

TERO REGULATIONS FOR OIL AND GAS EXPLORATION, PRODUCTION, AND ANCILLARY SERVICES

The Tribal Employment Rights Commission (TERO) of the Three Affiliated Tribes does hereby promulgate the following interim regulations for Indian preference in contracting and subcontracting on Oil and Gas Exploration, Production, and Ancillary Services on the Fort Berthold Reservation. These regulations are effective immediately. If these regulations are in conflict with any existing TERO regulation or policy, the interim regulations shall supersede and control. The section numbers refer to the location of these new regulations in the existing TERO regulations.

PART 3. INDIAN PREFERENCE IN CONTRACTING AND SUBCONTRACTING

New Section 3.2. Preference on Contracts and Subcontracts Involving Oil and Gas Exploration, Production, and Ancillary Services

Section 3.2(a). Order of Preference

“Qualified Indian Contractors” that are 100% owned and controlled by enrolled members of the Three Affiliated Tribes shall have first preference on all contracts and subcontracts in connection with oil and gas exploration, production, and ancillary services. (The term “Qualified Indian Contractors” is as defined in the TERO Ordinance and Regulations.) All entities engaged in activities in connection with oil and gas exploration, production, and ancillary services, when awarding contracts or subcontracts that are subject to this section shall:

1. Review the TERO list of Qualified Indian Contractors to determine if there is one or more firms that is 100% owned and controlled by one or more members of the Three Affiliated Tribes is registered with the TERO as having the necessary technical capability and experience to perform the work in the general area that is the subject of the contract or subcontract.
2. If there is more than one such firm described in subparagraph 1, the entity awarding the contract or subcontract shall limit bidding to such firms and award to the firm that meets the awarding entity’s qualifications regarding technical capability and price. Bids shall be opened in the TERO office with a TERO employee present to observe the bid opening.
3. The decision on technical qualification and reasonable price shall rest solely with the awarding entity unless the TERO determines the awarding entity is improperly using those criteria to circumvent its obligations under the TERO Ordinance.
4. If no technically qualified firm offers a price that the awarding entity considers reasonable, the awarding entity shall seek to negotiate a reasonable price with the technically qualified firm that offered the lowest price.
5. The awarding entity may not reject a firm defined in subparagraph 1 on the basis of price and then award to a firm that is not 100% owned and controlled by a member of the Three Affiliated Tribes at a higher price.
6. If there is only one firm described in subparagraph 1 on the TERO list of Qualified Indian Contractors, the awarding entity shall negotiate with said

firm and make award to it if it meets the awarding entity's qualifications regarding technical capability and price. The decision on technical qualification and reasonable price shall rest solely with the awarding entity, unless the TERO determines the awarding entity is improperly using those criteria to circumvent its obligations under the TERO Ordinance.

7. If there are no firms described in subparagraph 1 on the TERO list of Qualified Indian Contractors, the awarding entity shall follow the process set out above, except that bidding shall be limited to Qualified Indian Contractors that are 51% or more owned and controlled by enrolled members of the Three Affiliated Tribes and registered with the TERO as having the necessary technical capability and experience to perform the work in the general area that is the subject of the contract or subcontract.
8. If there are no firms described in subparagraphs 1 or 7 of this Subsection on the TERO list, or if the awarding entity followed the process set out in this subsection and was unable to find a firm that had the technical capability or that offered a reasonable price, it may compete the contract or subcontract in any way it so chooses.
9. The term "reasonable price" as used in this subsection shall mean as a general rule, a price that is within 10% of the amount the awarding entity has estimated it would spend on that contract or subcontract.
10. Notwithstanding the requirements set out in paragraphs 1 through 9 of this Subsection, if an awarding entity:
 - a. Has entered into a contract or subcontract with a Qualified Indian Firm that is 100% owned by one or more members of the Three Affiliated Tribes after complying with the procedures set out in this Subsection; and
 - b. The awarding entity wishes to use that Qualified Indian Firm that is 100% owned by one or more members of the Three Affiliated Tribes on subsequent contracts or subcontracts involving work in the same general business area as the initial contract or subcontract;

then the awarding entity, after verifying with the TERO that the firm remains certified as a Qualified Indian Firm that is 100% owned by one or more members of the Three Affiliated Tribes, may enter into one or more subsequent contracts or subcontracts with that Qualified Indian Firm that is 100% owned by one or more members of the Three Affiliated Tribes without first following the procedures set out in paragraphs 1 through 9 of this Subsection. The awarding firm shall send notice of the award of each subsequent contract(s) or subcontract(s) to the TERO within 20 days of its execution. The notice shall set out the name of the Qualified Indian Firm, the general business area of the contract or subcontract, the dollar amount, and the duration.

Section 3.2(b). Obligations of Qualified Indian Contractors

1. To be eligible for preference pursuant to Subsections 3.2(a)(1) or (7), a firm must be registered with the TERO as capable in the general business area in which the awarding entity is seeking a contractor or subcontractor. The TERO

has established categories of business areas for oil and gas related activity (e.g., trucking, mud, allottee signatures). To obtain registration in a category, a firm must demonstrate it has the experience, capability, and equipment needed to perform in that business area (herein after called "Fitness") and that the Indian owner(s) upon whom certification is based has the experience and/or education to effectively manage a company engaged in that area of work. If a firm lacks such experience, capability, or equipment in a business area, it will need to obtain the experience or capability on work that is not subject to the TERO's Indian contract and subcontract preference program before it will be listed in that business area. Proof of Fitness in a category shall include:

- a. Detailed list of current inventory and/or copies of current equipment leases and proof of payment.
 - b. Copies of all necessary certification and licenses of employees including but not limited to drivers licenses and adequate liability insurance.
 - c. List of contracts or subcontracts performed in that business area and the name of references from that work.
 - d. Resumes of the Indian owner demonstrating he or she has the experience and/or education to manage a company engaged in that business area.
 - e. Resumes of all key employees.
 - f. Financial records of the company.
2. In evaluating whether a firm is a Qualified Indian Contractor and whether a firm is qualified to perform work in a particular business area, the TERO will evaluate whether the structure, finances equipment arrangements, management and other factors are ones that are consistent with normal and customary business practices in that business area. TERO will reject any firm whose factors indicate the firm's structure is so atypical for a business in that area that it is likely the firm was created to or is seeking work in a business area in order primarily to take advantage of Indian preference and not as a firm that has the potential to be a successful Indian business over the long term in general or in that business area.. For example, a firm that relies inordinately on leased equipment and contract employees will not be certified. A firm whose sole experience is in gathering allottee signatures will not be certified for Indian preference for a trucking contract.
3. Any firm that has previously been certified by the TERO shall, within 60 days of the publication of these interim regulations, file a new application for certification in which it shall designate the general business areas it seeks certification in and shall provide the information these regulations require a firm to submit in order to obtain certification in a particular business area.

Section 3.2(c). Performance of Work by the Qualified Indian Firm

1. On any contract or subcontract received by a Qualified Indian Firm as a result of a preference provided by this Ordinance, the Qualified Indian Firm must perform no less than 51% of work with its own employees. 51% of the work is defined as “51% of the total amount of the contract, minus the cost of equipment and supplies, shall be expended on employees of the Qualified Indian firm.”
2. On any contract or subcontract received by a Qualified Indian Firm as a result of a preference provided by this Ordinance, the Qualified Indian Firm must either own at least 51% of the equipment or have an equipment lease arrangement that is normal and customary in that business area.

Section 3.2(d). Joint Venture Agreements, 51% Indian Ownership, and Mentorships

1. Any firm whose qualifications rely in any significant manner on a joint venture or mentorship with a non-Qualified Indian Contractor or on the qualifications of a non-Indian owning 49% or less of the firm must meet the following requirements in order to obtain or retain certification as a Qualified Indian Contractor:
 - a. The firm must submit a plan demonstrating that at the end of three Indian preference contracts or three years, whichever comes first, the firm will no longer be reliant on the non-Indian joint venture partner or mentor. For the less than 100% Indian-Owned Contractors, the plan shall show how the ownership and involvement of the non-Indian will diminish to under 10% by the end of three years. The plan shall include one year and two year milestones that must be met to show that the firm is making steady progress towards ending its reliance on its non-Indian mentor, joint venture partner, or partner.
 - b. For firms reliant on mentorships or joint venture relationships with non-Indian firms:
 - i. The firm shall, within 30 days of the effective date of these Interim Regulations, submit copies of any mentorship, joint venture or partnership agreement the firm is relying on to demonstrate its capability to work in a particular area.
 - ii. No less than 40% of the total revenue of the firm each year shall come from contracts or subcontracts received by the firm that were not subject to Indian preference, such as contracts for work off of the Reservation or on land within the Reservation boundaries that is not subject to the Tribe’s jurisdiction. It is the view of the TERO that if a non-Indian firm believes a Qualified Indian Contractor is worthy of a joint venture or mentorship, it should be willing to use that firm on work that is not subject to Indian preference. Within 30 days after the end of each such firm’s fiscal year, it shall submit documentation to the TERO demonstrating it has met this requirement.

- c. Any Qualified Indian Contractor that fails to meet these requirements shall be notified by the TERO that its certification as a Qualified Indian Contractor will be withdrawn. The notification shall specify which requirement(s) the firm failed to meet and the information the TERO relied on to make its determination. The firm shall have ten days to request a hearing before the TERO Commission at which it will be given an opportunity to demonstrate that the decision of the TERO was incorrect.
- d. Any Qualified Indian Contractor who fails to meet the conditions set out in the contract or subcontract it was awarded pursuant to these Indian preference requirements, such as failure to perform, or that abandons the job before completion, shall:
 - i. Lose its eligibility to bid as a Qualified Indian Contractor on any contract or subcontract for a period of six months; and
 - ii. Be reinstated as a Qualified Indian Contractor only upon reapplying and demonstrating that it has corrected the problems that led to its loss of eligibility. The decision to reinstate a contractor shall be at the discretion of the TERO Commission.

Section 3.2(e). Obligation of Awarding Entity

An entity awarding a contract or subcontract to a Qualified Indian Contractor pursuant to these Regulations shall:

1. Provide mentoring to the Qualified Indian Contractor to assist it succeed on the contract or subcontract. The Awarding Entity shall submit to the TERO its mentoring plan within 10 days after the Qualified Indian Contractor begins work.
2. Inform the TERO within 15 working days if a Qualified Indian Contractor failed to perform on a contract or subcontract, abandoned the contract or subcontract, or engaged in any other actions that may constitute grounds for the Qualified Indian Contractor to have its certification withdrawn or suspended, with specific information so that the TERO may exercise its responsibilities under subsection 3.2(d)(1)d of these Regulations.
3. At the end of the contract or subcontract, provide the Qualified Indian Contractor with a written evaluation of the Qualified Indian Contractor's performance on that contract or subcontract, with a copy to the TERO. The evaluation shall contain sufficient specificity to enable the Qualified Indian Contractor to determine how it can improve its performance in the future.