

Reclamation Manual

Directives and Standards

- Subject:** Requirements for Execution and Administration of Indian Self-Determination and Education Assistance Act (Pub. L. 93-638, as amended) Contracts and Annual Funding Agreements (AFAs)
- Purpose:** This Directive and Standard (D&S) establishes Bureau of Reclamation requirements for the execution and administration of contracts under the Indian Self-Determination Act (Title I of Pub. L. 93-638) and AFAs under the Tribal Self-Governance Act (Title IV of Pub. L. 93-638). The benefits of this D&S are to promote uniformity and accountability in the execution and administration of Pub. L. 93-638 contracts and AFAs.
- Authority:** 25 USC 450 et seq.; 25 USC 458aa to 458hh; 25 CFR 900; 25 CFR 1000; Office of Management and Budget (OMB) Circular A-123, *Management's Responsibility for Internal Control*, dated December 21, 2004, issued under the authority of the Federal Managers' Financial Integrity Act of 1982 (31 USC 3512); and 255 DM 1.
- Approving Official:** Deputy Commissioner - Operations
- Contact:** Native American and International Affairs Office (NAIAO) (96-43000)
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1. Introduction.

- A. Pub. L. 93-638 authorizes and directs Reclamation to enter into contracts and AFAs with federally recognized Indian tribes to direct, plan, conduct, and administer eligible programs and projects (also referred to as programs, functions, services, or activities) that otherwise would be carried out by the Federal government.
 - B. This D&S establishes Reclamation's requirements for the award and administration of Pub. L. 93-638 contracts under the Indian Self-Determination Act (25 USC 450 et seq.) and its implementing regulations (25 CFR 900) and AFAs under the Tribal Self-Governance Act (25 USC 458aa to 458hh) and its implementing regulations (25 CFR 1000).
 - C. This D&S is structured in a manner that integrates phased project management methodology including initiating, planning, executing, monitoring, administering, and closing out the self-determination contract or self-governance AFA.
2. **Applicability.** This D&S applies to all Reclamation employees involved in the planning, management, negotiation, execution, and administration of self-determination contracts and self-governance AFAs.

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3. Definitions.

- A. **Amendment.** The term “amendment” means a written modification to an existing contract or AFA.¹
- B. **Annual Funding Agreement or AFA.**² The terms “Annual Funding Agreement or AFA” mean a legally binding and mutually enforceable agreement between a non-Bureau of Indian Affairs bureau and a tribe or consortium³ participating in a self-governance program that contain:
- (1) a description of that portion or portions of a bureau program that are to be performed by the tribe; and
 - (2) associated funding, terms, and conditions under which the tribe will assume a program or portion of a program. See 25 CFR 1000.121.
- C. **Awarding Official (AO).** The term “awarding official or AO” means a Reclamation employee who by appointment or delegation has the authority to enter into and administer contracts or AFAs on behalf of the United States and make determinations and findings with respect thereto. See 25 CFR 900.6.
- D. **Awarding Official’s Technical Representative (AOTR).** The term “awarding official’s technical representative or AOTR” means any Reclamation employee who has been appointed in writing by the AO to act as an authorized technical representative in the monitoring and administration of an executed self-determination contract or self-governance AFA.
- E. **Days.** The term “days” means calendar days; except where the last day of any time period falls on a Saturday, Sunday, or a Federal holiday, the period shall carry over to the next business day unless otherwise prohibited by law. See 25 CFR 900.6 and 25 CFR 1000.2.
- F. **Declination.** The term “declination” means the procedures established in Subpart E of 25 CFR 900 to decline all or a portion of a contract proposal.

¹Pub. L. 93-638 and its implementing regulations use the term “amendment” rather than “modification” and that nomenclature has been adopted for this D&S.

²This term AFA is specific to the Tribal Self-Governance Act and its implementing regulations at 25 CFR 1000. Note that “annual funding agreement” also is used in the regulations implementing the Indian Self-Determination Act; however, that term has a different meaning and is not used in this D&S. See 25 CFR 900.6 to compare the definitions.

³For purposes of this D&S the terms “Indian tribe” or “tribe” includes the term “consortium” when discussing a self-governance AFA. The term “consortium” means an organization of Indian tribes that is authorized by those tribes to participate in self-governance under 25 CFR 1000 and is responsible for negotiating, executing, and implementing AFAs and compacts. See 25 CFR 1000.2.

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- G. **Fair and Reasonable Funding Amount.** The terms “fair and reasonable funding amount” means an amount that is fair under current local market conditions and reasonable to both the government and the Indian tribe.
- H. **Funding Amendment.** The term “funding amendment” means an amendment to an existing contract or AFA that only obligates additional funding for continued activities that have been specifically identified, priced, and documented as fair and reasonable in the original contract or AFA.
- I. **Indian.** The term “Indian” means a person who is a member of an Indian tribe. See 25 CFR 900.6 and 25 CFR 1000.2.
- J. **Indian Tribe or Tribe.** The terms “Indian tribe or tribe” mean any Indian tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. See 25 CFR 900.6 and 25 CFR 1000.2.
- K. **Initial Contract Proposal or Proposal.** The terms “initial contract proposal or proposal” means a proposal for programs, functions, services, or activities that the Secretary of the Department of the Interior (Secretary) is authorized to perform but which the Indian tribe or tribal organization is not now carrying out. See 25 CFR 900.6.
- L. **Reassumption.** Under self-determination, the term “reassumption” means rescission (canceling the contract) in whole or in part, of a contract and assuming or resuming control or operation of the contracted program by the Secretary without consent of the Indian tribe pursuant to the notice and other procedures set forth in Subpart P of 25 CFR 900. See 25 CFR 900.6. Under self-governance, the term “reassumption” means the Secretary reassumes control or operation of a program under Subpart M of 25 CFR 1000. See 25 CFR 1000.2.
- M. **Retrocession.** Under self-determination, the term “retrocession” means the voluntary return to the Secretary of a contracted program, in whole or in part, for any reason, before the expiration of the term of the contract. See 25 CFR 900.6. Under self-governance, the term “retrocession” means the voluntary return by a tribe to a bureau of a program operated under an AFA before the agreement expires. See 25 CFR 1000.2.
- N. **Scope of Work.** The term “scope or work” means the description of the work to be provided through a contract or AFA issued under Pub. L. 93-638 and the methods and processes, as applicable, to be used to accomplish that work. For construction, a scope of work is typically developed based on criteria provided in a program of requirements

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(POR) [see 25 CFR 900.113(g) for definition of a POR] during the design phase, and project construction documents (plans and specifications) during the construction phase. See 25 CFR 900.113(h).

- O. **Secretary.** The term “Secretary” means the Secretary of the Interior. See 25 CFR 900.6 and 25 CFR 1000.2.
 - P. **Self-Determination Contract or Contract.** The terms “self-determination contract or contract” mean a contract (or grant or cooperative agreement utilized under 25 USC 450e-1) entered into between a tribe or tribal organization⁴ and the Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law; provided, no contract (or grant or cooperative agreement) shall be construed to be a procurement contract. See 25 USC 450b(j).
 - Q. **Self-Governance Tribe.** The term “self-governance tribe” means a tribe that participates in permanent self-governance through application and selection from the applicant pool or has participated in the tribal self-governance demonstration project. See 25 CFR 1000.2.
 - R. **Successor AFA.** Means a funding agreement negotiated after a tribe’s initial AFA with a bureau for continuing to perform a particular project or program. See 25 CFR 1000.2.
4. **Responsibilities.**
- A. **Commissioner.** The Commissioner is responsible for fostering an environment that allows maximum opportunities for Indian tribes to enter into Pub. L. 93-638 contracts and AFAs with Reclamation, for eligible projects and programs, and ensuring that Reclamation fully complies with the requirements of Pub. L. 93-638 and its implementing regulations.
 - B. **Director, NAIAO - Operations Directorate.**
 - (1) **Policy and Oversight.** The Director, NAIAO is responsible for leading and overseeing Reclamation’s Pub. L. 93-638 activities, including but not limited to

⁴For purposes of this D&S the terms “Indian tribe” or “tribe” includes the term “tribal organization” when discussing a self-determination contract. The term “tribal organization” means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; provided, that, in any case where a contract is let or a grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant. See 25 CFR 900.6.

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monitoring, disseminating information about, and being responsive to statutes, regulations, policies, and judicial decisions potentially affecting Reclamation's implementation of Pub. L. 93-638.

- (2) **Internal Control.** The Director, NAIAO is responsible for issuing internal control requirements, which will be promulgated in a Pub. L. 93-638 Internal Control Plan (IC Plan) in accordance with Paragraph 7 of this D&S to provide reasonable assurance that Reclamation's Pub. L. 93-638 activities are attaining the internal control objectives of:
 - (a) effective and efficient operations;
 - (b) reliable financial reporting; and
 - (c) compliance with applicable laws and regulations.
- (3) **Training.** The Director, NAIAO is responsible for overseeing and implementing Reclamation's training requirements applicable to the award and administration of Pub. L. 93-638 self-determination contracts and self-governance AFAs.
- (4) **Collaboration and Assistance.** The Director, NAIAO is responsible for collaborating with and providing assistance to Reclamation's offices to mitigate, minimize, and help resolve issues encountered during implementation of Pub. L. 93-638, including but not limited to:
 - (a) declination of a contract proposal;
 - (b) contractibility issues;
 - (c) pre-award disputes;
 - (d) fraud, waste, or abuse issues;
 - (e) Office of the Inspector (OIG) inquiries;
 - (f) tribal requests for retrocession of a program or project, in whole or in part;
 - (g) potential termination of a self-determination construction contact for convenience or cause;
 - (h) reassumption of a self-determination non-construction contract;
 - (i) reassumption of a self-governance construction project;

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- (j) sanctions invoked under OMB Circular A-133, *Single Audit Act*, implementing the Single Audit Act (31 USC 75); and
 - (k) post-award disputes.
- (5) **Guidance.** The Director, NAIAO is responsible for providing guidance and assistance to Reclamation's offices to facilitate the award and administration of self-determination contracts and self-governance AFAs and to promote consistency Reclamation-wide.
- (6) **Submission of Self-Governance AFAs to Congress.** The Director, NAIAO is responsible for forwarding copies of initial self-governance AFAs and successor AFAs to the Congressional committees specified in 25 CFR 1000.177(b).
- C. **Regional Directors.** The regional directors are responsible for:
- (1) overseeing Pub. L. 93-638 activities within their regions and being accountable for the overall implementation of Pub. L. 93-638, including implementing NAIAO's Pub. L. 93-638 IC Plan;
 - (2) establishing internal control requirements, as deemed necessary, which are consistent and compliant with Reclamation's Pub. L. 93-638 IC Plan and this D&S;
 - (3) undertaking outreach to inform Indian tribes about opportunities to enter into authorized self-determination contracts and self-governance AFAs with Reclamation, as appropriate;
 - (4) appointing Pub. L. 93-638 AOs in accordance with the requirements outlined in Paragraph 5.A. of this D&S;
 - (5) retaining a copy of all AO appointments and terminations in a central location and furnishing a copy of all AO delegations and terminations to NAIAO;
 - (6) designating an official point of contact for receiving an Indian tribe's contract proposal, notice of intent, or tribal resolution that signifies the Indian tribe's intent, or formal request, to enter into a self-determination contract or self-governance AFA;
 - (7) collaborating with the Director, NAIAO, to mitigate, minimize, and resolve problem areas encountered during implementation of Pub. L. 93-638, including but not limited to:
 - (a) declination of a contract proposal;

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- (b) contractibility issues;
 - (c) pre-award disputes;
 - (d) fraud, waste, or abuse issues;
 - (e) OIG inquiries;
 - (f) tribal requests for retrocession of a program or project, in whole or in part;
 - (g) potential termination of a self-determination construction contract for convenience or cause;
 - (h) reassumption of a self-determination non-construction contract;
 - (i) reassumption of a self-governance construction project;
 - (j) sanctions invoked under OMB Circular A-133, *Single Audit Act*, implementing the Single Audit Act (31 USC 75); and
 - (k) post-award disputes.
- (8) declining a self-determination contract proposal consistent with the timeframes, procedures, and reasons provided in 25 USC 450f(a)(2), Subpart E of 25 CFR 900, and 25 CFR 900.123, as applicable; and
- (9) disclosing matters concerning fraud, waste, or abuse under self-determination contracts and self-governance AFAs to the OIG pursuant to DM Series 11, Part 355.

D. AO. The AO is responsible and accountable for:

- (1) entering into and administering self-determination contracts and self-governance AFAs on behalf of Reclamation;
- (2) ensuring compliance with all applicable laws, regulations, executive orders, policies, and procedures;
- (3) facilitating negotiations with Indian tribes for the award of self-determination contracts or self-governance AFAs and any subsequent amendments;
- (4) appointing in writing an AOTR for each self-determination contract or self-governance AFA and outlining in the appointment the responsibilities and authority limitations in accordance with Paragraphs 4.E. and 6.C. of this D&S;

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- (5) ensuring that post-award monitoring is conducted;
- (6) documenting all decisions and actions in writing and ensuring that transactions are properly documented and maintained in the official self-determination contract or self-governance AFA file;
- (7) issuing correspondence involving business management aspects of the self-determination contract or self-governance AFA;
- (8) exercising authority as otherwise established in law, regulations, and this D&S; and
- (9) resolving post-award disputes under the procedures in Subpart N of 25 CFR 900 or Subpart R of 25 CFR 1000, and all claims under the Contract Disputes Act, as amended (41 USC 601 et seq.).

E. **AOTR.** The AOTR is responsible and accountable for:

- (1) complying with the scope and limitations of his or her designated authority, as outlined in the AO's written appointment;
- (2) conducting post-award monitoring;
- (3) overseeing the technical portions of post-award activities under the self-determination contract or self-governance AFA; and
- (4) keeping the AO informed about any technical issues or concerns that arise during the performance of a self-determination contract or self-governance AFA.

5. **AO Procedures.**

A. **Appointment.** All AOs shall be appointed in writing by the regional directors. Each appointment shall expressly identify the AO's responsibilities. Further, the appointment shall provide any limitations or restrictions on the AO's authority. Those limitations shall include but not be limited to the authority limitations identified in Paragraph 5.C., below. The AO's authority shall remain in effect until terminated in writing, as provided in Paragraph 5.D., below. The AO shall retain the original copy of the appointment in a secure location.

B. **Qualifications.** In appointing an AO, the regional director shall consider the person's experience, training, education, business acumen, and judgment. An AO appointment shall include consideration of:

- (1) knowledge of the Indian Self-Determination Act, the Tribal Self-Governance Act, and their implementing regulations; and applicable OMB Circulars including

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but not limited to OMB Circular A-133, *Single Audit Act* and 2 CFR 225, *Cost Principles for State, Local and Indian Tribal Governments* (OMB Circular A-87);

- (2) knowledge of fundamental principles concerning working with federally recognized tribes in a government-to-government manner;
- (3) experience with awarding and administering actions under Pub. L. 93-638 commensurate with the complexity, type, or dollar amount of the awarded project or program;
- (4) completion of training in Pub. L. 93-638;
- (5) additional training related to contracting policies and procedures;
- (6) education or special training in procurement contracting, financial assistance, law, property management, business administration, accounting, or related fields; and
- (7) other applicable knowledge, skills, and abilities.

C. **Limitations on the AO's Authority.** The AO appointment shall expressly provide any limitations, as applicable, such as:

- (1) funding limitations;
- (2) type of project or program;
- (3) post-award administration only; and
- (4) other restrictions desired by the regional director.

D. **Termination of AO Appointment.** Termination of an AO appointment shall be in writing and signed by the regional director. Termination will be for reasons such as reassignment, termination of employment, or unsatisfactory performance. Documentation of terminations shall be retained by the regional director in a central location.

E. **Documentation.** All Pub. L. 93-638 pre-award and post-award actions shall be documented in writing by the AO for each self-determination contract or self-governance AFA. The purpose of this documentation is to present a reviewable record of significant actions, activities, and decisions. The documentation shall be available for review of the AO's analyses, findings, determinations, and compliance with Pub. L. 93-638. This documentation and all supporting materials shall be retained by the AO in the official award file.

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6. AOTR Procedures.

- A. **Appointment.** AOTRs shall be appointed in writing by the AO. Each appointment shall expressly identify the AOTR's duties and responsibilities. Further, the appointment shall provide any limitations or restrictions on the AOTR's authority. Those limitations shall include but not be limited to the authority limitations identified in Paragraph 6.C., below. The AOTR's authority shall remain in effect until terminated in writing, as provided in Paragraph 6.D., below. The AOTR shall retain the original copy of the appointment in a secure location.
- B. **Qualifications.** All AOTRs shall be currently certified to serve as either a Reclamation Grants Officer's Technical Representative or Contracting Officer's Technical Representative. In appointing the AOTR, the AO shall consider the person's experience, training, and education. An AOTR appointment will include consideration of:
- (1) having a combination of training or experience in administering actions under Pub. L. 93-638; and
 - (2) possessing the knowledge, skills, and abilities necessary to effectively perform the duties of an AOTR, including a complete understanding of the scope and limitations of the AOTR's authority.
- C. **Limitations on the AOTR's Authority.** When performing AOTR duties, the AOTR is not authorized to:
- (1) award, agree to, or execute any contract or AFA, amendment, or notice of intent;
 - (2) suspend work or issue change orders;
 - (3) grant extensions of time;
 - (4) modify the terms and conditions of a contract or AFA;
 - (5) commit the Federal government in any manner;
 - (6) re-delegate duties and responsibilities;
 - (7) make final decisions that are subject to appeal under the disputes clause of the contract or AFA; or
 - (8) exceed any other limitation that has been placed on the AOTR's scope of authority, as provided in the written appointment.

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- D. **Termination of AOTR Appointment.** Termination of an AOTR appointment shall be in writing, signed by the AO. Termination will be for reasons such as reassignment, termination of employment, or unsatisfactory performance. Documentation of terminations shall be retained by the AO in a central location.
7. **Pub. L. 93-638 IC Plan.** NAIAO shall issue a Pub. L. 93-638 IC Plan, normally each fiscal year, which will remain in effect until cancelled or superseded. The IC Plan will establish Reclamation-wide internal control requirements for Pub. L. 93-638 and be structured to accommodate and take into consideration statutory and regulatory deadlines. The Pub. L. 93-638 IC Plan shall address the following elements.
- A. **NAIAO Pre-Award Review and Approval of Individual Actions.** The Pub. L. 93-638 IC Plan shall specify:
- (1) type or types of actions requiring NAIAO pre-award review and approval;
 - (2) funding thresholds, if any, requiring NAIAO pre-award review and approval;
 - (3) minimum documentation required for each NAIAO pre-award review and approval; and
 - (4) other NAIAO pre-award requirements.
- B. **Department's Office of the Solicitor (Solicitor's Office) Pre-Award Review for Legal Sufficiency.** The Pub. L. 93-638 IC Plan will specify:
- (1) type or types of actions requiring Solicitor's Office pre-award review;
 - (2) funding thresholds, if any, requiring Solicitor's Office pre-award review;
 - (3) minimum documentation required for each Solicitor's Office pre-award review; and
 - (4) other Solicitor's Office pre-award requirements.
- C. **NAIAO Review of Regional Implementation of Pub. L. 93-638.** NAIAO shall conduct reviews to assess the strengths and weaknesses of a region's implementation of Pub. L. 93-638.
- (1) **Review Schedule.** NAIAO will review each region generally every 3 years but not less than once during any 5-year period. The Pub. L. 93-638 IC Plan will identify the specific regional reviews that will be performed during the current or forthcoming fiscal year, as applicable. NAIAO and the regions shall coordinate the scheduling of reviews.

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- (2) **Authorities.** When conducting reviews, NAIIO will follow the requirements and guidance issued by the U.S. Government Accountability Office; OMB; the Department's OIG, Office of Policy, Management, and Budget; and Office of Financial Management; and Reclamation's Policy and Administration office.
- (3) **Assessment Approach.** NAIIO's regional reviews will provide an assessment of the region's implementation of Pub. L. 93-638. The review is intended to achieve the objectives of effective and efficient operations, reliable financial reporting, and compliance with applicable laws and regulations. The review will assess, at a minimum, the following interrelated focus areas:
 - (a) organizational alignments and leadership;
 - (b) policies and processes;
 - (c) human capital;
 - (d) knowledge and information management (data and technology that support management decisions and safeguard the integrity of operations and data); and
 - (e) other applicable focus areas.
- (4) **Written Report of Findings and Recommendations.** NAIIO will prepare a written report following the completion of each review. The review report will provide findings and recommendations, along with any required corrective actions to be undertaken by the region, as appropriate. The report will indicate whether the region is required to prepare a corrective action plan under Paragraph 7.C.(5), below. The region will provide a written response to a draft review report provided by NAIIO, before NAIIO prepares a final report.
- (5) **Corrective Action Plan.** The region shall be responsible for preparing a corrective action plan, when required by the NAIIO regional review report, and submitting the plan to NAIIO following the submission of the final review report to the region. The plan will address, at minimum, the region's proposed corrective actions and date(s) for implementing the corrective actions. The plan will be reviewed by NAIIO to ensure that it satisfactorily addresses the findings, recommendations, and required actions identified in the regional review report. The region is responsible for tracking and ensuring compliance with its submitted plan.
- (6) **Overall Less Than Satisfactory Review Rating.** If a region receives an overall less than satisfactory review rating or fails to implement a required corrective

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action plan in accordance with Paragraph 7.C.(5), above, the Director, NAIIO shall inform the Deputy Commissioner – Operations and recommend appropriate corrective measures.

- D. **Additional Internal Control Requirements.** NAIIO will establish additional Reclamation-wide internal control requirements, as needed, in order to be responsive to new or amended statutes, regulations, and policies issued to prevent, waste, fraud, and abuse during implementation of Pub. L. 93-638.

8. Threshold Considerations.

- A. **Eligibility.** Programs and projects that are for the benefit of Indians because of their status as Indians are eligible for inclusion in self-determination contracts with Reclamation. See 25 USC 450f. Self-governance tribes are authorized to negotiate and enter into self-governance AFAs with Reclamation for programs and projects that are otherwise available to Indian tribes or Indians. See 25 USC 458cc(b)(2) and 25 CFR 1000.122. Other programs, services, functions, and activities, or portions thereof that are of special geographic, historical, or cultural significance to the self-governance tribe are eligible for negotiation and inclusion in self-governance AFAs with Reclamation. See 25 USC 458cc(c). The regions shall consult with NAIIO or the Solicitor's Office on issues regarding whether a project or program is eligible under Pub. L. 93-638.
- B. **Declination Under Self-Determination.** The regions shall consult with the Director, NAIIO and the Solicitor's Office prior to declining to enter into a self-determination contract proposal or amendment. Reclamation will follow the procedures in Subpart E of 25 CFR 900 when declining a non-construction contract proposal or amendment. Reclamation will follow the procedures in 25 CFR 900.123 when declining a construction contract proposal or amendment. Reclamation may only decline to enter into a contract proposal or amendment for one of five specific reasons listed in 25 USC 450f(a)(2) and 25 CFR 900.22, and restated below:
- (1) The service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory.
 - (2) Adequate protection of trust resources is not assured.
 - (3) The proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract.
 - (4) The amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under 25 USC 450j-1(a).

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- (5) The program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under 25 USC 450f(a)(1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

C. **Funding.** The amount of funds to be provided to a tribe will depend on whether the project or program is eligible under the Indian Self-Determination Act or Tribal Self-Governance Act.

- (1) For self-determination contracts, the amount of funds provided under the terms of the contract shall not be less than what Reclamation would have otherwise provided for the operation of the program or portions thereof for the period covered by the contract. See 25 USC 450j-1(a)(1).
- (2) For self-governance AFAs entered into for programs under Section 403(b)(2) [see 25 USC 458cc(b)(2) - programs eligible for contracting under the Indian Self-Determination Act], funds are provided in an amount equal to the amount that the tribe is eligible to receive under 25 USC 450j-1. See 25 CFR 1000.137(a).
- (3) For self-governance AFAs entered into for programs under Section 403(c) [see 25 USC 458cc(c) - programs of special geographic, historical, or cultural significance to a participating self-governance tribe; also referred to as nexus programs], funds are provided in amounts equal to the direct costs Reclamation would have incurred were it to operate that program at the level of work mutually agreed to in the AFA and allowable indirect costs. See 25 CFR 1000.137(b).

9. Timeframes Cost Estimating and Negotiation.

A. **Statutory and Regulatory Timeframes for Award.** The regions shall plan negotiations and internal review and approval requirements in a manner that allows for fulfilling the following:

- (1) **Self-Determination Contract – Non-Construction.** Reclamation has 90 days after the receipt of a proposal to review and approve the proposal and award the self-determination contract or decline the proposal in accordance with 25 USC 450f and Subpart E of 25 CFR 900. At any time during the review period Reclamation may approve the proposal and award the requested self-determination contract. 25 CFR 900.16. See 25 CFR 900.15 for the procedures to be followed upon receiving a proposal.
- (2) **Self-Determination Contract – Construction.** The review and negotiation of self-determination construction contract proposals, including timeframes, are specified in 25 CFR 900.122. If Reclamation and the tribe are unable to develop

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a mutually acceptable construction contract proposal, the tribe may submit a final contract proposal, and Reclamation has 30 days to award or decline the contract proposal. See 25 CFR 900.123.

- (3) **Self-Governance AFA.** There are no statutory or regulatory deadlines for completing the negotiation and award of a self-governance AFA. Instead, the timeframe is established by mutual agreement. However, if Reclamation and the tribe fail to reach an agreement by the mutually agreed upon date, the procedures in 25 CFR 1000.179 will be followed for submitting best and final offers and resolving disputes. For purposes of planning the start date of AFA activities, the effective date of the AFA shall not be earlier than 90 days after NAIIO's submission of the AFA to the Congressional committees outlined in 25 CFR 1000.177 and 1000.178.
- (4) **Self-Governance Successor AFA.** The process for negotiating a successor self-governance AFA is contained in 25 CFR 1000.173 to 1000.179. See also 25 CFR 1000.182. The parties to the AFA generally use the terms of the existing AFA to expedite and simplify the exchange of information and the negotiation process. If an AFA expires before the effective date of a successor AFA, Reclamation will follow the procedures in 25 CFR 1000.148.

B. Cost Estimating.⁵

- (1) **General.** Cost estimates prepared by Reclamation for the purpose of negotiating the award or amendment of a Pub. L. 93-638 self-determination contract or self-governance AFA, including successor AFAs, shall be consistent with the requirements of Pub. L. 93-638, its implementing regulations, and this D&S.
- (2) **Cost Estimator's Qualifications.** Reclamation's cost estimator shall have the requisite knowledge, skills, and abilities in planning, design, project management, construction, and cost estimating relative to the project or program.
- (3) **Construction Activities.** Reclamation shall develop cost estimates for self-determination construction contracts in accordance with 25 CFR 900.129(b) and apply similar estimating procedures, as applicable, when negotiating self-governance construction AFAs or successor AFAs.

⁵Reclamation normally will prepare cost estimates for projects in accordance with RM Policy, *Cost Estimating* (FAC P09) and RM D&Ss on cost estimating requirements (FAC 09-01, FAC 09-02, and FAC 09-03), as applicable, and to the extent that those procedures are not in conflict with Pub. L. 93-638, the regulations at 25 CFR 900 and 25 CFR 1000, and this D&S.

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- (4) **Non-Construction Activities.** Cost estimates prepared by Reclamation for the negotiation of non-construction self-determination contracts and non-construction self-governance AFAs will be tailored to meet the specific needs and requirements of the project or program.
- (5) **Documentation.** Reclamation's cost estimates will be current, signed, and dated by the cost estimator. The AO will retain a copy of the cost estimate in the official award file.

C. **Negotiation and Arriving at a Fair and Reasonable Funding Amount.** All negotiations with tribes leading up to the award or amendment of a Pub. L. 93-638 self-determination contract or self-governance AFA shall be tailored to the needs of the Indian tribe and the activities to be performed by Reclamation, as agreed upon by the parties. Prior to initiating negotiations with a tribe, Reclamation will provide its cost estimate to the tribe and make appropriate revisions based on concerns raised or information provided by the tribe during the negotiation.

- (1) **Negotiation Team.** Reclamation shall use a negotiation team composed of individuals possessing the appropriate set of knowledge, skills, and abilities necessary to successfully complete the negotiation, including negotiations regarding cost estimates. The negotiation shall include discussions with the tribe about any funds that will be retained by Reclamation to perform project oversight, monitoring, or inherently Federal functions.
- (2) **Negotiation Objective.** The objective of the negotiation is to arrive at a funding amount that is fair under current local market conditions and reasonable to both Reclamation and the tribe. The agreed upon funding amount does not necessarily have to be in strict conformance with either party's cost estimate nor does agreement have to be reached on every element of cost, but only on the overall fair and reasonable funding amount of each phase of work included in the self-determination contract, self-governance AFA, or amendment thereto.
- (3) **Determination and Documentation of a Fair and Reasonable Funding Amount.** Prior to the execution of a self-determination contract, self-governance AFA, or amendment, the funding amount shall be determined by the AO to be fair and reasonable in accordance with the Pub. L. 93-638 statutory and regulatory framework, including applicable OMB Circulars. This determination shall be documented in writing and retained by the AO in the official award file.

10. Award Process.

A. Pre-Award.

- (1) **Single Audit.** The AO is responsible for reviewing a tribe's current single audit to ensure that the proposed Pub. L. 93-638 action includes measures for

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mitigating significant deficiencies, material weaknesses, or disallowed costs presented within the single audit that are applicable to Reclamation's programs or may have an impact on performance under the proposed self-determination contract or self-governance AFA.

- (2) **Review of Financial, Procurement, and Property Management Standards and Systems.** The AO shall ensure that the tribe's initial self-determination contract proposal contains the statement under 25 CFR 900.8(g)(8) that the Indian tribe will meet the minimum procurement, property, and financial management standards and systems set forth in Subpart F of 25 CFR 900. Pursuant to 25 CFR 900.40, the AO shall review and evaluate the tribe's management standards upon submission of the tribe's initial contract proposal. The tribe's management systems are evaluated by an independent auditor through the annual single agency audit report that is required under Pub. L. 93-638 and OMB Circular A-133, *Single Audit Act*. Reclamation's review of a tribe's management standards shall be subject to negotiations with the tribe. Reclamation employees selected by the AO to perform such reviews shall possess an appropriate working knowledge of the theories, principles, practices, and terminology involving the subject matter for the type of management standards to be reviewed.
- (3) **Solicitor's Office Review for Legal Sufficiency.** Proposed self-determination contracts, self-governance AFAs, and amendments thereto shall be reviewed for legal sufficiency by the Solicitor's Office in accordance with the requirements specified in Reclamation's Pub. L. 93-638 IC Plan, which will be issued by NIAIO under Paragraph 7.B. of this D&S.
- (4) **NIAIO Pre-Award Approval of Individual Action.** Proposed self-determination contracts, self-governance AFAs, and amendments thereto shall be submitted for review and approval by NIAIO in accordance with the requirements specified in Reclamation's Pub. L. 93-638 IC Plan, which will be issued by NIAIO under Paragraph 7.A. of this D&S. The AO's authority, ultimate accountability, and responsibility are not affected by the NIAIO's review and approval of individual actions.

B. Award of the Contract or AFA.

- (1) **Award – Self-Determination Contract.**
 - (a) **Structure.** Each new self-determination contract shall be executed on either Reclamation Form 7-2279 (Assistance Agreement) or SF-26 (Contract Award), clearly reference the legal authority for the project or program, and cite the Indian Self-Determination Act as the contracting authority. The award shall include:
 - (i) a detailed scope of work;

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- (ii) a fair and reasonable funding amount;
- (iii) period of performance;
- (iv) applicable terms and conditions, consistent with the stated requirements of 25 USC 450 et seq. and 25 CFR 900; and
- (v) signatures of both parties, with Reclamation's AO signing after obtaining the authorized signature of the tribe.

(b) **Provisions, Terms, and Conditions.**

- (i) **Non-Construction.** Each self-determination non-construction contract shall contain the mandatory provisions, terms, and conditions contained in the model contract codified at 25 USC 450*l*. Additional provisions, terms, and conditions negotiated with the tribe shall be carefully reviewed by the AO to ensure that they are not in conflict with the language prescribed in 25 USC 450*l*.
 - (ii) **Construction.** Each self-determination construction contract shall contain the provisions, terms, and conditions outlined in Pub. L. 93-638 and Subpart J of 25 CFR 900, as appropriate to the phase(s) of construction activities included under the self-determination construction contract.
 - (iii) **Contract Term.** The term of a self-determination contract shall not exceed 3 years, unless Reclamation and the tribe agree that a longer term would be advisable. The AO shall document in writing the reasons for entering into a contract with a term exceeding 3 years. The AO will annually review each contract with a term longer than 1 year and document that:
 - (aa) the contract terms, conditions, and scope of work are still appropriate and valid;
 - (bb) the contract remains consistent with Pub. L. 93-638 and 25 CFR 900; and
 - (cc) the contract funding amount remains fair and reasonable to the parties.
- (2) **Award – Self-Governance AFA - Structure.** Each self-governance AFA shall be executed using a format negotiated between the tribe and Reclamation and agreed to as mutually acceptable to the parties. The AFA shall include:

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- (a) a scope of work;
 - (b) amount of funding for AFA activities;
 - (c) period of performance;
 - (d) applicable terms and conditions, consistent with the requirements of 25 USC 458aa to 458hh and 25 CFR 1000; and
 - (e) signatures of both parties, with Reclamation's AO signing after obtaining the authorized signature of the tribe.
- (3) **Award – Self-Governance Successor AFA - Structure.** Each self-governance successor AFA shall be executed using a format negotiated between the tribe and Reclamation and agreed to as mutually acceptable to the parties. The successor AFA is generally structured to include the terms of the existing AFA, subject to any authorized changes or additions as agreed upon between the AO and the tribe. The successor AFA shall include the information required in Paragraph 10.B.(2), above.
- (4) **Federal Assistance Award Data System (FAADS) Report.** All self-determination contract and self-governance AFA actions that create a financial obligation shall be recorded in FAADS or other systems sanctioned by OMB. Unless automatically generated and transmitted through an existing database, the completed FAADS report shall be transmitted within 5 days from the date the award action is executed by the AO.

11. Post-Award Monitoring and Administration.

- A. **Post-Award Monitoring.** Post-award monitoring is required for all Pub. L. 93-638 projects. The AO and AOTR will collaborate in the development of the post-award monitoring strategy. The post-award monitoring strategy must be consistent with the requirements and limitations specified in Pub. L. 93-638 and its implementing regulations, or as negotiated into a contract or AFA. The following minimum monitoring requirements shall apply to each self-determination contract or self-governance AFA:
- (1) **Site Visits.** Site visits shall be conducted by the AOTR in the manner and frequency prescribed in the contract or AFA.
 - (2) **Deliverables.** The AOTR and AO shall ensure that all required deliverables, including financial and progress reports, are received in accordance with the timeframes specified in the contract or AFA. Deliverables shall be reviewed to

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ensure compliance with the requirements specified in the contract or AFA, including comparing reported progress against the contract or AFA scope of work, terms and conditions, and expenditures.

- (3) **Notice.** The AO shall provide written notification to the tribe regarding overdue or incomplete financial reports, progress reports, and other deliverables, as required by the awarded contract or AFA.
- (4) **Records Retention.** The AO shall retain financial, progress, and site visit reports as part of the official contract or AFA file.

B. Role of Reclamation During Construction Performance.

- (1) **Self-Determination Construction Contract.** When an Indian tribe has contracted to perform construction management services or design and construction activities, Reclamation shall follow the procedures and timeframes in 25 CFR 900.131.
- (2) **Self-Governance Construction AFA.** Reclamation's role during the performance of a self-governance construction AFA shall be in accordance with Subpart J of 25 CFR 1000.

C. **Payments.** Payments shall be processed promptly in accordance with Pub. L. 93-638, its implementing regulations, and the terms and conditions of the self-determination contract or self-governance AFA. The AOTR will review all payment requests and provide recommendations to the AO. The AO shall approve each payment request, as appropriate, and follow the payment protocol established by Reclamation's paying office.

D. Amendments.

- (1) **General.** All amendments to an existing self-determination contract or self-governance AFA that provide additional work and funds shall be completed in accordance with the planning procedures in Paragraphs 9.B. and C. and the pre-award procedures in Paragraph 10.A. of this D&S.
- (2) **Structure.** Each self-determination contract or self-governance AFA amendment that provides additional work and funds shall be structured in accordance with Paragraphs 10.B.(1)(a) or 10.B.(2)(a) of this D&S, as applicable.
- (3) **Amendment Forms.** Each amendment to a self-determination contract shall be executed on either Reclamation Form 7-2279 (Modification of Assistance Agreement) or SF-30 (Amendment of Solicitation / Modification Contract). Each amendment to a self-governance AFA or successor AFA shall be executed using a format negotiated between the tribe and Reclamation as mutually acceptable to

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the parties. Signatures of both parties must be contained on the amendment document, with Reclamation's AO signing after obtaining the authorized signature of the tribe. Amendments to extend the period of performance under the contract or AFA shall be executed bilaterally (by both parties) prior to the original completion date specified under the self-determination contract, self-governance AFA, or successor AFA.

- (4) **FAADS.** All amendments shall be recorded in FAADS within 5 business days in accordance with Paragraph 10.B.(4) of this D&S.

E. Funding Amendments.

- (1) **General.** All funding amendments, as defined in Paragraph 3.H. shall be documented in accordance with Paragraph 9.C.(3) of this D&S.
- (2) **Amendment Forms.** Each funding amendment shall be executed on the forms described in Paragraph 11.D.(3), above.⁶
- (3) **FAADS.** All funding amendments shall be recorded in FAADS within 5 business days in accordance with Paragraph 10.B.(4) of this D&S.

12. Close Out.

- A. **Close Out Timeframe.** All self-determination contracts and self-governance AFAs shall be closed out within 120 days after the last remaining close out prerequisite has been completed. The close out prerequisites are as follows:

- (1) physical completion of the project;
- (2) expiration of the contract or AFA;
- (3) receipt of all deliverables required under the contract or AFA;
- (4) resolution of all single audit findings and questioned costs related to Reclamation's project or program, pursuant to the OMB Circular A-133, *Single Audit Act*;
- (5) disposition of all property in accordance with the terms and conditions of the contract or AFA;

⁶Note that pre-award review and approval by the Solicitor's Office and NAIAO are not required for funding amendments.

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- (6) resolution of all post-award disputes under Subpart N of 25 CFR 900 or Subpart R of 25 CFR 1000, as applicable, and all claims under the Contract Disputes Act (41 USC 601, as amended); and
 - (7) completion of all required payments, including the final payment.
- B. Close Out Amendment.** The AO shall execute a self-determination contract or self-governance AFA close out amendment, signed by both parties, to officially close out the self-determination contract or self-governance AFA.
- C. Retention of Records.** All self-determination contract and self-governance AFA official files, including supporting documents, must be retained by Reclamation in accordance with applicable record retention requirements.

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