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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

February 11, 2010

Shay D. Assad
Director, Defense Procurement, Acquisition Policy, and Strategic Sourcing
Department of Defense
Room 3B855
3060 Defense Pentagon
Washington, DC 20301-3060

Dear Mr. Assad:

As part of the Subcommittee's ongoing oversight of contracting preferences for Alaska Native Corporations, I am writing regarding the new requirements for justification and approval of sole-source contracts enacted in the National Defense Authorization Act for Fiscal Year 2010.

As you know, federal law mandates that all contracts must be awarded competitively. Under the Competition in Contracting Act (CICA), the head of an agency may award a sole-source contract in only a limited number of cases, including when only one source can provide the needed goods or services or when emergency circumstances require that the contract be awarded immediately. Contracting officers using one of the CICA exemptions are required to submit a written justification and, in the case of high-value awards, obtain the approval of more senior agency officials.¹

On July 16, 2009, the Subcommittee held a hearing on contracting preferences for Alaska Native Corporations (ANCs). At the hearing, the Subcommittee heard testimony relating to the ability of ANCs participating in the Small Business Administration's 8(a) program to receive sole-source contracts without complying with the CICA requirements. Thanks to a series of legislative and regulatory loopholes, ANCs could receive sole-source contracts of unlimited value regardless of circumstances and without any need for justification and approval by contracting officers and agency officials.²

¹ 10 U.S.C. § 2304.

² Senate Homeland Security and Governmental Affairs Committee, Subcommittee on Contracting Oversight, *Hearing on Contracting Preferences for Alaska Native Corporations* (July 16, 2009). See also Senate Homeland Security and Governmental Affairs Committee, Subcommittee on Contracting Oversight, *Majority Staff Analysis: New Information on Contracting Preferences for Alaska Native Corporations (Part II)* (July 16, 2009).

At the Subcommittee's hearing, you testified that you had concerns relating to the lack of competition in the award of sole-source contracts to ANCs participating in the 8(a) program and the benefits to taxpayers.³ You stated:

GAO has repeatedly reported that some sole-source procurements to ANCs have resulted in paying significantly more for services and products than were warranted. ... [T]he appropriate use of competition could provide economic opportunities for 8(a) ANCs and further help agencies to obtain best value for the government and for the taxpayers.⁴

In response to a question from Senator Susan Collins, you stated that the "informal competition" which might potentially occur prior to the award of a sole-source ANC contract is not equal to the CICA competition requirements. You also testified that you had requested that the Defense Department conduct a "detailed review" of all ANC contracts.⁵

On October 28, 2009, the President signed into law the National Defense Authorization Act for Fiscal Year 2010 (NDAA). Section 811 of the NDAA mandates that federal agencies may not award sole-source contracts in excess of \$20 million without written justification and approval from the relevant agency official responsible for such awards.⁶ In other words, this provision extends the justification and approval requirements of CICA to sole-source contracts awarded to ANCs and other entities under the 8(a) program.⁷

The Federal Acquisition Regulation is to be revised and federal agencies must implement these new requirements by no later than 180 days after the enactment of the NDAA.⁸ Under an additional requirement in the Managers' Statement of the Defense Appropriations Act, the Defense Department must also submit a report to Congress detailing the impact of the implementation of Section 811, including how the new requirements affect "the selection of Native American companies for large dollar contracts ... [and] whether an excessive administrative burden has been placed on contracting personnel"⁹ This report is due no more than 90 days after the implementation of Section 811.

³ Senate Homeland Security and Governmental Affairs Committee, Subcommittee on Contracting Oversight, *Hearing on Contracting Preferences for Alaska Native Corporations* (July 16, 2009).

⁴ *Id.*

⁵ *Id.*

⁶ Pub. L. 111-84, Sec. 811 (Oct. 28, 2009).

⁷ Pub. L. 111-84, Sec. 811(c)(1)(A)(Oct. 28, 2009); 10 U.S.C. § 2304.

⁸ Pub. L. 111-84, Sec. 811 (Oct. 28, 2009).

⁹ Pub. L. 111-118 (Dec. 19, 2009).

Shay D. Assad
February 11, 2010
Page 3

I am encouraged that the new requirements of Section 811 will increase competition in the award of Defense Department contracts. To better understand how the Department will implement these new requirements to benefit the government and the taxpayer, I request that you provide a briefing for Subcommittee staff **on or before April 15, 2010**. This briefing should also include information relating to the Department's methodology and plans for completing the "detailed review" of ANC contracting and the report required under the 2010 Defense Appropriations Act, referenced above.

The jurisdiction of the Subcommittee on Contracting Oversight is set forth in Senate Rule XXV clause 1(k); Senate Resolution 445 section 101 (108th Congress); and Senate Resolution 73 (111th Congress).

Please contact Margaret Daum with the Subcommittee staff at (202) 228-3862 with any questions.

Sincerely,



Claire McCaskill
Chairman
Subcommittee on Contracting Oversight

cc: Robert Bennett
Ranking Member