MODULE 4

INDIAN & TRIBAL PREFERENCE AND CONTRACT ADMINISTRATION

The Indian Self-Determination and Education Assistance Act

- The Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975 (Public Law 93-638) authorized the Secretary of the Interior, the Secretary of Health, Education, and Welfare, and some other government agencies to enter into contracts with, and make grants directly to, federally recognized Indian tribes. The tribes would have authority for how they administered the funds, which gave them greater control over their welfare.

Section 7(b) of ISDEAA

Preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in Section 3 of the Indian Financing Act of 1974.

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Indian Preference Final Rule for Tribal Preference

- The Final Rule amended 24 CFR Sections 1000.48, 1000.50, and 1000.52 to provide for tribal preference in employment and contracting.
- Program Guidance 2013-07 (R) dated July 11, 2013, provides additional information on administering these revisions.

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Tribal Action

- Tribe passes adopts law, code, or regulations regarding Tribal Preference.
- IHA adopts policies (personnel, procurement, etc.) regarding preference.
- Such law or policy may provide preferential treatment
  - Over other Indians that are not members of the tribe in employment and **Contracting.**
  - In reductions in workforce and layoffs.

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Implementing Indian and Tribal Preference

- Certify policies and procedures (§1000.52)
- Preference clauses must be incorporated into contracts
- Include Indian and Tribal Preference reference in notices and advertisements

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Importance of Indian and Tribal Preference

- Provides special opportunities for Indian contractors in selection
- Mandates additional preference that contractors must offer Indian laborers, subcontractors, and suppliers
- Economic opportunities for Indians, tribes, recipients, and your communities
- NOT required to hire an Indian individual / firm

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Preference in Solicitation Process

- Required by Federal (and often tribal) law
- Clarify preference standards in your procurement policy
- Clarify preference standards from the outset

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Where Indian Preference Is Applied

- In selection of contractors or vendors
- In the contractor's selection of subcontractors and suppliers
- During employment and training by contractors

Qualifying Bidders, Proposers, Vendors

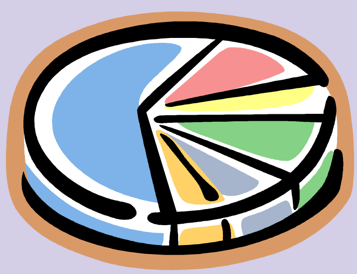
- **Specifically determine** if the individuals and entities are qualified to receive Indian preference.
- **Do not rely** on determinations and certifications made by others.

Who is Eligible for Indian Preference?

- Members of federally recognized tribes
- Federally recognized tribes
- Entities at least 51% owned AND controlled by such members or tribes

51% Ownership AND 51% Control

- Control includes voting rights, management, decision making, and allocation of profits.
- Entity owned by a tribe or a tribal member must show evidence of 51% ownership AND 51% control.



Preference Must Be Requested

- Advise all bidders, proposers, and vendors Indian preference is required in contract awards
- Parties seeking preference must request preference
- When feasible, provide interested parties with an Indian Preference Qualification Application

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Various Ways to Determine Indian Preference Eligibility

- Variety of approaches based on the size, regularity, and nature of the procurement
- More thorough the process, the better
- On large procurements, make the determination prior to the submission of the bid or proposal (pre-qualify firms)
- Shall include a determination that bidder is a responsible contractor

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When Feasible…

- Use Indian Preference Qualification Application and require supporting documentation
- Establish panel of at least three staff members to evaluate and decide eligibility
- Make independent verification and inquiry

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Common "Fronting" Practices

- Disguise how little profit tribe or member receives
- Indian tribe or member appears on paper as 51% owner, but management/control are with non-Indian
- Less than truthful in explaining resources that each owner brings to entity

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Document, Document, Document

- Carefully record decision in writing
- Make a brief decision in writing
- Be prepared to provide further explanation to anyone you disqualify
- Explain to any disqualified party that they may still submit a bid or proposal

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Reserve the Right to Reconsider

- **Reserve the right to disqualify** anyone (even if you have already qualified them) right up until the award of the contract in case you become aware of new information and/or the entity's structure changes
- **Add contract provisions** for termination if the entity loses its Indian ownership or control during the contract period

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Applying Indian Preference

24 CFR 1000.52(a)

- TDHE certifies that they have policy that will afford Indian preference that is consistent with ISDEA 25 USC 450e(b)
- OR solicit bids from Indian owned & controlled entities only
- OR use two-stage method (more…)

The Two-Stage Method

1 – Solicit **statements of intent** from Indian owned & controlled entities

2 – If two or more are received from qualified entities, then solicit bids/proposals from Indian owned & controlled entities only

- Otherwise, solicit bids/proposals from all entities using your established method of applying Indian preference

Applying Indian Preference

- If any method of Indian preference results in only one bid or proposal being received, then
- Re-advertise using any approved method of Indian preference under (a), OR
- Re-advertise to all entities using X-factor or other points for preference, OR
- Ask HUD-ONAP for approval (remember, you must justify in writing)

Using the X-Factor

Attachment A

Using the X-Factor for Indian Preference (Optional)

The following is an optional method that may be utilized in implementing the Native Preference requirements of 24 CFR 1000.52. Under this method, award shall be made under unrestricted solicitations to the lowest responsive bid from a qualified Indian owned economic enterprise or organization within the maximum total contract price established for the specific project or activity being solicited, if the bid is no more than "X" higher than the total bid price of the lowest responsive bid from any qualified bidder. The factor "X" is determined as follows:

When the lowest responsive, responsible bid is:	X = lesser of:
Less than $100,000	10% of that bid, or $9,000
At least $100,000, but less than $200,000	9% of that bid, or $16,000
At least $200,000, but less than $300,000	8% of that bid, or $21,000
At least $300,000, but less than $400,000	7% of that bid, or $24,000
At least $400,000, but less than $500,000	6% of that bid, or $32,000
At least $500,000, but less than $1,000,000	5% of that bid, or $40,000
At least $1,000,000, but less than $2,000,000	4% of that bid, or $60,000
At least $2,000,000, but less than $4,000,000	3% of that bid, or $80,000

X-Factor Exercise

1. Bids received:

Firm A (Non-Indian)	$70,000
Firm B (Indian-owned)	$80,000

Using the X-Factor, who gets the contract?

2. Bids received:

Firm A (Non-Indian)	$200,000
Firm B (Indian-owned)	$210,000

Using the X-Factor, who gets the contract?

Calculation of X-Factor:

1. Bids received:

Firm A (Non-Indian)	$70,000
Firm B (Indian-owned)	$80,000

a. Lowest bid is Non-Indian and is $10,000 below Indian firm.

b. According to the X-Factor chart, award to an Indian firm is made if the Indian bid is *no more than 10% higher* that the lowest bid:

10% of lowest bid = 10% x $70,000 = $7,000

c. Comparing the Indian bid, the difference of $10,000 is higher than 10% of the lowest bid and therefore, award is made to the non-Indian firm with its bid of $70,000.

Calculation of X-Factor:

2. Bids received:

   Firm A (Non-Indian) $200,000

   Firm B (Indian-owned) $210,000

a. Lowest bid is Non-Indian and is $10,000 below Indian firm.

b. According to X-Factor chart, award to the Indian firm is made if its bid is *no more than 8% higher* that the lowest bid:

Calculate 8% of lowest bid = 8% x $200,000 = $16,000

c. Comparing the Indian bid of $210,000, it is only $10,000 higher than the lowest bid which is less than the 8% X-factor of $16,000 and therefore, award is made to Indian firm bid at $210,000.

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CONTRACT ADMINISTRATION

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Award or Purchase Leads to a Contract

Contract is…

- Always in writing
- The contract form is may be made part of the solicitation
- Level of detail depends on circumstances

Awarding a Contract

- Award to responsive and responsible bidder with lowest bid or highest scored offeror
- Compare with cost/price analysis
- Comply with Indian and tribal preferences
- Carefully scrutinize and document
- Apply all standards evenly
- Cannot negotiate
- Can reject any and all bids or proposals for good reason

Contracts

- Can use conventional contract forms and invoices
- Use Recipient approved contract form or get legal advice before signing
- Procurement Officer transfers contract administration to contract or project manager

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Purpose and Importance of Contracts

- Clearly define expectations & timelines for all parties of the contract
- Incorporates terms that protect your right to get goods or services delivered promptly and properly
- Dispute avoidance
- Dispute resolution provisions

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Contract

- Ensure all solicitation and pre-contract terms have been complied with
- Contract may be one-page Invoice or Purchase order for micro-purchase or small purchases
- Use recipient-approved contract form (e.g., by AIA, AGC, HUD) or get legal advice before signing for construction or other professional services
- Executed by Contracting Officer for Recipient organization

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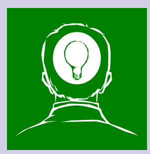
Award and Contract for Competitive Sealed-bids:



- Award and Contract:
  - Only to responsive and responsible bidder
  - Reasonable price
  - May not be the lowest bidder
- Use appropriate contract forms and methods after obtaining legal advice

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Award of Competitive Proposal Contract:

- Can reject any and all proposals for sound and documented reason
- Negotiations of a contract are allowed under certain circumstances
- Cost or price analysis required

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Competitive Proposal Contracts

- Professional services contracts often based on hourly rate and Not-To-Exceed price
- § 200.318 (j)(1-2): Time and Materials Contracts:
  - Provides no positive profit incentive to the contractor for cost control or labor efficiency, <u>therefore each contract must set a ceiling price that the contractor exceeds at its own risk.</u>
  - Requires a high degree of oversight by non-Federal Entity.

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Contract Administration Occurs After Execution of Contract

- In some cases, issue a Notice to Proceed
- Ensure contractor compliance with start-up obligations
- *Administration transferred from procurement officer to contract manager*
- Contract manager works in coordination with Project Manager

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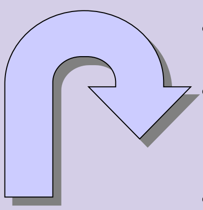
Importance of Contract Follow-Up



- Procurement evolves into contracting
- Contract execution initiates contract administration
- Compliance during performance
- Enforcement during performance through periodic work inspections
- Coordination between procurement and program staff to ensure proper payment

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Overlap of Contract Management and Project Management

- Contract management ensures fulfilment of contract requirements of all contractor obligations and payment for work or service delivered
- Project management is the process of completing the project by the contractor towards meeting the Recipient's objectives and assuring work being done accordingly and within the contracted amount & timeline
- Contract Manager or Contract Officer works in coordination with Project Manager throughout contract to closeout

Post-Award Procedures

1. Hold post-award conference
2. Issue notice to proceed, if applicable
3. Monitor contractor performance/compliance
4. Receipt of supplies, services, or construction.
5. Monitoring Inspection of supplies, services, or construction.
6. Acceptance of supplies, services, or construction.
7. Payment for work completed and accepted.
8. Exercise any applicable options for additional quantity or time period.
9. Project and Contract completion.
10. Project and Contract closeout.

Q & A Session

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