



As the Founder and spokesperson for the *Fairness in Procurement Alliance* (FPA), which represents the procurement priorities of all of the Groups for whom Congress created the set-aside program - a constituency of 10 million small businesses, - **I plead to GAO to address this protest and once-and-for-all mandate/order the revision of the so called 'set-aside exemptions' leading to their ultimate elimination from the FAR.**

GAO has addressed the issue of the exemptions as far back as 2001 in its report (GAO-01551) <sup>1</sup> acknowledging that *"the rationale for exclusions is not clearly defined... it represents about 10 per-cent of total procurements... and the guidance is unclear and incomplete."*

On November 2<sup>nd</sup>, 2007, GAO avoided a ruling on a similar protest FitNet had initiated challenging the legality of the 'GSA exemptions' on the exact same grounds as on this one, GAO had acknowledged that although the protest was valid, FitNet could not raise the protest because it was not an interested party. In the decision, GAO had said, ***a protester that does not hold an FSS contract is not an interested party to challenge a decision not to set aside an individual order.*** That GAO decision (B-309911) is in the process of been appealed. Furthermore, I have requested the intervention of a Congressional Committee Chairman plus the SBA Administrator to secure a 'GAO ruling' - regardless of my standing on that case - in accordance with the provisions of *GAO Order No. 0130.1.10 (April 5<sup>th</sup>, 2004)*

What is at stake, again, is the alleged 'illegality' or 'unlawful interpretation' of FAR 19.000(b).] On the one hand, the 'foreign set-aside exemptions' has failed to interpret the statutory mandate of the Small Business Act and on the other, they have caused small and minority businesses to loose access – for over a decade – to \$20 Billion in annual contracts!

**In short, these regulations have diverted \$200 Billion in government contracts away from small and minority businesses in the last decade!** (*The total amount becomes \$640 Billion when the GSA exemptions are added to the 'foreign' exemptions.*)

Even the SARA panel, in its final report to Congress, in January 2007, supported this allegation when it said, *"Inconsistent statutory and regulatory framework...hinders efficient and effective use of the programs"*. This Congressional Report went on to say, *"The Panel found potentially conflicting guidance between the statutory and (the) regulatory provisions."*

The DoDEA petition to dismiss the protest cites a reference (*American Eagle Industries, Inc; Yellowhorse, Joint Venture, B-255251, B=255251.2. February 22, 1994, 94-1CPD,*) which is irrelevant in this case.

The statutory mandate of the Small Business Act clearly articulates that **ALL** procurements be subject to its 'set-aside provisions' and the Act established **NO** exemptions. Both Senator John Kerry and Senator Olympia Snowe, Chairman and Ranking Member of the Senate Committee of Small Business and Entrepreneurship have stated <sup>2</sup> *"the unambiguous Congressional intent (is) that the Act govern all procurements..."* They went on to say, *"Executive Departments do not have the discretion to interpret the law in a matter inconsistent with its plain language."* Most importantly, regarding the 'foreign exemptions,' they added,, *"we urge... to clearly commit to compliance with the Small Business Act in all procurements regardless of the place of award."*

I shall point out that FAR19.000(b)] precluded the FAR and was adopted into the FAR without been subjected to the required Regulatory Flexibility Act (RFA) review rendering the regulation not only flawed, but unenforceable.

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<sup>1</sup> <http://www.gao.gov/new.items/d01551.pdf>

<sup>2</sup> Letter to State Department Secretary Powell dated January 15th 2005.

And finally, SBA went on record, on September 4th, 2007, with a historic ruling,<sup>3</sup> in response to a GAO request, stating that *“according to statute and regulations, small business set asides are mandatory for acquisitions valued from \$3,000 to \$100,000 and (they do) take priority.”*

The SBA historic ruling stated, *“The FAR Council published a final rule on September 28<sup>th</sup>, 2006 (70 Fed. Reg 73415), which amended 41 U.S.C § 431a to read, Each contract for the purchase of goods and services that has an anticipated value greater than \$2,500, but no greater than \$100,000 (\$250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition at 2.101,) is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery.”*

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Allow me to point out that GAO has already ruled *“a regulation must be interpreted so as to harmonize with and further and not conflict with the objective of the statute it implements.”* *Trustees Of Indiana University v. United States*, 618 F.2d 736, 739 (Ct. Cl. 1980).

In a GAO decision sustaining Protest B299291, dated March 28th, 2007, GAO asserted, *“The FAR should be read consistent with the SBA statutory and regulatory language. To adopt the more restrictive interpretation of the FAR... frustrate the intent of the Act . ...beyond what the statute clearly authorizes and contemplates.”*

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<sup>3</sup> <http://fitnet.net/fpa/press/SBA%20Opinion.pdf>

On behalf of FitNet and ALL the groups for whom Congress created the 'set-aside program,' **I am herewith petitioning GAO to sustain the protest; order DoDEA to restrict the solicitations to set-asides and advise the FAR Council and the OFPP of the need to remove the 'foreign set-aside exemptions' from the regulations.**

Additionally, as the protestor, I request the Controller General to direct DoDEA to reimburse FitNet for all cost incurred in connection with the pursue of this protest, including all reasonable attorneys fees and documented costs incurred in pursue of the resolution of this protest

By way of a copy of this communication, I am appealing for the support of this action to eliminate the 'foreign set-aside exemption' from my own Congressman, both Congressional Small Business Committees; OFPP, the SBA Office of General Council, the U.S. Office of Advocacy, and the DOD Office of Small Business.

Thank you for the opportunity to make a difference.



Raul Espinosa,  
President

cc.

Sen. John Kerry, Chairman, Small Business Entrepreneurship Committee  
Sen. Olympia Snow, Ranking Mbr., Small Business Entrepreneurship Committee  
Cong. Nydia Velazquez, Chairperson, Committee on Small Business  
Cong. Steve Chabot, Ranking Member, Committee on Small Business  
Cong. John Mica, Member, Government Reform Committee  
Paul Dennett, Administrator, Office of Federal Procurement Policy  
Michael Gerich, Office of Federal Procurement Policy  
Thomas Sullivan, Office of Advocacy  
Major Clark, Office of Advocacy  
John Klein, Esq., SBA General Counsel  
Dean Koppel, SBA Office of Policy  
Anthony Martoccia, DOD Office of Small Business