Subpart 326.6—Acquisitions Under the Buy Indian Act

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Parent topic: PART 326—OTHER SOCIOECONOMIC PROGRAMS

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.

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 (Pub. L. 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 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).

For a proposed contract action	The following official may authorize a deviation
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 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.