

Subcontractor Utilization Form to all of its DBE subcontractors, pursuant to § 33.303(e), (f) and (g), respectively.

Eighth, a tribal recipient that conducts procurements will have to create and maintain a bidders list in accordance with § 33.501(b). The purpose of this list is to provide recipients as accurate a database as possible about the universe of MBE/WBE and non-MBE/WBE prime and subcontractors who seek to work on procurements under EPA financial assistance agreements. The following information must be obtained from all such prime and subcontractors: (1) Entity name; (2) Entity address; (3) Entity's status as an MBE/WBE.

Consistent with EPA policy, EPA nonetheless consulted with tribal officials and/or representatives of tribal governments early in the process of developing this regulation to permit them to have meaningful and timely input into its development. Because E.O. Sections 5(b) and 5(c) do not apply, a Tribal Impact Summary is not required. EPA nonetheless is including one in this preamble.

The following constitutes a Tribal Impact Summary under Executive Order 13175:

EPA posted a staff draft of this proposed rule, dated June 19, 2000, on EPA's internet website. As part of its ongoing tribal consultations on this rule, EPA held meetings with tribal officials to discuss the staff draft rule in Boston, Massachusetts on April 11, 2001 and in Seattle, Washington on May 23, 2001. EPA held further formal consultations with tribal officials to discuss a draft of this Rule in Ocean Shores, Washington during the week of January 28, 2002.

By way of further background, today's proposed rule has been under development for the past several years. EPA invited tribal recipients of EPA grants and cooperative agreements to an EPA/State/Tribal Annual Conference held on February 2–4, 1999 in Albuquerque, New Mexico. During this conference, EPA representatives discussed a number of issues relating to the rule under development with the general audience. In addition, EPA representatives met separately with tribal officials and/or representatives to discuss issues of concern to tribes. On June 27–30, 2000, the Agency held its EPA/State/Tribal Annual Conference in Albuquerque, New Mexico. Again, EPA invited tribal recipients of EPA financial assistance agreements to attend. During the June, 2000 conference, agency representatives discussed in detail the June 19, 2000 staff draft of the rule, which had been posted on EPA's website. EPA solicited comments on the staff draft of the rule from conference

participants. Tribal officials and/or representatives attended that conference as well. As of June 30, 2001, EPA has received a total of 17 written comments on the staff draft from Indian tribes.

During the development of this rule EPA representatives have made a number of oral presentations to the Tribal Operations Committee (TOC) on the rule's progress and solicited input. The TOC is comprised of 19 national tribal representatives from the nine EPA Regions that have federally recognized tribes, and EPA Senior Management; its role is to provide input into EPA decision making affecting Indian Country. On November 29, 2000, EPA representatives met with the TOC at the EPA Tribal Caucus Regional Joint meeting in Miami, Florida to discuss the staff draft rule and to obtain further tribal input into the rulemaking process.

Starting in November, 2000, EPA invited tribal recipients of EPA grants and cooperative agreements to participate in outreach sessions held in cities around the country having EPA Regional offices in order to discuss the staff draft rule. EPA has further solicited tribal input into the rulemaking at meetings with tribal officials/representatives at the Department of the Interior 2001 Conference on the Environment hosted by the Bureau of Indian Affairs on March 13–15, 2001 in Albuquerque, New Mexico and at the Reservation Economic Summit and American Indian Business Trade Fair (RES 2001) in Anaheim, California, on March 20, 2001. EPA further solicited tribal input in another meeting with the TOC on April 24, 2001 in Miami, Florida.

EPA has considered tribal concerns and written comments in today's rulemaking. A summary of the nature of tribal concerns and EPA's initial response follows:

1. In general, tribes believe they should be exempt from the rule.

Awards of Grants and Cooperative Agreements to tribes are currently governed by 40 CFR Part 31, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments." These are government wide requirements that have been in effect since 1988. Among other entities subject to the regulations are governments. The definition of "Government" in 40 CFR 31.3 includes "* * * a federally recognized Indian tribal government." Many requirements contained in this proposed rule are not new but rather are the same requirements contained in 40 CFR Part 31, with which many tribes already have been complying. For example, the reporting and recordkeeping

requirements are already applicable to Indian tribes. In addition, neither EPA's 10% MBE/WBE procurement objective statute for research relating to the requirements of the Clean Air Act Amendments of 1990 nor EPA's statutory 8% MBE/WBE procurement objective requirements for all other programs contain language exempting tribes from their applicability. Therefore, EPA proposes that tribes should not be exempted from this rule because it promotes the utilization of all disadvantaged entities in procurement under EPA financial assistance agreements, including tribally owned businesses and businesses owned by a member(s) of a tribe.

2. Trigger for Fair Share Negotiations.

The issue of increasing the dollar amount of the trigger requiring compliance with the fair share objective requirements and the corresponding availability analysis was of special concern to tribes awarded GAP grants. One commentator also expressed the view that availability analysis preparation requirements should apply only to tribes spending 90% or more of their grants on outside procurement. Other tribes expressed the view that preparing availability analyses is too costly for them, especially for smaller tribes.

In response to concerns raised by tribes, under today's proposed rulemaking, the trigger requiring compliance with the fair share objective requirements has been increased to \$250,000 from \$100,000 contained in the staff draft of the rule. Also because of the nature of eligible program grants which can be included in Performance Partnership Grants (PPGs) to tribes under 40 CFR Part 35, Subpart B, and the unique nature of eligible recipients, the Agency is proposing to exempt PPG eligible program grants to tribes under 40 CFR Part 35, Subpart B from the fair share negotiation requirements.

Accordingly, only tribes receiving an EPA financial assistance agreement of more than \$250,000 for any single assistance agreement or of more than one financial assistance agreement with a combined total of more than \$250,000 in any one fiscal year (excluding PPG eligible program grants under 40 CFR Part 35, Subpart B) would have to comply with the fair share objective requirements.

The Agency believes that this change effectively addresses the concerns by setting a uniform standard applicable to all recipients, including tribes, rather than, for example, setting a standard based on amounts spent by tribes on outside procurement, which could pose implementation difficulties. EPA believes that most tribes will not have