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November 13, 2001

Ms. Angelina Moy
OUSD (AT&L) DP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 203014062

Re: FARS Case 99-301 **VIA -FACSIMILE - 703-602-0350**

Dear Ms. Moy:

The National Center for **American** Indian, Enterprise Development **submit** these comments regarding proposed regulations published at 66 **Federal Register** 47110-Z to implement the change to the 5% Indian Incentive Payment Program enacted as part of the **FY 2001** Department of Defense (**DoD**) Appropriations Act. Section 8022 of this **Act clarified that contractors** at any 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,

We urge that the **final** regulations implementing section 8022 be strengthened to ensure that prime contractors **shall**, to the **maximum extent**, sponsor the incentive payment claims submitted to **them** by lower-tier **DoD** contractors possible who subconacr to Indian **organizations** or Indian-owned **economic enterprises**. As described below, we believe that ordinary contract **administration vehicles** can ensure proper accounting for those **payments** made.

First, the Contracting **Officer** can determine whether the work performed by a lower-tier Indian owned economic enterprise "carries out the contract" by facially examining the prime contract number that appears on the subcontract and the subcontractor's invoices, reviewing and comparing the lower-tier **subcontract statement(s)** of work and deliverables against the prime contract's, as well as the related **flow-down** statements of work in the subcontracts.

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A quick technical review by the same **Contracting Officer** or **Contracting Officer's Technical Representative** also would show whether other contract **requirements** (such as **the Indian Incentive Payment Clause**) have been flowed **down** to the **subcontractor** that is claiming eligibility for an Indian Incentive Payment. The interim regulations appear to give effect to such a review **and** accountability process by making the current prime contractor Indian Incentive Payment **claims** process applicable to **the** lower-tier **DoD** contractors and requiring the prime contractors to "sponsor" the claim thus 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 (i.e., the lower-tier **DoD** contractor that subcontracts for **the** work to the **qualifying Indian** organization).

Second, the amount of **the** 5% Indian Incentive Payment can be determined by multiplying by 5% the **amounts that** have been paid to the lower-tier subcontractor. Document~~&~~on of **this** amount can be achieved through separate Indian Incentive payment invoices submitted to bob by the contractor, supported by payment **documentation (e.g., receiving and acceptance documentation for the DoD prime contract-related work performed by the Indian organization, payment records showing that such invoices have been properly paid, etc.)**. With **this** documentation, **the** risk of abuse will be minimized, and. in any case will be no different **than** in any **DoD relationship with** any contractor or subcontractor.

Proposed Change

Finally, we urge a change in 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 implementing regulations **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."

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As President of this Indian procurement technical assistance organization **that** works to promote government contracting, economic development and job **opportunities** in Indian country, I am frustrated that it has taken over a year to develop **DoD** regulations to clarify that the 5% Indian Incentive Payment Program is available to **qualifying subtier DoD** contractors. Therefore, I **urge** prompt issuance **of** final regulations and **guidance** that explicitly will make **the Indian** Incentive Payment Program available to **all** subcontractors - **regardless** of **their** subcontracting tier - who subcontract **DoD** work to Indian firms.

Thank you for **your** consideration of the **comments** of the National Center For American Indian Enterprise Development,

Sincerely,

Kenneth Robbins
President

Cc: NCAIED Board of Directors