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Parent topic: Federal Acquisition Regulation

Subpart 26.1 - Indian Incentive Program

26.100 Scope of subpart.

This subpart implements 25 U.S.C.1544, which provides an incentive to prime contractors that use *Indian organizations* and *Indian-owned economic enterprises* as subcontractors.

26.101 Definitions.

As used in this subpart-

Indian means any person who is a member of any *Indian tribe*, band, group, pueblo, or community that is recognized by the Federal Government as eligible for services from the Bureau of *Indian* Affairs (BIA) in accordance with 25 U.S.C. 1452(c) and any "Native" as defined in the Alaska Native *Claims* Settlement Act (43 U.S.C. 1601).

Indian organization means the governing body of any *Indian tribe* or entity established or recognized

by the governing body of an *Indian tribe* for the purposes of 25 U.S.C., Chapter 17.

Indian-owned economic enterprise means any *Indian*-owned (as determined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit, provided that *Indian* ownership constitutes not less than 51 percent of the enterprise.

Indian tribe means any *Indian tribe*, band, 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, that is recognized by the Federal Government as eligible for services from BIA in accordance with 25 U.S.C. 1452(c).

Interested party means a prime contractor or an actual or prospective *offeror* whose direct economic interest would be affected by the award of a subcontract or by the failure to award a subcontract.

26.102 Policy.

Indian organizations and *Indian-owned economic enterprises shall* have the maximum practicable opportunity to participate in performing contracts awarded by *Federal agencies*. In fulfilling this requirement, the *Indian* Incentive Program allows an incentive payment equal to 5 percent of the amount paid to a subcontractor in performing the contract, if the contract so authorizes and the subcontractor is an *Indian organization* or *Indian-owned economic enterprise*.

26.103 Procedures.

(a) *Contracting officers* and prime contractors, 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.

(b) In the event of a challenge to the representation of a subcontractor, the *contracting officer shall* refer the matter to the-

U.S. Department of the Interior Bureau of *Indian* Affairs (BIA)

Attn: *Acquisition* Management Director

12220 Sunrise Valley Drive

Reston, VA 20191.

The BIA will determine the eligibility and notify the *contracting officer*.

(c) The BIA will acknowledge receipt of the request from the *contracting officer* within 5 working days. Within 45 additional working days, BIA will advise the *contracting officer*, *in writing*, of its determination.

(d) The *contracting officer* will notify the prime contractor upon receipt of a challenge.

(1) To be considered timely, a challenge *shall*-

(i) Be *in writing*;

(ii) Identify the basis for the challenge;

(iii) Provide detailed evidence supporting the *claim*; and

(iv) Be filed with and received by the *contracting officer* prior to award of the subcontract in question.

(2) If the notification of a challenge is received by the prime contractor prior to award, it *shall* withhold award of the subcontract pending the determination by BIA, unless the prime contractor determines, and the *contracting officer* agrees, that award *must* be made in order to permit timely performance of the prime contract.

(3) Challenges received after award of the subcontract *shall* be referred to BIA, but the BIA determination *shall* have prospective application only.

(e) If the BIA determination is not received within the prescribed time period, the *contracting officer* and the prime contractor *may* rely on the representation of the subcontractor.

(f) Subject to the terms and conditions of the contract and the availability of funds, *contracting officers shall* authorize an incentive payment of 5 percent of the amount paid to the subcontractor. *Contracting officers shall* seek funding in accordance with agency procedures.

26.104 Contract clause.

Contracting officers in civilian agencies *may* insert the clause at 52.226-1, Utilization of *Indian Organizations* and *Indian-Owned Economic Enterprises*, in *solicitations* and contracts if-

(a) In the opinion of the *contracting officer*, subcontracting possibilities exist for *Indian organizations* or *Indian-owned economic enterprises*; and

(b) Funds are available for any increased costs as described in paragraph (b)(2) of the clause at 52.226-1.

Subpart 26.2 - Major Disaster or Emergency Assistance Activities

26.200 Scope of subpart.

This subpart implements the Robert T. Stafford Disaster Relief and *Emergency* Assistance Act (42U.S .C.5150), which provides a preference for local organizations, firms, and individuals when *contracting* for *major disaster* or *emergency* assistance activities.

26.201 Definitions.

Emergency response contract means a contract with private entities that supports assistance activities in a *major disaster or emergency area*, such as debris clearance, distribution of *supplies*, or reconstruction.

Local firm means a private organization, firm, or individual residing or doing business primarily in a *major disaster or emergency area*.

Major disaster or emergency area means the area included in the official Presidential declaration(s) and any additional areas identified by the Department of Homeland Security. *Major disaster* declarations and *emergency* declarations are published in the Federal Register and are available at https://www.fema.gov/disasters/disaster/declarations.

26.202 Local area preference.

(a) When awarding *emergency response contracts* during the term of a *major disaster* or *emergency* declaration by the President of the *United States* under the authority of the Robert T. Stafford Disaster Relief and *Emergency* Assistance Act (42 U.S.C. 5121, *et seq*.), preference *shall* be given, to the extent feasible and practicable, to *local firms*. Preference *may* be given through a local area set-aside or an evaluation preference.

(b) When using the authority under the Stafford Act, see the definitions of "*micro-purchase threshold*" and "*simplified acquisition threshold*" in 2.101 for the authority to use an increased *micro-purchase threshold* and *simplified acquisition threshold*.

26.202-1 Local area set-aside.

The *contracting officer may* set aside *solicitations* to allow only *local firms* within a specific geographic area to compete (see 6.208).

(a) The *contracting officer*, in consultation with the requirements office, *shall* define the specific geographic area for the local set-aside.

(b) A *major disaster or emergency area may* span counties in several contiguous States. The set-aside area need not include all the counties in the declared disaster/*emergency* area(s), but cannot go outside it.

(c) The *contracting officer shall* also determine whether a local area set-aside *should* be further restricted to small business concerns in the set-aside area (see part 19).

26.202-2 Evaluation preference.

The *contracting officer may* use an evaluation preference, when authorized in agency regulations or procedures.

26.203 Transition of work.

(a) In anticipation of potential *emergency* response requirements, agencies involved in response planning *should* consider awarding *emergency response contracts* before a *major disaster* or *emergency* occurs to ensure immediate response and relief. These contracts *should* be structured to respond to immediate *emergency* response needs, and *should* not be structured in any way that *may* inhibit the transition of *emergency* response work to *local firms* (*e.g.*, unnecessarily broad scopes of work or long periods of performance).

(b) 42U.S.C.5 150(b)(2) requires that agencies performing response, relief, and reconstruction activities transition to *local firms* any work performed under contracts in effect on the date on which the President declares a *major disaster* or *emergency*, unless the head of such agency determines *in writing* that it is not feasible or practicable. This determination *may* be made on an individual contract or class basis. The written determination *shall* be prepared within a reasonable time given the circumstances of the *emergency*.

(c) In effecting the transition, agencies are not required to terminate or renegotiate existing contracts. Agencies *should* transition the work at the earliest practical opportunity after consideration of the following:

(1) The potential duration of the disaster or *emergency*.

(2) The severity of the disaster or *emergency*.

(3) The scope and structure of the existing contract, including its period of performance and the milestone(s) at which a transition is reasonable (*e.g.*, before exercising an *option*).

(4) The potential impact of a transition, including safety, *national defense*, and mobilization.

(5) The expected availability of qualified local *offerors* who can provide the *products* or services at a reasonable price.

(d) The agency *shall* transition the work to *local firms* using the local area set-aside identified in 26.202-1.

26.204 Justification for expenditures to other than local firms.

(a) 42U.S.C .5150(b)(1) requires that, subsequent to any Presidential declaration of a *major disaster* or *emergency*, any expenditure of Federal funds, under an *emergency response contract* not awarded to a *local firm*, *must* be justified *in writing* in the contract file. The justification *should* include consideration for the scope of the *major disaster* or *emergency* and the immediate requirements or needs of *supplies* and services to ensure life is protected, victims are cared for, and property is protected.

(b) The justification *may* be made on an individual or class basis. The *contracting officer* approves the justification.

26.205 Disaster Response Registry.

(a) *Contracting officers shall* consult the *Disaster Response Registry* via https://www.sam.gov to determine the availability of contractors for debris removal, distribution of *supplies*, reconstruction, and other disaster or *emergency* relief activities inside the *United States* and *outlying areas*.

(b) A list of prospective vendors voluntarily participating in the *Disaster Response Registry* can be retrieved using the *System for Award Management (SAM*) search tool, which can be accessed via https://www.sam.gov, Search Records, Advanced Search, *Disaster Response Registry* Search. These vendors *may* be identified by selecting the criteria for "Disaster Response Contractors". Contractors are required to register in SAM in order to gain access to the *Disaster Response Registry*.

26.206 Solicitation provision and contract clauses.

(a) The *contracting officer shall* insert the provision at 52.226-3, Disaster or *Emergency* Area Representation, in *solicitations* involving the local area set-aside. For *commercial products* and *commercial services*, see 12.301(e)(5).

(b) The *contracting officer shall* insert the clause at 52.226-4, Notice of Disaster or *Emergency* Area Set-aside in *solicitations* and contracts involving local area set-asides.

(c) The *contracting officer shall* insert the clause at 52.226-5, Restrictions on Subcontracting Outside Disaster or *Emergency* Area, in all *solicitations* and contracts that involve local area set-asides.

Subpart 26.3 - Historically Black Colleges and Universities and Minority Institutions

26.300 Scope of subpart.

(a) This subpart implements Executive Order 12928 of September 16,1994, which promotes participation of Historically Black Colleges and Universities (HBCUs) and *Minority Institutions* (MIs) in Federal *procurement*.

(b) This subpart does not pertain to contracts performed entirely outside the *United States* and its *outlying areas*.

26.301 [Reserved]

26.302 General policy.

It is the policy of the Government to promote participation of HBCUs and MIs in Federal *procurement*.

26.303 Data collection and reporting requirements.

Executive Order 12928 requires periodic reporting to the President on the progress of departments and agencies in complying with the laws and requirements mentioned in the Executive order.

26.304 Solicitation provision.

Insert the provision at 52.226-2, *Historically Black College or University* and *Minority Institution* Representation, in *solicitations* exceeding the *micro-purchase threshold*, for research, studies, *supplies*, or services of the type normally acquired from higher educational institutions.

Subpart 26.4 - Food Donations to Nonprofit Organizations

26.400 Scope of subpart.

This section implements the Federal Food Donation Act of 2008 (42 U.S.C 1792).

26.401 Definitions.

As used in this subpart-

Apparently wholesome food means food that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the food *may* not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions, in accordance with (b)(2) of the Bill Emerson Good Samaritan Food Donation Act (42 U.S.C. 1791(b)).

Excess food means food that-

(1) Is not required to meet the needs of the *executive agencies*; and

(2) Would otherwise be discarded.

Food-insecure means inconsistent access to sufficient, safe, and nutritious food.

Nonprofit organization means any organization that is-

(1) Described in section 501(c) of the Internal Revenue Code of 1986; and

(2) Exempt from tax under section 501(a) of that Code.

26.402 Policy.

The Government encourages *executive agencies* and their contractors, to the maximum extent practicable and safe, to donate excess *apparently wholesome food* to *nonprofit organizations* that provide assistance to *food-insecure* people in the *United States*.

26.403 Procedures.

(a) In accordance with the Federal Food Donation Act of 2008 an *executive agency shall* comply with the following:

(1) *Encourage donations*. In the applicable contracts stated at section 26.404, encourage contractors, to the maximum extent practicable and safe, to donate apparently wholesome *excess food* to *nonprofit organizations* that provide assistance to *food-insecure* people in the *United States*.

(2) *Costs*.

(i) In any case in which a contractor enters into a contract with an *executive agency* under which *apparently wholesome food* is donated to *food-insecure* people in the *United States*, the head of the *executive agency shall* not assume responsibility for the costs and logistics of collecting, transporting, maintaining the safety of, or distributing excess, *apparently wholesome food* to *food-insecure* people in the *United States* under this Act.

(ii) The Government will not reimburse any costs incurred by the contractor against this contract or any other contract for the donation of Federal *excess foods*. Any costs incurred for Federal *excess food* donations are not considered allowable public relations costs in accordance with 31.205-1(f)(8).

(3) *Liability*. An *executive agency* (including an *executive agency* that enters into a contract with a contractor) and any contractor making donations pursuant to this Act *shall* be exempt from civil and criminal liability to the extent provided under the Bill Emerson Good Samaritan Food Donation Act (42 U.S.C. 1791).

26.404 Contract clause.

Insert the clause at 52.226-6, Promoting *Excess Food* Donation to *Nonprofit Organizations*, in *solicitations* and contracts greater than $35,000 for the provision, service, or sale of food in the *United States*.

Subpart 26.5 - Drug-Free Workplace

26.500 Scope of subpart.

This subpart implements 41 U.S.C. chapter 81, *Drug-Free Workplace*.

26.501 Applicability.

This subpart applies to contracts, including contracts with 8(a) contractors under FAR subpart 19.8 and modifications that require a justification and approval (see subpart 6.3), except contracts-

(a) At or below the *simplified acquisition threshold*; however, the requirements of this subpart apply

to all contracts of any value awarded to an individual;

(b) For the *acquisition* of *commercial products* and *commercial services* (see part 12);

(c) Performed outside the *United States* and its *outlying areas* or any part of a contract performed outside the *United States* and its *outlying areas*;

(d) By law enforcement agencies, if the head of the law enforcement agency or designee involved determines that application of this subpart would be inappropriate in connection with the law enforcement agency's undercover operations; or

(e) Where application would be inconsistent with the international obligations of the *United States* or with the laws and regulations of a foreign country.

26.502 Authority.

41 U.S.C. chapter 81, *Drug-Free Workplace*.

26.503 Definitions.

As used in this subpart-

Controlled substance means a *controlled substance* in schedules I through V of section 202 of the *Controlled Substances* Act (21 U.S.C. 812), and as further defined in regulation at 21 CFR1308.11–1308.15.

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State *criminal drug statutes*.

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, possession, or use of any *controlled substance*.

Employee means an *employee* of a contractor directly engaged in the performance of work under a Government contract. "Directly engaged" is defined to include all *direct cost employees* and any other contract *employee* who has other than a minimal impact or involvement in contract performance.

Individual means an *offeror*/contractor that has no more than one *employee* including the *offeror*/contractor.

26.504 Policy.

(a) No *offeror* other than an individual *shall* be considered a responsible source (see 9.104-1(g) and 19.602-1(a)(2)(i)) for a contract that exceeds the *simplified acquisition threshold*, unless it agrees that it will provide a *drug-free workplace* by-

(1) Publishing a statement notifying its employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the contractor's workplace,

and specifying the actions that will be taken against employees for violations of such prohibition;

(2) Establishing an ongoing drug-free awareness program to inform its employees about-

(i) The dangers of drug abuse in the workplace;

(ii) The contractor's policy of maintaining a *drug-free workplace*;

(iii) Any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) The penalties that *may* be imposed upon employees for drug abuse violations occurring in the workplace;

(3) Providing all employees engaged in performance of the contract with a copy of the statement required by paragraph (a)(1) of this section;

(4) Notifying all employees *in writing* in the statement required by paragraph (a)(1) of this section, that as a condition of employment on a covered contract, the employee will-

(i) Abide by the terms of the statement; and

(ii) Notify the employer *in writing* of the employee's *conviction* under a criminal drug statute for a violation occurring in the workplace no later than 5 days after such *conviction*;

(5) Notifying the *contracting officer in writing* within 10 days after receiving notice under subdivision (a)(4)(ii) of this section, from an employee or otherwise receiving actual notice of such *conviction*. The notice *shall* include the position title of the employee;

(6) Within 30 days after receiving notice under paragraph (a)(4) of this section of a *conviction*, taking one of the following actions with respect to any employee who is convicted of a drug abuse violation occurring in the workplace:

(i) Taking appropriate personnel action against such employee, up to and including termination.

(ii) Requiring such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(7) Making a good faith effort to maintain a *drug-free workplace* through implementation of paragraphs (a)(1) through (a)(6) of this section.

(b) No individual *shall* be awarded a contract of any dollar value unless that individual agrees not to engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance while performing the contract.

(c) For a contract of 30 days or more performance duration, the contractor *shall* comply with the provisions of paragraph (a) of this section within 30 days after contract award, unless the *contracting officer* agrees *in writing* that circumstances warrant a longer period of time to comply. Before granting such an extension, the *contracting officer shall* consider such factors as the number of contractor employees at the worksite, whether the contractor has or *must* develop a *drug-free workplace* program, and the number of contractor worksites. For contracts of less than 30 days performance duration, the contractor *shall* comply with the provisions of paragraph (a) of this section as soon as possible, but in any case, by a date prior to when performance is expected to be

completed.

26.505 Suspension of payments, termination of contract, and debarment and suspension actions.

(a) After determining *in writing* that *adequate evidence* to suspect any of the causes at paragraph (d) of this section exists, the *contracting officer may* suspend contract payments in accordance with the procedures at 32.503-6(a)(1).

(b) After determining *in writing* that any of the causes at paragraph (d) of this section exist, the *contracting officer may* terminate the contract for default.

(c) Upon initiating action under paragraph (a) or (b) of this section, the *contracting officer shall* refer the case to the agency *suspending and debarring official*, in accordance with agency procedures, pursuant to subpart 9.4.

(d) The specific causes for *suspension* of contract payments, termination of a contract for default, or *suspension* and *debarment* are-

(1) The contractor has failed to comply with the requirements of the clause at 52.226-7, *Drug-Free Workplace*; or

(2) The number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace indicates that the contractor has failed to make a good faith effort to provide a *drug-free workplace*.

(e) A determination under this section to suspend contract payments, terminate a contract for default, or debar or suspend a contractor *may* be waived by the *agency head* for a particular contract, in accordance with agency procedures, only if such waiver is necessary to prevent a severe disruption of the agency operation to the detriment of the Federal Government or the general public (see subpart 9.4). The waiver authority of the *agency head* cannot be delegated.

26.506 Contract clause.

Except as provided in 26.501, insert the clause at 52.226-7, *Drug-Free Workplace*, in *solicitations* and contracts.

Subpart 26.6 - Encouraging Contractor Policies to Ban Text Messaging While Driving

26.601 Purpose.

This subpart implements the requirements of the Executive Order (E.O.) 13513, dated October 1, 2009 (74 FR 51225, October 6, 2009), Federal Leadership on Reducing Text Messaging while Driving.

26.602 Applicability.

This subpart applies to all *solicitations* and contracts.

26.603 Definitions.

As used in this subpart-

Driving-

(1) Means operating a motor vehicle on an active roadway with the motor running, including while temporarily stationary because of traffic, a traffic light, stop sign, or otherwise.

(2) Does not include operating a motor vehicle with or without the motor running when one has pulled over to the side of, or off, an active roadway and has halted in a location where one can safely remain stationary.

Text messaging means reading from or entering data into any handheld or other electronic device, including for the purpose of short message service texting, e-mailing, instant messaging, obtaining navigational information, or engaging in any other form of electronic data retrieval or electronic data communication. The term does not include glancing at or listening to a navigational device that is secured in a commercially designed holder affixed to the vehicle, provided that the destination and route are programmed into the device either before *driving* or while stopped in a location off the roadway where it is safe and legal to park.

26.604 Policy.

Agencies *shall* encourage contractors and subcontractors to adopt and enforce policies that ban text messaging while driving-

(a) Company-owned or rented vehicles or Government-owned vehicles; or

(b) Privately-owned vehicles when on official Government business or when performing any work for or on behalf of the Government.

26.605 Contract clause.

The *contracting officer shall* insert the clause at 52.226-8, Encouraging Contractor Policies to Ban Text Messaging While Driving, in all *solicitations* and contracts.