

Tribal Economic Development Principles-at-a-Glance Series

The Buy Indian Opportunity



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What is the Buy Indian Act?

The Buy Indian Act, 25 U.S.C. § 47 is a law that authorizes the Department of the Interior, including the Bureau of Indian Affairs (BIA), the Bureau of Indian Education (BIE), and the offices of the Assistant Secretary – Indian Affairs (AS-IA), to purchase supplies, services and construction from qualified Native American vendors (“Indian economic enterprises” or "IEEs"). The Department of the Interior Acquisitions Regulations implements the Buy Indian Act. Title 48 of the Code of Federal Regulations, Part 1480 requires Indian Affairs to use the Buy Indian Act authority to give preference to Indians whenever authorized and practicable.

Federal preference for purchase of Native American goods and services started with the passage of the Indian Appropriations Act of 1886 but was not incorporated into a permanent authorizing statute until 1910. It became generally accepted during the 1980s that all BIA and Indian Health Service (IHS) procurement contracts should be awarded in accordance with the Buy Indian Act unless there is an important reason not to do so.

Effective May 9, 2022, final rule 87 FR 20761 revised the Department of the Interior's regulations implementing the Buy Indian Act. The revisions eliminated barriers to IEEs from competing on certain construction contracts, expanded IEEs' ability to subcontract construction work consistent with other socio-economic set-aside programs, and gave greater preference to IEEs when a deviation from the Buy Indian Act is necessary, among other updates. A link to the final ruling is provided here: <https://www.govinfo.gov/content/pkg/FR-2022-04-08/pdf/2022-07118.pdf>.

What opportunities does the Buy Indian Act present for Native and tribal vendors?

Indian Affairs considers all contract dollars to be set asides for Buy Indian Act vendors. An estimated \$300 million in annual contract opportunities are available to Native-owned businesses. Because the federal government makes large purchases, Buy Indian Act procurement can be profitable for contractors selected to meet the government's needs. When a Native firm is the contractor, the revenues it earns may enable it to expand operations and increase hiring in a Native community.

What kinds of purchases are covered under the Buy Indian Act?

The Buy Indian Act applies to all BIA, BIE, and AS-IA purchases. There is no dollar minimum or micro-purchase threshold, however, only the contract set asides are tracked.

What kinds of construction purchases are allowed under the Buy Indian Act?

Effective May 9, 2022, final rule 87 FR 20761 eliminated previous restrictions that allowed only “covered” construction set asides to IEEs. IEEs may compete for all construction contracts.

To what extent can IEEs subcontract with firms other than IEEs?

The contractor must comply with FAR 52.219–14 Limitations on Subcontracting clause in allocating what percentage of work to subcontract. Effective May 9, 2022, final rule 87 FR 20761 expanded the ability of IEEs to subcontract. IEEs may subcontract with firms other than IEEs for up to 75% in construction by special trade contractors, 85% in general construction, and 50% in non-construction supplies and services.

Bonding requirements are usually required for construction procurement contracts. These are particularly burdensome for tribally owned firms because they cannot pledge or put at risk tribal assets. Does the Buy Indian Act impose bonding requirements?

25 U.S.C. § 47(a) of the Buy Indian Act offers Indian-owned firms that are awarded Buy Indian Act construction contracts greater flexibility with respect to bonding requirements. This section, added in 1988, provides that the Secretary of the Interior may permit an Indian firm to identify security other than bonding when it is awarded a construction project pursuant to the Buy Indian Act. This permits the Secretary to waive the bonding requirements of the Miller Act (40 U.S.C. §§ 3131– 3134), which mandate that a prime contractor provide a bond for any federal construction project. Alternatives to bonding include posting letters of credit, certificates of deposit, and guarantees from other entities that have stronger balance sheets.

Eligibility

What constitutes an “Indian economic enterprise” or “IEE” under the Buy Indian Act? What is an “Indian small business economic enterprise” or “ISBEE?”

An 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 tribal ownership must constitute not less than 51 percent of the enterprise; the Indians or Indian tribes must, together, receive at least 51 percent 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 members of an Indian Tribe. 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.

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.

With respect to an IEE, what is meant by “Indian” and “Indian tribe”?

“Indian” means an enrolled member of a federally recognized tribe or “Native” as defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601). “Indian tribe” means an Indian Tribe, band, nation, or other group or community that is recognized as eligible for the special programs and services provided the U.S. government because of their status as Indians. This includes any Alaska Native village or regional or village corporation.

How can I find out whether the tribe I am enrolled in is federally recognized?

A list of federally-recognized tribes is published annually in the Federal Register. Below is the link to the Federal Register Internet site showing the 574 tribes listed in 2022 (Federal Register /Vol. 87, No. 19 /Friday, January 28, 2022 /Notices): <https://www.govinfo.gov/content/pkg/FR-2022-01-28/pdf/2022-01789.pdf>.

Deviations from the Buy Indian Act

Are there circumstances under which BIA, BIE, and AS-IA purchasers are permitted to deviate from the Buy Indian Act requirement?

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. Also, 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.

Deviation determinations are required for all other acquisitions where the Buy Indian Act is applicable and must be approved as described below and in Section 1480.403(c).

1. The contracting officer 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.

What must a BIA, BIE, or AS-IA purchaser do to ensure compliance after obtaining approval to deviate from Buy Indian Act policy?

As stated in section 1480.403(e) of the final rule, if a deviation determination has been approved, the contracting officer must follow the FAR and DIAR unless specified otherwise.

How to Find and Bid on Buy Indian Act Opportunities

Must I be certified to bid for a Buy Indian Act contract?

No. There is no certification process under the Buy Indian Act regulations. Whenever a Native-owned or tribally-owned firm responds to a procurement that is set aside under the Buy Indian Act regulations, it self-certifies that it qualifies as an IEE by responding to the provision in the solicitation titled "DIAR 1452.280-4, Indian Economic Enterprise representation." Please see the "Challenges" section of this document for information regarding misrepresentation.

Where can a Native or tribally owned business learn of Buy Indian Act opportunities?

Buy Indian Act opportunities are advertised in federal business opportunities, which can be accessed online in the System for Award Management (SAM) (<http://www.sam.gov>). SAM serves as the federal government's database for procurement purposes. The SAM is a valuable marketing tool because it is the primary means for federal purchasers to find prospective vendors and verify their identities and qualifications. To be a seller in the federal space, a Native firm must register in SAM. Companies must update their SAM profiles every 12 months.

Some small businesses also subscribe to bid-matching services which provide leads on potential procurement contract opportunities that match a company's qualifications. These subscriptions may often be obtained free through a local Procurement Technical Assistance Center (PTAC). See below for more about PTACs.

How must a Native or tribally owned business prepare in order to compete for a Buy Indian Act contract?

To compete for a Buy Indian Act contract, a Native or tribally owned firm must obtain various kinds of certifications and identities, including System for Award Management registration, a Unique Entity ID, CAGE Code, and NAICS code. It should also have on hand, and continually update, a capability statement.

What is a Unique Entity ID?

On April 4, 2022 the unique entity identifier used across the federal government changed from the DUNS Number to the Unique Entity ID, which is obtained through the federal government's SAM website. The Unique Entity ID is a 12-character alphanumeric ID assigned to an entity. Entity registration, searching, and data entry in SAM now require use of the new Unique Entity ID. Once a firm obtains this number, federal procurement officers and other interested parties can locate it in a database that shows the name of the company, its address, telephone number, number of employees, and kind of business.

What is a “CAGE” Code?

This is a unique five-character code that is assigned to suppliers of products and services used by federal agencies which identifies a facility at a particular location. The first and last characters are numerals and the remaining characters can be numerals or any letter except for I or O.

What are NAICS codes?

This is an abbreviation for the North American Industry Classification System. The federal government uses this code to classify businesses based on what kind of products or services they offer.

What is a capability statement?

This is a summary of a firm’s technical and business expertise and skills that details its performance history and the specific projects it has undertaken, lists awards and other honors it has earned, and provides the resumes of its key management personnel. Because a capability statement is a resume for the firm, it should be regularly updated so that it can be furnished on short notice to prospective federal and private sector buyers.

Where can a Native or tribally owned firm get help in applying for these certifications and codes and preparing a capability statement?

You can consult a local or Native American Procurement Technical Assistance Center (PTAC). PTACs have cooperative agreements with the U.S. Department of Defense to offer free services to help potential clients who are interested in federal procurement opportunities.

How can a Native or tribally owned firm locate the nearest PTAC?

The link below provides addresses of all of the PTACs in the United States. Users of the web site can use the map at the bottom of the site to click on the location nearest a tribal community and the site will identify the Native American PTAC serving that area. A Native firm can also consult its nearest local or state PTAC. <http://www.dla.mil/SmallBusiness/Pages/ptac.aspx>

Challenges

What if a business responding to a Buy Indian Act procurement solicitation claims falsely that it is an IEE?

Challenges to an IEE's status may be raised by the contracting officer or other interested parties. The contracting office will render a decision on the challenge which may be appealed to the Office of Acquisition and Property Management (PAM), Department of the Interior. Firms submitting a false certification may be suspended or debarred from participating in future procurements and may also be subject to the penalties enumerated in 31 U.S.C. §§ 3729 to 3731 and 18 U.S.C. § 287.

What can an IEE do if a BIA, BIE, or AS-IA contracting officer awards a contract to a vendor the IEE believes is not Indian?

The IEE may file a challenge with the contracting officer. To be eligible to make such a challenge, the IEE must show that it was or could have been a vendor in the transaction being challenged and that the challenged award would have a direct economic impact on the IEE. The IEE's challenge must be in writing and must be accurate, complete, and timely. It must be specific and contain detailed evidence that the vendor awarded the contract is not an IEE or is not Indian. The challenge must be submitted to the contracting officer no more than ten days from when the basis of the challenge was known or should have been known, whichever is earlier. A challenge may be made orally if it is confirmed in writing within the ten-day period.

Will the challenged vendor have an opportunity to defend him/herself?

Yes. Within three days after receiving a copy of the challenge, the challenged vendor must file with the contracting officer a complete statement and supporting evidence in opposition to the allegations contained in the written challenge. The contracting officer will then have ten days to determine whether the challenge is credible and respond by certified mail to both the challenger and the challenged vendor.

A challenged vendor may appeal this decision to the Office of Acquisition and Property Management, U.S. Department of the Interior.