

## BUSINESS

### CHAPTER 3. INDIAN PREFERENCE

#### Section 8-3-1. Purpose.

- A. The purpose of this Chapter is to promote the self-sufficiency of the Pueblo of Laguna, its members, and the residents of the Pueblo by promoting the development of Pueblo of Laguna-owned businesses and other Indian Owned and Controlled Business and to implement an Indian employment preference policy that promotes the hiring of qualified Indian employees for contract work administered within the Pueblo.

#### Section 8-3-2. Definitions.

- A. *Business* means any lawful corporation, partnership, contractor, subcontractor, sole proprietorship, joint venture, or other enterprise organized and operated for profit.
- B. *Contract* means an agreement entered into by parties for the procurement of construction goods or services.
- C. *Contractor* means any person having a contract with the Pueblo or any person or entity subject to this Chapter.
- D. *Contracting Entity/Officer* means the individual or entity that is designated by the business, government or entity letting the Contract to oversee the award and performance of a specific contract.
- E. *Construction* means the building, altering, repairing or demolishing in the ordinary course of business of any: road, highway, bridge, parking area or related project; building, stadium or other structure; airport, subway or similar facility; park, trail, athletic field, golf course or similar facility; dam, reservoir, canal, ditch or similar facility; sewerage or water treatment facility, power generating plant, pump station, natural gas compressing station, gas processing plant, coal gasification plant, refinery, distillery or similar facility; sewerage, water, gas or other pipeline; transmission line; radio, television or other tower; water, oil or other storage tank; shaft, tunnel or other mining appurtenance; microwave station or similar facility; retaining wall, wall, fence, gate or similar structure; or similar work; the leveling or clearing of land; the excavating of earth; the drilling of wells of any type, including seismograph shot holes or core drilling; or similar work; and includes construction material.
- F. *Core/Permanent Crew* means a regular, permanent employee whose been on the payroll thirty (30) business days prior to the award of contract and is in supervisory or other key position such that the employer would face a serious financial loss if the position were filled by a person who had not previously worked for that contractor or subcontractor.

- G. *Employer* means any person, company, contractor, subcontractor, or other entity engaged in construction work on the Pueblo of Laguna reservation. Employer does not include the Pueblo of Laguna, State of New Mexico, and the United States of America, or any department agency, or subdivision of any of the foregoing.
- H. *Employment Compliance Office* means the Pueblo of Laguna Administrative Service Department, or any other department designated by the Governor, whose duties include but are not limited to, certifying Indian Owned & Controlled Business and to monitor and certify an employer's compliance with the Indian Employment Preference section of this Chapter.
- I. *Governor* means the Governor of the Pueblo of Laguna.
- J. *Indian* means any enrolled member of a federally recognized tribe.
- K. *Indian Tribe* means a federally recognized Indian Tribe, its political subdivisions and entities wholly owned by that Tribe.
- L. *Indian living on the reservation* means a member of a federally recognized tribe who resides within the Pueblo of Laguna reservation.
- M. *Indian Owned and Controlled* means ownership of a business by an Indian or Indian Tribe demonstrated by entitlement to fifty-one percent (51%) or greater share in the profits and losses of the business and the power to direct or cause the direction of the management, day-to-day operations, and major decisions on matters of management, policy and operations of the business.
- N. *Indian Preference* means the practice establishing priority in the awarding of contracts to qualified Indian Owned and Controlled Businesses or the practice of facilitating a hiring priority to qualified Indian employees.
- O. *On or near the Reservation* means within the exterior boundaries of the Laguna Reservation or within thirty (30) miles from the Pueblo of Laguna Governor's Office.
- P. *Pueblo Entity* means a for-profit or non-profit entity, organized and operated by the Pueblo.
- Q. *Pueblo of Laguna* means the Pueblo of Laguna government and any of its departments.
- R. *Qualified Pueblo member or Indian* means a Pueblo member or Indian applicant who based upon their experience and/or certifications, meets the requirements for a position as determined by the job requirements.
- S. *Reservation* means the Pueblo of Laguna reservation.

- T. *Responsible bidder* means one who demonstrates the integrity and the technical, managerial, and financial capability to perform the work outlined in a particular solicitation.
- U. *Responsive bid* means at a minimum that the bid shall comply with all bid requirements stated in writing.
- V. *Pueblo member* means enrolled members of the Pueblo of Laguna.
- W. *Pueblo Council* means the Pueblo of Laguna Council.

**Section 8-3-3. Scope.**

- A. This Chapter shall apply to all construction contracts for work to be performed within the reservation, which are let or administered by the following:
  - (1) Pueblo Government: All awards and contracts exceeding \$250,000 administered by the Pueblo of Laguna.
  - (2) Pueblo Entities: All awards and contracts for construction projects exceeding \$250,000 administered by the duly recognized entities of the Pueblo of Laguna.
  - (3) Federal Government: All awards and contracts that are subject to applicable Indian Preference requirements. Applicable federal Indian Preference requirements that are a condition of the federal funding source will control when in conflict with this Chapter.
  - (4) State Government: the Indian Employment Preference section of this Chapter is applicable to all State awards and contracts for work within the Pueblo of Laguna Reservation.
  - (5) Businesses: All construction contracts exceeding \$250,000 let by businesses operating within the Reservation for construction work performed within the Reservation.

**Section 8-3-4. Compliance Mandatory.**

- A. Compliance with the provisions of this Chapter is mandatory unless a waiver is granted by Pueblo Council Resolution. Waivers shall be granted only upon determining that it is in the best interests of the Pueblo and its members.
- B. The Governor may waive compliance with this Chapter when an emergency situation threatens the health, safety or welfare of the Pueblo of Laguna or its members and compliance under the circumstances would increase the threat.
- C. Any waiver granted shall be narrowly tailored to allow non-compliance with this Chapter, only to the extent and only for the duration necessary to subdue the threat.

- D. Prime and general contractors shall be responsible for compliance with this Chapter by their subcontractors, brokers, agents, employees and subsidiaries.
- E. The Pueblo of Laguna Employment Compliance Program shall ensure certification of businesses as Indian owned, and shall monitor the certification of compliance of the Indian Preference by all applicable employers.
  - 1. The Laguna Employment Compliance Program shall:
    - A. Enforce the Pueblo's Indian Preference Code;
    - B. Promote development of Pueblo of Laguna owned businesses and other Indian-Owned and Controlled Businesses;
    - C. Implement an employment compliance program that promotes the hiring of qualified Pueblo of Laguna members and other Indian employees for construction work performed within the Pueblo of Laguna; and
    - D. Ensure that qualified Pueblo of Laguna members and other enrolled Native Americans receive employment, business and entrepreneurial opportunities on or near the Pueblo of Laguna lands.

**Section 8-3-5. Submission to the Jurisdiction of the Pueblo of Laguna.**

- A. Any business and its employees, that conducts activity within the exterior boundaries of the Pueblo of Laguna thereby subjects itself to the jurisdiction of the Pueblo of Laguna as proscribed by the laws of the Pueblo of Laguna.

**Section 8-3-6. Indian Preference for Contracts and Subcontracts.**

- A. *Indian Preference Plan.* Each contractor shall include in its bid, an Indian Preference plan for the master contract and any subcontracts. The plan shall indicate, but not limited to the following:
  - (1) Whether the prime contractor is eligible to be certified as an Indian Owned and Controlled Business.
  - (2) Indicate the name of the proposed subcontractor(s) and whether the subcontractor(s) qualifies as an Indian Owned and Controlled Business
  - (3) If the subcontractor(s) do not qualify for Indian preference, the information on the good faith steps taken to identify Indian Owned and Controlled businesses for the subcontract.
  - (4) Indicate the general approach the prime contractor and subcontractor(s) will take to comply with the Indian Employment Preference Section 8-3-7 of this Chapter.
- B. *Failure to Submit Indian Preference Plan.* A bidder who fails to submit an Indian

preference plan prior to award of the contract shall be considered a non-responsive bidder for the purpose of awarding the contract.

C. *Contracting Entity/Officer.* The Contracting Officer shall determine whether a business is eligible to receive Indian Preference pursuant to this Chapter. The Contracting Entity shall review and certify a bidders claim as an Indian Owned and Controlled Business based upon the rules and regulations promulgated by the Governor or his designee.

(1) The Contracting Officer shall deny a bid if it finds one or more of the following:

- a. The business claiming Indian Preference is not Indian Owned or Controlled as defined in the Pueblo's Indian Preference Code.
- b. The business claiming Indian Preference falsified, concealed, or provided misleading information contained in its application that bears on the Indian Preference eligibility.

(2) Any business that disagrees with the Contracting Officer's finding that the business is not an Indian Owned and Controlled Business or that that the business falsified information regarding its Indian Preference eligibility, may file a complaint and request a hearing with the Indian Preference Appeals Panel (IPAP) within five (5) business days from when the written notice of denial was received by the business.

D. *Indian Preference Priority.* When bids are received from businesses, Indian Preference is permitted to be utilized and contracts shall be awarded to the responsible bidder eligible for Indian preference whose bids are not more than five percent (5%) higher than the lowest responsible bidder not entitled to Indian Preference.

(1) In the event there are two or more responsible bidders eligible for Indian preference whose bids are no more than five percent (5%) higher than the lowest responsible bidder, the contract will be awarded in the following order:

- a. Business located on or near the Reservation.
- b. 51% Indian Owned and Controlled business.

(2) Indian preference shall not be afforded to businesses having poor record of performance, inadequate financial resources, or is a non-responsible bidder.

#### **Section 8-3-7. Indian Employment Preference.**

A. This section applies to the hiring of qualified Indian Employment Preference eligible workers by employers, for non-permanent employment positions that becomes available when a contractor or subcontractor subject to Section 8-3-3.A of this Chapter engages in construction work within the reservation.

B. *Order of Preference.* Contractors and sub-contractors shall give hiring preferences for

construction work done within the reservation to qualified applicants who can perform the work required, according to the following order:

- (1) Qualified Pueblo members when permitted by applicable law
- (2) Qualified Indians living on the reservation
- (3) Other qualified Indians

C. *Exemption for Permanent/Core Crew Employees.* The Indian Employment Preference section of this Chapter may be exempted by the Employment Compliance Officer (ECO) for an employee who is a member of a contractor or subcontractor's permanent/core crew.

D. *Employers Duties.* An employer subject to this Chapter and awarded a contract to do work within the reservation must comply with the following:

- (1) No more than fifteen (15) business days after a contract is awarded, the employer shall submit an Indian Employment Preference Plan to the ECO containing the following information:
  - a. A list of all permanent positioned employees that meet the requirements of subsection C of this section and all data requested by the ECO to verify the status of permanent and core crew employees.
  - b. A list of all eligible Indian Preference employment positions including the number of employee hours needed by craft and skill that are related to work that will be done within the Pueblo and the qualifications required for those positions.
  - c. A written plan detailing how the employer will implement the Indian Employment Preference requirements of this Chapter.
- (2) The employer shall request from the ECO, or his or her designee, the list of Indian Preference eligible employees that have submitted their qualifications to the ECO.
- (3) The employer shall reasonably determine if any Indian Preference eligible employees will be hired. The employer shall give a hiring preference in the following order:
  - a. a qualified Pueblo member
  - b. Indians living on the reservation
  - c. any other individual.
- (4) Once hiring is completed, the employer shall submit to the ECO or his or her designee the following:

- a. Written summary detailing the employer's compliance with hiring requirements of the Indian Employment Preference section of this Chapter, including the list of hires.
  - b. Written summary detailing the employer's determinations of non-qualified applications that were not hired.
- E. *Employment Compliance Office.* The Employment Compliance Office ("ECO"), or his or her designee, shall perform the following duties:
- (1) Maintain a database of eligible Indian Employment Preference workers that have submitted the required information published by the ECO, including but not limited to their qualifications, skills and experience.
  - (2) Upon receiving from the employer a list of Indian Employment Preference eligible positions that are available for hiring, the ECO, or his or her designee shall publicize the list to the general public within the Pueblo of Laguna.
  - (3) The ECO, or his or her designee, shall provide a list of Indian Employment Preference eligible workers.
  - (4) The ECO, or his or her designee, shall review the written plans, reports, or summaries submitted by the employer detailing the methods of implementing the Indian Employment Preference requirements and certify that the employer is taking reasonable steps to comply with this Chapter.
  - (5) The ECO, or his or her designee, in coordination with the Contracting Officer shall address an employer's non-compliance and shall take appropriate steps to bring the employer into compliance as proscribed by this Chapter.

**Section 8-3-8. Indian Preference Appeals Panel.**

- A. The Governor is hereby authorized to establish and promulgate rules for the Indian Preference Appeals Panel ("IPAP") to address compliance with this Chapter.
- B. The IPAP is an administrative panel that shall consist of three (3) individuals appointed by the Governor. The decisions of the IPAP will be made by majority vote.
- C. The IPAP will hear contract award and employment appeals only after the parties have exhausted their remedies with the Contracting Officer as identified in Section 8-3-6.C(2) of this Chapter or with the ECO as identified in Section 8-3-9 of this Chapter..
- D. The IPAP shall have the authority to issue citations and subpoenas to businesses and other

interested parties regarding violations of the Indian Preference provisions of this Chapter.

- E. The IPAP may impose civil penalties, including but not limited to, fines as may be reasonably necessary to remedy the consequences of a violation of the Indian Preference provisions of this Chapter or to deter future violations. In the event of blatant disregard for compliance with this Chapter, the IPAP may deny such business the right to commence business within the Pueblo of Laguna, terminate or suspend such employer's operation and deny them from engaging in further business within the Pueblo.

**Section 8-3-9. Complaints, Appeals and Hearings.**

- A. Any individual, eligible for Indian Employment Preference that believes an employer has violated the Indian Employment Preference section of this Chapter, may proceed according to the following:
  - (1) Within three (3) business days of an alleged Indian Employment Preference violation(s), the complaining party shall file their complaint with the ECO. The complaint shall be submitted in writing and shall specify the employer's violation(s) of this Chapter.
  - (2) Upon receipt of the written complaint, the ECO shall give written notice to the employer that a complaint has been filed with the ECO.
  - (3) The ECO, or his or her designee shall have the authority to review, investigate and determine if a violation(s) of this Chapter has occurred. The ECO shall provide the complaining party and employer a written determination within five (5) business days after receiving the complaint. If circumstances require an extension of time for the ECO to submit a written determination, notice and reasoning for the extension shall be provided to the complaining party in a timely manner.
  - (4) If upon investigation, the ECO, or his or her designee, determines that a violation of the Indian Employment Preference section of this Chapter has occurred, the ECO shall proceed with the following:
    - a. The ECO, or his or her designee, shall seek to achieve an informal settlement or resolve the violations with compliance with this Chapter.
    - b. If unable to achieve compliance, the ECO shall issue a formal Notice of Noncompliance.
    - c. An employer who has been issued a Notice of Non-Compliance shall file a corrective action plan within five (5) business days of receiving Notice of Non-Compliance.
    - d. If the ECO finds that the employer has not violated this Chapter, the ECO shall issue a formal Notice of Compliance to the employer and the complaining



party, and shall also advise the complaining party of his or her right to request an Indian Preference Appeals Panel (IPAP) hearing.

- e. An employer who disagrees with the Notice of Non-Compliance may exercise their right to request an Indian Preference Appeals Panel (IPAP) hearing.
- B. A request for an IPAP hearing must be filed within three (3) business days from when the Notice of Compliance or Non Compliance was received by the appealing party. Each party will be given sufficient prior notice of the IPAP hearing.
- C. Any hearing held, will be conducted pursuant to Section 8-3-6 of this Chapter and rules and regulations promulgated by the Governor. The IPAP's decision shall be in writing, and served to the parties no later than five (5) business days after the close of the hearing. All decisions of the IPAP are final and not subject to review by any court.

**Section 2-3-11. Administrative Fee**

Any contractor awarded a contract covered by the Indian Preference Code shall pay a fee of one percent (1%) of the actual construction cost. This fee will be based on the monthly progress payments for the construction contract. This fee will be due twenty-five (25) calendar days after the date the Contracting Officer approves the monthly progress payment.

**Section 2-3-12. Sovereign Immunity Not Waived.**

- A. Nothing in this Chapter shall be construed as an express waiver of the Pueblo of Laguna's sovereign immunity.

**Section 2-3-13. Severability.**

- A. If any provision of this Chapter or the application to any person or circumstance is held invalid, the remainder of the Chapter shall not be affected.