

COMMUNICATION TO DoDDDS IN JAPAN DEMANDING FOR ITS 'FOREIGN' PROCUREMENT TO BE 'SET-ASIDE' AS REQUIRED BY THE SMALL BUSINESS ACT.

I respectfully request for DoDDDS, in Japan, to 'restrict' SOL # HE1260-T-2002 – due on March 21st which calls for USA-made lockers to be delivered within the continental US – as a set-aside for small business. Federal Acquisition Regulation ("FAR") 19.502-2 requires that procurements under \$100,000 be set-aside **exclusively** for small business when there is a reasonable expectation that offers will be received from at least two responsible small businesses and award will be made at a fair market price. This is known as the "Rule of 2."

Although this procurement was initiated abroad, it relies, nevertheless, on DOD appropriated funds; for the purchase of US-made products; from a US supplier and with a delivery to be made within the continental US. In other words, it calls for the performance to be made, primarily in the US and not entirely abroad. Such a procurement, according to our legal advisors, shall not and cannot be interpreted, by procurement officials, as being covered under the exception described on FAR 19.000(b), which I also happen to believe is unfair, unethical and not what *Congress intended when it authored the Small Business Act*.

I am making this request in line with Recommendation # 15 (refer to the attachment) of the *Fairness in Set-Aside Procurement Coalition (FSAPC)* which represents the *'procurement priorities of 20 national advocacy organizations and 10 million small and minority businesses, including women and disabled veterans*.

Media and Public reports have long demonstrated that government procurement officials, abroad, have been acting against the intend of Congress by excluding purchases' of USA made products when they are delivered in the US from the FAR 'set-aside requirements' simply because of the wrong interpretation of the regulation and/or an ERRONEOUS assumption. The wrong interpretation, we had been led to believe, involved not treating 'foreign' as meaning for the procurement *"to be made physically abroad; from a foreign vendor and for delivery also abroad,"* The erroneous assumption, on the other hand, dealt with the belief that foreign countries require US agencies operating in their soil to make their purchases from local suppliers.

The practice which I am describing involve – according to government experts - in excess of \$20 Billion in purchases per year and it has been extremely damaging – for over a decade - to small and minority businesses. In short, it has limited our access to meaningful government contracts! **The small and minority business community wants this practice to end and I am asking for your cooperation on the matter!**

FSAPC is urging government procurement officials **abroad** to restrict - **BY CHOICE** - ALL of their foreign procurements under \$100,000. According to the GAO, the decision whether to set aside a procurement may be based on prior procurement history involving the commodity in question, recommendations of appropriate small business specialists (i.e., SBA PCRs), and/or a market survey that include responses to sources sought announcements. If the foreign agency refuses to set it aside, after a request is made, a small business may file a bid protest – which is what I intend to do if our request is denied - and report the action to DOD, the SBA, Congress and to the FSAPC which, in turn, will report it to influential advocates, elected officials and to the media.

Subsequent to my drafting this communication, I received a confirmation, from the Senate Small Business Committee that **Congress, on this issue, wants ALL 'foreign' procurements restricted as 'set-asides,' regardless of their delivery and/or their performance. It is 'a matter of record,' and it was detailed on a letter from Sen. Olympia Snowe to State Department Secretary Powell dated January 12th 2005.**

In said letter Sen. Snowe stated that *“Executive Departments do not have the discretion to interpret the law in a matter inconsistent with its plain language.”* Sen. Snowe added, *“we urge the State Department to clearly commit to compliance with the Small Business Act in all procurements regardless of the place of award and to modify its regulations accordingly.”*

Even the GAO addressed the issue as far back as 2001 in its report (GAO-01551) 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.”*

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

According to GAO, *“any government agency receiving a request to set-aside a particular procurement need only to use their business judgment when informed of the capabilities of a small business interested in bidding on the solicitation”.* (*ViroMed Labs., B-298931, Dec. 20, 2006, 2006 WL 3904357*)

Please kindly acknowledge this communication requesting that this specific procurement be set-aside and advice how DoDDDS would intend to proceed. I suggest you communicate with the DOD Office of Small Business for their view on the matter.

By way of a copy of this communication, I am alerting OFPP, SBA Office of Government Contracting; DOD Office of Small Business, the Advocacy Office and both Small Business Committees in Congress of the urgent need to bring clarity to these ‘foreign’ procurements.

The small, minority, women and disabled veteran businesses is expecting for the DOD Office of Small Business to add clarity to this issue and follow the intend of Congress which, again, is to restrict ALL ‘foreign’ procurements as ‘set-asides,’ regardless of their performance, as in the case of ALL federal procurements.

The attachment I’ve included, by the way, is designed to educate government and procurement officials of the shortcomings of the government procurement system when it comes to small and minority contracting. We trust you will share it with your colleagues and superiors for mutual benefit.

Let me leave you with one of my favorite phrases, by Ralph Waldo Emerson, who once said, *“What I need is someone who will make me do what I can.”* Thank you, in advance, for the opportunity to make a difference,



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FitNet is a buying and consulting group offering services involving government procurement, small business advocacy and the ‘fight against obesity (FAO) to government agencies (federal, state and local); private industry; the military, schools and universities. **FitNet** is also a minority owned business which accepts **8(a)** and **Program 1122FIT** sole source contracts for all of the products and services offered. Our company’s president was a recipient of the 2006 *Jacksonville Business Journal* Mozaic Awards **for his small business advocacy work** and the Business Council’s prestigious **‘Businessman of the Year’** award for 2003 for his efforts to *“positively affect and influence the procurement landscape at the local, state and federal level”* He serves as a Special Advisor to the *American Small Business League* (ASBL); MBELDEF and the Minority Business Round Table (MBRT) and is the author of three major small business initiatives, the *Contracting Abuse Resolution Board* (CARB); the *Small Business Set Aside Alliance* (SBSAA) and the Free Universal Access (FUA). He is also the Founder and spokesperson for the **‘Fairness in Set-Aside Procurement Coalition’** (**FSAPC**) which represents the procurement priorities of more than 20 advocacy groups and more than 10 million small and minority businesses