



U.S. Department
of Transportation
**Federal Highway
Administration**

Indiana Division 575 N. Pennsylvania Street, Room 254
Indianapolis, IN 46204

August 22, 2012

317-226-7475
317-226-7341

In Reply Refer To:
HDA-IN

Mr. Michael Cline, Commissioner
Indiana Department of Transportation
100 North Senate, Room N750
Indianapolis, Indiana 46204

Dear Mr. Cline:

EXPLANATION FOR APPROVAL OF THE INDIANA DOT DBE PROGRAM GOAL SETTING PROCESS FOR FY 2011/12/13

This document sets forth the Federal Highway Administration's (FHWA) reasons for approving, subject to adjustments set forth below, the Indiana Department of Transportation (INDOT) Disadvantaged Business Enterprise (DBE) program goal methodology and the portion of the goal to be attained by race- and gender- neutral means for FY 2011, 2012 and 2013. The INDOT is expected to make a good faith effort to meet its overall annual DBE goal each year during the three-year period. Any mid-cycle adjustments made to the overall DBE goal during the 3-year period require approval by the FHWA. The next regularly scheduled DBE goal submission by INDOT is due to FHWA August 1, 2013.

Goal Setting Methodology Section 26.45

The regulations require recipients to set an overall goal based on demonstrative evidence of the availability of ready, willing and able DBE firms relative to all businesses ready, willing and able to participate on DOT-assisted contracts.

A. Step One - Base Figure Section 26.45(c)

Under the regulations, the INDOT must begin the process by determining the base figure for the relative availability of DBE firms in its transportation contracting market.

Method Selected - The regulations set forth several examples of approaches recipients may use to determine availability and allows for alternatives. Consistent with 49 CFR 26.45, INDOT used Indiana's bidders list to determine the base figure. In so doing, INDOT considered DBE bidders relative to all bidders on contracts closed in calendar year 2009.

Description of Data Used – To develop Indiana's base figure for FY 2011/12/13, INDOT used the bidders' list. The bidders' list is composed of all firms, including both successful and non-successful bidders that bid as prime contractors or quoted as subcontractors on INDOT contracts during the 2009 calendar year. The transportation contracting market for INDOT was

determined to be all of Indiana, relevant parts of Wisconsin, Michigan, Ohio, Kentucky, and Illinois, within which over 98% of the firms bidding on INDOT contracts were located.

The data relied upon by INDOT to develop its base figure was not disaggregated or weighted as recommended by United States Department of Transportation (USDOT) guidance. INDOT has indicated it will consider developing a disaggregated approach in the future and it will evaluate data systems for future application. FHWA strongly encourages INDOT to begin the process of developing the data source and the methods to be used for disaggregating and weighting in anticipation of the August 2013 DBE Statewide Goal submittal.

Data used in the development of the statewide goal includes data from INDOT sub-recipients whose federally assisted contracts are let by INDOT. Sub-recipient data collected by INDOT is used in considering past participation by DBEs and in projecting race-and gender-neutral DBE participation.

INDOT does not consider “potential DBE firms” in calculating the relative availability of DBEs. It only counts certified DBEs. This undoubtedly understates DBE availability in the State’s transportation contracting market.

Description of Calculation Performed – To derive the base figure INDOT took the number of ready, willing and able certified DBE firms (both construction and professional services) and divided them by the number of all ready, willing and able firms (construction and professional services).

$$\frac{\text{Ready, willing and able DBE firms} - 174}{\text{All ready, willing and able firms} - 1695} = \text{Base Figure (10.27\%)}$$

Resulting Baseline Goal – Based on all the evidence originally considered by INDOT, the base figure is 10.27%.

B. Step Two Adjustments - Section 26.45(d)

As part of the Step Two analysis, INDOT must examine all available evidence in its jurisdiction to determine if an adjustment is needed to the base figure to arrive at the overall goal. The evidence to be considered includes: (1) the current capacity of DBEs measured by work that DBEs have performed in recent years; (2) evidence from disparity studies conducted anywhere within INDOT’s jurisdiction; and (3) evidence that affects opportunities for DBEs to form, grow and compete.

Past DBE Participation – INDOT considered past DBE participation data from FY 2003 through FY 2009. INDOT proposed making a Step 2 adjustment based on the median past participation of 10.07% achieved in 2004. USDOT guidance on goal setting indicates that an adjustment is not appropriate when levels of past participation are very similar to the base figure. Thus, given the similarity between the Step 1 base figure derived by INDOT (10.27%) and median past participation (10.07%), the adjustment proposed by INDOT is not necessary to “...reflect a more accurate measure of capacity.”

Disparity Studies – INDOT participated in a statewide disparity study with the Indiana

Department of Administration that was performed by BBC Research and Consulting. INDOT did not consider the data from the Indiana Disparity Study final report – 2010 (Disparity Study) in establishing its base figure because the Disparity Study was still in draft form at the time of INDOT's submission to FHWA. However, prior to the completion of FHWA's review, the Study was finalized in December 2010. Consequently, INDOT was required to consider evidence from the Disparity Study as a part of its goal setting analysis.

The Disparity Study provides direct evidence on disparities among certified and potentially certified firms in various sectors of the market. The bidder's list approach used by INDOT did not consider potential DBE firms in its Step one analysis. The USDOT reaffirmed its long-held position on including potential DBE firms as part of the goal setting analysis in the preamble to the new rules that took effect in February 2011. The preamble states, "[w]e also agree that it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (e.g., firms apparently owned and controlled by minorities and women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance."

As previously noted, the data relied upon in Step 1 is not weighted as recommended by USDOT Guidance. By contrast, the methodology used by BBC Research and Consulting, commissioned by the State of Indiana to conduct the Disparity Study, incorporates the recommended practices of disaggregating data, weighting data, and including potential DBEs to derive an availability estimate of 12.4%

In considering data from the Disparity Study, INDOT dismissed the 12.4% base figure offered by BBC as an over-accounting of certified and potential DBE firms. The methodologies used by both INDOT and BBC produce conservative estimates of DBE availability. Both approaches make use of factors that are impacted by discrimination (i.e., contract awards, bidding activity, firm size and revenues). However, while far from perfect, the detailed and extensive analysis by BBC provides a sounder basis for availability within a market. Further, the modified custom census approach used by BBC, with some exceptions, is empirically based and has withstood a recent challenge in the federal court. As such, FHWA views the BBC approach as a far more accurate estimate of the level of DBE participation one would expect absent the effects of discrimination. Accordingly, INDOT's base figure is adjusted to 12.4%.

Within the Indiana Disparity Study: Final Report 2010, BBC developed a few other options for the State of Indiana to consider as well.

When BBC removed the over-counting of potential DBE firms they identified from their universe, the Disparity Study suggested the option of reducing their 12.4% base figure to 10.2%. BBC actually excluded DBEs and potential DBEs that would be considered available by using a revenue standard at odds with the standard set in the DBE rules. BBC's methodology, in this regard, artificially limited the consideration of many ready, willing and able DBE firms in their adjustment. As such, INDOT must disregard the downward Step 1 refinement by BBC within the Disparity Study.

According to BBC, marketplace barriers, like access to capital and bonding, exist that adversely impact the ability of DBEs to form, grow, and compete. A 3.2% upward adjustment to the base figure was considered in Chapter 17 to reflect the impact of disparities in business ownership

rates for minorities and women could also be supported by INDOT. However, INDOT notes in correspondence from June 2011, that BBC determined that direct correlation of the disparities reflected in Chapter 17 of the Disparity Study could not be “practically quantified”. As such, making such an adjustment is not warranted.

Lastly, in Chapter 8 of the Disparity Study, BBC reports significantly different DBE utilization for FY 2007 through FY 2009 than data reported by INDOT in its goal submission for those years or in the Uniform Reports submitted by INDOT for those years. For example, according to the disparity study, the aggregate DBE participation during these years was 2.5%. By contrast, the Uniform Reports for those years show an average DBE participation rate of 8.38%. In order to consider this apparent underreporting by BBC, INDOT sampled BBC data against its own Affirmative Action Commitments (pre-bid DBE commitments) and DBE-3 reports (DBE utilization). It is unclear how the data provided to BBC was in such contrast to that relied upon by INDOT itself. However, the 2.5% aggregate participation reported by BBC was audited by INDOT. INDOT found significant undercounting on both commitment and utilization on the closed out contracts INDOT reviewed that INDOT believes explains the discrepancy. FHWA has confidence in the Affirmative Action Commitment (pre-bid commitments) data and the Affidavit of DBE Utilization (contract closeout) data relied upon by INDOT. The AAC and DBE-3 data has been corroborated by INDOT’s subcontractor payment tracking system as well. So while the 2.5% raises significant concerns, FHWA believes that INDOT has addressed the data quality concerns.

There is also the May 2000 State of Indiana Statistical Analysis of Utilization study which does not reflect any data in heavy-highway or Federal-Aid Highway construction and relates to the State of Indiana’s Minority Business Enterprise (MBE) and Women Business Enterprise (WBE) programs. As such it was not relied upon in determining any DBE participation in this statewide goal setting process. However, information on local M/WBE programs provides a ready source of data on “potential DBEs.” The most recent study provides substantially more current, relevant and available data.

Race & Gender Neutral and Conscious Projections Section 26.51

Race-Neutral and Race-Conscious Division- The race-neutral projection of the portion of the goal to be met through such means is **3.98%**. Therefore, the race-conscious projection of the goal is **8.42%**. The State of Indiana used the following evidence to support its projections regarding race neutral and race gender portions.

Description of Information Relied Upon - INDOT relied upon median past participation of DBE subcontractors on no goal projects, DBE subcontractors used beyond contract goals, and DBE prime contractors between calendar years 2003 and 2009. The median figure for DBE subcontractors was 2.76% (2008). The median figure for DBE prime contractors was 1.22% (2006).

$$\text{Race Neutral Portion} = 2.76\% + 1.22\% = \mathbf{3.98\%}$$

In taking the above described step, INDOT sought to maximize the race-neutral portion of the Statewide Goal for Fiscal Year 2011/12/13. The race-conscious portion of the FY 2011/12/13 Goal is that part of the Base Figure that remained after the race-neutral portion was subtracted

from the Adjusted Base Figure.

The race conscious portion is the remainder of the adjusted base figure after the race-neutral amount is subtracted.

Race Neutral Assistance

INDOT does not require bonding for subcontractors. As such, this policy benefits all subcontractors equally. The absence of bonding for sub-contractors prevent cash outlays that affect small business firms, as such financial barriers are removed for DBE (and other) subcontractors.

INDOT has also developed the Southern Indiana Development Institute (SINDI) to target development and utilization of Southern Indiana DBE firms in anticipation of the Ohio River Bridges and I-69 projects. While initially developed to address I-69 and the Louisville Bridges projects, this initiative is being implemented statewide. The technical assistance provided during this DBE supportive service effort, seeks to provide DBE firms the ability to better compete amid all firms. Class room instruction is provided to participants on bid preparation, financial management, marketing, obtaining and/or increasing prequalification limits of their businesses, developing strategies for doing business with the State of Indiana, the use of technology, and many critical thinking skills are provided in these supportive service efforts.

Public Participation Section 26.45(g)(2)

The public comment period was open from August 2, 2010 to September 16, 2010. The comment period was performed late. The objective of the DBE goal setting process is to have the public comment period completed prior to the required August 1st submittal date so comments from program stakeholders can be considered, and the state can make any warranted adjustments to the Statewide Goal. The concurrent consultation and publication is unacceptable and has been a long-standing concern of FHWA. It lends itself to incomplete and late DBE goal submittals. Going forward, we expect the state to comply with the public participation requirements in the sequence contemplated by the rules.

To facilitate public notice and solicit comments, a legal notice was posted in eleven newspapers around Indiana. Of the eleven papers, four are reported to have a predominately minority readership. In addition, INDOT provided notice via email to all INDOT registered DBE firms, the Indiana Construction Association (ICA), and the Indiana Association of Council Engineering Companies (IACEC). In addition, INDOT posted the goal on their website.

INDOT conducted a public meeting on August 4, 2010 as a means to engage stakeholders in dialogue and solicit public comments. Representatives from minority contracting, minority professional services providers, majority prime contracting firms, and the Indiana Construction Association (ICA) were present. Their discussions during the meeting echoed previous years' comments. Concerns centered on the under-reporting of race-neutral utilization. However, it was noted during the public meeting that an upcoming change (required as of September 2010) in Special Provision 100 C-151b requires primes and DBE subcontractors to provide a full accounting of DBE use on the DBE-3 – Affidavit of Disadvantaged Business Enterprise Utilization. This reporting will help INDOT assure a more thorough accounting of race-neutral,

rather than only reporting DBE use toward fulfillment of their Affirmative Action Commitments made at the time of award. At the time this goal was developed, race neutral DBE use was determined through prime contractor's reporting through the subcontractor payment tracking of DBE use on non-Goal contracts, DBE use above the goal amount reported above the DBE contract goal commitments, and prime contracts awarded to DBE firms. The requirement for post construction reporting of all DBE use on a contract, goal or non-goal, will enable INDOT to better determine race neutral use throughout the State.

In addition to the public meeting comments, ICA submitted written comments to INDOT on September 15, 2010. No other written comments were received during the 45-day comment period. INDOT did not respond to the written comments until October 14, 2010, the day the goal was finally submitted to FHWA. The written comments submitted by ICA echoed those comments the organization made during the August 4, 2010 hearing.

Specifically, ICA's noted a desire for INDOT to use the Sub-contractor Payment Tracking System (SPT) data in the statewide goal setting process. INDOT noted that the data has only been collected since mid-2008, and that it is not populated well enough to use for this goal setting period. However, INDOT noted optimism about their ability to use the data in coming years. The primary intent of gathering sub-contractor payment data is to allow INDOT adjust contract goals throughout the year to help maximize race neutral attainment rather than rely on goal setting to attain Statewide Goal achievement. However, once data is better developed INDOT will consider using the information in its goal setting process.

In addition, ICA noted their desire for INDOT to revert back to the use of prequalification limits as a means to establish capacity for the base figure. While this method was used in the past, there are a number of concerns associated with that approach. In INDOT's response, they noted their preference for using a method expressly identified in 49 CFR Part 26 rather than using one that is not. Further, INDOT noted that the prequalification data is likely no more accurate than the bidder's list, and potentially less so.

The ICA also wanted INDOT to consider accounting DBE use as race-neutral anytime a DBE is awarded a contract due to low bid, even if the DBE contractor was noted on the Affirmative Action Commitment as a firm used to meet the contract goal. INDOT noted in their response that the mechanism being proposed by ICA would be very difficult to verify. More importantly, DBE participation obtained to meet a contract goal (even if the DBE is the low bidder) would be considered by FHWA as race-conscious participation. In addition, INDOT cited the fact that all contractors are required to report all DBE use (a recent change in the reporting as of September 2010) thus ensuring that race-neutral use should no longer be under-counted.

Additionally, ICA commented they wanted INDOT to ensure the collection of race-neutral use on consulting contracts. INDOT responded to ICA that they currently request professional service providers to report to INDOT when the provider plans to obtain DBE participation through both race-conscious and race-neutral means. INDOT further noted in their response that they will continue to do so.

ICA also questions INDOT's consideration of new DBE firms in making adjustments in its calculations. INDOT noted that this practice is used to account for changes in the capacity. They further provided a statement noting that though this information/data is considered, there

was no impact in the FY 2011/2012/2013 Statewide Goal calculations.

Lastly, ICA sought a breakdown in the construction and consulting dollars as part of the Step 1 calculation. INDOT will consider making this change in future years.

There was no change in the final goal calculation as a result of public comments received.

Conclusion

For the above reasons, the Indiana Department of Transportation Disadvantaged Business Enterprise goal methodology and race-neutral/race-conscious projections for FY 2011/12/13 **must be adjusted to reflect an overall DBE Goal of 12.4%**, with a **Race Neutral portion of 3.98%** and a **Race Conscious portion of 8.42%**.

Should you have questions, please, do not hesitate to contact Ken Woodruff at (317) 226-0542 (kenneth.woodruff@dot.gov).

Sincerely,

A handwritten signature in black ink, appearing to read 'R.J. Marquis', with a long horizontal stroke extending to the right.

Richard J. Marquis
Acting Division Administrator

CC: Tiffany Mulligan, INDOT
Martha Kenley, FHWA-HCR