Buy Indian Act Updates

Advance Draft Listening Session
NCAI Annual Convention
October 21st, 2019
Reasons for Updating

- Improve Implementation of the requirements of the Buy Indian Act
- Strengthen the oversight of the Buy Indian Act to reduce potential of fraud or abuse
- Alleviate unnecessary regulatory burden as directed by Executive Order 13777 Enforcing the Regulatory Reform Agenda
- Current rule is overly burdensome for DOI implement
Terms in the Proposed Rule

- IEE - Indian Economic Enterprise
- ISBEE - Indian Small Business Economic Enterprise
- FAR - Federal Acquisition Regulation
- DIAR - Department of Interior Acquisition Regulation Supplement
- ISDEAA - Indian Self-Determination and Educational Assistance Act
- CO - Contracting Officer
The Buy Indian Act

- Title 25 U.S.C. § 47 states:

  "So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior."
Proposed Rule Summary

- Reduces potential for fraud and abuse by strengthening the IEE certification process
- Gives maximum preferences to ISBEEs and IEEs
- Revises and optimizes the process for deviating from the Buy Indian Act
- Removes references to ISDEAA
- Eliminates the restriction that prevents construction contracts from being set-aside for ISBEEs or IEEs
- Updates the limitations on subcontracting to match the construction limitations in the FAR
Reducing Fraud and Abuse

- Current rule allows for self-certification of IEE status
- Proposed rule now has processes to certify, identify, and validate IEE status
- 51% ownership, majority earnings, and daily business operations requirements would remain the same as current rule
- Also remaining the same are the requirements of 1480.801(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.
Reducing Fraud and Abuse – Certifying Text

Certifying and Identification Text of 1452.280-4(b) *Indian Economic Enterprise representation*:

“The offeror certifies that the ownership requirements defined by DIAR 1480.201 are met through the following Federally Recognized Indian Tribes or Alaska Native Corporations:

___________________________[insert name of the Federally Recognized Indian Tribe or Alaska Native Corporation]”
Reducing Fraud and Abuse - Validation of Ownership Information

- The CO must validate the IEE representation
- 1480.803 (b) The CO shall review the ownership information and ensure that the information submitted matches the List of Federally Recognized Tribes or is an Alaska Native Corporation
- Offers that do not submit verifiable information are not eligible for award
- Offers have the opportunity to correct information
- Proposed rule retains language to challenge representation at 1480.9 Challenges to Representation
Preference for ISBEEs and IEEs - Current Rule

- Separates acquisition into two categories
  - Commercial item or simplified acquisitions - Shall be set-aside for ISBEEs
  - Acquisitions in excess of the Simplified Acquisition Threshold ($250,000) - Shall be set-aside for IEEs

- These rigid procedures mandate that everything else is a deviation

- For instance, a $300,000 “covered” construction acquisition that was set-aside for ISBEEs would require a deviation.

- The current rule directs COs at 1480.403(b)
  - 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.
  - DOI has determined that this language is not fully compliant with the Buy Indian Act
Preferences - Proposed Rule

Is acquisition subject to ISDEAA? 1480.302

 acquisition is not subject to the Buy Indian Act

Is the acquisition a justified sole source? 1480.403(b)(1)

 acquisition subject to the deviation process 1480.403

 CO determines ISBEE offers will not be competitive 1480.401(e)

CO will give priority to ISBEEs 1480.401(c)

Is the acquisition an order or call placed against an contract with an approved deviation? 1480.403(b)(2)

 Offers received are not reasonable or otherwise unacceptable 1480.401(g)

 CO will give priority to IEEs 1480.401(d)

 CO determines IEE offers will not be competitive 1480.401(d)
Preference for ISBEEs and IEEs - Proposed Rule

- Gives priority to ISBEEs then IEEs
- COs can comply with the Buy Indian Act by
  - Set-aside for ISBEE/IEE or
  - Sole source award to an ISBEE/IEE under the FAR
- 8a contracts would be compliant with the Buy Indian Act
- Allows for direct negotiation when only one offer is received in response to a set-aside
Deviation Process

- Existing deviation process was burdensome and not fully compliant with the Buy Indian Act
- Created situations where IA needed a deviation for an award to an ISBEE/IEE firm
- Proposed rule specifies acquisitions not requiring a deviation
  - Justified sole source awards
  - Orders or calls placed against another indefinite delivery vehicle that has an approved deviation
- Approved deviation must follow the FAR
- Updated deviation approvals and thresholds
# Deviation Process

## Table at 1480.403(c):

<table>
<thead>
<tr>
<th>For a proposed contract action</th>
<th>The following official may authorize a deviation</th>
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<tbody>
<tr>
<td><strong>Up to $25,000</strong></td>
<td><strong>CO</strong></td>
</tr>
<tr>
<td>Exceeding $25,000 but not exceeding <strong>$700,000</strong></td>
<td><strong>One level above the CO or Chief of the Contracting Office (CCO) (or the IA Bureau Procurement Chief, absent a CCO).</strong></td>
</tr>
<tr>
<td>Exceeding <strong>$700,000</strong> but not exceeding <strong>$13.5 million</strong></td>
<td><strong>IA Competition Advocate.</strong></td>
</tr>
<tr>
<td>Exceeding <strong>$13.5 million</strong> but not exceeding <strong>$50 million</strong></td>
<td>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.</td>
</tr>
<tr>
<td>Exceeding <strong>$50 million</strong></td>
<td>Department of the Interior Senior Procurement Executive.</td>
</tr>
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</table>
References to ISDEAA

- Current rule references ISDEAA at 1426.70 and 1480.504(b)
- Contracts issued under the authority of ISDEAA are not procurement contracts subject to the FAR or DIAR
- ISDEAA regulations are codified under 25 CFR Part 900
- The proposed rule removes 1426.70 and 1480.504(b) in their entirety
- The proposed rule retains language at 1480.302 that IA must not use the authority of the Buy Indian Act to award ISDEAA contracts.
Elimination of “Covered” Construction

- Current rule restricts the Buy Indian Act to only “covered” construction
- The current rule had determined that the Supreme Court case *Andrus vs. Glover Construction Co.* prevented applicability of the Buy Indian Act to construction contracts
- There is a special application called “Covered” construction
- “Covered” construction means road construction covered under the Surface Transportation Assistance Act
Elimination of “Covered” Construction

- Underlying law relied upon in *Andrus vs. Glover Construction Co.* has substantially changed.
- DOI has reviewed the law as currently codified and has determined that the “covered” construction language in the current rule is no longer required.
- The proposed rule removes all references to “covered” construction.
- The proposed rule also explicitly includes construction and architect-engineering.
Updating the Limitations on Subcontracting

- Current rule restrictions on subcontracting exceed the restrictions set forth in the FAR
  - Current rule restricts the ability of IEEs from subcontracting more than 50% of the work to firms other than IEEs
  - The 50% limitation is currently not consistent with FAR clause which has different limitations for construction awards
  - Current rule disadvantages IEE firms with a low subcontract limit of 50% for construction
- Proposed rule does not change the 50% subcontract limitation for supplies and services
- Proposed rule ensures that the 1452.280-3 clause is consistent with the FAR clause
- Allows IEEs to subcontract work on contracts up to 75% for construction by special trade contractors and 85% for general construction
Other Updates

- Removed unnecessary definitions
- Updated contract clauses consistent with changes
- Change SUBCHAPTER H Header from “INDIAN AFFAIRS SUPPLEMENT” to “BUY INDIAN ACT” to broaden optional adoptions by other DOI bureaus
- Addition of Alaska Native Corporations to the definition of Indian Economic Enterprise
- Removal of the deviation table at 1480.403(b) and (c) since deviation now follow the FAR.
## Planned Teleconference Consultations

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<tr>
<th>Date</th>
<th>Time (local time zone)</th>
<th>Location</th>
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<tbody>
<tr>
<td>December 3rd, 2019</td>
<td>1PM EST</td>
<td>1-888-452-9848</td>
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<tr>
<td>December 5th, 2019</td>
<td>1PM EST</td>
<td>1-888-452-9848</td>
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Comments

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. Preventing Fraud and Abuse
5. Other Topic Related to the Proposed Rule
Comments

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