

# MODEL TRIBAL INDIAN CONTRACT PREFERENCE ORDINANCE

## AMENDED 4-28-91

Whereas economic development on the Blackfeet Indian Reservation is essential for the tribe to achieve social and economic self sufficiency.

And whereas construction contracting is a major economic activity on the Blackfeet Reservation.

And whereas there is a substantial and growing pool of Indian contractors available to do construction contracting and sub-contracting work on the Blackfeet Reservation.

And whereas the Blackfeet tribe has the inherent power to regulate contract activity on the Blackfeet Reservation, subject only to the requirements of federal contract law on construction projects involving federal funds.

**THEREFORE BE IT RESOLVED THAT:**

### **Section 1. COVERAGE**

This Ordinance applies to all construction contracts and subcontracts involving construction that will take place within the exterior boundaries of the Blackfeet Reservation. A contract or subcontract "takes place within any areas over which the Blackfeet Tribe exercises sovereignty authority over business activities.

A. The Indian contract preference requirements set out in section 3 and 4 of this Ordinance shall apply to:

1. All contracts and subcontracts which are not direct federal or federally funded contracts.
2. All contracts and subcontracts which are federally funded.
3. All subcontracts on direct federal contracts which are for the benefit of Indians and which therefore are covered by section 7(b) of the Indian Self-Determination Act (PL93-638 25 U.S.C.)

B. The utilization of minority contractors requirements, set out in section 5 of this ordinance shall apply to all subcontractors on federal and federally funded projects which are not for the benefit of Indians and therefore are not covered by section 7(b).

### **Section 2. DEFINITIONS**

A. Indian contractor is a contractor that is 51% or more Indian owned and controlled. The Blackfeet Tribe reserves the right to require such proof as it seems necessary to substantiate that a firm actually is 51% or more Indian owned and controlled.

B. The entity shall send summaries of the proposed prime contract to the Indian firms on that list to determine if any Indian contractor is interested in and qualified to bid on the proposed prime contract.

C. If within a reasonable time after summaries of the proposed prime contract have been sent and more than one Indian firm expresses an interest in bidding on the contract and is qualified to perform it, the entity shall restrict competition to those Indian firms. An expression of interest to bid on a contract shall mean the submission to the entity of a statement of intent to bid on the contract.

Upon the entity receiving a statement of intent to bid on the prime contract from two or more Indian firms, the entity shall request bids from Indian firms only. The contract shall be awarded to the Indian firm which submits the "lowest responsive overall bid." If that bid is within the budgetary limits established for the specific project. If no Indian firm submits a responsive bid which does not exceed the entity's projected contract costs, the entity shall have the option of entering into negotiations with the Indian firm submitting the lowest responsive bid. If the Indian firm with the lowest responsive bid is unable or unwilling to arrive at a contractual agreement with the entity after a reasonable period of time, then the entity shall have the option of entering into negotiations with the Indian firm submitting the next lowest responsive bid. This process shall continue with all the Indian firms submitting a responsive bid.

If the entity is unable to arrive at a contractual agreement with any of the Indian firms submitting responsive bids, then the entity shall advertise for bids in the manner set forth in section 3(b) and section 3(e).

D. If no more than one Indian firm expresses an interest in the contract, the entity shall advertise for bids inviting responses from non-Indian as well as Indian firms. Award of the contract shall be made to the Indian firm with the lowest responsive bid if: (1) that bid is within 10% of the lowest overall bid; (2) that bid does not exceed the entity's projected contract costs; and (3) and the Indian firm is able to meet "the lowest" overall responsive bid.

If the Indian firm with the lowest responsive bid is unable or unwilling to meet the lowest overall bid, an opportunity will be given to an Indian firm with the next lowest responsive bid to satisfy the aforementioned conditions for awarding of the contract. If no Indian firm bidding on the contract is able to satisfy the aforementioned conditions for awarding of the contract, award shall be made to the firm with the lowest overall bid.

E. If after proper advertisement of the proposed prime contract all the responsive bids exceed the entity's proposed contracts costs, the entity shall have the option of entering into negotiations with the Indian firm which submitted the lowest responsive bid if that bid is within 10% of the lowest overall bid. If the Indian firm with the lowest responsive bid is unable or unwilling to arrive at a contractual agreement with the entity after a reasonable time, then the entity shall have the option of entering into negotiations with the Indian firm submitting the next lowest responsive bid if that bid is within 10% of the lowest overall bid. This process shall continue as long as an Indian firm's responsive bid is within 10% of the lowest overall bid. If no Indian firm which has submitted a responsive bid which is within 10% of the lowest overall bid is able or

#### B. For the Benefit of Indians

Work to be performed under a federal or federally funded contract is for the benefit of Indians if the benefits it will provide to Indians are in addition to any incidental benefits which might accrue to the general public.

#### C. Prime Contractor

A prime contractor is the prime construction contractor the entity responsible for the construction project. This shall include both the general construction contractor or a construction management firm, which ever is being used.

#### D. Subcontract

A subcontract is any contract let by the prime contract or its subcontractors for supplies or work on the prime contract, regardless of tier.

#### E. Minority Business Enterprise

A minority business enterprise is an enterprise that is 51% or more owned or controlled by members of a minority group. A minority is a member of one or more of the following groups; Black American, Hispanic American, Asian American, American Indian, American Eskimo, and American Aleuts.

#### F. Direct Federal Contracts

A direct federal contract is a contract let by a federal agency directly to a prime contractor.

#### G. Federally Funded Contracts

A federally funded contract is one on which the federal government has contracted or granted funds to an entity, which, in turn, lets the prime contract.

### Section 3. INDIAN CONTRACT PREFERENCE REQUIREMENTS IN THE LETTING OF PRIME CONTRACTS.

Each entity, other than the Federal Government (but including the Blackfeet Tribe, a state, Indian organization, private and others), letting contracts for construction work on the Blackfeet Reservation shall comply with the following requirements when letting the prime contract:

A. The entity shall obtain, from the Blackfeet T.E.R.O., the source list of available Indian contractors.

willing to arrive at a contractual agreement with the entity, then the entity shall have the option of entering into negotiations with the firm which has submitted the lowest overall bid.

F. The entity letting the contract shall be responsible for making the determination on whether or not an interested Indian firm is qualified to perform the work. However, the T.E.R.O. reserves the right to require documentation from the entity, supporting its conclusion that an Indian firm or firms is not qualified to perform the work. If the T.E.R.O. determines that the evidence is such that no responsible person could conclude that the firm was not qualified, the T.E.R.O. reserves the right to require the entity to pay damages to the Indian firm that was improperly declared not to be qualified.

#### Section 4. INDIAN PREFERENCE IN SUBCONTRACTING

A. Prior to the letting of any construction contract for work to be performed on the Blackfeet Reservation, or within any areas over which the Blackfeet Tribe exercises sovereignty authority over business activities whether that contract is a direct federal contract, a federally funded contract or a non-federal contract, the T.E.R.O. shall establish the percentage of subcontracting work that shall be performed by the T.E.R.O. after considering the nature of the contract, the availability of Indian contractors with the requisite skills to perform the work on the contract, and such other factors as may be suggested by the entity letting the contract and accepted by the T.E.R.O.. Before setting the percentage, the T.E.R.O. shall meet with the entity letting the contract to inform it of the percentage it is proposing and to explain how it reached its conclusions. T.E.R.O. shall provide the entity letting the contract with a copy of the ordinance, a memo setting out the percentage and how it was arrived at, and a list of Indian contractors available to perform subcontract work on the contract.

On direct federal contracts, the T.E.R.O. shall request that the agency letting the contract include this material in its bid offering material. On all other contracts to include the material in its bid offering material.

#### Section 5. UTILIZATION OF MINORITY SUBCONTRACTORS ON FEDERAL AND FEDERALLY FUNDED CONTRACTS NOT FOR THE BENEFIT OF INDIANS.

A. For each direct federal or federally funded contract to be let for work on the Blackfeet Reservation not covered by the Indian subcontract preference requirements set out in section 4 of this ordinance, the T.E.R.O. shall set the percentage of the total value of all subcontracts, regardless of tier, resulting from the prime contract that shall be awarded to minority business enterprises. The percentage shall be expressed in terms of the percent of total subcontract dollars to go to minority business contract, the minority business enterprises with the requisite skills to perform the work, and such other factors as may be possible, the percentage set by the T.E.R.O. shall be the same as the responsibilities under the Federal Minority Business Enterprise Utilization Program.

B. The T.E.R.O. shall provide the entity letting the contract with a list of available minority business enterprises which is to be included in the bid offering material, along with the information on the required percentage for the utilization of Minority Business Enterprises, as set by the T.E.R.O.

C. The successful contractor shall be free to select subcontractors in whatever manner it so chooses, and to determine which contractors are qualified and whether the prices offered by the subcontractors are reasonable and appropriate. However, a contractor who fails to meet its percentage requirement for utilization of minority business enterprises shall demonstrate to the T.E.R.O. that good cause exists for its failure or shall be subject to one or more of the sanctions set out in Section 9, below, pursuant to the procedures and appeal processes set out in Section 10, below.

#### Section 6. RESPONSIBILITIES OF THE T.E.R.O.

A. The T.E.R.O. shall develop and keep updated a list of Indian contractors available to perform work on the Blackfeet Reservation. The list shall include information on the areas in which they consider themselves qualified to work, their experience, and their present availability to the extent possible. The T.E.R.O. shall coordinate in the Bureau of Indian Affairs, the Indian contractor source list.

B. The T.E.R.O. shall develop and keep updated a list of Minority Business Enterprises willing and able to perform work on the Blackfeet Reservation. The list shall include information on their qualifications, their prior experience, and such other information that T.E.R.O. determines appropriate. T.E.R.O. shall work closely with the Small Business Administration to coordinate its Minority Business Enterprise list with that of the SBA.

C. The T.E.R.O. shall work closely with federal agencies which have regulations requiring Indian contract preference or maximum utilization of Minority Business Enterprises and shall seek to coordinate their requirements, their monitoring efforts and their sanctioning activities to the extent feasible.

D. Within available resources the T.E.R.O. shall provide advice and counseling to Indian contractors located on the Blackfeet Reservation on the ways and means to improve their capability and qualifications, assist them in obtaining bonding, assist them in understanding the nature of the federal process and the requirements of federal construction contracts, assist them in locating other resources for technical assistance in the construction contracts, assist them in locating other resources for technical assistance in the construction field, and shall carry out such other activities as will promote the development of Indian construction contractor on the Blackfeet Reservation.

E. The T.E.R.O. shall take steps to ensure that all federal agencies, all other entities that may be letting contracts on the reservation, and all construction contractors in the area have notice of this ordinance and its requirements.

## Section 7. MONITORING

A. Contractors shall submit such reports and other information as is requested by the T.E.R.O.. Employees of the T.E.R.O. shall have the right to make on-site inspections during regular hours in order to monitor an employers compliance with this ordinance. All information collected by the T.E.R.O. shall be kept confidential, unless disclosure is required during a hearing or appeal as provided for in this ordinance.

B. The entity letting the prime contract shall require every bidder to submit, as part of its bid, a plan describing how it well satisfy the Indian subcontractor utilization percentage established by the T.E.R.O.. A bid that fails to contain a satisfactory Indian subcontractor utilization plan shall be considered a non-qualifying bid.

C. The successful prime contractor selected by the entity letting the contract shall be free to select its subcontractors in whatever manner it so chooses and to make its own determination a qualification and reasonableness of price. However, a successful contractor who fails to meet the percentage requirements for utilization of Indian subcontractors shall be required to demonstrate to the T.E.R.O. that good cause exists for its failure to meet said requirements. If it fails to demonstrate good cause, it shall be subject to one or more of the sanction set out in section 9 of the ordinance, pursuant to the procedures and appeals processes set out in section 10.

Prime contractor shall be encouraged to explore the possibility of dividing their subcontracts into components or sub-components that would enable the maximum number of Indian contractors to qualify.

## Section 8. COMPLIANCE AND HEARING PROCEDURES

If the Director of the office believes that a contract letting entity and/or a prime contractor has failed to comply with any of the requirements set out in this ordinance, he or she shall so notify the entity and/or contractor, in writing, specifying in detail the alleged violations(s). The entity or contractor shall then be entitled to a hearing before the director. Hearing procedures shall comply with the requirements of due process but will not be bond by the formal rules of evidence. The entity and/or contractor shall be entitled to present evidence and to call witnesses to demonstrate that it has complied with the requirements of this ordinance or that it made a best effort to do so and therefore should not be subject to sanction.

The director shall have the right to subpoena witnesses and documents, to put witnesses under oath, to call witnesses and present evidence in the tribes behalf, and to take such other steps as are necessary to insure a fair and complete hearing on the issues. On the basis of the evidence presented at the hearing and the information collected by the office, the director shall determine whether or not the entity and/or contractor complied with its Indian preference requirements. If the director determines that one or more of the parties is out of compliance and has not made a best effort to comply, the director shall impose one or more of the sanctions provided for in section 9 of this ordinance, as appropriate.

## Section 9. SANCTIONS

In the event that a contract-letting entity and/or contractor is found to be out of compliance with the requirement of this ordinance, the director shall be entitled to impose any or all of the following sanctions, as appropriate, after considering such mitigating factors as the effort to comply and its efforts to remedy and harm done by its non-compliance:

A. Impose civil monetary fines. Such fines shall not exceed \$500.00 per violation. Each day the entity or contractor is out of compliance with this ordinance shall be considered a separate violation.

B. Suspend the contract-letting process or the work on the contract until corrective action is taken or a plan for corrective action is developed.

C. Terminate the contract work.

D. Prohibit the contractor from engaging in any future operations on the reservation.

E. Provide monetary relief to any Indian or contractor who was harmed by the entity and/or contractors violation of this ordinance.

## Section 10. APPEALS

The entity and/or contractor shall have the right to appeal any decision of the director to the Blackfeet Tribal Court. An appeal must be filed within 20 days after receipt of notice of the director's decision. The director shall represent the interest of the tribe during the appeal.

## Section 11. INDIVIDUAL COMPLAINT PROCEDURE

Any Indian contracting firm or group of Indian firms who believe that an entity and/or contractor has failed to comply with this ordinance may file a complaint with the office. Persons may file whether or not they can show that they were personally harmed by the non-compliance. Upon receipt of a complaint, the office shall conduct an investigation of the charge and shall attempt to achieve an informal settlement of the matter.

If voluntary conciliation cannot be achieved, the director shall hold a hearing on the matter, shall make a determination on the validity of the charge, and shall order such relief as is necessary to make whole any Indian firm that was harmed by the non-compliance. The decision shall be in writing and shall be sent to all parties.

Either part shall have the right to appeal the decision of the director to the Tribal Court as provided for a section 10. Such appeal must be filed within 20 days after receipt of the decision notice from the director. In conducting the hearing provided for in this paragraph, the director shall have the same powers, and shall be bound by the same requirements as those set out in regard to the hearing provided for in section 8 of this ordinance.

## Section 12. SEVERABILITY

If any provision of this ordinance, or its application to any person or circumstance is held invalid, the remainder of the ordinance, or the application of the provision to other persons or circumstances is not affected.