



The Navajo Nation **DR. BUU NYGREN** *PRESIDENT*
Yideeskáądi Nitsáhákees **RICHELLE MONTOYA** *VICE PRESIDENT*

November 3, 2023

Honorable Crystalyne Curley, Speaker
Office of the Speaker
Navajo Nation Council
P.O. Box 3390
Window Rock, AZ 86515

RE: CO-81-23, An Action Relating to the Law and Order, Budget and Finance, and Naabik'iiáti' Committees, and the Navajo Nation Council; Amending the Navajo Nation Procurement Act at 12N.N.C. SECTION 301 – SECTION 371 and Amending the Navajo Nation Business Opportunity Act 5 N.N.C. SECTION 201 – SECTION 215.

Dear Honorable Delegates of the 25th Navajo Nation Council:

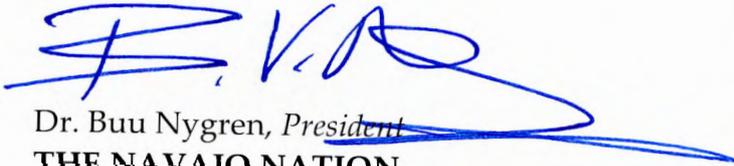
By signing this resolution into law, I am in support of approving the amendments to the Navajo Nation Procurement Act and the Navajo Nation Business Opportunity Act. Currently, the Acts as they are written and applied today, these statutes do not meet the changing needs of the Navajo Nation, Navajo businesses and those doing business on and with the Navajo Nation.

The Navajo Nation Procurement Act was passed in 1972 and has not been amended since – it is time that we take steps to update our laws to meet the economic and business needs of today. The purpose of the Procurement Act is to ensure consistency, quality and integrity in the Navajo Nation procurement process. Further, the Navajo Nation Business Opportunity Act was passed to determine if businesses are eligible for priority preference and if so, to give preference to businesses that are Navajo-owned and operated, or Navajo-majority owned when they submit bids or proposals in the procurement of services or goods. Signing the amendments into law is a step toward those goals.

In addition, these Amendments are also timely and important because the Navajo Nation has been awarded an unprecedented amount of funds – over \$2 billion in American Rescue Plan Act (ARPA) funds – which have looming deadlines. It is important the Navajo Nation takes advantage of these funds to mitigate the effects of the COVID-19 pandemic.

I recognize there are still rules and regulations that will be promulgated to clarify and further strengthen the statutes and processes. My office will continue to work with the Navajo Nation Council, the Department of Justice, the Department of Economic Development, and the Office of Controller to draft and promulgate Rules and Regulations to clarify and further strengthen the amended Procurement Act and NBOA.

Sincerely,



Dr. Buu Nygren, *President*
THE NAVAJO NATION

RESOLUTION OF THE
 NAVAJO NATION COUNCIL
 25th NAVAJO NATION COUNCIL - FIRST YEAR, 2023

AN ACT

RELATING TO THE LAW AND ORDER, BUDGET AND FINANCE, AND NAABIK'ÍYÁTI' COMMITTEES, AND THE NAVAJO NATION COUNCIL; AMENDING THE NAVAJO NATION PROCUREMENT ACT AT 12 N.N.C. § 301-§ 371 AND AMENDING THE NAVAJO NATION BUSINESS OPPORTUNITY ACT AT 5 N.N.C. § 201-§ 215

BE IT ENACTED:

SECTION ONE. AUTHORITY

- A. The Law and Order Committee is a standing committee of the Navajo Nation Council that makes recommendations to the Council concerning amendments to the Navajo Nation Code. 2 N.N.C. § 601(B)(14).
- B. The Budget and Finance Committee is a standing committee of the Navajo Nation Council that oversees and regulates the financial policies of the Navajo Nation. 2 N.N.C. § 300(C)(1).
- C. The Naabik'íyáti' Committee is a standing committee of the Navajo Nation Council that reviews legislations requiring final action by the Council. 2 N.N.C. § 164(A)(9).
- D. The Navajo Nation Council is the governing body of the Navajo Nation with the authority to review and approve amendments to the Navajo Nation Code. 2 N.N.C. § 102(A), 2 N.N.C. § 164(A).

SECTION TWO. FINDINGS

- A. The Navajo Nation Procurement Act ("Procurement Act") and the Navajo Nation Business Opportunity Act ("NBOA") have not been amended in decades. In their current form, these statutes no longer meet the changing needs of the Navajo Nation, especially with regard to the procurement of professional services, and federally-funded projects that are under strict funding deadlines.
- B. In 2014 the Navajo Nation Supreme Court issued its decision in *Iiná bá, Inc. v. Navajo Business Regulatory* (SC-CV-60-10). This decision found that the Navajo Nation failed to comply with the NBOA in awarding a contract to a Navajo-owned engineering firm.

- C. In the *Iiná bá* case, the Navajo Nation did follow the letter of the Procurement Act in selecting a non-Navajo engineering firm for a water project, but the Procurement Act's sections pertaining to the selection of engineers does not include procedures for giving Navajo Preference in the selection process. Therefore, the Procurement Act needs to be amended to incorporate appropriate wording to address the holding in *Iiná bá, Inc. v. Navajo Business Regulatory*.
- D. In August 2021 the Navajo Nation received \$2,079,461,464.93 in federal funds under the American Rescue Plan Act ("ARPA") to pay for projects aimed at mitigating the effects of the COVID-19 pandemic across the Navajo Nation.
- E. The Navajo Nation is now facing the imminent ARPA deadline of December 31, 2024 to fully spend or encumber all of the ARPA funds it has received. Amending the Procurement Act and the NBOA will help the Navajo Nation more efficiently procure the goods and services needed for the many ARPA-funded projects that the Navajo Nation is undertaking.
- F. The Navajo Nation finds it in the best interest of the Navajo Nation and the Navajo People to approve the proposed amendments to the Navajo Nation Procurement Act (clean version of the amended Act attached as EXHIBIT A) and the Navajo Nation Business Opportunity Act (clean version of the amended Act attached as EXHIBIT B) as set forth in this Act.

SECTION THREE. AMENDING THE NAVAJO NATION PROCUREMENT ACT AT 12 N.N.C. § 301-§ 371

- A. The Navajo Nation hereby amends 12 N.N.C. § 301-§ 371 as follows:

**TITLE 12. Fiscal Matters
Chapter 3. Navajo Nation Procurement Act
Subchapter 1. General Provisions**

§ 301. Short title

This Act shall be known and cited as the Procurement Act.

§ 302. Purposes, Rules of construction

- A. Interpretation. This Procurement Act shall be construed interpreted and applied in a manner that promotes its underlying purposes and policies.
- B. Purposes and Policies. The underlying purposes and policies of this Procurement Act are:

1. tTo simplify, clarify, and modernize the law governing Pprocurement by the Navajo Nation;
2. to foster effective broad-based competition within the free enterprise system to the extent consistent with the purposes and provisions of Navajo Nation laws, as may be amended from time to time, including, but not limited to the following: the Navajo Nation Business Opportunity Act ("NBOA"), 5 N.N.C. §§ 201 et seq., the Navajo Business and Procurement Act, 12 N.N.C. §§ 1501 et seq., and the Navajo Nation Ethics in Government Law, 2 N.N.C. §§ 3741 et seq.;
32. tTo permit the continued development of Pprocurement policies and practices;
43. tTo provide for consistency, quality, and integrity in all Navajo Nation Procurement consistent procurement practices;
54. tTo provide for increased public confidence in all Navajo Nation the procedures followed in public Pprocurement;
65. tTo ensure the fair and equitable treatment of all Ppersons who engagedeal with the Navajo Nation Pprocurement system; and of the Navajo Nation;
76. tTo provide increased economy in all Navajo Nation Procurement procurement activities and to maximize to the fullest extent practicable the purchasing value of Ppublic Ffunds of the Navajo Nation.;
7. ~~To provide safeguards for the maintenance of a procurement system of quality and integrity.~~

§ 3023. Ethics in Procurement and reporting of Anti-Competitive practices Requirement of good faith

- A. Good Faith Participation. This Procurement Act requires all Pparties involved in the negotiation, performance, or administration of all Navajo Nation Procurement and Ceontracts to act in good faith and in compliance with Navajo Nation laws.
- B. Void for Collusion or other Anti-Competitive Practices. In the event the Department of Justice determines that Collusion or other Anti-Competitive Practices have occurred, the Procuring Employee in consultation with the Department of Justice (or the Office of Legislative Counsel if the Procuring Party is the Legislative Branch) may void any Procurement or Contract.

§ 3034. Application of this Procurement Act

- A. General Application. This Procurement Act applies only to Contracts solicited or entered into after the effective date of this Procurement Act unless the parties agree to its application to a Contract solicited or entered into prior to the effective date.
- B. Application to all Navajo Nation Procurement. This Procurement Act shall apply to every expenditure of Public Funds, irrespective of their source, by the Navajo Nation, acting through a Procuring Party ~~division, department, office, or program of the Navajo Nation as defined herein,~~ under any Contract. Nothing in this Procurement Act or its Procurement Regulations ~~in regulations promulgated hereunder~~ shall prevent any Procuring Party ~~division, department, office, or program of the Navajo Nation or political subdivision of the Navajo Nation~~ from complying with the terms and conditions of any Grant, gift, bequest, or other agreement that requires compliance with procurement laws of another jurisdiction ~~intergovernmental, joint powers or cooperative agreement.~~ This Procurement Act shall not apply to Local Governance Act ("LGA"), 26 N.N.C. §§ 1 et seq., governance certified Chapters, ~~that~~ where are governed by their respective own Procurement policies.
- C. Exceptions of this Procurement Act. This Procurement Act shall not apply to the following agreements or types of Procurement:
1. selection of expert witnesses for litigation on behalf of the Navajo Nation, as selected by the Attorney General;
 2. agreements between the Navajo Nation and any federal, state, and local governments, including prime contracts and Grants, for the provision of governmental Services to Navajos and other Persons within the Navajo Nation unless specifically required by the agreement; and
 3. procurements for permits, licenses, or leases of real estate including appurtenant rights.

~~For the purposes of procuring the services of accountants, physicians, dentists, or other licensed professional services, other than attorneys or tribal court advocates, any division, department, office, or program of the Navajo Nation may act as a purchasing agency and contract on its own behalf for such services, subject to this Act and regulations promulgated by the Budget and Finance Committee. The purchasing agency may consult with the Director, Division of Finance, Purchasing Department or authorized designee when procuring such services.~~

~~D. Contracts for the services of outside attorneys and tribal court advocates shall be awarded only through the Attorney General of the Navajo Nation. This limitation shall not apply to the employment of attorneys or tribal court advocates by divisions, departments, offices, programs, and political subdivisions of the Navajo Nation, in accord with Navajo Nation law.~~

§ 3045. Severability

If any provision of this Procurement Act is held invalid, such invalidity shall not affect other provisions or the application of this Procurement Act which can be given effect without the invalid provision or application; and to this end, the provisions of this Procurement Act are declared to be severable.

§ 3056. Construction against implicit repealer

Since this Procurement Act is a general act, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction of the subsequent legislation can be reasonably avoided.

§ 3067. Effective date

This Procurement Act shall become effective pursuant to 2 N.N.C. § 164 (A) (17) ~~upon passage by the Navajo Nation Council.~~

~~§ 307. Determinations~~

~~Written determinations required by this Act shall be retained in the appropriate official Procurement File of the Director, Division of Finance, Purchasing Department or authorized designee or the purchasing agency for the period of three years, unless a different period of time is required by federal or state contract or grant requirements.~~

§ 308. Definitions

A. The words used in this Procurement Act shall have their ordinary meanings unless:

1. tThe context in which they are used clearly requires a different meaning; or
2. a different definition is ~~prescribed~~provided for in a particular provision.

B. "Aggrieved Person" means any Offeror or Contractor who is aggrieved in connection with a Solicitation or award of a

Contract; or any Person who is aggrieved in connection with a debarment or suspension decision. "Architect-Engineer and Land Surveying Services" are those professional services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws the Navajo Nation, or in the absence of Navajo law, the states in which the professional services are to be performed.

C. "Anti-Competitive Practice" means an act that harms, prevents, restricts, or distorts competition for a Procurement, or Contract opportunity, whether by fraudulent action or action taken in bad faith.

D.E. "Bid" means an Offer to perform a Contract for the provisionperformance of Goods, work and any attendant Services, labor and/or the delivery of goods at a specified price in response to the requirements contained in an Invitation for Bids.

E.D. "Business" means any legal entity, including but not limited to a corporation, limited liability company, company, partnership, individual, sole proprietorship, joint venture, or non-profit entities, or any other private legal entity.

F.E. "Change Order" means a written order signed by the procurement officer or authorized designee, directing the Contractor to make changes in the Scope of Work, term, or price in a Construction, architect, engineer, or land surveyor Contract only as authorized by the Contract without the consent of that contractor. A Change Order is a Contract Modification.

G. "Collusion" means an arrangement between two or more Persons designed to achieve an Anti-Competitive Practice, including to improperly influence the actions of another Person.

H. "Conflict of Interest" means the reasonable foreseeability that any personal or economic interest of a Public Official, or Employee, will be affected in any materially different manner than the interest of the general public, by any decision, enactment, agreement, award, or other official action or function of any governmental body the Navajo Nation.

I.F. "Construction" means the process of building, altering, repairing, improving, installing, renovating, or demolishing any public structure or building, or other public improvements of any kind to any public real property. It does not include the activities necessary to sustain routine operation, routine repair, or routine maintenance of existing structures, buildings, or other improvements to any real property.

J.H. "Contract" means all types of Navajo Nation agreements, regardless of what they may be called, for the procurement of Goods, Services, or Construction, unless it is the type of agreement excluded in Section 304(C) of this Procurement Act disposal of supplies, services, or construction. A purchase order is a Contract. The term contract does not include agreements, including prime contracts and grants, between the Navajo Nation and federal, state, and local governments for the provision of governmental services to Navajos and other persons within the Navajo Nation.

H. "Contract Modification" means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

K.F. "Contractor" means any Person, including Vendors, having a procurement Contract with a Division, Department, Office, or Program of the Navajo Nation.

L.J. "Cost Reimbursement Contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this Act, and a fee, if any.
K. "Data" means recorded information, regardless of form or characteristic.

M.F. "Designee" means an individual who is an appropriately a duly authorized representative acting within the limits of approved authority of a person.

M. "Employee" means an individual drawing a salary from a division, department, office, or program of the Navajo Nation whether elected or not, and any uncompensated individual performing personal services for any division, department, office, or program of the Navajo Nation.

N. "Established catalogue price" means the price included in a catalogue, price list, schedule, or other form that:

1. Is regularly maintained by a manufacturer or contractor;
2. Is either published or otherwise available for inspection by customers; and
3. States prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.

- N. ~~Division, Department, Office, or Program~~ of the Navajo Nation" means any Department, Commission, Council, Board, Bureau, Committee, Institution, Legislative Body, Agency, Government Corporation, non-LGA governance certified Chapter, or other establishment or Public Official of the Executive, Legislative, or Judicial Branch of the Navajo Nation government. It does not mean an LGA any other governance certified Chapter political subdivision of the Navajo Nation, or an Enterprise, or an Authority of the Navajo Nation.
- O. "Emergency" means a need, following an unexpected occurrence or occasion, that requires immediate action to protect the public health, welfare, or safety of the Navajo Nation or its property.
- P. "Employee" means an individual compensated by a Division, Department, Office, or Program of the Navajo Nation, whether elected, appointed, or not, and any uncompensated individual performing Services for any Division, Department, Office, or Program of the Navajo Nation.
- Q. "Goods" means all property, tangible or intangible, which includes but is not limited to supplies, products, equipment, materials, printing, software, and insurance.
- R.P. "Grant" means the receipt or provision of any governmental assistance, whether financial or otherwise, under a program authorized by Navajo Nation, state, or federal law; private; or philanthropic sources. It does not include an award with the whose primary purpose of is to procureing an end product, whether in the form of Goods supplies, Services, or Construction; a Contract resulting from such an award is not a Grant but a Procurement Contract.
- S. ~~Division, Department, Office, or Program~~ "Invitation for Bids" ("ITB") means a Solicitation issued by a Procuring Party seeking Offers where the offer providing the lowest price serves as the basis for the award, so long as the Offeror is Responsible and Responsive. ~~all documents, whether attached or incorporated by reference, utilized for soliciting bids.~~
- T. "Maximum Feasible Price" ("MFP") means the estimated cost of the Goods, Services, or Construction to be solicited. The Maximum Feasible Price establishes the maximum amount of funds the Procuring Party is willing to expend on the Procurement, and restricts the total purchase price for which a Procurement may be made. Regardless of Procurement method utilized, the Maximum Feasible Price shall be established prior to issuing any Solicitation and shall not be shared publicly.

- U.R. "May" denotes the permissive and shall apply if the defined term is not capitalized.
- V. "Modification" means any written document that amends the original Contract by mutual action and is signed by the Parties to the Contract.
- W. "Offer Security" means a Bid bond or deposit submitted with an Offer to guarantee to the Procuring Party that the Offeror, if awarded the, selection and solicitation of sources, preparation and award of Contract, will execute the and all phases of Contract within a specified period of time and will furnish any bonds or other requirements of the Solicitation administration. Offer Security shall only be required in Construction Procurement.
- X. "Offeror" means the Person who provides a timely, written response to a Solicitation.
- Y. "Party" or "Parties" means the Contractor and Procuring Party of a Procurement Contract as it pertains to this Procurement Act.
- Z. S. "Person" means any Bbusiness, individual union, committee, club, other organization, or group of individuals.
- AA. T. "Political Subdivision" means governmental units of the Navajo Nation which are created by Navajo Nation law and include the chapters and townsites of the Navajo Nation.
- U. "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any Goods, Services, or Construction goods and/or services, unless such purchase is excluded from coverage by this Procurement Act or by some other provision of Navajo Nation law. It also includes all functions that pertaining to the acquisition obtaining of any such Goods, Services, goods and/or Construction.
- BB. "Procuring Employee" means an Employee for a Division, Department, Office, or Program of the Navajo Nation Branch, Division Director, Executive Director, or Chapter Presidents services, including description of a non LGA governance certified Chapter who is responsible for procuring Goods, Services, or Construction for a Division, Department, Office, or Program of the Navajo Nation.
- CC. "Procuring Party" means any Division, Department, Office, or Program of the Navajo Nation that is subject to the Procurement Act or its implementing Procurement Regulations. The head of the Procuring Party may delegate completion of required actions

under this Procurement Act and Procurement Regulations to the Procuring Employee, unless authorization or signature is required. Such actions shall be made by the head or authorized Designee of the Procuring Party.

DD. "Proposal" means an offer to perform a Contract for the provision of Services, and any attendant Goods, or Construction, in response to the requirements contained in a Request for Proposals.

EE. "Public Funds" means all funds as provided in 12 N.N.C. § 810(S).

FF. "Public Notice" means Publication in a manner by which a Solicitation is made available to the general public.

GG. "Publication" means, for the purposes of this Procurement Act, any commonly utilized or easily accessible report, article, educational material, handbook, brochure, pamphlet, press release, public service announcement, web page, audio or visual material, or other communication for public dissemination.

HH. "Public Official" means a Public Official as defined in the Navajo Nation Ethics in Government Law, 2 N.N.C. § 3743(S).

~~II. V. "Procurement Officer or authorized designee" means any person authorized to enter into, make written determinations regarding, and administer contracts. The term also includes an authorized representative acting within the limits of authority.~~

~~W. "Proposal" means an offer to perform a contract for the performance of work and labor and/or the delivery of goods sought where it is either not practicable or not advantageous to the Navajo Nation to procure specified types of supplies, services, or construction by competitive sealed bidding.~~

X. "Purchase Description" means the words used in a Solicitation to describe the Goods, Services, supplies, services, or construction to be purchased, and includes specifications attached to, or made a part of the solicitation, or Construction to be procured, which includes any Specifications or Scope of Work.

~~Y. "Purchasing agency" means any division, department, office, program, and political subdivisions of the Navajo Nation, other than the Division of Finance,~~

JJ. "Purchasing Manager" means the person, or authorized Designee, of the Purchasing Services Department within the Office of the

Controller who is responsible for administering Procurement for the Navajo Nation. Department which is authorized by this Act or its implementing regulations, to enter into contracts.

KK.Z. "Procurement Regulations" means, for purposes of this Act, the regulations adopted by the Budget and Finance Committee to govern to regulate the Procurement of Goods, and Services, or Construction by the Procuring Party divisions, departments, programs and offices of the Navajo Nation government.

LL. AA. "Request for Proposals" ("RFP") means a Solicitation issued by all documents, whether attached or incorporated by reference, utilized for soliciting proposals Procuring Party seeking Offers where the award is based on meeting stated evaluation factors, including price.

MM. "Request for Statement of Qualifications" ("RSQ") means a Solicitation issued by a Procuring Party for the purpose of soliciting information from Persons as to their qualifications and capability to provide Goods or Services where award is based on contracting with the highest qualified Offeror at a fair and reasonable cost.

NN. BB. "Responsible bidder or Offeror" means a Person who has the capability in all respects to perform fully the Contract requirements noted in the Solicitation, and the integrity and reliability that which will assure good faith performance.

OO. CC. "Responsive Offeror/bidder" means a Person who has submitted an Offer that bid which conforms in all material respects to the requirements of the respective Solicitation for which it is submitted invitation for bids.

PP. "Scope of Work" means the terms describing the Goods to be provided or the Services to be performed. The Scope of Work should be a part of the Purchase Description and include, but is not limited to, any milestones, reports, deliverables, and end products expected from the Contractor in addition to a time line.

QQ. DD. "Services" means the furnishing of labor, time, or effort by a Contractor, not involving the delivery of Goods a specific end product other than those reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.

RR. EE. "Shall" denotes the imperative and shall apply if the defined term is not capitalized.

SS. "Solicitation" means the process of issuing written document(s), whether attached or incorporated by reference, to obtain information or pricing from an Offeror. Solicitations are issued in the form of an Invitation for Bids, Request for Proposal, Request for Statement of Qualification, or when seeking Quotations utilizing one of the following Procurement methods: Small Purchase, Micro-Purchase, Emergency, Direct Source, or Solo Source Procurement.

TT. "Statement of Qualifications" means an Offer to perform a Contract for the provision of Services that describes the qualifications and capabilities of the Offeror in response to the requirements contained in a Request for Statement of Qualifications.

UU. "Quotation" or "Quote" means an Offer to perform a Contract that provides the cost for Goods, Services, or Construction in response to a Solicitation, such as a Small, Micro-, Emergency, Direct, or Solo Procurement.

VV. "Vendor" means a dealer, distributor, merchant, or other seller providing Goods, Services, or Construction. A prospective or actual Offeror or Contractor may be a Vendor.

FF. ~~"Supplies" means all property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land.~~

§ 309. Public access to Procurement information

Procurement information shall be ~~a~~ available to the public to the extent provided by the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. §§ 81 et seq.

§ 310. Collection of data concerning public Procurement

~~The Director, Division of Finance, Purchasing Manager~~ Purchasing Department shall cooperate with the Office of the Controller ~~Division of Finance~~ in the preparation of statistical Data concerning the Procurement, usage, and disposition of all supplies Goods, Services, and Construction., and The Office of the Controller shall employ such trained personnel as may be necessary to carry out this function. A Procuring Party ~~All divisions, departments, offices, programs, and political subdivisions of the Navajo Nation,~~ shall furnish such reports as the Director, Division of Finance, Purchasing Manager, Department or authorized Designee, may require concerning usage, needs, and stocks on hand. The, and the Director, Division of Finance, Purchasing Manager, Department or authorized Designee, shall have the authority to prescribe forms to be used by the a Procuring

~~Party divisions, departments, offices, programs, and political subdivisions of the Navajo Nation, when in making requisitioning, ordering, and reporting regarding of Goods supplies, Services, and Construction, unless otherwise provided for in law or regulation.~~

§ 311. Retention of Procurement records

All Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules provided for in ~~approved by the Procurement Regulations Government Services Committee.~~ Inspection of all retained documents shall be governed by the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. §§ 81 et seq.

~~§ 312. Reporting of anti-competitive practices~~

~~When for any reason, collusion or other anti-competitive practices are suspected in contracting provided under this Act, a notice of the relevant facts shall be transmitted to the Attorney General.~~

Subchapter 2. Regulations Required by this Act

§ 320. Navajo Nation Procurement Regulations

A. The Budget and Finance Committee of the Navajo Nation Council shall adopt Procurement Regulations shall be within one (1) year of the passage of this Act.

1. These Procurement Regulations shall be developed by the Department of Justice and the Division of Finance, Purchasing Department of the Office of the Controller, in consultation with the Business Regulatory Department of the Division of Economic Development and the Office of Legislative Counsel., Department of Justice and Office of Legislative Counsel, and

2. The adopted Procurement Regulations adopted by the Budget and Finance Committee of the Navajo Nation Council within one (1) year of the passage of this Act, should and shall be reviewed evaluated for potential revision at least every two (2) years. Such Procurement Regulations Navajo Nation procurement regulations shall be consistent with the provisions of the Navajo Nation Business Opportunity Act NBOA, 5 N.N.C. §§ 201 et seq.

B. The Budget and Finance Committee shall not delegate its power to promulgate Procurement Regulations.

- C. No Procurement Reregulation shall change any commitment, right, or obligation of the Navajo Nation or of a Contractor under a Contract already in existence on the effective date of such Procurement Reregulation.

Subchapter 3. Prerequisites to Solicitation~~Source Selection and Contract Formation~~

§ 330. Procurement file

The Procuring Party shall create a Procurement file that shall document the life of the Procurement from pre-Solicitation activities through the expiration of any Contract or later in time warranties. Updating and storage of the Procurement file is the responsibility of the Procuring Party, including when submitting through a software program for review. A Procurement file is not a public record.

§ 331. Prerequisites to Solicitation

Prior to issuing a Solicitation, the Procuring Party shall document the below actions in the Procurement file, as is applicable to the Procurement method utilized:

- A. completion of research related to the Goods, Services, or Construction sought such that the Procuring Party is able to articulate the general details expected for a Contract of this type, including but not limited to cost, scope, potentials delays, and necessary time for completion;
- B. evidence of estimated project costs based on the Procuring Party's research into other similar projects, past work experience, and other expertise;
- C. documentation of the established the Maximum Feasible Price, including the relevant funding sources;
- D. a fully developed Purchase Description, including a Scope of Work and any Specifications, any project expectations related to expected quality of the Goods or Services, project completion, and delivery;
- E. submission of the Solicitation to the Risk Management Department to determine any required insurance coverage, if determined necessary; and
- F. documentation of established evaluation criteria and scoring system for assessment of all Offers received in response to the Solicitation.

§ 332. Cancellation of Solicitations

A Solicitation may be cancelled, or any or all Offers may be rejected in whole or in part, when it is in the best interests of the Navajo Nation. The reasons for the cancellation shall be made part of the Procurement File.

Subchapter 34. Methods of Source Selection: Non-Construction and Contract Formation

§ 3340. Allowed Procurement methods of source selection

A. Except as Unless otherwise authorized by law, all Navajo Nation Contracts shall be awarded utilizing the procedures and criteria for according to the below source selection methods according to the standards established for each method procedures and methods for each by competitive sealed bidding, pursuant to 12 N.N.C. §331 (Competitive Sealed Bidding), except as provided in:

1. Competitive Sealed Bidding, pursuant to 12 N.N.C. § 341;
- 2.A. 12 N.N.C. § 332 (Competitive Sealed Proposals, pursuant to 12 N.N.C. § 342);
3. Competitive Selection for Professional Services, pursuant to 12 N.N.C. § 343;
- 4.B. 12 N.N.C. § 333 (Small Purchases Procurement, pursuant to 12 N.N.C. § 344);
5. Micro-Purchase Procurement, pursuant to 12 N.N.C. § 345;
- 6.C. 12 N.N.C. § 334 (Emergency Procurement, pursuant to 12 N.N.C. § 346);
- 7.D. 12 N.N.C. § 335 (Sole Direct Source Procurement, pursuant to 12 N.N.C. § 347); or
8. Solo Source Procurement, pursuant to 12 N.N.C. § 348; and
- E. 12 N.N.C. § 346 (Architect Engineer and Land Surveying Services).
9. Construction Services Procurement, pursuant to 12 N.N.C. § 350.

§ 341. Public Notice.

- A. The Procuring Party shall give Public Notice of the Solicitation lasting a reasonable period, as is appropriate for the Goods, Services, or Construction sought. The Public notice period shall run from the time of first Publication to the deadline for submission of Offers.
- B. Public Notice shall be made via Publication in a manner that provides notice the Navajo Nation and the general public.
- C. The Business Regulatory Department of the Division of Economic Development shall maintain an internet website that is the official Procurement Solicitation webpage of the Navajo Nation providing Offerors with Public Notice of Solicitations and other relevant information about Navajo Nation Procurements. The Procuring Party may determine when it is in the best interest of the Navajo Nation to publish a Solicitation via this web page.

§ ~~34231~~. Competitive sSealed bBidding

- A. Competitive Sealed Bidding shall be utilized when selecting an offer relies on the lowest price as the determinative factor for the Procurement preferred method source selection, and shall be conducted in a manner consistent with the procedures set forth in the Navajo Nation Business Opportunity Act, 5 N.N.C. § 205.
- B. Invitation for Bids. The Procuring Party shall issue an Invitation for Bids with a Purchase Description describing the project in detail, the selection process, and all submission requirements, including at minimum deadlines, Offeror NBOA Priority status, project scope, duration, minimum qualifications, mandatory service standards, and any required warranties. Invitation for bids. An invitation for bids shall include a purchase description, and all contractual terms and conditions applicable to the procurement. Purchase descriptions, terms and conditions, and specifications for goods and services shall not be unduly restrictive. The invitation for bids shall set forth the criteria to be used in evaluation of bids which are submitted. The invitation for bids shall refer to the preference of Navajo and Indian owned businesses under the Navajo Nation Business Opportunity Act., 5 N.N.C. § 201 et seq.
- C.B. Public Notice. Public Notice of the Invitation for Bids shall be given, at a minimum, as required in 12 N.N.C. § 341331(B) (Public Notice). Adequate notice of the invitation for bids shall be issued a reasonable time prior to the date set for the opening of bids. Certified entities under the Navajo Nation Business Opportunity Act shall be provided such notice as set

~~forth in the Navajo Nation Business Opportunity Act. Such notice may include publication in a newspaper of general circulation a reasonable time prior to bid opening.~~

- ~~C. Bid Opening. Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The opening of bids shall be performed a manner consistent with the Navajo Nation Business Opportunity Act. The amount of each bid, and such other relevant information as may be specified by regulation, together with the name of each bidder shall be recorded; the record and each bid shall be open to public inspection, to the extent permitted by the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. § 81 et seq.~~
- D. Bid Acceptance. The Procuring Party and Bid Evaluation. Bids shall ensure Bids arebe unconditionally accepted without alteration or correction and kept protected from review, except as authorized by the Navajo Nation Business Opportunity Act, NBOA, this Section, or the Procurement Regulations. ~~or other provisions of law. Bids shall be evaluated based on the requirements set forth in the invitation for bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. The criteria affecting the bid price and considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.~~
- E. Bid Correction, Modification, or Withdrawal. Prior to the date and time set for the Bid opening, Offerors may correct, modify, or withdraw a Bid by providing the Procuring Party a written notice of the correction, Modification, or withdrawal according to the procedure identified in the Solicitation or the Procurement Regulations.
1. After the start of a Bid opening, Offerors shall not correct or modify their Bid in a manner prejudicial to fair competition or the interest of the Navajo Nation.
 2. E. Correction or Withdrawal of Bids; Cancellation of Awards. Correction or withdrawal of inadvertently erroneous Bbids before or after award, or cancellation of awards or Contracts based on such Bid mistakes, shall be permitted in accordance with the Procurement Regulations. ~~made by the Director, Division of Finance, Purchasing Department or authorized designee or head of a purchasing agency.~~

F. Bid Opening. Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the Invitation for Bids. The name of each Offeror, amount of each Bid, and such other relevant information required by the Procurement Regulations shall be recorded. Bids opening shall occur pursuant to the procedure established in the NBOA and the Procurement Regulations.

G. Bid Evaluation. The Procuring Party shall evaluate a Bid solely ~~on contract~~ shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria established ~~set forth~~ in the Invitation for Bids with the lowest Responsive price as the determinative factor for award.

HF. Award.

1. The Procuring Party shall issue, in writing, notice of the award of the Procurement Contract with reasonable promptness, to the lowest Responsible and Responsive Offeror. A Copy of this notice shall be maintained in the Procurement File.

2. In the event all bids in a procurement exceed available funds as certified by the appropriate fiscal officer, and Responsible and Responsive Bids exceed the established Maximum Feasible Price, the Procuring Party may negotiate and enter into a Contract with a low the low responsive and Responsible and Responsive Offeror if:

a. the original price of the selected Responsible and Responsiveresponsible Bbid does not exceed the Maximum Feasible Pricesuch funds by more than tenfive percent (10%);

b. the negotiations result in a reduction of price or, the Director, Division of Finance, Purchasing Department or authorized designee, or the head of a purchasing agency, is authorized in situations where time or economic considerations preclude re_solicitation of work of a reduced Sscope to negotiate an adjustment of Work, which may includethe bid price, including changes in the Bbid requirements, with the low responsive and responsible bidder, in order to bring the Bbid price within the Maximum Feasible Priceamount of available funds; and.

c. the negotiations are carried out according to procedures established in the Procurement Regulations.

IG. Multi-Step Sealed Bidding. When the Procuring Party determines it is considered impractical to initially prepare a purchase description to support an award based on price, it may issue an Invitation for Bids may be issued first requesting the submission of unpriced Offers to be followed by an second Invitation for Bids limited to those bidders/offerors whose offers have been/were qualified under the criteria set forth in the first Solicitation.

§ 33243. Competitive sealed proposals

- A. ~~Conditions for Use.~~ When, under regulations promulgated by the Budget and Finance Committee, the Director, Division of Finance, Purchasing Department, the head of a purchasing agency, or a designee of either officer determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the Navajo Nation, a contract may be entered into by competitive sealed proposals. The Budget and Finance Committee may provide by regulation that it is either not practicable or not advantageous to the Navajo Nation to procure specified types of supplies, services, or construction by competitive sealed bidding. The competitive sealed proposals process shall be conducted in a manner consistent with the procedures set forth in the Navajo Nation Business Opportunity Act, 5 N.N.C. § 205.B. Competitive Sealed Proposals shall be utilized when the Procuring Party determines that the selection of the most advantageous offer requires the evaluation of multiple qualifying factors in which price is one of the evaluated factors. shall be solicited through a request for proposals. A request for proposals shall be issued and shall include a purchase description, and all contractual terms and conditions applicable to the procurement. Purchase descriptions, terms and conditions, and specifications for goods and services shall not be unduly restrictive.
- B. The Request for Proposals. The Procuring Party shall issue a Request for Proposals, which shall include a Purchase Description, all contractual terms and conditions, and set forth the criteria to be used in evaluation ~~of~~ Proposal submissions from Offerors. The Purchase Descriptions, terms and conditions, and Specifications for Services and any attendant Goods shall not be unduly restrictive.
- C. Establishing proposals which are Evaluation Factors. In addition to the pre-Solicitation requirements of 12 N.N.C. § 331, prior to issuing a Request for Proposal, the Procuring Party shall:

1. prepare the factors by which it will evaluate Proposals submitted in response. The request for proposals shall refer to the Solicitation;
2. prepare the standards by which the Procuring Party will determine acceptability, preference of quality, workmanship, delivery, and suitability for a particular purpose of the final work product;
3. specify in writing a scoring system specific to the standards established in the Request for Proposals for rating each submitted Proposal; and
4. Include all abovementioned factors, standards, Navajo and scoring system in the Request for Proposal Indian-owned businesses under the Navajo Nation Business Opportunity Act, 5 N.N.C. § 201 et seq.

D.C. Public Notice. Public Notice of the Solicitation shall be given, at a minimum, as required in 12 N.N.C. § 341 (Public Notice). Adequate public notice of the request for proposals shall be given in the same manner as provided in 12 N.N.C. §(C)331(B) (Competitive Sealed Bidding, Public Notice).

E. Proposal Acceptance. The Procuring Party shall ensure Offers are unconditionally accepted without alteration or correction and kept protected from review, except as authorized by the NBOA, this Section, or the Procurement Regulations.

F. Proposal Correction, Modification, or Withdrawal. Prior to the date and time set for the Proposal opening, Offerors may correct, modify, or withdraw an Offer by providing the Procuring Party a written notice of the correction, Modification, or withdrawal according to the procedure identified in the Solicitation or the Procurement Regulations, subject to any requirements established in the Procurement Regulations.

1. After the start of an Offer opening, Offerors shall not correct or modify their Offer in a manner prejudicial to fair competition or the interest of the Navajo Nation.
2. Correction or withdrawal of inadvertently erroneous Offers before or after award, or cancellation of awards or Contracts based on such mistakes, shall be permitted in accordance with the Procurement Regulations.

G.D. Opening of Proposals. The opening of proposals shall be performed in a manner consistent with the Navajo Nation Business Opportunity Act, 5 N.N.C. § 201 et seq.. Proposals

shall be opened in a manner that avoids ~~as to avoid~~ disclosure of contents to competing Offerors during the process of evaluation and any necessary negotiation. Proposal opening shall occur pursuant to the procedures established in the NBOA and the Procurement Regulations. ~~A register of proposals shall be prepared in accordance with regulations promulgated by the Budget and Finance Committee, and shall be open for public inspection after contract award, to the extent provided in the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. § 81 et seq..~~

H. Evaluation and Award.

1. The Procuring Party shall issue, in writing, notice of award of the Procurement ~~The request for proposals shall state the relative importance of price and other evaluation factors. The Contract,~~ shall be awarded with reasonable promptness, to the Responsible and Responsive Offeror whose Proposal is determined to be the most advantageous to the Navajo Nation after considering the evaluation factors established in the Request for Proposals and the Maximum Feasible Price. The Procuring Party may only evaluate factors or criteria established in the Request for Proposal. The notice of award shall be maintained in the Procurement File.

2. by written notice to the lowest responsible and responsive offeror whose proposal meets the requirements and criteria set forth in the request for proposals. In the event all Responsible and Responsive Proposals in a procurement exceed available funds as certified by the Maximum Feasible Price, the Procuring Party may negotiate and enter into a Contract with a lowest Responsible and Responsive appropriate fiscal officer, and Offeror if:

a. the original price of the low Responsible and Responsive and Responsible Proposal selected does not exceed the Maximum Feasible Pricesuch funds by more than tenfive percent (10%); and, the Director, Division of Finance,

b. Purchasing Department or authorized designee, or the negotiations resulthead of a purchasing agency, is authorized in a price reduction or situations where time or economic considerations preclude re solicitation of work of a reduced Scope of Work, which may includeseope to negotiate an adjustment of the proposal price, including changes in the Proposal requirements, with the low responsive and responsible offeror, in order to bring the Proposal price within

the Maximum Feasible Price amount of available funds, and

c. the negotiations are carried out according to procedures established in the Procurement Regulations.

3F. Discussion with Responsible Offerors and Revisions to Proposals. As provided in the Request for Proposals, and according to standards set in the Procurement Regulations under regulations promulgated by the Budget and Finance Committee, the Procuring Party may conduct discussions with Responsible Offerors may be conducted with responsible offerors who submit Proposals, and the Procuring Party determines to be it reasonably susceptible of being likely to be selected for award, for the purpose of clarification of any issues in the Proposal to assure the Offeror's full understanding of, and responsiveness to, the Solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

G. Award. Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Navajo Nation taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The Procurement File shall contain the basis on which the award is made, and shall be made public to the extent provided in the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. § 81 et seq.

§ 344. Competitive selection for professional services

A. Competitive Selection of Professional Services shall be utilized when the Procuring Party determines that the selection of the most advantageous Contractor for the Navajo Nation requires the evaluation of multiple qualifying factors in which price is not one of the evaluated factors for award, but that the final agreed upon compensation after Contractor selection shall be fair and reasonable.

B. When procuring professional Services, the Procuring Party shall issue Request for Statements of Qualifications according to the procedures established in 12 N.N.C. § 343 (Competitive

Sealed Proposals), in addition to the requirements of this Section.

- C. Professional Services includes the architects, engineers, dentists, physician, land surveyors, attorneys, accountants, trainers or workforce education specialists, and other professional positions requiring specific expertise, certification, or licensing not otherwise addressed in this Procurement Act and as may be further explained in the Procurement Regulations.
- D. Any Procuring Party may procure professional Services, except for the Services of attorneys or tribal court advocates. Only the Attorney General of the Navajo Nation may procure Contracts for the Services of outside attorneys and tribal court advocates. This includes Contracts for attorneys representing LGA governance certified Chapters; however, the LGA governance certified Chapters shall follow their Procurement policies for the Procurement of an attorney, whose final selection and Contract award shall be reviewed and approved by the Attorney General.
- E. The Procuring Party shall award a Contract, in writing, to the best qualified Offeror based on the evaluation factors established in the Request for Statement of Qualification and after filing a written determination in the Procurement File explaining the reason the compensation is fair and reasonable.
- F. The award to a Contractor shall be made pursuant to the provisions of this Section and any further requirements set forth in the Procurement Regulations. If an Offeror includes a separate cost proposal in a submitted Statement of Qualifications when not required, the Procuring Party may not open or evaluate the cost proposal, but may evaluate the Offer only. If selected, the Procuring Party may require the Offeror honor the pricing provided in the originally submitted cost proposal.

§ 34533. Small purchases Pprocurement

A. Applicability. The Procuring Party may make Any Pprocurement costing no less than the amount established for a Micro-Purchase in the Procurement Regulations and not exceeding the amount established for Small Purchase in the fifty thousand dollars (\$50,000.00) may be made using small purchase Procurement Rregulations. Such Procurement shall be made according to the procedures established in the Procurement Regulations adopted by the Budget and Finance Committee, provided, however, that no Pprocurement requirements shall not be artificially divided so as to in such a manner to create constitute multiple a Ssmall Ppurchases

under this Section. The Procuring Party shall give Certified entities under the Navajo Nation Business Opportunity Act NBOA shall receive Priority Businesses preference in Small Purchases Procurements.

~~B. Review and Signature Requirements. Small purchases shall require only the following signatures and reviews: program director, division director or other procurement officer and appropriate representative of the Attorney General's Office (or Office of Legislative Counsel, for small purchases within the Legislative Branch). No oversight committee approval shall be required for these contracts.~~

§ 346. Micro-purchases Procurement

A. Applicability. The Procuring Party may make any Procurement not exceeding the amount established in the Procurement Regulations, provided that no Procurement shall be artificially divided in such a manner that it constitutes multiple Micro-Purchases under this Section. The Procuring Party shall give NBOA Priority Businesses preference in Micro-Purchases Procurements.

B. Micro-Purchases may be awarded without competitive selection if the Procuring Party considers the price to be reasonable based on research, experience, purchase history, or other information as provided in the Procurement Regulations. Such details and information shall be documented in the Procurement File.

§ 34734. Emergency Procurement

A. A Procuring Party may award a Contract without competitive selection when an Emergency exists, under the requirements of this Section, according to the procedure set forth in the Procurement Regulations. If no procedure exists, the Procuring Party may adhere to the Direct Source Procurement procedure. Notwithstanding any other provision of law, the Director, Division of Finance, Purchasing Department, the head of a purchasing agency, or a designee of either officer may make or authorize others to make emergency procurement when there exists a

B. An Emergency Procurement shall be limited to only the Goods, Services, or Construction necessary to fulfill the immediate need created by the present Emergency. threat to public health, welfare, or safety under emergency conditions as defined in regulations promulgated by the Budget and Finance Committee, provided that such emergency procurement shall be made with such competition as is practicable under the circumstances. A

~~written determination of emergency shall be made by the executive director of the affected division, in concert with the Director, Division of Finance, Purchasing Department or authorized designee, and a representative of the Attorney General's Office (or the Office of Legislative Counsel for emergency procurements by the Legislative Branch). To the extent possible, certified entities under the Navajo Nation Business Opportunity Act, 5 N.N.C. § 201 et seq., shall receive preference in emergency procurement. The written determination and the selection of the particular contractor shall be included in the Procurement File. No oversight committee approval shall be required for these contracts.~~

~~B. Notwithstanding any other provision of law, procurements using Navajo Nation Fiscal Recovery Funds may be authorized and executed as Emergency Procurements at the discretion of the Procuring Party without further justification, provided that such emergency procurement shall be made with such competition as is practicable under the circumstances. To the extent possible, certified entities under the Navajo Nation Business Opportunity Act, 5 N.N.C. § 201 et seq., that are able to complete the good or service within the Fiscal Recovery Fund's strict deadlines shall receive preference in emergency procurement. No oversight committee approval shall be required for these contracts.~~

C. Emergency Procurement shall be made utilizing competitive selection and preference for NBOA Priority certified Businesses as is practicable based on the circumstances.

§ 34835. SoleDirect source Pprocurement

A. A Procuring Party may award aA Ccontract may be awarded for Ggoods, and/or Sservices, or Construction without competitiveen selection when, regardless of price, under regulations promulgated by the Budget and Finance Committee, the executive director of the affected division or other procurement officer the Procuring Party, in concert with the Department of JusticeDirector, Division of Finance, Purchasing Department or authorized designee, and a representative of the Attorney General's Office, (or the Office of Legislative Counsel for Pprocurements by the Legislative Branch), determines in writing that either:

1. prior attempt(s) at there is only one source Procurement through competitive selection methods yielded no Offers, only Offers in excess of the Maximum Feasible Price, or otherwise did not result in a Procurement award or Contract;

2. the project relates to the selection of a utility provider where the selected provider is the sole utility provider in the respective area or when the Navajo Tribal Utility Authority is the preferred provider in the respective area; or
3. the Contractor has direct knowledge of or past experience with the particular project, such as being the original Contractor on an unfinished project and that it would be in the best interest of the Navajo Nation to award a Contract to the original Contractor in order to continue and finish the project. ~~for the required goods and/or services. Certified entities under the Navajo Nation Business Opportunity Act, 5 N.N.C. § 201 et seq. shall receive preference in sole source procurement.~~
- B. The Department of Justice (or the Office of Legislative Counsel for Procurements by the Legislative Branch) shall determine, and may consult with the Purchasing Manager, whether directly sourcing to a single Vendor or to a limited number of Vendors is the appropriate selection method according to the reasoning the Procuring Party provides.
- C. The written determination, reasoning for such, approval for the determination, and selection of the Contractor shall be included in the Procurement File.
- D. Direct Source selection shall be made utilizing competitive selection and preference for NBOA Priority certified Businesses as is practicable based on the circumstances. ~~The written determination and the selection of the particular contractor shall be included in the Procurement File.~~
- E. The Procuring Party shall only use Direct Source Procurement when no alternative Procurement method is feasible or when it is in the best interest of the Navajo Nation. ~~No oversight committee approval shall be required for these contracts.~~

~~§336. Record of small purchases, sole source procurement and emergency procurement~~

- A. ~~Contents of Record. The Director, Division of Finance, Purchasing Department shall maintain a record listing all contracts made under 12 N.N.C. § 333 (Small Purchases), 12 N.N.C. § 334 (Emergency Procurement) and 12 N.N.C. § 335 (Sole Source Procurement) for a minimum of five years. The record shall contain:~~

- ~~1. Each contractor's name;~~

- ~~2. The amount and type of each contract; and~~
- ~~3. A listing of the supplies, services, or construction procured under each contract.~~

~~B. Submission to Navajo Nation Council. A copy of such record shall be submitted to the Navajo Nation Council on an annual basis. The record shall be available for public inspection to the extent provided by the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. § 81 et seq.~~

§ 349. Solo source Procurement

A. A Procuring Party may award a Contract for Goods, Services, or Construction without competitive selection and according to procedures established in the Procurement Regulation when, regardless of price, the Procuring Party, with consent of a representative of the Department of Justice (or the Office of Legislative Counsel for Procurements by the Legislative Branch) and concurrence of the Purchasing Manager determines in writing that:

1. there is only one source available; and
2. no reasonable alternative exists to meet the intended purpose of the Contract.

B. The written determination, reasoning, and the selection of the particular Contractor shall be maintained in the Procurement File.

C. The Procuring Party shall only utilize Solo Source Procurement when no reasonable alternative source exists. If a generic or other equivalent option is available for the Goods, Services, or Construction sought, then the Procuring Party shall utilize competitive selection methods as allowed under this Procurement Act.

D. Procurement for Goods, Services, or Construction utilizing patents, trade secrets, or similar intellectual property protections where only one Vendor is capable of providing the Goods, Services, or Construction sought are subject to Solo Source Procurement, provided that a generic or other equivalent option is not available.

~~§ 337. Cancellation of invitations for bids or requests for proposals~~

~~An invitation for bids, a request for proposals, or other solicitation may be cancelled, or any or all bids or proposals may~~

~~be rejected in whole or in part as may be specified in the solicitation, or when it is in the best interests of the Navajo Nation in accordance with regulations promulgated by the Budget and Finance Committee. The reasons therefor shall be made part of the contract file.~~

~~§338. Responsibility of bidders and offerors~~

~~A. Determination of Nonresponsibility. A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations promulgated by the Budget and Finance Committee. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror.~~

~~B. Right of Nondisclosure. Information furnished by a bidder or offeror pursuant to this Section shall only be disclosed in accord with the provisions of the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. § 81 et seq.~~

~~§339. Pre-qualification of suppliers~~

~~Prospective suppliers may be pre-qualified for particular types of supplies, services, and construction in accordance with regulations promulgated by the Budget and Finance Committee. Solicitation mailing lists of potential contractors shall include but shall not be limited to such pre-qualified suppliers.~~

Subchapter 54. Procurement of Methods of Source Selection: Construction Services

§ 350. Construction Procurement

A. The default procedural method for Construction Procurement shall be that of Competitive Sealed Proposals; however, the Procuring Party may utilize other Procurement methods if the requirements for such methods are met, except that no Construction shall be procured through Competitive Sealed Bidding.

B. This subchapter provides additional requirements for Construction Procurements to which the Procuring Party must adhere no matter the Procurement method used. The Procurement Regulations shall provide additional guidance for Construction Procurement.

§ 35140. Responsibility for selecting en ef methods of Construction contracting management

A. ~~The Budget and Finance Committee, in consultation and coordination with the Transportation and Community Development Committee, shall include in the promulgate Procurement Regulations providing for as many alternative methods of project delivery, Contract type, and Construction management as it may determine feasible. These Procurement Regulations shall also:~~

1A. ~~Set forth criteria to be used in determining which method of construction contracting management is to be used for a particular project; B. Grant the discretion to select the appropriate method of project delivery and Construction contract management for a particular project to the Director, Division of Finance, Purchasing Department or authorized designee, or the head of the purchasing agency Procuring Party responsible for carrying out the Construction project the discretion to select the appropriate method of construction contracting management for a particular project; and; and~~

2C. ~~Require the procurement officer or authorized designee Procuring Party include in the Request for Proposal or Quotation the type of project delivery method and Construction management it expects to utilize for the project. to execute and include in the Procurement File a written statement setting forth the facts which led to the selection of a particular method of construction contracting management for each project.~~

§ 35241. Required Construction security and bonding Bid security

A. ~~Requirement for Bid Offer Security. Offer Bid s Security shall be required for all Construction Procurements competitive sealed bidding for construction contracts when the price is estimated by the procurement officer or authorized designee Procuring Party will to exceed the amount established by in the Procurement Regulation of the Budget and Finance Committee.~~

1. ~~The Procurement Regulations shall provide for any acceptable forms of the Offer Security required by this Procurement Act. B. Bid security shall be a bond provided by a surety company authorized to do business within the Navajo Nation, or the equivalent in cash, or otherwise supplied in a form satisfactory to the Navajo Nation. Nothing herein prevents the requirement of such bonds on construction contracts under the amount set by the Budget and Finance Committee when the circumstances warrant.~~

~~B. Amount of Bid Security. Bid security shall be in an amount equal to at least 10% of the amount of the bid.~~

~~2C. Rejection of Bids for Noncompliance with Bid Security Requirements. When the invitation for bids requires Any Offer submitted that does not noncomply with the Offer Security requirements shall iance requires that the bid be rejected unless, pursuant to Budget and Finance Committeethe Procurement Rregulations, the Procuring Partyit is determinedd that the bid Offer failures to comply is in a insubstantial manner with the security requirements.~~

~~3. If an Offeror withdraws its Proposal before the Procuring Party awards the Contract, no action shall be taken against the Offeror or the Offer Security.~~

~~B. Performance and Payment Bonding. § 342. Contract performance and payment bonds A. When Required Amounts. When a eConstruction Ceontract is awarded in excess of \$50,000, the amount established in the Procurement Regulations, the Contractor shall deliver a performance and payment bond following bonds or security shall be delivered to the Navajo Nation, which and shall become binding on the pParties upon the execution of the Ceontract and extend for the entire duration of the Contract, including Modifications-:~~

~~1. The bonds shall be provided such that they are:~~

~~a. aA performance bond satisfactory to the Navajo Nation, executed by a surety company or otherwise secured in a manner satisfactory to the Navajo Nation, in an amount equal to one hundred percent (100%) of the total purchase price specified in the Ceontract; and~~

~~b.2-aA payment bond satisfactory to the Navajo Nation, executed by a surety company or otherwise secured in a manner satisfactory to the Navajo Nation, for the protection of all Ppersons supplying labor and material to the Ceontractor or its subcontractors for the performance payment of the work provided performed pursuant tofer in the Ceontract. The bond shall be in an amount equal to one hundred percent (100%) of the total purchase price specified in the Ceontract.~~

~~2B. The Procurement Regulations shall provide for the acceptable form of the performance and payment bonds required by this Procurement Act.~~

3. Reduction of Bond Amounts. The Budget and Finance Committee may promulgate Procurement Regulations that authorize the Procuring Party Director, Division of Finance, Purchasing Department or authorized designee or head of a purchasing agency to reduce the amount of performance and payment bonds to fifty percent (50%) of the total purchase contract price for each bond.

C. Authority to Require Additional Bonds and Security. Nothing in this Section shall be construed to limit the authority of the Navajo Nation to require a performance bond or other security in addition to those bonds or security, or in circumstances other than those specified in Subsection 12 N.N.C. § 352(A)-(B) of this Section.

~~§ 343. Bond forms and copies~~

A. ~~Bond Forms.~~ The Budget and Finance Committee shall promulgate by regulation the form of the bonds required by this Act.

B. ~~Certified Copies of Bonds.~~ Any person may request and obtain from the Navajo Nation a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original

~~§ 344. Contract clauses and their administration~~

A. ~~Contract Clauses.~~ The Budget and Finance Committee shall promulgate regulations requiring the inclusion in Navajo Nation construction contracts of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

1. ~~The unilateral right of the Navajo Nation to order in writing:~~

a. ~~Changes in the work within the scope of the contract, and~~

b. ~~Changes in the time of performance of the contract that do not alter the scope of the contract work;~~

2. ~~Variations occurring between estimated quantities of work in a contract and actual quantities;~~

3. ~~Suspension of work ordered by the Navajo Nation; and~~

- ~~4. Site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses may be included in a contract.~~
- ~~a. When the site conditions within the contract are specifically negotiated;~~
 - ~~b. When the contractor provides the site or design; or~~
 - ~~c. When the parties have otherwise agreed with respect to the risk of differing site conditions.~~

~~B. Price Adjustments.~~

- ~~1. Adjustments in price pursuant to clauses promulgated under Subsection (A) of this Section shall be computed in one or more of the following ways:~~
 - ~~a. By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;~~
 - ~~b. By unit prices specified in the contract or subsequently agreed upon;~~
 - ~~c. By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;~~
 - ~~d. In such other manner as the contracting parties may mutually agree; or~~
 - ~~e. In the absence of agreement by the parties, by a unilateral determination by the Navajo Nation of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the Navajo Nation in accordance with applicable sections of the regulations promulgated by the Budget and Finance Committee.~~
- ~~2. A contractor shall be required to submit cost or pricing data if any adjustment in contract price is proposed.~~

~~C. Additional Contract Clauses. The Budget and Finance Committee shall promulgate regulations requiring the inclusion in Navajo Nation construction contracts of clauses providing for appropriate remedies and covering the following subjects:~~

- ~~1. Liquidated damages as appropriate;~~

- ~~2. Specified excuses for delay or nonperformance;~~
- ~~3. Termination of the contract for default; and~~
- ~~4. Termination of the contract in whole or in part for the convenience of the Navajo Nation.~~

~~D. Modification of Required Clauses. The Director, Division of Finance, Purchasing Department or the head of a purchasing agency may vary the clauses promulgated by the Budget and Finance Committee under Subsection (A) and Subsection (C) of this Section for inclusion in any particular Navajo Nation construction contract, provided that any variations are supported by a written determination that states the circumstances justifying such variations, and provided that notice of any such material variation be stated in the invitation for bids or request for proposals.~~

~~§ 345. Fiscal responsibility~~

~~Every contract modification, change order, or contract price adjustment under a construction contract with the Navajo Nation in excess of ten percent (10%) of the original contract amount shall be subject to prior written certification by the fiscal officer of the entity responsible for funding the project or the contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget and/or the total contract budget, the procurement officer or authorized designee shall not execute or make such contract modification, change order, or adjustment in contract price unless sufficient funds are available therefor, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget and/or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with the provisions of this Section.~~

~~§ 346. Architect-engineer and land surveying services~~

- ~~A. Applicability. Architect_engineer and land surveying services shall be procured as provided in this Section except as authorized by 12 N.N.C. § 334 (Small Purchases), 12 N.N.C. § 335 (Emergency Procurement), and 12 N.N.C. § 336 (Sole Source Procurement).~~
- ~~B. Policy. It is the policy of the Navajo Nation to publicly announce all requirements for architect_engineer and land surveying services and to negotiate contracts for architect_engineer and land surveying services on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.~~
- ~~C. Architect_Engineer Selection Committee. In the procurement of architect_engineer and land surveying services, the Director, Division of Finance, Purchasing Department or the head of a purchasing agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The Director, Division of Finance, Purchasing Department and a representative of Navajo Design and Engineering Services shall comprise the Architect_Engineer Selection Committee for each architect_engineer and land surveying services contract over \$250,000. The Selection Committee for architect_engineer and land surveying services contracts under this amount shall be established in accordance with regulations promulgated by the Budget and Finance Committee. The Selection Committee shall evaluate current statement of qualifications and performance data on file with the Navajo Nation, together with those that may be submitted by other firms regarding the proposed contract. The Selection Committee shall conduct discussions with no less than three firms (if at least three firms respond to the solicitation) regarding the contract and the relative utility of alternative methods of approach for furnishing the required services, and then shall select therefrom, in order of preference, based upon criteria established and published by the Selection Committee, no less than three of the firms (if at least three firms respond to the solicitation) deemed to be the most highly qualified to provide the services required.~~
- ~~D. Negotiation. The procurement officer shall negotiate a contract with the highest qualified firm for architect_engineer or land surveying services at compensation which the procurement officer or authorized designee determines in writing to be fair and reasonable to the Navajo Nation. In making this decision, the procurement officer or authorized designee shall take into account the estimated value, the scope, the complexity, and the professional nature of the services to be rendered. Should the procurement officer~~

~~or authorized designee be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price the procurement officer or authorized designee determines to be fair and reasonable to the Navajo Nation, negotiations with that firm shall be formally terminated. The procurement officer shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the procurement officer or authorized designee shall formally terminate negotiations. The procurement officer or authorized designee shall then undertake negotiations with the third most qualified firm. Should the procurement officer or authorized designee be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the procurement officer or authorized designee shall select additional firms in order of their competence and qualifications, and the procurement officer or authorized designee shall continue negotiations in accordance with this Section until an agreement is reached.~~

Subchapter 65. Contract Formation, Administration

§ 36050. Uniform Contract clauses and their Contract administration

A. Contract Clauses.

1. All Contract clauses shall be consistent with the provisions of this Procurement ActThe Budget and the Procurement Regulations issued pursuant to this Chapter. Contracts shall include all clauses necessary to ensure the Navajo Nation's interests are addressed and protected.
2. A provision Finance Committee may promulgate regulations permitting or requiring any litigation, arbitration, or other dispute resolution proceeding arising from the Contract be conducted in any state is against the Navajo Nation's public policy and is void and unenforceable.
3. The Procurement Regulations shall require the inclusion of clauses addressing, as applicable: dispute resolution; choice of law; appropriate remedies; priceproviding for adjustments, in prices, time of performance; differing site conditions; Contract Modification, changes in the Scope of Work and quantities of work; suspension of work; termination of Contracts; inspection, audit, recordkeeping requirements; statutory requirements; and other , or other Ccontract provisions as appropriate.

- B. Price Adjustments. Adjustments of Contractin price shall be permitted by mutual agreement of the parties in writing.

C. Appropriate Remedies. The Procurement Regulations may include, but are not limited to only clauses providing for appropriate remedies covering the following subjects:

- ~~1. The unilateral right of the Navajo Nation to order in writing:

 - a. Changes in the work within the scope of the contract, and
 - b. Temporary stopping of the work or delaying performance, and~~
- ~~2. Variations occurring between estimated quantities of work in a contract and actual quantities.~~

~~B. Price Adjustments.~~

- ~~1. Adjustments in price pursuant to clauses promulgated under Subsection (A) of this Section shall be computed in one or more of the following ways:

 - a. By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable,
 - b. By unit prices specified in the contract or subsequently agreed upon,
 - c. By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon,
 - d. In such other manner as the contracting parties may mutually agree, or
 - e. In the absence of agreement by the parties, by a unilateral determination by the Navajo Nation of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the Navajo Nation in accordance with applicable sections of the regulations promulgated by the Budget and Finance Committee.~~
- ~~2. A contractor shall be required to submit cost or pricing data if any adjustment in contract price is proposed.~~

~~C. Additional Contract Clauses.~~ The Budget and Finance Committee may promulgate regulations including, but not limited to,

~~regulations permitting or requiring the inclusion in Navajo Nation contracts of clauses providing for appropriate remedies and covering the following subjects:~~

1. ~~lLiquidated damages as appropriate;~~
2. ~~sSpecified excuses for delay or nonperformance;~~
3. ~~tTermination of the Ccontract for default of the Contractor; and~~
4. ~~tTermination of the Ccontract in whole or in part for the convenience of the Navajo Nation or due to unavailability of Navajo Nation funds.5. ~~Modification of Clauses. The Director, Division of Finance, Purchasing Department or authorized designee or the head of a purchasing agency may vary the clauses promulgated by the Budget and Finance Committee under Subsection (A) and Subsection (C) of this section for inclusion in any particular Navajo Nation contract; provided that any variations are supported by a written determination that states the circumstances justifying such variation and provided that notice of any such material variation be stated in the invitation for bids or request for proposals.~~~~

D. ~~Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods. When funds are not appropriated or otherwise made available to support continuingation of performance for a Contract in a subsequent fiscal period, the Ccontract shall be cancelled-terminated and the Ccontractor shall be reimbursed for the reasonable value of any non-recurring costs incurred to that date, but not amortized in the price of the Goods, supplies or Sservices, or Construction delivered under the Ccontract. The cost of cancellation termination may be paid from any appropriations available for such purposes.~~

E. ~~Contract Approval and Administration. In addition to any other statutory review requirements, prior to final execution and regardless of Procurement Method utilized, all~~

~~§ 351. Right to inspect plant~~

~~The Navajo Nation may, at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by the Navajo Nation.~~

~~§ 352. Right to audit records~~

- ~~A. Audit of Cost or Pricing Data. The Navajo Nation may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, change order or contract modification for which cost or pricing data is required, shall maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.~~
- ~~B. Contract Audit. The Navajo Nation shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed price contract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of five years from the date of final payment under the prime contract and by the subcontractor for a period of five years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing. Contracts shall be reviewed and approved by the head or Director (or authorized Designee) of the following:~~
- ~~1. the Division, Department, Office, or Program of the Navajo Nation from where the Contract originates;~~
 - ~~2. the Office of the Controller for documents related to the finances of the Contract;~~
 - ~~3. the Director of the Office of Management and Budget for documents related to a financial impact on the Navajo Nation; and~~
 - ~~4. the Department of Justice for legal sufficiency of the Contract, the Procurement, and the Procurement File.~~
- ~~F. Purchase Orders Excluded from Review. The Procurement Regulation may establish review and authorization procedures independent of to this Section for the final approval and execution of Purchase Orders, provided that any utilized form or version of a Purchase Order receives approval from the Department of Justice.~~

§ 361. Contract termination, expiration, and resumption

- ~~A. Termination. When a Procuring Party terminates a Contract for the Contractor's default, that Contractor shall not be eligible to complete the work unless decided otherwise by the Procuring Party in consultation with the Department of Justice. A~~

Contractor may be eligible to complete the work if the Navajo Nation terminated the Contract for reasons other than default.

B. Resumption of expired Contracts. When a Contract expires through no fault of the Contractor and the Scope of Work is not complete, the Procuring Party and the Contractor may enter into a Modification of the original Contract to extend the Contract term to complete the Scope of Work. The Procuring Party and the Contractor shall initiate the Modification within nine (9) months of the original Contract's expiration without amendment to the Scope of Work or total Contract price. This Subsection does not supersede the Navajo Nation preferred practice to extend the term of a Contract by Modification prior to its expiration to ensure continuous work performance.

§ 36253. Types of Contracts

Subject to the limitations of this SubchapterSection, any type of Cecontract ~~which will~~ promotes the best interests of the Navajo Nation may be used; ~~provided~~ except that the use of a cost-plus-a-percentage-of-cost Cecontract is prohibited.

§ 36354. Multi-term and multi-source Cecontracts

A. Unless otherwise provided by law, a Cecontract may be entered into for any period of time deemed to be in the best interests of the Navajo Nation, based on the considerations enumerated in the Procurement Regulations.

1. The provided the term of the Cecontract and conditions to meet foref renewal or extension, if any, shall beare included in the Ssolicitation.

2. A multi-term Cecontract may shall only be entered into if provided that funds are available to fully fund the first fiscal period or the first project phase of the Contract at the time of contracting. Payment and performance obligations for succeeding fiscal periods or phases shall be subject to the availability and appropriation of additional funds. If funds are not appropriated or otherwise made available to support continuation of Contract performance, the Navajo Nation shall terminate the Contractfor completion of the contract.

B. Indefinite Delivery Indefinite Quantity Contracts. A Procuring Party may procure indefinite delivery indefinite quantity Contracts for multiple projects and Contractors under a single Solicitation, provided that the total amount of the multiple Contracts and all renewals for a single Contractor do not

exceed the price and term limit, including increases and extensions, established in the Solicitation.

§ 36455. Reimbursement Cost principles regulations required

~~The Procurement Regulations Budget and Finance Committee shall may establish promulgate regulations setting forth reimbursement cost principles that which shall be used to determine set the allowable maximum limits of incurred costs for the purpose of under Ceontract reimbursement provisions which provide for the reimbursement of costs, provided that, such cost principles may be modified by contract.~~

~~Subchapter 6. Legal and Contractual Remedies~~

§ 3650. Authority to resolve pProtesting solicitations and awards

- A. ~~Right to Protest. Any actual or prospective bidder, Oofferor or Ceontractor who is aggrieved in connection with the Ssolicitation or award of a Ceontract may protest such grievanceto the Director, Division of Finance, Purchasing Department or the head of a purchasing agency. The protest shall be submitted in writing to the Procuring Party within fourteen (14) days after such the Aaggrieved Pperson knows or should have known of the facts giving rise theretoto the reason for the protest according to procedures provided by the Procurement Regulations.~~
- B. ~~Authority to Resolve Protests. The Director, Division of Finance, Purchasing Department, the head of a purchasing agency, or a designee of either officer, Procuring Party, with the approval of the Department of JusticeAttorney General's Office, shall have the authority to settle andinvestigate, resolve, and make a determination regarding a timely protest fromef an Aaggrieved Person in accordance with requirements of the Procurement Regulationsbidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract.~~
- C. ~~Decision. If the protest is not resolved by mutual agreement, the Director, Division of Finance, Purchasing Department, the head of a purchasing agency, or a designee of either officer shall promptly issue a decision in writing. The decision shall:~~
- ~~1. State the reasons for the action taken, and~~
 - ~~2. Inform the protestant of its right to administrative review as herein provided.~~

- ~~D. Notice of Decision. A copy of the decision under Subsection (C) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.~~
- ~~E. Finality of Decision. A decision under Subsection (C) of this Section shall be final and conclusive, unless fraudulent or the person adversely affected by the decision appeals administratively in accordance with 12 N.N.C. §§ 362 and 363.~~
- ~~F. Stay of Procurement During Protests. In the event of a timely protest under Subsection (A) of this Section, or under 12 N.N.C. §§ 362 and 363, the Navajo Nation shall not proceed further with the solicitation or with the award of the contract until the Director, Division of Finance, Purchasing Department, after consultation with the Attorney General's Office (or Office of Legislative Counsel, in the case of a Legislative Branch procurement) and the head of the using agency or the head of a purchasing Agency, makes a written determination that the award of that contract without delay is necessary to protect substantial interests of the Navajo Nation.~~

§ 3616. Authority to Debarment or suspension

- A. Authority. The Office of the Controller, with concurrence from the Department of Justice, shall have the authority to debar or suspend for cause a Person from contracting with or otherwise receiving a business opportunity from the Navajo Nation pursuant to the conditions and procedures established in the Procurement Regulations. The Office of the Controller shall issue a written decision of debarment or suspension, including length of such, to the Person under investigation. ~~After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Director, Division of Finance, Purchasing Department or the head of a purchasing agency, after consultation with the using agency and the Attorney General (or Office of Legislative Counsel, in the case of a Legislative Branch procurement) shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three years. The same officer, after consultation with the using agency and the Attorney General (or Office of Legislative Counsel, in the case of a Legislative Branch procurement) shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding three months. The authority to debar or suspend shall be exercised in accordance with regulations promulgated by the Budget and Finance Committee.~~

- B. Causes for Debarment or Suspension for Cause. The causes for debarment or suspension shall include the following and are applicable to a Person in their present form or any other identifiable capacity:
1. Conviction in any jurisdiction for commission of a criminal offense ~~as an incident to~~ obtaining or attempting to obtain a public or private Contract or subcontract, or in the performance of such Contract or subcontract;
 2. Conviction in any jurisdiction for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a Navajo Nation Contractor;
 3. Conviction under any antitrust statutes arising out of the submission of Offers bids or proposals;
 4. Violation of Contract provisions, as set forth below, of such a character that the which is regarded the Director, Division of Finance, Purchasing Department or Office of the Controllerhead of a Purchasing agency, with concurrence from the Department of Justice, of the Attorney General (or Office of Legislative Counsel, in the case of a Legislative Branch procurement) determines to be to be so serious as to justify debarment or a suspension action, such as the below:
 - a. Deliberate failure, without good cause, to perform in accordance with the specificationsPurchase Description or within the time limit provided in the Contract; or
 - b. A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more Contracts, provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the Contractor shall not be considered to beas a basis for debarment or suspension; and
 5. Ineligibility to conduct business with the Navajo Nation under the NBOA12-N.N.C.;
 6. Submission of bad Offers in which the Procuring Party determines that the Offeror has submitted Offers lower than the expected price, or overstated its qualifications, with the intent to conduct the Services or provide the Goods; and

~~5-7. Any other cause provided in Procurement Regulations or which the Office Director, Division of Finance, Purchasing Department or the Controllerhead of a purchasing agency, with the approval of the Attorney General, or Office of Legislative Counsel, in the case of a Legislative Branch procurement, determines to be so serious and compelling as to affect Rresponsibility as a Navajo Nation Ceontractor, including debarment or suspension by another governmental entity, for any cause listed in regulations of the Budget and Finance Committee.~~

~~C. Decision. The Director, Division of Finance, Purchasing Department or authorized designee or the head of a purchasing agency shall issue a written decision to debar or suspend. The decision shall:~~

~~1. State the reasons for the action taken; and~~

~~2. Inform the debarred or suspended person involved of his or her rights to administrative review as provided in this Article.~~

C. Debarment and Suspension List. The Office of the Controller shall maintain, on a publicly available website, a list of all debarred and suspended Persons, including the date on which the action expires. The Office of the Controller shall update this list monthly, except that at the time the Office of the Controller issues a written notice of debarment or suspension, it shall add the Person debarred or suspended to the list.

D. Right to Protest. Any Aggrieved Person in connection with being debarred or suspended may protest such action in writing to the Business Regulatory Department within thirty (30) days of the date of the written notice of debarment or suspension according to procedures established in the Procurement Regulations.

E. Authority to Resolve Protests. The Business Regulatory Department shall have the authority to investigate and make a determination regarding the protest in accordance with requirements of the Procurement Regulations.

§ 367. Rejection of Offer or termination of Contract by debarred or suspended Person

The Procuring Party shall, at the time of Offer acceptance and prior toperson involved of his or her rights to administrative review as provided in this Article. Contract execution, review the list of debarred or suspended Persons to determine whether the

Offeror, in its present or any other identifiable capacity is listed. If that Person is listed and currently debarred or suspended, the Procuring Party shall immediately, in writing, reject any Offer submitted without review or terminate the award.

~~D. Notice of Decision. A copy of the decision under Subsection (C) of this Section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.~~

~~E. Finality of Decision. A decision under Subsection (C) of this Section shall be final and conclusive, unless fraudulent or the person adversely affected by the decision appeals administratively in accordance with 12 N.N.C. §§ 362 and 363.~~

§ 3682. Administrative review

The Office of Hearings and Appeals shall have the jurisdiction to hear and decide appeals of protest decisions under this Procurement Act and its Procurement Regulations.

§ 3693. Scope of administrative review and presumed finality of decisions

A. The Office of Hearings and Appeals shall have jurisdiction to review and determine de novo:

1. aAny protest of a Ssolicitation or award of a Ccontract by an Aaggrieved Pperson actual or prospective bidder or offeror, or a contractor;
2. any protest of a debarment or suspension by the Aggrieved Person; and
3. aAny appeal by an Aaggrieved Personparty from a determination by the Procuring Party related to actions in 12 N.N.C. § 365Director, Division of Finance, Purchasing Department, the head of a purchasing agency, or a designee of either officer authorized by this Act, or by the Office of the Controller or Business Regulatory Department related to actions in 12 N.N.C. § 366.

B. Time Limitation on Filing an Appeal. The Aaggrieved Pperson shall file anhis or her appeal within twenty (20) calendar days of the receipt of a decision.

C. Decision. The ~~decision of the~~ Office of Hearing and Appeals shall make a determination based on the preponderance of the evidence on the issue of whether the actions of the Procuring Party, Division of Finance, Purchasing Department or Office of

~~the Controller, or the Business Regulatory Department other purchasing agency were consistent with the provisions of this Procurement Act and the Procurement Regulations promulgated by the Budget and Finance Committee. The Solicitation or award of a Contract or determination to debar or suspend a Person shall be upheld unless it is shown by a preponderance of the evidence that the actions of the Procuring Party, Division of Finance, Purchasing Department or Office of the Controller, or Business Regulatory Department other purchasing agency violated a specific provision of this Procurement Act or the Procurement Regulations promulgated by the Budget and Finance Committee.~~

~~§ 364. Presumed finality of decisions~~

~~D. Presumed Finality of Decisions. Determinations by the Office of Hearings and Appeals shall be final and conclusive.~~

~~Subchapter 7. Compliance with Federal Requirements of Another Jurisdiction~~

~~§ 370. Compliance with federal, state, county, municipal, or other source requirements~~

~~Where a Procurement involves the expenditure of external federal assistance or contract funds, and where the agreement requires compliance with Procurement laws of another jurisdiction, the Navajo Nation Division of Finance, Purchasing Department shall comply with only the such federal law and authorized regulations which are mandatorily applicable laws of the jurisdiction. If the agreement allows for choice of Procurement law between the two jurisdictions, this Procurement Act and its Procurement Regulations shall apply unless the Procurement Regulations provide for a specific instances when external funding Procurement law and regulation may be utilized and which are not presently reflected in this Act.~~

~~Subchapter 8. Amendment~~

~~§ 38071. Amendments~~

~~This Procurement Act may be amended by the Navajo Nation Council at any time.~~

~~* * * *~~

~~SECTION FOUR. AMENDING THE NAVAJO NATION BUSINESS OPPORTUNITY ACT AT 5 N.N.C. § 201- § 215~~

A. The Navajo Nation hereby amends 5 N.N.C. § 201-§ 215 as follows:

Title 5. Commerce and Trade

Chapter 2. Navajo Nation Business Opportunity Act

§ 201. Title; Findings; Legislative Purpose and Intent

- A. This Act shall be known and cited as the Navajo Nation Business Opportunity Act; ~~Title 5, Navajo Nation Code, §§ 201 through 215.~~ ("NBOA").
- B. Whereas the Navajo Nation Council finds:
1. ~~The Navajo Nation is comprised of more than 25,000 square miles of land;~~
 2. ~~The Navajo Nation population now exceeds 250,000 members, of which over 175,000 members reside within suffers from one of the Navajo Nation. In addition, residents of the Navajo Nation include approximately 8,000 non Navajos;~~
 3. ~~The highest unemployment rate of the Navajo Nation is approximately fifty percent (50%);~~
 4. ~~In 1996, rates in the United States Congress enacted the Personal Responsibility and Work Reconciliation Act of 1996 (P.L. 104 193 "Welfare Reform Act"). This Act will impact thousands of Navajo people. As a result, there is a need to accelerate the development of privately owned businesses and provide more employment opportunities;~~
- 2.5. There is a need within the Navajo Nation to accelerate business development and economic growth within the Navajo Nation;
6. ~~Although the Navajo Nation has a population that is approximately 90% Navajo, approximately 76% of the contracts by the Navajo Nation between the years 1994 and 2003 were awarded to non Navajos, according to the Navajo Nation award data; and~~
- 3.7. The Navajo Nation's sovereign status is directly related to its ability and authority to regulate all commercial activities within the Navajo Nation, including those of non-Native Americans Indians and non-member Native Americans Indians. In addition, the Treaty of 1868 between the Navajo Nation and the United States recognizes the inherent authority of the Navajo Nation to exclude non-

Native Americans Indians from the Navajo Nation. Pursuant to this authority, engaging in business within the Navajo Nation is a privilege granted by the Navajo Nation and is subject to such conditions as the Navajo Nation may require, subject to applicable federal law. The privilege of entering into the Navajo Nation for the purpose of engaging in business is therefore conditioned upon, among other things, compliance with this Act; and

4. The Navajo Nation has the sovereign authority to regulate all entities and business activity within the Navajo Nation, including non-profit businesses and organizations, to promote economic growth and protect the welfare of the Navajo Nation and its people.

C. The purpose of ~~this Act~~ the NBOA is to:

1. Promote the economic self-sufficiency of the Navajo Nation people by granting "first opportunity" and/or contracting preference in contracting to Navajo and/or Indian Native American owned and operated businesses;
2. Promote competitive bidding and contracting opportunities among Navajo businesses;
3. Develop a dynamic and self-sustaining private sector ~~for~~on the Navajo Nation;
4. Increase Navajo business and employment opportunities for the Navajo people;
5. Provide ~~for~~priority business certification ~~in accordance with current Navajo Nation laws; and~~ to Businesses;
6. Regulate the ~~conduct~~procurement of those engaging in business within the Navajo Nation in order to protect and promote the economic security and welfare of the Navajo Nation; and

~~D. It is not the intent of this Act to require the Navajo Nation or any other public entities or private entities to contract with non-qualified Navajo businesses.~~

- 7.E. ~~It is the intent of this Act to grant~~ Grant first opportunity and contracting preference to qualified Navajo-owned or Indian Native American-owned businesses for all contracts, subcontracts, grants, and subgrants issued by public and, private, and non-profit entities within the Navajo Nation.

D. It is not the intent of the NBOA to require the Navajo Nation or any other public, private, or non-profit entities to contract with non-qualified Navajo businesses.

~~E.F.~~ The provisions of ~~this Act~~ the NBOA should be liberally interpreted to ~~promote economic~~ promote economic development and the growth of Navajo-owned businesses within the Navajo Nation.

~~G. The Navajo Nation shall determine the nature, composition, qualification, and preference certification of all businesses subject to the provisions of this Act.~~

G. Only the Navajo Nation Council, through a valid resolution, shall waive the requirements of the NBOA.

§ 202. Definitions

Terms not defined in the NBOA that are defined in the Navajo Nation Procurement Act shall have the meanings in those definitions. For all purposes of ~~this Act~~ the NBOA, the following definitions shall be applicable:

A. "Bid" means an offer to perform a Contract for the provision of Goods and any attendant Services at a specified price.

~~B. "Bid/Proposal/Statement of Qualifications Shopping" is defined herein as any means a practice involving the solicitation or communication of any competitor's bid with Business prior to and/or after bida Bid/Proposal/Statement of Qualifications opening, thereby providing that results in an unfair advantage and/or opportunity to underbid any competitor being provided to that Business.~~

~~B. "Bidders" is defined as buyers and sellers of goods and services who offer to perform a contract for work and labor or to supply services and goods at a specified price.~~

C. ~~"Broker" is defined as~~ means buyers and sellers of goods and services including agents/negotiators between buyer and seller, who do not have custody of property or will not personally perform the contract to provide the goods or services.

D. "Business" means any entity, including but not limited to a sole proprietorship, partnership, limited liability company, corporation, joint venture, or non-profit.

E. "Business Regulatory Department" means what is stated in the Division of Economic Development Plan of Operations.

FD. ~~"Dealer" is defined as~~ means one who buys to sell for resale, not one who buys to keep, or makes to sell.

G. "Division, department, office, or program of the Navajo Nation" means any Department, Commission, Council, Board, Bureau, Committee, Institution, Legislative Body, Agency, Government Corporation, non-Local Governance Act certified Chapter, or other establishment or Public Official of the Executive, Legislative, or Judicial Branch of the Navajo Nation government. It does not mean a Local Governance Act ("LGA"), 26 N.N.C. §§ 1 et seq. governance certified Chapter, an Enterprise, or an Authority of the Navajo Nation.

H.E. ~~"Established Business" is defined as a for profit economic entity, firm or other organization,~~ means a Business engaged in business activities with ownership, custody, and control of an existing adequate inventory or providing professional services with a published address and telephone number and making significant contributions to the Navajo economy.

I.F. ~~"Front" is defined as a business~~ means an Business having or claiming to have fifty-one percent (51%) or more Navajo or other Indian Native American ownership of any commercial, industrial, or other economic entity or organization, but without the Navajo or other Indian Native American owner(s) or owners actually owning and controlling the Business. Control is demonstrated by the Navajo or other Indian Native American owner(s) actively exercising thea major role in decision-making for any of the following: day-to-day operations, profit-sharing, and/or actual management control.

J.G. ~~"Navajo Native American" means an Indian" or "Navajo" as the term is used and defined as~~ in Title 25 of the Code of Federal Regulations.

K. "Navajo" means a person who is an enrolled member of the Navajo Nation.

L.H. ~~"Navajo Nation" means what is stated shall have the same definition as used at~~ 1 in 7 N.N.C. § 552 including 254.

~~1. When referring to governmental territory, all land within the territorial boundaries of the Navajo Nation, including:~~

~~a. All lands within the exterior boundaries of the Navajo Indian Reservation, including the Navajo Partitioned Land, or of the Eastern Navajo portion of the Navajo Nation, including Alamo, Tohajiilee, and Ramah, or of Navajo dependent Indian Communities;~~

- ~~b. All lands held in trust by the United States for, or restricted by the United States or otherwise set aside or apart under the superintendence of the United States for the use or benefit of the Navajo Nation, the Navajo Tribe, any Band of Navajo Indians, or any individual Navajo Indian; and~~
- ~~e. All other lands over which the Navajo Nation may exercise governmental jurisdiction in accordance with federal or international law or to which the Navajo Nation has ownership through the Treaty of 1868.~~
- M. "Maximum Feasible Price" means the estimated cost of the Goods, Services, or Construction being solicited. This Maximum Feasible Price establishes the maximum amount of funds the Procuring Party is willing to expend on the Procurement, and restricts the total purchase price for which a Procurement can be made. Regardless of Procurement method utilized, the Maximum Feasible Price shall be established prior to issuing any Solicitation and shall not be shared publicly.
- N. "Modification" means any written document that amends the original Contract by mutual action of the Parties to the Contract.
- O. "Non-profit" means an entity that is formed for purposes other than generating profit, such as beneficial or charitable purposes, and in which no part of the organization's income is distributed to its members, directors, or officers.
- P. "Offeror" means the Business who responds to a Solicitation for the Procurement of any Goods, Services, or Construction. Solicitations are issued in the form of an Invitation for Bids, Request for Proposal, or Request for Statement of Qualification, but shall also include requests for Quotations for Small Purchase, Micro-Purchase, Emergency, Direct Source, or Solo Source Procurement.
- ~~Q.F. "Other Indian Native American" is defined as means an Indian Native American other than Navajo who is an enrolled member of a federally recognized Indian Native American Tribe within the United States.~~
- ~~R.F. "Owned and Controlled" is defined as means having at least fifty-one percent (51%) or more ownership of any commercial, industrial, or other economic entity, firm or organization Business, provided that such ownership shall consist of active participation in decision-making, a role in operations, profit-sharing and actual management control. For a non-profit entity, this shall mean having at least fifty-one percent (51%)~~

or more of the management and control over the organization's mission and operations.

S.K. "Prime Contractor" is defined as any party, or entity means a Business which that undertakes, offers to undertake, or purports to have the capacity to undertake contracting of a project for a specified price and is authorized and responsible for the management, coordination, completion, supervision, and/or subcontracting for the contracted project.

T.L. "Party" or "Parties" means the Contractor and Procuring Party" is defined of a Procurement Contract as the party it pertains to this Procurement Act.

U. "Procuring Party" means any Division, Department, Office, or Program of the Navajo Nation that initiates the proceeding to cause a project is subject to be bid the Procurement Act or its implementing Procurement Regulations.

V. "Proposal" means the document(s) submitted by an Offeror in response to requirements contained in a Request for contracting Proposals.

M. "Prospective bidders" is defined as potential buyers or sellers of goods and services who offer to perform a contract for work and labor or supply services and goods at a specific price.

W.N. "Private entity" is defined as" means a privately-owned business entity doing businessBusiness with operations on the Navajo Nation, including corporations which are wholly-owned by the Navajo Nation, and does not include non-profit entities since these types of organizations cannot be owned.

X.O. "Public entity" is defined as an entity which is" means a partDivision, department, office, or program of the Navajo Nation government. It also includes any LGA governance certified Chapters of the Navajo Nation, or an Enterprise or Authority.

Y.P. "Request for Proposals" means a Solicitation issued by the Procuring Party for Offers where the award is based on evaluation factors beyond price.

Z. "Responsible Offeror" means a Business who has the capability in all respects to perform fully the Contract requirements noted in the Solicitation, and the integrity and reliability that will assure good faith performance.

AA. "Responsive Offeror" means a Person who has submitted a Bid, Proposal, Statement of Qualification, or Quotation that

conforms in all material respects to the requirements of the respective Solicitation.

BB. "Request for Statement of Qualifications" means a Solicitation issued by a Procuring Party for the purpose of soliciting information from Persons as to their qualifications and capability to provide Goods or Services.

CC. "Solicitation" means the process of issuing written document(s), whether attached or incorporated by reference, to obtain information or pricing from an Offeror. This includes an Invitation to Bid, Request for Proposal, Request for Statement of Qualification, and any request for a Quotation.

DD. "Statement of Qualifications" means the document(s) submitted by an Offeror that describes the qualifications and capabilities of the Offeror in response to a Request for Statement of Qualifications.

~~EE.P. "Subcontractor" is defined as any party or entity to which any means a Business who receives a contract is let by the from a prime contractor or itsits' subcontractor for materials, equipment, transportation-, and/or other goods and services on that prime contract, regardless of tier.~~

§ 203. Jurisdiction; application, complianceApplication; Compliance Rrequirements; and violationsViolations

A. General jurisdiction. The Navajo Nation has the inherent sovereign authority to authorize and regulate business activities of Bbusinesses entities within the jurisdiction of the Navajo Nation, ~~as defined in 7 N.N.C. § 254.~~

B. Application. Unless otherwise provided for herein, this Act shall apply ~~uniformly~~ to all public and, private, and non-profit entities engaging in business on the Navajo Nation and ~~to the Navajo Nation itself. This Actwhen procuring goods and/or services. The NBOA shall apply to all Navajo Nation procurement contracts exceeding fifty thousand dollars (\$50,000.00) and on a limited basis to those Navajo Nation all procurement contracts less than fifty thousand dollars (\$50\$100,000. For purchases under \$100,000.00).~~ Procuring Parties must provide evidence they utilized the most recent source list during the procurement process. If the Procuring Party is unable to select a vendors from the source list, the Procuring Party must provide a written statement as to why.

C. ~~Inapplicability to lease and other transactions. This Act. The NBOA shall not apply to the negotiation, execution, award, transfer, assignment, or approval of business site leases,~~

homesite leases, office space leases, shopping center leases, mineral or non-mineral leases, subleases, permits, licenses and ~~transactions that are governed by other applicable laws and regulations of the Navajo Nation and the United States.~~ This Act and licenses. The NBOA shall not apply to activities of private persons who contract for goods or services for their individual use or benefit.

- D. ~~Implementing federal Native American Indian preference laws and regulations.~~ Preference. To the fullest extent possible, ~~this Act~~ the NBOA and its rules and regulations shall be construed in accordance with applicable federal ~~Indian Native American~~ preference laws and regulations. Specifically, with respect to any self-determination contract or portion of a self-determination contract intended to benefit the Navajo Nation, ~~this Act~~ the NBOA and any other applicable tribal employment or contract preference laws shall govern with respect to the administration of the contract or portion of the contract in accordance with the ~~Indian Native American~~ Self-Determination and Education Assistance Act, 25 U.S.C § 450 et seq. If federal or state-funded contracts specifically provide for the application of ~~Indian Native American~~ preference rather than Navajo preference, the ~~procuring party~~ Procuring Party shall attempt to negotiate with such party in order to apply the provisions of this Act. In the event federal or state law expressly precludes the application of ~~this Act~~ the NBOA, then ~~Indian Native American~~ preference laws shall be applied and shall not constitute a violation of ~~this Act~~ the NBOA.
- E. Federal Aviation Administration ~~grants~~ Grants. Notwithstanding any other provision herein, ~~this Act~~ the NBOA shall not apply to Navajo Nation procurement contracts or subcontracts that are to be paid with federal funds provided by the Federal Aviation Administration, whether such funds are provided via loans or grants, and whether such funds are provided on a reimbursement basis or up-front payment basis.
- F. ~~Falsification or concealment of information, sanctions and penalties.~~ Prohibited Activity. Any person who authorizes, or knowingly or recklessly omits, ~~or allows, or authorizes,~~ falsifies, or otherwise misrepresents any fact or matter material to any determination required by ~~the this Act~~ the NBOA, shall be subject to all applicable sanctions and penalties provided under ~~this Act~~ the NBOA, its regulations, and any other applicable laws or regulations of the Navajo Nation.
- G. Bid-/Proposal/Statement of Qualifications shopping. ~~Bid-Shopping~~ Bid/Proposal /Statement of Qualifications Shopping shall be prohibited. Any person who engages in such action

shall be subject to all applicable sanctions and penalties provided under the NBOA, its regulations, and any other applicable laws or regulations of the Navajo Nation.

H. Fronts. Fronts are prohibited. Any person who engages in such action shall be subject to all applicable sanctions and penalties provided under the NBOA, its regulations, and any other applicable laws or regulations of the Navajo Nation.

~~I.H. Conflicts of Interest:—disqualification. No official or employee of the Navajo Nation government or entity of the Navajo Nation which is authorized to implement this Act shall promote, approve, or participate in any matter pending before that agency or entity the BRD, in which such official or employee, or any member of his or her immediate family, has an economic or other special interest pursuant to the Navajo Nation Ethics in Government Law [FNNEW 1]. The failure or refusal of such official or employee to abstain from such participation as required thereunder, shall render void any approval or action taken by the Navajo Nation Government or entity BRD in which such official or employee participated, to the extent such action is favorable to the business entity in which such Business. The official or employee had an interest. The official(s) or employee(s) in conflict shall be subject to all applicable sanctions and penalties provided by law.~~

~~§ 204. Required Business and Contracting Preference Priorities, Certification Requirements~~

~~A. Preference Priorities The Navajo Nation shall certify all businesses pursuant to the following Navajo business opportunity priority classification:~~

- ~~1. Priority #1. Certification shall be granted to any one hundred percent (100%) Navajo owned and controlled business, having its principal place of business on or off the Navajo Nation.~~
- ~~2. Priority #2. Certification shall be granted to any fifty one percent (51%) to ninety nine percent (99%) Navajo or fifty one percent (51%) to one hundred percent (100%) other Indian owned and controlled business or one hundred percent (100%) Navajo Nation owned and controlled economic enterprise having its principal place of business on or off the Navajo Nation.~~

~~B. Obtaining a Priority Certification and Required Compliance. To receive a priority certification under this Act, the business must satisfactorily demonstrate that the business meets the requirements of § 204(A)(1) or (2).~~

~~C. Appeal of Priority Certification Determination. Any business denied a priority classification may appeal the determination pursuant to § 211 hereof.~~

~~D. Conditions and Requirements for Broker and Dealer Certification, Established Businesses. Brokers and dealers as defined in § 202 of this Act shall be certified for those activities which brokers and dealers normally conduct throughout the United States, subject to pre-qualification by the contract letting, purchasing or procuring entity requesting such broker and/or dealer's services. Certification of brokers and dealers shall further be limited to those having an established business as defined in § 202 herein and certified only for the services being performed. Certification of any broker or dealer shall not qualify any other entity, firm or organization thereof. Such other entities, firms or organizations shall be individually subject to the provisions and conditions herein.~~

~~E. Partnership Certification. To be certified as eligible for any Navajo Business Opportunity hereunder, Navajo or other Indian ownership and control must be at least fifty one percent (51%) of the entire partnership business, as well as the project or transaction for which Navajo Business Opportunity is sought, regardless of the number of general or limited partners.~~

~~F. Joint Venture Certification. To be eligible for any Navajo Business Opportunity hereunder, Navajo or other Indian ownership and control must be at least fifty one percent (51%) of the overall combined joint venture, as well as the project or transaction for which Navajo Business Opportunity is sought, with profits to be divided from each venture in proportion to such respective interest.~~

~~§ 205. Navajo Business Opportunity Procedures in Bidding and Procurement~~

~~A. Initial Determination of Maximum Feasible Price or Cost by Contracting or Procuring Party. The determination of the maximum feasible price or cost, in accordance with appropriate Business Regulatory Department rules and regulations, shall be made by the contracting or procuring party prior to soliciting bids and proposals. The maximum feasible price or cost may take into account market price, budgetary constraints and prototype cost and may not be revealed until the award of the contract.~~

~~B. Notice to the Business Regulatory Department. Prior to bid openings, the procuring party shall provide to the Business Regulatory Department:~~

- ~~1. A copy of the bid solicitation;~~
- ~~2. A copy of the notice published in the newspaper; and~~
- ~~3. A list of all businesses notified, including the dates and manner of such notices.~~

~~C. Bid Opening Procedures and Requirements. The following procedures shall be used at bid openings when there is more than one priority business submitting a bid.~~

- ~~1. All bids submitted by Priority #1 businesses shall be opened first.~~
- ~~2. The procuring entity shall determine the qualifications of the bidders based on qualifications established in accordance § 205(A) (2). Bids submitted by businesses deemed non-qualified or non responsive shall not be considered.~~
- ~~3. The award shall be made to the qualified Priority #1 bidder with the lowest responsive bid among the Priority #1 bidders provided the bid does not exceed the maximum feasible price or cost.~~
- ~~4. If there is no qualified Priority #1 bidder, or if there is no qualified Priority #1 bidder with a bid less than or equal to the maximum feasible price or cost, the bids of the Priority #2 businesses shall then be opened and award shall be given to the qualified Priority #2 bidder with the lowest responsive bid provided the bid is less than or equal to the maximum feasible price or cost.~~
- ~~5. If no qualified Priority #1 or Priority #2 bidder is entitled to award, bidding may then be open to all other bidders, subject to the same specifications, qualifications and maximum feasible price or cost.~~
- ~~6. Any modifications of the specifications, qualifications or maximum feasible cost or price made subsequent to bid opening and which does not result in a contract award shall be rebid pursuant to the above procedures.~~
- ~~7. Notwithstanding any provision of this Act, in the event that federal law prohibits bid or procurement opportunity or preference as provided herein or prohibits negotiations with a bidder other than the bidder with the lowest bid or price offer, the initial bidding shall be opened to all Priority #1 and #2 businesses; and award shall be made to the bidder~~

~~offering the lowest price, provided that the bid is less than or equal to the maximum feasible cost or price.~~

~~D. Subcontracting Requirements. Prior to the bid opening, prime contractors shall submit to the Business Regulatory Department a subcontracting plan listing the following:~~

~~1. Subcontractors and suppliers to be used by the prime contractor;~~

~~Procedures used in selecting subcontractors and suppliers; and~~

~~2. Subcontracts or lease agreements for equipment to be used in performance of the contract.~~

~~E. Prime and Subcontractor Performance Bonding: Permitted Alternatives. The prime contractor shall obtain surety bonding or other performance security from subcontractors to secure their performance and wage obligations including, but not limited to cash bonds, letters of credit and cash monitoring systems such as retention, escrow and/or assignment of construction accounts. The prime contractor shall determine the form of performance security. The prime contractor shall maintain guaranteed security and be ultimately liable for performance of subcontractors.~~

~~F. Minimum Subcontract and Procurement Percentage Requirements. The Business Regulatory Department shall have the authority to require all procurement entities and prime contractors to comply with current minimum percentages for procurement and subcontract awards to Navajo owned and controlled entities, firms and organizations, based upon availability and qualifications of such entities to provide specific products and services.~~

~~G. Prior Approval of Modifications. Any contract modification that results in a higher cost or price in excess of twenty percent (20%) of the original amount of the contract or if the procuring party substantially modifies such project, activity or transaction, shall be subject to review and approval by the Business Regulatory Department, to ensure that such modifications are not contrary to the purposes, intent or other provisions of other applicable laws.~~

~~H. Required Adherence to Priority Certification. Procuring entities shall not award contracts to non Navajo owned and controlled entities at a price equal to or greater than the price offered by an equally qualified Priority #1 or #2 business.~~

~~§ 206. Waivers~~

~~No Waiver of any requirement of this Act shall be granted except by valid resolution of the Navajo Nation Council.~~

~~§ 207. Implementation and Compliance with Navajo Nation Business Opportunity Provisions; Specific Duties and Responsibilities~~

- A. ~~Economic~~ Economic Resource and Development Committee. The ~~Economic~~ Economic Resource and Development Committee of the Navajo Nation Council shall have the responsibility and authority to review, amend, modify, and approve proposed rules and regulations for implementation of ~~this~~ the NBOA Act.
- B. Division of Economic Development. The Division of Economic Development of the Navajo Nation shall be responsible for administering, enforcing, and implementing the NBOA ~~the provisions herein.~~
- C. Business Regulatory Department. The Business Regulatory Department (BRD) within the Division of Economic Development, shall be responsible for:
1. Determine the nature, composition, qualification, and preference certification of all Businesses;
 - 2.1. ~~Developing and maintaining a certification program to determine the appropriate certification priority of business entities~~ Business.
 - 3.2. ~~Promulgating rules and regulations to implement this Act. All proposed rules and regulations shall be published for public comments at least 90 days prior to submission to the Economic Development Committee of the Navajo Nation Council for final review and approval~~ NBOA.
 - 4.3. ~~Publishing, maintaining, and making available approved rules, and regulations, guidelines, and forms including provisions of this Act, the NBOA to ensure that all Navajo Nation entities, all business entities and the Navajo People~~ people, are kept fully informed of all current laws, rules, regulations, and procedures for compliance hereto.
 - 5.4. ~~Regularly reviewing such rules and regulations in coordination with other Navajo Nation entities and agencies for applicability to economic and market conditions and their relevance to the interests of the Navajo People and people, the Navajo Nation, and the intent~~ purpose of this Act the NBOA.

- ~~6.5-~~ Enforcing compliance with this Act, ~~pursuant to the intent of this Act~~ NBOA and the rules and regulations adopted hereto, ~~requiring.~~
7. Requiring applicability of this Act ~~the~~ NBOA to any proposed contract, subcontract, or other transaction to be performed within the Navajo Nation by or on behalf of the Navajo Nation, as part of required clearance procedures, or prior to approval by the appropriate oversight committee or authority, ~~and requiring prebid, preconstruction or pre-qualification requirements as needed and appropriate to comply with this Act~~ authority. Public, private, and non-profit entities shall implement their own clearance procedures that they shall make available to BRD upon request.
8. Reviewing solicitation documents ~~so so~~ as needed and appropriate to comply with the NBOA.
- ~~9.6-~~ Coordinating efforts with federal agencies that require Indian Native American preference or maximum utilization of minority business enterprises ~~businesses.~~
- ~~10.7-~~ Maintaining and publishing a current Source List of all certified Priority #1 and #2 B ~~businesses~~ entities, persons, firms, enterprises or organizations. By including an entity on such a Source List, ~~the Business Regulatory Department in no way certifies that the entity is qualified to perform in the category in which it is listed.~~ The purpose of this Source List shall be to utilize such list as a source document only for contract-letting and procuring parties a resource for Procuring Parties, which are required to identify determine and seek Offers from notify all available Navajo and other Indian Native American-owned Businesses entities operating in the respective areas category of commerce which are subject to the provisions of this Act for the contract-letting. Inclusion of a Business on such a Source List in no way speaks to the capability of or certifies that the Business is qualified to perform the work in the category in which it is listed.
- ~~11.8-~~ Providing, in accordance with its responsibilities, capabilities, and available resources, in coordination with those of other responsible and appropriate Navajo Nation departments and entities, such community, governmental, and business sector educational programs, information, and advice as may be necessary and appropriate from time to time, to the continued understanding and awareness by such entities of the

policies, objectives, and current procedural requirements for compliance with all provisions of ~~this Act~~ the NBOA and the current rules and regulations adopted hereunder.

12.9- Recommend disciplinary action for Navajo Nation employees or officials found to be in violation or noncompliance with ~~this Act~~ the NBOA pursuant to the applicable Executive, Judicial, or Legislative Navajo Nation Personnel Policies Manual, or the Ethics in Government Law.

§ 205. ~~§ 208.~~ Contracting Preference Priorities; Certification of Eligible Entities and Authorization of Business Activities Requirements

A. Business Preference Priorities. Establishment of Procedure. ~~The Business Regulatory Department~~ Navajo Nation shall have certify all Businesses pursuant to the following duties, responsibilities and authority Navajo Business Opportunity Priority classification:

1. Priority 1. Certification shall be granted to any one hundred percent (100%) Navajo owned and controlled Business.
2. Priority 2. Certification shall be granted to any:
 - i. Fifty-one percent (51%) to ninety-nine percent (99%) Navajo owned and controlled Business;
 - ii. Fifty-one percent (51%) to one hundred percent (100%) other Native American owned and controlled Business;
 - iii. Any one hundred percent (100%) Navajo Nation owned and controlled economic enterprise;
 - iv. Fifty-one percent (51%) to ninety-nine percent (99%) Navajo or other Native American owned and controlled partnership;
 - v. Fifty-one percent (51%) to ninety-nine percent (99%) Navajo or other Native American owned and controlled joint venture; or
 - vi. Any non-profit that is eligible in accordance with § 205(B).

B. Non-Profit Certification. To receive a Navajo Business Opportunity Priority certification ("Priority Certification"), the Non-profit must have at least fifty-one percent (51%)

Navajo or other Native American control and management of the Non-profit organization's mission and operations, which may include the Non-profit's officers and board of directors and key management positions, such as the executive director.

- C. Obtaining a Priority Certification and Required Compliance. Require timely submission of To receive a Priority Certification under NBOA, the Business must satisfactorily demonstrate that it meets the requirements of § 205(A)(1) or (2) and must be in compliance with the Navajo Business Opportunity Act 12 N.N.C. §§ 1501 *et seq.*
- D. Renew, suspend, and decertify certifications. In order to maintain Priority certification eligibility, Businesses must renew the certification on an annual basis. Businesses must timely submit information and documentation on percentage of ownership and organization structure as required herein for certification or recertification eligibility;
- ~~B. Deny certification if required information is not provided in a timely manner;~~
- ~~C. Renew, suspend or decertify certifications. Annual, temporary or conditional certifications may be issued based on the circumstances. Certifications. Renewals shall be reviewed based on for new information or changes in organization or operations which materially affect eligibility for certification. Reviews shall be conducted in a manner so as to avoid any loss of eligibility to entities entitled hereto;~~
- D. Certified businesses entities shall be required to disclose, changes in organization and/or operations that may materially affect the eligibility for preference priority certification. Renewals will be denied if required information is not provided in a timely manner.
- E. Confidentiality. All confidential information submitted for the purpose of obtaining priority certification information shall be kept confidential and shall not be disclosed except as necessary in a proceeding under this Act and the NBOA or other applicable laws.
- F. Appeal of Priority Certification Determination. Any Business denied a priority classification may appeal the determination pursuant to § 207 of the Act.

§ 206. Procedures in Procurement

- A. Initial Determination of Maximum Feasible Price by Procuring Party. The determination of the Maximum Feasible Price shall

be made by the Procuring Party prior to the Solicitation. The Maximum Feasible Price may take into account market price, budgetary constraints, prototype cost, and evidence of estimated project costs based on the Procuring Party's research into other similar projects, past work experience, and other expertise. The Maximum Feasible Price may not be revealed until the award of the contract. Documentation of the Maximum Feasible Price and how it was determined must be retained by Procuring Party.

B. Notice to the Business Regulatory Department. Prior to Offer openings, the Procuring Party shall provide to the Business Regulatory Department:

1. A copy of the Solicitation, including the date and manner the notice was publicized; and
2. A list of all Businesses notified, including the dates and manner of such notices.

C. Bid Opening Procedures and Requirements. The following procedures shall be used at bid openings for Invitations for Bid:

1. All bids submitted by Priority 1 Offerors shall be opened first.
2. Only Bids submitted by Responsive Offerors shall be considered.
3. The award shall be made to the Priority 1 Responsive and Responsible Offeror with the lowest price, provided the price does not exceed the Maximum Feasible Price.
4. If there is no Priority 1 Responsive and Responsible Offeror with a price less than or equal to the Maximum Feasible Price, then the bids of the Priority 2 Offerors shall be opened. An award shall be given to the Priority 2 Responsive and Responsible Offeror with the lowest price, provided it does not exceed the Maximum Feasible Price.
5. If no Priority 1 or Priority 2 Responsive and Responsible Offeror is given an award, the Procuring Party may then be open all other bids, subject to the same specifications and Maximum Feasible Price.
6. Any modifications of the specifications, or Maximum Feasible Price made subsequent to the opening, and that does not result in a contract award, shall be re-procured.

7. Notwithstanding any provision of the NBOA, in the event that federal law prohibits preference as provided the NBOA or prohibits negotiations with an Offeror other than the Offeror with the lowest bid or price offer, the initial opening shall include all Priority 1 and 2 Businesses; and award shall be made to the Offeror the lowest Responsive price, provided that it is less than or equal to the Maximum Feasible Price.

D. Proposal/Statement of Qualification Opening Procedures and Requirements. The following procedures shall be used at openings for Request for Proposals and Request for Statements of Qualifications:

1. All Proposals or Statements of Qualifications submitted by Priority 1 Offerors shall be opened first.
2. For Request for Proposals, the Procuring Party shall evaluate each Proposal against the criteria published in the Request for Proposal. Price may be one of the factors in the criteria but it cannot be the determinative factor for award.
3. For Request for Qualifications, the Procuring Party shall evaluate each Statement of Qualifications against the criteria published in the Request for Qualifications. Price may not be one of the factors in the criteria evaluated for award.
4. An award shall be given to the most Responsible and Responsive Priority 1 Offeror, provided it is less than or equal to the Maximum Feasible Price.
5. If there is no Priority 1 Responsive and Responsible Offeror with a price less than or equal to the Maximum Feasible Price, then the Proposals or Statements of Qualifications of the Priority 2 Offerors shall be opened. An award shall be given to the most Responsible and Responsive Priority 2 Offeror, provided it is less than or equal to the Maximum Feasible Price.
6. If no Responsible and Responsive Offeror Priority 1 or Priority 2 Offeror is entitled to award, then the Procuring Party may then be open all other Proposals or Statements of Qualifications, subject to the same criteria and Maximum Feasible Price.
7. The award shall be made to the non-Priority Responsible and Responsive Offeror, provided the responsive price does not exceed the Maximum Feasible Price.

8. Any modifications of the criteria or Maximum Feasible Price made subsequent to the opening, and which does not result in a contract award, shall be re-procured.
9. Proposals or Statements of Qualifications submitted by an Offeror deemed non-responsive shall not be considered.

E. Subcontracting Requirements. After the award, Prime Contractors shall submit to the BRD a subcontracting plan listing the following:

1. Subcontractors and suppliers to be used by the prime contractor;
2. Procedures used in selecting subcontractors and suppliers; and
3. Subcontractors or lease agreements for equipment to be used in performance of the contract.

F. Prior Approval of Modifications. Any contract modification that results in a price exceeding twenty percent (20%) of the original contract amount, and/or that substantially modifies the contract's scope of work, shall be subject to review and approval by the BRD to ensure that such modifications are not contrary to the purposes or other provisions of NBOA.

G. Required Adherence to Priority Certification. Procuring Parties shall not award contracts to non-Navajo owned and controlled entities at a price equal to or greater than the price offered by an equally Priority 1 or 2 Responsible and Responsive Offeror.

§ 207. -~~§ 209~~ Monitoring and; Enforcement

A. Navajo Nation Review and Approval Process. All proposed professional services, procurement, and construction contracts shall be reviewed by ~~the Business Regulatory Department~~ BRD for compliance with the Act ~~NBOA~~.

B. ~~Procedure Upon for Investigating for Alleged Violation. To investigate alleged violations or noncompliance of this Act, the Business Regulatory Department shall; of NBOA:~~

~~1. Investigate any alleged violation and/or complaint under this Act upon receipt of a written document;~~

1. Upon receipt of a written complaint alleging a violation of the NBOA, the BRD shall conduct an investigation. A written complaint can only be submitted by a party whose interests

have been directly impacted by the alleged violation. BRD shall keep a record of any witness statements produced as a result of the investigation.

2. Once the investigation is complete, the BRD shall Pprepare a written summary of facts constituting a violation of the Act or applicable rules, and provide all statements of witnesses along with the summary thereof, and the alleged violation. ,and
3. Initially If a violation is found, BRD shall initially seek voluntary compliance and appropriate remedial action pursuant to this Act from the violating party.
4. If voluntary compliance or remediation is not possible, the Department or if no violation is found, BRD shall render a written decision pursuant to this Act. 5. A and provide a copy of the decision by the Business Regulatory Department may be appealed pursuant to § 211 of this Act to the complaining and the violating party.
5. A decision by BRD may be appealed pursuant to § 208 of this Act. Appeals shall not include matters that are determined through an investigation conducted under § 207(B) of this Act to be private contractual disputes between parties.

C. Interim Project Suspension; Temporary Restraining Orders; and Permanent Injunctive Relief from Navajo Nation Court.

1. In the event of a violation of or noncompliance with this Actthe NBOA presenting a probability of continuing material and irreparable harm which is greater than the harm from suspension of performance, the ExecutiveDivision Director of the Division of Economic Development shall, with assistance from the Navajo Nation Department of Justice, on behalf of the threatened interests of the Navajo Nation and of innocent third parties, immediately apply to the District Court of the Navajo Nation for a temporary restraining order and an order to show cause why permanent injunctive relief should not be granted (including orders to permanently cease and desist such performance as determined appropriate) according to the Navajo Nation Rules of Appellate Procedure.
2. If a Navajo Nation Court orders suspension of performance, the Division of Economic Development shall take immediate remedial action as authorized by said Court to prevent or minimize material harm and damage to innocent third parties and to the interests of the Navajo Nation resulting or likely to result from such suspension of performance.

~~§ 210. Imposition of sanctions~~

~~Upon opportunity for hearing and determination as provided herein, the Administrative Hearing Officer may impose any and all of the following sanctions for violation of this Act or the rules and regulations lawfully promulgated hereunder:~~

D. Certification Denials.

- ~~A. Civil monetary fines not to exceed five hundred dollars (\$500.00) per day, per violation.~~
- ~~B. Suspension or termination of a party's authorization to engage in business activity on the Navajo Nation; provided that the party shall be given a reasonable time to remove its equipment and other property it may have on the Navajo Nation and to take such measures to facilitate the satisfaction or assumption of any contractual obligations it has.~~
- ~~C. Prohibit the party from engaging in future business activity on the Navajo Nation for a specified period or permanently, pursuant to applicable laws of the Navajo Nation.~~
- ~~D. Require the party to make such changes in its performance, organization or operations to comply with this Act.~~
- ~~E. Impose other sanctions as appropriate to ensure compliance and to remedy any harm or damages from violation of this Act pursuant to applicable laws.~~
- ~~F. Recommend corrective or remedial action to the President of the Navajo Nation, or the Navajo Nation Council or its appropriate standing committee for Navajo Nation entities in violation or noncompliance with this Act.~~

§ 211. Appeals

1.A. Appeals to Business Regulatory Department. ~~Appeals can be made by those businesses who are denied a priority certification or parties that are adversely affected by a decision with the Act. Appeals shall not include those matters which are found through an investigation conducted under § 208 (b) of this Act to be private contractual disputes between parties. If a business is denied priority certification, the business may appeal the decision can submit a written complaint to the Department Manager of the BRD for administrative resolution to the Director of the Business Regulatory Department (or successor agency or designee) by filing with~~

~~the Director a notice of appeal~~ within 10 days of the date of the written adverse decision. The written notice ~~of appeal~~ complaint shall:

- ~~i.1.~~ Identify the ~~business~~ Business that was denied certification ~~or license or adversely affected by a decision made pursuant to this Act,~~
- ~~ii.2.~~ Provide a short statement indicating the nature and circumstances of the denial ~~or decision,~~
- ~~ii.3.~~ State the basis for the appeal; and,
- ~~iv.4.~~ State the remedial action being sought by the ~~business or party.~~

~~2.B. Appeals to the Hearing Officer. If The Department Manager shall have ten (10) days from the receipt of the Director upholds~~ written complaint to respond.

~~3. Once a response is received, or if no response is received, the Department's decision to deny certification to the affected business, the appealing~~ complaining party may file an appeal the Director's decision to the Navajo with the Office of Hearings and Appeals for assignment to an Administrative within ten (10) days.

§ 208. Appeals

A. Appeals to the Hearing Officer. A party disputing a decision made by BRD pursuant to § 207 can file an appeal with the Office of Hearing Officer and Appeals.

- 1. The hearing officer shall hear the appeal within thirty (30) days of receipt of the notice of appeal.
- 2. Upon mutual agreement with the appealing party, time extensions in increments of not more than fifteen (15) days may be granted.
- 3. Notice shall be provided to the parties at least ten 10 days in advance of hearing date.
- 4. Each party at the hearing may be represented by legal counsel and shall have the opportunity to subpoena witnesses and documents, present evidence, and examine witnesses.
- 5. After the hearing each party shall have ten 10 days to submit in writing proposed findings of facts and

conclusions of law. The hearing officer may uphold or reverse the appealed decision(s) or any part thereof, but may not grant any other relief.

6. The hearing officer shall issue written findings of facts and conclusions of law that shall state the decision and grounds thereof.

B. The Administrative Hearing Officer may impose any and all of the following sanctions for violation of the NBOA or the rules and regulations lawfully promulgated hereunder:

1. Civil monetary fines not to exceed five hundred dollars (\$500.00) per day, per violation.
2. Suspension or termination of a party's authorization to engage in business activity on the Navajo Nation; provided that the party shall be given a reasonable time to remove its equipment and other property it may have on the Navajo Nation and to take such measures to facilitate the satisfaction or assumption of any contractual obligations it has.
3. Prohibit the party from engaging in future business activity on the Navajo Nation for a specific period or permanently, pursuant to applicable laws of the Navajo Nation.
4. Require the party to make such changes in its performance, organization, or operations to comply with the NBOA.
5. Impose other sanctions as appropriate to ensure compliance and to remedy any harm or damages from violation of the NBOA pursuant to applicable laws.
6. Recommend corrective or remedial action to the President of the Navajo Nation, the Navajo Nation Council, or the appropriate standing committee for Navajo Nation entities in violation or noncompliance with the NBOA.

C. Appeals to the Courts. The decision of the hearing officer may be appealed by the party adversely affected to the Navajo Nation Supreme Court pursuant to the Navajo Nation Rules of Civil Appellate Procedure. The court shall review the decision of the hearing officer and the administrative record only. The decision shall not be subject to de novo review on appeal. The court may substitute its judgment on those questions of law within its special competence but shall otherwise uphold the decision of the hearing officer where reasonable.

§ 209. Severability~~212. Other Navajo Nation Entities and Associated Agencies~~

~~All Navajo Nation entities, departments and other agencies involved in any stage of contracting, subcontracting or other procurement process shall comply with this Act in accordance with applicable law.~~

§ 213. Severability

If any provision of ~~this Act~~the NBOA or any rule or regulation adopted hereto is found invalid, the remainder of this Act and of the rules and regulations adopted hereto shall not be affected thereby.

§ 214~~210. Effective Date~~

The effective date of ~~this Act~~the NBOA shall be the date of its approval by the Navajo Nation Council.

§ 215~~§ 211. Periodic Review and Amendments~~

~~This Act~~The Navajo Nation Council may be amended ~~the NBOA~~ from time to time only by ~~the Navajo Nation Council~~ upon the recommendation of the ~~Economic~~Resources and Development Committee.

* * * *

SECTION FIVE. CODIFICATION

The provisions of this Act that amend or adopt new sections of the Navajo Nation Procurement Act and the Navajo Nation Business Opportunity Act, as set forth in the Navajo Nation Code, shall be codified by the Office of Legislative Counsel. The Office of Legislative Counsel shall arrange for the incorporation of all such provisions in the next codification of the Navajo Nation Code.

SECTION SIX. SAVING CLAUSE

If any portion of this Act is determined invalid by the Navajo Nation Supreme Court, or by a District Court of the Navajo Nation without appeal to the Navajo Nation Supreme Court, the remainder of this Act shall remain the law of the Navajo Nation.

SECTION SEVEN. EFFECTIVE DATE

The provisions of this Act shall become effective in accordance with 2 N.N.C. § 221(B).

CERTIFICATION

I, hereby, certify that the foregoing resolution was duly considered by the 25th Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona), at which a quorum was present and that the same was passed by a vote of 17 in Favor, and 00 Opposed, on this 16th day of October 2023.



Honorable Crystalyne Curley, Speaker
25th Navajo Nation Council

10/26/2023

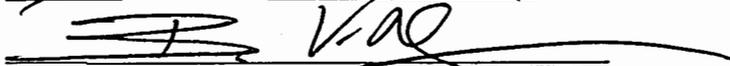
DATE

Motion: Honorable Seth Damon
Second: Honorable Andy Nez

Speaker Crystalyne Curley not voting

ACTION BY THE NAVAJO NATION PRESIDENT:

1. I, hereby, sign into law the foregoing legislation, pursuant to 2 N.N.C. § 1005 (C)(10), on this 3 day of NOVEMBER, 2023.



Buu Nygren, President
Navajo Nation

2. I, hereby, veto the foregoing legislation, pursuant to 2 N.N.C. § 1005 (C)(11), on this _____ day of _____, 2023 for the reason(s) expressed in the attached letter to the Speaker.

Buu Nygren, President
Navajo Nation

3. I, hereby, exercise line-item veto pursuant to the budget line-item veto authority delegated to the President by vote of the Navajo People in 2009, on this _____ day of _____, 2023.

Buu Nygren, President
Navajo Nation

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Subchapter 1. General Provisions

§ 301. Short title

This Act shall be known and cited as the Procurement Act.

§ 302. Purposes, Rules of construction

- A. Interpretation. This Procurement Act shall be interpreted and applied in a manner that promotes its underlying purposes and policies.

- B. Purposes and Policies. The underlying purposes and policies of this Procurement Act are:
 - 1. to simplify, clarify, and modernize the law governing Procurement by the Navajo Nation;
 - 2. to foster effective broad-based competition consistent with the purposes and provisions of Navajo Nation laws, as may be amended from time to time, including, but not limited to the following: the Navajo Nation Business Opportunity Act (“NBOA”), 5 N.N.C. §§ 201 *et seq.*, the Navajo Business and Procurement Act, 12 N.N.C. §§ 1501 *et seq.*, and the Navajo Nation Ethics in Government Law, 2 N.N.C. §§ 3741 *et seq.*;
 - 3. to permit the continued development of Procurement policies and practices;
 - 4. to provide for consistency, quality, and integrity in all Navajo Nation Procurement;
 - 5. to provide for increased public confidence in all Navajo Nation Procurement;
 - 6. to ensure the fair and equitable treatment of all Persons who engage with the Navajo Nation Procurement system; and
 - 7. To provide increased economy in all Navajo Nation Procurement and to maximize to the fullest extent practicable the purchasing value of Public Funds of the Navajo Nation.

§ 303. Ethics in Procurement and reporting of Anti-Competitive practices

- A. Good Faith Participation. This Procurement Act requires all Parties involved in the negotiation, performance, or administration of all Navajo Nation Procurement and Contracts to act in good faith and in compliance with Navajo Nation laws.

- B. Void for Collusion or other Anti-Competitive Practices. In the event the Department of Justice determines that Collusion or other Anti-Competitive Practices have occurred, the Procuring Employee in consultation with the Department of Justice (or the Office of Legislative Counsel if the Procuring Party is the Legislative Branch) may void any Procurement or Contract.

§ 304. Application of this Procurement Act

- A. General Application. This Procurement Act applies only to Contracts solicited or entered into after the effective date of this Procurement Act unless the Parties agree to its application to a Contract solicited or entered into prior to the effective date.
- B. Application to all Navajo Nation Procurement. This Procurement Act shall apply to every expenditure of Public Funds, irrespective of source, by the Navajo Nation acting through a Procuring Party under any Contract. Nothing in this Procurement Act or its Procurement Regulations shall prevent any Procuring Party from complying with the terms and conditions of any Grant, gift, bequest, or other agreement that requires compliance with procurement laws of another jurisdiction. This Procurement Act shall not apply to Local Governance Act (“LGA”), 26 N.N.C. §§ 1 *et seq.*, governance certified Chapters that are governed by their respective Procurement policies.
- C. Exceptions of this Procurement Act. This Procurement Act shall not apply to the following agreements or types of Procurement:
 - 1. selection of expert witnesses for litigation on behalf of the Navajo Nation, as selected by the Attorney General;
 - 2. agreements between the Navajo Nation and any federal, state, and local governments, including prime contracts and Grants, for the provision of governmental Services to Navajos and other Persons within the Navajo Nation unless specifically required by the agreement; and
 - 3. procurements for permits, licenses, or leases of real estate including appurtenant rights.

§ 305. Severability

If any provision of this Procurement Act is held invalid, such invalidity shall not affect other provisions or the application of this Procurement Act which can be given effect without the invalid provision or application; and to this end, the provisions of this Procurement Act are declared to be severable.

§ 306. Construction against implicit repealer

Since this Procurement Act is a general act, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction of the subsequent legislation can be reasonably avoided.

§ 307. Effective date

This Procurement Act shall become effective pursuant to 2 N.N.C. § 164(A)(17).

§ 308. Definitions

- A. The words used in this Procurement Act shall have their ordinary meanings unless:
 - 1. the context in which they are used clearly requires a different meaning; or
 - 2. a different definition is provided for in a particular provision.

- B. “Aggrieved Person” means any Offeror or Contractor who is aggrieved in connection with a Solicitation or award of a Contract; or any Person who is aggrieved in connection with a debarment or suspension decision.

- C. “Anti-Competitive Practice” means an act that harms, prevents, restricts, or distorts competition for a Procurement, or Contract opportunity, whether by fraudulent action or action taken in bad faith.

- D. “Bid” means an Offer to perform a Contract for the provision of Goods, and any attendant Services, at a specified price in response to the requirements contained in an Invitation for Bids.

- E. “Business” means any legal entity, including but not limited to a corporation, limited liability company, company, partnership, individual, sole proprietorship, joint venture, or non-profit entities.

- F. “Change Order” means a written order directing the Contractor to make changes in the Scope of Work, term, or price in a Construction, architect, engineer, or land surveyor Contract only as authorized by the Contract. A Change Order is a Contract Modification.

- G. “Collusion” means an arrangement between two or more Persons designed to achieve an Anti-Competitive Practice, including to improperly influence the actions of another Person.

- H. “Conflict of Interest” means the reasonable foreseeability that any personal or economic interest of a Public Official, or Employee, will be affected in any materially different manner than the interest of the general public, by any decision, enactment, agreement, award, or other official action or function of any governmental body the Navajo Nation.

- I. “Construction” means the process of building, altering, repairing, improving, installing, renovating, or demolishing any structure or building, or other improvements of any kind to any real property. It does not include the activities necessary to sustain routine operation, routine repair, or routine maintenance of existing structures, buildings, or other improvements to any real property.

- J. “Contract” means all types of Navajo Nation agreements, regardless of what they may be called, for the procurement of Goods, Services, or Construction, unless it is the type of agreement excluded in Section 304(C) of this Procurement Act.
- K. “Contractor” means any Person, including Vendors, having a procurement Contract with a Division, Department, Office, or Program of the Navajo Nation.
- L. “Data” means recorded information, regardless of form or characteristic.
- M. “Designee” means an individual who is an appropriately authorized representative acting within the limits of approved authority.
- N. “Division, Department, Office, or Program of the Navajo Nation” means any Department, Commission, Council, Board, Bureau, Committee, Institution, Legislative Body, Agency, Government Corporation, non-LGA governance certified Chapter, or other establishment or Public Official of the Executive, Legislative, or Judicial Branch of the Navajo Nation government. It does not mean an LGA governance certified Chapter, an Enterprise, or an Authority of the Navajo Nation.
- O. “Emergency” means a need, following an unexpected occurrence or occasion, that requires immediate action to protect the public health, welfare, or safety of the Navajo Nation or its property.
- P. “Employee” means an individual compensated by a Division, Department, Office, or Program of the Navajo Nation, whether elected, appointed, or not, and any uncompensated individual performing Services for any Division, Department, Office, or Program of the Navajo Nation.
- Q. “Goods” means all property, tangible or intangible, which includes but is not limited to supplies, products, equipment, materials, printing, software, and insurance.
- R. “Grant” means the receipt or provision of any assistance, financial or otherwise, under a program authorized by Navajo Nation, state, or federal law; private; or philanthropic sources. It does not include an award with the primary purpose of procuring an end product, whether in the form of Goods, Services, or Construction; a Contract resulting from such an award is not a Grant but a Procurement Contract.
- S. “Invitation for Bids” (“ITB”) means a Solicitation issued by a Procuring Party seeking Offers where the Offer providing the lowest price serves as the basis for the award, so long as that Offeror is Responsible and Responsive.

- V. “Maximum Feasible Price” (“MFP”) means the estimated cost of the Goods, Services, or Construction to be solicited. The Maximum Feasible Price establishes the maximum amount of funds the Procuring Party is willing to expend on the Procurement and restricts the total purchase price for which a Procurement may be made. Regardless of Procurement method utilized, the Maximum Feasible Price shall be established prior to issuing any Solicitation and shall not be shared publicly.
- W. “May” denotes the permissive and shall apply if the defined term is not capitalized.
- X. “Modification” means any written document that amends the original Contract by mutual action and is signed by the Parties to the Contract.
- Y. “Offer Security” means a Bid bond or deposit submitted with an Offer to guarantee to the Procuring Party that the Offeror, if awarded the Contract, will execute the Contract within a specified period of time and will furnish any bonds or other requirements of the Solicitation. Offer Security shall only be required in Construction Procurement.
- Z. “Offeror” means the Person who provides a timely, written response to a Solicitation.
- AA. “Party” or “Parties” means the Contractor and Procuring Party of a Procurement Contract as it pertains to this Procurement Act.
- BB. “Person” means any Business, union, committee, club, other organization, or group of individuals.
- CC. “Procurement” means buying, purchasing, renting, leasing, or otherwise acquiring any Goods, Services, or Construction, unless such purchase is excluded from coverage by this Procurement Act or by some other provision of Navajo Nation law. It also includes all functions pertaining to the acquisition of any such Goods, Services, or Construction.
- DD. “Procuring Employee” means an Employee for a Division, Department, Office, or Program of the Navajo Nation who is responsible for procuring Goods, Services, or Construction for a Division, Department, Office, or Program of the Navajo Nation.
- EE. “Procuring Party” means any Division, Department, Office, or Program of the Navajo Nation that is subject to the Procurement Act or its implementing Procurement Regulations. The head of the Procuring Party may delegate completion of required actions under this Procurement Act and Procurement Regulations to the Procuring Employee, unless

authorization or signature is required. Such actions shall be made by the head or authorized Designee of the Procuring Party.

- FF. “Proposal” means an offer to perform a Contract for the provision of Services, and any attendant Goods, or Construction, in response to the requirements contained in a Request for Proposals.
- GG. “Public Funds” means all funds as provided in 12 N.N.C. § 810(S).
- HH. “Public Notice” means Publication in a manner by which a Solicitation is made available to the general public.
- II. “Publication” means, for the purposes of this Procurement Act, any commonly utilized or easily accessible report, article, educational material, handbook, brochure, pamphlet, press release, public service announcement, web page, audio or visual material, or other communication for public dissemination.
- JJ. “Public Official” means a Public Official as defined in the Navajo Nation Ethics in Government Law, 2 N.N.C. § 3743 (S).
- KK. “Purchase Description” means the words used in a Solicitation to describe the Goods, Services or Construction to be procured, which includes any Specifications or Scope of Work.
- LL. “Purchasing Manager” means the person, or authorized Designee, of the Purchasing Services Department within the Office of the Controller who is responsible for administering Procurement for the Navajo Nation.
- MM. “Procurement Regulations” means the regulations adopted by the Budget and Finance Committee to govern the Procurement of Goods, Services, or Construction by a Procuring Party.
- NN. “Request for Proposals” (“RFP”) means a Solicitation issued by a Procuring Party seeking Offers where the award is based on meeting stated evaluation factors, which includes price.
- OO. “Request for Statement of Qualifications” (“RSQ”) means a Solicitation issued by a Procuring Party for the purpose of soliciting information from Persons as to their qualifications and capability to provide Goods or Services where award is based on contracting with the highest qualified Offeror at a fair and reasonable cost.

PP. “Responsible Offeror” means a Person who has the capability in all respects to perform fully the Contract requirements noted in the Solicitation, and the integrity and reliability that will assure good faith performance.

QQ. “Responsive Offeror” means a Person who has submitted an Offer that conforms in all material respects to the requirements of the respective Solicitation for which it is submitted.

RR. “Scope of Work” means the terms describing the Goods to be provided or the Services to be performed. The Scope of Work should be a part of the Purchase Description and include, but is not limited to, any milestones, reports, deliverables, and end products expected from the Contractor in addition to a time line.

SS. “Services” means the furnishing of labor, time, or effort by a Contractor, not involving the delivery of Goods other than those incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.

TT. “Shall” denotes the imperative and shall apply if the defined term is not capitalized.

UU. “Solicitation” means the process of issuing written document(s), whether attached or incorporated by reference, to obtain information or pricing from an Offeror. Solicitations are issued in the form of an Invitation for Bids, Request for Proposal, Request for Statement of Qualification, or when seeking Quotations utilizing one of the following Procurement methods: Small Purchase, Micro-Purchase, Emergency, Direct Source, or Solo Source Procurement.

VV. “Statement of Qualifications” means an Offer to perform a Contract for the provision of Services that describes the qualifications and capabilities of the Offeror in response to the requirements contained in a Request for Statement of Qualifications.

WW. “Quotation” or “Quote” means an Offer to perform a Contract that provides the cost for Goods, Services, or Construction in response to a Solicitation, such as a Small, Micro-, Emergency, Direct, or Solo Procurement.

XX. “Vendor” means a dealer, distributor, merchant, or other seller providing Goods, Services, or Construction. A prospective or actual Offeror or Contractor may be a Vendor.

§ 309. Public access to Procurement information

Procurement information shall be available to the public to the extent provided by the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. §§ 81 *et seq.*

§ 310. Collection of data concerning public Procurement

The Purchasing Manager shall cooperate with the Office of the Controller in the preparation of statistical Data concerning the Procurement, usage, and disposition of all Goods, Services, and Construction. The Office of the Controller shall employ such trained personnel as may be necessary to carry out this function. A Procuring Party shall furnish such reports as the Purchasing Manager, or authorized Designee, may require concerning usage, needs, and stocks on hand. The Purchasing Manager, or authorized Designee, shall have the authority to prescribe forms to be used by a Procuring Party when making requisitions, orders, and reports regarding of Goods, Services, and Construction, unless otherwise provided for in law or regulation.

§ 311. Retention of Procurement records

All Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules provided for in the Procurement Regulations. Inspection of all retained documents shall be governed by the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. §§ 81 *et seq.*

Subchapter 2. Regulations Required by this Act

§ 320. Navajo Nation Procurement Regulations

- A. The Budget and Finance Committee of the Navajo Nation Council shall adopt Procurement Regulations within one (1) year of the passage of this Act.
 1. These Procurement Regulations shall be developed by the Department of Justice and the Purchasing Department of the Office of the Controller in consultation with the Business Regulatory Department of the Division of Economic Development and the Office of Legislative Counsel.
 2. The adopted Procurement Regulations should be evaluated for potential revision at least every two (2) years. Such Procurement Regulations shall be consistent with the provisions of the NBOA, 5 N.N.C. §§ 201 *et seq.*
- B. The Budget and Finance Committee shall not delegate its power to promulgate Procurement Regulations.
- C. No Procurement Regulation shall change any commitment, right, or obligation of the Navajo Nation or of a Contractor under a Contract already in existence on the effective date of such Procurement Regulation.

Subchapter 3. Prerequisites to Solicitation

§ 330. Procurement file

The Procuring Party shall create a Procurement file that shall document the life of the Procurement from pre-Solicitation activities through the expiration of any Contract or later in time warranties. Updating and storage of the Procurement file is the responsibility of the Procuring Party, including when submitting through a software program for review. A Procurement file is not a public record.

Procurement File

§ 331. Prerequisites to Solicitation

Prior to issuing a Solicitation, the Procuring Party shall document the below actions in the Procurement file, as is applicable to the Procurement method utilized:

- A. completion of research related to the Goods, Services, or Construction sought such that the Procuring Party is able to articulate the general details expected for a Contract of this type, including but not limited to cost, scope, potentials delays, and necessary time for completion;
- B. evidence of estimated project costs based on the Procuring Party's research into other similar projects, past work experience, and other expertise;
- C. documentation of the established the Maximum Feasible Price, including the relevant funding sources;
- D. a fully developed Purchase Description, including a Scope of Work and any Specifications, any project expectations related to expected quality of the Goods or Services, project completion, and delivery;
- E. submission of the Solicitation to the Risk Management Department to determine any required insurance coverage, if determined necessary; and
- F. documentation of established evaluation criteria and scoring system for assessment of all Offers received in response to the Solicitation.

§ 332. Cancellation of Solicitations

A Solicitation may be cancelled, or any or all Offers may be rejected in whole or in part, when it is in the best interests of the Navajo Nation. The reasons for the cancellation shall be made part of the Project file.

Subchapter 4. Methods of Source Selection: Non-Construction

§ 340. Allowed Procurement methods

- A. Except as otherwise authorized by law, all Contracts shall be awarded utilizing the procedures and criteria for the below source selection methods according to the standards established for each:
 - 1. Competitive Sealed Bidding, pursuant to 12 N.N.C. § 341;
 - 2. Competitive Sealed Proposals, pursuant to 12 N.N.C. § 342;
 - 3. Competitive Selection for Professional Services, pursuant to 12 N.N.C. § 343;
 - 4. Small Purchases Procurement, pursuant to 12 N.N.C. § 344;
 - 5. Micro-Purchase Procurement, pursuant to 12 N.N.C. § 345;
 - 6. Emergency Procurement, pursuant to 12 N.N.C. § 346;
 - 7. Direct Source Procurement, pursuant to 12 N.N.C. § 347;
 - 8. Solo Source Procurement, pursuant to 12 N.N.C. § 348; and
 - 9. Construction Services Procurement, pursuant to 12 N.N.C. § 350.

§ 341. Public Notice.

- A. The Procuring Party shall give Public Notice of the Solicitation lasting a reasonable period, as is appropriate for the Goods, Services, or Construction sought. The Public notice period shall run from the time of first Publication to the deadline for submission of Offers.
- B. Public Notice shall be made via Publication in a manner that provides notice the Navajo Nation and the general public.
- C. The Business Regulatory Department of the Division of Economic Development shall maintain an internet website that is the official Navajo Nation Procurement Solicitation webpage providing Offerors with Public Notice of Solicitations and other relevant information about Navajo Nation Procurements. The Procuring Party may determine when it is in the best interest of the Navajo Nation to publish a Solicitation via this web page.

§ 342. Competitive sealed bidding

- A. Competitive Sealed Bidding shall be utilized when selecting an offer relies on the lowest price as the determinative factor for the Procurement.
- B. Invitation for Bids. The Procuring Party shall issue an Invitation for Bids with a Purchase Description describing the project in detail, the selection process, and all submission requirements, including at minimum deadlines, Offeror NBOA Priority status, project scope, duration, minimum qualifications, mandatory service standards, and any required warranties.

- C. **Public Notice.** Public Notice of the Invitation for Bids shall be given, at a minimum, as required in 12 N.N.C. § 341 (Public Notice).
- D. **Bid Acceptance.** The Procuring Party shall ensure Bids are unconditionally accepted without alteration or correction and kept protected from review, except as authorized by the NBOA, this Section, or the Procurement Regulations.
- E. **Bid Correction, Modification, or Withdrawal.** Prior to the date and time set for the Bid opening, Offerors may correct, modify, or withdraw a Bid by providing the Procuring Party a written notice of the correction, Modification, or withdrawal according to the procedure identified in the Solicitation or the Procurement Regulations.
1. After the start of a Bid opening, Offerors shall not correct or modify their Bid in a manner prejudicial to fair competition or the interest of the Navajo Nation.
 2. Correction or withdrawal of inadvertently erroneous Bids before or after award, or cancellation of awards or Contracts based on such Bid mistakes, shall be permitted in accordance with the Procurement Regulations.
- F. **Bid Opening.** Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the Invitation for Bids. The name of each Offeror, amount of each Bid, and such other relevant information required by the Procurement Regulations shall be recorded. Bids opening shall occur pursuant to the procedure established in the NBOA and the Procurement Regulations.
- G. **Bid Evaluation.** The Procuring Party shall evaluate a Bid solely on the requirements and criteria established in the Invitation for Bids with the lowest Responsive price as the determinative factor for award.
- H. **Award.**
1. The Procuring Party shall issue, in writing, notice of the award of the Procurement Contract with reasonable promptness, to the lowest Responsible and Responsive Offeror. A Copy of this notice shall be maintained in the Procurement file.
 2. In the event all Responsible and Responsive Bids exceed the established Maximum Feasible Price, the Procuring Party may negotiate and enter into a Contract with a low Responsible and Responsive Offeror if:
 - a. the original price of the selected Responsible and Responsive Bid does not exceed the Maximum Feasible Price by more than ten percent (10%);
 - b. the negotiations result in a reduction of price or Scop of Work, which may include changes in the Bid requirements, in order to bring the Bid price within the Maximum Feasible Price; and

- c. the negotiations are carried out according to procedures established in the Procurement Regulations.
- I. Multi-Step Sealed Bidding. When the Procuring Party determines it is impractical to initially prepare a purchase description to support an award based on price, it may issue an Invitation for Bids first requesting the submission of unpriced Offers to be followed by a second Invitation for Bids limited to those Offerors whose offers were qualified under the criteria set forth in the first Solicitation.

§ 343. Competitive sealed proposals

- A. Competitive Sealed Proposals shall be utilized when the Procuring Party determines that the selection of the most advantageous offer requires the evaluation of multiple qualifying factors in which price is one of the evaluated factors.
- B. Request for Proposals. The Procuring Party shall issue a Request for Proposals, which shall include a Purchase Description, all contractual terms and conditions, and set forth the criteria to be used in evaluating the Proposal submissions from Offerors. The Purchase Descriptions, terms and conditions, and Specifications for Services and any attendant Goods shall not be unduly restrictive.
- C. Establishing Evaluation Factors. In addition to the pre-Solicitation requirements of 12 N.N.C. § 331, prior to issuing a Request for Proposal, the Procuring Party shall:
 - 1. prepare the factors by which it will evaluate Proposals submitted in response to the Solicitation;
 - 2. prepare the standards by which the Procuring Party will determine acceptability of quality, workmanship, delivery, and suitability for a particular purpose of the final work product;
 - 3. specify in writing a scoring system specific to the standards established in the Request for Proposals for rating each submitted Proposal; and
 - 4. Include all abovementioned factors, standards, and scoring system in the Request for Proposal.
- D. Public Notice. Public Notice of the Solicitation shall be given, at a minimum, as provided in 12 N.N.C. § 341 (Public Notice).
- E. Proposal Acceptance. The Procuring Party shall ensure Offers are unconditionally accepted without alteration or correction and kept protected from review, except as authorized by the NBOA, this Section, or the Procurement Regulations.

- F. **Proposal Correction, Modification, or Withdrawal.** Prior to the date and time set for the Proposal opening, Offerors may correct, modify, or withdraw an Offer by providing the Procuring Party a written notice of the correction, Modification, or withdrawal according to the procedure identified in the Solicitation or the Procurement Regulations, subject to any requirements established in the Procurement Regulations.
1. After the start of an Offer opening, Offerors shall not correct or modify their Offer in a manner prejudicial to fair competition or the interest of the Navajo Nation.
 2. Correction or withdrawal of inadvertently erroneous Offers before or after award, or cancellation of awards or Contracts based on such mistakes, shall be permitted in accordance with the Procurement Regulations.
- G. **Opening of Proposals.** Proposals shall be opened in a manner that avoids disclosure of contents to competing Offerors during the process of evaluation and any necessary negotiation. Proposal opening shall occur pursuant to the procedures established in the NBOA and the Procurement Regulations.
- H. **Evaluation and Award.**
1. The Procuring Party shall issue, in writing, notice of award of the Procurement Contract, with reasonable promptness, to the Responsible and Responsive Offeror whose Proposal is determined to be the most advantageous to the Navajo Nation after considering the evaluation factors established in the Request for Proposals and the Maximum Feasible Price. The Procuring Party may only evaluate factors or criteria established in the Request for Proposal. The notice of award shall be maintained in the Procurement File.
 2. In the event all Responsible and Responsive Proposals exceed the Maximum Feasible Price, the Procuring Party may negotiate and enter into a Contract with a lowest Responsible and Responsive Offeror if:
 - a. the original price of the Responsible and Responsive Proposal selected does not exceed the Maximum Feasible Price by more than ten percent (10%);
 - b. the negotiations result in a reduction of price or Scope of Work, which may include changes in the Proposal requirements in order to bring the Proposal price within the Maximum Feasible Price; and
 - c. the negotiations are carried out according to procedures established in the Procurement Regulations.
 3. **Discussion with Responsible Offerors and Revisions to Proposals.** As provided in the Request for Proposals, and according to standards set in the Procurement Regulations, the Procuring Party may conduct discussions with Responsible Offerors who submit Proposals, and the Procuring Party determines it reasonably likely to be selected for award, for the purpose of clarification of any issues in the Proposal to assure the Offeror's full understanding of, and responsiveness to, the Solicitation requirements.

§ 344. Competitive selection for professional services

- A. Competitive Selection of Professional Services shall be utilized when the Procuring Party determines that the selection of the most advantageous Contractor for the Navajo Nation requires the evaluation of multiple qualifying factors in which price is not one of the evaluated factors for award, but that the final agreed upon compensation after Contractor selection shall be fair and reasonable.

- B. When procuring professional Services, the Procuring Party shall issue Request for Statements of Qualifications according to the procedures established in 12 N.N.C. § 343 (Competitive Sealed Proposals), in addition to the requirements of this Section.

- C. Professional Services includes the architects, engineers, dentists, physician, land surveyors, attorneys, accountants, trainers or workforce education specialists, and other professional positions requiring specific expertise, certification, or licensing not otherwise addressed in this Procurement Act and as may be further explained in the Procurement Regulations.

- D. Any Procuring Party may procure professional Services, except for the Services of attorneys or tribal court advocates. Only the Attorney General of the Navajo Nation may procure Contracts for the Services of outside attorneys and tribal court advocates. This includes Contracts for attorneys representing LGA governance certified Chapters; however, the LGA governance certified Chapters shall follow their Procurement policies for the Procurement of an attorney, whose final selection and Contract award shall be reviewed and approved by the Attorney General.

- E. The Procuring Party shall award a Contract, in writing, to the best qualified Offeror based on the evaluation factors established in the Request for Statement of Qualification and after filing a written determination in the Procurement File explaining the reason the compensation is fair and reasonable.

- F. The award to a Contractor shall be made pursuant to the provisions of this Section and any further requirements set forth in the Procurement Regulations. If an Offeror includes a separate cost proposal in a submitted Statement of Qualifications when not required, the Procuring Party may not open or evaluate the cost proposal, but may evaluate the Offer only. If selected, the Procuring Party may require the Offeror honor the pricing provided in the originally submitted cost proposal.

§ 345. Small purchases Procurement

Applicability. The Procuring Party may make any Procurement costing no less than the amount established for a Micro-Purchase in the Procurement Regulations and not exceeding the amount

established for a Small Purchase in the Procurement Regulations. Such Procurement shall be made according to the procedures established in the Procurement Regulations, provided that no Procurement shall be artificially divided in such a manner to create multiple Small Purchases under this Section. The Procuring Party shall give NBOA Priority Businesses preference in Small Purchases Procurements.

§ 346 Micro-purchases Procurement

- A. Applicability. The Procuring Party may make any Procurement not exceeding the amount established in the Procurement Regulations, provided that no Procurement shall be artificially divided in such a manner that it constitutes multiple Micro-Purchases under this Section. The Procuring Party shall give NBOA Priority Businesses preference in Micro-Purchases Procurements.
- B. Micro-Purchases may be awarded without competitive selection if the Procuring Party considers the price to be reasonable based on research, experience, purchase history, or other information as provided in the Procurement Regulations. Such details and information shall be documented in the Procurement File.

§ 347. Emergency procurement

- A. A Procuring Party may award a Contract without competitive selection when an Emergency exists, under the requirements of this Section, according to the procedure set forth in the Procurement Regulations. If no procedure exists, the Procuring Party may adhere to the Direct Source Procurement procedure.
- B. An Emergency Procurement shall be limited to only the Goods, Services, or Construction necessary to fulfill the immediate need created by the present Emergency.
- C. Emergency Procurement shall be made utilizing competitive selection and preference for NBOA Priority certified Businesses as is practicable based on the circumstances.

§ 348. Direct source procurement

- A. A Procuring Party may award a Contract for Goods, Services, or Construction without competitive selection when, regardless of price, the Procuring Party, in concert with the Department of Justice (or the Office of Legislative Counsel for Procurements by the Legislative Branch) determines in writing that either:
 - 1. prior attempt(s) at Procurement through competitive selection methods yielded no Offers, only Offers in excess of the Maximum Feasible Price, or otherwise did not result in a Procurement award or Contract;

2. the project relates to the selection of a utility provider where the selected provider is the sole utility provider in the respective area or when the Navajo Tribal Utility Authority is the preferred provider in the respective area; or
 3. the Contractor has direct knowledge of or past experience with the particular project, such as being the original Contractor on an unfinished project and that it would be in the best interest of the Navajo Nation to award a Contract to the original Contractor in order to continue and finish the project.
- B. The Department of Justice (or the Office of Legislative Counsel for Procurements by the Legislative Branch) shall determine, and may consult with the Purchasing Manager, whether directly sourcing to a single Vendor or to a limited number of Vendors is the appropriate selection method according to the reasoning the Procuring Party provides.
- C. The written determination, reasoning for such, approval for the determination, and selection of the Contractor shall be included in the Procurement File.
- D. Direct Source selection shall be made utilizing competitive selection and preference for NBOA Priority certified Businesses as is practicable based on the circumstances.
- E. The Procuring Party shall only use Direct Source Procurement when no alternative Procurement method is feasible or when it is in the best interest of the Navajo Nation.

§ 349. Solo source Procurement

- A. A Procuring Party may award a Contract for Goods, Services, or Construction without competitive selection and according to procedures established in the Procurement Regulations when, regardless of price, the Procuring Party, with consent of a representative of the Department of Justice (or the Office of Legislative Counsel for Procurements by the Legislative Branch) and concurrence of the Purchasing Manager determines in writing that:
1. there is only one source available; and
 2. no reasonable alternative exists to meet the intended purpose of the Contract.
- B. The written determination, reasoning, and the selection of the particular Contractor shall be maintained in the Procurement File.
- C. The Procuring Party shall only utilize Solo Source Procurement when no reasonable alternative source exists. If a generic or other equivalent option is available for the Goods, Services, or Construction sought, then the Procuring Party shall utilize competitive selection methods as allowed under this Procurement Act.

- D. Procurement for Goods, Services, or Construction utilizing patents, trade secrets, or similar intellectual property protections where only one Vendor is capable of providing the Goods, Services, or Construction sought are subject to Solo Source Procurement, provided that a generic or other equivalent option is not available.

Subchapter 5. Methods of Source Selection: Construction Services

§ 350. Construction Procurement

- A. The default procedural method for Construction Procurement shall be that of Competitive Sealed Proposals; however, the Procuring Party may utilize other Procurement methods if the requirements for such methods are met, except that no Construction shall be procured through Competitive Sealed Bidding.
- B. This subchapter provides additional requirements for Construction Procurements to which the Procuring Party must adhere no matter the Procurement method used. The Procurement Regulations shall provide additional guidance for Construction Procurement.

§ 351. Responsibility for selecting methods of Construction management

- A. The Budget and Finance Committee shall include in the Procurement Regulations as many methods of project delivery, Contract type, and Construction management as it may determine feasible. The Procurement Regulations shall also:
 - 1. grant the discretion to select the appropriate method of project delivery and Construction contract management for a particular project to the Procuring Party responsible for carrying out the Construction project; and
 - 2. require the Procuring Party include in the Request for Proposal or Quotation the type of project delivery method and Construction management it expects to utilize for the project.

§ 352. Required Construction security and bonding

- A. Offer Security. Offer Security shall be required for all Construction Procurements when the price estimated by the Procuring Party will exceed the amount established in the Procurement Regulation.
 - 1. The Procurement Regulations shall provide for any acceptable forms of the Offer Security.
 - 2. Any Offer submitted that does not comply with the Offer Security requirements shall be rejected unless, pursuant to the Procurement Regulations, the Procuring Party determines that the Offer failures to comply is insubstantial.
 - 3. If an Offeror withdraws its Proposal before the Procuring Party awards the Contract, no action shall be taken against the Offeror or the Offer Security.

← Old § 341
PDA is missing

- B. **Performance and Payment Bonding.** When a Construction Contract is awarded in excess of the amount established in the Procurement Regulations, the Contractor shall deliver a performance and payment bond to the Navajo Nation, which shall become binding on the Parties upon the execution of the Contract and extend for the entire duration of the Contract, including Modifications.
1. The bonds shall be provided such that they are:
 - a. a performance bond satisfactory to the Navajo Nation in an amount equal to one hundred percent (100%) of the total purchase price specified in the Contract; and
 - b. a payment bond satisfactory to the Navajo Nation for the protection of all Persons supplying labor and material to the Contractor or its subcontractors for the payment of the work performed pursuant to the Contract. The bond shall be in an amount equal to one hundred percent (100%) of the total purchase price specified in the Contract.
 2. The Procurement Regulations shall provide for the acceptable form of the performance and payment bonds required by this Procurement Act.
 3. **Reduction of Bond Amounts.** The Procurement Regulations may authorize the Procuring Party to reduce the amount of performance and payment bonds to fifty percent (50%) of the total purchase price for each bond.
- C. **Authority to Require Additional Bonds and Security.** Nothing in this Section shall be construed to limit the authority of the Navajo Nation to require a bond or other security in addition to those bonds or security, or in circumstances other than those specified in 12 N.N.C. § 352(A)-(B).

Subchapter 6. Contract Formation, Administration

§ 360. Uniform Contract clauses and Contract administration

- A. **Contract Clauses.**
1. All Contract clauses shall be consistent with the provisions of this Procurement Act and the Procurement Regulations issued pursuant to this Chapter. Contracts shall include all clauses necessary to ensure the Navajo Nation's interests are addressed and protected.
 2. A provision requiring any litigation, arbitration, or other dispute resolution proceeding arising from the Contract be conducted in any state is against the Navajo Nation's public policy and is void and unenforceable.
 3. The Procurement Regulations shall require the inclusion of clauses addressing, as applicable: dispute resolution; choice of law; appropriate remedies; price adjustments; time of performance; differing site conditions; Contract Modification, changes in the Scope of Work and quantities of work; suspension of work; termination of Contracts; inspection, audit, recordkeeping requirements; statutory requirements; and other Contract provisions as appropriate.

- B. Price Adjustments. Adjustments of Contract price shall be permitted by mutual agreement of the parties in writing.
- C. Appropriate Remedies. The Procurement Regulations may include, but are not limited to only clauses providing for appropriate remedies covering the following subjects:
1. liquidated damages;
 2. specified excuses for delay or nonperformance;
 3. termination of the Contract for default of the Contractor; and
 4. termination of the Contract in whole or in part for the convenience of the Navajo Nation or due to unavailability of Navajo Nation funds.
- D. Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods. When funds are not appropriated or otherwise made available to support continuing performance for a Contract in a subsequent fiscal period, the Contract shall be terminated and the Contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred to that date, but not amortized in the price of the Goods, Services, or Construction delivered under the Contract. The cost of termination may be paid from any appropriations available for such purposes.
- E. Contract Approval and Administration. In addition to any other statutory review requirements, prior to final execution and regardless of Procurement Method utilized, all Contracts shall be reviewed and approved by the head or Director (or authorized Designee) of the following:
1. the Division, Department, Office, or Program of the Navajo Nation from where the Contract originates;
 2. the Office of the Controller for documents related to the finances of the Contract;
 3. the Director of the Office of Management and Budget for documents related to a financial impact on the Navajo Nation; and
 4. the Department of Justice for legal sufficiency of the Contract, the Procurement, and the Procurement File.
- F. Purchase Orders Excluded from Review. The Procurement Regulation may establish review and authorization procedures independent of to this Section for the final approval and execution of Purchase Orders, provided that any utilized form or version of a Purchase Order receives approval from the Department of Justice.

§ 361. Contract termination, expiration, and resumption

- A. Termination. When a Procuring Party terminates a Contract for the Contractor's default, that Contractor shall not be eligible to complete the work unless decided otherwise by the

Procuring Party in consultation with the Department of Justice. A Contractor may be eligible to complete the work if the Navajo Nation terminated the Contract for reasons other than default.

- B. Resumption of expired Contracts. When a Contract expires through no fault of the Contractor and the Scope of Work is not complete, the Procuring Party and the Contractor may enter into a Modification of the original Contract to extend the Contract term to complete the Scope of Work. The Procuring Party and the Contract shall initiate the Modification within nine (9) months of the original Contract's expiration without amendment to the Scope of Work or total Contract price. This Subsection does not supersede the Navajo Nation preferred practice to extend the term of a Contract by Modification prior to its expiration to ensure continuous work performance.

§ 362. Types of Contracts

Subject to the limitations of this Subchapter, any type of Contract promotes the best interests of the Navajo Nation may be used; except that the use of a cost-plus-a-percentage-of-cost Contract is prohibited.

§ 363. Multi-term and multi-source Contracts

- A. Unless otherwise provided by law, a Contract may be entered into for any period of time deemed to be in the best interests of the Navajo Nation, based on the considerations enumerated in the Procurement Regulations.
 - 1. The term of the Contract and conditions to meet for renewal or extension, if any, shall be included in the Solicitation.
 - 2. A multi-term Contract shall only be entered into if funds are available to fully fund the first fiscal period or the first project phase of the Contract at the time of contracting. Payment and performance obligations for succeeding fiscal periods or phases shall be subject to the availability and appropriation of additional funds. If funds are not appropriated or otherwise made available to support continuation of Contract performance, the Navajo Nation shall terminate the Contract.

- B. Indefinite Delivery Indefinite Quantity Contracts. A Procuring Party may procure indefinite delivery indefinite quantity Contracts for multiple projects and Contractors under a single Solicitation, provided that the total amount of the multiple Contracts and all renewals for a single Contractor do not exceed the price and term limit, including increases and extensions, established in the Solicitation.

§ 364. Reimbursement Cost principles regulations required

The Procurement Regulations may establish reimbursement cost principles that set the maximum limits of incurred costs under Contract reimbursement provisions.

§ 365. Protesting Solicitations and awards

- A. Right to Protest. Any Offeror or Contractor aggrieved in connection with the Solicitation or award of a Contract may protest such grievance in writing to the Procuring Party within fourteen (14) days after the Aggrieved Person knows or should have known of the facts giving rise to the reason for the protest according to procedures provided by the Procurement Regulations.

- B. Authority to Resolve Protests. The Procuring Party, with the approval of the Department of Justice, shall have the authority to investigate, resolve, and make a determination regarding a timely protest from an Aggrieved Person in accordance with requirements of the Procurement Regulations.

§ 366. Debarment or suspension

- A. Authority. The Office of the Controller, with concurrence from the Department of Justice, shall have the authority to debar or suspend for cause a Person from contracting with or otherwise receiving a business opportunity from the Navajo Nation pursuant to the conditions and procedures established in the Procurement Regulations. The Office of the Controller shall issue a written decision of debarment or suspension, including length of such, to the Person under investigation.

- B. Debarment or Suspension for Cause. The causes for debarment or suspension shall include the following and are applicable to a Person in their present form or any other identifiable capacity:
 - 1. conviction in any jurisdiction for commission of a criminal offense incident to obtaining or attempting to obtain a public or private Contract or subcontract, or in the performance of such Contract or subcontract;
 - 2. conviction in any jurisdiction for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a Navajo Nation Contractor;
 - 3. conviction under any antitrust statute arising out of the submission of Offers;
 - 4. violation of Contract provisions of such a character that the Office of the Controller, with concurrence from the Department of Justice, determines to be so serious as to justify debarment or a suspension action, such as the below:
 - a. deliberate failure, without good cause, to perform in accordance with the Purchase Description or within the time limit provided in the Contract; or
 - b. a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more Contracts, provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the Contractor

- shall not be considered as a basis for debarment or suspension;
5. ineligibility to conduct business with the Navajo Nation under the NBOA;
 6. submission of bad Offers in which the Procuring Party determines that the Offeror has submitted Offers lower than the expected price, or overstated its qualifications, with the intent to conduct the Services or provide the Goods; and
 7. any other cause provided in Procurement Regulations or which the Office of the Controller, with the approval of the Attorney General, determines to be so serious and compelling as to affect Responsibility as a Navajo Nation Contractor, including debarment or suspension by another government.
- C. Debarment and Suspension List. The Office of the Controller shall maintain, on a publicly available website, a list of all debarred and suspended Persons, including the date on which the action expires. The Office of the Controller shall update this list monthly, except that at the time the Office of the Controller issues a written notice of debarment or suspension, it shall add the Person debarred or suspended to the list.
- D. Right to Protest. Any Aggrieved Person in connection with being debarred or suspended may protest such action in writing to the Business Regulatory Department within thirty (30) days of the date of the written notice of debarment or suspension according to procedures established in the Procurement Regulations.
- E. Authority to Resolve Protests. The Business Regulatory Department shall have the authority to investigate and make a determination regarding the protest in accordance with requirements of the Procurement Regulations.

§ 367. Rejection of Offer or termination of Contract by debarred or suspended Person

The Procuring Party shall, at the time of Offer acceptance and prior to Contract execution, review the list of debarred or suspended Persons to determine whether the Offeror, in its present or any other identifiable capacity is listed. If that Person is listed and currently debarred or suspended, the Procuring Party shall immediately, in writing, reject any Offer submitted without review or terminate the award.

§ 368. Administrative review

The Office of Hearings and Appeals shall have the jurisdiction to hear and decide appeals of protest decisions under this Procurement Act and its Procurement Regulations.

§ 369. Scope of administrative review & presumed finality of decisions

- A. The Office of Hearings and Appeals shall have jurisdiction to review and determine de novo:

1. any protest of a Solicitation or award of a Contract by an Aggrieved Person;
 2. any protest of a debarment or suspension by the Aggrieved Person; and
 3. any appeal by an Aggrieved Person from a determination by the Procuring Party related to actions in 12 N.N.C. § 365 or by the Office of the Controller or Business Regulatory Department related to actions in 12 N.N.C. § 366.
- B. Time Limitation on Filing an Appeal. The Aggrieved Person shall file an appeal within twenty (20) calendar days of the receipt of a decision.
- C. Decision. The Office of Hearing and Appeals shall make a determination based on the preponderance of the evidence on the issue of whether the actions of the Procuring Party, Office of the Controller, or the Business Regulatory Department were consistent with the provisions of this Procurement Act and the Procurement Regulations. The Solicitation or award of a Contract or determination to debar or suspend a Person shall be upheld unless it is shown by a preponderance of the evidence that the actions of the Procuring Party, Office of the Controller, or Business Regulatory Department violated a specific provision of this Procurement Act or the Procurement Regulations.
- D. Presumed Finality of Decisions. Determinations by the Office of Hearings and Appeals shall be final and conclusive.

Subchapter 7. Compliance with Requirements of Another Jurisdiction

§ 370. Compliance with federal, state, county, municipal, or other source requirements

Where a Procurement involves use of external assistance or funds, and where the agreement requires compliance with Procurement laws of another jurisdiction, the Navajo Nation shall comply with only the mandatorily applicable laws of the jurisdiction. If the agreement allows for choice of Procurement law and regulations between the two jurisdictions, this Procurement Act and its Procurement Regulations shall apply unless the Procurement Regulations provide for a specific instance when external funding Procurement law and regulation may be utilized.

Subchapter 8. Amendment

§380. Amendments

This Procurement Act may be amended by the Navajo Nation Council.

1. Chapter 2. Navajo Nation Business Opportunity Act**§ 201 Title; Findings; Purpose****§ 202 Definitions****§ 203 Jurisdiction; Application; Compliance requirements; and Violations****§ 204 Implementation; Specific Duties and Responsibilities****§ 205 Contracting Preference Priorities; Certification Requirements****§ 206 Procedures in Procurement****§ 207 Monitoring; Enforcement****§ 208 Appeals****§ 209 Severability****§ 210 Effective Date****§ 211 Periodic Review and Amendments****§ 201. Title; Findings; Purpose**

- A. This Act shall be known and cited as the Navajo Nation Business Opportunity Act (“NBOA”).
- B. Whereas the Navajo Nation Council finds:
 1. The Navajo Nation suffers from one of the highest unemployment rates in the United States;
 2. -The Navajo Nation’s sovereign status is directly related to its ability and authority to regulate all commercial activities within the Navajo Nation, including those of non-Native Americans and non-member Native Americans. In addition, the Treaty of 1868 between the Navajo Nation and the United States recognizes the inherent authority of the Navajo Nation to exclude non-Native Americans from the Navajo Nation. Pursuant to this authority, engaging in business within the Navajo Nation is a privilege granted by the Navajo Nation and is subject to such conditions as the Navajo Nation may require, subject to applicable federal law. The privilege of entering into the Navajo Nation for the purpose of engaging in business is therefore conditioned upon, among other things, compliance with this Act; and
 3. -The Navajo Nation has the sovereign authority to regulate all entities and business activity within the Navajo Nation, including non-profit businesses and organizations, to promote economic growth and protect the welfare of the Navajo Nation and its people.
- C. The purpose of the NBOA is to:
 1. Promote the economic self-sufficiency of the Navajo people by granting “first opportunity” and contracting preference in contracting to Navajo and-Native American owned and operated businesses;
 2. Promote competitive bidding and contracting opportunities among Navajo businesses;
 3. Develop a dynamic and self-sustaining private sector on the Navajo Nation;
 4. Increase Navajo-business and employment opportunities for the Navajo people;

5. Provide priority business certification to Businesses;
 6. Regulate the procurement of those engaging in business within the Navajo Nation in order to protect and promote the economic security and welfare of the Navajo Nation; and
 7. Grant first opportunity and contracting preference to qualified Navajo-owned or Native American-owned businesses for all contracts, subcontracts, grants, and subgrants issued by public, private, and non-profit entities within the Navajo Nation.
- D. It is not the intent of the NBOA to require the Navajo Nation or any other public, private, or non-profit entities to contract with non-qualified Navajo businesses.
 - E. The provisions of the NBOA should be liberally interpreted to promote economic development and the growth of Navajo-owned businesses within the Navajo Nation.
 - F. Only the Navajo Nation Council, through a valid resolution, shall waive the requirements of the NBOA.

§ 202. Definitions

Terms not defined in the NBOA that are defined in the Navajo Nation Procurement Act shall have the meanings in those definitions. For all purposes of the NBOA, the following definitions shall be applicable:

- A. “Bid” means an offer to perform a Contract for the provision of Goods and any attendant Services at a specified price.
- B. “Bid/Proposal/Statement of Qualifications Shopping” means a practice involving the communication with Business prior to or after a Bid/Proposal/Statement of Qualifications opening, that results in an unfair advantage or opportunity being provided to that Business.
- C. “Broker” means buyers and sellers of goods and services including agents/negotiators between buyer and seller, who do not have custody of property or will not personally perform the contract to provide the goods or services.
- D.- “Business” means any entity, including but not limited to a sole proprietorship, partnership, limited liability company, corporation, joint venture, or non-profit.
- E. “Business Regulatory Department” means what is stated in the Division of Economic Development Plan of Operations.
- F. “Dealer” means one who buys to sell for resale, not one who buys to keep, or makes to sell.
- G.-“Division, department, office, or program of the Navajo Nation” means any Department, Commission, Council, Board, Bureau, Committee, Institution, Legislative Body, Agency, Government Corporation, non-Local Governance Act certified Chapter, or other establishment or Public Official of the Executive, Legislative, or Judicial Branch of the Navajo Nation government. It does not mean a Local Governance Act (“LGA”), 26 N.N.C. §§ 1 *et seq.* governance certified

Chapter, an Enterprise, or an Authority of the Navajo Nation.

- H. “Established Business” means a Business engaged in activities with ownership, custody, and control of an existing adequate inventory or providing professional services.
- I. “Front” means an Business having or claiming to have fifty-one percent (51%) or more Navajo or other Native American ownership, but without the Navajo or other Native American owner(s) actually owning and controlling the Business. Control is demonstrated by the Navajo or other Indian Native American owner(s) actively exercising a major role in decision-making for any of the following: day-to-day operations, profit-sharing, and/or actual management control.
- J. “Native American” means an Indian as the term is used and defined in Title 25 of the Code of Federal Regulations.
- K. “Navajo” means a person who is an enrolled member of the Navajo Nation.
- L. “Navajo Nation” means what is stated in 7 N.N.C. §254.
- M. “Maximum Feasible Price” means the estimated cost of the Goods, Services, or Construction being solicited. This Maximum Feasible Price establishes the maximum amount of funds the Procuring Party is willing to expend on the Procurement, and restricts the total purchase price for which a Procurement can be made. Regardless of Procurement method utilized, the Maximum Feasible Price shall be established prior to issuing any Solicitation and shall not be shared publicly.
- N. “Modification” means any written document that amends the original Contract by mutual action of the Parties to the Contract.
- O. “Non-profit” means an entity that is formed for purposes other than generating profit, such as beneficial or charitable purposes, and in which no part of the organization's income is distributed to its members, directors, or officers.
- P. “Offeror” means the Business who responds to a Solicitation for the Procurement of any Goods, Services, or Construction. Solicitations are issued in the form of an Invitation for Bids, Request for Proposal, or Request for Statement of Qualification, but shall also include requests for Quotations for Small Purchase, Micro-Purchase, Emergency, Direct Source, or Solo Source Procurement.
- Q. “Other Native American” means an Native American other than Navajo who is an enrolled member of a federally recognized Native American Tribe within the United States.
- R. “Owned and Controlled” means having at least fifty-one percent (51%) or more ownership of any Business, provided that such ownership shall consist of active participation in decision-making, a role in operations, profit-sharing and actual management control. For a non-profit entity, this shall mean having at least fifty-one percent (51%) or more of the management and control over the organization's mission and operations.

- S. “Prime Contractor” means a Business that undertakes, offers to undertake, or purports to have the capacity to undertake contracting of a project for a specified price and is authorized and responsible for the management, coordination, completion, supervision, and/or subcontracting for the contracted project.
- T.—“Party” or “Parties” means the Contractor and Procuring Party of a Procurement Contract as it pertains to this Procurement Act.
- U. “Procuring Party” means any Division, Department, Office, or Program of the Navajo Nation that is subject to the Procurement Act or its implementing Procurement Regulations.
- V. “Proposal” means the document(s) submitted by an Offeror in response to requirements contained in a Request for Proposals.
- W. “Private” means a privately-owned Business with operations on the Navajo Nation, including corporations which are wholly-owned by the Navajo Nation, and does not include non-profit entities since these types of organizations cannot be owned.
- X. “Public” means a Division, department, office, or program of the Navajo Nation. It also includes any LGA governance certified Chapters of the Navajo Nation, or an Enterprise or Authority.
- Y. “Request for Proposals” means a Solicitation issued by the Procuring Party for Offers where the award is based on evaluation factors beyond price.
- Z. “Responsible Offeror” means a Business who has the capability in all respects to perform fully the Contract requirements noted in the Solicitation, and the integrity and reliability that will assure good faith performance.
- AA. “Responsive Offeror” means a Person who has submitted a Bid, Proposal, Statement of Qualification, or Quotation that conforms in all material respects to the requirements of the respective Solicitation.
- BB. “Request for Statement of Qualifications” means a Solicitation issued by a Procuring Party for the purpose of soliciting information from Persons as to their qualifications and capability to provide Goods or Services.
- CC. “Solicitation” means the process of issuing written document(s), whether attached or incorporated by reference, to obtain information or pricing from an Offeror. This includes an Invitation to Bid, Request for Proposal, Request for Statement of Qualification, and any request for a Quotation.
- DD. “Statement of Qualifications” means the document(s) submitted by an Offeror that describes the qualifications and capabilities of the Offeror in response to a Request for Statement of Qualifications.
- EE. “Subcontractor” means a Business who receives a contract ~~is let by the~~ from a prime contractor or its’ subcontractor for materials, equipment, transportation, and/or other goods and services on

that prime contract.

§ 203. Jurisdiction; Application; Compliance Requirements; and Violations

- A. General jurisdiction. The Navajo Nation has the inherent sovereign authority to authorize and regulate activities of Businesses-within the jurisdiction of the Navajo Nation.
- B. Application. Unless otherwise provided for herein, this Act shall apply to all public, private, and non-profit entities engaging in business on the Navajo Nation when procuring goods and/or services. The NBOA shall apply on a limited basis to all procurement contracts less than \$100,000. For purchases under \$100,000, the Procuring Parties must provide evidence they utilized the most recent source list during the procurement process. If the Procuring Party is unable to select a vendor from the source list, the Procuring Party must provide a written statement as to why.
- C. Inapplicability. The NBOA shall not apply to the negotiation, execution, award, transfer, assignment, or approval of business site leases, homesite leases, office space leases, shopping center leases, mineral or non-mineral leases, subleases, permits, and licenses. The NBOA shall not apply to activities of private persons who contract for goods or services for their individual use or benefit.
- D. Native American Preference. To the fullest extent possible, the NBOA and its rules and regulations shall be construed in accordance with applicable federal Native American preference laws and regulations. Specifically, any self-determination contract or portion of a self-determination contract intended to benefit the Navajo Nation, the NBOA and any other applicable tribal employment or contract preference laws shall govern with respect to the administration of the contract or portion of the contract in accordance with the Native American Self-Determination and Education Assistance Act, 25 U.S.C § 450 *et seq.* If federal or state-funded contracts specifically provide for the application of Native American preference rather than Navajo preference, the Procuring Party shall attempt to negotiate with such party in order to apply the provisions of this Act. In the event federal or state law expressly precludes the application of, then Native American preference laws shall be applied and shall not constitute a violation of the NBOA.
- E. Federal Aviation Administration Grants. Notwithstanding any other provision herein, the NBOA shall not apply to Navajo Nation procurement contracts or subcontracts that are to be paid with federal funds provided by the Federal Aviation Administration, whether such funds are provided via loans or grants, and whether such funds are provided on a reimbursement basis or up-front payment basis.
- F. Prohibited Activity. Any person who ~~authorizes, or~~ knowingly or recklessly omits, authorizes, falsifies, or otherwise misrepresents any fact or matter material to any determination required by the NBOA, shall be subject to all applicable sanctions and penalties provided under the NBOA, its regulations, and any other applicable laws or regulations of the Navajo Nation.
- G. Bid/Proposal/Statement of Qualifications shopping. Bid/Proposal/Statement of Qualifications Shopping shall be prohibited. Any person who engages in such action shall be subject to all

applicable sanctions and penalties provided under the NBOA, its regulations, and any other applicable laws or regulations of the Navajo Nation.

- H. Fronts. Fronts are prohibited. Any person who engages in such action shall be subject to all applicable sanctions and penalties provided under the NBOA, its regulations, and any other applicable laws or regulations of the Navajo Nation.
- I. Conflicts of Interest. No official or employee of the Navajo Nation government shall promote, approve, or participate in any matter pending before the BRD, in which such official or employee, or any member of his or her immediate family, has an economic or other special interest pursuant to the Navajo Nation Ethics in Government Law. The failure or refusal of such official or employee to abstain from such participation, shall render void any approval or action taken by BRD in which such official or employee participated, to the extent such action is favorable to the Business. The official or employee in conflict shall be subject to all applicable sanctions and penalties provided by law.

§ 204. Implementation; Specific Duties and Responsibilities

- A. Resource Development Committee. The Resource Development Committee of the Navajo Nation Council shall have the responsibility and authority to review, amend, modify, and approve rules and regulations for implementation of the NBOA.
- B.- Division of Economic Development. The Division of Economic Development of the Navajo Nation shall be responsible for administering, enforcing, and implementing the NBOA.
- C. Business Regulatory Department. The Business Regulatory Department (BRD) within the Division of Economic Development, shall be responsible for:
 - 1. Determine the nature, composition, qualification, and preference certification of all Businesses;
 - 2. Developing and maintaining a certification program to determine the appropriate certification priority of Business.
 - 3. Promulgating rules and regulations to implement the NBOA.
 - 4. Publishing, maintaining, and making available approved rules and regulations, guidelines, and forms including provisions of the NBOA to ensure that all entities, and the Navajo people, are kept fully informed of all current laws, rules, regulations, and procedures for compliance.
 - 5. Regularly reviewing such rules and regulations in coordination with other Navajo Nation entities and agencies for applicability to economic and market conditions and their relevance to the interests of the Navajo people, the Navajo Nation, and the purpose of the NBOA.
 - 6. Enforcing compliance with the NBOA and the rules and regulations adopted hereto.
 - 7. Requiring applicability of the NBOA to any proposed contract, subcontract, or other

transaction to be performed within the Navajo Nation by or on behalf of the Navajo Nation, as part of required clearance procedures, or prior to approval by the appropriate authority. Public, private, and non-profit entities shall implement their own clearance procedures that they shall make available to BRD upon request.

8. Reviewing solicitation documents as needed and appropriate to comply with the NBOA.
9. Coordinating efforts with federal agencies that require Native American preference or maximum utilization of minority businesses.
10. Maintaining and publishing a current Source List of all certified Priority 1 and 2 Businesses. The Source List shall be a resource for Procuring Parties, which are required to identify and seek Offers from all available Navajo and other Native American-owned Businesses operating in the respective category of commerce for the contract-letting. Inclusion of a Business on such a Source List in no way speaks to the capability of or certifies that the Business is qualified to perform the work in the category in which it is listed.
11. Providing, in accordance with its responsibilities, capabilities, and available resources, in coordination with those of other responsible and appropriate Navajo Nation departments and entities, such community, governmental, and business sector educational programs, information, and advice as may be necessary and appropriate, to the continued understanding and awareness by such entities of the policies, objectives, and current procedural requirements for compliance with all provisions of the NBOA and the current rules and regulations adopted hereunder.
12. Recommend disciplinary action for Navajo Nation employees or officials found to be in violation or noncompliance with the NBOA pursuant to the applicable Executive, Judicial, or Legislative Navajo Nation Personnel Policies Manual, or the Ethics in Government Law.

§ 205. Contracting Preference Priorities; Certification Requirements

- A. Business Preference Priorities. The Navajo Nation shall certify all Businesses pursuant to the following Navajo Business Opportunity Priority classification:
 1. Priority 1. Certification shall be granted to any one hundred percent (100%) Navajo owned and controlled Business.
 2. Priority 2. Certification shall be granted to any:
 - i. Fifty-one percent (51%) to ninety-nine percent (99%) Navajo owned and controlled Business;
 - ii. Fifty-one percent (51%) to one hundred percent (100%) other Native American owned and controlled Business;
 - iii. Any one hundred percent (100%) Navajo Nation owned and controlled economic enterprise;
 - iv. Fifty-one percent (51%) to ninety-nine percent (99%) Navajo or other Native American owned and controlled partnership;
 - v. Fifty-one percent (51%) to ninety-nine percent (99%) Navajo or other Native American

- owned and controlled joint venture; or
- vi. Any non-profit that is eligible in accordance with § 205(B).
- B. **Non-Profit Certification.** To receive a Navajo Business Opportunity Priority certification (“Priority Certification”), the Non-profit must have at least fifty-one percent (51%) Navajo or other Native American control and management of the Non-profit organization's mission and operations, which may include the Non-profit’s officers and board of directors and key management positions, such as the executive director.
- C. **Obtaining a Priority Certification and Required Compliance.** To receive a Priority Certification under NBOA, the Business must satisfactorily demonstrate that it meets the requirements of § 205(A)(1) or (2) and must be in compliance with the Navajo Business Opportunity Act 12 N.N.C. §§ 1501 *et seq.*
- D. **Renew, suspend, and decertify certifications.** In order to maintain Priority certification eligibility, Businesses must renew the certification on an annual basis. Businesses must timely submit information and documentation on percentage of ownership and organization structure as required. Renewals shall be reviewed for new information changes in organization and/or operations that may materially affect the eligibility for preference priority certification. Renewals will be denied if required information is not provided in a timely manner.
- E. **Confidentiality.** All information submitted for the purpose of obtaining priority certification information shall be kept confidential and shall not be disclosed except as necessary in a proceeding under ~~this Act and the~~ NBOA or other applicable laws.
- F. **Appeal of Priority Certification Determination.** Any Business denied a priority classification may appeal the determination pursuant to § 207 of the Act.

§ 206. Procedures in Procurement

- A. **Initial Determination of Maximum Feasible Price by Procuring Party.** The determination of the Maximum Feasible Price shall be made by the Procuring Party prior to the Solicitation. The Maximum Feasible Price may take into account market price, budgetary constraints, prototype cost, and evidence of estimated project costs based on the Procuring Party’s research into other similar projects, past work experience, and other expertise. The Maximum Feasible Price may not be revealed until the award of the contract. Documentation of the Maximum Feasible Price and how it was determined must be retained by Procuring Party.
- B. **Notice to the Business Regulatory Department.** Prior to Offer openings, the Procuring Party shall provide to the Business Regulatory Department:
1. A copy of the Solicitation, including the date and manner the notice was publicized; and
 2. A list of all Businesses notified, including the dates and manner of such notices.
- C. **Bid Opening Procedures and Requirements.** The following procedures shall be used at bid

openings for Invitations for Bid:

1. All bids submitted by Priority 1 Offerors shall be opened first.
2. Only Bids submitted by Responsive Offerors shall be considered.
3. The award shall be made to the Priority 1 Responsive and Responsible Offeror with the lowest price, provided the price does not exceed the Maximum Feasible Price.
4. If there is no Priority 1 Responsive and Responsible Offeror with a price less than or equal to the Maximum Feasible Price, then the bids of the Priority 2 Offerors shall be opened. An award shall be given to the Priority 2 Responsive and Responsible Offeror with the lowest price, provided it does not exceed the Maximum Feasible Price.
5. If no Priority 1 or Priority 2 Responsive and Responsible Offeror is given an award, the Procuring Party may then be open all other bids, subject to the same specifications and Maximum Feasible Price.
6. Any modifications of the specifications, or Maximum Feasible Price made subsequent to the opening, and that does not result in a contract award, shall be re-procured.
7. Notwithstanding any provision of the NBOA, in the event that federal law prohibits preference as provided the NBOA or prohibits negotiations with an Offeror other than the Offeror with the lowest bid or price offer, the initial opening shall include all Priority 1 and 2 Businesses; and award shall be made to the Offeror the lowest Responsive price, provided that it is less than or equal to the Maximum Feasible Price.

D. Proposal/Statement of Qualification Opening Procedures and Requirements. The following procedures shall be used at openings for Request for Proposals and Request for Statements of Qualifications:

1. All Proposals or Statements of Qualifications submitted by Priority 1 Offerors shall be opened first.
2. For Request for Proposals, the Procuring Party shall evaluate each Proposal against the criteria published in the Request for Proposal. Price may be one of the factors in the criteria but it cannot be the determinative factor for award.
3. For Request for Qualifications, the Procuring Party shall evaluate each Statement of Qualifications against the criteria published in the Request for Qualifications. Price may not be one of the factors in the criteria evaluated for award.
4. An award shall be given to the most Responsible and Responsive Priority 1 Offeror, provided it is less than or equal to the Maximum Feasible Price.
5. If there is no Priority 1 Responsive and Responsible Offeror with a price less than or equal to the Maximum Feasible Price, then the Proposals or Statements of Qualifications of the Priority 2 Offerors shall be opened. An award shall be given to the most Responsible and Responsive

Priority 2 Offeror, provided it is less than or equal to the Maximum Feasible Price.

6. If no Responsible and Responsive Offeror Priority 1 or Priority 2 Offeror is entitled to award, then the Procuring Party may then be open all other Proposals or Statements of Qualifications, subject to the same criteria and Maximum Feasible Price.
 7. The award shall be made to the non-Priority Responsible and Responsive Offeror, provided the responsive price does not exceed the Maximum Feasible Price.
 8. Any modifications of the criteria or Maximum Feasible Price made subsequent to the opening, and which does not result in a contract award, shall be re-procured.
 9. Proposals or Statements of Qualifications submitted by an Offeror deemed non-responsive shall not be considered.
- E. Subcontracting Requirements. After the award, Prime Contractors shall submit to the BRD a subcontracting plan listing the following:
1. Subcontractors and suppliers to be used by the prime contractor;
 2. Procedures used in selecting subcontractors and suppliers; and
 3. Subcontractors or lease agreements for equipment to be used in performance of the contract.
- F. Prior Approval of Modifications. Any contract modification that results in a price exceeding twenty percent (20%) of the original contract amount, and/or that substantially modifies the contract's scope of work, shall be subject to review and approval by the BRD to ensure that such modifications are not contrary to the purposes or other provisions of NBOA.
- G. Required Adherence to Priority Certification. Procuring Parties shall not award contracts to non-Navajo owned and controlled entities at a price equal to or greater than the price offered by an equally Priority 1 or 2 Responsible and Responsive Offeror.

§ 207. Monitoring; Enforcement

- A. Navajo Nation Review and Approval Process. All proposed professional services, procurement, and construction contracts shall be reviewed by BRD for compliance with the NBOA.
- B. Procedure For Investigating Alleged Violation of NBOA:
1. Upon receipt of a written complaint alleging a violation of the NBOA, the BRD shall conduct an investigation. A written complaint can only be submitted by a party whose interests have been directly impacted by the alleged violation. BRD shall keep a record of any witness statements produced as a result of the investigation.
 2. Once the investigation is complete, the BRD shall prepare a written summary of facts

constituting the alleged violation.

3. If a violation is found, BRD shall initially seek voluntary compliance and appropriate remedial action from the violating party.
4. If voluntary compliance or remediation is not possible, or if no violation is found, BRD shall render a written decision and provide a copy of the decision to the complaining and the violating party.
5. A decision by BRD may be appealed pursuant to § 208 of this Act. Appeals shall not include matters that are determined through an investigation conducted under § 207(B) of this Act to be private contractual disputes between parties.

C. Interim Project Suspension; Temporary Restraining Orders; and Permanent Injunctive Relief from Navajo Nation Court.

1. In the event of a violation of or noncompliance with the NBOA presenting a probability of continuing material and irreparable harm which is greater than the harm from suspension of performance, the Division Director of the Division of Economic Development shall, with assistance from the Navajo Nation Department of Justice, on behalf of the threatened interests of the Navajo Nation and of innocent third parties, immediately apply to the District Court of the Navajo Nation for a temporary restraining order and an order to show cause why permanent injunctive relief should not be granted (including orders to permanently cease and desist such performance as determined appropriate) according to the Navajo Nation Rules of Appellate Procedure.
2. If a Navajo Nation Court orders suspension of performance, the Division of Economic Development shall take immediate remedial action as authorized by said Court to prevent or minimize material harm and damage to innocent third parties and to the interests of the Navajo Nation resulting or likely to result from such suspension of performance.

D. Certification Denials.

1. If a Business is denied priority certification, the Business can submit a written complaint to the Department Manager of the BRD for administrative resolution within 10 days of the date of the written adverse decision. The written complaint shall:
 - i. Identify the Business that was denied certification;
 - ii. Provide a short statement indicating the nature and circumstances of the denial;
 - iii. State the basis for the appeal; and
 - iv. State the remedial action being sought by the party.
2. The Department Manager shall have ten (10) days from the receipt of the written complaint to respond.
3. Once a response is received, or if no response is received, the complaining party may file an appeal with the Office of Hearings and Appeals within ten (10) days.

§ 208. Appeals

- A. Appeals to the Hearing Officer. A party disputing a decision made by BRD pursuant to § 207 can file an appeal with the Office of Hearing and Appeals.
1. The hearing officer shall hear the appeal within thirty (30) days of receipt of the notice of appeal.
 2. Upon mutual agreement with the appealing party, time extensions in increments of not more than fifteen (15) days may be granted.
 3. Notice shall be provided to the parties at least ten 10 days in advance of hearing date.
 4. Each party at the hearing may be represented by legal counsel and shall have the opportunity to subpoena witnesses and documents, present evidence, and examine witnesses.
 5. After the hearing each party shall have ten 10 days to submit in writing proposed findings of facts and conclusions of law. The hearing officer may uphold or reverse the appealed decision(s) or any part thereof, but may not grant any other relief.
 6. The hearing officer shall issue written findings of facts and conclusions of law that shall state the decision and grounds thereof.
- B. The Administrative Hearing Officer may impose any and all of the following sanctions for violation of the NBOA or the rules and regulations lawfully promulgated hereunder:
1. Civil monetary fines not to exceed five hundred dollars (\$500.00) per day, per violation.
 2. Suspension or termination of a party's authorization to engage in business activity on the Navajo Nation; provided that the party shall be given a reasonable time to remove its equipment and other property it may have on the Navajo Nation and to take such measures to facilitate the satisfaction or assumption of any contractual obligations it has.
 3. Prohibit the party from engaging in future business activity on the Navajo Nation for a specific period or permanently, pursuant to applicable laws of the Navajo Nation.
 4. Require the party to make such changes in its performance, organization, or operations to comply with the NBOA.
 5. Impose other sanctions as appropriate to ensure compliance and to remedy any harm or damages from violation of the NBOA pursuant to applicable laws.
 6. Recommend corrective or remedial action to the President of the Navajo Nation, the Navajo Nation Council, or the appropriate standing committee for Navajo Nation entities in violation or noncompliance with the NBOA.
- C. Appeals to the Courts. The decision of the hearing officer may be appealed by the party adversely affected to the Navajo Nation Supreme Court pursuant to the Navajo Nation Rules of Civil Appellate Procedure. The court shall review the decision of the hearing officer and the administrative record only. The decision shall not be subject to de novo review on appeal. The

court may substitute its judgment on those questions of law within its special competence but shall otherwise uphold the decision of the hearing officer where reasonable.

§ 209. Severability

The NBOA or any rule or regulation adopted hereto is found invalid, the remainder of this Act and of the rules and regulations adopted hereto shall not be affected thereby.

§ 210. Effective Date

The effective date of the NBOA shall be the date of its approval by the Navajo Nation Council.

§ 211. Periodic Review and Amendments

The Navajo Nation Council may amend the NBOA from time to time only upon recommendation of the Resources and Development Committee.

NAVAJO NATION

Navajo Nation Council Fall Session

10/16/2023

01:39:20 PM

Amd# to Amd#
MOT Damon, S
SEC Nez, A

Consent Agenda: Legislations
0231-23, 0158-23, 0203-23,
0232-23, and 0230-23

PASSED

Yeas : 17

Nays : 0

Excused : 4

Not Voting : 2

Yea : 17

Arviso, S
Aseret, L
Begay, H
Charles-Newton, E
Claw, S

Damon, S
Daniels, H
Jesus, B
Johnson, C

Nez, A
Nez, R
Simonson, G
Simpson, D

Slater, C
Tolth, G
Yanito, C
Yazzie, C

Nay : 0

Excused : 4

James, V

Crotty, A

Tso, O

Notah, N

Not Voting : 2

Parrish, S

Begay, N

Presiding Speaker: Curley, C