

do not authorize or require a recipient to automatically establish MBE or WBE fair share objectives at the 8% or 10% levels. The fair share objectives apply only to procurement dollars and not, for example, to salaries or other overhead costs.

Section 33.402 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 will apply its fair share objective (if the entity receiving the identified loan uses a relevant geographic area that is substantially similar to the recipient's) or a separately negotiated fair share objective to entities receiving identified loans. For the CWSRF and DWSRF Programs, identified loans are those projects or activities funded from amounts equal to the capitalization grant. For the Brownfields Cleanup Revolving Loan Fund (BCRLF) Program, identified loans are those projects funded with federal financial assistance. 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.

Section 33.403 What Is a Fair Share Objective?

A fair share objective is a percentage based on the capacity and availability of qualified 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, if possible, to reflect the level of MBE and WBE participation absent the effects of past discrimination in the marketplace.

A fair share objective is not a quota. A recipient and its prime contractor must make the good faith efforts described in Subpart C of this Rule in attempting to achieve its fair share objectives.

Section 33.404 When Must a Recipient Negotiate Fair Share Objectives With EPA?

This Rule requires a recipient to submit its proposed fair share objectives and supporting documentation to the Agency within 90 days after its acceptance of a financial assistance agreement for more than \$250,000. In situations where a recipient receives

several EPA financial assistance agreements that are \$250,000 or less in one fiscal year, the recipient must submit its proposed fair share objectives and supporting documentation to the Agency within 90 days after its acceptance of the financial assistance agreement that takes the recipient over the \$250,000 threshold (see § 33.411). In recent years EPA has included time frames for submission of proposed fair share objectives in special grant conditions for each financial assistance agreement. EPA is now incorporating a general time frame into this Rule. A recipient may not spend any of its financial assistance award for procurement until the fair share objective negotiation process has been completed.

Section 33.405 How Does a Recipient Determine Its Fair Share Objectives?

Starting in FY 1998, EPA, through the 1997 Guidance and implementing terms and conditions, has required that fair share objectives for MBEs and WBEs be based on the availability of qualified MBEs and WBEs in the relevant market for the four procurement categories of construction, equipment, services and supplies. In this proposed regulation, EPA is also offering recipients the option of combining the four proposed procurement category objectives for MBEs into a single weighted objective. The same option would be available for WBEs. In this proposed regulation, EPA is continuing to allow recipients to establish separate MBE and WBE fair share objectives for different EPA financial assistance programs and to establish separate MBE and WBE fair share objectives by geographic area.

Beginning with MBE and WBE objectives for FY 1999, the Agency required that fair share negotiations be supported by an availability analysis, or at the recipient's option, a disparity study conducted within the past ten years. In this rulemaking, EPA is proposing to keep this basic approach, with some fine tuning. The recipient would have to consider whether an adjustment from the availability analysis or disparity study percentage is needed based on past MBE or WBE achievements, other disparity studies done within the recipient's jurisdiction or other types of relevant available data (e.g., statistical disparities in the ability of MBEs and WBEs to obtain financing, bonding and insurance required to participate in the DBE Program). This process is needed to ensure that objectives accurately reflect the MBE and WBE participation expected absent the effects of discrimination.

Recognizing that EPA makes many different types of financial assistance awards (e.g., Superfund awards for Hazardous Waste Cleanup, CWSRF capitalization grants) to a wide variety of recipients, EPA is also soliciting comments to help us determine how best to achieve a "level playing field" for MBEs and WBEs. EPA is specifically asking for comments on whether recipients should be able to choose from a variety of methods in calculating MBE and WBE fair share objectives with the Agency.

This process is intended to provide maximum flexibility for recipients while ensuring that objectives are based, at a minimum, on the capacity and availability of qualified MBEs and WBEs in the recipient's relevant market.

A recipient may negotiate separate MBE and WBE fair share objectives applicable to different geographic markets, and must use the fair share objectives for the geographic markets in which the contract work for its project is being performed.

(1) Step 1: Determining a Base Figure for the MBE and WBE Objectives

A recipient may determine a base figure by preparing an availability analysis. An availability analysis represents an actual measurement by the recipient of the availability of MBEs and WBEs in the relevant geographic market in the four procurement categories compared to the number of all businesses in the same market that perform work in the same procurement categories. From these data the recipient would derive a base figure that is as accurate a representation as possible of the percentage of qualified MBEs and WBEs available versus the total number of available businesses.

EPA is not specifying a methodology or formula for a recipient to use in preparing its availability analysis. Instead, the Agency is proposing to place primary emphasis on the principles underlying the measurement, requiring only that a measurement of the availability be made on the basis of demonstrable evidence of relevant market conditions.

EPA is providing a number of examples which recipients may adopt or use as guidelines for deriving their own availability analysis.

(A) MBE/WBE Directories and Census Bureau Data

The first example is setting an MBE base figure using a recipient's own MBE directories, including the bidders list required by § 33.501. For each procurement category, the recipient would first tabulate the number of