

# **KIOWA TRIBE TERO ORDINANCE**

## **TABLE OF CONTENTS**

<b>PART I.</b>	<b>POLICIES AND GENERAL DEFINITIONS</b>
<b>PART II.</b>	<b>TRIBAL EMPLOYMENT RIGHTS COMMISSION AND FEE</b>
	<b>Title I: Tribal Employment Rights Commission</b>
	<b>Title II: Tribal Employment Rights Fee</b>
<b>PART III.</b>	<b>INDIAN PREFERENCE IN EMPLOYMENT AND CONTRACTING ACT</b>
	<b>Title I: Indian Preference in Employment</b>
	<b>Title II: Indian Preference in Contract and Subcontracting</b>
	<b>Title III: Notification of TERO Requirements and TERO Compliance Plan Requirements</b>
<b>PART IV.</b>	<b>ACT PROHIBITING EMPLOYMENT DISCRIMINATION BASED ON RACE, SEX, AGE, DISABILITY, RELIGION OR NATIONAL ORIGIN</b>
<b>PART V.</b>	<b>EMPLOYEE WAGE AND HOUR ACT</b>
	<b>Title I: Generally</b>
	<b>Title II: Tribal “Davis-Bacon” Requirements</b>
<b>PART VI.</b>	<b>FAMILY MEDICAL LEAVE PROTECTION ACT</b>
<b>PART VII.</b>	<b>OCCUPATIONAL SAFETY AND HEALTH ACT</b>
<b>PART VIII.</b>	<b>FREEDOM TO WORK WITHOUT JOINING A LABOR UNION ACT</b>
<b>PART IX.</b>	<b>ENFORCEMENT</b>
	<b>APPENDIX A CRITERIA AND PROCEDURES FOR CERTIFYING FIRMS AS INDIAN PREFERENCE ELIGIBLE</b>

## **PART I. POLICY AND DEFINITIONS**

### **Section 1-101: Declaration of Policy**

As a guide to the interpretation and application of this Ordinance, the public policy of the Kiowa Tribe (hereinafter “the Tribe”) is declared to be as follows:

Economic insecurity and unemployment are a serious menace to the health and welfare of the Tribe. Like land, water, and minerals, employment is an important resource that must be protected and promoted. Indians have unique and special employment, subcontract and contract rights. All employees subject to the Tribe’s jurisdiction are entitled to a workplace environment that is free of employment discrimination, that protects their health and safety, and that provides them basic rights and protections that serve human dignity. The Tribe’s Legislature therefore declares that in its considered judgment, the public good and welfare of the Tribe require the enactment of this Workforce Protection Ordinance, under its inherent sovereign and police powers, in order to increase employment of Indian workers and businesses within the exterior boundaries of the Kiowa Tribe and to protect the workforce rights of Indian and non-Indian workers subject to the jurisdiction of the Tribe.

### **Section 1-102: Definitions**

The following definitions shall apply to all Parts of this Ordinance.

- (a) “Commission” means the Tribal Employment Rights Commission established by this Ordinance.
- (b) “Day” means a work day, or any day an employee is required to work representing a shift.
- (c) “Employee” means any person employed for financial remuneration.
- (d) “Employer” means any Entity that employs, two or more persons who during any 30-day period, spend, cumulatively, 40 or more hours performing work within the exterior boundaries of the Tribe.

- (e) “Entity” means any person, partnership, corporation joint venture, government, governmental enterprise, including other natural or artificial person or organization. The term “Entity” is intended to be as broad and encompassing as possible to ensure the Ordinance’s coverage over all employment and contract activities within the Tribe’s Territory.
- (f) “Government Commercial Enterprise” means any Entity owned by the Tribe or any subsidiary of an entity owned by the Tribe, regardless of how such business activity is structured.
- (g) “Indian” means any member of a federally-recognized tribe.
- (h) “Local Indian” means any member of a federally-recognized tribe who has resided within the Territory of the Tribe for at least 60 days prior to asserting a right granted by this Ordinance.
- (i) “TERO Director” means the Director of the Office appointed pursuant to the provisions of Part II of this Ordinance.
- (j) “Territory” shall have that meaning set out in the Constitution of 2017, as it may be amended.
- (k) “Tipped Employee” means any employee engaged in an occupation in which they customarily and regularly receive more than thirty dollars (\$30) a month in tips.
- (l) “Tribe” means the Kiowa Tribe.
- (m) “Tribe’s Government” shall mean all offices of the Tribe carrying out governmental activities, all subsidiary entities of the Tribe, including the Kiowa Housing Authority, and all district, segment or other local governmental entities of the Tribe.
- (n) “Union” shall mean a formal organization of workers in a certain trade, industry, or corporation formed to advance their collective interests in improved salary, benefits, or working conditions.
- (o) “Regulations” shall mean the regulations implementing this Ordinance adopted by the Commission.

(p) “Office” means the Kiowa Tribal Employment Rights Office

### **Section 1-103: Severability**

Should any provision in this Ordinance be found to be unconstitutional by a court of Ordinance, such provision shall be severed from the remainder of the Ordinance, and such action shall not affect the enforceability of the remaining provisions of the Ordinance.

### **Section 1-104: Effective Date**

This Ordinance shall be effective upon the approval by the Tribal Legislature.

## **PART II: TRIBAL EMPLOYMENT RIGHTS COMMISSION AND EMPLOYMENT RIGHTS FEE**

### **TABLE OF CONTENTS:**

**TITLE I: TRIBAL EMPLOYMENT RIGHTS COMMISSION**

**TITLE II: EMPLOYMENT RIGHTS FEE**

### **Title I: TRIBAL EMPLOYMENT RIGHTS COMMISSION**

#### **Section 2-101: Commission; Members, Qualifications, Compensation, Quorum**

(a) There is hereby created the Tribal Employment Rights Commission (“Commission”), which shall be an independent commission of the Tribe, reporting directly to the Chairman of the Kiowa Tribe.

(b) The Commission shall be composed of five (5) members, four being nominated by the Kiowa Tribe Chairman, the fifth member will be the TERO Director. The Chairman shall serve as an ex officio member of the Commission. The 2024 Minimum Commission Standards Act shall apply to the Commission, including all its members. Commissioners shall have experience in one or more the following areas:

- (1) Business;
- (2) Finance;
- (3) Construction;
- (4) Employment Training; or
- (5) Law

(c) Commissioner's appointments shall be staggered as follows:

Chairman for a term of 2 years

Vice-Chairman for a term of 2 years

Secretary for a term of 2 years

Commission member for a term of 2 years

The Chairman and Secretary terms will be limited for the first two years; the Vice-Chairman and Commission member will be limited one year after selection of the Chairman and Secretary. These terms will be staggered, so that the terms of no more than two Commissioners shall terminate in any year.

(d) Recusal of Commission Members:

(1) For purposes of this section, "immediate family" means brother, sister, son, daughter, mother, father, husband, wife, step-brother, step-sister, half-brother, half-sister, or brother, sister, son, daughter, mother or father by adoption.

- (2) No member of the Commission shall participate in any action or decision by the Commission directly involving himself, or a member of his immediate family, or any entity of which he or a member of his immediate family is an owner, employee, or a member of his immediate family has a substantial contractual relationship.
- (3) Nothing in this section shall preclude a Commissioner from participating in any action or decision by the Commission which:
  - (a) Generally, affects a class of persons, regardless of whether the Commissioner or a member of his immediate family is a member of the affected class;
  - (b) Affects the Tribe, a Tribal enterprise, or a person or entity in a contractual relationship with the Tribe or a Tribal enterprise, regardless of whether the Commissioner is a member of the Tribe.
- (4) A Commissioner may voluntarily recuse himself and decline to participate in any action or decision by the Commission when the Commissioner, in his discretion, believes:
  - (a) that he cannot act fairly or without bias, or
  - (b) that there would be an appearance that he could not act fairly or without bias.

## **Section 2-102: Powers of the Commission**

The Commission has the full power, jurisdiction, and authority to:

- (a) Take all actions necessary and appropriate to implement the provisions of this Ordinance.
- (b) Formulate, adopt, amend and rescind rules, regulations and guidelines necessary to carry out the provision of this Ordinance. Except when an emergency exists, the Commission shall provide public notice with a reasonable time for comment before promulgating any final regulations.

(b) Require each covered employer or entity to submit to the Commission an acceptable compliance plan indicating how it will comply with the Ordinance, before a covered employer or entity may commence work in Kiowa Indian Country.

(c) Conduct hearings in accordance with such rules of practice and procedure as may be adopted by the Commission or as may be required by Ordinance, and to order any relief or sanctions authorized by this Ordinance, and to petition Tribe's Court for such orders as are necessary and appropriate to enforce the decisions of the Commission or any sanctions imposed by the Commission.

#### **Section 2-103: TERO Director; Qualification; Staff; Duties**

(a) The TERO Director, shall serve as the chief executive officer of the Office. They shall be appointed by the Commission to serve as a fifth member of the Commission pursuant to Section 2-101(b), and shall serve at the discretion of the Commission, with the Commission reporting directly to the Tribe's Chairman.

(b) The TERO Director shall have such administrative ability, education and training as the Commission determines.

(c) The TERO Director shall have authority to conduct the day to day operations of the Office in conformity with the approved budget of the Commission and in conformity with the policies and directions of the Commission. The Director shall report monthly to the Commission.

(d) The TERO Director shall comply or seek to enforce all decisions and orders duly adopted by the Commission.

#### **Section 2-104: Intergovernmental Relationships**

Subject to approval by the Commission, the TERO Director is authorized to negotiate agreements or contracts with any federal, state or local employment,

such as EEOC, OSHA, OFCCP BIA, HUD, DOL, FHWA and IHS, in order to protect and promote the employment rights of Indians on Kiowa tribal lands. Said agreements and contracts shall be in the name of the Tribe and signed by the Chairman of the Tribe.

### **Section 2-105: Federal Indian Preference Enforcement**

The Commission may enforce any Indian preference requirements of Tribal, Federal, State or Local Ordinance, and may see to be delegated authority to do so.

## **TITLE II: EMPLOYMENT RIGHTS FEE**

### **Section 2-201: Employment Rights Fee**

An employment rights fee is established as follows:

(a) Every Entity or department, including tribal gaming, with a construction contract in the amount of \$1,000 or more shall pay to the Commission a “TERO Fee” of three percent (3%) of the total amount of the contract. For good cause is shown, the TERO Director may authorize an Entity or department, with a construction contract to pay said fee in installments over the course of the contract.

(b) Notwithstanding any other provision of this Ordinance, and except where expressly exempted by Ordinance, an entity awarded a Construction Contract by the Tribe, or any Entity owned by the Tribe, shall as a condition of doing business with the Tribe or an Entity it owns, grant its consent to deduct the amount of the TERO Fee from the total amount due the contractor under the Construction Contract.

(c) Every Entity with annual gross revenue of \$200,000 or more and who conducts business inside the Territory of the Kiowa Tribe, shall pay a “Payroll Fee” of 3 percent (3%) of its gross payroll to the Commission within 30 days after the end of each quarter.



(d) The fees imposed in this Section shall not apply to education, health, religious, governmental, or non-profit employers. It shall apply to contractors employed by such employers.

**Section 2-202: Fee Collection and Expenditure**

This fee shall be collected by the TERO Director pursuant to the regulations of the Commission. The fee shall be paid over to the Kiowa Tribe's Finance Department and shall be credited to the Kiowa Tribe TERO Fund. Said funds shall be expended solely by the TERO, pursuant to budgets duly approved by the Legislature, to carry out the purposes of this Ordinance, including the administration of the Tribe's Bureau of Apprenticeship and Training certified apprenticeship training program.

**Section 2-203: Monthly Statements**

The Kiowa Tribe's Finance Department shall provide the TERO Director with a monthly report of all TERO Fees and Revenues and all Payroll Fees received, indicating the payee, amount and date.

**PART III. INDIAN PREFERENCE IN EMPLOYMENT AND CONTRACTING ACT**

**TITLE I INDIAN PREFERENCE IN EMPLOYMENT**

**TITLE II INDIAN PREFERENCE IN CONTRACTING AND SUBCONTRACTING**

**TITLE III NOTIFICATION AND COMPLIANCE PLAN REQUIREMENTS**

**TITLE I. INDIAN PREFERENCE**

**Section 3-101: Coverage**

(a) For purposes of this Title, the term "Employer" shall include all private employers subject to the Tribe's jurisdiction, the Tribe's government, every Government Commercial Enterprise including all branches and divisions, all subsidiary governmental entities of the Tribe (including the Housing Authority,

Districts, and other local governmental entities of the Tribe), and any governmental commercial enterprises of the Tribe, its divisions , its divisions or subsidiaries, (including casinos), except when the Attorney General of the Tribe opined that application of these requirements to that Tribe-related entity is specifically preempted or otherwise prohibited by laws of the Tribe or Federal law.

(b) The requirements set out in this Title shall not apply to any direct employment by the Federal or State government or their subdivisions, or to the government of another Tribe. However, 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 Tribe.

### **Section 3-102: Indian Preference in Employment**

All Employers, shall give preference to Indians, with the first preference to Local Indians, in all hiring, promotion, training, lay-offs, and all other aspects of employment. Such Employers shall comply with the rules, regulations, guidelines and orders of the TERO Director, who shall set forth the specific obligations of Employers in regard to Indian preference and local Indian preference.

### **Section 3-103: TERO Hiring Hall**

No Employer shall employ a non-Local Indian or a non-Indian without first providing the Director with 72 hours to locate and refer a Local Indian; provided that, the Commission may, by regulation, provide for a period of less than 72 hours when required by business necessity.

### **Section 3-104: Goals and Timetables**

All Employers shall comply with the goals and timetable established by the TERO Director specifying the minimum number or percentage of Indians an Employer must hire, by craft, or skill level.

### **Section 3-105: Job Qualifications and Business Necessity**

No Employer shall use any job qualification criteria or other personnel requirements that serve as barriers to Indian preference in employment, as determined by the TERO Director, unless the Employer can demonstrate that such criteria or requirements are necessary.

### **Section 3-106: Unions**

Employers who have a collective bargaining agreement with a union are responsible for informing said union of this Ordinance and any regulations promulgated by the Commission. An Employer shall obtain a written agreement, acceptable to the TERO Director and the TERO Commission from each union with which it has a collective bargaining agreement providing that:

- (a) the union will give absolute support preference to Local Indians in job referrals regardless of the position of said Local Indians on any referral list the union may keep;
- (b) the union will grant Temporary Work Permits to any Local Indian who does not wish to join a union; and
- (c) the union will agree to the Employer paying the fringe benefits to any Local Indian who is not a union member and who chooses not to participate in the union's fringe benefit programs.

No union agreement shall supersede the requirements of this Ordinance and its implementing Regulations.

### **Section 3-107: Apprenticeship Program**

- (a) The TERO Director shall after the effective date of this Ordinance; prepare and begin to implement a plan for promoting the development of the maximum number of Local Indian journeyman, through the development or upgrading of a Bureau of Apprenticeship and Training Certified Apprenticeship Program or similar program that will permit trainees to be employed on Davis-Bacon covered projects and be paid trainee wages. The Director shall provide the Chairman 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.

(b) Each Employer that hire employees in crafts that are participating in the Tribe's Certified Apprenticeship Program shall employ the maximum number of trainees or apprentices required by that Program and shall otherwise cooperate in full with said Program in order to promote the development of Local Indian journeymen.

## **TITLE II. INDIAN PREFERENCE IN CONTRACTING AND SUBCONTRACTING**

### **Section 3-201. Indian Preference in Contracting**

(a) The Tribe and all Government Commercial Enterprises, when awarding contracts or subcontracts for supplies, services, labor and materials in an amount of \$5,000 or more where the majority of the work on the contract or subcontract will occur within the jurisdiction of the Tribe, shall give preference in contracting and subcontracting to Entities that are certified by the TERO Director as 51% or more Indian-owned. Where an Entity is selected by the Tribe or a Government Commercial Enterprise through a competitive process, the awarding Entity shall limit competition to Entities that are certified by the Director as 51% or more Indian-owned and controlled. 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.

(b) The requirements set out in this Title shall not apply when the Attorney General opines that application of these requirements is prohibited by Kiowa, State, local or Federal Ordinance. If a Federal preference requirement applies and is in conflict with the requirements of this Ordinance, the Federal requirement governs.

(c) 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 Tribe, whether or not the prime contract was

subject to these requirements, except when it is determined by the Attorney General that application of these requirements to that entity is specifically prohibited by Federal law.

**Section 3-202: Certification as Indian Preference-Eligible**

The Commission shall issue regulations for determining when Entities are certified by the Director as 51% or more Indian-owned. The Commission shall issue regulations for implementation of Indian preference when the awarding entity uses a method other than competition to select a contractor or subcontractor. The Commission shall issue regulations for ensuring that Entities that are not truly 51% or more owned by Indians are not granted Indian preference certification.

**TITLE III. NOTIFICATION OF TERO REQUIREMENTS AND TERO COMPLIANCE PLAN REQUIREMENTS**

**Section 3-301: Compliance Plan**

All Employers shall no less than twenty days prior to commencing business on Kiowa Tribal land, prepare a plan, acceptable to the TERO Director, setting out how the Employer shall comply with the requirements of this Title on Indian employment and contract preference and any implementing regulations. An Employer already present on Kiowa Tribal lands on the effective date of this Ordinance that has not prepared a Compliance plan acceptable to the Director, shall come into compliance with the requirements of this section within 60 days of the effective date of this Ordinance.

**Section 3-302: Signs at Kiowa Tribal Lands Ports of Entry**

The TERO Director shall cause to be erected next to each paved road at the point at which it enters the Kiowa Tribal lands, a sign informing the public that Employers are required to comply with the requirements of this Title.

**Section 3-303: Notice to Proposed Contractors**

The Tribe and all Government Commercial Enterprises when issuing a notice of a proposed contract or notice of any other proposed action that will create new

employment or subcontracting opportunities with Kiowa Tribal Lands, shall include provisions in the notice that fully inform any Entity about the requirements of this Ordinance.

**Section 3-304: Contract Language Imposing TERO Indian Preference Requirements**

The Tribe and all Government Commercial Enterprises, when awarding a contract, lease, right-of-way or entering into any other legal agreement with a Party that will create new employment or subcontracting opportunities on the Kiowa Tribal lands, shall include provisions that impose the requirements of this Ordinance on the contractor, lessee, right-of-way grantor, or other Party, such that the legal document will fully bind the Party to comply with the requirements of this Ordinance.

**Section 3-305: Model Language**

In order to implement the requirements of this Ordinance, the TERO Director shall prepare and provide to the Tribe and all Government Commercial Enterprises:

(a) model language that shall be included in the notice to prospective contractors, lessees, rights-of-way grantee, or other parties, informing them of the requirements established by this Ordinance; and

(b) model language which shall be included in each contract or agreement of the Tribe and all Government Commercial Enterprises that implements the requirements of this Ordinance.

The TERO Director shall submit the proposed model language to the Attorney General for approval prior to distributing the language to the Tribe and all Government Commercial Enterprises.

**Section 3-306: TERO Approval of Contracts Awarded by Tribal Entities**

(a) The Tribe and all Government Commercial Enterprises shall ensure all notices, contacts, and agreements contain the language set out in this part.

(b) The TERO Director shall have the right to audit the contracts and agreements of the Tribe and all Government Commercial Enterprises to ensure that the proper language is included.

(c) Any contract or agreement of the Tribe or any of its Government Commercial Enterprises which does not contain the language required by this part shall be voidable at the option of the Attorney General.

#### **PART IV. ACT PROHIBITING EMPLOYMENT DISCRIMINATION BASED ON RACE, SEX, AGE, DISABILITY, RELIGION OR NATIONAL ORIGIN**

##### **Section 4-101: Prohibitions**

It is acknowledged that pursuant to well settled legal authority, preference for the hiring of an Indian is a preference based on political and not racial facts.

Therefore, no preference for the hiring of an Indian is discriminatory. It shall be unlawful for: race, color, religion, national origin, sex, age, marital status, personal appearance, disability, sexual orientation, or political affiliation of any individual.

(a) An Entity – to fail or refuse to hire, or to discharge, any person, or otherwise to discriminate against any person with respect to his or her compensation, terms, privileges or conditions of employment, including promotion based upon, race, religions, national origin, sex, age, marital status, pregnancy status, personal appearance, sexual orientation, disability, or political affiliation;

(b) An Entity – to discriminate in recruiting people for employment, or to limit, segregate, or classify employees in any way which would tend to deprive them of employment opportunities based upon race, religion, national origin, sex, age, disability, marital status, pregnancy status, person appearance, sexual orientation or political affiliation;

(c) A labor organization – to exclude or to expel from its membership, or otherwise to discriminate against any person, or to classify, or fail or refuse to



refer for employment any person in any way, which would deprive such person of employment opportunities, or would limit such employment opportunities, or otherwise adversely affect a person's status as an employee or as an applicant for employment based upon race, religion, national origin, sex, age, disability, marital status, pregnancy status, personal appearance, sexual orientation, or political affiliation; or

(d) An Employer or a labor organization – to discriminate against any person in the admission to or the employment in, any program established to provide training or retraining, including on-the-job training based upon race, religion, national origin, sex, age, marital status, pregnancy status, personal appearance, sexual orientation, disability, or political affiliation.

#### **Section 4-102: Religious Accommodation**

The Kiowa Tribe official recognizes and respects all organized religions. While there is no official list of the organized religions of the world, it is noted there are approximately 4,300 such religions and this Ordinance intends to broadly and inclusively define organized religion to protect people from religious discrimination in the workplace. It shall be an unlawful discriminatory practice for an Employer to refuse to make a reasonable accommodation for an employee's observance religious ceremonies or holidays. Accommodations may include permitting the employee to make up work time lost due to such observance, unless such an accommodation would cause the Employer undue hardship.

#### **Section 4-103: Discrimination Based on Pregnancy**

People (both men and women) affected by pregnancy, childbirth, or medical complications of pregnancy or childbirth shall be given reasonable accommodations and shall not be discriminated against nor shall they lose employment opportunities, nor shall they be limited in employment opportunities, nor otherwise adversely affected in their status as an employee or as an applicant for employment because of pregnancy or childbirth.

#### **Section 4-104: Discrimination Based on Disability**

(a) It shall be unlawful for an Employer or labor organization to discriminate in any aspect of employment against a disabled person because of that disability;



provided that, Employers may use qualification standards, tests or selection criteria that have been shown to be job-related and consistent with business necessity and such performance cannot be accomplished by reasonable accommodation. Provided further, nothing in this section shall prohibit an Employer from refusing to hire or from discharging an person with a disability, if the person, because of the disability, is unable to perform the duties or to perform the duties in a manner that would endanger the health and safety of the individual or others or is unable to be at, remain at, or go to or from the place where the duties of employment are to be performed.

(b) For purposes of this Section, the term “disabled person” is any person suffering from a medical or mental condition. A medical or mental condition is a physical or mental impairment that substantially limits a person in one or more major life activities, such as walking, seeing, hearing, learning, or working. A medical or mental condition includes addition in all its forms. However, a medical or mental condition shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the Employer acts on the basis of such illegal use.

(c) If a person with an addiction to drugs is engaging in or has successfully completed a supervised drug rehabilitation program and is not using drugs in proximity to the time of an employment decision, then that person shall be considered a disabled person for the purposes of protections under this Ordinance.

(d) A person may be terminated by an Employer for illegal drug use. It shall not be a violation of this section for an Employer to hold an employee who engages in the illegal use of drugs or excessive use of alcohol to the same qualification standards for employment or job performance and behavior to which that Employer holds other employees, even if any unsatisfactory performance or behavior is related to the drug or alcohol use of the employee.

#### **Section 4-105: Harassment (including Sexual Harassment)**

(a) Harassment consist of engaging in the workplace in unwanted behavior that annoys, upset, or causes emotional suffering to any other person, including supervisor, employees, customers or any member of the public. Sexual

harassment is harassment that is sexual in nature and may include unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

(b) An Employer is responsible for the acts of workplace harassment of its supervisory and non-supervisory employees where the Employer, or its agents or supervisory employees, knew or should have known of the conduct. An Employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action upon learning of the harassment.

## **PART T. EMPLOYEE WAGE AND HOUR ACT**

### **TITLE I MINIMUM WAGE**

#### **Section 5-101: Minimum Wage**

- (a) Every employer within the jurisdiction of the Kiowa Tribe shall pay their employees no less than the Kiowa Minimum Wage. Each year, on or before February 1<sup>st</sup>, the Commission shall establish the Minimum Wage that prevails in the jurisdiction of the Kiowa Tribe. The Commission shall ensure the Minimum Wage is above the poverty line for a single working adult and may consider any publicly available data when making said determination. Such Minimum Wage may be changed by resolution of the Tribal Legislature and signature of the Chairman of the Tribe.
- (b) **Tipped Employees.** Every employer within the jurisdiction of the Kiowa Tribe shall pay their Tipped Employees no less than one-third (1/3) of the Kiowa Minimum Wage established in subsection (a), provided that if a Tipped Employee's hourly wage, when combined with their tips on an hourly basis, meets or exceeds the Kiowa Minimum Wage. In the instance

it does not meet or exceed the Kiowa Minimum Wage, the employer shall pay the Tipped Employee the difference in wages.

#### **Section 5-102: Maximum Hours**

No employer shall require a person to work for more than 40 hours per week unless the employer pays compensation for all hours over 40 per week at a rate of 1.5 times the person's normal hourly rate. The duty to pay overtime does not apply to tipped employees or persons who earn more than half their income from commission.

#### **Section 5-103: Exemptions**

This title shall not apply to any person who holds a supervisory position and who is paid a salary of not less than \$50,000 per year where the amount of the salary is not depended upon the number of hours worked.

#### **Section 5-104: Private Right of Action**

Any person may file a lawsuit in the Trial Court against any person or Entity, including the Tribe or any Government Commercial Enterprise and any employee or office there of who is alleged to be violating this Ordinance. The person filing suit may see any remedy the Court finds just, including but not limited to restoration of employment, retroactive payment of unpaid minimum wages or unpaid overtime, or compensatory or punitive damages for harassment.

#### **Section 5-105: Statute of Limitations**

Any action under this Ordinance must be commenced within six months after the date on which the last violation is alleged to occur. If violations constitute a pattern and practice, damages may be sought for all such actions no matter when they occurred, so long as the last such action occurred less than six months before the filing of the suit.

## **TITLE II MINIMUM WAGE RATES ON PROJECTS SUBJECT TO THE FEDERAL DAVIS-BACON ACT**

### **Section 5-201: Assertion of Tribal Authority over Wage Determinations on Certain Housing Construction Projects**

The Nation hereby asserts the authority granted to tribal governments by Title 1, section 104 of P.L. 104-33 (25 U.S. C. 4114(b)(3)) to establish prevailing wage rates, in lieu of those established by the U.S. Secretary of Labor, for laborers and mechanics employed in the development of affordable housing under the Native American Housing Assistance and Self-Determination Act.

### **Section 5-202: Wage Determinations**

The wages to be paid laborers and mechanics employed in the development of affordable housing under the Native American Housing Assistance and Self-Determination Act shall not be greater of those provided by this Ordinance, or those required by the U.S. Secretary of Labor under the Davis-Bacon Act (40 U.S.C. 3142, et seq.) at it may be amended, for the locality in which the work is to be performed.

### **Section 5-203 Wages Determination for Trainees**

(a) An Employer engaged in a project subject to this Title (a project under the Native American Housing and Self-Determination Act) may pay laborers and mechanics who are not certified as journeymen at the wage rate established by the U.S. Department of Labor Davis-Bacon Wage Determination for a trainee at that skill level, or, if the employee's skill level has not been rated, a wage that is not less than three-fifths of the minimum wage for a journeyman in that craft as determined by the U.S. Secretary of Labor under the Davis-Bacon Act (40 U.S.C. 3142, et seq.) for the locality in which the work is to be performed, (including any fringe benefit amounts that are included in said wage determination by the Secretary) if the TERO Director has certified that said employee is participating in a formal or informal training program that will lead to journeyman status.

(b) Each Employer shall employ one trainee for every three journeymen the Employer employs in that craft on that project.

### **Section 5-204: Fringe Benefits**

An employee shall be permitted to elect to receive the cash value of fringe benefits which are offered in lieu of the fringe benefits, in the form of a direct payment that is to be included in the employee's paycheck. Taxes shall be withheld, as appropriate from such payments. Each Employer shall offer this option to every employee at the time he or she is first employed and to the extent an employee was hired before this passage of this Ordinance, every Employer shall offer this option to every employee within 90 days of the passage of this Ordinance.

## **PART VI      FAMILY MEDICAL LEAVE PROTECTION ACT**

### **Section 6-101:                      Family Medical Leave Protection**

(a) Family medical leave requirement. Every employee who has been employed by the same employer for 12 consecutive months is entitled to up to 10 consecutive work weeks of family medical leave in any 2 years. The following conditions apply to family medical leave granted under this section:

(1) The employee must give at least 30 days' notice of the intended date upon which family medical leave will commence and terminate, unless prevented by medical emergency from giving that notice.

(2) The employer shall require certification from a physician to verify the amount of leave requested by the employee, except that an employee who in good faith relies on treatment by prayer or spiritual practice, may submit certification from an accredited practitioner of those healing methods; and

(3) The employer and employee may negotiate for more or less leave, but both parties must agree.

Family medical leave granted under this subchapter may consist of unpaid leave. If an employer provides paid family medical leave for fewer than 10 weeks, the

additional weeks of leave added to attain the total of 10 weeks required may be unpaid.

(b) Employee benefits protection.

(1) Restoration. Any employee who exercises the right to family medical leave under this section, upon expiration of the leave, is entitled to be restored by the employer to the position held by the employee when the leave commenced or to a position with equivalent seniority status, employee benefits, pay and other terms and conditions of employment. This subsection does not apply if the employer proves that the employee was not restored as provided in this subsection because of conditions unrelated to the employee's exercise of rights under this section.

(2) Maintenance of employee benefits. During any family medical leave taken under this subchapter, the employer shall make it possible for employees to continue their employee benefits at the employee's expense. The employer and employee may negotiate for the employer to maintain benefits at the employer's expense for the duration of the leave.

(c) Effect on existing employee benefits.

(1) Benefit accrual. The taking of family medical leave under this section shall not result in the loss of any employee benefit accrued before the date on which the leave commenced.

(2) Contract rights. Nothing in this subchapter may be construed to affect or diminish the contract rights or seniority status of any other employee of any employer covered by this subchapter.

## **PART VII OCCUPATIONAL SAFETY AND HEALTH ACT**

### **Section 7-101: Duties of Employers and Employees**

(a) Each Employer shall:

(1) Furnish employees with a place and condition of employment that is free from recognized hazards that may cause or are likely to cause death or serious physical harm to the employees;

(2) Comply with all occupational safety and health rules promulgated or adopted by the Tribe pursuant to this Part.

(b) Each employee shall comply with all occupational safety and health rules promulgated or adopted by this Part that are applicable to the actions and conduct of the employee.

### **Section 7-102: Adoption of the Rules of the Federal Occupational Safety and Health Administration**

The rules and regulations of the Occupational Safety and Health Administration (OSHA) of the United States Department of Labor, including all future rules or amendments to existing rules, promulgated pursuant to the authority granted to OSHA by the Occupational Safety and Health Act of 1975, (29 U.S.C. sections 651 et. Seq.) are hereby adopted by the Tribe to the full extent of the Tribe's authority and apply to all Employers within the jurisdiction of the Tribe.

### **Section 7-103: Enforcement**

(a) The TERO Director is authorized to enforce the rules adopted by this title, to the full extent permitted by Ordinance.

## **PART VIII FREEDOM TO WORK WITHOUT JOINING A UNION ACT**

### **Section 8-101: Policy**

It is hereby declared to be the public policy of the Tribe that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization.

### **Section 8-102: Agreements Declared Unlawful**

Any agreement between any Employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for the Employer, or whereby such membership is made a condition



of employment, continuation of employment, promotion or any other benefits by such Employer is hereby declared to be against public policy and illegal.

**Section 8-103: Employees Not Required to Join a Union**

No person shall be required by an Employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such Employer.

**Section 8-104: Employees May Not be Prohibited from Joining a Union**

No person shall be required by an Employer to abstain or refrain from membership in, or holding office in, any labor union or labor organization as a condition of employment or continuation of employment. Moreover, no Employer may interfere with the organization of a union.

**Section 8-105: Employees Shall Not be Required to Pay Union Dues**

No Employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to a labor union or labor organization.

**Section 8-106: Payment of Fringe Benefits**

Any Employer who is subject to a collective bargaining agreement that requires it to pay monies for fringe benefits for its employees into a union fund, such as health and pension funds, shall offer any employee who is not a union member the option of receiving directly, in each paycheck, the amount that would otherwise have been placed into the union fund on behalf of that employee.

**PART IX. ENFORCEMENT**

**Section 9-101: Applicability**

These enforcement provisions shall be used to enforce the requirements of this Ordinance, unless a specific enforcement provision is contained in a particular



part, in which case the specific provision shall take priority but may be supplemented by the provisions provided in this Part.

### **Section 9-102: Investigation**

- (a) On his own initiative or on the basis of a complaint filed pursuant to any provision contained in this Ordinance, the TERO Director or his/her designee may make such public or private investigations, including the hiring of a non-tribal investigator, within or without the exterior boundaries of Kiowa Tribal lands as the TERO Director deems necessary to insure compliance with under this Ordinance, to determine whether any Employer or Entity has violated any provision of this Ordinance or its implementing regulations, or to aid in prescribing rules, regulations or policies hereunder.
- (b) Separate from acting on any complaint filed, the TERO Director shall conduct regular compliance reviews to insure all Employers and Entities are complying with the requirements of this Ordinance.
- (c) The TERO Director or his/her designee may enter the place of business or employment of any Employer or Entity for the purpose of such investigation or compliance review. The Director officer 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 Employer or Entity, review and copy any documents, and carry out any other activity the TERO Director or officer deems necessary to the carrying out of the investigation or compliance review.
- (d) For the purpose of investigations, compliance, review, or hearing which, in the opinion of the Director or the Commission are necessary and proper for the enforcement of this Ordinance, the TERO Director 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 TERO Director or the Commission deems relevant or material to the inquiry.
- (e) Any state or federal tax records, trade secrets, or privileged or confidential commercial, financial, or employment information subpoenaed or otherwise

obtained pursuant to the provisions of this Ordinance or used in a compliance hearing or subsequent appeal to the Trial Court, shall be confidential records of the business or person from which they were obtained and, shall not be opened to public inspection, shall be used only by the TERO 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 and the person(s) to whom they belong.

### **Section 9-103: Complaints**

Any person or Entity, has violated any requirement imposed by any Part of this Ordinance or regulations issued pursuant to it, may file a complaint with the Commission. The complaint shall be in writing and shall provide such information as is necessary to enable the TERO Director to carry out an investigation. The TERO Director shall, within 30 days of the date on which a complaint is filed, complete an investigation of said complaint unless the TERO Director requests and is granted an extension by the Commission, which shall be for no more than 30 days. If upon investigation, the TERO Director has reason to believe a violation has occurred, he/she shall determine what action to take, which may include prosecuting the violation. Within 15 days after receipt of the complaint, and on a regular basis thereafter, the TERO Director shall provide the complaining Party with a written report on the status of the complaint. If the complaint is against the TERO Director or staff, the Commission shall appoint an independent Party to conduct the investigation and to carry out the responsibilities given to the TERO Director by this Part.

### **Section 9-104: Resolution of Complaints**

(a) When, after conducting an investigation or compliance review, whether initiated by a complaint filed by a Party or an investigation or compliance review initiated by the TERO Director, the TERO Director has reasonable cause to believe a violation of this Ordinance or regulations issued pursuant to it has occurred, (including a failure on the part of a Party to comply with a subpoena or other request during the investigation phase) the TERO Director shall so notify the

Employer or Entity in writing, delivered by registered mail, specifying the alleged violations. However, he may withhold the name(s) of the complaint Party if he has reason to believe such Party may be subject to retaliation.

(b) The TERO Director shall make a good faith effort to achieve an informal settlement of the alleged violation by meeting with the Employer or Entity and taking such other actions as are appropriate.

(c) If the TERO Director is unable to achieve an informal settlement, he shall issue a formal notice of non-compliance, which shall also advise the Employer or Entity of his right to request a hearing. The formal notice shall set out the nature of the alleged violation and the steps that must be taken to come into compliance. It shall provide the Employer or Entity (hereinafter the "Party") with a reasonable time, which in no event shall be less than five days from the date of receipt of such notice, comply, unless the TERO Director has reason to believe irreparable harm will occur during that period, in which case, the TERO Director may require that compliance occur within fewer than five days.

(d) If the Party fails or refuses to comply, as provided for in the formal notice, the Party may request a hearing before the Commission, which shall be held no sooner than five days and no later than 30 days after the date for compliance set forth in the formal notice, unless an expedited hearing is deemed necessary by the Commission to avoid irreparable harm or is requested by the Party and good cause is shown.

(e) If a Party fails or refuses to comply and does not request a hearing, the TERO Director shall request the Commission Chairman to convene a session of the Commission for the purposes of ordering compliance by the Party.

(f) Notwithstanding the other provisions of this Ordinance, if the TERO Director has good cause to believe that immediate remedial action is necessary to prevent irreparable harm, which shall include but not be limited to loss of employment, contracting, or subcontracting opportunities or dangers to employees from unsafe practices, the TERO Director may require that the Party come into compliance immediately or that the Party immediately enter into a written agreement to come into compliance pursuant to a schedule acceptable to the TERO Director. In such cases, if the Party fails or refuses to comply and

requests a hearing, the hearing shall be held within 48 hours after the Party has received notification of the hearing schedule. If the Party fails or refuses to comply but does not request a hearing, the TERO Director shall request that the Commission Chairman convene a session of the Commission within 48 hours to provide for enforcement of TERO Director's directive.

#### **Section 9-105:      Hearing Procedures**

- (a) Any hearing held pursuant to this Title shall be conducted by the Commission. The hearing shall be governed by rules of practice and procedure which shall be adopted by the Commission. The Commission may consider any evidence which it deems relevant to the hearing. The Commission shall not be bound by technical rules of evidence in the conduct of hearings under this Ordinance, and no informality in any proceeding, as in the manner of taking testimony, shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the Commission. A tape recording shall be made of each hearing. No stenographic record of the proceedings and testimony shall be required except upon arrangement by, and at the cost of the Party charged.
- (b) The TERO Director shall prosecute the alleged violation on behalf of TERO. For the hearing and during all stages of the procedures provided for in this Title, the TERO Director shall be represented by the Attorney General or his designee. If the Party is an office or subsidiary of the Tribal Government, an independent prosecutor shall be appointed.
- (c) During the hearing phase of the enforcement process, to avoid a conflict of interest between the Commission, which shall sit as an impartial judicial body, and the Director who shall act as the prosecutor, the Commission shall establish such procedures and safeguards to ensure the due process rights of all parties are protected and that there is no improper contact or communication between the Commission and the TERO Director.
- (d) If the Commission requires legal assistance during the hearing process or at any other phase of the enforcement process and it would be a conflict of interest for the Attorney General to provide such assistance, the Commission shall retain independent legal counsel.

## **Section 9-106: Remedies**

(a) If, after a hearing, the Commission determines that the alleged violation of this Ordinance or regulations has occurred and that the Party charged has no adequate defense in Ordinance or fact, or if a Party were issued a formal complaint and failed to request a hearing, the Commission may:

- (1) Deny such Party the right to commence business on Tribal lands;
- (2) Suspend such Party's business activity within Indian lands;
- (3) Terminate such Party's business activity within Tribal lands;
- (4) Deny the right of such Party to conduct any further business within Tribal lands;
- (5) Impose a civil fine on such Party.
- (6) Order such Party to make payment of back pay or other damages to any aggrieved Party;
- (7) Order such Party to dismiss any employees hired in violation of the Tribes' employment right requirements;
- (8) 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.
- (9) Order the Party to take such other action as is necessary to ensure compliance with this Ordinance, consistent with the requirements of the laws of the Tribe and the Indian Civil Rights Act, 25 U.S.C. 1301 et seq.

(b) The maximum monetary penalty which may be imposed is five thousand dollars (\$5,000.00) for each violation. The penalties will be graduated as follows:

- 1) The first violation will incur a fine of two hundred dollars (\$200.00)
- 2) The second violation will incur a fine of one thousand dollars (\$1,000.00)
- 3) The third violation will incur a fine of five thousand dollars (\$5,000.00)

- (c) Each day during which a violation exists shall constitute a separate violation.
- (d) Monetary penalties assessed by the Commission may be doubled if it is shown that the violation occurred egregiously or with malicious, reckless or wanton behavior.
- (e) Attorney Fees and Cost of pursuing or defending an action of the Commission may be awarded to the prevailing party.
- (f) The Commission's decision shall be in writing, shall be served on the charged Party by registered mail or in person by the TERO Director or his/her designee no later than five days after the Commission issues an order. Where the Party's failure to comply immediately with the Commission's orders may cause irreparable harm, the TERO Director may move the Trial Court, and the Court shall grant such relief as it finds and appropriate.

#### **Section 9-108: Appeals**

- (a) An appeal to the Trial Court may be taken from any final order of the Commission by any person adversely affected thereby, including the TERO Director or a complainant. Said appeal must be filed with the Trial Court, with a copy served on 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 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 the Court.
- (c) Except as provided elsewhere in this Ordinance, the order of the Commission shall be stayed pending the determination of the Trial Court.

However, the Director 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 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 shall so notify the Court and the other parties.

(e) The Trial Court shall uphold the decision of the Commission unless it is demonstrated that the decision of the Commission was contrary to law or was not based upon substantial evidence.

(f) If, by the 20<sup>th</sup> day after the Party's receipt of either:

(1) Notice of a decision by the Commission from which no appeal to the Trial Court is taken, or

(2) Notice of a final decision of the Trial Court upholding the Commission's decision from which no appeal to the Supreme Court is taken, and the Party against whom the Order is written has failed to come into compliance with the decision of the Commission or Court, the TERO Director 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 including sanctions or confiscations and sale as provided herein.

(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 the Commission shall take in the matter, including making and entering any order or orders in connection therewith, and the limitations, or conditions to be contained therein.

## **Section 9-109: Confiscation and Sale**

If a Party has failed to pay monetary damages imposed on it or otherwise failed to comply with an order of the Commission or the Court, and the TERO Director believes there is a likelihood the Party will remove itself and its property from the



jurisdiction of the Tribe, the TERO Director may petition the Tribe's Court to order the Tribe's police to confiscate, and 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 TERO 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 confiscation of property and hold said property or as much as is available. The TERO Director shall deliver in person or by certified mail, a notice to the Part informing it of the confiscation and of its right to redeem said property by coming into compliance with the order outstanding against it. If 30 days after confiscation other Party has not come into compliance, the Court shall order the said sale of the confiscated property and use the proceeds to pay, in the following order of priority, 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 after any judgment is satisfied shall be returned to the Party.

#### **Section 9-110: Other Enforcement Authorities**

(a) If at any stage in the enforcement process, the TERO Director has reason to believe there is a danger that a Party will remove itself or its property from the jurisdiction of the Trial Court, such that the Commission or the Court will not be able to collect monetary damages or TERO fees that are (1) owned by that Party pursuant to any outstanding order of the Commission or Court, or (2) which may be owed if the charges set out in any outstanding notice of violations are upheld, the TERO Director may, in his discretion, require the Party to post a bond with the Commission in an amount sufficient to cover possible monetary damages that may be or have been assessed against the Party. If the Party fails or refuses to post said bond, the TERO Director may petition the Tribe's Court for such interim and injunctive relief as is appropriate to protect the rights of the tribe and other parties during the pendency of the complaint and hearing proceedings.



(b) If the TERO Director believes that irreparable loss of employment, contracting, or subcontracting opportunities will occur pending a hearing requested by a Party, pending a session of the Commission where a Party has failed to request a hearing, pending action by the Trial Court, or at any other stage of the process provided for in this Title, the TERO Director may petition the Trial Court to temporarily enjoin such actions of the party as may be necessary to prevent the irreparable loss. Upon showing by the TERO Director likely success on the merits and irreparable injury, the Court shall grant the requested injunction for such period as may be necessary to prevent the irreparable loss.

(c) When irreparable harm will occur before a matter can be brought before the Trial Courts, the Commission is authorized to issue such cease and desist or related orders as may be necessary to enforce the requirements of this Ordinance. The Tribe's police are hereby expressly authorized and directed to enforce such cease and desist or related orders as may from time to time be properly issued by the Commission. Such orders do not require judicial decree or order to render them enforceable. The police shall not be civilly liable for enforcing such orders so long as the order is signed by the Chairman of the Commission as a duly authorized order of the Commission. The Commission shall seek a Court order as quickly as possible. The Court may dissolve the cease and desist order or may order such injunctive or other relief to replace the cease and desist order as it deems appropriate.

(d) In addition to the procedure and remedies provided for in this Ordinance, the TERO Director is authorized to petition the Trial Courts under any other appropriate provision of the Ordinances and ordinances of the Tribe as is necessary to effect implementation of and compliance with the Ordinance.

### **Section 9-111: Monitoring and Coordination in Regard to Other Tribal, Federal and State Ordinances**

If, when carrying out inspections at work sites or otherwise carrying out their responsibilities under this Ordinance, the TERO Director or his/her designees have reason to believe that a requirement of a Kiowa, Federal, state or local Ordinance, ordinance or regulation, other than the ones included in this Ordinance, may have

been violated by a Party, the TERO Director is authorized to document such possible violation, to report it to the appropriate enforcement agency, and, to the extent that resources permit and the TERO Director determines it to be appropriate, assist that agency to investigate and cure the possible violation.

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**APPENDIX A      CRITERIA AND PROCEDURES FOR CERTIFYING FIRMS AND  
INDIAN PREFERENCE ELIGIBLE**

## 1 General Statement of Policy

Pursuant to its sovereign authority, the Kiowa Tribe (hereinafter, “the Tribe”) has imposed Indian contract preference requirements as one tool for promoting the economic development of the Tribe. When used properly, Indian preference in contracting can assist in the development of Indian businesses and thereby assist the Tribe and its members to achieve economic self-sufficiency. However, if the preference is abused, it will undermine this development and discredit the preference tool. Because of this, it is the policy of the Tribe to require that 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 Tribe 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 require that the ownership, control, and management arrangements of a firm make sense from a sound business perspective. The Indian owners must own and control 51% or more of 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 51% 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 good value for his or her 51% 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 owners(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 tribal lands. 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, bonding, financing or other specialty capability. The TERO will certify Indian-owned companies 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 Tribe nor the Indian community benefits from the establishment of "bogus" Indian firms, while the certification of such firms undercuts the credibility of the Tribe'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 Tribe's requirement that preference be given to Indian subcontractor and employees.

The procedural requirements for certification provide that applications shall be reviewed by the Director of the Tribe's Tribal Employment Rights Office (TERO), who shall request any additional information it believes appropriate. It will then submit the application, along with its recommended findings, to the TERO Commission. The Commission shall review the application and findings, interview the principals of the firm, request additional information as appropriate, and then decide on whether certification should be granted. The firm will have a right of appeal to the 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 investigate a firm to determine if its certification should be suspended or withdrawn. The 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.

## 2. Criteria for Indian Contract Preference Certification

To receive 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 51% or more Indian-owned. The applicant must demonstrate the following:

1. Formal Ownership. That an Indian or Indians own(s) 51% 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 51% or more of the assets and equipment, will receive 51% or more of the firm's assets upon dissolution, and will receive 51% or more of the profits; and

b. control – i.e., the Indian(s) 51% or more 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 Ordinance.

2. Value. The Indian owner(s) provided real value for his or her 51% or more 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 51% or more 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 51% or more of all profits. If there is any provision that give 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 51% or more of 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 tribal lands, 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, the TERO will consider the factors set out below. The 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.

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.

### 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 won, 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 51% 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) programs.

### 3. Certification Procedures

#### (a) Application for Certification

A firm seeking certification as an Indian preference eligible firm shall submit a completed application (see Appendix at the end of this Part) to the TERO on a form provided by the TERO Office. (Application forms may be obtained at the TERO office.) The TERO Director will be available to assist a firm fill out the application. Within 21 days after receipt of a completed application, the TERO Director shall review the application, request such additional information as he/she believes appropriate (computation of the 21-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, the TERO Office may extend the processing period by an additional 21 days, by sending notification of the extension to the applicant by registered mail. Within 15 days of receipt of the TERO's analysis and recommended disposition, the Commission shall hold a hearing on the application, posting notice of the hearing time at the Tribal Office, the Agency, and the TERO Office at least five days prior to the hearing. 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 the TERO Hearing Procedures.

(b) Probationary Certification

An applicant granted certification shall be issued a one-year probationary certificate. During that period, the TERO Office shall monitor the firm's activities to ensure that the firm is operating in the manner described in the application. During the probationary period, the 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 the TERO Director, shall either:

1. grant full certification;
2. continue the probationary period for up to six months; or
3. deny 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, the TERO may initiate proceedings to withdraw or suspend

the certification of any firm. The TERO Director 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 the TERO. At the hearing, the TERO Director 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 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 Tribe prior to the effective date of these Regulations shall apply as required under these criteria to the TERO within 30 days after the effective date of these Regulations. If the TERO determines the firm qualified 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 30 days of receipt of the TERO's recommendation. If the 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 the 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 Part IX of the Workforce Protection Act, which shall be held within 15 days after receipt of the 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 the 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 the TERO. Failure to provide information pursuant to these requirements shall constitute grounds for withdrawal of certification.