

# Proposed Updates to Buy Indian Regulations

Proposed Rule - 86 FR 59338

Tribal Consultation

December 1<sup>st</sup>, 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

# Proposed Rule Summary

- 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

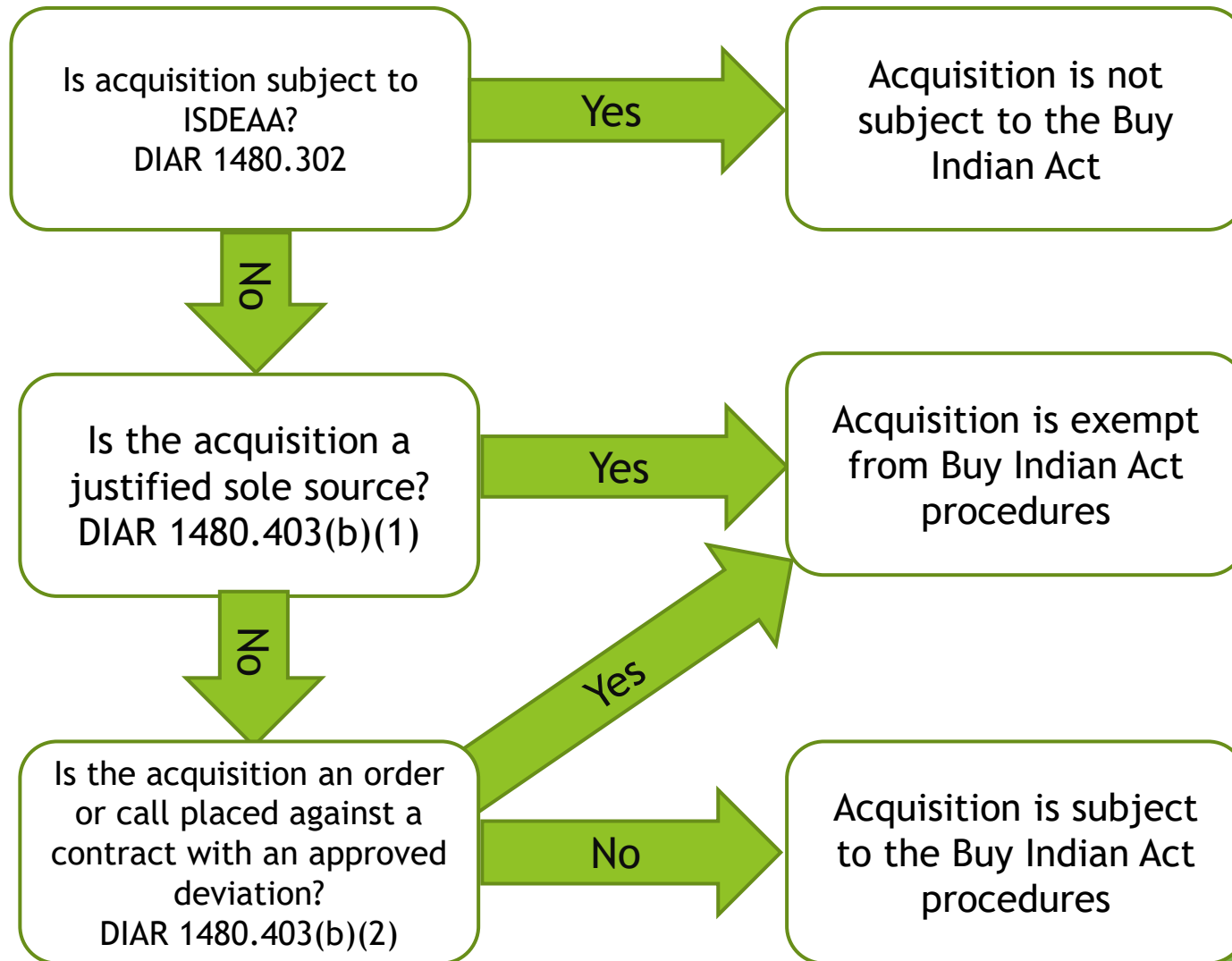
# V. Deviation Process (cont'd)

Table at 1480.403(c):

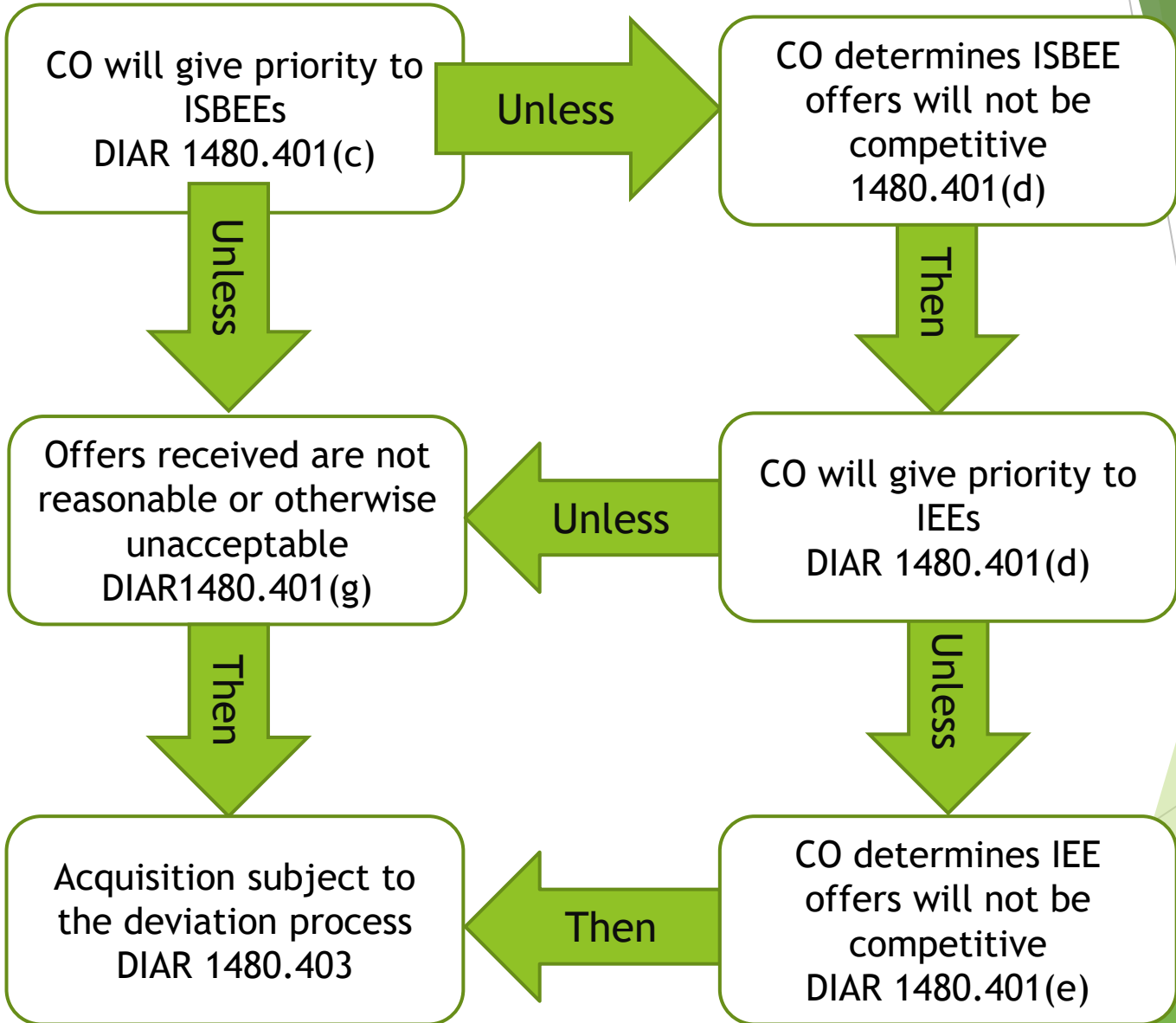
For a proposed contract action	The following official may authorize a deviation
Up to \$25,000	CO
Exceeding \$25,000 but not exceeding <b>\$700,000</b>	<b>One level above the CO or Chief of the Contracting Office (CCO)</b> (or the IA Bureau Procurement Chief, absent a CCO).
Exceeding <b>\$700,000</b> but not exceeding <b>\$13.5 million</b>	IA Competition Advocate.
Exceeding <b>\$13.5 million</b> but not exceeding <b>\$57 million</b>	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.
Exceeding <b>\$57 million</b>	Department of the Interior Senior Procurement Executive.

**Bold indicates proposed changes**

# When Buy Indian Act Applies- Proposed Rule



# IEE/ISBEE Preferences - Proposed Rule



# 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 27<sup>th</sup>, 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