



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

Office of the  
Administrator

December 29, 1998

**MEMORANDUM**

**SUBJECT:** FY 1999 MBE/WBE Terms and Conditions

**FROM:** Romulo L. Diaz, Jr. /s/  
Assistant Administrator for Administration  
and Resources Management

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

**TO:** Regional Administrators  
Assistant Regional Administrators for Policy and Management  
Regional Counsels

EPA regards its program for Utilization of Small, Minority and Women's Business Enterprises in Procurement (MBE/WBE) under Assistance Agreements as a major component of the Agency's overall mission and is committed to the program's success. In order to ensure consistency with the Supreme Court's decision in Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995), it is important that EPA MBE/WBE "fair share" goals 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 Agency has begun FY 1999 MBE/WBE "fair share" negotiations with States and other governmental recipients wishing to negotiate their own MBE/WBE goals with EPA. If a State or other governmental entity negotiated FY 1998 MBE/WBE "fair share" goals based on a disparity study, EPA will accept these goals for FY 1999. Similarly, if a State or other governmental entity 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 these goals for FY 1999. FY 1999 "fair share" negotiations for States and other governmental recipients which based their FY 1998 MBE/WBE goals on historical data of dollars awarded to MBEs and WBEs should be recalculated on the basis of a current availability analysis, or at the recipient's option, a disparity study.

We previously advised you that these negotiations were to be completed by December 31, 1998. The Agency has decided to extend the time period for submission of these analyses to March 1, 1999, and the deadline for concluding these negotiations to March 31, 1999. The Agency has made this decision because several Regions did not send out their FY 1999 fair share negotiation letters with time enough for States and other governmental recipients to comply with the original deadlines.

Attached are new MBE/WBE terms and conditions which will be included in all non-State Revolving Fund (SRF) assistance agreements (except fellowship agreements and agreements with foreign entities, Indian Tribes and Trust Territories) where the recipients based their FY 1998 MBE/WBE goals on historical data of dollars awarded to MBEs and WBEs. These terms and conditions replace the October 13, 1998, version for this category of recipients. The terms and conditions sent to you on October 13, 1998, for non-SRF recipients whose EPA approved FY 1998 MBE/WBE goals were not based on historical data of dollars awarded to MBEs and WBEs remain in effect.

Also attached are two new MBE/WBE terms and conditions for FY 1999 awards to SRF recipients. One is to be used for recipients that based their FY 1998 MBE/WBE goals on historical data of dollars awarded to MBEs and WBEs. The other is to be used for recipients with EPA-approved FY 1998 MBE/WBE goals that were not based on historical data of dollars awarded to MBEs and WBEs.

We ask that you notify your State and other governmental recipients orally upon receipt of this letter, as well as in writing as soon as possible and no later than January 15, 1999, of the new time frames for submission and approval of FY 1999 MBE/WBE fair share goals. In doing so, please call their attention to the language in the grant conditions regarding corrective action. The Agency will impose corrective action on those recipients who fail to meet these deadlines as follows:

- In the case of the Clean Water SRF (CWSRF) program, the corrective action is that EPA will make no further payments to the State after March 31, 1999, until such time as the FY 1999 MBE/WBE "fair share" negotiations are concluded. For capitalization grants awarded after March 31, 1999, EPA will not make payments to the State until such time as the FY 1999 "fair share" negotiations are concluded.
- In the case of the Drinking Water SRF (DWSRF) program, the corrective action is that EPA will make no further payments for procurement activities to the State after March 31, 1999, until such time as the FY 1999 MBE/WBE "fair share" negotiations are concluded. For capitalization grants awarded after March 31, 1999, EPA will not make payments for procurement activities to the State until such time as the FY 1999 MBE/WBE "fair share" negotiations are concluded.
- For non-SRF State or other governmental recipients wishing to negotiate their own

FY 1999 MBE/WBE goals, EPA will withhold payments for procurement activities until such time as the FY 1999 MBE/WBE “fair share” negotiations are concluded.

The Agency believes that notifying State and other governmental recipients of its corrective action policy up-front will result in a smoother approval process. In FY 1998, numerous extensions of time were granted to the States; this resulted in the need for many different grant conditions to be negotiated between EPA and grant recipients.

The attached terms and conditions for non-SRF recipients that based their FY 1998 MBE/WBE goals on historical data of dollars awarded to MBEs and WBEs, and the two terms and conditions for FY 1999 Awards to SRF recipients are effective January 15, 1999. Thank you in advance for your cooperation in this very important matter. If you have any questions, please contact Lupe Saldaña in the Grants Administration Division at (202) 564-5353, or Mark Gordon of the Office of Small & Disadvantaged Business Utilization at (202) 260-8886.

#### Attachments

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**Minority Business Enterprises (MBE)/Women’s Business Enterprises (WBE) Terms and Conditions for State Revolving Fund (SRF) Recipients with EPA-approved FY 1998 MBE/WBE Goals that were not based on historical data of dollars awarded to MBEs and WBEs**

1. The recipient agrees to comply with the requirements for EPA’s Program for Utilization of Small, Minority and Women’s Business Enterprises in procurement under assistance agreements:

(a) The recipient accepts the applicable FY 1999 Minority Business Enterprise (MBE)/Women’s Business Enterprise (WBE) “fair share” goals/objectives negotiated with EPA by the [insert applicable State Agency’s name] as follows:

	MBE		WBE
Construction	_____ %		_____ %
Supplies	_____ %		_____ %
Services	_____ %		_____ %
Equipment	_____ %		_____ %
		Or	
Combined Rate	_____ %		_____ %

(b) The recipient agrees to ensure, to the fullest extent possible, that at least the applicable “fair share” objectives of Federal funds for prime contracts or subcontracts for construction, equipment, services or supplies are made available by the recipient and/or the State Revolving Fund (SRF) identified project, as defined in paragraphs 1.(d) or (e) below, to organizations owned or controlled by socially and economically disadvantaged individuals, women and Historically Black Colleges and Universities.

(c) The recipient agrees to include in its bid documents the applicable “fair share” objectives of Federal funds and require all of its prime contractors to include in their bid documents for subcontracts the negotiated “fair share” percentages.

(d) The recipient agrees to require Clean Water State Revolving Fund (CWSRF) projects assisted with funds directly made available by capitalization grants (“CWSRF identified projects”) to include in their bid documents the applicable “fair share” objectives of Federal funds and require all of their prime contractors to include in their bid documents the negotiated “fair share” percentages.

(e) The recipient agrees to ensure that the applicable “fair share negotiations” will be applied to the amount of the capitalization grant that is to be used on projects and activities involving procurement, whether they are funded from the DWSRF project fund or from amounts set aside from the capitalization grant (“DWSRF identified projects”) and that all prime contracts

on such projects and activities will include in their bid documents the negotiated “fair share” percentages.

(f) The recipient agrees to follow the six affirmative steps stated in §31.36(e), 40 CFR §35.3145(d) or as incorporated into the Drinking Water SRF Program Guidelines, as appropriate, and to require CWSRF identified projects and/or DWSRF identified projects, as applicable, to follow these six affirmative steps; the recipient agrees to retain records documenting compliance.

(g) The recipient agrees to submit an EPA form 5700-52A “MBE/WBE Utilization Under Federal Grants, Cooperative Agreements and Interagency Agreements,” beginning with the Federal fiscal year quarter the recipient receives the award and continuing until the project is completed. These reports must be submitted to [insert the EPA Award Official or other appropriate EPA official] within 30 days of the end of the Federal fiscal quarter (January 30, April 30, July 30, and October 30).

(h) In the event a locality determines to use its own MBE/WBE goals based on availability rather than the State’s negotiated goals with EPA, the recipient agrees that until it approves the locality’s goals, it will require the locality to use the applicable State negotiated MBE/WBE goals with EPA.

(i) If race and/or gender neutral efforts prove inadequate to achieve a “fair share” objective, the recipient agrees to notify EPA in advance of any race and/or gender conscious action it or its CWSRF identified project or its DWSRF identified project plan to take to more closely achieve the “fair share” objectives.

2. EPA may take corrective action under 40 CFR Parts 31 and 35, as appropriate, if the recipient fails to comply with these terms and conditions.

**Minority Business Enterprises (MBE)/Women’s Business Enterprises (WBE) Terms and Conditions for FY 1999 Awards to State Revolving Fund (SRF) Recipients that based their FY 1998 MBE/WBE Goals on historical data of dollars awarded to MBEs and WBEs**

1. The recipient agrees to comply with the requirements for EPA’s Program for Utilization of Small, Minority and Women’s Business Enterprises in procurement under assistance agreements:

(a) The recipient accepts the applicable FY 1999 Minority Business Enterprise (MBE)/Women’s Business Enterprise (WBE) “fair share” goals/objectives negotiated with EPA by the [insert applicable State Agency’s name] as follows:

	MBE		WBE
Construction	_____ %		_____ %
Supplies	_____ %		_____ %
Services	_____ %		_____ %
Equipment	_____ %		_____ %
		Or	
Combined Rate	_____ %		_____ %

(b) The recipient agrees to ensure, to the fullest extent possible, that at least the applicable “fair share” objectives of Federal funds for prime contracts or subcontracts for construction, equipment, services or supplies are made available by the recipient and/or the State Revolving Fund (SRF) identified project, as defined in paragraphs 1.(d) or (e) below, to organizations owned or controlled by socially and economically disadvantaged individuals, women and Historically Black Colleges and Universities.

(c) The recipient agrees to include in its bid documents the applicable “fair share” objectives of Federal funds and require all of its prime contractors to include in their bid documents for subcontracts the negotiated “fair share” percentages.

(d) The recipient agrees to require Clean Water State Revolving Fund (CWSRF) projects assisted with funds directly made available by capitalization grants (“CWSRF identified projects”) to include in their bid documents the applicable “fair share” objectives of Federal funds and require all of their prime contractors to include in their bid documents the negotiated “fair share” percentages.

(e) The recipient agrees to ensure that the applicable “fair share negotiations” will be applied to the amount of the capitalization grant that is to be used on projects and activities involving procurement, whether they are funded from the DWSRF project fund or from amounts set aside from the capitalization grant (“DWSRF identified projects) and that all prime contracts on such projects and activities will include in their bid documents the negotiated “fair share” percentages.

(f) The recipient agrees to follow the six affirmative steps stated in §31.36(e), 40 CFR §35.3145(d) or as incorporated into the Drinking Water SRF Program Guidelines, as appropriate, and to require CWSRF identified projects and/or DWSRF identified projects, as applicable, to follow these six affirmative steps; the recipient agrees to retain records documenting compliance.

(g) The recipient agrees to submit an EPA form 5700-52A “MBE/WBE Utilization Under Federal Grants, Cooperative Agreements and Interagency Agreements,” beginning with the Federal fiscal year quarter the recipient receives the award and continuing until the project is completed. These reports must be submitted to [insert the EPA Award Official or other appropriate EPA official] within 30 days of the end of the Federal fiscal quarter (January 30, April 30, July 30, and October 30).

(h) In the event a locality determines to use its own MBE/WBE goals based on availability rather than the State’s negotiated goals with EPA, the recipient agrees that until it approves the locality’s goals, it will require the locality to use the applicable State negotiated MBE/WBE goals with EPA.

(i) If race and/or gender neutral efforts prove inadequate to achieve a “fair share” objective, the recipient agrees to notify EPA in advance of any race and/or gender conscious action it or its CWSRF identified project or its DWSRF identified project plan to take to more closely achieve the “fair share” objectives.

2. (a) Until the applicable State Agency has completed its FY 1999 MBE/WBE “fair share” negotiations with EPA, the recipient agrees to apply that Agency’s FY 1998 MBE/WBE “fair share” objectives in accordance with paragraphs 1.(b)-(i). Once the applicable State Agency has completed its FY 1999 MBE/WBE “fair share” negotiations with EPA, the recipient agrees to apply those objectives in accordance with paragraphs 1.(b)-(i).

(b) The recipient agrees to submit proposed MBE/WBE “fair share” objectives, together with the supporting availability analysis or at its option, a disparity study, to [insert the MBE/WBE Coordinator or the other EPA official] by March 1, 1999 in order for EPA to conclude “fair share” negotiations by March 31, 1999. Once EPA approves the “fair share” objectives, the recipient agrees to apply them in accordance with paragraphs 1.(b)-(i).

3. If MBE/WBE CWSRF “fair share” negotiations are not concluded by March 31, 1999, EPA will make no further payments to the State until such time as they are concluded.

4. If MBE/WBE DWSRF “fair share” negotiations are not concluded by March 31, 1999, EPA will make no further payments for procurement activities to the State until such time as they are concluded.

5. If the CWSRF capitalization grant is awarded after March 31, 1999 and the MBE/WBE CWSRF “fair share” negotiations are not concluded by that date, EPA will not make payments to the State until such time as the FY 1999 “fair share” negotiations are concluded.

6. If the DWSRF capitalization grant is awarded after March 31, 1999 and the FY 1999 MBE/WBE DWSRF “fair share” negotiations are not concluded by that date, EPA will not make payments for procurement activities to the State until such time as the FY 1999 “fair share” negotiations are concluded.

**Minority Business Enterprises (MBE)/Womens' Business Enterprises (WBE) Terms and Conditions for FY 1999 Awards to non-SRF Recipients that based their FY 1998 MBE/WBE Goals on historical data of dollars awarded to MBEs and WBEs**

1. The recipient agrees to comply with the requirements for EPA's Program for Utilization of Small, Minority and Women's Business Enterprises in procurement under assistance agreements:

(a) Except as otherwise provided in paragraph 2., the recipient accepts the applicable FY 1999 Minority Business Enterprise (MBE)/Womens' Business Enterprise (WBE) "fair share" goals/objectives negotiated with EPA by the [insert applicable State Agency's name] as follows:

	MBE	WBE
Construction	_____ %	_____ %
Supplies	_____ %	_____ %
Services	_____ %	_____ %
Equipment	_____ %	_____ %
OR		
Combined Rate:	_____ %	_____ %

(b)(1) The recipient agrees to ensure, to the fullest extent possible, that at least the applicable "fair share" objectives of Federal funds for prime contracts or subcontracts for supplies, construction, equipment or services are made available to organizations owned or controlled by socially and economically disadvantaged individuals, women and Historically Black Colleges and Universities.

(2) For assistance agreements related to research under the Clean Air Act Amendments of 1990, the recipient agrees to ensure, to the fullest extent possible, that at least the applicable "fair share" objectives of Federal funds for prime contracts or subcontracts for supplies, construction, equipment or services are made available to organizations owned or controlled by socially and economically disadvantaged individuals, women, disabled Americans, Historically Black Colleges and Universities, Colleges and Universities having a student body in which 40% or more of the students are Hispanic, minority institutions having a minority student body of 50% or more, and private and voluntary organizations controlled by individuals who are socially and economically disadvantaged.

(c) The recipient agrees to include in its bid documents the applicable "fair share" objectives of Federal funds and require all of its prime contractors to include in their bid documents for subcontracts the negotiated "fair share" percentages.

(d) The recipient agrees to follow the six affirmative steps stated in 40 CFR §30.44(b), 40 CFR §31.36(e), or 40 CFR §35.6580, as appropriate, and retain records documenting compliance.

(e) The recipient agrees to submit an EPA form 5700-52A “MBE/WBE Utilization Under Federal Grants, Cooperative Agreements and Interagency Agreements,” beginning with the Federal fiscal year quarter the recipient receives the award and continuing until the project is completed. These reports must be submitted to [insert the EPA Award Official or other appropriate EPA official] within 30 days of the end of the Federal fiscal quarter (January 30, April 30, July 30, and October 30). For assistance awards for continuing environmental programs and assistance awards with institutions of higher education, hospitals and other non-profit organizations, the recipient agrees to submit an EPA form 5700-52A to [insert the EPA Award Official or other appropriate EPA official] by October 30 of each year.

(f) If race and /or gender neutral efforts prove inadequate to achieve a “fair share” objective, the recipient agrees to notify EPA in advance of any race and/or gender conscious action it plans to take to more closely achieve the “fair share” objective.

2. (a) Until the applicable State Agency has completed its FY 1999 MBE/WBE “fair share” negotiations with EPA, the recipient agrees to apply that Agency’s FY 1998 MBE/WBE “fair share” objectives in accordance with paragraphs 1.(b)-(f). Once the applicable State Agency has completed its FY 1999 MBE/WBE “fair share” negotiations with EPA, the recipient agrees to apply those objectives in accordance with paragraphs 1.(b)-(f), unless it wishes to negotiate its own FY 1999 MBE/WBE goals with EPA.

(b) State recipients and other governmental recipients that wish to negotiate their own FY 1999 MBE/WBE goals must submit an availability analysis or, at their option, a disparity study, based on the availability of qualified MBEs and WBEs to do the work in the relevant market for construction, equipment, services and supplies. The recipient agrees to submit proposed MBE/WBE “fair share” objectives, together with the supporting availability analysis or disparity study, to [insert the MBE/WBE coordinator or other appropriate EPA official] by March 1, 1999 in order for EPA to conclude “fair share” negotiations by March 31, 1999. Once EPA approves the “fair share” objectives, the recipient agrees to apply them in accordance with paragraphs 1.(b)- (f).

(c) Non-governmental recipients that wish to negotiate their own FY 1999 MBE/WBE goals must submit proposed MBE/WBE goals based on an availability analysis, or, at their option, a disparity study, of qualified MBEs and WBEs to do the work in the relevant market for construction, equipment, services, and supplies. The recipient agrees to submit proposed “fair share” objectives, together with the supporting availability analysis or disparity study, to the [insert the MBE/WBE Coordinator or other appropriate EPA official] within 30 days of award. EPA will conclude “fair share” negotiations within 30 days of receiving the submission. Once EPA approves the objectives, the recipient agrees to apply them in accordance with paragraphs 1.(b)-(f).

3. If a State recipient or other governmental recipient wishing to negotiate its own FY 1999 MBE/WBE goals has not concluded its MBE/WBE “fair share” negotiations by March 31, 1999, EPA will withhold payments for procurement activities until such time as they are concluded.