

**KIVA Institute, LLC**  
**Construction Contracting Under Pub. L. 93-638 (Subpart J)**  
**Agenda**  
**Three Days / 24 Hours**

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**Day 1**

**9:00 a.m.**

**Module 1 – Overview of Indian Self-Determination Act**

*Construction contracting under Pub. L. 93-638 is very unique; and is very different from commercial construction contracting. Indian tribes have an automatic right to contract for construction projects under the Act. There is no competition. Module 1 provides an overview of the Indian Self-Determination Act with a special focus on construction contracting under the Act, the sovereign rights of Indian tribes under the Act; and the main tenants of the Act. It is important for attendees to understand the true intent of Congress in passing the Act.*

- Tribal Sovereign Rights Under Indian Self-Determination Act
- Contract Relationship Model under Indian Self-Determination Act
- Key Principles (Tenants) Under the Indian Self-Determination Act
  - Secretary's Mandate to Contract
  - Contractible Construction Projects and Functions
    - Construction Management Services
    - Project Design and Construction
  - Contract Application Requirements
  - Right to Program Redesign
  - Use of Tribal Standards
  - Waiver of Federal Procurement Regulations
  - Waiver of Pub. L. 93-638 Regulations
  - Property Donation
  - Declination Criteria & Procedures
  - Right to Technical Assistance
  - Tribal Sovereign and Administrative Rights
  - Wage and Labor Standards
  - Indian/Tribal Preference Requirements
  - Funding Provisions & Funding Protections
  - Indirect Costs (Contract Support Costs)
  - Contract Start-Up, Pre-Award, Direct Contract Support Costs
  - Contract Reassumption & Retrocession
  - Rights to Appeals & Disputes
  - Single Audit Requirements

## **Module 2 – Construction Contracting under Pub. L. 93-638 (Subpart J)**

### **Overview**

*Construction contracting under the Indian Self-Determination Act was made possible through Pub. L 100-472, the 1988 Technical Amendments to the Act. As such, the Act was revised to include special statutory provisions pertaining to construction contracting under the Act. Construction contracting under the Act is much different from commercial construction contracting, that it requires a special, stand-alone Subpart (Subpart J) to identify the unique provisions. Module 2 provides a detailed review of construction contracting under the Act and 25 CFR Part 900, Subpart J.*

- Contract Relationship Model under the Act
  - Government-to-Government Relationships
  - Contractual Relationships Tribal-Federal Government, Tribal-General Contractor and Subcontractors)
- Overview of Special Statutory Provisions Relating to Construction (Sec. 105 and Sec. 106)
- What is Construction Contracting under the Act?
  - Construction Contracting Projects
  - Non-Construction Contract Projects/Activities
  - Construction Management Services (CMS)
- Construction Phases (Pre-Planning, Planning, Design, Construction, Close Out)
- Tribal Responsibilities (Pre-Planning, Planning, Contract Application Process)
  - Pre-Planning & Planning Activities
  - Strategic Planning; Project Conceptual Plans
  - Land Use Planning/Ordinances
  - Feasibility Studies
  - Program/Construction Standards/Tribal Building Codes
  - Community Outreach Efforts
  - Contents of Construction Contract Application
  - Statement of Assurances
  - Engineer's Cost Estimates/Construction Budget
  - Cost Estimates and Funding Considerations
  - Secretarial Responsibilities (Technical Assistance, Funding)
- What Must the Construction Contract Application Include?
  - Type(s) of Construction Contract Proposal (Design Activities, Construction Activities, Construction Management Services)
  - Use of Licensed and Qualified Architects
  - Health & Safety Standards

- Tribal Project Plans, Scope of Work, Program of Requirements, Construction Standards, Construction Codes, Tribal Building Codes,
- Contract Budget (Engineer's Cost Estimates)
- Statement of Assurances (Compliance with Applicable Federal Statutes)
- Contract Budget and Payment Schedules
- Secretarial Funding Obligations
- Secretarial Responsibilities Relative to Contract Application Review Process
  - Technical Assistance/Information Sharing
  - Consultation with Tribes
  - Secretarial Funding Levels (Direct Costs, Contract Support Costs, Pre-Award Costs, Start-Up Costs)
  - Engineer's (Secretary's) Cost Estimates
  - Arriving at Fair and Reasonable Costs
  - Compliance with Statutory and Regulatory Time Frames
  - National Environmental Policy Act (NEPA) Process
  - Tribal Laws and Ordinances
  - Contract Review and Statutory/Regulatory Timelines
  - Special Construction Contract Declination Criteria Process, Tribal Appeals; and Technical Assistance Requirements
    - Informal Appeals, Formal Appeals, Federal District Court
    - Secretary's Responsibilities (Technical Assistance)
    - Tribes' Responsibilities

**4:00 p.m.      Question & Answer Session**  
**4:30 p.m.      Adjourn**

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**Day 2**

**9:00 a.m.      Module 2 - Construction Contracting under Pub. L. 93-638 (Subpart J)  
Overview (Continued)**

- Contract Negotiation and Award Requirements (Contract Budget, Advances, Program Standards, Reporting, Contract Modifications, Property Donation; Contract Savings)
- Pre-Construction Costs (Pre-Award Costs)
- Waiver of Federal Procurement Regulations (FAR): The “Test of Three”
- Indian Preference/Tribal Preference Mandates
- Davis-Bacon Act/Miller Act
- Tribal Sovereign and Sovereign Immunity Considerations
- Subcontracting Rules/Subcontract Contract Provisions/Monitoring
- Contract Pre-Award, Start-Up, Advance Payments
- Addressing Contract Performance and Compliance Issues
  - Contracting Design Phase
  - Contracting Construction Phase
- Negotiation Tips and Considerations
- Contract Dispute Resolution/Alternative Dispute Resolution
- Contract Close Out Requirements
- Secretarial Oversight Responsibilities Regarding Contract Performance Under:
  - Construction Management Services Contract
  - Project Design and Construction Contract

**Module 3 – Construction Planning, Development, Management**

*Construction planning, development, and contract management are very important issues and tasks to address in developing a cost-effective project. This module provides tools and ideas for more effectively executing projects that tribes and tribal organizations must seriously consider before proceeding further in the construction process. It provides some basic project management principles and practices for effective construction project completion.*

- What is Project Management?
  - Principles and Philosophy (Plan, Organize, Control)
  - Planning the Project (Project Organization, Execution Plan and Strategy)

- Project Management Principles (Define Project Objectives, Develop Execution Plan, Devine Baselines for Control, Manage Risk, Effective Closeout)
- Roles and Responsibilities (Project Execution, Maintain Customer Relations, Create a Positive Environment)
- Project Execution Plan (Define Project Objectives, SMART Objectives)
- Four Cornerstones of Project Management (Cost, Schedule, Scope, Quality, Fifth Cornerstone – Safety)
- What is Construction Management?
  - Initial Scoping Effort
  - Work Breakdown Structure (WBS)
  - Critical Path Scheduling (Critical Path, Bar Chart, Gantt Chart, Project Schedule Tools)
  - Contract Management Considerations (Types of Contracts, Differing Project Delivery Methods, Codes and Standards, Deliverables, Change Orders and Claims, Contractor Incentives)
  - Risk Assessments and Management of Risk (Risk Identification; Likelihood/Probability; Risk Register; Heat Index; Project Management Plan)
  - Four Commandments of Good Project Scope (The Creeping Scope)
  - Elements of Cost Control (Cost Control, Project Control, Basic Elements of Control System, Contingency Plans)
  - Project Quality Improvement
- Types of Contracts
  - Methods of Awards (Competitive Bidding, Negotiated)
  - Methods of Pricing (Lump Sum, Unit Price, Cost-Plus, Cost-Plus Fixed Percentage, Cost Plus Fixed Fee, Cost Plus Variable Percentage)
  - Method or Systems of Project Delivery (Design-Bid-Build, Fast-Track, Design-Build, Multi-Prime, Hybrid)
- Advertising for Bids – Bidding Process
  - Contract Advertisement Process
  - Information to Bidders
  - Bid Requirements (Bid Bonds, Performance Bonds, Payment Bonds, Plans and Specifications, General Conditions)
  - Selection of Contractor (CMS Contractor, General Contractor)
  - Selection of Subcontractors
  - Pre-Qualification of Bidders

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**Day 3**

**9:00 a.m.      Module 3 – Construction Planning, Development, Management (Continued)**

- Negotiating and Awarding the Contract(s)
  - Construction Contract Documents
  - Elements of a Legal Contract
    - General Conditions
    - Bonding Requirements (Miller Act)
    - Contractor’s Warranties and Guarantees
    - Review and Approval Processes
    - Relations with Tribe and Subcontractors
    - Construction Codes, Standards and Regulations
    - Compliance with Tribal Laws (TERO, Tribal/Indian Preference, Tribal Environmental and Cultural Preservation Laws, Zoning Ordinances, Building Codes)
    - OSHA Requirements
    - Davis-Bacon Wage Requirements
    - Inspections of Materials and Workmanship
    - Duties of Inspector and AO/AOTR
    - Permits, Licenses, Patents
    - Salary Payment Processes/Invoice Payments
    - Contract Suspensions and Termination for Default
    - Contract Changes (Change Orders)
    - Liquidated Damages
    - Contract Disputes, Dispute Resolution, Mediation Processes
    - Claims and Disputes
    - Claims Avoidance
    - Risk Managing Process
    - Project Closeout – Major Phases
    - Final Inspection, Approval, Certificate of Occupancy

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