

## CHAPTER 10-3 INDIAN PREFERENCE IN CONTRACTING

### 10-3-1 General

(a) This Chapter specifies the methods and procedures all agencies of the Confederated Tribes of the Colville Reservation (Tribes) must follow to provide preference to a certified firm when contracting and all contractors with the Tribes, or a tribal agency, when subcontracting. For purposes of this Chapter, the tribal governing body means the Colville Business Council.

(b) This Chapter, except as provided herein, shall apply to all oral or written contracts to provide goods or services entered into, or proposed to be entered into, by any agency of the Tribes or any person or entity contracting with an agency of the Tribes. This Chapter shall supersede all prior conflicting tribal statutes or resolutions.

(c) This Chapter shall not be interpreted to, in any way, prevent any agency Tribes from rejecting any bid or proposal on the ground that the bid or proposal is unresponsive or for any other reason which is not inconsistent with this Chapter.

(Amended 11/19/98, Resolution 1998-852)  
(Amended 3/6/14, Resolution 2014-118)  
(Certified 3/12/14)

### 10-3-2 Definitions and Requirements

(a) "Agency" means the party offering the contract, and the party responsible for compliance with this Chapter. An Agency may be a natural person, a legal person, an artificial person, or a political subdivision. In addition, Agency, for the purposes of this Chapter shall mean any and all arms, agencies, departments, enterprises, organizations, instrumentalities, Corporations, 638 contract programs, or other entities of the Tribes. Where the contracting party is the Colville Business Council or the Tribal Court, this Chapter shall apply only to contracts for construction, physical repair, upkeep of buildings, or physical work on tribally owned or managed real or personal property.

(b) "Certified firm" means a firm certified as a 100% Colville business enterprise, Colville family business enterprise, Colville business enterprise or other Indian business enterprise according to the criteria and procedures in this Chapter.

(c) "Clear and Convincing" means that the evidence presented by a party during the trial must be highly and substantially more probable to be true than not, and the trier of fact must have a firm belief or conviction in its factuality. In this standard, a greater degree of believability must be met than the common standard of proof in civil actions, "Preponderance of the Evidence", which requires that the facts as a threshold be more likely than not to prove the issue for which they are asserted."

(d) "100% Colville business enterprise" means an enterprise or organization which is 100% owned and controlled by Colville tribal members and which meets all criteria for certification under this Chapter.

(Amended 11/19/98, Resolution 1998-852)  
(Amended 3/6/14, Resolution 2014-118)(Certified 3/12/14)

(e) "Colville business enterprise" means an enterprise or organization which is at least 60% owned and controlled by Colville tribal members and which meets all criteria for certification under this Chapter.

(Amended 11/19/98, Resolution 1998-852)

(f) "Colville family business enterprise" means an enterprise or organization which is 100% owned and controlled by a Colville member and their non-Colville spouse, parent or children, and which meets all requirements for certification under this Chapter.

(Amended 11/19/98, Resolution 1998-852)

(g) "Commission" means the Colville Tribal Employment Rights Commission as defined in the Tribal Employment Rights Chapter (CTC § 10-1-1 et seq.) of the Confederated Tribes of the Colville Reservation.  
(Amended 12/20/01, Resolution 2001-700)  
(Certified 12/31/01)

(h) "Indian" means any member of a federally recognized Indian tribe, band or nation. It shall also include members of Canadian Indian tribes, bands or nations. Applicant(s) for Indian preference will be required to provide certification from a federally recognized tribe or BIA agency for the tribe for which membership is claimed.  
(Amended 11/19/98, Resolution 1998-852)  
(Amended 3/12/14, Resolution 2014-118)(Certified 3/12/14)

(i) "Indian business enterprise" means an enterprise or organization which is at least 60% Indian owned and controlled and which meets all criteria for certification under this Chapter.  
(Amended 11/19/98, Resolution 1998-852)

(j) "Indian tribe" means an Indian tribe, band, or nation or other organized group or community; including any Alaska Native village or regional or village corporation as defined in or established according to the Alaska Native Claims Settlement Act; recognized as such by the United States or Canada.

(k) "Joint venture" means an association of two or more persons or firms to carry out a single or limited number of business enterprises for profit, for which purpose they combine their property, money, effects, skills and knowledge.

(l) "Key employee" means an employee who is in a supervisory position or who is authorized to perform management functions including, but not limited to, bidding, contracting, financially obligating the firm, financial management, business planning, hiring, disciplining and firing employees.

(m) "Preference" means the process of providing advantage, or limiting bidding or requests for proposals, to certified firms as defined under this Chapter and to provide a means by which certified firms receive preference in contracts.  
(Amended 3/12/14, Resolution 2014-118)(Certified 3/12/14)

(n) "Responsive bid" means at a minimum that the bid shall comply with all bid requirements stated in writing and shall be a reasonable price.

(o) "Technically qualified" means the practical, technical, administrative and financial ability of a firm to perform or provide by itself, if permitted, through subcontracts, the services or goods specifically set out in the bid or request for proposal package.

(p) "TERO" means the Tribal Employment Rights Office.

(q) "Tribal Court" means the Colville Tribal Courts.

(r) "Tribes" means the Confederated Tribes of the Colville Reservation.  
(Amended 3/12/14, Resolution 2014-118)(Certified 3/12/14)

### **10-3-3 Responsibility for Compliance**

(a) Agencies, except as set out in this Chapter, are responsible for compliance with this Chapter. In addition to the Agencies, all entities and persons engaged directly or indirectly in contracting with an Agency shall be responsible for compliance with this Chapter when subcontracting.

(b) Agencies shall be responsible for compliance with all of their contractors. No contractor shall be permitted to commence work on the Reservation until it has demonstrated compliance with the subcontract

preference requirements.

(c) The Agency awarding a contract shall comply with the requirement that preference be given in the award of such contract and shall be responsible, together with the TERO and the contractor, for insuring that the contractor complies with Chapter 10-1 requirements.

(d) When the Agency is an Indian housing authority, it shall comply only with the Department of Housing and Urban Development's Indian preference in contracting regulations.

(e) The Tribes shall not be liable for any losses incurred by a contractor who is not permitted to commence work on the Reservation because the contractor has entered into a subcontract and has failed to comply with the subcontracting preference requirement.

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**Certification**

(a) An applicant seeking to qualify for preference in contracting or subcontracting as a certified firm shall submit written proof of the applicant's Indian or Indian family ownership and control to the TERO of the Tribes. Written proof of ownership shall include, but not be limited to, deeds, titles, stock, bonds, tax records, joint venture agreements or contracts. Written proof of control shall include but not be limited to a business plan, articles of incorporation, by-laws, operating manual, or any document which shall have binding effect upon the authority of the owner to exercise control over the firm.

(Amended 3/6/14, Resolution 2014-118)(Certified 3/12/14)

(b) The TERO shall certify applicant firms who meet the minimum ownership and control requirements for the applicable preference category. The following ownership and control requirements applicable to each preference category are as follows:

(1) 100% Colville Business Enterprise:

(A) Ownership: Colville members must own 100% of the firm.

(B) Control: Colville members must exercise 100% management and supervisory control of the day-to-day operations of the business. All key employees must be Colville members.

(Amended 11/19/98, Resolution 1998-852)

(2) Colville Family Business Enterprise:

(A) Ownership: The firm must be 100% owned by a Colville member or a marital community consisting of a Colville member and a non-Colville spouse.

(B) Control: The Colville member and their non-Indian spouse, parent or children must exercise 100% management control and supervisory control of the day-to-day operations of the business.

(Amended 11/19/98, Resolution 1998-852)

(3) Colville Business Enterprise:

(A) Ownership: Colville members must own at least 60% of the firm and its assets.

(B) Control: Colville members must exercise majority control of the business, and be substantially involved in the day-to-day management and operations of the business.

(Amended 11/19/98, Resolution 1998-852)

(4) Indian Business Enterprise:

(A) Ownership: Indians must own at least 60% of the firm and its assets.  
(Amended 3/12/14, Resolution 2014-118)(Certified 3/12/14)

(B) Control: Indians must exercise majority control of the business, and be substantially involved in the day-to-day management and operations of the business.  
(Amended 11/19/98, Resolution 1998-852)

(b) Ownership Requirements: The following factors will be applied in determining whether the firm meets the minimum ownership requirements for the applicable certification category:

(1) Value: The Indian owner(s) must establish that they provided real value for their stated ownership interest by providing capital, equipment, real property, or similar assets commensurate with the value of their ownership share. It will not be considered "real value" if the Indian(s) purchased his or her ownership share, directly or indirectly, through a promissory note, the ultimate creditor of which is the non-Indian owner of the firm or an immediate relation thereof, or any similar arrangement, unless a convincing showing can be made that the Indian owner(s) brought such special skills, marketing connections, or similar benefits to the firm that there is a good reason to believe that arrangement would have been entered into even if there were not an Indian preference program in existence.

Where the Indian participant can demonstrate that he or she could not pay good value for his or her ownership interest because the normal capital sources were closed to him or her because he or she is an Indian, that person may satisfy this requirement by demonstrating further that he or she extended his or her capital raising capability as far as possible, such that the Indian participant clearly is at risk in the business in relationship to his or her means.

(2) Profits: The Indian owner(s) will receive the percentage of all profits equal to their ownership interest. If there is any provision that gives the non-Indian owner a greater share of the profits, in whatever form and under whatever name, such as through management fees, equipment rental fees, or bonuses tied to profits, certification will be denied. Salary scales will be reviewed to ensure the relative salaries being paid Indian and non-Indian owners are consistent with the skills of the parties and are not being used to circumvent the requirement that the Indian owners are receiving profits equal to their ownership interest.

(3) Community Ownership: An ownership interest arising in a non-applicant spouse solely because of the operation of community property laws will not, by itself, disqualify the applicant spouse from meeting the applicable ownership requirements for certification, provided all other ownership and control requirements are satisfied for the category of certification for which they have applied.

(c) Control Requirements:

(1) 100% Colville Business Enterprises: Certification for this category requires that the firm establish that it is wholly controlled, managed and supervised by Colville tribal members. All key employees must be Colville members. For trucking firms to qualify for this category, all drivers must be Colville members. The employment of non-Colville members who are not key employees will not disqualify the firm from certification in this category, provided:

(A) they have been approved by TERO through issuance of a work permit or a compliance and utilization plan; and

(B) they do not exercise, nor have the authority to exercise, any management or supervisory functions for the firm. Temporary employment in key positions of non-Colville members due to unexpected key employee vacancies shall not disqualify a firm from continued certification in this category, provided;

(C) the temporary hire is approved by TERO through issuance of a work permit or a compliance and utilization plan; and

(D) such employment does not exceed thirty (30) days.

(Amended 7/6/2000, Resolution 2000-433)  
(Effective 10/11/2000)

(2) Colville Family Businesses: Certification for this category requires that the firm establish that it is wholly controlled, managed and supervised by Colville tribal members and their non-Colville family members. For purposes of certification under this category, family members are limited to spouses, parents and children of Colville members. All key employees must be Colville members or their family members. The employment of non-Colville members or their family members who are not key employees will not disqualify the firm from certification in this category, provided:

(A) they have been approved by TERO through issuance of a work permit or a compliance and utilization plan; and

(B) they do not exercise, nor have the authority to exercise any management or supervisory functions for the firm. Temporary employment in key positions of non-Colville members or their family members due to unexpected key employee or management vacancies shall not disqualify a firm from continued certification in this category, provided;

(C) the temporary hire is approved by TERO through issuance of a work permit or a compliance and utilization plan; and

(D) such employment does not exceed thirty (30) days.

(Amended 11/19/98, Resolution 1998-852)

(3) Colville and Other Indian Business Enterprise Control Requirements: The same requirements apply to both Colville business enterprises and Indian business enterprises. If the Indians meeting the minimum ownership and control requirements are Colville members, they shall be certified as a Colville business enterprise. The firm must be under significant Indian management and operational control. The firm must be able to demonstrate that:

(A) One or more of the Indian owners must be substantially involved, as a senior level official, in the day-to-day management and operation of the firm. He or she must, through prior experience or training, have substantial occupational ties to the area of business in which the firm is engaged such that he or she is qualified to serve in the senior level position and is sufficiently knowledgeable about the firm's activities to be accountable to the Tribes for the firm's activities. The Indian owners must have the demonstrable ability to independently make basic decisions pertaining to the day-to-day operations of the firm. Office management, clerical, or other experience unrelated to the firm's field operations is insufficient to establish the requisite control necessary for certification.

(B) There must be good reason to believe that the firm was not established solely or primarily to take advantage of the Indian preference program. In evaluating an applicant under this criterion the TERO will consider the factors set out below. The TERO shall exercise broad discretion in applying these criteria in order to preserve the integrity of the Indian preference program and in questionable cases shall deny certification:

(i) History of the Firm: Whether the history of the firm provides reason to believe it was established primarily to take advantage of the Indian preference

program, and in particular whether the firm, a portion of the firm, or key actors in the firm originally were associated with a non-Indian-owned business that gained little of business value in terms of capital, expertise, equipment, etc., by adding ownership or by merging with an Indian firm.

(ii) Employees: Whether key non-Indian employees of the applicant are former employees of a non-Indian firm with which the Indian firm is or has been affiliated, through a joint venture or other arrangement, such that there is reason to believe the non-Indian firm is controlling the applicant. Whether Indians are employed in all or most of the positions for which qualified Indians are available. A high percentage of non-Indian employees in such positions will provide reason to believe the firm was established primarily to benefit non-Indians.

(iii) Relative Experience and Resources: Whether the experience, expertise, resources, etc., of the non-Indian partner(s) is so much greater than that of the Indian(s) that there is little sound business reason for the non-Indian to accept a junior role in the firm or venture other than to be able to take advantage of the Indian preference program.

(Amended 11/19/98, Resolution 1998-852)

(d) Brokers: Brokers will be certified only if they are dealers who own, operate, or maintain a store, warehouse, or other establishment in which the commodities being supplied are bought, kept in stock, and sold to the public in the usual course of business; Provided, that this requirement shall not apply where the applicant demonstrates that it is customary and usual in the establishment and to keep the commodities in stock.

(e) Joint Ventures: No Indian/non-Indian joint venture shall be provided a preference under this Chapter in contracting or subcontracting unless the Indian portion of the joint venture can successfully demonstrate to the TERO that it has the capability to manage all the work on the project on its own and has entered into the joint venture because the non-Indian firm provides only limited backup capability such as bonding, specialized expertise, or capital.

(Amended 3/12/14, Resolution 2014-118)(Certified 3/12/14)

(f) A firm seeking a contracting or a subcontracting preference under this Chapter shall submit evidence sufficient to demonstrate to the satisfaction of the agency and/or the contractor, as appropriate, that the applicant has the technical, administrative, and financial capability and/or the necessary license(s) and bondability; to perform contract work of the size and type involved, and within the time provided, under the proposed contract or subcontract.

(g) A tribal agency may state in its solicitation that bidders or persons and entities submitting proposals, must submit evidence of certification as an Indian contractor and entitlement to the preferences provided for in this Chapter, within a specified time period before a scheduled bid opening.

(h) No contractor or subcontractor shall qualify for preference if Indian ownership in, or control of, the business is less than the required minimum percent at any time during the bidding stage, the proposal stage, or the performance of the contract.

(i) No Indian firm shall represent that it is exercising management control of a project in order to qualify for Indian preference in the award of said contract or subcontract when in fact such management control is exercised by a non-Indian entity such that the Indian entity is acting as a front or brokering out services.

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**Certification Procedures**

(a) Application for Certification: A firm seeking certification as a certified firm shall submit a completed TERO application to the TERO. TERO staff will be available to assist a firm in filling out the application, request such additional information as it believes appropriate (computation of the twenty-one (21) day period shall be stayed during the time any request for additional information is outstanding), conduct such investigations as it deems appropriate, and make a final written finding to certify or not to certify. The TERO may extend the processing period by an additional twenty-one (21) days, by sending notification of the extension to the applicant by registered mail. Within fifteen (15) days of receipt of the TERO's analysis and finding(s), the applicant may request a hearing before the Commission on the application to appeal any part of the certification finding. The Indian principal(s) of the firm shall be present at the hearing. In addition, any person wishing to present information to the Commission shall be entitled to do so, by requesting, no less than one day prior to the hearing, an opportunity to participate. Hearings shall be conducted as provided for in Tribal Code Chapter 2-4.

(Amended 3/12/14, Resolution 2014-118)(Certified 3/12/14)

(b) Probationary Certification: An applicant granted certification shall be issued a one-year probationary certificate. During that period, the TERO staff and the Commission shall monitor the firm's activities to ensure that the firm is operating in the manner described in its application. During the probationary period, the TERO and the Commission shall have the right to request and receive such information and documents as they deem appropriate.

(c) Final Certification: At the end of any probationary period the TERO, after receiving recommendations from the TERO Staff, shall either:

- (1) Grant full certification;
- (2) Continue the probationary period for up to six months; or
- (3) Deny certification.

(d) Withdrawal of Certification: From the information provided in any required reports, on the basis of a written grievance filed by any other firm or person, or on its own initiative, the TERO may initiate proceedings to withdraw or suspend the certification of any firm. The TERO shall prepare an analysis and finding and prior to making a finding shall send the firm notice, by registered mail, that its certification is being examined, along with the grounds therefore. A firm may appeal any finding of withdrawal or suspension of certification within thirty (30) days from receipt of the notice, by filling a written appeal, including all relevant facts and legal arguments as to why the withdrawal or suspension was in error, to the Commission which will hold a hearing, at which the TERO shall have the burden of proof by the preponderance of the evidence, to determine whether the withdrawal or suspension was not in error. At the hearing, the TERO staff shall present the case for suspension or withdrawal, and the firm shall have the opportunity to present evidence in support of their case. After the hearing, the Commission may:

(Amended 3/12/14, Resolution 2014-118)(Certified 3/12/14)

- (1) Withdraw certification;
- (2) Suspend certification for up to one year;
- (3) Put the firm on probation; and/or
- (4) Order that corrective action be taken within a fixed period.

A firm that has had its certification withdrawn may not reapply for a period of one (1) year.

(e) Firms Certified Prior to the Adoption of these Criteria: Each firm holding Indian preference

Certification from the Tribes prior to the effective date of this Chapter shall submit an application required under these criteria to the TERO within thirty (30) days after the effective date of this Chapter. If the TERO determines that the firm qualifies under these new criteria, it shall, within forty-five (45) days of receipt of the application, so find. Should the TERO require additional information from the firm, computation of the forty-five (45) day period shall be stayed by written notice from the TERO for a reasonable time to permit such information to be provided. If the TERO finds that certification is denied, the firm may appeal to the Commission as set out above.

(f) Change in Status and Annual Reports: Each certified firm shall report to the TERO, in writing, any changes in its ownership or control status within thirty (30) days after such changes have occurred. Each certified firm, on the anniversary of its receipt of certification, shall update the information provided in this initial application on an annual report form provided by the TERO. Failure to provide information pursuant to these requirements shall constitute grounds for TERO to move for withdrawal of certification.

(g) TERO may ask Covered Employers to complete surveys or otherwise provide feedback about certified firm performance. TERO may use this feedback in formulating recommendations for the firm and potential contractors.

(Amended 3/12/14, Resolution 2014-118)(Certified 3/12/14)

#### **10-3-6 Indian Preference**

(a) All agencies and of the Tribes shall give preference to qualified Indian business enterprises when awarding contracts.

(Amended 3/12/14, Resolution 2014-118)(Certified 3/12/14)

(b) Consistent with procedures and requirements outlined in this section, preference shall be given in the following order:

- (1) 100% Colville business enterprises;
- (2) Colville family business enterprises;
- (3) Colville business enterprises;
- (4) Indian business enterprises.

(c) All requests for proposals, invitations for bids, or other contract solicitations shall contain a statement that Indian preference applies in the award of the contract and in the work to be performed pursuant to the contract.

(Amended 11/19/98, Resolution 1998-852)

#### **10-3-7 Indian Preference in the Award of Contracts and Subcontracts**

(a) Preference in the award of contracts and subcontracts that are let under an invitation for bids (IFB) process (e.g., conventional bid construction contracts, material supply contracts) shall be provided as follows:

- (1) The IFB may be restricted to qualified certified firms. The IFB should, however, not be so restricted unless the agency has a reasonable expectation that two or more qualified Indian certified firms are likely to submit responsive bids. If two or more qualified certified firms submit responsive bids, preference shall first be given in the order stated in section 10-3-6. Award shall be made to the qualified certified firm, after first applying the preference order stated in section 10-3-6, with the lowest responsive bid if that bid is within budgetary limits established for the specific project or activity for which bids are being taken and no more than "X" higher than the total bid price of the lowest responsive bid from any certified bidder in a lower preference category. "X" is determined by reference to the chart in section 10-3-7(a), subpart (2). If fewer



than the minimum required number of qualified certified firms submit responsive bids, the agency may reject all bids, and shall readvertise the IFB in accordance with section 10-3-7(a), subpart (1) or section 10-3-7(a), subpart (2). In unusual circumstances and where only a single qualified certified firm has submitted a bid, agencies may accept that one bid or negotiate a reasonable price with the single qualified certified firm, bidder; i.e, the agency determines that the single bid received is at an unusually favorable price, or the agency determines that delays caused by readvertising would subject the project to higher costs.

(2) If the tribal agency prefers not to restrict the IFB as described in section 10-3-7(a), subpart (1), or if an insufficient number of qualified certified firms submit responsive bids in response to an IFB under section 10-3-7(a), subpart (1), the agency or contractor may advertise for bids inviting responses from technically qualified non-certified enterprises as well as qualified certified firms. Award shall be made to the qualified certified firm, after first applying the preference order stated in section 10-3-6, with the lowest responsive bid if that bid is within budgetary limits established for the specific project or activity for which bids are being taken and no more than "X" higher than the total bid price of the lowest responsive bid from any qualified bidder.

(3) "X" is determined as follows:

When the lowest responsive bid is:

less than \$100,000	10% of that bid, or \$9,000
At least \$100,000, but less than or \$200,000	9% of that bid, or \$16,000
At least \$200,000, but less than \$300,000	8% of that bid, or \$21,000
At least \$300,000, but less than \$400,000	7% of that bid, or \$24,000
At least \$400,000, but less than \$500,000	6% of that bid, or \$25,000
At least \$500,000, but less than \$1 million	5% of that bid, or \$40,000
At least \$1 million, but less than \$2 million.	4% of that bid, or \$60,000
At least \$2 million, but less than \$4 million.	3% of that bid, or \$80,000
At least \$4 million, but less than \$7 million	2% of that bid, or \$105,000
\$7 million or more...	1.5% of the lowest responsive bid, with no dollar limit.

(4) The offer of a price or bid below a contractor's cost of performing the contract, producing the product, or providing the services shall not be considered the lowest bid.

(5) If no responsive bid by a qualified certified firm is within the stated range of the total bid price of the lowest responsive bid, award shall be made to the qualified bidder with the lowest bid.

(b) Preference in the award of contracts and subcontracts that are let under a request for proposals (RFP) process shall be provided as follows:

(1) The RFP may be restricted to qualified certified firms. The RFP should, however, not be so

restricted unless the agency has a reasonable expectation that the required minimum number of qualified certified firms are likely to submit responsive proposals. If two or more qualified certified firms submit responsive proposals at a reasonable price as determined by the agency, award shall be made, in accordance with the preference order stated in section 10-3-6, to the certified firm with the best proposal based on a rating system as set out below. If fewer than the minimum required number of qualified certified firms submit responsive proposals, the tribal agency shall reject all proposals and shall readvertise the RFP in accordance with section 10-3-7(b), subpart (1) or subpart (2). The agency shall develop the particulars concerning the RFP, including a rating system that provides for the assignment of points for the relative merits of submitted proposals.

The RFP shall identify all rated factors, including price or cost, and any significant subfactors that will be considered in awarding the contract, and shall state the relative importance the agency places on each evaluation factor and subfactor.

(2) If the agency prefers not to restrict the RFP solicitation as described in section 10-3-7(b), subpart (1), or if an insufficient number of qualified, certified firms satisfactorily respond under that procedure, the agency or contractor may issue an RFP inviting responses from technically qualified noncertified as well as certified firms. The agency shall develop the particulars concerning the RFP, including a rating system that provides for the assignment of points for the relative merits of submitted proposals. The RFP shall identify all factors, including price or cost, and any significant subfactors that will be considered in awarding the contract, and shall state the relative importance the tribal agency places on each evaluation factor and subfactor. Notification that Indian preference is applicable to this procurement shall be included in the RFP solicitation.

(3) If the RFP invites responses from technically qualified non-certified firms, an agency shall set aside a minimum of 15% of the total number of available rating points for the provision of Indian preference to qualified certified firms in the award of contracts and subcontracts. The percentage or number of points set aside for preference and the method for allocating these points shall be specified in the RFP.

(4) An agency shall require that contractors responding to an RFP solicit subcontractors for the RFP in compliance with the requirements for subcontracting found in Chapter 10-1.

(Amended 12/20/01, Resolution 2001-700)

(Certified 12/31/01)

#### **10-3-8 Preference Not Feasible**

Agencies shall, in the conduct of their own operations, adhere to the preference requirements in this Chapter. Where the provision of preference is determined by an agency not to be feasible, the agency shall:

- (a) Document in writing its determination and the basis for its findings;
- (b) Shall maintain for three years the documentation in its files for TERO's review; and
- (c) Provide the TERO with a copy of the determination within twenty (20) days of its issuance. The written determination shall be public information. The TERO, an Indian contractor, or subcontractor affected by the determination may oppose or contest the determination under this Chapter.

#### **10-3-9 Other Preference Provisions**

(a) When both tribal and federal funds are used for a project, the work to be accomplished with the funds should be separately identified, and federal Indian preference regulations, if any, must be applied to the work financed by federal funds. If the funds cannot be separated, federal Indian preference regulations, if any, will apply to the total project.

(b) Each agency and contractor shall be responsible for enforcing and monitoring Indian preference implementation, according to the requirements of Chapter 10-1, in subcontracting, employment, and training by its contractors and subcontractors. Should incidents of noncompliance be found to exist, the agency or contractor shall take appropriate remedial action. A finding by the TERO that the agency or contractor has not provided adequate monitoring or enforcement of Indian preference may result in a determination by the TERO that the agency is in breach of this Chapter. Such a finding shall constitute grounds for the Commission to impose remedies or sanctions under this Chapter.

(c) Preference in contracting, subcontracting, employment, and training applies not only on-site, on the Reservation, or within the tribal territorial or agency jurisdiction, but also to contracts with firms that operate outside this jurisdiction (i.e., employment in modular or manufactured housing construction facilities) and deliver goods or services for use on the Reservation.

(d) Technical Qualifications: An agency shall have the discretion to determine technical, administrative and financial qualifications of contractors and subcontractors. If an agency or contractor determines that a certified firm is not technically qualified, the agency must provide to each certified firm it rejects, written reasons for the rejection.

(1) If an agency or contractor determines that certified enterprises lack the qualifications to perform all of the work required under a contract or subcontract; the agency or contractor may, at the discretion of the agency, divide the work required into smaller portions so that certified firms can qualify for a portion of the work.

(2) If a certified enterprise is disqualified on the ground that it is technically unqualified and believes that the disqualification was the result of an incorrect decision or an improper effort by an agency or contractor to circumvent its preference responsibilities under this Chapter, the certified enterprise may file a complaint with the Commission.

(3) Any complaint shall be filed under section 10-3-9 within twenty (20) calendar days after the firm was notified of its disqualification. The burden shall be on the complaining, certified enterprise to demonstrate that it is technically qualified, and that its disqualification was the result of an effort to circumvent obligations established by this Chapter.

(e) Reasonable Price: An agency may use any lawful process it chooses for determining what constitutes a reasonable price including, but not limited to: competitive, open or closed bidding; or the establishment of a prototype cost ceiling before bidding or negotiations commence. An agency may reject bids by certified enterprises and other firms on the basis of price. No agency may reject a bid or proposal for a specific project or contract by a certified enterprise on the grounds that the price is not reasonable and subsequently contract with a non-certified firm at a price the same or higher than that contained in the rejected bid.

#### **10-3-10 Review Procedures for Complaints Alleging Inadequate or Inappropriate Provision of Preference**

(a) Any aggrieved party or the director may file a complaint if they believe the provisions of this Chapter have been violated. Each complaint shall be in writing, signed and filed with the agency or contractor.

(b) A complaint must be filed with the agency or contractor no later than twenty (20) calendar days from the date of the action (or omission) upon which the complaint is based.

(c) Upon receipt of a complaint, the agency or contractor shall promptly stamp the date and time of receipt upon the complaint, acknowledge its receipt in writing to the complainant within five (5) days and shall either meet, or communicate by mail or telephone, with the complaining party in an effort to resolve the matter. In all cases, but especially where the complaint indicates that expeditious action is required to preserve the rights of the complaining party, the agency or contractor shall endeavor to resolve the matter as expeditiously as possible. If noncompliance with Indian preference requirements is found to exist, the agency or contractor shall take appropriate steps to remedy the noncompliance and to amend its procedures

so as to be in compliance. If the matter is not resolved to the satisfaction of the complaining party within fifteen (15) days following the agency's receipt of a complaint, the complaining party may file a written complaint with the director. Complaints filed with the director must be received by the TERO within thirty (30) days after the action (or omission) on which the complaint is based. If the TERO director initiated the complaint with the agency, the director and agency shall proceed directly to the procedure in (d) below.

(Amended 3/12/14, Resolution 2014-118)(Certified 3/12/14)

(d) Upon receipt of a written complaint, the agency or contractor shall provide a written report to the director setting forth all relevant facts, including, but not limited to, the date the complaint was filed with the agency, the name of the complainant, the nature of the complaint, including the manner in which Indian preference was or was not provided and actions taken by the agency in addressing or resolving the complaint. The agency or contractor shall provide its report and all relevant documents concerning the complaint to the director within ten (10) days after receipt of TERO's notice to the agency or contractor that a complaint has been filed.

(e) Upon receipt of the agency's or contractor's report, the director will investigate the complaint and determine whether the actions taken by the agency or contractor comply with Indian preference requirements under this Chapter. If the director finds a violation which the director is unable to resolve through negotiation and conciliation, the director shall refer the matter to the Commission for a final determination on the complaint. The director shall also transfer its entire complaint file together with a written report of their investigative findings. The Commission shall order a hearing on the complaint with notice of such hearing given to all affected parties.

Notification of the Commission's determination shall be provided to the agency and to the complaining party, in writing, no later than thirty (30) days following the TERO Commission's receipt of the complaint. If the complaining party's alleged injury will occur during this thirty (30) day period, the Commission will make a good faith effort to make its determination before the occurrence of such injury (i.e., contract award). There shall be no appeal to the Tribal Court from a finding of the Commission under this Chapter.

(f) Where the Commission determines on the basis of the facts provided by the agency or contractor and on the basis of other available information that there has been noncompliance with Indian preference requirements, the Commission shall, in addition to other penalties provided in this Chapter, instruct the agency or contractor to take appropriate steps to remedy the noncompliance and to amend its procedures so as to be in compliance.

### **10-3-11 Sanctions**

If after a hearing, provided for in this Chapter and upon the determination that the complaint is valid, the Commission shall impose such sanctions on an agency or contractor as are provided here and elsewhere in this Chapter. Such sanctions shall be money damages to be paid by the contractor or agency to the complainant up to the amount of profit the complaining contractor or subcontractor might reasonably have expected to receive under the specific circumstances of the complaint, and may include reasonable costs of filing and prosecuting the complaint. The Commission shall assess the reasonable costs of defending the complaint against an unsuccessful complaining party. There shall be no appeal to the Tribal Court from the imposition of money damage, sanctions or costs.

Where a manager of a tribal agency is found to be in willful noncompliance with the provisions of this statute, that willful noncompliance shall be grounds for disciplinary action against the manager. The Commission may make recommendations to the executive director, CTEC personnel director or other proper authority regarding disciplinary action for violations of this Chapter. All discipline shall be carried out pursuant to the applicable personnel procedure.

(Chapter Amended 7/6/98, Resolution 1998-550)  
(Chapter Amended 1/15/98, Resolution 1998-16)  
(Chapter 10-3 Adopted 2/7/91, Resolution 1991-20)  
(Certified 2/26/91)