PART 1480 - ACQUISITIONS UNDER THE BUY INDIAN ACT

Authority: 25 U.S.C. 47, as amended, 41 U.S.C. 253(c)(5), and 5 U.S.C. 301.

Source: 87 FR 20766, Apr. 8, 2022, unless otherwise noted.

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Parent topic: SUBCHAPTER H - Buy Indian Act

Subpart 1480.1 - General

1480.101 Scope of part.

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

1480.102 Buy Indian Act acquisition regulations.

(a) This part supplements Federal Acquisition Regulation (FAR) and Department of the Interior Acquisition Regulation (DIAR) requirements in this chapter to meet the needs of the Department of Interior in implementing the Buy Indian Act.

(b) This part is under the direct oversight and control of the Chief Financial Officer, within the Office of the Assistant Secretary - Indian Affairs, Department of the Interior (CFO). The CFO is responsible for issuing and implementing this part.

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

Subpart 1480.2 - Definitions

1480.201 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.

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

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.

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 15.404-1(b).

Federally Recognized Indian Tribe means an Indian Tribe, band, nation, or other Federally recognized group or community on the List of Federally Recognized Tribes. This definition includes any Alaska Native regional or village corporation under the Alaska Native Claims Settlement Act (ANSCA).

Governing Body means the recognized entity empowered to exercise governmental authority over a Federally Recognized Indian Tribe.

Indian means a person who is an enrolled member of a Federally Recognized Indian Tribe.

Indian Affairs (IA) means all bureaus and offices under the Assistant Secretary - Indian Affairs.

Indian Economic Enterprise (IEE) means any business activity owned by one or more Indians or Federally Recognized Indian Tribes provided that:

(1) The combined Indian or Federally Recognized Indian Tribe ownership of the enterprise constitutes not less than 51 percent;

(2) The Indians or Federally Recognized Indian Tribes must, together, receive at least 51 percent of the earnings from the contract; and

(3) The management and daily business operations of an enterprise must be controlled by one or more individuals who are Indians. The Indian individual(s) must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business. Management may be provided by:

(i) Committees, teams, or Boards of Directors which are controlled by one or more members of Tribe, or;

(ii) Non-Tribal members if the enterprise can demonstrate that the Tribe can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how Tribal members will develop managerial skills sufficient to manage the enterprise or similar enterprises in the future.

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 an entity appearing on the United States Department of the Interior's List of federally recognized Indian Tribes published annually in the Federal Register pursuant to Section 104 of Public Law 103-454, codified at 25 U.S.C. 5131.

Subpart 1480.3 - Applicability

1480.301 Scope of part.

Except as provided in 1480.302, this part applies to all acquisitions, including simplified acquisitions, made by IA and by any other bureau or office of the Department of the Interior conducting acquisitions on behalf of IA or otherwise delegated the authority to conduct acquisitions under the Buy Indian Act.

1480.302 Restrictions on the use of the Buy Indian Act.

IA must not use the authority of the Buy Indian Act and the procedures contained in this part to award intergovernmental contracts to Tribal organizations to plan, operate, or administer authorized IA 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). IA must use the Buy Indian Act solely to award procurement contracts to IEEs. Contracts subject to ISDEAA must follow 25 CFR part 900.

Subpart 1480.4 - Policy

1480.401 Requirement to give preference to Indian Economic Enterprises.

(a) IA must use the negotiation authority of the Buy Indian Act to give preference to Indians or Federally Recognized Tribes whenever the use of that authority is practicable. The Buy Indian Act provides that so far as may be practicable, Indian labor shall be employed, and purchases of the products (including, but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market at the discretion of the Secretary of the Interior. Thus, IA 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 IA needs and requirements. All other FAR and DIAR requirements that do not conflict with this part, such as requirements applicable to the acquisition of A&E and construction services, remain applicable.

(b) The Buy Indian Act does not apply when a supply requirement can be met by existing inventories of the requiring agency or excess from other agencies.

(c) The CO will give priority to ISBEEs for all purchases, regardless of dollar value. 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 that will be competitive in terms of market price, quality, and delivery, 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 offers that will be competitive in terms of market price, quality, and delivery from ISBEEs or IEEs, then the CO must follow the Deviation process under 1480.403.

(f) When only one offer is received from a responsible IEE in response to an acquisition set-aside or direct negotiation under paragraph (c)

(1) or (d)

(1) of this section:

(1) If the offer is not at a reasonable and fair market price, then the CO may negotiate with that enterprise for a reasonable and fair market price.

(2) If the offer 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 from one or more responsible IEEs in response to an acquisition set-aside under paragraph (c)

(1) or (d)

(1) of this section are not reasonable or otherwise unacceptable, then the CO must follow the deviation process under 1480.403. 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 set-aside solicitation and inform all offerors in writing.

(2) When the solicitation of the same requirement is posted, the CO must inform all previous offerors in writing of the solicitation number.

1480.402 Delegations and responsibility.

(a) The Secretary has delegated authority under the Buy Indian Act to the Assistant Secretary - Indian Affairs. IA exercises this authority in support of its mission and program activities and as a means of fostering Indian employment and economic development.

(b) The Secretary may delegate authority under the Buy Indian Act to a bureau or office within the

Department of the Interior other than IA.

(c) The Chief Financial Officer of The Office of the Assistant Secretary - Indian Affairs is responsible for ensuring that all IA acquisitions under the Buy Indian Act comply with the requirements of this part.

1480.403 Deviations.

There are certain instances where the application of the Buy Indian Act to an acquisition may not be appropriate. In these instances, the Contracting Officer must detail the reasons in writing and make a deviation determination.

(a) Sole source acquisitions awarded to an ISBEE or IEE under 1480.401(c)(2) or (d)(2) do not require a deviation determination and comply with the requirements of the Buy Indian Act.

(b) Some acquisitions by their very nature would make such a written determination unnecessary. The following acquisitions do not require a written deviation from the requirements of the Buy Indian Act:

(1) Any sole source acquisition justified and approved in accordance with FAR 6.3 and DIAR 1406.3 constitutes an authorized deviation from the requirements of the Buy Indian Act.

(2) 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 are 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
Up to $25,000	CO.
Exceeding $25,000 but not exceeding $700,000	One level above the CO or Chief of the Contracting Office (CCO) (or the IA Competition Advocate, absent a CCO).
Exceeding $700,000 but not exceeding $13.5 million	IA Competition Advocate.
Exceeding $13.5 million but not exceeding $57 million	The Head of the Contracting Activity or a designee who is a civilian serving in a position in a grade above GS-15 under the General Schedule or in a comparable or higher position under another schedule.

For a proposed contract action	The following official may authorize a deviation
Exceeding $57 million	Department of the Interior 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 ISBEE, IEEs, or direct negotiation with an IEE that is a certified 8a business.

(2) The deviation determination is authorized by the official listed at 1480.403(c) for the applicable contract action.

(e) If a deviation determination has been approved, the CO must follow the FAR and DIAR 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 8.002.

Subpart 1480.5 - Procedures

1480.501 General.

All acquisitions made in accordance with this part, including simplified or commercial item acquisitions, must conform to all applicable requirements of the FAR and DIAR.

1480.502 [Reserved]

1480.503 Procedures for acquisitions under the Buy Indian Act.

(a) 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.

(b) When acquiring construction services, solicit proposals and evaluate potential contractors in accordance with FAR part 36 and DIAR subpart 1436.2.

(c) When acquiring A&E services, solicit proposals and evaluate potential contractors in accordance with FAR part 36 and DIAR subpart 1436.6.

(d) This paragraph (d) 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 subsequent to the 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) This paragraph (e) lists the clauses and provisions that must be inserted.

(1) Insert the clause at 1452.280-1, Notice of Indian Small Business Economic Enterprise set-aside, in accordance with 1480.401(c).

(2) Insert the clause at 1452.280-2, Notice of Indian Economic Enterprise set-aside, in accordance with 1480.401(d).

(3) Insert the clause at 1452.280-3, Indian Economic Enterprise subcontracting limitations, in accordance with 1480.601(b).

(4) Insert the clause at 1452.280-4, Indian Economic Enterprise representation, in accordance with 1480.801(a).

1480.504 Other circumstances for use of other than full and open competition.

(a) Other circumstances may exist where the use of an IEE set-aside in accordance with 1480.401(a) and FAR 6.302-5 is not feasible. In such situations, the requirements of FAR subparts 6.3 and 13.5 and DIAR subpart 1406.3 apply in justifying the use of the appropriate authority for other than full and open competition.

(b) Except as provided in FAR 5.202, all proposed acquisition actions must first be publicized in accordance with the requirements of FAR 5.2 and DIAR 1405.2.

(c) Justifications for use of other than full and open competition in accordance with this section must be approved in accordance with DIAR part 1406. These approvals are required for a proposed contract or for an out of scope modification to an existing contract.

1480.505 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 be cause for debarment or suspension in accordance with FAR 9.406 and 9.407 and DIAR 1409.406 and 1409.407. IA must refer recommendations for debarment or suspension to the Director, Office of Acquisition and Property Management, Department of the Interior, in accordance with DIAR 1409.406 and 1409.407, through the Head of the Contracting Activity.

Subpart 1480.6 - Contract Requirements

1480.601 Subcontracting limitations.

(a) In contracts awarded under the Buy Indian Act and this part, the CO must insert the clause FAR 52.219-14, Limitations on Subcontracting.

(b) The CO must also insert the clause at 1452.280-3, Indian Economic Enterprise subcontracting limitations, in all awards to ISBEEs and IEEs pursuant this part.

1480.602 Performance and payment bonds.

Solicitations requiring performance and payment bonds must conform to FAR part 28 and may authorize use of any of the types of security acceptable in accordance with FAR subpart 28.2 or 25 U.S.C. 1497a. 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.

Subpart 1480.7 - [Reserved]

Subpart 1480.8 - Representation by an Indian Economic Enterprise Offeror

1480.801 General.

(a) The CO must insert the provision at 1452.280-4, Indian Economic Enterprise representation, in all solicitations regardless of dollar value solicited under 1480.401(c) or (d) and in accordance with this part.

(b) To be considered for an award under 1480.401(c) or (d), an offeror must certify that it meets the definition of “Indian Economic Enterprise” (as defined in 1480.201) in response to a specific solicitation set-aside in accordance with the Buy Indian Act and this part; and

(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 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 provide written notification required by paragraph (d) of this section means that:

(1) The economic enterprise may be declared ineligible as an IEE for future contract awards under this part; and

(2) The CO may consider termination for default if it is determined to be in the best interest of the Government.

(f) A CO will review 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 subpart 1480.9.

(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.

1480.802 Representation provision.

(a) Contracting offices must provide copies of the IEE representation to any interested parties upon written request.

(b) The submission of a Solicitation Mailing List Application by an enterprise does not remove the requirement for it to provide representation as an IEE, as required by this part, if it wishes to be considered as an offeror for a specific solicitation. COs may determine the validity of the contents of the applicant's representation.

(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.

(d) The CO will review and refer to the appropriate officials all IEE misrepresentation by an offeror or failure to provide written notification of a change in IEE eligibility.

1480.803 Representation process.

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

(b) Eligibility is based on information furnished by the enterprise to a CO in the IEE representation at DIAR 1452.280-4 in response to a specific solicitation under the Buy Indian Act.

(c) The CO may ask the appropriate Regional Solicitor to review the enterprise's representation.

(d) The CO may also request the Office of the Inspector General (on Form DI-1902 as part of a normal pre-award audit) to assist in determining the eligibility of the low responsive and responsible offerors on Buy Indian Act awards.

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

Subpart 1480.9 - Challenges to Representation

1480.901 General.

(a) The CO can accept an offeror's written representation of being an IEE (as defined in 1480.201) only when it is submitted with an offer in response to a solicitation under the Buy Indian Act. Another interested party may challenge the representation of an offeror or contractor by filing a written challenge to the applicable CO in accordance with the procedures in 1480.902.

(b) After receipt of offers, the CO may question the representation of any offeror in a specific offer by filing a formal objection with the CCO.

1480.902 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 1480.201 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 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, telefax, telegram, 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 electronic mail.

(e) Within 3 days after receiving a copy of the challenge and the CO's request for detailed information, the challenged offeror must file, as specified at paragraph (d)(2) of this section, 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 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 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 by other expeditious means including by hand, email, telefax, or telegraph if actual delivery can be shown, and make known to all parties the option to appeal the determination to the Director, Office of Acquisition and Property Management, Department of the Interior (PAM).

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

1480.903 Award in the face of challenge.

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

(1) This determination of validity is final unless it is appealed to the Director of PAM and the CO is notified of the appeal before making award.

(2) If an award was made before the CO received notice of appeal, the award 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 solicitation will not be awarded due to a pending challenge. 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 or terminated, a mutual no cost agreement will be sought.

1480.904 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.