



Council of the Cherokee Nation

Cherokee Nation Tribal
Council
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Legislation Details (With Text)

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Sponsors: David Walkingstick
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6/28/2018	1	RULES COMMITTEE	Approved and Forwarded to Council	Fail
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AN ACT AMENDING CNCA TITLE 40, "CHEROKEE NATION EMPLOYMENT RIGHTS ACT" BE IT ENACTED BY THE CHEROKEE NATION:

Section 1. Title and Codification

This act shall be known as an Act Amending the Cherokee Nation Employee Rights Act as codified in Title 40 of the Cherokee Nation Code Annotated amending §§1041, 1011, 1051, 1061; adding §§1033, 1034, 1035; and striking §§1071 and 1083.

Section 2. Purpose

The purpose of this amendment is to provide a legal framework to allow Indian owned businesses to obtain developmental assistance from larger mentors, and form joint ventures with those mentors to pursue TERO certified contracts. This act also amends the sections in Title 40 that pertain to administrative appeals. The Administrative Appeals Board was abolished when Chapter 10 of Title 51 C.N.C.A. was repealed and replaced by the Employee Access to Justice Act of 2017, L.A. 30-17.

Section 3. Legislative History

L.A. 01-14
Title 40 C.N.C.A.
L.A. 05-16
L.A. 17-16

Section 4. Definitions

For purposes of this Title:

Title 40, §1004 shall be amended as follows:

§1004. Definitions

A. **"Administration"** shall mean the Executive Branch of Cherokee Nation as provided in the Cherokee Nation Constitution.

B. **"Cherokee Nation Indian Country"** shall mean the territorial boundaries of the Cherokee Nation as defined within the Cherokee Nation 1999 Constitution, Article II.

C. **"Cherokee Nation Government"** shall mean the officials and employees of the Cherokee Nation and its programs or commissions wherever located. **"Cherokee Nation"** shall mean the government of Cherokee citizens, authorized by the Act of Union of 1839.

D. **"Contractor"** shall mean any person, company or other entity engaged in work with Cherokee Nation, its entities or wholly-owned corporations. The term **"contractor"** includes Cherokee Nation, its entities and wholly-owned corporations, and includes contractors and subcontractors thereof. This term shall not include federal, state, or county government agencies to the extent prohibited by federal or state law.

E. **"Core crew"** shall mean an owner of the firm, or an employee of a company who is in a supervisory or other key position such that the employer would face serious financial damage or loss if that position were filled by a person who had not previously worked for the employer, contractor or subcontractor.

F. **"Council"** shall mean the Tribal Council of Cherokee Nation as established pursuant to the Cherokee Nation Constitution.

G. **"Debarment list"** shall be a list of contractors which have previously provided poor performance or engaged in behavior in non-compliance with contract provisions, rules, regulations, or laws.

H. **"EEOC"** shall mean the Equal Employment Opportunity Commission of the United States.

I. **"Emergency"** means any condition that places an extreme physical or emotional condition or financial burden on a Cherokee citizen. (After all reasonable efforts have been made to contact a TERO vendor.)

J. **"Employer"** shall mean (i) Cherokee Nation, its entities and wholly-owned corporations, (ii) any person, company, contractor, subcontractor or other entity or engaged in work on a Project with Cherokee Nation, its entities or wholly-owned corporations or (iii) any person or entity employing two or more persons located within Cherokee Nation Indian Country that has applied for or received certification with the TERO Office. The term "Employer" shall not include companies that are engaged in government contracting or other activities where the application of this law may violate applicable federal or state laws.

K. An employer is **"engaged in work"** if, during any portion of a business enterprise or specific project, contract or subcontract, the employer performs work under contract with Cherokee Nation, its entities and wholly-owned corporations and/or the work is performed in Cherokee Nation Indian Country.

L. Reserved for future use.

M. **"Indian"** shall mean a person who is a member of a federally-recognized Indian tribe

N. **"Indian organization"** shall mean the governing body of any Indian tribe or entity established or recognized by such governing body in accordance with the Indian Financing Act of 1974 (88 Stat. 77, 25 U.S.C. § 1451).

O. **"Indian-owned economic enterprise"** shall mean any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, provided that such Indian ownership shall constitute not less than fifty-one percent (51%) of the enterprise, and the ownership shall encompass active operation and control of the enterprise. No Business that is more than 49 percent (49%) owned by a trust shall be included.

P. **"Indian tribe"** means an Indian tribe, pueblo, band, nation, or other organized group or community, including any Alaska Native Village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims

Settlement Act (85 Stat. 688, 43 U.S.C. § 1601), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Q. "Joint venture" means a business agreement in which the parties agree to develop, for a finite time, a new entity that is mutually beneficial to both businesses, to bid on contract opportunities.

QR. "Locally-owned" means a business that has its headquarters and majority of its employees residing within the jurisdictional boundaries of Cherokee Nation, as described in Article II of the Cherokee Constitution, or counties contiguous to those boundaries.

RS. An employer is "Located within Cherokee Nation Indian Country" if, during and in connection with any portion of a business enterprise or specific project, contract or subcontract, the employer maintains a temporary or permanent office or facility in or performs work in Cherokee Nation Indian Country.

ST. "Major Cherokee employer" shall mean an Indian-owned business that employs at least fifty (50) Cherokee citizens as either part of the core crew or project crew, or has at least seventy-five percent (75%) of its workforce comprised of Cherokee citizens as certified by the TERO. A business may be certified as Indian-owned, major Cherokee employer, or both.

TU. "Mentor" shall mean a business that has the ability to assist and commits to assisting a protege https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=15-USC-309012676-747582737&term_occur=13&term_src=title:15:chapter:14A:section:657r to compete for Cherokee Nation contracts and subcontracts.

UV. "Mentor-Protégé contract" shall mean a contract that pairs a mentor with a protege for the purpose of assisting the protege to compete for Cherokee Nation contracts and subcontracts.

TW. "Nation" shall mean Cherokee Nation.

UX. "OFCCP" shall mean the Office of Federal Contract Compliance Programs of the United States.

VY. "One-stop business center" means a centralized location where Cherokee- owned businesses can obtain information regarding procurements, training, and financing.

YZ. "Protégé" shall mean an Indian-owned economic enterprise that is eligible to enter into Cherokee Nation contracts and subcontracts.

WAA. "Secretary" shall mean the United States Secretary of the Interior or his or her duly authorized representatives.

XBB. "Tribal citizen" or "citizen" shall mean any person who is a duly enrolled member of Cherokee Nation.

YCC. "TERO" shall mean the Tribal Employment Rights Office.

ZDD. "TERO staff" shall mean employees assigned to the TERO by the Executive Branch of Cherokee Nation.

AAEE. "Project" shall mean any construction, alteration, or repair of buildings or structures performed for Cherokee Nation or its entities.

Section 5.

Title 40, §1011 shall be amended as follows:

18. To participate and cooperate in appeal court hearings in accordance with this chapter;

Title 40, §1011 shall be added as follows:

22. To engage in the process of certifying mentor protégé contracts and to determine whether they may be given Indian preference.

Title 40, §1033 shall be added as follows:

§ 1033. Mentor-Protégé generally

Mentor/protégé agreements are designed to encourage approved mentors to provide various forms of business development assistance to protégé businesses. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; sub contracts
<https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=3e1275e6fc3818559e5d445a696109ce&term_occur=1&term_src=Title:13:Chapter:I:Part:124:Subpart:A:Subgrp:292:124.520> (either from the mentor to the protégé or from the protégé to the mentor); trade education; and/or assistance in performing contracts through joint venture arrangements. Mentors are encouraged to provide assistance relating to the performance of non-Cherokee Nation contracts so that protégé firms may more fully develop their capabilities. The purpose of the mentor/protégé relationship is to enhance the capabilities of the protégé, assist the protégé with meeting the goals established in its approved business plan, and to improve its ability to successfully compete for contracts.

Title 40, §1034 shall be added as follows:

§1034. Mentor-Protégé requirements

1. In order <https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=d254fd6f55dec6a6ba3d0fb8c22b9aa4&term_occur=1&term_src=Title:
 - a. Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement; and
 - b. Does not appear on the list of debarred contractors; and
 - c. Can impart value to a protégé business due to lessons learned and practical experience gained or through its knowledge of general business operations and government contracting.
2. In order <https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=d254fd6f55dec6a6ba3d0fb8c22b9aa4&term_occur=3&term_src=Title:
3. A protégé and mentor may joint venture as an Indian-owned economic enterprise for any contract, provided the protégé qualifies as Indian-owned economic enterprise for the procurement and that the joint venture can successfully demonstrate the following:
 - a. That the mentor is to provide limited backup to such as bonding, specialized expertise in specific area of business, or capitol; and
 - b. That the mentor will increase the area of expertise and value of the protégé
4. TERO must approve the mentor-protégé agreement before the two businesses may submit an offer as a joint venture on a particular contract <https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=28ecffbfcc51433405558dc74cf1be8f&term_occur=7&term_src=Title:
5. The Indian-owned economic enterprise must perform at least 40% of the work performed by the joint venture. Such work must be more than administrative or ministerial, so that the protégé member can gain substantive experience.
6. Salary scales are subject to review by TERO to ensure the relative salaries being paid to the mentor and protégé owners are consistent with the skills of the parties and are not being used to circumvent the requirements of this Code.
7. The protégé owner shall submit performance of work reports to TERO annually and at the completion of any contract and must describe how the protégé is meeting or has met the performance by the joint venture.

Title 40 §1035 shall be added as follows:

§1035. Mentor-Protégé Agreement

1. The mentor-protégé agreement must take the form of a joint venture agreement in writing and include provisions that meet the following criteria:

- a. Purpose. Set forth the purpose of the joint venture.
 - b. Managing venture/Project Manager. Designate the Indian-owned economic enterprise as the managing venture; and an employee of the managing venture as the project manager. If the individual identified as the project manager is not an employee of the venture, there must be a signed letter of intent that the individual commits to being employed by the managing venture. The project manager cannot be employed by the mentor and become an employee of the managing venture for purposes of performance under the joint venture.
 - c. Ownership. State that the joint venture is a separate legal entity and it is at least 51% owned by the managing venture.
 - d. Profits. Distribute profits from the joint venture commensurate with the ownership interests in the joint venture. Any provision that gives a mentor owner a greater share of the profits, such as but not limited to management fees, equipment rental fees or bonuses will result in decertification.
 - e. Bank Account. Provide for a special bank account in the name of the joint venture. The account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments to the joint venture for performance on a set-aside contract will be deposited in the special bank account; all expenses incurred under the contract will be paid from the account.
 - f. Equipment, Facilities, and Other Resources. Itemize all major equipment, facilities, and other resources to be furnished by each venturer, along with a detailed schedule of the cost or value of such items. If a contract is indefinite in nature, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is available.
 - g. Parties' Responsibilities. Specify the responsibilities of the venturers with regard to contract negotiation, source of labor, and contract performance, including ways that the parties will ensure that the joint venture will meet the performance of work requirements.
 - h. Guaranteed Performance. Obligate all parties to the joint venture to ensure complete performance despite the withdrawal of any venturer.
 - i. Records. State that accounting and other administrative records of the joint venture must be kept in the office of the Indian-owned managing venturer, unless TERO gives permission to keep them elsewhere. Additionally, the joint venture's final original records must be retained by the Indian-owned managing venturer upon completion of the contract. Business records may be kept in a cloud-based records system provided that documents be available in real-time to both parties.
 - j. Statements. Provide that quarterly financial statements showing cumulative contract receipts and expenditures must be submitted to TERO not later than 45 days after each operating quarter of the joint venture. The agreement must also state that the parties will submit a project-end profit-and-loss statement, including a statement of final profit distribution, to TERO no later than 90 days after completion of the contract.
2. TERO must approve all changes and amendments to a mentor-protégé agreement in advance, and any changes made to the agreement must be provided in writing. If the parties to the mentor-protégé relationship change the mentor-protégé agreement without prior approval by TERO, TERO shall terminate the mentor-protégé relationship and may also propose debarment of one or both businesses.
 3. A joint venture between two or more businesses that each qualify as an Indian-owned economic enterprise separately do not require any specific contract provisions.

Title 40, §1051 shall be amended as follows:

If any employer or person feels aggrieved by a decision made by the TERO they may appeal that decision to the Administrative Appeals Board Cherokee Nation District Court. The Administrative Appeals Board Cherokee Nation District Court shall hold a hearing in accordance with this act and will either confirm or deny the TERO decision the procedures in

51 C.N.C.A §1001.

1. Hearings shall be governed by the following rules and procedure:

a. All parties may present testimony of witnesses and other evidence and may be represented by counsel at their expense;

b. The Board may have the advice and assistance at the hearing of counsel provided by the Nation;

c. The Chairman of the Board or the Vice-Chairman shall preside and the Board shall proceed to ascertain the facts in a reasonable and orderly fashion;

d. The hearing may be adjourned, postponed and continued at the discretion of the Board.

2. At the final close of the hearings, the Board may take immediate action or take the matter under advisement.

3. The Board shall notify all parties forty-five (45) days after the last hearing of its decision in the matter.

4. The Board shall conclude this process within ninety (90) days of the request for a hearing.

Notice of hearings

A. The Administrative Appeals Board, as established pursuant to 51 CNCA § 1001 et seq. shall have the power and duty to hear employer appeals of TERO decisions denying certification of the employer as an Indian-owned economic enterprise. The Administrative Appeals Board shall have the power to either affirm or reverse the TERO certification decision, but will not have the power to award any other form of remedy in the cases brought under this title.

B. The Administrative Appeals Board shall have the power to create rules as may be necessary to perform the duties and functions delegated to the Administrative Appeals Board herein.

1.. If a hearing is requested by the Board, an individual, an employer, or union pursuant to this section, a written notice of the hearing shall be given to all concerned parties stating the nature of the hearing and the evidence to be presented.

2. The notice shall advise such parties of their right to be present at the hearing, to present testimony of witnesses and other evidence and to be represented by counsel at their own expense.

Title 40, §1061 shall be amended as follows (title of section only):

§1061. Penalties for violations of Title and rules, regulations or orders of the TERO or Administrative Appeals Board

Title 40, §1071 shall be stricken in its entirety:

§1071. Appeals from decisions of Committee

A. Any party to a hearing shall have the right to appeal any decision of the Board to the District Courts of Cherokee Nation.

B. Standard of review. The District Court shall review decisions of the Administrative Appeals Board without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the Administrative Appeals Board, not shown in the record, testimony thereon may be taken by the District Court. The District Court, upon request, shall hear oral arguments and receive written briefs.

C. Appeals of the decision of the District Court may be taken in the Supreme Court under the rules and procedures

~~governing civil appeals before that Court.~~

Title 40, §1083 shall be stricken in its entirety:

~~§ 1083. Employee Appeals Board-Change of name~~

~~The Employee Appeals Board, as established pursuant to 51 CNCA § 1001 et seq., shall hereinafter be known as the "Administrative Appeals Board".~~

Section 6. Provisions as cumulative

The provisions of this act shall be cumulative to existing law.

Section 7. Severability

The provisions of this act are severable and if any part of provision hereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

Section 8. Effective Date

The provisions of this act shall become effective thirty (30) days from and after the date of its passage and approval.

Section 9. Self-Help Contributions

To the extent that this Act involves programs or services to citizens of the Nation or others, self-help contributions shall be required, unless specifically prohibited by the funding agency, or a waiver is granted due to physical or mental incapacity of the participant to contribute.