



THE NAVAJO NATION

Kelsey A Begaye, President

Taylor McKenzie, M.D., Vice-President



November 9, 2001

Defense Acquisition Regulations Council
Attn: Ms. Angelina Moy
OUSD (AT&L) DP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

Re: Public Comments [DFARS Case 2000-D024]

Dear Ms. Moy:

The Indian Financing Act of 1974, 25 U.S.C. § 145 et seq., 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 (see, 25 U.S.C. § 1544 (1999)). Recently, the Indian Incentive Program has experienced or is experiencing an increasing number of prime contractors that are making use of the program and consequently, an increasing number of Indian organizations and Indian-owned enterprises have benefited from the increased economic opportunities.

Congress recognizes the growing importance of this program and its goal to increase economic development in American Indian and Alaska Native communities. Recently, Congress has taken several steps to support the Indian Incentive Program and to encourage its use. In the 2000 and 2001 Department of Defense Appropriations Act, Congress appropriated \$8 million for the Indian Incentive Program. Congress also required that the program be made available to subcontractors as well as prime contractors. Congress' support and original intent of this vital program has been undermined by the Defense Acquisition Regulation (DAR) Council's recent decision that the Indian Incentive Program contract clause (FAR 52.226-1, Utilization of Indian Organizations and Indian-Owned Economic Enterprises) should not be used in solicitations and contracts for commercial items (FAR Part 12 procedures).

The Navajo Nation 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 only 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. There are few, if any, Indian organizations and Indian-owned enterprises able to compete in these arenas and, therefore, few will be able to take advantage of this important program.

Letter to Defense Acquisition Regulations Council

Re: Public Comments [DFARS Case 2000-D024

November 9, 2001

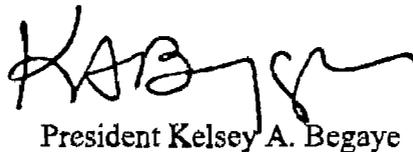
Page 2

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.¹ The proposed rule, published on November 18, 1999, 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, 2001, 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 effected parties, including the Navajo Nation and tribal governments.

Thus, the DAR Council's decision to place limitations on the Indian Incentive Program was incorrect. The DAR Council's decision on the interim rule to expand these limitations to subcontractors at any tier further negatively impacts the program's success. The Navajo Nation strongly urges the Council to remove the Federal Acquisition Regulation (FAR) Part 12 commercial item exclusion from the Defense Federal Acquisition Regulation Supplement (DFARS) 52.226-104 and the interim rule DFARS Case 2000-D024.

Sincerely,

THE NAVAJO NATION



President Kelsey A. Begaye

cc: Derrick Watchman, Chief of Staff
Office of the President and Vice President

Ed Richards, Executive Director
Navajo Nation Division of Economic Development

¹ 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).