

# Summary of Comments Received During June 2021 Consultation with Tribes and Alaska Native Corporations and Department of the Interior Responses

## Accountability for Implementing the Buy Indian Act

Three Tribes and a Tribal organization offered several suggestions for increasing accountability for using the Buy Indian Act. For example, the Tribes urged BIA to establish a goal of 30% for Indian-owned small business economic enterprises (ISBEE) and 25% for Indian-owned economic enterprises (IEE).

*Response:* The Department of Interior is committed to following policy set forth at DIAR 1480.401 “to give preference to Indian or Federally Recognized Tribes whenever the use of that authority is practicable”. These proposed regulation revisions remove barriers to setting aside certain construction requirement and expands what is practicable to set-aside for Indian Economic Enterprises. In Fiscal Year 2020 Indian Affairs has awarded over 53% to Indian Economic Enterprises. Indian Affairs is committed to giving preference to Indian Economic Enterprises to the maximum extent practicable and continuously monitor the marketplace to identify Indian Economic Enterprise that can perform Indian Affairs requirements.

A Tribe and Tribal organization recommended IA report on Buy Indian implementation. The Tribe recommended the development and distribution of a Buy Indian Act report annually. The Tribal organization stated that Contracting Officers at each Bureau of Indian Affairs (BIA) Regional Office should be required to collect, aggregate, and maintain accurate data to measure its progress in the implementation of the Buy Indian Act and should be required to submit quarterly and annual reports to the Office of the Assistant Secretary – Indian Affairs on the status of completed solicitations, any deviation determinations, updates on current Buy Indian Act contracts, and information on any pending or planned solicitations.

*Response:* The Office of the Assistant Secretary – Indian Affairs (IA) reports on Buy Indian Act performance to Congress and will comply with all reporting requirements of the Indian Community Economic Enhancement Act. IA is interested in collaborating with Tribes to provide more data and insight on how IA meets the requirements of the Buy Indian Act.

A Tribe recommended the Department demonstrate a commitment to small business through regular training of acquisition, program, contracting staff and senior Management, consistent with Congressional intent to strengthen Buy Indian Act procurement authority.

*Response:* IA provides annual training and other helpful information routinely to internal and external stakeholders and all acquisition staff.

A Tribal organization stressed the importance of ongoing evaluation of Buy Indian implementation and stated that DOI should hold annual Tribal Listening Sessions with each BIA Region to receive input on successes and challenges to inform DOI of potential updates required for its contracting policies and procedures, updates for internal DOI guidance, and if Tribal consultation is required to develop further updates to its Buy Indian Act regulations. The Tribal organization stated that these actions will ensure that Buy Indian Act regulations will receive timely revisions and provide a record of evidence if Congress must update the Buy Indian Act.

*Response:* IA is interested in collaborating with Tribes to provide more data and insight on how IA meeting the requirements of the Buy Indian Act and is actively exploring how to publicly share information related to Buy Indian Act performance to provide visibility to tribes.

### **Barriers to Buy Indian**

Several Tribes stated that the “rule of two” in procurement decisions is a barrier to Buy Indian implementation.

*Response:* The “rule of two” requirement is not applicable to the Buy Indian Act. The current regulation does not employ a “rule of two” requirement, and the advance draft regulatory changes do not apply the “rule of two.” Contracting Officers are required by DIAR 1480.401(d) and (e) to perform market research. Contracting Officers may waive the requirement to set-aside for SBEEs or IEEs only if there is no reasonable expectation of obtaining offers that will be competitive. When a deviation is determined to be necessary, Contracting Officers are required to document and defend the rationale. If a Contracting Officer must deviate from the Buy Indian Act preferences they must use the procedures of DIAR 1480.403 and the deviation must be approved by the officials at DIAR 1480.403(d).

### **“Indian Economic Enterprise”**

An Alaska Native Corporation stated that the definition of “Indian Economic Enterprise,” at 48 CFR § 326.601, must be clarified with regard to ANCs so that it follows rather than contravenes existing statute. 43 USC § 1626(e)(1) mandates: “For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.” 43 USC § 1626(e)(2) similarly mandates: “For all purposes of Federal law, direct and indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation qualifying pursuant to paragraph (1) shall be considered to be entities owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the shares of

stock or other units of ownership interest in any such entity held by such Native Corporation and by the holders of its Settlement Common Stock represent a majority of both—(A) the total equity of the subsidiary corporation, joint venture, or partnership; and (B) the total voting power of the subsidiary corporation, joint venture, or partnership for the purpose of electing directors, the general partner, or principal officers. ”To assure the definition of “Indian Economic Enterprise” in the proposed new regulations at 48 CFR § 326.601 complies with the requirements of 43 USC § 1626(e)(1) and (2), Calista recommends adding the following 2 sentences at the end of subsection 3 of that definition: “Alaska Native Corporations meeting the requirements of 43 USC § 1626(e)(1) shall be deemed to fulfill this requirement. Direct and indirect subsidiary corporations, joint ventures, and partnerships of Alaska Native Corporations meeting the requirements of 43 USC § 1626(e)(2) shall also be deemed to fulfill this requirement.”

*Response:* The draft rule definition at DIAR 1480.201 of “Indian Economic Enterprises” “ means any business activity owned by one or more Indians or Federally Recognized Indian Tribes”. “Federally Recognized Indian Tribes” is also defined at DIAR 1480.201 stating “means an Indian tribe, band, nation, or other Federally recognized group or community on the List of Federally Recognized Tribes. This definition includes any Alaska Native regional or village corporation under the Alaska Native Claims Settlement Act (ANSCA)”. Interior does not view the subject regulation to be in conflict with 43 U.S.C. § 1626.

A Tribal power authority stated that the definition of “Indian Economic Enterprise” assumes that Indian-owned companies are only capable of small-scale, small-budget businesses, and needs to be revised to enable Tribes to participate in future renewable energy and technology-based economies.

*Response:* The definition of Indian Economic Enterprise at Department of Interior Acquisition Regulations 1480.201 does not contain any prohibition on the types of industries or scale of enterprises.

A Tribal power authority stated that the term “owned and controlled” by a Tribal entity in the definition of “Indian Economic Enterprise” eliminates the possibility of Tribal partnership with Tribal experts and that the 51% of earnings requirement should be made flexible to accommodate different deal structures that benefit Tribes.

*Response:* Before January 1988, DOI policy required participant firms to be 100 percent Indian-owned and controlled. DOI changed its policy and subsequent regulations in order to facilitate and expand economic development in Indian communities by increasing the opportunities for Indian businesses to obtain operating capital, which was often difficult, if not impossible, to do under the “100 percent ownership” policy. The current 51% ownership requirement is designed to protect the integrity of the majority Indian owner(s) of the Indian economic enterprise, while promoting economic

development. Specifically, DOI believes that this minimum is flexible enough to provide an incentive for outside investors to partner with Indian economic enterprises and contribute needed capital and seed money to Indian communities. In addition, the rule defines Indian economic enterprise to include additional qualifications beyond just 51 percent Indian ownership to help prevent pass-through entities. To be an Indian economic enterprise, Indian(s) or tribe(s) must manage the contract, receive the majority of earnings from the contract, and control management and daily business operations. To ensure actual control, the Indian(s) must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business. Further the 51% ownership, earnings, and management of business operations requirement is consistent with other Federal socio-economic set-aside programs in the Federal Acquisition Regulation.

Two Tribes suggested establishing a certification program to verify that an “Indian economic enterprise” is Indian owned and controlled.

*Response:* There is no drafted or proposed changes to the self-certification process of validating IEEs. IEEs must certify that they meet the requirements of DIAR 1452.280-4. Contracting Officers and other IEEs may validate IEE status through the procedures of DIAR 1480.8 and 1480.9.

### **“Fair Market Price”**

A Tribal power authority stated that the definition of “Fair Market Price” for energy purchases must consider the chronic underinvestment in transmission infrastructure in and around Tribal lands and the externalized costs of hydropower and coal-fueled plants.

*Response:* The definition of “Fair Market Price” at Department of Interior Regulation 1480.201 is consistent with the Federal Acquisition Regulation 15.404-1(b). The definition at 1480.201 incorrectly references Federal Acquisition Regulation 19.206(a) and will be corrected to 15.404-1(b). Changes to the Federal Acquisition Regulation are not within the scope of the subject regulation.

### **Coordination with Other Federal Agencies**

A Tribal organization stated that DOI should coordinate with other Federal agencies, such as the Indian Health Service (IHS) to ensure consistency in their regulations implementing the Buy Indian Act.

*Response:* DOI is committed to faithfully implementing the Indian Community Economic Enhancement Act requirement to harmonize the regulations implementing the Buy Indian Act and will continue to coordinate with IHS.

### **Consultation**

One Alaska Native corporation stated that consultation should have occurred before BIA published proposed Buy Indian regulations in November 2020 and should have consulted rather than merely extending the deadline for comment.

*Response:* DOI did not publish any proposed regulations concerning updates to the Buy Indian Act at any point in 2020 or the first half of 2021. DOI is committed to the DOI policy on consultation with Tribes and Alaska Native corporations. DOI invited Tribes and Alaska Native corporations to consult an Advance Draft of revisions to Buy Indian regulations in May and June 2021, before publishing any proposed rule. This consultation period was intended to give tribes meaningful input into the rulemaking process prior to publishing a proposed rule. Interior looks forward to additional consultation following publication of a proposed rule. (Note: The IHS, within the Department of Health and Human Services, published proposed Buy Indian regulations in November 2020. See [85 FR 71596 \(November 10, 2020\)](#) and extended the comment deadline to June 21, 2021. See [86 FR 20648 \(April 21, 2021\)](#)).

### **Other Comments**

An Alaska Native corporation expressed general support of the draft revisions and specifically supported elimination of “covered” construction contracts and allowing contracting officers to engage in direct negotiation when only one offer is received. This corporation also noted that minimizing the contracting officers’ obligation to go through the deviation process will likely increase the amount of contract awards to ISBEEs/IEEs.

*Response:* These provisions are included in the proposed regulation.

Several Tribes, a Tribal organization, and a Tribal power authority stated that the Buy Indian Act should be expanded beyond DOI and IHS. One Tribe recommended the establishment of a Tribal Advisory Committee that meets bi-annually to meet this goal. Two Tribes suggested giving preference to tribal-owned and tribal-member owned enterprises in federal “green products” procurement and federal energy procurement broadly. A Tribal power authority stated that Buy Indian regulations should promote the federal purchase of Indian energy.

*Response:* While these comments are beyond the scope of this regulation, because this regulation addresses only DOI’s implementation of the Buy Indian Act, DOI appreciates this input.