



**Billing Code: 4160-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Indian Health Service**

**48 CFR Parts 326 and 352**

**[Docket No. DOI-2012-0005]**

**RIN 0917-AA18**

**Acquisition Regulations; Buy Indian Act; Procedures for Contracting**

**AGENCY:** Indian Health Service (IHS), Department of Health and Human Services (HHS).

**ACTION:** Notice of Proposed Rulemaking (NPRM).

**SUMMARY:** The United States Department of Health and Human Services (HHS) is proposing to issue regulations guiding implementation of the Buy Indian Act, which provides IHS with authority to set-aside procurement contracts for Indian-owned and controlled businesses.

**DATES:** Send your comments on or before **[Insert Date 60 Days After Date of Publication in the Federal Register]**.

**ADDRESSES:** You may send comments identified by docket number **[Insert Date 60 Days After Date of Publication in the Federal Register]** using any of the following methods:

Evonne Bennett, Acting Director, Division of Regulatory Policy Coordination (DRPC), Office of Management Services (OMS), Indian Health Service, 5600 Fishers Lane, Mail Stop 09E70, Rockville, MD 20857

Tiffani Redding, Director, Office of Recipient Integrity Coordination (ORIC), Department of Health and Human Services, Office of the Assistant Secretary for Financial Resources (ASFR), Room 533H, Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, DC 20201

**FOR FURTHER INFORMATION CONTACT:** For technical questions concerning this proposed rule contact:

Evonne Bennett, Acting Director, Division of Regulatory Policy Coordination (DRPC), Office of Management Services, Indian Health Service, 301-443-4750, [evonne.bennett@ihs.gov](mailto:evonne.bennett@ihs.gov); or Santiago Almaraz, Acting Director Office of Management Services, Indian Health Service, 301-443-4872, [santiago.almaraz@ihs.gov](mailto:santiago.almaraz@ihs.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Indian Health Service (IHS) is an agency of the United States Department of Health and Human Services (HHS) whose principal mission is to provide health care to American Indians and Alaska Natives. 25 U.S.C. 1661. IHS' authority to provide health care services to the American Indian and Alaska Native people derives from the Snyder Act of 1921, 25 U.S.C. 13, a broad, general authority to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians," for, among other things, the "relief of distress and conservation of health." 25 U.S.C. 13. In 1954, Congress transferred this responsibility and other health care "functions, responsibilities, authorities, and duties of the Department of the Interior" (including the Snyder Act) to the Department of Health, Education, and Welfare, the predecessor of the Department of Health and Human Services ("HHS"). See Pub. L. No. 83-568, 68 Stat. 674 (1954) (codified at 42 U.S.C. 2001 et seq.) The Transfer Act authorizes IHS to use the Buy Indian Act (25 U.S.C. 47) to carry out its health care responsibilities. IHS authority to use the Buy Indian Act is further governed by 25 U.S.C. 1633. This rule is proposed to describe uniform administration procedures that the IHS will use in all of its locations to encourage procurement relationships with Indian labor and industry in the

execution of the Buy Indian Act. IHS' current rules are codified at HHSAR, 48 CFR Part 326, Subpart 326.6.

## **II. Statutory Authority**

The Transfer Act authorizes the Secretary of HHS to “make such other regulations as he deems desirable to carry out the provisions of the [Transfer Act]”. 42 U.S.C. 2003. The Secretary’s authority to carry out functions under the Transfer Act has been vested in the Director of the Indian Health Service under 25 U.S.C. 1661. Because of these authorities, use of the Buy Indian Act is reserved to IHS and is not available for use by any other HHS component. IHS authority to use the Buy Indian Act is further governed by 25 U.S.C. 1633, which directs the Secretary to issue regulations governing the application of the Buy Indian Act to construction activities.

## **III. Overview of Proposed Rule**

This rule supplements the Federal Acquisition Regulations (FAR) and the Health and Human Services Acquisition Regulations (HHSAR). This rule formalizes an administrative procedure for all IHS acquisition activities and locations to ensure uniformity for offers submitted by Indian labor and industry under solicitations set aside under the Buy Indian Act and this part.

### **A. Numbering System**

This rule replaces the HHSAR, Subpart 326.6 - Acquisitions Under the Buy Indian Act.

### **B. How This Rule Fits With the Indian Health Service and Department Acquisition Regulations**

This rule proposes to amend the HHSAR, which is maintained by Assistant Secretary for Financial Resources (ASFR) pursuant to 48 CFR 301.103. ASFR is responsible for developing and preparing for issuance all acquisition regulatory material to be included in the HHSAR.

Accordingly, the rule is being proposed through coordination between IHS and ASFR. The rule

is intended to establish Buy Indian Act acquisition policies and procedures for IHS that are consistent with rules proposed and/or adopted by the Department of the Interior.

#### **IV. Tribal Consultation**

Under 25 U.S.C. 1672, IHS must consult with Indian tribes and publish, any proposed revision or amendment of any regulation promulgated under the Indian Health Care Improvement Act, in the Federal Register not less than sixty days prior to the effective date of such revision or amendment in order to provide adequate notice to, and receive comments from, other interested parties. Because this rule is being promulgated in part based on the Indian Health Care Improvement Act, IHS will be hosting tribal consultation meetings addressing this rule on the following dates at these locations:

<b>Date</b>	<b>Time (local time zone)</b>	<b>Location</b>
November 9, 2020	3:00 – 4:30 PM EST	1-888-391-3141 Participant Code: 8680097
November 16, 2020	3:00 – 4:30 PM EST	1-888-391-3141 Participant Code: 8680097

Tribal leader letters announcing these consultation meetings will be distributed to provide advance notice of these consultations.

#### **V. Required Determinations**

1. *Regulatory Planning and Review (Executive Orders 12866 and 13563)*. Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this proposed rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public, where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

2. *Regulatory Flexibility Act.* HHS certifies that the adoption of this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

3. *Small Business Regulatory Enforcement Fairness Act.* This proposed rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule does not have an annual effect on the economy of \$100 million or more. This proposed rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. This proposed rule does not

have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

4. *Unfunded Mandates Reform Act*. This proposed rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments, or the private sector nor does the rule impose requirements on State, local, or tribal governments. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

5. *Takings (E.O. 12630)*. This proposed rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

6. *Federalism (E.O. 13132)*. Under the criteria in section 1 of E.O. 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. This rule would not substantially and directly affect the relationship between the Federal and State Governments. A Federalism summary impact statement is not required.

7. *Civil Justice Reform (E.O. 12988)*. This proposed rule complies with the requirements of E.O. 12988. Specifically, this rule (1) meets the criteria of section 3(a) of this E.O. requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize

litigation; and (2) meets the criteria of section 3(b)(2) of this E.O. requiring that all regulations be written in clear language and contain clear legal standards.

8. *Consultation with Indian tribes (E.O. 13175)*. IHS strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department and Agency consultation policies and under the criteria in E.O. 13175 and have determined there may be substantial direct effects on federally recognized Indian Tribes that will result from this rulemaking. In addition, we note that 25 U.S.C. 1672 expressly directs consultation prior to amendment of the rule. HHS will hold meetings with the Tribes as stated in the Background section of this preamble.

9. *Paperwork Reduction Act, 44 U.S.C. 3501, et seq.* This proposed rule requires offerors to certify whether they met the definition of an “Indian Economic Enterprise” and to provide the name of the federally recognized Indian Tribe or Alaska Native Corporation with which they are affiliated. These statements are considered simple representations that an offeror submitted to support its claim for eligibility to participate in contract awards under the authority of the Buy Indian Act (25 U.S.C. 47, as amended). Because these statements are a simple certification or acknowledgment related to a transaction, they do not qualify as a collection of information under the Paperwork Reduction Act. See 5 CFR 1320.3(h).

10. *National Environmental Policy Act.* This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the rule is covered by the categorical exclusion listed in 43 CFR 46.210(c). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

11. *Clarity of this Regulation.* We are required by Executive Orders 12866 (section 1(b)(12)), and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must (1) be logically organized; (2) use the active voice to address readers directly; (3) use common, everyday words and clear language rather than jargon; (4) be divided into short sections and sentences; and (5) use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the “FOR FURTHER INFORMATION CONTACT” section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the number of section or paragraphs that you find unclear, which section or sentences are too long, the sections where you feel lists or tables would be useful, etc.

12. *Public availability of comments.* Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware



that your entire comment - including your personal identifying information - may be publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

When submitting comments please identify what topic your comment covers from the following list:

- (1) Subcontract Limitations
- (2) Buy Indian Act Deviations
- (3) Preventing Fraud and Abuse
- (4) Covered Construction
- (5) Other Topic Related to the Proposed Rule

#### **List of Subjects**

##### **48 CFR Part 326**

Government procurement, Indians, Indians-business and finance, Reporting and recordkeeping requirements.

##### **48 CFR Part 352**

Government procurement.

For the reasons set out in the preamble, the HHS proposes to amend parts 326 and 352 as follows:

#### **CHAPTER 3 – HEALTH AND HUMAN SERVICES**

#### **SUBCHAPTER D – SOCIOECONOMIC PROGRAMS**

## **PART 326 – OTHER SOCIOECONOMIC PROGRAMS**

1. The authority citation for part 326 is revised to read as follows:

**Authority:** 5 U.S.C. 301, 25 U.S.C. 47, 25 U.S.C. 1633, 41 U.S.C. 253(c)(5), and 42 U.S.C. 2003.

2. Revise subpart 326.6 to read as follows:

### **Subpart 326.6 – Acquisitions Under the Buy Indian Act**

#### **326.600—General**

Sec.

326.600-1 Scope of part.

326.600-2 Buy Indian Act acquisition regulations.

#### **326.601—Definitions**

326.601 Definitions.

#### **326.602—Applicability**

326.602-1 Scope of part.

326.602-2 Restrictions on the use of the Buy Indian Act.

#### **326.603—Policy**

326-603-1 Requirement to give preference to Indian Economic Enterprises.

326-603-2 Delegations and responsibility.

326-603-3 Deviations.

#### **326.604—Procedures**

326.604-1 General.

326.604-2 Procedures for Acquisitions under the Buy Indian Act.

326.604-3 Debarment and suspension.

#### **326.605—Contract Requirements**

326.605-1 Subcontracting limitations.

326.605-2 Performance and payment bonds.

#### **326.606—Representation by an Indian Economic Enterprise Offeror**

326.606-1 General.

326.606-2 Representation provision.

326.606-3 Representation process.

### **326.607—Challenges to Representation**

326.607-1 Procedure.

## **Subpart 326.6 – Acquisitions Under the Buy Indian Act**

### **326.600—General**

#### **§ 326.600-1 Scope of part.**

This subpart implements policies and procedures for the procurement of supplies, general services, architect and engineering (A&E) services, or covered construction (including A&E services), while giving preference to Indian Economic Enterprises under authority of the Buy Indian Act (25 U.S.C. 47).

#### **§ 326.600-2 Buy Indian Act acquisition regulations.**

(a) This subpart supplements Federal Acquisition Regulation (FAR) and Health and Human Services Acquisition Regulation (HHSAR) requirements to meet the needs of the Department of Health and Human Services, Indian Health Service in implementing the Buy Indian Act.

(b) This subpart is under the direct oversight and control of the Head of Contracting Activity (HCA), within the Office of Management Services (OMS) – Indian Health Service, Department of Health and Human Services. The HCA, in consultation with the ASFR and the Senior Procurement Executive (SPE), is responsible for promulgating this subpart, and following its enactment, will be primarily responsible for implementing its terms.

(c) Acquisitions conducted under this subpart are subject to all applicable requirements of the FAR and HHSAR, as well as internal policies, procedures, or instructions issued by Indian Health Service. After the FAR, this HHSAR subpart would take precedence over any inconsistent Indian Health Service policies, procedures, or instructions.

## **326.601—Definitions**

### **§ 326.601 Definitions.**

*Alaska Native Claims Settlement Act (ANCSA)* means Public Law 92-203 (December 18, 1971), 85 Stat. 688, codified at 43 U.S.C. 1601-1629h.

*Alaska Native Corporation* means any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation as those terms are defined by ANCSA.

*Buy Indian Act* means section 23 of the Act of June 25, 1910, codified at 25 U.S.C. 47.

*Chief Contracting Officer (CCO)* means a person with authority to enter into, administer, or terminate contracts and make related determinations and findings on behalf of the U.S. Government for the respective IHS Areas.

*Contracting Officer (CO)* means a person with the authority to enter into, administer, or terminate contracts and make related determinations and findings on behalf of the U.S. Government.

*Covered construction* means the planning, design, construction and renovation, including associated architecture and engineering services, of IHS facilities pursuant to 25 U.S.C. 1631 and in the construction of safe water and sanitary waste disposal facilities pursuant to 25 U.S.C. 1632.

*Deviation* means an exception to the requirement to use the Buy Indian Act in fulfilling an acquisition requirement subject to the Buy Indian Act.

*Fair market price* means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost, as determined in accordance with FAR 19.202-6(a).

*Federally Recognized Indian Tribe* means an Indian tribe, band, nation, or other recognized group or community, or any Alaska Native village or Native group (as those terms

are defined in ANCSA) found on the List of Federally Recognized Tribes. *Governing Body* means the recognized entity empowered to exercise governmental authority over a Federally Recognized Indian Tribe.

*Indian* means a person who is an enrolled member of a Federally Recognized Indian Tribe.

*Indian Health Service (IHS)* means operations at all administrative levels of IHS, including Headquarters, Area Offices and Service Units (inclusive of clinics).

*Indian Economic Enterprise (IEE)* means any business activity owned by one or more Indians, Federally Recognized Indian Tribes, or Alaska Native Corporations provided that:

- (1) The combined Indian, Federally Recognized Indian Tribe, or Alaska Native Corporation ownership of the enterprise constitutes not less than 51 percent;
- (2) The Indians, Federally Recognized Indian Tribes, or Alaska Native Corporations must, together, receive at least 51 percent of the earnings from the contract; and
- (3) The management and daily business operations of an enterprise must be controlled by one or more individuals who are Indians. The Indian individual(s) must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business.

*Indian Small Business Economic Enterprise (ISBEE)* means an IEE that is also a small business concern established in accordance with the criteria and size standards of 13 CFR part 121.

*Interested Party* means an IEE that is an actual or prospective offeror whose direct economic interest would be affected by the proposed or actual award of a particular contract set-aside pursuant the Buy Indian Act.

*List of Federally Recognized Tribes* means a tribal entity recognized by and eligible for funding and services from the Indian Health Service by virtue of their status as Indian Tribes. A full list of these entities is published annually in the Federal Register pursuant to Section 104 of Pub. L. 103-454, codified at 25 U.S.C. 5131.

*Transfer Act of 1954* means the authority of transferred responsibility and other health care “functions, responsibilities, authorities and duties of the Department of the Interior” (including the Snyder Act) to health, education and welfare, the predecessor of the Department of Health and Human Services (DHHS). Pub. L. No. 83-568, 68 Stat. 674 (1954) (codified at 42 U.S.C. 2001 et. Seq). The Transfer Act authorizes IHS to use the Buy Indian Act (25 U.S.C. 47) to carry out its health care responsibilities.

### **326.602—Applicability**

#### **§ 326.602-1 Scope of part.**

Except as provided in HHSAR 326.602-2, this subpart applies to all acquisitions, including simplified acquisitions, made by IHS, any HHS operating divisions or agency outside of HHS conducting acquisitions on behalf of IHS.

#### **§ 326.602-2 Restrictions on the use of the Buy Indian Act.**

(a) IHS may not use the authority of the Buy Indian Act and the procedures contained in this subpart to award intergovernmental contracts to tribal organizations to plan, operate, or administer authorized IHS programs (or parts thereof) that are within the scope and intent of the Indian Self-Determination and Education Assistance Act (ISDEAA) (Pub. L. 93-638). IHS must use the Buy Indian Act solely to award procurement contracts to IEEs. Contracts subject to ISDEAA are not covered under the FAR and are codified separately under 25 CFR part 900 and 42 CFR part 137.

(b) Contract health services (referred to administratively as Purchased/Referred Care services) are defined at 25 U.S.C. 1603 as excluding services provided by Buy Indian Act contractors. Accordingly, the Buy Indian Act may not be used to obtain services through the Purchased/Referred Care program (previously CHS). Purchase orders for care authorized pursuant to 42 CFR part 136 subpart C may be issued without regard to the provisions of this Part.

### **326.603—Policy**

#### **§ 326.603-1 Requirement to give preference to Indian Economic Enterprises.**

(a) Except as provided by 25 U.S.C. 1633, IHS must use the negotiation authority of the Buy Indian Act to give preference to Indians, Federally Recognized Tribes, or Alaska Native Corporations whenever the use of that authority is practicable. Thus, IHS may use the Buy Indian Act to give preference to IEEs through set-asides when acquiring supplies, general services, A&E services, or covered construction to meet IHS needs and requirements.

(b) Contract awards under the authority of The Buy Indian Act can be pursued via the acquisition procedures prescribed in this HHSAR subpart in conjunction with the procedures from FAR part 12, 13, 14, 15 and/or 16.

(c) The CO will give priority to ISBEEs for all purchases, regardless of dollar value, by utilizing ISBEE set-aside to the maximum extent possible.

(d) If the CO determines after market research that there is no reasonable expectation of obtaining offers from two or more ISBEEs that will be competitive in terms of market price, product quality, and delivery capability, the CO shall expand the market research to all IEEs to determine if the requirement can be set aside for IEEs.

(e) If the CO determines after market research that there is no reasonable expectation of obtaining two or more offers that will be competitive in terms of market price, product quality, and delivery capability, from ISBEEs and/or IEEs, then the CO shall follow the Deviation process under HHSAR 326.603-3.

(f) Price analysis technique(s) provided in FAR 15.404-1(b) shall be used in determination of price fair and reasonableness when only one offer is received from a responsible ISBEE or IEE in response to an acquisition set-aside under paragraph (c) or (d) of this section.

(g) If the offers received in response to an acquisition set-aside under paragraph (c) or (d) of this section are determined to be unacceptable upon price and/or technical evaluations, then the CO must follow the Deviation process under HHSAR 326.603-3. The CO must document in the deviation determination the reasons why the IEE offeror(s) were not reasonable or otherwise unacceptable.

(1) If a deviation determination is approved, the CO must cancel the current ISBEE or IEE set-aside solicitation and identify, based on current available market research, an alternate set-aside or procurement method.

(h) With respect to covered construction, the provisions of 25 U.S.C. 1633 shall apply. Under 25 U.S.C. 1633, IHS may give a preference to an IEE unless the agency finds, after considering the evaluation criteria listed in 25 U.S.C. 1633, that the project to be contracted for will not be satisfactory or cannot be properly completed or maintained under the proposed contract.

#### **§ 326.603-2 Delegations and responsibility.**

(a) The Director, IHS—exercises the authority of the Buy Indian Act pursuant to the Transfer Act of 1954, as delegated pursuant to 25 U.S.C. 1661. Under 25 U.S.C. 1661, the Director is authorized “to enter into contracts for the procurement of goods and services to carry



out the functions of the IHS.” IHS exercises this authority in support of its mission and program activities and as a means of fostering Indian employment and economic development.

(b) The Head of Contracting Activity, IHS (IHS HCA) is responsible for ensuring that all IHS acquisitions under the Buy Indian Act comply with the requirements of this part.

**§ 326.603-3 Deviations.**

(a) There are certain instances where the application of the Buy Indian Act to an acquisition may not be appropriate. In these instances, the Contracting Officer must detail the reasons in writing or via email and make a deviation determination.

(b) Some acquisitions by their very nature would make such a written determination unnecessary. The following acquisitions do not require a written deviation from the requirements of the Buy Indian Act:

(1) Any sole source acquisition justified and approved in accordance with FAR Subpart 6.3 and HHSAR 306.3 constitutes an authorized deviation from the requirements of the Buy Indian Act.

(2) Any order or call placed against an indefinite delivery vehicle that already has an approved deviation from the requirements of the Buy Indian Act.

(c) Deviation determinations shall be required for all other acquisitions where the Buy Indian Act is applicable and must be approved as follows:

**Table 1 to paragraph (c)**

<b>For a proposed contract action</b>	<b>The following official may authorize a deviation</b>
Exceeding the micro-purchase threshold and up to \$25,000	Contracting Officer

Exceeding \$25,000 but not exceeding \$700,000	Chief Contracting Officer (CCO) (or the IHS Division of Acquisition Policy (DAP) Director, absent a CCO)
Exceeding \$700,000 but not exceeding \$13.5 million	IHS Competition Advocate
Exceeding \$13.5 million but not exceeding \$68 million	Head of Contracting Activity
Exceeding \$68 million	HHS Office of Small & Disadvantaged Business Utilization (OSDBU), Office of General Counsel (OGC), HHS Department Competition Advocate and the HHE Senior Procurement Executive

### **326.604—Procedures**

#### **§ 326.604-1 General.**

All acquisitions under the authority of the Buy Indian Act, must conform to all applicable requirements of the FAR and HHSAR.

#### **§ 326-604-2 Procedures for Acquisitions under the Buy Indian Act.**

(a) This paragraph applies to solicitations that are not restricted to participation of IEEs.

(1) If an interested IEE is identified after a solicitation has been issued, but before the date established for receipt of offers, the contracting office must provide a copy of the solicitation to this enterprise. In this case, the CO:

(i) Will not give preference under the Buy Indian Act to the IEE; and

(ii) May extend the date for receipt of offers when practical.

(2) If more than one IEE is identified after issuing a solicitation, but prior to the date established for receipt of offers, the CO may cancel the solicitation and re-compete it as an IEE set-aside.

(b) Clauses and Provisions.

(1) The contracting officer shall insert the provision at HHSAR 352.226-4, NOTICE OF INDIAN SMALL BUSINESS ECONOMIC ENTERPRISE SET-ASIDE, in solicitations for acquisitions that are set aside to ISBEE concerns under HHSAR 326.603-1(c).

(2) The contracting officer shall insert the provision at HHSAR 352.226-5, NOTICE OF INDIAN ECONOMIC ENTERPRISE SET-ASIDE, in solicitations for acquisitions that are set aside to IEE concerns in accordance with HHSAR 326.603-1(d).

(3) The contracting officer shall insert the clause at HHSAR 352.226-6, SUBCONTRACTING LIMITATIONS, in all solicitations and contracts when the contract award is to be made under the authority of the Buy Indian Act.

(4) The contracting officer shall insert the provision at HHSAR 352.226-7, INDIAN ECONOMIC ENTERPRISE REPRESENTATION, in all solicitations when the contract award is to be made under the authority of the Buy Indian Act.

**§ 326.604-3 Debarment and suspension.**

A misrepresentation by an offeror of its status as an IEE, failure to notify the CO of any change in IEE status that would make the contractor ineligible as an IEE, or any violation of the regulations in this part by an offeror or an awardee may lead to debarment or suspension in accordance with FAR 9.406 and 9.407 and HHSAR 309.406 and 309.407.

**326.605—Contract Requirements**

**§ 326.605-1 Subcontracting limitations.**

(a) The contracting officer shall insert FAR clause at 52.219-14, Limitations on Subcontracting, in solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set aside for ISBEEs and IEEs.

**§ 326.605-2 Performance and payment bonds.**

Solicitations requiring performance and payment bonds must conform to FAR Part 28 and authorize use of any of the types of security acceptable in accordance with FAR Subpart 28.2 or section 11 of Public Law 98-449, the Indian Financing Act Amendments of 1984 (25 U.S.C. 47a). In accordance with FAR 28.102 and 25 U.S.C. 47a, the CO may accept alternative forms of security in lieu of performance and payment bonds if a determination is made that such forms of security provide the Government with adequate security for performance and payment.

### **326.606—Representation by an Indian Economic Enterprise Offeror**

#### **§ 326.606-1 General.**

(a) The CO must insert the provision at HHSAR 352.226-7, INDIAN ECONOMIC ENTERPRISE REPRESENTATION, in all solicitations regardless of dollar value solicited under HHSAR 326.603-1 (c) or (d) and in accordance with this part.

(b) To be considered for an award under HHSAR 326.603-1(c) or (d), an offeror must:

(1) Certify that it meets the definition of “Indian Economic Enterprise” in response to a specific solicitation set-aside in accordance with the Buy Indian Act and this part; and

(2) Identify the Federally Recognized Indian Tribe(s) or Alaska Native Corporation(s) upon which the offeror relies for its IEE status.

(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.

(d) If, after award, a contractor no longer meets the eligibility requirements as it has certified and as set forth in this section, then the contractor must provide the CO with written notification within 3 calendar days of its failure to comply with the eligibility requirements. The

notification must include:

- (1) Full disclosure of circumstances causing the contractor to lose eligibility status; and
- (2) A description of actions, if any, that must be taken to regain eligibility.
- (e) Failure to maintain eligibility under the Buy Indian Act or to provide written

notification required by paragraph (d) of this section means that:

- (1) The contractor may be declared ineligible for future contract awards under this part;
- (2) The CO may consider termination for default of the ongoing contract; and
- (3) The CO may pursue debarment or suspension of the contractor.

(f) The CO will review the offeror's representation that it is an IEE in a specific bid or proposal and verify that the Federally Recognized Indian Tribe(s) or Alaska Native Corporation(s) that the offeror identifies in the representation is either on the List of Federally Recognized Tribes or is an Alaska Native Corporation. A CO will also investigate the representation if an interested party challenges the IEE representation or if the CO has any other reason to question the representation. The CO may ask the offeror for more information to substantiate the representation. Challenges of and questions concerning a specific representation must be referred to the CO or CCO in accordance with HHSAR 326.607.

(g) Participation in the Mentor-Protégé Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (25 U.S.C. 47 note) does not render an IEE ineligible for contracts awarded under the Buy Indian Act.

**§ 326.606-2 Representation provision.**

(a) Contracting offices must provide copies of the awardees' IEE representation to any interested parties upon written request. IHS will make awardees' IEE representations via IHS public sites and/or other means.

(b) Any false or misleading information submitted by an enterprise when submitting an

offer in consideration for an award set aside under the Buy Indian Act may be a violation of the law punishable under 18 U.S.C. 1001. False claims submitted as part of contract performance may be subject to the penalties enumerated in 31 U.S.C. 3729 to 3731 and 18 U.S.C. 287.

(c) The CO shall inform the Head of Contracting Activity, within 10 business days, of all suspected IEE misrepresentation by an offeror or failure to provide written notification of a change in IEE eligibility.

### **§ 326.606-3 Representation process.**

(a) Only IEEs may participate in acquisitions set aside in accordance with the Buy Indian Act and this part. The procedures in this Part are intended to support responsible IEEs and prevent circumvention or abuse of the Buy Indian Act.

(b) The CO shall review the ownership information furnished under HHSAR 352.226-7(b) and ensure that the information submitted matches the List of Federally Recognized Tribes or is an Alaska Native Corporation, as identified and published via a Federal Register Notice as Indian entities recognized by and eligible to receive services from the United States Department of the Interior (DOI), Bureau of Indian Affairs (BIA).

(c) If the CO cannot verify the offeror submission with the List of Federally Recognized Tribes the CO must allow the offeror to correct information submitted under HHSAR 352.226-7(b). The contracting officer should make every effort to allow the offeror to correct the information. If the requirement is time sensitive the contracting officer must specify to the offeror the time and date by which a response is required.

(1) If the CO determines the offeror is not responsive, the CO must document the circumstances and inform the offeror of the determination.

(2) The CO may ask the Office of the General Counsel to review the IEE representation.

(3) The IEE representation does not relieve the CO of the obligation for determining

contractor responsibility, as required by FAR Subpart 9.1.

### **326.607—Challenges to Representation**

#### **§ 326.607-1 Procedure.**

(a) The CO can accept an offeror's written representation of being an ISBEE or IEE (as defined in HHSAR 326.601) only when it is submitted in response to a Sources Sought Notice, Request for Information (RFI) or with an offer in response to a solicitation under the Buy Indian Act. Another interested party may challenge the representation of an offeror or awardee by filing a written challenge.

(b) Upon receipt of the challenge, the CO shall re-verify the representation of the offeror or awardee in accordance with the requirements of this subpart, including the provisions of 326.606.

## **PART 352 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

1. The authority citation for part 352 is revised to read as follows:

**Authority:** 5 U.S.C. 301, 40 U.S.C. 121(c)(2), 42 U.S.C. 2003

### **Subpart 352.2 – Text of Provisions and Clauses**

2. Add §§ 352.226-4 through 352.226-7 to read as follows:

#### **§ 352.226-4 Notice of Indian Small Business Economic Enterprise set-aside.**

As prescribed in HHSAR 326.604-2(b)(1), and in lieu of the requirements of 48 CFR 19.508, insert the following clause in solicitations and contracts for acquisitions that are set aside to Indian Small Business Economic Enterprise concerns.

#### **Notice of Indian Small Business Economic Enterprise Set-aside**

Under the Buy Indian Act, 25 U.S.C. 47, offers are solicited only from Indian Economic Enterprises (HHSAR 326.606) that are also small business concerns. As required by HHSAR § 352.226-7(b), offerors shall include a completed Indian Economic Enterprise Representation form in response to Sources Sought Notices, Request for Information (RFI) and as part of the proposal submission. The Indian Economic Enterprise Representation form, available on the IHS Division of Acquisition Policy public website ([www.IHS.gov/DAP](http://www.IHS.gov/DAP)), shall be included in

synopses, presolicitation notices, and solicitations for the acquisitions under the Buy Indian Act. Offers received from enterprises that are not both Indian Economic Enterprises and small business concerns shall not be considered.

(End of clause)

**§ 352.226-5 Notice of Indian Economic Enterprise set-aside.**

As prescribed in HHSAR 326.604-2(b)(2), insert the following clause in solicitations and contracts involving Indian Economic Enterprise set-asides.

Notice of Indian Economic Enterprise Set-aside

Under the Buy Indian Act, 25 U.S.C. 47, offers are solicited only from Indian Economic Enterprises (326.606). As required by HHSAR 352.226-7(b), offerors shall include a completed Indian Economic Enterprise Representation form in response to Sources Sought Notices, Request for Information (RFI) and as part of the proposal submission. The Indian Economic Enterprise Representation form, available on the IHS Division of Acquisition Policy public website ([www.IHS.gov/DAP](http://www.IHS.gov/DAP)), shall be included in synopses, presolicitation notices, and solicitations for the acquisitions under the Buy Indian Act. Offers received from enterprises that are not Indian Economic Enterprises shall not be considered.

(End of clause)

**§ 352.226-6 Indian Economic Enterprise Subcontracting Limitations.**

A contractor shall not subcontract more than the subcontract limitations specified under FAR 52.219-14 Limitations on Subcontracting. As prescribed in HHSAR 326.604-2(b)(3), insert the following clause in each written solicitation and contract to provide supplies, general services, A&E services, or covered construction:

Indian Economic Enterprise Subcontracting Limitations

(a) Definitions as used in this clause.

(1) *Indian Economic Enterprise Concern* means any business activity owned by one or more Indians, Federally Recognized Indian Tribes, or Alaska Native Corporations that is established for the purpose of profit, provided that:

(i) The combined Indian, Federally Recognized Indian Tribe, or Alaska Native Corporation ownership of the enterprise shall constitute not less than 51 percent;

(ii) The Indians, Federally Recognized Indian Tribes, or Alaska Native Corporations shall, together, receive at least 51 percent of the earnings from the contract; and

(iii) The management and daily business operations of an Indian Economic Enterprise must be controlled by one or more individuals who are Indians. To ensure actual control over the enterprise, the individuals must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business.

(2) *Subcontract* means any agreement (other than one involving an employer-employee



relationship) entered into by a subcontractor to furnish supplies and/or services required for performance of a prime contract or a subcontract. It includes but is not limited to contracts and contract modifications.

(3) *Subcontractor* means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

(b) The contractor must comply with FAR 52.219-14, Limitations on Subcontracting clause throughout the contract period.

(End of clause)

### **352.226-7 Indian Economic Enterprise representation.**

As prescribed in HHSAR 326.604-2(b)(4), insert the following provision in each written solicitation for supplies, services, A&E, or covered construction:

#### Indian Economic Enterprise Representation

(a) The offeror must represent as part of its offer that it does meet the definition of Indian Economic Enterprise (IEE) as defined in HHSAR 326.601 and that it intends to meet the definition of an IEE throughout the performance of the contract. The offeror must notify the contracting officer within 10 business days, via email, if there is any ownership change affecting compliance with this representation.

(b) The representation must be made on the designated IHS Indian Economic Enterprise Representation form or any successor forms through which the offeror will certify that the ownership requirements defined by HHSAR 326.601 are met.

(c) Any false or misleading information submitted by an enterprise when submitting an offer in consideration for an award set aside under the Buy Indian Act is a violation of the law punishable under 18 U.S.C. 1001. False claims submitted as part of contract performance are subject to the penalties enumerated in 31 U.S.C. 3729 to 3731 and 18 U.S.C. 287.

(End of provision)

Dated: September 30, 2020.

Michael D. Weahkee,  
RADM, Assistant Surgeon General,  
U.S. Public Health Service,  
Director, Indian Health Service.

Approved: October 6, 2020.

Alex M. Azar II,  
Secretary,  
Department of Health and Human Services.