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Gene Bruno, *President*
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Colonel Barry Wilson, Director
Defense Acquisition Regulations Council
Crystal Square 4, Suite 200A
Arlington, VA 22202-3402

Dear Colonel Wilson:

Thank you for allowing us, as a Native American company (or Tribe) to comment on the DEARS Case 2000-DO24 interim rule with respect to Congress's Indian Incentive Program. While the interim rule has been constructed in a logical and professional manner, as a Native American owned company we remain very concerned with respect to the Commercial Item exclusion in section (f)(1), as it may appear in the "final rule."

On April 13, 2001 the DAR Council issued its final rule with respect to DFARS 52.226-1 04. Based on DFARS 52.226- 104, the DAR Council has excluded Indian manufactured and/or supplied Commercial Items from Congress's Indian Incentive Program. Specifically, any item supplied or manufactured by an Indian-owned Economic Enterprise that is subject to Part 12 commercial supply procedures has been eliminated from the Indian Incentive Program. While no explanation, whatsoever, or no legal rationale for the Indian Commercial Item exclusion was ever offered by the DAR Council, we feel certain that the Council must have some compelling legal reason to eliminate **such** a significant number of **DoD** contracts from the Indian Financing Act of 1974, specifically 25 USC 1544 as enacted by Congress.

Upon our review of 25 USC 1544, we have not been able to determine any reason for the DAR Council to eliminate all Commercial Items from the Indian Incentive Program. Provided below is Title 25, Section 1544 of the United States Code in its' entirety:

25 USC 1544. Additional compensation to contractors of a Federal agency

*Notwithstanding any other provision of law, a contractor of a Federal agency under any Act of Congress may be allowed an additional amount of compensation equal to 5 percent of the amount paid, or to be paid, to a subcontractor or supplier, in carrying out the contract if such subcontractor or supplier is an Indian organization or Indian-owned economic enterprise as **defined** in this chapter.*

Please note that nowhere in this section of the United States Code does Congress provide for the exclusion of Indian Commercial Items from this public law. While there may exist a compelling legal reason known to the DAR Council for the Indian Commercial Item exclusion, we are concerned with respect to Department of Defense Directive 5000.1, as it relates to the Indian Incentive Program. On October 23, 2000, the Under Secretary of Defense for Acquisition Technology and Logistics issued **DoD** Directive 5000.1. Based on **DoD** Directive 5000.1, the Under Secretary of Defense AT&L ordered all Contracting Officers, to give preference for the acquisition of Commercial Items, and to stop purchasing non-commercial items.

To enforce **DoD** Directive 5000.1, the Under Secretary of Defense AT&L issued a memorandum on January 5, 2001 ordering all Contracting Officers, to the maximum extent possible, to only purchase Commercial Items that meet Part 12 Commercial Item procedures. Based on the fact that all Indian Commercial Items subject to Part 12 procedures have been excluded by the DAR Council from Congress's Indian Incentive Program, and the fact that the Under Secretary of Defense AT&L issued **DoD** Directive 5000.1, as well as this important memo, which requires the purchase of Commercial Items to the maximum extent possible, the DAR Council and the Under Secretary of Defense AT&L have unintentionally eliminated the Department of Defense from the Indian Incentive Program, 25 USC 1544.

As a result of these conflicting orders and rules issued by **DoD**, the Indian Incentive Program has been completely dismantled. The fact that the Under Secretary of Defense AT&L has ordered all Contracting Officers to only purchase items subject to Part 12 Procedures, and the fact that the DAR Council has eliminated Indian items that are subject to Part 12 procedures **from** the Indian Incentive Program, leaves no products that can be supplied by Indian's that qualify for 25 USC 1544. To make this situation worse, we understand the DAR Council is in the process of implementing a new DFARS rule to reclassify all service contracts under \$5 million dollars, as Commercial Item contracts subject to Part 12 procedures. Reclassifying all service contracts, as Commercial Item contracts will also eliminate all **DoD** service contracts from Congress's Indian Incentive Program.

In addition to the reclassification of all **DoD** service contracts as Commercial Item contracts, the FAR and DAR Council's have proposed to reclassify all construction contracts, as Commercial Item contracts subject to Part 12 procedures. Once all construction contracts are subject to Part 12 procedures, they too will be eliminated from Congress's Indian Incentive Program. Once all **DoD** Commercial Item contracts, all service contracts under \$5 million, and all constructions contracts are subject to Part 12 procedures, there will be no contracts that will qualify for Congress's Indian Incentive Program. As a result, Title 25, Section 1544 of the United States Code will have been completely dismantled by the Office of the Under Secretary of Defense AT&L and the DAR Council.

We respectfully appeal to you and the DAR Council to remove the Part 12 Commercial Supply exclusion from DFARS 52.226-104 and the interim rule DFARS Case **2000-D024**. We do not believe that it was the intent of the men and women representing the DAR Council and the Under Secretary of Defense AT&L to dismantle Congress's Indian Incentive Program. We do not believe that the DAR Council would purposely interfere with Congress's privilege as set forth in Article 1, Section 8, Clauses 1 and 3 of the United States Constitution to "regulate Commerce with the Indian Tribes" and the Federal Government. We hope that these actions were merely an oversight, and that these actions will be corrected once these public comments are reviewed by the DAR Council, the Under Secretary of Defense AT&L, and the Office of Management and Budget.

Respectfully yours,



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cc: Attn: Angelina Moy, DAR Council
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