

# DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM PROPOSED THREE-YEAR OVERALL GOAL & METHODOLOGY FOR FEDERAL FISCAL YEARS 2017 THROUGH 2019

## DRAFT FOR DISCUSSION PURPOSES

The Indiana Department of Transportation (INDOT) submitted its three-year overall Disadvantaged Business Enterprise (DBE) goal for federal fiscal years (FFYs) 2014 through 2016 to the Federal Highway Administration (FHWA) on August 1, 2013. FHWA subsequently approved INDOT's goal of 12.40%. In accordance with 49 Code of Federal regulations (CFR) Part 26, the United States Department of Transportation's (USDOT's) "Tips for Goal-Setting," and other official USDOT guidance, INDOT based its goal and methodology on a disparity study that BBC Research & Consulting (BBC) completed in December 2010 as well as on other relevant information.

Recently, INDOT commissioned BBC to conduct a new disparity study related to the agency's implementation of the Federal DBE Program. BBC completed the study in March 2016 (referred to herein as the 2015-16 INDOT Disparity Study). The disparity study is included in its entirety as Appendix B. Based substantially on study results, federal guidance, and relevant case law, INDOT proposes a new three-year overall DBE goal for FFYs 2017 through 2019. To determine its amended overall DBE goal, INDOT closely followed federal regulations including the two-step goal-setting methodology set forth in 49 CFR Section 26.45.

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

INDOT began the process of determining its new overall DBE goal by establishing a base figure. Consistent with USDOT guidance, INDOT established a base figure based on data from a *custom census* availability analysis that BBC conducted as part of the 2015-16 INDOT Disparity Study (for details, see Chapter 5 and Appendix C of the disparity study report). For the purposes of establishing a base figure, the availability analysis was limited to the availability of *potential DBEs*—minority- and woman-owned businesses that are currently DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Section 26.65 (maximum revenue limits ranging from \$7 million to \$24.1 million depending on work area)—for FHWA-funded prime contracts and subcontracts that INDOT awarded from July 1, 2009 through June 30, 2013 (referred to herein as the study period).<sup>1,2</sup> INDOT has determined that the mix of the types and sizes of transportation contracts that it anticipates awarding in FFYs 2017 through 2019 will be similar to the mix of types and sizes of transportation contracts that it awarded during the study period.

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<sup>1</sup> Consistent with USDOT guidance, INDOT considers any contract with at least \$1 of FHWA funding as an "FHWA-funded contract" and includes the total value of the contract in its pool of total FHWA-funded contracting dollars.

<sup>2</sup> BBC defined woman-owned businesses specifically as *non-Hispanic white woman-owned businesses*. BBC grouped minority woman-owned businesses with their corresponding minority groups (e.g., grouping Black American woman-owned businesses with all other Black American-owned businesses). For details about BBC's definition of woman-owned businesses, see Chapter 1 of the disparity study report.

**Methodology for the availability analysis.** BBC's availability analysis focused on specific work areas (i.e., subindustries) related to the types of FHWA-funded contracts that INDOT awarded during the study period. BBC identified specific subindustries—based on 8-digit Dun & Bradstreet (D&B) industry codes—for inclusion in the availability analysis and identified the geographic market areas in which INDOT awarded the vast majority of corresponding contract dollars (i.e., the relevant geographic market area). BBC considered the state of Indiana as the relevant geographic market area for the study. BBC based its determination of the relevant geographic market area on INDOT's contracting and vendor data, and, more specifically, on information about where the contractors that participated in INDOT prime contracts and subcontracts during the study period were located. BBC's analysis indicated that 88 percent of INDOT's construction; professional services; and goods and support services contracting dollars during the study period went to businesses with locations in Indiana, indicating that Indiana should be considered the relevant geographic market area for the study.

**Overview of availability surveys.** The study team developed a database of potentially available businesses through surveys with local business establishments within relevant subindustries. The study team conducted telephone surveys with business owners and managers to identify businesses that are potentially available for INDOT FHWA-funded prime contracts and subcontracts.<sup>3</sup> BBC began the survey process by collecting information about business establishments from D&B Marketplace listings. BBC collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the FHWA-funded contracts that INDOT awarded during the study period.

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

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

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

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

**Considering businesses as potentially available.** BBC considered businesses to be potentially available for INDOT FHWA-funded prime contracts or subcontracts if they reported possessing *all* of the following characteristics:

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

BBC also considered the following information to determine if businesses were potentially available for specific contracts that INDOT awarded during the study period:

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

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

Only a subset of businesses in the availability database were considered potentially available for any given INDOT FHWA-funded prime contract or subcontract (referred to collectively as *contract elements*). BBC identified the specific characteristics of each FHWA-funded prime contract and subcontract that the study team examined as part of the disparity study and then, for the purposes of helping INDOT establish a base figure, took the following steps to calculate the availability of potential DBEs for each FHWA-funded contract element:

1. For each contract element, the study team identified businesses in the availability database that reported that they:
  - Are qualified and interested in performing transportation-related work in that particular role for that specific type of work (based on 8-digit D&B industry codes) for INDOT or other local government agencies;
  - Are able to serve customers in that geographic location;

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<sup>4</sup> That information was gathered separately for prime contract and subcontract work.

- Have bid on or performed work of that size; and
  - Were in business in the year that INDOT awarded the contract.
2. The study team then counted the number of potential DBEs (by race/ethnicity and gender) relative to all businesses in the availability database that met the criteria specified in Step 1.
  3. The study team translated the numeric availability of potential DBEs for the contract element into percentage availability.

BBC repeated those steps for each FHWA-funded contract element that the study team examined as part of the disparity study. BBC multiplied the percentage availability for each contract element by the dollars associated with the contract element, added results across all contract elements, and divided by the total dollars for all contract elements. The result was a dollar-weighted estimate of the overall availability of potential DBEs and estimates of availability by each relevant racial/ethnic and gender group. Figure 1 presents detailed information about the base figure for INDOT's overall DBE goal:

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

As presented at the bottom of column (e), the availability analysis shows that potential DBEs could be considered available for 10.9% of INDOT's FHWA-funded prime contracts and subcontracts. Thus, INDOT considers **10.9% as its base figure**. As presented in the last row of Figure 1, the overall base figure reflects a weight of 0.87 for construction contracts; 0.12 for professional services contracts; and 0.01 for goods and support services contracts based on the volume of dollars of FHWA-funded contracts that INDOT awarded during the study period.

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

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

- Current capacity of DBEs to perform work on USDOT-assisted contracting as measured by the volume of work DBEs have performed in recent years;
- Information related to employment, self-employment, education, training, and unions;

**Figure 1.**  
**Availability components of the base figure**  
**(based on availability of potential DBEs for FHWA-funded transportation contracts)**

a. Potential DBEs	Availability Percentage			
	b. Construction	c. Professional Services	d. Goods and Support Services	e. Total
Black American-owned	1.3 %	0.9 %	1.6 %	1.2 %
Asian Pacific American-owned	0.1	1.7	0.0	0.3
Subcontinent Asian American-owned	0.1	4.2	0.1	0.6
Hispanic American-owned	0.6	0.0	0.1	0.5
Native American-owned	0.2	0.0	0.0	0.2
White woman-owned	8.5	4.1	19.0	8.0
<b>Total potential DBEs</b>	<b>10.8 %</b>	<b>11.0 %</b>	<b>20.7 %</b>	<b>10.9 %</b>
<b>Industry weight</b>	<b>87 %</b>	<b>12 %</b>	<b>1 %</b>	

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

Source: BBC Research & Consulting availability analysis.

- Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
- Other relevant data.<sup>5</sup>

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

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

Figure 2 presents past DBE participation based on INDOT’s Uniform Reports of DBE Awards or Commitments and Payments as reported to FHWA. According to INDOT’s Uniform Reports, median DBE participation in FHWA-funded contracts from FFYs 2010 through 2015 was 8.9 percent. If INDOT were to use the approach that USDOT outlined in “Tips for Goals Setting” based on Uniform Reports of DBE Awards/Commitments and Payments, the overall goal would be the average of the 10.9 percent base figure and the 8.9 percent median past DBE participation, yielding a potential overall DBE goal of 9.9 percent. Thus, information about the

<sup>5</sup> 49 CFR Section 26.45.

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

current capacity of DBEs to perform work on FHWA-funded contracts supports a downward adjustment to INDOT’s base figure.

**Figure 2.**  
**Past certified DBE participation in FHWA-**  
**funded contracts, FFY 2010-2015**

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

FFY	DBE Attainment	Annual DBE Goal	Difference
2010	6.48 %	9.70 %	-3.22 %
2011	5.83	10.17	-4.34
2012	8.26	10.17	-1.91
2013	9.50	12.40	-2.90
2014	10.12	12.40	-2.28
2015	9.59	12.40	-2.81

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

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

**Other relevant data.** The Federal DBE Program suggests that federal funding recipients also examine “other factors” when determining whether to make any adjustments to their base figures.<sup>7</sup>

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

<sup>7</sup> 49 CFR Section 26.45

adversely affects minority- and woman-owned businesses in the local contracting industry (for details, see Appendix E of the disparity study report). Thus, information about the success of businesses also supports an upward adjustment to INDOT's base figure.

**Evidence from disparity studies conducted within the jurisdiction.** USDOT suggests that federal funding recipients also examine evidence from disparity studies conducted within their jurisdictions when determining whether to make adjustments to their base figures. BBC also conducted disparity studies for 10 other Indiana state agencies and entities. However, those agencies' contracts differ substantially in terms of size and type from the FHWA-funded contracts that INDOT awarded during the study period. Therefore, the results from the 10 other Indiana state agencies and entities' disparity studies are of limited use to INDOT in determining whether to make an adjustment to its base figure.

**Percent of DBE-certified businesses in INDOT's bidders list.** USDOT indicates that an agency may use data from its bidders list to inform goal-setting given that those data are disaggregated and weighted appropriately. INDOT conducted an analysis of its bidders list examining the percentage of businesses that are DBE-certified. INDOT conducted the analysis by disaggregating the businesses by contracting area, finding the percentage of businesses that are DBE-certified in each contracting area, and applying weights to each contracting area according to the number of contracts that INDOT awarded. INDOT's analysis indicated that 3.7 percent of its bidders list is made up of DBE-certified businesses. Thus, data from INDOT's bidders list support a downward adjustment to its base figure.

**Adjustment.** INDOT has considered information relevant to a potential adjustment and proposes to make no adjustment to its base figure for several reasons:

- INDOT believes that it is important to account for the different information that is relevant to making an adjustment. Some of that information supports an upward adjustment to the base figure whereas other information supports a downward adjustment. Because that evidence conflicts, INDOT believes that the most appropriate decision is to make no adjustment to the base figure.
- INDOT would like to ensure that its overall DBE goal is based on the most comprehensive, quantifiable information available. The data suggesting an upward adjustment to the base figure is not easily quantifiable so making upward adjustments to the base figure that directly and specifically relate to those data is difficult.
- INDOT is committed to maximizing contracting opportunities for minority- and woman-owned businesses as part of its implementation of the Federal DBE Program. As a result, INDOT does not believe that it is appropriate to make a downward adjustment to its base figure as supported by past DBE attainment and analyses of the agency's bidder's list.

Therefore, INDOT proposes to consider the **10.9%** base figure as its overall DBE goal for FFYs 2017 through 2019.

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

In accordance with federal regulations and USDOT guidance, INDOT will attempt to meet the maximum feasible portion of its proposed 10.9% overall DBE goal by using race- and gender-neutral measures. INDOT considered the median past DBE race- and gender-neutral participation for calendar years 2011 through 2015 to project the portion of its overall goal that it will meet using race- and gender-neutral measures. Figure 3 presents the past DBE race- and gender-neutral participation for the last five calendar years. INDOT’s median past DBE race- and gender-neutral participation for those five years was 1.6%

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

Source:  
INDOT Goal & Methodology document FFYs 2014-2016.

Year	DBE Attainment
2011	0.8 %
2012	1.6
2013	1.1
2014	2.0
2015	5.3

INDOT used myriad race- and gender-neutral measures to encourage DBE participation on those contracts (for details, see Chapter 10 of the disparity study report). The agency still uses most of those measures and will continue using them through FFY 2019. Based on that information, INDOT projects that it will be able to meet 1.6% of its proposed DBE goal for FFYs 2017 through 2019 through race- and gender-neutral measures. INDOT projects that it will meet the remainder of its proposed 10.9% overall DBE goal—9.3%—through the use of race- and gender-conscious measures (i.e., DBE contract goals). Figure 4 presents INDOT’s proposed race- and gender-neutral and race- and gender-conscious split for its overall DBE goal.

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

Goal portion	Percent Allocation
Race- and gender-neutral	1.6 %
<u>Race- and gender-conscious</u>	<u>9.3</u>
<b>Overall DBE goal</b>	<b>10.9 %</b>

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

Several seminal court cases have indicated that, in order to implement the Federal DBE Program in a narrowly tailored manner, agencies should limit the use of race- and gender-conscious program measures to those minority groups “that have actually suffered discrimination” within its transportation contracting industry.<sup>8,9</sup> Moreover, USDOT official guidance states that “even

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

when discrimination is present in a state, a program is narrowly tailored only if its application is limited to those specific groups that have actually suffered discrimination or its effects.”<sup>10</sup> As provided in 49 CFR Part 26, such guidance is “valid, and express[es] the official positions and views of the Department of Transportation ... .”<sup>11</sup>

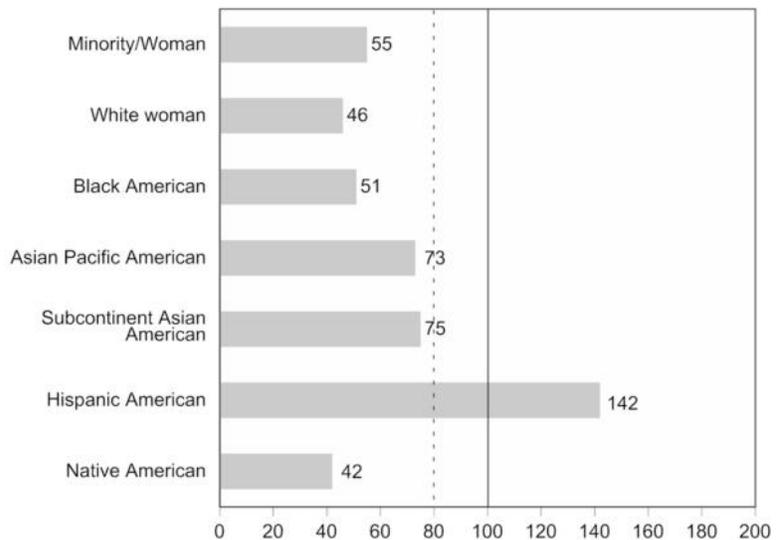
As part of the 2015-16 INDOT Disparity Study, BBC assessed whether there were any disparities between the participation and availability of minority- and woman-owned businesses on INDOT contracts (for details, see Chapter 7 and Appendix F of the disparity study report). The study showed substantial disparities—that is, disparities whereby utilization was less than 80% of availability—for all minority- and woman-owned business groups across different sets of contracts and particularly on contracts to which race- and gender-conscious measures did not apply. For example, Figure 5 presents disparity indices for contracts to which INDOT did not apply minority-owned business enterprise (MBE), woman-owned business enterprise (WBE), or DBE goals. The dotted line shown at 80 indicates the threshold for what many courts consider to be “substantial” disparities. As shown in Figure 5, nearly all relevant racial/ethnic and gender groups showed substantial disparities between participation and availability on INDOT contracts to which MBE/WBE or DBE goals did not apply. The only exception were Hispanic American-owned businesses. However, Hispanic American-owned businesses showed substantial disparities for several other key contract sets including all INDOT contracts considered together (disparity index of 54) and on INDOT’s FHWA-funded contracts (disparity index of 73).

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

Note:  
 The study team analyzed 7,619 contracts without goals.

For more detail, see Figure F-16 in Appendix F.

Source:  
 BBC Research & Consulting disparity analysis.



Therefore, based on all available information including disparity analysis results from the 2015-16 INDOT Disparity Study, INDOT proposes that all relevant groups will be eligible to

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

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

<sup>11</sup> 49 CFR Section 26.9

participate in the race- and gender-conscious measures that will be part of the agency's implementation of the Federal DBE Program:

- Black American-owned businesses;
- Asian-Pacific American-owned businesses;
- Hispanic American-owned businesses;
- Native American-owned businesses;
- Subcontinent Asian American-owned businesses; and
- White woman-owned businesses.<sup>12</sup>

### **Public Participation – 49 CFR Section 26.45(g)**

Public participation is a key component of INDOT's process for amending its overall DBE goal. INDOT has made efforts to engage the public as part of the goal-setting process and will make additional public engagement efforts in finalizing its Goal and Methodology.

**Public notice.** INDOT published a public notice announcing its proposed amended overall DBE goal and rationale for the goal. The notice stated that INDOT was accepting comments on its overall DBE goal for 30 days, and it provided physical addresses and e-mail addresses where the public could send any comments. The public notice appeared for 30 days at the INDOT Central Office in Indianapolis. The notice was also posted on INDOT's website and was published in general circulation media and trade association publications. Figure 6 presents a list of the general circulation media and trade association publications in which INDOT posted the notice. INDOT also e-mailed the public notice to all registered DBEs, prime contractors, and potential DBEs included in BBC's availability database from the 2015-16 INDOT Disparity Study.

**Public forums.** INDOT conducted three public meetings throughout the state of Indiana to provide information about its proposed overall DBE goal as well as to solicit comments about the goal from meeting participants. During each public meeting, INDOT solicited participants for testimony about its goal and about local marketplace conditions for minority- and woman-owned businesses. Participants were invited to submit testimony in either verbal or written format. The public meetings that INDOT conducted took place in:

- Gary, Indiana on June 13, 2016;
- Evansville, Indiana on June 14, 2016; and
- Indianapolis, Indian on June 15, 2016.

Appendix A presents testimony that INDOT collected from each of the three public meetings as well as written testimony that individuals submitted outside of the meetings.

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

**Figure 6.  
Publications in which  
INDOT posted notices**

Publications	
Chronicle Tribune	Michigan City News Dispatch
Court & Commercial	News Sentinel
Elkhart Truth	News Sun
Evansville Courier & Press	News & Tribune
Frankfort Times	Our Times
Frost Illustrated	Pilot News
Herald Argus	South Bend Tribune
Herald Bulletin	Star Press
Herald Times	The Republic
Indianapolis Recorder	The Times
Indianapolis Star	Times & Union
Journal & Courier	Tribune-Star
Journal Gazette	Pharos Tribune
Kokomo Tribune	