

Dated: October 13, 2021.

John Blevins,

Acting Regional Administrator, Region 4.

[FR Doc. 2021–22914 Filed 10–26–21; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

48 CFR Parts 1426, 1452 and 1480

[DOI–2019–0012; 190D0102DM DS62500000
DLSN00000.000000 DX62501]

RIN 1090–AB21

Acquisition Regulations; Buy Indian Act; Procedures for Contracting

AGENCY: Assistant Secretary for Policy, Management and Budget, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Interior proposes to revise regulations implementing the Buy Indian Act, which provides the Department with authority to set aside procurement contracts for Indian-owned and controlled businesses. These revisions would eliminate barriers to Indian Economic Enterprises from competing on certain construction contracts, expand Indian Economic Enterprises' ability to subcontract construction work consistent with other socio-economic set-aside programs, and give greater preference to Indian Economic Enterprises when a deviation from the Buy Indian Act is necessary, among other updates.

DATES: Comments must be received on or before December 27, 2021. Consultation sessions with Tribes and Alaska Native corporations will be held on Wednesday, December 1, 2021, 2 p.m. to 4 p.m. ET.

ADDRESSES: You may submit comments on the rulemaking on Docket Number DOI–2019–0012 through the Federal eRulemaking Portal at <https://www.regulations.gov>. Please use Regulation Identifier Number (RIN) 1090–AB21 in your message. Follow the instructions on the website for submitting comments.

FOR FURTHER INFORMATION CONTACT: Mr. Christopher Bell, Senior Small Business Specialist, Office of Small and Disadvantaged Small Business, Department of the Interior, 1849 C Street NW, Mail Stop 4214 MIB, Washington, DC 20240; telephone (202) 208–3458 or email christopher_bell@ios.doi.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of the Interior Acquisition Regulations (DIAR) are in title 48, chapter 14 of the Code of Federal Regulations (48 CFR parts 1401–1499) and include regulations implementing the Buy Indian Act (25 U.S.C. 47, as amended). The Department recently reviewed the DIAR consistent with Executive Order (E.O.) 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*. The Department has identified various aspects of parts 1426, 1452, and 1480 that are barriers to equal opportunity for Indians and Indian Tribes in the Department of the Interior (DOI) procurement process. These barriers inhibit job creation, are ineffective at promoting maximum economic development in Indian Country, and limit Indian country from fully participating in Interior procurements subject to the Buy Indian Act.

This rule supplements the Federal Acquisition Regulation (FAR) and revises the DIAR. For this reason, the rule is issued by the Assistant Secretary for Policy, Management and Budget and follows the numbering system established by the FAR and DIAR. The DIAR was last revised in 2013 and included the addition of a new part 1480 to address acquisitions under the Buy Indian Act. *See* 78 FR 34266 (June 7, 2013).

II. Description of Changes

This rule proposes to revise the DIAR in the following ways, as explained below: Eliminate the restriction on Indian Economic Enterprises (IEE) from competing on “covered” construction contracts issued under the Buy Indian Act; expand IEEs' ability to subcontract work subject to the Buy Indian Act consistent with other government socio-economic set-aside programs; give greater preference to IEEs; update the process and thresholds for deviations; and clarify applicability.

A. Elimination of Restriction for “Covered” Construction Contracts

Interior's review of DIAR parts 1426, 1480, and 1452 identified changes in law that affect how Interior applies the *Andrus v. Glover Construction Co.* Supreme Court decision, 446 U.S. 608 (1980). The case has underpinned the current language of the DIAR part 1480, which restricts IEE set-asides to “covered” construction. Interior has determined that the underlying law upon which the case was decided has significantly changed since the case was decided in 1980. The decision

references 41 U.S.C. 252, which was amended by The Deficit Reduction Act of 1984 (Pub. L. 98–369) and moved to 41 U.S.C. 253. Interior has reviewed 41 U.S.C. 253 as currently codified (and now reclassified to 41 U.S.C. 3301 *et seq.* per Pub. L. 111–315) and has determined that the “covered” construction language in the regulation is no longer required by law. Interior has removed all references to “covered” construction throughout the regulation. Removal of this language will allow for the set-aside of construction contracts to IEEs.

B. Expansion of Indian Economic Enterprises' Ability To Subcontract

Since Interior proposes to remove references to “covered” construction and allow IEEs to compete for all construction contracts, Interior has identified restrictions on IEEs that exceed restrictions in other government socio-economic set-aside programs. Currently, 48 CFR 1452.280–3 restricts the ability of IEEs from subcontracting more than 50% of the work to firms other than IEEs. This rule does not change the 50% subcontract limitation for supplies and services. However, the 50% limitation is currently not consistent with FAR clause 52.219–14 Limitation on Subcontracting which has different limitations for construction awards. This rule ensures that the 48 CFR 1452.280–3 clause is consistent with the FAR 52.219–14 clause. The change will allow IEEs to subcontract up to 75% for construction by special trade contractors and 85% for general construction. Consistency with FAR clause 52.219–14 ensures equal treatment of IEEs in Federal procurement and removes subcontracting barriers for IEEs.

C. Preference for Indian Small Business Economic Enterprises

The proposed rule revises 48 CFR 1480.4 to clarify and simplify the preferences granted to IEEs under the Buy Indian Act. The current language of section 1480.403(b) directs Contracting Officers (CO) to solicit purchases as an unrestricted small business set-aside open to non-ISBEE firms when the CO determines two or more Indian Small Business Economic Enterprises (ISBEE) would not provide competitive offers and the CO has an approved deviation. The proposed rule would delete existing language, because it has been determined to not be fully compliant with the Buy Indian Act.

The revised section 1480.401(c) adds language that the CO will give priority to ISBEEs for all purchases subject to the Buy Indian Act. The current

language of 1480.4 only gives preference to ISBEs when the purchase is commercial or a simplified acquisition. Section 1480.401(d) adds language that if a CO determines that there is not a reasonable expectation of obtaining competitive offers, then the CO will give priority to IEEs. The updated language would also allow sole source awards to an ISBE or IEE authorized under the FAR to be compliant with the Buy Indian Act.

D. Updates to Thresholds and Process for Deviations

Interior has determined the existing deviation process at 48 CFR 1480.403 to be burdensome in implementation and not fully compliant with the Buy Indian Act. The proposed rule clarifies the deviation process by identifying acquisitions that do not require a deviation and streamlining the actions taken after a deviation is approved. As proposed at section 1480.403(b), if a contract follows the requirements of FAR 6.3 or is subject to a previously approved deviation, the contract no longer requires an approved deviation. As proposed at section 1480.403(f), acquisitions made under an authorized deviation from the Buy Indian Act must follow the FAR and DIAR unless specified otherwise.

Other changes to the deviation process include:

- Adding section 1480.403(a) which ensures sole source awards made to IEEs or ISBEs comply with the requirements of the Buy Indian Act and do not require a deviation;
- Adding COs as authorized to approve deviations under \$25,000 at section 1480.403(c);
- Updating deviation approval thresholds in section 1480.403(c) from \$550,000 to \$700,000 to be consistent with changes in FAR 6.304; and
- Adding “one level above the CO” to officials authorized to approve deviations for actions exceeding \$25,000 but not exceeding \$700,000 in section 1480.403(c).

E. Inapplicability to ISDEAA Contracts

The proposed rule removes language referencing the Indian Self Determination and Education Assistance Act (ISDEAA) (Pub. L. 93–638) in 48 CFR 1426.70 and 1480.504(b). Contracts issued under the authority of ISDEAA are not covered under the FAR and are codified separately under 25 CFR part 900. Since the contracts under ISDEAA are not a procurement action subject to the FAR and are separately codified, there is no need to address contracts subject to ISDEAA in the DIAR. This rule specifically removes 48

CFR 1426.70, 1452.226–70, 1452.226–71, and 1480.504(b) in their entirety and removes all other references to those sections.

III. Tribal Consultation

The Office of the Assistant Secretary—Indian Affairs will be hosting Tribal consultation and Alaska Native corporation consultation meetings addressing this rule on Wednesday, December 1, 2 p.m.–4 p.m. ET. Please register in advance at: <https://www.zoomgov.com/meeting/register/vJltdyhrDsqEqErEEGizgMi5rooyGrj12s>.

IV. Development of the Proposed Rule

This proposed rule has been developed with consideration of prior rule-making comments and from experience in implementing existing regulations. Prior comments on previous proposed rules were published in the **Federal Register** and may be viewed there. Previous proposed rules were published on October 8, 1982 (47 FR 44678), November 15, 1984 (49 FR 45187), June 30, 1988 (53 FR 24738), September 12, 1991 (56 FR 46468), and July 26, 2012 (77 FR 43782).

V. Required Determinations

1. *Regulatory Planning and Review (Executive Orders 12866 and 13563).* Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this proposed rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 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. E.O. 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. We have developed this rule in a manner consistent with these requirements.

2. *Regulatory Flexibility Act.* The Secretary certifies that the adoption of this proposed 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 proposed 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. This proposed rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. This proposed 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 proposed rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments, or the private sector nor does the rule impose requirements on State, local, or Tribal governments. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. *Takings (E.O. 12630).* This proposed 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 (E.O. 13132).* Under the criteria in section 1 of E.O. 13132, this proposed rule does not have sufficient Federalism implications to warrant the preparation of a federalism summary impact statement. It 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 (E.O. 12988).* This proposed rule complies with the requirements of E.O. 12988. Specifically, this rule (1) meets the criteria of section 3(a) of this E.O. requiring 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 E.O. requiring that all regulations be written in clear language and contain clear legal standards.

8. *Consultation with Indian Tribes (E.O. 13175).* The Department of the

Interior 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's consultation policy and under the criteria in E.O. 13175 and have determined there may be substantial direct effects on federally recognized Indian Tribes that will result from this rulemaking. The Department has invited Tribes by letter to consult on these proposed regulations and will hold consultation sessions with Tribes on October 15 and 20, 2021, 1 p.m. to 3 p.m. by webinar.

9. *Paperwork Reduction Act*, 44 U.S.C. 3501, *et seq.* This proposed rule requires offerors to certify whether they met the definition of an "Indian Economic Enterprise". 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 proposed 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. *Effects on the Energy Supply (E.O. 13211)*. This proposed rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

12. *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.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **FOR FURTHER INFORMATION CONTACT** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the number of section or paragraphs that you find unclear, which section or sentences are too long, the sections where you feel lists or tables would be useful, etc.

13. *Public availability of comments*. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. When submitting comments please identify what topic your comment covers from the following list:

- (1) Covered Construction
- (2) Subcontract Limitations
- (3) Buy Indian Act Deviations
- (4) Other Topic Related to the Proposed Rule

This action is taken pursuant to delegated authority.

List of Subjects in 48 CFR Parts 1426, 1452, and 1480

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

For the reasons set out in the preamble, the DOI proposes to amend chapter 14 of title 48 CFR as follows:

PART 1426—OTHER SOCIOECONOMIC PROGRAMS

■ 1. The authority citation for part 1426 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

Subpart 1426.70—[Removed and Reserved]

■ 2. Remove and reserve subpart 1426.70.

PART 1452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. The authority citation for part 1452 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

Subpart 1452.2—Text of Provisions and Clauses

1452.226–70 and 1452.226–71 [Removed and Reserved]

- 4. Remove and reserve sections 1452.226–70 and 1452.226–71.
- 5. Revise sections 1452.280–1 through 1452.280–4 to read as follows:

1452.280–1 Notice of Indian Small Business Economic Enterprise set-aside.

As prescribed in 1480.503(e)(1), and in lieu of the requirements of FAR 19.508, insert the following provision in each written solicitation of offers to provide supplies, general services, A–E services, or construction. If the solicitation is oral, information substantially identical to that contained in the provision must be given to potential offerors.

Notice of Indian Small Business Economic Enterprise Set-Aside (FEB 2021)

Under the Buy Indian Act, 25 U.S.C. 47, offers are solicited only from Indian Economic Enterprises (Subpart 1480.8) that are also small business concerns. Any acquisition resulting from this solicitation will be from such a concern. 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 provision)

1452.280–2 Notice of Indian Economic Enterprise set-aside.

As prescribed in 1480.503(e)(2), insert the following clause in solicitations and contracts involving Indian Economic Enterprise set-asides. If the solicitation is oral, information substantially identical to that contained in the provision must be given to potential offerors.

Notice of Indian Economic Enterprise Set-Aside (FEB 2021)

(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 a Federally Recognized Indian Tribe.

Indian Economic Enterprise means any business activity owned by one or more Indians or Federally Recognized Indian Tribes that is established for the purpose of profit, provided that:

- (i) The combined Indian or Federally Recognized Indian Tribe ownership of the enterprise shall constitute not less than 51 percent;
- (ii) The Indians or Federally Recognized Indian Tribes shall, together, receive at least 51 percent of the earnings from the contract; and

(iii) The management and daily business operations of an Indian Economic 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 the requirements of (i) through (iii) throughout the following time periods:

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

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 (ANCSA).

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.

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 1480.8.

(b) General.

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

(2) The Contracting Officer (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 1452.280-3, 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 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.

(End of clause)

1452.280-3 Indian Economic Enterprise subcontracting limitations.

A contractor shall not subcontract more than the subcontract limitations specified under FAR 52.219-14 to other than responsible Indian Economic Enterprises when receiving an award under the Buy Indian Act. For this purpose, work to be performed does not include the provision of materials, supplies, or equipment. As prescribed in 1480.503(e)(3), insert the following clause in each written solicitation or contract to provide supplies, general services, A-E services, or construction:

Indian Economic Enterprise Subcontracting Limitations (FEB 2021)

(a) Definitions as used in this clause.

(1) *Concern* means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States or its outlying areas and that makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, materials and/or labor, etc. It includes but is not limited to an individual, partnership, corporation, joint venture, association, or cooperative. For the purpose of making affiliation findings (see FAR 19.101), it includes any business entity, whether or not it is organized for profit or located in the United States or its outlying areas.

(2) *Subcontract* means any agreement (other than one involving an employer-employee relationship) entered into by a government prime contractor or subcontractor calling for supplies and/or services required for performance of the contract, contract modification, or subcontract.

(3) *Subcontractor* means a concern to which a contractor subcontracts any work under the contract. It includes subcontractors at any tier who perform work on the contract.

(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 employees 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 Affairs, 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 supplies, general services, A-E services, and construction awarded under this contract.

1452.280-4 Indian Economic Enterprise representation.

As prescribed in 1480.503(e)(4), insert the following provision in each written solicitation for supplies, services, A-E, or construction:

Indian Economic Enterprise Representation (FEB 2021)

(a) The offeror represents as part of its offer that it [] does [] does not meet the definition of Indian Economic Enterprise (IEE) as defined in DIAR 1480.201 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 in writing if there is any ownership change affecting compliance with this representation.

(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 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)

■ 6. Under the authority of 25 U.S.C. 9, revise subchapter H to read as follows:

Subchapter H—Buy Indian Act

PART 1480—ACQUISITIONS UNDER THE BUY INDIAN ACT

Subpart 1480.1—General

- 1480.101 Scope of part.
- 1480.102 Buy Indian Act acquisition regulations.

Subpart 1480.2—Definitions

- 1480.201 Definitions.

Subpart 1480.3—Applicability

- 1480.301 Scope of part.
- 1480.302 Restrictions on the use of the Buy Indian Act.

Subpart 1480.4—Policy

- 1480.401 Requirement to give preference to Indian Economic Enterprises.
- 1480.402 Delegations and responsibility.
- 1480.403 Deviations.

Subpart 1480.5—Procedures

- 1480.501 General.
- 1480.502 [Reserved]
- 1480.503 Procedures for acquisitions under the Buy Indian Act.
- 1480.504 Other circumstances for use of other than full and open competition.
- 1480.505 Debarment and suspension.

Subpart 1480.6—Contract Requirements

- 1480.601 Subcontracting limitations.
- 1480.602 Performance and payment bonds.

Subpart 1480.7—[Reserved]**Subpart 1480.8—Representation by an Indian Economic Enterprise Offeror**

- 1480.801 General.
- 1480.802 Representation provision.
- 1480.803 Representation process.

Subpart 1480.9—Challenges to Representation

- 1480.901 General.
- 1480.902 Receipt of challenge.
- 1480.903 Award in the face of challenge.
- 1480.904 Challenge not timely.

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

PART 1480—ACQUISITIONS UNDER THE 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 (ANCSA).

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.

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 to 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 Bureau Procurement Chief, 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 procuring 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.
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)(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 Bureau Procurement Chief with the concurrence of 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 to this part.

1480.602 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. 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 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 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 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 investigate 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, and make known to all parties the option to appeal the determination to the 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 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 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 the PAM, 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, 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.

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[FR Doc. 2021–23272 Filed 10–26–21; 8:45 am]

BILLING CODE 4334–63–P