

Indian Health Service Framing Paper on The Buy Indian Act

Proposed Rule - Buy Indian Act Regulations

25 U.S.C. 47

This document provides a framework for implementing the subject Proposed Rule within the Indian Health Service (IHS) and additional information on the Buy Indian Act of 1910 (Buy Indian Act), at 25 U.S.C. § 47.

Purpose:

The IHS is working with the Department of Health and Human Services (HHS) to issue regulations guiding implementation of the Buy Indian Act within the IHS. This proposed rule describes the uniform procedures that the IHS will use in all of its locations to encourage procurement relationships with Indian labor and Indian-owned businesses in the execution of the Buy Indian Act.

The Buy Indian Act at 25 U.S.C. § 47 is brief, with limited detail. The key to implementation is dependent on the HHS establishing regulations and Agency policy.

The current Buy Indian Policy in the *Indian Health Manual* (IHM), at Part 5, Chapter 5 (5-5.6), is also brief and requires an update. In conjunction with actions to revise and update the Buy Indian Act regulations, the IHS can also revise the IHM to address recommendations provided in a report by the United States (U.S.) Government Accountability Office (GAO) entitled, “Buy Indian Act, Bureau of Indian Affairs and Indian Health Service Need Greater Insight into Implementation at Regional Offices” (GAO-15-588), located online at <https://www.gao.gov/assets/680/671291.pdf>.

Background:

HHS intends to issue regulations guiding the implementation of the Buy Indian Act, which provides the IHS with the authority to set-aside procurement contracts for Indian-owned and Indian-controlled businesses. The Buy Indian Act is reserved to the IHS and is not available for use by any other HHS component. The Buy Indian proposed rule establishes acquisition policies and procedures for the IHS that are consistent with those adopted by the Department of the Interior (DOI), Bureau of Indian Affairs (BIA). The BIA is the only other Federal agency besides the IHS where the Buy Indian Act is applicable.

The IHS authority to provide health care services to the American Indian and Alaska Native people derives from the Snyder Act of 1921 (25 U.S.C. 13), a broad, general authority to “expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians,” for among other things, the “relief of distress and conservation of health.” In 1954, Congress transferred this responsibility and other health care “functions, responsibilities, authorities, and duties of the Department of the Interior” (including the Snyder Act) to the Department of Health, Education, and Welfare, the predecessor of the HHS.

In 1910, the Buy Indian Act was passed by the Congress to give preference to Indian-owned and Indian-controlled businesses in matters of procurement. The Transfer Act (42 U.S.C. 2003) authorizes the IHS to use the Buy Indian Act to carry out its health care responsibilities. The Transfer Act authorizes the Secretary of HHS to “make such other regulations as he deems desirable to carry out the provisions of the [Transfer Act].” The HHS Secretary’s authority to carry out functions under the Transfer Act has been vested in the Director of the IHS under 25 U.S.C. 1661. IHS authority to use the Buy Indian Act is further governed by 25 USC 1633, which directs the HHS Secretary to issue regulations governing the application of the Buy Indian Act to construction activities.

This proposed rule will supplement HHS Acquisition Regulations (48 CFR Parts 326 and 352), which are maintained by the Assistant Secretary for Financial Resources (ASFR).

Eligibility Requirements:

The IHS must use the Buy Indian Act to give preference to Indians whenever the use of that authority is authorized and practicable. The Buy Indian Act provides that, so far as may be practicable, Indian labor shall be employed and purchases of the products of Indian industry may be made in the open market. The IHS may use the Buy Indian Act to give preference to Indian Economic Enterprises (IEEs) through set-aside contract awards when acquiring supplies, services, and covered construction to meet IHS requirements.

Main requirements for contract competition under the Buy Indian Act:

- The business must be an Indian Economic Enterprise business that is at least 51 percent Indian/Indian Tribe owned.
- The Indian Economic Enterprise owner or owners must be members of a federally recognized Indian Tribe or Alaska Native village.
- The Indian Economic Enterprise must manage the contract.
- The Indian/Indian Tribe must receive the majority of the earnings from the contract.
- The Indian/Indian Tribe must control the daily business operations.

Set-asides for IEEs:

- Acquisitions of supplies or services using either Commercial Item Procedures (FAR Part 12) or Simplified Acquisition Procedures (FAR Part 13), must be set-aside exclusively for Indian Small Business Economic Enterprises (ISBEEs), which are IEEs that are also small business concerns established in accordance with U.S. Small Business Administration (SBA) small business criteria and size standards.
- Each acquisition must be set-aside exclusively for IEEs, with preference to ISBEEs, when there is a reasonable expectation that offers will be received from two or more responsible IEEs (or ISBEEs) and award will be made at a reasonable price.

Other Considerations:

- If only one offer is received:
 - If reasonably priced and determined to be technically acceptable, then award to the Indian Economic Enterprise.
 - If not reasonably priced and/or technically acceptable, then the requirement may be re-solicited or re-negotiated to obtain an acceptable offer.
- Subcontracting is permitted, but at least 50 percent of the subcontracted work must go to IEEs.
- The Indian Economic Enterprise must meet the Buy Indian Act eligibility requirements during the following periods:
 - At the time the offer was made;
 - At the time of award;
 - During the life of the contract; and
 - If a contractor loses eligibility during any of these times, the Contracting Officer may terminate the contract for default.

Laws/Regulations/HHS Acquisition Regulations (HHSAR):

Reference to the laws and regulations cited throughout this document.

The Buy Indian Act

- 25 U.S.C. 47
([https://uscode.house.gov/view.xhtml?req=\(title:25%20section:47%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title25-section47\)&f=treesort&num=0&edition=prelim](https://uscode.house.gov/view.xhtml?req=(title:25%20section:47%20edition:prelim)%20OR%20(granuleid:USC-prelim-title25-section47)&f=treesort&num=0&edition=prelim))

HHSAR -- 48 CFR Chapter 3, Part 326, “*Other Socioeconomic Programs,*” and 48 CFR Chapter 3, Part 352, “*Solicitation Provisions and Contract Clauses*”

- HHSAR Subpart 326.5 – *Indian Preference in Employment, Training, and Subcontracting Opportunities*
(<https://www.hhs.gov/grants/contracts/contract-policies-regulations/hhsar/part-326-other-socioeconomic-programs/index.html#326.5>)
- HHSAR Subpart 326.6 – *Acquisitions Under The Buy Indian Act*
(<https://www.hhs.gov/grants/contracts/contract-policies-regulations/hhsar/part-326-other-socioeconomic-programs/index.html#326.6>)

- HHSAR Subpart 352.226-1 – *Indian Preference*
(<https://www.hhs.gov/grants/contracts/contract-policies-regulations/hhsar/part-352-solicitation-provisions-contract-clauses/index.html#352.226-1>)
- HHSAR Subpart 352.226-2 – *Indian Preference Program*
(<https://www.hhs.gov/grants/contracts/contract-policies-regulations/hhsar/part-352-solicitation-provisions-contract-clauses/index.html#352.226-2>)