

**PROCUREMENT POLICY FOR *TRIBE/TRIBE***

Established for the                     **Name of Tribe/TDHE**                     by Board action on           **Date**          .  
The effective date of this Statement is                     **Date**                    .

This Statement of Procurement Policy complies with the Native American Housing Assistance and Self Determination Act of 1996, as amended and the implementing regulations at 24 CFR 1000, and the procurement standards of 2 CFR 200.

**I. GENERAL PROVISIONS**

**A. PURPOSE**

The purpose of this Statement of Procurement Policy is to: provide for the fair and equitable treatment of all persons or firms involved in purchasing by the Tribe/TDHE; assure that supplies, services, and construction are procured efficiently, effectively, and at the most favorable prices available to the Tribe/TDHE; promote competition in contracting; provide safeguards for maintaining a procurement system of quality and integrity; and assure that Tribe/TDHE purchasing actions are in full compliance with applicable Federal standards, HUD regulations, and tribal laws.

**B. APPLICATION**

This Statement of Procurement Policy (Statement) applies to all contracts for the procurement of supplies, services, and construction entered into by the Tribe/TDHE after the effective date of this Statement. It shall apply to every expenditure of funds by the Tribe/TDHE for public purchasing, irrespective of the source of funds, including contracts which do not involve an obligation of funds (such as concession contracts); however, nothing in this Statement shall prevent the Tribe/TDHE from complying with the terms and conditions of any grant, contract, gift, or bequest that is otherwise consistent with law. When both HUD and non-Federal funds are used for a project, the work to be accomplished with the funds should be separately identified, and the provisions of this Statement must be applied to the work financed by HUD; if it is not possible to separate the funds, the provisions of this Statement shall be applied to the total project. The term "procurement," as used in this Statement, includes both contracts and modifications (including change orders) for construction or services, as well as purchase, lease, or rental of materials, supplies and equipment.

**C. PROCUREMENT AUTHORITY AND ADMINISTRATION**

1. Contracting Officer. All procurement transactions shall be administered by the Contracting Officer, who shall be the Executive Director or other

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individual he or she has authorized in writing. The Executive Director shall issue operational procedures to implement this Statement. The Executive Director shall also establish a system of sanctions for violations of the ethical standards described in Section VI below.

2. Executive Director Duties. The Executive Director or his/her designee shall ensure that:
  - a. Procurement requirements are subject to an annual planning process to assure efficient and economical purchasing. The annual plan should be completed by     Date     of each year;
  - b. Procurements and modifications are in writing, clearly specifying the desired supplies, services, or construction activity, and are supported by sufficient documentation, regarding the history of the procurement, including as a minimum the rationale for the procurement method chosen, the contract type, the rationale for selecting or rejecting offers, and a price or cost analysis supporting the basis for the contract price;
  - c. For procurements other than small purchases, public notice is given of each upcoming procurement before a solicitation is issued; responses to such notice are honored to the maximum extent practical; a minimum of 30 days for main construction contracts and 15 days for other contracts is provided for preparation and submission of bids or proposals; and notice of contract award is made available to the public;
  - d. Solicitation procedures are conducted in full compliance with Federal standards stated in 2 CFR 200 and the Indian preference requirements at 24 CFR 1000.52;
  - e. An independent cost estimate is prepared before formal solicitation issuance and is appropriately safeguarded for each procurement above the small purchase limitation, and a cost or price analysis is conducted of the responses received for all procurements above the small purchase threshold;
  - f. There are sufficient unencumbered funds available to cover the anticipated cost of each procurement before contract award or modification (including change orders), work is inspected before payment, and payment is made promptly for contract work performed and accepted;

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- g. A contract administration system is maintained to insure that contractors perform in accordance with their contracts, which provides for the proper inspection of supplies, services, or construction, as well as monitoring contractor performance, status reporting on construction contracts, and similar matters.

### D. COOPERATIVE PURCHASING

The Tribe/TDHE may enter into State or tribal inter-governmental agreements to purchase or use common goods and services. The decision to use an inter-governmental agreement or conduct a direct procurement shall be based on fostering greater economy and efficiency. If used, the inter-governmental agreement shall stipulate who is authorized to purchase on behalf of the participating parties and shall specify inspection, acceptance, termination, payment, and other relevant terms and conditions. Tribe/TDHE is encouraged to use Federal or State excess and surplus property instead of purchasing new equipment and property whenever such use is feasible and reduces project costs.

### E. SPECIFICATIONS AND SCOPES OF WORK

1. General. All specifications and scopes of work shall be drafted to promote overall economy for the purposes intended and to encourage competition in satisfying the Tribe/TDHE needs. Specifications and scopes of work shall be reviewed prior to solicitation to ensure that they are not unduly restrictive or represent unnecessary or duplicative items. Functional or performance specifications are preferred. Detailed product specifications shall be avoided whenever possible. Consideration shall be given to consolidating or breaking out procurements to obtain a more economical purchase (but see Section V below). For equipment purchases, a lease versus purchase analysis should be performed to determine the most economical form of procurement.
2. Limitations. The following specification and scope of work limitations shall be avoided: geographic restrictions not mandated or encouraged by applicable Federal law (except for architect-engineer contracts, which may include geographic location as a selection factor if adequate competition is available); unnecessary bonding or experience requirements; brand name specifications (unless a written determination is made that only the identified item will satisfy the Tribe/TDHE needs); brand name or equal specifications (unless they list the minimum essential characteristics and standards to which the item must conform to satisfy its intended use). Nothing in this procurement policy shall preempt any State, tribal, or local licensing laws. Specifications and scopes of work shall be scrutinized to ensure that organizational conflicts of interest do not occur (for example, having a consultant perform a study of the Tribe/TDHE

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computer needs and then allowing that consultant to compete for the subsequent contract for the computers).

### F. ASSISTANCE TO SMALL AND MINORITY BUSINESSES

1. Required Effort. The Tribe/TDHE shall make good faith efforts to ensure those small businesses and minority-owned businesses, women's business enterprises, and individuals or firms located within or owned in substantial part by persons residing in the area of a Tribe/TDHE project are used when possible.
2. Such efforts shall include, but shall not be limited to:
  - a. Including such firms, when qualified, on solicitation mailing lists;
  - b. Encouraging their participation through direct solicitation of bids or proposals whenever they are potential sources;
  - c. Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by such firms;
  - d. Establishing delivery schedules, where the requirement permits, which encourage participation by such firms;
  - e. Using the services and assistance of the Small Business Administration;
  - f. Requiring prime contractors, when subcontracting is anticipated, to take the steps listed in a. through f. above.

### G. CONTRACT CLAUSES

1. Required clauses. In addition to containing a clause identifying the contract type, all contracts shall include any clauses required by Federal statutes, executive orders, and their implementing regulations, as provided in 2 CFR 200.326 and Appendix II to Part 200, such as the following:
  - a. administrative, contractual and legal remedies when contractor violates or breaches contract (Contracts over small purchase threshold)
  - b. termination for default and termination for convenience (Contracts over \$10,000)
  - c. Equal Employment Opportunity
  - d. Davis-Bacon Act and Copeland "Anti-Kickback" Act

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- e. Contract Work Hours and Safety Standards Act
  - f. Rights to Inventions Made Under a Contract or Agreement
  - g. Clean Air Act and Federal Water Pollution Control Act
  - h. Debarment and Suspension
  - i. Byrd Anti-Lobbying Amendment
  - j. Procurement of recovered materials
2. Forms. If all required clauses are not included on forms (e.g., Form HUD 5370), then the Tribe/TDHE shall attach any additional clauses to the forms used in contract documents and shall include the contract clauses and solicitation notices for Indian preference described above.

### H. CONTRACT TYPES AND OPTIONS

1. Contract Types. Any type of contract (pricing arrangement) which is appropriate to the procurement and which will promote the best interests of the Tribe/TDHE may be used, provided that the cost-plus-a-percentage-of-cost and percentage of construction cost methods are prohibited. All procurements shall include the clauses and provisions necessary to define the rights and responsibilities of the parties and shall be in the HUD-approved form of contract. A cost reimbursement contract shall not be used unless it is likely to be less costly or it is impracticable to satisfy the Tribe/TDHE needs otherwise, and the proposed contractor's accounting system is adequate to allocate costs in accordance with applicable cost principles (for commercial firms, Subpart 31.2 of the Federal Acquisition Regulation (FAR), found in 48 CFR Chapter 1). A time and material contracts may be used only if a written determination is made that no other contract type is suitable, and the contract includes a ceiling price that the contractor exceeds at its own risk.
2. Options. Options for additional quantities or performance periods may be included in contracts, provided that: (i) the option is contained in the solicitation; (ii) the option is a unilateral right of the Tribe/TDHE; (iii) the contract states a limit on the additional quantities and the overall term of the contract; (iv) the options are evaluated as part of the initial competition; (v) the contract states the period within which the options may be exercised; (vi) the Options may be exercised only at the price specified in or reasonably determinable from the contract; and (vii) the options may be

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exercised only if determined to be more advantageous to the Tribe/TDHE than conducting a new procurement.

### II. INDIAN PREFERENCES AND SECTION 3

#### A. INDIAN PREFERENCE

1. Section 7(b) of the Indian Self Determination and Education Assistance Act (25 U.S.C. 450e(b), which provides for Indian preference, shall apply to all procurement funded by HUD funds. The Tribe/TDHE shall, to the greatest extent feasible, give preference in the award of all contracts and subcontracts, and in training and employment to Indian organizations and Indian owned economic enterprises.
2. All preferences shall be publicly announced in the IFB and RFP and the bidding or proposal documents. Efforts to provide Indian preference must be documented. If Indian preference is not feasible, Tribe/TDHE shall document in writing the basis of its finding of infeasibility and maintain the documentation in its files for three (3) years after close out of the grant.
3. Contractors applying for eligibility for Indian preference shall submit the following:
  - a. Evidence showing that the applicant is an Indian of a federally recognized Indian tribe. A certificate of Indian blood or census card will suffice.
  - b. Evidence showing fully the extent of Indian ownership and interest;
  - c. Evidence of structure, management and financing affecting the Indian character of the enterprise, including major subcontracts and purchase agreements; materials or equipment supply arrangements; and management salary or profit-sharing arrangements; and evidence showing the effect of these on the extent of Indian ownership and interest.
4. If the Tribe/TDHE or its prime contractor determines an applicant ineligible for Indian preference, the Tribe/TDHE or prime contractor shall notify the applicant in writing before contract award, before filling the position, or before providing training.
5. Solicitation notices shall include the following information:

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- a. A recipient shall incorporate the following clause (referred to as the section 7(b) clause) in each solicitation and included in all contracts and subcontracts, as follows:
    - (1) The work to be performed under this contract is subject to Section 7(b) of the Indian Self-Determination Act (25 U.S.C. 450e(b)). Section 7(b) requires that to the greatest extent feasible:
      - (i) preference and opportunities for training and employment shall be given to Indians, and
      - (ii) preference in the award of contracts and subcontracts shall be given to Indian organizations or Indian-owned economic enterprises.
    - (2) The parties to this contract shall comply with the provisions of section 7(b) of the Indian Act.
    - (3) In connection with this contract, the contractor shall, to the greatest extent feasible, give preference in the award of any subcontracts to Indian-owned economic enterprises, and preferences and opportunities for training and employment to Indians.
    - (4) The contractor shall include this section 7(b) clause in every subcontract in connection with the project, and shall, at the direction of the recipient, take appropriate action pursuant to the subcontract upon a finding by the recipient or HUD that the subcontractor has violated the section 7(b) clause of the Indian Act.
  - b. A statement as to whether the Tribe/TDHE maintains lists of Indian owned economic enterprises and Indian organizations by trade specialty that are available to contractors and subcontractors for use in meeting Indian preference responsibilities;
  - c. A statement that Tribe/TDHE requires contractors and subcontractors to provide preference to the greatest extent feasible by hiring qualified Indians in all positions;
  - d. A requirement that offerors submit a list of core crew employees with their offers, and that contractors are required to provide preference to the greatest extent feasible by hiring qualified Indians in all positions.
6. Methods of Providing Indian Preference

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- a. **For micro- and small purchases**, the Tribe/TDHE shall seek maximum participation by Indian-owned economic enterprises and shall to the extent available, refer to lists of qualified Indian supply sources. If no quotation are solicited or received from Indian-owned economic enterprises, the Tribe/TDHE must include as part of its documentation a statement explaining the reasons for lack of Indian participation. As an alternative, a Tribe/TDHE solicitation may be unrestricted to allow both non-Indian and qualified Indian-owned economic enterprises or organizations to submit quotes and an award shall be made to the qualified Indian-owned economic enterprises or organizations with the lowest responsive quote, if the quote is within ten percent of the lowest non-Indian quote and the price is determined reasonable. If no responsive quotation by a qualified Indian-owned economic enterprises or organizations is within ten percent of the lowest non-Indian quote, award shall be made to the source with the lowest quote.
  
- b. **For sealed bids**, the Tribe/TDHE prior to solicitation shall decide on the method it will use in applying Indian preference depending on the particular procurement. In accordance with 24 CFR 1000.52, the Tribe/TDHE may select any one of the methods below, as follows:
  - (1) Issue the solicitation unrestricted to allow both non-Indian and qualified Indian-owned economic enterprises or organizations to submit bids and award shall be made to the qualified Indian-owned economic enterprises or organizations with the lowest responsive bid, if the bid is within the total maximum contract price established for the procurement and within the applicable range specified in Attachment A (**Choose Option 1 or Option 2**) of the lowest non-Indian bid price; or
  - (2) Restrict the solicitation to qualified Indian-owned economic enterprises or organizations; or
  - (3) Use a two stage preference procedure, as follows:
    - aa. Stage 1. Invite or otherwise solicit Indian-owned economic enterprises to submit a statement of intent to respond to the bid announcement limited to Indian-owned economic enterprises.
    - bb. Stage 2. If responses are received from more than one qualified Indian-owned economic enterprise, advertise for bids limited to Indian-owned economic enterprises.



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- c. **For competitive proposals**, the Tribe/TDHE prior to solicitation shall decide on the method it will use in applying Indian preference depending on the particular procurement. In accordance with 24 CFR 1000.52, the Tribe/TDHE may select any one of the methods below, as follows:
- (1) Issue the solicitation unrestricted to allow both non-Indian and qualified Indian-owned economic enterprises or organizations to submit proposals and establish a percentage or number of points, i.e. 15-20 points, set aside for Indian preference as one of the evaluating factors to consider other than price; or
  - (2) Restrict the solicitation to qualified Indian-owned economic enterprises or organizations; or
  - (3) Use a two stage preference procedure, as follows:
    - aa. Stage 1. Invite or otherwise solicit Indian-owned economic enterprises to submit a statement of intent to respond to the bid announcement limited to Indian-owned economic enterprises.
    - bb. Stage 2. If responses are received from more than one qualified Indian-owned economic enterprise, advertise for bids limited to Indian-owned economic enterprises.
- d. If the Tribe/TDHE selects a method of providing preference, in b. or c. above, that results in fewer than two responsible qualified organizations or enterprises submitting a statement of intent, a bid or proposal to perform the contract at a reasonable cost, then the Tribe/TDHE shall:
- (1) Re-advertise the contract using any of the methods described above at b. or c. for sealed bids and competitive proposals respectively; or
  - (2) Re-advertise the contract without limiting the solicitation for bids or proposals to Indian-owned economic enterprises or organizations. This method does not provide Indian preference. By selecting this method, the Tribe/TDHE has determined that Indian preference is not feasible even after providing for Indian preference in accordance with 24 CFR 1000.52(a), i.e. no qualified Indian bidder(s) responded, or less than two of the bid(s) received from Indian bidders were approvable; or

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(3) If one approvable bid or proposal is received, the Tribe/TDHE may request ONAP review and approval of the proposed contract and related justification and procurement documentation in accordance with 2 CFR 200.324.

- e. **Monitoring and Remedies.** The Tribe/TDHE shall monitor the implementation of Indian preference in its contracts, subcontracts, training, and employment, and take appropriate remedial action to ensure compliance. If no bids or offers are received from Indian organizations and enterprises, the lack of participation and any reasons known by the Tribe/TDHE for lack of participation shall be documented in the procurement file.

### B. SECTION 3 OF THE HUD ACT OF 1968

1. The Tribe/TDHE shall to the maximum extent feasible and consistent with, but not in derogation of, compliance with section 7(b) of the Indian Self-Determination and Education Act (25 U.S.C. 450e(b)) comply with Section 3 of the Housing and Urban Development Act of 1968. Section 3 provides job training, employment, and contracting opportunities for section 3 residents and Section 3 Business Concerns respectively.
2. Definitions:
  - a. Section 3 Business Concern – 1) A business concern that is 51% or more owned by section 3 residents, or 2). Whose permanent, full time employees include persons, at least 30% of whom are current section 3 residents, or within three years of the date of first employment with the business concern were section 3 residents, or 3) That provides evidence of a commitment to subcontract in excess of 25% of the dollar award of all subcontracts to be awarded to business concerns that meet the qualifications set forth in 1 and 2 above.
  - b. Section 3 Resident – 1) A public housing resident; or 2) An individual who resides in the metropolitan area or non-metropolitan county in which the section 3 covered assistance is expended, and who is low-income or very low-income as defined by the Housing Act of 1937.
3. The recipient threshold requirements for section 3 apply only to those section 3 covered projects or activities for which the amount of assistance exceeds \$200,000. Covered projects are housing rehabilitation, housing construction, and other public construction projects.

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4. All section 3 covered contracts shall include the following clause (referred to as the section 3 clause):
  - a. The work to be performed under this contract is subject to the requirements of section 3 of the Housing and Urban Development Act of 1968, as amended, 12 U.S.C. 1701u (section 3). The purpose of section 3 is to ensure that employment and other economic opportunities generated by HUD assistance or HUD-assisted projects covered by section 3, shall, to the greatest extent feasible, be directed to low- and very low-income persons, particularly persons who are recipients of HUD assistance for housing.
  - b. The parties to this contract agree to comply with HUD's regulations in 24 CFR Part 135, which implement section 3. As evidenced by their execution of this contract, the parties to this contract certify that they are under no contractual or other impediment that would prevent them from complying with the part 135 regulations.
  - c. The contractor agrees to send to each labor organization or representative of workers with which the contractor has a collective bargaining agreement or other understanding, if any, will post copies of the notice in conspicuous places at the work site where both employees and applicants for training and employment positions can see the notice. The notice shall describe the section 3 preference, shall set forth minimum number and job titles subject to hire, availability of apprenticeship and training positions, the qualifications for each; and the name and location of the person(s) taking applications for each of the positions; and the anticipated date the work shall begin.
  - d. The contractor agrees to include this section 3 clause in every subcontract subject to compliance with regulations in 24 CFR part 135, and agrees to take appropriate action, as provided in an applicable provision of the subcontract or in this section 3 clause, upon a finding that the subcontractor is in violation of the regulations in 24 CFR part 135. The contractor will not subcontract with any subcontractor where the contractor has notice or knowledge that the subcontractor has been found in violation of the regulations in 24 CFR part 135.
  - e. The contractor will certify that any vacant employment positions, including training positions, that are filled (1) after the contractor is selected but before the contract is executed, and (2) with persons other than those to whom the regulations of 24 CFR part 135 require

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employment opportunities to be directed, were not filled to circumvent the contractor's obligations under 24 CFR part 135.

- f. Examples of efforts to offer training and employment opportunities to Section 3 residents and procurement procedures that provide for preference for Section 3 business concerns may be found under 24 CFR Part 135, Appendix to Part 135.
  - g. Noncompliance with HUD's regulations in 24 CFR part 135 may result in sanctions, termination of this contract for default, and debarment or suspension from future HUD assisted contracts.
  - h. With respect to work performed in connection with section 3 covered Indian housing assistance, section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e) also applies to the work to be performed under this contract. Section 7(b) requires that to the greatest extent feasible (i) preference and opportunities for training and employment shall be given to Indians, and (ii) preference in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned Economic Enterprises. Parties to this contract that are subject to the provisions of section 3 and section 7(b) agree to comply with section 3 to the maximum extent feasible, but not in derogation of compliance with section 7(b).
5. EXEMPTION: TDHEs/Tribes that are subject to and complying with tribal employment and contract preference laws adopted in accordance with Section 101(k) of NAHASDA are deemed to be in compliance with the requirements of Section 3. Therefore, such recipients do not have to establish preferences for applicants claiming Section 3 status when hiring or procuring goods or services in order to meet the requirements of Section 3. These recipients also are not required to submit the annual HUD-60002 form.

### III. PROCUREMENT METHODS

#### A. SELECTION OF METHOD

When satisfying its needs by procurement, the Tribe/TDHE shall choose one of the following procurement methods, based on the nature and anticipated dollar value of the total requirement. The Tribe/TDHE shall provide a rationale in its supporting documentation as to why it selected that particular method.

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### B. MICRO-PURCHASE PROCEDURES

1. General. Any procurement less than \$5,000 [insert a lower dollar amount if desired or required to conform to tribal law] may be conducted in accordance with the micro-purchase procedures authorized in this section. Contract requirements shall not be artificially divided so as to constitute a micro-purchase under this section (except as may be reasonably necessary to comply with Section V of this Statement or in instances where breaking out such procurements can be shown to result in more economical purchases).
2. Indian preference. See above Section II(A)(6)(a).
3. Petty Cash Purchases. Petty cash purchases should be kept to a minimum, since purchasing in limiting quantities does not provide for the best price and all administrative requirements under small purchases apply.
4. Obtaining Quotes. The Tribe/TDHE shall solicit price quotations by phone, letter, or other informal procedure that allows participation by a reasonable number of competitive sources. When soliciting quotations, the Tribe/TDHE shall inform the sources solicited of the specific item being procured, the time by which quotations must be submitted, and the information required to be submitted with each quotation. The names, addresses, and telephone numbers of the offerors and persons contacted, and the date and amount of each quotation shall be recorded and maintained as a public record.
5. Competition. The Tribe/TDHE shall attempt to obtain quotations from a minimum of one qualified source but would also need to meet the requirements of 2 CFR 200.320(a).
6. Award based on price. For micro-purchases award is generally based on price and fixed specifications taking into account the method of providing Indian and Section 3 preferences.
7. Blanket Purchase Agreements (BPA). Once a BPA has been established, task or delivery orders can be placed without further competition. BPAs may be used for a variety of expendable supplies and services and are particularly attractive when the exact items, quantities and delivery requirements are not known in advance. The process to setup a BPA will save your Tribe/TDHE time and money while making your purchasing quicker and easier. Prior to following the small purchasing procedures established above, the Tribe/TDHE will have conducted an historical database on their re-occurring purchases. After obtaining an estimate on the volume or quantities of a list of products, the Tribe/TDHEs use that

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information to solicit quotes or discount rates from a number of vendors. By using the purchasing power of greater quantities, the Tribe/TDHE secures better pricing. The maximum total value of the micro-purchase BPA must be less than \$5,000.

### C. SMALL PURCHASE PROCEDURES

1. General. Any procurement not exceeding \$150,000 [insert a lower dollar amount if desired or required to conform to tribal law] may be conducted in accordance with the small purchase procedures authorized in this section. Contract requirements shall not be artificially divided so as to constitute a small purchase under this section (except as may be reasonably necessary to comply with Section V of this Statement or in instances where breaking out such procurements can be shown to result in more economical purchases).
2. Indian preference. See above Section II(A)(6)(a).
3. Petty Cash Purchases. Petty cash purchases should be kept to a minimum, since purchasing in limiting quantities does not provide for the best price and all administrative requirements under small purchases apply.
4. Obtaining Quotes. The Tribe/TDHE shall solicit price quotations by phone, letter, or other informal procedure that allows participation by a reasonable number of competitive sources. When soliciting quotations, the Tribe/TDHE shall inform the sources solicited of the specific item being procured, the time by which quotations must be submitted, and the information required to be submitted with each quotation. The Tribe/TDHE shall obtain written quotations; however, the written quotation may be a confirmation of a previous oral quotation only if it is submitted within 10 days of the oral quotation or by the due date for submitting quotations. The names, addresses, and telephone numbers of the offerors and persons contacted, and the date and amount of each quotation shall be recorded and maintained as a public record.
5. Competition. The Tribe/TDHE shall attempt to obtain quotations from a minimum of two (preferably three) qualified sources and document the procurement file with a justification whenever it has been unable to obtain at least two quotations. Solicitation of fewer than two sources is acceptable if the Tribe/TDHE has attempted but has been unable to obtain a sufficient number of quotations. The sole quotation received may be accepted only in unusual circumstances (such as an emergency threatening public health and safety). But would also need to meet the requirements of 2 CFR 200.320(b).

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6. Award based on price. For small purchases award is generally based on price and fixed specifications taking into account the method of providing Indian and Section 3 preferences.
7. Blanket Purchase Agreements (BPA). Once a BPA has been established, task or delivery orders can be placed without further competition. BPAs may be used for a variety of expendable supplies and services and are particularly attractive when the exact items, quantities and delivery requirements are not known in advance. The process to setup a BPA will save your Tribe/TDHE time and money while making your purchasing quicker and easier. Prior to following the small purchasing procedures established above, the Tribe/TDHE will have conducted an historical database on their re-occurring purchases. After obtaining an estimate on the volume or quantities of a list of products, the Tribe/TDHEs use that information to solicit quotes or discount rates from a number of vendors. By using the purchasing power of greater quantities, the Tribe/TDHE secures better pricing. The maximum total value of the small purchase BPA is \$150,000.

### D. SEALED BIDDING

1. Conditions for Use. Contracts shall be awarded based on competitive sealed bidding if the following conditions are present: a complete, adequate, and realistic specification or purchase description is available; two or more responsible bidders are willing and able to compete effectively for the work; the procurement lends itself to a firm fixed price contract; and the selection of the successful bidder can be made principally on the basis of price. Sealed bidding is the preferred method for construction procurement. For professional services contracts, sealed bidding should not be used.
2. Solicitations and Receipt of Bids.
  - a. Issuance and amendments. An invitation for bids shall be issued including specifications and all contractual terms and conditions applicable to the procurement. Any amendments to the invitation shall be in writing, and if it is necessary to issue an amendment within seven days of the bid opening, the bid opening shall be postponed until at least seven days after the issuance of the amendment. The invitation for bids shall state the time and place for both the receipt of bids and the public bid opening. All bids received shall be time-stamped but not opened and shall be stored in a secure place until bid opening. A bidder may withdraw its bid at any time prior to bid opening.

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- b. Indian Preference. A Tribe/TDHE has several options to meet Indian preference requirements under §1000.52(a). The decision of what particular option to use should be made well in advance of the solicitation process and based on the potential availability of Indian-owned firms capable and willing to bid or propose on a particular contract.
- (1) A Tribe/TDHE may develop and adopt policies and procedures in procurement activities consistent with the requirements of section 7(b) of the Indian Self-Determination and Education Act, OR
  - (2) A Tribe/TDHE may restrict the solicitation to qualified Indian-owned economic enterprises and Indian organizations if the Tribe/TDHE has a reasonable expectation of receiving at least two bids, OR
  - (3) If a Tribe/TDHE is not sure there are a sufficient number of Indian owned economic enterprises or organizations available or that they will receive at least two bids, a Tribe/TDHE may use a two stage preference procedure as follows:
    - aa. Stage 1 – Invite or otherwise solicit from Indian-owned economic enterprises to submit a statement of intent to respond to the bid announcement limited to Indian-owned economic enterprises.
    - bb. Stage 2 – If responses are received from more than one qualified Indian-owned economic enterprise, advertise for bids limited to Indian-owned economic enterprises.
3. Bid Opening. Bids shall be opened publicly and in the presence of at least one witness. An abstract of bids shall be recorded and made available for public inspection.
4. Award. Award shall be made to the lowest responsive and responsible bidders provided in the invitation for bids by written notice to the successful bidder, as follows:
- a. Restricted solicitations. If the solicitation is restricted to Indian-owned economic enterprises and organizations, and two or more [or a greater number determined by the Tribe/TDHE and stated in the invitation] qualified Indian owned economic enterprises or organizations submit



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responsive bids, award shall be made to the qualified enterprise or organization with the lowest responsive bid. If equal low bids are received, award shall be made by drawing lots or similar random method. If fewer than two responsive and responsible bids from qualified Indian-owned economic enterprises or organizations submit bids, the Tribe/TDHE shall evaluate its options to reject all bids, cancel the solicitation and re-advertise: 1. using any of the procedures in III(D)(2)(b) above, or 2. inviting bids from non-Indian as well as Indian-owned economic enterprises and organizations with no preference given, or 3. the Tribe/TDHE may accept a single bid received from a responsible bidder, subject to HUD approval, in unusual circumstances, such as if the Tribe/TDHE determines that, based on a cost analysis, the bid price is fair and reasonable, and the Tribe/TDHE determines that the delay of re-advertising would subject the project to significant higher construction costs.

- b. Unrestricted solicitations. If the solicitation is not restricted to Indian-owned economic enterprises and organizations, award shall be made to the qualified Indian-owned economic enterprise or organization with the lowest responsive bid, if that bid is within the maximum total contract price established for the specific project or activity being solicited, and the bid is within the range specified in the Attachment A (**Choose Option 1 or Option 2**) to this Statement. If no responsive bid by a qualified Indian-owned economic enterprise or organization is within this range, award shall be made to the lowest responsible, responsive bidder.

### 5. Mistakes in Bids.

- a. Correction or withdrawal of inadvertently erroneous bids may be permitted, where appropriate, before bid opening by written or telegraphic notice received in the office designated in the invitation for bids prior to the time set for bid opening. After bid opening, corrections in bids shall be permitted only if the bidder can show by clear and convincing evidence that a mistake of a nonjudgmental character was made, the nature of the mistake, and the bid price actually intended. A low bidder alleging a nonjudgmental mistake may be permitted to withdraw its bid if the mistake is clearly evident on the face of the bid document but the intended bid is clear or the bidder submits convincing evidence that a mistake was made.

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- b. All decisions to allow correction or withdrawal of bid mistakes shall be supported by a written determination signed by the Contracting Officer. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the Tribe/TDHE or fair competition shall be permitted.

### E. COMPETITIVE PROPOSALS

1. Conditions for Use. Competitive proposals (including turnkey proposals for development) may be used if there is an adequate method of evaluating technical proposals and where the Tribe/TDHE determines that conditions are not appropriate for the use of sealed bidding. An adequate number of qualified sources (two, preferably three) shall be solicited.
2. Solicitation.
  - a. General. The request for proposals (RFP) may be restricted to qualified Indian-owned economic enterprises and Indian organizations if the Tribe/TDHE has a reasonable expectation of receiving offers from two [or a greater number stated in the RFP] such entities. The Tribe/TDHE shall solicit proposals from non-Indian as well as Indian-owned economic enterprises and Indian-organizations if: the Tribe/TDHE prefers not to restrict the RFP; or, an insufficient number of qualified Indian-owned economic enterprises or Indian organizations satisfactorily respond to a restricted RFP; or, a single proposal is received but not accepted. A mechanism for fairly and thoroughly evaluating the technical and price proposals shall be established before the solicitation is issued. Proposals shall be handled so as to prevent disclosure of the number of offerors, identity of the offerors, and the contents of their proposals.
  - b. Evaluation Factors. The RFP shall clearly identify the relative importance of price and other evaluation factors and sub factors, including the weight given to each technical factor and sub factor. Tribe/TDHE shall reserve 15% of the total number of available rating points in unrestricted solicitations for the provision of Indian preference in the award of contracts and subcontracts, and up to an additional 10% for evaluation of the offeror's statement regarding training and employment of Indians. The proposals shall be evaluated only on the criteria stated in the request for proposals.
3. Negotiations. In those situations where negotiations are deemed necessary, negotiations shall be conducted with offerors who submit proposals

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determined to have a reasonable chance of being selected for award, based on evaluation against the technical and price factors as specified in the RFP. Such offerors shall be accorded fair and equal treatment with respect to any opportunity for negotiation and revision of proposals. The purpose of negotiations shall be to seek clarification with regard to and advise offerors of the deficiencies in both the technical and price aspects of their proposals so as to assure full understanding of and conformance to the solicitation requirements. No offeror shall be provided information about any other offeror's proposal, and no offeror shall be assisted in bringing its proposal up to the level of any other proposal. Offerors shall not be directed to reduce their proposed prices to a specific amount in order to be considered for award. A common deadline shall be established for receipt of proposal revisions based on negotiations.

4. Award. After evaluation of proposal revisions, if any, the contract shall be awarded to the responsible firm whose qualifications, price and other factors considered, are the most advantageous to the Tribe/TDHE, provided that the price is within the maximum total contract price established for the specific project or activity. For solicitations restricted to qualified Indian-owned economic enterprises and Indian organizations, if two [or a greater number stated in the RFP] such entities submit acceptable proposals, award shall be made to the qualified Indian-owned economic enterprise or Indian organization with the best proposal, provided that the price is within the maximum total price established for the specific project or activity. If fewer than this number of Indian-owned economic enterprises or Indian organizations submits acceptable proposals, the Tribe/TDHE shall reject all proposals and re-solicit without restricting the RFP to qualified Indian-owned economic enterprises and Indian organizations. The Tribe/TDHE may accept the sale proposal received, subject to HUD approval, in unusual circumstances, such as when the Tribe/TDHE determines that the delays caused by re-soliciting would cause higher costs, or where the Tribe/TDHE determines that the proposal has a fair and reasonable price.
5. Architect Engineer Services. Architect Engineer services in excess of the small purchase limitation may be obtained by either the competitive proposals method or qualifications-based selection procedures, Sealed bidding shall not be used to obtain architect/engineering services. Under qualifications-based selection procedures, competitors' qualifications are evaluated and the most qualified competitor is selected, subject to the negotiation of fair and reasonable compensation. These procedures shall not

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be used to purchase other types of services even though architect-engineer firms are potential sources.

### F. NONCOMPETITIVE PROPOSALS

1. Conditions for use. Procurements shall be conducted competitively to the maximum extent possible. Procurement by noncompetitive proposals may be used only when the award of a contract is not feasible using small purchase procedures, sealed bids, or competitive proposals, and one of the following applies:
  - a. An emergency exists that seriously threatens the public health, welfare, or safety, or endangers property, or would otherwise cause serious injury to the Tribe/TDHE, as may arise by reason of a flood, earthquake, epidemic, riot, equipment failure, or similar event. In such cases, there must be an immediate and serious need for supplies, services, or construction such that the need cannot be met through any other procurement methods, and the emergency procurement shall be limited to those supplies, services, or construction necessary to meet the emergency; or
  - b. Only one source of supply is available, and the Contracting Officer so certifies in writing; or
  - c. After solicitation of a number of sources, competition is determined inadequate; or
  - d. HUD/ONAP specifically authorizes the use.
2. Justification. Each procurement based on noncompetitive proposals shall be supported by a written justification for using such procedures. The justification shall be approved in writing by the Contracting Officer. See Attachment B.
3. Price reasonableness. The reasonableness of the price for all procurements based on noncompetitive proposals shall be determined by performing a cost analysis, as described in section IV below.

### G. CANCELLATION OF SOLICITATIONS'

1. An invitation for bids, request for proposals, or other solicitation may be cancelled before offers are due if: the Tribe/TDHE no longer requires the supplies, services or construction; or, the Tribe/TDHE can no longer reasonably expect to fund the procurement; or, proposed amendments to the

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solicitation would be of such magnitude that a new solicitation would be desirable; or similar reasons.

2. A solicitation may be cancelled and all bids or proposals that have already been received may be rejected if: the supplies, services, or construction are no longer required; or, ambiguous or otherwise inadequate specifications were part of the solicitation; or, the solicitation did not provide for consideration of all factors of significance to the Tribe/TDHE; or, prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds; or, there is reason to believe that bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or, a condition for canceling a solicitation and re-solicit, as specified above, is met; or, for good cause of a similar nature when it is in the best interest of the Tribe/TDHE.
3. The reasons for cancellation shall be documented in the procurement file and the reasons for cancellation and/or rejection shall be provided upon request to any offeror solicited. A notice of cancellation shall be sent to all offerors solicited.

### IV. COST AND PRICE ANALYSIS

#### A. GENERAL

A cost or price analysis shall be performed for all procurement actions, including contract modifications. The degree of analysis shall depend on the facts surrounding each procurement. The Tribe/TDHE shall perform an independent cost or price estimate prior to receiving bids or proposals.

#### B. PRICE ANALYSIS

Conducted on sealed bids received above the small purchase threshold. The Tribe/TDHE shall perform a comparability of prices received in relation to the independent cost estimate, to ensure the price is reasonable and within funds budgeted.

#### C. COST ANALYSIS

Conducted for all competitive proposals (e.g., when contracting for professional, consulting, or architect/engineer services), noncompetitive proposals, or when only one offer is received and any contract modifications or change orders above the small purchase threshold. A cost analysis is necessary in these cases because price competition is lacking. The recipient must, therefore, determine whether the proposed costs meet three test: allocability, allowability and reasonableness.

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1. A cost is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with the benefits received.
2. A cost is allowable under Federal awards if the costs meet the following general criteria: a.) Necessary and reasonable for proper and efficient performance and administration of the grant; b.) Allocable to the federal grant under provision in 2 CFR 200 Subpart E; c.) Is authorized or not prohibited under State or local laws or regulations; e.) Conforms to any limitations or exclusions set forth in 2 CFR 200 Subpart E, Federal laws, terms and conditions of the grant agreement, or other governing regulations as to types and amounts of cost items; f.) Is accorded consistent treatment; g.) In accordance with GAAP; h.) Not included as a cost or used to meet cost sharing or matching requirements of any other Federal award in either the current or prior period, except as specifically provided by Federal law or regulation; i.) Be the net of all applicable credits; j.) Be adequately documented.
3. A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost.

### D. COST ANALYSIS PROCESS

1. The Tribe/TDHE has made its own Independent Cost Estimate in conjunction with this procurement, which has been broken down, into individual cost elements of labor, materials, subcontracted costs, overhead and profit.
2. The Tribe/TDHE has obtained a cost proposal from the proposed contractor, which provides separate elements of costs, including overhead and profit.
3. The Tribe/TDHE has made a comparison of the contractor's proposal with the in-house independent cost estimate. This analysis is insufficient for cost analysis but does provide a starting place and an analysis of the two provided similarities or differences in cost areas, as follows:
4. Verified cost and pricing data of the proposal by:
  - a. Examining the specific elements of costs;
  - b. Determined the necessity of certain costs;
  - c. Determined the reasonableness of amounts for certain costs;

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- d. Reviewed the basis used for Indirect Cost Rates;
  - e. Determined the appropriateness of indirect costs to the proposed contract;
  - f. Determined the reasonableness of the total cost or price.
  - g. Evaluated the effect of the proposal's costs on future costs.
  - h. Compared costs, as applicable, of proposal with:
    - i. Actual costs previously proposed by same offeror
    - ii. Previous cost estimates from the offeror or other offerors for the same or similar items;
    - iii. An independent cost estimate and ensure that the costs are within the budget available.
5. The results of the applied techniques are summarized and maintained in the procurement file in accordance with Tribe/TDHE's requirements.

### III. CONTRACTOR QUALIFICATIONS AND DUTIES

#### A. CONTRACTOR RESPONSIBILITY

Procurements shall be conducted only with responsible contractors, i.e., those who have the technical and financial competence to perform and who have a satisfactory record of integrity. Before awarding a contract, the Tribe/TDHE shall review the proposed contractor's ability to perform the contract successfully, considering factors such as the contractor's integrity (including a review of the List of Parties Excluded from Federal Procurement and Non-procurement Programs published by the U.S. General Services Administration), compliance with public policy, record of past performance (including contacting previous clients of the contractor, such as other TDHEs/Tribes), and financial, administrative, and technical capability to perform contract work of the size and type involved and within the time provided under the contract. If a prospective contractor is found to be non-responsible, a written determination of non-responsibility shall be prepared and included in the contract file, and the prospective contractor shall be advised of the reasons for the determination.

#### B. SUSPENSION AND DEBARMENT

Contracts shall not be awarded to debarred, suspended, or ineligible contractors. Contractors may be suspended, debarred, or determined ineligible by HUD in accordance with HUD regulations (24 CFR Part 24) or by other Federal agencies (e.g., Department of

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Labor, for violations of Secretary of Labor Regulations) when necessary to protect the Tribe/TDHE in its business dealings. The Tribe/TDHE may suspend or debar a contractor under State, local or tribal laws, as applicable.

### C. QUALIFIED BIDDER'S LISTS

Interested businesses shall be given an opportunity to be included on qualified bidder's lists. Any pre-qualified lists of persons, firms, or products, which are used in the procurement of supplies and services, shall be kept current and shall include enough qualified sources to ensure competition. Lists of pre-qualified Indians, Indian enterprises, or Indian organizations may be maintained by the Tribe/TDHE. Firms shall not be precluded from qualifying during the solicitation period. Solicitation mailing lists of potential contractors shall include, but not be limited to, such qualified suppliers.

### D. QUALIFYING INDIAN-OWNED ENTERPRISES & INDIAN ORGANIZATIONS

A Tribe/TDHE, at its discretion, may require prospective contractors seeking to qualify as Indian organizations or Indian owned economic enterprises to complete, or update if applicable, an Indian Enterprise Qualification Statement.

### E. REQUIRING STATEMENTS ON EMPLOYMENT & TRAINING OF INDIANS

A Tribe/TDHE, at its discretion, may require prospective contractors and offerors (and their subcontractors, if required by the Tribe/TDHE) to provide a statement describing how they will provide Indian preference in subcontracting, training, and employment, including the number or percentage of Indians to be employed and trained.

## IV. APPEALS AND REMEDIES

### A. GENERAL

It is the Tribe/TDHE's policy to resolve all procurement and contractual issues timely and informally at the Tribe/TDHE level without litigation.

### B. BID PROTESTS

1. An unsuccessful bidder or offeror may file a written complaint (or protest) with the Contracting Officer within twenty (20) calendar days from the date of Tribe/TDHE's notice to the unsuccessful bidder or offeror or from the date of the action (or omission) upon which the complaint is based. The complaint must be signed and shall detail the basis of the complaint. No untimely or oral complaint will be considered.
2. Tribe/TDHE need not suspend contract performance or terminate the award of the contract unless Tribe/TDHE determines, in its sole discretion, which



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it appears likely that the contract award will be invalidated and that a delay in receiving the supplies or services will not be prejudicial to Tribe/TDHE's interests.

3. Upon receipt of a complaint, the Tribe/TDHE shall promptly stamp the date and time of receipt on the complaint and acknowledge receipt of the complaint within five (5) calendar days.
4. Within twenty (20) calendar days of receipt of a complaint, the Contracting Officer shall meet, or communicate by mail or telephone, with the complainant in an effort to resolve the matter. The Contracting Officer shall make a determination on the complaint within thirty (30) calendar days of Tribe/TDHE's receipt of the written complaint. The decision of the Contracting Officer shall constitute the final administrative action on the complaint.
5. A complainant must exhaust all administrative remedies with Tribe/TDHE before pursuing a protest with HUD or other agency providing funds for the procurement.
6. Reviews of complaints by the Federal or other agency will be limited to:
  - a. Violations of Federal or relevant law or regulations and the standards of this Section; and
  - b. Violations of Tribe/TDHE 's complaint procedures for failure to review a complaint or protests.
7. Violations of Tribal law will be under the jurisdiction of the Tribal authorities.

### C. CONTRACT CLAIMS AND DISPUTES

All claims by a contractor relating to performance of a contract shall be submitted in writing to the Contracting Officer or designee for a written decision. The contractor may request a conference on the claim. The Contracting Officer's decision shall inform the contractor of its appeal rights to a higher level in the Tribe/TDHE, such as the Executive Director or a designated Board member, or a Procurement Appeals Board.

1. Background: Many contractor “claim” items are initially addressed under various sections of the “General Conditions” of the construction contract, Form HUD 5370, such as:

#### 8. Differing Site Conditions

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28. Contract Modifications

29. Changes

30. Suspension of Work

31. Default

34. Termination for Convenience

If “claims” are unable to be agreed upon and resolved under these sections, a “dispute” may exist, which is then to be addressed in the General Conditions, Section 31, Disputes.

2. Procedures: The following series of actions by the contractor and the Tribe/TDHE have been established for processing disputes involving claims for damages for alleged breach of contract.
  - a. The contractor submits a written notice of claim to the Contracting Officer:
    - i. Previous editions of the General Conditions stated that all claims for alleged breach of contract shall, within 10 days of commencement of the dispute, be presented to the Tribe/TDHE in writing. The current General Conditions do not state a time-limit under Section 31, Disputes, but does provide various time-limits for filing claims under other sections of the General Conditions.
    - ii. Often the contractor’s initial notice will appear to be innocuous. It may be perceived as being written to provide the Contracting Officer with information on “problems” without specific reference to the Tribe/TDHE’s alleged breach of contract or without the contractor explicitly claiming the need for additional compensation or time.
    - iii. Since any dispute might eventually reach the court system, it is incumbent upon the Contracting Officer to ensure against flaws in its case if litigation arises. As to questions of fact, it is of utmost importance that the Contracting Officer’s “Findings of Fact” were not capricious, fraudulent, in bad faith, or not supported by substantial evidence. “Substantial evidence” means that from a reading of the documents, one could reasonably

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conclude that there was sufficient evidence submitted to support the decision rendered.

- b. The Tribe/TDHE is to record the date of the receipt of the contractor's letter and save the cancelled stamped envelope.
- c. The Contracting Officer is to acknowledge receipt of the letter and state that a written response will be forthcoming at the earliest possible time.
  - i. If the Contracting Officer is unsure that the contractor's letter is a notice of a claim, the Contracting Officer should provide acknowledgement of receipt of the letter and ask for clarification.
  - ii. If the contractor's notice was not filed within the time frame stated in the specific General Conditions section, the Contracting Officer shall issue a letter stating the notice was not filed pursuant to the contract conditions' time frame (reference applicable sections), and any claim (or applicable portions) is considered to have been waived and is not eligible for consideration.
  - iii. For all other situations, acknowledge receipt of the contractor's letter of notice of the claim and, if not previously provided, ask for detailed presentation and proof of claim without delay, with three copies to be submitted. The Tribe/TDHE's letter should state that without such documentation, the Contracting Officer's decision is to deny validity of the claim, and if the detailed presentation is not received within 30 days, the claim will be denied and the matter considered closed. Note: The General Conditions do not state specific time frames for a contractor to respond to the Contracting Officer's request for additional information and justification. Depending upon the complexity of the claim, time frames can reasonably vary.
- d. The Tribe/TDHE shall send a copy of the contractor's notice and the Tribe/TDHE's initial acknowledge to the Tribe/TDHE's attorney.
- e. The contractor is to prepare and submit information asked for by the Tribe/TDHE without delay.
- f. Upon receipt of the contractor's detailed presentation and proof of claim, the Tribe/TDHE is to record the date of receipt of such and save the cancelled stamp envelope.

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- g. The Tribe/TDHE shall send, without delay, a copy of the contractor's proof of claim submittal to the Tribe/TDHE's attorney.
- h. Upon receipt of the contractor's documented claim, the Tribe/TDHE is to:
  - i. Assemble all pertinent records and data pertaining to the claim. This includes all pertinent correspondence, daily logs, photographs, videos, test reports, meeting minutes and other documented information.
  - ii. Acquire documented testimonies from involved Tribe/TDHE staff, the architect or owner's representative, and other pertinent individuals.
  - iii. Evaluate claims in regards to the contractor and Tribe/TDHE's obligations under the terms of the contract.
  - iv. Consultation with the Tribe/TDHE's attorney is advisable. Depending on the complexity of the claim and Tribe/TDHE in-house expertise, sue of outside claims specialists to evaluate the claim may be advisable.
- i. The Tribe/TDHE is to make a "Findings of Fact and Determination" on the claim, signed by the Contracting Officer. The "Findings of Fact and Determination" shall include the following items:
  - i. References to the contract involved.
  - ii. Summary of the contractor's claim(s).
  - iii. Tribe/TDHE's "Finding of Fact" specific to each contractor claim (refer to IV(C)(2)(a)(iii) above) and proposed determination, with copies of pertinent records and data (three copies).
- j. All testimonies taken (three copies).
- k. Tribe/TDHE's attorney's opinion regarding the claim, when applicable (three copies).
- l. Once all information above is consolidated, the Tribe/TDHE will issue its decision in writing to the contractor. If the decision requires a modification to the contract, the Tribe/TDHE, with the help of its architect, shall prepare and process a change order.

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- m. If the contractor fails to provide written notification to the Tribe/TDHE within 30 days of receipt of the Tribe/TDHE's decision that it takes exception to the decision, the Contracting Officer is to issue a letter to the contractor stating the Tribe/TDHE's decision is considered final and conclusive pursuant to the General Conditions, Section 14(e).
- n. Section 14(e) of the General Conditions provides that notwithstanding the Contracting Officer's decision, the decision shall not be considered final or conclusive, thereby permitting the dispute to be determined on the merits by:
  - i. Appealing in writing to a higher level in the Tribe/TDHE (Board of Commissioners) in accordance with the Tribe/TDHE's policies and procedures, or
  - ii. Refers the appeal to an independent mediator or arbitrator, or
  - iii. Files suit in a court of competent jurisdiction.

Such appeal must be made within 30 days (unless otherwise indicated) after receipt of the Contracting Officer's decision.

- o. The contractor is obligated to proceed with the Contracting Officer's directed work, whether or not he presents a claim or continues to dispute the Tribe/TDHE's decision on the claim pursuant to General Conditions, Section 14(f).

### D. PROTESTS INVOLVING INDIAN PREFERENCE

- 1. General. Complaints arising out of any of the methods of providing for Indian preference shall be handled in accordance with the procedures in 24 CFR 1000.54.
- 2. The following procedures are applicable to complaints arising out of any of the methods of providing for Indian preference contained in this part:
  - a. Each complaint shall be in writing, signed, and filed with the Tribe/TDHE.
  - b. A complaint must be filed with the Tribe/TDHE no later than 20 calendar days from the date of the action (or omission) upon which the complaint is based.

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- c. Upon receipt of a complaint, the Tribe/TDHE shall promptly stamp the date and time of receipt upon the complaint, and immediately acknowledge its receipt.
- d. Within 20 calendar days of receipt of a complaint, the Tribe/TDHE shall either meet, or communicate by mail or telephone, with the complainant in an effort to resolve the matter. The Tribe/TDHE shall make a determination on a complaint and notify the complainant, in writing, within 30 calendar days of the submittal of the complaint to the Tribe/TDHE. The decision of the Tribe/TDHE shall constitute final administrative action on the complaint.

### VI. ETHICS IN PUBLIC CONTRACTING

#### A. GENERAL

The Tribe/TDHE shall adhere to the following code of conduct governing the performance of their employees, officers or agents engaged in the award and administration of contracts consistent with applicable State, tribal, or local law, and shall comply with the limitations imposed by 2 CFR 200.318(c) and 24 CFR 1000.30.

#### B. CONFLICT OF INTEREST

1. No employee, officer or agent of this Tribe/TDHE shall participate directly or indirectly in the selection or in the award or administration of any contract if a conflict, real or apparent, would be involved. Such conflict would arise when a financial or other interest in a firm selected for award is held by:
  - a. An employee, officer or agent involved in making the award;
  - b. His/her relative (including father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, and half sister);
  - c. His/her partner, or,
  - d. An organization which employs, is negotiating to employ, or has an arrangement concerning prospective employment of any of the above.
2. Employees, agents and grantees may have acquired confidential and privileged information during their tenure with the Tribe/TDHE. They are prohibited from publicly disclosing that information and from using that

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information for personal purposes. Former Board Members and employees are prohibited from acquiring a contract or any other financial interest, direct or indirect, in any Tribe/TDHE project or activity that is affected by that confidential or privileged information.

3. Nothing in this section shall prohibit a tenant, homebuyer, or program participant, who is a Board Member, employee, officer, or agent from fully participating in Tribe/TDHE activities and decision making so long as the person is low income and otherwise an eligible applicant and selected for assistance in accordance with the Tribe/TDHE's written policies for eligibility, admission and occupancy of families for housing assistance with IHBG funds.
  - a. The Tribe/TDHE must make a public disclosure of the nature of the assistance to be provided and the specific basis for the selection of the person.
  - b. The Tribe/TDHE shall provide ONAP with a copy of the disclosure before the assistance is provided to the person

### C. GRATUITIES, KICKBACKS, AND USE OF CONFIDENTIAL INFORMATION

Tribe/TDHE officers, employees or agents shall not solicit or accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subcontracts, and shall not knowingly use confidential information for actual or anticipated personal gain. It is determined that providing meals, entertainment or gifts in an amount in excess of twenty dollars (\$20.00) per gift or meal, or a total per calendar year of meals, entertainment or gifts in excess of one hundred dollars (\$100.00) per individual by an individual company, including all related concerns and individuals, is determined to be of monetary value and is therefore prohibited.

### D. PROHIBITION AGAINST CONTINGENT FEES

Contractors shall not retain a person to solicit or secure a Tribe/TDHE contract for a commission, percentage, brokerage, or contingent fee, except for bona fide employees.

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Option 1 - ATTACHMENT A

In accordance with this Statement and 24 CFR 1000.52, award shall be made under unrestricted solicitations to the lowest responsive bid from a qualified Indian owned economic enterprise or organization within the maximum total contract price established for the specific project or activity being solicited, if the bid is no more than "X" higher than the total bid price of the lowest responsive bid from any qualified bidder. The factor "X" is determined as follows:

	X = lesser of:
When the lowest responsive bid is less than \$150,000	10% of that bid
When the lowest responsive bid is:	
At least \$150,000, but less than \$200,000	9% of that bid,
At least \$200,000, but less than \$300,000	8% of that bid,
At least \$300,000, but less than \$400,000	7% of that bid,
At least \$400,000, but less than \$500,000	6% of that bid,
At least \$500,000, but less than \$1,000,000	5% of that bid,
At least \$1,000,000, but less than \$2,000,000	4% of that bid,
At least \$2,000,000, but less than \$4,000,000	3% of that bid.



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Option 2 - ATTACHMENT A

If the bid from the qualified Indian-owned economic enterprise or organization is within the 10% range of the lowest, non-Indian firm, the Indian-owned firm will be given the opportunity to meet the lowest bid price. Should the Indian-owned firm refuse to meet the lower price, the bid shall then be awarded to the responsive and responsible low bidder for the project.

Example: Bidder #1: \$150,000.00 Non-Indian Firm

Bidder #2: \$160,000.00 Indian Firm

Bidder #3: \$155,000.00 Non-Indian Firm

Bidder #4 \$166,000.00 Indian Firm

Bidder #3, a non-Indian-owned firm, is the apparent low bidder for this project, Bidder #2 an Indian-owned firm is within 10% of Bidder #3. Bidder #2 is then provided the opportunity to meet the dollar amount of Bidder #3's bid. If Bidder #2 is unable to meet Bidder #3's bid, the award shall be made to Bidder #3. If Bidder #2 is able to meet the lower bid, award shall be made under this method of implementing Indian preference.

ATTACHMENT B

**FILE DOCUMENTATION FOR NON-COMPETITIVE PROPOSALS**

(All areas of this form need to be complete and substantiate by documentation where indicated)

Description of Proposed Procurement:

Estimated date goods/services will be needed:

Estimated purchase/contract amount:

Grant(s) to which costs will be charged:

The following information constitutes the significant history of this procurement, as required by 2 CFR 200.318(i):

1. RATIONALE FOR METHOD OF PROCUREMENT:

Use of Non-competitive proposals may only be used under very unique circumstances. Pursuant to 2 CFR 200.320(f), two determinations have to be made and substantiated by the grantee:

- A. A determination of the use of small purchase procedures, sealed bids or competitive proposals is infeasible because:
- B. A determination of one of the following circumstances apply: (Check appropriate box)

- The item is available from only one source. (Describe why.)
- The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation. Note: The scope of work should only provide for the minimum requirements of the exigent or emergency situation.  
  
(Describe the exigency or emergency situation)
- The grantee is requesting the Federal agency to authorize a noncompetitive proposal. (Attach a letter of authorization from HUD/ONAP.)
- After solicitation of a number of sources, competition is determined inadequate.

(Describe the sequence of events, which have been completed to substantiate this conclusion and retain all documentation)

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### 2. SELECTION OF CONTRACT TYPE:

- This procurement was determined on a firm-fixed-price basis, because this contract type is most advantageous to the TDHE, in that it poses minimal cost risk and is not subject to adjustment based on actual costs incurred by the contractor.
- This procurement was determined under an indefinite quantities basis, as it is most advantageous to the TDHE because the exact quantity of supplies or services is not known during the effective period of time and space limits the TDHE's ability to store products until needed.
- This procurement was determined under an indefinite quantities basis, as it is most advantageous to the TDHE because the exact quantity of supplies or services is not known during the effective period of time and space limits the TDHE's ability to store products until needed.

### 3. BASIS OF PROVIDING INDIAN PREFERENCE

As required by 24 CFR 1000.52, "To the greatest extent feasible, recipients shall give preference in the award of contracts for projects funded under this part to Indian Organizations and Indian-owned economic enterprises." Describe the bases Indian preference was provided in the award of this contract. If the recipient has determined that because of the unique circumstances that apply to this procurement, providing Indian preference is infeasible for the reasons as stated in Section 1, A and B above, reaffirm that determination here:

### 4. COST ANALYSIS

A cost analysis is required by 2 CFR 200.323 because adequate price competition is lacking under the non-competitive proposal method of procurement.

The recipient must, therefore, determine whether the proposed costs meet three test: allocability, allowability and reasonableness.

A cost is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with the benefits received.

A cost is allowable under Federal awards if the costs meet the following general criteria: a.) Necessary and reasonable for proper and efficient performance and administration of the grant; b.) Allocable to the federal grant under provision in 2 CFR 200 Subpart E; c.) Is authorized or not prohibited under State or local laws or regulations; e.) Conforms to any limitations or exclusions set forth in 2 CFR

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200 Subpart E, Federal laws, terms and conditions of the grant agreement, or other governing regulations as to types and amounts of cost items; f.) Is accorded consistent treatment; g.) In accordance with GAAP; h.) Not included as a cost or used to meet cost sharing or matching requirements of any other Federal award in either the current or prior period, except as specifically provided by Federal law or regulation; i.) Be the net of all applicable credits; j.) Be adequately documented.

A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost.

### 5. COST ANALYSIS PROCESS

The recipient has made its own Independent Cost Estimate in conjunction with this procurement, which has been broken down, into individual cost elements of labor, materials, subcontracted costs, overhead and profit. (See Attached.)

The recipient has obtained a cost proposal from the proposed contractor, which provides separate elements of costs, including overhead and profit. (See Attached)

1. The recipient has made a comparison of the contractor's proposal with the in-house independent cost estimate. This analysis is insufficient for cost analysis but does provide a starting place and an analysis of the two provided similarities or differences in cost areas, as follows:
2. The recipient has appropriately used the techniques below to conduct its cost analysis:
  - a. Verified cost and pricing data of the proposal by:
    - i. Examining the specific elements of costs;
    - ii. Determined the necessity of certain costs;
    - iii. Determined the reasonableness of amounts for certain costs;
    - iv. Reviewed the basis used for Indirect Cost Rates;
    - v. Determined the appropriateness of indirect costs to the proposed contract;
    - vi. Determined the reasonableness of the total cost or price.

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- b. Evaluated the effect of the proposal's costs on future costs.
- c. Compared costs, as applicable, of proposal with:
  - i. Actual costs previously proposed by same offeror
  - ii. Previous cost estimates from the offeror or other offerors for the same or similar items;
  - iii. An independent cost estimate
- d. The results of the applied techniques are summarized as follows:

6. BASIS FOR CONTRACTOR/VENDOR SELECTION:

In accordance with 2 CFR 200.318(h), the contractor is considered to be responsible and possess the ability to perform successfully under the terms and conditions of this contract, based on the following: [check applicable block(s)]

- The contractor has performed satisfactory on other contracts awarded by this recipient, and no adverse information has been received that would bring the contractor's present responsibility or integrity into question.
- A review of the Federal Lists of Parties Excluded from Procurement and Non-procurement programs dated \_\_\_\_\_ has been conducted, and the contractor does not appear on the Lists.
- A survey of other agencies or companies doing business with the contractor was performed, and no adverse information has been received that would bring the contractor's present responsibility and technical capability into question. List the agencies/companies below, date called, and person contacted:
- A review of the contractor's financial and technical resources indicates that it is capable of performing the contract. List documents reviewed:

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Contracting Officer Name

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Signature

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Date