

RAIN-2019-G10

Class Exception for Fair Share Objectives Pursuant to 40 CFR Part 33, Subpart D and EPA MBE/WBE Certification Pursuant to 40 CFR Part 33, Subpart B

Effective/ Notification Date: October 1, 2019

Purpose: This Recipient/Applicant Information Notice (RAIN) informs recipients and applicants of the approved exception that temporarily waives the requirements in 40 CFR Part 33, Subpart D and permanently suspends the EPA certification process in 40 CFR Part 33, Subpart B. The certification requirements located in 40 CFR Part 33, Subpart B remain unchanged.

Policy Summary: EPA has approved a temporary exception to 40 CFR Part 33, Subpart D which includes the requirement that recipients must negotiate fair share objectives for minority business enterprise (MBE) and women's business enterprise (WBE) participation in procurement under assistance agreements in 40 CFR Part 33, Subpart D, and suspends the EPA MBE/WBE certification program in 40 CFR Part 33, Subpart B. This exception also updates and consolidates the national term and condition which requires recipients to comply with 40 CFR Part 33 regarding the utilization of small, minority and women's business enterprises.

EPA financial assistance recipients are no longer required to negotiate fair share objectives. In addition, the EPA MBE/WBE certification program has been suspended. Entities seeking MBE/WBE certification may obtain such certification from one of the various programs located at the Federal, state, local and private sector levels.

All other requirements located in 40 CFR Part 33 remain in effect- [including the increase to the Simplified Acquisition Threshold which increased the MBE/WBE reporting threshold to \\$250,000.](#)

Background:

Under Subpart D of 40 CFR Part 33, recipients are required to negotiate a fair share objective to serve as a goal for all procurements under financial assistance agreements. None of the statutes authorizing EPA's DBE program require EPA to employ the use of fair share objectives. In addition, 40 CFR 33.410 clearly specifies that a recipient cannot be penalized or treated by EPA as being noncompliant with Subpart D solely because the recipient's MBE and/or WBE participation levels did not meet the negotiated fair share objective. Further, OGD has determined that negotiating fair share objectives is a labor-intensive process for both the recipient community and EPA. Since EPA does not require the use of fair share objectives, and given the burden placed on EPA and recipients in negotiating the fair share objectives, EPA is no longer requiring recipients to negotiate fair share objectives at this time.

In addition, OGD's initial assessment determined that only a limited number of entities have requested certification by EPA. The EPA MBE/WBE certification program is contained within Subpart B of 40 CFR Part 33. OGD's initial assessment finds that sufficient certification programs currently exist at both the federal and state level for any entity to obtain MBE, WBE or DBE certification. Such certification programs are located within: the United States Small Business Administration, the United States Department of Transportation, Indian Tribal Governments, State Governments, local Governments or independent private organizations. Since EPA's MBE/WBE certification program is underutilized and many certification programs exist, EPA is suspending its MBE/WBE certification program. However, it should be noted that in order to qualify for EPA's DBE program, an entity must be certified, and such certification must meet the criteria as stipulated in 40 CFR §33.202 and/or §33.203.

Related Resources:

[Questions Related to the DBE Exception Issued October 1, 2019](#)

[40 CFR Part 33](#)

[RAIN-2018-G04 Micro-Purchase and Simplified Acquisition Threshold for Procurements by EPA Assistance Agreement Recipient and Subrecipients](#)

[EPA Form 5700-52A, United States Environmental Protection Agency Minority Business Enterprise/Woman Business Enterprise Utilization under Federal Grants and Cooperative Agreements](#)