

SUBCHAPTER B—GRANTS AND OTHER FEDERAL ASSISTANCE

PART 33—PARTICIPATION BY DIS-ADVANTAGED BUSINESS ENTERPRISES IN UNITED STATES ENVIRONMENTAL PROTECTION AGENCY PROGRAMS

Subpart A—General Provisions

Sec.

- 33.101 What are the objectives of this part?
- 33.102 When do the requirements of this part apply?
- 33.103 What do the terms in this part mean?
- 33.104 May a recipient apply for a waiver from the requirements of this part?
- 33.105 What are the compliance and enforcement provisions of this part?
- 33.106 What assurances must EPA financial assistance recipients obtain from their contractors?
- 33.107 What are the rules governing availability of records, cooperation, and intimidation and retaliation?

Subpart B—Certification

- 33.201 What does this subpart require?
- 33.202 How does an entity qualify as an MBE or WBE under EPA's 8% statute?
- 33.203 How does an entity qualify as an MBE or WBE under EPA's 10% statute?
- 33.204 Where does an entity become certified under EPA's 8% and 10% statutes?
- 33.205 How does an entity become certified by EPA?
- 33.206 Is there a list of certified MBEs and WBEs?
- 33.207 Can an entity reapply to EPA for MBE or WBE certification?
- 33.208 How long does an MBE or WBE certification from EPA last?
- 33.209 Can EPA re-evaluate the MBE or WBE status of an entity after EPA certifies it to be an MBE or WBE?
- 33.210 Does an entity certified as an MBE or WBE by EPA need to keep EPA informed of any changes which may affect the entity's certification?
- 33.211 What is the process for appealing or challenging an EPA MBE or WBE certification determination?
- 33.212 What conduct is prohibited by this subpart?

Subpart C—Good Faith Efforts

- 33.301 What does this subpart require?
- 33.302 Are there any additional contract administration requirements?
- 33.303 Are there special rules for loans under EPA financial assistance agreements?

- 33.304 Must a Native American (either as an individual, organization, Tribe or Tribal Government) recipient or prime contractor follow the six good faith efforts?

Subpart D—Fair Share Objectives

- 33.401 What does this subpart require?
- 33.402 Are there special rules for loans under EPA financial assistance agreements?
- 33.403 What is a fair share objective?
- 33.404 When must a recipient negotiate fair share objectives with EPA?
- 33.405 How does a recipient determine its fair share objectives?
- 33.406 May a recipient designate a lead agency for fair share objective negotiation purposes?
- 33.407 How long do MBE and WBE fair share objectives remain in effect?
- 33.408 May a recipient use race and/or gender conscious measures as part of this program?
- 33.409 May a recipient use quotas as part of this program?
- 33.410 Can a recipient be penalized for failing to meet its fair share objectives?
- 33.411 Who may be exempted from this subpart?
- 33.412 Must an Insular Area or Indian Tribal Government recipient negotiate fair share objectives?

Subpart E—Recordkeeping and Reporting

- 33.501 What are the recordkeeping requirements of this part?
- 33.502 What are the reporting requirements of this part?
- 33.503 How does a recipient calculate MBE and WBE participation for reporting purposes?

APPENDIX A TO PART 33—TERM AND CONDITIONS

AUTHORITY: 15 U.S.C. 637 note; 42 U.S.C. 4370d, 7601 note, 9605(f); E.O. 11625, 36 FR 19967, 3 CFR, 1971 Comp., p. 213; E.O. 12138, 49 FR 29637, 3 CFR, 1979 Comp., p. 393; E.O. 12432, 48 FR 32551, 3 CFR, 1983 Comp., p. 198, 2 CFR part 200.

SOURCE: 73 FR 15913, Mar. 26, 2008, unless otherwise noted.

Subpart A—General Provisions

§ 33.101 What are the objectives of this part?

The objectives of this part are:

(a) To ensure nondiscrimination in the award of contracts under EPA financial assistance agreements. To that end, implementation of this rule with respect to grantees, sub-grantees, loan recipients, prime contractors, or subcontractors in particular States or locales—notably those where there is no apparent history of relevant discrimination—must comply with equal protection standards at that level, apart from the EPA DBE Rule's constitutional compliance as a national matter;

(b) To harmonize EPA's DBE Program objectives with the U.S. Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995);

(c) To help remove barriers to the participation of DBEs in the award of contracts under EPA financial assistance agreements; and

(d) To provide appropriate flexibility to recipients of EPA financial assistance in establishing and providing contracting opportunities for DBEs.

[73 FR 15913, Mar. 26, 2008]

§ 33.102 When do the requirements of this part apply?

The requirements of this part apply to procurement under EPA financial assistance agreements performed entirely within the United States, whether by a recipient or its prime contractor, for construction, equipment, services and supplies.

§ 33.103 What do the terms in this part mean?

Terms not defined below shall have the meaning given to them in 2 CFR part 200 and 1500, and 40 CFR part 35 as applicable. As used in this part:

Availability analysis means documentation of the availability of MBEs and WBEs in the relevant geographic market in relation to the total number of firms available in that area.

Availability analysis means documentation of the availability of MBEs and WBEs in the relevant geographic market in relation to the total number of firms available in that area.

Award official means the EPA Regional or Headquarters official delegated the authority to execute financial assistance agreements on behalf of EPA.

Broker means a firm that does not itself perform, manage or supervise the work of its contract or subcontract in a manner consistent with the normal business practices for contractors or subcontractors in its line of business.

Business, business concern or business enterprise means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials or labor.

Construction means erection, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other improvements to real property, and activities in response to a release or a threat of a release of a hazardous substance into the environment, or activities to prevent the introduction of a hazardous substance into a water supply.

Disabled American means, with respect to an individual, permanent or temporary physical or mental impairment that substantially limits one or more of the major life activities of such an individual; a record of such an impairment; or being regarded as having such an impairment.

Disadvantaged business enterprise (DBE) means an entity owned or controlled by a socially and economically disadvantaged individual as described by Public Law 102-389 (42 U.S.C. 4370d) or an entity owned and controlled by a socially and economically disadvantaged individual as described by Title X of the Clean Air Act Amendments of 1990 (42 U.S.C. 7601 note); a Small Business Enterprise (SBE); a Small Business in a Rural Area (SBRA); or a Labor Surplus Area Firm (LSAF), a Historically Underutilized Business (HUB) Zone Small Business Concern, or a concern under a successor program.

Disparity study means a comparison within the preceding ten years of the available MBEs and WBEs in a relevant geographic market with their actual usage by entities procuring in the categories of construction, equipment, services and supplies.

Equipment means items procured under a financial assistance agreement as defined by 2 CFR 200.1.

Fair share objective means an objective expressing the percentage of MBE or WBE utilization expected absent the effects of discrimination.

Financial assistance agreement means grants or cooperative agreements awarded by EPA. The term includes grants or cooperative agreements used to capitalize revolving loan funds, including, but not limited to, the Clean Water State Revolving Loan Fund (CWSRF) Program under Title VI of the Clean Water Act, as amended, 33 U.S.C. 1381 *et seq.*, the Drinking Water State Revolving Fund (DWSRF) Program under section 1452 of the Safe Drinking Water Act, 42 U.S.C. 300j-12, and the Brownfields Cleanup Revolving Loan Fund (BCRLF) Program under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9604.

Good faith efforts means the race and/or gender neutral measures described in subpart C of this part.

Historically black college or university (HBCU) means an institution determined by the Secretary of Education to meet the requirements of 34 CFR part 608.

HUBZone means a historically underutilized business zone, which is an area located within one or more qualified census tracts, qualified metropolitan counties, or lands within the external boundaries of an Indian reservation.

HUBZone small business concern means a small business concern that appears on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration.

Identified loan means a loan project or set-aside activity receiving assistance from a recipient of an EPA financial assistance agreement to capitalize a revolving loan fund, which:

(1) In the case of the CWSRF Program, is a project funded from amounts equal to the capitalization grant;

(2) In the case of the DWSRF Program, is a loan project or set-aside activity funded from amounts up to the amount of the capitalization grant; or

(3) In the case of the BCRLF Program, is a project that has been funded with EPA financial assistance.

Insular area means the Commonwealth of Puerto Rico or any territory or possession of the United States.

Joint venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Labor surplus area firm (LSAF) means a concern that together with its first-tier subcontractors will perform substantially in labor surplus areas (as identified by the Department of Labor in accordance with 20 CFR part 654). Performance is substantially in labor surplus areas if the costs incurred under the contract on account of manufacturing, production or performance of appropriate services in labor surplus areas exceed 50 percent of the contract price.

Minority business enterprise (MBE) means a Disadvantaged Business Enterprise (DBE) other than a Small Business Enterprise (SBE), a Labor Surplus Area Firm (LSAF), a Small Business in Rural Areas (SBRA), or a Women's Business Enterprise (WBE).

Minority institution means an accredited college or university whose enrollment of a single designated group or a combination of designated groups (as defined by the Small Business Administration regulations at 13 CFR part 124) exceeds 50% of the total enrollment.

Native American means any individual who is an American Indian, Eskimo, Aleut, or Native Hawaiian.

Recipient means an entity that receives an EPA financial assistance agreement or is a sub-recipient of such agreement, including loan recipients under the Clean Water State Revolving Fund Program, Drinking Water State Revolving Fund Program, and the Brownfields Cleanup Revolving Loan Fund Program.

Environmental Protection Agency

§ 33.105

Services means a contractor's labor, time or efforts provided in a manner consistent with normal business practices which do not involve the delivery of a specific end item, other than documents (e.g., reports, design drawings, specifications).

Small business, small business concern or small business enterprise (SBE) means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding, and qualified as a small business under the criteria and size standards in 13 CFR part 121.

Small business in a rural area (SBRA) means a small business operating in an area identified as a rural county with a code 6-9 in the Rural-Urban continuum Classification Code developed by the United States Department of Agriculture in 1980.

Supplies means items procured under a financial assistance agreement as defined by applicable regulations for the particular type of financial assistance received.

United States means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico and any other territories and possessions of the United States.

Women's business enterprise (WBE) means a business concern which is at least 51% owned or controlled by women for purposes of EPA's 8% statute or a business concern which is at least 51% owned and controlled by women for purposes for EPA's 10% statute. Determination of ownership by a married woman in a community property jurisdiction will not be affected by her husband's 50 percent interest in her share. Similarly, a business concern which is more than 50 percent owned by a married man will not become a qualified WBE by virtue of his wife's 50 percent interest in his share.

[73 FR 15913, Mar. 26, 2008, as amended at 79 FR 76054, Dec. 19, 2014; 87 FR 30397, May 19, 2022]

§ 33.104 May recipients apply for a waiver from the requirements of this part?

(a) A recipient may apply for a waiver from any of the requirements of this part that are not specifically based on a statute or Executive Order, by sub-

mitting a written request to the Director of the Office of Small and Disadvantaged Business Utilization.

(b) The request must document special or exceptional circumstances that make compliance with the requirement impractical, including a specific proposal addressing how the recipient intends to achieve the objectives of this part as described in § 33.101. The request must show that:

(1) There is a reasonable basis to conclude that the recipient could achieve a level of MBE and WBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subparts C or D of this part;

(2) Conditions in the recipient's jurisdiction are appropriate for implementing the request; and

(3) The request is consistent with applicable law.

(c) The OSDBU Director has the authority to approve a recipient's request. If the OSDBU Director grants a recipient's request, the recipient may administer its program as provided in the request, subject to the following conditions:

(1) The recipient's level of MBE and WBE participation continues to be consistent with the objectives of this part;

(2) There is a reasonable limitation on the duration of the recipient's modified program; and

(3) Any other conditions the OSDBU Director makes on the grant of the waiver.

(d) The OSDBU Director may end a program waiver at any time upon notice to the recipient and require a recipient to comply with the provisions of this part. The OSDBU Director may also extend the waiver if he or she determines that all requirements of paragraphs (b) and (c) of this section continue to be met. Any such extension shall be for no longer than the period originally set for the duration of the program waiver.

[73 FR 15913, Mar. 26, 2008]

§ 33.105 What are the compliance and enforcement provisions of this part?

If a recipient fails to comply with any of the requirements of this part, EPA may take remedial action under 2

§ 33.106

CFR 200.339, Remedies for noncompliance, or 40 CFR part 35, as appropriate, or any other action authorized by law, including, but not limited to, enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*). Examples of the remedial actions under 2 CFR 200.339 or 40 CFR part 35 include, but are not limited to:

- (a) Temporarily withholding cash payments pending correction of the deficiency by the recipient or more severe enforcement action by EPA;
- (b) Disallowing all or part of the cost of the activity or action not in compliance;
- (c) Wholly or partly suspending or terminating the current award; or
- (d) Withholding further awards for the project or program.

[73 FR 15913, Mar. 26, 2008, as amended at 79 FR 76054, Dec. 19, 2014; 87 FR 30397, May 19, 2022]

§ 33.106 What assurances must EPA financial assistance recipients obtain from their contractors?

The recipient must ensure that each procurement contract it awards contains the term and condition specified in Appendix A to this part concerning compliance with the requirements of this part. The recipient must also ensure that this term and condition is included in each procurement contract awarded by an entity receiving an identified loan under a financial assistance agreement to capitalize a revolving loan fund.

§ 33.107 What are the rules governing availability of records, cooperation, and intimidation and retaliation?

(a) *Availability of records.* (1) In responding to requests for information concerning any aspect of EPA's DBE Program, EPA complies with the provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). EPA may make available to the public any information concerning EPA's DBE Program release of which is not prohibited by Federal law or regulation, including EPA's Confidential Business Information regulations at 40 CFR part 2, subpart B.

(2) EPA recipients shall safeguard from disclosure to unauthorized per-

40 CFR Ch. I (7–1–23 Edition)

sons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law.

(b) *Cooperation.* All participants in EPA's DBE Program are required to cooperate fully and promptly with EPA, EPA Private Certifiers and EPA recipients in reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved in accordance with § 33.105.

(c) *Intimidation and retaliation.* A recipient, contractor, or any other participant in EPA's DBE Program must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part. Violation of this prohibition shall be a ground for appropriate action against the party involved in accordance with § 33.105.

Subpart B—Certification

§ 33.201 What does this subpart require?

(a) In order to qualify and participate as an MBE or WBE prime or subcontractor for EPA recipients under EPA's DBE Program, an entity must be properly certified as required by this subpart.

(b) EPA's DBE Program is primarily based on two statutes. Public Law 102–389, 42 U.S.C. 4370d, provides for an 8% objective for awarding contracts under EPA financial assistance agreements to business concerns or other organizations owned or controlled by socially and economically disadvantaged individuals, including HBCUs and women ("EPA's 8% statute"). Title X of the Clean Air Act Amendments of 1990, 42 U.S.C. 7601 note, provides for a 10% objective for awarding contracts under EPA financial assistance agreements for research relating to such amendments to business concerns or other organizations owned and controlled by socially and economically disadvantaged individuals ("EPA's 10% statute").

Environmental Protection Agency

§ 33.203

§ 33.202 How does an entity qualify as an MBE or WBE under EPA's 8% statute?

To qualify as an MBE or WBE under EPA's 8% statute, an entity must establish that it is owned or controlled by socially and economically disadvantaged individuals who are of good character and citizens of the United States. An entity need not demonstrate potential for success.

(a) *Ownership or control.* "Ownership" and "control" shall have the same meanings as set forth in 13 CFR 124.105 and 13 CFR 124.106, respectively. (See also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations).

(b) *Socially disadvantaged individual.* A socially disadvantaged individual is a person who has been subjected to racial or ethnic prejudice or cultural bias because of his or her identity as a member of a group without regard to his or her individual qualities and as further defined by the implementing regulations of section 8(a)(5) of the Small Business Act (15 U.S.C. 637(a)(5); 13 CFR 124.103; see also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations).

(c) *Economically disadvantaged individual.* An economically disadvantaged individual is a socially disadvantaged individual whose ability to compete in the free enterprise system is impaired due to diminished capital and credit opportunities, as compared to others in the same business area who are not socially disadvantaged and as further defined by section 8(a)(6) of the Small Business Act (15 U.S.C. 637(a)(6)) and its implementing regulations (13 CFR 124.104). (See also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations). Under EPA's DBE Program, an individual claiming disadvantaged status must have an initial and continued personal net worth of less than \$750,000.

(d) *HBCU.* An HBCU automatically qualifies as an entity owned or con-

trolled by socially and economically disadvantaged individuals.

(e) *Women.* Women are deemed to be socially and economically disadvantaged individuals. Ownership or control must be demonstrated pursuant to paragraph (a) of this section, which may be accomplished by certification under § 33.204.

§ 33.203 How does an entity qualify as an MBE or WBE under EPA's 10% statute?

To qualify as an MBE or WBE under EPA's 10% statute, an entity must establish that it is owned and controlled by socially and economically disadvantaged individuals who are of good character and citizens of the United States.

(a) *Ownership and control.* An entity must be at least 51% owned by a socially and economically disadvantaged individual, or in the case of a publicly traded company, at least 51% of the stock must be owned by one or more socially and economically disadvantaged individuals, and the management and daily business operations of the business concern must be controlled by such individuals. (See also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations).

(b) *Socially disadvantaged individual.* A socially disadvantaged individual is a person who has been subjected to racial or ethnic prejudice or cultural bias because of his or her identity as a member of a group without regard to his or her individual qualities and as further defined by the implementing regulations of section 8(a)(5) of the Small Business Act (15 U.S.C. 637(a)(5); 13 CFR 124.103; see also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations).

(c) *Economically disadvantaged individual.* An economically disadvantaged individual is a socially disadvantaged individual whose ability to compete in the free enterprise system is impaired due to diminished capital and credit opportunities, as compared to others in

the same business area who are not socially disadvantaged and as further defined by section 8(a)(6) of the Small Business Act (15 U.S.C. 637(a)(6)) and its implementing regulations (13 CFR 124.104). (See also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations). Under EPA's DBE Program, an individual claiming disadvantaged status must have an initial and continued personal net worth of less than \$750,000.

(d) *Presumptions.* In accordance with Title X of the Clean Air Act Amendments of 1990, 42 U.S.C. 7601 note, Black Americans, Hispanic Americans, Native Americans, Asian Americans, Women and Disabled Americans are presumed to be socially and economically disadvantaged individuals. In addition, the following institutions are presumed to be entities owned and controlled by socially and economically disadvantaged individuals: HBCUs, Minority Institutions (including Tribal Colleges and Universities and Hispanic-Serving Institutions) and private and voluntary organizations controlled by individuals who are socially and economically disadvantaged.

(e) *Individuals not members of designated groups.* Nothing in this section shall prohibit any member of a racial or ethnic group that is not designated as socially and economically disadvantaged under paragraph (d) of this section from establishing that they have been impeded in developing a business concern as a result of racial or ethnic discrimination.

(f) *Rebuttal of presumptions.* The presumptions established by paragraph (d) of this section may be rebutted in accordance with § 33.209 with respect to a particular entity if it is reasonably established that the individual at issue is not experiencing impediments to developing such entity as a result of the individual's identification as a member of a specified group.

(g) *Joint ventures.* (1) A joint venture may be considered owned and controlled by socially and economically disadvantaged individuals, notwithstanding the size of such joint venture, if a party to the joint venture is an entity that is owned and controlled by a

socially and economically disadvantaged individual, and that entity owns 51% of the joint venture.

(2) As a party to a joint venture, a person who is not an economically disadvantaged individual, or an entity that is not owned and controlled by a socially and economically disadvantaged individual, may not be a party to more than two awarded contracts in a fiscal year solely by joint venture with a socially and economically disadvantaged individual or entity.

§ 33.204 Where does an entity become certified under EPA's 8% and 10% statutes?

(a) In order to participate as an MBE or WBE prime or subcontractor for EPA recipients under EPA's DBE Program, an entity must first attempt to be certified by the following:

(1) The United States Small Business Administration (SBA), under its 8(a) Business Development Program (13 CFR part 124, subpart A) or its Small Disadvantaged Business (SDB) Program, (13 CFR part 124, subpart B);

(2) The United States Department of Transportation (DOT), under its regulations for Participation by Disadvantaged Business Enterprises in DOT Programs (49 CFR parts 23 and 26); or

(3) an Indian Tribal Government, State Government, local Government or independent private organization in accordance with EPA's 8% or 10% statute as applicable.

(2) Such certifications shall be considered acceptable for establishing MBE or WBE status, as appropriate, under EPA's DBE Program as long as the certification meets EPA's U.S. citizenship requirement under § 33.202 or § 33.203.

(3) An entity may only apply to EPA for MBE or WBE certification under the procedures set forth in § 33.205 if that entity first is unable to obtain MBE or WBE certification under paragraphs (a) (1) through (3) of this section.

(b) [Reserved]

§ 33.205 How does an entity become certified by EPA?

(a) *Filing an application.* In accordance with § 33.204, an entity may apply

to EPA's Office of Small and Disadvantaged Business Utilization (EPA OSDBU) for certification as an MBE or WBE. EPA's Regional Offices will provide further information and required application forms to any entity interested in MBE or WBE certification. The applicant must attest to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States. The application must include evidence demonstrating that the entity is owned or controlled by one or more individuals claiming disadvantaged status under EPA's 8% statute or owned and controlled by one or more individuals claiming disadvantaged status under EPA's 10% statute, along with certifications or narratives regarding the disadvantaged status of such individuals. In addition, the application must include documentation of a denial of certification by a Federal agency, State government, local government, Indian Tribal government, or independent private organization, if applicable.

(b) *Application processing.* EPA OSDBU will advise each applicant within 15 days, whenever practicable, after receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required. EPA OSDBU shall make its certification decision within 30 days of receipt of a complete and suitable application package, whenever practicable. The burden is on the applicant to demonstrate that those individuals claiming disadvantaged status own or control the entity under EPA's 8% statute or own and control the entity under EPA's 10% statute.

(c) *Ownership and/or control determination.* EPA OSDBU first will determine whether those individuals claiming disadvantaged status own or control the applicant entity under EPA's 8% statute or own and control the applicant entity under EPA's 10% statute. If EPA OSDBU determines that the applicant does not meet the ownership and/or

control requirements of this subpart, EPA OSDBU will issue a written decision to the entity rejecting the application and set forth the reasons for disapproval.

(d) *Disadvantaged determination.* Once EPA OSDBU determines whether an applicant meets the ownership and/or control requirements of this subpart, EPA OSDBU will determine whether the applicable disadvantaged status requirements under EPA's 8% or 10% statute have been met. If EPA OSDBU determines that the applicable disadvantaged status requirements have been met, EPA OSDBU shall notify the applicant that it has been certified and place the MBE or WBE on EPA OSDBU's list of qualified MBEs and WBEs. If EPA OSDBU determines that the applicable disadvantaged status requirements have not been met, EPA OSDBU will reject the entity's application for certification. EPA OSDBU will issue a written decision to the entity setting forth EPA OSDBU's reasons for disapproval.

(e) *Evaluation standards.* (1) An entity's eligibility shall be evaluated on the basis of present circumstances. An entity shall not be denied certification based solely on historical information indicating a lack of ownership and/or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the entity currently meets the ownership and/or control standards of this subpart.

(2) Entities seeking MBE or WBE certification shall cooperate fully with requests for information relevant to the certification process. Failure or refusal to provide such information is a ground for denial of certification.

(3) In making its certification determination, EPA OSDBU may consider whether an entity has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE Program.

(4) EPA OSDBU shall not consider the issue of whether an entity performs a commercially useful function in making its certification determination. Consideration of whether an entity performs a commercially useful function or is a regular dealer pertains solely to counting toward MBE and

§ 33.206

WBE objectives as provided in subpart E of this part.

(5) Information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information will be safeguarded from disclosure to unauthorized persons, consistent with applicable Federal, State, and local law.

(6) To assist in making EPA OSDBU's certification determination, EPA OSDBU itself may take the following steps:

(i) Perform an on-site visit to the offices of the entity. Interview the principal officers of the entity and review their resumes and/or work histories. Perform an on-site visit to local job sites if there are such sites on which the entity is working at the time of the certification investigation. Already existing site visit reports may be relied upon in making the certification;

(ii) If the entity is a corporation, analyze the ownership of stock in the entity;

(iii) Analyze the bonding and financial capacity of the entity;

(iv) Determine the work history of the entity, including contracts it has received and work it has completed;

(v) Obtain a statement from the entity of the type of work it prefers to perform for EPA recipients under the DBE Program and its preferred locations for performing the work, if any; and

(vi) Obtain or compile a list of the equipment owned by or available to the entity and the licenses the entity and its key personnel possess to perform the work it seeks to do for EPA recipients under the DBE Program.

§ 33.206 Is there a list of certified MBEs and WBEs?

EPA OSDBU will maintain a list of certified MBEs and WBEs on EPA OSDBU's Home Page on the Internet. Any interested person may also obtain a copy of the list from EPA OSDBU.

§ 33.207 Can an entity reapply to EPA for MBE or WBE certification?

An entity which has been denied MBE or WBE certification may reapply for certification at any time 12 months or more after the date of the most re-

40 CFR Ch. I (7-1-23 Edition)

cent determination by EPA OSDBU to decline the application.

§ 33.208 How long does an MBE or WBE certification from EPA last?

Once EPA OSDBU certifies an entity to be an MBE or WBE by placing it on the EPA OSDBU list of certified MBEs and WBEs specified in § 33.206, the entity will generally remain on the list for a period of three years from the date of its certification. To remain on the list after three years, an entity must submit a new application and receive a new certification.

§ 33.209 Can EPA re-evaluate the MBE or WBE status of an entity after EPA certifies it to be an MBE or WBE?

(a) EPA OSDBU may initiate a certification determination whenever it receives credible information calling into question an entity's eligibility as an MBE or WBE. Upon its completion of a certification determination, EPA OSDBU will issue a written determination regarding the MBE or WBE status of the questioned entity.

(b) If EPA OSDBU finds that the entity does not qualify as an MBE or WBE, EPA OSDBU will decertify the entity as an MBE or WBE, and immediately remove the entity from the EPA OSDBU list of certified MBEs and WBEs.

(c) If EPA OSDBU finds that the entity continues to qualify as an MBE or WBE, the determination remains in effect for three years from the date of the decision under the same conditions as if the entity had been granted MBE or WBE certification under § 33.205.

§ 33.210 Does an entity certified as an MBE or WBE by EPA need to keep EPA informed of any changes which may affect the entity's certification?

(a) An entity certified as an MBE or WBE by EPA OSDBU must provide EPA OSDBU, every year on the anniversary of the date of its certification, an affidavit sworn to by the entity's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes

in the entity's circumstances affecting its ability to meet disadvantaged status, ownership, and/or control requirements of this subpart or any material changes in the information provided in its application form. Failure to comply may result in the loss of MBE or WBE certification under EPA's DBE Program.

(b) An entity certified as an MBE or WBE by EPA OSDBU must inform EPA OSDBU in writing of any change in circumstance affecting the MBE's or WBE's ability to meet disadvantaged status, ownership, and/or control requirements of this subpart or any material change in the information provided in its application form. The MBE or WBE must attach supporting documentation describing in detail the nature of such change. The notice from the MBE or WBE must take the form of an affidavit sworn to by the applicant before a person who is authorized by State law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. The MBE or WBE must provide the written notification within 30 calendar days of the occurrence of the change.

§ 33.211 What is the process for appealing or challenging an EPA MBE or WBE certification determination?

(a) An entity which has been denied MBE or WBE certification by EPA OSDBU under § 33.205 or § 33.209 may appeal that denial. A third party may challenge EPA OSDBU's determination to certify an entity as an MBE or WBE under § 33.205 or § 33.209.

(b) Appeals and challenges must be sent to the Director of OSDBU at Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Mail Code 1230T, Washington, DC 20460.

(c) The appeal or challenge must be sent to the Director of OSDBU (Director) within 90 days of the date of EPA OSDBU's MBE or WBE certification determination. The Director may accept an appeal or challenge filed later than 90 days after the date of EPA OSDBU's MBE or WBE certification determination if the Director determines that there was good cause, beyond the control of the appellant or challenger, for

the late filing of the appeal or challenge.

(d) No specific format is required for an appeal or challenge. However, the appeal or challenge must include information and arguments concerning why EPA OSDBU's MBE or WBE certification determination should be reversed. For challenges in which a third party questions EPA OSDBU's determination to certify an entity as an MBE or WBE under § 33.205 or § 33.209, the third party must also send a copy of the challenge to the entity whose MBE or WBE certification is being questioned. In addition, the Director shall request information and arguments from that entity as to why EPA OSDBU's determination to certify the entity as an MBE or WBE should be upheld.

(e) The Director makes his/her appeal or challenge decision based solely on the administrative record and does not conduct a hearing. The Director may supplement the record by adding relevant information made available by any other source, including the EPA Office of Inspector General; Federal, State, or local law enforcement authorities; an EPA recipient; or a private party.

(f) Consistent with Federal law, the Director shall make available, upon the request of the appellant, challenger or the entity affected by the Director's appeal or challenge decision, any supplementary information the Director receives from any source as described in paragraph (e) of this section.

(g) Pending the Director's appeal or challenge decision, EPA OSDBU's MBE or WBE certification determination remains in effect. The Director does not stay the effect of its MBE or WBE certification determination while he/she is considering an appeal or challenge.

(h) The Director shall reverse EPA OSDBU's MBE or WBE certification determination only if there was a clear and significant error in the processing of the certification or if EPA OSDBU failed to consider a significant material fact contained within the entity's application for MBE or WBE certification.

(i) All decisions under this section are administratively final.

§ 33.212 What conduct is prohibited by this subpart?

An entity that does not meet the eligibility criteria of this subpart may not attempt to participate as an MBE or WBE in contracts awarded under EPA financial assistance agreements or be counted as such by an EPA recipient. An entity that submits false, fraudulent, or deceitful statements or representations, or indicates a serious lack of business integrity or honesty, may be subject to sanctions under § 33.105.

Subpart C—Good Faith Efforts

§ 33.301 What does this subpart require?

A recipient, including one exempted from applying the fair share objective requirements by § 33.411, is required to make the following good faith efforts whenever procuring construction, equipment, services and supplies under an EPA financial assistance agreement, even if it has achieved its fair share objectives under subpart D of this part:

(a) Ensure DBEs are made aware of contracting opportunities to the fullest extent practicable through outreach and recruitment activities. For Indian Tribal, State and Local and Government recipients, this will include placing DBEs on solicitation lists and soliciting them whenever they are potential sources.

(b) Make information on forthcoming opportunities available to DBEs and arrange time frames for contracts and establish delivery schedules, where the requirements permit, in a way that encourages and facilitates participation by DBEs in the competitive process. This includes, whenever possible, posting solicitations for bids or proposals for a minimum of 30 calendar days before the bid or proposal closing date.

(c) Consider in the contracting process whether firms competing for large contracts could subcontract with DBEs. For Indian Tribal, State and local Government recipients, this will include dividing total requirements when economically feasible into smaller tasks or quantities to permit maximum participation by DBEs in the competitive process.

(d) Encourage contracting with a consortium of DBEs when a contract is too large for one of these firms to handle individually.

(e) Use the services and assistance of the SBA and the Minority Business Development Agency of the Department of Commerce.

(f) If the prime contractor awards subcontracts, require the prime contractor to take the steps in paragraphs (a) through (e) of this section.

§ 33.302 Are there any additional contract administration requirements?

(a) A recipient must require its prime contractor to pay its subcontractor for satisfactory performance no more than 30 days from the prime contractor's receipt of payment from the recipient.

(b) A recipient must be notified in writing by its prime contractor prior to any termination of a DBE subcontractor for convenience by the prime contractor.

(c) If a DBE subcontractor fails to complete work under the subcontract for any reason, the recipient must require the prime contractor to employ the six good faith efforts described in § 33.301 if soliciting a replacement subcontractor.

(d) A recipient must require its prime contractor to employ the six good faith efforts described in § 33.301 even if the prime contractor has achieved its fair share objectives under subpart D of this part.

(e) A recipient must require its prime contractor to provide EPA Form 6100–2—DBE Program Subcontractor Participation Form to all of its DBE subcontractors. EPA Form 6100–2 gives a DBE subcontractor the opportunity to describe the work the DBE subcontractor received from the prime contractor, how much the DBE subcontractor was paid and any other concerns the DBE subcontractor might have, for example reasons why the DBE subcontractor believes it was terminated by the prime contractor. DBE subcontractors may send completed copies of EPA Form 6100–2 directly to the appropriate EPA DBE Coordinator.

(f) A recipient must require its prime contractor to have its DBE subcontractors complete EPA Form 6100–3—DBE Program Subcontractor Performance

Environmental Protection Agency

§ 33.304

Form. A recipient must then require its prime contractor to include all completed forms as part of the prime contractor's bid or proposal package.

(g) A recipient must require its prime contractor to complete and submit EPA Form 6100-4—DBE Program Subcontractor Utilization Form as part of the prime contractor's bid or proposal package.

(h) Copies of EPA Form 6100-2—DBE Program Subcontractor Participation Form, EPA Form 6100-3—DBE Program Subcontractor Performance Form and EPA Form 6100-4—DBE Program Subcontractor Utilization Form may be obtained from EPA OSDBU's Home Page on the Internet or directly from EPA OSDBU.

(i) A recipient must ensure that each procurement contract it awards contains the term and condition specified in the appendix concerning compliance with the requirements of this part. A recipient must also ensure that this term and condition is included in each procurement contract awarded by an entity receiving an identified loan under a financial assistance agreement to capitalize a revolving loan fund.

§ 33.303 Are there special rules for loans under EPA financial assistance agreements?

A recipient of an EPA financial assistance agreement to capitalize a revolving loan fund, such as a State under the CWSRF or DWSRF or an eligible entity under the Brownfields Cleanup Revolving Loan Fund program, must require that borrowers receiving identified loans comply with the good faith efforts described in § 33.301 and the contract administration requirements of § 3.302. This provision does not require that such private and nonprofit borrowers expend identified loan funds in compliance with any other procurement procedures contained in 2 CFR part 200 Subpart D—Post Federal Award Requirements, Procurement Standards, or 40 CFR part 35 subpart O, as applicable.

[73 FR 15913, Mar. 26, 2008, as amended at 79 FR 76054, Dec. 19, 2014]

§ 33.304 Must a Native American (either as an individual, organization, Tribe or Tribal Government) recipient or prime contractor follow the six good faith efforts?

(a) A Native American (either as an individual, organization, corporation, Tribe or Tribal Government) recipient or prime contractor must follow the six good faith efforts only if doing so would not conflict with existing Tribal or Federal law, including but not limited to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e), which establishes, among other things, that any federal contract, subcontract, grant, or subgrant awarded to Indian organizations or for the benefit of Indians, shall require preference in the award of subcontracts and subgrants to Indian organizations and to Indian-owned economic enterprises.

(b) Tribal organizations awarded an EPA financial assistance agreement have the ability to solicit and recruit Indian organizations and Indian-owned economic enterprises and give them preference in the award process prior to undertaking the six good faith efforts. Tribal governments with promulgated tribal laws and regulations concerning the solicitation and recruitment of Native-owned and other minority business enterprises, including women-owned business enterprises, have the discretion to utilize these tribal laws and regulations in lieu of the six good faith efforts. If the effort to recruit Indian organizations and Indian-owned economic enterprises is not successful, then the recipient must follow the six good faith efforts. All tribal recipients still must retain records documenting compliance in accordance with § 33.501 and must report to EPA on their accomplishments in accordance with § 33.502.

(c) Any recipient, whether or not Native American, of an EPA financial assistance agreement for the benefit of Native Americans, is required to solicit and recruit Indian organizations and Indian-owned economic enterprises and give them preference in the award process prior to undertaking the six good faith efforts. If the efforts to solicit and recruit Indian organizations and Indian-owned economic enterprises

§ 33.401

is not successful, then the recipient must follow the six good faith efforts.

(d) Native Americans are defined in § 33.103 to include American Indians, Eskimos, Aleuts and Native Hawaiians.

Subpart D—Fair Share Objectives

§ 33.401 What does this subpart require?

A recipient must negotiate with the appropriate EPA award official or his/her designee, fair share objectives for MBE and WBE participation in procurement under the financial assistance agreements.

§ 33.402 Are there special rules for loans under EPA financial assistance agreements?

A recipient of an EPA financial assistance agreement to capitalize revolving loan funds must either apply its own fair share objectives negotiated with EPA under § 33.401 to identified loans using a substantially similar relevant geographic market, or negotiate separate fair share objectives with entities receiving identified loans, as long as such separate objectives are based on demonstrable evidence of availability of MBEs and WBEs in accordance with this subpart. If procurements will occur over more than one year, the recipient may choose to apply the fair share objective in place either for the year in which the identified loan is awarded or for the year in which the procurement action occurs. The recipient must specify this choice in the financial assistance agreement, or incorporate it by reference therein.

§ 33.403 What is a fair share objective?

A fair share objective is an objective based on the capacity and availability of qualified, certified MBEs and WBEs in the relevant geographic market for the procurement categories of construction, equipment, services and supplies compared to the number of all qualified entities in the same market for the same procurement categories, adjusted, as appropriate, to reflect the level of MBE and WBE participation expected absent the effects of discrimination. A fair share objective is not a quota.

40 CFR Ch. I (7–1–23 Edition)

§ 33.404 When must a recipient negotiate fair share objectives with EPA?

A recipient must submit its proposed MBE and WBE fair share objectives and supporting documentation to EPA within 120 days after its acceptance of its financial assistance award. EPA must respond in writing to the recipient's submission within 30 days of receipt, either agreeing with the submission or providing initial comments for further negotiation. Failure to respond within this time frame may be considered as agreement by EPA with the fair share objectives submitted by the recipient. MBE and WBE fair share objectives must be agreed upon by the recipient and EPA before funds may be expended for procurement under the recipient's financial assistance agreement.

§ 33.405 How does a recipient determine its fair share objectives?

(a) A recipient must determine its fair share objectives based on demonstrable evidence of the number of certified MBEs and WBEs that are ready, willing, and able to perform in the relevant geographic market for each of the four procurement categories (equipment, construction, services, and supplies). The relevant geographic market is the area of solicitation for the procurement as determined by the recipient. The market may be a geographic region of a State, an entire State, or a multi-State area. Fair share objectives must reflect the recipient's determination of the level of MBE and WBE participation it would expect absent the effects of discrimination. A recipient may combine the four procurement categories into one weighted objective for MBEs and one weighted objective for WBEs.

(b) *Step 1.* A recipient must first determine a base figure for the relative availability of MBEs and WBEs. The following are examples of approaches that a recipient may take. Any percentage figure derived from one of these examples should be considered a basis from which a recipient begins when examining evidence available in its jurisdiction.

(1) *MBE and WBE Directories and Census Bureau Data.* Separately determine

the number of certified MBEs and WBEs that are ready, willing, and able to perform in the relevant geographic market for each procurement category from a MBE/WBE directory, such as a bidder's list. Using the Census Bureau's County Business Pattern (CBP) database, determine the number of all qualified businesses available in the market that perform work in the same procurement category. Separately divide the number of MBEs and WBEs by the number of all businesses to derive a base figure for the relative availability of MBEs and WBEs in the market.

(2) *Data from a Disparity Study.* Use a percentage figure derived from data in a valid, applicable disparity study conducted within the preceding ten years comparing the available MBEs and WBEs in the relevant geographic market with their actual usage by entities procuring in the categories of construction, equipment, services, and supplies.

(3) *The Objective of Another EPA Recipient.* A recipient may use, as its base figure, the fair share objectives of another EPA recipient if the recipient demonstrates that it will use the same, or substantially similar, relevant geographic market as the other EPA recipient. (See § 33.411 for exemptions from fair share objective negotiations).

(4) *Alternative Methods.* Subject to EPA approval, other methods may be used to determine a base figure for the overall objective. Any methodology chosen must be based on demonstrable evidence of local market conditions and be designed to ultimately attain an objective that is rationally related to the relative availability of MBEs and WBEs in the relevant geographic market.

(c) *Step 2.* After calculating a base figure, a recipient must examine the evidence available in its jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at the fair share objective.

(1) There are many types of evidence that must be considered when adjusting the base figure. These include:

(i) The current capacity of MBEs and WBEs to perform contract work under EPA financial assistance agreements, as measured by the volume of work MBEs and WBEs have performed in recent years;

(ii) Evidence from disparity studies conducted anywhere within the recipient's jurisdiction, to the extent it is not already accounted for in the base figure; and

(iii) If the base figure is the objective of another EPA recipient, it must be adjusted for differences in the local market and the recipient's contracting program.

(2) A recipient may also consider available evidence from related fields that affect the opportunities for MBEs and WBEs to form, grow and compete. These include, but are not limited to:

(i) Statistical disparities in the ability of MBEs and WBEs to get the financing, bonding and insurance required to participate; and

(ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent it can be related to the opportunities for MBEs and WBEs to perform in the program.

(3) If a recipient attempts to make an adjustment to its base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of another ongoing MBE/WBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

§ 33.406 May a recipient designate a lead agency for fair share objective negotiation purposes?

If an Indian Tribal, State or local Government has more than one agency that receives EPA financial assistance, the agencies within that Government may designate a lead agency to negotiate MBE and WBE fair share objectives with EPA to be used by each of the agencies. Each agency must otherwise negotiate with EPA separately its own MBE and WBE fair share objectives.

§ 33.407 How long do MBE and WBE fair share objectives remain in effect?

Once MBE and WBE fair share objectives have been negotiated, they will remain in effect for three fiscal years unless there are significant changes to

§ 33.408

40 CFR Ch. I (7–1–23 Edition)

the data supporting the fair share objectives. The fact that a disparity study utilized in negotiating fair share objectives has become more than ten years old during the three-year period does not by itself constitute a significant change requiring renegotiation.

§ 33.408 May a recipient use race and/or gender conscious measures as part of this program?

(a) Should the good faith efforts described in subpart C of this part or other race and/or gender neutral measures prove to be inadequate to achieve an established fair share objective, race and/or gender conscious action (e.g., apply the subcontracting suggestion in § 33.301(c) to MBEs and WBEs) is available to a recipient and its prime contractor to more closely achieve the fair share objectives, subject to § 33.409. Under no circumstances are race and/or gender conscious actions required by EPA.

(b) Any use of race and/or gender conscious efforts must not result in the selection of an unqualified MBE or WBE.

§ 33.409 May a recipient use quotas as part of this program?

A recipient is not permitted to use quotas in procurements under EPA's 8% or 10% statute.

§ 33.410 Can a recipient be penalized for failing to meet its fair share objectives?

A recipient cannot be penalized, or treated by EPA as being in noncompliance with this subpart, solely because its MBE or WBE participation does not meet its applicable fair share objective. However, EPA may take remedial action under § 33.105 for a recipient's failure to comply with other provisions of this part, including, but not limited to, the good faith efforts requirements described in subpart C of this part.

§ 33.411 Who may be exempted from this subpart?

(a) *General.* A recipient of an EPA financial assistance agreement in the amount of \$250,000 or less for any single assistance agreement, or of more than one financial assistance agreement with a combined total of \$250,000 or less in any one fiscal year, is not required

to apply the fair share objective requirements of this subpart. This exemption is limited to the fair share objective requirements of this subpart.

(b) *Clean Water State Revolving Fund (CWSRF) Program, Drinking Water State Revolving Fund (DWSRF) Program, and Brownfields Cleanup Revolving Loan Fund (BCRLF) Program Identified Loan Recipients.* A recipient under the CWSRF, DWSRF, or BCRLF Program is not required to apply the fair share objective requirements of this subpart to an entity receiving an identified loan in an amount of \$250,000 or less or to an entity receiving more than one identified loan with a combined total of \$250,000 or less in any one fiscal year. This exemption is limited to the fair share objective requirements of this subpart.

(c) *Tribal and Intertribal Consortia recipients of program grants which can be included in Performance Partnership Grants (PPGs) under 40 CFR Part 35, Subpart B.* Tribal and Intertribal consortia recipients of PPG eligible grants are not required to apply the fair share objective requirements of this subpart to those grants. This exemption is limited to the fair share objective requirements of this subpart.

(d) *Technical Assistance Grant (TAG) Program Recipients.* A recipient of a TAG is not required to apply the fair share objective requirements of this subpart to that grant. This exemption is limited to the fair share objective requirements of this subpart.

§ 33.412 Must an Insular Area or Indian Tribal Government recipient negotiate fair share objectives?

The requirements in this subpart regarding the negotiation of fair share objectives will not apply to an Insular Area or Indian Tribal Government recipient until three calendar years after the effective date of this part. Furthermore, in accordance with § 33.411(c), tribal and intertribal consortia recipients of program grants which can be included in Performance Partnership Grants (PPGs) under 40 CFR part 35, subpart B are not required to apply the fair share objective requirements of this subpart to such grants.

Subpart E—Recordkeeping and Reporting**§ 33.501 What are the recordkeeping requirements of this part?**

(a) A recipient, including those recipients exempted under § 33.411 from the requirement to apply the fair share objectives, must maintain all records documenting its compliance with the requirements of this part, including documentation of its, and its prime contractors', good faith efforts and data relied upon in formulating its fair share objectives. Such records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement.

(b) A recipient of a Continuing Environmental Program Grant or other annual grant must create and maintain a bidders list. In addition, a recipient of an EPA financial assistance agreement to capitalize a revolving loan fund also must require entities receiving identified loans to create and maintain a bidders list if the recipient of the loan is subject to, or chooses to follow, competitive bidding requirements. (See e.g., § 33.303). The purpose of a bidders list is to provide the recipient and entities receiving identified loans who conduct competitive bidding with as accurate a database as possible about the universe of MBE/WBE and non-MBE/WBE prime and subcontractors. The list must include all firms that bid or quote on prime contracts, or bid or quote subcontracts on EPA assisted projects, including both MBE/WBEs and non-MBE/WBEs. The bidders list must only be kept until the grant project period has expired and the recipient is no longer receiving EPA funding under the grant. For entities receiving identified loans, the bidders list must only be kept until the project period for the identified loan has ended. The following information must be obtained from all prime and subcontractors:

- (1) Entity's name with point of contact;
- (2) Entity's mailing address, telephone number, and e-mail address;
- (3) The procurement on which the entity bid or quoted, and when; and

(4) Entity's status as an MBE/WBE or non-MBE/WBE.

(c) *Exemptions.* A recipient of an EPA financial assistance agreement in the amount of \$250,000 or less for any single assistance agreement, or of more than one financial assistance agreement with a combined total of \$250,000 or less in any one fiscal year, is exempt from the paragraph (b) of this section requirement to create and maintain a bidders list. Also, a recipient under the CWSRF, DWSRF, or BCRLF Program is not required to apply the paragraph (b) of this section bidders list requirement of this subpart to an entity receiving an identified loan in an amount of \$250,000 or less, or to an entity receiving more than one identified loan with a combined total of \$250,000 or less in any one fiscal year. This exemption is limited to the paragraph (b) of this section bidders list requirements of this subpart.

§ 33.502 What are the reporting requirements of this part?

MBE and WBE participation must be reported by all recipients, including those recipients exempted under § 33.411 from the requirement to apply the fair share objectives, on EPA Form 5700-52A. Recipients of Continuing Environmental Program Grants under 40 CFR part 35, subpart A, recipients of Performance Partnership Grants (PPGs) under 40 CFR part 35, subpart B; General Assistance Program (GAP) grants for tribal governments and intertribal consortia; and institutions of higher education, hospitals and other non-profit organizations receiving financial assistance agreements, will report on MBE and WBE participation on an annual basis. All other financial assistance agreement recipients, including recipients of financial assistance agreements capitalizing revolving loan funds, will report on MBE and WBE participation semiannually. Recipients of financial assistance agreements that capitalize revolving loan programs must require entities receiving identified loans to submit their MBE and WBE participation reports on a semi-annual basis to the financial assistance

§ 33.503

40 CFR Ch. I (7–1–23 Edition)

agreement recipient, rather than to EPA.

[73 FR 15913, Mar. 26, 2008, as amended at 79 FR 76054, Dec. 19, 2014]

§ 33.503 How does a recipient calculate MBE and WBE participation for reporting purposes?

(a) *General.* Only certified MBEs and WBEs are to be counted towards MBE/WBE participation. Amounts of MBE and WBE participation are calculated as a percentage of total financial assistance agreement project procurement costs, which include the match portion of the project costs, if any. For recipients of financial assistance agreements that capitalize revolving loan programs, the total amount is the total procurement dollars in the amount of identified loans equal to the capitalization grant amount.

(b) *Ineligible project costs.* If all project costs attributable to MBE and WBE participation are not eligible for funding under the EPA financial assistance agreement, the recipient may choose to report the percentage of MBE and WBE participation based on the total eligible and non-eligible costs of the project.

(c) *Joint ventures.* For joint ventures, MBE and WBE participation consists of the portion of the dollar amount of the joint venture attributable to the MBE or WBE. If an MBE's or WBE's risk of loss, control or management responsibilities is not commensurate with its share of the profit, the Agency may direct an adjustment in the percentage of MBE or WBE participation.

(d) *Central Purchasing or Procurement Centers.* A recipient must report MBE and WBE participation from its central purchasing or procurement centers.

(e) *Brokers.* A recipient may not count expenditures to a MBE or WBE that acts merely as a broker or passive conduit of funds, without performing, managing, or supervising the work of its contract or subcontract in a manner consistent with normal business practices.

(1) *Presumption.* If 50% or more of the total dollar amount of a MBE or WBE's prime contract is subcontracted to a non-DBE, the MBE or WBE prime contractor will be presumed to be a

broker, and no MBE or WBE participation may be reported.

(2) *Rebuttal.* The MBE or WBE prime contractor may rebut this presumption by demonstrating that its actions are consistent with normal practices for prime contractors in its business and that it will actively perform, manage and supervise the work under the contract.

(f) *MBE or WBE Truckers/Haulers.* A recipient may count expenditures to an MBE or WBE trucker/hauler only if the MBE or WBE trucker/hauler is performing a commercially useful function. The following factors should be used in determining whether an MBE or WBE trucker/hauler is performing a commercially useful function:

(1) The MBE or WBE must be responsible for the management and supervision of the entire trucking/hauling operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting MBE or WBE objectives.

(2) The MBE or WBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

APPENDIX A TO PART 33—TERM AND CONDITION

Each procurement contract signed by an EPA financial assistance agreement recipient, including those for an identified loan under an EPA financial assistance agreement capitalizing a revolving loan fund, must include the following term and condition:

The contractor 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 40 CFR part 33 in the award and administration of contracts awarded under EPA financial assistance agreements. 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 other legally available remedies.