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RECIPIENT GUIDANCE

PROGRAM: Indian Housing Block Grant (IHBG)

FOR: All Tribal Government Leaders and Tribally Designated Housing Entities

FROM: Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs, PN

TOPIC: Indian and Tribal Preferences in Employment and Contracting in IHBG

Purpose: The purpose of this guidance is to provide tribes and tribally designated housing entities (TDHEs) with updated information on implementing regulatory changes relating to tribal preference in employment and contracting in the IHBG program. The guidance also addresses the distinction between Indian preference and tribal preference, and addresses requirements under Section 3 of the Housing and Urban Development Act of 1968 relating to economic opportunities for low- and very low-income persons.

Background: Section 101(k) of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), authorizes tribal preferences in employment and contracting when using IHBG funds. The NAHASDA final rule, published on December 3, 2012, amended 24 CFR Sections 1000.48, 1000.50, and 1000.52 to provide for tribal preference in employment and contracting. This guidance provides tribes and TDHEs with additional information on administering these revisions.

Indian Preference: IHBG regulations require tribes and TDHEs to comply with Section 7(b) of the Indian Self-Determination and Education Assistance Act (U.S.C. 450e(b)) and, to the greatest extent feasible, give preference in the award of contracts for projects funded under the IHBG program to Indian organizations and Indian-owned economic enterprises. The law requires Indian preference in training and employment and in the award of contracts and subcontracts.

Tribal Preference: When an Indian tribe has adopted a tribal preference law, regulation, or ordinance governing preferences in employment and contracting, that tribal preference law will govern any preferences in employment and contracting under the IHBG program. Such laws may, for instance, provide tribal members with preferential treatment over other Indians that are not members of the tribe in employment and contracting carried out under an IHBG grant. Tribal preference laws may also specify any preferences in reductions in workforce and layoffs.

Tribes and TDHEs that adopt a tribal preference law must comply with that tribal law in lieu of Indian preference requirements that would otherwise apply under Section 7(b) of the Indian Self-Determination and Education Assistance Act.

If a TDHE is the IHBG recipient, it must comply with the tribal preference laws of the beneficiary tribe. If the TDHE is authorized to issue regulations or ordinances under tribal law, any regulations or ordinances issued by the TDHE that provide for tribal preferences in employment and contracting will govern under the IHBG program.

Applicability of Other Requirements:

- a. Small Purchase Procurement:** Procurements that are less than the simplified acquisition threshold, recently increased to \$150,000, but equal to or greater than \$5,000, are considered small purchases under 24 CFR §85.36(d)(1). If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources. Recipients carrying out small purchase procurement must still comply with Indian preference or tribal preference requirements that are applicable.
- b. De Minimis Exception:** Procurements with a value less than \$5,000, known as "De Minimis procurement" or "Micro-Purchasing," are not subject to Indian preference requirements pursuant to 24 CFR §§1000.48(c) and 1000.52(d). Recipients are also exempt from complying with the general procurement requirements in 24 CFR §85.36 when carrying out De Minimis procurement. See the PIH Notice on *Micro-Purchasing* for additional information.
- c. Federal Supply Sources:** In accordance with Section 101(j) of NAHASDA, recipients may use federal supply sources made available by the General Services Administration (GSA), pursuant to 40 U.S.C. 501. Recipients must still comply with any Indian preference or tribal preference requirements that may be applicable when procuring goods and services through GSA's supply sources. See Program Guidance 2010-09 for additional information.
- d. Section 3:** Generally, if an IHBG recipient has projects or activities that exceed \$200,000 or more in HUD financial assistance, the recipient is subject to the requirements of Section 3 of the Housing and Urban Development Act of 1968, (12 U.S.C. 1701u), and HUD's implementing regulations at 24 CFR Part 135. Section 3 regulations require recipients to provide certain preferences in job training, employment, and contracting to low-income individuals.

HUD will be launching a new online Section 3 reporting system (60002) for the 2013 reporting period. The new system will resolve some of the technical issues encountered with the current system, will reduce user errors, and will decrease recipient burden. A series of trainings on the new 60002 reporting system will be offered in the coming weeks, and will be posted on the Section 3 webpage at www.hud.gov/section3. This site will also provide assistance if you are having technical difficulties.

The current Section 3 reporting system at:

<http://www5.hud.gov:63001/apps/po/e/srs/Public/form.cfm> **will no longer be available after July 1, 2013.** Additional guidance will be posted on the above webpage after July 1, 2013 for agencies that are unable to meet the reporting requirements before the system terminates.

If you have any questions or concerns, please send an email to: section3@hud.gov. HUD's Section 3 office will make every effort to respond to you within 2 business days.

Recipients must submit a completed Section 3 Summary Report (HUD-60002) describing employment, training, and contracting opportunities provided to low-, and very low-income persons, as required by 24 CFR Section 135.90. The Section 3 Summary Report (HUD-60002) is required to be submitted to HUD's Office of Fair Housing and Equal Opportunity at the same time the recipient submits its Annual Performance Report (APR) to the Area Office of Native American Programs (ONAP).

Exemption: Recipients that are subject to and complying with tribal employment and contract preference laws adopted in accordance with Section 101(k) of NAHASDA are deemed to be in compliance with the requirements of Section 3. Therefore, such recipients do not have to establish preferences for applicants claiming Section 3 status when hiring or procuring goods or services in order to meet the requirements of Section 3. These recipients also are not required to submit the annual HUD-60002 form.

Indian Preference Procurement Requirements: As stated above, in the absence of tribal employment and contracting preference laws, a recipient must, to the greatest extent feasible, give preference and opportunities for training and employment in connection with the administration of NAHASDA grants in accordance with the Indian preference requirements of Section 7(b) of the Indian Self-Determination and Education Assistance Act. Recipients may comply with Indian preference requirements by:

- Certifying to HUD that the policies and procedures adopted by the recipient will provide preference in procurement activities. (An Indian preference policy that was previously approved by HUD for a recipient will meet the requirements of this section);
- For procurement by sealed bids, advertising for bids or proposals limited to qualified Indian organizations and Indian-owned enterprises; or
- Using a two-stage preference procedure as follows:

Stage 1. Invite or otherwise solicit Indian-owned economic enterprises to submit a statement of intent to respond to a bid announcement or request for proposals limited to Indian-owned firms.

Stage 2. If responses are received from more than one Indian enterprise found to be qualified, advertise for bids or proposals limited to Indian organizations and Indian-owned economic enterprises.

All preferences must be publicly announced in the advertisement and bidding or proposal solicitation documents and the bidding and proposal documents. If fewer than two responsive, qualified organizations or enterprises submit a statement of intent, a bid, or a proposal to perform the contract at a reasonable cost, then the recipient must:

- (i) Re-advertise the contract, limiting the solicitation to qualified Indian organizations and Indian-owned enterprises; or
- (ii) Re-advertise the contract without limiting the advertisement for bids or proposals to Indian organizations and Indian-owned economic enterprises; or
- (iii) If only one approvable bid or proposal is received, the tribe or TDHE should request Area ONAP review and approval of the proposed contract and related procurement documents in order to award the contract to the single bidder or offeror.

A recipient may require information of prospective contractors seeking to qualify as Indian organizations or Indian-owned economic enterprises. Examples of such information may include:

- (i) evidence showing fully the extent of Indian ownership and interest; (ii) evidence of structure, management, and financing affecting the Indian character of the enterprise, including major subcontracts and purchase agreements; materials or equipment supply arrangements; management salary or profit-sharing arrangements and evidence showing the effect of these on the extent of Indian ownership and interest; and (iii) evidence sufficient to demonstrate to the satisfaction of the recipient that the prospective contractor has the technical, administrative, and financial capability to perform contract work of the size and type involved.

Recipients must incorporate the following, commonly referred to as the Section 7(b) clause, in each contract awarded in connection with a funded project:

- (i) The work to be performed under this contract is on a project subject to Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)). Section 7(b) requires that, to the greatest extent feasible:

- (A) Preferences and opportunities for training and employment shall be given to Indians; and

- (B) Preferences in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises.

- (ii) The parties to this contract shall comply with the provisions of Section 7(b) of the Indian Self-Determination and Education Assistance Act.

- (iii) In connection with this contract, the contractor shall, to the greatest extent feasible, give preference in the award of any subcontracts to Indian organizations and Indian-owned economic enterprises, and preferences and opportunities for training and employment to Indians.

(iv) The contractor shall include this Section 7(b) clause in every subcontract in connection with the project; shall require subcontractors at each level to include this Section 7(b) clause in every subcontract they execute in connection with the project; and shall, at the direction of the recipient, take appropriate action pursuant to the subcontract upon a finding by the recipient or HUD that the subcontractor has violated the Section 7(b) clause.

If you have questions or need further assistance please contact your Area ONAP.