

# TEXT OF FPA PETITION TO OFPP TO RESCIND THE EXEMPTIONS

September 14<sup>th</sup>, 2007

I am writing this petition on behalf of **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.

**FPA** is herewith requesting you, as Administrator of the Office of Federal Procurement Policy (**OFPP**) - in accordance with **Section 421(4)(a)** of **Title 41 Public Contracts Act**, which created **OFPP** -- to rescind **FAR 8.404(a); FAR 8.405 and FAR 19.000(b)** in light of the SBA Legal Opinion of September 4<sup>th</sup>, 2007. In that historic Legal Opinion, SBA confirmed my allegations that the 'set-aside exemptions' have no authority nor statute to exempt procurements and are, therefore unlawful and unenforceable.

Additionally, I am requesting you to investigate allegations that the FAR does not adequately address the unique requirements and processes of 'auctions and reverse auctions' and they do require regulations which would adequately protect the rights of suppliers (especially the small businesses) which take part in them. Reverse auctions, in my opinion and in the opinion of many advocates, are the future of government procurement.

My Congressman, John Mica, has written letters (see attached) to Jim Nussle, Director of The Office of Management and Budget (OMB) supporting my action, and to Congressman Thomas Davis III, Ranking Member of the House Committee on Oversight and Government Reform, requesting the Committee to conduct a review of the OMB procurement policies.

Below, for the record, is a link to the Section of the Act I have referenced:

[http://www.law.cornell.edu/uscode/html/uscode41/usc\\_sec\\_41\\_00000421----000-.html](http://www.law.cornell.edu/uscode/html/uscode41/usc_sec_41_00000421----000-.html)

In summary, **Section 421(4)(a)** of **Title 41 Public Contracts Act** states, *"Under procedures established by the Administrator, a person may request the Administrator to review any regulation relating to procurement on the basis that such regulation is inconsistent ..."* Section (b) further states *"Unless the request is frivolous or does not, on its face, state a valid basis for such review, the Administrator shall complete such a review not later than 60 days after receiving the request. The time for completion of the review may be extended if the Administrator determines that an additional period of review is required. The Administrator shall advise the requester of the reasons for the extension and the date by which the review will be completed."*

**Section 421(5)** states *“If the Administrator determines that a regulation relating to procurement is inconsistent with the Federal Acquisition Regulation or that the regulation should otherwise be revised to remove an inconsistency with any policies issued under section **405(a)** of this title, the Administrator shall rescind or deny the promulgation of the regulation or take such other action authorized under section **405** of this title as may be necessary to remove the inconsistency. If the Administrator determines that such a regulation, although not inconsistent with the Federal Acquisition Regulation or such policies, should be revised to improve compliance with such Regulation or policies, the Administrator shall take such action authorized under section **405** of this title as may be necessary and appropriate.*

**Section 421(6)** further states, *“The decisions of the Administrator shall be in writing and made publicly available. The Administrator shall provide a listing of such decisions in the annual report to Congress required by section **407**<sup>(1)</sup> of this title. “*

The **FPA** allegations - currently the subject of a GAO protest (**B-309911**) which I had initiated, – claim that the ‘exemptions’ are inconsistent with the ‘set-aside statutory provisions of the Small Business Act and wrong in their interpretation of the Act.

These ‘exemptions have allowed the government to exclude \$64 Billion in annual contracts – for over a decade - from small businesses. That is \$640 Billion in contracts, which should have gone to small businesses as per the intent of Congress!

The SBA – in the Legal Opinion they provided GAO - has not only sided with my challenge against the ‘set-aside exemptions’, but confirmed, – for the first time ever - their illegality.

SBA’s Legal Opinion - a copy of which is attached – states that, *“small business set asides are mandatory for acquisitions valued from \$3,000 to \$100,000 and take priority over GSA Schedule contracts.”* Furthermore, SBA affirmed that, *“this (set-aside) statute does not exempt GSA Schedule awards or orders issued pursuant to the Schedule contract from the Small Business Act.”* The Opinion goes on to say, *“As it stands now, agencies believe that the Small Business Act’s programs do not apply to either the GSA Schedule contracts or orders issued off the contracts. This is clearly contrary to statute and Congressional intent.”*

The SBA had never articulated nor promoted those positions until **FPA** challenged the legality of the ‘set-aside exemptions.’ In fact, the SBA PCR community has been told – for years - not to interfere with procurements (under \$100,000) which had been restricted to GSA Schedule holders only!

In their Legal Opinion, SBA also acknowledged *“there is nothing in statute or GAO ruling indicating that a GSA Schedule contract should or can take priority over this statutory mandated small business reservation requirement.”*

This SBA Legal Opinion verifies the **FPA**'s allegation that the 'set-aside exemptions' are (and have always been) illegal and discriminatory towards small and minority businesses. The FPA allegations are summarized on the link below:

<http://www.prweb.com/releases/2007/05/prweb525536.htm>

After public pressure from **FPA** and the Advocacy community to make the government data transparent, the SBA revealed last month that the three Federal Agencies (DOD, GSA and State Department) which have benefited directly from these 'exemptions' had failed – for the second straight year in which accurate data is available - to meet their own 'set-aside goals.' The Federal Government, for that matter, was also reported to have failed to meet the statutory mandate, which calls for the government to spent 23% of all Federal contracts with small businesses.

I respectfully request, for you to acknowledge this petition and advise me of your intention.

Thank you, in advance, for the opportunity to make a difference.



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*The mission of FPA is to bring fairness to public procurements so that small and minority businesses can both compete and prosper at the federal, state and local levels. FPA activities are aimed at protecting and enhancing 'set-aside programs' so they can achieve their intended results.*