



KONIAG
INCORPORATED

October 25, 2010

VIA EMAIL: tribal-consultation@omb.eop.gov

General Services Administration
FAR Secretariat (MVPR)
1800 F Street NW Room 4041
Washington, DC 20405

RE: Consultation Comments
FAR Case 2009-038; Docket 2010-0095; Sequence 1

Dear Sir/Madam:

I. INTRODUCTION

Koniag Incorporated ("Koniag") is pleased to submit these comments in response to the Federal Acquisition Regulatory Council's ("FAR Council") August 31, 2010 notice in the Federal Register, in connection with the tribal consultation process for the development of proposed regulations to implement Section 811 of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84 ("Section 811").

Koniag, one of 13 regional Alaska Native corporations established under the terms of the 1971 Alaska Native Claims Settlement Act ("ANCSA"), through its business arm, wholly owned subsidiary Koniag Development Corporation ("KDC"), is investing in and partnering with companies and in real estate holdings, which demonstrate a high potential for growth and return. KDC's family of companies share a high potential for success and a financially sound operating environment.¹

KDC takes pride in the market diversity of its suite of subsidiaries, which offer a cross-section of technical services and products while providing stability to the KDC portfolio. Specifically, KDC's companies provide services which include cultural and natural resource assessment, fluid reprocessing technology, security, telecom asset management, logistics, IT services, GSA schedule consulting, and government contract marketing. Our products range from highly-technical "how to" manuals for the U.S. Armed Forces to telecommunication management software and composite aircraft parts. Many of Koniag's companies have gained certification under the Small Business Administration's ("SBA") 8(a) Program, and through the 8(a) Program, have become successful commercial enterprises, delivering both jobs and dividends to its shareholders.

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As Congress recognized when it amended the Small Business Act to allow Native-owned firms to participate in the 8(a) Program, unlike 8(a) firms owned by individual entrepreneurs, ANCs like Koniag have obligations to an entire community of Native people, and thus, need to pursue larger contracts than individual 8(a) owners. Koniag's 8(a) companies have been able to meet these obligations in large part due to their ability to receive 8(a) sole-source awards in larger dollar amounts than businesses owned by individuals.

Sole-source awards have enabled many small and disadvantaged Native-owned businesses, like Koniag's 8(a) companies, to combat the difficulties they face in entering the federal market. Such difficulties include a lack of resources to engage in costly business development and proposal preparation, which can cost hundreds of thousands of dollars, as well as the inability to compete against larger contractors which have established relationships with government customers and possess the capital and capabilities to dominate the federal procurement market. Without sole-source contracts, many small disadvantaged businesses would not succeed and thrive.

More importantly, earnings associated with sole-source awards have allowed Tribes and Alaska Native Corporations to provide countless benefits to their communities, including dividends, management training, internships and youth programs, community infrastructure investments, scholarships, subsistence programs, burial assistance, land leasing and gifting, support of non-profit organizations, elder benefits, shareholder job opportunities and cultural preservation.

We are providing comments today because we are concerned that the implementation of regulations to implement Section 811 will affect the ability of Native-owned 8(a) firms like Koniag's subsidiaries to receive sole-source awards over \$20 million. Thus, we respectfully request that the FAR Council consider Koniag's comments as it begins to implement Section 811. We submit that Koniag's recommendations further the federal government policies toward Natives and the trust relationship between the federal government and Natives.

II. COMMENTS ON PROPOSED REGULATIONS

A. Koniag Requests Clarification that Section 811 Applies Only to Sole-Source Contracts for an Amount Exceeding \$20,000,000.00 for the Base Year of the Contract.

Koniag understands that the \$20 million threshold provided in Section 811 has recently been interpreted by agencies and contracting officers as a "total value" contract, which would include any option years. Koniag does not believe that Congress intended this result, as this would dramatically affect the ability of Native-owned 8(a) firms to receive larger sole-source contracts, and thus, fulfill its responsibilities to its shareholders. Further, had Congress intended agencies to include options in the calculation of the \$20 million threshold, it would have

included specific language indicating so. Instead, unlike a similar provision of the FY 2008 NDAA, Section 843, where Congress included the parenthetical expression “(including all options)” when establishing certain restrictions on the award of a task or delivery order contract in an amount estimated to exceed \$100 million. Under Section 811, Congress clearly omitted options in the \$20 million threshold figure. As such, Koniag requests that the FAR Council clarify in the preamble to the proposed regulations that the \$20 million threshold applies only to the base year of the contract.

B. Koniag’s Proposed Amendments to the FAR to Implement Section 811

1. The J&A Requirements in the New Rule Should Not Exceed the Requirements of Section 811.

As a threshold matter, Koniag requests clarification in the FAR that the five (5) “Elements of Justification” identified in Section 811(b) are the only elements required to justify a sole-source contract over \$20 million. See Public Law 111-84, Section 811(b). Specifically, Koniag requests that this clarification be set forth in 48 C.F.R. § 6.302-5, which addresses the exception to the competition requirement under the Competition in Contracting Act (“CICA”) where a sole-source award is authorized and required by statute.

To this end, Koniag recommends adding the following two amendments to 48 C.F.R. § 6.302-5:

First, Koniag recommends adding a section (d) to FAR 6.302-5 that provides:

(d) The justifications and approvals required for sole-source awards under Section 811 of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84; 123 Stat. 2190, will be limited to the following elements:

- (i) A description of the needs of the agency concerned for the matters covered by the contract.
- (ii) a specification of the statutory provision providing the exemption from the requirement to use competitive procedures in entering into the contract.
- (iii) a determination that the use of a sole-source contract is in the best interest of the agency concerned.
- (iv) a determination that the anticipated cost of the contract will be fair and reasonable.
- (v) such other matters as the head of the agency concerned shall specify for purposes of this section.

Second, Koniag recommends adding a section (iii) to FAR 6.302-5(c)(2) that states:

(iii) Contracts awarded pursuant to Section 811 of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84; 123 Stat. 2190.

2. Defining When the use of a Sole-Source Contract is in the “Best Interests” of the Agency.

Koniag notes that there is no explanation in Section 811(b)(3) of when the use of a sole-source contract would be in the “best interests” of the agency concerned. As such, Koniag recommends adding the following language as a new subsection (e) under FAR 6.302-5:

(e) In making a “best interest” determination under section (d)(iii) of this section, the agency shall consider how an award to an 8(a) Program Participant owned by an Indian tribe, Alaska Native Corporation or Native Hawaiian Organization will allow it to meet the agency’s small business goals.

Such a determination furthers the Federal Government’s interest in ensuring that a “fair proportion” of the Government’s contracts for goods and services be placed with small businesses. See 15 U.S.C. § 631(a); see also 48 C.F.R. § 19.201(a) (noting the “policy of the Government to provide maximum practicable opportunities in its acquisitions to small business”); 15 U.S.C. § 644(g)(1) (Goals for participation of small business concerns in procurement contracts).

3. Defining What “Other Matters” the Agency can Include as Part of the J&A Requirements

Koniag notes that the term “other matters” is not defined in Section 811. Leaving this term undefined will cause uneven application of Section 811 among different agencies, as each agency head may require differing J&A requirements.

Koniag recommends defining “other matters” by adding a section (f) to FAR 6.302-5 that provides:

(f) In considering such “other matters” under section (d)(v) of this section, agency heads shall look to part 19.804-1 of title 48, Code of Federal Regulations.

Koniag submits that defining the scope of “other matters” as those factors appropriate to evaluating an award under the 8(a) Program will ensure consistency in the 8(a) award process among the different agencies.

4. Clarifying that Section 811 is not a Cap on Sole-Source Awards

Finally, from a practical standpoint, Koniag requests that the FAR Council explain, perhaps in the preamble to the proposed rule, that Section 811 does not “cap” Native-owned 8(a) firms to sole-source awards of less than \$20 million; rather Section 811 simply imposes a requirement for a streamlined J&A process for sole-source awards to Native-owned 8(a) firms.

FAR Secretariat (MVPR)

October 22, 2010

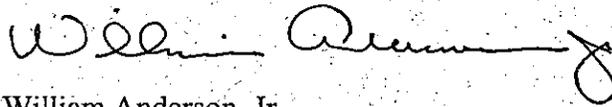
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Koniag understands that there has been some confusion regarding this issue, so clarification would be appreciated.

III. CONCLUSION

We appreciate your attention to this matter and hope that you will carefully consider our aforementioned concerns. Please do not hesitate to contact us if you have any questions or concerns regarding our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "William Anderson, Jr.", with a stylized flourish at the end.

William Anderson, Jr.
President and Chief Executive Officer