

GAO B-406075 DECISION HAS AWAKENED A SLEEPING GIANT

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JACKSONVILLE, FL, - *“The 350,000 plus small businesses engaged in the \$700 Billion Federal marketplace have been illegally excluded from contract opportunities (through illegal regulations); severely abused (by government barriers); lied to (through the results published on the SBA Report Card) and denied justice (protests don’t work) said Raul Espinosa whose latest GAO protest against the Army[1] – raised on behalf of all small businesses - was dismissed by GAO[2] without addressing the abusive procurement practices it had raised. Espinosa is the Founder and CEO of The Fairness in Procurement Alliance (FPA)[3] and the Managing Partner of The Umbrella Initiative,” [4] whose mission is “to double the number of small businesses contracting with the government by the year 2020.”*

Espinosa, a seasoned government contractor, who had just been named, by Diversity Business, as *“One of the Nation’s Champions of Diversity for 2012,”*[5] added, *“I encourage everyone to fight back with the crying call made famous by the movie, Network:[6] ‘Small business are as mad as hell at the regulations, their barriers and the lack of justice and they are not going to take the abuse anymore’ “*

At a gathering of small businesses called by Jacksonville Mayor, Alvin Brown, attended by SBA Administrator Karen Mills, and flanked by Representatives of numerous small business organizations, Espinosa said, *“The manner in which GAO had dismissed my protest, without addressing the ‘simplified acquisitions’ issue[7] and without addressing the abuses of the rules of reverse auctions – has convinced small businesses that the GAO protest venue has become just as unfair as ‘size protests,’ a protest venue known for delivering only illusionary justice![8]*

Scott Amey, General Counsel for the Project on Government Oversight (POGO) - speaking for the small business community - said, “The GAO decision on B-406075 has awakened a sleeping giant.” It is an election year in which both the economy and the creation of jobs will be key issues on the campaign trail!

SBA had submitted a legal brief[9] supporting Espinosa’s arguments and the U.S. Office of Advocacy had written a letter[10] confirming the abuses of the rules of reverse auctions to support the Espinosa’s allegations, yet GAO chose, instead, to defend the GSA exemption, even though, according to Amey, *“GSA has no statutory basis for exemptions on their Federal Supply Schedule (FSS) and its Contracting Teaming Arrangements (CTA) restricts small businesses and has never undergone regulatory approval.”*

GSA Regulators are in the midst of trying to promote ‘simplified acquisition’ on the GSA Schedule, but at the discretion of the Agencies through an *interim rule*. [11] The Small Business Act (15 USC 644), on the other hand, states that simplified acquisitions (contracts between \$3,000 - \$150,000) *“shall be reserved exclusively for small business concerns.”* In other words, if Agencies are to have any discretion, it must be for contracts above \$150,000.

Numerous ‘amicus briefs’ were also filed[12] by attorneys and small business groups including one by the American Small Business League (ASBL) whose president, Lloyd Chapman had this to say, *“Contrary to the GAO assertion on its B-406075 decision, Section 1331 of the Small Business Jobs Act of 2010 made no reference to ‘simplified acquisitions,’ but wished to end the original blunder, by Regulators, to incorporate exemptions on the FAR without the authority to do so.”* He added, *“The ‘discretion’ referenced on Section 1331 referred to procurements above \$150,000.”*

“It was inconceivable for GAO to have ruled that Espinosa did not have standing on a restricted reverse auction when he regularly bids and uses complaint teaming arrangements to get awards on that venue,”

said Terry Lee, a POGO attorney. John Klein, SBA Associate General Counsel for Procurement Law was dumbfounded since he had cited the fact that, on December 19th, 2011, GAO had ruled on Kindomware Technologies B-405727 protest^[13] by affirming that *“Where, as here, the protester is challenging the terms of the solicitation, and the remedy sought is the opportunity to compete under a revised solicitation – the protester is an interested party, even if it did not submit a quotation or offer.”*

Since GAO ignored the documentation and the proof that Espinosa had presented on his case, FPA has filed a complaint with the Army OIG^[14] and is preparing similar ones against DHS, the Air Force and VA over those Agencies alleged abuses of the government reverse auctions rules, cited on the protest dismissed by GAO.

Roger Campos, President of the Minority Business RoundTable (MBRT), pledged *“to encourage both Congressional Small Business Committees to hold hearings on the Agencies barriers, the fairness of the government protests and the need for penalties and consequences for the culprits.”*

Fernando Galaviz, Chairman of the National Federal Contractors Association (NaFCA) on whose Board, Espinosa seats, said, *“Small and disadvantaged businesses have suffered enough abuses in accessing contracts and subcontracts and we are going to fight back to simplify size standards and to bring penalties for Agencies and individuals who restrict our access to contracts and subcontracts.”* ^[15]

Over the next several weeks, small business advocates and watchdogs, will be evaluating their legal options including lawsuits and injunctions, to assert their position in demanding justice and make sure SBA and OFPP establish a final rule on ‘set-asides on the GSA Schedule’ that would confirm that the discretionary set-aside referenced on Section 1331 shall be applied to contracts above \$150,000. The subject of penalties and consequences for Agencies which misrepresent their results in contracting or engage in abusive procurement practices will also be discussed.

FPA is recommending for small business contractors, facing barriers on government contracts, to consider:

- Φορτοινγ θυεστιονινγ ανψ βαρριερ φαχεδ ανδ, ινστεαδ, φιλε α ΓΑΟ προτεστ. Ινυδατινγ της ΓΑΟ προτεστ προχεσσ ωιλλ σενδ α χλεαρ μεσσαγε τηατ σμαλλ βυσινεσσεσ αρε νοτ γοινγ το πυτ υπ ωιτη της αβυσεσ ανψμορε!
- Ρεθυεστινγ α δεβριεφινγ, ιφ τηεψ συσπεχτ τηατ τηερε ωερε ανψ αβυσιτωε προχυρεμεντ βαρριερσ ινπολωεδ.
- Φιλινγ α Φρεεδομ οφ Ινφορματιον Αχτ (ΦΟΙΑ) ρεθυεστ δεμανδινγ δοχυμεντατιον αδδρεσσινγ σμαλλ βυσινεσσ χοορδινατιον; μαρκετ ρεσεαρχη ανδ – ιφ τηε σολιχιτατιον ινπολωεσ ρεωερσε αυχτιον – τηε φυστιφιχατιον υσεδ ον τηε Αυτηοριζεδ Ταργετ Πριχε (ΑΤΠ), ωηιχη αλλεγεδλψ ισ βεινγ υσεδ το αλλοω τηε γοωερνμεντ το ηαωε αν υνφαιρ αδωανταγε ιν ρεωερσε αυχτιονσ. (α πωιολατιον οφ τηε Σηερμαν Αχτ.)
- Ρεπορτινγ τηε Αγενχψ, τηε χοντραχτινγ υνιτ ανδ τηε ινδιωιδυαλσ ρεφερενχεδ ον τηε σολιχιτατιον το τηε Αγενχψ Ινσπεχτορ Γενεραλ (ΙΓ) ρεθυεστινγ τηατ α) τηε Αγενχψ βε πεναλιζεδ ανδ β) τηε ινδιωιδυαλσ ινπολωεδ βε ηελδ αχχουνταβλε φορ δισχιπλιναρψ αχτιον. ΦΠΑ ισ τακινγ στεπσ το χρεατε α δαταβαση – ιν τηε πριωατε σεχτορ – το ιδεντιψ βαρριερσ ανδ βρινγ τρανσπαρενχψ ανδ οωερσιγητ το γοωερνμεντ χοντραχτινγ.
- Ρεπορτινγ τηε βαρριερ το τηε ΣΒΑ Προχυρεμεντ Χεντερ Ρεπρεσεντατιωε (ΠΧΡ); τηε Αγενχψ Οφφιχε οφ Σμαλλ ανδ Δισαδωανταγεδ Βυσινεσσ Υτιλιζατιον (ΟΣΔΒΥ); τηε ΣΒΑ γοωερνμεντ χοντραχτινγ οφφιχε νοτ το μεντιον ελεχτεδ οφφιχιαλσ ανδ τηε τραδε μεδια.
- Ιγνορινγ τηε γοωερνμεντ προτεστ πενυεσ (ΓΑΟ, Αγενχψ ανδ/ορ Σιζε Προτεστ) ιφ τηεψ ηαωε τηε

ρεθυιρεδ φινανχιαλ ρεσυργεσ ανδ φιλε α λαωσυιτ – τηρουγη α χοντραχτ αττορνεψ ατ τηε Υ.Σ. Διστριχτ Χουρτ.

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- [1] Espinosa GAO B-406075 Protest Against the Army. - <http://bit.ly/zSf9qt>

- [2] GAO Dismisses Espinosa B-406075 Protest. - <http://bit.ly/xEpvWW>

- [3] FPA and its Track Record. - <http://bit.ly/cSJHTI>

- [4] The Umbrella Initiative. - <http://bit.ly/cZCwgE>

- [5] Diversity Business Announcement. - <http://bit.ly/zh9LuD>

- [6] Video Clip of the speech on movie Network, - <http://bit.ly/vq2hj6>

- [7] Simplified Acquisitions are exclusive of small businesses. - <http://bit.ly/yeEfTM>

- [8] Umbrella Initiative Think Tank Paper on Size Protest. - http://bit.ly/Why_Size_Protests_Do_Not_Work

- [9] The SBA Legal Brief in Support of Espinosa's arguments. - <http://1.usa.gov/yLDMgO>

- [10] The U.S. Office of Advocacy confirms Abuses cited, - <http://www.sba.gov/advocacy/816/42071>

- [11] The Interim Rule on the GSA Schedule. - <http://1.usa.gov/skYcrV>

- [12] Amicus Briefs filed on behalf of Espinosa arguments. - <http://bit.ly/AdFP0h>

- [13] The Kindomware GAO Decision. - <http://www.gao.gov/products/B-405727>

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WHEN : 2012-02-06 23:46:22

WHERE :

CONTACT:

FPA Advocacy Office

The mission of the Fairness in Procurement Alliance (FPA) is to bring fairness to public procurements so that small and disadvantaged businesses (SDB) can receive "maximum practicable utilization" (MPU) as prescribed by P.L. 95-507 and thus compete and prosper at the federal, state and local levels. FPA operates a Think Tank and Legal Center whose purpose is to involve university and Law School professors and students in sustainable projects that bring transparency to public procurement and create jobs. FPA also manages the "Umbrella Initiative" whose goal is "to double the number of small businesses contracting with the government by the year 2020."