

Navajo Nation Law CLE

Section 5

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Navajo Preference in Contracting

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I. Introduction

Two separate laws enacted by the Navajo Nation Council provide for preference in contracting to Navajo owned businesses on the Navajo Nation, the Navajo Nation Business Opportunity Act, 5 NNC § 201, et seq., (NBOA), and the Navajo Nation Procurement Act, 12 NNC § 301, et seq. (NNBPA).

INTENT of the NBOA:

- Promote economic self sufficiency of the Navajo Nation by granting “first opportunity” in contracting to Navajo and/or Indian owned businesses
- Promote competitive bidding and contracting opportunities among Navajo businesses
- Increase Navajo business and employment opportunities for the Navajo people

INTENT of the NBPPA:

- Simply, clarify and modernize the law of procurement by the Navajo Nation
- To foster competition to the extent consistent with the NBOA
- To provide for increased public confidence in the procurement process
- To provide for fair and equitable treatment of all persons involved in the procurement process

The Navajo Business Opportunity Act applies to Navajo Nation procurement contracts. 2 NNC § 181.

II. Navajo Business Opportunity Act

What transactions does the NBOA apply to?

The NBOA applies to the procurement of goods or services by any public or private entity doing business on the Navajo Nation. 5 NNC § 203(B).

A public entity is an entity which is part of the Navajo Nation government. 5 NNC § 202(O). Navajo Nation entities are defined in the Navajo Sovereign Immunity Act. 1 NNC § 552. Federal and state entities are not deemed public entities for the purpose of the NBOA. A

private entity is a privately-owned business entity doing business on the Nation, including corporations which are wholly-owned by the Navajo Nation. 5 NNC § 202(N).

The NBOA applies to contractors under the Indian Self-Determination and Assistance Act, where the contract is intended to benefit the Navajo Nation, unless federal or state law expressly precludes the application of NBOA. In such cases, Indian preference rather than Navajo preference is followed.

Benefits of NBOA Certification

The NBOA requires notice of any procurement by a procuring party to a business listed on the Source List that can supply the goods or services being procured.

The benefit of certification is that a contract shall be awarded to a qualified, certified Priority 1 bidder, even if there are other Priority 2 or non-priority bidders that bid a lower price. Those bids are not even opened. 5 NNC § 205(C).

How does a business become certified under NBOA?

A business obtains NBOA certification by applying to the Navajo Business Regulatory Department (BRD) and the office will grant certification upon a determination that the business meets eligibility requirements. BRD maintains a list of certified businesses on a Source List that is published on the Internet.

The Department provides checklists, applications, and other necessary forms on its website at:

http://navajobusiness.com/doingBusiness/Registration/NBOA/Cert_process.htm

Ineligibility for Doing Business with the Nation

Certification may be denied for a number of reasons. A basic reason for denial is failure to provide the information required by the Department in timely manner. A business may also be disqualified under the ineligibility provisions of the Navajo Business and Procurement Act, 12 NNC § 1505, in the following circumstances:

- If there is an outstanding money judgment in favor of the Nation or a valid delinquent accounts receivable debt which is due and owing to the Nation from that applicant, *either in its present form or in any other identifiable capacity as an individual, corporation, partnership or other entity*;
- If there is *evidence* of default or materially deficient business practices or failure to meet contractual or financial obligations to the Navajo Nation, or failure to materially comply with applicable laws or material delay by the applicant, resulting in monetary or other detriment to the Nation which remains uncured;

- If the applicant has been found to have engaged in unlawful or criminal actions or other activities which adversely reflects on the honesty and moral character of the applicant so as to make any dealing with the Nation undesirable; or
- If the principals of an applicant have been convicted of specified offenses during the previous 10 years.

Priority Classifications

Priority 1 certification is available for any 100% Navajo-owned and controlled business.

Priority 2 certification is available to a:

- 51% - 99% Navajo-owned and controlled
- 51% - 100% “other Indian” owned and controlled, or
- 100% Navajo Nation enterprise-owned business.
- Joint venture or partnership that is at least 51% owned by a Navajo or other Indian

How does a public entity comply with the NBOA?

First, establish a maximum feasible price (MFP) for any procurement.

Second, provide to the Business Regulatory Department:

- A copy of the bid solicitation
- A copy of the notice published in the newspaper
- A list of the businesses notified, including dates and manner of notice

Third, comply with the bid opening procedures and requirements under 5 NNC § 205C.

- Open all Priority 1 bids first.
- Determine the qualifications of the bidders
- Award contract to qualified Priority 1 bidder submitting the lowest bid under MFP.
- If there is no bid by a qualified Priority 1 business, open Priority 2 bids and award to qualified Priority 2 bidder submitting lowest bid under MFP.
- If no Priority bidder is entitled to award, open up bid to all other bidders, subject to same specifications, qualifications and MFP.

Prime Contractors

Prime contractors of the Navajo Nation government, while covered by the NBOA, are not required to prepare an MFP nor do they follow the bid opening procedures and requirements of 2 N.N.C. § 205(C).

Pursuant to 2 N.N.C. § 205(D), prime contractors are required to submit a subcontracting plan to the Business Regulatory Department that lists the following:

- Subcontractors and suppliers
- Procedures used in selection
- Subcontracts or lease agreements for equipment to be used in performance

205(E) Minimum Subcontract and Procurement Percentage Requirements

BRD is authorized to establish minimum percentages for procurement and subcontract awards for all procuring entities and prime subcontractors. BRD has not established any NBOA regulations.

Private Parties

The NBOA does not apply to private parties, unless the party has consented in a lease, right-of-way grant or other contract to be bound by the NBOA.

Exceptions to Competitive Bidding

All Navajo Nation contracts shall be awarded by competitive sealed bidding pursuant to 12 NNC § 331, except as provided in 12 NNC § 332 (competitive sealed proposals), § 333 (small purchases), § 334 (emergency procurement), § 335 (sole source) and § 346 (architectural and engineering services) under regulations promulgated by the Budget and Finance Committee:

- When it is not practicable nor advantageous to utilize competitive scaled bidding, a contract may be entered into by competitive sealed proposals
- Purchases of less than \$50,000 may be made pursuant to small purchase regulations, from NBOA certified businesses
- Upon certification of an emergency by the executive director of a department, the Attorney General and the Controller, purchases may be made by emergency procurement
- After determination of the qualifications of architectural, engineering and land surveying firms by the Selection Committee (Controller, the head of the purchasing agency and Design and Engineering Services), the procurement officer shall negotiate a contract with the highest qualified firm at compensation that is deemed fair and reasonable to the Navajo Nation.

Is a Contract Award Following a Request for Qualifications covered by the NBOA?

Short answer: No.

As stated in the Exceptions to Competitive Bidding, above, the Navajo Nation may determine the qualifications of architects, engineers, and surveyors, then negotiate a contract

with the highest qualified bidder. This process is now the prevailing practice for public entity construction projects and service contracts on the Navajo Nation.

Navajo Nation enterprises and corporations routinely publish requests for qualifications that require submission of qualification criteria. Such criteria may include similar projects completed, licenses held, list of prior customers, availability of various bonds, qualifications of key personnel, *joint venture participation by a NBOA certified entity*, references, etc.

Enforcement of the NBOA by Business Regulatory Department

A Priority 1 or Priority 2 bidder may file a complaint for violation of the bidding and procurement procedures with the Business Regulatory Department. 5 NNC § 209A. The Department is required to investigate complaints, make findings of fact based on witness statements, and seek voluntary compliance. If voluntary compliance is not forthcoming, the Department may enter a decision and impose sanctions. 5 NNC § 209B4.

The Department may impose sanctions for violations of the NBOA or Department rules and regulations. Sanctions include a civil fine up to \$500.00 per day, suspension of authorization to conduct business on the Navajo Nation or a prohibition from engaging in future business on the Navajo Nation. Additionally, the Department may require changes in performance, organization or operations to cure any violations. 5 NNC § 209E. Department orders are subject to appeal to the Office of Hearings and Appeals.

The Department is authorized, with the assistance of the Navajo Nation Department of Justice, to apply to the Navajo Nation District Court for enforcement of its orders, including injunctive relief. 5 NNC § 209C.

Appeals

Appeals of certification can be appealed to the Director of the Department, to the Office of Hearings and Appeals and further to the Navajo Nation Supreme Court.

Appeal of a contract award in violation of the NBOA is made under 5 NNC § 211. Due to failure of the Nation to promulgate NBOA regulations, appeals are normally resolved by the Navajo Nation Department of Justice in the form of a letter opinion.

III. The Navajo Nation Procurement Act

Application

The Navajo Nation Procurement Act applies to procurement by the Navajo Nation government, i.e. every expenditure of public funds, irrespective of source, through a branch or agency of the Navajo Nation government, with the exception of governance certified chapters, enterprises, authorities and Navajo Nation owned corporations. Contracts with professional

attorneys are not subject to the Act, such contracts being awarded on the basis of qualifications by the Navajo Nation Attorney General.

Primacy of Navajo Business Opportunity Act

All contracts entered into pursuant to the Navajo Nation Procurement Code *shall comply with the Navajo Business Opportunity Act* as well as the Navajo Preference in Employment Act. 2 NNC § 223D.

All contracts of the Navajo Nation government shall be awarded only after advertisement and bidding unless otherwise authorized as small purchases, emergency purchases or sole source purchases under the Navajo Nation Procurement Code, or are Intergovernmental Agreements approved by the Navajo Nation Council or its standing committees. 2 NNC § 223E.

Other Provisions of Navajo Nation Procurement Contracts

Contracts shall not contain a waiver of sovereign immunity unless approved by a 2/3 vote of the Navajo Nation Council. 2 NNC § 223C. Change orders, modifications or amendments of Navajo Nation contracts exceeding 20% of the accepted bid shall be re-bid and re-advertised. 2 NNC § 223F. Prospective suppliers may be pre-qualified for particular supplies, goods and construction. 12 NNC § 339.