

## **SUBPART M—INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT PROGRAM**

[Note: Yellow Highlights emphasize areas for **attention**; Blue Highlights provide **interpretation**]

### **PART 273-EDUCATION CONTRACTS UNDER JOHNSON-O'MALLEY ACT**

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AUTHORITY: Secs. 201-203, Pub. L. 93-638, 88 Stat. 2203, 2213-2214 (25 U.S.C. 455-457), unless otherwise noted.

SOURCE: 40 FR 51303, Nov. 4, 1975, unless otherwise noted.

#### **Subpart A—General Provisions**

##### **273.1 Purpose and scope.**

(a) The purpose of the regulations in this part is to set forth the application and approval process for education contracts under the Johnson-O'Malley Act. Such contracts shall be for the purpose of financially assisting those efforts designed to meet the specialized and unique educational needs of eligible Indian students, including programs supplemental to the regular school program and school operational support, where such support is necessary to maintain established State educational standards.

(b) The application and approval process in this part applies specifically to contracts with a State, school district, or Indian corporation.

(c) Contracts with tribal organizations for supplemental and operational support will be entered into only upon the request of an Indian tribe(s), and shall be subject to the provisions of part 271 of this chapter and 41 CFR part 14H-70, except as provided in S273.11.

(d) Nothing in these regulations shall be construed as:

(1) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe:

(2) Authorizing or requiring the termination or any existing trust responsibility of the United States with respect to the Indian people; or,

(3) Permitting significant reduction in services to Indian people as a result of this part.

(e) Nothing in these regulations shall be construed to mandate an Indian tribe to request a contract or contracts. Such requests are strictly voluntary.

## **273.2 Definitions.**

As used in this part:

- (a) “Area Director” means the official in charge of a Bureau of Indian Affairs Area Office.
- (b) “Bureau” means the Bureau of Indian Affairs.
- (c) “Commissioner” means the Commissioner of Indian Affairs, under the direction and supervision of the Assistant Secretary—Indian Affairs, who is responsible for the direction of day-to-day operations of the Bureau of Indian Affairs.
- (d) “Days” means calendar days.
- (e) “Economic enterprise” means any commercial, industrial, agricultural, or business activity that is at least 51 percent Indian owned, established or organized for the purpose of profit.
- (f) “Education plan” means a comprehensive plan for the programmatic and fiscal services of and accountability by a contractor for the education of eligible Indian students under this part.
- (g) “Indian tribe” means any Indian tribe, band, nation, rancheria, pueblo, colony 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) which is federally recognized as eligible by the U.S. Government through the Secretary for the special programs and services provided by the Secretary to Indians because of their status as Indians.
- (h) “Indian corporation” means a legally established organization of Indians chartered under State or Federal law and which is not included within the definition of “tribal organization” given in paragraph (v) of this section.
- (i) “Indian Education Committee” means one of the entities specified by S273.15.
- (j) “Indian” means a person who is a member of an Indian tribe.
- (k) “Johnson-O'Malley Act” means the Act of April 16, 1934 (48 Stat. 596), as amended by the Act of June 4, 1936 (49 Stat. 1458, 25 U.S.D. 452-456), and further amended by the Act of January 4, 1975 (88 Stat. 2203).
- (l) “Operational support” means those expenditures for school operational costs in order to meet established State educational standards or State-wide requirements.
- (m) “Pub. L. 93-638” means the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638; 88 Stat. 2203).
- (n) “Previously private school” means a school (other than a Federal school formerly operated by the Bureau) that is operated primarily for Indian students from age 3 years through grades 12; and, which at the time of application is controlled, sanctioned, or chartered by the government body(s) of an Indian tribe(s).
- (o) “School district” or “local education agency” means that subdivision of the State which contains the public elementary and secondary educational institutions providing educational services and is controlled by a duly elected board, commission, or similarly constituted assembly.
- (q) “Secretary” means the Secretary of the Interior.
- (r) “State” means a State of the United States of America or any political subdivision of a State.
- (s) “Superintendent” means the official in charge of a Bureau of Indian Affairs Agency Office.
- (t) “Supplemental programs” means those programs designed to meet the specialized and unique educational needs of eligible Indian students which may have resulted from socio-economic

conditions of the parents, from cultural or language differences or other factors, and as provided by S 273.34(b).

(u) “*Tribal government*,” “*tribal governing body*” and “*tribal Council*” means the recognized governing body of an Indian tribe.

(v) “*Tribal organization*,” means the recognized governing body of an Indian tribe or any legally established organization of Indians or tribes which is controlled, sanctioned or chartered by such governing body or bodies, 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 a request for a contract must be made by the Indian tribe that will receive services under the contract; *Provided further*, That in any case where a contract is let 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 of such a contract.

(w) “*Assistant Secretary—Indian Affairs*” means the Assistant Secretary—Indian Affairs who discharges the responsibility of the Secretary for activities pertaining to Indians and Indian Affairs.

[40 FR 51303, Nov. 4, 1975, as amended at 41 FR 5098, Feb. 4, 1976; 43 FR 37445, Aug. 23, 1978; 45 FR 13451, Feb. 29, 1980]

### **273.3 Revision or amendment of regulations.**

In order to make any substantive revision or amendments to regulations in this part, the Secretary shall take the following actions:

(a) Consult with the Indian tribes and national and regional Indian organizations to the extent practicable about the need for revision or amendment and consider their views in preparing the proposed revision or amendment.

[NOTE: This regulation requires annual tribal consultation and provides a forum for tribes to express concerns about the JOM program]

(b) Publish the proposed revisions or amendments in the FEDERAL REGISTER as proposed rulemaking to provide adequate notice to, and receive comments from, all interested parties.

(c) After consideration of all comments received, publish the regulations in the FEDERAL REGISTER in final form not less than 30 days before the date they are made effective.

(d) Annually consult with Indian tribes and national and regional Indian organizations about the need for revision or amendment, and consider their views in preparing the revision or amendment.

(e) Nothing in this section shall preclude Indian tribes or national or regional Indian organizations from initiating requests for revisions or amendments subject to paragraphs (a), (b), and (c) of this section.

[NOTE: This means tribes don't have to wait for annual tribal consultation to initiate requests for revisions of the regulations]

### **273.4 Policy of maximum Indian participation**

The meaningful participation in all aspects of educational program development and implementation by those affected by such programs is an essential requisite for success. Such

participation not only enhances program responsiveness to the needs of those served, but also provides them with the opportunity to determine and affect the desired level of educational achievement and satisfaction which education can and should provide. Consistent with this concept, **maximum Indian participation\* in the development, approval and implementation of all programs contracted under this part shall be required.**

[\*Note: This means if a program is in compliance with this section, all community members feel they are represented and their comments or recommendations are heard by the IEC. Conversely, if community members feel that they are not allowed to participate, they may file a grievance, which the IEC must hear as required in their Organizational documents and By-Laws. If the grievant feels they were not served, their complaint then is forwarded to the authorizing Federal agency and it becomes involved to resolve the issue. If the grievance is founded and supported by the authorizing Federal agency, the JOM program may be required to cease and desist from spending until the community member's complaint is addressed and resolved to mutual satisfaction.]

## **Subpart B—Application Process**

### **273.11 Eligible applicants**

(a) Any State, school district, tribal organization or Indian corporation is eligible to apply for contracts for supplemental or operational support programs. For the purposes of this part, previously private schools as defined in S273.2(n) are considered tribal organizations.

(b) States, school districts, or Indian corporations shall apply for contracts for supplemental or operational support programs as required in this part.

(c) Tribal organizations must comply with the following requirements to obtain contracts for supplemental programs or operational support:

(1) The applications submitted by the tribal organizations shall meet the requirements in S273.20 in addition to those in S271.14 of this chapter.

(2) The requirements in Sections 271.1 through 271.27, 271.41 through 271.52, 271.54, 271.61 through 271.66, and 271.81 through 271.84 shall apply to such contracts with tribal organizations.

(3) The provisions in Sections 271.71 through 271.77 of this chapter concerning retrocession and reassumption of programs do not apply to a tribal organization retroceding a contract for supplemental programs or operational support as the Bureau does not operate education programs authorized to be contracted under the Johnson-O'Malley Act. However, the tribal organization may retrocede such a contract and the Bureau will then contract with a State, school district, or Indian corporation under this part for the supplemental programs or operational support.

(4) The requirements in Sections 273.12 through 273.18, 273.20, 273.21, 273.31 through 273.38, 273.41, 273.51 and 273.52 shall apply to such contracts with tribal organizations.

(5) The requirements in 41 CFR part 14H-70 shall apply to such contracts with tribal organizations.

[40 FR 51303, Nov. 4, 1975, as amended at 41 Fr 5098, Feb. 4, 1976]

**S 273.12 Eligible students.**

Indian students, from **age 3 years through grade(s) 12**, except those who are enrolled in Bureau or sectarian operated schools, shall be **eligible for benefits provided by a contract pursuant to this part if they are ¼ or more degree Indian blood\* and recognized by the Secretary** as being eligible for Bureau services. Priority shall be given to contracts (a) which would serve Indian students on or near reservations and (b) where a majority of such Indian students will be members of the tribe(s) of such reservations (as defined in S 273.2(o)).

[\*NOTE: The eligibility section provides no mention of requirement for a Certificate of Indian Blood or CIB, other than the Indian blood must be from a Federally-recognized tribe.]

**Many tribes are providing JOM services to students on the basis of a Certificate of Lineage that verifies the parents' Indian blood quantum.**

**273.13 Proposals eligible for contracts.**

(a) Any proposal to contract for funding a program **which meets the definition of a supplemental program** given in 273.2(t) will be considered an eligible proposal under this part.

(b)(1) To contract for operational support, a public school district shall be required to establish as part of the proposal that:

(i) It cannot meet the applicable minimum State standards or requirements without such funds.

(ii) It has made a reasonable tax effort with a mill levy at least equal to the State average in support of educational programs.

(iii) It has fully utilized all other sources of financial aid, including all forms of State aid and Pub. L. 874 payments. The State aid contribution per pupil must be at least equal to the State average.

(iv) There is at least 70 percent eligible Indian enrollment within the school district.

(v) It shall clearly identify the educational needs of the students intended to benefit from the contract.

(vi) It has made a good faith effort in computing State and local contributions without regard to contract funds pursuant to this part.

(vii) It shall not budget or project a deficit by using contract funds pursuant to this part.

(2) The requirements given in paragraph (b)(1) of this section do not apply to previously private schools.

(c) At his discretion, the Commissioner may consider as eligible a proposal to contract under which a school district will be reimbursed for the full per capita costs of educating Indian students who meet all of the following:

(1) Are members of recognized Indian tribes.

(2) Do not normally reside in the State in which the school district is located.

(3) Are residing in Federal boarding facilities for the purposes of attending public schools within the school district.

**273.14 Preparing the education plan.**

A prospective contractor in **consultation with its Indian Education Committee(s)** shall formulate an education plan and submit it to the appropriate Area Director as a part of the application to contract required by S 273.20. Such plan shall become a part of any contract awarded. The education plan shall contain:

(a) The **education programs approved by the Indian Education Committee(s)** as required in 273.17.

[NOTE: This section requires official approval of education plan by the IEC]

(b) Other requirements for the education plan given in 273.18.

**273.15 Establishment of an Indian Education Committee.**

(a) When a school district to be affected by a contract(s) for the education of Indians pursuant to this part has a local school board not comprised of a majority of Indians, the tribal governing body(s) of the Indian tribe(s) affected by the contract(s) under this part shall specify one of the following entities to serve as the Indian Education Committee for the purpose of this part:

(1) An Indian Education Committee to be elected from among the parents (including persons acting *in loco parentis* except school administrators or officials) of eligible Indian students enrolled in the school(s) affected by a contract(s) under this part; or

[NOTE: This section authorizes *in loco parentis* to cover the other caretakers of eligible Indian children, as eligible for serving on the IEC.]

(2) A local Indian committee established pursuant to section 305(b)(2)(B)(ii) of the Act of January 23, 1972 (86 Stat. 235) and existing prior to January 4, 1975; or

(3) An Indian advisory school board or Indian Education Committee established pursuant to the Johnson-O'Malley Act and existing prior to January 4, 1975.

(b) When the local school board is not composed of a majority of Indians and the tribal governing body(s) of the Indian tribe(s) affected by a contract(s) under this part determine which of the entities provided for in paragraph (s) of this section is to serve as the Indian Education Committee for the purpose of this part, it shall notify the Area Director of such determination by January 15 preceding the school year for which the contract will be let.

- (c) The **Indian Education Committee** established under paragraph (a) of this section and its members **shall establish procedures under which the Committee shall serve. Such procedures shall be set forth in the Committee's organizational documents and by-laws.** Each Committee shall file a copy of its organizational documents and by-laws with the appropriate Area director, together with a list of its officers and members as soon as practicable after the Committee is organized.

[NOTE: This section requires uniform operating procedures and by-laws for the IEC]

- (d) The **existence of an Indian Education Committee shall not limit the continuing participation\* of the rest of the Indian community in all aspects of programs** contracted under this part.

[\*Note: Second mention of promoting community participation in all aspects of JOM program.]

### **273.16 Powers and duties of Indian Education Committee.**

- (a) Consistent with the purpose of the Indian Education Committee, each **such Committee shall be vested with the authority** to:

[NOTE: 'Shall be vested with the authority' is the major section authorizing the IEC.]

- (1) **Participate fully in the planning, development, implementation, and evaluation** of all programs, including both supplemental and operational support, conducted under a contract or contracts pursuant to this part. Such participation **shall include further authority** to:
  - i. **Recommend curricula**, including **texts, materials**, and **teaching methods** to be used in the contracted program or programs.
  - ii. **Approve budget preparation and execution.**
  - iii. **Recommend criteria for employment** in the program.
  - iv. **Nominate** a reasonable number of **qualified prospective educational programmatic staff members** from which the **contractor would be required to select.**
  - v. **Evaluate staff performance** and **program results** and **recommend appropriate action to the contractor.**
- (2) **Approve and disapprove all programs to be contracted** under this part. **All programs contracted pursuant to this part shall require the prior approval of the appropriate Indian Education Committee.**
- (3) Secure a copy of the negotiated contract(s) which include the program(s) approved by the Indian Education Committee.
- (4) **Recommend** to the Commissioner through the appropriate Bureau contracting officer **cancellation or suspension of a contract(s)** which contains the program(s) approved by the Indian Education Committee **if the**

contractor fails to permit such Committee to exercise its powers and duties as specified by this section.

(b) The **organizational papers and by-laws** of the Indian Education Committee **may\*** **include additional powers and duties** which would permit the Committee to:

- (1) Participate in negotiations concerning all contracts under this part.
- (2) Make an **annual\*** assessment of the learning needs of Indian children in the community affected.

[\*Note: "Annual" is under section qualified by "may include". Conclusion is Annual Needs Assessment is required only by those IECs stating it in their organizational papers and by-laws. If they have not stated it thusly, an annual needs assessment is not required.]

- (3) Have access to all reports, evaluations, surveys, and other program and budget related documents determined necessary by the Committee to carry out responsibilities, subject only to the provisions of Sections 273.49.
- (4) Request periodic reports and evaluations regarding the Indian education program
- (5) **Hear grievances** related to programs in the education plan

[Note: Third mention of a requirement to hear the community grievances. This is to ensure full participation by the community in JOM programs. This grievance clause is required to be included in the organizational papers and by-laws.]

- (6) **Meet regularly** with the professional staff serving Indian children and with the local education agency .
- (7) Hold committee meetings on a regular basis which are open to the public.

[NOTE: "regular" does not say monthly as many IECs believe. Regular can be as few as twice a year, quarterly, or whatever is determined to be "regular."]

- (8) **Have such additional powers as are consistent with these regulations.**

#### **273.17 Programs approved by Indian Education Committee.**

(a) All programs contracted under this part **shall**:

- (1) Be **developed and approved in full compliance with the powers and duties of the Indian Education Committee** as set out in Sections 273.16 and **as may be contained in the Committee's organizational documents and by-laws.**
- (2) **Be included as a part of the education plan** provided for in Section 273.14.

- (b) **No program contracted** pursuant to this part **shall be changed** from the time of its original approval by the Indian Education Committee to the end of the contract period **without the prior approval, in writing**, of the Committee.

[NOTE: Any revision of the education plan; program budget; or budget narrative; requires official approval by the IEC]

- (c) Programs developed or approved by the Indian Education Committee pursuant to this part **may, at the option of such Committee, include funds for the performance of Committee duties**, including the following:

- (1) **Member's attendance at regular and special meetings, workshops and training sessions**, as the Committee deems appropriate.
- (2) **Such other reasonable expenses** incurred by the Committee in performing its primary duties, **including the planning, development, implementation and evaluation** of the program.

### **273.18 Additional requirements for education plan**

In addition to incorporating the programs approved by the Indian Education Committee(s) as required by Sections 273.14(a), **the education plan** prepared by the prospective contractor **shall:**

- (a) **Contain educational goals and objectives which adequately address the educational needs of the Indian students** to be served by the contract.
- (b) **Incorporate the program or programs developed and approved by the Indian Education Committee(s)**. As provided in Sections 273.17(b), **changes in such programs must have prior written approval** of the Indian Education Committee(s).
- (c) **Contain procedures for hearing grievances\* from Indian students, parents, community members, and tribal representatives** relating to the programs contracted under this part. Such **procedures shall provide for adequate advance notice of the hearing**.

[\*NOTE: **Fourth mention** of requirement for procedures for hearing grievances from the Indian community served by the JOM program. This section requires that it be stated in the education plan.]

- (d) **Identify established State standards and requirements** which shall be maintained in operating programs and services contracted under this part.
- (e) **Describe how the State standards and requirements will be maintained**.
- (f) Provide that the **contractor shall comply in full with the requirements concerning meaningful participation** by the Indian Education Committee as required by Section 273.4.
- (g) Provide that **educational facilities receiving funds shall be open to visits and consultations by the Indian Education Committee(s), tribal representatives, Indian parents** in the community, and **by duly authorized representatives of the Federal and State Governments**.

- (h) Outline procedures of administrative and fiscal management to be used by the contractor.
- (i) Contain justifications for requesting funds for operational support. The public school district must establish in its justification that it meets the requirements given in Section 273.13(b). The information given should include records of receipt of local, State, and Federal funds.
- (j) Include budget estimates and financial information needed to determine program costs to contract for services. This includes, but is not limited to, the following:
  - (1) State and district average operational cost per pupil.
  - (2) Other sources of Federal funding the applicant is receiving, the amount received from each, the programs being funded, and the number of eligible Indian students served by such funding.
  - (3) Administrative costs involved, total number of employees, and total number of Indian employees.
  - (4) Costs which parents normally are expected to pay for each school.
  - (5) Supplemental and operational funds outlined in a separate budget, by line item, to facilitate accountability.
  - (6) Total number of employees for each special program and number of Indian employees for that program.
- (k) State the total enrollment of school or district, by age and grade level.
- (l) State the eligible Indian enrollment-total and classification by tribal affiliation(s) and by age and grade level.
- (m) State the total number of school board members and number of Indian school board members.
- (n) List Government equipment needed to carry out the contract.
- (o) State the period of contract term requested.
- (p) Include the signature of the authorized representative of applicant.
- (q) Provide written information regarding:
  - (1) Program goals and objectives related to the learning needs of potential target students.
  - (2) Procedures and methods to be used in achieving program objectives, including ways whereby parents, students and

communities have been involved in determining needs and priorities.

- (3) Overall program implementation including staffing practices, parental and community involvement, evaluation of program results, and dissemination thereof.
- (4) Determination of staff and program effectiveness in meeting the stated needs of target students.

### **273.19 Obtaining application forms**

Application forms, instructions, and related application materials are available from Agency Superintendents, Area Directors and the Commissioner. Use of standard application forms will facilitate processing of applications. However, they are not required if the information required by Section 273.2- is given in the application to contract.

### **273.20 Content of application to contract**

An application for a contract under this part shall be in writing and shall contain the following:

- (a) Name, address, and telephone number of the proposed contractor.
- (b) Name, address, and telephone number of the tribe(s) to be served by the contract.
- (c) Descriptive narrative of the contract proposal.
- (d) The education plan required by Section 273.14.
- (e) A separate budget outlining the Johnson-O'Malley funds for operational support and/or supplemental programs, by line item, to facilitate accountability.
- (f) A clear identification of what educational needs the Johnson-O'Malley funds requested for operational support will address.
- (g) Documentation of the requirements for operational support in 273.13(b)(1).

### **273.21 Tribal request for contract**

- (a) An Indian tribal governing body(s) that desires that a contract be entered into with a tribal organization must so notify the Area Director no later than February 1 preceding the school year for which the contract will be let.
- (b) If the tribal governing body's notice is not received by the date given in paragraph (a) of this section, the Area Director may contract with the State, school district, or Indian corporation under this part.

### **273.22 Application approval officials**

- (a) Each Area Director is authorized to approve the contract(s) submitted by the State, school district, or Indian corporation under this part which will provide services to Indian children within the jurisdiction of that Area Office.
- (b) When a proposed contract(s) will provide services to Indian children within the jurisdiction of more than one Area Office, the contract must be approved by the Commissioner.

### **273.23 Submitting applications to Area Office**

When services under the proposed contract will be provided to Indian children within the jurisdiction of a single Area Office, the completed application shall be submitted to the Area Director of that Area Office.

[Note: the reference to "Area Office" and "Area Director" is outdated language and in practical terms is the "Agency Office" and "Education Line Officer".]

#### **273.24 Area Office review and decision**

Upon receiving a contract application, the Area Director shall:

- (a) Notify the applicant in writing that the application has been received. This notice shall be made within fourteen (14)\* days after the Area Office receives the application.

[Note: The P.L. 93-638 Law was amended changing the 14 day requirement to a 2 day requirement.]

- (b) Review the application for completeness and request within 20 days any additional information from the applicant which will be needed to reach a decision.
- (c) On receiving an application for operational support, make formal written determination and findings supporting the need for such funds. In arriving at such a determination, the Area Director must be assured that each local education agency has made a good faith effort in computing State and local contributions without regard to funds requested pursuant to this part.
- (d) Assess the completed application to determine if the contract proposal is feasible and if the proposal and the application comply with the appropriate requirements of the Johnson-O'Malley Act and of the regulations in this part.
- (e) Approve or disapprove the application after fully reviewing and assessing the application and any additional information submitted by the applicant.
- (f) Promptly notify the applicant in writing of the decision to approve or disapprove the application. If the application is disapproved, the notice will give the reasons for disapproval and the applicant's right to appeal pursuant to part 2 of this chapter.

#### **273.25 Deadline for Area Office action**

- (a) The Area Director [ELO] shall approve or disapprove an application for a contract within sixty (60)\* days after the Area Office [Agency Office] receives the application and any additional information requested in 273.24(b). The sixty (60) day deadline can be extended after obtaining the written consent of the applicant.

[\*NOTE: There Education Line Officer (ELO) replaced the Area Director; The Agency Office replaced the Area Office; P.L. 93-638 was amended changing the 60 day requirement to a 90 day requirement.]

- (b) An application under this part cannot be approved before February 1\* preceding the school year for which the contract will be let.

[NOTE: the February 1 date applies to School Year Contracts only.]

#### **273.27 Central Office\* review and decision**

[NOTE: Central Office no longer receives or reviews the application, the Agency Office office receives and reviews the application for approval.]

Upon receiving a contract application, the Commissioner\* shall:

[NOTE: The Commissioner no longer has a role in the JOM application process and it is the Education Line Officer that administers the application for approval.]

- (a) Notify the applicant in writing that the application has been received. This notice shall be made within fourteen (14) days after the Central Office receives the application.
- (b) Review the application for completeness and request within 20 days any additional information from the applicant which will be needed to reach a decision.
- (c) On receiving an application for operational support, make formal written determination and findings supporting the need for such funds. In arriving at such a determination, the Commissioner must be assured that each local agency has made a good faith effort in computing State and local contributions without regard to funds requested pursuant to this part.
- (d) Assess the completed application to determine if the contract proposal is feasible and if the proposal and the application comply with the appropriate requirements of the Johnson-O'Malley Act and of the regulations in this part.
- (e) Approve or disapprove the application after fully reviewing and assign the application and any additional information submitted by the applicant.
- (f) Promptly notify the applicant in writing of the decision to approve or disapprove the application. If the application is disapproved, the notice will give the reasons for disapproval and the applicant's right to appeal pursuant to part 2 of this chapter.

**273.28 Deadline for Central Office action**

- (a) The Commissioner shall approve or disapprove an application for a contract within sixty (60) days after the Central Office receives the application, and any additional information requested in Section 273.27(b). The sixty (60) [90]day deadline can be extended after obtaining the written consent of the applicant.
- (b) An application under this part cannot be approved before February 1 preceding the school year for with the contract will be let.

[NOTE: The above yellow highlighted language is superseded by Part 900 language and 90 day deadlines.]

**273.29 Negotiating the contract**

After the proposal for a contract has been approved by the Area Director or Commissioner [ELO] as provided in Section 273.22, the contract will be negotiated by a Bureau contracting officer assisted by Bureau education personnel.

**SUBPART C – Funding Provisions**

**273.31 Distribution formula**

- (a) Funds shall be distributed to eligible contractors based upon the number of eligible Indian students to be served times twenty-five (25%) percent of the higher of the State or national average per pupil operating cost. Notwithstanding any other provisions of the law, Federal funds appropriated for the purpose shall be allotted pro rata in accordance with the distribution method outlined in this formula.
- (b) The Assistant Secretary may make exceptions to the provisions of paragraph (a) of this section based on the special cultural, linguistic, social or educational needs of the communities involved including the actual cost of education in the community only after consultation with all tribes who may be affected by such exceptions.

(25 U.S.C. 452-456; sec. 202. Pub. L. 93-638, 88 Stat. 2203, and Pub. L. 95-561, sec. 1102

(a) and (b).

[45 FR 9241, Feb. 11, 1980]

### **273.32 Pro rata requirement**

All monies provided by a contract pursuant to this part, shall be expended only for the benefit of eligible Indian students. Where students other than eligible Indian students participate in programs contracted under this part, money expended under such contract shall be prorated to cover the participation of only the eligible Indian students, except where the participation of non-eligible Indian students is so incidental as to be de minimus. Such de minimus participation must be approved by the Indian Education Committee.

### **273.33 Use of funds for operational support**

All funds for school operations support shall be used to meet established State educational standards or Statewide requirements.

### **273.34 Use of other Federal, State and local funds.**

- (a) Contract funds under this part **shall supplement, and not supplant** Federal, State and local funds. Each contract shall require that the use of these contract funds will not result in a decrease in State, local, or Federal funds which would be made available for Indian students if there were no funds under this part.

**[NOTE: This section requires supplemental education programs]**

- (b) State, local and other Federal funds must be used to provide comparable services to non-Indian and Indian students prior to the use of contract funds.
- (c) Except as hereinafter provided, the school lunch program of the United States Department of Agriculture (USDA) shall constitute the only federally-funded school lunch program for Indian students in public schools. Where Indian students do not qualify to receive free lunches under the National School Lunch Program of USDA because such students are non-needy and do not meet the family size and income guidelines for free USDA lunches, plans prepared pursuant to Section 273.18 may provide, to the extent of funding available for Johnson-O'Malley programs, for free school lunches for those students who do not qualify for free USDA lunches but who are eligible students under Section 273.12.
- (d) [47 FR 57275, Dec. 23, 1982]

### **273.35 Capital outlay or debt retirement**

In no instance shall contract funds provided under this part be used as payment for capital outlay or debt retirement expenses; except that, such costs are allowable if they are considered to be a part of the full per capita cost of educating eligible Indian students who reside in Federal boarding facilities for the purpose of attending public schools.

### **273.36 Eligible subcontractors**

No contract funds under the Johnson-O'Malley Act shall be made available by the Bureau directly to other than tribal organizations, States, school districts and Indian corporations. However, tribal organizations, States, school districts, and Indian corporations receiving funds under this part may use the funds to subcontract for necessary services with any appropriate individual, organization or corporation.

### **273.37 Use of funds outside of schools**

Nothing in these regulations shall prevent the Commissioner from contracting with Indian corporations who will expend all or part of the funds in places other than the public or private schools in the community affected.

### **273.38 Equal quality and standard of education**

Contracts with State education agencies or school districts receiving funds under the provisions of this part shall provide educational opportunities to all Indian children within that school district on the same terms and under the same conditions that apply to all other students provided that it will not affect the rights of eligible Indian children to receive benefits from the supplemental programs as provided for in this part. School districts receiving funds under this part must insure that Indian children receive all aid from the State, and other proper sources other than this contract, which other schools in the district and other school districts similarly situated in the State are entitled to receive. **In no instance shall there be discrimination against Indians or schools enrolling such Indians.**

### **Subpart D – General Contract Requirements**

#### **273.41 Special program provisions to be included in contract**

All contracts under this part shall contain the following:

- (a) The education plan required by Sections 273.14 and 273.18 and, as part of the education plan, the education programs approved by the Indian Education Committee(s) under Section 273.17.
- (b) Any formal written determination and findings made by the Area Director or Commissioner supporting the need for operational support as required by Sections 273.24(c) and 273.27(c).
- (c) The provision that State, local, and other Federal Funds shall be used to provide comparable services to non-Indian and Indian students prior to the use of Johnson-O'Malley funds for the provision of supplementary program services to Indian children, as required in Section 273.34(b).

#### **273.42 Civil Rights Act violations**

**In no instance shall there be discrimination against Indians or schools enrolling such Indians.** When informed by a complainant or through its own discovery that possible violation of title VI of the Civil Rights Act of 1964 exists within a State school district receiving funds under this part, the Department of the Interior shall, in accordance with Federal requirements, notify the Department of Health, Education and Welfare of the possible violations of title VI. The Department of Health, Education, and Welfare will conduct an investigation into the matters alleged, pursuant to a Memorandum of Understanding between the Department of the Interior and the Department of Health, Education, and Welfare. If the report of the investigation conducted by the Department of Health, Education, and Welfare discloses a failure or threatened failure to comply with this part, and if the non-compliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to contract or to continue financial assistance under the Johnson-O'Malley Act or by any other means authorized by law. As delineated in 43 CFR 17.1, 17.8, and 17.9, such other means may include reference to the Department of Justice with a recommendation that appropriate legal proceedings be brought by the United States to secure compliance or by formal hearing before the Commissioner or, at his discretion, before an administrative law judge designated in

accordance with section 11 of the Administrative Procedure Act. The Secretary, may, by agreement with one or more other Federal departments, provide for the conduct or consolidated or joint hearing as prescribed in 43 CFR 17.8(e).

### **273.43 Advance payments**

Advance payments to States, school districts and Indian corporations will be made in accordance with the applicable provisions of 41 CFR part 1 as supplemented by 41 CFR part 14 and 41 CFR part 14H except 41 CFR part 14H-70.

### **273.44 Use and transfer of Government property.**

- (a) The use of Government-owned facilities for school purposes may be authorized when not needed for Government activities. Transfer of title to such facilities (except land) may be arranged under the provisions of the Act of June 4, 1953 (67 Stat. 41) subject to the approval of the tribal government if such property is located on a reservation.
- (b) In carrying out a contract made under this part, the Area Director or Commissioner may, with the approval of the tribal government, permit a contractor to use existing buildings, facilities, and related equipment and other personal property owned by the Bureau within his jurisdiction under terms and conditions agreed upon for their use and maintenance. The property at the time of transfer must conform to the minimum standards established by the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended (29 U.S.C. 651). Use of Government property is subject to the following conditions:
  - (1) When nonexpendable Government property is turned over to public school authorities or Indian corporations under a use permit, the permittee shall insure such property against damage by flood, fire, rain windstorm, vandalism, snow and tornado in amounts and with companies satisfactory to the Federal officer in charge of the property. In case of damage or destruction of the property by flood, fire, rain, windstorm, vandalism, snow or tornado, the insurance money collected shall be expended only for repair or replacement of property. Otherwise, insurance proceeds shall be paid to the Bureau.
  - (2) If the public school authority is self-insured and can present evidence of that fact to the Area Director or Commissioner, insurance for lost or damaged property will not be required. However, the public school authority will be responsible for replacement of such lost or damaged property at no cost to the Government or for paying the Government enough to replace the property.
  - (3) The permittee shall maintain the property in a reasonable state of repair consistent with the intended use and educational purposes.
- (c) The contractor may have access to existing Bureau records needed to carry out a contract under this part, as follows:
  - (1) The Bureau will make the records available subject to the provisions of the Freedom of Information Act (5 U.S.C.

552), as amended by the Act of November 21, 1974 (Pub. L. 93-502, 88 Stat. 1561).

- (2) The contractor may have access to needed Bureau records at the appropriate Bureau office for review and making copies of selected records.
- (3) If the contractor needs a small volume of identifiable Bureau records, the Bureau will furnish the copies to the contractor.

#### **273.45 Indian preference**

- (a) **Any contract** made by the Bureau with a State, school district or Indian corporation **shall provide that the contractor shall, to the greatest extent feasible, give preference in and opportunities for employment and training to Indians.**
- (b) **Any contract** made by the Bureau with a State, school district or Indian corporation shall provide that the contractor shall, to the greatest extent feasible, **give preference in the award of subcontracts to Indian organizations and Indian-owned economic enterprises.**
- (c) **All subcontractors** employed by the contractor **shall, to the extent possible, give preference to Indians for employment and training and shall be required to include in their bid submission a plan to achieve maximum use of Indian personnel.**
- (d) In the performance of contracts under this part 273 and subject to the provisions of part 14H of title 41, a tribal governing body may develop its own Indian preference requirements to the extent that such requirements are not inconsistent with the purpose and intent of paragraphs (a), (b) and (c) of this section.

[NOTE: This section has potential to cause difficulty to JOM programs if an Indian applicant feels they are not being provided preference for hiring.]

#### **273.46 Liability and motor vehicle insurance**

- (a) States, school districts and Indian corporations shall obtain public liability insurance under contracts entered into with the Bureau under this part. However, where the Bureau contracting officer determines that the risk of death, personal injury or property damage under the contract is small and that the time and cost of procuring the insurance is great in relation to the risk, the contractor may be exempted from this requirement.
- (b) Notwithstanding paragraph (a) of this section, any contract which requires or authorizes, either expressly or by implication, the use of motor vehicles must contain a provision requiring the State, school district, or Indian corporation to provide liability insurance, regardless of how small the risk.
- (c) If the public school authority is self-insured and can present evidence of that fact to the Area Director or Commissioner, liability and motor vehicle insurance will not be required.

#### **273.47 Recordkeeping**

A contractor will be required to maintain a recordkeeping system which will allow the Bureau to meet its legal records program requirements under the Federal Records Act (44 U.S.C. 3101 et.seq.). Such a record system shall:

- (a) **Fully reflect all financial transactions involving the receipt and expenditure of funds provided under the contract in a manner which will provide the accurate, current**

**and complete disclosure of financial status; correlation with budget or allowable cost schedules; and clear audit facilitating data.**

- (b) Reflect the amounts and sources of funds other than Bureau contract funds which may be included in the operation of the contract.**
- (c) Provide for the creation, maintenance and safeguarding of records of lasting value, including those involving individual rights, such as permanent records and transcripts.**
- (d) Provide for orderly retirement of permanent records in accordance with General Records Schedules and the Bureau Records Control Schedule, where there is no established system set up by the State, school district, or Indian corporation.**

[NOTE: Explicit direction as to records to maintain for the JOM annual report and financial reports.]

#### **273.48 Audit and inspection**

- (a) During the term of a contract under this part and for three years after the project or undertaking is completed, the Comptroller General and the Secretary, or any of their duly authorized representatives, shall have access, for audit and examination purposes, to any of the contractor's books, documents, papers, and records** which, in their opinion, may be related or pertinent to the contract or any sub-contract.
- (b) The contractor will be responsible for maintaining all documents such as invoices, purchase orders, canceled checks, balance sheets and all other records relating to financial transactions in a manner which will facilitate auditing. The contractor will be responsible for maintaining files of correspondence and other documents relating to the administration of the contract** properly separated from general records or cross-referenced to general files.
- (c) The contractor receiving funds under this part shall be responsible for contract compliance.**
- (d) The records involved in any claim or expenditure that has been questioned shall be further maintained until final determination has been made on the questioned expenditures.**
- (e) All contracts, non-confidential records concerning all students served by the program, reports, budgets, budget estimates, plans, and other documents pertaining to preceding and current year administration of the contract program shall be made available by the contractor and local school officials to each member of the Indian Education Committee** and to members of the public upon request. The contractor or local school official shall provide, free of charge, single copies of such documents upon request.

[NOTE: In general practice, tribes and tribal finance offices take responsibility for the annual audit reports required under P.L. 94-638.]

#### **273.49 Freedom of information**

- (a) Unless otherwise required by law, the Bureau shall not place restrictions on contractors which will limit public access to the contractor's records except when records must remain confidential.**
- (b) A contractor under this part shall make all reports and information concerning the contract available to the Indian people which the contract affects. Reports and information may be withheld from disclosure only when both of the following conditions exist:**

- (1) **The reports and information fall within one of the following exempt categories:**
- i. **Specifically required by statute or Executive Order to be kept secret.**
  - ii. **Commercial or financial information obtained from a person or firm on a privileged or confidential basis.**
  - iii. **Personnel, medical, social, or psychological, academic achievement and similar files where disclosure would be a clearly warranted invasion of personal privacy.**

(2) Disclosure is prohibited by statute or Executive Order or sound grounds exist for using the exemption given in paragraph (b)(1) of this section.

(c) **A request to inspect or copy reports and information shall be in writing and must reasonably describe the reports and information requested.** The request may be delivered or mailed to the contractor. Within ten (10) working days after receiving the request, the contractor shall determine whether to grant or deny the request. The requester shall be notified immediately of the determination.

(d) The time limit for making a determination may be extended up to an additional ten (10) working days for good reason. The requester shall be notified in writing of the extension, reasons for the extension, and date on which the determination is expected to be made.

[NOTE: Social Security numbers for eligible Indian students are the most critical information to protect. Recording of the numbers should not be replicated and kept in secure folders. The folders should have a log sheet on the front to note who, what, when, why, the folder was opened.]

#### 273.50 Annual reporting

(a) **A contractor under this part shall make a detailed annual report to the approving official before September 15\* of each year and covering the previous school year. The report shall include, but not be limited to, an accounting of the amounts and purposes for which the contract funds were expended, information on the conduct of the program, a quantitative evaluation of the effectiveness of the contract program in meeting the stated objectives contained in the applicant's educational plans, and a complete accounting of actual receipts at the end of the contract period.**

[\*NOTE: The September 15 date applies only to School Year Contracts.]

(b) In addition to the yearly reporting requirement given in paragraph (a) of this section, the contractor shall furnish other contract-related reports when and as required by the Area Director or Commissioner [ELO].

(c) A **contractor** under this part **shall send copies of the reports** required by paragraphs (a) and (b) of this section **to the Indian Education Committee(s) and to the tribe(s) under the contract at the same time as the reports are sent to the Bureau.**

[NOTE: This area is a general weakness as shown in monitoring reports.]

#### 273.51 Penalties

If any officer, director, agent, or employee of, or connected with, any contractor or subcontractor under this part embezzles, willfully misapplies, steals, or obtains by fraud any of the funds or property connected with the contract or subcontract, he shall be subject to the following penalties:

(a) If the amount involved does not exceed \$100, he shall be fined not more than \$1000 or imprisoned not more than one year, or both.

- (b) If the amount involved exceeds \$100, he shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

### **273.52 State school laws**

In those States where Pub. L. 83-280, 18 U.S.C. 1162 and 28 U.S.C. 1360 do not confer civil jurisdiction, State employees may be permitted to enter upon Indian tribal lands, reservations, or allotments if the duly-constituted governing body of the tribe adopts a resolution of consent for the following purposes:

- (a) Inspecting school conditions in the public schools located on Indian tribal lands, reservations, or allotments.
- (b) Enforcing State compulsory school attendance laws against Indian children, parents or persons standing in *loco parentis*.

### **273.53 Applicable procurement regulations**

States, school districts, or Indian corporations wanting to contract with the Bureau under this part must comply with the applicable requirements in the Federal Procurement Regulations (41 CFR part 1), as supplemented by the Interior Procurement Regulations (41 CFR part 14), and the Bureau of Indian Affairs Procurement Regulations (41 CFR part 14H), except 41 CFR part 14H-70.

### **273.54 Privacy Act requirements**

(a) When a contractor operates a system of records to accomplish a Bureau function, the contractor shall comply with Subpart D of 43 CFR part 2 which implements the Privacy Act (5 U.S.C. 552a). Examples of the contractor's responsibilities are:

- (1) To continue maintaining those systems of records declared by the Bureau to be subject to the Privacy Act as published in the FEDERAL REGISTER.
- (2) To make such records available to individuals involved.
- (3) To disclose an individual's record to third parties only after receiving permission from the individual to whom the record pertains. 43 CFR 2.56 lists exceptions to this procedure.
- (4) To establish a procedure to account for access, disclosures, denials, and amendments to records.

(b) The contractor may not:

- (1) Discontinue or alter any established systems of records without prior approval of the appropriate Bureau systems manager.
- (2) Deny requests for notification or access of records without prior approval of the appropriate Bureau systems manager.
- (3) Approve or deny requests for amendments of records without prior approval of the appropriate Bureau systems manager.
- (4) Establish a new system of records without prior approval of the Department of Interior and the Office of Management and Budget.
- (5) Collect information about an individual unless it is relevant or necessary to accomplish a purpose of the Bureau as required by statute or Executive Order.

(c) The contractor is subject to the penalties provided in section (i) of 5 U.S.C. 552a.

## **Subpart E – Contract Revision or Cancellation**

### **273.61 Contract revision or amendment**

Any contract made under this part may be revised or amended as deemed necessary to carry out the purposes of the program being contracted. A contractor may make a written request for a revision or amendment of a contract to the Bureau contracting officer. However, no program approved by the Indian Education Committee shall be altered from the time of its original approval to the end of the contract period without the written approval of the Committee.

### **273.62 Canceling a contract for cause**

- (a) Any contract entered into under this part may be cancelled for cause when the contractor fails to perform the work called for under the contract or fails to permit an Indian Education Committee to perform its duties pursuant to this part.
- (b) Before canceling the contract, the Bureau will advise the contractor in writing of the following:
  - (1) The reasons why the Bureau is considering canceling the contract.
  - (2) The contractor will be given an opportunity to bring its work up to an acceptable level.
- (c) If the contractor does not overcome the deficiencies in its contract performance, the Bureau shall cancel the contract for cause. The Bureau will notify the contractor, in writing, of the cancellation. The notice shall give the reasons for the cancellation and the right of the contractor to appeal under subpart C of 43 CFR part 4.
- (d) When a contract is cancelled for cause, the Bureau will attempt to perform the work by another contract.
- (e) Any contractor that has a contract cancelled for cause must demonstrate that the cause(s) which led to the cancellation have been remedied before it will be considered for another contract.

## **Subpart F – Appeals**

### **273.71 Contract appeal**

A contractor may appeal an adverse decision or action of a Bureau contracting officer regarding a contract under this part as provided in subpart C of 43 CFR part 4.

### **273.72 Appeal from decision to cancel contract for cause**

A contractor may appeal the decision of a Bureau official to cancel a contract under this part for cause. The appeal shall be made as provided in subpart C of 43 CFR part 4.

### **273.73 Other appeals**

Any decision or action by a Bureau official under this part, other than those given in Sections 273.71 and 273.72, may be appealed as provided in part 2 of this chapter.