Proposed Updates to Buy Indian Regulations

Proposed Rule - 86 FR 59338
Tribal Consultation
December 1st, 2021
Reasons for Updating

- Implement Executive Order 13985: *Advancing Racial Equity and Support Underserved Communities Through the Federal Government*;
- Better adhere to the language and intent of the Buy Indian Act;
- Expands which contracts the Buy Indian Act applies to;
- Eliminate competitive barriers that disadvantage Indian Economic Enterprises;
- Ensure greater preference to Indian Economic Enterprises when a deviation from the Buy Indian Act is necessary.
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
I. Gives maximum preferences to ISBEEs and IEEs

II. Eliminates the restriction that prevents construction contracts from being set-aside for ISBEEs or IEEs

III. Updates the limitations on subcontracting to match the construction limitations in the FAR

IV. Removes erroneous references to ISDEAA

V. Revises and optimizes the process for deviating from the Buy Indian Act

VI. Other updates
I. Preference for ISBEEs and IEEs - Current Rule

- Separates acquisition into two categories
  - Commercial item or simplified acquisitions (< $250k):
    - 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, If a Contracting Officer has a $300,000 acquisition and market research indicates a set-aside for ISBEEs that acquisition would require a deviation
- The current deviation process 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 ISBEEs 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
I. 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
II. 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
II. Elimination of “Covered” Construction (cont’d)

- 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.
III. 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:
    - Not consistent with FAR clause which has different limitations for construction awards
    - Disadvantages IEE firms

- Proposed rule:
  - Ensures consistency with the FAR clause (see 1452.280-3)
  - Allows IEEs to subcontract work on contracts up to:
    - 75% for construction by special trade contractors and
    - 85% for general construction
  - Does not change the 50% subcontract limitation for supplies and services
IV. 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.
V. 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
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>Up to $25,000</td>
<td>CO</td>
</tr>
<tr>
<td>Exceeding $25,000 but not exceeding $700,000</td>
<td>One level above the CO or Chief of the Contracting Office (CCO) (or the IA Bureau Procurement Chief, absent a CCO).</td>
</tr>
<tr>
<td>Exceeding $700,000 but not exceeding $13.5 million</td>
<td>IA Competition Advocate.</td>
</tr>
<tr>
<td>Exceeding $13.5 million but not exceeding $57 million</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 $57 million</td>
<td>Department of the Interior Senior Procurement Executive.</td>
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</tbody>
</table>
When Buy Indian Act Applies—Proposed Rule

Is acquisition subject to ISDEAA? DIAR 1480.302

Yes

Acquisition is not subject to the Buy Indian Act

No

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

Yes

Acquisition is exempt from Buy Indian Act procedures

No

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

Yes

Acquisition is subject to the Buy Indian Act procedures

No
CO will give priority to ISBEEs
DIAR 1480.401(c)

Unless

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

Then

CO will give priority to IEEs
DIAR 1480.401(d)

Unless

CO determines IEE offers will not be competitive
DIAR 1480.401(e)

Then

Acquisition subject to the deviation process
DIAR 1480.403
VI. Other Updates

- Remove unnecessary definitions
- Update 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
- Remove the deviation table at 1480.403(b) and (c) because deviation now follows the FAR
Comments

Please submit your comments by December 27th, 2021:

- **Comments may be submitted to** [www.regulations.gov](http://www.regulations.gov).
- 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) Indian Self-Determination and Education Assistance Act
  - (5) Other Topic Related to the Proposed Rule