




Department of Energy  
Washington, DC 20585

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MEMORANDUM FOR SENIOR PROCUREMENT EXECUTIVES

FROM: STEVEN CHU 

SUBJECT: Department of Energy Procurement Policy Guidance – Purchase of Electricity, Energy Products and Energy By-Products from Indian Tribes

STATEMENT OF POLICY

The National Renewable Energy Laboratory (NREL) has estimated that Indian lands contain substantial generating capacity for renewable resources with over 23,000 million MWh of generation capacity from solar, wind, biomass, geothermal, and small/low power hydro technologies. Title V of the Energy Policy Act of 2005 (EPA 2005) provides the Department of Energy (DOE or the Department) with specific authority to help tribes and tribal enterprises develop these energy resources through a variety of financial, technical assistance, and procurement mechanisms. In addition, section 503 of EPA 2005 provides a Federal agency or department (including DOE) with authority to give preference to tribal majority owned business organizations when purchasing electricity, energy products, and energy by-products. 25 U.S.C. § 3502(d). This statutory procurement preference provides Federal agencies with discretion to give tribal majority owned business organizations<sup>1</sup> preferred access to the Federal government marketplace for electricity, energy, and energy by-products.

Promoting tribal renewable energy development would enable further economic development in Indian Country, reaffirm the Federal government's trust responsibility to Indian Tribes, and reinforce key national policy objectives. A tribal procurement preference for renewable energy would also help advance multiple public goals, such as promoting the acquisition and use of clean energy products pursuant to Executive Order 13514, and the Federal Government's statutory goal of acquiring at least 7.5 percent of its electricity through renewable energy sources in fiscal year 2013 and thereafter.<sup>2</sup>

On May 4, 2011, I approved a Decision Memorandum to develop policy guidance for the Department to implement this procurement preference provision. In this Decision Memorandum, I determined that the Department's policy would focus on preference for tribal renewable energy, which is consistent with the Department's efforts to promote tribal renewable energy development. This memorandum serves as the Department's guidance for implementing 25 U.S.C. § 3502(d).

<sup>1</sup> A tribal majority owned business organization includes an "energy and resource production enterprise, partnership, consortium, corporation or other type of business organization the majority of the interest in which is owned and controlled by 1 or more Indian tribes." 25 U.S.C. § 3502(d)(1).

<sup>2</sup> Under section 203(c)(3) of EPA 2005, when purchasing electricity from renewable energy projects on Indian lands, the Department receives double credit towards this goal.



## STATUTORY PROVISIONS

The EPAct 2005 provision allows Federal agencies to give preference in the procurement of electricity, energy or energy byproducts produced by tribal majority-owned business organizations, provided the Department does not pay more than the prevailing market rate for any such energy products or by-product, nor obtain less than prevailing market terms and conditions. 25 U.S.C. § 3502(d). This preference provision must also be read in conjunction with other statutory and regulatory requirements applicable to the purchase of electricity, energy products, and energy by-products, including, but not limited to:

- 40 U.S.C. § 591 (statutory requirements for purchase of electricity)
- 40 U.S.C § 501 (statutory maximum 10-year contract length)
- 48 C.F.R. Part 41 (Acquisition of Utility Services)
- 41 U.S.C. § 3101 et seq. (The Competition in Contracting Act)

## APPLICATION OF THE STATUTORY PROVISIONS

While the statute allows the Department to give preference to all energy sources, energy products, or by-products, I determined that the Department will give preference to tribes and tribal majority-owned business organizations for the purchase of electricity produced by renewable resources, renewable energy products, and renewable energy by-products.

For purposes of this guidance, renewable resources mean: wind, solar, geothermal, bioenergy, and incremental hydropower. Renewable energy products include, but are not limited to, renewable fuel or feed sources, such as woody biomass and biofuels. Renewable energy by-products include, but are not limited to, the environmental attributes generated by renewable energy and sold in organized markets; renewable energy credits (RECs); and greenhouse gas credits.

Preference can only be given to a tribe or an energy and resource production enterprise, partnership, consortium, corporation, or other type of business organization in which one or more Indian tribes owns and controls at least a 51 percent ownership interest. 25 U.S.C. § 3502(d)(1).

Section 3502(d) requires that the Department pay no more than “the prevailing market rate for an energy product or by-product.” For purposes of implementing section 3502(d), “prevailing market rate” can be determined based on the following factors:

- a) the type of energy product or by-product required to meet the needs of the facility;
- b) local market conditions for similar products (if available);
- c) local market rates for similar products (if available);
- d) for electricity produced on tribal lands, the double value of any included RECs.

Taking these factors into consideration, the prevailing market rate should be based upon what the price would be to procure new electric service either with the local serving utility or through a competitive acquisition, whichever applies. For example, the cost to procure electricity for a

new customer with the same requirements as DOE and served by the same utility in the same rate class and regulatory structure as the DOE Site could be considered in determining prevailing market rate. Or, if a DOE Site is buying electricity or energy products or by-products through an open-bid procurement (such as through a request for proposal [RFP] process), then the purchase price can be considered the prevailing market rate for the purposes of a Section 3502(d) analysis. The price of power directly received by a DOE Site as a result of preference hydropower from a Power Marketing Administration (PMA) should not be considered a factor in this analysis.

To ensure preference is given to a tribe or tribal majority owned business organizations, a DOE Site may conduct a limited competition that includes only tribes and tribal enterprises. For example, a DOE Site may issue a limited competition RFP (limited to tribes and tribal majority owned business organizations) for the purchase of electricity, energy products, or byproducts. Or, the appropriate PMA may be able to issue an RFP, for which only tribal majority owned business organizations are eligible vendors, to purchase RECs for DOE sites. In any of these above circumstances, the DOE purchaser would need to ensure that it pays no more than prevailing market rate for any purchases resulting from the limited competition.

### **INTERACTION WITH DOE POWER MARKETING ADMINISTRATIONS**

When DOE Sites work with a PMA to acquire electricity, energy products or energy by-products under this Policy, the PMA should give due consideration to this guidance memorandum as the policy of the Department.

### **IMPLEMENTATION**

The Department's Senior Procurement Executives are directed to issue Acquisition Letters based on this Policy Guidance, in consultation with the Heads of Contracting Activity (HCAs), Office of Indian Energy, and General Counsel.