P.L.93-638/CFR 25
PART 900
TRANSPORTATION - ALASKA
Preamble:

AN ACT

To provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Self-Determination and Education Assistance Act".
Sec.101 This title may be cited as the "Indian Self-Determination Act".

Sec.102 (a) Request by tribe; authorized programs:

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs -

(B) Which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C.A. § 13], and any Act subsequent thereto;

(C) Provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C.A. § 2001 et seq.];

(D) Administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and
GOVERNMENT-TO-GOVERNMENT

(E ) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

Treaty Rights
The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractible. The administrative functions referred to in the preceding sentence shall be contractible without regard to the organizational level within the Department that carries out such functions.
(j) ‘self-determination contract’ means a contract (or grant or cooperative agreement utilized under section 9 [25 USC 450e-1] of this Act) entered into under title I of this Act between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: Provided, That except as provided [in] the last proviso in section 105(a) of this Act, no contract (or grant or cooperative agreement utilized under section 9 [25 USC 450e-1] of this Act) entered into under title I of this Act shall be construed to be a procurement contract;

Strikeout is not part of the law as amended. This definition was added through the 1988 amendment (Pub. Law 100-472). The 1994 amendment (Pub. Law 103-413) completely rewrote section 105(a). This rewrite removed the referenced last proviso, at that time this language should have been struck from this definition. It was not officially struck. It has been struck here to avoid confusion and misunderstanding.
Contract; Compact - The terms “contract” and “compact” mean a self-determination contract and a self-governance compact as these terms are defined in the Indian Self-Determination and Education Assistance Act (25 U.S.C.A. § 450 et seq.).
CONSTRUCTION PROGRAMS

(a) ‘construction programs’ means programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities, including, but not limited to, housing, law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, and water conservation, flood control, or port facilities;
(m) ‘construction contract’ means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract -

(1) that is limited to providing planning services and construction management services (or a combination of such services);

(2) for the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Secretary of the Interior; or

(3) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.
FOUR REASONS TO CONTRACT 638

- The act provides tribes with 4 flexible and innovative tools to help them respond to their own critical needs and priorities.
  - Contracting of Bureau Programs
  - Planning and Designing Programs that the Bureau continues to operate.
  - Tribal Management Systems that secure their financial operations, particularly in regard to Federal funding of contracts and grants
  - Grants to tribal governing bodies.
TRIBAL MANAGEMENT SYSTEMS

- Tribal operation and direction of Bureau Programs for Indians is intended to increase:
  - Tribal governments will increase their responsibilities.
  - Federal involvement will shift to technical assistance, evaluation, and monitoring.
ALTHOUGH THE PROCESSES ARE DIFFERENT, BOTH ARE LEGAL AND BINDING METHODS OF ENTERING INTO A CONTRACT.
THE REGULATIONS

Subpart A – Contract Proposal Contents

Authority

These regulations are prepared, issued, and maintained jointly by the Secretary of Health and Human Services and the Secretary of the Interior, with the active participation and representation of Indian tribes, tribal organizations and individual tribal members pursuant to the guidance of the Negotiated Rule making procedures required by section 107 of the Indian Self-Determination and Education Assistance Act.
PURPOSE AND SCOPE OF THE REGULATIONS

a. These regulations make uniform and consistent rules for contracts by the Department of Health and Human Services DHHS and the DOI in implementation...

b. Programs funded by other departments and agencies. Included under this part are programs that may be administered by the DHHS and DOI for the benefit of Indians for which appropriations are to other Federal Agencies.

c. **Freedom of Information Act** does not apply to records kept solely by Indian Tribes and tribal organizations.

d. **Privacy Act** – Tribal government records shall not be considered Federal Records.
Systems established by Indian tribes will govern the administration of contracts provided that they include the core management principles or standards adopted from the Common Rule which the committee determined best meet the needs of Indian tribes and tribal organizations.
**TRIBAL MANAGEMENT SYSTEMS**

**Subpart F** contains provisions relating to the following management standards:

(1) Financial Management;

(2) Procurement Management; and

(3) Property Management.

In these areas the Advisory Committee designed minimal regulations that focus on the minimum standards for the performance of the three management systems.
The standards contained in this subpart are designed to be the targets which the Indian tribe and tribal organization’s management systems should be designed and implemented to meet. The management systems themselves are to be designed by the Indian tribe or tribal organization.
Includes provisions that:
(1) Identify the Management Systems
(2) Set forth the requirements to be imposed;
(3) Limit the applicability of OMB circulars;
(4) Provide that the Indian tribe or tribal organization has the option to impose these standards upon subcontractors; (5) identify the difference between a standard and a system; and
(6) specify when the management standards and management systems are evaluated by the Tribe, and the Awarding Official.
SUBPART F

Contains the standards for financial management systems. Subpart F establishes the minimum requirements for seven elements including:

(1) Financial reports;
(2) accounting records;
(3) internal control;
(4) budget control;
(5) allowable costs;
(6) source documentation; and
(7) cash management.
Establishes the minimum requirements for seven elements:

(1) To ensure that vendors and subcontractors perform in accordance with the terms of purchase orders or contracts;

(2) to require standards of conduct for employees award contracts to avoid any conflict of interest;

(3) to review proposed procurements to avoid buying unnecessary or duplicative items;

(4) to provide full and open competition, to the extent feasible in the local area, subject to the Indian preference and tribal preference provisions of the Act;
(5) to ensure that tribal procurement awards are made only to entities that have the ability to perform consistent with the terms of the award;

(6) to maintain records on significant history of all major procurements; and

(7) the Indian tribe or organization is solely responsible for processing and settling all contractual and administrative issues arising out of a procurement.
SUBPART F

In addition, each Indian tribe or tribal organization must establish its own small purchase threshold and definition of “major procurement transactions”;

establish minimum requirements for subcontract terms, and include a provision in its subcontracts that addresses the application of Federal laws, regulations and executive orders to subcontractors.
Standards for both Federally-titled property and property titled to an Indian tribe or tribal organization, with differences based upon who possesses title to the property.

Elements including:

(1) Property inventories;
(2) Maintenance of property;
(3) Differences in inventory and control requirements for property where the Federal agency retains title to the property; and
(4) Disposal requirements for Federal property.
SUBPART F

**Standards** are the minimum baseline requirements for the performance of an activity. Standards establish the “what” that an activity should accomplish.

**Systems** are the procedural mechanisms and processes for the day-to-day conduct of an activity. Systems are “how” the activity will be accomplished.
It is the Secretary's policy that no later than upon receipt of a contract proposal under the Act (or written notice of an Intention to Contract), the Secretary shall commence planning such administrative actions, including but not limited to transfers or reductions in force, transfers of property, and transfers of contractible functions, as may be necessary to ensure a timely transfer of responsibilities and funding to Indian tribes and tribal organizations.
(10) It is the policy of the Secretary to make available to Indian tribes and tribal organizations all administrative functions that may lawfully be contracted under the Act, employing methodologies consistent with the methodology employed with respect to such functions under titles III and IV of the Act.
(11) The Secretary's commitment to Indian self-determination requires that these regulations be liberally construed for the benefit of Indian tribes and tribal organizations to effectuate the strong Federal policy of self-determination and, further, that any ambiguities herein be construed in favor of the Indian tribe or tribal organization so as to facilitate and enable the transfer of services, programs, functions, and activities, or portions thereof, authorized by the Act.
Nothing in these regulations shall be construed as:

(a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by Indian tribes;

(b) Terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian tribe(s) or individual Indians. The Secretary shall act in good faith in upholding this trust responsibility;

(c) Mandating an Indian tribe to apply for a contract(s) or grant(s) as described in the Act; or

(d) Impeding awards by other Departments and agencies of the United States to Indian tribes to administer Indian programs under any other applicable law.
Section 5 - Tribal Report/Financial Reports/Reports included in the contract/Single Audit.

Section 6 - Penalties for Fraud, Waste and Abuse.

Section 7 - Waiver of Davis-Bacon. Tribal/Native preference in hiring and wages.

Native preference meaning hiring Native employees and subcontractors first.

Section 8 - Carryover Funds. Spend down in a timely manner.

*Funds available until spent....maybe*
Section 9 - A tribe can chose to contract, grant, or cooperative agreement

Use of Funds
In construction where cost of construction is less than the estimated costs, use of excess funds shall be determined by the Secretary after consultation with the tribe. This affects “profits.”
SECTION 102 AUTHORITY

Section 102 (a) (1) Tribal Resolution – the tribe’s Authority to contract and signed by the Tribal Chairperson (elected authority).

Federal Authority – an Approving Official reviews the construction proposal. Approving Officials (Regional Directors who may pass their authority to Deputy Directors, Superintendents or Line Officers) They must find the funding and certify that it is available to the project. Their authority is arrived through qualifying and accepting the position.
5 REASONS TO DECLINE A PROPOSAL

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a); or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.
Section 102
The contractor shall include in the proposal the standards under which the tribal/tribal organization will operate the contracted program, service, function, or activity. In the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards.
The standards referred to in the preceding sentence shall ensure:

- structural integrity,
- accountability of funds,
- adequate competition for subcontracting under tribal or other applicable law,
- the commencement, performance, and completion of the contract,
• adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals),
• the use of proper materials and workmanship,
• necessary inspection and testing,
• and changes,
  • modifications, stop work, and termination of the work when warranted.
TRIBES CAN APPEAL A REJECTION

Whenever the Secretary declines to enter into a Self-determination contract or contracts pursuant to subsection (a) of Section 102, the Secretary shall -

(1) state any objections in writing to the tribal organization, provide assistance to the tribal organization to overcome the stated objections, and…

Tribe can take their objections to Appeals or Federal Court

With respect to any hearing or appeal conducted pursuant to subsection (b)(3) or any civil action conducted pursuant to section 110(a), the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).
Section 102…the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, **on the most cost-effective basis**, …for tribal contractors carrying out contracts, grant and cooperative agreements…

_In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in Section 3 of the Indian Financing Act..._
Tribes may invest funds, including mutual funds and/or obligations of the United States, and only if they are insured by FEDERAL securities.
Lawful provisions of Construction or Construction Projects under the Law.

In P.L.93-638 the Federal Acquisition Regulations are Waived - unless a tribe wishes to include FAR provisions, or a FAR provision requires tribes to include a specific provision. The Law requires tribes to include those provisions described in Section 102 in writing. Those provisions will be included, or excluded based on the “Test of Three”:

i. necessary to ensure that the contract be carried out in a satisfactory manner.

ii. directly related to the construction activity.

iii. not inconsistent with the Act.
Except for those provisions expressly stated in a FAR provision or the Test of Three, no Federal Acquisition law will apply to a construction contract.
A tribe can give back (quite a contract) by formal request, through tribal resolution when it feels necessary:

The date for which the contract expires,

or, on such date the Secretary (delegated authority by the Secretary is the Awarding Official) as may be mutually agreed by the Secretary and the tribe.
Section 105 (f)

Use of existing buildings, hospitals and other facilities and equipment:

1) under Self-determination permit carry out an agreement use of available property, including personal property, and equipment under mutually agreed upon terms and conditions.

2) Donate and vest title to the tribe of such equipment and property to carryout the agreement.
EXCEPT
(B) if the property has a value of $5000 or more, the tribe has completed, retroceded or rescinded the agreement, the Secretary may take the title and the property back.

FURTHER
Property acquired under contract shall remain eligible for replacement on the same basis as if title were vested in the United States.
Federal Sources of Supply

(relating to Federal sources of supply including lodging providers, airlines and other transportation providers), a tribal organization carrying out a contract, grant, or cooperative agreement under this Act shall be deemed an Executive agency and the employees of the tribal organization shall be eligible to have access to such sources of supply on the same basis as employees of an executive agency have such access.
FEDERAL SOURCES OF SUPPLY

...at the request of an Indian tribe, on behalf of the Indian tribe, of any goods, services, or supplies available to the Secretary from the General Services Administration or other Federal agencies that are not directly available to the Indian tribe under this section or under any other Federal law, including acquisitions from prime vendors.
All such acquisitions shall be undertaken through the most efficient and speedy means practicable, including electronic ordering arrangements.
The Secretary shall compensate each Indian tribe or tribal organization that enters into a lease for the use of the facility leased for the purposes specified. Such compensation may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable.
(m) Statutory requirements; technical assistance; pre-contract negotiation phase; fixed price construction contract:

(1) Each construction contract requested, approved, or awarded under this Act shall be subject to:

(A) ...the provisions of this Act, other than sections 102(a)(2), 106(1), 108 and 109; and

In providing technical assistance in the development of construction contract proposals, the Secretary shall provide, not later than 30 days after receiving a request from a tribe or tribal organization, all information available to the Secretary regarding the construction project, including construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments or environmental impact statements, and archaeological reports.
Prior to finalizing a construction contract and upon request of the tribe or tribal organization that submits the proposal, the Secretary shall provide for a pre-contract negotiation phase in the development of a contract proposal.
Such phase shall include, at a minimum, the following elements:
A joint scoping session between the Secretary and the tribe or tribal organization to review all plans, specifications, engineering reports, cost estimates, and other information available to the parties, for the purpose of identifying all areas of agreement and disagreement.
SECTION 105

An opportunity for the Secretary to revise the plans, designs, or cost estimates of the Secretary in response to concerns raised, or information provided by, the tribe or tribal organization.
SECTION 105

A negotiation session during which the Secretary and the tribe or tribal organization shall seek to develop a mutually agreeable contract proposal.

Upon the request of the tribe or tribal organization, the use of an alternative dispute resolution mechanism to seek resolution of all remaining areas of disagreement pursuant to the dispute resolution provisions under subchapter IV of chapter 5 of title 5, United States Code.
The submission to the Secretary by the tribe or tribal organization of a final contract proposal pursuant to section 102(a).
(4) In funding a “fixed-price” construction contract pursuant to Section 106 (The Funding Section), the Secretary shall provide for the following:

(i) The reasonable costs to the tribe or tribal organization for general administration incurred in connection with the project...

(ii) The ability of the contractor that carries out the construction contract to make a reasonable profit, taking into consideration the risks associated with carrying out the contract and other relevant considerations.
In establishing a contract budget for a construction project, the Secretary shall not be required to separately identify the components described in clauses (i) and (ii)… (Approving Official)

The total amount awarded under construction contract shall reflect an overall fair and reasonable price to the parties, including the following costs:

(i) The reasonable costs to the tribal organization of performing the contract, taking into consideration the terms of the contract and the requirements of this Act and any other applicable law.
For “cost-reimbursement” construction contracts for projects whose actual cost is less than the estimated cost, the Secretary shall determine how to use the excess funds after consulting with the tribes.
The **total amount awarded** under construction contract shall reflect an overall fair and reasonable price to the parties, including the following costs:

(i) The reasonable, taking into consideration the terms of the contract and the requirements of this Act *and any other applicable law (which could be tribal law)*.

(ii) The costs of preparing the contract proposal and supporting cost data (*Pre-Award and Start-up Costs*).
(iii) The costs associated with auditing the general and administrative costs of the tribal organization.

(iv) In the case of a fixed-price contract, a fair profit determined by taking into consideration the relevant risks and local market conditions.

For cost-reimbursement construction contracts for projects whose actual cost is less than the estimated cost, the Secretary shall determine how to use the excess funds after consulting with the tribes.
(v) If the Secretary and the tribal organization are unable to develop a mutually agreeable construction proposal pursuant to the procedures in this subsection, the tribal may submit a final proposal to the Secretary.

Within 30 days after receiving such final contract proposal, the Secretary shall approve the contract proposal and award the contract, unless, the Secretary declines the proposal pursuant to sections 102(a)(2) and 102(b) of Section 102…
(h) *Fair and uniform* provision by tribal organization of services and assistance to covered Indians shall include provisions to assure the fair and uniform provision of the organizations... of the services and assistance they provide to Indians under such contracts and grants.
A tribe or tribal organization can pursue the active employment of Bureau of Indian Affairs staff to work and live on-site. Negotiated cost to each parties: the Secretary and tribe will determine costs.
Chapter 13/5IAM/2.2 the Delegation of Authority provides who, how and what federal personnel have authority to operate under P.L.93-638.