

Mandatory Minority/Women's Business Enterprise Requirements for State/Local EPA Grant Recipients and Penalties for Non-Compliance

Part A -- The Six Affirmative Steps: EPA grant regulations require that state and local government grant recipients, and their contractors, take the following six affirmative steps when using EPA grant funds to procure construction, equipment, supplies and services. The point of EPA's six affirmative steps is to maximize contracting opportunities for small and disadvantaged businesses and build relationships between large and small contractors. The actual regulatory language is in boldface, and EPA Region 4 recommendations follow specific paragraphs in regular typeface.

40 C.F.R. § 31.36(e) Contracting with small and minority firms, women's business enterprise and labor surplus area firms.

(1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

Grantees and their prime contractors should develop and maintain a list of qualified vendors for current and future solicitations and include qualified small/minority and women-owned businesses (MBE/WBE) on the list. Email addresses should also be included and email should be used to notify vendors of procurement solicitations. Copies of Emails to small/minority and women owned businesses should be retained by the grantee of evidence of attempts to solicit qualified MBE/WBEs. If a vendor does not have an email address, grantees and contractors could send a certified letter or facsimile to the MBE/WBE vendor and retain a copy of the certified mail receipt or facsimile confirmation as evidence of an attempt to solicit MBE/WBEs. EPA suggests that grantees share their lists with their State environmental agency. If the grantee/contractor has only one project funded with EPA grant dollars, the grantee or contractor should maintain a list of the vendors that bid on the project or they contacted in their procurement file in the event their project is audited by EPA.

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

See (i) above.

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

See (iv) below

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

When planning their procurement strategy, grantees and their contractors should break down the project into its basic elements (i.e., dirt hauling, landscaping services, painting, pipe installation, etc.) and determine whether it's economically feasible to bid the elements separately. The grantee and/or contractor should document this analysis with a short memo to the grant file in the event of an audit by EPA. Prime Contractors should anticipate that EPA will review its procurement strategy and be prepared to discuss its efforts to break down the elements of the project into smaller projects to maximize contracting opportunities for MBE/WBE firms. Prime Contractors need to understand that they must compete all subcontracts under a prime contract and that they cannot simply use the same subcontractors for all of their work funded under an EPA grant.

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

This section requires that EPA grantees and their prime contractors **must** contact the Minority Business Development Agency (MBDA) and the Small Business Administration (SBA) **before** grantees and contractors solicit for bids and inform MBDA and SBA that the grantee or prime contractor must comply with affirmative outreach steps required by EPA. The SBA and MBDA will help identify qualified MBE/WBE vendors in your geographic region and will also help contact MBE/WBE vendors and provide the grantee or contractor with evidence of compliance with steps (i) and (ii) above.

The easiest way to utilize the services of MBDA and SBA is to visit their websites: www.mbda.gov and www.sba.gov and use the electronic tools available there. EPA suggests that grantees and contractors print pages of the MBDA and SBA websites which evidence efforts to register a solicitation on those sites and retain those pages in your files for evidence of compliance with subparagraph (v) in the event of an EPA audit. Another alternative is to send the nearest MBDA and SBA office a certified letter that generally describes the solicitation, the dates it will be open, the types of vendors you are seeking and applicable SIC or NAIC codes if known. The grantee or contractor should then retain the certified mail receipt and copy of the letter in its files to evidence compliance with this section. Additionally the contractor or grantee could write a short memo to its procurement file that memorializes the steps taken (i.e., phone calls to SBA/MBDA with dates and name of contact, efforts to register on the website, etc.) to comply with the six affirmative steps.

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

This section makes it very clear that Prime Contractors and other contractors that subcontract must follow the six affirmative steps.

Part B -- Penalties for Non-Compliance. EPA's MBE/WBE program includes statewide goals for participation by minority and women owned firms that are based on actual availability of qualified MBE/WBE firms. The goals are only targets and there is no penalty for failing to meet a goal. However there are several potential penalties for failing to comply with the six affirmative steps from 40 C.F.R. § 31.36(e) are mandatory requirements. Since Title VI of the Civil Rights Act applies to all EPA funding, ignoring the six affirmative steps are a material failure to comply with a federal regulation and therefore EPA can pursue one of the enforcement remedies described below.

40 C.F.R. § 31.43 Enforcement.

(a) Remedies for noncompliance. If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

EPA could disallow a significant percentage of the grant award for failure to comply with the six affirmative steps. The more wilful the noncompliance, the larger the percentage that could be withheld.

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

In the event that a grantee anticipates future grants from EPA, failure to comply with the six affirmative steps could jeopardize the future funding.

(5) Take other remedies that may be legally available.

EPA could instigate a Suspension and Debarment action whereby the grantee and/or the prime contractor are ineligible for all federal grants and contracts including US Department of Transportation projects (state medicare and state educational assistance could continue). Additionally, or alternatively, EPA could designate the recipient as a High-Risk Grantee which will place additional burdens on ANY federal grant award. This includes requiring cost-reimbursable payments (i.e., a grantee must spend its own funds first and then provide the federal agency proof of payment before being reimbursed), increased reporting requirements, mandatory audits and similar measures.

EPA has the discretion to take a combination of the above actions if warranted.