

Title 13 – Indian Employment and Contracting Preferences

Chapter 5. Contracting and Subcontracting Preference; Registration; Contracting Plan

(CHAPTER AMENDED AS PER RESOLUTION NO. 231 5-87-2, DATED 02/25/87.)

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Sec. 501. Indian references for contracting and subcontracting.

Every covered entity engaged in any business on trust land within the Reservation, shall give preference to firms certified by the Tribes under this Chapter in all contracts and subcontracts to be performed on the Reservation.

(AMENDED AS PER RESOLUTION NO. 423-94-1, DATED 01/11/94).

Sec. 501.1. Scope of preference.

An entity engaged in activity subject to this Chapter may not enter into a contract or subcontract with

a firm not certified under this Chapter unless it has contacted every certified firm in the relevant field and has determined that there is no certified firm that is technically qualified to perform the work required and willing to do so at a reasonable price. So long as a certified firm meets minimum threshold qualifications, no other firm may be selected for any contract or subcontract. If the entity determines that a certified firm lacks the qualifications to perform all of the work required under a contract or subcontract, the entity shall make a good faith effort to divide the work required into

smaller portions so that the certified firm can qualify for a portion of the work. An entity engaged in activity subject to this Chapter shall be responsible for the compliance of all its contractors and subcontractors with this Chapter. No entity shall circumvent the requirements of this Section by hiring non-Indians and designating them as employees rather than contractors or subcontractors.

(a) "Near the Reservation" means within reasonable daily commuting distance of any Indian community on the Reservation;

(b) "TERO" shall mean the Tribal Employment Rights Office established by Section 201;

(c) "Director" shall mean the director of TERO appointed under Section 202

(d) "Review Board" shall mean the Tribal Employment Rights Review Board created by Section 301;

(e) "Covered entity" shall mean any individual, corporation, association, partnership, or other entity doing business on trust land on the Reservation other than the Tribes or any entity administered, owned, or operated by the Tribes.

(f) "Business on trust lands" includes doing business that requires regular access to, or use of, trust land within the exterior boundaries of the Reservation.

(g) "Contract and subcontract" shall mean all contracts, including but not limited to, contracts for supplies, services, and equipment, regardless of tier.

(h) "Indian" shall mean a member of a federally recognized Indian tribe.

(i) "Qualified" shall mean meeting the minimum qualifications for a job.

Sec. 502. Responsibility for evaluation of technical qualification and reasonable price.

(a) Technical qualifications. A covered entity engaged in activity subject to this Chapter shall determine the technical qualifications required for a particular contract or subcontract. However, if the entity determines that all certified firms are not qualified, the entity must first;

(1) Interview the principals in all available certified firms to determine their knowledge and expertise in the area and

(2) Provide to each certified firm it rejects a description, in writing, of areas where it believes the firm is weak and steps it could take to upgrade its qualifications. The entity shall evaluate a certified firm that does not yet have an established record on the basis of the individual qualifications of the principals in the firm, their equipment, and any other relevant factors which provide guidance on the firm's ability to perform the work.

(b) Reasonable price. A covered entity engaged in activity subject to this Chapter may use any process it chooses for determining a reasonable price including, but not limited to, competitive bidding (open or closed) or private negotiations. However, before an entity can reject a certified firm on the basis that it is not willing to do the work at a reasonable price, it must offer the certified firm an opportunity to negotiate price. If there is only one technically qualified certified firm, an entity must enter into negotiations on price with such firm and contract with that firm if a reasonable price can be negotiated. No covered entity may reject a certified firm on the grounds that the price is not reasonable, and subsequently contract with a non-certified firm at the same or a higher price.

Sec. 503. Submission of a contracting and subcontracting plan.

(a) Every covered entity seeking to conduct business on trust lands within the Reservation with any number of employees or any number of contractors or subcontractors shall register with, and obtain a Business License from, TERO in full compliance with section 403 of this Title.

(b) Every such covered entity seeking to conduct business on trust lands within the Reservation with any number of contractors or subcontractors shall, before commencing any work, submit a contracting and subcontracting plan to TERO for approval. The plan shall indicate contracts and subcontracts that will be entered into in such activity and projected dollar amounts

thereof. If the entity has already selected a firm to perform any contract or subcontract work, it shall list the name of that firm and indicate whether or not it is a certified firm. If the firm selected is not a certified firm, the covered entity shall further indicate why each certified firm registered with TERO in the relevant area of endeavor was not selected, and the name of a contact person at each certified firm with which the covered entity dealt. No authorization shall be granted to any firm which submits a plan indicating that less than one hundred percent (100%) of the value of all subcontracts will be paid to certified firms unless the entity can demonstrate that it was unable to employ Indian firms for sub-contract categories because there was an insufficient number of Indian firms qualified or available. To make such a demonstration the entity must show, at a minimum, that it interviewed all Indian firms listed on the TERO register in that area of endeavor and that:

(1) A sufficient number was not available to enable it to meet the goal; or

(2) The ones that were available and would have enabled the entity to reach the goal were rejected because they lacked the necessary technical qualifications; or

(3) That no certified firm was willing to do the work at a reasonable price after negotiation as required by Section 502;

(c) No entity authorized to engage in activity subject to this Chapter shall deviate from its plan in a manner that diminishes the percentage of Indian subcontracting, without prior written notification to TERO, and obtaining prior written approval of TERO;

(AMENDED AS PER RESOLUTION NO. 2465-89-5, DATED 05/23/89.)

(d) TERO shall have the right to inspect the records of any entity to ensure that a plan is complied with.

Sec. 504. Operation of the contract or subcontract.

Once an entity enters into a contract with a certified firm, the Tribes will not intervene in any way in the relationship between the parties unless

a certified firm demonstrates that action taken against it is intended primarily to circumvent the requirements of this Title.

Sec. 505. Replacement of non-Indian firms by certified firms after a project is underway.

(a) When an entity hires a non-certified firm because no certified firm exists at the time the non-certified firm was hired and a certified firm subsequently comes into existence, TERO shall promptly notify the entity of the existence of the certified firm;

(b) The entity shall replace the non-certified firm with a certified firm if:

(1) The contract or relationship between the entity and the non-Indian firm is expected to extend more than one year beyond the date of notification by TERO;

(2) The certified firm is technically qualified to do the work, and

(3) The certified firm is prepared to undertake the work on the same terms, including price, as the non-certified firm performing the contract.

(c) If the relationship between the entity and the non-certified firm is through a year-to-year contract, the non-certified firm shall be replaced only when the contract expires; provided that, if the contract expires within one hundred twenty (120) days following notification that a certified firm is available, the entity shall have the right to extend the contract with the non-certified firm to a date not to exceed thirty (30) days from that notice,

(d) If there is no written contract or if the contract is not a year-to-year contract, the entity will have thirty (30) days after notification by TERO to replace the non-Indian firm with the certified firm;

(AMENDED AS PER RESOLUTION NO. 2466-89- 5, DATED 05/23/89.)

(e) The requirements of this Section may be waived or the transition period extended by TERO in individual cases upon a showing of hardship upon the covered entity.

Sec. 506. Reports and monitoring.

(a) All entities engaged in any activity subject to this Chapter shall submit such reports to TERO as it requests. An entity may refuse to submit any information which it can demonstrate must remain confidential for valid business purposes;

(b) Employees of TERO shall have the right to make on-site inspections during regular business hours in order to monitor compliance with this Chapter and shall have the right to talk to any employee on-site so long as it does not interfere with the operations of the business.

Sec. 507. Individual complaints.

Any certified firm, group of certified firms, or other person or entity which believes that any entity engaged in activity subject to this Chapter has failed to comply with the requirements of this Chapter may file a complaint with TERO whether or not the complaining party can demonstrate it is personally harmed by the alleged non-compliance.

Sec. 508. Compliance and hearing procedures.

If TERO has reason to believe, either as a result of a complaint filed pursuant to Section 507 or through

its own investigations, that an entity engaged in activity subject to this Chapter on trust land has failed to comply with any of the requirements of this Chapter, TERO shall so notify the entity in writing specifying the alleged violation(s). If the party being so notified is a contractor or subcontractor, notice shall also be provided to the entity holding the permit or authorization under which the contractor or subcontractor is operating, and such entity may be a party to all further negotiations, hearings and appeals. The entity cited and TERO shall have twenty (20) days to pursue a voluntary, informal resolution of the problem. If no such resolution can be reached at the end of twenty (20) days, TERO shall notify the Review Board and request that it set up a formal hearing on the problem within twenty (20) days of such notice. The procedures at such hearings shall be as provided in Chapter 3. TERO shall pursue on

behalf of the Tribes complaints it determines to have merit. If the Review Board decides that an entity has failed to comply with this Chapter, it may impose one or more of the sanctions provided for in Section 305, and may order the party to take such corrective actions as are necessary to remedy any harm done to the Tribes or to certified firms by the non-compliance.

Sec. 509. Criteria for Indian contract preference certification.

To receive certification as a firm eligible for Indian preference an applicant must satisfy all of the following criteria:

(a) Ownership. The entity must be sixty percent (60%) or more Indian owned. The applicant must demonstrate the following:

(1) Formal ownership. That an Indian or Indians own(s) sixty percent (60%) or more of the partnership, corporation, joint venture, or other arrangement for which the application is being submitted. Such ownership must be embodied in the firm's organic documents, such as its stock ownership or partnership agreement. Ownership includes:

(i) Financial ownership and

(ii) Control The Indian(s)' ownership must provide him or her with a majority of voting rights or other decisional mechanisms regarding all decisions of the firm and the Indian(s) must receive at least a majority of the firm's assets upon dissolution;

(2) Value. The Indian owner(s) must provide real value for his/her majority ownership by providing capital, equipment, real property, or similar assets commensurate with the value of his/her ownership share. It will not be considered real value if the Indian(s) purchased his/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 good reason to believe the arrangement would have been entered into even if there

were not an Indian preference program in existence;

(3) Profits. The Indian owner(s) must receive at least sixty percent (60%) of all profits. If there is any provision that gives non-Indian owner(s) a greater share of the profits, in whatever form and under whatever name, such as through management fees, equipment rental fees, bonus tied to profits, or other vehicles, certification will be denied. Salary scales will be reviewed to ensure that 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 Indian owners receive at least sixty percent (60%) of the profits.

(b) Management control. The firm must be under significant Indian management control. The firm must be able to demonstrate that:

(1) Unitary firms (non-joint ventures). One or more of the Indian owners is substantially involved as a senior level official in the day-to-day management of the firm. The Indian owner does not have to be the Chief Executive Officer: However 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:

(i) Is qualified to serve in the senior level position; and

(ii) Is sufficiently knowledgeable about the firm's activities to be accountable to the Tribes on the firm's activities.

This provision shall be waived when:

(i) The firm is one hundred percent (100%) Indian-owned and the Chief Executive Officer is the spouse and/or parent of the owner(s), the family lives on or near the Reservation, and the majority of employees are Indian; or

(ii) The firm is owned by ten (10) or more persons, is at least seventy percent (70%) Indian-owned, the Chief Executive Officer and the highest-salaried employee in the firm are Indian, and a majority of the employees are Indian; **(AMENDED AS PER RESOLUTION NO. 2467-89-5, DATED 05/23/89.)**

(2) Joint ventures. A joint venture will be required to demonstrate that the Indian firm, in

addition to meeting the requirements on management control set out in subsection (b)(1) above, is, in fact, the controlling partner in the joint venture. The venture will be required to demonstrate that the Indian partner has the experience and expertise to manage the entire operation and that the non-Indian partner is providing specialized or limited resources or expertise to the venture and is not the manager in fact.

(c) Integrity of structure. The firm must not have been established solely or primarily to take advantage of the Indian preference program. In evaluating an applicant under this criterion TERO will consider the factors set out below. 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:

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

(2) Employees.

(i) 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;

(ii) 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.

(3) 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.

(d) Residence. The entity must have its principal place of business on or near the Fort Peck Reservation. This provision may be waived when the firm has met the criteria above and TERO and the Review Board are satisfied that the firm is bona fide and is not attempting to circumvent the requirements of this chapter.

(AMENDED AS PER RESOLUTION NO. 25-2149-2011-05, DATED 05/23/2011.)

Sec. 510. Applications for certification.

An individual or entity seeking certification as eligible for Indian preference shall submit a completed application, accompanied by an application processing fee of twenty-five dollars (\$25.00), to TERO on forms provided by TERO office. TERO staff will be available to assist an applicant in filling out and filing the application. The application shall contain, at a minimum, the following information:

(a) The applicant's name, residence, business name and address, the period of time the applicant has resided or done business on the Reservation, and if the applicant is an individual, satisfactory proof that the applicant is an Indian. If the applicant is other than an individual, the name, address and period of residence

at that address of each partner, officer and other person owning a financial interest in the net earnings of the applicant's on-Reservation business, The percentage ownership interest of each partner, officer, and other person in the applicant's net earnings from on-Reservation activities whether such partner, officer and other person is Indian or non-Indian, and if Indian, satisfactory proof that the individual is an Indian;

(b) Information sufficient to demonstrate that the criteria of Section 509(a) and (b) are met;

(c) Information concerning the origins and history of the applicant, and its employees sufficient to allow evaluation of the firm under Section 509 (c);

(d) Satisfactory proof that the applicant is qualified to conduct and operate the business for which certification is sought;

(e) A statement of the applicant's policy with respect to the employment of Indians resident on the Reservation and a history, if any, of past employment of Indians resident on the Reservation;

(f) A statement reading as follows: The undersigned each hereby certify on behalf of the applicant and each for himself or herself that the foregoing statements are true and correct and that if any material is false, any license granted pursuant to this application shall be void and of no force or effect.

Sec. 511. Certification determinations; Temporary Certification; Licensing and Registration.

Within twenty-one (21) business days after receipt of a completed application, TERO shall review the application, request such additional information as it believes appropriate (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 submit an analysis and recommended disposition to the Review Board. Copies of the analysis and recommended disposition shall be kept confidential and shall not be made available to the applicant or any other party. When it is so required, 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 thirty (30) days of receipt of TERO's analysis and recommended disposition, the Review Board shall hold a hearing on the application, posting notice of the hearing time at the Tribal Office, and Agency, and the TERO office at least five (5) days prior to the hearing. In addition, any other party wishing to present information to the Review Board shall be entitled to do so, by requesting, no less than one (1) day prior to the hearing, an opportunity to participate and may be represented by counsel. Hearings and any appeals shall be conducted as provided in Chapter 3 of this Title.

The TERO Director shall have discretion to issue temporary certification for up to thirty (30)

days to any applicant for Indian ownership certification when the Director is confident that the criteria for such certification under this Chapter are, more likely than not, to be met. Such a temporary certification may, at the discretion of the TERO Director, be extended for one additional 30 day period if the Review Board has not yet reached decision on certification. Any entity granted temporary certification shall comply with the licensing, registration, and other requirements of this Title.

Sec. 512. Probationary certification.

An applicant granted certification shall be issued a six (6) month probationary certificate, upon payment to TERO of a fifty dollars (\$50.00) certification fee. During that period, TERO shall monitor the firm's activities to ensure that the firm is operating in the manner described in its application. During the probationary period, TERO shall have the right to request and receive such information and documents as they deem appropriate. All entities granted probationary certification shall comply with the licensing, registration and other requirements of this Title.

Sec. 513. Final certification; Registration and Licensing.

At the end of the probationary period the Review Board, after receiving recommendations from TERO, shall either grant full certification or deny certification. All entities granted final certification shall comply with the licensing, registration and other requirements of this Title.

Sec. 514. Withdrawal of certification.

From information provided in the change notices or Annual Reports required by Section 516, on the basis of a written grievance filed by any other firm or person, or on its own initiative, TERO may initiate proceedings to withdraw or suspend certification for any firm. TERO shall prepare an analysis and recommended disposition for the Review Board and shall send the firm notice, by registered mail, that its certification is being examined, along with the grounds thereof.

The Review Board shall then set a date for a hearing, which shall be held within twenty one (21) days after it receives the analysis and recommended disposition from TERO. At the hearing, TERO staff shall present the case for suspension or withdrawal and the hearing shall be conducted as in Chapter 3 of this Title.

After the hearing, the Board may:

- (1) Withdraw certification;
- (2) Suspend certification for up to one (1) 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.

Sec. 515. 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 remain certified without submitting a new application under Section 510. However, if any such firm does not meet the criteria of Section 509, certification may be withdrawn in accordance with Section 514.

Sec. 516. Annual and other reports.

Each certified firm shall report to TERO, in writing, any changes in its ownership or control status within sixty (60) days after such changes have occurred. Each certified firm, on the anniversary of its receipt of permanent certification, shall update the information provided in its initial application on an Annual report form provided by TERO. Failure to provide information pursuant to these requirements shall constitute grounds for withdrawal of certification.

Sec. 517. List of certified entities.

TERO shall maintain a current list of all entities certified pursuant to this Chapter. Copies of this list shall be posted in a conspicuous place in the TERO office, shall be made available to the interested public, for a reasonable copying fee, and shall be brought to the attention of those persons,

associations, partnerships and corporations seeking to contract subcontractors for activity subject to this Chapter. No preference as between certified entities shall be indicated on the list.

Sec. 518. Retaliation forbidden.

Any covered entity and any union or person subject to tribal jurisdiction which retaliates against any employee, employer, union, or other person because of the person's exercise of rights under this Chapter, or compliance with provisions of this Chapter, shall be subject to the sanctions set forth in Section 305. In addition, if the Review Board determines a complaint has merit, TERO may petition the Tribal Court to order reinstatement or other temporary or permanent injunctive relief to prevent harm or further harm caused by such retaliatory actions.

**(SECTIONS 519-522 ARE REPEALED AS
PER RESOLUTION NO. 2315-87-2, DATED
02/25/87.)**