

Beyond the SBA – Other Contracting Preferences Based on Native Ownership and Control

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The Buy Indian Act

Buy Indian Act

- Enacted by Congress in 1910
- The Buy Indian Act provides the Bureau of Indian Affairs (BIA) with the authority to set-aside procurement contracts for Indian-owned and controlled businesses.
 - "So far as may be practicable Indian labor shall be employed, and purchases of the products (including, but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market in the discretion of the Secretary of the Interior..." 25 U.S.C. 47



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The Buy Indian Act

- In 2013, almost 100 years after the initial enactment of the Buy Indian Act, the Department of the Interior's Assistant Secretary for Policy, Management and Budget issued new regulations to implement a uniform procedure for Buy Indian Act set-asides.
- The new regulations were geared for the Bureau of Indian Affairs' use, but left room for future use by "any other bureau or office of the Department of Interior delegated authority to make acquisitions under the Buy Indian Act[.]" See 48 C.F.R. §§ 1480.101 through 1480.904.
- 78 Fed. Reg. 34266 (June 7, 2013) ("The Department of the Interior is finalizing regulations guiding implementations of the Buy Indian Act, **which provides Indian Affairs (IA) with authority to set aside procurement contracts for Indian-owned and controlled businesses.**") (Emphasis added.)

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The Buy Indian Act

- Main requirements for eligibility under the Buy Indian Act.
 - "Buy Indian contract" – Any contract involving activities covered by the Buy Indian Act that is negotiated under the provisions of 41 U.S.C. 252(c) and 25 U.S.C. 47 between an **Indian economic enterprise** and a Contracting Officer representing the Department of the Interior. 48 C.F.R. 1480.201.
 - "Indian economic enterprise" (IEE) – Any business activity owned by one or more **Indians or Indian Tribes** that is **established for the purpose of profit** provided that: the combined Indian or Indian tribe **ownership must constitute not less than 51 percent of the enterprise**; the Indian or Indian Tribes must, together, receive at least a majority of the earnings from the contract; and the **management and daily business operation of an enterprise must be controlled by one or more individuals who are Indians.**
 - To ensure **actual control** over the enterprise, the individuals must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business.

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The Buy Indian Act

- Main requirements for eligibility under the Buy Indian Act (*con'd*)
 - These requirements must be met:
 - 1) At the time an offer is made in response to written solicitation
 - 2) At the time of contract award
 - 3) During the full term of the contract. *Id.*
 - Immediate notice to contracting officer required if eligibility lost. Failure to provide written notice can result in future ineligibility from program. 48 C.F.R. 1480.801.
- **"Indian Tribe"** – Must be "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, including any Alaska Native village or regional or village corporation under the Alaska Native Claims Settlement Act."
- Contracting officer can accept offeror's written representation of being an eligible IEE only when submitted with offer in response to Buy Indian Act solicitation. 48 C.F.R. 1480.901(a).
 - Interested party may challenge agency acceptance of offeror's representation. See 48 C.F.R. 1480.902.

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The Buy Indian Act

- *Comment:* A commenter noted that the proposed rule's definition of "Indian economic enterprise" could be interpreted to mean that any one individual Indian must own at least 51 percent of the enterprise, thus excluding enterprises in which one Indian owns 50 percent and another Indian owns the other 50 percent.
- *Response:* We have revised the proposed rule to address this issue. The final rule now specifies that the enterprise may be owned by one or more Indians or Indian tribes and such ownership shall together constitute no less than 51 percent of the enterprise.

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The Buy Indian Act

- Are Alaska Native Corporations eligible?
 - Yes.
- *Comment:* A commenter asked whether Alaska Native regional corporations may receive Buy Indian set-asides.
- *Response:* The definition of "Indian tribe" includes Alaska Native villages and regional or village corporations under the Alaska Native Claims Settlement Act. If an Alaska Native regional corporation meets this definition and otherwise qualifies as an Indian economic enterprise, it may receive a Buy Indian set-aside.
 - 78 FR 34270 (June 7, 2013)

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The Buy Indian Act

- What about Alaska Native Corporation (ANC) subsidiaries with non-Native managers/presidents? Do these subsidiaries qualify for a Buy Indian Act award?
 - Yes, so long as the subsidiary is at least 51% owned by the parent ANC.
 - Under ANCSA, ANCs and their majority-owned subsidiaries are deemed to be controlled by Alaska Natives as a matter of law.
 - Section 1626(e) of ANCSA mandates that **"for all purposes of federal law,"** an ANC and its majority-owned subsidiaries are deemed to be controlled by Alaska Natives.
 - Accordingly, even though the new regulations purport to limit award of Act set-asides to entities "actually controlled" by Alaska Natives, this question should, under ANCSA, be answered as a question of law for ANCs and their subsidiaries.
 - It is therefore inappropriate for contracting officers to, for example, request to see an ANC's shareholder list to confirm that individual Natives comprise the majority of the corporation's voting power.
 - As a practical matter, BIA contracting officials are not always familiar with ANCSA.
 - Not listing entity ownership on Alaska state corporations website can lead to additional confusion.

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The Buy Indian Act

- What does the Act, along with the recent implementing regulations, provide for eligible entities?
- 48 C.F.R. 1480.401 – Requirement to give preference to Indian economic enterprises (IEEs)
 - IA must use the negotiation authority of the Buy Indian Act, 25 U.S.C. 47, to give preference to Indians whenever the use of that authority is authorized and practicable.
 - IA may use the Buy Indian Act to give preference to IEEs through set-asides when acquiring supplies, services, and covered construction to meet IA needs and requirements. IA must contract for covered construction in accordance with FAR Part 36.
- 48 C.F.R. 1480.503 – Commercial item or simplified acquisitions
 - (a) Each acquisition of supplies, services, and covered construction that is subject to commercial item or simplified acquisition procedures in accordance with FAR Parts 12 (Commercial Item Procedures) or 13 (Simplified Acquisition Procedures) and DIAR 1413 must be set aside exclusively for ISBEEs. ...
- See also DIAR 1480-504-1
 - Each Acquisition with an anticipated dollar value above the Simplified Acquisition Threshold (SAT) of \$150,000 must be set aside exclusively for IEE when there is a reasonable expectation that offers will be received from two or more responsible IEEs and award will be made at a reasonable price.

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The Buy Indian Act

- What does the Act, along with the recent implementing regulations, provide for eligible entities? (*cont'd*)
- 48 C.F.R. 1480.504-1 – Set-asides for Indian economic enterprises
 - Each proposed procurement for supplies or services that has an anticipated dollar value in excess of the simplified acquisition threshold amount in FAR Part 13.003 must be set aside exclusively for IEEs, and referred to as an "Indian Economic Enterprise Set-aside," when there is a reasonable expectation that offers will be received from **two or more responsible IEEs**, and award will be made at a **reasonable price** except when:
 - (1) The acquisition is for construction that is not covered construction, as described in 1480.401(b);
 - (2) A deviation has been obtained in accordance with 1480.403; or
 - (3) Use of other than full and open competition has been justified and approved in accordance with 1480.504-2.
 - Procedural requirements, including notice to tribe if services to be performed in whole or in part on Indian land under a tribe's jurisdiction.
- Subcontracting limitations under FAR 52.219-14 apply to Buy Indian Act contracts. 48 C.F.R. 1480.601.
 - See also DIAR 1452.280-3 – Subcontracting limitations – A contractor shall not subcontract to other than responsible Indian economic enterprises more than 50 percent of the subcontracted work when the prime contract was awarded under the Buy Indian Act. For this purpose, work to be performed does not include the provision of materials, supplies, or equipment.

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The Buy Indian Act

- What sort of construction work is eligible?
- *Comment:* A commenter requested clarification on the applicability of *Andrus v. Glover*, 446 U.S. 608 (1980), on Buy Indian set-asides for construction and whether the applicability changes depending upon whether the construction will occur on reservation or off reservation.
- *Response:* In response to this comment, IA reexamined and refined its interpretation of applicable law, as stated in the proposed rule. The final rule implements IA's current interpretation of the Federal Property and Administrative Services Act of 1949 (FPASA), the U.S. Supreme Court decision in *Andrus v. Glover*, and the subsequent Surface Transportation Assistance Act of 1982 (STAA), Public Law 97-424. In light of these legal parameters, IA has determined that it has authority to use funds available for construction of Indian reservation roads by using Indian labor and may use Buy Indian set-asides for the following:
 - Road facilities on Indian-owned land;
 - Road facilities on an Indian reservation;
 - Road facilities that are primary access routes proposed by tribal governments, including roads between villages, roads to landfills, roads to drinking water sources, roads to natural resources identified for economic development;

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The Buy Indian Act

- Roads that provide access to intermodal termini, such as airports, harbors, or boat landings;
- Bridges along these roads;
- Planning and other needs and facilities associated with roads; and
- Sidewalks along these roads.
- IA has determined that it may not use Buy Indian set-asides for other categories of public works including buildings, sewers, water mains, and similar items. The final rule reflects this distinction.
- Other types of contracts
 - Personnel and hiring services, IT, etc.
 - IDIQs may be set aside under the rule

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The Buy Indian Act

- On January 12, 2016, the Department's Bureau of Indian Affairs announced a new policy to improve the implementation of the Act, in response to a July 2015 GAO report criticizing the federal government's enforcement and implementation of the Buy Indian Act.
- To address the concerns raised by the GAO, the Interior Department's new policy:
 - directs that all BIA, BIE, Office of the Special Trustee for American Indians (OST) and AS-IA acquisitions be subject to the Buy Indian Act policy whenever "authorized and practicable" — including acquisitions for supplies, administrative and custodial services, and some construction contracts;
 - indicates when deviations from the policy may be authorized; and
 - requires quarterly reporting on Buy Indian Act acquisitions to better monitor deviations and challenges.

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The Buy Indian Act

- As of June 8, 2016, all Department of the Interior offices and bureaus were delegated authority to award Buy Indian Act set-asides.

Thank you for your March 11, 2016, letter to Secretary Jewell regarding the scope of authority to use Buy Indian Act set-asides within the Department of the Interior (DOI). Following are DOI's responses to your questions:

1. Which bureaus or offices within DOI have been delegated authority from the Secretary to use Buy Indian Act set-asides?

All DOI bureaus and offices have been delegated authority to use Buy Indian Act set-asides. As you are aware, in 2013 DOI issued a final rule for the Bureau of Indian Affairs (BIA) to implement the Buy Indian Act. The rule authorized the Secretary of the Interior to set aside procurement contracts for American Indian- and Alaska Native-owned and controlled small businesses for BIA; and authorized the Secretary of the Interior to delegate Indian set-aside procurement authority to other DOI bureaus and offices.

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Department of Defense – Indian Incentive Program

- Under Section 504 of the Indian Financing Act of 1974 (see below), Congress encouraged the use of more Native subcontractors, organizations, and businesses in federal contracting.
- 25 USC 1544:
 - Notwithstanding any other provision of law, a contractor of a Federal agency under any Act of Congress may be allowed an additional amount of compensation equal to 5 percent of the amount paid, or to be paid, to a subcontractor or supplier, in carrying out the contract if such subcontractor or supplier is an Indian organization or Indian owned economic enterprise as defined in this chapter.

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Department of Defense – Indian Incentive Program

- The Department of Defense (DoD) Indian Incentive Program is an example of this encouragement.
- The program, which is administered by the DoD's Office of Small Business Programs, strives to provide opportunities to Indian organizations and Indian-owned economic enterprises, by providing for the **payment of 5% of the amount subcontracted to an Indian organization or Indian-owned economic enterprise at any sub-tier**, when authorized under the terms of the contract.
- DOD contracts with prime contractors that contain the FAR clause 52.226-1, or DFARS Clause 252.226-7001, Utilization of Indian Organizations and Indian-Owned Economic Enterprises, are eligible for incentive payments
 - Contractor can request that FAR clause be added at any time during the life of the contract.
 - DFARS clause required to be included in contracts and subcontracts exceeding \$500,000.

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Department of Defense – Indian Incentive Program

- Examples of such DoD contracts could include, for example:
 - Engineering
 - Construction
 - IT
- Program applies to both services and supply subcontracts.

Department of Defense – Indian Incentive Program

- Definition of "Indian"
 - [A]ny person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs and any "Native" as defined in the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.], 25 U.S.C. 1452.
- Definition of "Tribe"
 - [A]ny Indian tribe, band, group, pueblo, or community, including Native villages and Native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.], which is recognized by the Federal Government as eligible for services the Bureau of Indian Affairs. Id.
- Definition of "Economic Enterprise"
 - [A]ny Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit. Provided, That such Indian ownership shall constitute not less than 51 per centum of the enterprise. Id.

Department of Defense – Indian Incentive Program

- Alaska Native Corporations qualify.
 - See, e.g., 69 FR 55989
 - Comment: The rule should clarify that Alaska Native Corporations are eligible for participation in Program.
 - DoD Response: The rule already provides for participation of Alaska Native Corporations, through the definitions of "Indian" and "Indian-owned economic enterprise" in the clause at 252.226-7001. Minor changes have been made to the definition of "Indian" to clarify this point.
- Note, however, that DoD does not authorize payments based upon a subcontract to a subsidiary of the prime contractor.

Department of Defense – Indian Incentive Program

- Process:
 - Prime Contractor identifies a Native American, Alaska Native, or Hawaiian Native owned firm as a subcontractor or supplier.
 - The subcontractor must then submit proof of eligible ownership to the prime contractor.
 - The prime contractor then submits the request for Indian Incentive Act payments to the contracting officer, who reviews and verifies all documents.
- Review of certification of eligibility (**Self-Certification**)
 - The Contracting Officer and the Contractor, acting in good faith, may rely on the representation of an Indian organization or Indian-owned economic enterprise as to its eligibility, unless an interested party challenges its status or the Contracting Officer has independent reason to question that status. FAR 52.226-1, DFAR 252.226-7001.
 - Offeror must be prepared to make this certification, which may come in e-mail from contracting officer about to issue award.
 - ANC subsidiaries, in particular, must be prepared for this.
- Payments
 - Funding contingent on appropriation.
 - Payments are first come, first served.
 - Payments not available in current fiscal year rolled over to next. Can involve a back log of two years or more.

Native Preference Under ISDEAA

- Federal Statutes: 25 USC Chapter 46 – Indian Self-Determination and Education Assistance Act (ISDEAA)
 - (b) Preference requirements for wages and grants
 - Any contract, subcontract, grant, or subgrant pursuant to this chapter, the Act of April 16, 1934 (48 Stat. 596), as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible--
 - (1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians, and
 - (2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.
 - (c) Self-determination contracts
 - Notwithstanding subsections (a) [payment of prevailing wages] and (b) of this section, with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.
- 25 U.S.C. § 5307

Native Preference under ISDEAA

- Federal Regulations: 25 C.F.R. 900.48
- If the Indian tribe or tribal organization does not propose different standards, what basic standards shall the Indian tribe or tribal organization follow?
 - (d) The Indian tribe or tribal organization shall conduct all major procurement transactions by providing full and open competition, to the extent necessary to assure efficient expenditure of contract funds and to the extent feasible in the local area.
 - ... (2) As provided in sections 7 (b) and (c) of the Act, Indian preference and tribal preferences shall be applied in any procurement award.

Example Procurement Code Provisions

- How to implement these directives at the tribal level?
 - Tribal employment rights ordinance (TERO)
 - Authority
 - o Publicly announced employment practice regarding Native preference on or near tribal lands (Title VII exception)
 - o ISUEAA and corresponding regulations
 - Sample ordinance provisions
 - o All employers are hereby required to give preference to resident Indians in hiring, promotion, training, pay, benefits, and other terms and conditions of employment. All employers are further required to give preference to Indians in sub-contracting. Employers shall comply with the rules, regulations and guidelines of the Tribe in regard to its Indian preference requirements.
 - o The Employment Rights Officer is authorized to: Impose numerical hiring goals and timetables that specify the minimum number of Indians an employer must hire, by craft or skill level; or at the Employment Rights Officer's discretion, to set percentage hiring goals by craft or skill level for specified employment fields ...
 - Corresponding implementation of procedures under procurement code, which code incorporates the TERO
 - Overall policy:
 - o In accordance with existing laws and policies, the Tribe exercises a preference for Indian-owned businesses in contracting. The [tribe's] tribal employment rights ordinance (TERO) is hereby incorporated by reference for implementing Indian-owned business preference in contracting. All contracting for goods and services within the [tribe's] Reservation is subject to the Tribe's TERO. Furthermore, the Tribe shall adhere to the provisions of 25 U.S.C. § 5307 and 25 CFR § 900.48(d)(2) concerning the preference for Indian-owned firms in contracting.

Example Procurement Code Provisions

- Procedures:
 - The following procedures shall govern the Procurement Officer's implementation of the Tribe's Indian-owned business preference. In employing the preference for Indian-owned businesses over other open market commercial vendors, the Procurement Officer shall also use the [tribe's] TERO as guidance.
 - (a) The Procurement Officer shall solicit quotations, proposals and/or bids from qualified Indian-owned businesses certified by the Tribe's TERO director.
 - (b) In conducting a procurement ... the following steps shall be taken.
 - o If a P.L. 93-638 contract or grant provides funding for the purchase in an amount greater than 50% of the cost of the item, then the purchase action shall be offered first to [the Tribe's own] Indian-owned businesses provided that three or more qualified [Tribal] Indian-owned businesses are solicited. This shall be termed a "tribal set-aside."
 - o If fewer than three [of the Tribe's own] Indian-owned businesses exist or are qualified but three or more Indian-owned businesses exist and if a P.L. 93-638 contract or grant provides funding for the purchase in an amount greater than 50% of the cost of the item, then the solicitation shall be offered only to Indian-owned businesses. This shall be termed an "Indian set-aside."
 - o If funding is provided from a source other than a P.L. 93-638 contract or grant, i.e. tribal funds or other kinds of federal grants, and three or more Indian-owned businesses exist then the solicitation shall be offered only to Indian-owned businesses. This shall be termed an "Indian set-aside."
 - o If fewer than three qualified Indian-owned businesses are available, or if the Indian-owned businesses identified are not determined to be responsive or responsible, the Tribe shall then offer the purchase action to all vendors with preference given to tribal member owned businesses or Indian owned businesses using a percentage factor for sealed bids (as defined in the TERO ordinance) or a weighted point factor in evaluation and selection for Competitive Proposals as defined below.

Example Procurement Code Provisions

- Procedures (cont'd):
 - (c) In conducting a procurement via Competitive Sealed Bidding, the Procurement Officer shall ensure that the contract will be awarded to the responsible firm submitting the lowest responsive bid. However, the award will be made to a responsive and responsible Indian-owned firm if the Indian-owned firm's bid is within 5% of the lowest bid and the lowest bid was submitted by a non-Indian-owned firm. The bid solicitation shall contain the following statement: "Contract will be awarded to the lowest responsive, responsible firm. Award will be made to a responsive, responsible 51% or more Indian-owned, managed and controlled firm only if the Indian-owned firm's bid is within 5% of a lower non-Indian firm's bid."
 - (d) In conducting a procurement via Competitive Proposals, Indian-owned firms shall receive a preference in evaluation scoring equivalent to 5% of the total points available under the evaluation rubric (i.e., if 100 total points are available, Indian-owned firms receive 5 points for Indian preference). The request for proposals shall contain the following statement: "Indian-owned firms shall receive a 5% preference in scoring if the firm is 51% or more Indian-owned, managed and controlled."
 - (e) Sole source acquisition from Indian-owned businesses shall not be permitted. If only one source of supply is available from an Indian-owned business, then the Procurement Officer shall use weighted evaluation and selection factors in open market competition set forth in Section 11.B.(2)(d) above.