

1. Roger Clegg-

This recent *Federal Register* notice discusses EPA's DBE program, but does not cite any statutory authority for its apparent use of classifications and preferences on the basis of race, ethnicity, and sex. As you may know, it is generally illegal for the government to show favoritism or even use classifications based on race, ethnicity, or sex. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("all racial classifications ... must be analyzed by a reviewing court under strict scrutiny"); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (gender classifications require an "exceedingly persuasive justification"). See also Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d (prohibiting discrimination on the basis of race, color, and national origin in federally funded programs). Indeed, such classifications and favoritism are "presumptively invalid" (see *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979)). Accordingly, unless there is some statutory mandate requiring the use of race, ethnicity, and sex in this program, we respectfully request that EPA not do so. If there is such a statutory mandate, we would very much appreciate your sharing that information with us. We would also urge that you ensure that any such program is within the constitutional parameters set recently in *Rothe Development Corp. v. United States Department of Defense*, 545 F.3d 1023 (F. Cir. 2008), and *Dynalantic Corp. v. U.S. Dep't of Defense*, No. 95-2301, 2012 WL 3356813 (D.D.C. Aug. 15, 2012).

The regulation associated with this information collection was promulgated after the Supreme Court's decision in *Adarand v. Peña*. 40 CFR Part 33 requires the use of race and gender-neutral efforts to increase the participation of disadvantaged business enterprises in procurements funded by EPA financial assistance agreements. For a full discussion on how this ruling shaped 40 CFR Part 33, please see the background section of the preamble of the regulation, which can be found at <http://www.epa.gov/osbp/pdfs/dbe/final%20dbe%20rule.pdf>

2. H. Allen-

EPA Form 6100-2 (DBE Subcontractor Participation Form) states, "The DBE subcontractor can complete and submit this form to the EPA DBE Coordinator at any time during the project period of performance"; however, the form does not give a mailing address or e-mail address for the EPA DBE Coordinator. At a minimum, the form should list a webpage where the address of the EPA DBE Coordinator may be obtained. Subcontractors need to know where this form is supposed to go. Without this information, the form has no purpose.

This information can be found in the grant recipient documents. It is purposefully left off since coordinator names, addresses may change.

3. Tamara Griffin-

6100-3 1. If a subcontractor is not a DBE, why would they complete and submit the form? No need for the "Not certified" area on the form. 2. Subcontractors more than likely will not know, nor research if they meet or exceed EPA's certification standards. 3. Maybe there should be a line to ask that the subcontractor submit their certification

1. "Not certified" will be removed.

2. The “unknown” option was added for those who are not aware as to whether or not their certification meets or exceeds EPA’s. By indicating by whom the firm is certified, the DBE coordinator will be able to make a determination as to whether the certification meets EPA requirements. Submission of the actual certification is not necessary.
3. A firm may be certified as a DBE by another entity but that certification may not meet EPA requirements. All DBE subcontractors should complete this form regardless of whether or not EPA considers the certification acceptable for establishing MBE or WBE status under the DBE Program.

6100-4 1. If a subcontractor is not a certified DBE, they wouldn't need to complete the form.

1. The 6100-4 form should be completed by the prime contractor and is intended to capture the prime contractor’s actual and/or anticipated use of identified certified DBE subcontractors and the estimated dollar amount of each subcontract. The prime contractor may list firms that are not currently DBE certified but may be certified before the project is awarded.

4. Sonya Butler-

It would be helpful if all three forms can be denoted as REQUIRED or OPTIONAL on/near the heading, in bold text, and if the person responsible for completing the form was clearly defined in the footer of the forms. Example: The first line on EPA Form 6100-2 should read with the word REQUIRE in bold text: An EPA Financial Assistance Agreement Recipient must REQUIRE its prime contractors to provide this form to it's DBE subcontractors. An example of the footer/footnote for EPA Form 6100-2 would read as follows: This form is REQUIRED to be provided to the subcontractor by the prime contractor. It is OPTIONAL for the subcontractor to complete and submit the form to the EPA DBE Coordinator.

OSBP feels as though the directions on each form clearly identify who should complete the form and whether it is required or optional. Recipients and their subcontractors are responsible for reading each form in its entirety before completion. The addition of footnotes would be redundant.

5. Karen Hefler-

**Form 6100-2**

1. We do not understand why the first paragraph (at the top of 1. the first page) states that the form gives the subcontractor “the opportunity to describe work received and /or report any concerns...”. Shouldn’t form 6100-3, not 6100-2, be used to describe the work received from the prime contractor? We thought that the sole purpose of form 6100-2 is to provide a mechanism for subcontractors to relay any concerns directly to the State. Without this clarified, there is potential for confusion between the use of 6100-3 and the use of 6100-2, especially when you consider how similar looking the forms are in format.

Form 6100-3 is a required form where a description of the work to be performed is detailed. This form is signed by both the prime contractor and DBE subcontractor. Form 6100-2 is an optional form completed by the DBE subcontractor to describe concerns regarding the EPA funded project. The difference between each form is clearly explained in the instructions.

2. On the second page of this form, there are blank lines for describing the concerns. We think it could be useful to have more lines available for the writer. The form appears to have extra room so it seems it would be easy to do.

More lines will be added to accommodate additional information.

3. On the second page there is a signature box. We would recommend another line indicating "Printed name". The person who signs may or may not be the contact person indicated on the first page and the signature may not be legible.

A "printed name" option will be added to all forms.

### **Form 6100-3**

1. On the second page of this form there are two signature blocks. For both, we think another line for the printed name should be added. The person who signs may or may not be the contact person indicated on the first page and the signature may not be legible.

A "printed name" option will be added to all forms.

### **Form 6100 -4**

1. The very first box indicates "Subcontractor Name". We believe this is an error. It should be "Prime Contractor Name". With that correction, the box (under the telephone number) indicating "Prime Contractor name" should be deleted.

This is an error that will be corrected.

2. On the second page of this form there is a signature block. We think another line for the printed name should be added. The person who signs may or may not be the contact person indicated on the first page and the signature may not be legible.

A "printed name" option will be added to all forms.

### 6. Kristi Roy-

I work with the Oklahoma DWSRF Program. I am the Disadvantaged Business Enterprises Coordinator and review DBE solicitation efforts and utilization for each project. I am also responsible for submitting a semiannual report (EPA Form 5700-52A) to EPA to account for DBE usage for subcontracts and supplies for all Oklahoma DWSRF projects.

In January 2011, EPA forms 6100-2, 6100-3, and 6100-4 were suspended by the Office of Small Business Programs (OSBP) for usage because of the expiration date. The EPA forms were not used for a year and a half. If they were not imperative during this time, is reinstatement justifiable? During the

time of the suspension, there were no known problems that occurred in Oklahoma from not using the EPA forms, and reporting requirements were achieved. If the EPA forms are reinstated as they are in draft form, it will be necessary to use State forms as well as EPA forms, to collect essential DBE information. Causing redundancy makes it more difficult to get required information from contractors.

Since January 2011, we have continued to collect the information required by EPA on our State forms, which are more user friendly. These State forms require more information than the EPA 6100-3 and 6100-4 forms, including the following:

- Whether a DBE will be used, and the justification/ reason if not used. An account of all DBEs utilized is required for the EPA Form 5700-52A Semiannual Report. If this information is not included on EPA's forms, we will have to continue to collect this information on a separate State form.
- Whether the DBE is a MBE or WBE. The type of DBE is required for the EPA Form 5700-52A Semiannual Report. If this information is not included on EPA's forms, we will have to continue to collect this information on a separate State form.

Is it possible to include whether a DBE will be used and whether the DBE is a MBE or WBE on the EPA forms? If required to complete EPA forms, as well as a State form, the time necessary to report DBE solicitation and usage will increase. Additionally, there will be redundancy in information collected on the EPA forms and the State form.

Although we appreciate the effort the Oklahoma DWSRF Program has made to collect the information required by EPA on its own forms, EPA must require that form 6100-2, -3, and -4 be used pursuant to 40 CFR 33.302. Additionally, not every state has developed its own forms and requiring the use of standard forms is the only way EPA can guarantee that its recipients will submit the information required by law.

Oklahoma State forms can be completed electronically, although a signature is required, so the forms still must be printed. If completed electronically, the forms are much easier to read, it is usually faster to type responses than to write them out, and mistakes can easily be corrected. It would be helpful if EPA forms could also be completed electronically.

There is currently no system in place to allow for electronic completion of EPA Forms 6100-2, -3 and -4. As technology advances within the Agency, EPA will make every effort to streamline the process and allow for electronic signatures.

Regarding the revised EPA 6100-4, I believe that the first box that reads "Subcontractor Name" should read "Prime Contractor Name" since this is a form the Prime Contractor completes and signs. The box for Prime Contractor Name that follows four lines down should be removed.

This is an error that will be corrected.

Please clarify what information is being requested for “Bid/Proposal No., Assistance Agreement ID No., and Issuing/Funding Entity, it is unclear what information is being requested and how it should be answered.

This information is helpful in referencing the project if needed. Each bid/proposal is assigned a number which is used to identify the project. Furthermore, every EPA-funded project (assistance agreement) is issued an ID number although this information may not be readily available to the prime contractor and is therefore optional on the forms.

The box in the first column midway down shows its title as “Company Name.” This title would be better understood if it were changed to “Subcontractor Name/Company Name.”

This change will be made.

The new instructions make it easier to understand who should complete the EPA forms and what information should be included. However, I believe it will have little effect in shortening the amount of time required by the contractors to complete the forms, since the number of forms and the bidding process has not changed.

Thank you for your comment, however, EPA feels as though the instructions provide clarity to these forms thereby reducing ambiguity and streamlining the completion process.