



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
WATER

November 5, 1998

SRF 99-03

MEMORANDUM

SUBJECT: Application of Minority and Women-Owned Business Enterprise Requirements in the Clean Water and Drinking Water State Revolving Fund Programs

FROM: Michael B. Cook, Director, Office of Wastewater Management /s/

Cynthia C. Dougherty, Director, Office of Ground Water and Drinking Water /s/

Jeanette L. Brown, Director, Office of Small and Disadvantaged Business Utilization /s/

TO: Water Management Division Directors, Regions I - X
MBE/WBE Coordinators, Regions I - X

In 1995, the Supreme Court ruled that Federal affirmative action programs must be strictly scrutinized by reviewing courts and must be narrowly tailored to serve compelling government interests. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). In response to the *Adarand* decision, and under the aegis of the Department of Justice (DOJ), President Clinton directed all Federal government agencies to ensure that their minority and women-owned business enterprises (MBE/WBE) programs were consistent with the principles set forth in that decision.

In consultation with DOJ, EPA issued its revised MBE/WBE program guidance (MBE Guidance¹) in July, 1997.¹ The changes to the MBE/WBE program set forth in the MBE Guidance affect all Agency assistance programs, including the Clean Water and Drinking Water State Revolving Fund (CWSRF and DWSRF or, collectively, SRF) programs. This memorandum explains a key revision in the Guidance regarding the negotiation of MBE/WBE "fair share" goals -- a revision that was prompted by the *Adarand* decision -- and describes how MBE/WBE requirements will apply in the SRF programs beginning with grants awarded in fiscal year 1999.

Negotiating goals for the participation of MBE/WBEs in the SRF programs.

¹ "Guidance for Utilization of Small, Minority and Women's Business Enterprises in Procurement Under Assistance Agreements - 6010" (July 1997).

The MBE Guidance changes the process by which EPA and assistance recipients negotiate “fair share” goals for the participation of MBE/WBEs. In keeping with *Adarand* principles, the MBE Guidance requires “fair share” goals for all Agency assistance programs, including the SRF programs, to be based on the availability of qualified MBE/WBEs in the relevant market to do the work for four categories of procurement: construction, equipment services and supplies. The eight percent MBE/WBE minimum participation goals contained in EPA’s FY 1993 Appropriations Act, Pub .L. No. 102-389, which were commonly included in SRF and other EPA assistance agreements, will now serve as an overall, national goal for all Agency assistance programs, but the fair share goals with individual States may vary based on the availability standard.

Including the six affirmative steps in the bid documents of SRF projects is the primary means for achieving the “fair share” goals. The six affirmative steps, which are described in the CWSRF regulations at 40 C.F.R. § 35.3145(d)(1) - (6), represent good faith efforts to attract and utilize MBE/ WBEs, as well as small business enterprises (SBEs),and small businesses in rural areas (SBRAs), primarily through race/gender neutral outreach, recruitment and other activities. The objective is to expand the pool of bidders to include these types of businesses, not to use race or ethnicity in the actual decision -- in other words, to level the playing field for these types of businesses. The requirement to apply the six affirmative steps to all identified projects is consistent with the Administration’s post-*Adarand* policy, reflected in the MBE Guidance, to expand the pool of available bidders on projects utilizing Federal funds. Identified SRF projects, described under the heading “Identifying projects to which MBE/WBE requirements apply”, must continue to include the six affirmative steps in their bid documents even after the goals have been met.

A State may elect to negotiate fair share goals based on the availability of MBE/WBEs State-wide or it may elect to negotiate separate MBE/WBE fair share goals for different geographic areas of a State (*e.g.*, upstate, downstate) based on the availability of MBE/WBEs in those areas. Beginning with capitalization grants awarded in fiscal year FY 1999, if a State chooses to negotiate State-wide MBE/WBE goals, it must apply those goals to all identified SRF projects. If a State chooses to use the geographic approach, the State must apply the negotiated fair share goal for the area of the State in which the identified project is located.

If a State negotiated FY 1998 MBE/WBE “fair share” goals based on a disparity study, EPA will accept for FY 1999 the MBE and WBE goals negotiated for FY 1998 based on the results of that study. Similarly, if a State negotiated FY 1998 “fair share” goals based on an availability analysis (other than one that was premised on historical data of dollars awarded to MBEs and WBEs), EPA will accept for FY 1999 the MBE and WBE goals negotiated for FY 1998 based on the results of that analysis. However, if a State negotiated FY 1998 MBE and WBE “fair share” goals based on historical data, for FY 1999 it will need to negotiate new MBE and WBE goals based on a disparity study, if it has conducted one, or based on an availability analysis. As stated in the August 20, 1998 Memorandum from Jeanette L. Brown (see

Attachment), FY 1999 fair share negotiations for SRF recipients that based their FY 1998 MBE/WBE goals on historical data of dollars awarded to MBEs and WBEs need to be completed by December 31, 1998. A State's failure to complete MBE/WBE "fair share" negotiations by the time of the capitalization grant award may result in sanctions being imposed by EPA, which may include not allowing procurements under SRF loans from being initiated or withholding payments for procurement activities. Grant conditions implementing this policy will be forthcoming.

In some cases, a locality, such as a large city with its own local MBE/WBE program, may determine that its own MBE/WBE goals based on availability are more appropriate than the goals negotiated for the State. If the locality makes such a determination, it must prepare an availability analysis or, at its option, a disparity study supporting its proposed fair share goals and submit that analysis or study to the State for the State's approval. States and localities may use the attached guidance for preparing an availability analysis (see Attachment). Until the State has approved the locality's goals based on availability, the locality will have to use the State's goals.

These changes in the administration of the SRF programs are needed to ensure that SRF projects to which the MBE/WBE goals apply are administered in a manner consistent with the *Adarand* principles. Thus, if State-wide goals are negotiated by a State and EPA, the State must apply the State negotiated fair share objectives to all identified projects unless the State approves a locality's own MBE/WBE goals based upon availability.

State option to apply the "fair share" goal to loans or to procurements.

The State must negotiate its fair share goals each year and select one of two options for applying the goals to identified projects. The State must either apply the MBE and WBE goals to identified projects that receive loans in the year that the goals are effective, or, alternatively, apply the goals to individual procurements made by an identified project during the year. In the first instance, the same goals will apply to all procurements under the loans, whether or not a particular procurement occurs in the year the loan is awarded or in a later year when a different goal may be in effect. In the second instance, the goals attaching to a single identified project may differ depending on the year in which the procurement occurs. For example, if a State awards a loan to a project in 1999, when an eight percent goal is in effect, any procurement made in 1999 from that loan will be subject to the eight percent goal. If a procurement is made from that loan in 2000 when a nine percent goal is in effect, then that procurement will be subject to the higher goal.

Identifying projects to which MBE/WBE requirements apply.

Clean Water SRF:

The existing CWSRF regulations allow a State to achieve its "fair share" goals by applying the six affirmative steps to "certain equivalency projects". However, because equivalency projects, as those are defined at 40 C.F.R. § 35.3105(f), no longer exist, the

MBE/WBE requirement must now be treated in a manner similar to other cross-cutting Federal authorities. In this circumstance, the general rule under which Federal cross-cutting authorities apply to all projects assisted with funds “directly made available by” capitalization grants, 40 C.F.R. § 35.3145(a), must now take precedence. Accordingly, the negotiated fair share goals must be applied to all CWSRF projects assisted with funds “directly made available by” capitalization grants, which are projects funded in amounts equaling the amount of the grant. 40 C.F.R. § 35.3105(g). The State must ensure that all of these projects include the six affirmative steps set out at 40 C.F.R. § 35.3145(d)(1)-(6) in their bid documents.

Drinking Water SRF:

Section 1452 of the SDWA, which establishes the DWSRF project fund, authorizes a State to set aside a portion of its capitalization grant to fund other activities authorized under SDWA. Although most of the capitalization grant is deposited in the DWSRF project fund, up to 31 percent of the grant may be used by the State to administer the DWSRF and carry out other programs under section 1452. Some of these “set-aside” activities may not entail procurement. Consequently, the fair share goals will be applied to the amount of the capitalization grant that is to be used by the State on projects or activities involving procurement, whether they are funded from the DWSRF project fund or from amounts set aside. Thus, the fair share goal will only apply to those Federal set-aside dollars used for procurement activities, as set forth in the Intended Use Plan submitted to EPA. As with CWSRF projects, the State must ensure that all identified projects include the six affirmative steps in their bid documents.

Ensuring compliance with MBE/WBE requirements.

As with other Federal cross-cutting authorities, in its capitalization grant agreement the State must ensure the Agency that identified projects will comply with the MBE/WBE requirements. This includes ensuring that adequate records are retained to demonstrate compliance with the requirements. See 40 C.F.R. § 31.36(b)(9), 40 C.F.R. § 31.42, 40 C.F.R. 35.3165(c)(2). Generally, the Agency will review compliance with the six affirmative steps during annual reviews of State programs.

EPA’s Office of Small and Disadvantaged Business Utilization (OSDBU), which is responsible for the Agency’s MBE/WBE program, is chairing a workgroup that will draft a rule to conform the Agency’s programs, including the SRF programs, to the *Adarand* principles. The rulemaking workgroup includes among its membership staff from both SRF programs. The forthcoming rule for the MBE/WBE program will more comprehensively prescribe requirements for the SRF and all other Agency assistance programs. The rule is likely to address many of the matters in a set of Questions and Answers that OSDBU issued to the Regions on August 18, 1998, as well as other issues, some of which may pertain specifically to the SRF programs. In the meantime, all capitalization grant agreements awarded beginning in FY 1999 must be consistent with the requirements in this memorandum and the MBE/WBE program guidance.

If you have further questions after reviewing this memorandum, the attached Qs and As, and the MBE/WBE program guidance, please call Rich Kuhlman, of the CWSRF program at (202) 260-7366, Jamie Bourne of the DWSRF program at (202) 260-5557, or Mark Gordon of OSDBU at (202) 260-8886.

Attachments

ccs: Assistant Administrator for Water
Regional Counsels
Assistant Regional Administrators
Regional SRF Coordinators
Beth Craig, GAD
Gary Katz, GAD
Bruce Feldman, GAD
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Howard Corcoran, OGC
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Pat Hirsch, OGC
Geoff Cooper, OGC
MBE/WBE Rulemaking Workgroup
Jennifer Morris, Region 7
Norm White, Cincinnati

ATTACHMENT

August 20, 1998

Memorandum

Subject: FY 1999 MBE/WBE Fair Share Negotiations

From: Jeanette L. Brown, Director,
Office of Small and Disadvantaged
Business Utilization

To: MBE/WBE Coordinators, Region 1-10, Headquarters and Cincinnati

As a follow up to our recent July 20-22 MBE/WBE Conference, attached is an insert for you to use in your letters initiating FY 1999 fair share negotiations with States. Please refer to that insert for applicable requirements to States. Again as was the case in FY 1998, local governments and interstate agencies, commissions, compacts and the like may use the applicable State agency FY 1999 MBE/WBE fair share goals or may negotiate their own goals with you. If they negotiated FY 1998 MBE/WBE goals with you based upon the results of a disparity study or an availability analysis, EPA will accept for FY 1999 the MBE and WBE goals negotiated for FY 1998 based on that study or analysis. However, if they negotiated FY 1998 MBE and WBE fair share goals based on historical data of dollars awarded to MBEs and WBEs, they will need to negotiate those goals based on a disparity study, if they already have done one, or based on an availability analysis. The time frames are the same as those for States, i.e., availability analyses need to be submitted to you by November 30, 1998 in order for fair share negotiations to be completed by December 31, 1998. Procurement initiated before EPA approves their FY 1999 MBE/WBE goals will continue to use their applicable FY 1998 MBE/WBE goals. Thereafter, the new goals for FY 1999 will apply. The methodology for preparing an availability analysis for local governments and interstate agencies, commissions, compacts and the like is the same as that for States. You may either send these entities the insert for States or incorporate the methodology language from the insert into your letters to them.

The insert specifically mentions an availability analysis which was accepted by EPA Region 5 for FY 1998 MBE/WBE fair share negotiation purposes prepared by the Metropolitan Water Reclamation District of Chicago (District). You are free to send a copy of that analysis to the entities with which you will negotiate FY 1999 MBE/WBE fair share goals.

Also attached is an "Availability Analysis Check Sheet" which can be used to assist EPA assistance award recipients making the transition from using historical data to preparing an availability analysis. This Check Sheet was extracted from the availability analysis submitted by the District, with some additional EPA information added to make the document easier to use. The District is one of our Region 5 applicants that opted to negotiate its own FY 1998 MBE/WBE goals, rather than use State MBE/WBE goals.

Your assistance award recipients may find this Check Sheet to be helpful in preparing an availability analysis. However, it is not our intent to lock assistance recipients into a specific format or analysis structure. If you have any questions about the Check List, you may contact Bob Richardson, MBE/WBE Coordinator Region 5 at (312)353-5677 or George Stone of Region 5, who is currently on detail to Headquarters (OSDBU) at (202)260-1563.

cc: Howard Corcoran, OGC
Beth Craig, GAD
Gary Katz, GAD
Bruce Feldman, GAD
Richard Kuhlman, CWSRF
James Bourne, SDWASRF
MBE/WBE Rulemaking Workgroup Participants
Office of Regional Counsel MBE/WBE Contacts

Attachments

Insert For FY 1999 MBE/WBE Fair Share Negotiations With States

If you receive an assistance award from EPA in FY 1999, you will need to have your FY 1999 (i.e., EPA's FY 1999) fair share negotiations based on the availability of qualified Minority Business Enterprises (MBEs) and Women's Business Enterprises (WBEs) to do the work in the relevant market for construction, equipment, services and supplies completed with your Regional MBE/WBE Coordinator by December 31, 1998. In the interim, you may continue to use your applicable FY 1998 MBE/WBE goals. Procurement initiated before EPA approves your FY 1999 MBE/WBE goals will continue to use your applicable FY 1998 MBE/WBE goals. Thereafter, the new goals for FY 1999 will apply. In order to meet the December 31 date, you will need to submit your "fair share" analysis based on availability, as further discussed below, to your Regional MBE/WBE Coordinator by November 30, 1998.

If you negotiated FY 1998 "fair share" goals for MBEs and WBEs based on a disparity study, EPA will accept for FY 1999 the MBE and WBE goals negotiated for FY 1998 based on the results of that study. NOTE-EPA is not requiring any State to conduct a disparity study.

Similarly, if you negotiated FY 1998 "fair share" goals based on an availability analysis, EPA will accept for FY 1999 the MBE and WBE goals negotiated for FY 1998 based on the results of that analysis.

However, if you negotiated FY 1998 MBE and WBE "fair share" goals based on historical data of dollars awarded to MBEs and WBEs, for FY 1999, you will need to negotiate these goals based on a disparity study, if your State has conducted one, or based on an availability analysis.

For FY 1999, as was the case for FY 1998, EPA is not mandating a particular manner in which a State needs to prepare an availability analysis supporting its proposed "fair share" objectives. However, the analysis must address the availability of qualified minority and women-owned businesses to do the work in the relevant market for construction, equipment, services and supplies. If the State has more than one agency which negotiates MBE/WBE goals with EPA, and the goals are not uniform among the Agencies, then each agency proposing different goals will need to prepare an availability analysis. Alternatively, if the State's goals are uniform among State Agencies and are based on an availability analysis prepared by a Lead Agency, the other agencies may rely on the Lead Agency's Analysis. States may use the following methodology in preparing an availability analysis for each procurement category, i.e., construction, equipment, services and supplies.

Minority-Owned Businesses in Relevant
Standard Industrial Classification (SIC) Codes in Relevant Geographic Area=MBE Availability
All Businesses in Relevant
SIC Codes in Relevant Geographic Area

Women-Owned Business in Relevant
SIC codes in Relevant Geographic Area = WBE Availability
All Businesses in Relevant
SIC Codes in Relevant Geographic Area

Please refer to Part 19 of the FAR (Federal Acquisition Regulations), found in 48 CFR Part 19 for a listing of SIC Codes. You are also free to utilize another method so long as it is based on the availability of qualified MBEs/WBEs to perform the work in the relevant market for each of the four procurement categories.

For FY 1999, as was the case for FY 1998, States may choose to propose different MBE/WBE goals for different types of EPA programs, (e.g., different Superfund goals, Clean Water Revolving Fund goals, etc.) based on availability. NOTE -EPA is not requiring States to do this. Rather, the Agency is offering it as a means to give States flexibility in implementing the requirements for FY 1999.

Among the sources of information you may find useful in obtaining data concerning the availability of qualified MBEs /WBEs to perform the work in the relevant market for each of the four procurement categories are: U.S. Department of Commerce, Bureau of the Census (301)457-4608, U.S. Small Business Administration's PRO-Net Procurement Marketing and Access Network, which can be accessed on the Internet at <http://www.sba.gov>. (You may contact Mr. L. T. Leong for assistance at (202)205-7312) and the Minority Business Development Agency's Phoenix dBASE System (to identify available MBE's to do the work), which can be accessed on the internet at <http://www.mbda.gov> (you may contact Mr. Keith Flores for assistance at (202)482-0404).

Enclosed (see Enclosure A) is a copy of a submission which was accepted by EPA Region 5 for FY 1998 MBE/WBE fair share negotiation purposes, prepared by the Metropolitan Water Reclamation District of Chicago (District). That submission is based upon a formal affirmative action program adopted by the District after conducting an investigation of the scope of discrimination in the award of and participation in the District's construction contracts. EPA is not requiring States to conduct such an investigation. Nonetheless, the methodology specified in its **January** 8, 1998 memorandum, as further discussed in its August 4, 1998 memorandum, wherein the district explains how it establishes annual MBE and WBE goals based on availability may be useful to you in preparing your own availability analysis. Also enclosed (see Enclosure B) is a sample checklist based on that submission which you may find helpful in preparing your availability analysis.

Please bear in mind as you review the District's submission, which focuses to a great extent on construction, that the District is not a State Agency and therefore does not receive the wide variety of assistance awards from EPA that States receive; EPA requires States to negotiate separate "fair share" goals for construction, equipment, services and supplies.

AVAILABILITY ANALYSIS CHECK SHEET

“WHAT MAKES A GOOD AVAILABILITY ANALYSIS”
EXTRACTED FROM THE METROPOLITAN WATER RECLAMATION DISTRICT OF
GREATER CHICAGO

What is an Availability Analysis?

An availability study is an analysis of the market of qualified MBE/WBE businesses that are available in a given geographical location to do the work involved. The analysis should be based on those qualified MBE/WBE firms that are available to do the work in the given arena or field that you need for your project.

How may MBE/WBE goals be supported by an availability analysis?

Such goals may be supported through a number of data bases, including a **Vendor's List**. For our purposes, a vendor's list can be defined as a list of Minority and Women-owned firms that provide a service in a specific field that is consistent with the needs of a given entity. These firms are often limited to a specific geographical radius. This list can be a basis for establishing MBE/WBE fair share procurement goals for construction, equipment, services and supplies.

How do I keep my Vendor's List current?

The list may be updated quarterly, semi-annually or annually. Firms that have not responded to bids more than three times consecutively may be contacted. If the business no longer exists or does not want to remain on a vendor's list, the firm can be deleted from the list.

What criterion do Minority and Women Owned firms have to meet in order to be recognized as an eligible entity to be included in one's availability analysis?

- 1) The Metropolitan Water Reclamation District of Greater Chicago District requires that MBE/WBE firms must be certified as a MBE or WBE either by the City of Chicago or by it. The District places certified MBEs and WBEs on its vendor list (NOTE-EPA allows for self certification by MBEs and WBEs).
- 2) The MBE/WBE firms need to be qualified and need to be available to perform the work in the relevant geographic market.

3) You may wish to consider whether the MBE/WBE bid or sought to work in the past or may have been on a previously existing Vendor's list.

What are MBE/WBE Goals?

EPA requires "fair share" MBE/WBE procurement goals for construction, equipment, services and supplies. Those goals are negotiated between EPA and States and/or recipients of EPA financial assistance awards. Separate MBE and WBE goals should be clearly reflected in your analysis as USEPA requires separate goals for MBEs and another for WBEs for each of the four procurement categories. The 8% MBE/WBE goal contained in EPAs FY 1993 Appropriations Act, and the 10% MBE/WBE goal contained in the Clean Air Act Amendments of 1990 relating to the requirements of those amendments are treated by EPA as overall national goals. This allows for smaller or larger "fair share" objectives to be negotiated for particular grants and cooperative agreements based on the availability standard.

What is the rationale for developing Utilization Goals?

An entity's rationale for developing its goals is as important as the goal itself. Your analysis should contain a detailed narrative substantiating the availability of firms and how you arrived at your goals. This is probably the single most important part of your Availability Analysis.

How can I construct my Availability Analysis?

An Availability Analysis may be constructed in many different styles or formats. USEPA at this time is not mandating a particular manner in which a State and/or recipient needs to prepare an availability analysis supporting its proposed MBE/WBE goals so long as the analysis addresses the availability of qualified minority and women-owned businesses to do the work in the relevant market for construction, equipment, services and supplies. However, the following is a breakdown of how an Availability Study may be structured:

I. Data Research Method

A. Vendor's List

B. Contractor's List

C. Census Data

D. SBA Information, including SBA's PRO-Net Procurement Marketing and Access Network

E. MBDA Information, including MBDA's Phoenix dBase System (to identify MBEs available to do the work).

II. Discussion

III. Proposed Goals