



NATIONAL CONGRESS OF AMERICAN INDIANS

November 12, 2001

Defense Acquisition Regulations. Council

Attn: Ms. Angelina Moy

FAX: (703) 602-0350

3062 Defense Pentagon

Washington, DC 20301-3062

Re: Public Comments [DFARS Case 2000-D024]

dear Ms. Moy:

The National Congress of American Indians, the oldest, largest, **and** most representative tribal organization in the United States, would like to take this opportunity to offer comments on DFARS Case 200-D024. Rules *on* contracting have large effects in Indian Country, especially those relating directly to Indian Incentive Programs. The Indian Financing Act of 1974¹ established the Indian Incentive Program to aid the economic development of American Indian and Alaska Native communities. The Indian Incentive Program provides additional compensation to Federal contractors when these contractors use Indian organizations or Indian-owned enterprises as subcontractors or suppliers.² Although the Indian Incentive Program has historically been underutilized, an increasing number of prime contractors have recently been making use of the program and, consequently, an increasing number of Indian organizations and Indian-owned enterprises have been benefiting from the economic opportunities thereby made available.

Recognizing the growing importance of this program to the achievement of its goal of increasing economic development in American Indian and Alaska Native communities, Congress has recently taken several steps to support the Indian Incentive Program and to encourage its utilization. In the 2000 and 2001 Department of Defense Appropriations Act, Congress appropriated \$8 million for the Indian Incentive Program. It also required that the program be made available to subcontractors as well as prime contractors. NCAI recognizes the Department's commitment to the Program, and supports the interim rule that extends benefits to subcontractors.³ However, we must take issue with previous actions by **the**

¹ 25 U.S.C. § 1451 *et seq.*

² See 25 U.S.C. § 1544 (1999).

³ 66 Fed. Reg. 176. Page 471 10.

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DAR Council. We believe a recent decision by the DAR Council undermines the Congress' support of the vital program. The decision that the Indian Incentive Program contract clause" should not be used in solicitations and contracts for commercial items.⁵

NCAI strongly objects to the DAR Council's decision to bar the use of the Indian Incentive Program clause in contracts for commercial items. The Council's decision to exclude Indian manufactured or supplied commercial items from the Indian Incentive Program effectively limits the Indian Incentive Program to contracts and subcontracts for supplies or services that exceed the simplified acquisition threshold of \$100,000.00 and for products that are unique to the Department of Defense. Few, if any, Indian organizations and Indian-owned enterprises are able to compete in these arenas, and, therefore, few will be able to take advantage of this important program,

We have taken this opportunity to address the DAR Council's prior decision to limit the Indian Incentive Program, because the DAR Council gave interested parties no opportunity to comment on this limitation prior to the promulgation of the final rule." The proposed rule, published on November 18, 19'99,' *explicitly permitted* the use of the Indian Incentive Program clause in commercial contracts under FAR Part 12 at the discretion of the contracting officer, if there were subcontracting opportunities for Indian organizations or Indian-owned enterprises. The final rule, published on April 13, 2000,⁸ does not allow for the Indian Incentive Program to be used in commercial contracts, thereby seriously restricting the application of the Indian Incentive Program. This limitation was added to the final rule without notice and without an appropriate opportunity for comment from affected parties, including tribal governments.

In conclusion, NCAI believes that the DAR Council's decision to place limitations on the Indian Incentive Program was wrong. And while we agree that the incentive program should be expanded to include subcontractors, extending the limitations to subcontractors at any tier will further negatively impact the program's success. We strongly urge the Council to remove the FAR Part 12 commercial item exclusion from DFARS 52.226-104 and the interim rule DFARS Case 2000-D024. If you have any questions, please contact Adam Bailey on the NCAI Staff.

Sincerely,



Susan Masten
President, NCAI

⁴ FAR 52.226-1, Utilization of Indian Organizations and Indian-Owned Economic Enterprises

⁵ FAR Part: 12 procedures

⁶ The DAR Council's failure to provide an opportunity to comment on the proposed change violates the Administrative Procedure Act. See Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency, 227 U.S. App. D.C. 201 (D.C. Cir. 1983).

⁷ 64 Fed Reg. 222. Page 63003.

⁸ 65 Fed Reg. 72. Page 19858.