

INDIANA DEPARTMENT OF TRANSPORTATION
DISADVANTAGED BUSINESS ENTERPRISE (“DBE”) PROGRAM MANUAL

TABLE OF CONTENTS

POLICY STATEMENT	4-5
SECTION1: PROGRAM AUTHORITY	6
SECTION 2: DEFINITIONS AND TERMS	7-12
SECTION 3: RESPONSIBILITY FOR DBE PROGRAM	13
DBE Liaison Officer (DBELO)	13
Reconsideration Officials	14
SECTION 4: ADMINISTRATIVE REQUIREMENTS	15
DBE Financial Institutions	15
DBE Business Directory	15
Managing Overconcentration	15-16
Business Development Program (Supportive Services)	16-17
Fostering Small Business Participation (26.39)	17-18
SECTION 5: OVERALL DBE GOALS FOR FEDERALLY-ASSISTED CONTRACTS	19
Methodology Overview	19
FHWA Goal-setting	19-22
Implementation/Accountability	22
Contract Goal Setting Procedure	23
SECTION 6: GOOD FAITH EFFORT	24
Pre-award Good Faith Effort Determination	24-25
Administrative Reconsideration	25-26
Post-award Good Faith Effort Determination	26-28
Counting DBE Participation	28-30
Transportation/Hauling	30-31
Set-Asides or Quotas	31
SECTION 7: REQUIRED CONTRACT PROVISIONS	32
Non-discrimination	32
Non-discrimination Assurance	32
Contract Assurance	32-33
Prompt Payment and Retainage	33
Use of Joint Check Policy and Procedure	34

SECTION 8: CERTIFICATION POLICY AND PROCEDURES	35
Unified Certification Program	35
Certification Procedure	35
Interstate Certification	36-38
Procedures Governing Removal of DBE Eligibility	47-50
Confidentiality	50
 SECTION 9: INFORMATION COLLECTION AND REPORTING	 51
Bidders List	51
Records and Reports	51-53
Reporting to Operating Administrations of the USDOT	53
 SECTION 10: MONITORING AND ENFORCEMENT MECHANISMS	 54
Staffing	54
Commercially Useful Function	54
Enforcement Protocols	55

APPENDIX

POLICY STATEMENT
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

The Indiana Department of Transportation (INDOT) receives Federal financial assistance from the United States Department of Transportation (USDOT), and as a condition of receiving this assistance, has signed an assurance that it will comply with 49 CFR Part 26.

Accordingly, INDOT has established a Disadvantaged Business Enterprise (DBE) program in accordance with 49 CFR Part 26. It is the policy of INDOT to ensure that DBEs have an equal opportunity to receive and participate in USDOT assisted contracts, without regard to race, color, national origin, or sex. To this end, INDOT shall not 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 program objectives stated below:

1. To ensure nondiscrimination in the award and administration of USDOT assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for USDOT assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Parts 23 and 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in USDOT assisted contracts;
6. To assist the development of firms that can compete successfully in the marketplace outside the DBE Program;
7. To promote the use of DBEs in all types of federally assisted contracts and procurement activities conducted by recipients; and

8. To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

The Director of the Economic Opportunity Division has been designated as the DBE Liaison Officer (DBELO). The DBELO is responsible for implementing all aspects of the DBE program. Other Economic Opportunity Division Department employees are responsible for assisting the Office of Civil Rights in carrying out this obligation. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by INDOT in its financial assistance agreements with each operating administration of the USDOT.

INDOT will make available this policy statement to division administrators and managers of each organizational component, and to DBE and non-DBE business communities that perform work on USDOT-assisted contracts.

This policy statement will be made available at www.INDOT.IN.gov.

Joe McGuinness, Commissioner
Indiana Department of Transportation

Signature

Date

SECTION 1: PROGRAM AUTHORITY

The requirements and procedures set forth in this program apply to all Federal financial assistance where INDOT receives Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107, and *Section 1101 (b) of Moving Ahead for Progress in the 21st Century and 49 CFR Part 26*, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs.”

Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III and V of the TEA-21, Pub. L. 105-178, and *Section 1101 (b) of Moving Ahead for Progress in the 21st Century and 49 CFR Part 26*, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs.”

As a recipient of Federal funds, INDOT is required to administer a DBE program in compliance with all laws, regulations, Executive Orders, and guidance. This program does not apply to contracts in which DOT financial assistance does not participate.

SECTION 2: DEFINITIONS AND TERMS

Administrative Law Judge (ALJ): an independent hearing officer who evaluates the denial of initial certification of a firm at the local level.

Affirmative Action Certification (AAC): a certified document signed by the prime contractor or prime consultant and submitted with its bid at a construction contract letting or with its consultant contract letter of interest in response to a Request for Proposal (RFP) that lists the DBE firms it intends to use to achieve the contract goal. The AAC requires the name of the DBE; the type of service the DBE will perform by line item, if applicable; and planned contract dollar amounts committed to each DBE firm for construction contracts or contract dollar percentages committed to each DBE firm for consultant contracts. The AAC requires the identification of DBE firms used for race conscious and race neutral participation.

Airport Concessionaire Disadvantaged Business Enterprise (ACDBE): a firm certified by INDOT as an airport concession pursuant to the requirements set forth in 49 CFR Part 23.

Administrative Law Judge (ALJ): an officer appointed by the Commissioner to hear and decide DBE revocation of certification appeals prior to appeal to USDOT.

Business Development Program (BDP): part of the requirement from FHWA to offer courses based on various business principles to DBE's in the DBE supportive services program.

Bid Express: The secure Internet program utilized by contractors to submit bids electronically to INDOT.

Bidder's List: a list maintained by INDOT's Contract Administration Division which consists of all firms bidding on prime contracts or bidding or quoting on subcontracts on DOT-assisted projects. An example is found in the Appendix to this document.

Certification Review Committee: a group that consists of INDOT's Certification Specialists, Certification Manager, and Supportive Services staff that makes DBE certification determinations based upon documentation and recommendation of the reviewer.

Commercially Useful Function (CUF): a requirement for all INDOT federal aid projects. A DBE firm performs a CUF when it is responsible for the execution of the work of the contract and is carrying out its responsibilities by actually performing, managing and supervising the work involved as further defined in 49 CFR Part 25.55.

CUF Report: an INDOT generated report which monitors DBE performance on federal aid INDOT project sites for compliance with the CUF requirements which includes the

review of contracting records and the monitoring of work sites. An example of this is found in the Appendix to this document.

Commissioner: the Indiana Department of Transportation Commissioner.

Compliance: The term used to indicate that a recipient or contractor has correctly implemented or responded to the requirements of 49 CFR Part 26, this program, or any related contract provision.

Consultant: an individual or firm participating as a prime or subcontractor in an INDOT professional services project.

Contract Administration Division: the division of INDOT responsible for construction and consultant contract administration.

Disadvantaged Business Enterprise (DBE): A for-profit small business concern, at least 51% owned by one or more individuals who are socially and economically disadvantaged, or, in the case of a corporation, at least 51% of the stock of which is owned by one or more such individuals; and the management and daily business operations of such business are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DBE-3 Form: otherwise known as “Indiana Department of Transportation Disadvantaged Business Enterprise Utilization Affidavit”, a document completed prior to contract closeout which is signed by both the prime contractor and all DBE’s at the end of all federal aid contracts that attests to the amount of money and percentage of contract committed to the DBE in the AAC has in fact been paid in full to the DBE. This form is submitted for all federal aid contracts, including those without a DBE goal, if a DBE performs any work on the project. This form also measures race neutral participation on federal contracts. An example of this form is included in the Appendix to this document.

DBE Codes: a code system created by INDOT to identify the primary business of a DBE firm and to assist prime contractors in locating DBE’s to meet contract goals. DBE codes are more specific and distinct than NAICS code. The NAICS codes can be found here: <http://www.census.gov/eos/www/naics/>.

DBE Directory: a web based tool which lists all currently certified DBE’s in the State of Indiana located here: <https://entapps.indot.in.gov/DBELocator/>. The DBE Directory replaces the DBE public search and remains separate in form and function from the Bidder’s List.

DBE Interest Report: a report generated by INDOT’s Contract Administration Division which demonstrates proposal items, broken up by specification groups, which DBE’s have performed in the past.

DBE Liaison Officer (DBELO): the Director of the Economic Opportunity Division of INDOT.

Districts: the six geographical areas of INDOT operation outside of INDOT's central office including Crawfordsville, Fort Wayne, Greenfield, LaPorte, Seymour and Vincennes.

Economic Opportunity Division (EOD): The division that houses INDOT's DBE and Contractor Compliance programs.

Entrepreneurial Development Institute (EDI): A part of INDOT's supportive services program which offers DBE's the opportunity to receive education on business development, business courses and an understanding of various INDOT processes.

Equal Employment Opportunity Officers (EEO's): INDOT employees located in each of the districts who monitor DBE and EEO compliance on INDOT jobsites.

FAA: the Federal Aviation Administration.

FAST Act: the Fixing America's Surface Transportation Act, as enacted by the United States Congress in 2015 and renewed through 2021.

FHWA: the Federal Highway Administration.

FTA: the Federal Transit Authority.

Good Faith Efforts (GFE): All efforts to achieve a DBE goal or other requirement of 49 CFR Part 26, which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the contract or program requirement.

Home State: Refers to the state in which a DBE or applicant for DBE certification maintains its principal place of business.

Immediate Family Member: means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

INDOT: the Indiana Department of Transportation.

ITAP: Indiana Technical Assistance Portal, an online secure portal which houses applications for DBE certification and various compliance modules.

Joint Check: a two-party check between a DBE, a prime contractor and the regular dealer of materials and/or supplies.

Letter of Interest (LOI): a letter submitted by a professional services firm to INDOT in response to a Request for Proposal (RFP) that indicates interest in being selected as a prime contractor. The LOI must include all proposed subcontractors and the AAC if there is a DBE goal.

Local Public Agency (LPA): examples include a city or county which is typically a subrecipient of federal funds passed through INDOT.

Metropolitan Planning Organization (MPO): a larger city or organization which is typically a subrecipient of federal funds passed through INDOT.

No Change Affidavit (NCA): a form utilized by currently certified DBE's on an annual basis to report no changes to the control, affiliation, expertise or ownership of the DBE. This form also includes affirmation of the thresholds for business size standards and personal net worth as required by 49 CFR 26.

North American Industrial Classification System (NAICS) Code: a code system utilized by INDOT and designed by the federal government to assign types of work permissible by DBE's on INDOT contracts. The NAICS codes are set forth here: <http://www.census.gov/eos/www/naics/> .

Noncompliance: The term used to indicate that a recipient or contractor has incorrectly implemented or responded to the requirements of 49 CFR Part 26, this program, or any related contract provision.

Personal Net Worth (PNW): The net values of an individual's assets remaining after total liabilities are deducted. As used herein, the personal net worth of each individual owner of a DBE applicant firm must not exceed \$1,320,000.00, excluding the individual's ownership interest in the applicant firm and the individual's equity in his or her personal, primary residence.

Prequalification: a certification required for most contractors and consultants doing business with INDOT verifying that they have the qualifications necessary to do business with the State of Indiana. Evaluation requires assessment of a firm's financial position, equipment, experience, personnel and any other relevant information to set prequalification limits. All prime contractors and any DBE who has more than \$300,000.00 worth of business on their books at one time as principal or subcontractor regardless of its location and with whom it is contracted must be prequalified with INDOT. Haulers and material suppliers are not required to be prequalified. See generally 105 IAC 11-2-10.

Prequalification Committee: a Committee responsible for review of contractor and consultant qualifications in accordance with 105 IAC 11-2 of the Indiana Administrative Code. The Prequalification Director serves as chair.

Race-Conscious Measure or Program: An activity that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-Neutral Measure or Program: An activity that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

Ready, Willing, and Able (RWA) DBE: A certified DBE that has submitted a bid or quote on a USDOT prime or subcontract contract.

Recipient: Any entity, public or private, to which USDOT financial assistance is extended through programs of the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA) and/or Federal Transit Administration (FTA), whether directly, as the primary recipient, or indirectly as a sub-recipient through a primary recipient, or an entity that has applied for such assistance.

Request for Proposal (RFP): The process used when INDOT awards a contract by undergoing a qualification-based selection process; as opposed to basing contract award on low bid. This process is typically utilized for professional services or consultant work.

Site Exchange: a secure, paperless electronic system which allows INDOT prime contractors to request subcontractor approval to perform on contracts.

Site Manager: an integrated series of electronic forms for entering and viewing all information required for a contract from the planning to archival stages. The information is stored in a central database and provides a unified and up to date entry point for contract data.

Small Business Concern: With respect to firms seeking to participate as DBEs in USDOT -assisted contracts, a small business concern is as defined in Section 3 of the Small Business Act and in the Small Business Administration (SBA) regulations 13 CFR Part 121; which business does not exceed the cap on average annual gross receipts specified in USDOT regulation 49 CFR Section 26.65(b).

Socially and Economically Disadvantaged Individuals: Any individual who is a citizen or lawfully admitted permanent resident of the United States and who is:

(a) Any individual who is found to be a socially and economically disadvantaged individual on a case-by-case basis;

(b) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

- (i) "Black Americans" which includes persons having origins in any of the Black racial groups of Africa;
- (ii) "Hispanic Americans" which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- (iii) "Native Americans" which includes persons who are American Indians, Eskimos, Aleuts or Native Hawaiians;
- (iv) "Asian-Pacific Americans" which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos,

Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), The State of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans" which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women.

Subcontract Payment System (SPT): an electronic reporting system that allows prime contractors with active INDOT contracts to report payment information to approved subcontractors. Beginning with contracts let after July 1, 2020, the SPT system includes both payment information from prime contractors and verification of payments from DBE subcontractors, suppliers and haulers. An example is found in the Appendix to this document.

Sub-Recipient: Any entity to which USDOT financial assistance is extended through a primary Recipient;

UCP Participants: According to USDOT announcement dated February 12, 2002:

Section 26.81(a) of the DBE regulation says to recipients that "You and all other USDOT recipients in your state must participate in a Unified Certification Program (UCP)." Recipients who are not required to have DBE programs do not have certification responsibilities. Therefore, they do not need to participate in a UCP.

As of December 2011, "Participants of the State UCP" refer to the following entities as and any other entities that may be required to participate in the future.

State & Regional Authorities: State Department of Transportation, State Port Authority, Regional Transit Authority

Municipal and Regional Airports: Municipal Airport, Regional Airport

SECTION 3: RESPONSIBILITY FOR DBE PROGRAM

A. DBE Liaison Officer (DBELO)

The Commissioner of the Indiana Department of Transportation (INDOT) has designated the Director of the Economic Opportunity Division (EOD) as the DBE Liaison Officer (DBELO). The DBELO reports directly to INDOT's Chief Legal Counsel and Deputy Commissioner on matters pertaining to the DBE Program but has independent access to the Commissioner. The DBELO for INDOT is:

NAME:	Elizabeth Kiefner Crawford, J.D.
TITLE:	Director, Economic Opportunity Division
ADDRESS:	INDOT 100 North Senate Avenue, Room N750 Indianapolis, Indiana 46204
TELEPHONE:	(317) 650-1689
EMAIL:	dbecertification@indot.in.gov

In this capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that INDOT complies with all provisions of 49 CFR Part 26. Other EOD employees are responsible for assisting the DBELO with carrying out the obligations of the DBE program. An organizational chart for EOD is included in the Appendix to this document.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. Duties and responsibilities include the following:

1. Developing and updating major changes to INDOT's DBE program for approval by the Commissioner and FHWA;
2. Calculation of INDOT's statewide DBE goal and setting individual contract goals in a manner that is narrowly tailored to meet the DBE Program's objectives;

3. Certifying applicant firms that meet all of the DBE eligibility standards set out in 49 CFR Parts 23 and 26;
4. Maintaining an updated directory on certified DBEs;
5. Administration of appeal procedures for certification denials and revocations;
6. Serving as the Agency liaison for the DBE community, contractors, consultants and other Agencies concerned with the DBE program;
7. Assisting DBE firms with problems and assistance at developing potential solutions to problems;
8. Providing and administering the DBE Supportive Services programs;
9. Informing INDOT's prime contractors and consultants of their obligations relative to the DBE program;
10. Participation with INDOT staff to determine contractor compliance with good faith efforts;
11. Gathering and reports statistical data and other information as required by each operating administration of the USDOT;
12. Working cooperatively with other INDOT divisions to ensure interdisciplinary compliance with DBE Program requirements;
13. Overseeing process modification due to changes in federal requirements;
14. Identification of DBE Program progress and deficiencies and making recommendations to correct identified deficiencies.

B. Reconsideration Officials

In accordance with 49 CFR Part 26.53(d)(2), all proceedings by INDOT regarding the reconsideration of compliance with the provisions of the DBE regulations concerning a contract award or the DBE status of a firm shall be made by an official designated by the Office of the General Counsel. The appointed official will not have played any role in the original determination that is presented for reconsideration.

INDOT's reconsideration official concerning contract awards is its Chief Legal Counsel. In the case of denial of DBE certification, INDOT executes a memorandum of understanding with the Indiana Office of the Attorney General to hear those types of cases.

SECTION 4: ADMINISTRATIVE REQUIREMENTS

A. DBE Financial Institutions

INDOT will 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 prime contractors on USDOT-assisted contracts to use these institutions. The most current information found on these types of institutions from the FDIC located here: <https://www.fdic.gov/regulations/resources/minority/2015q3.xls> indicates no such institutions currently exist in Indiana.

B. DBE Business Directory

INDOT maintains a directory identifying all firms eligible to participate as DBEs. The directory (located at: <https://entapps.indot.in.gov/DBELocator/>) lists each firm's name, address, phone number, fax number (if applicable), contact person, NAICS codes, and the types of work that the firm has been certified to perform as a DBE. INDOT's DBE Certification Manager reviews and revises the directory on a weekly basis as needed and makes the directory available to the public via the Internet. The DBE directory is searchable by each field including: company name, NAICS code, DBE category/specialty, district, or DBE code. A screenshot of the current DBE Business Directory can be found in the Appendix to this document. Please note that the DBE directory closes to any changes the Friday before INDOT's scheduled monthly letting.

C. Managing Overconcentration

The EOD staff will monitor industries or fields of work to determine if they are so over concentrated with DBEs as to unduly burden the opportunity of non-DBE firms to participate in a particular type of work. The DBE business directory 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 DBELO 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 DBELO may discontinue assigning a goal on a contract that offers a particular NAICS Code for subcontracting in an over concentrated field.

3. The DBELO may work with prime contractors to find and use DBEs in other industry areas.
4. Industry limitations met by INDOT will be explained in the procurement document.
5. To determine which areas are over concentrated, the DBELO will keep a statistical count of the number of actual bidders on US assisted contracts and the areas of work they perform, or seek to perform.
6. The information gathered will assist the DBELO in making the over concentration determination. Census Bureau information will also be included to identify over concentrated areas.
7. Once the area is determined by INDOT to be over concentrated, the DBELO 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.

D. Business Development Program (Supportive Services)

INDOT has established a DBE business development program to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program in accordance with 49 CFR Part 26.35(a).

The objective of INDOT's DBE Supportive Services (DBE/SS) program is to increase the number of small, minority and women owned businesses within the State that have the resources, finances, management and technical skills necessary to compete successfully for public and private contracts and subcontracts. INDOT EOD implements its DBE/SS program to address areas of specific relevance to the State transportation construction industry. INDOT implements each of its assistance programs with full consideration to the needs of the intermodal transportation industry specifically including the statewide highway construction industry.

E. Fostering Small Business Participation

The DBE program improvements regulations, that became effective on February 28, 2011, require that recipients include in its DBE program an element to structure contracting requirements to facilitate competition by small business concerns and take all

reasonable steps to eliminate obstacles to the participation of small business concerns in procurement as prime contractors or subcontractors.

1. Small Business Enterprise (“SBE”) Eligibility

In Indiana, the Small Business Administration (SBA) is the governmental entity responsible for certifying small businesses. INDOT will rely on SBA’s verification and certification processes and INDOT’s certification manager will do periodic spot checks to ensure firms claiming small business status are certified as such with SBA.

In order to increase opportunities for small businesses as prime contractors or subcontractors on INDOT contracts, INDOT has adopted the strategies that follow.

2.

2. Packaging of Request for Proposal (RFP) Contract Items

When determining the packaging of RFP contract items, INDOT considers small businesses by advertising (when appropriate) more project specific contract items packaged to allow smaller firms to be competitive due to the prequalification capacity amounts.

3. Prequalification

All contractors desiring to offer bids on INDOT let contracts must first be prequalified. INDOT’s Prequalification Division allows construction companies and consultants to become prequalified for specialty work types in addition to larger predefined work types. Benefits exist for small businesses due the opportunity to work on INDOT-let contracts even if they cannot meet the prequalification standards. Non-prequalified contractors may work on INDOT contracts so long as they have less than \$300,000.00 total of INDOT work at any one time. Suppliers and haulers are exempt from prequalification.

Information on Consultant Prequalification is found on the INDOT website at <http://www.in.gov/indot/2732.htm> . Information on Contractor Prequalification may be found at <http://www.in.gov/indot/2740.htm> .

EOD works closely with INDOT’s prequalification staff to investigate matters involving complaints for quality control, potential fraud, or other potential violations of INDOT’s specifications or state/federal regulations. Prequalification staff collect information on their annual application regarding affiliation for all companies and EOD may use that information in combination with commercially useful function evaluations or other investigations as needed.

4. Unbundling prime contracts

INDOT considered incorporating a process for evaluation of unbundling of contracts in the design and planning processes to foster small business participation. Due to the restrictions and definition required by FHWA, INDOT determined not to do so as this

may increase the cost of INDOT projects and cause INDOT to reprioritize or eliminate important projects due to added costs. Without the flexibility to consider unbundling on a case by case basis and consider the best interests of the State, INDOT has determined that it cannot incorporate this process at this time.

SECTION 5: OVERALL DBE GOALS FOR FEDERALLY-ASSISTED CONTRACTS

A. Methodology Overview

INDOT is required to establish an overall DBE participation goal to be submitted to each USDOT operating administration based on the requirements of the DBE program improvements regulations at CFR Part 26 and in accordance with the schedule established by the USDOT operating administration. INDOT submitted its current DBE 3-year overall goal to FHWA in July 2019, and received approval in December 2019.

The goal methodology makes use of a two-step process. Step one includes a determination of a base figure for the relative availability of DBEs to participate on INDOT federally-assisted contracts. INDOT considers all available evidence of marketplace availability as well as evidence of racial and gender disparity and discrimination in the marketplace.

Step two includes an examination of all the evidence available in INDOT's geographical area to determine what adjustments, if any, are needed to the base figure in order to arrive at the overall DBE goal. Using data collected regarding DBE availability of firms ready, willing and able, to participate on federal aid contracts and other necessary adjustments, a goal is set at the level of DBE participation expected absent the effects of discrimination. The data presented will demonstrate the portions of the overall goal that can be achieved through race-conscious and race-neutral measures. INDOT will attempt to meet the maximum feasible portion of the overall goal by using race-neutral means.

B. FHWA Goal-setting

INDOT is one of the state transportation agencies selected to submit its DBE goal setting methodology and process next on August 1, 2022 and every three years thereafter. In establishing our goal and taking into consideration the effective change, INDOT acknowledges the importance of fully engaging stakeholders and the public in meaningful ways to obtain relevant information in establishing its overall goal. Therefore, the proposed overall goal may require some mid-cycle adjustments to the methodology, if significant information that would impact the goal is received from the public and the stakeholders during the 30-day comment period.

INDOT's current overall DBE goal from October 1, 2019 to September 30, 2022 is 10.1%.

1. Step 1-Determination of Base Figure for Relative Availability of DBEs

INDOT utilizes an outside consultant to contact a disparity study to determine the base figure for FHWA-assisted contracts, and uses the state of Indiana as our local market area.

The disparity study provides direct evidence on disparities among certified and potentially certified firms in various market sectors. The disparity study incorporates the practice of disaggregating data, weighting data and including potential DBE's. The disparity study also identifies marketplace barriers which may adversely impact the ability of DBE's to form, grow and compete.

2. Step 2-Examination of Other Evidence for Determination of Availability and Adjustments

In the most current approved disparity study (FFY 2020-2022), INDOT determined that an upward adjustment was warranted in Step 2.

In its *latest* disparity study finished in 2019, INDOT examined the current capacity of DBEs to perform work on FHWA-assisted contracts based on the value of work scheduled to be performed from 2020 through 2022..

INDOT sought additional evidence in related fields within its jurisdiction that may affect opportunities for DBEs to form, grow, and compete, such as statistical disparities for DBEs to obtain finance, bonding, insurance, employment, education and training. INDOT's search produced no relative evidence in this area.

Based on the review of available data, including median past participation, INDOT determined that an upward adjustment was necessary and the overall DBE goal was set at 10.1%.

Based on the availability, past participation, and data presented here INDOT projects that 3.7% of the overall goal will be achieved through Race-Neutral (RN) measures and 6.4% of the overall goal will be achieved through Race-Conscious measures.

3. Description of the types of race-neutral measures implemented by INDOT:

Current services available to all small business through INDOT include Online advertising schedules, bid tabulations, and up-to-date information on prime contractors that have taken out plans and specifications during a project's advertising period. INDOT maintains program information including a "Doing Business with INDOT"

section of its website (located here: <http://www.in.gov/indot/2384.htm>) that is available to all small businesses.

4. Public Notice and Participation

In May 2019, a public notice announcing INDOT's proposed 3-year DBE goal was published on INDOT's website located here: <http://www.in.gov/indot/2674.htm>, informing the public that the proposed goal and the basis for its rationale are available for inspection for 30 days following the date of the notice. This same notice placed the public on notice that INDOT and the FHWA will accept comments on the goals for 30 days from the date of the notice.

Consistent with the USDOT guidance to obtain feedback from as many interested stakeholders as possible, INDOT hosted a public information meetings to the goal setting process on June 25, 2019 in Columbus, Indiana and June 26, 2019 in Kokomo, Indiana.. Specifically, INDOT articulated its data sources and how they were used in calculating the goal. Comments received were incorporated into INDOT's submission to FHWA for the proposed goal. INDOT responded to these comments by discussing the reliability of the data collected and any additional explanations required.

The public participation meetings provide a forum for stakeholders to obtain a better understanding of the DBE goal setting process and to provide feedback on the proposed DBE goal. INDOT sought feedback from interested stakeholders. Stakeholder comments were considered prior to submitting the final overall goal for FY 2020-2022.

The 30-day comment period ended on June 30, 2019.

C. Implementation/Accountability

INDOT acknowledges its obligations under this section to respond to USDOT directives and the conditions that require mid-cycle reviews and the submission of revised goals for approval by FHWA that reflect changes in circumstances not contemplated in the original submission. INDOT further acknowledges that no mid-cycle goal adjustment shall take effect unless approved by the appropriate US DOT modal administration.

Whenever the awards and commitments shown on INDOT'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, INDOT will conduct and submit a shortfall analysis and corrective action with its second report due on Dec 31st as required under this section. INDOT was not required to complete a shortfall analysis as its goal was met in the last several federal fiscal reporting years.

D. Contract Goal Setting Procedures

On a regular basis, the Contract Administration Division of INDOT provides the EOD with a list of projects selected for advertising. This list is reviewed by the Contract

Compliance Manager and staff for the purpose of establishing DBE goals on projects that will be constructed with financial assistance from FHWA.

1. The following factors are considered in establishing a project-specific construction or consultant contract goal:
 - a. EOD staff review both the contract proposal and the DBE Interest Report in a traditional construction contract, the proposal items which DBE's have performed in the past are flagged. The EOD staff member reviews the report for:
 - i. Overall contract type. INDOT utilizes the following contract types: Traffic (T), Bridge (B), Road (R), Resurface (RS), Major Moves Projects (IR), Traffic Maintenance (TM) and Maintenance (T).
 - ii. Contract location;
 - iii. Contract estimate amount;
 - iv. DBE firms identified in the interest report and currently certified to perform these items;
 - v. Capacity of DBE firms;
 - vi. The race conscious goal average to date as it relates to the Annual goal.
2. Other types of INDOT projects not let in the traditional manner are currently underway and goals have been set for them in the following manner:
 - a. Indefinite Delivery Indefinite Quantity (IDIQ): For state FY20, INDOT awarded bridge contracts only for Indefinite Delivery Indefinite Quantity (IDIQ) in each district utilizing federal aid dollars. The DBE goals for each of these contracts was set at 7% utilizing historical averaging and the categories of work that are included in the unique special provision. These contracts are monitored in INDOT's traditional way utilizing Site Manager for subcontractor approvals, tracking of subcontractor payments and the traditional DBE-3 close out process.
 - b. Design/Build or Public Private Partnership (P3) Projects. These projects vary in scope and nature and are handled on a case by case basis. In general, setting the DBE goal on these types of contracts will typically include a review of the historical utilization of DBE's on projects of this nature and the averaging of the DBE utilization on prior projects, if available. INDOT's current design build projects are monitored via Site Manager with subcontractor approvals and contract monitoring completed by EEO's and construction management. INDOT EOD works closely with its Major Projects team to provide both annual updates on the Major Projects program and opportunities for DBE networking.

SECTION 6: GOOD FAITH EFFORTS

A. Pre-Award Good Faith Effort (GFE) Determination

INDOT ensures 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 GFE, INDOT requires the bidder/proposer to demonstrate at the time of letting that it has made good faith effort by submitting a completed AAC which lists the DBE(s) with which it has agreed to subcontract and the amount to be paid to the DBE(s). Bidder/proposers may not wait until after the contract award to commit to meeting the contract's DBE goal.

Effective July 1, 2019 any contractor identified as the Lowest Qualified Bidder on any INDOT federal-aid construction contract must submit the quotes from any DBE utilized on the Affirmative Action Certificate to EOD via email (dbequotes@indot.in.gov) within twenty-four (24) hours of any letting. This level of scrutiny creates an even more level playing field and allows EOD to ensure that prime contractors are actually contacting DBE's prior to letting to negotiate price, quantity, etc. If a quote is not received in a timely manner, the Contracts Administration Division notifies the LQB of its obligation to provide the necessary documentation. If an LQB cannot provide the necessary documentation or the quotes received result in a reduction below the entire DBE goal for any individual contract, the contract goes to GFE.

If the low bidder/proposer fails to achieve any or the entire DBE goal, INDOT completes the following process:

- A. The low bidder/proposer is notified it has five business days from receipt of notice to provide INDOT's Pre-bid Engineer with a written explanation accompanied by supporting documentation of its GFE taken to achieve the DBE goal prior to letting. If a response is not provided, then the next lowest bidder will be contacted;
- B. If a response is provided, the EOD reviews the response and any documentation provided and makes a fair and reasonable judgment as to whether GFE was achieved prior to award. EOD reviews the documentation and response pursuant to the guidance set forth in Appendix A to 49 CFR Part 26. The kinds of efforts that will be considered demonstrative of good faith effort include, but are not limited to, the following:
 1. Whether the bidder/proposer solicited through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capacity to perform the work of the contract;

2. Whether the bidder/proposer solicited interest within sufficient time to allow the DBEs to respond and if appropriate steps were taken to follow up with interested DBEs;
 3. Whether the bidder/proposer selected portions of the work to be performed by DBEs and where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces;
 4. Whether the bidder/proposer negotiated in good faith with interested DBEs. Evidence of such negotiation includes names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting and evidence as to why additional agreements could not be reached;
 5. Whether the bidder/proposer made efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services;
 6. Whether the bidder/proposer made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor;
 7. Whether the bidder/proposer effectively used the services of available minority/women community organizations, contractors' groups, and other organizations to provide assistance in the recruitment and placement of DBEs;
 8. Whether the performance of other bidders relative to the bidder/proposer and whether the average of DBE participation by other bidders meets or exceeds the average DBE participation obtained by other bidders.
 9. Whether the bidder/proposer effectively utilized the most up to date version of INDOT's DBE repository.
- C. If a determination is made that GFE occurred, the contract is awarded to that bidder/proposer. If a determination is made that GFE did not occur, the bidder/proposer will be notified by the Contract Administration Division via email and may elect to proceed on to the Administrative Reconsideration section. If the bidder/proposer decides not to pursue Administrative Reconsideration, then the GFE analysis is recommenced with the next lowest bidder/proposer.

B. Administrative Reconsideration of Good Faith Efforts

Within five (5) days of notification by the Contract Administration Division that it has been found ineligible for award because it has not documented sufficient GFE, a bidder may request administrative reconsideration. The bidder should make this request for reconsideration in writing to:

Chief Legal Counsel/Deputy Commissioner
INDOT
Indiana Government Center North
100 North Senate Avenue, Room N750
Indianapolis, Indiana 46204

A reconsideration official is appointed by the Chief Legal Counsel, and the official will not have played any role in the original determination concerning the bidder's failure to document GFE.

INDOT EOD highly recommends that bidders take advantage of the reconsideration hearing as it also serves as an educational experience for all parties. As part of this reconsideration, the bidder has the opportunity to provide written documentation or provide testimony concerning the issue of whether it met the goal or made adequate GFE to do so. The bidder has the opportunity to meet with the reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. INDOT sends the bidder a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate GFE to do so. The decision is made part of the records for the subject bid. If upon reconsideration, INDOT determines that the bidder has made the requisite showing, the contract is not awarded to the bidder.

The result of the reconsideration process is not administratively appealable to the USDOT.

C. Post-Award Good Faith Effort Determinations

INDOT requires contractors to demonstrate good faith efforts to meet the DBE goal of the contract by taking the following compliance steps:

A. All activity performed by a DBE for credit toward the contract goal must be performed, managed and supervised by the DBE in accordance with all commercially

useful function requirements of 49 CFR 26. The Prime Contractor shall not enter, or condone, any other arrangement.

B. Prime Contractor shall not perform with its own organization, or assign to any other business, an activity designated for the DBE(s) named on the Affirmative Action Certification submitted by the Prime Contractor without the approval of INDOT EOD as set forth below.

C. INDOT may suspend payment for any activity that was not performed by the DBE to whom the activity was committed on the approved Affirmative Action Certification, or that was not performed in accordance with the requirements.

D. A Prime Contractor's compliance with the participation goal shall be determined by reference to the established percentage of the total contract price, provided, however, that no decrease in the dollar amount of a bidder's commitment or a reduction in the scope of work to any DBE shall be allowed without the written approval of INDOT EOD's staff.

E. In the event of the decertification or removal of a DBE scheduled to participate on the contract for credit toward the goal, but not under subcontract, the Contractor shall proceed in accordance with the procedures set forth below:

1. Prime Contractor shall notify dbechange@indot.in.gov and any other party listed on the form immediately of any facts that come to its attention indicating that it may or will be unable to comply with any aspect of its DBE obligation under this contract utilizing this form:

<https://www.in.gov/indot/files/Change%20In%20DBE%20Utilization%20Form.pdf> .

2. Any notice required by these Special Provisions shall be given in writing via email to: (1) the Project Manager; (2) the district EEO Officer; and (3) the INDOT EOD Contract Compliance Manager.

INDOT's specifications comply with the federal regulations regarding nonpayment to contractors for failure to utilize DBE's committed to at the time of letting on the AAC. EOD staff work with INDOT's State Construction Engineer and field staff to insure that recommendations for nonpayment for failure to utilize DBE's that are listed as part of the award of the contract, i.e. on the Affirmative Action Certificate, are consistently carried out throughout INDOT's districts.

H. Prime Contractor and its subcontractors shall comply with INDOT's Electronic Reporting System Requirements. Effective for any contract let after July 1, 2020, all INDOT prime contractors, DBE subcontractors, DBE suppliers and DBE haulers must utilize the upgraded Subcontractor Payment Tracking System (SPT) located in ITAP. SPT provides real-time payment information and payment verification or identification of potential disputes by DBE's. Instructions for the SPT system are located here under the Subcontractor Payment Tracking System heading: <https://www.in.gov/indot/2753.htm>

INDOT reserves the right to request reports in the format it deems necessary anytime during the performance of the Contract.

I. Termination of DBE by Prime Contractor

(1) A Prime Contractor shall not terminate a DBE subcontractor or an approved substitute DBE firm without the prior written consent of INDOT EOD's Contract Compliance staff. This includes, but is not limited to, instances in which a Prime Contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm regardless of the source of the change.

(2) INDOT EOD may provide such written consent only if INDOT EOD agrees, for reasons stated in its concurrence document, that the Prime Contractor has good cause to terminate the DBE firm.

(3) For purposes of this paragraph, good cause includes the following circumstances:

- (i) The DBE subcontractor fails or refuses to execute a written contract;
- (ii) The DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Good cause, however, does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the Prime Contractor;
- (iii) The DBE subcontractor fails or refuses to meet the Prime Contractor's reasonable, non-discriminatory bond requirements.
- (iv) The DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
- (v) The DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law;
- (vii) INDOT has determined that the listed DBE subcontractor is not a responsible contractor;
- (vi) The listed DBE subcontractor voluntarily withdraws from the project and provides written notice of its withdrawal;
- (vii) The listed DBE is ineligible to receive DBE credit for the type of work required;
- (viii) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;
- (ix) Other documented good cause that INDOT EOD's Contract Compliance staff determines compels the termination of the DBE subcontractor. Good

cause, however, does not exist if the Prime Contractor seeks to terminate a DBE it relied upon to obtain the contract so that the Prime Contractor can self-perform the DBE work or substitute another DBE or non-DBE contractor after contract award.

(4) Before transmitting to INDOT EOD's Contract Compliance staff a request to terminate and/or substitute a DBE subcontractor, the Prime Contractor must give notice in writing to the DBE subcontractor, with a copy to dbechange@indot.in.gov, of its intent to request to terminate and/or substitute, and the reason for the request. The form is located under the heading "Change in Utilization":
<https://www.in.gov/indot/2753.htm>.

(5) The Prime Contractor must give the DBE five (5) days to respond to the Prime Contractor's notice and advise INDOT EOD and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why INDOT EOD should not approve the Prime Contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), INDOT EOD may provide a response period shorter than five (5) days. Approval time from INDOT may vary depending on the circumstances.

(6) In addition to post-award terminations, the provisions of this section apply to pre-award deletions of or substitutions for DBE firms.

(7) If a Prime Contractor fails to follow this process, INDOT will not pay for the labor or material that was committed to on the AAC by the Prime Contractor.

D. Awarding of DBE Credit and Counting DBE Participation

Only the work actually performed by a DBE will be counted towards the DBE goal. The cost of supplies and materials obtained by the DBE or equipment leased (except from the prime contractor or its affiliate) may also be counted if the DBE is responsible for negotiating the cost of materials or supplies, determining quantity and quality, ordering the material, paying for the material itself, and providing or arranging for its delivery in accordance with normal industry standards.

Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals. Expenditures may only be counted if the DBE is performing a commercially useful function. In general, a DBE must perform at least 30 percent of the total value of its contract with its own work force. Decisions on commercially useful functions are subject

to review by the USDOT operating administration but are not administratively appealable to USDOT.

For the purposes of counting DBE participation on Contract Goals INDOT utilizes the following classifications and determination of DBE credit:

1. DBE Manufacturer 49 CFR § 26.55 (e)(1)

If materials or supplies are obtained from a DBE manufacturer, 100 percent of the cost will be counted. A manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises the materials, supplies, articles or equipment required under the contract and of the general character described by the specifications.

2. DBE Supplier (Regular Dealer) 49 CFR § 26.55 (e)(2)

If the materials or supplies are purchased from a DBE regular dealer, 60 percent of the cost will be counted. For purposes of this section, a regular dealer is a firm that owns; operates; or maintains a store, warehouse, or other establishment in which materials or supplies, articles or equipment of the general character described by the specifications and required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm shall engage in, as its principal business and in its own name, the purchase and sale of the products in question. INDOT requires DBE suppliers to have an established presence in the supply chain and inventory available to both governmental and non-governmental entities.

A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock provided it both owns and operates the distribution equipment. If the DBE supplier does not own the distribution equipment, a lease containing the terms of the agreement shall be available and must be approved in writing by INDOT EOD's Contract Compliance staff.

INDOT will conduct pre and post CUF reviews to insure CUF compliance for the purposes of fuel supply credit towards DBE participation. *See also* the section below on DBE Brokers.

INDOT considers currently certified field office providers to be suppliers and not manufacturers for the purpose of counting DBE participation.

INDOT worked with various stakeholders including FHWA on developing its Policy Document on DBE Supplier Crediting which launched in January 2018 and is located here: <https://www.in.gov/indot/2753.htm> .

3. DBE Broker- 49 CFR §26.55 (e)(3)

INDOT will count 100% of the *fee or commission* received by the DBE broker for materials purchased and resold to the contractor that become a permanent part of the

project. The prime contractor cannot count any portion of the cost of the materials and supplies themselves toward the DBE goal. A facilitator, packager, manufacturers' representative, or any other person who arranges or expedites transactions but does not manufacture or supply on a regular basis cannot be a DBE regular dealer or DBE manufacturer.

4. DBE Subcontractor- 49 CFR § 26.55 (a)

When a DBE participates in a construction contract, INDOT will count the value of the work performed by the DBE's own forces. INDOT will count the cost of supplies and materials obtained by the DBE for the work of its contract, including supplies purchased or equipment leased by the DBE in accordance with the paragraph above. Supplies, labor, or equipment the DBE subcontractor uses, purchases, or leases from the Prime Contractor or any affiliate of the Prime Contractor will not be counted.

5. DBE Service Providers

INDOT will count the entire amount of fees or commissions charged by a DBE firm for providing bona fide services, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a U.S.DOT assisted contract, toward DBE goals, provided it is determined that the fee is reasonable and not excessive as compared with fees customarily allowed for similar services.

6. DBE Prime Contractors

When DBE performs as a prime contractor, INDOT will count the portions of the contract to be completed by certified DBE firms other than the prime contractor toward meeting the goal. Items of the contract subcontracted to non-DBE firms will not be counted in the commitment. DBE prime contractors are subject to the same DBE subcontracting responsibilities as non-DBE prime contractors.

7. Joint Ventures

INDOT reserves the right to approve or not approve joint ventures between firms. When a DBE performs as a participant in a joint venture, INDOT will count the portion of the total dollar value of the contract equal to the distinct and clearly defined portion of work performed by the DBE with its own forces or subcontracted or purchased/leased from another DBE.

E. Transportation or Hauling of Materials

1. INDOT allows for DBE credit in either the leasing of DBE certified firms owned/leased trucks or in trucks leased to or by DBE firms. The verification of truck drivers employed by DBE firms will continue to be by submission of payrolls independent from any Davis-Bacon regulations.

a) The DBE must demonstrate control of the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals;

- b) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract;
- c) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs;
- d) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from other DBE's receives credit for the total value of the transportation services the lessee DBE provides on the contract;
- e) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract.
- f) The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, the DBE is entitled to credit for the total value of the hauling services.
- g) For purposes of this paragraph, a lease must indicate that the DBE has exclusive use of and control over the truck. Leases cannot be Department contract-specific, must be long term, and must be approved by the INDOT Project Engineer or Project Supervisor. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

The Contractor shall provide the Project Engineer/Project Supervisor and the district Equal Employment Opportunity Officer copies of any lease agreements between DBE trucking subcontractors and any DBE or non-DBE trucking firms or owner/operators that will be used to supplement the DBE trucking subcontractor's trucks for the purpose of meeting the DBE goal. Copies of these lease agreements shall be provided by the time of use of any supplemental trucks on the contract. *See generally* INDOT Specification 103.01(h). The pathway for the standard specifications is as follows: <http://www.in.gov/dot/div/contracts/standards/>.

INDOT conducts seminars on hauling which include guidance in relation to seeking DBE credit on various hauling scenarios. The most recent materials are located here: <https://www.in.gov/indot/2753.htm>

F. Set-Asides or Quotas

INDOT does not use quotas in any way in the administration of the DBE program.

SECTION 7: REQUIRED CONTRACT PROVISIONS

A. Nondiscrimination

INDOT 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 its DBE program, INDOT will not, 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 the DBE program with respect to individuals of a particular race, color, sex, or national origin.

B. Nondiscrimination Assurance

Each financial assistance agreement INDOT signs with a USDOT operating administration shall include the following assurance:

The INDOT 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 INDOT 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 INDOT'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 INDOT of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

C. Contract Assurance

INDOT, its operating administrations, and subrecipients will ensure that the following clause is placed in every USDOT-assisted contract and subcontract:

The contractor or subcontractors 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 INDOT deems appropriate.

INDOT EOD's Contract Compliance section reviews subcontracts during the Contract Compliance Review process to ensure that subcontracts contain the required nondiscrimination language as well.

D. Prompt Payment

INDOT includes the following clause in each USDOT-assisted prime contract:

Within ten business days of receipt of payment for any such estimate, the Contractor shall make payment to all subcontractors, including lessors and material suppliers, for the value of their work performed and materials complete in place in accordance with the contract. Failure to comply with this clause shall constitute a material breach of the contract and may result in sanctions under the contract.

In addition, INDOT staff monitors the prompt payment to all subcontractors with information submitted by primes electronically through the subcontractor payment tracking (SPT) system.

INDOT staff audits the entries made by prime contractors in SPT and compares these entries with front and back copies of cancelled checks from prime contractors. INDOT EOD Contract Compliance staff conducts two random prompt payment audits per month. If a prime contractor is found to be routinely late in making payments to its contract participants, the prime contractor may be referred to the prequalification committee and subject to penalties including but not limited to prequalification suspension, reduction of prequalification limits or prequalification revocation.

Prompt payment in non-traditionally let contracts, i.e. design/build or public/private partnership agreements, is reviewed in conjunction with any organizational partner. The contract for each of these projects instructs as to the prompt payment guidelines.

For all INDOT federal aid contracts let after July 1, 2020, Special Provision 108-C-264 Subcontractor Payment Verification is in effect. This Special Provision mandates enrollment in the Subcontractor Payment Tracking system module of ITAP is mandatory for the Prime, all subcontractors, and all DBE haulers and suppliers to record and verify payments. The Prime Contractor must record payments made and the subcontractor or DBE hauler or supplier must verify those payments no later than twenty (20) days after the month they are received. The Prime Contractor is responsible for ensuring that timely entries are made in the Subcontractor Payment Verification system.

INDOT provides an additional tool that allows subcontractors to view when payments are made on INDOT line items. The program is called SMGR and is located within the ITAP portal. Once you have access to the SMGR Report application, a contract participant simply enters in their INDOT contract number and has access to several reports. In the top section, the IC642CLN report gives information on the whole contract.

In the lower section, the Progressive Record Activity gives information on a specific line item and what has been recorded on a daily basis. This is an easy and quick way to see what work has been recorded for payment by the INDOT or Consultant field staff on a particular contract.

Retainage

INDOT will not withhold retainage from prime contractors; however, INDOT does not object when prime contractors withhold retainage from subcontractors so long as the prime contractor is not discriminatory in its use of retainage. In accordance with 49 CFR § 26.29, prime contractors must make prompt and full payment of any retainage to the subcontractor within thirty days after satisfactory completion of the work by the subcontractor. For the purposes of this section, satisfactory completion is interpreted as occurring when the subcontractor has completed all physical work and other contract requirements to INDOT's satisfaction. The subcontractor payment tracking requires the prime contractor to report all retainage held and released each month. Any complaint on retainage should be reported to the INDOT Contract Compliance Manager and the same audit process would be followed.

D. Use of Joint Check Policy and Procedure:

INDOT has established the joint check policy and procedure set forth below in accordance with FHWA guidelines for the use of joint checks to pay manufacturers/suppliers:

Joint Check Allowance for DBE's:

A DBE must receive pre-approval by INDOT EOD's Contract Compliance staff before using a joint check. Joint check requests shall be submitted, by the DBE, to the Contract Compliance manager prior to the execution of the contract agreement.

The following are some general conditions that must be met regarding joint check use:

- a. The second party (typically the prime contractor) acts solely as a guarantor.
- b. The DBE must release the check to the supplier.
- c. The use of joint checks must be a commonly recognized business practice in the industry.
- d. The DBE remains responsible for all other elements of 49 CFR 26.55(c)(1)
- e. The DBE is not required to use either a specific supplier or the prime contractor's negotiated unit price.

f. The DBE shall submit receipt/copy of cancelled checks to the INDOT EOD Contract Compliance Manager.

If a contractor is found to be routinely in violation of these standards, the contractor may be referred to the Prequalification Committee and subject to penalties.

SECTION 8: POLICY AND PROCEDURES FOR DBE CERTIFICATION

A. Unified Certification Program

INDOT EOD has established a State Unified Certification Program (“UCP”) to assist qualifying firms in entering DBE programs. All subrecipients of FHWA funds must comply with the prime recipient’s DBE plan and may not have a DBE plan independent from INDOT EOD. INDOT is the sole certifier of Disadvantaged Business Enterprises in Indiana.

The UCP has agreed to use the certification standards of Subpart D of Part 26 and the certification procedures of Subpart E of Part 26 to determine the eligibility of firms to participate as DBEs in USDOT-assisted contracts. To be certified as a DBE, a firm must meet all 49 CFR Part 26 certification eligibility standards. UCP will make DBE certification decisions based on the facts as a whole. INDOT is the sole certifying agency for the Indiana DBE Program and certifies for FHWA and FAA. INDOT’s multimodal section certifies for FTA and a copy of their approval procedures is attached herein and incorporated into the Appendix.

To apply for DBE or ACDBE certification, all firms must register through the Indiana Technical Application Pathway. Detailed instructions are located here: <https://www.in.gov/indot/2748.htm>.

B. DBE and ACDBE Certification Procedures

Intake Procedures

The following outline reflects the Intake Procedures that apply upon an initial application for recognition as a DBE or ACDBE:

A. For All New Applicants who claim Indiana as their Home State

Applicants may submit the Unified Certification Application (“UCA”) to the UCP following these steps: <https://www.in.gov/indot/2748.htm>. INDOT has a DBE Reciprocity Exchange Agreement with the Kentucky Transportation Cabinet and Memorandums of Understanding with the City of Indianapolis and the Indiana Department of Administration which can be found here: <https://www.in.gov/indot/2748.htm>. The DBE certification contains both social and economic thresholds. Reciprocity is only valid for federal aid contracts in the KYTC MOU. Reciprocity is limited to the use of INDOT’s DBE

certification to shorten the certification processes of the City of Indianapolis or IDOA for their certification processes only.

1. The assigned Certification Specialist within 3 to 5 days verifies that the application is complete and that the applicant has provided all the necessary supporting documents.
 - a. If the application is deemed complete, the assigned Certification Specialist sorts the submitted documentation into the appropriate sections and log the application as “complete”. The applicant firm is notified via email within 15 days that its application is suitable for evaluation;
 - b. For all incomplete applications, the assigned Certification Specialist notifies the applicant firm of its specific deficiencies by using the email address provided by the applicant. The applicant receives fifteen (15) days to provide the missing information subject to an extension not to exceed an additional 15 days which may be granted under appropriate circumstances, and with documentation to support the granting of an extension, if warranted by the facts.
 - i. If the applicant provides the requested information, The Certification Specialist processes the application.
 - ii. If the applicant does not respond, the UCP Certification Manager take the following steps:
Inactivate the application; and notify the applicant firm of this action in writing by email of the determination of inactivation of their application.
 - c. If found complete, the Certification Specialist proceeds to conduct a comprehensive review of the application to ensure that it meets the program requirements in the procedures set forth below.

C. For Interstate Certification

All Interstate applicants must be certified in their home state prior to making a request for certification in Indiana. Interstate applicants must also register in the ITAP portal and choose the interstate application. This is an abbreviated application form that meets the requirements of 49 CFR 26.85.

The assigned Certification Specialist acknowledges receipt of the interstate applicant’s request by email within 3 to 5 days of submission and notifies the applicant in writing

that their request has been assigned. INDOT evaluates interstate certification applications according to 49 CFR 26.85 and does not evaluate interstate certification applications in the same manner as new in state applications.

1.

1. After the assigned Certification Specialist confirms that the applicant is in fact certified in its home state, the Certification Specialist verifies the NAICS codes in the home state.

2. Within 7 days after the assigned Certification Specialist receives contacts the applicant's home state to request a copy of its original and most recent on-site report pertaining to the applicant. If the home state's most recent on-site report is more than three years old as of the date of the firm's application to INDOT, the Certification Specialist may require an affidavit that affirms that the facts in the on-site report remain true and correct.

3. Within 60 days of receiving the required documentation, the UCP either certifies the firm and places the firm in its Unified DBE Directory or establishes good cause that the firm's certification in its home state:

- Was obtained by fraud;
- Is no longer valid based on new information not available to the home state at the time of its certification, showing that the firm is ineligible;
- Was erroneous or inconsistent with the requirements at 49 CFR Part 26;
- Does not apply due to any law of the State that would require a different result. In such cases, the UCP may delay certification until the applicant firm has provided evidence of its compliance.

Where the UCP establishes good cause to deny an application, a notice stating the specific reasons for the denial and an opportunity to respond within 10 days is provided to the applicant firm. Applicant firms may respond in writing or request a meeting with INDOT EOD staff to discuss its objections to the UCP's determination. The UCP schedules such meetings within 30 days of the firm's request.

Any request beyond 10 days of the UCP's notice denying certification is considered untimely, and the UCP's decision becomes final.

Upon meeting with the INDOT EOD staff, the applicant firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements pertaining to the particular issues raised in the notice. The UCP issues its final written decision within 30 days of either the meeting with the INDOT EOD staff or receipt of the firm's written arguments, whichever is later. The firm's application for certification is stayed pending the outcome of this process and until the UCP's final decision is reached.

The UCP makes entries of all firms denied Interstate Certification into the US DOT Office of Civil Rights' Ineligibility Determination Online Database. The DBE Certification Manager enters the appropriate firms into this database.

All Interstate applicants denied certification have the right to appeal directly to US DOT in accordance with 49 CFR Part 26.89.

In the instance where an out-of-state firm has not retained its home state certification, the assigned Certification Specialist contacts the appropriate state UCP to seek information concerning the basis for the removal. After a review of the facts and circumstances surrounding the removal, the UCP determines whether or not reasonable cause exists for an ineligibility proceeding under 26.87. Any ineligibility proceeding follows the corresponding federal regulations.

D. General Initial Certification Procedures

The following outline generally reflects the procedures that INDOT EOD applies to make certification determinations:

Administrative Procedures

1. INDOT EOD's Certification Manager assigns a Certification Specialist to cases on a weekly basis using a first in—first out methodology to ensure equity in the assignment process.
2. Upon assignment of a case to the Certification Specialist, the Certification Specialist notifies the applicant in writing of the assignment. The Certification Specialist conducts a desk audit of the application and its accompanying documents to determine the applicant's eligibility.
3. If the Certification Specialist determines that any additional documentation is required or further information as to specific issues pertaining to certification is needed, the Certification Specialist notifies the applicant in writing of the specific documents needed and provides fifteen (15) days to respond. The Certification Specialist may grant a one-time extension to an applicant for an additional 15 days, if requested or necessary at their discretion.
5. If the Certification Specialist determines the desk audit is complete, the Certification Specialist notifies any new in-state applicant and arranges for a mutually convenient time to conduct a site visit. Whenever possible, the Certification Specialist schedules visits so as to reduce travel costs and time out of the office. Onsite visits may also be conducted virtually at the discretion of INDOT EOD. The Certification Specialist completes the Onsite Questionnaire during the site visit that will be included in the file. The most recent version of the Onsite Questionnaire is attached and incorporated herein in the Appendix.

- a. Where applicable, the Certification Specialist visits a job site with the applicant as well as visit its principal place of business.
- b. If deemed necessary, the Certification Specialist interviews all principals and any other person possessing relevant information as to the applicant's operations, including, employees, subcontractors, consultants, legal counsel, accountants, and government personnel.
6. The assigned Certification Specialist trackss all communications and interactions with the applicant. Information to be recorded includes, but is not limited to, phone calls, meetings, emails, and letters sent to the applicant.
7. After conducting the site visit, the assigned Certification Specialist prepares a recommendation on the applicant to either certify or deny. The report is submitted to the Certification Committee to either approve or deny the applicant's request for certification. The report details how the company either did or did not comply with the regulatory requirements of 49 CFR Part 26, Subpart D. The Certification Specialist notifies the applicant of the Certification Committee's decision if approved.
8. Where an applicant withdraws its request or is nonresponsive, the assigned Certification Specialist prepares a brief report and close the file. Any firm that withdraws its application before the UCP has rendered its certification decision may reapply at any time. However, firms that have established a pattern of withdrawing an application before a certification decision is made may be required to wait up to 12 months.

Determination Procedures

In general, a certification specialist makes an initial determination regarding the social and economic disadvantage, ownership, capital contribution and control of the eligible principal(s); and the ongoing and independent nature of the applicant.

1. Social and Economic Disadvantage

- a. In reviewing an applicant for Social and Economic Disadvantage ("SED"), Certification Specialist analyzes the Personal Net Worth Form(s) and Affidavits of Certification for each individual relied upon to establish social and economic disadvantage. If the spouse of a disadvantaged owner is involved in the operation of the firm, the spouse must also submit a Personal Net Worth Form with the UCP application.

- b. The Certification Specialist ensures that the individuals relied upon meet the requirements of social disadvantage as defined in 49 CFR §26.63. If the Certification Specialist has a well-founded reason to question the applicant's claim to group membership, the Certification Specialist may request additional documentation justifying the individual's inclusion.
- c. Pursuant to federal regulation, enrolled members of Native American tribes, whether State or federally recognized, Alaska Natives, or Native Hawaiians would all be recognized as socially disadvantaged individuals. Certification specialists request a federally recognized tribal card or an official letter from the tribe for Native Americans and review the birth certificate for Native Alaskans or Hawaiians as part of the documentation gathered for DBE certification.
 - i. While 49 CFR §26.67 defines the classes presumed to be socially disadvantaged, an individual who is not presumed to be socially and economically disadvantaged may apply for DBE certification, provided s/he can establish a pattern and history of disenfranchisement, including but not limited to decreased access to education, employment, and business opportunities, and, with respect to economic disadvantage, limited access to capital and credit. Certification Specialists make a case-by-case determination of whether each individual whose ownership and control is relied upon for DBE certification is socially and economically disadvantaged in accordance with 49 CFR Part 26 Appendix E. In such a proceeding, the applicant firm bears the burden of demonstrating by a preponderance of the evidence that the individuals who own and control it are socially and economically disadvantaged.
- d. In reviewing any Personal Financial Statements, the Certification Specialist validates the statements with the individual's business and personal tax returns. The UCP Supporting Documents Checklist requires submission of three years of individual and business tax returns.
- e. In determining that the individual(s)'s personal net worth does not exceed the **\$1,320,000.00** threshold, the Certification Specialist excludes the eligible principal(s)'s share of the equity in his or her primary residence and in the applicant firm, but includes the present value of assets, including retirement assets or investment programs.

- f. The Certification Specialist reviews any transfers of assets to or from the applicant and/or to or from any of its owners over the past two years, including any marital transfer.
- g. The Certification Specialist reviews the average of the applicant's gross receipts over the previous three years to determine whether the cap on small businesses is exceeded. The current cap on small businesses is set at \$23.98 million dollars. Update 1/13/21: After 1/13/21 the small business cap is increased to \$26.29 million dollars for the DBE program only.
- h. A socially disadvantaged individual may be disqualified if there is evidence that the applicant is not economically disadvantaged due to assets and resources that indicate an ability to accumulate substantial wealth based on specific factors, similar to those used by the Small Business Administration, that are set out in rule.

2. Ownership

- a. The Certification Specialist evaluates ownership and capital contribution percentages for each individual involved in the company to ascertain that the SED principal(s) own the applicant in both substance as well as form.
- b. The Certification Specialist determines not only that the paper ownership of the company reflects a true and accurate statement of the eligible principal(s)'s ownership, but that the substance of the company reflects 51% or more of an ownership interest, including but not exclusively, salary and profit distribution disparities.
- c. In validating the SED(s)'s substantive ownership, the Certification Specialist analyzes the capital contribution provided to the company by each owner, including monetary payments, debt instruments, tangible assets, or services in lieu of payment.
 - i. Where the eligible principal used marital assets to acquire ownership, verify that the assets belonged to the eligible principal or the ineligible spouse legally denounced any right to the assets. Documents reviewed may include but copies of checks utilized to acquire ownership and copies of any spousal renunciation.

- ii. Where the SED alleges to have provided services in lieu of payment, the Certification Specialist determines if the services provided were (a) in a specialized field; (b) of outstanding quality; (c) in areas critical to the firm's operations; (d) indispensable to the firm's potential success; (e) specific to the type of work the firm performs; and (f) documented in the records of the firm, clearly showing the contribution and its value to the firm. Note that even in the case of services in lieu of payment, some financial contribution must be made by the SED. Certification specialists typically look at the length of time worked at the company and documentation of the value of the company versus the sweat equity claimed as part of the payment structure.
- iii. The Certification Specialist reviews any agreements or practices in place that give a non-disadvantaged individual or firm a priority or superior right to a DBE's profits. If so, these agreements or practices constitute grounds for denial of certification or removal from the program.
- d. The Certification Specialist evaluates the transfer or general acquisition by the eligible principal(s) of any ownership interests from an ineligible individual, especially one who retains ownership or remains involved with the company.
 - i. In analyzing any transfer of assets, Certification Specialist pays careful attention to any inter-spousal transfer, even one for value, to ensure the SED spouse owns and controls the firm.
- e. In companies, securities, or any other assets held in trust, the Certification Specialist collects the entire trust instrument for review. Where the ownership is held in trust, the Certification Specialist requests the applicant provide a notarized statement as to the trust's (a) Settlor; (b) current Trustees; and (c) the current and expected beneficiaries.

3. Control

- a. To verify that an applicant firm and its eligible principal(s) qualify as an independently-controlled DBE, the Certification Specialist evaluates the applicant's relationship(s) with non-DBE firms regarding personnel, facilities, and equipment as compared to standard operating procedures within the applicable industry; review, the financial, bonding support, and resources, of the applicant, as well as its prime- and sub-contractor dealings; and if applicable, determines the binding effect of any franchise agreement on the applicant's operations.

- b. In determining whether the eligible principal(s) control the applicant, the Certification Specialist evaluates whether s/he has “power to direct or cause the direction of the management and policies of the firm and to make day to day as well as long term decisions on matters of management, policy, and operations.
- c. The eligible principal(s) must have sole discretion to make any business decision of the firm; hold the highest officer position; and control any board of directors, or be general partner with control over all decisions in a partnership.
 - i. While delegation of some aspects of management, policymaking, or daily operations is permissible, the eligible principal(s) must retain the authority to revoke the delegation and have power to fire the person to whom the delegation is made.
- d. The Certification Specialist determine whether the eligible principal(s) have the technical expertise in the specific areas and directly related to the scope of business the company performs. Technical expertise does not require the principal actually perform the work of the company, rather that s/he has the ability to “intelligently and critically evaluate information presented” by the firm members and be able to “use this information to make independent decisions concerning the firm’s daily operations, management, and policymaking.” However, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.
- e. The Certification Specialist ensures that the eligible principal(s) hold any licenses required, by state or local law, to operate the company or perform its work. UCP may have to undertake research to determine whether or not state or local ordinances require the company or its employees to be licensed.
- f. Certification Specialists evaluate the compensation paid to all officers and employees of the company as well as each individual scope of participation in the company’s operations (i.e., full-time or part-time employment with the applicant). While the eligible principal(s) need not be the highest paid employees, discrepancies in compensation may indicate that the principal does not share in the risks and profits commensurate with his/her ownership interest.

- g. The participation by non-eligible family members, other non-eligible individuals, or prior owners in the business of the firm must be evaluated under 49 CFR § 26.71(k) (1)—(2), 49 CFR § 26.71(e) and 49 CFR § 26.71(l). Certification Specialists pay careful attention to situations where non-eligible family members participate in the business, particularly if they used to own all or part of the business. If the UCP cannot determine that the eligible individual controls the business separate and distinct from the non-eligible family members, the business fails to carry its burden. An assumption of control is created when a non-disadvantaged individual who is a former owner of the firm remains involved in the operation of the firm unless a determination is made by the Certification Specialist that the disadvantaged owner is in control.
- h. Certification Specialists determine the applicant's independence and viability by comparing its relationships with other companies or individuals with normal industry practices in the acquisition of personnel, facilities or equipment; financial and bonding support or resources; and whether the business actually exists and performs the functions in claims to perform based on interviews, site visits, and other information in the applicant's file.
- i. A franchise agreement does not preclude a company's inclusion into the DBE program, but the franchise agreement cannot unduly bind the eligible principal's ability to control the applicant's daily and long-term operations.

Assignment of NAICS Codes

Certification specialists review the NAICS codes requested during the onsite evaluation for in state applicants, or the onsite received from the home state for interstate certification. NAICS codes are assigned for in state applications after evaluation of the personnel, experience and equipment which is evaluated during the onsite review. For interstate applicants, certification specialists award certification in all NAICS codes granted by the home state if the applicant is eligible for certification in Indiana.

Denial of Certification

A. Initial Denial

1. Once the assigned Certification Specialist determines whether the applicant carried its burden as to affirmatively establishing that it meets the regulatory requirements of 49 CFR Part 26 Subpart D, a recommendation is made to the Certification Committee. If the Certification Committee determines that an applicant's request for certification lacks merit, the INDOT EOD staff notify the company in writing, specifically listing the regulatory criteria the applicant failed to establish. Certification decisions are made looking at the standards as a whole.
2. Applicant firms are NOT be denied certification based on a failure to meet any legal requirement pertinent to conducting business in the State.
3. For recommendations of denial, EOD staff prepares a letter to the applicant, based on the report, explaining the reasons for the denial with specific references to the documentation on file. The applicant is given the opportunity to respond, present documents or information, or appear for a meeting with INDOT EOD staff. The applicant is also given the opportunity to withdraw the application at this time.
4. If, after the review of additional documentation and/or an in-person meeting with INDOT EOD staff, the Certification Committee believes that the recommendation of denial should stand, a certification staff member sends out the initial denial letter to the applicant via email.
5. An initial denial affords the applicant the opportunity to appeal INDOT EOD's decision to the USDOT without any right to a local hearing or appeal. INDOT's certification staff notifies the company, by email, of its determination, the address at USDOT to send its appeal and that it has 90 days from the date of receipt of notice to appeal. INDOT cooperates with requests for information as required by 49 CFR 26.73.
6. If a firm decides to have a local appeal, an Administrative Law Judge ("ALJ") is appointed. The ALJ convenes a pre-hearing conference to determine whether discovery is needed, sets discovery deadlines if appropriate and sets a hearing date. The ALJ renders a decision after the hearing which is appealable to USDOT.
 - i. If a firm's application is denied, it may reapply to UCP no sooner than eleven (11) months from the date of the final decision. Additionally, the UCP shall make an entry in the Department of Transportation Office of Civil Rights' Ineligibility Determination Online Database, listing the applicants firm's name, name(s) of owner(s), type and date of action, and the reason for the action.

- ii. An applicant who appeals the denial of its application for certification to DOT is not prohibited from reapplying at the end of the waiting period (typically twelve (12) months from the initial denial) if the appeal remains pending.

Summary Suspension

A DBE's certification is suspended without a hearing for thirty (30) days if the recipient has evidence that the disadvantaged owner(s) has died or is incarcerated. At the discretion of the recipient, evidence of other material changes affecting the certification eligibility of the DBE also may result in summary suspension. INDOT has thirty (30) days to determine whether to reinstate certification or initiate removal proceedings.

Post-Certification Procedures

A. No Change Affidavit

Each year after certification, the DBE shall submit a No Change Affidavit form. A copy of the No Change Affidavit Form is located within the DBE Certification ITAP application. This process includes obtaining updated financial data, including corporate income tax information. The owner(s) of the DBE are required to sign the "no change" affidavit, attesting to the fact that there has been no change affecting its ability to meet the size, disadvantaged status, ownership, changes in management responsibility or control requirements of 49 CFR Part 26. If additional information is required to decide, a Certification Specialist may contact the DBE to obtain this information.

While failure to maintain home state certification does not prevent renewal, it shall result in a review of the facts and circumstances to determine whether reasonable cause exists to initiate an ineligibility proceeding under 26.87.

1. In evaluating the company's revenues, averaged over three years, the Certification Specialist determines if the company exceeds the USDOT threshold for a small business. If the company exceeds the amount, INDOT EOD staff notifies the company, in writing that it has graduated from the program.

2. If the company's three year average tax revenue exceeds the threshold, as set by the SBA, for any of the NAICS codes assigned to it, INDOT EOD staff notifies the company as to what categories it retains.

3. INDOT EOD staff also reviews the personal net worth ("PNW") of the eligible individual to ensure s/he remains economically disadvantaged. If the staff member determines that the individual's PNW exceeds the threshold, INDOT EOD staff notifies the company, in writing, of the fact.

4. If the company disputes any findings with respect to (b) through (d) above, the UCP will initiate decertification proceedings under 26.87, and provide the company with an opportunity to dispute the findings.

5. If INDOT EOD staff does not receive any or all of the documents by the anniversary date, s/he notifies the company of its deficiency via email and gives the company 10 business days to show cause as to why it should remain certified. Should the company fail to respond to the “show cause” notification, INDOT EOD staff sends a notification to the company that it will initiate decertification proceedings pursuant to the processes outlined in 26.87.

B. Regular and Discretionary Review

INDOT EOD conducts an on-site review for in state firms on a case by case basis when an amendment occurs which indicates there are significant changes to corporate structure, when the primary objective of the business changes, or there is a definitive expansion of the business and/or any other notable differences that could affect the original DBE certification decision.

1. INDOT EOD's Certification staff accepts, reviews and processes any requests for structure change, or category expansion provided the company submits an amendment request to the office via the ITAP application. The request must detail the specific nature of the change requested and be accompanied by documentation supporting the basis for the change.
2. Should a company relocate, move, or change its contact information, the company has the duty to notify INDOT EOD within 30 days of the change and the directory is updated to accurately reflect the change.
3. Wherever possible, INDOT EOD uses technology to facilitate the process for certified businesses to request changes and make updates to their company profiles.
4. INDOT EOD conducts random regular and discretionary reviews as required.

D. Procedures Governing the Removal of DBE Eligibility

1. Administrative Removal

- A. INDOT EOD Certification staff removes a company's certification if the company makes an affirmative request to withdraw from the program or does not dispute that it has exceeded small business, NAICS code or personal net worth caps.
- B. A DBE that is suspended or debarred for conduct related to the DBE program is automatically be removed from the program.

2. Decertification

A. Ineligibility Complaints

1. Any person may file a written complaint with the UCP alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible.
2. The complaint should include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities shall be protected as provided in Sec. 49 CFR Part 26.109(b).

3. If an allegation of ineligibility is accepted, the INDOT EOD Certification manager review records and other material, requests further information and conduct any investigation deemed necessary.
4. Where reasonable cause is established, the UCP notifies the firm in writing that ineligibility proceedings have been initiated.
5. Ineligibility complaints should be submitted via email to the following address:
dbecertification@indot.in.gov

B. Recipient-Initiated Proceedings

1. If, based on information gained by INDOT that implicates a change in its circumstances or other information that gives reasonable cause to believe that a currently certified firm is ineligible, INDOT conducts a certification review to determine if such cause exists.
2. Where reasonable cause is established, the UCP notifies the company in writing that ineligibility proceedings have been initiated. Such notice will set forth the reasons for the proposed removal and will specifically reference the evidence in the record on which each reason is based.

C. Directive to Initiate Proceeding

1. If any USDOT operating administration determines that information in the certification records, or other information available to the relevant operating administration, provides reasonable cause to believe that a certified firm does not meet the eligibility criteria, the concerned operating administration may direct INDOT to initiate a proceeding to remove the firm's certification.
2. The concerned USDOT operating administration must provide an official of the UCP and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

D. Notification Process

1. Any recommendation to remove a company's DBE certification require INDOT EOD staff to notify the company, in writing, of the grounds for the removal, its right to a local hearing, or to submit written arguments within 10 days. The company remains certified during the period leading up to any hearing. During this period of time, INDOT EOD reserves the right to continue to collect evidence, and generally investigate the company.

2. INDOT EOD staff maintains a record of the date it notified the DBE of the proposed decertification, process any requests for a local hearing, and promptly notifies the Hearing Officer of any such requests.

3. Should the DBE fail to exercise its right to a local hearing or submit written arguments within ten days of notification, INDOT EOD staff renders a final decision and notifies the entity, in writing, of its decertification.

E. Local Hearing

1. Once a hearing request or written arguments are received, INDOT EOD staff arranges for a hearing with an Administrative Law Judge (“ALJ”).

2. The ALJ will not have previously taken part in the actions leading to the removal of the firm's eligibility.

3. While the right is to a local hearing, the firm may submit its arguments in writing without attending and has the right to have the ALJ base its decision on the written documents.

4. The hearing will be conducted in accordance with 49 CFR Part 26; a complete record, including a transcript, of the proceedings is maintained, and will be made available to USDOT, if there is an appeal under 49 CFR Part 26.89, and to the firm upon request.

F. Final Decisions

After any final decision rendered by the ALJ in which a firm is found ineligible and decertified, INDOT’s Certification Manager makes an entry in the Department of Transportation Office of Civil Rights Ineligibility Determination Online Database.

G. Certification Appeals

1. Any firm that has been denied certification or whose eligibility is removed may submit an administrative appeal to the USDOT, if it has exercised its rights to a local hearing, if applicable.

2. Anyone submitting an ineligibility complaint, including a concerned USDOT operating administration, may appeal to the USDOT if the ALJ does not find reasonable cause to propose removing the firm’s eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

3. All administrative appeals must be filed in writing within 90 days of the ALJ’s final decision to:

U.S. Department of Transportation
Office of Civil Rights

1200 New Jersey Avenue, SE.
Washington, D.C. 20590

4. The ALJ's final decision shall remain in effect concerning any matter under appeal, pending the USDOT's determination.

H. Waiting Period

Any company, who is administratively removed or is decertified, may reapply for certification after 11 months. The calculation of time accrues from the date any decision regarding the entity's certification becomes final.

I. Confidentiality and Cooperation

INDOT safeguards from disclosure to third party's information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law. This includes any information that was relied upon for the certification or renewal of a DBE firm. INDOT, however, is required to transmit this information to US DOT in any certification appeal proceeding under 26.89 or upon request to any other state in which a firm has applied or is currently certified under 26.85.

INDOT will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than USDOT) without the written consent of the submitter.

INDOT keeps the identity of complainants confidential at their election. If said confidentiality hinders the investigation, proceeding or hearing or result in a denial of appropriate administrative due process to other parties, the complainant is advised of their option of waiving their right to confidentiality.

J. Maintenance and Retention of Records of Certified Firms

INDOT, pursuant to 49 CFR 26.11(d) maintains the application package, affidavits of no change, onsite reports, and other changes submitted by a certified DBE via a web-based secure system. The information is accessible to certified DBE's who register and receive access which is tracked via a username and password protected system. Records are retained at this point in perpetuity via the web-based system.

SECTION 9: INFORMATION COLLECTION AND REPORTING

A. Bidders List

Pursuant to the provisions of 49 CFR 26.11(c), INDOT's Contract Administration Division must collect from all Bidders who seek work on Federally assisted contracts the firm name(s), addresses and telephone numbers of all subcontractor firms that have submitted bids or quotes to the Bidders in connection with a federally-assisted project. INDOT requires firms working under an INDOT contract to submit this list in accordance with INDOT Standard Specification 103.02 which can be found at: <http://www.in.gov/dot/div/contracts/standards/>.

The bidder's list is compiled, weighted and disaggregated as a management tool for use in the triennial evaluation efforts as part of the DBE goal setting methodology and process. The bidder's list form is completed as part of the prequalification application package and forward to EOD for compilation of the relevant parties into the database.

Failure by the bidder to comply with a written request for this information may result in a recommendation to the Prequalification Committee that prequalification status be suspended until the information is received.

B. Records and Reports

1. INDOT affirms that it will retain indefinitely, application packages for each certified DBE, including affidavits of no change; changes submitted by the firm; and onsite reports. Information is stored via a secured server that requires username and password access for any INDOT employee who is given the authority for read only permission rights.

2. INDOT, its operating agencies, and subrecipients subject to this program requires bidders to keep such records as are necessary to determine compliance. These records include, but are not limited to the following:

- a. The type and actual values of work performed, goods furnished, or services rendered, and copies of payments to certified and non-certified businesses;
- b. Documentation of all correspondence, contacts, telephone calls, etc., to obtain the services of certified DBEs on the procurement.

3. The bidder shall, on an agreed upon periodic basis, submit reports on subcontract performance and other business transactions entered into with certified DBEs with respect to the records as referenced in Subparagraph 1.a. above, in such format and content as prescribed by INDOT, its operating agencies, or subrecipients.

2. Examples of current INDOT reporting requirements include the following:

- a. **Subcontract Payment Tracking (SPT):** INDOT uses the data the SPT collects for two primary purposes. First, the system helps insure that INDOT prime contractors comply with the ten day payment provision in all INDOT contracts in accordance with INDOT Standard Specification 108.01. Second, the data helps ensure compliance with the DBE Program provisions required by 49 CFR §26.29. Enrollment and log-in procedures for SPT can be found at: <https://www.in.gov/indot/div/legal/dbe/spt.htm> The

[requirement for federal aid contracts let after July 1, 2020 is referenced earlier in this manual.](#)

b. **Commercially Useful Function Reports:** In partial fulfillment of its responsibility to monitor DBE CUF's, pursuant to 49 CFR § 26.55(c), INDOT requires all INDOT District EEO Officers and other relevant project personnel monitor DBE performance on federal aid INDOT project sites for compliance with CUF requirements. The EEO Officers and INDOT project staff evaluate DBE performance and submit completed CUF Compliance Review forms to INDOT staff. The form includes a written certification that the individual completing the review has assessed both contracting records and monitored work sites. In any case where a CUF may result in nonpayment and the need for good faith efforts, the Contract Compliance Manager is responsible for issuing the findings, communicating the nonpayment to the affected parties and insuring that the prime contractor's good faith efforts are received in a timely manner.

c. **DBE-3 Form:** INDOT requires all federal aid prime contractors who utilized a DBE on the contract, regardless of whether the contract included a DBE goal, to complete a DBE-3 form on the contract, prior to the contract closeout, pursuant to INDOT Standard Specification 103.01(g). Both the prime contractor and the DBE must sign the DBE-3 form, verifying that the latter has received all payments due under the contract as committed in the AAC. The DBE-3 form allows INDOT to ensure that the prime contractor's actual payments to DBE's meet or exceed the original DBE commitment at the time of award. INDOT also utilizes this information to determine race-neutral participation on federal contracts. If a DBE-3 form indicates that a DBE received less than the prime contractor's original commitment in the AAC used to meet the DBE goal, INDOT requires a written explanation before final payment is released. If it was determined that the shortage was not the result of a previously approved good faith efforts variance or another legitimate reason, INDOT EOD may recommend that INDOT not make final payment to the prime contractor and may refer the matter to INDOT's Prequalification Committee for action.

d. **Affirmative Action Certification ("AAC"):** INDOT requires all prime construction and consultant contractors to submit, at the time of bid letting or submittal of an LOI respectively, an AAC on which the contractor verifies its DBE subcontracting or subconsulting commitments to specific DBE firms. The AAC records the dollar amounts and contract percentage commitments to DBE firms by a prime construction contractor or consultant. Construction contractors submit the AAC electronically to INDOT through the Bid Express program.

Any federal aid construction contract let after July 2019, requires the lowest qualified bidder to submit copies of the quotes of all DBE firms utilized for the award of the contract within 24 hours of the letting for review and analysis of good faith efforts and compliance with state and federal requirements. If quotes are not received in a timely manner, the contract is subject to good faith efforts review.

- e. **Trns*Port and Site Manager:** These programs are comprehensive construction management systems used in conjunction to manage all aspects of the construction contracting process.

Such reports shall be submitted in a timely manner upon request. If, for any reason, a report cannot be submitted on time, the contractor must notify INDOT EOD's Contract Compliance Manager, or the appropriate operating agency or subrecipient, to that effect and request additional time to furnish the report. Failure of the contractor to submit reports in a timely manner may result in a finding of breach of contract.

C. Reporting to Operating Administrations of the USDOT

INDOT commits to submitting timely and accurate reports of DBE participation semi-annually (June 1st and December 1st) to the appropriate USDOT operating administration and the Department of Office of Civil Rights. The DBE Uniform Reporting Form shall be used for this purpose. The reports shall be sent in the format included in 49 CFR Part 26, Appendix B, via electronic mail to the appropriate personnel at the USDOT operating administration and the DOCR. INDOT utilizes its site manager system to track the state and federal spend and divide into the appropriate state or federal funding splits to ensure that only the federal share is reported.

If a firm ceases to be DBE-certified during the pendency of a contract, the DBE credit will be counted on contract close out towards the goal for the specific contract. However, no DBE credit will be awarded towards the overall DBE-goal reported to FHWA on the uniform report.

By January 1st of each new year, INDOT reports the current information required by the latest FHWA appropriations bill to the appropriate USDOT operating administration. This is currently known as the MAP-21 report.

SECTION 10: MONITORING AND ENFORCEMENT MECHANISMS

A. Staffing

The Contract Compliance Section of INDOT EOD & the DBELO is responsible for implementing and managing the DBE program in conjunction with the legal division, engineering/construction divisions, district offices, and field personnel/resident engineers.

INDOT 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. INDOT currently staffs its EOD Contract Compliance division with two full time managers, six full time compliance officers located in each of INDOT's six geographically divided districts, and three program analysts.

B. Commercially Useful Function

During performance of contracts, monitoring is conducted by the Project Engineer/Project Supervisor in conjunction with the EEO Officer on each federal aid construction contract to ensure that: 1) the type of work and the value of work performed is consistent with work stated in the "Schedule of Participation"; 2) the DBE is performing a "commercially useful function" by actually performing, managing and supervising the work with its own workforce; and 3) the equipment utilized is either owned or leased by the DBE. The CUF forms completed by the Compliance Officer and/or PE/PS, as maintained in the project file shall serve as written certification by INDOT that contracting records have been reviewed and work monitored relative to distinct elements of each DBE subcontract.

Currently INDOT requires construction contractors to report all DBE payment activities electronically through its electronic reporting system that allows INDOT to verify receipt of subcontractor payments from the Prime Contractor in a timely manner in accordance with prompt payment provisions. INDOT requires each subcontractor to acknowledge receipt of payments identified as made to the subcontractor by registering the date the subcontractor receives the payment from the Prime. In addition, this information is also verified again at contract closure by requiring the Prime and the DBE subcontractor to complete the certificate of completion by DBE form.

Commercially useful function evaluations are not a certification issue and are not generally appealable to USDOT. However, after CUF investigations are completed, certification standards may be reviewed to determine whether the appropriate corporation code or NAICS codes have been assigned to a DBE. For example, if a supplier was originally certified with a NAICS code, but was found to only be able to be classified as a broker after a CUF is performed, an adjustment may be made to the DBE's certification by INDOT's certification staff.

C. Enforcement Protocols

Where a contractor is found to have operated in a manner that is inconsistent with the requirements of 49 CFR part 26.55, as set forth in the DBE Special Provision, INDOT 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 Special Provision will be reported to the Prequalification Committee and subject to sanctions and penalties.

INDOT will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program that would give cause to initiate proceedings for suspension, debarment, or criminal prosecution (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) against a participant in the DBE Program, as provided in 49 CFR Part 26.107. INDOT will also consider imposing sanctions.

All participants in INDOT's DBE program (including, but not limited to, sub recipients, 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 INDOT'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 sub recipients, 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.

APPENDIX

1. INDOT Bidders List Registration Statement-
2. CUF Report
3. INDOT DBE-3 Form
4. Subcontractor Payment Tracking System Screen Shot
5. INDOT EOD Organizational Chart- Updated November 2020
6. DBE Business Directory- <https://entapps.indot.in.gov/DBELocator/>
- 7.
8. FHWA Approved Goal for INDOT for the current three year cycle
9. DBE Interest Report-
- 10.
11. Onsite Questionnaire- Updated May 2019
12. No Change Affidavit Instructions- <https://www.in.gov/indot/2748.htm>
13. DBE Change in Utilization Form- <https://www.in.gov/indot/3633.htm>

Indiana Kentucky DBE Exchange

As of July 1, 2018, the Indiana Department of Transportation and the Kentucky Transportation Cabinet entered into an Agreement for DBE reciprocity. The purpose of the Agreement is to increase the pool of available DBE's and remove unnecessary administrative and regulatory burdens. The details regarding the current Agreement can be found here: <https://www.in.gov/indot/files/Clean%20Copy%20Executed%20DBE%20Reciprocity%20Agreement%207.1.18%20to%206.30.19.pdf>. This Agreement was renewed for an additional two year term through July 2021 and an option to renew exists for an additional two year term.