize the achievement of its goal through race-neutral means, as described in 49 CFR Part 26.51. The recommended methods described therein are as follows:

- 1) *Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under §26.39 of this part.*
- 2) *Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);*
- 3) *Providing technical assistance and other services;*
- 4) *Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);*
- 5) *Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;*
- 6) *Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;*
- 7) *Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;*
- 8) *Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and*
- 9) *Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.*

In addition, DPW did not develop and implement a small business element as required.

Corrective Actions and Schedule

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

- An updated DBE Program Plan that includes a description of the race-neutral means implemented by DPW, as required by 49 CFR Part 26.45 and recommended by 49 CFR Part 26.51.

- A small business element, as required by 49 CFR Part 26.39. DPW's small business element can be submitted as part of its updated DBE Program Plan.

D) Race-Conscious DBE Participation

Basic Requirement (49 CFR Part 26.51)

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

Discussion

During this compliance review, FTA found no deficiencies with this requirement. In its FY 2015–17 DBE Goal Methodology, DPW established an overall goal of 20.1 percent, 19.7 percent of which DPW would obtain through race-conscious means. DPW determined the race-conscious portion of its overall goal after evaluating, based on limited historical data, the portion of its overall goal it would likely achieve through race-neutral means, as required by 49 CFR Part 26.

Corrective Actions and Schedule

FTA requires no corrective actions on the part of DPW for the race-conscious DBE participation requirement.

E) Good Faith Efforts

Basic Requirement (49 CFR Part 26.53)

Recipients may award contracts with DBE goals only to bidders who have either met the goals or conducted good faith efforts (GFEs) to meet the goals. Bidders must submit the names and addresses of the DBE firms that will participate on the contract, a description of the work each DBE will perform, the dollar amount of DBE participation, written commitment to use the DBE(s) submitted in response to the contract goal, written confirmation from each DBE listed, or good faith efforts as explained in Appendix A of 49 CFR Part 26. The bidders must submit documentation of these efforts as part of the initial bid proposal—as a matter of responsiveness; or no later than 5 days after bid opening—as a matter of responsibility. The recipient must review bids using either the responsiveness or responsibility approach and document which approach it uses in its DBE Program Plan.

Discussion

During this compliance review, FTA found deficiencies with this requirement. DPW employed the construction manager/general contractor (CM/GC) project delivery model for the MSP. In doing so, DPW did not address or otherwise explain how it reconciled the CM/GC model (explained below) with the GFE requirements found in 49 CFR Part 26, nor its own treatment of a bidder's compliance with GFEs as a matter of responsiveness as described in its DBE Program Plan. In addition, DPW did not provide documentation confirming it followed its GFE procedures in its DBE Program Plan for its owner's representative (The Concord Group) and design contractor's (HNTB Corporation) procurements.

As understood by the review team, the CM/GC project delivery model is a two-phase approach similar to the design-build model, except many in the construction industry believe the CM/GC model comparatively reduces design and construction time and related costs. The CM/GC model reportedly accomplishes these reductions by better facilitating innovation, flexibility, cost control and certainty, fewer change orders and overruns, higher design quality, less risk, optimized schedules, enhanced collaboration, upfront value engineering, and improved constructability.

The CM/GC model requires a design phase and a construction phase. In the design phase, the CM/GC works collaboratively with the design contractor and project owner to identify risks, provide cost projections, and refine the project schedule. The project owner then negotiates the price for the final construction contract with the CM/GC. After the CM/GC and project owner reach an agreement, the project enters the construction phase.

Under the CM/GC model, although the project owner sets an overall DBE goal for the entire project, in most cases neither the project owner nor CM/GC have enough information prior to phase 1 to submit the required DBE GFE information as a matter of responsiveness at the time of bid, or as a matter of responsibility within five days of the bid submission. The CM/GC is in a better position to provide detailed GFE information once it completes phase 1 (design) and enters phase 2 (construction) of the project.

As the CM/GC model is a relatively innovative approach to construction project management, federal agencies have had to consider and provide direction on its use vis-à-vis 49 CFR Part 26 GFE requirements for bidders on federally funded projects to submit GFEs as a matter of responsiveness or responsibility. The CM/GC model does not practically allow for either option.

As precedent, this *Federal Register* Final Rule (Vol. 81, No. 232, Friday, December 2, 2016) provided the following discussion and guidance regarding the use of the CM/GC model in Federal Highway Administration (FHWA)–funded construction projects:

The GCA [General Contractors Association of New York] believed that the CM/GC rule should clarify that CM/GC is similar to design-build with respect to the use of DBE program requirements. The GCA believed that design-build and CM/GC are similar in that it is difficult to identify specific DBE commitments up front as part of the bid documents. The GCA stated that the CM/GC contractor should only be required to put forth the list of the DBEs to be used for work in the first year of the project, or for early work items, and, for work that will be performed in later years, to list the categories of work that will be available for DBE participation. The ARTBA [American Road & Transportation Builders Association] noted that the DBE program requirements are still geared toward the traditional design-bid-build delivery process and that the increased use of alternative contracting techniques has precipitated apparent compliance gaps in the DBE program. The ARTBA stated that it is critical that FHWA provide clarity in exactly how DBE program compliance is to be harmonized with the CM/GC process as the latter evolves in use. The ARTBA indicated that uncertainty in this regard merely invites various agencies, or individual officials, to inject their own, unrelated policy priorities into the procurement process. As it relates to DBE compliance, the GCA and ARTBA believed that CM/GC projects should be treated like design-build projects where the contractor has some flexibility in identifying DBE commitments when submitting its technical and price proposals.

In response, FHWA agrees that CM/GC contracting presents a variation from the DBE selection process used in traditional design-bid-build projects. The FHWA recognizes ARTBA's concerns regarding potential DBE implementation issues on alternative contracting projects, but DBE policy revisions are best made through the rulemaking process for the DBE program. The FHWA believes that it is possible for the CM/GC contractor to provide the DBE documentation required by 49 CFR 26.53(b)(2) when the CM/GC contractor is providing its initial proposal for the construction services. There may be situations, however, where at this stage there is not sufficient detail (such as price, scope, and schedule) to provide the required DBE information.

The FHWA has added language to the rule that will allow the CM/GC contractor to provide a contractually binding commitment at the time of initial proposal that will commit the contractor to meet the DBE contract goal if the contractor is awarded the construction services contract. This would give the CM/GC contractor time to provide the information required by 49 CFR 26.53(b)(2) before the contracting agency awards the contract. For example, CM/GC contractors may be able to gather and provide the required DBE documentation when the contracting agency and the CM/GC contractor enter into final price discussions because the level of design would be relatively high, and the scope and schedule would be defined so that risk and price can be assigned. This allowance is consistent with 49 CFR 26.53.(b)(3)(ii) for negotiated procurement situations.

49 CFR Part 26.53.(b)(3)(iii) reads as follows:

Provided that, in a negotiated procurement, including a design-build procurement, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by the recipient.

DPW hired Kiewit Infrastructure as its CM/GC and HNTB Corporation as its design firm. In addition, DPW hired The Concord Group to provide overall project management. During the site visit, the review team discussed DPW's use of the CM/GC model in detail with DPW and its owner's representative, confirming the CM/GC's intent and initial preparations to document and confirm construction phase GFE requirements were met. The owner's representative provided a detailed spreadsheet used by the CM/GC to record and track actual and planned DBE participation.

DPW did not explain its CM/GC procedures in its DBE Program Plan. In addition, DPW's RFP/contract *Exhibit K – Disadvantaged Business Enterprise (DBE) Utilization Specifications*, contained the following language:

If awarded the contract, you will enter into a contractual agreement, directly or through subcontractors, according to the Commitment to Contract with DBE (DBE-14) form(s) submitted with your bid/proposal. Copies of the executed contract(s) or purchase order(s) will be required to be submitted to DPW.

DPW required bidders to submit its *Exhibit Q – Commitment to Contract with DBE* form with its bid proposal. This form required the bidder to communicate the DBE's name, scope of work,

contract amount, and percentage of total contract. In the CM/GC model, this information would likely not be available at the time of bid for phase 1 of the project.

Corrective Actions and Schedule

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

- An updated DBE Program Plan that describes in detail DPW's GFE requirements applicable to contracting under the CM/GC model and otherwise.
- Documentation that GFE requirements were met in the owner's representative (The Concord Group) and design contractor's (HNTB Corporation) procurements.
- Updated RFP and contract exhibits that reflect CM/GC-related exceptions to the requirement for bidders to provide GFEs as a matter of responsiveness.

F) Protecting Against Termination for Convenience

Basic Requirements (49 CFR Parts 26.53 and 26.13)

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

Discussion

During this compliance review, FTA found deficiencies with this requirement. DPW's DBE Program Plan did not address the requirement to provide protections against termination for convenience. In addition, a review of several contracts showed they did not include language to meet this requirement: equipment contract No. C523150521 (Brookville), professional services prime contract No. C523130510 (HNTB) and three related subcontracts, and CM/GC contract documents all lacked the required provision. Finally, the contracts between HNTB and its subcontractors Martinsek and Associates, Zoe Engineering, LLC, and Paragon Project Resources, Inc. contained the following language:

HNTB may terminate or suspend performance of all or any part of this Agreement for HNTB's convenience upon written notice to Consultant. Upon receipt of notice, Consultant shall terminate or suspend performance of the Services on a schedule acceptable to HNTB. Consultant's sole remedy shall be payment for Services performed in accordance with this Agreement up to the effective date of termination or suspension. Nothing in this Article shall prohibit or limit HNTB from recovering its costs, losses and damages (direct, indirect, and consequential) arising out of or resulting from Services provided by Consultant prior to HNTB's termination or suspension for convenience.

Corrective Action and Schedule

Within 60 days of the issuance of the final report, DPW must submit to the FTA Office of Civil Rights an updated DBE Program Plan that describes the steps it takes to ensure protection against termination for convenience, as required by 49 CFR Part 26. DPW must provide documentation confirming it has instructed HNTB to amend all its MSP subcontracts by replacing the existing termination for convenience language with language consistent with the requirements found in 49 CFR Part 26.53, and that HNTB has complied.

G) Counting DBE Participation

Basic Requirement (49 CFR Part 26.55)

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

Discussion

During this compliance review, FTA issued an advisory comment with this requirement. In its DBE Program Plan, DPW included many of the requirements in 49 CFR Part 26.55 establishing what grantees can count toward the achievement of DBE participation goals. DPW also included these requirements in *Exhibit K – Disadvantaged Business Enterprise (DBE) Utilization Specifications*, incorporated in all RFPs and contracts. However, DPW did not describe in sufficient detail in this section of its plan how it would ensure it was accurately counting DBE participation, as required. During the site visit, DPW explained that during the design stage of its streetcar project, it periodically interviewed DBEs regarding the scope of work they performed and related payments. DPW also required prime contractors to report monthly on payments received from DPW and payments made by the prime contractor to DBEs. DPW then verified those reports by contacting DBEs to ensure there were no payment issues. In addition, in the section of its plan in which DPW described its monitoring procedures and enforcement mechanisms, DPW provided the specific steps it takes to ensure the collection and reporting of accurate DBE participation. Finally, as part of the RFP and contract exhibits that accompany DPW contracting opportunities, DPW included the DBE Site Monitoring checklists used to assist in ensuring the accurate counting of DBE participation.

Corrective Actions and Schedule

FTA advised DPW not only to describe what it will count toward DBE achievement goals, but to more clearly describe how it will count DBE participation by documenting and describing all its relevant procedures in the Counting DBE Participation section of its DBE Program Plan.

H) Quotas

Basic Requirements (49 CFR Part 26.43)

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

Discussion

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

Corrective Action and Schedule

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

6.9 Shortfall Analysis and Corrective Action Plan

Basic Requirement (49 CFR Part 26.47)

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

Discussion

During this compliance review, FTA found a deficiency with this requirement. DPW did not meet its FY 2016 DBE goal of 20.1 percent, achieving DBE participation of 17.4 percent, and did not conduct the required shortfall analysis and prepare the required corrective action plan.

Corrective Actions and Schedule

Within 60 days of the issuance of the final report, DPW must submit to the FTA Office of Civil Rights a shortfall analysis and corrective action plan for its FY 2016 DBE goal shortfall.

6.10 Transit Vehicle Manufacturers (TVMs)

Basic Requirement (49 CFR Part 26.49)

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

Discussion

During this compliance review, FTA found deficiencies with this requirement. In its DBE Program Plan, DPW did not include in its TVM contract award procedures the requirement to report to FTA within 30 days of TVM contract award.

DPW entered into a vehicle equipment contract with Brookville Equipment Corporation on November 11, 2015, confirming the awardee was on the FTA's TVM list. However, at the time of the site visit, DPW had not yet reported the contract award to FTA as required. During the site

visit, the review team demonstrated how to access and complete the required TVM contract award information via the online TVM Vehicle Award Report located on the FTA website.

Corrective Actions and Schedule

Within 60 days of the issuance of the final report, DPW must submit to the FTA Office of Civil Rights an updated DBE Program Plan that includes procedures for meeting all applicable TVM requirements described in 49 CFR Part 26.49. In addition, DPW must complete the online FTA TVM Vehicle Award Report for its Brookville Equipment Corporation TVM contract.

6.11 Required Contract Provisions

A) Contract Assurance

Basic Requirement (49 CFR Part 26.13)

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

Discussion

During this compliance review, FTA found deficiencies with this requirement. U.S. DOT 49 CFR Part 26.13 requires the inclusion of the following clause in all DOT-assisted contracts:

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

- (1) Withholding monthly progress payments;*
- (2) Assessing sanctions;*
- (3) Liquidated damages; and/or*
- (4) Disqualifying the contractor from future bidding as non-responsible.*

DPW did not include the entire assurance in its DBE Program Plan, omitting the four potential remedies listed in the clause above. In addition, in its DBE Program Plan DPW stated it would include the DBE nondiscrimination assurance in its plan in every U.S. DOT-assisted contract and subcontract. A review of equipment contract No. C523150521 (Brookville), professional services prime contract No. C523130510 (HNTB), and related subcontracts with Paragon Project Resources Inc., Zoe Engineering LLC, and Martinsek and Associates showed that DPW included DBE nondiscrimination language that substantially met the spirit of the requirement in the prime contract, and the prime contractor (HNTB) included the same language in the subcontracts reviewed. However, the language used in the contracts reviewed was not the language DPW ensured in its plan it would include in all prime contracts and subcontracts.

Finally, a review of CM/GC contract documents, in particular contract requirement exhibits referenced in the contracts, did not include DPW's nondiscrimination assurance. The review team reviewed the following exhibits: *Exhibit K – Disadvantaged Business Enterprise (DBE) Utilization Specifications*, *Exhibit Q – Commitment to Contract with DBE*, and *Exhibit S – Milwaukee Streetcar Project Federal Transit Administration Requirements*.

During the site visit, DPW indicated it had drafted a DBE provisions template that would include the required DBE nondiscrimination assurance and other DBE-related provisions. DPW planned to make this template available for reference and use by its prime contractors and subcontractors, as appropriate.

Corrective Actions and Schedule

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

- An updated DBE Program Plan that includes the complete DBE nondiscrimination assurance, as required by 49 CFR Part 26.13.
- Documentation confirming that all CM/GC contracts include the required nondiscrimination assurance or documentation confirming that DPW has amended all CM/GC contracts to include said assurance.
- A final DBE provisions template that includes the required nondiscrimination clause.

B) Prompt Payment

Basic Requirement (49 CFR Part 26.29)

Recipients must establish a contract clause to require prime contractors to pay subcontractors for satisfactory performance on their contracts no later than 30 days from receipt of each payment made by the recipient. This clause must also address prompt return of retainage payments from the prime to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed.

Discussion

During this compliance review, FTA found no deficiencies with this requirement. DPW's DBE Program Plan contained the following language, which the review team confirmed DPW included in contracts No. C523150521 (Brookville), No. C523130510 (HNTB), and related subcontracts with Paragon Project Resources Inc., Zoe Engineering LLC, and Martinsek and Associates:

It is the City's policy to pay all invoices within 30 days. If the City does not make payment within 45 days after receipt of properly completed supporting payment and other required contract documentation, the City shall pay simple interest beginning with the 31st calendar day at the rate of one percent per month (unless the amount due is subject to a good-faith dispute and, before the 45th day of receipt, notice of the dispute is sent to the contractor by first-class mail, personally delivered, or sent in accordance with the notice provisions in the contract). If there are subcontractors, consistent with

s.66.0135(3), Wis. Stats., the prime contractor must pay or assure payment of subcontractors (at every tier) for satisfactory work within seven calendar days of each receipt of payment from the City of Milwaukee, or seven calendar days from receipt of a properly submitted and approved invoice from the subcontractor, whichever is later.

The prime contractor agrees further to release retainage payments to each subcontractor within 30 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment beyond the above-referenced timeframe may occur only for good cause following written approval of the DPW.

If the contractor fails to make timely payment to a subcontractor, the contractor shall pay interest at the rate of 12 percent per year, compounded monthly, beginning with the 8th calendar day. (See City of Milwaukee Common Council File No. 101137, adopted January 2011.)

In addition, DPW included this same prompt payment language in *Exhibit OO – Prompt Payment and Return of Retainage Provisions*, which appeared in all CM/GC contracts.

Corrective Action and Schedule

FTA requires no corrective action for the prompt payment requirement at this time.

C) Legal Remedies

Basic Requirements (49 CFR Part 26.37)

Recipients must implement appropriate mechanisms to ensure compliance by all participants, applying legal and contract remedies under Federal, state, and local law. Recipients should use breach of contract remedies as appropriate.

Discussion

During this compliance review, FTA found no deficiency with this requirement. DPW's DBE Program Plan included Attachment 7: Monitoring and Enforcement, which described the City, State of Wisconsin, and federal remedies available to DPW to enforce the DBE requirements contained in its contracts. Those remedies included

- *Breach of contract action, pursuant to the terms of the contract;*
- *Breach of contract action, pursuant to State law; and*
- *Milwaukee Code of Ordinances regulations.*
- *Suspension or debarment proceedings pursuant to 49 CFR Part 26;*
- *Enforcement action pursuant to 49 CFR Part 31; and*
- *Prosecution pursuant to 18 USC 1001.*

Corrective Action and Schedule

FTA requires no corrective action for the legal remedies requirement at this time.

6.12 Record Keeping and Enforcements

Basic Requirements (49 CFR Parts 26.11 and 26.37)

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

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

Discussion

During this compliance review, FTA found no deficiencies with this requirement. FTA issued advisory comments with this requirement. DPW submitted its first Semi-Annual Uniform Report in December 2013 and has since submitted all reports on time. Regarding monitoring the accuracy of its DBE reports and DBE performance in general, in its DBE Program Plan, DPW described 18 measures and enforcements it was either currently using or planned to use. A sample of DPW's monitoring measures is as follows:

DBEs are contacted monthly to confirm reported payment amounts and to ensure that there are no outstanding payment issues.

All prime contractors and consultants are required to report what they have been paid on a monthly basis, as well as what they have paid any DBEs. This helps to ensure that all DBEs are paid promptly.

All service providers will be required to submit progress billings monthly, inclusive of subcontractor invoices received. Progress billings shall indicate all payments received from the City of Milwaukee and all payments made to each subcontractor, at all tiers. Any retainage withheld, at any level, shall be clearly identified within the monthly billing.

Included with progress billings, all service providers shall submit accurate workforce certified payroll reports, for the immediate past reporting period, as well as all appropriate country of origin material/supply affidavits -- if required within the vendor's signed contract.

Each month, the City of Milwaukee shall confirm and reconcile all reported past payments – including retainage -- with each DBE Service Provider and appropriate material/supply affidavits before payments are made to the Prime Service provider for newly invoiced materials and services.

The City of Milwaukee will provide regular reviews of submittals from DBE consultants and contractors, and perform on and off site visits to observe work performed by DBE

firms, no less than quarterly, to ensure that DBE and non-DBE firms operate in accordance with 49 CFR 26.

During site visits, DPW will document the number of direct and subcontracted employees under the management and in the employment of DBE firms deployed to perform contracted work.

DPW will observe the portion of the DBE's direct employees engaged in supervisory, skilled or unskilled roles related to the DBE's contract scope of work.

DPW will monitor both approved and in place contracts as well as payments to DBE firms monthly for all categories of work to ensure Contractors achieve DBE commitments in each Contract.

The Owner's Representative shall monitor DBEs approved to perform Work on the project in the Contract and on the Awards List distributed by DPW Contract Administration. The Owner's Representative shall verify that DBE firms working are approved to work on the project by DPW.

The review team noted that because the streetcar project was relatively new, the majority of work performed by DBEs at the time of the site visit was design work with some preliminary minor construction underway. As such, DPW had not yet implemented all the monitoring measures detailed in its DBE Program Plan. For example, DPW had yet to implement visits to construction sites to observe work performed by prime contractor staff and DBEs or begun reconciling monthly supply and material affidavits.

DPW did demonstrate it was monitoring DBE performance throughout the design stage of the streetcar project. For example, DPW periodically interviewed DBEs regarding the scope of work they performed, invoicing, and prompt payment. DPW required prime contractors to report monthly on payments received from DPW and payments made by the prime contractor to DBEs. DPW then verified those reports by contacting DBEs to ensure there were no payment issues. During the site visit, DPW verbally described these procedures and activities; however, DPW did not provide notes or other documented records of its DBE monitoring efforts during the design stage.

DPW included the following enforcements in its DBE Program Plan:

DPW will bring to the attention of the USDOT any false, fraudulent, or dishonest conduct in connection with the program, so that USDOT can take the appropriate steps (e.g., referral to the Department of Justice for criminal prosecution; referral to the United States Inspector General; action under suspension and debarment or Program Fraud and Civil Penalties rules provided in 26.107).

DPW will consider similar action under its own legal authority, including responsibility determinations in future contracts. Attachment 12 (Chapter 370) lists the regulations, provisions, and contract remedies available to DPW in the event of non-compliance with the DBE regulations by a participant in DPW's procurement activities.

DPW will also implement a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by the DBEs. This

mechanism will provide for a running tally of actual DBE attainments (i.e., payment actually made to DBE firms), including a means of comparing these attainments to commitments.

Contractors which fail to achieve contracted participation commitments or to submit reports in a timely and accurate manner may have payments delayed or face other sanctions as provided by law.

At the time of the site visit, DPW had not needed to use any of its enforcement mechanisms.

The review team noted that in its list of monitoring and enforcement mechanisms, DPW included the following statement:

All service providers will commit to a minimum DBE contract spend on the project and all onsite construction contractors will commit to specific minimum percentages of minority and women workforce participation, both of which shall become elements of contract performance.

Prior to beginning work, all contractors shall provide an estimated workforce utilization plan indicating the number of hours to be worked by each onsite contractor - each month. The utilization shall include an estimate of the hours to be worked by minorities and women – for each contractor. The total hours worked by minorities and woman in this plan, expressed as a percentage of the total workforce hours, may not be less than the specific minimum percentage of minorities and women made at the time of the contract award.

These monitoring measures are not responsive to the DBE requirements found in 49 CFR Part 26.

Finally, throughout its description of its monitoring and enforcement mechanisms, DPW seemed to reference the City of Milwaukee, DPW, and the owner's representative interchangeably. If there is no reason for distinguishing between these entities, FTA recommends using only one of them to represent the grantee.

Corrective Actions and Schedule

FTA advised DPW to ensure it documented its monitoring activities, particularly once construction of the streetcar begins in earnest. The review team noted DPW's DBE Site Monitoring Checklist and DBE Site Monitoring Checklist Supplement and encouraged their use. However, as construction activity increases, DPW must ensure it documents all its monitoring efforts, including those that do not occur during scheduled and ad hoc site visits (e.g., periodic phone calls with DBEs). FTA recommended keeping a project diary that documents phone calls, construction progress meetings attended by DPW staff, and so forth.

FTA also advised DPW to remove those monitoring and enforcement measures more appropriately responsive to FTA EEO program requirements.

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7. Summary of Findings

Item	Requirement of 49 CFR Part 26	Ref.	Site Visit Finding(s)	Finding(s) of Deficiency	Response Days/Date
1.	DBE Program Plan	26.21	D	<p>Finding: DPW's DBE Program Plan did not address all required elements and did not apply to all FTA-funded projects.</p> <p>Corrective Action: DPW must submit to the FTA Office of Civil Rights an updated DBE Program Plan that includes all required elements and applies to all FTA-funded projects.</p>	60 Days
2.	DBE Policy Statement	26.23	D	<p>Findings: DPW did not provide documentation that it distributed its DBE Policy Statement to the DBE and non-DBE business communities as described in its DBE Program Plan. The policy statement included in DPW's DBE Program Plan was unsigned and undated.</p> <p>Corrective Actions: DPW must submit to the FTA Office of Civil Rights:</p> <ul style="list-style-type: none"> • Documentation confirming it has distributed its DBE Policy Statement, as required by 49 CFR Part 26.23 and as stated in its DBE Program Plan; and • An updated DBE Program Plan that includes a DPW DBE Policy Statement that is signed and dated. 	60 Days
3.	DBE Liaison Officer	26.25	AC	<p>Findings: The DBE Officer was incorrectly designated, and inadequate internal personnel were available to coordinate and administer the DBE program.</p> <p>Corrective Actions: DPW must submit to the FTA Office of Civil Rights:</p>	60 Days

				<ul style="list-style-type: none"> Documentation confirming it has designated someone other than its Commissioner of Public Works as its DBELO; and Evidence of all corrective actions taken to designate and/or coordinate DBE responsibilities properly. 	
4.	DBE Financial Institutions	26.27	D	<p>Findings: DPW's process for evaluating and considering the use of DBE financial institutions was lacking. DPW listed one bank that was not minority-owned. DPW misinterpreted the DBE financial institutions requirement inasmuch as it included provisions for helping DBE firms obtain financial assistance.</p> <p>Corrective Actions: DPW must submit to the FTA Office of Civil Rights:</p> <ul style="list-style-type: none"> Documentation confirming it has investigated and considered the services of Columbia Savings and Loan Association An updated DBE Program Plan that includes referencing the Federal Reserve Statistical Release on Minority-Owned Depository Institutions in its procedures for investigating the availability of DBE financial institutions that DPW and/or its contractors could possibly use for banking services; includes an updated list of viable minority-owned banks, removing NMSB from the list; and removes language related to providing financing assistance to DBE subcontractors from the DBE Financial Institutions section of its plan. Documentation confirming it has disseminated information on the availability of DBE financial institutions to prime contractors encouraging them to use one or more of the DBE financial institutions identified by DPW. 	60 Days
5.	DBE Directory	26.31	ND		
6.	Overconcentration	26.33	AC	<p>Findings: DPW's description of its process for evaluating the existence of overconcentration was lacking.</p>	

				<p>Corrective Action: FTA advised DPW to update its DBE Program Plan to include a detailed description of the steps it takes to address overconcentration.</p>	
7.	Business Development Programs	26.35	D	<p>Findings: DPW did not implement a Business Development Program, as required.</p> <p>Corrective Actions: DPW must submit the following to the FTA Office of Civil Rights:</p> <ul style="list-style-type: none"> • Documentation confirming it has developed and implemented a BDP per 49 CFR Part 26, Appendix C. • A plan and schedule for identifying and enrolling DBEs associated with its FTA DBE program in its BDP. • An updated DBE Program Plan that describes in detail DPW's newly developed and implemented BDP. 	60 Days
8.	Determining/Meeting Goals				
8.a	Calculation	26.45	AC	<p>Findings: DPW did not include all FTA-funded projects in its goal-setting process. DPW established separate DBE participation goals for construction service and professional services.</p> <p>Corrective Actions: FTA advised DPW to add all FTA-funded projects, including planning and operations projects, to its goal-setting process and to not limit its goals to those contracting opportunities associated with the construction of its streetcar project. FTA further advised that for future goal-setting processes, DPW list all relevant NAICS codes, including construction, professional service, and otherwise, and weight its step one goal accordingly per U.S. DOT goal-setting recommendations found at www.transportation.gov.</p>	

8.b	Public Participation	26.45	ND		
8.c	Race-Neutral DBE Participation	26.51	D	<p>Findings: DPW's race-neutral measures for obtaining DBE participation were lacking. DPW did not develop a small business element, as required.</p> <p>Corrective Actions: DPW must submit the following to the FTA Office of Civil Rights:</p> <ul style="list-style-type: none"> • An updated DBE Program Plan that includes a description of the race-neutral means implemented by DPW, as required by 49 CFR Part 26.45 and recommended by 49 CFR Part 26.51. • A small business element as required by 49 CFR Part 26.39. DPW's small business element can be submitted as part of its updated DBE Program Plan. 	60 Days
8.d	Race-Conscious DBE Participation	26.51	ND		

8.e	Good Faith Efforts	26.53	D	<p>Finding: DPW did not implement and/or enforce the GFE requirements described in its DBE Program Plan and in RFP and contract exhibits.</p> <p>Corrective Actions: DPW must submit to the FTA Office of Civil Rights:</p> <ul style="list-style-type: none"> • An updated DBE Program Plan that describes in detail DPW's GFE requirements applicable to contracting under the CM/GC model and otherwise. • Documentation that GFE requirements were met in the owner's representative (The Concord Group) and design contractor's (HNTB Corporation) procurements. • Updated RFP and contract exhibits that reflect CM/GC-related exceptions to the requirement for bidders to provide GFEs as a matter of responsiveness. 	60 Days
8.f	Protecting Against Termination for Convenience	26.53 and 26.13	D	<p>Finding: DPW did not include the required protections against termination for convenience in its DBE Program Plan or in all its contracts.</p> <p>Corrective Actions: DPW must submit to the FTA Office of Civil Rights an updated DBE Program Plan that describes the steps it takes to ensure protection against termination for convenience, as required by 49 CFR Part 26. DPW must also provide documentation confirming it has instructed HNTB to amend all its MSP subcontracts by replacing the existing termination for convenience language with language consistent with the requirements found in 49 CFR Part 26.53, and that HNTB has complied.</p>	60 Days
8.g	Counting DBE Participation	26.55	AC	<p>Findings: DPW described what it would count toward its DBE participation goals but did not sufficiently describe how it would count DBE participation.</p> <p>Corrective Actions:</p>	

				FTA advised DPW not only to describe what it will count toward DBE achievement goals, but to more clearly describe how it will count DBE participation by documenting all its relevant procedures in the Counting DBE Participation section of its DBE Program Plan.	
8.h	Quotas	26.43	ND		
9.	Shortfall Analysis and Corrective Action Plan	26.47	D	<p>Findings: DPW reported a DBE participation goal shortfall for FY 2016 and did not conduct a shortfall analysis and prepare a corrective action plan, as required.</p> <p>Corrective Actions: DPW must submit to the FTA Office of Civil Rights a shortfall analysis and corrective action plan for its FY 2016 DBE goal shortfall.</p>	60 Days
10.	Transit Vehicle Manufacturers (TVMs)	26.49	D	<p>Findings: DPW did not include procedures for reporting TVM awards in its DBE Program Plan. DPW did not submit the required TVM report to FTA within 30 days after awarding a TVM contract.</p> <p>Corrective Actions: DPW must submit to the FTA Office of Civil Rights an updated DBE Program Plan that includes procedures for meeting all applicable TVM requirements described in 49 CFR Part 26.49. In addition, DPW must complete the online FTA TVM Vehicle Award Report for its Brookville Equipment Corporation TVM contract.</p>	60 Days

11.	Required Contract Provisions and Enforcements				
11.a	Contract Assurance	26.13	D	<p>Findings: DPW's DBE Program Plan did not contain the complete nondiscrimination assurance, as required. DPW did not include the required nondiscrimination contract assurance in all contracts.</p> <p>Corrective Actions: DPW must submit the following to the FTA Office of Civil Rights:</p> <ul style="list-style-type: none"> • An updated DBE Program Plan that includes the complete DBE nondiscrimination assurance, as required by 49 CFR Part 26.13. • Documentation confirming that all CM/GC contracts include the required nondiscrimination assurance or documentation confirming that DPW has amended all CM/GC contracts to include said assurance. • A final DBE provisions template that includes the required nondiscrimination clause. 	60 Days
11.b	Prompt Payment	26.29	ND		
11.c	Legal Remedies	26.37	ND		
12.	Record Keeping and Enforcements	26.11 and 26.37	AC	<p>Finding: DPW did not adequately document all its recordkeeping and enforcement activities. DPW's documented procedures included considerations not covered by 49 CFR Part 26.</p> <p>Corrective Actions: FTA advised DPW to ensure it documented all its monitoring activities. FTA recommended keeping a project diary that documents phone calls, construction progress meetings attended by DPW staff, and so forth.</p> <p>FTA also advised DPW to remove those monitoring and enforcement measures more appropriately responsive to FTA EEO program requirements.</p>	

Findings at the time of the site visit: ND = no deficiencies found; D = deficiency; AC = advisory comment.