



Disadvantaged Business Enterprises Program Plan

Prepared by:
The Office of Diversity and Civil Rights

Prepared for:
Federal Transit Administration

June 21, 2022

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POLICY STATEMENT (26.1, 26.23)

The Massachusetts Bay Transportation Authority, hereinafter referred to as “the Authority” or “the MBTA,” has established a Disadvantaged Business Enterprise (DBE) Program in accordance with regulations of the U.S. Department of Transportation (USDOT), 49 CFR Part 26. The Authority has received Federal financial assistance from the USDOT, and as a condition of receiving this assistance, the Authority has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of the Authority to ensure that DBEs, as defined in 49 CFR Part 26, have an equal opportunity to receive and participate in contracts funded wholly or in part by USDOT funds. Further, in keeping with the spirit of growth and development, raising the bar to fulfill business needs and ensuring quality, the Authority will also provide networking opportunities, technical support, guidance and training to DBEs and contractors to support quality business partnerships.

It is the policy of the Authority to do the following:

1. Ensure non-discrimination in the award and administration of USDOT-assisted contracts.
2. Create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts.
3. Ensure that the DBE Program is narrowly tailored in accordance with applicable law.
4. Ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate in the DBE Program.
5. Help remove barriers to the participation of DBEs in USDOT-assisted contracts.
6. Assist the development of firms that can compete successfully in the market place outside the DBE Program.

In administering the DBE Program, the Authority will not do the following:

1. Exclude any person from participation in the award and performance of any contract on the basis of age, race, color, religion, sexual orientation, disability or national origin.
2. Directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of 49 CFR Part 26.
3. Use race- or gender-conscious participation set-asides on any USDOT-assisted contracts; but race- or gender-neutral set-asides can be used as part of the MBTA’s Fostering Small Business Program.

Implementation of the DBE Program is accorded the same priority as compliance with all other legal obligations incurred by the Authority in its financial assistance agreements with the USDOT. The Assistant Secretary of the Office of Diversity and Civil Rights, Julian T. Tynes, has been designated as the DBE Liaison Officer (DBELO), and has unimpeded and direct access to the General Manager, Steve Pofatak. In that capacity, the Assistant Secretary is responsible for implementing all aspects of the DBE Program. The DBELO shall act in an administrative capacity in implementing the DBE Program throughout the Authority.

SUBPART A – GENERAL REQUIREMENTS

Applicability (26.3)

Pursuant to 49 CFR § 26.3, the Authority is the recipient of federal financial assistance from the Federal Transit Administration (FTA) of the USDOT and is required to implement a DBE Program in accordance with 49 CFR Part 26. The DBE Program outlined herein applies to all Authority contracts that are funded, in whole or in part, by USDOT.

Definitions (26.5)

Terms and definitions applicable to the USDOT DBE Program and this Program Plan may be found at 49 CFR Part 26 and related appendices and guidance pages.

Non-Discrimination Requirements (26.7)

The Authority will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

In administering the DBE Program, the Authority will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing the accomplishments of the objectives of this DBE Program with respect to individuals of a particular race, color, sex or national origin.

Record Keeping Requirements (26.11)

Reporting to USDOT (26.11(a))

The Authority will report DBE participation to the FTA on a semi-annual basis using the Uniform Report of DBE Awards or Commitments and Payments form. These reports will reflect payment actually made to DBEs on USDOT-assisted contracts. This report shall be filed on or by each June 1 and December 1 of the calendar year.

Bidders List (26.11(c))

The Authority is creating and maintaining a bidders list which consists of information required under 49 CFR § 26.11(c) about all DBE and non-DBE firms that seek to work on USDOT-assisted contracts. The purpose of this list is to provide accurate data about the universe of DBE and non-DBE contractors and sub-contractors who seek to work on federally-assisted contracts.

The list will be maintained on an on-going basis and will include all businesses that have shown interest in doing business with the Authority. The list will be used for targeted outreach activities and surveys to improve our process in ODCR and assist ODCR.

The list is derived from various sources in the Authority and includes the following:

1. Professional services firms that have been previously vetted during the Architectural & Engineering bidding process by Contract Administration.

2. Construction firms that have been previously vetted during the construction bidding process by Contract Administration.
3. DBEs that have been awarded contracts and purchase orders that are listed in the Capital Management Systems (CMS) and Financials and Materials Information System (FMIS) databases in the Information Technology Department (ITD) and the Procurement and Logistics department.
4. Vendors awarded Contracts and purchase orders (PO's) by the Procurement and Logistics Department for the period that the data is being analyzed.
5. Firms identified in the Authority's Business Center Program Data-Registration, including DBEs that have shown interest in performing on Authority projects.

Contract Assurances

Federal Financial Assistance Agreement (26.13(a))

The Authority has signed the following assurances, applicable to all USDOT-assisted contracts and their administration:

“The Authority shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any USDOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The Authority shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of USDOT-assisted contracts. The Authority's DBE Program, as required by 49 CFR Part 26 and as approved by USDOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the Authority of its failure to carry out its approved program, the Department may impose sanction as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or Program Fraud Civil Remedies Act of 1986 (U.S.C. 3801 et seq.)”

Contract Assurance (26.13(b))

The Authority will ensure that the following clause is placed in every USDOT-assisted contract and subcontract:

“The contractor, sub-recipient, 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 USDOT-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 Authority deems appropriate, which may include, but is not limited to:

1. Withholding progress payments;
2. Assessing sanctions;

3. Liquidated damages; and/or
4. Disqualifying the contractor from future bidding as non-responsible.”

The Authority will insert contract language in all its contracts requiring submission of sub-agreements to ODCR. The compliance staff will review said agreements for contract assurance language.

SUBPART B – ADMINISTRATIVE REQUIREMENTS

DBE Program Updates (26.21)

Since the Authority has received a grant of \$250,000 or more in FTA planning capital, and or operating assistance in a federal fiscal year the Authority will continue to carry out this program until all funds from USDOT financial assistance have been expended. The Authority will provide to USDOT updates representing significant changes in the program.

Policy Statement (26.23)

The Policy Statement is on page three (3) of this plan.

DBE Liaison Officer (DBELO) (26.25)

The Authority has designated the Assistant Secretary, Office of Diversity and Civil Rights as the DBE Liaison Officer (DBELO). In this capacity, the DBELO is responsible for implementing all aspects of the DBE Program and ensuring that the Authority complies with all provisions of 49 CFR Part 26. The DBELO has direct, independent access to the General Manager concerning DBE Program matters and has overall responsibility for all activities identified below. Other department staff, primarily the Deputy Chief of External Programs and the Assistant Director of Compliance, the Assistant Director for Special Projects and Subrecipients will assist the DBELO in carrying out obligations of the DBE Program. The delegated areas may include the coordination of program activities, including contract compliance, conducting outreach activities and preparation of required reports. The ODCR DBE Program Organizational Chart displaying the DBELO’s position in the organization is attached as Appendix A.

The DBELO is responsible for overseeing the development, implementation and monitoring of the DBE Program in coordination with other appropriate staff and officials. Duties and responsibilities of the DBELO in conjunction with staff under the charge of the DBELO include the following:

- Gathering and reporting statistical data and other information as required by USDOT;
- Works with other departments as required in reviewing third party contracts and purchase requisitions for compliance with this program;
- Working with all departments to establish the overall triennial DBE goals;
- Working with procurement offices to ensure that bid notices and requests for proposals are available to DBEs in a timely manner;
- Identifying contract and procurements so that a DBE goal is included in each solicitation as appropriate (contract specific goal) and monitors results;

- Analyzing Authority's progress toward goal attainment and identifies ways to improve progress;
- Participating in pre-bid meetings as is necessary;
- Advising the General Manager on matters impacting DBE policy and achievement;
- Chairing the DBE Advisory Committee and providing guidance to the DBE Program;
- Providing DBEs with information and assistance in preparing bids, obtaining bonding and insurance;
- Planning and participating in DBE training seminars, tradeshow and other marketing tools;
- Acting as a liaison to the Unified Certification Program in Massachusetts;
- Providing outreach to DBEs and community organizations to advise them of contracting opportunities;
- As a member of the UCP, providing oversight of the maintenance of the DBE Directory and
- Submitting the FTA Semi-Annual Reports.

DBE Program Staff (26.25)

The Authority will provide adequate staff to administer its DBE Program in accordance with 49 CFR 26.25. The day-to-day activities of the DBE Program are not solely carried out by the DBELO. To ensure the effective implementation of the program and the performance of the daily activities, the DBELO has assigned duties and responsibilities to senior staff members as summarized below and as is reflected in the organizational chart.

Deputy Chief of Diversity & Civil Rights, External Programs

Assist the DBELO by overseeing the development and implementation of the Authority's DBE Program. The Deputy Chief of External Programs has responsibility of supervising the work of the ODCR's Assistant Director of Government Compliance, Assistant Director for Special Projects and Subrecipients, the Deputy Director of the Small Business Resource Center and other staff. The Deputy Chief also reviews the Authority's Triennial DBE Goal, FTA DBE Semi-annual reports, DBE shortfall analysis and other reports and program activities.

Assistant Director for Government Compliance

The Assistant Director for Government Compliance provides management support to the DBELO with the following duties and responsibilities:

- Overseeing, directing and supervising functions related to DBE program's development, implementation, and monitoring and enforcement requirements.
- Assisting the DBELO in conjunction with compliance staff in ensuring the Authority's compliance with 49 CFR Part 26 as outlined above.
- Developing DBE outreach and business development activities.
- Developing a bidders' list as required by 49 CFR 26.11.
- Supervising the DBE Program staff; and other tasks as assigned by the DBELO or by the Deputy Chief of Civil Rights, External Programs; and
- Conducting shortfall analyses.

The Assistant Director for Government Compliance is responsible for the day-to-day administration and implementation of the DBE Program. The Assistant Director supervises the Government Compliance Program staff to implement the Authority's compliance with 49 CFR Part 26 and other tasks as assigned by the DBELO.

The Assistant Director of Government Compliance interfaces on a frequent basis with other Authority departments in the management and implementation of the Authority's DBE Program. The departments that provide information, data, materials and assistance to the Authority's Office of Diversity and Civil Rights are:

- Contract Administration (Capital Delivery Department) – Contract Administration is responsible for ensuring federally-funded construction and professional service contracts are assessed for establishing an individual DBE goal on contracts and Project Managers and Resident Engineers are working with Government Compliance staff in monitoring DBE performance. Contract Administration maintains the Capital Management System (CMS) which Government Compliance staff uses on a daily basis to monitor DBE performance.
- Procurement & Logistics (Goods and Services) –
 - The Procurement and Logistics Department is responsible for preparing bids for solicitation on Goods and Services for the MBTA. The Buyers in Procurement send DBE goal request to Government Compliance staff on federally funded procurements over \$35,000 which become part of the solicitation. Procurement and Logistics is responsible for entering bid award data into the Financial Management Information System (FMIS) and once entered, Compliance Staff can then monitor for DBE performance.
 - The Procurement and Logistics Department also processes Transit Vehicle Manufacturer (TVM) procurements, in accordance with 49 CFR § 26.49 and Subpart C of this Program Plan.
- Budget - The Budget/Grant Department provides the Authority financial data to ODCR on request or when deemed appropriate.
- Finance - Finance provides information for the DBE Program Plan on minority institutions the Authority is currently utilizing. The Finance Department is also responsible for auditing the FTA DBE Semi-Annual Report that is filed with the FTA.
- Information Technology (IT) – IT works with ODCR in providing IT-related solutions to ODCR's manual internal processes.
- Legal- the Legal Department advises the Government Compliance Unit on contract issues involving DBEs.
- Supplier Diversity Office (SDO) – SDO maintains an online directory of DBEs.

- Massachusetts Unified Certification Program (“MassUCP”) certifies firms for the DBE Program. MassUCP reports out on a periodic basis of newly certified and decertified DBE firms. All questions relating to certification status of a DBE firm are referred to MassUCP.

Assistant Director for Special Projects and Subrecipients

Responsible for overseeing and monitoring special projects including the Commuter Rail Operating Agreement and subrecipients and ensuring compliance with the DBE and civil rights-related programs. Duties and responsibilities include:

- Monitoring and ensuring commuter rail operator (Keolis) and subrecipients comply with DBE and related civil rights requirements;
- Ensuring that commuter rail and other subrecipients implement a policy of non-discrimination in the procurement of goods and services, professional services and construction;
- Providing guidance and technical assistance to commuter rail operator on DBE goal setting, good faith determination, monitoring and reporting;
- Developing appropriate DBE and related civil rights-related language for RFPs on special projects to ensure DBE requirements are a vital part of the procurement process;
- Playing lead role in reviewing and interpreting revised DBE regulations under 49 CFR Part 26;
- Coordinating the development and revision of the Authority’s DBE Program plan;
- Serving on the Authority’s senior management selection committee to review and evaluate responses to RFPs on special projects;
- Reviewing monthly and other DBE reports and statistical data from commuter rail operator and other subrecipients;
- Working with the commuter rail operator and subrecipients to encourage DBEs to participate in procurement opportunities;
- Serving as a Member of the Massachusetts DBE Adjudicatory Board;
- Working on DBE-related special assignments as directed by the Deputy Chief of External Programs.

Government Compliance Officers

Government Compliance Officers report to the Assistant Director of Government Compliance. Government Compliance Officers’ duties and responsibilities are as follows:

- Assisting in implementing, administering and monitoring of the Authority’s DBE Program;
- Interpreting and implementing federal rules and regulations;
- Conducting outreach activities; such as, participation in job fairs, workshops, seminars and other related activities, and participating in procurement bid meetings and selection committees;
- Monitoring firms to ensure contract and program compliance;
- Where appropriate, establishing an individual DBE goal on Construction, Professional Service and Goods & Services procurements;

- Conducting project reviews, consisting of site-visits, data gathering and analyses, Commercially Useful Function and attending project meetings;
- Monitoring contract compliance, including Prompt Payment & Retainage;
- Reviewing Change Orders, Amendments and related activities;
- Monitoring DBE firms to ensure current certification;
- Preparing Close-out Reports and monitoring certification;
- Assisting in maintaining a Bidders List; Review responses to Request for Proposals (RFPs) for EEO/AA/DBE compliance;
- Acting as a technical resource to contractors, employees, and the general public concerning regulations, the Authority's policies and procedures involving the DBE Program;
- Representing the Authority at transportation-related organizational events, and various community business groups and transit functions related to DBE programs; and
- Performing other duties as assigned.

DBE Financial Institutions (26.27)

It is the policy of the Authority to investigate, the full extent of services, offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage contractors on MBTA contracts subrecipients to make use of these institutions.

In an effort to identify and use such institutions, using the Federal Deposit Insurance Corporation (FDIC) directory from its website (www.fdic.gov/regulations/resources/minority) of financial institutions owned and operated by socially and economically disadvantaged persons, the MBTA will investigate any financial institutions established within the community, which are owned by socially and economically disadvantaged individuals. When financial institutions are opened during the period of this approved Program, the MBTA will use the services of the financial institutions when feasible and encourage contractors doing business with the MBTA to consider the same.

The Authority has made the following efforts to identify and utilize such institutions:

Commercial Banking Services

The Authority currently has funds on deposit with two minority-owned banks: Cathay Bank and East West Bank. The Authority also has Bond proceeds invested with East West Bank, which they won by competitive bid. Both deposit banks referenced here are American Subsidiaries of Asian Banks and serve the Asian and Greater Boston community.

Investment Banking Services

The Authority currently has three (3) tiers of participation on its competitively procured investment banking team: (1) senior managers, (2) co-managers, and (3) selling group members. Of the senior managers there is one DBE firm: Ramirez and Company.

Accounting Services

Through a competitive process, the Authority has engaged the firm of KPMG Peat Marwick as its financial auditor and KPMG uses the woman-owned accounting firm of P. L. Jones as its DBE partner.

Equipment Leasing

The Authority often acquires both revenue and non-revenue vehicles and other equipment through financing leases. The lease financing is competitively bid and the award is made to the lease arranger offering the best terms to the Authority.

Prompt Payment Mechanisms (26.29 & 26.37(c))

The Authority will include the following clause in each USDOT-assisted prime contract:

“The contractor must promptly pay each subcontractor under this contract for satisfactory performance of its contract within ten (10) business days from the receipt of each payment the contractor receives from the Authority. The contractor further agrees to make payment in full, including retainage, to each Subcontractor no later than ten (10) business days after the Subcontractor has satisfactorily completed all of the work required under its subcontract. Failure to comply with this requirement may result in the withholding of payment to the contractor until such time as all payments due under these Provisions have been received by the subcontractor(s) and/or referral to the Prequalification Committee for action, which may affect the contractor’s prequalification status.”

MBTA will include the above-stated clause in each USDOT-assisted contract as well as require that prime contractors on USDOT-assisted contracts include this provision in each of their subcontracts:

1. The Contractor is required to pay each first tier Subcontractor for all Work that the Subcontractor has performed to the satisfaction of the MBTA no later than ten (10) calendar days after the Contractor has received payment from the MBTA for that Work, and each tier of Subcontractors must likewise pay the next lower tier of Subcontractors within ten (10) calendar days after receiving payment. The Contractor agrees to include these assurances in all subcontracts and require its Subcontractors to include these assurances in their subcontracts.
2. If this Contract provides for retainage, the MBTA will make partial payments of retainage amounts for distinct portions of the Work that have been satisfactorily completed; the Contractor must then remit to each first-tier Subcontractor its share of any retainage within ten (10) calendar days after receipt of such retainage from MBTA, and each tier of Subcontractors must likewise remit retainage to the next lower tier of Subcontractors within ten (10) calendar days after receiving payment. ***If this Contract does not provide for retainage, then neither Contractor nor any Subcontractor may withhold retainage from a Subcontractor.*** The Contractor agrees to include these assurances in all

subcontracts and require its Subcontractors to include these assurances in their subcontracts.

A delay in or postponement of payment to the Subcontractor requires good cause and prior written approval of the MBTA DBE Liaison Officer.

Reporting Requirements

The Contractor shall, prior to any work being performed by any Subcontractor of any tier, execute written subcontracts or purchase orders with the Subcontractors included in the Bid. In the event the Contractor cannot complete the agreement with one or more DBE Subcontractors, the Contractor must submit a request to remove and replace or substitute the firm or firms in accordance with the instruction provided in 49 CFR 26.53(f) and the MBTA DBE Program Plan. The Contractor shall then submit their request to the project MBTA DBE Compliance Officer for review.

All contracts between the Bidder and its Subcontractors must contain the following clauses as set forth in section 5.17 and Appendix 3 of the Supplementary Conditions herein: prompt payment clause, retainage clause, and non-discrimination clause.

The Contractor must utilize the electronic monitoring service provided by the MBTA which provides the Contractor an easy-to-use, web-based service for reporting payments rendered to all Subcontractors.

The Contractor will receive an electronic alert for every payment received from the Authority and must report all Subcontractor payments through the MBTA electronic compliance management system no later than five (5) calendar days after paying the Subcontractor(s). Failure to follow these directions may delay payment.

The Contractor will be expected to respond to desk audits performed at the contract's quarterly milestones. Requests for information will include, but are not limited to, subcontractor invoices and proof of payment - i.e., cancelled check or electronic fund transfer ("EFT") statement.

Enforcements

Failure to comply with the DBE requirements of the contract or with the DBE substitution procedures or failure to use DBEs as stated in the Bid constitutes a material breach of contract. The DBELO or his designees shall have the discretion to determine that the Authority apply suitable sanctions to the Contractor if the Contractor is found to be in non-compliance with the DBE requirements. Such sanctions include, but are not limited to:

- Withholding payment to the Contractor until corrective action is taken.
- Suspension and/or termination of the contract, in whole or in part.
- Declaring the Contractor non- responsible; and

- Debarring or suspending the Contractor from entering into future contracts with the Authority.

The failure by the Contractor to use a DBE Subcontractor to the extent the Contractor committed to use said DBE gives the underutilized DBE specific contract remedies, including the right to damages, and the right to request a Demand for Direct Payment as follows:

- **Damages.** In the event the Contractor has not complied with the contractual DBE percentage and the change to the contractual DBE usage has not been approved by the Authority, an affected DBE may recover from the Contractor damages suffered by said DBE as a result of being underutilized. This provision is intended for the benefit of any DBE affected by underutilization and grants such entity third party beneficiary rights under the contract. Any rights conferred by this provision are non-waivable and take precedence over any conflicting provisions in the agreement between the Contractor and the DBE.
- **Demand for Direct Payment.** Approved subcontractors on MBTA projects have the right to request a Demand for Direct Payment as described under M.G.L. c.30, § 39F if the subcontractor has not received payment of the balance due under the subcontract “within seventy (70) days after substantial completion of subcontracted work.”

Directory (26.31)

The Authority, through the Massachusetts Unified Certification Program (“MassUCP”) unit, maintains a directory identifying all firms eligible to participate as DBEs.¹ The directory lists the firms’ name, address, contact person, telephone number, fax number, email address, website address, date of most recent certification, and a business description. The directory is updated during the first week of every month to assist Authority personnel and contractors in their efforts to increase the Authority’s DBE participation. The directory is available from MassDOT’s MassUCP unit at 10 Park Plaza, Suite 2600B in Boston, MA 02116, telephone number (857) 368-8656.

The DBE Directory can also be downloaded from:

<https://www.sdo.osd.state.ma.us/BusinessDirectory/BusinessDirectoryDownload.aspx>.

The directory is made available during the final week of every month.

The most recent directory is also available online. The online DBE directory may be accessed at:

<https://www.sdo.osd.state.ma.us/BusinessDirectory/BusinessDirectory.aspx>

¹ The current directory will be updated pursuant to the requirements of certification of DBEs and the Uniform Certification Programs (“UCP”) pursuant 49 CFR Part 26
DBE Program Plan (revised March 2019)

Select “Certified Disadvantaged Business Enterprise (DBE)” from the list of Certification Types to search for certified DBE firms. The search also may be restricted by Business Type and Industry Type. The results may be sorted by Company Name, Business Type, Industry Category, City or Town, Zip Code, or NAICS (North American Industry Classification System) in order to facilitate the identification of potential DBEs for particular contracting opportunities. The online directory is updated daily.

Provided that the firm is eligible and qualified in the areas of work, MassUCP will list as many NAICS codes in its DBE directory as requested by the DBE.

MassUCP will safeguard from disclosure to unauthorized persons the information gathered as part of their certification process which reasonably may be regarded as proprietary or other confidential business information consistent with federal, state, and local law.

Overconcentration (26.33)

The Assistant Director of Government Compliance will monitor industries or fields of work to determine if overconcentration exists with DBEs as to unduly burden the opportunity of non-DBE firms to participate in a particular type of work. The Availability of DBE data (using the best data available to the Authority at the time) by NAICS Code will be scanned regularly for evidence of NAICS code overconcentration. Where overconcentration is determined, the corrective measures outlined in 49 CFR Part 26.33 will be utilized. Examples of measures to address DBE overconcentration in a particular field may include:

1. The Assistant Director of Government Compliance will work with the DBE Supportive Service provider to develop ways to assist the DBE to move in a non-traditional area of work.
2. The Assistant Director of Government Compliance may consider limiting to actual availability the number of DBEs in overconcentrated industries that may count toward the goal or, in extreme cases, may discontinue using certain NAICS codes for overconcentrated industries when setting DBE participation goals.
3. The Assistant Director of Government Compliance may work with prime contractors to find and use DBEs in other industry areas.
4. Once the industry is determined by the Authority to be overconcentrated, the Assistant Director of Government Compliance will present this information with supporting data and a plan to address the overconcentration to the Civil Rights Specialist of the appropriate USDOT operating administration for approval; any measures deemed necessary to remedy overconcentration will be implemented upon their approval.
5. The Assistant Director of Government Compliance will complete a review of overconcentration data annually at the end of each fiscal year.

Business Development Program (26.35)

The Authority has joined forces with MassDOT in participating on its Business Development Program (BDP) in compliance with Section 26.35. The objective of the Business Development Program is to assist disadvantaged business enterprises to move into non-traditional areas of work, and to assist these firms to gain the ability to compete successfully in the marketplace outside of the DBE Program. The BDP is a good example of race- or gender-neutral methods the Authority may use to promote the participation of DBEs and other small businesses in its contracting and procurement program.

The Authority's BDP in conjunction with MassDOT strives to provide assistance to small business concerns, including DBEs, in the areas of business development, strategic planning, information technology access, management and marketing. Other areas of concentration will include industry specific information training and education and industry specific information on the Authority's procurement and contracting process.

This program is designed to contribute to the growth and sustainability of construction and consultant DBEs competing and obtaining MBTA contracts. It addresses the barriers facing certified DBEs that will provide general business development training paired with specific transportation technical assistance and other resources to increase the capacity of participating DBEs. This will lead to improved bidding and estimating skills, an increase in the number of DBE firms that are capable of bidding on MBTA projects, and the development of strategic business relationships. The program consists of two stages: developmental and a transitional stage. The program will focus on certified, but underutilized DBEs with potential for success that are bidding on MBTA work, but rarely win contracts. Achieving these objectives will ultimately result in the successful participation of DBE firms on federally funded construction contracts.

The Developmental Stage - Assessment

Ten DBEs will be recruited to participate in the DBE Supportive Services Program and will increase their business contacts and networks, improve each firm's ability to estimate, bid, and negotiate contracts. All DBE firms seeking assistance will be assessed to determine their specific business needs. These business assessments will take place within 90 days of enrollment and prior to receiving services. This information will be used to inform the process of matching businesses with existing resources. The business assessments will evaluate:

- The strengths, weaknesses, threats and opportunities of each DBE participant;
- Access to financing and bonding;
- Available human resources;
- Existing capabilities and equipment related to work type; and
- Existing capabilities and processes related to business management.

The Developmental Stage - Capacity Development Workshops

The DBE will be enrolled into the business development workshop series and/or provided professional assistance in the areas of estimating, and finance, and overhead rate calculation, or be referred to resources within the partnership network. MassDOT plans

to achieve this by conducting workshops to improve the core business functions of the firms and increase their knowledge of essential business tools and provide the tools needed to overcome the barriers to entrepreneurial growth and sustainability. These business development workshops shall include the following topics:

- **Bringing a business to scale;**
- **Talent Management** – developing techniques for, and understanding of, effective delegation, holding others accountable, and driving performance;
- **Strategy** – leveraging strategic frameworks, competitive positioning and marketing;
- **Finance** – understanding pricing, profitability, and cost management techniques;
- **Pursuing Contracts** – qualifying and applying for MassDOT contracts, selecting appropriate bids, and understanding the benefits of networking, teaming and joint ventures to access contracts; and
- **Networking and Teaming** – meeting other DBEs interested in growing their businesses, as well as general and Prime Contractors who are looking to do business with DBEs.

The Transitional Stage – Technical Assistance

Up to forty DBE firms will be provided with specific technical assistance according to the needs identified by assessment. As DBEs become more familiar with doing business with MassDOT and become proficient in bidding on and winning contracts a number of firms have requested various types of assistance specific to highway construction and highway construction-related disciplines. Technical assistance will be available to these transitioning firms and to DBEs that have shown interest in doing business with MassDOT, or have participated in previous business assistance workshops at MassDOT. During the past three years MassDOT has been able to accommodate 35-40 unique DBEs for technical assistance services. We anticipate that we will be able to accommodate a similar number of firms given the amount of resources we are requesting. Technical assistance with the specific challenges presented by the transportation industry will be delivered in the form of a combination of group workshops and one-on-one assistance. The topics to be addressed will include, but will not be limited, to the following:

- Increasing market potential;
- Enhancing estimation capacity; and
- Bonding.

The Transitional Stage - Accelerated Small Business Forum

Three DBEs will be chosen by MassDOT to participate in the week long accelerated Small Business Forum entitled *Building a High Performing Minority Business*, where businesses will evaluate their organization's health and diagnose strengths or *Growing the Minority Business to Scale* where businesses will evaluate three business strategies of growth, capacity building and forming strategic alliances at TUCK Business School Dartmouth College. MassDOT proposes to sponsor three DBEs at a cost of \$5,000 per business. The criteria for selection will be as follows: Gross net receipts, growth

strategy and business plan. DBEs and businesses owned by minorities and women are included in TUCK's definition of minority businesses.

Eligibility and Selection Criteria

The following selection criteria will be used to select the DBEs that will participate in the Business Development Program:

- Certified Disadvantaged Business Enterprise;
- In business for at least six months;
- In a highway- or transit-related work category (NAICS code);
- In an underutilized work category (still to be determined);
- Demonstrated willingness and ability to perform on highway- or transit-related projects;
- Demonstrated willingness to commit to a two-year in-depth customized business development plan; and
- Overall business development needs

The Business Development Plan

A customized business plan will be developed with two-year target objectives for each of the ten DBEs that identify needs, and a strategy will be developed to address each of the identified needs. Establish performance goals to be accomplished within the two-year period. The plan will include periodic reviews to evaluate progress and make adjustments, if necessary.

Monitoring and Enforcement Mechanisms (26.37)

The Authority will bring to the attention of the U.S. Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that USDOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109. The Authority will also consider imposing sanctions as specified in the attached DBE Participation Provisions (Appendix F).

The following are procedures and processes for reviewing contract records and monitoring worksites. During the performance of the contracts, monitoring will be conducted by the Government Compliance Officers in conjunction with either the Resident Engineers for construction contracts or the Project Managers for professional services contracts. This collaborative effort is to ensure that:

- The type of work and value of work performed is consistent with the work stated in the Schedule of DBE Participation;
- The DBE is performing a "commercially useful function" (CUF) by actually performing, managing and supervising the work involved;
- The equipment utilized is either owned or leased by the DBE;
- The Prompt Payment clause is being complied with and monitored; and
- The Commercially Useful Function (CUF) form completed by the Government Compliance Officer /or the Resident Engineer will be maintained in the project file and

shall support the written certification by the Authority that contracting records have been reviewed and work monitored relative to the distinct element of each DBE subcontract. (Refer to Appendix B for the Capital Delivery Organizational Chart).

A. Procedures for Monitoring and Enforcement of DBE Requirements

The following are procedures for reviewing contract records and monitoring worksites in accordance with the DBE regulations. Monitoring of Professional Services is conducted in a similar manner.

1. Responsibility

On MBTA construction contracts, the Government Compliance Officer and the Resident Engineer (“RE”) are jointly responsible for monitoring compliance with DBE requirements through the following methods:

- Working with the project RE to monitor DBE and subcontractor performance on assigned scopes of work;
- Attending project meetings;
- Conducting on site visits;
- Administering CUF Reviews; and
- Monitoring prompt payment.

The Government Compliance Officer shall evaluate DBE compliance on a periodic basis as well as responding to and investigating any apparent non-compliance issues that develop at the site.

The Government Compliance Officer shall verify final DBE payment by receipt of final payment estimate from the Project Engineer.

2. Compliance by Prime Contractor

A DBE subcontractor must perform a Commercially Useful Function (“CUF”) in order for the prime contractor and Authority to properly receive credit toward DBE participation for the project. The CUF review ensures that the DBE is using its own workforce to perform a minimum of thirty (30) percent of the total value of its contracted amount with the prime in order to receive full credit for performance on the project. A CUF review is administered by the Government Compliance Officer at least once during the duration of the project to ensure the DBE is actually performing the contracted scope of work by, managing and supervising its own workforce, and/or by providing materials and equipment in accordance with the contract or subcontract.

The Government Compliance Unit reviews the schedule of DBE participation at the time of the assessment of the contract to determine whether the proposed work of the DBE qualifies as a commercially useful function by examining the following:

- DBE prequalification documents; and
- Whether the DBE is classified under the proper NAICS codes to perform the scope(s) of work.

Work that is designated for a specific DBE on an approved subcontract shall not be performed by anyone else without prior written approval of the Government Compliance Officer in accordance with 49 CFR 26.53. Additionally, second-tier subcontracting or any work may be allowed if authorized by the Government Compliance Officer. The Government Compliance Officer will review the following before approving or disapproving DBE removal and substitution:

- Evidence of good cause for DBE replacement;
- If applicable, written acknowledgement from the DBE of record showing it does not object to the substitution or replacement; and
- A list of potential DBE firms who can perform the scope of work.

The following guidance is intended to help identify possible issue that may arise on a construction contract:

- The RE shall direct the Prime Contractor to notify him or her seven (7) days prior to the first start of any work by the DBE and one (1) day prior to the start of any subsequent work by same. If a DBE begins work at the job site without prior notification by the Prime Contractor, the RE should make a notation in the Project Diary and notify the Government Compliance Officer that the DBE is on site.
- The RE shall notify, by email, the Government Compliance Officer when the DBE subcontractor begins, suspends, resumes or completes their work, and shall keep a record of each such notification in the project diary.
- The RE shall record DBE daily activities on the project as they do for non-DBE subcontractors. The Resident Engineer shall also identify and record the names of the persons directing the DBE's operations and all employees, and verify that the work being performed is consistent with the subcontract. If the Government Compliance Officer notices that the daily logs have not been updated or maintained, the Government Compliance Officer shall notify the Senior Director of Contract Administration and notify him/her of the noncompliance by the RE.

- In the project diary, the RE shall record a list of equipment being utilized by each DBE subcontractor, as determined by field observation. Executed rental or leased agreements must be provided for equipment not owned by the DBE subcontractor. Copies of agreements must be provided to the RE and included in the project log. Included will be names inscribed on the equipment which indicate the ownership of that piece of equipment.
- If the RE suspects that there is prohibited activity taking place in relation to the DBE as described below, he/she shall use the CUF Form to record the status of the subcontractor's work effort and immediately forward the CUF Form to the Government Compliance Officer for further investigation.

3. DBE Equipment Rental Firm and Material Supplier Compliance

The Government Compliance Officer, shall, with assistance from the RE, verify compliance by the prime with the DBE requirements when utilizing DBE suppliers or rental firms by providing the project RE with a checklist describing prohibitive activity.

REs, however, are responsible for recording any concerns relating to the obligations of the DBE Supplier or rental firm and immediately reporting such to the Government Compliance Officer.

4. Prohibited Activities

The Government Compliance Officer shall, with the assistance of the RE when applicable, monitor for the following prohibited activities to ensure DBE activity compliance on construction contracts:

- A prime contractor or other entity performing work designated in the DBE subcontract without prior written authorization.
- A DBE subcontractor using the prime or other contractor's employees without proper written authorization to ensure proper counting.
- A DBE "borrowing" or employing a prime contractor's or other subcontractor's foreman or other supervisory personnel under any circumstances.
- A DBE subcontractor borrowing the prime contractor's or another contractor's equipment without an appropriate lease or rental agreement and approval of the Government Compliance Officer to ensure proper counting.
- A prime contractor purchasing materials for a DBE subcontractor, except when the subcontractor item is for "Labor Only" or through the use of a joint check after written approval by the Government Compliance Officer in accordance with DBE procedures and 49 CFR Part 26.

- Materials supplied by someone other than the DBE when the approved subcontract or Letter of Intent by a DBE shows a DBE supplier. To be credited with a CUF for supplying materials, the DBE must own the warehouse in which the materials are stored and from which deliveries are made or must own the truck used to make the deliveries.
- Bulk materials supplied by someone other than the DBE when the approved subcontract or Letter of Intent by a DBE shows a DBE supplier. To be credited with a CUF for supplying materials, the DBE may lease the warehouse in which the materials are stored and from which deliveries are made and can lease the truck used to make the deliveries. The DBE will have to provide copies of lease arrangements to the Government Compliance Unit.
- Trucks hauling material for a DBE subcontracted for trucking do not appear to be owned, leased or directed by the DBE. To be credited, at least one of the trucks must be owned by the DBE and the amount of counting must conform to 49 CFR § 26.55 (d)(5).

5. Procedure for Investigating Settlement Involving DBEs.

A DBE's decision to settle or withdraw a lawsuit filed against a prime contractor or subcontractor arising out of an alleged violation of the DBE's rights under the DBE Program Plan and/or Part 26 is not binding on the Authority. Upon notice of any such lawsuit, the DBE Liaison Officer (DBELO) and/or the DBELO's designee, in consultation with MBTA Legal, will conduct an investigation of the alleged matter, including interviewing relevant witnesses and collecting and reviewing relevant documents. Upon completion of this investigation, the DBELO will issue a final report based on the facts uncovered by the DBE Investigator. The report will contain the investigation's findings and conclusions and may direct appropriate corrective action, including imposing sanctions and/or exercising any other available remedies.

Where applicable, the above procedures and processes for construction contracts also shall apply to professional services contracts and contracts for goods and services. With respect to DBE Program Plan compliance, the Project Manager shall have the responsibilities of a Resident Engineer with respect to construction contracts.

B. Subrecipient Contract Monitoring and Enforcement Mechanisms

A subrecipient is defined for the purposes of the DBE Program Plan as an entity that receives USDOT financial assistance through the Authority. The Authority will require in its requests for grant applications and proposals that subrecipients comply with all requirements that the Authority is subject to as a condition of receiving USDOT funds. As the Authority has an overall numerical DBE goal, subrecipients are required to undertake all due diligence to assist in the attainment of that goal.

The Authority has adopted a race/gender-conscious program to meet its three (3)-year DBE goal, which means it seeks to achieve DBE participation through setting DBE participation goals where appropriate on USDOT-assisted project. The Authority will require subrecipients to carry out reasonable efforts to ensure contractor compliance with the federal requirements stipulated in their contracts; and, with respect to contract goals, subrecipients must ensure contractors comply with the applicable pre- and post-award requirements. Through its oversight obligation as the primary recipient of USDOT funds, the Authority will perform regular monitoring to ensure compliance as follows.

Pre-award activities

1. How DBE requirements apply to subrecipients:

- DBE requirements apply to all subrecipients where contracting or subcontracting opportunities exist. These opportunities may include, but are not limited to, professional services, construction, and goods and services.
- Where there are no contracting opportunities, DBE requirements are not applicable.
- DBE requirements for vehicle projects, TVMs (Transit Vehicle Manufacturers), must be satisfied through certification of the vehicle manufacture directly with the FTA.
- The Authority's DBE Participation Provisions (Appendix F) provide specific instructions to contractors concerning their obligations and procedures to be followed on contracts containing DBE goals. On construction projects, subrecipients will be required to insert the Authority's DBE Participation Provisions. Subrecipients will call contractors' attention to any procedures therein requiring interaction between a contractor and the Authority and provide notice that contractors should interact or report directly to the subrecipient.

2. Establishing DBE contract goals.

Prior to awarding any contract, subrecipients are required to assess whether or not to set DBE goals. The following are conditions that will be considered:

- Whether there are subcontracting opportunities in the proposed procurement;
- The existence of ready, willing and able DBEs to perform contract-related work. In other words, whether there are DBEs that have the capacity and willingness to perform a distinct element of contract work;
- If any of the above mentioned conditions is not met, it is not appropriate to establish contract goals; and
- Other factors in goal assessment include the location of the project, level of overall goal attainment, value of the contract and other factors. If a project is located in an

area with a high concentration of DBEs, goals are expected to be higher. However, if the overall goal is being exceeded then the goal may be adjusted downward.

Post-award activities

3. Monitoring oversight of subrecipients

Subrecipients will have the obligation to monitor their contracts to ensure compliance with the Authority's policies and FTA requirements. Subrecipients will be required to submit reports on compliance activities to the Assistant Director for Government Compliance. The following will apply:

- Subrecipients will conduct at least one review during a major portion of work performed by a DBE and will provide written certification that contracting records have been reviewed and that projects on which DBEs have participated have been monitored. The Authority ODCR staff will be available to provide training and assistance upon request.
- Written certification will include a statement that the project was monitored for DBE compliance and that a commercially useful function (CUF) review was conducted relative to the distinct elements of work performed by each DBE. Subrecipients are directed to use the Authority's CUF form. These documents and records of compliance activities shall be retained by subrecipients for a minimum of three (3) years from completion of the project.
- Subrecipients will keep records of actual payments to contractors for distinct elements of work performed by DBEs and compare such payments to the prime's commitments made at the time of award. Subrecipients are required to submit a final report upon the substantial completion of work. The final report shall include completed CUF forms, written certifications for each project, the contract amount, and the total amount paid each DBE to date.
- These records will be reviewed as part of the grant auditing process that is conducted by the Authority before final payment is made.

4. Required contract clauses:

Subrecipients must include the following clauses in their agreements or contracts with contractors or suppliers whenever USDOT funds are being used:

- A non-discrimination assurance as required by 49 CFR 26.13(b). This clause prohibits the contractor from discriminating based on protected categories in the performance of the contract.
- "The contractor must promptly pay each subcontractor under this contract for satisfactory performance of its contract within ten (10) business days from the receipt of each payment the contractor receives from the Authority. The

contractor further agrees to make payment in full, including retainage, to each Subcontractor no later than ten (10) business days after the Subcontractor has satisfactorily completed all of the work required under its subcontract. Failure to comply with this requirement may result in the withholding of payment to the contractor until such time as all payments due under these Provisions have been received by the subcontractor(s) and/or referral to the Prequalification Committee for action, which may affect the contractor's prequalification status. The Contractor further agrees to make payment in full, including retainage, to each subcontractor not later than ten (10) business days after the subcontractor has completed all of the work required under the subcontract. This clause applies to both DBE and non-DBE subcontractors."

5. Reporting requirements

Subrecipients must report Awards/Commitments and Actual Payments twice annually to the Deputy Director of the Small Business Resources Center. The purpose of this report is to provide ODCR with data regarding the participation of DBEs relative to all funds on FTA-assisted contracts. This data is essential for accurate reporting by MBTA to the FTA on a semi-annual basis.

Subrecipients are required to report the following:

- On Awards/Commitments, subrecipients must report on all contracts and subcontracts awarded during the reporting period. "Awarded" means the procurement of goods and services in any manner (i.e., purchasing supplies at a store);
- Payment made during the reporting period on ongoing contracts; and
- With respect to Actual Payments information, subrecipients must report payments on all completed contracts and subcontracts. "Completed" means the inclusion of final payment on a large contract or more informal procurements that are awarded and completed in the same instant (e.g., purchasing supplies).

All subrecipients must create and maintain a bidders list consisting of information about all DBE and non-DBE firms, including subcontractors that bid, quoted, or otherwise showed interest in working on an FTA-assisted contract. This information shall be made available to MBTA annually and must include (a) firm name, (b) firm contact information, (c) firm status (whether DBE or non-DBE), (d) age of firm, and (i) annual gross receipts of the firm (by categories).

Fostering Small Business Participation (26.39)

The Authority is committed to fostering small business participation through meeting the requirements established in 49 CFR Part 26.39. The Authority is taking active and effective steps to increase small business participation. In implementing its strategies to foster small business participation, the Authority recognizes this as a requirement of good faith implementation of its DBE Program. Under the revised Section 26.39, the MBTA is not required

to report on the level of small business participation achieved through the small business element. However, race- and gender-neutral DBE participation generated through the small business element will be tracked and reported as is currently done through the DBE Program. \ Refer to Appendix C for the Fostering Small Business Participation Plan.

SUBPART C – GOALS, GOOD FAITH EFFORTS, AND COUNTING

Set-asides or Quotas (26.43)

The Authority does not use quotas in any way in the administration of this DBE Program. However, set-asides can be used as part of the Fostering Small Business Program. The Authority does not use any race- or gender-conscious quotas or set-asides.

Overall Goal (26.45)

The overall goal is based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on MBTA USDOT- assisted contracts. In accordance with 49 CFR 26.45(c)(d), the Authority will follow the two-step process to develop its overall DBE goal.

- Step One – Base Figure: Calculation of a base figure that represents the availability of certified DBEs ready, willing and able to work on Authority contracts.
- Step Two – Adjustments: Adjustment of the base figure so that the final overall goal represents the amount of participation the Authority might expect in the absence of discrimination or its effects. Determination of adjustments is based upon the contracting program and knowledge of the local contracting market.

This process is intended to provide the maximum flexibility for the Authority while ensuring that the goal is based on availability of ready, willing and able DBEs in its relevant market.

Step One – Determination of Base Figure (26.45(c))

Projected Budget Project Analysis

The Authority shall provide a three (3)-year projection for federally-funded procurements by category and dollar value for construction, professional services and goods and services to be used in the Step One process of setting the Triennial Goal.

Relative Availability of DBEs to All Firms

To establish the relative availability of DBEs ready, willing and able to all comparable firms (DBE and Non-DBEs) in the Authority's market area, in applicable work categories, the Authority follows the prescribed goal-setting methodology described in accordance with 49 CFR § 26.45. In determining relative availability, the Authority uses the following sources:

- For the numerator, or the number of potentially available DBEs, the Authority uses the DBE directory maintained by SDO. This list is supplemented, in accordance with U.S. DOT's Tips for Goal Setting, with lists of certified M/WBEs that might choose to also be certified as DBEs.
- For the denominator, or the number of all firms (including DBEs), data obtained from the Census Bureau's most recent County Business Patterns data set. an

Determination of the Authority's Market Area

For purposes of DBE goal setting, the Authority's market area has been defined as the Commonwealth of Massachusetts. The majority of construction contractors, professional services consultants and goods and services vendors are Massachusetts based.

Weighting Process

To ensure an accurate as possible base figure, a weighting process is applied based on the proportionate value of expenditure in each industry category.

Step Two: Adjustment to Base Figure

The Authority shall examine the current capacity of DBEs to perform work on FTA assisted contracts based on the value of work performed by DBEs in the previous several FTA reporting periods.

Determining the Median Past Participation

To determine the Median Past Participation, the following principles help to calculate the median past participation:

1. The median is the middle number in any group of numbers.
2. To determine the median, arrange the values in a list from low to high.
3. If you have an odd number of values from which to determine the median, take the number which falls in the middle.
4. If you have an even number of values, then you should average the two numbers which fall in the middle.
5. If you have only two numbers, simply average those two numbers together.

Adjusting the Step One Base Figure with the Median Past Participation

Calculate the median past participation percentage and use that figure to adjust your Step One Base Figure by taking the average of the median past participation figure and the Step One Base Figure. Average the Step One Base Figure with the median of the past years' participation rates.

Example:

Step One Base Figure + Median Past Participation divided (/) by 2 =
Step One Base Figure adjusted for past participation.

Additional Sources of Information considered in Step Two

In accordance with 49 CFR 26.45(d)(1)(i), after arriving at the preliminary base figure, the Authority will review and assess other data to determine if the base figure should be adjusted.

The following factors may be considered:

1. Evidence from disparity studies conducted in the Authority's market area, if available (including relevant studies commissioned by other contracting agencies in the market area).
2. Statistical disparities in the ability of DBEs to get financing, bonding and insurance.
3. Data on employment, self-employment, education and training, union apprenticeship programs.
4. The attainment of DBE goal through DBE primes.
5. Other data that helped to better measure the percentage of work DBEs would be likely to obtain in the absence of discrimination.

Race- and Gender-Conscious and Race- and Gender-Neutral Participation

The Authority will always seek to meet the maximum feasible portion of the overall goal by using race- and gender-neutral means as referenced in section 26.51. The Authority will also carefully explain why the Authority can achieve the projected level of race- and gender-neutral participation with specific reasoning and data supporting the Authority's conclusion by applying the following considerations.

Past Race Neutral Attainment

- The Authority reviews several past years of DBE race neutral attainment to determine various sources of race neutral participation. This may include prime contracts won in competitive bidding (or through the small business element) by DBEs, DBE attainment on contracts without contract goals and DBE achievement in excess of contract goals. The Authority will also consider past history of inability to achieve goals. For example, if the Authority have relied exclusively on race- and gender-conscious measures in the past to meet overall goals, but have not been able to achieve them, this may justify relying exclusively on race- and gender-conscious means to meet the goal for the upcoming year.

Other Race- and Gender-Neutral Measures

The Authority will meet the race- and gender-neutral portion of the goal of increasing DBE participation through a variety of activities which include:

- Participation at appropriate trade fairs and other business forums;
- Provide technical assistance and other services if needed;
- Ensure the inclusion of known DBEs on mailing list for bidders;
- Provide SDO's DBE listing to prime and other contractors;
- Organize workshops to inform DBEs of proposed projects; and
- Meet with DBEs one-on-one and inform them of opportunities and address concerns.

Public Participation

As the regulations require, prior to the submission of the methodology for review, the Authority will consult with minority, women and general contractor groups, community organizations, and other officials or organizations that could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on

opportunities for DBEs, and the Authority's efforts to establish a level playing field for the participation of DBEs. The focus of this exchange is to obtain information relevant to the goal setting process.

Publication of Goal

Following the consultations with the public, the Authority will post notice of the proposed overall goal, as required by the regulations, on the Authority's website and may post in any other sources (e.g., minority-focused media, trade association publications). The Authority will inform the public that the proposed overall goal and its rationale are available for inspection during normal business hours at the MBTA's Office of Diversity and Civil Rights, 10 Park Plaza, Suite 3800, Boston, MA 02116 and for thirty (30) days comment period prior to the submission on August 1st.

Goal Setting and Accountability and Shortfall (26.47)

Pursuant to 49 CFR 26.47, the Authority cannot be penalized, or treated by the U.S. Department of Transportation as being in noncompliance with this rule, because the DBE participation falls short of the Authority's overall goal, unless the Authority has failed to administer the DBE Program in good faith.

If the Authority does not have an approved DBE Program or overall goal, or if the Authority fails to implement the DBE Program in good faith, the Authority will be in noncompliance with this part.

If the awards and commitments shown on the Authority's Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, the Authority must do the following in order to be regarded by the USDOT as implementing the DBE Program in good faith:

1. Analyze in detail the reasons for the difference between the overall goal and the Authority's awards and commitments in that fiscal year.
2. Establish specific steps and milestones to correct the problems the Authority have identified in the Authority's analysis and to enable the authority to meet fully your goal for the new fiscal year.
3. As the Authority is one of the 50 largest transit authorities as determined by the FTA, the Authority must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (1) and (2) to the FTA for approval. If the FTA approves the report, the Authority will be regarded as complying with the requirements of this section for the remainder of the fiscal year.
 - As a transit authority not meeting the criteria of paragraph (3) as stated above, the Authority must retain analysis and corrective actions in the Authority's records for three years and make it available to FTA on request for their review.
4. FTA may impose conditions on the Authority as part of its approval of the Authority's analysis and corrective actions including, but not limited to, modifications to the overall goal methodology, changes in the race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.

5. The Authority may be regarded as being in noncompliance with 49 CFR Part 26, and therefore subject to the remedies in 26.103 or 26.105 of this part and other applicable regulations, for failing to implement your DBE program in good faith if any of the following things occur:
 - The Authority does not submit its analysis and corrective actions to FTA in a timely manner as required under paragraph (3) of this section;
 - FTA disapproves the Authority's analysis or corrective actions; or
 - The Authority does not fully implement the corrective actions to which it has committed or conditions that FTA has imposed following review of its analysis and corrective actions.

Shortfall Analysis Procedure

Pursuant to section 26.47 whenever the awards and commitments shown on the Authority's Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, the Authority will conduct and submit a shortfall analysis and corrective action, including milestones, due on Dec 29th as required under this section by analyzing the difference between the overall goal and the actual awards/commitments.

The analysis will include an examination of causes for the shortfall and will provide corrective measures to address the shortfall. The Authority will review the following factors:

1. Whether there were circumstances in the procurement/bidding process that might have contributed to the shortfall; i.e., more contracts awarded on good faith effort and/or not all contracts let;
2. Whether ongoing monitoring of the overall goal was adequately conducted in order to project and make timely adjustments to contract goal-setting;
3. Whether contract goals were appropriately established on projects that had opportunities for DBE participation;
4. Whether there was a substantial change in the construction or procurement program, where a mid-cycle review would have demonstrated a need for a downward adjustment to the goal; and
5. Whether there were outside factors that contributed to the shortfall such as a substantial decrease in the availability of DBEs to bid on Authority projects or more work from other entities that limited DBE capacity

Transit Vehicle Manufacturers Goal (26.49)

The Authority will require each transit vehicle manufacturer (TVM), as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of 49 CFR Part 26.49.

The Authority's Procurement and Logistics Department will be responsible for TVM procurements as follows:

1. Within 5 business days following a contract award, the Procurement and Logistics Department will provide to ODCR a copy of the TVM's FTA approved certificate;
2. The Procurement and Logistics Department will include copy of the TVM's FTA approved certificate in the contract file; and
3. Within 30 days after the contract award, the Procurement and Logistics will submit the Transit Vehicle Award Reporting Form found on the FTA website <https://faces.fta.dot.gov/suite/> and upload into TrAMS, <https://www.surveymonkey.com/r/vehicleawardreportsurvey> as required by 49CFR 26.49(a)(4).

Meeting Overall and Contract Goals (26.51)

The Authority will establish contract goals as a percentage of total USDOT-assisted contracts with subcontracting opportunities to meet any portion of its overall goal that is not projected to be accomplished under race-neutral means.

Race-neutral efforts may include, but are not limited to, the following:

1. Providing assistance in overcoming limitations such as inability to obtain bonding or financing with referrals to the Small Business Supportive Services team;
2. Providing technical assistance and other similar services with referrals to the Small Business Supportive Services team;
3. Providing information and communication assistance on contracting and business procedures, as well as, specific contract opportunities;
4. Providing assistance 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;
5. Ensuring distribution of the list of certified DBE firms through print and electronic means to the widest feasible range of potential prime contractors;
6. Considering unbundling larger contracts when feasible into a series of manageable projects to facilitate participation of DBEs/small businesses;
7. Conducting internal training seminars to facilitate better understanding among project managers and engineers regarding DBE Program objectives;
8. Maintaining web site information on DBE certification, DBE Program, DBE procedures and directory of DBE firms; and

9. Implement a SBE program that can also assist DBEs with the business tools needed to participate in contracting opportunities at the MBTA.

Contract goals are applicable as follows:

1. Only on USDOT assisted contracts with subcontracting possibilities; and
2. The goal for a specific contract may be higher or lower than the percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract.

To ensure that its DBE Program continues to be narrowly-tailored to overcome the effects of discrimination, the Authority will adjust usage of contract goals as follows:

1. If during the course of any year in which contract goals are used, and the Authority determines that the overall goal will be exceeded, the use of contract goals will be reduced or eliminated to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If the Authority determines that it will fall short of its overall goal, appropriate modifications will be implemented in the use of race-neutral and race-conscious measures to allow the overall goal to be met.
2. If DBE participation obtained by race-neutral means alone meets the overall goals for two (2) consecutive years, contract goals will not be set on any contracts during the next year. Only race-neutral means will continue to be used thereafter to meet overall goals unless and until such time as the overall goals are not met for a year.
3. If DBE participation through the use of contract goals exceeds the Authority's overall goal in two (2) consecutive years, use of contract goals will be reduced proportionately in the following year.

Good Faith Efforts Procedures (GFE) (26.53)

Award of Contracts with a DBE Contract Goal (26.53 (a))

The obligation of the bidder/proposer is to make good faith efforts. A bidder/proposer can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts. Examples of good faith efforts are found in 49 CFR Part 26, Appendix A.

Information to be submitted (26.53(b))

The Authority will treat bidders'/proposers' compliance with good faith efforts' requirements as a matter of responsiveness.

Each solicitation for which a contract goal has been established will require the bidders/proposers to submit the following information:

1. The names and addresses of DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform.

3. The dollar amount of the participation of each DBE firm participating.
4. Written and signed documentation of the bidder's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal.
5. Written confirmation from the DBE that it is participating in the contract as provided in the prime contractors' commitment.
6. If the contract goal is not met, evidence of good faith efforts. The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract.

To obtain this information, the Authority requires each bidder/proposer, at the time of submitting its bid/proposal, to submit a Schedule of Participation by Disadvantaged Business Enterprises, a Letter of Intent signed by each DBE on the schedule, and the most recent MassUCP certification letter for each DBE on the schedule. Provided that, in a negotiated procurement, including design-build procurement, the bidder/proposer 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 this section before the Authority makes the final selection for the contract.

Pre-Award Good Faith Efforts Evaluation (26.53 (a) and (c))

The Authority will ensure that all information is complete and accurate and adequately documents the bidder/proposer's good faith efforts before committing to the performance of the contract by the bidder/proposer. To assess good faith efforts, the Authority will require the bidder/proposer to demonstrate that it has either met the established contract DBE goal or made good faith efforts by demonstrating and documenting its good faith efforts to do so. The Authority will consider evidence of good faith efforts as outlined in 49 CFR Part 26, Appendix A.

The Government Compliance Officer will be responsible for making the initial determination of whether a bidder/proposer has met the contract goal or demonstrated the required good faith efforts. If the Government Compliance Officer determines that the bidder/proposer has not met the contract goal or demonstrated the required good faith efforts, the Government Compliance Officer will notify the Assistant Director of Government Compliance. If the Assistant Director of Government Compliance concurs in the determination, the Assistant Director of Government Compliance will notify the appropriate Procurement Department Head of this determination. Within three (3) business days of receiving this notice, the Procurement Department will notify the bidder/proposer of the determination.

If the bidder/proposer fails or refuses to comply, the Assistant Director of Government Compliance will propose to the DBELO that the bidder be declared ineligible for award and will notify the appropriate Procurement Department Head. The Procurement Department will notify the bidder/proposer in writing of their ineligibility for failure to comply with 49 CFR Part 26 (§§ 26.53(c) and (d)).

Administrative Reconsideration (26.53(d))

Within five (5) days of being informed by Authority that the bidder/proposer is not responsive because it has not documented sufficient good faith efforts, a bidder/proposer may request administrative reconsideration. Bidder/offerors should make this request in writing to the following Reconsideration Official: General Counsel or designee, MBTA, 10 Park Plaza, Boston, MA 02116. The reconsideration official will not have played any role in the original determination that the bidder/proposer did not document sufficient good faith efforts.

As part of this reconsideration:

1. The bidder/proposer will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so;
2. The bidder/proposer will have the opportunity to meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do;
3. The reconsideration official will send the bidder/proposer a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so; and
4. The result of the reconsideration process is not administratively appealable to the US Department of Transportation.

Good Faith Efforts when a DBE is substituted or terminated on a contract (26.53(f))

The Authority will require a contractor to make good faith efforts to replace a DBE that is substituted or terminated for cause or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. For purposes of this paragraph, good cause includes the circumstances identified in 49 CFR § 26.53. Prime contractors are prohibited from substituting or terminating DBEs for convenience.

The Authority requires the following steps to occur when a contractor seeks to substitute or terminate a DBE subcontractor:

1. The contractor must notify the Government Compliance Officer immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation;
2. The contractor must provide written notification to the DBE subcontractor of its intention to request to terminate and or substitute and state the reason for the request with a copy sent to the Government Compliance Officer;
3. The contractor must allow the subcontractor five (5) days to respond to its notice and to advise ODCR and the contractor of the reasons, if any, why the DBE objects to the proposed substitution or termination of its subcontract and why ODCR should not approve the Prime Contractor's action;

4. Upon receipt of the DBE subcontractor's rebuttal, the Government Compliance Officer, in conjunction with Contract Administration, has five (5) days to provide a written determination to both the Prime and DBE subcontractor of its decision; and
5. If approval is granted to terminate the DBE subcontractor, the contractor has fifteen (15) days to find a DBE substitute or provide written documentation of its good faith efforts taken to locate a qualified DBE substitute.

If the contractor fails or refuses to comply in the time specified, the ODCR in conjunction with Contract Administration may issue a Stop Order for all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

Counting DBE Participation (26.55)

The Authority will count DBE participation toward overall goal and contract goals as provided in 49 CFR Part 26.55.

5.2 Joint Check Policy

The Authority recognizes that the use of Joint Checks may be a business practice required by material suppliers and vendors in the construction industry. A Joint Check is a two-party check issued by a/the Prime Contractor to a DBE third party such as a regular dealer of material or supplies. The Prime Contractor issues the check as payer to the DBE and the third party jointly as payees to guarantee payment to the third party for materials or supplies obtained or to be used by the DBE. FTA has established criteria to ensure that DBEs are in fact performing a commercially useful function (CUF) while using a Joint Check arrangement. Contractors and DBEs must meet and conform to these conditions and criteria governing the use of Joint Checks.

In the event that a Contractor or DBE Subcontractor desires to use a Joint Check, the Authority will require prior notice and will closely monitor the arrangement for compliance with FTA regulations and guidance. The Authority may allow a Joint Check arrangement and give credit to a Contractor for use of the DBE where one or more of the following conditions exist:

- The use of a Joint Check is in fact required by this type of vendor or supplier as a standard industry practice that applies to all Contractors (DBEs and non-DBEs); or is required by a specific vendor or supplier;
- Payment for supplies or materials would be delayed for an unreasonably extended period without the Joint Check arrangement;
- The DBE (or any of its Subcontractors) has a pattern or history of not paying a vendor or supplier within a reasonable time or has not established enough of a credit history with the supplier or vendor; and/or
- The presence of severe adverse economic conditions, where credit resources may be limited and such practices may be necessary or required to effect timely payments.

Other factors the Authority may consider:

- Whether there is a requirement by the Prime Contractor that a DBE should use a specific vendor or supplier to meet their Subcontractor specifications;
- Whether there is a requirement that a DBE use the Prime Contractor's negotiated price;
- The independence of the DBE;
- Whether approval has been sought prior to use of a Joint Check arrangement;
- Whether any approved Joint Check arrangement has exceeded a reasonable period of use;
- The operation of the Joint Check arrangement; and
- Whether the DBE has made an effort to establish alternate arrangements for following periods (i.e., the DBE must show it can, or has, or why it has not, established or increased a credit line with the vendor or supplier).

Even with the use of a Joint Check, both the Contractor and DBE remain responsible for compliance with all other elements under 49 CFR § 26.55 (c) (1), and must still be able to prove that a commercially useful function is being performed for the Contractor.

MBTA's Process and Tools Used for Counting DBE Participation

The Government Compliance Unit uses several methods for counting DBE Participation in its day to day activities as stated below.

- On Professional Services, contracts Compliance Officers receive Subcontractor Payments Forms and then verify with the subcontractor that payment(s) were received.
- On Construction contracts, Compliance Officers monitor payments to DBE subcontractors using CMS to verify receipt of payment by contractors.
- Compliance Officers prepare Monthly Record of DBE Monitoring capturing the Contract/P.O. number, Contract Name, Contractor, Subcontractor and Activities: dates of Site Visit, CUF review, Resident Engineer activity and Subcontractor Payment Verification.
- Compliance Officers correspond with DBEs to validate prime contractors' reported activities and payment reports.
- Compliance Officers monitor construction site activities to verify the type and quantity of work performed by DBEs on FTA-funded projects.
- At contract close-out, Compliance Officers prepare the MBTA Compliance Contract Close-Out Form that shows the original DBE Commitment, the DBE Participation Amount and Percentage obtained, Percentage Race-conscious, Percentage Race-neutral. A copy of this report will be with each project file.

Currently MBTA uses the following tools for capturing data for the FTA Semi-Annual Uniform Reports:

- The data for the Report originates from the MBTA's core IT systems Capital Management Systems (CMS) and the Financial Management Information System (FMIS).

CMS: maintains contracts for capital projects and contract information for professional service, engineering, service, and construction contracts.

FMIS: is the primary financial system that maintains the general ledger and contract information related to goods and services procurements.

- CMS and FMIS feed into the DBE Dashboard to create the Uniform Report.

The MBTA is in the process of transitioning to an industry standard information system to assist in its effort to improve contract compliance and to provide accurate and dependable DBE reports. Presently, ODCR uses what can be described as essentially a manual system with the aid of Capital Management System (CMS) for Professional Services and Construction and Financial Management Information System (FMIS) for Goods and Services. However, neither of these systems was originally intended for contract compliance or reporting requirements and as such has, therefore, proven to be inadequate for such purposes.

To improve the implementation of the DBE program and the accuracy of the DBE reports, the MBTA has made a decision to acquire the Equitable Business Opportunities Solution (EBO) which is an internet based management and control application that will provide the MBTA with the ability to develop, implement, monitor and report on the DBE program based on 49 CFR Part 26. With EBO, the MBTA as well as participation contractors and subcontractors can more precisely comply with the regulations and monitor ongoing contract requirements including reporting.

EBO will meet all DBE and reporting requirements by gathering all necessary data from the various departments and from ready, willing and able contractors and applying the data to a variety of analysis and reporting tools. Though EBO, MBTA and contractor data will be warehoused in a single location on the internet, providing real time access to data and eliminating any data movement between the agency and contractors. Consolidating reporting via EBO will reduce time and cost to the MBTA and contractors in preparing and meeting reporting requirements.

In adopting this new initiative, the MBTA working with its ITD department, is undertaking the following major steps:

- Infrastructure set up – server set up;
- Configuration – data mapping; and
- Interfacing – CMS and FMIS.

The MBTA will include online training for its users and develop contract specifications requiring the use of EBO by its vendors prior to deploying the system.

Separation of Duties

To ensure internal control, the MBTA has different individuals involved in the gathering and validating of data for completing the Semi-Annual Reports.

- Government Compliance Officers gather the data and prepare the reports;
- The Assistant Director of Government Compliance reviews the reports; and
- The DBELO signs the reports for submission.

SUBPART D & E – CERTIFICATION STANDARDS and CERTIFICATION PROCEDURES

Certification Process (26.61 – 26.73)

MassUCP is responsible for implementing the DBE certification program in accordance with 49 CFR Part 26.

The Authority receives monthly DBE Directory listings, notifications of recently certified DBEs, decertified DBEs, and renewals from MassUCP. The Authority participates in monthly UCP meetings that address MassUCP budget and activities including federal regulations updates. ODCR is represented on the Adjudicatory Board that holds certification hearings.

Refer to Appendix E for the Unified Certification Program (UCP) detailing the DBE certification standards.

SUBPART F – COMPLIANCE AND ENFORCEMENT

The Government Compliance Unit monitors contractor compliance with all contract provisions relating to civil rights and provides assistance to prime contractors, disadvantaged business contractors and subcontractors in meeting the required goals of the contract.

Government Compliance Officers assist in ensuring the responsiveness and effectiveness of the Authority's DBE Program by monitoring payments to DBEs, conducting investigations to ensure prime and subcontractors comply with 49 CFR Part 26 and with the Authority's program guidelines; assisting in the preparation of DBE-related reports for internal and external use; assisting in the preparation of the DBE annual goal and the program's bidders' list; helping to perform DBE outreach and enhance DBE participation in contracts with the Authority; and performing other duties as assigned.

Commercially Useful Function Monitoring

See Subpart B, § 26.37.

Enforcement Protocols (26.107, 26.105)

Where a contractor is found to have operated in a manner that is inconsistent with the requirements of 49 CFR 26.55, 26.105, as set forth in the DBE Participation Provision, the Authority will take immediate action to ensure that any actual or projected goal shortfall resulting is addressed. Depending on the severity of the matter, the Contractor or contractor(s) involved will be advised in writing of the violation. Contractors that have demonstrated a pattern of violating the requirements set forth in the DBE Participation Provision will be reported to the pre-qualification committee and subject to the remedies and penalties described at Section VIII of that document. See Appendix F for the DBE Participation Provision.

The Authority will proceed as described in Subpart B, § 26.37, with respect to any false, fraudulent, or dishonest conduct in connection with the program that would give cause to initiate proceedings for suspension, debarment, or criminal prosecution.

All participants in the Authority's DBE Program (including, but not limited to, subrecipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) will cooperate fully and promptly with USDOT and the Authority's compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party concerned. With respect to subrecipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment.

Monitoring Payments to DBEs

The Authority monitors payments to DBEs through its electronic systems Financial Management Information System (FMIS) and Capital Management System (CMS). ODCR receives Notice of Payment from Capital Delivery on a monthly basis based on invoices submitted by prime contractors. Government Compliance Officers contact DBEs for acknowledgement of receipt of payment.

For goods and services contracts originating in the Procurement and Logistics Department, payment is net thirty (30) days to prime vendors if the Purchase Order (PO) has been executed. Government Compliance Officers check POs in FMIS for status of procurement as follows:

- Accessing the FMIS Purchasing database to identify the Purchase Order (PO) linked to the Requisition used for goal setting;
- Identifying the DBE vendor and the percentage of DBE participation credited towards DBE participation;
- Contacting the DBE for payment confirmation and include the notes in the Monthly Record of DBE Monitoring Report; and
- Copying the Monthly Record of DBE Monitoring located in Government Compliance shared Drive (O)."

Documentation for receipt of payment will be kept on contract file by compliance staff.

Information Collection and Reporting (26.109)

The Authority will safeguard from disclosure to third parties information that reasonably may be regarded confidential business information, consistent with federal, state and local law.

Notwithstanding any contrary provisions of state or local law, the Authority will not release personal financial information submitted in response to the personal net worth requirements to a third party (other than DOT) without written consent of the submitter.