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*Title 5, Navajo Nation*

*Code 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, Sections 201 through 215.

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 the Navajo Nation. In addition, residents of the Navajo Nation include approximately 8,000 non-Navajos;
3. The unemployment rate of the Navajo Nation is approximately 50%;
4. In 1996, 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;
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 contract award data; and

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-Indians and non-member 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-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.

C. The purpose of this Act is to:

1. Promote the economic self-sufficiency of the Navajo Nation by granting "first opportunity" and/or preference in contracting to Navajo and/or Indian owned and operated businesses;

2. Promote competitive bidding and contracting opportunities among Navajo businesses;

3. Develop a dynamic and self sustaining private sector for the Navajo Nation;

4. Increase Navajo business and employment opportunities for the Navajo people;
5. Provide for business certification in accordance with current Navajo Nation laws; and
6. Regulate the conduct of those engaging in business within the Navajo Nation in order to protect and promote the economic security and welfare of the Navajo Nation.

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.

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

F. The provisions of this Act should be liberally interpreted to 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.

## §202. Definitions

For all purposes of this Act, the following definitions shall be applicable:

A. "*Bid Shopping*" is defined herein as any practice involving the solicitation or communication of any competitor's bid prior to and after bid opening, thereby providing an unfair advantage and

opportunity to under bid any competitor.

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

E. "*Established Business*" is defined as an for-profit economic entity, firm or other organization, 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.

F. "*Front*" is defined as a business claiming to having have 51% or more Navajo or other Indian ownership of any commercial, industrial, or other economic entity or organization, but without the Navajo or other Indian owner or owners exercising the major role in decision-making for operations, profit-sharing and actual management control.

G. "*Navajo Indian*" or "*Navajo*" is defined as a person who is an enrolled member of the Navajo Nation.

H. "*Navajo Nation*" shall have the same definition as used at 1 N.N.C. § 552 including:

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

c. All other lands over which the Navajo Nation may exercise

d. governmental jurisdiction in accordance with federal or international law or to which the Navajo Nation has ownership through the Treaty of 1868.

2. When referring to the Navajo Nation government, shall include governmental entities, chapters, statutorily recognized townships, and Navajo Nation enterprises.

I. "*Other Indian*" is defined as an Indian other than Navajo who is an enrolled member of a federally recognized Indian Tribe within the United States.

J. "*Owned and Controlled*" is defined as having at least 51% or more ownership of any commercial, industrial, or other economic entity, firm or organization, provided that such ownership shall consist of active participation in decision making in operations, profit-sharing and actual management control.

K. "*Prime Contractor*" is defined as any party, or entity which 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 or subcontracting for the contracted project.

L. "*Procuring Party*" is defined as the party that initiates the proceeding to cause a project to be bid for contracting.

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.

N. "*Private entity*" is defined as a privately-owned business entity doing business on the Navajo Nation, including corporations which are wholly-owned by the Navajo Nation.

O. "*Public entity*" is defined as an entity which is a part of the Navajo Nation government.

P. "*Subcontractor*" is defined as any party or entity to which any contract is let by the prime contractor or its subcontractor for materials, equipment, transportation or other goods and services on that prime contract, regardless of tier.

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

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

B. *Application.* This Act shall apply uniformly to all public and

private entities engaging in business on the Navajo Nation and to the Navajo Nation itself. This Act shall apply to all procurement contracts exceeding \$50,000 and on a limited basis to those procurement contracts less than \$50,000.

C. *Inapplicability to Lease and Other Transactions.* This Act shall not apply to the negotiation, execution, award, transfer, assignment or approval of business site leases, home site 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 shall not apply to activities of private persons who contract for goods or services for their individual use or benefit.

D. *Implementing Federal Indian Preference Laws and Regulations.* To the fullest extent possible, this Act and its rules and regulations shall be construed in accordance with applicable federal Indian 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 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 Self Determination and Education Assistance Act, 25 U.S.C §§450 (e) (c). If federal or state funded contracts specifically provide for the application of Indian preference rather than Navajo Preference, the contract letting or procuring entity party shall attempt to negotiate and agreement with such party in order to apply the provision of this Act. In the event if federal or state law expressly precludes the application of the provisions of the this Act, then application of Indian preference laws shall be applied and shall not constitute a violation of this Act.

E. *Falsification or Concealment of Information; Sanctions and*

*Penalties.* Any person who authorizes, or knowingly or recklessly omits, or allows, or falsifies, or otherwise misrepresents any fact or matter material to any determination required by this Act, shall be subject to all applicable sanctions and penalties provided under this Act and any other applicable laws or regulations of the Navajo Nation.

F. *Bid-Shopping.* Bid shopping shall be prohibited.

G. *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, 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 as required thereunder, shall render void any approval or action taken by the Navajo Nation Government or entity in which such official or employee participated, to the extent such action is favorable to the business entity in which such 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 100% Navajo-owned and controlled business, having its principal place of business on or off the Navajo Nation and Navajo Engineering and Construction Authority, notwithstanding 55 N.N.C. § 204(A)(2) of this section.
2. *Priority #2.* Certification shall be granted to any 51% to 99% Navajo or 51% to 100% other Indian owned and controlled business or 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 bidder 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 applicable 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;
2. Procedures used in selecting subcontractors and suppliers; and
3. Subcontracts or lease agreements for equipment to be used in performance of the contract.

E. *Prime and Subcontractor Performance Bonding: Permittee Alternative.* 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 bands, 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 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 Development Committee.* The Economic 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 Act.

B. *Division of Economic Development.* The Division of Economic Development of the Navajo Nation shall be responsible for administering, enforcing and implementing the provisions herein.

C. *Business Regulatory Department.* The Business Regulatory Department within the Division of Economic Development shall be responsible for:

1. Developing and maintaining a certification program to determine the appropriate certification priority of business entities.
2. Promulgating rules and regulations to implement this Act. All proposed rules and regulations shall be published for public comments at least ninety (90) days prior to submission to the Economic Development Committee of the Navajo Nation Council for final review and approval.
3. Publishing, maintaining and making available approved rules, regulations, guidelines and forms including provisions of this Act, to ensure that all Navajo Nation entities, all business entities and the Navajo People are kept fully informed of all current laws, rules, regulations and procedures for compliance hereto.
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 the Navajo Nation and the intent of this Act.
5. Enforcing compliance with this Act, pursuant to the intent of this Act and the rules and regulations adopted hereto; requiring applicability of this Act to any proposed contract, subcontract or other transaction to be performed within the Navajo Nation by or on behalf of the Navajo Nation; and requiring prebid, preconstruction or prequalification requirements as needed and appropriate to comply with this Act.
6. Coordinating efforts with federal agencies that require Indian preference or maximum utilization of minority business

enterprises.

7. Maintaining and publishing a current Source List of all certified Priority #1 and #2 business 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 is to utilize such list as a source document only for contract-letting and procuring parties required to determine and notify available Navajo and other Indian-owned entities in the respective areas of commerce which are subject to the provisions of this Act.
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 and the current rules and regulations adopted hereunder.
9. Recommend disciplinary action for Navajo Nation employees or officials found to be in violation or noncompliance with this Act pursuant to the applicable Executive, Judicial, or Legislative Navajo Nation Personnel Policies Manual, or the Ethics in Government Law.

#### §208. Certification Of Eligible Entities And Authorization Of Business Activities

*Establishment of Procedure.* The Business Regulatory Department shall have the following duties, responsibilities and authority:

- A. Require timely submission of 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 shall be reviewed based on 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 ownership that may materially affect the eligibility for preference priority certification.

E. All confidential certification information shall not be disclosed except as necessary in a proceeding under this Act and other applicable laws.

#### §209. Monitoring And Enforcement

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

B. *Procedure Upon Alleged Violation.* To investigate alleged violations or noncompliance of this Act, the Business Regulatory Department shall:

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

3. Initially seek voluntary compliance and appropriate remedial action pursuant to this Act.
4. If voluntary compliance or remediation is not possible, the Business Regulatory Department shall render a decision pursuant to this Act.
5. A decision by the Business Regulatory Department may be appealed pursuant to §210 of this Act.

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 Act presenting a probability of continuing material and irreparable harm which is greater than the harm from suspension of performance, the Executive 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 Civil 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:

- 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

- A. *Appeals to Business Regulatory Department.* Appeals can be made by

those businesses who are denied 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 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 ten (10) days of the date of the written adverse decision. The written notice of appeal shall:

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

B. *Appeals to the Hearing Officer.* If the Director upholds the Department's decision to deny certification to the affected business, the appealing party may appeal the Director's decision to the Navajo Nation Office of Hearing and Appeals for assignment to an Administrative Hearing Officer.

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.

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.

§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 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. Effective Date

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

§215 Periodic Review And Amendments

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