

Current draft 11-30-21
SHOALWATER BAY INDIAN TRIBE

TRIBAL EMPLOYMENT RIGHTS ORDINANCE (TERO)

CODE OF LAWS TITLE ____

Article I – Declaration of Policy

1.1 Authority. Pursuant to the authority vested in the Shoalwater Bay Indian Tribe by its Constitution, particularly Article VI Sections 1(a), (e), (t), (w), and (x) thereof, and its inherent authority to provide for the health, safety, morals, and welfare of the Tribe, the Tribal Council of the Shoalwater Bay Indian Tribe hereby enacts this ordinance in order to regulate the hiring preferences of Tribal members and Indian workers within the jurisdiction of the Tribe, and to re-establish a Tribal Employment Rights Office.

1.2 Policy Considerations. As a guide to the interpretation and application of this Ordinance, the public policy of the Tribe is as follows:

- (a) Land, water, and minerals, private sector jobs, contracts, and subcontracts on or near the Shoalwater Bay Reservation are an important resource for Indian people. Indians must use their rights to obtain their rightful share of such opportunities as they become available.
- (b) Indians have unique and special employment, contract, and subcontract rights, and the Tribe has the inherent sovereign power to pass laws to implement and enforce those special rights on behalf of Indians. Indians are also entitled to the protection of the laws that the federal government has adopted to combat employment discrimination. Tribal governments can and should play a role in the implementation of such laws, which include:
 - (1) Title 42 U.S. Code Section 2000e–2 (1) Unlawful employment practices, which makes Indian and Tribal member preference in employment possible
 - (2) Executive Order 11246, enforced by the Office of Federal Contract Compliance Programs and exempting from the general requirements contractors extending preference in employment for Indians living on or near an Indian Reservation, and which further prohibits discrimination among Indians as a group on the basis of religion, sex, or Tribal affiliation. Executive Order 11246 applies only to employers working under federal contracts.
 - (3) The Indian Self-Determination and Education Assistance Act, Section 7(b) of Public Law 93-638;(codified as Title 25 US Code, Section 5307 Wage/Labor Standards) and Title 41 Code of Federal Regulations, Section 60-1.5(a)(7) which provides for Indian preference in employment, training, and contracting or subcontracting on all contracts negotiated on behalf of an Indian tribe.

- (4) The Indian Civil Rights Act of 1968, which prohibits Indian Tribal governments from enacting or enforcing laws that violate certain individual rights similar to those individual rights guaranteed under the Bill of Rights of the United States Constitution.
- (c) The Tribe believes it is important to support and respect the aforementioned laws and powers to:
 - (1) Increase employment of Indian workers and growth of Indian businesses to help eradicate discrimination against Indians;
 - (2) Ensure compliance with this Title that is intended to give preference in employment, contracting and subcontracting, and training to Indians;
 - (3) Maximize utilization of Indian workers in all employment opportunities on Shoalwater Bay Tribal lands and waters;
 - (4) Ensure that the Indians seeking employment on Shoalwater Bay lands and waters are trained and equipped to enter the workforce and maintain employment of their choosing;
 - (5) Ensure due process for all individuals affected by the application of this Title's requirements; and
 - (6) Provide clarity to Indian workers, covered employers, and contractors regarding TERO requirements and greater efficiency in the TERO process

Article II – General Provisions

2.1 Short Title. The ordinance codified in this Title shall be referred to as the “Shoalwater Bay Tribal Employment Rights Ordinance” or “Shoalwater Bay TERO”.

2.2 Scope. This Title applies to all covered employers and contractors subject to the Shoalwater Bay Indian Tribe's jurisdiction. This Title also applies to all projects on or off the Shoalwater Bay Reservation involving Tribal funds and initiated or taken over by the Tribe or a Tribal entity.

2.3 Definitions. The following definitions apply to this Title:

- (a) “Contractor” means either a covered employer that is a utility company performing work within Shoalwater Bay Tribal lands, or a covered employer who undertakes a contract or subcontract with the Tribe or a Tribal entity for supplies, services, labor, or materials where:
 - (1) The total contract amount exceeds:
 - (A) Fifty thousand dollars (\$50,000) in the case of a construction contract, or
 - (B) Twenty thousand dollars (\$20,000) in the case of a non-construction contract; and
 - (2) Either of the following conditions are satisfied:
 - (A) The majority of the work under the contract or subcontract will occur on Shoalwater Bay Tribal fee or trust lands, or
 - (B) The work utilizes Tribal funds.
- (b) “Council” or “Tribal Council” means the Shoalwater Bay Indian Tribal Council.

- (c) “Covered employer” means:
- (1) The Shoalwater Bay Indian Tribe and Tribal entities, including but not limited to tribal government and tribally chartered entities for any project utilizing Tribal funds, regardless of whether the employment or contract activity is on Shoalwater Bay Tribal lands;
 - (2) Any person, partnership, corporation, joint venture, government or governmental entity, or other entity that utilizes Tribal funds for a project, or that voluntarily submits to Tribal jurisdiction under this Title;
 - (3) The Washington State Department of Transportation for projects within Shoalwater Bay Tribal ancestral territory, pursuant to any negotiated agreement between the Tribe and WSDOT; and
 - (4) Any person, partnership, corporation, joint venture, utility, government or governmental entity, or other entity that is located or engaged in commerce within the Reservation and that employs two (2) or more employees.
 - (5) Any federal contractor who, pursuant to Office of Federal Contract Compliance Program regulation 41 C.F.R. § 60-1.5(7), voluntarily submits to Tribal jurisdiction for projects on or near the reservation.
- (d) “Days” means regular business days – Monday through Friday – not including Tribally recognized holidays.
- (e) “Employee” means a person working for remuneration on Shoalwater Bay Tribal lands in the service of another, including, but not limited to, independent contractors and regular and temporary employees.
- (f) “Indian” means a person enrolled in a federally recognized Indian tribe. For TERO purposes, the Tribe also seeks to support the employment rights of Alaska Natives, Native Hawaiians, and members of non-federally recognized tribes as well.
- (g) “Indian firm” means an entity that has been certified as an Indian firm by the SBERC.
- (h) “Indian preference plan” means a negotiated agreement between the SBERC and a covered employer detailing Indian preference goals and incorporated into the TERO permit.
- (i) “Key employee” means an employee of a covered employer in a managerial or project supervisory position, or who performs an essential job function as identified on a case-by-case basis by SBERC and prior to issuing a TERO permit.
- (j) “Reservation” or “Shoalwater Bay Reservation” means all lands and waters within the exterior boundaries of the Shoalwater Bay Reservation.
- (k) “TERO” means this Tribal Employment Rights Ordinance.
- (l) “Commissioner” means the Commissioner of the Shoalwater Bay Employment Rights Commission.
- (m) “TERO permit” means a permit issued to and signed by a covered employer after negotiation with the SBERC of an acceptable Indian preference plan.
- (n) “Tribal Court” means the Shoalwater Bay Tribal Court.
- (o) “Tribal entity” means the Tribe and any agency, entity, subdivision, instrumentality, or nonprofit or for-profit corporation that acts at the direction of the Council.

- (p) “Tribal funds” means funds of the Shoalwater Bay Indian Tribe or a Tribal entity and includes grant funds received by the Tribe or a Tribal entity.
- (q) “Tribal household” means a family with at least one (1) enrolled Tribal member within the household.
- (r) “Tribal member” means a duly enrolled member of the Shoalwater Bay Indian Tribe listed on the Shoalwater Bay Tribal membership roll.
- (s) “Tribe” means the Shoalwater Bay Indian Tribe acting at the direction of Council.
- (t) “Trust lands” means all land the fee title which is held by the United States of America in trust for the benefit of the Tribe or a Tribal member.
- (u) “SBERC” means the Shoalwater Bay Employment Rights Commission as established by this Title.
- (v) “Shoalwater Bay Tribal lands” means all lands within the Reservation, trust lands, and lands owned by the Tribe or a Tribal entity.

Article III – Tribal Employment Rights Office

3.1 Re-Establishment and Organization of an Employment Rights Commission. The Tribal Council hereby re-establishes a Shoalwater Bay Employment Rights Commission (SBERC), as originally created by Resolutions 06-04-04-28 and 06-30-04-31, to enforce Shoalwater Bay Tribal and Indian preference with all enterprises, businesses, and projects operated or undertaken on Shoalwater Bay Tribal lands. SBERC shall consist of a Commissioner and such other officers as may be determined by the Tribal Council. The Tribal Council is vested with full supervisory authority over SBERC.

3.2 Duties. SBERC shall oversee implementation and enforcement of this Title and the day-to-day operations of this TERO program. SBERC will be overseen by a Commissioner, with such other officers as may be necessary to carry out the purpose of this TERO. Individual SBERC officers shall have the following duties:

- (a) Identify skills training opportunities for Tribal members;
- (b) Maintain a list of certified Indian firms;
- (c) Assist covered employers in hiring qualified Shoalwater Bay Tribal members and Indians;
- (d) Manage a Tribal skills bank of Indians seeking employment, which includes a preliminary screening of contact information and employment history;
- (e) Provide monthly reports to the Council outlining the number of projects, number of Shoalwater Bay and Indian employees, number of non-Indian employees, and other information required by the Council; and
- (f) Provide the Shoalwater Bay Tribal Treasurer with monthly accountings of all TERO permits then in effect.

3.3 Powers and Authorities of the Commissioner. The Commissioner shall have the following powers and authorities:

- (a) Hire SBERC officers and staff;

- (b) Develop a budget and expend funds in accordance with a Council-approved budget;
- (c) Issue guidelines and develop forms;
- (d) Conduct audits, investigations, and inspections upon its own initiative or allegation;
- (e) Issue notice of noncompliance, warnings, and citations;
- (f) Petition the Tribal Court for such orders as are necessary and appropriate to enforce decisions and sanctions imposed under this Title;
- (g) Subpoena documents and witnesses;
- (h) Require covered employers to submit reports, including labor force and payroll reports;
- (i) Issue orders;
- (j) Impose fines;
- (k) Suspend or terminate a covered employer's operation;
- (l) Certify eligible Indians and Indian firms;
- (m) Revoke Indian firm certifications and permits;
- (n) Monitor employers for compliance;
- (o) Restrict or prevent hiring of non-Tribal members or non-Indians;
- (p) Develop numerical hiring goals and timetables for a covered employer;
- (q) Conduct or facilitate training programs and job fairs to meet the purposes of this Title;
- (r) Require Indians seeking employment and covered employers to participate in TERO training programs;
- (s) Require covered employers to pay back wages to an aggrieved employee;
- (t) Enforce this Title;
- (u) Enter into inter-governmental agreements with federal, state, or local agencies to carry out the provisions of this Title; and
- (v) Take any action necessary to achieve the purposes and goals of this Title.

3.4 Inspections. SBERC officers shall have the authority to make on-site inspections during regular working hours and in accordance with job site safety standards in order to monitor compliance with this Title. The SBERC and its officers shall have the right to inspect and copy all relevant records of a covered employer, to interview or speak to workers, and otherwise conduct investigations on the job site. All information collected shall be kept confidential unless or until disclosure is required during a hearing or appeal under this Title or ordered as part of any federal or Tribal judicial or administrative proceeding.

3.5 Indian Preference Goals for Indian Preference Plan. The SBERC shall negotiate with a contractor an Indian preference plan establishing the minimum number of qualified Tribal members and Indians to be employed by the contractor. The SBERC may negotiate with the contractor for trainee or apprentice positions not otherwise required under the contract, but such positions shall be funded by SBERC or other Tribal resources. Goals will be established for all non-key employee occupational classifications on a contract by contract basis to be used by the covered employer. The goals shall be expressed as:

- (a) Project hours of Tribal member employment as a percentage of the total hours of employment by the covered employer for the occupational classification involved; and

- (b) Numerical goals based on surveys of the available Tribal member and Indian labor forces and projections of employment opportunities for each occupational classification.

3.6 Powers and Authorities of Tribal Council. The Council shall have, but not be limited to, the following powers and authorities:

- (a) Review and approve SBERC policies;
- (b) Develop amendments to this Title;
- (c) Review and approve requests to waive this Title and/or Indian preference as otherwise required under this Title;
- (d) Waive TERO fees on a case-by-case-basis or by category; and
- (e) Approve a SBERC budget and annual work plan.

3.7 TERO Fee.

- (a) TERO Fee Amount. A fee, to raise revenue for the operation of SBERC, is imposed on the following activities:
 - (1) Construction Contracts. Contractors with a construction contract exceeding \$50,000.00-\$250,000 shall pay a fee of five percent (5%) of the total contract amount. Contracts of a value above \$250,000 to \$1 million shall pay a fee of two percent (2%), and contracts in excess of \$1 million shall pay a fee of one percent (1%).
 - (2) Non-construction Contracts. Contractors for all non-construction contracts exceeding \$20,000.00 shall pay a fee of one percent (1%) of the total contract amount.
- (b) Changes to Contract Amount. The contractor must notify SBERC of any changes to the original contract amount by providing an approved change order or amended contract. The TERO fee assessed shall be increased or reduced in proportion to any increase or reduction of the original contract amount.
- (c) Inapplicable to Certain Agreements. The TERO fee does not apply to financing, loan and similar type agreements.
- (d) For purposes of this section, construction contract activities include, but are not limited to, the following: building, modifying, refurbishing, or outfitting structures; road construction, maintenance, or upgrading; and supplies and materials for a construction or road project. Contracts for the following activities are considered non-construction contracts: legal services and architect and engineering services.

3.8 TERO Fee Collection.

- (a) Payment and Use. Contractors shall pay the TERO fee to the Shoalwater Bay Tribe or appropriate Tribal entity and such amount shall be credited to the account. TERO fees shall be used to carry out the purposes of this Title, such as staff support, TERO coordination, workforce development, job training and preparedness.
- (b) Contractor Consent to Automatic Deduction. For all contracts awarded by the Tribe or a Tribal entity, a contractor shall consent to the Tribe or the Tribal entity deducting the TERO fee amount from the total amount due the contractor under the contract and to pay that amount directly to the Shoalwater Bay Tribe.

- (c) Automatic Deduction of TERO Fee. The Shoalwater Bay Tribal Treasurer, or corresponding department of a Tribal entity, shall automatically deduct the TERO fee from an invoiced amount due a contractor.
- (d) Authority to Invoice for TERO Fee. The Shoalwater Bay Tribal Treasurer shall have the authority to invoice contractors for the TERO fee, if the TERO fee is not automatically deducted.

3.9 TERO Fee Exemption. The Tribal Council in its sole discretion and by resolution may waive the TERO fee for any contract or activity. In addition, the Tribe will retain a list of types of contracts, activities, and/or workers the Tribal Council has deemed waived from this Ordinance.

3.10 TERO Fee Reconciliation. SBERC shall forward copies of all TERO permits and monthly report all TERO permits then in effect to the Shoalwater Bay Tribal Treasurer. Tribal entities shall monthly report all TERO fees collected by that Tribal entity for each outstanding TERO permit to the Shoalwater Bay Tribal Treasurer. The Shoalwater Bay Tribal Treasurer shall maintain an accounting to ensure that the Tribe collects the entire TERO fee due by a covered employer under a TERO permit.

3.11 Training. The SBERC may require a contractor to participate, or to assign interested Indians to participate, in training programs to assist Indians to become qualified in various occupation classifications used by the contractor. If such training programs are not included in a bid package, the SBERC shall give due consideration to the increase in cost, if any, for performing the program and compensate the contractor for actual costs. Actual costs shall include, but not be limited to, the cost of additional supervision to conduct on-site training.

3.12 Complaints Against SBERC. Any complaint against SBERC is to be directed to the Commissioner. If the Commissioner is not able to resolve the complaint, SBERC will forward the complaint to the Chief Judge of the Tribal Court. General legal counsel for the Tribe will respond to the complaint for the Tribe. The Chief Judge may elect to utilize informal mediation, or more formal Tribal Court rules, to resolve the dispute in the Court's discretion. The Tribal Court retains exclusive jurisdiction and discretion to hear and decide complaints against SBERC.

3.13 Sanctions. A covered employer who violates this Title shall be subject to sanctions including, but not limited to:

- (a) Denial of the right to commence or continue business or contracts on Shoalwater Bay Tribal lands, with a Tribal entity, or involving Tribal funds;
- (b) Suspension of operations on Shoalwater Bay Tribal lands, with a Tribal entity, or involving Tribal funds;
- (c) Debarment or prohibition from engaging in commerce or contracts on Shoalwater Bay Tribal lands, with a Tribal entity, or involving Tribal funds;
- (d) Payment of back pay and damages to compensate an injured party;
- (e) Imposition of monetary civil penalties;
- (f) An order to stop work until the provisions of this Title are satisfied;

- (g) An order to remove any employee hired in violation of this Title;
- (h) An order requiring the employment, promotion, or training of Indians injured by the violation;
- (i) An order mandating changes in procedure or policies necessary to eliminate or correct the violation; and
- (j) An order mandating any other provision deemed necessary by the Tribal Council or Tribal Court to alleviate, eliminate, or compensate for the violation.

3.14 Willful Violation of SBERC regulations. Covered employers have an affirmative duty to inform the SBERC of all contracts that are not exempt from the TERO fee, and that are not exempt from SBERC Indian preference requirements. A person commits the offense of willful violation of SBERC regulations if the person:

- (a) Holds an executive position or is a governing board member with a covered employer;
- (b) Knows, should know, or fails to appropriately investigate whether a contract is subject to this Title; and
- (c) Knowingly, willfully, or intentionally fails to inform the SBERC that the covered employer has entered into a contract subject to this Title or to collect TERO fees as directed by this Title.

Each contract for which the person fails to inform the SBERC shall constitute a separate offense. A person who violates this section shall be subject to a minimum fine of \$100.00 for each offense and shall be held jointly and severally liable for any TERO fees due to the Tribe that are not collected from the contractor.

3.15 Debarment. Tribal Council may debar a covered employer at its own initiative or upon the written recommendation of the Commissioner. Debarment prohibits a covered employer from engaging in commerce, bidding on contracts, or having a bid considered for a contract on Shoalwater Bay Tribal lands, with Tribal entities, or involving Tribal funds. A covered employer may be debarred for the following reasons:

- (a) If a covered employer is found to have intentionally misrepresented its or a subcontractor's status as an Indian firm to SBERC, the covered employer may be debarred for up to five (5) years after the finding of such misrepresentation.
- (b) If a covered employer is found to have violated this Title twice within a five-year period, the covered employer may be debarred for up to five (5) years.

Notwithstanding any other provisions in this section, the Council maintains discretion to debar a contractor indefinitely.

3.16 Monetary Civil Penalties. The maximum monetary civil penalty that may be imposed for a violation of this Title is the maximum permitted under any tribal case law involving claims made under the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, as amended. SBERC may establish a fee schedule setting the standard monetary civil penalty amount for violations of this Title. Each day during which a violation exists shall constitute a separate occurrence.

3.17 Late Payment of Fees – Interest. A covered employer that fails to timely pay the TERO fee may be subject to a monetary civil penalty or other sanctions and an interest rate of fifteen percent (15%) per annum, compounded daily on all amounts owed, may be applied.

3.18 Enforcement – Costs. SBERC shall be entitled to pursue the enforcement of any order of the Commissioner or Tribal Court when necessary to enforce sanctions or to ensure compliance with the terms and conditions of any such order. Any cost associated with the enforcement of an order issued pursuant to this Title may be assessed by SBERC against the covered employer that is out of compliance. This may include but is not limited to document reproduction costs, administrative fees, filing fees, and attorney fees and costs.

3.19 Publication to Bidders. SBERC shall inform all existing and future covered employers, contractors and subcontractors of their obligation to comply with this Title. All bid announcements issued by any tribal, federal, state or other private or public entity for the benefit or use of Indians shall contain a statement that the successful bidder will be obligated by tribal law to comply with this Title and that a bidder or potential bidder may contact SBERC to obtain additional information.

3.20 Tribal Departments’ and Agencies’ Responsibilities. Those departments responsible for issuing business licenses, grants, contracts, or subcontracts or otherwise engaged in activities involving contact with prospective covered employers or contractors on the Reservation shall be responsible for informing such prospective covered employers or contractors of their obligations under this Title.

3.21 Notice. Within one (1) month of the effective date of this Title and for each amendment thereto, SBERC shall send copies of this Title to every covered employer and contractor/subcontractor presently operating on the Reservation. It shall be the responsibility of SBERC to send copies of any future revisions to the Title to all Tribal departments and agencies as described in Section 3.20 of this Title.

Article IV – Indian Preference Protocol

4.1 Indian Preference In Employment. All covered employers shall give absolute preference to qualified Indians (see definition of “Indian” in this Ordinance to include others receiving preference) in all phases of employment and training, including recruitment, hiring, upgrade, promotion, transfer, rate of pay, retention, and selection for training or apprenticeship. Indian preference in employment means that if a qualified Indian is available, that person will be given preference over a qualified non-Indian in any phase of employment. A covered employer may not refuse to employ an Indian on the basis that a non-Indian is more qualified, so long as the Indian satisfies the threshold requirements for that occupational classification.

4.2 Covered positions. Indian preference shall apply to all occupational classifications, except for key employees of non-Tribal entities. Occupational classifications may be identified by the U.S. Department of Labor, Bureau of Labor Statistics, Standard Occupational Classification then in effect. The Shoalwater Bay Tribe and Tribal entities are required to apply Indian preference to the hiring of key employees.

4.3 Qualified Indians. An Indian shall be deemed qualified for employment in a position if that person meets the minimum requirements for such position. No employer may utilize any employment criterion that is not legitimately related to the performance of the position.

4.4 Eligible Indians. Eligible Indians include:

- (a) Shoalwater Bay Tribe, Tribal Entities, and Covered Employers. The Shoalwater Bay Tribe, Tribal entities, and covered employers shall extend a preference to qualified Indians according to the following tier priorities:
 - (1) Shoalwater Bay Tribal members;
 - (2) Members of Tribal Households; and
 - (3) Other Indians, including Alaska Natives, Native Hawaiians, and members of non-federally recognized tribes.
- (b) Contractors Working on or near the Reservation and Using Federal Funds. Contractors working on or near the Shoalwater Bay Reservation and using federal funds shall extend a preference to qualified Indians according to the following tier priorities:
 - (1) Indians living on or near the Reservation; and
 - (2) Other Indians.

For purposes of subsection (b) of this section, the word “near” means all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a workday.

4.5 Proof of Shoalwater Bay or Indian eligibility.

- (a) Tribal Member. A person claiming that they are a Shoalwater Bay Tribal member shall present an appropriate Shoalwater Bay Tribal membership identification card.
- (b) Spouse of Tribal Member. A person claiming that they are a spouse of a Shoalwater Bay Tribal member shall present the Shoalwater Bay Tribe membership identification card of their spouse and proof of marriage.
- (c) Indian, Alaska Native, Native Hawaiian, Non-recognized Tribal member. A person claiming that they fit one of these categories shall have the burden to prove their status with membership in a federally recognized tribe, or other status documentation. To prove membership in a federally recognized tribe, SBERC may require a person to submit the following:
 - (1) Certification or verification from a federally recognized tribe or the U.S. Bureau of Indian Affairs indicating that a person is a member of a federally recognized tribe;
 - (2) A Tribal membership card; or
 - (3) Other documentation satisfactory to the Commissioner.

4.6 Tribal Skills Bank. SBERC shall manage a database of Shoalwater Bay Tribal members and other Indians seeking employment. This database shall be known as the Tribal skills bank. Tribal skills bank records for such individuals may include name and contact information, membership in a federally recognized tribe, occupational classifications for which an individual meets minimum qualifications, training or additional qualifications, training or qualification needs, and such other information as necessary or useful to achieve the goals of this Title. It shall be the individual's responsibility to ensure that the Tribal skills bank contact information for that person is accurate and up to date.

4.7 TERO Card. The Tribe reserves the right to establish a TERO card system in the future but may choose to implement TERO with or without a card system. If the Tribe does use cards, in order to facilitate Indian employment, a Shoalwater Bay Tribal member who has met Indian eligibility requirements may apply to SBERC for a TERO card. A TERO card shall indicate the person's skilled labor occupational classifications. A TERO card constitutes presumptive evidence that a person is a Tribal member with the highest tier priority. A covered employer may hire such Tribal member for an available position without being required to notify SBERC prior to hiring as otherwise required by this Title. A TERO card shall expire no later than two (2) years after issuance, but may be renewed by the cardholder prior to its expiration for an additional two-year period.

4.8 TERO Applicant Responsibilities. In order for SBERC to conduct its services efficiently and to meet its goal of obtaining jobs for eligible Indians, TERO applicants are required to follow the work guidelines and procedures set forth by their respective employers. Failure to follow an employer's work requirements may be cause for disciplinary actions by the employer, up to and including termination. Failed drug screenings, poor employee performance reviews, disciplinary action, or termination by a covered employer may result in the TERO applicant forfeiting future client services, training and education opportunities, and TERO assistance for employment. These actions will be noted in the TERO applicant's file.

4.9 Indian Preference In Contracting. Covered employers shall give preference to Indian firms in the award of contracts or subcontracts to the extent permitted by applicable law. A contractor may not refuse to employ an Indian firm as a subcontractor on the basis that a non-Indian firm is more qualified, so long as the Indian firm satisfies the threshold requirements for technical qualifications. In a dispute regarding threshold technical qualifications, the Commissioner shall determine the appropriate qualifications and whether they are met.

4.10 Indian Firm Eligibility Requirements. In order to receive certification as an Indian firm, an entity must meet the following eligibility requirements:

- (a) The entity must be a nonprofit or for-profit entity where an Indian or Indians own at least a fifty-one percent (51%) interest and where such Indian or Indians have managerial and operational control of the business operations;

- (b) The Indian owner(s) must possess the power to direct or cause the direction to the management and policies of the entity and to make day-to-day, as well as long-term, decisions on matters of management, policy and operations;
- (c) At least fifty-one percent (51%) of the profits must flow to the Indian owner(s); and
- (d) The entity must not be tied to another firm in such a way as to compromise its independence and control.

4.11 Certification of an Indian Firm.

- (a) Burden of Demonstrating Satisfaction of Eligibility Requirements. An entity claiming that it is an Indian firm and seeking certification shall have the burden to demonstrate to the Commissioner, by a preponderance of the evidence, that it satisfies Indian firm eligibility requirements. Indian ownership must be real, substantial, and continuing, going beyond *pro forma* ownership of the entity as reflected in ownership documents.
- (b) Application for Certification. An entity shall submit an Indian firm certification application, in a form acceptable to SBERC, and proof of the entity's Indian ownership, which shall include, but not be limited to:
 - (1) Evidence that the entity is at least 51 percent owned by an Indian or at least 51 percent owned by a federally recognized tribe;
 - (2) Evidence that at least 51 percent of all profits will flow to the Indian owner during all portions of the contract or subcontract;
 - (3) Evidence that the Indian owner maintains management control; and
 - (4) The entity's name, address, and telephone number.
- (c) Documentation of Indian Ownership. To establish Indian ownership or maintain certification, SBERC may require an entity to submit the following:
 - (1) Current bank and tax records, incorporation documents, joint venture agreements, or partnership agreements documenting the share of Indian ownership;
 - (2) Certification that an Indian owner is a member of a federally recognized tribe; and
 - (3) Documents demonstrating that an Indian owner is an entity of a federally recognized tribe, such as articles of incorporation, a tribal ordinance or resolution establishing the entity, or certification by an appropriate authority of the federally recognized tribe that the entity is tribally owned;
 - (4) Such other documents as may be reasonably necessary to establish that Indian firm eligibility requirements are satisfied.
- (d) Certification. Upon satisfactory evidence that the requirements are met, the Commissioner shall certify the entity as an Indian firm. The Commissioner maintains sole authority to certify an entity as an Indian firm.
- (e) Certified Indian Firms. SBERC shall maintain a list or database of certified Indian firms that classifies such Indian firms by major group using the North American Industry Classification System standard. SBERC shall confirm certification of an Indian firm upon a contractor's request.
- (f) Ongoing Obligations. An Indian firm maintains ongoing obligations to ensure that Indian firm eligibility requirements are satisfied. The Commissioner maintains discretion to

revoke Indian firm certification upon finding that Indian firm eligibility requirements are not being met.

- (g) Expiration of Certification. An Indian firm must resubmit a certification application every two (2) years to remain in good standing.

4.12 Eligible Indian firms. Covered employers shall extend a preference to Indian firms according to the following priorities:

- (a) Indian firm that is at least 51 percent owned, operated, and controlled by a Shoalwater Bay Tribal member or Shoalwater Bay Tribal entity;
- (b) Indian firm that is less than 51 percent owned, operated, and controlled by a Shoalwater Bay Tribal member or Shoalwater Bay Tribal entity;
- (c) Indian firm without any ownership share held by a Shoalwater Bay Tribal member or Shoalwater Bay Tribal entity.

4.13 Contractors Using Federal Funds. Notwithstanding the requirements of Section 4.11, contractors using federal funds shall only be required to extend a preference to Indian firms according to the following tier priorities:

- (a) Indian firm whose Indian owner is living on or near the Shoalwater Bay Reservation; and
- (b) Other Indian firms.

For purposes of this section, the word “near” means all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a workday.

4.14 Specific Indian Preference Obligations of Contractors. In addition to the requirements of all covered employers, contractors shall have the following obligations:

- (a) Indian Preference Plan. Upon being selected for a contract and prior to commencing work, a contractor shall negotiate an Indian preference plan with SBERC. The Indian preference plan shall include key employees, anticipated project occupational classifications, and Indian preference goals for the general contract and any subcontracts. For subcontracts, the contractor shall indicate proposed subcontractors and, if the subcontractor is not an Indian firm, evidence of steps taken to identify Indian firms.
- (b) Labor Force Reports. Upon commencing work, to submit to SBERC weekly labor force reports, in a form acceptable to SBERC, indicating the number of Indian and non-Indian employees, pay rates, fringe benefits paid, hires, terminations, layoffs, promotions, pay increases, reprimands, and results in achieving Indian preference goals. SBERC maintains discretion to require such reports on a more or less frequent basis and to require additional information.
- (c) Payroll Reports. Upon request by SBERC, to submit to SBERC weekly payroll reporting forms, in the format then in use by the Washington State Department of Labor and Industries, for all employees. SBERC may also require submission of canceled payroll checks and check stubs.

- (d) Nonresponsive Bidder. A contractor who fails to secure a TERO permit within a reasonable amount of time as determined by the Commissioner shall be considered a nonresponsive bidder for the purpose of awarding the contract.
- (e) Primary Responsibility for TERO Compliance. A contractor shall have initial and primary responsibility for ensuring that it and all of its subcontractors comply with these requirements. A contractor may be held jointly and severally liable for violations of this Title by its subcontractors.

4.15 Subcontractors. The Indian preference requirements contained in this Title shall be binding on all subcontractors of covered employers, regardless of a subcontractor's size, and shall be deemed a part of all resulting subcontract specifications. A subcontractor may be held liable for violations of this Title. For large construction projects, subcontractors should meet and negotiate their own Indian preference plan with SBERC. The subcontractor is to be treated in the same manner as a contractor under this Title. Both the subcontractor and the contractor can be held jointly and severally liable for any violation of the subcontractor's TERO permit or Indian preference plan and both may be subject to sanctions, including a stop work order or monetary civil penalty. Because the Tribe may not be the contracting entity with the subcontractor, the contractor is encouraged to work cooperatively with SBERC to ensure the subcontractor meets compliance obligations.

4.16 Employment Procedures. The contractor may use whatever employment process it chooses; provided, that it makes reasonable efforts to hire qualified Indians and a non-Indian person will not be hired if there is a qualified Indian available. The employer may obtain qualified Indian referrals from SBERC and other sources. In all cases, the contractor is required to notify SBERC of all jobs planned for a project. Except for key employees, which nevertheless must be identified in an Indian preference plan, all positions existing or planned to exist on the Reservation are subject to Indian preference requirements. A contractor may not use job qualifications, criteria, or requirements which tend to bar Indians from employment unless the same are required by business necessity. It is the employer's burden to prove business necessity.

4.17 Indian Preference Plan. No contractor may commence work until the contractor has submitted to SBERC an Indian preference plan, negotiated with and approved by SBERC, setting forth how the contractor intends to meet the contractor's obligations under this Title. The Indian preference plan should list by occupational classification all key and non-key employee positions to be used by the contractor. For multi-year contracts, the Indian preference plan shall be reviewed at least annually, or sooner at the request of a contractor or the discretion of the Commissioner, and shall be revised to reflect changes in the number of Tribal members or Indians available or in the contractor's hiring plans and practices.

4.18 TERO Permit. No contractor may commence work until the contractor has received a TERO permit. SBERC shall issue a TERO permit to contractors upon approval of a negotiated Indian preference plan. The TERO permit shall incorporate the terms of the Indian preference plan and shall constitute a consensual contractual relationship between the Shoalwater Bay Tribe and the contractor.

4.19 Ongoing TERO Compliance – Filling Available Positions. Once work has commenced under a valid TERO permit and if a position becomes available, a contractor shall not hire a non-Indian unless the contractor makes reasonable efforts to hire a qualified Indian for that position.

- (a) TERO Card Hiring. A contractor may hire immediately a Tribal member who presents the contractor with a valid TERO card. The contractor shall notify SBERC that a Tribal member has been hired for the available position within two (2) days of hiring and shall submit to SBERC a copy of the TERO card.
- (b) Reasonable Efforts to Hire Qualified Indian. A contractor is presumed to have made reasonable efforts if all of the following conditions are satisfied:
 - (1) The contractor notifies SBERC in writing of the available position;
 - (2) The contractor requests a list from SBERC of qualified Indians for that classification;
 - (3) The contractor is unable to identify a qualified Indian available for the position and:
 - (A) The contractor submits documents to SBERC showing reasonable efforts to identify and contact qualified Indians for that classification, which may include call logs, job fair notices, public notices in local newspapers and Tribal offices, online job postings, and evidence that SBERC failed to respond to the list request within five (5) business days or two (2) business days for a construction contract; or
 - (B) SBERC certifies in writing that no qualified Indian is available to fill that position;
 - (4) If no qualified Indian is available for the position, the contractor notifies SBERC in writing of the non-Indian replacement and deviation from the Indian preference plan.
- (c) Ensuring Reasonable Efforts. The Commissioner maintains discretion to seek additional documentation of reasonable efforts by a contractor, and to order an employee removed if a contractor does not substantially comply with this section.
- (d) Emergency Waiver. The Commissioner may waive or modify the requirements of subsection (b) of this section for a position if there is clear indication that:
 - (1) The process would impose an unreasonable burden on a contractor for a project; or
 - (2) Time is of the essence due to exigent or emergency circumstances in completing the work and it is unreasonable to request full compliance.

4.20 Layoffs or Reductions in Workforce. In all layoffs and reductions in workforce for a contractor, no Shoalwater Bay Tribal member or Indian shall be terminated if a non-Indian worker in the same occupational classification is still employed. A non-Indian shall be terminated first, and eligible Indians shall be terminated by tier.

4.21 Promotions. Each contractor shall give Shoalwater Bay Tribal members and Indians preferential consideration for all promotion opportunities and shall encourage Indians to seek such opportunities. For each promotion, supervisory position, or managerial position filled by a non-Indian, the contractor shall file a report with SBERC stating what efforts were made to inform Indian workers about the position, what Indians, if any, applied for the position, and if an Indian was not chosen, the reasons therefor

4.20 Final Payment – Compliance. For contracts with the Shoalwater Bay Tribe or other Tribal entities, final payment shall not be made under a contract if the entity is notified by the Commissioner that the contractor is subject to an ongoing SBERC investigation.

4.21 Prohibition Against Retaliation. If a contractor fires, lays off, penalizes, attempts to intimidate, or otherwise retaliates in any manner toward a person who utilizes the individual complaint procedure or exercises any right provided in this Title, the contractor shall be subject to sanctions provided for in this Title.

4.22 Unions. Covered employers with collective bargaining agreements with a union are responsible for informing such unions of this Title, its rules and regulations, and their Indian preference plan. Covered employers shall be responsible for obtaining agreement from all bargaining unions stating that the union will comply with this Title before the employer will be permitted to commence work. Such agreements shall be subject to approval of SBERC. In addition, unions must agree to:

- (a) give absolute preference to qualified Indians in referrals, regardless of which union referral list they are on;
- (b) cooperate with SBERC hiring and employment procedures;
- (c) establish a mechanism so that Indians are not required to travel on a regular basis to retain their place on union lists, such as phone or mail registration or a union sub-office on the Reservation;
- (d) indenture and refer only qualified Indian apprentices to employers;
- (e) remove all barriers to entry into the union for Indians who are qualified for journey person status and wish to join the union;
- (f) grant temporary work permits to Indians who do not wish to join the union; and
- (g) meet such other requirements as SBERC may deem necessary to fulfill the employer's Indian preference obligations.

Nothing herein shall constitute official recognition of any union or Tribal endorsement of any union activities on Shoalwater Bay Tribal lands.

4.23 Tribal Prevailing Wage. Any applicable prevailing wage provisions shall be incorporated in the terms of the TERO permit.

4.24 Recognition of Religious Freedom. Covered employers shall make accommodations to the religious beliefs and practices of Indian workers in accordance with Public Law 95-341, "American Indian Religious Freedom", and tribal custom. Employers should be aware that Indians of various tribes practice different religions, both traditional Indian religions and modern American religions. Therefore, the specific religious practices of an Indian employee may vary from any other Indian employee. Employers are advised to contact SBERC in all instances where an Indian employee has requested special accommodation to his/her religious beliefs, to request

counsel in determining that the request is both necessary and reasonable.

4.25 Part-Time, Temporary, Summer, and Co-Operative Student Employees. Covered employers shall reserve opportunities for part-time, temporary, summer and co-operative student employment for Indians. SBERC will work in conjunction with employers to locate and refer qualified candidates. Covered employers are further encouraged to make every effort to promote after-school, summer and vacation employment for Indian youth.

Article V – TERO Citations and Tribal Court Review

5.1 Investigation by SBERC. Upon the Commissioner’s own allegation or upon written allegation of a violation, including violation of an Indian preference plan, the Commissioner shall ensure a prompt and thorough investigation of the alleged violation. Any person who believes that a covered employer has failed to comply with this Title, or who believes that they have been discriminated against by a covered employer because they are Indian, may file a written allegation of that violation with SBERC. The filer shall be responsible for providing SBERC with sufficient evidence of the alleged violation to allow for an appropriate investigation by SBERC. SBERC shall seek to achieve an informal settlement of the alleged violation. SBERC shall monthly report all alleged violations and their settlement, if any, to the Tribal Court and Tribal Council.

5.2 Issuance of Citation. If the Commissioner determines that a violation of this Title exists and an informal settlement cannot be achieved, the Commissioner shall issue a Notice of Noncompliance to the covered employer. This notice shall specify the nature of the violation and time period in which the covered employer must remedy the violation. If the violation is not corrected within the time specified, the Commissioner shall issue a written citation to the covered employer that includes the following:

- (a) The name of the violator;
- (b) The signature of the Commissioner or an authorized representative;
- (c) The name and section number of the code provision violated;
- (d) A brief summary of the facts constituting the violation; and
- (e) The covered employer’s rights to an informal meeting with the Commissioner.

Once the time specified in the notice of noncompliance to correct a violation has expired and prior to a hearing, the Commissioner may impose any sanction permitted under this Title.

5.3 Right to a Meeting with Commissioner. A covered employer that receives a citation shall be entitled to an informal meeting with the Commissioner. A covered employer must request such meeting within ten (10) days of the date of the citation. The Commissioner shall conduct a meeting no later than ten (10) days after receipt of a citation, unless the covered employer and

Commissioner agree to a later date. A citation for which a covered employer does not request a meeting shall become final and enforceable ten (10) days after the date of the citation.

5.4 Right to Formal Hearing. If a cited covered employer and the Commissioner are unable to resolve the issues that led to the citation, or a covered employer chooses not to participate in an informal meeting with the Commissioner, within ten (10) days of the informal meeting specified in Section 5.3, or twenty (20) days from the date of citation if no meeting occurred, the covered employer may request a formal hearing before the Tribal Court. This time period to request a hearing may be extended up to thirty (30) days for extenuating circumstances. A covered employer who fails to request a hearing within the required time period waives any right to a formal hearing, and the citation becomes final upon expiration of the filing period.

5.5 Hearing Procedures. Hearing procedures shall comply with the requirements of the processes described in Shoalwater Bay Tribal Code Title 1 Court Procedures, but not necessarily the formal rules of evidence, which can mean a less formal, binding mediation procedure if chosen by the Chief Judge, in his/her discretion. A covered employer shall be entitled to present evidence and call and question witnesses to demonstrate that it has complied with the requirements of this Title or that it has made best efforts to do so and therefore should not be subject to sanctions. On the basis of evidence presented at the hearing, and the information collected by SBERC, the Tribal Court shall determine whether or not the covered employer complied with this Title. Within thirty (30) days of concluding the hearing, the Tribal Court shall issue a written order. The written order shall contain at least:

- (a) A brief summary of the SBERC investigation and informal meeting proceedings;
- (b) Include findings of fact;
- (c) Provide the Tribal Court's determination of whether the covered employer has complied with this Title;
- (d) Identify any defenses such as best efforts that may excuse the covered employer's noncompliance; and
- (e) Direct the covered employer to take corrective action as necessary to remedy any harm caused by the noncompliance.

If the Tribal Court determines that the covered employer is out of compliance and such noncompliance is not excused, the Tribal Court by written order shall impose one (1) or more of the sanctions provided for in this Title. Ruling on matters arising under this Title, the Tribal Court shall have the authority to assess and collect civil penalties, these penalties must be documented, published and readily available for examination. to enjoin or mandate actions to enforce the provisions of this Title, and to provide any other relief the Tribal Court deems lawful and equitable. The Tribal Court shall forward a copy of any order to the Commissioner.

5.6 Appeals. Either SBERC or the covered employer may file a formal appeal of the Tribal Court's decision to the Shoalwater Bay Court of Appeals, consistent with the Title 19 Appellate rules of procedure.

5.7 Sovereign Immunity. Nothing in this provision or this Title shall be construed as a waiver of the Tribe's sovereign immunity or as authority for a claim for money damages against the Tribe.