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November 1, 2010

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

Mr. Daniel Gordon
Administrator for Federal Procurement Policy
Office of Federal Procurement Policy
Office of Management and Budget

Re: Consultation Comments:Defense Authorization Act for Fiscal Year 2010, Section 811

Dear Mr. Gordon,

Thank you for your letter dated August 30, 2010, asking for our views in regards to implementation of Section 811 of the National Defense Authorization Act for Fiscal Year 2010. As Principal Chief of the Cherokee Nation and on behalf of the Cherokee Nation and Cherokee Nation Businesses, LLC, I respectfully submit the following comments as a participant in the Federal Acquisition Regulatory (FAR) Council's tribal consultation process.

The Cherokee Nation is centered in the heart of Indian country in Northeastern Oklahoma, and is largely within HUBZone (Historically Underutilized Business Zones) qualified areas. The SBA 8(a) Business Development program is another program established to further economic development among disadvantaged individuals, tribes, Hawaiian natives and Alaskan natives. The Cherokee Nation, which historically has not been awarded single sole-sourced contracts over \$20 million, believes that both the HUBZone and 8(a) programs greatly enhance our ability to pursue larger contract awards, and thus provide greater benefits to our citizenry.

In regards to Section 811, we are gravely concerned that some of the proposed changes may stifle our ability to grow and assist with economic self-sufficiency for Cherokee citizens. The Cherokee Nation's business units employ thousands of Native Americans in northeastern Oklahoma, and contracting with the federal government is a vital part of our plan to increase tribal employment within our jurisdictional boundaries.

Section 811 of FY2010 National Defense Authorization Act requires contracting officers to provide a justification and to obtain approval by the "head of agency" before awarding a sole-source contract over \$20 million. Our fear is this requirement will have a chilling effect on the federal contracting process, and contracting officers are likely to be reluctant to make 8(a) sole-sourced awards to native 8(a) contractors even if the award is fully justifiable.

The new requirement will add additional administrative burdens and impose time delays in seeking and obtaining the requisite “agency head” approval. We would encourage a clarification to contracting officers that this \$20 million is not a “cap” on sole-sourced contracts, and that justification and approvals will not be unduly burdensome or withheld and that the “head of agency” be allowed some delegation authority. We also recommend that the justification include ONLY the five elements listed in Section 811, not the 12 preexisting justifications in 48 CFR § 6.303-2 plus the five elements in Section 811.

Furthermore, it is unclear exactly what the \$20 million “value of the contract” is referring to and whether this can be construed to referring to the base year of the contract, the total contract value - which may ultimately be unknown in the case of an IDIQ (Indefinite Delivery Indefinite Quantity) award, or whether this is a \$4 million per year over a five year period. We believe a statutory amendment will provide the best assurance to enable contracting officer to implement the Section correctly. We recommend that language be inserted that clearly indicates the \$20 million only applies to the “base year” of the contract.

Lastly, Cherokee Nation is supportive of the position that the Native American Contractors Association (NACA) has presented on this topic. They have clearly articulated the sentiments of many tribal enterprises, and Cherokee Nation will continue to work with, and support, the NACA on these issues.

Thank you for your time and consideration in this matter.

Sincerely,



Chad Smith
Principal Chief
Cherokee Nation

Cc: Sarah L. Lukin, Native American Contractors Association