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TERO REGULATIONS

OF THE THREE AFFILIATED TRIBES

(Approved by TERO Commission _____)

(Approved by MHA Tribal Business Council _____)

PART 1.

GENERAL PROVISIONS

1.1 Purpose

The following Regulations are issued pursuant to the authority granted to the Mandan Hidatsa and Arikara Tribal Employment Rights Office (hereinafter "TERO") by the Mandan Hidatsa and Arikara Tribal Employment Rights Ordinance, which requires Indian Preference in contracting, subcontracting, and employment to Indians and Indian-owned firms by all contract awarding entities operating within the exterior boundaries of the lands over which the Mandan Hidatsa and Arikara Nation ("MHA Nation") has jurisdiction.

A. Jurisdiction

Any person or business Entity applying for and receiving a TERO Business License or any person or business entity conducting business on the MHA Nation shall be deemed as submitting to the jurisdiction of the MHA Nation Tribal Courts.

B. Regulatory Authority

Any business Entity applying for and receiving a TERO Business license or for purposes of conducting business operations on the MHA Nation shall be deemed to have submitted to the regulatory authority of the MHA Nation Tribal Courts.

See also Ordinance 201(B)

C. Government Employment

The requirements set out in this Title shall not apply to any direct employment by the Federal or State government or their subdivisions. It shall apply to all contractors or grantees of such governments and to all commercial enterprises operated by such governments so long as they are subject to the jurisdiction of the MHA Nation.

1.2 Dissemination

It is the obligation of all employers to learn, understand, and comply with Tribal Employment and Contract rights requirements. All bid announcements issued by any Tribal, Federal, State, or other private or public entity for projects within the exterior boundaries of the MHA Nation shall contain a statement that the successful bidder will be obligated to comply with all TERO Regulations and that a bidder may contact TERO to obtain additional information. Those offices responsible for issuing any type of permit, right of way, easement, surface use permit, etc., for the lands within the exterior boundaries of the MHA Nation, or otherwise engaged in activities involving contact with prospective employers on the lands within the exterior boundaries of the MHA Nation shall be responsible for informing prospective employers of their obligations under these Regulations.

1.3 Definitions

- *Bid shopping* is defined as any practice involving or comparable to the contacting of different subcontracting firms, informing them that a competitor has underbid them, but offering them an opportunity to underbid the competitor.
- *Capital Lease* is a lease that includes at least two of the following: full asset ownership by the end of the lease term; the opportunity to purchase the leased asset at the end of the lease period for a price significantly below market value; the lease term is for 75% of the useful life of the asset; or the lease duration runs for 90% of the fair market value of the asset at the inception of the lease.
- *Certification* shall be the level of preference to a specific service provided by a certified firm.
- *Certified Firm*, also referred to as a *Qualified Firm*, means a firm that is certified as an Indian owned and Indian-controlled firm recognized as possessing qualifications to be given a level of preference for services, securing employment, contracts or sub-contracts pursuant to the terms and procedures provided for in these TERO Regulations.
- *Certified Services* shall mean services that have been given a level of preference by TERO, as established in these TERO Regulations.
- *Commercial Enterprise* means any activity by the MHA Nation, or by the Federal or State Governments that is not a traditional Government function as defined by the Internal Revenue Service.

- *Commission* means the Tribal Employment Rights Commission established by the TERO Ordinance.
- *Conventional Financing* means bank loan financing.
- *Covered Employer* means any employer employing two or more employees who, during any 20-day period, spends sixteen (16) or more cumulative hours performing work within the exterior boundaries of the lands on which the MHA Nation has jurisdiction.
See also Ordinance 201(a).
- *Day* means a work day, which may exclude Saturdays, Sundays, and Federal holidays.
- *EEOC* means the U.S. Equal Employment Opportunity Commission
- *Employee* means any person employed for remuneration.
- *Employer* means any person, partnership, corporation or other Entity that employs, for wages, two or more employees.
- *Entity* means any person, partnership, corporation joint venture, Government, Governmental enterprise, or any other natural or artificial person or organization including the MHA Nation. The term Entity is intended to be as broad and encompassing as possible to ensure the application of the TERO Ordinance and TERO Regulations over all business, employment and contract activities within the MHA Nation's jurisdiction. The term shall be interpreted broadly by the Commission and the Courts.
- *Front or 10 Percenter* is an enrolled Tribal member that, for a fee, uses Indian Preference on behalf of a non-Indian entity.
- *Government Commercial Enterprise* means any company owned and controlled by the MHA Nation or any subsidiary Governmental Entity of the Nation, such as a District or Segment.
- *Indian* means any member of a Federally recognized tribe.
- *Key Employee* is one who is in a top supervisory position or who performs a critical function such that an employer would likely risk financial damage or loss if that task were assigned to a person unknown to the employer.
- *Local Indian* means any member of a Federally recognized tribe who has resided within the exterior boundaries of the lands over which the MHA Nation has jurisdiction or has lived near the lands over which the MHA Nation has jurisdiction for no fewer than 60 days prior to asserting a right granted by this TERO Ordinance or these Regulations.
- *MHA Nation* means the Mandan Hidatsa and Arikara Nation.

- *Nation* may include other references including but not limited to the Ft. Berthold Indian Reservation or MHA Nation, or Reservation.
- *Near the lands over which the MHA Nation has jurisdiction* means an Indian who resides at a location which is within a reasonable daily commuting distance of the job site at issue.
- *Non-local Indian* means a member of a Federally-recognized tribe who does not live on or near the lands over which the MHA Nation has jurisdiction.
- *Ordinance* means the codified Tribal Statute promulgated by the MHA Nation Tribal Business Council.
- *Qualified Indian Contractor* means an Indian Contractor that has met the criteria established by TERO to obtain Indian Preference.
- *Preference Partnership Agreement (PPA)* means a TERO approved agreement between a Certified Indian Contractor and another contractor, which is structured as a tool for the Indian Contractor to perform a service it cannot currently perform by itself with the use of a mentorship/partnership process.
- *Reasonable Price* shall mean a price that is within 10% for projects under one million dollars (\$1,000,000.00) and within 2% for projects over one million dollars (\$1,000,000.00) of the amount the awarding entity has estimated it would spend on that contract or subcontract. “Reasonable price” shall also mean a price that is within 2% of the amount the awarding entity has estimated it would spend on a vendor contract or subcontract. (see 3.2(a) (10))
- *Regulations* means these legally enforceable policies passed by the TERO Commission and enforced by TERO.
- *Reservation* shall mean all lands within the exterior boundaries of the Ft. Berthold Indian Reservation or the lands on which the MHA Nation has jurisdiction and/or Regulatory control.
- *Services* mean a defined scope of work performed within the Nation.
- *TERO* means the MHA Nation Tribal Employment Rights Office.
- *TERO Certified Service* means a service within industry that has been critiqued by the TERO and given a designation of Category A, B, C, D, or E.

- *TERO Team* means and includes TERO employees selected by the TERO Director or his designee, within the TERO staff, to grade and certify services of all Indian owned and Indian controlled Contractors. The TERO team or a member thereof, facilitates and is present during all bid openings.
- *TIMS* means the TERO Information Management System, a software based program TERO utilizes with contractors for application, categorization of services and grading.
- *Tribally Owned Firm* means any company owned in whole or in part by MHA Nation.

1.4 Coverage

A. Employment

These Preference Regulations shall apply to any employer who employs two or more employees, who, during any 20-day period, spend sixteen (16) or more cumulative hours performing work within the exterior boundaries of the lands on which MHA Nation has jurisdiction or regulatory control. However, the Regulations shall not apply to any direct employment by the MHA Nation, the Federal Government, the State Governments, or the subdivisions of such Governments. These Regulations shall apply to all contractors or grantees of such Governments and to all commercial enterprises operated by such Governments.

B. Contracting and Subcontracting

The contract and subcontract Preference requirements of these Regulations shall apply to any Entity that awards one or more contracts and/or subcontracts for supplies, services, labor, or materials, the total amount of which exceeds \$5,000, and the majority of the work done pursuant to the contracts and/or sub-contracts shall occur in the MHA Nation, or the majority of the supplies or materials shall be used in the MHA Nation. The Regulations shall apply in the award of subcontracts by entities which have received direct contracts from the State or Federal Government. They shall also apply to the award of any contract by the MHA Nation, its subdivisions, commercial enterprises, and other entities of the MHA Nation. These Regulations shall apply to all contractors or grantees of such Governments and to all commercial enterprises operated by such Governments so long as they are subject to the jurisdiction of the Nation.

1.5 Submission of Compliance Plans

A. Compliance Plan

All Covered Employers and all Entities subject to these Regulations shall, no less than twenty days prior to commencing business on the Reservation, prepare a plan, acceptable to the TERO Director, setting out how the Employer or Entity shall comply with the requirements of this Ordinance and implementing regulations. A Covered Employer or Covered Entity already present on the Reservation on the effective date of these Regulations that has not prepared a Compliance Plan acceptable to the TERO Director, shall come into compliance with the requirements of this section within 60 days of the effective date of these Regulations.

See also Ordinance Section 401.

B. Contracting and Subcontracting Compliance Plans

Each Covered Employer intending to engage in business activity in the MHA Nation, must submit a contracting and subcontracting plan to TERO prior to the time it commences work on the Reservation. No new employer may commence work in the MHA Nation until it has met with TERO and developed an acceptable plan for meeting its obligations under these Regulations. A Covered Employer that fails to submit an acceptable plan in a timely manner shall be in violation of the TERO Ordinance and subject to fines and other sanctions.

The contracting and subcontracting plan shall indicate all contracts and subcontracts that will be entered into by such Covered Employer on a project and the projected dollar amounts per contract and subcontract. If the Covered Employer has already selected a firm to perform any contract or subcontract work, it shall list the name of that firm and indicate whether the firm is certified as an Indian-owned or Indian-controlled firm registered with TERO. If it is not a Certified Firm, the Covered Employer shall further indicate why any technically qualified and certified Indian-owned or Indian-controlled firm, if any, registered with TERO was not selected. The plan shall also indicate how the Covered Employer intends to comply with TERO Regulations when

awarding all contracts and subcontracts not yet awarded at the time the plan is submitted.

C. Employment and Training Plan

Any employment and training plan shall include, but not be limited to, the number of man-hours, by craft and skill category, needed on the project; the persons the Covered Employer or Entity wishes to have approved as permanent and Key Employees; and shall include all data needed or required by TERO to verify the status of those employees. All non-permanent key positions shall be filled with Local Indians unless TERO has determined that there is no Qualified Indian available for that position. The plan shall also describe how the Covered Employer will participate in the MHA Nation's training programs.

PART 2.

INDIAN PREFERENCE IN EMPLOYMENT AND TRAINING

2.1 Hiring

A. Covered Employer Obligation

All Covered Employers shall, for all employment that is subject to the jurisdiction of the MHA Nation, give Preference to Qualified Indians, with first Preference to Local Indians, in all hiring, promotion, training, retention from lay-offs, and all other aspects of employment. Such Covered Employers shall comply with the rules, Regulations, Ordinances, guidelines, and orders of the Tribal Employment Rights Office which set forth the specific obligations of employers in regard to Indian Preference and Local Indian Preference.

See Ordinance Section 202

B. TERO Approval Required

A Covered Employer may recruit and hire workers from whatever sources are available and by whatever process the Covered Employer so chooses, provided that, except as stated in subsection (B), the Covered Employer may not employ a non-local Indian or non-Indian until the Covered Employer has given TERO seven (7) business days to locate and refer a qualified Local Indian. Where a Covered Employer or TERO cannot locate a qualified Local Indian, they shall make a best faith effort to locate, refer and hire an Indian who does not qualify as a Local Indian, but who is a member of a federally-recognized Tribe. In cases where a worker is needed in fewer than seventy-two hours, the Covered Employer may request from TERO, in writing, that TERO make an exception. TERO shall grant such request, so long as the Covered Employer can demonstrate that need exists. The TERO Director or his designee may enter into agreements with contractors providing that all hiring shall be done through TERO.

C. TERO Commission Waiver

No Covered Employer shall employ a non-local Indian or a non-Indian without first providing the TERO with no less than seven (7) business days to locate and refer a

qualified Local Indian; however, the Commission may provide for a period of less than seven (7) business days and waive this mandate when required by business necessity.

See Ordinance Section 203

D. Permanent and Key Employees

Prior to commencing work on the Reservation, a prospective employer and all subcontractors shall identify key, regular, permanent key and regular employees. Such employees may be employed on the project whether or not they are Local Indians.

A regular, permanent employee is one who is and has been on the employer's or subcontractor's annual payroll, or is the owner of the firm, (as opposed to one who is hired on a project-by-project basis).

A Key Employee is a regular, permanent employee who is in a top supervisory position or who performs a critical function such that an employer would risk likely financial damage or loss if that task were assigned to a person unknown to the employer. The fact that an employee had worked for the employer on previous projects shall not qualify that employee as a regular, permanent employee; provided, that exceptions for superintendents and other key personnel who are not permanent, regular employees may be granted by the TERO Director or his designee on a case-by-case basis.

Any employer or subcontractor which fills vacant employment positions in its organization immediately prior to undertaking work pursuant to a contract to take place on the Reservation shall set forth evidence acceptable to the TERO Director or his designee that its actions were not intended to circumvent these requirements.

E. No Barriers to Indian Employment

No Covered Employer shall use any job qualification criteria or other personnel requirements that serve as barriers to Indian employment, as determined by TERO, unless the employer can demonstrate that such criteria or requirements are required by business necessity.

See Ordinance Section 205

F. Sanctions

Any non-local Indian found to be employed by a Covered Employer who was hired in violation of the requirements of these Regulations shall be summarily removed from the job and the Covered Employer shall be subject to such additional sanctions, including emergency sanctions, TERO may impose. In imposing sanctions under this section, TERO shall consider such factors as whether the violation was the violation intentional; whether the employer acted quickly to remove the employee at issue; and whether the employer been cited for other work permit violations in the past.

G. No Discrimination

Except in regard to Indian Preference, it shall be unlawful for a Covered Employer to refuse to hire, to discharge any individual, or to otherwise discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment, including promotion and training. It shall also be unlawful for a Covered Employer to engage in any other action that would deprive or tend to deprive any individual of employment opportunities, on the basis of race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibilities, disability, or political affiliation.

See also Ordinance 206

H. Termination

No Local Indian worker shall be terminated so long as a non-local Indian or non-Indian worker in the same craft is still employed. The non-Indians shall be terminated first, then the non-local Indians so long as the Indian or Local Indian meets the threshold qualifications for the job. Further, if the Covered Employer lays off by crews, qualified local Indians shall be transferred to crews that will be retained, so long as there are non-local Indians or non-Indians in the same craft employed on the crews that are to be retained.

2.2 Unions Subject to TERO

- A. An employer or subcontractor who has a collective bargaining agreement with one or more labor unions must obtain written agreements from said unions indicating that the Union will comply with these Indian Preference requirements. Specifically, the

contractor may make initial job referral requests to the union. However, if the union does not have a qualified Local Indian worker on any of its out-of-work lists, the union shall contact TERO. If TERO can identify a qualified Local Indian worker, that worker shall be referred through the union hiring hall to the job site. The union may not refer a non-local Indian or non-Indian until it has so contacted TERO. Before referring the non-local Indian or non-Indian to the job site, the union shall request and TERO shall grant permission for that worker. No union agreement shall supersede the requirements of the TERO Ordinance and Regulations. Nothing herein shall constitute official recognition of any union by the MHA Nation or the MHA Nation's endorsement of any union activities on the Reservation.

See also Ordinance Section 207

B. Exemptions to Union Rules

No Indian worker shall be required to travel to a site off the Reservation to be processed by the union hiring hall. Such processing shall be done on the lands over which the MHA Nation has jurisdiction or by telephone or mail.

Any Indian worker who does not wish to become a member of the union shall be granted permission to work for the duration of the project. Said worker shall pay all union dues but shall not be required to pay an initiation fee.

C. Obligation of Covered Employers.

Covered Employers with collective bargaining agreements with a union are responsible for informing such unions of the TERO Ordinance and TERO Regulations. A Covered Employer shall obtain a written agreement, acceptable to the TERO Director, from each union with which it has a collective bargaining agreement stating that:

1. The union will give absolute Preference to Local Indians in job referrals regardless of the position of said local Indians on any referral list the union may keep;
2. The union will grant Temporary Work Permits to any Local Indian who does not wish to join a union; and

3. The union will agree to the employer paying the fringe benefits in cash to any Local Indian who is not a union member and who chooses not to participate in the union's fringe benefit programs.

See also Ordinance Section 207

2.3 Training Programs

- A. All Covered Employers, as requested by TERO, shall participate in training programs to assist Indians in becoming qualified in the various job classifications used by the employer. Covered Employers engaged in construction shall participate in a designated (DELETED "Tribe's BAT") certified training program or a union apprenticeship program. All trainees or apprentices shall be Local Indians. Where an employer is not presently participating in a union apprenticeship program, the MHA Nation shall make a best effort to bear the costs of such training programs, but Covered Employers may also be required to bear part of the cost, including on the job training. Covered Employers that have collective bargaining agreements with unions may use union apprenticeship programs so long as they obtain agreement from the unions to use only Indian apprentices on the project.
- B. Plans & Reports

All Apprenticeship and Training or Apprenticeship Programs ("Program") are placed under the direction of the TERO Director or his designee. The Director, within one year after the effective date of these Regulations shall prepare and begin to implement a plan for promoting the development of the maximum number of local Indian journeymen as quickly as possible, consistent with the requirements of the program. The TERO Director or his designee shall provide the Tribal Council with an annual report on the apprenticeship program, including the number of Local Indian journeymen in each craft, the status of each Local Indian in the Program, the number of Local Indians who have dropped out of the Program during the past year, and the steps the Director is taking to maximize the effectiveness of the Program. Each Covered Employer that hires employees in crafts that are participating in the Nation's Certified

Apprenticeship Program shall employ the maximum number of apprentices required by that Program and shall otherwise cooperate in full with said Program in order to promote the development of Local Indian journeymen.

See also Ordinance Section 208

2.4 Job Qualifications, Personnel Requirements and Religious Accommodations

A Covered Employer may not use any job qualification criteria or personnel requirements that serve as barriers to the employment of Indians and which are not required by business necessity. The burden shall be on TERO to demonstrate that job qualification criteria or personnel requirement is a barrier to Indian employment. The burden will then be on the Covered Employer to demonstrate that the job qualification criteria or personnel requirement is required by business necessity. If the Covered Employer fails to meet this burden, he will be required to eliminate the criteria or personnel requirement at issue. Covered Employers shall also make reasonable accommodation to the religious beliefs of Indian workers. In implementing these requirements, TERO shall be guided by the principles established by the EEOC Guidelines. However, TERO reserves the right to go beyond the EEOC principles in order to address employment barriers that are unique to Indians.

2.5 Reports Required for Passing over Indian Promotion

The Covered Employer shall give Local Indians preference in consideration of all promotion opportunities and shall encourage Local Indians to seek such opportunities. For all supervisory positions filled by non-local Indians or non-Indians, the Covered Employer shall file a report with TERO stating which Local Indians, if any, applied for the job, the reasons why they were not given the job, and what efforts were made to inform Local Indian workers about the job opportunity. Failure to report the passing over of Indian employee promotions is subject to TERO sanctions.

2.6 Summer Students

Local Indians shall be given Preference in the hiring of summer student help. The Covered Employer shall make every effort to promote after-school, summer, and

vacation employment for Indian youth.

2.7 Retaliation; Whistleblowers – Removal of Non-Indian Employers

No employer shall punish, terminate, harass, or otherwise retaliate against any employee or other person who has exercised his or her rights under these TERO Regulations or has assisted another to do so. Further, any employer who harasses or abuses an employee of TERO who is carrying out official duties under these Regulations shall be summarily removed by the TERO Director or his designee from the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction. An employer shall be responsible for the actions of all of its employees, supervisory or otherwise, and for the actions of its subcontractors and their employees in regard to the prohibitions in this section.

2.8 Counseling and Support Programs

TERO, in conjunction with other Tribal and Federal offices, will provide counseling and other support services to Indians employed by Covered Employers to assist such Indians retain employment. Covered employers shall be required to cooperate with such counseling and support services.

PART 3.
INDIAN PREFERENCE IN
CONTRACTING AND SUBCONTRACTING

3.1 Entity Obligations

A. Generally – Partition of Contract Required to Secure Indian Preference.

The primary goal of this section is the promotion of MHA Indian-owned and MHA Indian-controlled contractors. Every Covered Employer engaged in any business activity within the exterior boundaries of the MHA Nation, including, but not limited to, construction, minerals development, supplies, and service shall give Preference to firms and services certified by TERO in any contract or subcontract to be performed on the Reservation, so long as there are Certified Firms that are technically qualified and willing to perform the work at a reasonable price. If the Covered Employer determines that Certified Firms lack the qualifications to perform all of the work required under a contract or subcontract, the Covered Employer shall make a good faith effort to divide the work required into small portions so that the Certified Firms can qualify for a portion of the work.

See also Ordinance section 301.

B. Indian Preference in Contracting

1. All Covered Employers awarding contracts or subcontracts for supplies, services, labor and materials in an amount of \$25,000 or more where the majority of the work on the contract or subcontract will occur within the jurisdiction of the MHA Nation, shall give preference in contracting and subcontracting to Certified Firms who have a preference level 1. The second preference shall be given to Native-owned and controlled Contractors from other federally recognized tribes who have a preference level 2. Where the contractor or subcontractor is selected through a competitive process, the awarding Covered Employer shall limit competition to Certified Firms; provided that, if the bid submitted by a firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, if the project is less than \$1,000,000.00 and within 10% if the project is more than \$1,000,000.00. The Commission shall issue regulations providing guidance on the

implementation of this requirement and for implementation of Indian preference when the awarding entity uses a method other than competition to select a contractor or subcontractor.

2. MHA Nation Contracts

The requirements set out in this Title shall apply to contracts awarded directly by the MHA Nation, its branches, divisions and all subsidiary governmental entities of the Nation, including the Mandan Hidatsa and Arikara Housing Authority, Districts, and Segments, and any governmental commercial enterprises of the MHA Nation or its divisions or subsidiary governmental entities (including casinos), except when it is determined by the Mandan Hidatsa and Arikara Legal Department that application of these requirements to that entity is specifically prohibited by Federal law. If a Federal Indian contract or subcontract requirement applies and is in conflict with the requirements of this Ordinance, the Federal requirements shall apply.

3. Federal and State Contracts.

The requirements set out in this Title shall not apply to contracts awarded by the federal or state government or their subdivisions. They shall apply to all subcontracts awarded by a federal or state direct contractor or grantee that is subject to the jurisdiction of the MHA Nation, whether or not the prime contract was subject to these requirements, except when it is determined by the Mandan Hidatsa and Arikara Legal Department that application of these requirements to that entity is specifically prohibited by Federal law.

4. MHA Government Commercial Enterprises Have Preference.

Notwithstanding subsections 1, 2 and 3 above, all tribal programs and tribal entities shall give a right of first refusal to a Government Commercial Enterprise qualified to perform the work on the project where the contract is to be awarded by the Tribe, Tribal Program, Tribal Office or any Tribal entity, regardless of the source of funds for that project and contract. The Tribal program, office, or entity that is letting the contract on the project shall engage in negotiations with the qualified Government Commercial Enterprise to negotiate a price and terms of a

contract for the work. If good faith negotiations do not result in a contract within thirty days after commencement of negotiations, the Tribal entity letting the contract may put the contract out for competitive bid in a manner consistent with subsections 1, 2 and 3 of this Section.

5. Sole Source Negotiations with Tribal Contracting Firms by Tribal Entities and Programs

Notwithstanding subsections (A), (B) and (C) of this Section, all Tribal programs and Tribal Entities shall give a right of first refusal for the work on any project funded by Tribal or Tribal Entity dollars and/or PL 93-638 funds to a Tribally-owned contracting firm qualified to perform the work on the project. The Tribal program or Entity that is letting the contract on the project shall engage in negotiations with the qualified Tribally-owned contracting firm to negotiate a price and terms of a contract for the work. If good faith negotiations do not result in a contract within thirty days after commencement of negotiations, the Tribal Entity letting the contract may put the contract out for competitive bid in a manner consistent with subsections (A), (B) and (C) of this Section.

C. Order of Preference

The following order of Preference shall apply in the award of contracts and subcontracts:

1. Competition in the award of all contracts and subcontracts shall be limited to services from firms that have been certified, and graded by TERO; however, if the bid submitted by a responsive and responsible Certified Firm owned by a member of the Three Affiliated Tribes is within 2% of the lowest bid, that firm shall be awarded the contract if that firm is technically qualified to perform the work and its price is reasonable.
2. If only one responsive and responsible Indian Certified Firm is available, the awarding Covered Employer shall negotiate with said firm and award the contract or subcontract to the Certified Firm if its price is reasonable and it is technically qualified to perform the work.

If the awarding Covered Employer determines, through a review of the list of Certified Firms that there are no Certified Firms with the technical qualifications to perform the work, it may, with the written approval of the TERO director or his designee, award the contract through a full and open competition.

D. Notice to TERO and to Certified Firms

Any Covered Employer planning to issue a bid, request for proposal, or other action leading to the employment of a contractor who would be covered by the TERO Regulations shall notify TERO of its plans no fewer than twenty days prior to issuing notice to bidders or other potential contractors. The Covered Employer shall also obtain from TERO a list of Indian Preference Certified Firms and shall send a copy of the bid notice or other notice setting out the contract opportunity to each Indian Preference Certified Firm engaged in the field of commerce in which the contract work will take place. TERO shall identify such firms based on the order of Preference set out in subsection (B) of this section. A Covered Employer that fails to comply with this requirement shall be subject to sanctions set forth in these Regulations.

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

A. Order of Preference

Qualified Indian Contractors are 100% owned and controlled by enrolled members of the Three Affiliated Tribes and shall have Preference on all contracts and subcontracts in connection with oil and gas exploration, production, and ancillary services.

Additionally, TERO will utilize a rating system for each service applied for based on proof of fitness. All Covered Employers 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 are Certified Firms that have the qualifications to render the specified services.
2. If there is more than one Certified Firm or Qualified Indian Contractor, the Covered Employer awarding the contract or subcontract shall limit bidding to such firms and award the contract or sub-contract to the firm that meets the

awarding Covered Employer's qualification regarding technical capability and price. Sealed Bids shall be opened in the TERO office with the TERO Team. The Bidding Requirements are listed below.

3. The decision on technical qualification and reasonable price shall rest solely with the awarding Covered Employer, unless TERO determines the awarding Covered Employer is improperly using those criteria to circumvent its obligations under the TERO Ordinance and Regulations.
4. If no technically Qualified Firm offers a price that the awarding Covered Employer considers reasonable, the awarding Covered Employer shall seek to negotiate a reasonable price with the technically Qualified Firm that offered the lowest price.
5. The awarding Covered Employer may not reject a Certified 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 Certified Firm on the TERO list of Qualified Indian Contractors, the awarding Covered Employer shall negotiate with said Certified firm and award the contract or sub-contract to that Certified Firm if it meets the awarding Covered Employer's qualifications regarding technical capability and price. The decision on technical qualification and reasonable price shall rest solely with the awarding Covered Employer, unless TERO determines the awarding Covered Employer is improperly using those criteria to circumvent its obligations under TERO Ordinance.
7. **BIDDING REQUIREMENTS**
The Requirements for Covered Employers releasing bids are as follows:
 - a. The Covered Employer must go to the TERO list of Certified Indian Contractors and determine if there is a contractor that provides that service. If there is one, the Covered Employer shall enter into negotiations with the contractor for a reasonable price.

- b. If there is more than one contractor, the Covered Employer shall open the project to bids from the qualified contractors for that project.
 - c. It is the responsibility of the Covered Employer releasing the work to obtain a current list of Indian Contractors.
 - d. The Covered Employer must provide TERO the list of contractors the invitation to bid was sent to.
 - e. The Covered Employer shall receive and maintain the sealed bids.
 - f. The sealed bids must be opened at the TERO office with all or part of the TERO team present.
 - g. The Covered Employer shall notify TERO of the award. If the contractor selected was not the lowest bidder, a justification of why the lowest bidder was not selected shall be provided to TERO in writing.
8. The TERO Bid Responsibilities are as follows – TERO must ensure:
- a. That there is a fair and transparent bid process;
 - b. That the Certified Indian Contractors are approved for the service in which they are bidding;
 - c. That the Certified Indian Contractor owner or key employee signs the bid response;
 - d. That the Covered Employer releasing the bid is complying with TERO requirements;
 - e. That the bid is generated by the Certified Indian Contractor and not a subcontractor;
 - f. Record the bid information to ensure that the lowest bidder or most qualified contractor is selected based on the bid submitted.
9. The Certified Indian Contractor Bid Responsibilities are as follows – The Certified Indian Contractor must:
- a. Submit the bid response on Company letterhead;
 - b. Have equipment related to the contract;
 - c. Have personnel on location of the contract;
 - d. Invoice/bill for the contractor;

- e. Receive payment for contract by the Covered Employer letting the contract;
 - f. Pay any subcontractor in a timely manner;
 - g. Adhere to MHA TERO Oil & Gas Regulations and Indian Preference in Contracting.
10. The term, “reasonable price” as used in this subsection shall mean a price that is within 10% for projects under one million dollars (\$1,000,000.00) and within 2% for projects over one million dollars (\$1,000,000.00) of the amount the awarding Covered Employer has estimated it would spend on that contract or subcontract. “Reasonable price” shall also mean a price that is within 2% of the amount the awarding Covered Employer has estimated it would spend on a vendor contract or subcontract.
11. Notwithstanding the requirements set forth in paragraphs 1 through 10 of this subsection, if an awarding Covered Employer:
- a. Has entered into a contract or subcontract with a Certified Indian Firm that is 100% owned by one or more members of the Three Affiliated Tribes after complying with the procedure set out in these Regulations; and been graded by the TERO Team in a service category; and
 - b. The awarding Covered Employer wishes to use that Certified Indian Firm that is 100% owned by one or more members of the Three Affiliated Tribes on subsequent contracts or subcontract involving the same service work in the same general service business area as the initial contract or subcontract; then
 - c. The awarding Covered Employer, after verifying with TERO that the desired firm remains a Certified Indian Firm that is 100% owned by one or more members of the Three Affiliated Tribes, may enter into subsequent contracts or subcontracts with that Certified Indian Firm for the same service work without first following the procedures set out in paragraphs 1 through 10 of this Subsection.

The awarding Covered Employer shall send notice of the award of each

subsequent contracts or subcontracts to TERO within 20 days of its execution.

The notice shall set out the name of the Certified Indian Firm, the general business area of the contract or subcontract, the dollar amount, and duration of the contract. Failure to send Notice of subsequent contracts may result in sanctions.

B. Obligations of Certified Indian Contractors

1. To be eligible for Indian Preference pursuant to these Regulations, a Certified Firm's service must be registered and certified with TERO as capable in the general business service area of the contract or sub-contract from the awarding Covered Employer. TERO has established a Master Service List of business areas for oil and gas related activity (e.g., trucking, mud, Allottees signatures). To obtain registration in a service category, a firm must demonstrate it has the experience or capable staff and equipment needed to perform in that business service area (herein after called "Fitness") and that the Indian owner(s) upon whom certification is based has the experience or capable staff 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 TERO's Indian contract and subcontract Preference program before it will be listed in that business service area. Proof of Fitness in a category shall include:
 - a. Detailed list of current inventory and/or copies of current equipment owned or financed through conventional financing or capital leases along with proof of payment.
 - b. Copies of all necessary certification and licenses of employees including but not limited to driver's license and adequate liability insurance.
 - c. The Indian Owner must show proof that he or she has the experience or staff within his or her company who have the knowledge to engage in that business area.
 - d. Resumes of all Key Employees.
 - e. Must reveal financial records as requested by TERO.

- f. A new company shall have one-year probation to prove viability of company and provide references before they receive Permanent TERO Certified Indian Contractors listing status.
2. In evaluating whether a firm is a Certified Indian Contractor and whether a firm is qualified to perform work in a particular business service area, 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 service area. TERO will reject any firm whose factors indicate the firm's structure is so atypical for a business in that service area that it is likely the firm was created to or is seeking work (i.e. acting as a "front") in a business service area in order to take advantage of Indian Preference and not as 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 graded as high in a service area when compared to an Indian Contractor that either owns the equipment or uses conventional financing or a capital lease. For example, a firm whose sole experience is in gathering Allottees' signatures will not be certified for Indian Preference for a trucking contract.

C. Ownership Requirements for Certified Firms CAPITAL LEASING)

1. On any contract or subcontract received by a Certified Indian Firm as a result of a Preference provided by this Ordinance, the Certified Indian Firm must own the equipment or be in the process of buying the equipment through conventional financing from a disinterested third-party entity or proceed with a capital lease that includes two of the following:
 - a. Full equipment ownership by the end of the lease term;
 - b. The Opportunity to purchase the leased asset at the end of the lease period for a price significantly below market value;
 - c. That the lease term is for 75% of the useful life of the asset; and
2. That the lease duration runs for 90% of the fair market value at the inception of the lease.

D. Preferred Preference Agreements, Joint Venture Agreements

Any firm whose qualifications rely in any significant manner on a joint venture, mentorship or Preferred Preference Agreement with a non-Certified Indian Contractor must meet the following requirements in order to obtain or retain service certification as a Certified Indian Contractor:

1. The Firm must submit a plan demonstrating that at the end of three Indian Preference contracts or three years, whichever comes first, that it has made progress toward full ownership of all assets and/or the company and that the total buyout occurs within 10 years.
2. For firms reliant on mentorships or joint venture relationships with non-Indian firms:
 - a. The firm shall, 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.
 - b. Must show proof that the partnership includes off-Reservation work or projects.
3. Any Certified Indian Contractor that fails to meet these requirements shall be notified by TERO that its certification as a Certified Indian Contractor will be withdrawn. The notification shall specify which requirement(s) the firm failed to meet and the information TERO relied on to make its determination. The firm shall have ten days to request a hearing before TERO Commission at which it will be given an opportunity to demonstrate that the decision of TERO was incorrect.
4. Any Certified 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:
 - a. Lose its eligibility to bid as a Certified Indian Contractor or any contract or subcontract for a period of six months; and
 - b. Be reinstated as a Certified Indian Contractor only upon reapplying and demonstrating that is has corrected the problems that led to its loss of

eligibility. The decision to reinstate a contractor shall be at the discretion of TERO Commission.

E. Obligation of Awarding Covered Employer

A Covered Employer awarding a contract or subcontract to a Certified Indian Contractor pursuant to the above Regulations shall:

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

F. Preference Partnership Agreement (PPA) Guidelines

1. Preference Partnership Agreement (PPA) must contain these items:
 - a. Language pertaining to services that are clear and concise. The PPA must not contain ambiguous language like "all Oil Field Services" or "Not Limited To";
 - b. Legal Venue/ Jurisdiction identified as the MHA Nation Tribal Court;
 - c. Termination of lease agreement: (Not to exceed 30 days);
 - d. Duration of lease agreement: (Not to exceed two years)

- e. Preference Partnership Agreement (PPA) must include a business/mentorship plan with timeline that illustrates how the Indian Contractor will be mentored to provide the service independently in the future;
 - f. All Preference partnership agreements (PPAs) that utilize Indian Preference must be submitted to MHA TERO and recorded in file to be valid.
2. The Certified Indian Contractor (CIC) Responsibilities are as follows:
 - a. Contract with only one subcontractor per service;
 - b. Have equipment related to the service;
 - c. Invoice the Operator for the service;
 - d. Have an employee providing the service;
 - e. Pay subcontractor upon receipt of payment from operator for service(s);
 3. The Certified Indian Contractor Trucking Responsibilities are as follows:
 - a. Adhere to established subcontractor ratio or limit;
 - b. Have equipment related to service;
 - c. Have an employee providing the service;
 - d. Invoices the Operator for the service;
 - e. Pay subcontractor upon receipt of payment from operator for service;
 4. The Subcontractor Responsibilities are as follows:
 - a. Subcontract will be exclusively with only one Certified Indian Contractor;
 - b. Must develop training and mentorship to the Certified Indian Contractor and adhere to it.

G. Subcontracting

A Tribally controlled company may sub-contract, but must first contact all other Certified Indian Contractors to see if they can do the work before bringing a non-Indian subcontractor. The Company must provide evidence that other Certified Indian Contractors were first all contacted via written correspondence.

3.3 Requirements in non-Oil and Gas Contracting

Preference shall be given to Indian Certified Firms in the award of all contracts. An Entity may select its contractor in any manner or procedure it so chooses. Provided that:

A. Competitive Award

1. If the Covered Employer uses competitive bidding or proposals, competition shall be limited to Certified Firms. If the Covered Employer is unsure if there are any qualified Certified Firms, it may first publish a prior invitation for Certified Firms to submit a Statement of Intent to respond to such a limited advertisement when published and to furnish, with the Statement of Intent, evidence sufficient to establish their technical qualifications, provided that, if the bid submitted by a firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, the award shall be made to that firm if it is technically qualified to perform the work.
2. If the Covered Employer fails to receive any Statement of Intent from a technically qualified Certified Firm, it may after so notifying TERO, advertise for bids or proposals without limiting competition to Certified Firms and may award to the low bidder, provided that, if the bid submitted by a firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work.
3. If only one Certified Firm submits a bid or Statement of Intent, the Covered Employer, unless otherwise prohibited by Federal law or Regulations, shall enter into negotiations with that Certified Firm for a period not to exceed ten days and shall award the contract to that Certified Firm so long as the firm is technically qualified and is willing to perform the work at a reasonable price as defined in these Regulations.

B. Negotiated Award

If the Covered Employer selects its contractor through negotiations or other informal processes, it may not enter into a contract with a non-Certified Firm unless it has contacted every Certified Firm in the relevant service categories and has determined that there is no Certified Firm available that is technically qualified to perform the work required at a reasonable price as defined in section 3.5. So long as a Certified Firm meets the minimum threshold qualifications, no non-certified firm may be selected.

3.4 Requirements in non-Oil and Gas Subcontracting

A. General Requirements

Preference shall be given in the award of all subcontracts to Certified Firms. The contractor may select its subcontractor in any manner it so chooses. Provided that if the contractor uses competitive bidding or proposals, competition shall be limited to Certified Firms and award shall be made to the responsive and responsible firm submitting the lowest bid if its price is reasonable as defined in these Regulations. If the contractor is unsure if there are any qualified Certified Firms, it may first publish a prior invitation for Certified Firms to submit a Statement of Intent to respond to such a limited advertisement when published and to furnish, with the Statement of Intent, evidence sufficient to establish their technical qualifications. If the contractor fails to receive any Statement of Intent from a technically qualified firm, it may, after so notifying TERO, advertise for bids or proposals without limiting competition to Certified Firms and may award to the low bid; provided that, if the bid submitted by a firm owned by a member of the MHA Nation is within 2% of the low bid, the award shall be made to that firm if it is technically qualified to perform the work. If only one Certified Firm submits a bid or Statement of Intent, the contractor shall enter into negotiations with that firm and shall award the contract to that firm so long as the firm is technically qualified and is willing to perform the work at a reasonable price as defined in section 3.5.

If the contractor selects its subcontractor through negotiations or other informal process, it may not enter into a contract with a non-certified firm unless it has contacted every Certified Firm in the relevant field and has determined that there is not a Certified Firm available that is technically qualified to perform the work required at a reasonable price as defined in section 3.5. So long as a Certified Firm meets the minimum threshold qualifications, no non-certified firm may be selected.

B. Special Requirements

Covered Employers awarding construction contracts shall comply with the following requirements in the award of subcontracts:

1. The bid notice shall require that each bidder submit, as part of its bid, an Indian subcontract plan showing, for each subcontract it intends to enter into, the name of the firm, whether it is or is not certified, and, if not certified, why the contractor did not select a Certified Firm, and the projected subcontract price, as provided for in Part 1, section 1.3(b). Since, pursuant to that section a contractor will not be permitted to commence work on the Reservation unless it has an approved subcontracting plan, it is in the contract awarding Covered Employer's self-interest to declare as nonresponsive or non-responsible any bidder who fails to submit a satisfactory plan. The subcontract price information for each bidder shall be made available to TERO and shall be used to ensure that a contractor has not engaged in bid shopping as a means to discourage Certified Firms or to force them to accept a subcontract at an unreasonably low price.
2. It shall be illegal for any contractor or bidder to engage in bid shopping. Bid shopping is defined as any practice involving or comparable to the contacting of different subcontracting firms, informing them that a competitor has underbid them, but offering them an opportunity to underbid the competitor. Any contractor found to have engaged in bid shopping shall be prohibited from engaging in work on the Reservation or, if engaged in work, shall be liable for treble damages for any losses suffered by a certified firm as a result of the contractor's bid shopping practices. TERO reserves the right to require any contractor to demonstrate that a reasonable relationship exists between the dollar amount of a proposed subcontract and the reasonable costs of supplies, materials, and labor.
3. The contractor shall not be prohibited from requiring that a subcontractor provide some form of security. However, if a subcontractor bonding requirement has been imposed and an Indian firm is unable to obtain a bond, the prime contractor must permit the Indian subcontractor to provide another adequate form of security. A list of acceptable bonding alternatives is provided here:
 - a. No bond required on amounts of \$25,000 or less;
 - b. Surety bonds;

- c. Cash bonds -- to 25% -- held in escrow by Tribal attorney or bank;
 - d. Increased retainers -- 25% instead of normal;
 - e. Letter of credit -- 100%;
 - f. Letter of credit -- 10% -- with cash monitoring system;
 - g. Cash monitoring system;
 - h. Other options to be considered as they arise. The final decision on whether an alternative form of security is sufficient shall rest with TERO.
4. If it is determined that there is no Certified Firm available qualified to perform a particular subcontract because the subcontract is too large for the capacity of any one certified firm, the contractor shall make a good faith effort to divide that subcontract into smaller pieces so that several Certified Firms may qualify and perform the work.

C. Technical Assistance to Indian Subcontractors

When requested by TERO the Covered Employer shall develop, submit and implement a plan to assist Indian subcontractors to develop and improve their technical and managerial capabilities.

3.5 Responsibility for Evaluating Technical Qualifications and Reasonable Price

A. Technical Qualifications

The Covered Employer and its contractors and subcontractors shall have the discretion to determine technical qualifications. However, if the Covered Employer determines that there are no Certified Firms that are technically qualified, the Covered Employer must provide to each Certified Firm it rejects a description, in writing, of areas in which it believes the firm is weak and steps it could take to upgrade its qualifications.

If a Certified Firm that was disqualified on the grounds of technical qualification believes that the disqualification was the result of an improper effort by a Covered Employer, contractor, or subcontractor, to circumvent its Preference responsibilities under these Regulations, the Certified Firm may file a complaint with TERO. Said complaint must be filed within 20 days after the firm was notified of its non-

qualification. The burden shall be on the complaining firm to demonstrate that (a) it is qualified, and (b) its disqualification was the result of an effort to circumvent these Regulations. If after a hearing, as provided for in Part 5, section 5.3, the complaint is found to be valid, TERO Director or his designee shall impose such sanctions as he deems appropriate, including punitive damages.

B. Reasonable Price

A Covered Employer may use any process it so chooses for determining what constitutes a reasonable price including, but not limited to, competitive bidding (open or closed), private negotiations, or the establishment of a prototype cost ceiling before bidding or negotiations commence. However, before a Covered Employer may reject all Certified Firms on the basis of price, it must offer one or more of the Certified Firms an opportunity to negotiate price.

If there is only one technically qualified Certified Firm, a Covered Employer must enter into negotiations on price with such firm and must contract with that firm if a reasonable price can be negotiated. No Covered Employer may reject a Certified Firm on the grounds that the price is not reasonable and subsequently contract with a non-Certified Firm at the same or higher price. Any contract modification executed between a Covered Employer and a non-certified firm during the course of a project which results in a higher price to the firm will be subject to review by TERO to assure that the modification in price is justified and not a circumvention of this section.

Any Covered Employer found to have violated this requirement by such circumvention shall be liable for treble damages for any losses suffered by a Certified Firm as a result of the Covered Employer's actions.

3.6 Operation of the Contract or Subcontract

Once a Covered Employer enters into a contract with a Certified Firm, TERO will not intervene in any way in the relationship between the parties unless a Certified Firm demonstrates that action taken against it is intended primarily to circumvent the requirements of these Regulations.

3.7 Maintenance of Indian Preference Status

If a Certified Indian Firm receives a contract or subcontract award on the basis of Indian Preference as provided for in this Part, it shall maintain its certification throughout the entire period of the contract. If, as a result of changes in the firm's ownership or control during the period of the contract, the firm no longer qualifies as a Certified Firm, TERO reserves the right to take such action against the firm as it deems appropriate to preserve the purposes of these Regulations.

PART 4.
CRITERIA AND PROCEDURES FOR
CERTIFYING FIRMS AS INDIAN PREFERENCE ELIGIBLE

4.1 General Statement of Policy

Pursuant to its sovereign authority, the Mandan Hidatsa and Arikara Nation has imposed Indian contract Preference requirements as one tool for promoting the economic development of the Reservation. When used properly, Indian Preference in contracting can assist in the development of Indian businesses and thereby assist the MHA Nation and its members to achieve economic self-sufficiency. However, if the Preference is abused through Fronts, it will undermine this development and discredit the Preference tool. Because of this, it is the policy of the MHA Nation to require an applicant for Indian contract Preference certification provide **rigorous proof** that it is a legitimate Indian-owned and controlled firm.

In evaluating an applicant, a number of specific criteria will apply. These criteria are set out in section 4.2, the criteria section, of this Part. However, experience has shown that persons interested in abusing the Indian Preference program are able to structure firms to get around most specific criteria. Therefore, in addition to applying the specific criteria, the reviewing body for the MHA Nation will evaluate a firm under the following general criterion: applying sound management principles, would the firm have been structured in the manner it is, and would the Indian owners have been given the amount of ownership and control they have been given, if there were no Indian Preference program in existence? If the reviewing body determines that it has good reason to believe that the firm has been structured, managerially or financially, in a manner that is convoluted or inconsistent with sound business practices in order to enable the firm to qualify for Indian Preference certification, the firm will be denied such certification, even if it meets the specific criteria, unless the firm is able to demonstrate beyond a reasonable doubt that it was not structured to manipulate the Indian Preference criteria.

The specific criteria also requires that the ownership, control, and management arrangements of a firm make sense from a sound business perspective. The Indian owners must own and control the firm. One primary consideration in applying this criterion is whether the Indian owner's contribution to the firm is appropriately related to the extent of ownership given them such that sound business practice would justify their assigned share were Indian Preference not a consideration. For example, assume the Indian owner paid for his share through a promissory note to the non-Indian owners. In the ordinary course of business, such a transaction would not occur unless the new owner brought something of value, such as managerial or technical expertise, capital and equipment, or marketing opportunities. (The ability to qualify for Indian Preference is not considered such a marketing opportunity.) Therefore, such an arrangement would be denied Indian Preference certification unless some other sound business reason for the arrangement could be demonstrated. Where an Indian can demonstrate that he or she was unable to provide value for his or her share because the usual sources of capital were closed off to him or her because he or she was an Indian, that person shall be required to demonstrate that he or she extended his or her capital-raising ability as far as possible -- such that he or she is "at risk" in a significant way -- e.g., mortgaged a house or vehicle.

The Indian owner(s) must be directly involved in the firm's management. While it is not required that the Indian owner(s) be the Chief Operating Officer of the firm, at least one of the Indian owners will have to be involved in the day-to-day operations of the firm on a full-time basis and in a senior level position. The Indian person(s) in this position must have the experience or expertise in the area of business the firm is engaged in (or in management generally) to make the senior level role a legitimate one. The Indian owner(s) must also have sufficient knowledge about the firm to be accountable for the firm's activities.

Certification will not be granted to a firm where one or more of the Indian owners are not involved in the day-to-day operations of the firm in the manner described above. There is virtually no benefit to the Indian community from such passive ownership, other than

profits to the owners. It could take several years for a firm to show a profit, if one in fact materializes. Yet, during that time, the non-Indian managers can benefit at the expense of the Indian community. The limited benefits to the Indian owner(s) do not justify this risk. One of two exceptions to this rule is that certification will be granted to 100% Indian-owned firms where the manager of the business is a non-Indian spouse of an Indian and the family lives on or near the Reservation. No effort will be made to distinguish between the value contributed by a non-Indian spouse versus the Indian spouse. The family's contribution will be treated as an undivided unit. The second exception is for a more "public corporation," defined as one that is owned by 10 or more persons, 70% of which is Indian-owned, and where the Chief Executive Officer is an Indian.

Joint ventures will not be granted certification as Indian Preference firms, except in exceptional circumstances where it is clear that the Indian-owned firm has the capability to manage the project and the non-Indian joint venture partner is involved to provide certain technical or other specialty capability. TERO will certify Indian-owned companies with services that have entered into legitimate management contracts with non-Indian firms to assist the Indian firm develop its management and technical capability.

Such rigorous criteria, giving substantial discretion to the reviewing body, are necessary and appropriate for the Indian contract Preference program. Neither the MHA Nation nor the Indian community benefits from the establishment of "bogus" Indian firms, while the certification of such firms undercuts the credibility of the MHA Nation's Indian Preference program. An Indian firm or individual that is unable, on its own, to qualify as the prime contractor on a large project has other options open to it besides participating in the development of a bogus firm. For example, he or she can seek work at the subcontractor or employee level and benefit from the MHA Nation's requirement that Preference be given to Indian subcontractors and employees.

The procedural requirements for certification provide that applications shall be reviewed by a TERO team to grade and certify services. The TERO team shall request any additional information it believes appropriate. The TERO Director or his designee shall maintain oversight and select the TERO Team. Those applying for a TERO or Tribal Business license will submit an on-line application to register services. The TERO Commission shall review the grade from the TERO team and then decide on whether certification should be granted. The firm will have a right of appeal to the MHA Nation Tribal Court, which shall reverse the decision only if it finds that the decision was arbitrary or capricious.

A firm shall first receive a probationary certification, to be made final at the end of one year; or a longer period where the Commission believes such is necessary. The TERO Office shall have the right, at any time, either on their own initiative or upon the filing of a complaint by any party, to conduct an investigation of a firm to determine if its certification should be suspended or withdrawn. TERO Office shall require new applications from firms that had been certified by the Tribe prior to the adoption of these criteria. If it is determined that a firm does not qualify under the new criteria, the firm will be given four months to come into compliance with the new criteria. If it fails to do so by the end of that period, its certification shall be withdrawn.

4.2 Criteria for Indian Contract Preference Certification

To receive service certification as a firm eligible for Indian Preference, an applicant must satisfy all of the criteria set out in this section.

A. Ownership

The firm must be Indian-owned. The applicant must demonstrate the following:

1. Formal Ownership. That an Indian or Indians own(s) or more of the partnership, corporation, or other arrangement for which the application is being submitted. Such ownership must be embodied in the firm's organic documents, such as its stock ownership or partnership agreement. Ownership includes:

- a. financial ownership -- i.e., the Indian(s) owns the assets and equipment, will receive the firm's assets upon dissolution, and will receive the profits; and
 - b. control -- i.e., the Indian(s) ownership provides him or her with a majority of voting rights or other decisional authority and that all decisions of the firm are to be made by a majority vote except where otherwise required by law.
2. Value. The Indian owner(s) provided real value for his or her ownership by providing capital, equipment, real property, or similar assets commensurate with the value of his or her ownership share. It will not be considered "real value" if the Indian(s) purchased his or her ownership share, directly or indirectly, through a promissory note, the ultimate creditor of which is the non-Indian owner of the firm or an immediate relation thereof, or any similar arrangement, unless a convincing showing can be made that the Indian owner(s) brought such special skills, marketing connections, or similar benefits to the firm that there is a good reason to believe the arrangement would have been entered into even if there were not an Indian Preference program in existence. Where the Indian participant can demonstrate that he or she could not pay good value for his or her Indian ownership because the normal capital sources were closed to him or her because he or she is an Indian, that person may satisfy this requirement by demonstrating further that he or she extended his or her capital-raising capability as far as possible, such that the Indian participant clearly is at risk in the business in relationship to his or her means.
3. Profit. The Indian owner(s) will receive all profits. If there is any provision that gives the non-Indian owner a greater share of the profits, in whatever form and under whatever name, such as through management fees, equipment rental fees, or bonuses tied to profits, certification will be denied. Salary scales will be reviewed to ensure the relative salaries being paid Indian and non-Indian owners are consistent with the skills of the parties and are not being used to circumvent the requirement that Indian owners receive the profits.

B. Management Control

The firm must be under significant Indian management and control. The firm must be able to demonstrate that:

1. One or more of the Indian owners must be substantially involved, as a senior level official, in the day-to-day management of the firm as his or her primary employment activity. The Indian owner does not have to be the "Chief Executive Officer." However, he or she must, through prior experience or training, have substantial occupational ties to the area of business in which the firm is engaged such that he or she is qualified to serve in the senior level position and is sufficiently knowledgeable about the firm's activities to be accountable to the Tribe for the firm's activities. This provision may be waived when:
 - a. the firm is 100% Indian owned and the Chief Executive Officer is the spouse and/or parent of the owner(s), the family lives on or near the Reservation, and the majority of employees are Indian; or
 - b. the firm is modeled on a publicly-held corporation such that it is owned by 10 or more persons, is at least 70% Indian-owned, the Chief Executive Officer and the highest-salaried employee in the firm is/are Indian, and a majority of the employees are Indian.

C. Integrity of Structure

There must be good reason to believe that the firm was not established solely or primarily to take advantage of the Indian Preference program. In evaluating an applicant under this criterion TERO will consider the factors set out below. TERO shall exercise broad discretion in applying these criteria in order to preserve the integrity of the Indian Preference program and in questionable cases shall deny certification.

1. History of the Firm – Whether the history of the firm provides reason to believe it was established primarily to take advantage of the Indian Preference program, and in particular whether the firm, a portion of the firm, or key actors in the firm originally were associated with a non-Indian owned business that gained little of business value in terms of capital, expertise, equipment, etc., by adding ownership or by merging with an Indian firm.

The Certified Indian Contractor shall determine qualified and responsive subcontractors they deem to be qualified and or contractible within their firm.

2. Employees – Whether key non-Indian employees of the applicant are former employees of a non-Indian firm with which the Indian firm is or has been affiliated, through a joint venture or other arrangement, such that there is reason to believe the non-Indian firm is controlling the applicant.

Whether Indians are employed in all or most of the positions for which Qualified Indians are available. A high percentage of non-Indian employees in such positions will provide reason to believe the firm was established primarily to benefit non-Indians.

The Certified Indian Contractor shall determine offers for employment they deem to be qualified or employable within their firm.

3. Relative Experience and Resources – Whether the experience, expertise, resources, etc., of the non-Indian partner(s) is so much greater than that of the Indian(s) that there is little sound business reason for the non-Indian to accept a junior role in the firm other than to be able to take advantage of the Indian Preference program.

D. Brokers

Brokers will be certified only if they are dealers who own, operate, or maintain a store, warehouse, or other establishment in which the commodities being supplied are bought, kept in stock, and sold to the public in the usual course of business; Provided, that this requirement shall not apply where the applicant demonstrates that it is customary and usual in the area of trade for a broker/dealer not to maintain an establishment and to keep the commodities in stock.

E. Manufacturing Companies

In determining whether or not a manufacturing firm is Indian-owned and controlled, the Commission shall be guided by the Small Business Administration Standard Operating Procedures on certifying firms as eligible for the 8(a) program.

4.3 Certification Procedures

A. Application for Certification

A firm seeking certification as an Indian Preference eligible firm shall submit an on-line application to TERO through TIMS (Application forms are found on MHATERO.com). TERO personnel will be available to assist a firm to complete the application. Within twenty-one (21) working days after receipt of a completed application, the TERO team shall review the application, request such additional information as he believes appropriate (computation of the 21-working day period shall be stayed during the time any request for additional information is outstanding), conduct such investigations as it deems appropriate, and submit an analysis and recommended disposition to the Commission. Copies of the analysis and recommended disposition shall be kept confidential and shall not be made available to the applicant or any other party. When it is so required, TERO Office may extend the processing period by an additional 21 working days, by sending notification of the extension to the applicant by registered mail. Within fifteen (15) working days of receipt of TERO's analysis and recommended disposition, the Commission shall hold a hearing on the application. Only the Indian principal(s) of the firm shall be present at the hearing. In addition, any other party wishing to present information to the Commission shall be entitled to do so, by requesting, no less than one day prior to the hearing, an opportunity to participate. A party may not be represented by counsel. Hearings shall be conducted as provided for in TERO Hearing Procedures.

B. Probationary Certification

An applicant granted certification shall be issued a one-year probationary certificate. During that period, TERO Office shall monitor the firm's activities to ensure that the firm is operating in the manner described in its application. During the probationary period, TERO Office shall have the right to request and receive such information and documents as they deem appropriate.

C. Final Certification

At the end of the probationary period the Commission, after receiving recommendations from TERO Director or his designee, shall either:

1. grant full service certification;
2. continue the probationary period for up to six months; or
3. deny certification.
4. The firm may appeal to the TERO Commission at the next Commission meeting if the Certified Firm is unsatisfied with the certification.

D. Withdrawal of Certification

From the information provided in reports required by sections 3.3(f) and 5.1, on the basis of a written grievance filed by any other firm or person, or on its own initiative, TERO may initiate proceedings to withdraw or suspend the certification of any firm. TERO Director or his designee shall prepare an analysis and recommended disposition for the Commission and shall send the firm notice, by registered mail, that its certification is being examined, along with the grounds therefor. The Commission shall then set a date for a hearing, which shall be held within 21 days after it receives the analysis and recommended disposition from TERO. At the hearing, TERO Director or his designee shall present the case for suspension or withdrawal, and the hearing shall be conducted as set out in section 5.2. After the hearing, the Commission may:

1. withdraw certification;
2. suspend certification for up to one year;
3. put the firm on probation; and/or
4. order that corrective action be taken within a fixed period. A firm that has had its certification withdrawn may not reapply for a period of one year.

E. Firms Certified Prior to the Adoption of These Criteria

Each firm holding Indian Preference certification from the Nation prior to the effective date of these Regulations shall submit an application to TERO within 30 days after the effective date of these Regulations. If TERO determines the firm qualifies under these new criteria, it shall, within 21 days of receipt of the application, so recommend to the Commission, which, unless it has grounds to act to the contrary, shall, without the requirement of a public hearing, issue a new certificate within thirty (30) days of receipt of TERO's recommendation. If TERO has reason to believe the firm does not qualify, it shall prepare an analysis of the reasons therefore along with its recommended disposition. The analysis shall be submitted to the Commission within 21 days after

receipt of the application. Should TERO require additional information from the firm, computation of the 21-day period shall be stayed by the Commission for a reasonable time to permit such information to be provided. The Commission, after providing the firm an opportunity for a hearing as provided in section 5.2, which shall be held within 15 days after receipt of TERO's findings, shall:

1. grant the firm a new certification; or
2. determine that the firm is not in compliance. If the Commission determines that the firm is not in compliance, it shall provide the reasons therefore. The firm shall then have 15 days from the date of the decision to demonstrate to the Commission that it has made such changes as are necessary to come into compliance. If at the end of the 15-day period the firm has failed to come into compliance, its certificate shall be withdrawn. A copy of the withdrawal notice shall be sent to the firm.

F. Change in Status and Annual Reports

Each Certified Firm shall report to TERO, in writing, any changes in its ownership or control status within 60 days after such changes have occurred. Each certified firm, on the anniversary of its receipt of permanent certification, shall update the information provided in its initial application on an Annual Report form provided by TERO.

Failure to provide information pursuant to these requirements shall constitute grounds for sanctions and/or withdrawal of certification as well as Indian Preference.

PART 5
TERO FEES

5.1 Collection of Fees Prior to Commencement of Work

All fees are due and shall be paid in full by any Covered Employer prior to his or her commencing work in the Nation, unless other arrangements are agreed to, in writing, by the TERO Director or his designee.

Immediately upon becoming aware that a Covered Employer is intending to engage in work on the lands over which the MHA Nation has jurisdiction or regulatory control, the TERO Director or his designee shall provide notice informing the Covered Employer of the nature and the purpose of the fee, the percentage, the specific amount due, if known, the date due, and the possible consequences if the Covered Employer fails to comply.

If the Covered Employer fails to pay the fee by the day it commences work on the lands over which MHA Nation has jurisdiction, appropriate sanction may be levied by the TERO Director or his designee including the issuance of a cease and desist letter subject to review by the TERO Commission and may file a formal charge of non-compliance. A Commission hearing may be held as soon thereafter as the Commission can meet, and shall inform the Covered Employer of the scheduled hearing.

At the hearing, to be held whether or not the Covered Employer attends, the Commission shall determine whether or not the Covered Employer has failed to comply. If it finds non-compliance, it shall: a) Impose penalties as set by the TERO Commission; b) seize assets; c) Apply sanctions as set forth in _____; or d) Employment Rights Fee

5.2 Fees

Please note: the following fees shall/shall not apply to Certified Indian Firms.

See also Ordinance Section 601.

A. 2.5% of Contracts

Every Covered Employer with any contract in the sum of \$1,000 or more shall pay a fee of two and one-half percent of the total amount of the contract including materials and fees for right of ways, easements, etc. Such fee shall be paid by the Covered

Employer prior to commencing work on the Reservation. However, where good cause is shown, the TERO Director or his designee may authorize a construction contractor to pay said fee in installments over the course of the contract.

B. 2.5% Quarterly Payroll

Every Covered Employer other than construction contractors, with five (5) or more employees working on the Reservation, or with gross sales on the Reservation of \$1,000 or more shall pay a quarterly fee of Two and one-half percent of his quarterly payroll for employees working on the Reservation, which shall be paid within 30 days after the end of each quarter. The employment rights fees of 2 and 1/2 percent (2.5%) shall apply to any Covered Employer.

C. Exemptions

1. The fee imposed by subsections (a) and (b) of this Section shall not apply to education, health, religious, Governmental, or non-profit employers. It shall apply to contractors employed by such Covered Employers.
2. Provided that, a construction contractor awarded a contract by the Nation's Government, including all branches, offices and divisions, all subsidiary Governmental entities of the Nation (including the Mandan Hidatsa and Arikara Housing Authority, Districts, and Segment), and any Governmental commercial enterprises of the MHA Nation, its divisions or subsidiary Governmental entities, (including casinos) regardless of the source of funds for that contract, shall, as a condition of doing business on the MHA Nation, grant its consent to the Tribal Entity awarding the contract to deduct the amount of TERO fee from the total amount due the contractor under the contract and to pay said amount directly to the MHA TERO prior to the commencement of work under the contract. Prior to making said deduction, the Tribal Entity awarding the contract shall provide the contractor with a form prepared by TERO, in which the contractor grants its consent to the deduction of TERO fee from the amount it is entitled to receive from the Tribal Entity, as provided for above. A contractor shall not be permitted to commence work on the MHA Nation until it has executed said form. This provision shall not apply where the Nation's legal counsel has opined that

application of these requirements to that Tribal Entity is specifically preempted or otherwise prohibited by Federal law.

5.3 Fee Collection and Expenditure (SECTION 602 ORDINANCE)

The fee shall be collected by TERO Director or his designee pursuant to these Regulations of the Commission. The fee shall be paid over to the Nation's Treasurer and shall be credited to the general account of the MHA Nation. Said funds shall be expended by TERO, pursuant to budgets duly approved by the Tribal Council, to carry out the purposes of this Ordinance, including the administration of the Nation's Bureau of Apprenticeship and Training certified apprenticeship training program.

See also Ordinance Section 602.

5.4 Monthly Statements (SECTION 603 ORDINANCE)

The Tribal Treasurer shall provide TERO Director or his designee with a monthly Statement that provides the following information:

- A. The total amount of money that was in the fees account at the beginning of the month;
- B. The fees paid into the account during the month, itemized by the name of the payer, the amount paid, and the date of payment.

5.5 Employers with a Permanent Place of Business on the Reservation

A Covered Employer that the TERO Director or his designee determines will have a permanent place of business on the Reservation shall pay the fee pursuant to the following procedures:

- A. On April 15, July 15, October 15, and January 15, the Covered Employer shall submit, on a form provided by the TERO Director or his designee, information showing his total payroll for the previous quarter, accompanied by a check for an amount equal to 1/2 of 1% of the payroll for that quarter.
- B. The TERO Director or his designee, upon receipt of a written request, may authorize, in writing, a Covered Employer to submit the information and payments on a quarterly

schedule other than the one set out in subsection "a", when doing so would make the schedule compatible with the Covered Employer's fiscal year structure.

- C. A Covered Employer covered by this section shall be subject to the same interest, penalty and enforcement requirements and deadlines as those established in section 1. The TERO Director or his designee shall send said Covered Employers appropriate notices and forms.

5.6 Alternative Arrangement

The TERO Director, in his discretion, may, upon receipt of a written request, authorize a Covered Employer to pay the required fees in installments over the course for the year or the contract, as appropriate, when:

- A. The total annual fee exceeds \$10,000, and
- B. The Covered Employer demonstrates hardship or other good cause.

The decision to authorize an alternative arrangement, which shall be in writing, shall rest solely with TERO Director or his designee and may not be appealed to the Commission or the Courts.

The Covered Employer shall pay interest, at the prime rate, on all amounts paid after the day he commences work on the Reservation when paying under an alternative arrangement.

PART 6
ADMINISTRATIVE PROCEDURES

6.1 Reports and Monitoring

- A. All Covered Employers engaged in any aspect of business activity on the Reservation shall submit reports and such other information as is requested by TERO. Employees of TERO shall have the right to make on-site inspections during regular working hours in order to monitor a Covered Employer's compliance with these Regulations. Employees of TERO shall have the right to inspect and copy all relevant records of a Covered Employer, of the Covered Employer's signatory unions or subcontracts, to speak with workers on the job site, and to engage in similar investigatory activities. All information collected by TERO shall be kept confidential, unless disclosure is required during a hearing or appeal as provided for in these Regulations.

See also TERO Confidentiality Policy

- B. The TERO director or his designee is authorized to work cooperatively with Federal, other Indian Nations, State, and local Governmental agencies that have responsibility for enforcing the prohibitions on discrimination set out in subsection (a) and shall assist Indians to file and prosecute discrimination complaints with such agencies when the Director or his designee determines said complaints have merit and the TERO lacks the full authority to provide complete relief to the complainant.

See also Ordinance 206(b) and 206(c)

- C. Nothing in this Title shall bar a complainant from filing a complaint with the TERO just because he has filed a complaint involving the same matter with another Governmental Entity. However, in such cases the TERO Director shall seek to coordinate with the other agency(s) in order to promote efficiencies in the processing of the complaints.
- D. If, when carrying out inspections at work sites or otherwise carrying out their responsibilities under these Regulations, the TERO Director, his designee, or TERO compliance officers have reason to believe that a requirement of a Nation, Federal, State or local law, ordinance or regulation, may have been violated by a party, the

Director, or his designee, is authorized to document such possible violation, to report it to the appropriate enforcement agency, and, to the extent that resources permit and the Director, or his designee determines it to be appropriate, assist that agency to investigate and cure the possible violation.

See also Ordinance Section 710

6.2 Complaint Procedures

A. Non-Compliance by a Covered Employer

Any Indian, group of Indians, representatives of a class of Indians, certified firm, group of Certified Firms, or other person or employer who believes that a Covered Employer has failed to comply with these Regulations, or who believes that they have been discriminated against by a Covered Employer because they are Indian may file a complaint with TERO. Persons may file whether or not they can show that they were personally harmed by the Covered Employer's non-compliance.

B. Non-Compliance by TERO

1. Procedure Against TERO

Any Covered Employer, group of Covered Employers, non-Certified Firms, group of non-Certified Firms, non-Indian worker, group of non-Indian workers or other person or employer who believes that an action or inaction of TERO office under these Regulations is in violation of these Regulations, the Mandan Hidatsa and Arikara Nation Code, or Federal law or Regulations may file a complaint with TERO. Persons may file whether or not they can show they were personally harmed by TERO's action.

See also Ordinance Section 703.

2. Procedures Against an MHA Employee

Any individual who believes any office, division, branch, subsidiary Entity or commercial enterprise of the Mandan Hidatsa Arikara Nation Government or any of its subsidiary entities has violated any requirements imposed by these Regulations regarding employment may file a complaint with the Director or his designee only after he has either:

- a. filed a complaint with, and exhausted the administrative remedies provided by, that office, division, branch, subsidiary Entity, or commercial enterprise of the Nation or of any of the Nation's subsidiary entities, or
- b. filed a complaint and 60 days have passed since he filed said complaint and no meaningful action has been taken on the complaint by that office, division, subsidiary Entity, or commercial enterprise of the Nation or of any of the Nation's subsidiary entities, whichever comes first, at which time the individual, group of individuals, business, or organization may file a complaint with the Director, or his designee.

Upon receiving a complaint that meets the requirements of this Section, the Director or his designee shall proceed in the same manner as he would on any other complaint filed pursuant to these Regulations, except that the Director or his designee and the Commission shall consider any written decision on the complaint issued by the office, division, branch, subsidiary Entity or commercial enterprise of the Nation or any of the Nation's subsidiary entities that is the subject of the complaint.

See also Ordinance Section 701

C. Investigations

On his own initiative or on the basis of a complaint filed pursuant to this Title, the Director, or any field compliance officer designated by the Director may make such public or private investigations within or without the exterior boundaries of the Reservation as the Director deems necessary to insure compliance with these Regulations, to determine whether any Covered Employer or Entity has violated any provision of these Regulations or its implementing regulations, or to aid in prescribing rules, regulations or policies hereunder.

D. Right to Inspections

The Director or any field compliance officer designated by the Director may enter the place of business or employment of any Covered Employer or Entity for the purpose of such investigation. The Director or his designee may, at said place of business or employment, in a manner consistent with good safety practices and with the orderly operation of the business activity, interview any employee or agent of the Covered

Employer, review and copy any documents, and carry out any other activity the Director, his designee, or officer deems necessary to the carrying out of the investigation; provided that, the Director, his designee, or officer shall comply with the requirements of these Regulations when reviewing or copying any confidential documents subject to that subsection

E. Right to Subpoena

For the purpose of investigations or hearings which, in the opinion of the Director, or his designee, or the Commission are necessary and proper for the enforcement of these Regulations, the Director, or his designee or the Commission Chairman may administer oaths or affirmations, subpoena witnesses, take evidence, and require, by citation, the production of books, papers, contracts, agreements, or other documents records or information which the Director, his designee, or the Commission deems relevant or material to the investigation.

F. Confidentiality

Any State or Federal tax records, trade secrets, or privileged or confidential commercial, financial, or employment information subpoenaed pursuant to this section or used in a compliance hearing or subsequent appeal to the Tribal Court, shall be confidential records of the Commission or the Court, shall not be opened to public inspection, shall be used only by the Director, the Commission, parties to a Compliance Hearing or subsequent appeal to Court, and the Court, and shall be used in a manner that, to the maximum extent possible consistent with the requirements of fairness to the parties, protects the confidentiality of the documents.

See also Ordinance Section 702

G. Processing

The Director or his designee shall within a reasonable time of the date on which a complaint is filed complete an investigation of said complaint unless the Director or his designee requests and is granted an extension by the Commission, which shall be for no more than 90 days. If upon investigation, the Director has reason to believe a violation has occurred, he shall may issue a citation with a monetary sanction deemed appropriate by the Director or he may exercise emergency measures including but not

limited to the immediate suspension of business as well as the right to seize assets. Within a reasonable time after receipt of the complaint, and on a regular basis thereafter, the Director or his designee shall provide the complaining party with a written report on the status of the complaint.

6.3 Informal Settlement

If, based on a complaint filed, or on its own information, TERO has reason to believe that a Covered Employer has failed to comply with any of these requirements, TERO may issue an appropriate sanction and shall so notify the Covered Employer in writing, specifying the alleged violation(s). If the party so notified is a contractor or subcontractor, notice shall also be provided to the Covered Employer holding the permit or authorization under which the contractor or subcontractor is operating, and such Covered Employer shall be a party to all further negotiations, hearings, and appeals. TERO may continue its investigation of the charge and shall attempt to achieve an informal settlement of the matter. If voluntary conciliation cannot be achieved and the Director has reasonable cause to believe a party has violated these Regulations, the Director or his designee shall issue a formal notice of non-compliance to the party and shall proceed with the enforcement procedures as set out in these Regulations.

6.4 Sanctions

- A. Without a hearing, the TERO Director may immediately issue the sanctions set forth below in 6.4(B), including the immediate and temporary suspension of business licenses and fines up to \$5,000 per day upon a finding of the following:
1. a violation of any provision under the TERO Ordinance and Regulations;
 2. a continued pattern of unacceptable business practices;
 3. a pattern of constant delay and/or refusal to pay employees or subcontractors;
 4. false information on a TERO application;
 5. failure to follow a submitted compliance plan;
 6. the business engages and/or continues to engage in illegal activity or impropriety.
- B. The Commission may impose any or all of the sanctions in these Regulations where it finds a violation of these Regulations. If after the hearing, the Commission determines that the violation alleged in subsection (a) occurred and that the Covered Employer

charged has no adequate defense in law or fact, or if no hearing is requested, the Commission may:

1. Deny such Covered Employer the right to commence business on the lands over which the MHA Nation has jurisdiction;
2. Impose a civil fine on such Covered Employer in an amount not to exceed \$5,000 per day for each violation;
3. Suspend such Covered Employer's operation on the lands over which the MHA Nation has jurisdiction;
4. Terminate such Covered Employer's operation on the lands over which the MHA Nation has jurisdiction;
5. Deny the right of such Covered Employer to conduct any further business on the lands over which the MHA Nation has jurisdiction;
6. Order such Covered Employer to make payment of back pay to any aggrieved Indian;
7. Order such Covered Employer to dismiss any employees hired in violation of the MHA Nation's employment rights requirements.
8. Order the Covered Employer to take such other action as is necessary to ensure compliance with these Regulations or to remedy any harm caused by a violation of these Regulations.
9. The Commission may attach property of an Entity when it finds that any one of the conditions set out below exists:
 - a. An Entity has refused or failed to post a bond after being so ordered to do so by the Director, Commission, or Court, as provided in Section 6.6 of this part; or
 - b. The Commission has good reason to believe the Entity will remove itself or its property from the Reservation before it can complete its effort to require the Entity to post a bond; or
 - c. The Entity has demonstrated, through its behavior an intent to disregard the requirements and orders of the Director, Commission or Court.

See also Ordinance Section 708

10. The Director or his designee may request the Nation's police to confiscate, and later request the Nation's Court to hold for sale, such property of the party as is necessary to ensure payment of said monetary damage order or to otherwise achieve compliance with the order of the Commission or the Court. Said petition shall be accompanied by a list of property belonging to the party which the Director has reason to believe is within the jurisdiction of the Court, the value of which approximates the amount of monetary damages at issue. If the Court finds the petition to be valid, it shall order the Nation's police to confiscate and hold said property or as much as is available. Notice shall be provided to the party informing it of the confiscation and of its right to redeem said property by coming into compliance with the order outstanding against it. If after thirty (30) days after confiscation the party has not come into compliance, the Court shall order the police to sell said property and use the proceeds to pay any outstanding monetary damages imposed by the Commission or Court and all costs incurred by the Court and police in the confiscation and sale. Any proceeds remaining shall be returned to the party.
11. In addition to the procedure and remedies provided for in these regulations the Director is authorized to petition the Tribal Courts under any other appropriate provision of the laws of the Nation as is necessary to effect implementation of and compliance with these regulations.

See also Ordinance section 706, 709

- C. If, after a hearing, the Commission determines that the alleged violation of this Ordinance or regulations have occurred and that the covered employer charged has no adequate defense in law or fact, or if a covered employer were issued a formal complaint and failed to request a hearing, the Commission may:
 1. Order the Tribal Treasurer to reimburse any party who improperly paid a TERO fee or overpaid said fee, but no interest shall be paid in such cases.
 2. Order the Covered Employer to take such other action as is necessary to ensure compliance with these Regulations or to remedy any harm caused by a violation

of these Regulations, consistent with the requirements of the laws of the MHA Nation and Indian Civil Rights Act, 25 U.S.C. 1301 et seq.

- D. The Commission's decision shall be in writing, shall be served on the charged Covered Employer after the close of the hearing. Where the Covered Employer's failure to comply immediately with the Commission's orders may cause irreparable harm, the Director or his designee may immediately utilize the sanctions set forth in these Regulations.

6.5 Bonds

The TERO Director or his designee may require an Entity to post a bond with the Commission pending a hearing before the Commission, pursuant to these Regulations. The TERO Director or his designee may petition the Court to require a Covered Employer to post a bond pending an appeal to the Court from a decision of the Commission, pursuant to these Regulations, upon making a written finding that any of the conditions set out below exists. The Entity:

- A. has no permanent place of business on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction; and
- B. the amount of the sanctions exceeds or likely will exceed \$1,000; and
- C. the project on which the Entity is employed will be substantially completed within 60 days, such that it may be difficult to locate property of said employer on the Reservation that would be available for attachment or confiscation if the Entity fails to pay any sanction imposed on it; or
- D. the Entity has failed to comply with an order of the Commission or the Courts in the past, and the employer has engaged in behavior that demonstrates a blatant disregard for the authority and requirements of the Commission, such that the Director or Commission has good reason to believe the Entity will not comply with the orders of the Commission or the Court.

PART 7
DUE PROCESS HEARING PROCEDURES

7.1 Pre-Hearing Procedures

A. Review of TERO Files

The respondent (the Covered Employer or Entity against whom a charge has been filed) shall have the right to review the case file of TERO Director (the Director) by scheduling a visit to TERO office during regular working hours at any point after receiving notice of a hearing. However, the Director shall have the right to "sanitize" any portion of the file to protect confidential information. The file shall be sanitized in a manner that causes the loss of the least amount of relevant information from the files.

B. List of Witnesses

Ten (10) days prior to the hearing (or as soon as possible if the hearing is to be held within ten (10) days after notice.) the respondent and the Director or his designee shall submit to the Commission Chairman a list of witnesses each intends to call at the hearing, the approximate length of their testimony, and the subject matter and relevance of their testimony. It shall indicate any witnesses that must be subpoenaed. The Director or his designee shall then issue the subpoenas.

C. Pre-Hearing Interviews of Witnesses

The respondent and the Director or his designee shall have the right to interview the witnesses of the other party, prior to hearing. The Director's witnesses shall be interviewed in the presence of the Director or his delegate. The respondent's witnesses shall be interviewed under such reasonable conditions as are established by the respondent. Either party may appeal to the Chairman of the Commission if cooperation is not forthcoming on this matter and the Chairman is empowered to require such steps as are necessary to resolve the problem.

D. Subpoenas of Documents and Things

The respondent shall, no later than ten (10) days prior to the hearing (or as soon as possible if the hearing is noticed less than 10 days before the hearing) provide the Director or his designee with a list of items it wishes to have subpoenaed and the relevance of each. The Director or his designee shall subpoena all relevant items listed

as well as items needed by the Director. Any disputes shall be brought to the Chairman of the Commission who shall resolve such disputes.

E. Postponements

Any request for a postponement of the hearing must be submitted in writing to the Chairman of the Commission no fewer than three (3) days prior to the hearing.

However, if the Director and respondent mutually submit a request for a postponement because there is a possibility of settling the matter, the request for a postponement may be submitted at any time.

7.2 Conduct of the Hearing

A. Presiding Officer

As presiding official, the Chairman of the Tribal Employment Rights Commission will control the proceedings. He or she will take whatever action is necessary to insure an equitable, orderly, and expeditious hearing. Parties will abide by the presiding official's rulings. The presiding official has the authority, among others, to:

1. administer oaths or affirmations;
2. regulate the course of the hearing;
3. rule on offers of proof;
4. limit the number of witnesses when testimony would be unduly repetitious; and
5. exclude any person from the hearing for contemptuous conduct or misbehavior that obstructs the hearing.

B. Director

TERO Director or his designee shall represent TERO on all charges filed by it, even if the charge was initiated by a complaint filed by a private individual.

C. Respondent

The respondent shall be present for the entire hearing and he or his representative (other than an attorney) shall represent him during the proceedings.

D. Attorneys

Either party may have an attorney present as an advisor. However, the attorney may not make any presentations, cross-examine witnesses or address the Commission.

- E. Recording of the Hearing
The Commission shall have the hearing tape recorded in full and shall retain the tape(s) for no less than one (1) year after the hearing. The respondent shall also be permitted to tape the hearing.
- F. Prohibition Against Reprisals
All parties shall have a right to testify on their own behalf, without fear of reprisal.
- G. Starting Time
The hearing shall be opened promptly at the time specified by the Commission.
- H. Opening Statements
Both parties will be afforded the opportunity to present opening Statements with respect to what they intend to prove at the hearing.
- I. Order of Proceeding
The Director or his designee will present TERO's case first.
- J. Examination and Cross Examination of Witnesses
Both parties may subpoena and examine friendly and hostile witnesses. Both parties may examine and cross-examine witnesses. However, no harassment or efforts to intimidate witnesses shall be permitted. The Commission members may examine witnesses at any point in their testimony. The testimony of all witnesses shall be under oath or affirmation.
- K. Irrelevant Testimony
Parties may object to clearly irrelevant material, but technical objections to testimony as used in a Court of law will not be entertained. The Commission shall prohibit any testimony that it deems clearly irrelevant in order to keep control of the hearing.
- L. Written Testimony
Written testimony will be admitted into evidence during the hearing only when a witness cannot appear in person. When a party wishes to use the written testimony of a witness who cannot appear, the party must submit, in advance of the hearing, a written explanation for the non-appearance of the witness to the Tribal Business Preference Commission. If the Commission is satisfied with the explanation, the party will obtain the testimony by means of an interrogatory. When, for reasons satisfactory to the Commission, an interrogatory cannot be used, an affidavit or a deposition from the witness may be used. A signed, but, unsworn Statement will be admitted into evidence

only under unusual circumstances and when the Commission is satisfied that the testimony cannot be obtained otherwise.

M. Closing Statement

Closing Statements for each party will be permitted. The Director or his designee shall proceed first.

N. Audience

The hearing shall be open to the public. However, the Commission may remove any person who disrupts the hearing or behaves in an inappropriate manner.

7.3 The Decision

The decision shall be in writing and issued within 30 days after the hearing. The decision shall consist of the following parts, in the following order:

- (a) The facts,
- (b) The finding of violation or no violation on each charge filed by the Director, along with the legal and factual basis for the finding,
- (c) The orders and/or sanctions imposed, if any,
- (d) Information on the respondent's right to appeal,
- (e) Information on the authority of the Commission to act if the party fails to comply with its orders or fails to appeal, and
- (f) The injunctive relief or bonding requirements, if any, that the Commission will seek from the Court pending the completion of the appeal if an appeal is filed, or the running of the time for the appeal if no appeal is filed.

7.4 Appeals

Any complaining Covered Employer or Entity shall have the right to appeal any decision of the Commission to the Tribal Court, pursuant to the procedures set out in these Regulations.

See also Ordinance section 707

- A. An appeal to the Tribal Court may be taken from any final order of the Commission by any party adversely affected thereby, including a complainant. Said appeal must be

filed with the Tribal Court, with a copy to the TERO Director and any other party to the proceeding, no later than 20 days after the party receives a copy of the Commission's decision.

- B. The notice of appeal shall:
 - 1. Set forth the order from which appeal is taken.
 - 2. Specify the grounds upon which reversal or modification of the order is sought.
 - 3. Be signed by the appellant or his legal representative.
 - 4. Comply with any other requirements for actions filed in the Tribal Court established by that Court.
- C. Except as provided elsewhere in this Title, the order of the Commission shall abate pending the determination of the Tribal Court. However, the TERO Director or his designee may petition and, for good cause shown, the Court may order the party filing the appeal to post a bond sufficient to cover monetary damages that the Commission assessed against the party or to assure the party's compliance with other sanctions or remedial actions imposed by the Commission's Order if that Order is upheld by the Court.
- D. If a Complainant files an appeal of a decision by the Commission, the Commission may choose not to be a party to the appeal. If the Commission chooses not to be a party in such a situation, the TERO Director or his designee shall so notify the Court and the other parties.
- E. The Tribal Court shall uphold the decision of the Commission unless it is demonstrated that the decision of the Commission is arbitrary, capricious or in excess of the authority of the Commission.
- F. If, by the twentieth (20th) day after the Tribal Court has issued a final decision upholding the Commission's decision from which no appeal may be taken, or if no appeal were sought from the decision by the Commission, by the 20th day after the date of the party's receipt of the Commission's order, the party has failed to come into compliance with the decision of the Commission or Court, the TERO Director or his designee shall petition the Court and the Court shall grant such orders as are necessary

and appropriate to enforce the orders of the Commission or Court and the sanctions imposed by them, including confiscation and sale.

- G. If the order of the Commission is reversed or modified, the Court shall by its mandate specifically direct the Commission as to further action in the matter, including making and entering any order or orders in connection therewith, and the limitations, or conditions to be contained therein.

PART 8

Miscellaneous

8.1 Confidentiality

- A. All information regarding the MHA TERO, its employees, contractors and services are to be held in the strictest confidence. All employees and TERO Commissioners, past and present, cannot use or disclose business or employee information that is not generally available to the public either during employment or when not employed with the MHA NATION. Any information learned or developed during the course of employment is the property of MHA NATION and is to be used solely for the benefit of the MHA NATION.
- B. All employees and TERO Commissioners, past and present, are prohibited from making copies or removing any records, reports, or any other documents, either electronically or conventionally, from MHA TERO without proper written approval. If someone questions you and you are concerned about the appropriateness of providing information in response, you are not required to answer. Rather, refer the request to the TERO Director.
- C. All employees and TERO Commissioners, past and present, who improperly use or disclose confidential information will be subject to disciplinary action, up to and including termination of employment and/or legal action, even if they do not directly or indirectly benefit from the divulged information.

8.2 Payments to Indian Contractors

- A. Because many 100% Indian owned companies and Indian employees are becoming economically disadvantaged from a pattern of delayed payments to subcontractors, TERO promulgates the following emergency regulations:
 - 1. That all fees for services from Indian Contractors are due and shall be paid in full by any covered employer within forty-five (45) days, thereafter, sanctions may be imposed;
 - 2. Any additional interest incurred from factoring companies shall be paid by the covered employer that delays payment for such services;

3. Subcontractors shall be paid immediately upon the general contractor receiving payment from invoices;
4. The above provisions may be waived for good cause and other arrangements may be agreed to in writing by TERO.

If a covered employer fails to pay fees for services as set forth above, TERO may also make an immediate and temporary order of non-compliance and impose temporary sanctions prior to an evidentiary hearing if good cause so requires.

8.3 Citations

- A. The TERO Commission authorizes TERO, during the course of their duties, to enforce the TERO Ordinance and TERO Regulations as necessary, including the right to halt a person and a person's vehicle or other associated equipment. Whenever any person is halted for the violation of any of the provisions in the TERO Ordinance or TERO Regulations or an equivalent ordinance mandated by law, the TERO employee halting that person, except as otherwise provided, may:
 1. Take the name and address of the person;
 2. Take the license number of the person's motor vehicle; and
 3. If the ordinance or regulation is in violation, issue a citation or otherwise notify that person in writing to appear at a time and place to be specified in writing, or notify the person of the right to request a hearing.
 4. A citation must be in writing and describe the nature of the violation(s).
- B. The TERO Commission adopts keeps current a citation fee schedule in the forms section of these Regulations and may amend said schedule at any time.

8.4 Master Service Agreements – MSA's

- A. Indian Contractors have been subject to mandatory MSA's prior to entering into contracts with non-Indian entities. TERO believes this may cause harm to issues including sovereignty and Indian Preference. Further, MSA's sometimes impose significant costs without the guarantee of work including but not limited to various insurances, bonding, obtaining State business entities (Corp's, LLC's, LLP's, etc.) and

safety inspections. TERO may, for just cause, find such provisions contained in MSA's to be voidable for the above State reasons.

- B. TERO shall consider any dispute resolution mandating forum selection outside of the FBIR administrative and judicial system to be void absent written waiver by the contracting parties and the TERO Commission.

8.5 Well Head Production liability

- A. Production of oil and gas is highly transformative of landscapes and at times can be destructive. It may also offer economic benefits to Tribal members and many landowners, but threatens the environment and property values of other local landowners, traditional rural economic activity, the carrying capacity of local infrastructure, the natural habitat of wildlife, and the public health, safety, and quality of life of residents in areas where the wellhead production is taking place. Wellhead production diminishes or destroys the natural beauty of the land, depletes or interferes with the natural sources of water, disrupts the natural habitat of wildlife, and reduces property values thereby harming both property owners and the municipalities in which such activities are located. The economic benefit to the Tribe that may arise only comes thru the employment and contracting benefits of Indian Preference as administered by MHA TERO.
- B. Wellhead producers must be held accountable along with any entities for all damages shown to be caused by wellhead production and that all responsible parties shall be held strictly liable for damages resulting from such activities.
- C. *Well head production* shall mean either the owner or the produce that causes or agrees to the extraction of oil and gas or other hydro carbons beneath the surface.
- D. *Person* shall mean any individual, association, corporation, or other Entity that engages in wellhead production. The term "person" shall include any individual, association, corporation, or other Entity that owns an interest in land that is subject to a lease or other grant that permits surface rights, sub-surface rights, or both surface and sub-surface rights for the purpose of wellhead production.
- E. Well head production, having been deemed a hazardous activity, entails strict liability on the part of any person, as defined in this regulation, that undertakes such activity

within the exterior boundaries of the MHA Nation. Neither compliance with the requirements of any MHA Nation Ordinance, TERO regulation, North Dakota law, the issuance of a permit for such activity, nor the exercise of due care shall excuse any such person from liability for personal, property, or other elements of damage pursuant to this ordinance determined to be caused by activities related to wellhead production. Distinctions between direct and consequential damage shall not relieve such person of absolute liability, such person's intent or negligence for any personal, property, or other element of damage pursuant to this ordinance notwithstanding.

- F. The liability of any person, as defined in this ordinance, shall be joint and several with the liability of all other persons found liable for damages resulting from the same incident, event, wellhead production operation, exploration, or extraction, or transportation activity.

8.6 Non-Indian Spouse

MHA Nation recognizes Local Indians owning Certified Firms may have a non-Indian Spouse. In addition, issues of a Certified Firm passing to a non-Indian spouse upon death may arise. Therefore, if the local Indian shall predecease his or her spouse, TERO will allow a grace period of time for the Indian Preference to continue so that either a transition to another local Indian may occur or the business may wind up its affairs and be dissolved. TERO shall make determinations to continue the Indian Preference for a Certified Firm on a case by case basis, with the intent to be construed broadly, giving ample time for a grieving spouse to transition business affairs, and be treated fairly.

PART 9

TRUCKING REQUIREMENTS

9.1 Indian Preference for All Trucking Related to Production Water Transport and Crude Transport.

No truck that is owned by an Indian Certified Firm shall remain idle while non-Indian trucks are operating within the exterior boundaries of the lands over which the MHA Nation has jurisdiction.

All Indian Certified Firms desiring to have their DOT certified trucks perform the work will have immediate preference above any non-Indian trucking firm and any non-Indian owned truck.

A reasonable rate must be negotiated through TERO to determine reasonable price. Once a negotiated rate is agreed to, it shall be secured in writing and notification sent to MHA TERO.

Best businesses practices will be followed. Producers may not be forced to utilize Indian-owned truck and Indian-owned companies when prior litigation, liens, disputes with payments to sub-contractor or non-corrected safety issues exist. All future RFPs or Bids must mandate the full use of Indian Certified Firm trucks, anything not fulfilled can thereafter go to non-Indian trucks.

MHA TERO realizes that existing contracts could possibly be affected. These existing contract arrangements may continue if there are no idle company owned trucks of Indian Certified Firms. The existing contracts shall continue if there are no idle company owned trucks of Indian Certified Firms. The existing contracts shall continue to the greatest extent possible, secondary to the Indian preference requirements noted in this section and these Regulations.

All future bids submitted must include a list of trucks owned by the Indian Firm that are not working in other contracts. To prevent overlapping on other contracts, those assets cannot be used on other bids. The effect would be knowing one company has all its trucks in use in another contract allowing any Indian Trucker with idle equipment to be utilized. The bids with all producers will be closely monitored.

Failure to comply with the requirements of this section may result in a violation of Indian Preference in Contracting and Subcontracting.

- 9.2 All Trucking companies will have the following: A USDOT number which is required for any “FOR HIRE” trucking. Every trucking company must have a USDOT number.
- 9.3 All Trucking companies with services that require a HAZMAT designation will, in addition to the requirement above, have the following: A motor carrier “MC” number which is required for HAZMAT.
- 9.4 All Trucking companies who wish to transport any load that is subject to the requirements established by the FMSCA (Federal Motor Carrier Standards Association) will have the following FMCSA designations:
- (a) InterState designation: Crude oil, distillates/by-products, NGL’s, hydrocarbons, Federal InterState Products;
 - (b) IntraState/HAZMAT designation: Chemicals, Hot Oil Trucks;
 - (c) IntraState designation: salt water, flat bed, sand loads, any non-HAZMAT.
- 9.5 All Trucking Companies who wish to transport any load that is subject to the requirements established by the Division of Hazardous Waste within the North Dakota Department of Health, will have the following: A valid North Dakota Department of Health – Special Waste Transporters Permit. This includes but is not limited to produced water, drilling fluids, garbage, trash, sanitary wastes in septic tanks, etc.
- 9.6 TERO shall be have authority over Indian Preference issues regarding Trucking. MHA DOT shall have authority over all other trucking matters including the above provisions subject to Title 7.

PART 10
TRIBAL BUSINESS ENTERPRISES

PART 11

FORMS

- Printed TIMS Indian Preference Application
- Printed TIMS Service Justification Questionnaire
- Printed TIMS Service Scoring Form
- BIA Oil and Gas Mining Lease – Allotted Indian Lands
- MHA Ethics in Government Ordinance
- FOIA Release
- Confidential Information Release
- Title 7 Business Permit & Transportation Impact Fee
- Oil and Gas Tax Agreement Between the Three Affiliated Tribes and the State of North Dakota

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