

United Defense

November 13, 2001

VIA -FACSIMILE - 703-602-0350

Ma. Angelina Moy
OUSD (AT&L) DP (DAR)
IMD 3C132
3082 Defense Pentagon
Washington, DC 20301-3062

Re: **DFARS Case 2000-024**

Dear Ms. Moy:

This letter constitutes the **comments** of United Defense, L.P. on the interim regulations published at 66 *Federal Register* 47110-2 to implement a legislative change to the 5% Indian Incentive **Payment** Program. As part of the FY 2001 Department of Defense (DoD) Appropriations Act, Congress enacted section 8022 to clarify that **DoD contractors**, regardless of subcontracting tier, **may** apply for an incentive payment of 5% of the **total value of** subcontract work awarded to an **Indian** organization or an **Indian-owned** economic enterprise. The outcome of this **rulemaking** to implement this statutory change is critically important to United Defense's efforts to provide subcontracting opportunities in **Indian** Country.

Last summer, we **submitted** a request for over \$734,000 as an incentive **payment of 5%** of the amount **UDLP paid** through FY2000 to Sioux **Manufacturing**, a qualified Indian-owned economic **enterprise** subcontractor. Our prime contractor, Lockheed **Martin**, submitted our request to the Navy. On September 7, 2001, we received the Navy's **rejection** of our request based on FAR 52.226-1(a), although **the OUSD (A&T) SADBUD did acknowledge** that action was pending on eligibility for such a **subtier contractor's** incentive payment. The implementing **DFARS**, long overdue, were published less than a week later.

We urge the Defense Acquisition Regulations Council to publish the final rule as **soon** as possible, with the **few** changes we urge **below**.

Regulations Must Require Use of the Indian Incentive Payment Clause

The proposed language for revised **DFAR 226.104** properly **directs Contracting** Officers to insert in solicitations the new **Indian Incentive Payment clause 252.226-7001**. We urge **DoD** to get this new **regulation** out as quickly and as broadly as possible so that there is no **more** confusion about who is eligible and how the program works.

The Regulation Must Ensure Participation by All Subcontracting Tiers

To date, **DoD** has **not** allowed incentive payments to lower-tier contractors under **DoD prime contracts** (e.g., **first-** and second-tier subcontractors) **who subcontract** with Indian-owned firms, although **DoD** has acknowledged that the law has always permitted such payments. The interim rule finally implements the process whereby the **Contracting** Officer can determine whether the contract work was actually performed by a lower-tier Indian owned economic **enterprise** (e.g., by facially examining **the prime contract number that appears on the subcontract and the subcontractor's invoices**, reviewing and comparing the lower-tier **subcontract statements of work and deliverables** against the prime contract's, as well as **the related flow-down statements of work in the subcontracts**). The interim **regulations** give **effect** to this review and accountability **process by** making the current prime contractor' Indian Incentive Payment claims **process** applicable to the lower-tier **DoD** contractors and

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requiring **the prime contractors** to “sponsor” or **acknowledge the** validity of the claim **that** the work performed and payments made **were** done under the **DoD** prime contract. Such sponsorship also will make clear to **DoD** to whom the monies ultimately will be paid – namely, **ultimately to** the lower-tier **DoD** contractor **that** subcontracts for the work to the qualifying Indian **organization** [as is **contemplated** by the Indian Incentive Payment statute).

Most important now is to change the **final rule** to **ensure that** prime contractors **will** sponsor claims for incentive payments from eligible **subtier** contractors. As the statutory basis for **the** incentive payment contains mandatory **language, the** complementing regulations **also must** go as far as possible in directing the **prime** contractor to **act on the subtier** contractor’s behalf. Therefore, **we urge that the** clause in **252.7001** be amended in subsection (e)(5) **to read as follows:**

“(5) If the Contractor receives an adjustment request from a subcontractor, and the Contractor believes **that the request** is made in good faith and is accurate and complete to **the best** of the Contractor’s knowledge and belief, **the** Contractor shall submit the request to the **Contracting Officer**. If the **Contractor** receives an adjustment on behalf of a subcontractor, the Contractor is obligated to pay the subcontractor The adjustment.”

The **above** change is essential. Please deliberate quickly, and publish the final rule before the end of this year.

Thank you for your consideration of our comments.

Sincerely,



Dana Carson
Manager, **Contracts and Estimating**