



ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Senior Procurement Executives of DOE and NNSA. It is intended for use by procurement professionals of DOE and NNSA, primarily Contracting Officers, and other officials of DOE and NNSA that are involved in the acquisition process. Other parties are welcome to its information, but definitive interpretations of its effect on contracts, and related procedures if any, may only be made by DOE and NNSA Contracting Officers.

Subject: Implementation of Indian Energy Preference Provision in EAct 2005

References:

Energy Policy Act of 2005	Pub. L. No. 109-58, codified at 25 U.S.C. § 3502(d)
Secretarial Decision Memo of 5/3/11	DOE Policy on Indian Energy Purchase Preference
Secretarial Policy Guidance Memo of 12/4/12	DOE Procurement Policy Guidance -- Purchase of Electricity, Energy Products and Energy By-Products from Indian Tribes
FAR 9.104-1	General Standards for Responsible Prospective Contractors
FAR 6.302-5(a) (2)	Exception to Full and Open Competition -- Authorized or required by statute
41 U.S.C. § 3101 et seq.	Competition in contracting
40 U.S.C. 501	Limits length of contracts for utility services to ten (10) years.
40 U.S.C. 591	Requires all Federal Agencies to purchase electricity in compliance with State and local laws.
FAR 41	Acquisition of Utility Services

When Is this Acquisition Letter (AL) Effective?

This AL is effective immediately upon issuance.

When Does this AL Expire?

This AL remains in effect until superseded or canceled.

Who Is the Intended Audience For this AL?

Department of Energy (DOE) Contracting Officers who purchase renewable energy, renewable energy products or by-products are the audience for this AL.

Who Is the Point of Contact For this AL?

Contracting Officers may contact Jason Taylor of the Contracts and Financial Assistance Policy Division, Office of Policy, Office of Acquisition and Project Management by phone at (202) 287-1945 or by email at Jason.Taylor@hq.doe.gov.

Pursuant to DOE Order 436.1, all contracts for the purchase of utility services including renewable energy must be reviewed and concurred upon by the Federal Energy Management Program (FEMP). Contact Tracy Logan (202) 586-9973, tracy.logan@ee.doe.gov and David McAndrew (202) 586-7722, david.mcandrew@ee.doe.gov for expert technical advice in developing your utility acquisition plan.

Need More Information on ALs?

Visit the website at <http://energy.gov/management/office-management/operational-management/procurement-and-acquisition/guidance-procurement> for information on Acquisition Letters and other policy issues.

What Is the Purpose Of this AL?

The purpose of this AL is to provide guidance to Contracting Officers on the statutory authority to limit competition to qualified Indian tribes and tribal-majority owned organizations for the purchase of renewable energy, renewable energy products, and renewable energy by-products (as defined below).

What Types of Contracts Are Affected by this AL?

All new contracts for the purchase of energy produced by renewable resources, renewable energy products, and renewable energy by-products. For the purposes of this AL, renewable energy is limited to energy generated by the resources defined in the Energy Policy Act of 2005, section 203, which includes: wind, solar, geothermal, bioenergy, and incremental hydropower. Renewable energy products include, but are not limited to, renewable fuel or feed sources, such as woody biomass and biofuels. Renewable energy by-products include, but are not limited to, the environmental attributes generated by renewable energy and sold in organized markets; renewable energy credits (RECs) and greenhouse gas credits (GHGCs).

Preference can only be given to a tribe or an energy and resource production enterprise, partnership, consortium, corporation, or other type of business organization, in which one or more Indian tribes owns and controls at least a 51 percent ownership interest. 25 U.S.C. § 3502(d)(1). The degree of Indian ownership of an organization shall be at least 51 percent during the period covered by the contract entered into under the authority of 25 U.S.C. § 3502(d).

The term “Indian Tribe” means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 USCS §§ 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. § 3501(4)(A); 25 U.S.C. § 450b(e)).

What Is the Background Of this AL?

The Energy Policy Act of 2005 (EPAcT 2005), Pub. L. No. 109-58, amended Title XXVI of the Energy Policy Act of 1992 (EPAcT 1992), Pub. L. No. 102-486 to authorize a federal agency or department to provide preference to qualified Indian owned organizations for the purpose of purchasing electricity, or other energy products or byproducts. (25 U.S.C. 3502(d)) Section 2602(d)(2) of EPAcT 1992, as amended, provides that in carrying out this preference, the agency or department shall not pay more than the prevailing market price or obtain less than prevailing market terms and conditions. (25 U.S.C. 3502(d) (2))

On May 4, 2011, Secretary Chu approved a Decision Memorandum to develop policy guidance for the Department to implement this procurement preference provision. In his Decision Memorandum the Secretary determined that the Department's policy would focus on preference for the purchase of energy produced by renewable resources, renewable energy products, and renewable energy by-products. The memorandum defined these terms as follows:

For purposes of this guidance, renewable resources mean: wind, solar, geothermal, bioenergy, and incremental hydropower. Renewable energy products include, but are not limited to, renewable fuel or feed sources, such as woody biomass and biofuels. Renewable energy by-products include, but are not limited to, the environmental attributes generated by renewable energy and sold in organized markets; renewable energy credits (RECs) and greenhouse gas credits (GHGs).

What Guidance is Included in this AL?

Statutory and Regulatory Considerations

This preference provision must also be read in conjunction with other statutory and regulatory requirements for the purchase of electricity, energy products, and energy by-products, including, but not limited to:

- 40 U.S.C. § 591 (may not purchase electricity in a manner inconsistent with state law)
- 40 U.S.C § 501 (statutory maximum 10-year contract length)
- 41 U.S.C. § 3101 et seq. (competition in contracting)
- FAR Part 41 (acquisition of utility services)

Indian Preference Provision and the Competition in Contracting Act

The Office of General Counsel has opined that the Indian preference provision of EPAcT 1992 contains the necessary language to permit the use of the CICA exception at FAR 6.302-5, because it provides for procurement procedures "otherwise expressly authorized by statute." Therefore, when purchasing renewable energy or other renewable energy products or byproducts, Contracting

Officers may limit competition to Indian owned organizations as defined in § 2602(d) (1)¹. In so doing, the Contracting Officer should provide a reasonable opportunity for any entity in the statutorily defined list to participate by publishing the synopsis and solicitation on FedBizOpps. The synopsis should indicate that the acquisition is limited to those sources identified in § 2602(d)(1) of EPOA 1992. Contracting Officers must remember that the use of FAR 6.302-5 requires a Justification for Other than Full and Open Competition (JOFOC), because the underlying statute “authorizes” but does not require that the procurement be made from a specified source (FAR 6.302-5(c)(2)(ii)).

Prevailing Market Price and Prevailing Market Terms and Conditions

Section 2602(d)(2) of EPOA 1992 provides that in carrying out this preference, the agency or department shall not pay more than the prevailing market price or obtain less than prevailing market terms and conditions.

The “prevailing market price” can be defined as the common or widespread price at which a given commodity or service may be bought or sold in an open marketplace. Similarly, “prevailing market terms and conditions” can be defined as those terms and conditions associated with the purchase of particular commodities or services that are common or widespread in the marketplace in which the commodities or services are sold.

For implementation purposes, the following factors should be considered:

- a) the type of renewable energy product or by-product required to meet the needs of the facility;
- b) local market conditions for similar products (if available);
- c) local market rates for similar products (if available);
- d) for renewable energy produced on tribal lands, the double value of any included RECs.

When utilizing this preference, Contracting Officers must clearly document the file to show that, in addition to being fair and reasonable, the price is not more than the prevailing market price and the terms obtained are not less than the prevailing market terms.

Contact FEMP for technical support in performing the prevailing market price analysis.

Questions and Answers

Question 1: How does one determine that a particular entity is Indian owned as defined in §2602(d)(1)?

Answer 1: The degree of Indian ownership shall be at least 51 percent during the period covered by the contract. All solicitations issued pursuant to this authority will require the offeror to certify, prior to contract award, the following:

¹ §2602(d)(1) of EPOA 2005 provides: “In purchasing electricity or any other energy product or byproduct, a Federal agency or department may give preference to an energy and resource production enterprise, partnership, consortium, corporation, or other type of business organization the majority of the interest in which is owned and controlled by 1 or more Indian tribes.”

The offeror hereby certifies that it is an energy and resource production enterprise, partnership, consortium, corporation, or other type of business organization, the majority of the interest in which is owned and controlled by 1 or more Indian tribes. The offeror also certifies that the degree of Indian ownership shall be at least 51 percent during the period covered by the contract. If the degree of Indian ownership is no longer at least 51 percent during any period covered by the contract, the offeror agrees to notify the Contracting Officer immediately in writing.

Question 2: May an Indian-owned business entity enter into a joint venture with other entities for specific projects?

Answer 2: Yes, a joint venture is an example of an “other type of organization” under section 2602(d)(2) of EPO Act 1992. The Indian-owned entity may enter into the joint venture so long as the Indian-owned entity is the managing partner. The Contracting Officer should verify that the joint venture satisfies the 51% ownership requirement prior to the award of a contract under section 2602(d)(2) of EPO Act 1992.

Question 3: Is a Justification for Other than Full and Open Competition (JOFOC) Required?

Answer 3: Yes. FAR 6.302-5(c)(2)(ii) requires justification and approval requirements for those contracts awarded under statutes that authorize, but do not require “that the procurement be made from a specified source.” In this case, the purchase preference is authorized, but not required from a specified source.

The Contracting Officer shall synopsize and publish solicitations in FedBizOpps and provide copies of the synopses to the Tribal office of the Indian Tribal government(s) directly concerned with the proposed acquisition as well as to Indian concerns and others having a legitimate interest. The synopses shall state that the acquisition is restricted to Indian firms under the authority of § 2602(d)(1) of the Energy Policy Act of 1992.

Justifications for acquisitions at or below the simplified acquisition threshold may be in the form of a paragraph or paragraphs contained in the requisition or associated purchase request document. Justifications for acquisitions in excess of the simplified acquisition threshold shall be in the form of a separate, self-contained document, prepared in accordance with FAR 6.303-2 and titled "Justification for Other Than Full and Open Competition" (JOFOC). See Acquisition Guide Chapter 6.1, pages 7-8. http://energy.gov/sites/prod/files/6.1_Competition_Requirements_0.pdf.

Question 4: May state law preclude us from applying this preference?

Answer 4: FAR 41.201(d) implements a statutory prohibition on agencies use of appropriated funds for the purchase of electricity in a manner inconsistent with state law. The electric utility industry is extremely complex and the local regulatory environment may dictate the only legally available providers of electricity. A site-specific analysis conducted by subject matter experts is necessary to determine what the local regulatory environment requires. Because of the complexity of this industry and the special rules for utility acquisitions, FEMP provides expert advice to DOE

sites. CO's are encouraged to consult early with FEMP upon identifying a requirement for electric utility services. As mentioned above, DOE Order 436.1 "Departmental Sustainability" requires FEMP's review and concurrence on all contracts for utility services prior to execution (for NNSA, FEMP provides expert analysis and recommendation on concurrence).

Question 5: Is it also permissible to give preference to Indian-owned entities under a full and open competition for renewable energy, renewable energy products or renewable energy byproducts?

Answer 5: Yes. In that case, offerors should be advised that you intend to give preference to Indian-owned entities in accordance with § 2602(d)(2) of EPAAct 1992. The preference in this scenario would amount to a tie-breaker whereby, all other things being equal, the Indian-owned firm will be selected.

Question 6: What should I do if an Indian-owned entity approaches with an offer to sell renewable energy, renewable energy products or renewable energy byproducts without having been solicited?

Answer 6: If the firm offers prevailing market prices and terms, the offer is consistent with the regulatory and legal environment in your state, and does not conflict with any existing contracts, this is an indication that you should consider issuing a limited source RFP. FEMP will provide technical assistance and analysis to assist in determining prevailing market rate using the factors outlined above. Before commencing negotiations or awarding a contract, CO's must ensure that the requirements of FAR 6.303-1 have been satisfied. Unsolicited offers for the provision of electric utility service should be referred to FEMP for expert technical review. Because the electric utility industry is complex, there may be regulatory and financial consequences to changes in a site's current utility acquisition strategy. FEMP will conduct the due diligence necessary to ensure the site is aware of all options and consequences.

Question 7: How are GSA areawide contracts affected by this preference program?

Answer 7: FAR 41.204(c)(1) requires use of areawide contracts in covered areas with two exceptions. When one of the exceptions exists, preference may be given to Indian-owned entities. Contact FEMP for information regarding the specific regulatory environment at your site and an analysis of the options available to you for procuring renewable energy.

Question 8: Is it necessary to make a responsibility determination?

Answer 8: Yes. The CO shall make a responsibility determination prior to award in accordance with the standards set forth in FAR 9.104-1. Many tribes may not have relevant past performance under procurement contracts, but could have a history of performance under contracts and grants awarded by the respective offices within the U.S. Department of the Interior (Bureau of Indian Affairs or BIA) and U.S. Department of Health and Human Services (Indian Health Service or IHS) under the authority of the Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended. CO's may wish to verify with BIA and IHS that the tribe has not been suspended and/or debarred and whether there are any significant performance issues.

Question 9: How do I ensure that the contractor is complying with the relevant statutory requirements, including section 2602(d)(1)-(2) of EPAAct 1992 05?

Answer 9: The Contracting activity should conduct periodic reviews to ensure contractor compliance. The Tribes concerned may assist in the conduct of these reviews. The CO shall promptly investigate and resolve complaints and/or disputes that are filed in writing with the contracting activity.