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### **Comments on the Implementation of Section 811 of the Defense Authorization Act for 2010**

**Introduction:** POWTEC Holding Company LLC (POWTEC) appreciates and welcomes the opportunity to make comments regarding the implementation of Section 811 of the Defense Authorization Act for 2010. We are the holding company for a couple of businesses that are tribally-owned by the Organized Village of Kasaan and Craig Community Association, located on Prince of Wales Island in SE Alaska. POWTEC has been the recipient of a few directed source contract awards under the Small Business Administration's 8(a) Small Disadvantaged Business Development Program. These directed source contracts exceeded the \$20 million threshold and would have been subjected to the restrictions set forth in Section 811. We anticipate that we will be considered for future directed source contracts, some of which would be above the \$20 million threshold. As such, we are an interested party when it comes to the implementation of Section 811.

**Background:** POWTEC is proud of the performance record of our tribally-owned small businesses as prime contractors to the United States Government for more than nine years. We have consistently delivered best value (cost, schedule, quality) performance to our Government customers. Our numerous Contractor Performance Assessment Reports and several other performance awards attest to the fact that given the opportunity, tribally-owned companies can perform as well as or better than other Government contractors. We are serious about using our Government contracts to develop the capabilities of our tribal businesses and our personnel. We employ a preference for Native Americans in our hiring process. Furthermore, annual revenue beyond our retained earnings is returned to the tribal shareholder to assist with the economic development of our tribal communities on Prince of Wales Island in Southeast Alaska.

**Overview:** POWTEC concurs with the leaders of many other tribally-owned businesses that Section 811 is not only unnecessary but also has the potential to undermine a very successful socio-economic program that was put in place by the United States Government to help the economically depressed tribal communities. POWTEC realizes that it is not the Federal Acquisition Regulation (FAR) Council's responsibility to pass judgment on the merits of Section 811, but rather to craft implementing instructions that are designed to assist the Government's contracting officers in complying with this section of the law. POWTEC implores the FAR Council to craft the implementing instructions to guide compliance with the requirements of Section 811 without discouraging contracting officers from using the authority to make directed source awards as permitted by law (10 U.S.C. 2304(c)(5); 41 U.S.C. 253(c)(5); and 15 U.S.C. 637) and as set forth in the FAR (Parts 6.302-5 and 19.8).

## Specific Comments:

**The \$20 Million Threshold** – In establishing the implementing language, it must be made abundantly clear to all Government acquisition and contracting officials that the \$20 million figure cited in the Act is not a ceiling but rather a threshold, above which a justification and approval (J&A) is required. As you heard during the consultation process, some Government personnel have already been referring to the \$20 million figure as a “cap” or “ceiling” above which direct awards to tribally-owned 8(a) businesses are not permitted. It is imperative upon the FAR Council to make clear through the implementing instructions that there is no dollar ceiling on the authority to make direct awards to tribally-owned 8(a) businesses.

**The \$20 Million Amount Calculation** – The implementing language should also make it clear that when calculating the contract value to arrive at the \$20 million threshold, the dollar value for the threshold should be based on an annual contract amount, and not the total contract value. The rationale for this recommendation is that to do otherwise would impose unreasonably low or varying thresholds for the justification and approval requirement. For example, you could have a one-year contract valued at \$19 million and no justification and approval would be required. Yet, you could have a four-year contract with a total value of \$20 million (only \$5 million per year) that would require the J&A. Another consideration that needs to be addressed is how options would be handled in the calculation. Do you only consider the base amount of the contract, or the total amount including options? For example, is a contract with a \$10 million base period and a \$15 million option period subject to the J&A requirement or not? What about a contract with a \$10 million base period and three option periods of \$10 million each? Clearly the simplest and most logical approach would be to establish the \$20 million threshold as an annual contract value amount.

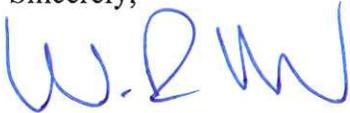
**Elements of Justification** – POWTEC recommends that the FAR Council emphasize in the implementing instructions that, when a justification and approval is required, it only needs to address the five specific elements of justification set forth in Section 811. This will help mitigate the administrative burden associated with this new and unnecessary J&A requirement. Furthermore, since three (3) of the five (5) elements are duplicative to three (3) of the 12 elements in a standard J&A, it is clear that the Congress did not intend for the J&A to address all 12 standard elements of justification.

**“Other Matters” Element** – One of the five (5) elements of the required justification and approval document is “Such other matters as the head of the agency concerned shall specify...” Section 811 of the Act does not prescribe the content or nature of these “other matters.” Therefore, when the FAR Council crafts the implementing language, it would be helpful to make a suggestion as to what these “other matters” might be. Given the context of Section 811, we suggest that it is entirely appropriate and reasonable to highlight as a potential “other matter” the need for the agency to meet their small business contracting goals with emphasis on direct source contract awards to tribally-owned 8(a) businesses.

**Exception to Competition** – POWTEC requests the FAR Council, as part of the implementing instructions, affirm in the strongest possible terms the FAR Part 6.302-5(b)(4) exception to the requirement for full and open competition. POWTEC fully understands that 10 U.S.C. 2304 and 41 U.S.C. 235 require that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts. However, POWTEC also notes that there are certain limited exceptions to this requirement. FAR Subpart 6.3 prescribes the policies and procedures, and identifies the statutory authorities for contracting without providing for full and open competition. One such exception can be found at FAR Part 6.302-5(b)(4), which permits sole source awards under the 8(a) Program. By the establishment of this authority, it is clear that it was the intent of the Government to forego the low-cost benefits of competition in order to fulfill the Government's obligation to assist in the economic development of small disadvantaged businesses.

**Conclusion:** POWTEC Holding Company thanks the FAR Council for engaging in the consultation process with the Native American community and their tribally-owned businesses. It is our hope that you will give full consideration to these comments and those of other tribally-owned businesses as you develop the Section 811 implementation instructions. It is our contention that the 8(a) Program does not entitle us to a Government contract. We do believe that the Program does afford tribally-owned businesses like POWTEC the opportunity to demonstrate that we can deliver best value to our Government customers once we have been awarded a contract. With proper care, the implementation instructions you craft will encourage rather than discourage direct awards to deserving tribally-owned 8(a) businesses.

Sincerely,



William R. Cole

CEO

POWTEC Holding Company