

section and which the Department determines will best meet the needs of Native Hawaiians.

(4) *Public or private agencies.* The Department may designate as a section 401 grantee a private nonprofit organization or public agency which meets the requirements in paragraphs (b) and (c) of this section to serve areas where there are significant numbers of Indians or Native Americans, but where there are no Indian tribes, bands or groups, Alaskan Native entities or Hawaiian sponsors or consortia of such sponsors eligible for designation.

(5) *Consortium grantees.* The Department may designate as a Native American grantee a consortium of any of the types of grantees described in paragraphs (c), (1), (2), (3), and (4) of this section which may or may not be independently eligible. All such consortia shall meet the following requirements, in addition to the requirements in paragraphs (b) and (c) of this section:

(i) All the members shall be in geographic proximity to one another. A consortium may operate in more than one State.

(ii) An administrative unit shall be designated for operating the program, which may be a member of the consortium or an agency formed by the members. The administrative unit shall be delegated all powers necessary to administer the program effectively, including the power to enter into contracts and subgrants and other necessary agreements, to receive and expend funds, to employ personnel, to organize and train staff, to develop procedures for program planning, to monitor financial and program performance, and to modify the grant agreement through agreement with the Secretary. The right of reallocating funds within the consortium area shall be reserved to the consortium's members.

(iii) The consortium shall be the Native American grantee. The consortium agreement shall be signed by an official or officials of each member of the consortium authorized to enter into a binding consortium and shall specify that each member shall be liable jointly or separately for claims established against the grantee. Additional standardized requirements for consortium

agreements will be communicated to grantees under separate order.

(e) In the situation where the Department does not designate Indian tribes, bands or groups or Alaska Native groups to serve such groups, the Department shall, to the maximum extent feasible, enter into arrangements for the provision of services to such groups with other types of section 401 grantees which meet with the approval of the Indian tribes, bands, groups or Alaska Native groups to be served (section 401(d)). In such cases, the Department shall consult with the governing body of such Indian tribes, bands, groups or Alaska Native groups prior to the designation of a Native American grantee.

(f) In designating Native American grantees to serve groups other than those in paragraph (e) of this section, such as nonreservation Indians and Native Hawaiians, the Department shall, whenever feasible, designate grantees which are directly controlled by Indian or Native American people. Where it is not feasible to designate such types of grantees, DINAP shall consult with Indian or Native American-controlled organizations in the area with respect to the designation of a Native American grantee. Where a private nonprofit organization is designated, DINAP shall require any such grantees not directly controlled by Indian or Native American people to establish a Native American Employment and Training Planning Council and to implement an Indian preference policy with respect to hiring of staff and contracting for services with regard to all funds provided pursuant to this part (sec. 7(b) of the Indian Self-Determination and Education Assistance Act).

§ 632.11 Designation of Native American grantees.

(a) When designations are required and the potential grantee is not under a Master Plan agreement, an applicant for designation as a Native American grantee shall submit a notice of intent to apply for funds. Such notices of intent shall be postmarked by January 1 and be submitted to the Division of Indian and Native American Programs (DINAP), Employment and Training Administration, U.S. Department of

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Labor, 601 D Street NW., Washington, DC. 20213. Notices of intent may also be delivered to that office in person not later than the close of business on January 2 or the first business day of the designation year. Such notices of intent to apply shall be submitted on Standard Form 424 as a preapplication for Federal assistance. For applicants not under an active Master Plan agreement or the Master Plan agreement is due to expire during the year of designation, the following information shall be included in the notice of intent:

(1) Evidence that the applicant meets the requirements for a Native American grantee contained in § 632.10.

(2) A description of the geographic area or areas which the applicant proposes to serve, together with the Indian and Native American population in such areas, to the extent known. The description must include a list of States (if more than one), in alphabetical order, and under each State, a list of counties in alphabetical order, followed by a list of tribes, bands or groups (if any) in alphabetical order. If the applicant was a Native American grantee for the period prior to the one which is being applied for, the applicant must also list any counties and tribes, bands or groups which are being added to, or deleted from, the previous fiscal year's service area;

(3) A description of the applicant's organization, including the legal status of the applicant, the process of selection of the governing body, the duties and responsibilities of the governing body, and in the case of private non-profit organizations, a copy of the articles of incorporation;

(4) Evidence of the applicant's capability to operate an Indian or Native American employment and training program, including a statement of the applicant's past successes in operating programs for Indians or other Native Americans and a statement of the applicant's experience in managing the types of programs and activities allowable under the Act;

(5) A description of the planning process including employer involvement which the applicant proposes to undertake in developing a plan for the use of funds;

(6) Information related to a grantee's administrative responsibility. The DOL will conduct an independent review to determine whether each applicant is currently delinquent in repaying any DOL claims or has any outstanding administrative problems. Applicants are, therefore, encouraged to submit any documents related to these factors including documents and correspondence previously submitted to DOL. Submittal of such materials will enable DOL to move rapidly to complete the Notice of Intent and grantee designation review process.

(7) If the applicant is applying as a consortium, evidence that the consortium meets the requirements for a consortium in this part and a consortium agreement as specified in § 632.10(d)(5)(iii).

(b) If more than one organization submits a Notice of Intent for a geographic area, the Department will notify the organizations involved and conduct a special review for the area in question. The notice to the organizations will indicate any additional information needed and the review process to be followed.

(c) If the applicant for designation is a current grantee, under a master plan agreement, and there is no change in the service area requested, only the Standard Form 424 and a statement(s) indicating that to the best of the applicant's knowledge, it meets the requirements of § 632.10(c)(4) will be necessary and shall be submitted within the timeframe established in § 632.11(a).

(d) *Responsibility Review.* Prior to finally designating, conditionally designating or nondesignating the Department will conduct a review of the available records to determine whether or not the organization has failed any responsibility test. This review is intended to establish overall responsibility to administer Federal funds. With the exception of § 632.11 (c)(1) and (c)(3), the failure to meet any one of the following responsibility test factors would not establish that the organization is irresponsible unless the failure is substantial or persistent. The responsibility tests are as follows:

(1) The agency's efforts to recover debts (for which three demand letters have been sent) established by final

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agency action have been unsuccessful, or failure to comply with an approved repayment plan.

(2) Serious administrative deficiencies have been identified in final findings and determination—such as failure to maintain a financial management system as required by Federal regulations.

(3) Established fraud or criminal activity exists within the organization.

(4) Wilful obstruction of the audit process.

(5) Substantial failure to provide services to applicants as agreed to in a current or recent grant or to meet performance standards requirements as provided for and developed pursuant to § 632.89.

(6) Failure to correct deficiencies brought to the grantee's attention in writing as a result of monitoring activities, reviews, assessments, etc.

(7) Failure to return a grant closeout package on outstanding advances within 90 days of expiration date or receipt of closeout package, whichever is later, unless an extension has been requested and granted; final billings reflecting serious cost category or total budget cost overrun.

(8) Failure to submit required reports.

(9) Failure to properly report and dispose of government property as instructed by DOL.

(10) Failure to have maintained cost controls resulting in excess cash on hand.

(11) Failure to procure or arrange for audit coverage for any two year period when required by DOL.

(12) Failure to audit subrecipient within the required period when applicable.

(13) Final disallowed costs in excess of five percent of the grant or contract award.

(14) Failure to establish a mechanism to resolve subrecipient's audit within established time frames.

(e) On March 1 of each designation year, the Department shall designate or conditionally designate Native American grantees for the coming two program years. Each applicant shall be notified in writing of the determination. Those applicants that are not designated in whole or in part as Native

American grantees may appeal under the complaint procedures available for this part. Conditional designations will include the nature of the conditions and the actions required to be finally designated.

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§ 632.12 Alternative arrangements for the provision of services, nondesignation.

(a) If no application for Native American grantee designation for an area is filed, or if the Department has denied such application for that area, the Department may designate and fund an entity to serve that area, pending the final resolution of any Petitions for Reconsideration or other actions taken pursuant to § 632.13. An organization not designated in whole or in part may also appeal to an ALJ under the provisions of part 636. This further appeal will not in any way interfere with the Department's designation and funding of another organization to serve the area in question. The available remedy under such an appeal will be the right to be designated in the future rather than a retroactive or immediately effective designation status. Therefore, in the event the ALJ rules that the organization should have been designated and the organization continues to meet the requirements at §§ 632.10 and 632.11, the Department will designate the successful appellant organization and fund within 90 days of the ALJ decision unless the end of the 90 day period is within six months of the end of the two year designation period. Any organization designated or funded for the area in question would be affected by this remedial action and undesignated. All parties must agree to this arrangement prior to funding. The alternate organization which loses its designation as a result of the application of this remedy may not appeal the undesignation.

(b) If the grant officer finally disapproves a CAP pursuant to § 632.21 he/she may withdraw the Native American grantee's designation and immediately designate another entity to