Native American Contractors Association
Working to enhance the economic self-sufficiency of America's indigenous peoples
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September 28, 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

The Native American Contractors Association ("NACA")[1] is pleased to submit these comments in response to the Federal Acquisition Regulatory Council's ("FAR Council") notice in the Federal Register, dated August 31, 2010, as part of 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"). We request that you consider these NACA's written comments to the regulations that will be proposed.

NACA was formed in 2003 to promote the common interests of its members – Tribes, Native Hawaiian Organizations ("NHO"), and Alaska Native Corporations ("ANC") (hereinafter collectively "Native-owned 8(a) firms," unless otherwise noted) doing business with the Federal government and participating in the Small Business Administration's ("SBA") 8(a) program. NACA represents and serves almost 40 Native-owned 8(a) firms across the nation. Collectively NACA's members perform government contracts in all 50 states, several U.S. territories and foreign countries, employing thousands and bringing the benefits back to their Native communities, serving some of the poorest most underrepresented people in America. NACA's members represent over 475,000 Tribal Members, Alaska Native Shareholders, and Native Hawaiians.

[1] NACA is located at 1514 P. Street NW, Suite 2, Washington, DC 20005, telephone number 202-758-2676 and facsimile 202-758-2699, email: sarah@nativecontractors.org.

The 8(a) Program is very valuable to NACA members and has helped stimulate economic development within Native communities that have been plagued by many social ills, including staggering poverty and unemployment rates. Unlike 8(a) companies owned by disadvantaged individuals, the benefits of the 8(a) Program for Native-owned firms have the potential to reach hundreds, and even thousands, of Native people. NACA's members are seeing the intended benefits of the 8(a) Program, as they strive to achieve their full competitive potential.

When Congress amended the Small Business Act to allow Native-owned firms to participate in the 8(a) Program, it recognized the unique responsibilities of Native-owned 8(a) firms. Businesses owned by Tribes, NHO's and ANC's, including 8(a) firms, are ultimately responsible to an entire community of Native people. Congress recognized this unique responsibility and wisely provided Native communities with the ability to receive sole-source awards in larger dollar amounts than businesses owned by individuals.

Section 811, however, dramatically changes the ability of Native-owned 8(a) firms to participate in the 8(a) program. NACA is very concerned about the implementation of regulations to implement Section 811, as they will have a direct impact on Native-owned 8(a) firms, which are currently the only Participants in the SBA's 8(a) Program that are eligible to receive sole-source awards over $20 million. Thus, NACA appreciates the FAR Council's willingness to consult with Native-owned 8(a) firms as it develops its regulations.

To this end, NACA provides the following comments, which we request the FAR Council consider as it proceeds with implementing proposed regulations to implement Section 811.

II. COMMENTS ON PROPOSED REGULATIONS

A. The Rule Should Clarify that Section 811 Applies Only to Sole-Source Contracts for an Amount Exceeding $20,000,000.00 for the Base Year of the Contract.

As a threshold matter, NACA questions the basis for the $20 million figure in Section 811 over which a justification and approval ("J&A") process must be implemented to award an 8(a) contract to a Native-owned 8(a) firm. This figure was arbitrarily derived without consulting the tribal communities Section 811 will impact. No consideration was given to the needs of Native communities, the size of government contracts being bundled and awarded or the slim profits associated with government contracts in general. Accordingly, NACA would like to state for the record that it opposes the $20 million threshold.

NACA is also very concerned that the $20 million threshold will be interpreted by agencies and contracting officers as a "total value" contract. As a total value contract, any option years (typically 4 year options) will be included in the total value of the contract, which effectively limits Native-owned 8(a) firms to sole-source contracts at a lower dollar amount than we submit Congress contemplated. The negative impact on Native-owned 8(a) firms of such an interpretation of Section 811 would be drastic. Therefore, NACA requests clarification in the implementing regulations that the $20 million threshold applies only to the base year of the

contract. We submit that this clarification should be set forth in the preamble to the proposed and final regulations.

B. NACA'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.

Section 811(b) identifies five (5) "Elements of Justification" for a J&A of a sole source contract over $20 million. See Public Law 111-84, Section 811(b). NACA is concerned that the five elements identified in the law will be added to the current, unrelated FAR requirements in 48 C.F.R. § 6.303-2 to justify a sole source award. The provisions in FAR 6.303-2 were established for non-Native contractors being awarded sole source contracts under exemptions implementing another statute—the Competition in Contracting Act ("CICA"). Application of such criterion would not only unduly burden contracting officers but also would result in a general unwillingness to consider Native-owned 8(a) firms as eligible for these awards. It would also impose additional obligations on agencies to justify awards to Native-owned 8(a) firms that do not apply to other government contractors. We submit that this was never intended by Congress, as the "Elements for Justification" under Section 811 were specifically spelled out in Public Law 111-84.

Accordingly, because the authority to award a sole source award to Native-owned 8(a) firms is provided in the Small Business Act at 15 U.S.C. § 637, and CICA (10 U.S.C. § 2304 and 41 U.S.C. § 253), we submit that the regulations implementing Section 811 should be set forth in 48 C.F.R. § 6.302-5. This FAR provision addresses the exception to the competition requirement under CICA where a sole source award is authorized and required by statute. Considering that Section 811 recognizes that sole source awards to Native-owned 8(a) firms below $20 million do not require any J&A, implementing regulations for Section 811 in FAR 6.302-5 makes the most sense.

C. NACA's Proposed Amendments to the FAR

NACA recommends adding the following two amendments to FAR 6.302-5, to make it clear that the requirements for a J&A in 48 C.F.R. § 6.303-2 do not apply to sole source awards under Section 811(b):

First, NACA 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.

Second, NACA 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.

These changes would eliminate any ambiguity as to whether additional J&A requirements apply to sole source contracts exceeding $20 million beyond those stated in Section 811(b).

1. The Rule Should Define When a Determination that the use of a Sole-Source Contract is in the "Best Interests" of the Agency.

Section 811(b)(3) requires a determination to be made that the use of a sole-source contract is in the "best interest" of the agency concerned. However, Section 811 does not specify how that determination should be made. Accordingly, NACA 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.

We believe such a best interest determination is appropriate as Native-owned 8(a) firms offer significant benefits for procuring agencies. In the Small Business Act, Congress declared the development and growth of small businesses to be a national priority. 15 U.S.C. § 631(a). Congress further stated that it was the Government's policy to "aid, counsel, and assist" small businesses to ensure that a "fair proportion" of the Government's contracts for goods and services be placed with small businesses. 15 U.S.C. § 631(a). The FAR reflects this policy by explicitly requiring executive agencies to provide "maximum practicable opportunities" to small businesses, including small disadvantaged businesses, i.e., 8(a) firms, in the Government's acquisitions of goods and services. 48 C.F.R. § 19.201(a); see also 15 U.S.C. § 637(d)(1).

Further, Congress has established small business and 8(a) goals that agencies must meet under the Small Business Act. 15 U.S.C. § 644(g)(1). Because Congress and this Administration want to expand the small business base, the best interests of an agency can

clearly be met through Native-owned 8(a)s. The regulations ultimately issued should provide this guidance to assist agency officials in making their best interest determination.

2. The Rule Should Define What "Other Matters" the Agency can Include as part of the J&A Requirements

NACA is also concerned as what "other matters" the agency head may include in the J&A requirements. The ability of a head of an agency to arbitrarily decide what to include as "other matters" may lead to widely differing J&A requirements, causing confusion and frustration for those Native-owned 8(a) firms and their partners which are seeking contract awards from different agencies. To add to the confusion, the term "other matters" is not defined in Section 811; thus, NACA believes both the contracting officers and contractors will have difficulty anticipating what requirements must be included in the J&A, which could slow the process.

Accordingly, NACA recommends 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.

Referring agency heads to section 19.804-1 of title 48 in the Code of Federal Regulations as part of the J&A required for sole source awards under Section 811 is appropriate, as this regulation sets forth the factors that agencies are required to evaluate before recommending a contract for the 8(a) Program. Further, clarifying that the scope of "other matters" is limited to those factors appropriate to evaluating an award under the 8(a) Program will ensure uniformity in the 8(a) award process. Finally, this amendment will provide consistency across the different agencies with respect to the J&A requirements under Section 811 and eliminate any uncertainties regarding what requirements must be included in the J&A.

3. The Rule Should Clarify that Section 811 is not a Cap on Sole-Source Awards but simply a requirement for a streamlined J&A process for sole source awards to Native-owned 8(a) firms

There has been some confusion on the part of contracting officers, agencies and even Members of Congress regarding whether (1) Section 811 "caps" Native-owned 8(a) firms to sole-source awards of less than $20 million; or (2) simply a requirement for a streamlined J&A process for sole source awards to Native-owned 8(a) firms.. After receiving notification from our members that Section 811 was being viewed by agencies as a "cap," and reviewing Congressional hearing by other committees where Section 811 is referred to as a "cap," NACA contacted the Armed Services Committee for their interpretation of Section 811. The Committee confirmed that the intent of the Section was to simply require a J&A process for sole-source 8(a) awards in excess of $20 million. NACA recommends that this guidance be included in the proposed regulations and the Preamble of the proposed regulations implementing Section 811.

III. Conclusion

Without the clarifications to Section 811 NACA has proposed, NACA believes the impact of the implementation of Section 811 will have a dramatic chilling effect on the willingness of contracting officers to contract with Native-owned enterprises.

Thank you for your consideration of NACA's comments. Please feel free to contact us if you have any questions or concerns regarding the issues we have raised or the suggestions we have offered.

Sincerely,

Sarah L. Luki

Executive Director
Native American Contractors Association