



DEPARTMENT OF HEALTH AND HUMAN SERVICES

48 CFR Parts 326 and 352

[Docket No. O1-2012-0005]

RIN 0917-AA18

Acquisition Regulations: Buy Indian Act; Procedures for Contracting

AGENCY: Indian Health Service (IHS), Department of Health and Human Services HHS.

ACTION: Final rule.

SUMMARY: The Secretary of the Department of Health and Human Services (HHS) is finalizing regulations guiding implementation of the Buy Indian Act, which provides the Indian Health Service (IHS) with authority to set-aside procurement contracts for Indian-owned and controlled businesses. This rule supplements the Federal Acquisition Regulations (FAR) and the Department of Health and Human Services Acquisition Regulations (HHSAR).

DATES: This rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this rule contact: Carl Mitchell, Director, Division of Regulatory Policy Coordination (DRPC), Office of Management Services (OMS), IHS, 301-443-6384, carl.mitchell@ihs.gov; or Santiago Almaraz, Acting Director, OMS, IHS 301-443-4872, santiago.almaraz@ihs.gov.

SUPPLEMENTARY INFORMATION: In the *Federal Register* of November 10, 2020 (85 FR 71596), IHS published a proposed rule entitled “Acquisition Regulations; Buy Indian Act; Procedures for Contracting” with a 60-day comment period.

IHS received comments from Tribes and Tribal entities requesting an extension of the comment period due to the encompassing of the holiday season during the original comment period, as well as the disproportionately high impact of the pandemic on Indian Country. The commenters

felt both of these events delayed stakeholders from being able to perform a complete and full review of the proposed rule and provide comments within the initial 60-day comment period. IHS concluded that it was reasonable to reopen and extend the comment period for an additional 60 days to allow any interested persons to submit comments on the proposed rule. On April 21, 2021, the IHS reopened and extended the comment period for 60 days with written or electronic comments on the proposed rule due by June 21, 2021.

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I. BACKGROUND

IHS is an agency of HHS whose principal mission is to provide health care to American Indians and Alaska Natives, 25 U.S.C. 1661. IHS' authority to provide health care services to the American Indian and Alaska Native people derives from the Snyder Act of 1921, 25 U.S.C. 13, a broad, general authority to “expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians,” for, among other things, the “relief of distress and conservation of health”, 25 U.S.C. 13. In 1954, Congress transferred this responsibility and other health care “functions, responsibilities, authorities, and duties of the Department of the Interior” (including the Snyder Act) to the Department of Health, Education, and Welfare, the

predecessor of HHS. See Public Law 83-568, 68 Stat. 674 (1954) (codified at 42 U.S.C. 2001 *et seq.*). The Transfer Act authorizes IHS to use the Buy Indian Act (25 U.S.C. 47) to carry out its health care responsibilities. IHS authority to use the Buy Indian Act is further governed by 25 U.S.C.1633. This rule describes uniform administration procedures that the IHS will use in all of its locations to encourage procurement relationships with Indian labor and industry in the execution of the Buy Indian Act. IHS's current rules are codified at HHSAR, 48 CFR part 326, subpart 326.6.

II. STATUTORY AUTHORITY

The Transfer Act authorizes the Secretary of HHS to “make such other regulations as he deems desirable to carry out the provisions of the [Transfer Act]”, 42 U.S.C. 2003. The Secretary's authority to carry out functions under the Transfer Act has been vested in the Director of the IHS under 25 U.S.C. 1661. Because of these authorities, use of the Buy Indian Act is reserved to IHS and is not available for use by any other HHS component. IHS authority to use the Buy Indian Act is further governed by 25 U.S.C.1633, which directs the Secretary to issue regulations governing the application of the Buy Indian Act to construction activities.

III. OVERVIEW OF FINAL RULE

This rule supplements the FAR and the HHSAR. This rule formalizes an administrative procedure for all IHS acquisition activities and locations to ensure uniformity for offers submitted by Indian labor and industry under solicitations set-aside under the Buy Indian Act and this part.

A. Numbering System

This rule replaces the HHSAR, Subpart 326.6—Acquisitions Under the Buy Indian Act.

B. How This Rule Fits With the Indian Health Service and Department Acquisition Regulations

This rule amends the HHSAR, which is maintained by the Assistant Secretary for Financial Resources (ASFR) pursuant to 48 CFR 301.103. ASFR is responsible for developing and

preparing for issuance all acquisition regulatory material to be included in the HHSAR.

Accordingly, the rule is being issued through coordination between IHS and ASFR. The rule is intended to establish Buy Indian Act acquisition policies and procedures for IHS that are consistent with rules proposed and/or adopted by the Department of the Interior (DOI).

IV. TRIBAL CONSULTATION

In accordance with 25 U.S.C. 1672 and Executive Order 13175, IHS held consultation sessions with the Tribes on the proposed version of this rule. The rule will more directly affect Indian economic enterprises and any contractors who use the Buy Indian Act for subcontracting.

V. DEVELOPMENT OF RULE

A. Publication and Comment Solicitation

This rule has been in development at IHS since 2016, in collaboration with HHS/ASFR. Public comments received by IHS were reviewed, addressed, and incorporated in this final rule.

Notification regarding a series of four public consultation sessions was published in the Federal Register on November 10, 2020 (85 FR 71596). The consultation sessions were conducted virtually on November 9, 2020; November 16, 2020; January 6, 2021; and June 9, 2021.

IHS also published a proposed rule on November 10, 2020 (85 FR 71596). A summary of the comments received during these consultations and throughout the public comment period is provided below.

B. Summary of Comments

Indian Economic Enterprise (IEE) and Indian Small Business Economic Enterprise

(ISBEE) Preference:

Comment: A Tribal organization supported allowing the Contracting Officer (CO) to engage in direct negotiations when only one offer is received. The commenter stated this is a welcome improvement that will minimize the CO's obligation to go through the deviation process and will likely increase the amount of contract awards to ISBEE/IEEs.

Response: The CO may negotiate with the IEE if otherwise permitted under the applicable procurement strategy.

Comment: A Tribal organization suggested eliminating GSA from the IHS required sources due to the awards to off-reservation entities. The Tribal organization recommended that offers from on-reservation entities have preference to those off-reservation.

Response: IHS will prioritize Buy Indian set-asides ahead of small businesses that are not ISBEEs/IEEs and satisfy acquisitions priorities for the use of mandatory government sources, as required under FAR Part 8.002.

Comment: A Tribal organization supported the inclusion of priority use of the Buy Indian Act, as proposed, to ISBEEs and then to IEEs. The commenter felt it will be critical for the IHS CO to have the necessary time and resources to formulate a “reasonable expectation” that no competitive ISBEE offers will be received. The commenter also asked what identified benchmarks and/or types of engagement with Tribes and Tribal economic organizations, if any, will be deployed to inform this expectation.

Response: IHS agrees with the comment and confirms that if the CO determines after market research that there is no reasonable expectation of obtaining offers from two or more ISBEEs, the CO may consider a set-aside for IEEs. To maintain consistency and fairness to all ISBEEs and IEEs, the CO will post all Buy Indian Act set-asides to the government point of entry, beta.sam.gov (formerly Federal Business Opportunities), unless other government advertising requirements apply.

Comment: A Tribal organization commented that documenting the reasons why an ISBEE/IEE was chosen for a contract award is just as important as documenting why an ISBEE/IEE was not chosen. The commenter supported the language in Section 326.603-1(g) that requires a CO to document the reasons for an approved deviation determination when IEE offeror(s) were not reasonable or otherwise unacceptable. The commenter also suggested that the CO’s documentation include, at a minimum, an accurate list of all IEE offeror(s), a description of the

communications issued during the solicitation process and a detailed explanation why each IEE offeror was not selected. The commenter felt such records are key to transparency and accountability in the implementation of the Buy Indian Act.

Response: When awarding Buy Indian contracts, the CO will fulfill their usual responsibilities under the FAR. IHS will ensure strict guidelines COs will follow, to include sufficient documentation, when preparing the Buy Indian Act Deviation determination. Deviation approval thresholds are in place to ensure appropriate oversight review is conducted to support determinations. IHS will also require all approved deviations be reported and provided to IHS Headquarters to be posted for public access. IHS understands it is important for Indian Country and the public to have transparency on the categories in which deviations have been issued. This will assist ISBEEs and IEEs to categorically focus on these specific IHS procurement opportunities.

Comment: Two Tribal organizations requested an explanation why preference would not be given under the Buy Indian Act to an IEE when an interested IEE is identified after a non-restricted solicitation has been issued. The commenters were concerned that non-restricted solicitations may be issued where use of an IEE restricted solicitation would have been appropriate and would have likely identified one or more qualified Indian-owned offerors. The commenters recommended requiring the IHS Head of Contracting Activity and the CO to prioritize IEE preference in accordance with the Buy Indian Act to the greatest extent possible. However, the commenters noted that there are certain circumstances where set-asides under the Buy Indian Act are infeasible. Where it is feasible, the commenters requested that IHS ensure, to the best of its ability, that appropriate solicitations are issued and market research conducted. The commenters suggested an express regulatory requirement that Buy Indian Act contracts be prioritized in the IHS procurement process, making the Buy Indian Act the starting point in all procurements.

Response: When awarding Buy Indian contracts, the CO will fulfill their usual responsibilities under the FAR. Subpart 326.603 maintains that IHS give preference to IEEs through set-asides when acquiring supplies, general services, Architect-Engineer (A&E) services or construction. Additionally, Subpart 326.604 maintains that acquisitions of supplies, services and construction subject to commercial items or simplified acquisitions procedures, in accordance with FAR Part 12 and 13 be set-aside exclusively for ISBEEs. Subpart 326.604 also maintains procedures the CO will follow if an IEE identifies interest to a solicitation that has not been set-aside under the Buy Indian Act. The COs are responsible for conducting sufficient market research and obtaining approval to deviate from the Buy Indian Act prior to issuing a solicitation not set-aside under the Buy Indian Act.

IEE and ISBEE Definition and Clarification:

Comment: A Tribal organization recommended that the definition of Indian Economic Enterprise (IEE) in the proposed new regulations at 48 CFR 326.601 acknowledge the requirements of 43 USC 1626(e)(1) and (e)(2). The commenter recommended adding language to the definition of IEE to specify the inclusion of Alaska Native Corporations that meet the requirements of 43 USC 1626(e)(1) or (e)(2).

Response: Following publication of the proposed rule, Congress amended the Buy Indian Act through Public Law 116-261 (December 30, 2020) to incorporate the definition of “Indian economic enterprise” (IEE) set forth in 48 CFR 1480.201 (or successor regulations). To maintain consistency with the statute, IHS is utilizing the definition of an Indian economic enterprise in 48 CFR 1480.201. IHS will also utilize the definitions of “Indian” and “Indian Tribe” from 48 CFR 1480.201 in the final rule, since these terms are included in the definition of IEE. As defined in 48 CFR 1480.201, the term “Indian Tribe” encompasses a Tribe, band, nation or other recognized group or community that is recognized as eligible for the special programs and services by the United States to Indians because of their status as Indians. This definition also

includes Alaska Native village or regional or village corporation under the Alaska Native Claims Settlement Act (ANCSA).

Comment: A Tribe commented in support of the proposed definition of an Indian Economic Enterprise. The commenter felt that the minimum threshold of at least 51 percent combined Native ownership and management control by at least one or more qualified individual AI/ANs both aligns with the Act and is appropriately tailored to ensure that it benefits only majority Indian-owned businesses. Further, the commenter supported the separate definition of federally recognized Tribe and Alaska Native Corporation.

Response: As noted in response to the comment above, Congress amended the Buy Indian Act following publication of the proposed rule and incorporated the definition of “Indian Economic Enterprise” set forth in 48 CFR 1480.201 (or successor regulations). To maintain consistency with the statute, IHS is utilizing the definition of “Indian Economic Enterprise” (IEE) set forth in 48 CFR 1480.201. IHS is also utilizing the definitions of other terms in 48 CFR 1480.201, such as “Indian Tribe,” since they are included in the IEE definition.

Comment: A Tribe commented in support of the multiple pathways for responding to a change in a contractor’s ownership status during the term of a contract award. The commenter felt that changes in ownership status may be caused by a variety of factors and allowing more than one response mechanism recognizes that. The commenter recommended the inclusion of a new subsection clarifying the process when a contractor is sanctioned under Section 326.606-1. If a contract were to be terminated for default before an initiated construction is completed, the commenter suggested that the CO consult the solicitation records and offer the second choice ISBEE/IEE offerors. The commenter also recommended allowing the existing contractor facing termination to continue work on the project until a new rapid solicitation process can be completed. The commenter felt that project completion is important and should be facilitated in the new regulations by minimizing the potential for disruption of the underlying contract.

Response: When awarding Buy Indian contracts, the contracting officer will fulfill their usual responsibilities under the FAR and adhere to those processes as outlined in FAR Part 49.

Comment: A Tribal organization commented it was pleased to see the ISBEE/IEE verification process, which instructs the CO to make every effort to allow an offeror to correct the information submitted to verify its status as an eligible ISBEE or IEE. The commenter felt this language aligns with the spirit of the Buy Indian Act and will enable the IHS to avoid unnecessarily disqualifying an offeror in situations where a supplemental response would address an issue.

Response: These provisions are included in the final regulation. The CO will maintain fairness in all acquisitions and fulfill their usual responsibilities under the FAR.

Comment: A Tribe recommended identifying the specific timeframes, types of outreach and follow-up actions that would qualify an offeror as “not responsive” for the purposes of verifying submitted information and IEE representation status. As written, the commenter thought the determination would be in the CO’s discretion. For consistent application and expectations, the commenter strongly recommended that a uniform standard be stated.

Response: The CO will maintain fairness in all acquisitions and fulfill their usual responsibilities under the FAR. The cognizant CO will determine a reasonable response time for the purposes of verifying IEE representation. As such, specified timeframes are identified in Subpart 326.607, Challenges to Representation, where a CO may question the representation of an IEE at any time.

Comment: A Tribe felt that it is important to highlight the need for support of investment in ISBEE and IEE development, beyond the scope of the proposed rule. The commenter noted that implementation of the Buy Indian Act depends on the availability of qualified IEEs. The commenter also noted that Tribes and individual American Indians and Alaska Natives face substantial barriers in developing the capital, personnel, infrastructure, business networks, supply chains, etc. to compete for federal contracts. The commenter pointed to the Government

Accountability Office's July 2015 report (Buy Indian Act: Bureau of Indian Affairs and Indian Health Service Need Greater Insight into Implementation at Regional Offices, GAO-15-588) and the data in Figure 4, regarding IHS total contract obligations and Indian-owned obligations. The commenter felt that meaningful federal commitment is needed to improve the Buy Indian Act and take into consideration how it can better develop qualified ISBEEs and IEEs in Indian Country. The commenter thought this would likely require interagency coordination and leveraging of available resources, as well as outreach in Indian Country to educate Indian-owned business on contracting opportunities. The commenter recommended that the issue be taken to the respective Tribal advisory committees of agencies such as HHS, Department of Treasury, and Department of Labor for the deliberation of Tribal leaders.

Response: IHS is interested in collaborating with Tribes and other Federal agencies to provide more data and insight on how IHS is meeting the requirements of the Buy Indian Act. IHS, in collaboration with DOI BIA, is actively exploring how to publicly share information related to Buy Indian Act performance to provide visibility to Tribes. Additionally, once the HHSAR Buy Indian Act rule is finalized, IHS will coordinate, plan and conduct training, and disseminate other helpful information routinely to internal and external stakeholders and all IHS acquisition workforce.

Covered Construction:

Comment: A Tribal organization commented that it welcomes the proposed elimination of “covered” construction contracts. It expressed discontent with the decision in *Andrus v. Glover Construction Co.* and noted the ability to utilize the Buy Indian Act will be a great benefit to ISBEEs/IEEs.

Response: The decision in *Andrus v. Glover Construction Co.* did not directly impact IHS. However, to avoid any potential confusion, we are eliminating the word “covered” in reference to construction contracts.

Buy Indian Deviation/Challenges:

Comment: A Tribal organization suggested that the proposed deviation thresholds be revised to reflect the business acumen of the warranted CO, noting that \$250,000 is the Simplified Acquisition Threshold (SAT) and suggesting that warranted COs should have the authority to approve a Buy Indian Act deviation up to the SAT. The commenter also suggested specifying the Chief Contracting Officer (CCO) (or IHS DAP Director, absent a CCO) for deviations exceeding \$250,000 but not exceeding \$700,000.

Response: To maintain required oversight of all deviation determinations, IHS will ensure specific authorized approvals for larger dollar proposed contract actions. To ensure compliance and consistency, IHS will require all approved deviations be reported to IHS Headquarters on a quarterly basis.

Comment: Two Tribal organizations expressed concern with how IHS will determine fair market price and reasonableness. The commenters recommended a sliding scale be utilized to determine fair and reasonable pricing based on the government estimate of each procurement action. The commenters were concerned about potential protests on the basis of fair and reasonable pricing. The commenters also recommended a tiered approach in determining the competitive range, such as allowing the IEE to propose a new scope and fee when they are within 10 percent of the winning proposal/bid.

Response: When awarding Buy Indian contracts, the contracting officer will fulfill their usual responsibilities under the FAR. IHS' ability to allow for an IEE to propose a new scope and fee would not be allowable unless such discussions are made with and available to all offerors.

Comment: A Tribal organization requests clarification in the final rule of applicable procedures when a deviation determination is disapproved. The commenter felt this situation was not addressed in the draft regulations. The commenter recommended that the CO first be required to reassess the viability of the ISBEE/IEE offers received and make a selection from the existing solicitation pool, but if no such offers were acceptable, the CO could cancel the solicitation and issue a new IEE set-aside. The commenter felt this would be an efficient approach that would

avoid the imposition of duplicative administrative burdens on both offerors and the federal government.

Response: The CO will fulfill their usual responsibilities under the FAR. IHS believes the current language and additional process details set forth in the final rule are sufficient and address this concern.

Buy Indian Act Compliance:

Comment: A Tribe and Tribal organization recommended that IHS include a new section on internal accountability and communications. The commenters felt that establishing efficient monitoring and compliance protocols, as well as communications standards, would enhance the success of the Buy Indian Act in promoting economic growth for Tribal Nations. The commenters recommend requiring COs at each IHS Area Office to collect, aggregate, and maintain accurate data to measure progress in the implementation of the Buy Indian Act. The commenters suggested that the data collected should reflect outreach and coordination efforts with Tribal Nations, and status reports on anticipated, pending, and completed ISBEE and IEE solicitations. The commenters noted that this should not include any additional data collection or reporting requirements for Tribal Nations. The commenters suggested requiring COs at each IHS Area Office to submit quarterly and annual reports to IHS Headquarters on the status of completed solicitations, any deviation determinations, updates on current Buy Indian Act contracts, and information on any pending or planned solicitations. The commenters felt that the systematic monitoring, compliance protocols and communications standards are critically needed to make meaningful, sustainable gains in the long-term success of the Buy Indian Act and its underlying policy of advancing economic self-sufficiency and growth in Indian Country. The commenters further suggested that the HHS include review of Buy Indian Act contracts as part of its regular procurement review process and provide an annual report to Congress on compliance with Buy Indian Act requirements, aggregate data on ISBEE and IEE contracts, developments, and ongoing challenges in implementation.

Response: When the HHS Buy Indian Act rule is finalized, IHS plans to update its internal Indian Health Manual (IHM) in support of the Buy Indian Act to provide for specific processes and details on training, reporting and compliance. Each IHS Area Office will be required to report quarterly on all Deviations and Challenges. IHS, Tribes and the public can access public data in beta.sam.gov to generate reporting of all IHS obligations set-aside under the Buy Indian Act.

Comment: Two Tribal organizations commented that, in order to ensure and improve the success of the Buy Indian Act, IHS needed to develop ongoing evaluation mechanisms in policies and procedures to gather input from Tribal Nations on barriers to the Act's implementation. The commenters felt that one such barrier would be the "rule of two" in procurement decisions. The commenters noted that this has been a barrier to the Buy Indian Act program and the commenters felt it could be resolved if IHS and other federal agencies considered the input of Tribal Nation businesses. The commenters recommended that IHS hold annual Tribal Listening Sessions with each IHS Area to receive input on successes and challenges to the Buy Indian Act implementation, which could inform IHS of the need to update policies/procedures/guidance and the need for Tribal consultation on the development of further updates to its Buy Indian Act regulations. The commenters recommended the development of a mechanism to evaluate the Buy Indian Act implementation process, to make the best use of the Buy Indian Act in serving Indian Country and filling covered procurement contracts.

Response: COs are required by Subpart 326.603-1(e) and (f) to perform market research. COs may seek a deviation from the requirement to set-aside for ISBEEs or IEEs only if there is no reasonable expectation of obtaining offers that will be competitive. When a deviation is determined to be necessary, COs are required to document and defend the rationale. If a CO must deviate from the Buy Indian Act preferences they must use the procedures of Subpart 326.603-3. Additionally, IHS is interested in collaborating with Tribes to provide more data and insight on how IHS is meeting the requirements of the Buy Indian Act and plans to collaborate with BIA on

how to publicly share information related to Buy Indian Act performance to provide visibility to Tribes.

Comment: A Tribe commented that DOI recently held Tribal consultations on the proposed updates to its Buy Indian Act regulations, which are intended to eliminate barriers to IEEs from competing on certain construction contracts; expand the ability for IEEs to subcontract work; clarify preferences for IEEs; and ensure greater preference to IEEs when a deviation from the Buy Indian Act is necessary. The commenter recommended that IHS issue an update to its NPRM to reflect DOI's current draft, which DOI shared with IHS. Although DOI is still considering its proposed changes, the commenter felt that IHS has the opportunity to ensure consistency with implementing the Buy Indian Act regulations. Furthermore, the commenter recommended that IHS and DOI work collaboratively to update the Buy Indian Act regulations to ensure that there is no further confusion regarding participation in the program.

Response: IHS is committed to implementing the Indian Community Economic Enhancement Act requirement to harmonize the regulations implementing the Buy Indian Act and will continue to coordinate and collaborate with DOI/BIA.

Comment: A Tribal organization recommended language requiring the COs to insert the clause at HHSAR 352.226-2, Indian Preference Program, and the clause at HHSAR 326.504, Tribal Preference Requirements, in all solicitations and contracts when the contract award is to be made under the authority of the Buy Indian Act. The commenter felt that the inclusion of this requirement would bring the proposed HHSAR Section 326.6 into greater alignment with the DOI's regulations and reaffirm the preference to Indians in employment, training, and subcontracting.

Response: Pursuant to HHSAR Subpart 326.5, Indian Preference in Employment, Training and Subcontracting Opportunities, IHS already includes clauses 352.226-1, Indian Preference and 352.226-2, Indian Preference Program in all service, A&E and constructions contracts. HHSAR

Subpart 326.5 is not part of the rule to update Subpart 326.6, Acquisitions Under the Buy Indian Act.

General Comments

Comment: A Tribal organization recommended that the HHSAR regulations parallel the DOI's rules that extend the Buy Indian Act's procurement authority more broadly than the purview of the Assistant Secretary of Indian Affairs (ASIA). The commenter noted that the DOI regulations permit the Secretary to delegate authority under the Buy Indian Act to a bureau or office within the Department other than BIA, 48 CFR 1480.402(b). The commenter felt that the current draft amendments to the HHSAR should be revised to allow use of the Buy Indian Act authority by other parts of HHS, in addition to the IHS, in order to be parallel.

Response: As further explained under the "Statutory Authority" section of this notice, use of the Buy Indian Act is not available to any HHS component other than IHS.

Comment: A Tribal organization commented that all current procurement officers need to receive training on the Buy Indian Act and its importance from the Native American/Tribe's perspective. The commenter also recommended that all new procurement officers spend at least a day learning the history of Native Americans, the more recent acts of Congress, and the information needed to perform due diligence or sources sought under the Buy Indian Act.

Response: Once the HHS Buy Indian Act rule is updated and finalized, IHS will begin the process of updating its IHM, Chapter 5, Section 6, Buy Indian Policy, to define and implement training, compliance and reporting measures to be taken to ensure the agency fully adheres to the Buy Indian Act. The estimated costs to IHS in conducting these actions and measures in-house will be very minimal.

Other Comments

Comment: A commenter recommended including a few items not directly related to the HHS Buy Indian Act proposed rule. These items include cross agency coordination on law enforcement acquisitions and through a consolidated database system. The commenter also

suggested auditing and addressing the new organizational structures for completeness, and modernization to a coordinated system that manages and tracks procurements.

Response: While these comments are beyond the scope of this regulation, because this regulation addresses only HHS's implementation of the Buy Indian Act, HHS/IHS appreciates this input.

VI. REQUIRED DETERMINATIONS

1. *Regulatory Planning and Review (Executive Orders 12866 and 13563).* Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866. Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public, where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. IHS has developed this rule in a manner consistent with these requirements.

2. *Regulatory Flexibility Act.* HHS certifies that the adoption of this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

3. *Small Business Regulatory Enforcement Fairness Act.* This final rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule does not have an annual effect on the economy of \$100 million or more nor does it cause a major increase

in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. This final rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

4. *Unfunded Mandates Reform Act*. This final rule does not impose an unfunded mandate on State, Local, or Tribal Governments (SLTG) or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on SLTGs, or the private sector nor does the rule impose requirements on SLTGs. This final rule does not result in the expenditures of funds by SLTGs, in aggregate, or by the private sector of \$100 million or more in any one year. As such, a prepared written statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. *Takings (Executive Order 12630)*. This final rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

6. *Federalism (Executive Order 13132)*. Under the criteria in section 1 of Executive Order 13132, this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. This rule would not substantially and directly affect the relationship between the Federal and State Governments. A Federalism summary impact statement is not required.

7. *Civil Justice Reform (Executive Order 12988)*. This final rule complies with the requirements of Executive Order 12988. Specifically, this rule (1) meets the criteria of section 3(a) of this requiring Executive Order that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (2) meets the criteria of section 3(b)(2) of this Executive Order requiring that all regulations be written in clear language and contain clear legal standards.

8. *Consultation with Indian Tribes (Executive Order 13175)*. IHS strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to

consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department and Agency consultation policies and under the criteria in Executive Order 13175 and have determined there may be substantial direct effects on federally recognized Indian Tribes that will result from this rulemaking. In addition, we note that 25 U.S.C. 1672 expressly directs consultation prior to amendment of the rule. The IHS held consultation sessions with the Tribes as stated in the Background section of this preamble.

9. *Paperwork Reduction Act, 44 U.S.C. 3501, et seq.* This final rule requires offerors to certify whether they met the definition of an “Indian Economic Enterprise” and to provide the name of the federally recognized Indian Tribe or Alaska Native Corporation with which they are affiliated. These statements are considered simple representations that an offeror submitted to support its claim for eligibility to participate in contract awards under the authority of the Buy Indian Act (25 U.S.C. 47, as amended). Because these statements are a simple certification or acknowledgment related to a transaction, they do not qualify as a collection of information under the Paperwork Reduction Act. See 5 CFR 1320.3(h).

10. *National Environmental Policy Act.* This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the rule is covered by the categorical exclusion listed in 43 CFR 46.210(c). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

11. *Clarity of this Regulation.* We are required by Executive Orders 12866 (section 1(b)(12)), and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must (1) be logically organized; (2) use the active voice to address readers directly; (3) use common,

everyday words and clear language rather than jargon; (4) be divided into short sections and sentences; and (5) use lists and tables wherever possible.

List of Subjects

48 CFR Part 326

Government procurement, Indians, Indians-business and finance, Reporting and recordkeeping requirements.

48 CFR Part 352

Government procurement.

For the reasons set out in the preamble, HHS amend parts 326 and 352 as follows:

CHAPTER 3—HEALTH AND HUMAN SERVICES

Subchapter D—Socioeconomic Programs

PART 326—OTHER SOCIOECONOMIC PROGRAMS

1. The authority citation for part 326 is revised to read as follows:

Authority: 5 U.S.C. 301, 25 U.S.C. 47, 25 U.S.C. 1633, 41 U.S.C. 253(c)(5), and 42 U.S.C. 2003.

2. Revise subpart 326.6 to read as follows:

Subpart 326.6—Acquisitions Under the Buy Indian Act

326.600—General

326.600-1 Scope of part.

326.600-2 Buy Indian Act acquisition regulations.

326.601—Definitions

326.601 Definitions.

326.602—Applicability

326.602-1 Scope of part.

326.602-2 Restrictions on the use of the Buy Indian Act

326.603—Policy

326-603-1 Requirement to give preference to Indian Economic Enterprises.

326-603-2 Delegations and responsibility.

326-603-3 Deviations.

326.604—Procedures

326.604-1 General.

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Subpart 326.6—Acquisitions Under the Buy Indian Act

326.600—General

§ 326.600-1 Scope of part.

This subpart implements policies and procedures for the procurement of supplies, general services, architect and engineer (A&E) services, or construction while giving preference to Indian Economic Enterprises under authority of the Buy Indian Act (25 U.S.C. 47).

§ 326.600-2 Buy Indian Act acquisition regulations.

(a) This subpart supplements Federal Acquisition Regulation (FAR) and Health and Human Services Acquisition Regulation (HHSAR) requirements to meet the needs of the Department of Health and Human Services (HHS), Indian Health Service (IHS) in implementing the Buy Indian Act.

(b) This subpart is under the direct oversight and control of the Head of Contracting Activity (HCA), within the Office of Management Services (OMS)—IHS, HHS. The HCA, in consultation with the Assistant Secretary for Financial Resources (ASFR) and the Senior Procurement Executive (SPE), is responsible for promulgating this subpart, and following its enactment, will be primarily responsible for implementing its terms.

(c) Acquisitions conducted under this subpart are subject to all applicable requirements of the FAR and HHSAR, as well as internal policies, procedures, or instructions issued by IHS. After the FAR, this HHSAR subpart would take precedence over any inconsistent IHS policies, procedures, or instructions.

326.601—Definitions

§ 326.601 Definitions.

Alaska Native Claims Settlement Act (ANCSA) means Public Law 92-203 (December 18, 1971), 85 Stat. 688, codified at 43 U.S.C. 1601-1629h.

Alaska Native Corporation means any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation as those terms are defined by ANCSA.

Buy Indian Act means section 23 of the Act of June 25, 1910, codified at 25 U.S.C. 47.

Chief Contracting Officer (CCO) means a person with authority to enter into, administer, or terminate contracts and make related determinations and findings on behalf of the U.S. Government for the respective IHS Areas.

Contracting Officer (CO) means a person with the authority to enter into, administer, or terminate contracts and make related determinations and findings on behalf of the U.S. Government.

Construction means the planning, design, construction and renovation, including associated architecture and engineering services, of IHS facilities pursuant to 25 U.S.C. 1631 and in the construction of safe water and sanitary waste disposal facilities pursuant to 25 U.S.C. 1632.

Deviation means an exception to the requirement to use the Buy Indian Act in fulfilling an acquisition requirement subject to the Buy Indian Act.

Fair market price means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost, as determined in accordance with FAR 19.202-6(a).

Indian means a person who is an enrolled member of an Indian Tribe or “Native” as defined in the Alaska Native Claims Settlement Act.

Indian Health Service (IHS) means operations at all administrative levels of IHS, including Headquarters, Area Offices, and Service Units (inclusive of clinics).

Indian Economic Enterprise (IEE) means 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 Indians or Indian Tribes must, together, receive at least a majority of the earnings from the contract; and the management and daily business operations 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. The enterprise must meet these requirements throughout the following time periods:

- (1) At the time an offer is made in response to a written solicitation;
- (2) At the time of the contract award; and
- (3) During the full term of the contract.

Indian Tribe means an Indian Tribe, band, nation, or other recognized group or community that is 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 (PL 92-203, 85 Stat. 688; 43 U.S.C. 1601).

Indian Small Business Economic Enterprise (ISBEE) means an IEE that is also a small business concern established in accordance with the criteria and size standards of 13 CFR part 121.

Interested Party means an IEE that is an actual or prospective offeror whose direct economic interest would be affected by the proposed or actual award of a particular contract set-aside pursuant the Buy Indian Act.

List of Federally Recognized Tribes means the list published annually in the Federal Register identifying Indian entities that are recognized by and eligible to receive services from the United States Department of the Interior (DOI), Bureau of Indian Affairs (BIA).

Transfer Act of 1954 means the authority of transferred responsibility and other health care “functions, responsibilities, authorities and duties of the Department of the Interior” (including the Snyder Act) to Health, Education and Welfare, the predecessor of the HHS. Public Law 83-568, 68 Stat. 674 (1954) (codified at 42 U.S.C. 2001 *et seq.*). The Transfer Act authorizes IHS to use the Buy Indian Act (25 U.S.C. 47) to carry out its health care responsibilities.

326.602—Applicability

§ 326.602-1 Scope of part.

Except as provided in HHSAR 326.602-2, this subpart applies to all acquisitions above the micro-purchase threshold, including simplified acquisitions, made by IHS, and any HHS operating divisions or agency outside of IHS conducting acquisitions on behalf of IHS.

§ 326.602-2 Restrictions on the use of the Buy Indian Act.

(a) IHS may not use the authority of the Buy Indian Act and the procedures contained in this subpart to award intergovernmental contracts to Tribal organizations to plan, operate, or administer authorized IHS programs (or parts thereof) that are within the scope and intent of the Indian Self-Determination and Education Assistance Act (ISDEAA) (Pub. L. 93-638). IHS must use the Buy Indian Act solely to award procurement contracts to IEEs. Contracts subject to

ISDEAA are not covered under the FAR and are codified separately under 25 CFR part 900 and 42 CFR part 137.

(b) Contract health services (referred to administratively as Purchased/Referred Care services) are defined at 25 U.S.C. 1603 as excluding services provided by Buy Indian Act contractors. Accordingly, the Buy Indian Act may not be used to obtain services through the Purchased/Referred Care program (previously Contract Health Services). Purchase orders for care authorized pursuant to 42 CFR part 136 subpart C may be issued without regard to the provisions of this Part.

326.603—Policy

§ 326.603-1 Requirement to give preference to Indian Economic Enterprises.

(a) Except as provided by 25 U.S.C. 1633, IHS must use the negotiation authority of the Buy Indian Act to give preference to IEEs whenever the use of that authority is practicable. Thus, IHS may use the Buy Indian Act to give preference to IEEs through set-asides when acquiring supplies, general services, A&E services, or construction to meet IHS needs and requirements. The Buy Indian Act does not apply when mandatory government sources are available, as required by FAR Part 8.002.

(b) Contract awards under the authority of the Buy Indian Act can be pursued via the acquisition procedures prescribed in this HHSAR subpart in conjunction with the procedures from FAR part 12, 13, 14, 15 and/or 16.

(c) The CO will give priority to ISBEEs for all purchases, regardless of dollar value, by utilizing ISBEE set-aside to the maximum extent possible. COs when prioritizing ISBEEs may consider either:

(1) A set-aside for ISBEEs; or

(2) A sole source award to an ISBEE, as authorized under the FAR.

(d) If the CO determines after market research that there is no reasonable expectation of obtaining offers from two or more ISBEEs that will be competitive in terms of market price, product quality, and delivery capability, the CO may consider either:

- (1) A set-aside for IEEs; or
- (2) A sole source award to an IEE, as authorized under the FAR.

(e) If the CO determines after market research that there is no reasonable expectation of obtaining two or more offers that will be competitive in terms of market price, product quality, and delivery capability, from ISBEEs and/or IEEs, then the CO shall follow the Deviation process under HHSAR 326.603-3.

(f) Price analysis technique(s) provided in FAR 15.404-1(b) shall be used in determination of price fair and reasonableness when only one offer is received from a responsible ISBEE or IEE in response to an acquisition set-aside under paragraph (d)(1) or (e)(1) of this section:

(1) If the offer meets the technical capability requirements and is not at a reasonable and fair market price, then the CO may negotiate with that enterprise for a reasonable and fair market price, as authorized under the FAR.

(2) If the offer meets the technical capability requirements and is at a reasonable and fair market price, then the CO must:

- (i) Make an award to that enterprise;
- (ii) Document the reason only one offer was considered; and
- (iii) Initiate action to increase competition in future solicitations.

(g) If the offers received in response to an acquisition set-aside under paragraph (c) or (d) of this section are determined to be unreasonable or otherwise unacceptable upon price and/or technical evaluations, then the CO must follow the Deviation process under HHSAR 326.603-3. The CO must document in the deviation determination the reasons why the IEE offeror(s) were not reasonable or otherwise unacceptable.

- (1) If a deviation determination is approved, the CO must cancel the current ISBEE or IEE set-aside solicitation and inform all offerors in writing.
 - (2) If a deviation determination is approved, the CO must identify, based on current available market research, an alternate set-aside or procurement method.
 - (3) When the solicitation of the same requirement is posted, the CO must inform all previous offerors in writing of the solicitation number.
- (h) With respect to construction, the provisions of 25 U.S.C. 1633 shall apply. Under 25 U.S.C. 1633, IHS may give a preference to an IEE unless the agency finds, after considering the evaluation criteria listed in 25 U.S.C. 1633, that the project to be contracted for will not be satisfactory or cannot be properly completed or maintained under the proposed contract.

§ 326.603-2 Delegations and responsibility.

- (a) The Director, IHS—exercises the authority of the Buy Indian Act pursuant to the Transfer Act of 1954, as delegated pursuant to 25 U.S.C. 1661. Under 25 U.S.C. 1661, the Director is authorized “to enter into contracts for the procurement of goods and services to carry out the functions of the IHS.” IHS exercises this authority in support of its mission and program activities and as a means of fostering Indian employment and economic development.
- (b) The IHS HCA is responsible for ensuring that all IHS acquisitions under the Buy Indian Act comply with the requirements of this part.

§ 326.603-3 Deviations.

- (a) There are certain instances where the application of the Buy Indian Act to an acquisition may not be appropriate. In these instances, the CO must detail the reasons in writing or via email and make a deviation determination.
- (b) Some acquisitions by their very nature would make such a written determination unnecessary. For example, any order or call placed against an indefinite delivery vehicle that already has an approved deviation from the requirements of the Buy Indian Act.

(c) Deviation determinations shall be required for all other acquisitions where the Buy Indian Act is applicable and must be approved as follows:

Table 1 to Paragraph (c)

For a proposed contract action	The following official may authorize a deviation
Exceeding the micro-purchase threshold and up to \$25,000	Contracting Officer
Exceeding \$25,000 but not exceeding \$700,000	Chief Contracting Officer (CCO) (or the IHS Division of Acquisition Policy (DAP) Director, absent a CCO)
Exceeding \$700,000 but not exceeding \$13.5 million	IHS Competition Advocate
Exceeding \$13.5 million but not exceeding \$68 million	Head of Contracting Activity
Exceeding \$68 million	HHS Office of Small & Disadvantaged Business Utilization (OSDBU), Office of the General Counsel (OGC), HHS Department Competition Advocate and the HHS Senior Procurement Executive

(d) Deviations may be authorized prior to issuing the solicitation when the CO makes the following determinations and takes the following actions:

- (1) The CO determines after market research that there is no reasonable expectation of obtaining offers that will be competitive in terms of market price, quality and delivery from two or more responsible ISBEEs or IEEs.
- (2) The deviation determination is authorized by the official listed at HHSAR 326.603-3(c) for the applicable contract action.

(e) If a deviation determination has been approved, the CO must follow the FAR and HHSAR unless specified otherwise.

(f) Acquisitions made under an authorized deviation from the requirements of the Buy Indian Act must be made in conformance with the order of precedence required by FAR Part 8.002.

326.604—Procedures

§ 326.604-1 General.

All acquisitions under the authority of the Buy Indian Act, must conform to all applicable requirements of the FAR and HHSAR.

§ 326.604-2 Procedures for Acquisitions under the Buy Indian Act.

(a) Each acquisition of supplies, services and construction that is subject to commercial items or simplified acquisition procedures in accordance with FAR Parts 12 or 13 must be set-aside exclusively for ISBEEs, except as otherwise set forth in this Part. IHS will use ISBEE commercial item(s) or simplified acquisition set-asides to accomplish this preference action.

(b) Commercial items or simplified acquisitions under this section must conform to the competition and price reasonableness documentation requirements of FAR 12.209 for commercial item acquisitions and FAR 13.106 for simplified acquisitions.

(c) When acquiring construction and A&E services, solicit proposals and evaluate potential contractors in accordance with FAR Part 36.

(d) This paragraph applies to solicitations that are not restricted to participation of IEEs.

(1) If an interested IEE is identified after a solicitation has been issued, but before the date established for receipt of offers, the contracting office must provide a copy of the solicitation to this enterprise. In this case, the CO:

(i) Will not give preference under the Buy Indian Act to the IEE; and

(ii) May extend the date for receipt of offers when practical.

(2) If more than one IEE is identified after issuing a solicitation, but prior to the date established for receipt of offers, the CO may cancel the solicitation and re-compete it as an IEE set-aside.

(e) The contracting officer shall insert the provision at HHSAR 352.226-4, NOTICE OF INDIAN SMALL BUSINESS ECONOMIC ENTERPRISE SET-ASIDE, in solicitations for acquisitions that are set-aside to ISBEE concerns under HHSAR 326.603-1(c).

(1) The contracting officer shall insert the provision at HHSAR 352.226-5, NOTICE OF INDIAN ECONOMIC ENTERPRISE SET-ASIDE, in solicitations for acquisitions that are set-aside to IEE concerns in accordance with HHSAR 326.603-1(d).

(2) The contracting officer shall insert the clause at HHSAR 352.226-6, SUBCONTRACTING LIMITATIONS, in all solicitations and contracts when the contract award is to be made under the authority of the Buy Indian Act.

(3) The contracting officer shall insert the provision at HHSAR 352.226-7, INDIAN ECONOMIC ENTERPRISE REPRESENTATION, in all solicitations when the contract award is to be made under the authority of the Buy Indian Act.

§ 326.604-3 Debarment and suspension

A misrepresentation by an offeror of its status as an IEE, failure to notify the CO of any change in IEE status that would make the contractor ineligible as an IEE, or any violation of the regulations in this part by an offeror or an awardee may lead to debarment or suspension in accordance with FAR 9.406 and 9.407 and HHSAR 309.406 and 309.407.

326.605—Contract Requirements

§ 326.605-1 Subcontracting limitations

(a) The CO shall insert FAR clause at 52.219-14, Limitations on Subcontracting, in solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set-aside for ISBEEs and IEEs.

(b) The CO must also insert the clause 352.226-6, Indian Economic Enterprise Subcontracting Limitations, in all awards to ISBEEs and IEEs pursuant this part.

§ 326.605-2 Performance and payment bonds

Solicitations requiring performance and payment bonds must conform to FAR Part 28 and authorize use of any of the types of security acceptable in accordance with FAR Subpart 28.2 or section 11 of Public Law 98-449, the Indian Financing Act Amendments of 1984 (25 U.S.C. 47a). In accordance with FAR 28.102 and 25 U.S.C. 47a, the CO may accept alternative forms of security in lieu of performance and payment bonds if a determination is made that such forms of security provide the Government with adequate security for performance and payment.

326.606—Representation by an Indian Economic Enterprise Offeror

§ 326.606-1 General

- (a) The CO must insert the provision at HHSAR 352.226-7, INDIAN ECONOMIC ENTERPRISE REPRESENTATION, in all solicitations regardless of dollar value solicited under HHSAR 326.603-1(c) or (d) and in accordance with this part.
- (b) To be considered for an award under HHSAR 326.603-1(c) or (d), an offeror must:
- (1) Certify that it meets the definition of “Indian Economic Enterprise” in response to a specific solicitation set-aside in accordance with the Buy Indian Act and this part; and
 - (2) Identify the Indian Tribe(s) upon which the offeror relies for its IEE status.
- (c) The enterprise must meet the definition of “Indian Economic Enterprise” throughout the following time periods:
- (1) At the time an offer is made in response to a solicitation;
 - (2) At the time of contract award; and
 - (3) During the full term of the contract.
- (d) If, after award, a contractor no longer meets the eligibility requirements as it has certified and as set forth in this section, then the contractor must provide the CO with written notification within 3 calendar days of its failure to comply with the eligibility requirements. The notification must include:
- (1) Full disclosure of circumstances causing the contractor to lose eligibility status; and
 - (2) A description of actions, if any, that must be taken to regain eligibility.

(e) Failure to maintain eligibility under the Buy Indian Act or to provide written notification required by paragraph (d) of this section means that:

(1) The contractor may be declared ineligible for future contract awards under this part;

(2) The CO may consider termination for default of the ongoing contract; and

(3) The CO may pursue debarment or suspension of the contractor.

(f) The CO will review the offeror's representation that it is an IEE in a specific bid or proposal and verify that the Indian Tribe(s) that the offeror identified in the representation is either on the List of Federally Recognized Tribes or is an Alaska Native Corporation. A CO will also investigate the representation if an interested party challenges the IEE representation or if the CO has any other reason to question the representation. The CO may ask the offeror for more information to substantiate the representation. Challenges of and questions concerning a specific representation must be referred to the CO or CCO in accordance with HHSAR 326.607.

(g) Participation in the Mentor-Protégé Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (25 U.S.C. 47 note) does not render an IEE ineligible for contracts awarded under the Buy Indian Act.

§ 326.606-2 Representation provision.

(a) Contracting offices must provide copies of the awardees' IEE representation to any interested parties upon written request. IHS will make awardees' IEE representations available via IHS public sites and/or other means.

(b) Any false or misleading information submitted by an enterprise when submitting an offer in consideration for an award set-aside under the Buy Indian Act may be a violation of the law punishable under 18 U.S.C. 1001. False claims submitted as part of contract performance may be subject to the penalties enumerated in 31 U.S.C. 3729 to 3731 and 18 U.S.C. 287.

(c) The CO shall inform the Head of Contracting Activity, within 10 business days, of all suspected IEE misrepresentation by an offeror or failure to provide written notification of a change in IEE eligibility.

§ 326.606-3 Representation process.

(a) Only IEEs may participate in acquisitions set-aside in accordance with the Buy Indian Act and this part. The procedures in this Part are intended to support responsible IEEs and prevent circumvention or abuse of the Buy Indian Act.

(b) The CO shall review the ownership information furnished under HHSAR 352.226-7(b) and verify that the Indian Tribe(s) identified is either on the List of Federally Recognized Tribes or is an Alaska Native Corporation.

(c) If the CO cannot verify from the offeror submission that the Indian Tribe(s) identified is either on the List of Federally Recognized Tribes or is an Alaska Native Corporation, the CO must allow the offeror to correct information submitted under HHSAR 352.226-7(b). The CO should make every effort to allow the offeror to correct the information. If the requirement is time sensitive the CO must specify to the offeror the time and date by which a response is required.

(1) If the CO determines the offeror is not responsive, the CO must document the circumstances and inform the offeror of the determination.

(2) The CO may ask the appropriate regional Office of the General Counsel to review the IEE representation.

(3) The IEE representation does not relieve the CO of the obligation for determining contractor responsibility, as required by FAR Subpart 9.1.

326.607—Challenges to Representation

§ 326.607-1 Procedure.

(a) The CO can accept an offeror's written representation of being an ISBEE or IEE (as defined in HHSAR 326.601) only when it is submitted in response to a Sources Sought Notice, Request for Information (RFI) or with an offer in response to a solicitation under the Buy Indian Act. Another interested party may challenge the representation of an offeror or awardee by filing a written challenge.

(b) Upon receipt of the challenge, the CO shall re-verify the representation of the offeror or awardee in accordance with the requirements of this subpart, including the provisions of 326.606.

§ 326.607-2 Receipt of Challenge.

(a) An interested party must file any challenges against an offeror's representation with the cognizant CO.

(b) The challenge must be in writing and must contain the basis for the challenge with accurate, complete, specific and detailed evidence. The evidence must support the allegation that the offeror fails to meet the definition of Indian Economic Enterprise or Indian Small Business Economic Enterprise as defined in HHSAR 326.601 or is otherwise ineligible. The CO will dismiss any challenge that is deemed frivolous or that does not meet the conditions in this section.

(c) To be considered timely, a challenge must be received by the CO no later than 10 calendar days after the basis of challenge is known or should have been known, whichever is earlier.

(1) A challenge may be made orally if it is confirmed in writing within the 10-day period after the basis of challenge is known or should have been known, whichever is earlier.

(2) A written challenge may be delivered by hand, email, or letter postmarked within the 10-day period after the basis of challenge is known or should have been known, whichever is earlier.

(3) A CO's challenge to a certification is always considered timely, whether filed before or after award.

(d) Upon receiving a timely challenge, the CO must:

(1) Notify the challenger of the date it was received, and that the representation of the enterprise being challenged is under consideration; and

(2) Furnish to the offeror (whose representation is being challenged) a request to provide detailed information on its eligibility by certified mail, return receipt requested or email.

(e) Within 3 calendar days after receiving a copy of the challenge and the CO's request for detailed information, the challenged offeror must file, as specified at (d)(2), with the CO a complete statement answering the allegations in the challenge and furnish evidence to support its position on representation. If the offeror does not submit the required material within the 3 calendar days, or another period of time granted by the CO, the CO may assume that the offeror does not intend to dispute the challenge and must not award to the challenged offeror.

(f) Within 10 calendar days after receiving a challenge, the challenged offeror's response, and any other pertinent information, the CO must determine the representation status of the challenged offeror and notify the challenger and the challenged offeror of the decision by certified mail, return receipt requested or email, and make known to all parties the option to appeal the determination to IHS DAP.

(g) If the representation accompanying an offer is challenged and subsequently upheld by DAP, the written notification of this action must state the reason(s).

§ 326.607-3 Award in the Face of Challenge.

(a) Award of a contract in the face of challenge only may be made on the basis of the CO's written determination that the challenged offeror's representation is valid.

(1) This determination is final unless it is appealed to DAP, and the CO is notified of the appeal before award.

(2) If an award was made before the CO received notice of appeal, the contract is presumed to be valid.

(b) After receiving a challenge involving an offeror being considered for award, the CO must not award the contract until the CO has determined the validity of the representation. Award may be made in the face of a timely challenge when the CO determines in writing that an award must be made to protect the public interest, is urgently required, or a prompt award will otherwise be advantageous to the Government.

(c) If a timely challenge on representation is filed with the CO and received before award in response to a specific offer and solicitation, the CO must notify eligible offerors within one day that the award will be withheld. The CO also may ask eligible offerors to extend the period for acceptance of their proposals.

(d) If a challenge on representation is filed with the CO and received after award in response to a specific offer and solicitation, the CO need not suspend contract performance or terminate the awarded contract unless the CO believes that an award may be invalidated and a delay would prejudice the Government's interest. However, if contract performance is to be suspended, the CO would follow those guidelines as outlined in FAR Part 49.

§ 326.607-4 Challenge Not Timely.

If a CO receives an untimely filed challenge of a representation, the CO must notify the challenger that the challenge cannot be considered on the instant acquisition but will be considered in any future actions. However, the CO may question at any time, before or after award, the representation of an IEE.

PART 352—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for part 352 is revised to read as follows:

Authority: 5 U.S.C. 301, 40 U.S.C. 121(c)(2), 42 U.S.C. 2003

Subpart 352.2—Text of Provisions and Clauses

2. Add §§ 352.226-4 through 352.226-7 to read as follows:

§ 352.226-4 Notice of Indian Small Business Economic Enterprise set-aside.

As prescribed in HHSAR 326.604-2(b)(1), and in lieu of the requirements of 48 CFR 19.508, the Contracting Officer shall insert the following provision:

Notice of Indian Small Business Economic Enterprise Set-Aside

Under the Buy Indian Act, 25 U.S.C. 47, offers are solicited only from Indian Economic Enterprises (HHSAR 326.606) that are also small business concerns. Any acquisition resulting from this solicitation will be from such a concern. As required by HHSAR § 352.226-7(b), offerors shall include a completed Indian Economic Enterprise Representation form in response to Sources Sought Notices, Request for Information (RFI) and as part of the proposal submission. The Indian Economic Enterprise Representation form, available on the IHS DAP public website (www.IHS.gov/DAP), shall be included in synopses, presolicitation notices, and solicitations for the acquisitions under the Buy Indian Act. Offers received from enterprises that are not both Indian Economic Enterprises and small business concerns will not be considered and will be rejected.

(End of clause)

§ 352.226-5 Notice of Indian Economic Enterprise set-aside.

As prescribed in HHSAR 326.604-2(e)(2), the Contracting Officer shall insert the following clause:

Notice of Indian Economic Enterprise Set-Aside

(a) *Definitions as used in this clause:*

Alaska Native Claims Settlement Act (ANCSA) means Public Law 92-203 (December 18, 1971), 85 Stat. 688, codified at 43 U.S.C. 1601-1629h.

Indian means a person who is an enrolled member of an Indian Tribe or “Native” as defined in the Alaska Native Claims Settlement Act.

Indian Economic Enterprise means 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 Indians or Indian Tribes must, together, receive at least a majority of the earnings from the contract; and the management and daily business operations 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. The enterprise must meet these requirements throughout the following time periods:

- (i) At the time an offer is made in response to a written solicitation;
- (ii) At the time of the contract award; and
- (iii) During the full term of the contract.

Indian Tribe means an Indian Tribe, band, nation, or other recognized group or community that is 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 (PL 92-203, 85 Stat. 688; 43 U.S.C. 1601).

Representation means the positive statement by an enterprise of its eligibility for preferential consideration and participation for acquisitions conducted under the Buy Indian Act, 25 U.S.C. 47, in accordance with the procedures in Subpart 326.606.

(b) *General*. (1) Under the Buy Indian Act, offers are solicited only from Indian Economic Enterprises.

(2) The CO will reject all offers received from ineligible enterprises.

(3) Any award resulting from this solicitation will be made to an Indian Economic Enterprise, as defined in paragraph (a) of this clause.

(c) *Required submissions*. In response to this solicitation, an offeror must also provide the following:

(1) A description of the required percentage of the work/costs to be provided by the offeror over the contract term as required by section 352.226-6, Subcontracting Limitations clause; and

(2) Qualifications of the key personnel (if any) that will be assigned to the contract.

(d) Required assurance. The offeror must provide written assurance to the CO that the offeror is and will remain in compliance with the requirements of this clause. It must do this before the CO awards the Buy Indian Act contract and upon successful and timely completion of the contract, but before the CO accepts the work or product.

(e) Non-responsiveness. Failure to provide the information required by paragraphs (c) and (d) of this clause may cause the CO to find an offer non-responsive and reject it.

(f) Eligibility.

(1) Participation in the Mentor-Protégé Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (25 U.S.C. 47 note) does not render an Indian Economic Enterprise ineligible for contracts awarded under the Buy Indian Act.

(2) If a contractor no longer meets the definition of an Indian Economic Enterprise after award, the contractor must notify the CO immediately and in writing. The notification must include full disclosure of circumstances causing the contractor to lose eligibility status and a description of any actions that the contractor will take to regain eligibility. Failure to give the CO immediate written notification means that:

(i) The economic enterprise may be declared ineligible for future contract awards under this part; and

(ii) The CO may consider termination for default if it is in the best interest of the government.

(g) Representation. Under the Buy Indian Act, 25 U.S.C. 47, offers are solicited only from Indian Economic Enterprises (326.606). As required by HHSAR 352.226-7(b), offerors shall include a completed Indian Economic Enterprise Representation form in response to Sources Sought Notices, Request for Information (RFI) and as part of the proposal submission. The Indian Economic Enterprise Representation form, available on the IHS DAP public website (www.IHS.gov/DAP), shall be included in synopses, presolicitation notices, and solicitations for the acquisitions under the Buy Indian Act. Offers received from enterprises that are not Indian Economic Enterprises shall not be considered.

(End of clause)

§ 352.226-6 Indian Economic Enterprise Subcontracting Limitations

As prescribed in HHSAR 326.604-2(e)(3), the Contracting Officer shall insert the following clause:

Indian Economic Enterprise Subcontracting Limitations

(a) Definitions as used in this clause.

(1) *Indian Economic Enterprise* means 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 Indians or Indian Tribes must, together, receive at least a majority of the earnings from the contract; and the management and daily business operations 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. The enterprise must meet these requirements throughout the following time periods:

- (i) At the time an offer is made in response to a written solicitation;
- (ii) At the time of the contract award; and
- (iii) During the full term of the contract.

(2) *Subcontract* means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of the prime contractor or subcontractor. It includes, but is not limited to, purchase orders, and changes and modifications to purchase orders.

(3) *Subcontractor* means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

(b) Required Percentages of work by the concern. The contractor must comply with FAR 52.219-14, Limitations on Subcontracting clause in allocating what percentage of work to subcontract.

The contractor shall not subcontract work exceeding the subcontract limitations in FAR 52.219-14 to a concern other than a responsible Indian Economic Enterprise.

(c) Any work that an IEE subcontractor does not perform with its own employee shall be considered subcontracted work for the purpose of calculating percentages of subcontract work in accordance with FAR 52.219-14 Limitations on Subcontracting.

(d) Cooperation. The contractor must:

(1) Carry out the requirements of this clause to the fullest extent; and

(2) Cooperate in any study or survey that the CO, Indian Health Service or its agents may conduct to verify the contractor's compliance with this clause.

(e) Incorporation in Subcontracts. The contractor must incorporate the substance of this clause, including this paragraph (e), in all subcontracts for general services, A&E services and construction awarded under this contract.

(End of clause)

§ 352.226-7 Indian Economic Enterprise representation.

As prescribed in HHSAR 326.604-2(e)(4), the Contracting Officer shall insert the following provision:

Indian Economic Enterprise Representation

(a) The offeror must represent as part of its offer that it does meet the definition of Indian Economic Enterprise (IEE) as defined in HHSAR 326.601 and that it intends to meet the definition of an IEE throughout the performance of the contract. The offeror must notify the contracting officer immediately, via email, if there is any ownership change affecting compliance with this representation.

(b) The representation must be made on the designated IHS Indian Economic Enterprise Representation form or any successor forms through which the offeror will certify that the ownership requirements defined by HHSAR 326.601 are met.

(c) Any false or misleading information submitted by an enterprise when submitting an offer in consideration for an award set-aside under the Buy Indian Act is a violation of the law punishable under 18 U.S.C. 1001. False claims submitted as part of contract performance are subject to the penalties enumerated in 31 U.S.C. 3729 to 3731 and 18 U.S.C. 287.

(End of provision)

Dated: December 22, 2021.

Xavier Becerra,

Secretary,

Department of Health and Human Services.

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