

2012-ORD-001
TRIBAL EMPLOYMENT RIGHTS ORDINANCE (TERO)

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The Mashpee Wampanoag Tribal Council does ordain as follows:

Section 1. FINDINGS

- (a) The Mashpee Wampanoag Tribe is a federally recognized Indian tribe with a duly enacted Constitution.
- (b) Article V, § 2 of the Constitution provides that the Mashpee Wampanoag Tribal Council (the “Tribal Council”) shall exercise the executive and legislative powers of the Tribe, including the power to make and enforce the law, consistent with the letter and spirit of the Constitution.
- (c) Article VI, § 2.A. of the Constitution provides that the Tribal Council shall be empowered to exercise the power to promote and protect the health, peace, morals, education, political integrity, economic security and general welfare of the Tribe and its members.

(d) Article VI, § 2.B of the Constitution provides that the Tribal Council shall be authorized to establish a basic structure for the executive branch of the Tribal government with a delegation of appropriate powers to such subdivisions and agencies.

(e) The Tribal Council has identified the need to create employment, employment training and education, contracting, and subcontracting opportunities for Tribal Members and for Native Americans who are not Tribal Members.

(f) The Tribal Council acknowledges that the Tribal Member economic insecurity and unemployment rate is much higher than that of the immediate surrounding community and the Commonwealth of Massachusetts at large.

(g) The Tribal Council also acknowledges that Native Americans, including Tribal Members, have long struggled with the challenges of discrimination in the workplace and beyond.

(h) The Tribal Council deems it essential to promote and protect the political integrity, economic security and general welfare of the Tribe and its Tribal Members by establishing an employment rights program to increase employment of and to eradicate discrimination of Tribal Members and all other Native Americans, through the development and implementation of a Tribal Employment Rights Ordinance that is in conformity with the Tribe's culture, traditions and values.

Section 2. AUTHORITY AND PURPOSE

(a) **Authority.** The authority for this ordinance is Article VI, § 2, Article VI, § 2.A. and Article VI, § 2.B. of the Constitution of the Mashpee Wampanoag Tribe.

(b) **Purpose.** The purpose of this Ordinance is to:

- (1) require employment of Native Americans to the maximum degree practicable,
- (2) set forth the Native American preference requirements for employers and contractors operating in any capacity with the Tribe,
- (3) assist in the proper administration of Native American preference, and
- (4) provide training and education opportunities to improve career and economic potential for Tribal Members and Native Americans.

Section 3. DEFINITIONS

(a) "Certified Mashpee Wampanoag Entity" means an entity in which an individual Tribal Member holds the requisite ownership and control of the business under Section 7 of this Ordinance.

- (b) “Certified Native American Entity” means an entity in which an individual Native American enrolled in a federally recognized tribe or in some cases a non-federally recognized tribe, holds the requisite ownership and control of any business that meets all of the criteria of Section 7 of this Ordinance.
- (c) “Commercially Responsible Bid” means a bid made in good faith, at the current market value, which is timely submitted by an entity that demonstrates the ability to meet all project requirements at the price for which the bid is submitted.
- (d) “Contract” means each contract and subcontract to be performed in whole or in part for the Tribe, including but not limited to, each contract or subcontract for construction, equipment, material, services or supplies.
- (e) “Contracting Entity” means any entity providing materials or equipment to or performing work or services for the Tribe or on Tribal Lands. Contracting Entity shall include the Tribe and its entities, instrumentalities and authorities.
- (f) “Covered Employer” means any person located or engaged in work on Tribal Lands that has entered into a TERO contract with the Tribe. Covered Employer shall include the Tribe and its entities, instrumentalities and authorities unless the total project cost is \$20,000 or less. The Federal government along with any subdivision of the Federal government is excluded from the definition of Covered Employer and not subject to this Ordinance.
- (g) “Day” means any business working day (Monday through Friday) excluding weekend days (Saturday and Sunday) and any holidays recognized by the United States government or the Tribe.
- (h) “Employee” means any person employed for remuneration, but specifically excluding individuals who by law are considered independent contractors.
- (i) “Entity” means any person as defined herein, excluding any natural person.
- (j) “Family member” means any spouse, parent, child, sibling and those raised or living in the principal home of the applicable individual.
- (k) “Hiring Hall” means a list composed and maintained by the TERO Office that is a record of qualified, employable Tribal Members and Native Americans that is to be used by Covered Employers to fill vacancies.
- (l) “Indian tribe” means any federally recognized Indian tribe, except the Tribe.
- (m) “Minimum Qualifications” means insurance coverage and financial resources to bid for a contract, and those job-related qualifications that are essential to the performance of the

basic responsibilities of each employment position or contract, including any essential qualifications concerning education, training, and job-related experience as to employment and related experience.

- (n) “Native American” means an individual who is a duly enrolled member of the Tribe or a duly enrolled member of any other Indian tribe. For the purposes of this Ordinance, the TERO Office may, at its discretion, and on a case-by-case basis, find that a duly enrolled member of any non-federally recognized Indian tribe is included in this definition of Native American.
- (o) “Person” means both natural and artificial persons, including, but not limited to, companies, contractors or subcontractors, corporations, partnerships, joint ventures, limited liability companies, sole proprietorships, tribes, associations, unions, trusts, trustees, and agents.
- (p) “Tribal Council” and “Mashpee Wampanoag Tribal Council” means the governing body of the Tribe as established by the Constitution of the Tribe.
- (q) “Tribal Court” means the Tribal Court of the Tribe.
- (r) “Tribal Lands” means all trust lands of the Tribe, all lands owned by the Tribe that are contiguous to the trust lands, and all lands over which the Tribe has authority.
- (s) “Tribal Member” means a natural person who is duly enrolled in the Tribe.
- (t) “Tribe” shall mean the Mashpee Wampanoag Tribe.
- (u) “Unconditionally Controlled” means the power to direct, without conditions precedent, conditions subsequent or any other conditions or arrangements, the management and policies of the business and to make the day-to-day as well as major decisions in matters of policy, management, finance and operations. Such control shall include direct and active participation in supervision and management of the day-to-day operations. Control shall be real, substantial and continuing, not pro forma, and shall be exemplified by possession of the requisite knowledge and expertise to operate the particular business.
- (v) “Unconditionally Owned” means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, shareholder agreements, or other similar arrangements which serve to allow the primary benefits of Native American preference to accrue to entities or individuals other than those for whom Native American preference eligibility is based. An entity may be considered unconditionally owned if such ownership is subject to a lien that is made in favor of a financial institution for the provision of working capital to the entity.

Section 4. ESTABLISHMENT AND STRUCTURE OF TERO OFFICE

- (a) **Establishment.** The TERO Office is hereby established as an office of the executive branch of Tribal government.
- (b) **TERO Office.** The TERO Office is hereby vested with the general authority to oversee and implement this Ordinance. The TERO Office shall have the specific duty and responsibility of engaging in the daily implementation of the provisions set forth in this Ordinance, as may be amended, and in any and all rules, regulations, policies and/or guidelines promulgated pursuant to this Ordinance. The TERO Office shall also provide monthly reports to the Tribal Administrator. The TERO Office shall be subject to all Tribal laws.
- (c) **Structure.** The Tribal Council shall hire a Director to manage the TERO Office. The Director shall manage the day-to-day operations of the Office and implement such applicable laws, regulations, policies and/or guidelines as may be enacted or adopted by the Tribal Council. The Director shall present monthly reports to the Tribal Administrator. The Tribal Council shall hire such additional full-time, part-time, and temporary or seasonal staff for the Department as necessary to implement this Ordinance, including an Assistant Director to support the Director.
- (d) **Conflicts of Interest.**
 - (1) Any TERO Office employee who holds an ownership interest or other financial interest in any Certified Mashpee Wampanoag Entity or Certified Native American Entity shall remove and excuse himself or herself from the review of any decision of the TERO Office concerning such entity.
 - (2) No TERO Office employee shall participate in any decision involving his or her personal financial interest or a financial interest of a family member or an entity in which the employee or a family member is an owner, member, or officer. A “personal financial interest” or a “financial interest of a family member,” for the purposes of this Section 4, shall not mean any interest held in common by all Tribal Members.

Section 5. TRIBAL EMPLOYMENT RIGHTS ENFORCEMENT

- (a) **TERO Office Responsibilities.** The TERO Office shall:
 - (1) Assure that this Ordinance and any and all rules, regulations, and/or guidelines promulgated pursuant to this Ordinance are made accessible and available to all Covered Employers, and maintain copies of this Ordinance, and all rules, regulations, policies, and/or guidelines promulgated pursuant to this Ordinance for dissemination to any person who should request copies thereof;
 - (2) Work with Covered Employers and Contracting Entities to ensure compliance with the requirements of this Ordinance concerning hiring practices and contracting

requirements. Educate Covered Employers and Contracting Entities on proper procedures and work to resolve issues at an informal level;

- (3) Investigate complaints of potential violations of this Ordinance and make determinations regarding the same;
- (4) Review submissions and make determinations regarding businesses seeking certification under this Ordinance to ensure documents and paperwork are in compliance with this Ordinance;
- (5) Conduct on-site inspections at any time during the actual operation of the business of any Covered Employer or any Contracting Entity in accordance with this Ordinance for the purpose of monitoring compliance with the requirements set forth in this Ordinance and in any and all rules, regulations, policies, and/or guidelines promulgated pursuant to this Ordinance;
- (6) Communicate and establish relationships with any entity or federal, state, local or tribal government, department, agency, instrumentality or subdivision thereof for the purpose of fulfilling its primary responsibility, including, but not limited to, accessing federal and state funding, provided, however, the authority to enter into final agreements, contracts, and understandings with them shall remain with the Tribal Council;
- (7) Require the submission of a written TERO Compliance plan from all contractors, subcontractors and Covered Employers to the TERO Office prior to commencement of any project activities on Tribal lands;
- (8) Qualify through an application process Tribal Members and Native Americans to be added to the TERO Hiring Hall;
- (9) Compose and maintain a Tribal TERO Hiring Hall;
- (10) Dispatch qualified Tribal Member and Native American workers from the TERO Hiring Hall; and
- (11) Comply with all ordinances, resolutions, rules, regulations, procedures and orders prescribed by the Tribal Council.

(b) **Powers of the TERO Office.** The TERO Office shall have the power to:

- (1) Hold formal hearings, issue notices thereof, and request the appearance of witnesses and documents in accordance with the notice procedures set forth in this Ordinance and in any and all rules, regulations, and/or guidelines promulgated pursuant to this

Ordinance;

- (2) Impose any sanctions and grant any relief as authorized and prescribed by this Ordinance;
- (3) Seek advice from the Tribe's legal counsel whenever legal advice is needed in the fulfillment of its duties under this Ordinance;
- (4) Submit recommendations to the Tribal Administrator for the hiring and firing of TERO Office employees and pay salaries pursuant to a salary schedule established by the Tribal Administrator and/or Tribal Council;
- (5) Require Covered Employers and Contracting Entities to submit reports and take all action deemed necessary by the TERO Office for fair and consistent implementation, application, and compliance with this Ordinance;
- (6) Establish, assess and collect administrative fees as imposed by this Ordinance or by any and all rules, regulations, policies and/or guidelines promulgated pursuant to this Ordinance;
- (7) Grant any remedy or relief that the TERO Office deems just and equitable and within the scope of any agreement of the parties to a hearing, including but not limited to, specific performance of contracts;
- (8) Establish and impose penalties against Covered Employers and Contracting Entities as the TERO Office deems necessary, proper, and in accordance with this Ordinance;
- (9) Establish and implement workforce training and education programs for Tribal members;
- (10) Upon written approval of the Tribal Council, enter into agreements with federal, state, and private entities in order to further the purposes of this Ordinance; and
- (11) Take other such action as is necessary to achieve the purpose and objectives of the Ordinance and to carry out the duties and functions of the TERO Office.

Section 6. NATIVE AMERICAN PREFERENCE IN EMPLOYMENT

(a) **Preference in Hiring.** This Ordinance requires Native American preference in all aspects of employment, including but not limited to recruitment, hiring, promotion, lateral transfers, retention, and training. A Covered Employer shall not recruit, hire, or otherwise employ any non-Native American for any position covered by this Ordinance, if a Native American who meets the Minimum Qualifications has applied for such position, unless an

exception exists within this Ordinance. The Covered Employer shall select the Native American who meets the Minimum Qualifications for such position and who qualifies for employment in accordance with the hiring policies of the Covered Employer by using the following order of priority:

- (1) A Tribal Member.
- (2) All other Native Americans.

(b) **Applicability.** This Ordinance applies to all Covered Employers doing business on behalf of the Tribe. Irrespective of the qualifications of any applicant or employee who is not Native American, any Native American applicant who meets the Minimum Qualifications required by the employment position and who qualifies for employment under the hiring policies of the Covered Employer shall be selected by the Covered Employer before any applicant or employee who is not Native American. Unless otherwise provided in this Ordinance, the Native American employment preference requirements in this Ordinance and priority of selection shall apply to each and every job classification, skill area or craft recognized and used by a Covered Employer including administrative, supervisory, and professional classifications.

(c) **Key Employee Exception.** The coverage and applicability provisions and the preference provisions as set forth in this Ordinance shall not be applicable to personnel actions regarding any key employee.

(1) For the purposes of this Subsection, a “key employee” includes:

- (A) One who is an owner of the Covered Employer; or
- (B) One who is in a high-level supervisory position or who performs a critical function such that an employer would risk likely financial damage or loss if that task were assigned to a person unknown to the employer.

(2) An employee is not considered a “key employee” under this subsection solely based upon his experience gained through being a consultant to the Covered Employer. Furthermore, a temporary employee retained for a project, shall not necessarily be considered a “key employee.”

(d) **Lay Offs.** No Native American shall be laid off as long as a worker who is not Native American in the same craft or position is still employed, provided that such Native American meets the Minimum Qualifications for the position with the Covered Employer. If the Covered Employer lays off by crew, qualified Native Americans shall be transferred to any crew that will be retained. Exceptions may be made on a case-by-case basis upon receipt of written approval from the TERO Office.

(e) **Job Qualifications.** Covered Employers are prohibited from instituting and utilizing job qualifications, criteria, hiring policies and/or personnel requirements to serve as a barrier to

employment of individual Tribal Members or other Native Americans, unless such qualification, criterion, hiring policy and/or personnel requirement is shown by the Covered Employer to be a business necessity or is financially prudent for the Tribe. For purposes of this Section, “business necessity” is defined as a job requirement that shall be indispensable to perform the basic functions of the job. If a Covered Employer fails to prove a qualification, criterion, policy or personnel requirement is required by business necessity, the Covered Employer shall eliminate the qualification, criterion, policy or personnel requirement at issue. If, upon elimination of the qualification, criterion, policy or personnel requirement, a Native American meets the Minimum Qualifications for such position and qualifies for employment in accordance with the remaining qualifications, criteria, policies and requirements of the Covered Employer, that individual shall be considered qualified for employment and shall be selected, as set forth in this Ordinance. Minimum Qualifications for a position approved by the Tribal Council are exempt from this provision.

(f) **Native American Preference Distinguishable from Points.** Native American preference does not mean that a Covered Employer gives points for being Native American. Native American preference means if there are two equally qualified applicants one Native American and one non-Native American, then the person who is Native American gets the job.

(g) **Hiring Hall Identification Requirements.** No Covered Employer shall employ anyone without first providing the TERO Office with no less than seventy-two (72) hours to locate and refer a qualified Tribal Member or Native American; provided that, the Tribal Council may provide for a period of less than 72 hours when required by business necessity.

(h) **Schedule of Positions.** At least twenty (20) days prior to commencing work on Tribal lands, all prospective Covered Employers, contractors and subcontractors shall identify key, regular and permanent employees that they intend to utilize, and a listing of all positions and the qualifications for these positions, that they intend to hire locally. The TERO Office, before the commencement of work, must approve the listing.

Section 7. CONTRACTOR PREFERENCE AND CERTIFICATION

(a) **Preference in Contracting.** This Ordinance requires Native American preference in contracting and subcontracting by any Contracting Entity on Tribal Lands. A Contracting Entity shall comply with the requirements of this Section 7 in awarding contracts for materials, equipment, work or services with the Tribe.

(b) **One Certification Only.** Where an entity qualifies under this Section 7 as a Certified Mashpee Wampanoag Entity and a Certified Native American Entity, the TERO Office shall certify that entity as a Certified Mashpee Wampanoag Entity only.

(c) **Criteria for a Certified Mashpee Wampanoag Entity.** In order to be certified as a Certified Mashpee Wampanoag Entity, an applicant must prove that it meets the following criteria:

- (1) Mashpee Wampanoag Owned. The applicant shall be Fifty One percent (51%) Unconditionally Owned by a Tribal Member and/or the Tribe.
- (2) Mashpee Wampanoag Controlled and License. The management of daily operations of the applicant shall be Unconditionally Controlled by Tribal Members and/or the Tribe. In addition, for those industries requiring professional licensing (i.e., public accountancy, law, professional engineering, insurance, etc.), the Tribal Members shall hold a license in such industry and individuals employed by the applicant shall hold any requisite license in such industry.
- (3) Prior Existence. The applicant must demonstrate that for at least one (1) year prior to application for certification, the applicant existed and actively operated as a business entity that was owned and controlled by a Tribal Member and/or the Tribe as defined in this Ordinance off Tribal Lands.

(d) **Criteria for a Certified Native American Entity.** In order to be certified as a Certified Native American Entity, an applicant must prove that it meets the following criteria:

- (1) Native American Owned. The applicant shall be Fifty One percent (51%) Unconditionally Owned by a Native American and/or an Indian tribe.
- (2) Native American Controlled and License. The management of daily operations of the applicant shall be Unconditionally Controlled by a Native American and/or an Indian Tribe. In addition, for those industries requiring professional licensing (i.e., public accountancy, law, professional engineering, insurance, etc.), the Native American shall hold a license in such industry and individuals employed by the applicant shall hold any requisite license in such industry.
- (3) Prior Existence. The applicant must demonstrate that for at least one (1) year prior to application for certification, the applicant existed and actively operated as a business entity that was owned and controlled by a Native American and/or an Indian tribe as defined in this Ordinance off Tribal Lands.

(e) **Certification Not Granted.** Certification shall not be granted if any of the conditions below exist:

- (1) The entity, a portion of the entity, or any key personnel of the entity was originally associated with a non-Native American owned business and did not contribute in any material way in terms of capital, expertise, equipment, or other business segment, by adding ownership or by merging with a Native American entity or by divesting ownership.
- (2) The experience, expertise, resources, and other skills, of the non-Native American owner are so much greater than those of the Native American that there is little sound business reason for the non-Native American owner to accept a junior role in the entity other than to take advantage of the Native American preference program.

(3) If the business of the entity has the following commonalities to an already Certified Mashpee Wampanoag Entity or Certified Native American Entity:

(i) serves the same purpose;

(ii) requires the same skills; and

(iii) is owned by one (1) or more owners of an already Certified Mashpee Wampanoag Entity or Certified Native American Entity.

(f) Priority of Contracting Preference; Disqualification Due to Conflict of Interest. Each Certified Mashpee Wampanoag Entity or Certified Native American Entity meeting the Minimum Qualifications for the contract shall be included on each bid list in its industry provided that such entity's vendor privileges have not been revoked and provided further that no conflict of interest exists. Each Certified Mashpee Wampanoag Entity or Certified Native American Entity that submits a Commercially Responsible Bid shall be given preference on each contract as set forth in Subsection (j) below. The order of preference shall be:

(1) Certified Mashpee Wampanoag Entities.

(2) Certified Native American Entities.

(g) Outstanding Ability or Unique Qualification. This Ordinance shall not apply to any contract that requires outstanding ability or unique qualification such that the Contracting Entity would risk likely financial damage or loss if contract was let to an entity unknown to the Contracting Entity. Outstanding ability or unique qualification shall be shown by, but not limited to, unique marketing skills, insurance and/or bonding requirements, special vendor relationship or product selection (e.g. food distributors used by chain restaurants or leasing space on Tribal Lands), and outstanding artistic skills such as film and photography.

(h) Prequalification. The Contracting Entity letting the bid shall pre-qualify Certified Mashpee Wampanoag Entities and Certified Native American Entities and other entities to bid on a contract to determine that the Minimum Qualifications to bid are met.

(i) List of Certified Native American Entities. The TERO Office shall maintain an updated list of all Certified Mashpee Wampanoag Entities and other Certified Native American Entities.

(j) Award of Contracts. The following shall govern the award of contracts:

(1) If one (1) or more Certified Mashpee Wampanoag Entities bid on a contract, a Certified Mashpee Wampanoag Entity shall be awarded the contract provided that a Certified Mashpee Wampanoag Entity submits the lowest Commercially Responsible Bid and is able to meet all insurance, bonding and other requirements imposed by the project;

- (2) In the event that one (1) or more Certified Mashpee Wampanoag Entities submit a bid and no Certified Mashpee Wampanoag Entity is selected to be awarded the contract, the Contracting Entity awarding the contract shall notify the TERO Office of such, at least five (5) days prior to the awarding of the contract to any entity that is not a Certified

Mashpee Wampanoag Entity. Such notification shall include the reasons that no Certified Mashpee Wampanoag Entity was selected;

- (3) If no Certified Mashpee Wampanoag Entity bids on or qualifies for a contract and one (1) or more Certified Native American Entities bid on the contract, a Certified Native American Entity shall be awarded the contract provided that the Certified Native American Entity submits the lowest Commercially Responsible Bid and is able to meet all insurance, bonding and other requirements imposed by the project;

- (4) In the event that no Certified Mashpee Wampanoag Entity bids, and one (1) or more Certified Native American Entities submit a bid and no Certified Native American Entity is selected to be awarded the contract, the Contracting Entity awarding the contract shall notify the TERO Office of such, at least five (5) days prior to the awarding of the contract to any entity that is not a Certified Native American Entity. The notification shall include the reasons that no Certified Native American Entity was selected; or

- (5) If a contract is for two hundred thousand dollars (\$200,000) or less, it shall be awarded to a Certified Mashpee Wampanoag Entity or a Certified Native American Entity provided such entity's proposal is no more than 10% higher than of the lowest

Commercially Responsible Bid. Any contract exceeding Two Hundred Thousand Dollars (\$200,000.00) shall be competitively awarded in accordance with the preference provisions of this Section 7.

(k) **Performance of Work.** Any Certified Mashpee Wampanoag Entity or Certified Native American Entity awarded a contract may not delegate work under the contract (e.g., tiered contracting) unless:

- (1) The Certified Mashpee Wampanoag Entity or Certified Native American Entity retains at least fifty percent (51%) of the work as measured by the dollar value of the work;
- (2) Such delegation is to an entity that is a Certified Mashpee Wampanoag Entity or Certified Native American Entity; or

- (3) The Certified Mashpee Wampanoag Entity or Certified Native American Entity, by the nature of the contract, is reasonably expected to delegate work as part of its normal contract responsibilities.
- (l) **Application for Certification.** An applicant for certification as a Certified Mashpee Wampanoag Entity or Certified Native American Entity shall submit a fully completed and executed application to the TERO Office on a form provided by the TERO Office, including supporting documents required by the TERO Office.
- (1) Within a period of sixty (60) days after the date of receipt of a fully completed and executed application, the TERO Office shall review such application and conduct any investigations necessary to make a determination on the application for certification pursuant to the TERO Office's rules and regulations.
- (2) When circumstances require, the TERO Office may extend the application process period by a reasonable additional period not to exceed sixty (60) days, upon written notification of such extension to the applicant by certified mail. Computation of the initial sixty (60) day processing period and any extension thereof shall be stayed while any request for additional information and/or documentation is outstanding.
- (m) **Change in Ownership or Control of Firm.** Each Certified Mashpee Wampanoag Entity and Certified Native American Entity shall promptly report to the TERO Office, in writing, any change in the ownership and/or control of the Certified Mashpee Wampanoag Entity or Certified Native American Entity, which report shall be delivered in any event within thirty (30) days from the date on which such change has occurred.
- (n) **Annual Report.** On or before April 30th of each year, each Certified Mashpee Wampanoag Entity and Certified Native American Entity shall submit to the TERO Office a complete annual report. Such annual report shall be on a form prescribed by the TERO Office. Such annual reports shall include such information (including supporting documentation) as the TERO Office requests to enable the TERO Office to determine whether the Certified Native American Entity is in compliance with this Ordinance and any rules and regulations promulgated pursuant to this Ordinance.
- (o) **Annual Review.** An annual review shall be conducted by the TERO Office to verify the status of a Certified Mashpee Wampanoag Entity or Certified Native American Entity to ensure that it is meeting all requirements of this Ordinance.
- (p) **No Liability; Technical Qualifications; Non-Intervention.**
- (1) If, after a review of information submitted and an evaluation of the criteria listed above, an entity is denied certification as a Certified Mashpee Wampanoag Entity or Certified Native American Entity, or its certification is suspended or revoked, none of the TERO Office, the Tribe, or any of its instrumentalities or entities shall be held

liable for the decision. The entity may continue to participate in the bidding process, however, the entity may not use the designation and/or qualify for any preference as a Certified Mashpee Wampanoag Entity or Certified Native American Entity. The decision of the TERO Office regarding certification or suspension or revocation of certification shall be final, except for appeals as authorized by Section 12 of this Ordinance.

- (2) Neither the Tribe nor its instrumentalities or entities shall be liable for any losses or damages, whether direct or indirect, incurred by a Contracting Entity, Certified Mashpee Wampanoag Entity or Certified Native American Entity, as a result of failure by a Certified Mashpee Wampanoag Entity or a Certified Native American Entity to perform under a contract.
- (3) Any Contracting Entity awarding a contract shall have the discretion to determine the technical qualifications required by the contract. If a Certified Mashpee Wampanoag Entity or a Certified Native American Entity is disqualified on the grounds of technical qualifications and the Certified Mashpee Wampanoag Entity or Certified Native American Entity reasonably believes that its disqualification is the result of an improper effort by the Contracting Entity to circumvent the preference requirements under this Ordinance, such aggrieved Certified Mashpee Wampanoag Entity or Certified Native American Entity may file a notice with the TERO Office.
- (4) Once a Contracting Entity enters into a contract with a Certified Mashpee Wampanoag Entity or a Certified Native American Entity, the TERO Office shall not intervene in any way in the relationship between the parties unless the Certified Mashpee Wampanoag Entity or Certified Native American Entity demonstrates that action taken against it is intended to circumvent the requirements of this Ordinance.

Section 8. ADMINISTRATIVE FEES

- (a) **Administrative Fees shall be Imposed.** The TERO Office shall establish guidelines to determine the amounts for all fees and impose such fees on Covered Employers and Contracting Entities to provide revenue for the general operation of the TERO Office and the TERO Office's workforce training, education, and counseling programs. The fees established for construction contracts shall be no more than four percent (4%) of the total contracted work or sales. The Fee Schedules shall be made available by the TERO Office, and explained to Contracting Entities by TERO at Pre-Bid conferences, telephone contacts or through in-person meetings.
- (b) **Advertisement of Fees.** Information regarding the fees imposed pursuant to this Section shall be advertised by the TERO Office on the Tribe's website and readily available to the public by other means.

(c) **Collection and Use of Fees.** The TERO Office will be responsible for the collection of TERO fees and such fees will be sent directly to the TERO Office, which the TERO Office shall then provide to the Mashpee Wampanoag Tribe Finance Department. Fees are to be made payable to “Mashpee Wampanoag Tribe TERO.” The fees shall be used pursuant to Section 8(a) of this Ordinance. Amounts collected in excess of the amount required to operate the TERO Office’s workforce training and education programs will be used for other TERO Office programs and services.

(d) **Payments.** The TERO Office shall be responsible for ensuring that TERO fees are paid as required under this Section.

Section 9. CONFIDENTIALITY

(a) **Confidentiality.** All written materials maintained on file in the TERO Office relating to any Covered Employer, Contracting Entity, Certified Mashpee Wampanoag Entity and/or Certified Native American Entity shall remain strictly confidential unless such information is generally available to the public or is required to be disclosed by applicable law. Such written material shall include, but is not limited to, Native American preference certification applications and accompanying documentation, financial records, corporate and other business organic documents, resumes, and documentation from financial institutions.

(b) **Limited Access to Information.** No persons other than the TERO Officers and the TERO Office staff members, the Tribe’s legal counsel, and the Tribal Council shall have access to any such written materials or other information maintained on file with the TERO Office without an order from the Tribal Court, provided, however, that:

- (1) After submitting a written request, an authorized representative or agent of a Covered Employer or Contracting Entity shall have the right to secure access only to the particular file so maintained on such Covered Employer or Contracting Entity after seven (7) calendar days of the receipt of such request or sooner if authorized by the TERO Office, for the purpose of review and/or photostatic copying within the TERO Office offices;
- (2) No file or any written material maintained therein shall be removed from the TERO Office offices by any such representative or agent of a Covered Employer or Contracting Entity; and
- (3) The authorized representative or agent of a Covered Employer or Contracting Entity and any other person having access to such information hereunder shall recognize and comply with such confidentiality and shall not disseminate or disclose, either orally or in writing, to any person any such information.

Section 10. ON-SITE COMPLIANCE INSPECTIONS

The TERO Office may conduct periodic on-site inspections at any time during the performance of work or operation of the business of any Covered Employer or Contracting Entity in order to monitor compliance by such Covered Employer or Contracting Entity with the requirements set forth in this Ordinance, and in the rules, regulations, and/or guidelines promulgated pursuant to this Ordinance, or any other Tribal law. During the period of any such on-site inspection, the TERO Officer, his or her designee, or person(s) under his or her direction may speak with any contractor, subcontractor, or employee working on the site, so long as such conversation does not interfere with the performance of work or operation of the business. The TERO Office may also inspect any and all records and other written material maintained on-site by a Covered Employer or Contracting Entity in order to determine compliance with this Ordinance. Any and all such written materials so inspected shall be subject to confidentiality requirements as set forth in Section 9 of this Ordinance.

Section 11. SUSPENSION AND REVOCATION OF CERTIFICATION AS A CERTIFIED MASHPEE WAMPANOAG ENTITY OR CERTIFIED NATIVE AMERICAN ENTITY.

(a) **Action by the TERO Office.** Upon the basis of information provided in a notice of change of ownership or the annual report, upon the basis of a substantiated written notice filed by an interested party, or upon the basis of its own initiative, the TERO Office may determine that a Certified Mashpee Wampanoag Entity or Certified Native American Entity is in violation of this Ordinance and suspend or revoke the certification of an entity and terminate the participation of the entity in the Tribe's Native American preference program. If the TERO Office finds that a certification should be suspended or revoked, it shall notify the affected entity by certified mail of the proposed action and offer it an opportunity to appear and be heard before the TERO Office pursuant to Section 12 of this Ordinance. If the affected entity does not request an opportunity to be heard within ten (10) work days after the TERO Office's mailing of such notice, the TERO Office's action shall be implemented and shall be final. If the TERO Office finds, in its sole discretion, that the suspension or revocation must be effective immediately in order to protect the interests of the Tribe, it may summarily suspend or revoke a certification. When the TERO Office summarily suspends or revokes a certification, it shall notify the affected entity by certified mail of its action. The affected entity shall have ten (10) work days after the TERO Office's mailing of such notice to request an opportunity to appear and be heard before the TERO Office pursuant to Section 12 of this Ordinance.

(b) **Suspension/Revocation.** Grounds for suspension or revocation of certification as a Certified Mashpee Wampanoag Entity or Certified Native American Entity and termination of participation in the Tribe's Native American preference program may include, but are not limited to:

- (1) Criminal conviction or civil judgment for an offense that indicates a lack of business integrity or honesty, including, but not limited to, fraud in obtaining or performing any contract;

- (2) Serious violation of the terms of a contract, including, but not limited to:
 - (i) A willful failure to perform,
 - (ii) A willful violation of applicable law,
 - (iii) A willful breach of a confidentiality agreement;
- (3) Failure to pay substantial and/or numerous debts to any entity;
- (4) Failure to comply with the requirements in this Ordinance, including failure to provide required reports or requested documentation;
- (5) Failure to comply with lien waiver or insurance or bonding requirements;
- (6) Submission of false information in the entity's application regardless of whether the correct information would have caused the entity to be denied certification, and regardless of whether the correct information is given to the TERO Office in accompanying documents or by other means;
- (7) Failure by the entity for any reason, including the resignation or removal of the individual upon whom Native American preference is based, to maintain requisite ownership and control by a Native American;
- (8) Failure by the entity to disclose to the TERO Office the extent to which the nonNative American persons participate in the management of the entity's business;
- (9) Cessation of business operations by the entity;
- (10) A pattern of inadequate performance by the entity of awarded contracts;
- (11) Failure by the entity to obtain and maintain all required permits, licenses, and charters, including suspension or revocation of any professional license required to operate the business; or
- (12) Willful violations by an entity, or any of its principals, of any applicable laws.

Section 12. NOTICE OF NON-COMPLIANCE AND TERO OFFICE HEARING

- (a) **Notice.** The TERO Office, on its own initiative or upon a written notice filed by an interested party, may investigate an allegation of non-compliance with this Ordinance by a Covered Employer, a Contracting Entity, a Certified Mashpee Wampanoag Entity or a Certified Native American Entity. If the TERO Office finds that a violation of this

Ordinance has occurred, it shall notify the affected entity by certified mail, return receipt requested, of the proposed sanction(s) to be imposed by the TERO Office and offer the affected entity an opportunity to appear and be heard before the TERO Office. If the affected entity does not request an opportunity to appear and be heard before the TERO Office within ten (10) days after the TERO Office's mailing of such notice, the TERO Office's determination and proposed sanction(s) shall be implemented.

(b) TERO Office Hearing.

- (1) Upon its receipt of such request for hearing, the TERO Office shall forthwith direct written notice of such hearing to: the respondent; the complainant; the TERO Officers; and any and all other identified interested persons. Such notice shall set forth:
 - (A) The date, time and location of the hearing;
 - (B) The nature of the hearing;
 - (C) The right to be present at and participate in the hearing; and
 - (D) The right to present witnesses and documentary evidence and to cross-examine witnesses.
- (2) At the hearing before the TERO Office, the following rules of procedure shall be recognized and adhered to:
 - (A) Each notified interested person shall have the right to be present at and participate in the hearing. Other persons claiming to be interested in the matter may petition the TERO Office to participate in the hearing;
 - (B) Each such interested person shall have the right to present relevant sworn testimony and documentary evidence;
 - (C) The Chairperson or another TERO Officer appointed by the Chairperson or the Director of the TERO Office shall preside over the proceedings;
 - (D) The TERO Office and all other parties may have the advice and assistance at the hearing of legal counsel;
 - (E) Neither the formal rules of evidence nor any formal rules of procedure need to be observed, but the TERO Office shall proceed to ascertain the facts inherent in the matter in a reasonable and orderly manner;

- (F) A complete recording of the proceedings shall be made and maintained by the TERO Office. A party may request a transcription of the recording which cost shall be borne by the requestor;
 - (G) The proceedings may be adjourned, postponed, or continued at the discretion of the TERO Office, should it deem such action advisable; and
 - (H) Any matter to be proven must be done to the satisfaction of the TERO Office by a preponderance of the evidence, unless otherwise provided in this Ordinance.
- (3) At the termination of the hearing, the TERO Office, within its discretion, may either render an immediate determination or take the matter under advisement and issue its decision no later than sixty (60) days from the date of the hearing. In its decision, the TERO Office shall set forth the specific ground(s) for its decision and shall send by certified mail a copy of such decision to each notified interested person who was present at and participated in the hearing.
- (c) **Sanctions.** The TERO Office may impose any of the following sanctions or a combination thereof, upon a decision that a Covered Employer or Contracting Entity failed to comply with this Ordinance, or any rules, regulations, and guidelines adopted by the TERO Office:
- (1) levy of a civil monetary fine up to a maximum of one thousand dollars (\$1,000) per violation, per day for noncompliance;
 - (2) suspend, halt, or terminate the conduct of business on Tribal Lands by the Covered Employer or Contracting Entity;
 - (3) prohibit future business activities by the Covered Employer or Contracting Entity on Tribal Lands for a definite or indefinite period of time;
 - (4) order monetary or other relief necessary to compensate the Tribe or any worker(s) for damages resulting from the noncompliance;
 - (5) order requiring employment, promotion, or training of Native Americans injured by the violation;
 - (6) require termination from employment of any individual(s) hired in contravention to the requirements relative to Native American Preference under this Ordinance;
 - (7) require immediate rescission of any contract(s) and/or subcontracts entered into by the Covered Employer or Contracting Entity in contravention of any TERO requirements relative to Indian Preference in contracting and subcontracting;

- (8) award reasonable back pay by the Covered Employer or Contracting Entity to any Native American individual(s) adversely affected by the non-compliance;
- (9) require a Covered Employer or Contracting Entity to implement changes in its policies, procedures, and/or business practices to be in compliance with the Ordinance; or
- (10) order such other relief as the TERO Office determines is fair and reasonable.

(d) **Appeal to the Tribal Court.** As a limited exception to Section 16 of this Ordinance, a person who is aggrieved by a final decision of the TERO Office may appeal to the Tribal Court.

Section 13. RETALIATION

A Covered Employer shall not retaliate against any employee who files a notice alleging violation of this Ordinance with the TERO Office or who participates in an investigation by the TERO Office. A Contracting Entity shall not retaliate against any contractor or subcontractor who files a notice alleging violation of this Ordinance with the TERO Office or who participates in any investigation by the TERO Office. A Covered Employer or Contracting Entity who violates this Section 13 may be sanctioned pursuant to this Ordinance at the discretion of the TERO Office.

Section 14. RECOGNITION OF FREEDOM OF RELIGION

A Covered Employer shall make any reasonable modifications in the operation of its business for the purpose of accommodating the religious beliefs, traditions, and practices of Native American employees in accordance with any relevant guidelines of the Tribe.

Section 15. RULES AND REGULATIONS

(a) **Promulgation of Rules and Regulations.** The TERO Office may promulgate rules and regulations and may establish guidelines to implement any of the provisions of this Ordinance. Rules and regulations shall be promulgated as follows:

- (1) The TERO Office shall give notice of the proposed rules and regulations by posting proposed rules and regulations in the Tribal Council Office and on the official Tribal website at least two (2) weeks prior to the rule's effective date;
- (2) Such notice shall state the name, address, phone number, and other appropriate information to allow Tribal Members and other interested persons to submit comments, as well as the time period in which comments must be received, which shall be not less than two (2) weeks;

- (3) The TERO Office shall consider all written comments and shall adopt final rules and regulations, which it shall then forward to the Tribal Council for approval;
- (4) The TERO Office may hold hearings if the Chairperson deems public hearings are in the best interests of the Tribe and Tribal Members;
- (5) If the rules and regulations are approved by the Tribal Council, they shall then be published in final form. The TERO Office shall send copies of the final rules and regulations to all known Covered Employers, Contracting Entities, Certified Mashpee Wampanoag Entities and Certified Native American Entities, as applicable; and
- (6) The final rules and regulations shall state the date on which they shall take effect.

(b) **Bid Requirement.** All bid announcements issued by any Contracting Entity shall contain a statement that the successful bidder shall be obligated to comply with this Ordinance and all rules and regulations of the TERO Office.

Section 16. SOVEREIGN IMMUNITY

The TERO Office is an instrumentality of the Tribe and entitled to all of the privileges and immunities of the Tribe, including sovereign immunity from suit. Except for the limited waiver provided in Section 12(c) of this Ordinance, nothing herein shall be construed to constitute a waiver of the sovereign immunity of the Tribe or the TERO Office from suit. Nothing herein shall be construed to allow for an award of monetary damages.

Section 17. REPEALER

All ordinances or parts of ordinances inconsistent with this Ordinance are repealed.

Section 18. SEVERABILITY

If any provision of the Ordinance or its application to any person or circumstance is held invalid, the remainder shall continue to be in full force and effect to the maximum extent possible that can be given effect without the invalid provision or application.

Section 19. EFFECTIVE DATE

This Ordinance shall take immediate effect and be enforced from and after its passage and publication according to Tribal law.

Passed by the Mashpee Wampanoag Tribal Council on February 8th, 2012.

Legislative History

Enacted February 8th, 2012
Amended March 19th, 2014