

Disparity/Availability Assessment Study
Vendor's Questions and Answers
Ref#: 16-96064 IPB#: 22038016
Round 2

1. Section D.2. in various places refers to the requirement to perform disparity testing on federal-aid contracts. However, the USDOT's General Counsel has provided Guidance to recipients outside the Ninth Circuit Court of Appeals that disparity testing should not be conducted to establish the recipient's compelling interest in implementing the federal DBE program. Further, IDOT did not present disparity analyses in its successful defense of the DBE program in *Northern Contracting, Inc. v. Illinois DOT*. Will IDOT accept a proposal that conforms to the Guidance and case law for federal-aid contracts? **Thank you for your comment. IDOT is requesting a statistical analysis of the utilization rates to determine whether there is a significant statistical disparity between the availability of firms and their utilization. Disparity studies are an approved method for the Step 1 of overall goal setting in accordance with 26.45(c)(3).**

2. Section D.2., page 24 states "the Vendor shall factor out the impact of any goals programs on utilization rates in order to determine whether there would be any disparity attributable to discrimination if the goals were removed." While "unremediated markets" evidence is important, and the results of such no goals contracts were important in establishing the need for the continued use of raceconscious contract goals in the *Northern Contracting* case it is not possible to "factor out the impact of any goals programs on utilization rates" on specific contracts because there is no way to determine what DBE utilization might have been if there had been no contract goal. What is possible is to use other databases to examine disparities throughout the wider economy, as was done in the *North Contracting* and the *Midwest Fence Corp v. IDOT and the Illinois Tollway* cases. Will IDOT accept a proposal that applies the economy-wide analyses used in those cases? **This part of the study may include databases to examine disparities throughout the wider economy, however, if an economy-wide analysis used, the Agency will look closely at relevancy and specificity to the Agency.**

3. Section D.2., page 24 states that the Agency team and the Vendor will work "to verify any testimony received." The courts are clear that there is no requirement to "verify" anecdotal data. Indeed, "unverified" anecdotal testimony presented by the plaintiff and the Department was admitted in the *Northern Contracting* trial. Will IDOT accept a proposal that follows long established approaches and the National Model Disparity Study Guidelines to gathering anecdotal data that do not somehow "verify" such data? **The Agency would like some verified anecdotal data, if possible, but will also accept some unverified anecdotal data.**