

DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM PROPOSED THREE-YEAR OVERALL GOAL & METHODOLOGY FOR FEDERAL FISCAL YEARS 2020 THROUGH 2022

The Indiana Department of Transportation (INDOT) submitted its last three-year overall Disadvantaged Business Enterprise (DBE) goal for federal fiscal years (FFYs) 2017 through 2019 to the Federal Highway Administration (FHWA) in 2016. FHWA subsequently approved INDOT's goal of 10.9% for FFYs 2017 through 2019. In accordance with 49 Code of Federal regulations (CFR) Part 26, the United States Department of Transportation's (USDOT's) "Tips for Goal-Setting," and other official USDOT guidance, INDOT based its 2017 through 2019 goal and methodology on a disparity study that BBC Research & Consulting (BBC) completed in March 2016 (referred to herein as the 2016 disparity study), as well as on other relevant information. The 2016 disparity study is included in its entirety on INDOT's website.¹ Based substantially on disparity study results; information about USDOT-assisted projects that the agency anticipates awarding; federal guidance; and relevant case law, INDOT proposes a new three-year overall DBE goal for FFYs 2020 through 2022. To determine its new overall DBE goal, INDOT closely followed federal regulations including the two-step goal-setting methodology set forth in 49 CFR Section 26.45.

Step 1. Determining a Base Figure – 49 CFR Section 26.45(c)

INDOT began the process of determining its new overall DBE goal by establishing a base figure. Consistent with USDOT guidance, INDOT established a base figure based on FHWA-assisted contracts that the agency anticipates awarding in FFYs 2020 through 2022.² INDOT projects that it will award nearly \$3.5 billion worth of FHWA-assisted construction contracts and \$186.5 million worth of FHWA-assisted professional services contracts in FFYs 2020 through 2022. INDOT also projected the amount of anticipated subcontracting associated with future projects based on information about similar projects that the agency previously awarded. INDOT evaluated each anticipated project and identified the various work types (i.e., subindustries) involved in each project. INDOT anticipates awarding contracts related to the following subindustries as part of the agency's expected 2020-2022 FHWA-assisted projects.

- Electrical work
- Engineering
- Environmental services and transportation planning
- Fencing, guardrails, and signs
- Heavy construction
- Masonry, drywall, and stonework
- Other construction services
- Painting
- Testing services
- Water, sewer, and utility lines

¹ <http://www.in.gov/indot/files/INDOT%202015-16%20Disparity%20Study%20-Full%20Document.pdf>

² Consistent with USDOT guidance, INDOT considers any contract with at least \$1 of FHWA funding as an "FHWA-assisted contract" and included the total value of the contract in its pool of total anticipated FHWA-assisted contracting dollars.

After identifying the work types relevant to each anticipated project, INDOT used data from a *custom census* availability analysis that BBC conducted as part of the 2016 disparity study to determine the availability of minority- and woman-owned businesses for anticipated contracting opportunities (for details, see Chapter 5 and Appendix C of the disparity study report). For the purposes of establishing a base figure, the availability analysis was limited to the availability of *potential DBEs*—minority- and woman-owned businesses that are currently DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Section 26.65.

Methodology for the availability analysis. The availability analysis focused on specific subindustries related to the types of FHWA-assisted contracts that INDOT anticipates awarding in FFYs 2020 through 2022. INDOT used a database of potentially available businesses that BBC developed through surveys with business establishments that are located in INDOT's relevant geographic market area and that work in relevant subindustries.

Overview of availability surveys. As part of the 2016 disparity study, BBC conducted telephone surveys with business owners and managers to identify businesses that are potentially available for INDOT FHWA-assisted prime contracts and subcontracts.³ BBC began the survey process by collecting information about business establishments from Dun & Bradstreet (D&B) Marketplace listings. BBC collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most relevant to INDOT contracting.

Information collected in availability surveys. BBC conducted telephone surveys with the owners or managers of 2,200 business establishments. Survey questions covered many topics about each organization including:

- Status as a private business (as opposed to a public agency or nonprofit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Qualifications and interest in performing work for INDOT or other local government agencies;
- Qualifications and interest in performing work as a prime contractor or as a subcontractor;
- Ability to work in specific geographic regions of Indiana;
- Largest prime contract or subcontract bid on or performed in the previous five years;
- Year of establishment; and
- Race/ethnicity and gender of ownership.

³ The study team offered business representatives the option of completing surveys via fax or e-mail if they preferred not to complete surveys via telephone.

Information about businesses that completed surveys was entered into an availability database that served as a basis for the availability analysis.

Considering businesses as potentially available. BBC considered businesses to be potentially available for INDOT FHWA-assisted contracts that the agency anticipates awarding in FFYs 2020 through 2022 if they reported possessing *all* of the following characteristics:

- a. Being a private business (as opposed to a nonprofit organization);
- b. Having performed work relevant to INDOT FHWA-assisted contracting;
- c. Having bid on or performed public or private sector prime contracts or subcontracts in Indiana in the past five years; and
- d. Being qualified for and interested in work for INDOT and other local government agencies.⁴

BBC also considered the following information to determine if businesses are potentially available for specific FHWA-assisted contracts that INDOT anticipates awarding in FFYs 2020 through 2022:

- e. The ability to work in specific regions of Indiana; and
- f. The largest contract bid on or performed in the past (to inform an assessment of *relative capacity*).

Steps to calculating availability. As part of the availability analysis, BBC collected and analyzed relevant information to develop dollar-weighted availability estimates to help INDOT set its overall DBE goal. Dollar-weighted availability estimates represent the percentage of contracting dollars that potential DBEs would be expected to receive based on their availability for specific types and sizes of INDOT's anticipated FHWA-assisted contracts. BBC's approach to calculating availability was a bottom up, contract-by-contract matching approach.

Only a subset of businesses in the availability database were considered potentially available for any particular contract opportunity. BBC identified the specific characteristics of each FHWA-assisted contract opportunity that INDOT anticipates awarding in FFYs 2020 through 2022 and then, for the purposes of helping INDOT establish a base figure, took the following steps to calculate the availability of potential DBEs for each contract opportunity:

1. For each contract opportunity, BBC identified businesses in the availability database that reported that they:
 - Are qualified and interested in performing transportation-related work in that particular role for that specific type of work for INDOT or other local government agencies;
 - Are able to serve customers in that geographic location; and
 - Have bid on or performed work of that size.

⁴ That information was gathered separately for prime contract and subcontract work.

2. BBC then counted the number of potential DBEs (by race/ethnicity and gender) relative to all businesses in the availability database that met the criteria specified in Step 1.
3. BBC translated the numeric availability of potential DBEs for the contract opportunity into percentage availability.

BBC repeated those steps for each FHWA-assisted contract opportunity that INDOT anticipates awarding in FFYs 2020 through 2022. BBC multiplied the percentage availability for each contract opportunity by the dollars associated with the contract opportunity, added results across all contract opportunities, and divided by the total dollars for all contract opportunities. The result was a dollar-weighted estimate of the overall availability of potential DBEs and estimates of availability by each relevant racial/ethnic and gender group. Figure 1 presents detailed information about the base figure for INDOT’s overall DBE goal for FFYs 2020 through 2022:

- Column (a) presents the groups of potential DBEs that BBC considered as part of the base figure analysis;
- Column (b) presents the availability percentage for each group for FHWA-assisted *construction* contract opportunities;
- Column (c) presents the availability percentage for each group for FHWA-assisted *professional services* contract opportunities; and
- Column (d) presents the availability percentage for each group for *all* FHWA-assisted contract opportunities considered together (i.e., construction and professional services contracts).

As presented at the bottom of column (d), the availability analysis shows that potential DBEs could be considered available for 8.1% of FHWA-assisted contracts that INDOT anticipates awarding in FFYs 2020 through 2022. Thus, INDOT considers **8.1% as its base figure**. As presented in the last row of Figure 1, the overall base figure reflects a weight of 0.95 for construction contracts and 0.05 for professional services contracts based on the volume of dollars of FHWA-assisted contracts that INDOT anticipates awarding in FFYs 2020 through 2022.

Figure 1.
Availability components of the base figure (based on availability of potential DBEs for FHWA-assisted transportation contracts anticipated for FFYs 2020, 2021, and 2022)

Note:
 Numbers rounded to nearest tenth of 1%.
 Numbers may not add to totals due to rounding.

Source:
 BBC Research & Consulting availability analysis and INDOT data.

a. Potential DBEs	Availability Percentage		
	b. Construction	c. Professional Services	d. Total
Black American-owned	1.1 %	2.0 %	1.1 %
Asian Pacific American-owned	0.1 %	3.0 %	0.2 %
Subcontinent Asian American-owned	0.1 %	6.3 %	0.4 %
Hispanic American-owned	0.6 %	0.0 %	0.5 %
Native American-owned	0.1 %	0.0 %	0.1 %
White woman-owned	5.8 %	3.9 %	5.7 %
Total potential DBEs	7.7 %	15.2 %	8.1 %
Industry weight	95 %	5 %	

Step 2. Determining if an Adjustment is Needed – 49 CFR Section 26.45(d)

After establishing the base figure, INDOT considered relevant information to determine whether any adjustment was needed to the base figure to determine the agency's 2020-2022 overall DBE goal and to make it as precise as possible. In considering an adjustment to the base figure, INDOT evaluated information about:

- Current capacity of DBEs to perform work on USDOT-assisted contracting as measured by the volume of work DBEs have performed in recent years;
- Information related to employment, self-employment, education, training, and unions;
- Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
- Other relevant data.⁵

Current capacity of DBEs to perform work on USDOT-assisted contracting as measured by the volume of work DBEs have performed in recent years. USDOT's "Tips for Goal-Setting" suggests that agencies should examine data on past DBE participation in their USDOT-assisted contracts in recent years. USDOT further suggests that agencies should choose the median level of annual DBE participation for those years as the measure of past participation:

Your goal setting process will be more accurate if you use the median (instead of the average or mean) of your past participation to make your adjustment because the process of determining the median excludes all outlier (abnormally high or abnormally low) past participation percentages.⁶

Figure 2 presents past DBE participation based on INDOT's Uniform Reports of DBE Awards or Commitments and Payments as reported to FHWA. According to INDOT's Uniform Reports, median DBE participation in FHWA-assisted contracts from FFYs 2014 through 2018 was 12.1%. If INDOT were to use the approach that USDOT outlined in "Tips for Goals Setting" based on Uniform Reports of DBE Awards/Commitments and Payments, the overall goal would be the average of the 8.1% base figure and the 12.1% median past DBE participation, yielding a potential overall DBE goal of 10.1%. Thus, information about the current capacity of DBEs to perform work on FHWA-assisted contracts supports an upward adjustment to INDOT's base figure.

⁵ 49 CFR Section 26.45.

⁶ Section III (A)(5)(c) in USDOT's "Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program."
<http://www.osdbu.dot.gov/DBEProgram/tips.cfm>

Figure 2.
Past certified DBE
participation in FHWA-
assisted contracts, FFY 2014-
2018

Source:
 Commitments/Awards reported on INDOT's
 Uniform Reports of DBE
 Awards/Commitments and Payments.

FFY	DBE Attainment	Annual DBE Goal	Difference From Goal
2014	13.4%	12.4%	1.0%
2015	12.1%	12.4%	-0.3%
2016	11.9%	12.4%	-0.5%
2017	10.7%	10.9%	-0.2%
2018	12.4%	10.9%	1.5%
Median past DBE participation	12.1%	-	-

Information related to employment, self-employment, education, training, and unions. BBC's 2016 disparity study analyses indicate that there are barriers that certain minority groups and women face related to human capital, financial capital, and business ownership in the Indiana contracting industry. Such barriers may decrease the availability of minority- and woman-owned businesses to obtain and perform the FHWA-assisted contracts that INDOT awards, which supports an upward adjustment to INDOT's base figure (for details, see Chapter 3 and Appendices D and E of the disparity study report).

Any disparities in the ability of DBEs to get financing, bonding, and insurance. BBC's 2016 disparity study analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that minorities, women, and minority- and woman-owned businesses in Indiana do not have the same access to those business inputs as non-Hispanic white men and businesses owned by non-Hispanic white men (for details, see Chapter 3 and Appendices D and E of the disparity study report). Any barriers to obtaining financing, bonding, and insurance might limit opportunities for minorities and women to successfully form and operate businesses in the Indiana contracting marketplace. Any barriers that minority- and woman-owned businesses face in obtaining financing, bonding, and insurance would also place those businesses at a disadvantage in competing for INDOT's FHWA-assisted prime contracts and subcontracts. Thus, information from the 2016 disparity study about financing, bonding, and insurance also supports an upward adjustment to INDOT's base figure.

Other relevant data. The Federal DBE Program suggests that federal funding recipients also examine "other factors" when determining whether to make any adjustments to their base figures.⁷

Success of businesses. There is quantitative evidence that certain groups of minority- and woman-owned businesses are less successful than businesses owned by non-Hispanic white men and face greater barriers in the marketplace, even after accounting for race- and gender-neutral factors (for details, see Chapter 3 and Appendix D of the disparity study report). There is also qualitative evidence of barriers to the success of minority- and woman-owned businesses. Some of that information suggests that discrimination on the basis of race/ethnicity and gender adversely affects minority- and woman-owned businesses in the local contracting industry

⁷ 49 CFR Section 26.45.

(for details, see Appendix E of the disparity study report). Thus, information about the success of businesses also supports an upward adjustment to INDOT's base figure.

Evidence from disparity studies conducted within the jurisdiction. USDOT suggests that federal funding recipients also examine evidence from disparity studies conducted within their jurisdictions when determining whether to make adjustments to their base figures. Along with the 2016 INDOT Disparity Study, BBC also conducted disparity studies for 10 other Indiana state agencies and entities in 2016. However, those agencies' contracts differ substantially in terms of size and type from the FHWA-assisted contracts that INDOT anticipates awarding in FFYs 2020 through 2022. Therefore, the results from other disparity studies are of limited use to INDOT in determining whether to make an adjustment to its base figure.

Adjustment. INDOT has considered information relevant to a potential adjustment and proposes to make an adjustment to its base figure for the following reasons:

- INDOT believes that it is important to account for the different information that is relevant to making an adjustment. Because all of that information supports an upward adjustment to the base figure, INDOT believes that the most appropriate decision is to make an upward adjustment to the base figure.
- INDOT has achieved a median DBE participation of 12.1% in recent years and believes it is important to set its overall DBE goal to be reflective of its past participation.

Therefore, INDOT has decided to take the average of the 8.1% base figure and the 12.1% median past DBE participation, yielding an **overall DBE goal of 10.1%** for FFYs 2020 through 2022. INDOT anticipates awarding a higher volume of contracts in terms of dollars for FFYs 2020 through 2022 than it has in recent years. Although the proposed goal is slightly lower than the agency's current goal, INDOT estimates that the proposed goal will result in a higher volume of contracting dollars for minority- and woman-owned businesses in FFYs 2020 through 2022.

Race-/Gender-Neutral and Race/Gender-Conscious Split – 49 CFR Section 26.51 (c)

In accordance with federal regulations and USDOT guidance, INDOT will attempt to meet the maximum feasible portion of its proposed 10.1% overall DBE goal by using race- and gender-neutral measures. INDOT considered the median past DBE race- and gender-neutral participation for calendar years 2014 through 2018 to project the portion of its overall goal that it will meet using race- and gender-neutral measures. Figure 3 presents the past DBE race- and gender-neutral participation for the last five years. INDOT's median past DBE race- and gender-neutral participation for those five years was 3.7%.

Figure 3.
Median past DBE race- and gender-neutral participation

Source:
 INDOT’s Uniform Reports of DBE Awards/Commitments and Payments.

FFY	DBE Attainment
2014	4.8%
2015	3.6%
2016	3.7%
2017	3.2%
2018	3.7%

INDOT used myriad race- and gender-neutral measures to encourage DBE participation in those contracts (for details, see Chapter 10 of the disparity study report). The agency still uses most of those measures and will continue using them through FFY 2022. Based on that information, INDOT projects that it will be able to meet 3.7% of its proposed overall DBE goal for FFYs 2020 through 2022 through race- and gender-neutral measures. INDOT projects that it will meet the remainder of its proposed 10.1% overall DBE goal—6.4%—through the use of race- and gender-conscious measures (i.e., DBE contract goals). Figure 4 presents INDOT’s proposed race- and gender-neutral and race- and gender-conscious split for its overall DBE goal.

Figure 4.
Race- and gender-neutral and race- and gender-conscious split

Goal portion	Percent Allocation
Race- and gender-neutral	3.7 %
<u>Race- and gender-conscious</u>	<u>6.4 %</u>
Overall DBE goal	10.1 %

DBE Groups Eligible for Race- and Gender-Conscious Measures – 49 CFR Section 26.15

Several seminal court cases have indicated that, in order to implement the Federal DBE Program in a narrowly tailored manner, agencies should limit the use of race- and gender-conscious program measures to those minority groups “that have actually suffered discrimination” within its transportation contracting industry.^{8,9} Moreover, USDOT official guidance states that “even when discrimination is present in a state, a program is narrowly tailored only if its application is limited to those specific groups that have actually suffered discrimination or its effects.”¹⁰ As provided in 49 CFR Part 26, such guidance is “valid, and express[es] the official positions and views of the Department of Transportation”¹¹

As part of the 2016 disparity study, BBC assessed whether there were any disparities between the participation and availability of minority- and woman-owned businesses on INDOT contracts (for details, see Chapter 7 and Appendix F of the disparity study report). The study showed substantial disparities—that is, disparities whereby utilization was less than 80% of

⁸ *AGC, San Diego Chapter v. California DOT*, 713 F.3d 1187, 1191, 1199, 2013 WL 1607239 (9th Cir. April 16, 2013)

⁹ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 997-98 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006)

¹⁰ United States Department of Transportation Official Questions and Answers (Q&A’s) Disadvantaged Business Enterprise Program Regulation (49 CFR 26), <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/official-questions-and-answers-26>

¹¹ 49 CFR Section 26.9

availability—for all minority- and woman-owned business groups across different sets of contracts and particularly on contracts to which race- and gender-conscious measures did not apply. For example, Figure 5 presents disparity indices for contracts to which INDOT did not apply minority-owned business enterprise (MBE), woman-owned business enterprise (WBE), or DBE goals. The dotted line shown at 80 indicates the threshold for what many courts consider to be “substantial” disparities. As shown in Figure 5, nearly all relevant racial/ethnic and gender groups showed substantial disparities between participation and availability on INDOT contracts to which MBE/WBE or DBE goals did not apply. The only exception was Hispanic American-owned businesses. However, Hispanic American-owned businesses showed substantial disparities for several other key contract sets including all INDOT contracts considered together (disparity index of 54) and FHWA-assisted contracts (disparity index of 73).

Figure 5.
Disparity indices for
contracts to which
MBE/WBE and DBE goals
did not apply.

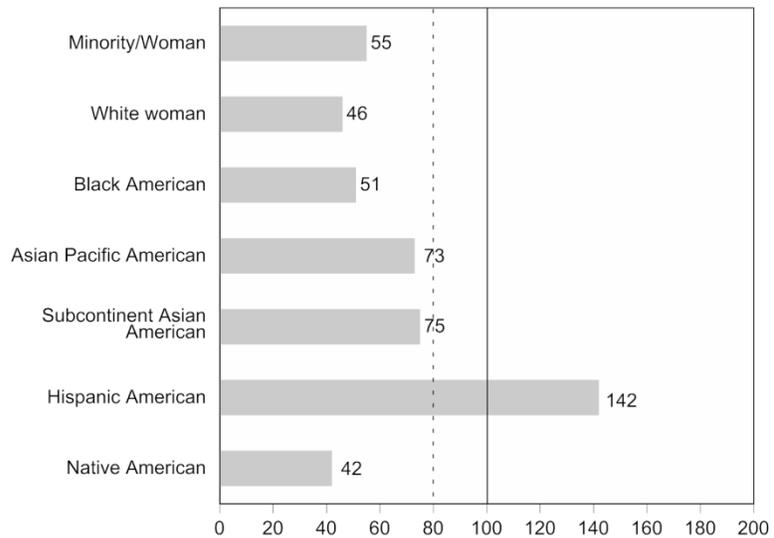
Note:

The study team analyzed 7,619 contracts without goals.

For more information, see the 2016 disparity study.

Source:

2016 INDOT Disparity Study, Chapter 7, Figure 7-4.



Therefore, based on all available information including disparity analysis results from the 2016 disparity study, INDOT proposes that all relevant groups will be considered eligible to participate in the race- and gender-conscious measures that will be part of the agency’s implementation of the Federal DBE Program:

- Black American-owned businesses;
- Asian-Pacific American-owned businesses;
- Hispanic American-owned businesses;
- Native American-owned businesses;
- Subcontinent Asian American-owned businesses; and
- Non-Hispanic white woman-owned businesses.¹²

¹² Courts have found that a substantial disparity index for white woman-owned businesses may raise an inference of discrimination sufficient to support inclusion of all women in a recipient’s DBE program. See *AGC, San Diego Chapter v. California DOT*, 713 F.3d 1187, 1195, 1198 (9th Cir. 2013).

Public Participation – 49 CFR Section 26.45(g)

Public participation is a key component of INDOT's process for setting its overall DBE goal. INDOT has made appropriate efforts to engage the public as part of the goal-setting process.

[TO BE COMPLETED]