

Diné Bí Beehazaanii:
A Brief Review of Navajo Law Related to Business of the Navajo Nation
By Dr. James D. Nez, Esq.

At the commencement of this project, the Think-Team (an unofficial name I gave the group) decided that the best means to contributing to a better system of business processes under Navajo law and policies was to review the current frame work and make suggestions for improvements. I was tasked with the duty of reviewing the laws, regulations and internal policies under the Navajo Nation Business Opportunity Act (hereinafter “Act”). This was an interesting review mainly because there was not a lot to review that was specific to business efficiency and providing equity to business people.

Fairness to business people that decide to locate on the Navajo Nation appears to be found in the mere opportunity to do business on the Navajo Nation. As with most off-reservation business opportunity legislations, there is a sense that both businesses and government opportunities need one another. There are benefits for off-reservation businesses that are absent on the Navajo Nation even within the processes that are provided as guidance to resident Navajo businesses.

The Think-Team had initially identified that businesses competing for Navajo Nation contracts, that were unsuccessful at their bid, were often left wondering why their proposal was not accepted, *and* what they could have done different to have that edge needed to win a Navajo Nation business contract bid. In federal contracting, bidders that did not win a government contract after bidding can request a debriefing session. Under the US Federal Acquisition Regulation’s Acquisition Guidelines, there is an opportunity for Offerors to engage in a post-award debriefing session with the contracting officer under FAR 15.506 et seq.

Under FAR 15.506 (D), a debriefing session includes the following:

1. Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal;
2. Overall cost or price evaluation and technical rating of the successful and debriefed offeror with past performance information on the debriefed offeror;
3. Overall ranking of all offerors, including when any ranking was developed by the agency during the source selection;
4. Summary of the rationale for award;
5. If commercial products were deliverables, the make and model of the product to be produced or delivered by the successful offeror;
6. Reasonable responses to relevant questions about whether source procedures contained in the solicitation, applicable regulations and other applicable authorities were followed.

Under the Navajo Nation Business Opportunity Act, 5 N.N.C § 201 et seq., intent of the Act focused on the need for Navajo priority in tribal contracting for goods and services. This was made clear according to 5 N.N.C. § 201 (B) (4), which was a response to the impact of the 1996 US enactment of the Personal Responsibility and Work Reconciliation Act (Public Law 104-193) on the Navajo people. The Navajo Nation began to reshape it's business opportunity act to ensure Navajos were being awarded tribal government contracts as a priority and that a system was established by the vested regulatory department, the Navajo Nation Division of Economic Development's Navajo Nation Business Regulatory Department.

The Navajo Nation Business Opportunity Act provides laws related to bidding on tribal government contracts by Navajo and Non-Navajo businesses, establishment of regulatory authority over the bidding and contracting processes, compliance with regulations and sanctions. What it does not appear to include is an opportunity for debriefing and for contractors to receive feedback as to how prior performance on tribal contracts may have affected their bid. One major disclosure that would be beneficial to an unsuccessful bidder is the disclosure of the Maximum Feasible Price or Cost by

Contracting or Procuring Party. There is no clear rule on how to obtain this information except through the appeal process where this can be discovered through request for information regarding the projected cost ceiling and the priority status of other bidders.

When searching for case law related to the Navajo Nation Business Opportunity Act, there were 4 cases identified as including the title of the act. When narrowing down the search to the title of the Act and the word disclosure, there were no cases identified. Most case law related to the Navajo Nation Business Opportunity Act involve the guidance by the Court for businesses to seek certification under the Navajo Nation Business Regulatory for priority listing as either a Priority 1 (100% Navajo Owned) or a Priority 2 (51 to 99% Navajo or other Indian owned business or a 100% Navajo owned and controlled economic enterprise).

In *Ashkii v. Kayenta Family Court*, SC-CV-28-13 (Nav. Sup. Ct., 2013), the Court directed the lower Court that it also had an obligation under the Act to seek certified contractors for services it was ordering litigants to seek related to custody evaluations. The Navajo Nation Supreme Court admonished the lower court stating that it did not have the authority to sole source vendor services through a court order. In *Nelson v. Initiative Committee to Reduce Navajo Nation Council, Office of the President et al.*, SC-CV-03-10, (Nav. Sup. Ct., 2011), the high court, in addition to other rulings, ruled that the SAS Process could not be used to waive fiscal safeguards related to contracting for services.

Under Navajo Common Law, there appears to be no case law directly related to challenges brought under the Navajo Business Regulatory Act specific to unsuccessful offerors and debriefing. Again, the Act's main intent is to situate the law to benefit Navajo businesses that bid on tribal contracts. The procedure of review is not bright

lined in the statutes or the regulations. Under the Navajo Nation Business Regulatory, this department's main function is to: (1) provide forms and regulatory procedures on business formation within the Navajo Nation, (2) provide priority certification forms and procedures, (3) provide a public priority listing of certified businesses, (4) and to regulate general business activities within the Navajo Nation under the Act. See the Navajo Nation Business Regulatory website at navajoeconomy.org/business-regulatory/.

Think-Team Recommendations:

1. Revise the Navajo Nation Business Opportunity Act as allowed under 5 N.N.C. § 207 (A) by the Economic Development Committee of the Navajo Nation Council, or this committee's current equivalent, to include debriefing for non-selected offerors of Navajo Nation opportunities. This will assist Navajo companies and business people strengthen their future proposals.
2. Revise the Act to include a mandatory pre-bidding overview of the services and/or goods requested under the opportunity up for bid. This will help inform bidders on the intent and requests of the tribal contract opportunity in an in-person format.
3. Revise the Act to include an opportunity for bidders to submit questions about the project up for bid. All questions by and bidders and answers by the regulatory should be publicly shared.
4. Revise the Act directing the regulatory agency to establish a culturally enhanced webpage for bidders to follow the flow of procedures regarding the opportunity.