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GAO Protest Against Set-Aside Exemptions

To: Paul Wengert Fax: 202.512.9749

Company Government Accounting Office eMail: wengertp@gao.gov

From: Raul Espinosa Date: August 27th, 2007

Re: Response to the Army's Agency Report (AR) on Protests B309911 Pages 15

CC: Charles Halverson Charles.halverson@hqda.army.mil

Please accept this communication as FitNet's official response to the Army's Agency Report (AR) challenging not only the Army's Statement of Facts, but the Army's Argument, which - in summary - claims that "*FAR Part 19 is not applicable in this instance.*" The lack of 'exemption authority' on the part of FAR 8.404(a) and its contradictory stand against the set-aside statutes of the Small Business Act **IS** the subject of this protest. In short, FAR 8.404(a) is not consistent with applicable law when it claims that "*Far Part 19 does not apply to Federal Supply Schedules.*"

The statutory authorities for the FSS program are Title III of the Federal Property and Administrative Services Act of 1949 ([41 U.S.C. 251](#), *et seq.*) and Title [40 U.S.C. 501](#), Services for Executive Agencies. Neither one of these authorities allows for exemptions which would contradict the set-aside statutes of the Small Business Act. Furthermore, [Title 41, Chapter 7, Sec.405 \(f\)](#) which created the Office of Federal Procurement Policy (OFPP), authorizes rescinding any Government-wide regulation or final rule or regulation of any executive agency relating to procurements, "*if the Administrator determines that such rule or regulation is inconsistent with any policies, regulations, or procedures issued.*"

If there is no statutory authorization for a procurement regulation, much less a statutory prohibition , such regulation(s) would not be consistent with applicable law and therefore it would be unlawful and unenforceable..

Lastly, the FAR is subject to judicial review under the Administrative Procedures Act (APA) and any regulation found to have neither authority nor statutory mandate to exclude set-asides can also be rescinded by any U.S. Federal Court. I am prepared to petition a U.S. Federal Court to tackle this issue and request for the Office of Advocacy and Congress to support such a request. In such an event, I am also prepared to ask the small business advocacy community for '*Amicus Briefs*' on the subject addressing the extensive damage these exemptions have had among small and minority businesses.

I. STATEMENT OF FACTS

1. The Army failed to state that the Protester had communicated with the Agency requesting for the procurement to be converted to 'set-aside for small-business' and that the Agency had denied the request. (**Schedule A**)
2. The Army failed to acknowledge that the Protester had also appealed to the SBA's PCR to intervene and have the procurement converted to 'set-aside' for small-businesses and that the Agency had also disregarded such intervention as well. (**Schedule A**)
3. The Army failed to acknowledge that FitNet had also challenged – as part of the protest - the government's unfair use of reverse auctions claiming that reverse auctions: (a) have unique processes which are not adequately addressed by the current FAR; (b) allows the government to circumvent FAR Part 19 and (c) allows the government to both restrict competition and establish 'sole source and/or 'sole brand' requirements in direct violation of the Office of Federal Procurement Policy Memorandums (**Schedule B**)

4. The Army failed to acknowledge that FitNet's had also opposed the Army's alleged arbitrary and unethical use of FedBid's 'Active Target Price' (ATP) to unfairly plan to drive down the offers on the procurement in question. Although the ATP is supposed to be a 'reserve price,' FedBid has unfairly linked such ATP to the vendor's lowest price to purposely drive the auction price down. In other words, a vendor is not competing against other vendors, but against the government's ATP price which dictates if the offer is 'leading' or 'lagging'. Such a procedure is not neutral, it's unfair, unethical and abusive towards suppliers. (**Schedule C**)

5. The Army failed to acknowledge that the ATP 'target price' it had entered (\$12,500) for this reverse-auction - to allegedly drive down the bids for this type of commodity - was well under the published GSA prices (\$16,215 – \$26,496) for the type of commodity sought by the Buy 43672 (**Schedule D**)

6. The Fairness in Procurement Alliance (FPA), a Coalition which represents the procurement interests of **ALL** the groups for whom Congress created the Set-Aside Program – a constituency of 10 million small businesses - has alleged that FAR 8.402(a); FAR 8.404(b), along with FAR 19.000(b), referred to as the 'set-aside exemptions', have no statutory basis for their exemptions and their authorities (for the FSS program) list no exemptions which would contradict the set-aside statutes. Furthermore these 'exemptions' have never been subject to the Regulatory Flexibility Act (RFA) required review. Most importantly, these 'exemptions,' FPA claims, have prevented small and minority businesses – for over a decade – to access \$64 Billion in annual contracts! That's \$640 Billion worth of Contracts over the last decade! (**Shedule E**¹)

7. The SBA's recently unveiled an 'Score Card System' which shows that GSA, DOD and the State Department, the Agencies which have directly benefited from the 'set-aside exemptions' have all failed to meet the statutory mandate for small business awards. (**Refer to SBA Release #07-51**²)

¹ <http://www.hispanicbusiness.com/news/newsbyid.asp?id=64676>

² <http://sba.gov/aboutsba/sbaprograms/goals/index.html>

8. On August 17th, SBA Administrator Preston, in a response to a question - at a press conference - regarding the SBA's intentions regarding the (set-aside) exemptions,' confirmed that his Agency, "*will vigorously pursue the issue of the exemptions.*" The Administrator said, "*SBA and the agencies are saying they want to be held most publicly accountable for contracting with small business at desired levels,*" and "*federal agencies know they will have to place more new contracts with small businesses.*" (**Refer to SBA Release #07-51** ³)

9. The Army failed to acknowledge that the reference (*Global Analytic Information Technology Services, Inc. B297200.3, Mar.21, 2006,*) it had cited in their motion to dismiss this protest was irrelevant in this case because such case did not address the alleged illegality of a regulation, which has been claimed to have no statutory grounds, and its rationale, according to a 2001 GAO Report, is "*unclear and incomplete.*"

10. The recent [GAO-07-791](#) Report, titled '*Reexamining Regulations,*' ⁴ acknowledged that the FAR has had a history of ineffective and lack of transparent review. Thomas M. Sullivan, Chief Counsel for Advocacy while addressing this subject said, "*This GAP report makes clear that federal agencies need to do a better job of reviewing existing regulations,*" He added, "*We owe it to small businesses to try to streamline, update and reform those rules.*"

II. ARGUMENT

The issue under protest is the 'illegality' or otherwise 'unlawful interpretation' of the Small Business Act. Additionally, the fact that FAR Part 8, specifically FAR 8.402(a) and FAR 8.404(a) (in addition to FAR 19.000(b) have been alleged to have no statutory basis for their existence; no mandate for set-aside exemptions in their authorizations and, lastly, their purpose clearly contradict the mandate of the Act as interpreted by FAR 19.

³ <http://sba.gov/aboutsba/sbaprograms/goals/index.html>

⁴ <http://www.gao.gov/new.items/d07791.pdf>

The GAO has addressed the issue of the exemptions as far back as 2001 in its report (GAO-01551)⁵ 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.”*

For the record, every time the alleged unlawful ‘set-aside exemptions’ has been challenged through a GAO protest, (I have personally brought up three separate cases) the government has cancelled them. When a solicitation is cancelled (even if it is in the middle of a protest, an action which deserves ethical attention) GAO, as a matter of policy, dismisses the protest on the ground that the protest is ‘academic.’

What is at stake, again, is the alleged ‘illegality’ or ‘unlawful interpretation’ of FAR 8.404(a) [including also FAR 19.000(b).] On the one hand, these ‘set-aside exemptions’ are alleged to have no ‘exemptions’ for set-asides in their authority and on the other, they have failed to interpret the statutory mandate of the Small Business Act. Most importantly, they have caused small and minority businesses to loose access – for over a decade – to \$64 Billion in annual contracts! **In short, these regulations have diverted \$640 Billion in government contracts away from small and minority businesses!**

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 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 gone on record stating⁶

⁵ <http://www.gao.gov/new.items/d01551.pdf>

⁶ Letter to State Department Secretary Powell dated January 12th 2005.

"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.*" As far as 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 performance and to modify its regulations accordingly.*"

Furthermore, both FAR 8.404(a) and FAR19.000(b)] have been alleged that they have never been subject to the required Regulatory Flexibility Act (RFA) review rendering both regulations, by statute, flawed and unenforceable.

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.*"

When an Agency receives a request from a supplier to set-aside procurement, especially if the SBA PCR supports such request, that Agency has a duty to the standard procurement protocol and a responsibility to the taxpayers to accommodate it. 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*) By denying FitNet request to set-aside this procurement, the Army failed to apply such guidance.

Furthermore, the protest has alleged that the unique processes of reverse auctions are not addressed (or addressed very poorly) by the current regulations and that reverse auctions are unlawfully allowing the government to, among other things, (1) circumvent the statutory set-aside provisions of the Act (FAR Part 19); (2) restrict competition;

(3) overly restrict the specifications by allowing 'sole brand' or 'sole source'; (4) ignore the required posting of the procurements on FedBizopps and (5) receive preferential treatment through its Lead/Lag feature).

GAO is urged – through this protest - to advise the OFPP and the FAR Council of the need to create new regulations and/or to amend the existing ones for the purpose of bringing fairness to the parties participating on 'reverse auction' so that this contracting vehicle can be truly a 'neutral' and effective instrument. In my humble opinion, 'reverse-auctions' are the future of government procurement due to their simplicity and lack of bureaucratic support and taxpayer burden for their utilization.

To further demonstrate how 'abusive contracting practices' have been affecting small and minority businesses, I wish to submit the following 'FPA NOTICE' which describe the steps which the OFPP have had to take to eliminate the practice of 'sole source/source brand,' an alleged procurement abuse issue addressed by this case.

The Office of Federal Procurement Policy (OFPP) has issued - in response to a proven endemic unethical/unfair practices - one directive demanding 'competition in procurements' and two demanding 'vendor neutral' specifications in all of their solicitations to, among other things, prevent contracting abuse allegations and to assure maximum competition. Federal Acquisition Regulations (FAR) 11.104; 11.105 and 11.107, according to the OFPP, prohibit end-users from either requesting a 'sole source/brand'; relying on a patent(s) and/or on any unique characteristic(s) of a desired brand-name or commodity to unfairly (and unethically) overly restrict the specifications and/or justify disqualifying an 'equal(s)' which meets the salient characteristics¹ of the commodity sought. Additionally,

Commodities in solicitations which fall in the category of 'non-essential to the business of the government' – as per OFPP directive - cannot be supported by an end-user justification(s) if such justification(s) restricts competition.

End-users, according to the OFPP, must judge 'equals' based, solely, on the 'salient characteristics¹ of the product/commodity(ies) besides its price, for award recommendation purposes.

Additionally, a 'brand-name or equal' solicitation must also define the basis for the award or, in this absence, the award must be made, solely, on 'lowest cost meeting the salient characteristics¹ of the commodity(ies) sought.'

Although these statements pertain to Federal procurements, its meaning - by default - apply also to public procurements at both the state and municipal level where this unfair and unethical practice also flourishes at the expense of small, minority and socio-economic businesses which are affected by this abuse.

*The FPA intention, in providing this 'notice,' is solely **TO ALERT** procurement specialists of a widely reported endemic situation involving end users attempts to unfairly (and unethically) seek 'sole source/brand'; overly restrict specifications or justify a recommendation for an award(s) based on an alleged 'brand-name preference' and/or on an alleged allegiance to a particular manufacturer or vendor. For questions, please, consult your Agency's Procurement Director or Ombudsman; your small business specialist, the SBA PCR assigned to you Agency and/or your Agency's OSDBU office. Such consultation(s) will assure fair competition and ethical evaluations*

III. CONCLUSION

On behalf of FitNet and on behalf of **ALL** the groups for whom Congress created the 'set-aside program,' **I am herewith petitioning GAO to sustain the protest and advice the OFPP Director of the legal need to rescind the 'set-aside exemptions' and establish new regulations to properly address the unique processes of 'reverse auctions'**

Contrary to the Army's contention that our argument is without merit and that "*there is no applicable statute or regulation that required the agency to set the requirement here aside for small businesses in lieu of purchasing from FSS vendors,*" the facts will prove – beyond any doubt - **that the is no statute which legally supports the 'exemptions' in either the authorities (for FSS) and on the Small Business Act as interpreted by FAR Part 19. And, If there is no statutory authorization for a procurement regulation, much less a statutory prohibition , such regulation(s) is not consistent with applicable law.**

By way of a copy of this communication, I am appealing for support of this action (to eliminate the 'set-aside exemptions') to my own Congressman, both Congressional Small Business Committees; the OFPP, the SBA Office of Government Contracting, the Office of Advocacy, and the GSA OSDBU.

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
Steven Preston, SBA Administrator
Paul Hsu, SBA Office of Government Contracts
John Klein, Esq., SBA General Counsel
Laura Mann Eyester, Esq., SBA General Counsel
Dean Koppel, SBA Office of Policy
Michael Tully, Esq., GSA General Counsel
Felipe Mendoza, GSA OSDBU

SCHEDULES IN SUPPORT OF FITNET PROTEST B-309911

SCHEDULE A

From: FitNet Contracts [mailto:info@fitnet.net]
Sent: Monday, July 23, 2007 3:28 PM
To: Clientservices
Cc: Larry Mallory; info@fitnet.net
Subject: Request to have Fort Bragg convert SWCSKQ-7177-N035 (Buy 43672-_01) to Small Bus. Set-Aside

We are requesting FedBid to advise the buyer of our request to have them convert the procurement described below to a 'set-aside for small businesses.' Please acknowledge and advise how they wish to proceed.

By way of a copy of this communication, **I am asking the SBA PCR assigned to Fort Bragg to intervene on our behalf to help accomplish that objective.**

Raul Espinosa
FitNet Purchasing Alliance

-----Original Message-----

From: notifications@fedbid.com [mailto:notifications@fedbid.com]
Sent: Monday, July 23, 2007 9:09 AM
To: notifications@fedbid.com
Subject: New FedBid Opportunity: USA ACA Ft. Bragg , Wardrobe Lockers

PLEASE DO NOT REPLY TO THIS EMAIL

FedBid has a business opportunity that matches the profile you created in the FedBid marketplace. A summary of the opportunity is provided below.

Buy No.: 43672_01
Solicitation No.: **SWCSKQ-7177-N035**
Buy Description: Wardrobe Lockers
Buyer: USA ACA Ft. Bragg
Ship To: Fayetteville, NC 28310
Contract Requirement: GSA Schedules Only
Set-Aside: All Sellers
Payment Term: Purchase Order or Delivery Order

SCHEDULE B

From: FitNet Contracts [mailto:info@fitnet.net]

Sent: Thursday, July 26, 2007 9:51 AM

To: Tucker Smith; GAO Protests

Cc: Andrea Grimsley; Chris Harvel; Geoff Edwards; Clientservices; Larry Mallory; Brian Waldrip; Paul Hsu; Major Clark; Michael Gerich; Greg Willis; Erik Necciai; Leann Delaney

Subject: GAO Protest on Sol # SWCSKQ-7177-N035 (Buy 43672-_01) for failure to convert this procurement to Small Bus. Set-Aside

Please accept this communication, as a GAO protest against the Fort Bragg Contracting unit for their decision to deny my request to have this procurement be set-aside for small businesses. By denying my request, Fort Bragg failed to abide by the statutory requirements of the Small Business Act (the Act) regarding 'set-asides' and the regulation (FAR Part 19) which interprets said mandate. Please kindly **stop this Fedbid Buy** and advice Fort Bragg of my action....

I further wish for GAO, as part of this protest to review the allegation that Agencies are using the FedBid 'reverse-auction' venue to purposely circumvent the statutory mandate of FAR Part 19 (the 'set-aside' provisions of the Act.) The majority of the procurements which circumvent Part 19 are never posted on Fedbizopps also in violation of the regulations.

Although I support 'reverse-auctions' as a government procurement vehicle and believe they are the future of government procurement, the venue is in dire need of regulations which protect the rights of suppliers, especially small and minority businesses.

SCHEDULE C (section taken from an attachment to the protest)

ISSUE 1. REMOVING THE LINKAGE - ON THE 'LEADING/LAGGING' NOTIFICATION - TO THE PRICE THE GOVERNMENT WISHES TO PAY FOR THE COMMODITY(IES) ON THE AUCTION. – PRICE FIXING

FedBid's practice to identify a bid as 'leading or lagging' is unfair to suppliers because it is arbitrarily linked to the price the CO has listed as the amount the government wishes to pay for the item(s) on the auction. This arrangement not only creates distrust among suppliers, but it offers grounds for a 'protest.' A reverse auction must be 'neutral' and must not provide either party with any benefit during the bidding process. This specific procurement practice unlawfully restricts the supplier's right to both benefit and profit from their involvement on a supposedly neutral auction whose transaction is currently benefiting solely one party at the expense of the other. In summary, the FedBid system must eliminate such linkage. *The sellers' 'lowest' offer in a competition must be the sole and ruling element, which determines the leading/lagging' feature.*

FEDBID RESPONSE


FedBid includes a feature called 'Active Target Price' ("ATP"), which is activated by the government buyer at the buyer's sole discretion. The ATP, as clearly defined in FedBid's Terms of Use, is a price point, usually based on a GSA Schedule catalog price, a previous purchase price, or funding threshold, that must be underbid before a Bid received "LEAD" Bid Status. **The ATP is equivalent to a reserve**, which is a common feature of auctions and reverse auctions, and it allows the Buyer to utilize the IGE in a way that encourages Sellers to meet government pricing expectations. When bidding through FedBid, Sellers are required only to submit good faith offers to sell the required items at a certain price. There is no requirement for every Bid to beat the ATP or be a 'LEAD' Bid; however, if the Seller bids a certain item at a certain price, it must be prepared to deliver the item at that price. In addition, because most Buyers use a simplified acquisition based best value determination to make an award decision, there is no guarantee that the LEAD Seller will be selected. FedBid makes this clear both in the Terms of Use and through the low bidder's status of 'LEAD - Pending Selection', which appears after the close of a reverse auction. Accordingly, part of the incentive for Sellers to Rebid is to be as close to the top of the price-based ranking as possible to increase likelihood of selection on a best value basis, even if they can't get to 'LEAD' status.

ESPINOSA'S COUNTER RESPONSE TO FEDBID

Thank you for confirming that FedBid ATP is nothing more than a 'reserve price' which has nothing to do with the bidding competition. I stand firm of my suggestion to have FedBid remove the link to the 'Leading/Lagging' feature and treat the ATP as what it is, a 'reserve price.' 'Reserve Prices' on auctions (i.e., eBay) sole purpose is to advise the bidder, separately, from the auction's competition itself, that the 'reserve price' has been met or not. The ATP role, on the auction should solely confirm this and nothing else. Currently, the ATP is a misleading amount, which not only has nothing to do with the bidding competition, but it creates distrust among suppliers and detrimentally affects their profit margins. The bidding between suppliers shall be the sole determinant as to which vendor is leading the auction. In summary, **FedBid has assumed that buyers would enter a GSA price as opposed to an arbitrary low price on the ATP.** Additionally, **FedBid cannot guarantee that buyers are using the ATP the way FedBid envisioned. The FedBid ATP, again, is an arbitrary number representing the 'reserve price' and it should be treated as such.**

SCHEDULE D (data from GSA Advantage on items)

Product Detail

<p>Product: COMBINATION STORAGE/WARDROBE CABINET [CABINET,STORAGE]</p> <p>NSN/Mfr Part #: 7125-00-641-5434</p> <p>Mfr: UNICOR</p> <p>Desc: Gray, 78"h x 18"d x 36"w, Cabinet is assembled and ready for use. Equipped with 1 nonadjustable hat shelf, 6 adjustable shelves, 1 vertical dividing partition, 1 coat rod and 2 coat hooks. AA-C-00031. Combination cabinet made of enameled steel has close-fitting, reinforced double doors with three hinges per door. Secured with lock and keys. Includes satin-finished hardware, number plate and label holder. Door handle controls a three-point latching mechanism. This is non-mailable items.</p>		<p>\$324.30 x 50 = \$16,215</p>
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Contractor	 GSA Global Supply (strategic sourcing)
Delivery	63 days
Unit Price	\$324.30

Additional Entries on GSA Advantage

<input type="radio"/> URBAN OFFICE PRODUCTS	<input type="radio"/> CORPORATE OFFICE SOLUTIONS	<input type="radio"/> LC Industries	<input type="radio"/> INTERIOR FACILITIES DESIGN, LLC
3 days delivered ARO	2 days delivered ARO	4 days delivered ARO	3 days delivered ARO
\$470.61	\$473.10	\$498.00	\$529.92

SCHEDULE E



Coalition of Small and Minority Businesses Claims the Government Unfairly Excludes Their Access to \$64 Billion in Federal Contracts

5/15/2007

The Fairness in Procurement Alliance (“FPA”) which represents the procurement priorities of 10 million small businesses, including but not limited to, businesses owned by minorities, women, veterans, Native Americans, and service-disabled veterans (8a and Hub Zones included.) has charged that the Federal Acquisition Regulations (FAR) fails to implement the mandates of the Small Business Act, (Act) which governs all Federal procurements.

According to Raul Espinosa, Founder and Spokesperson for the Coalition, "The results of the regulations' misinterpretation of the Act is the deprivation of our access to more than \$64 Billion in federal contracts each year (20 Billion in 'foreign' contracts and \$44 Billion in Federal Supply Schedule (FSS) awards. "

Roger Campos, President of the Minority Business Round Table (MBRT) said, “the impact of H.R. 1873 which increased the set-aside ceilings to 30% will mean nothing unless the exemptions are eliminated.” Anthony Robinson, President of MBELDEF, added, “The set-aside exemptions in the regulations will continue to exclude our access to those contracts.”

The Small Business Act mandates that small business concerns, owned and controlled by socially and economically disadvantaged individuals, veterans, service-disabled veterans, including women, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. 15 USC 637(d)(1).

Further, the Small Business Act mandates that each contract for the purchase of goods and services that has an anticipated value greater than \$2,500, but not greater than \$100,000 shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices. 15 USC 644(j)(1).

Notwithstanding these clear statutory mandates, the FAR exempt 'foreign' purchases from the 'set-aside' mandate of the Act. FAR 19.000(b) – whose origins pre-dates the FAR - provides that Part 19 [which includes the regulations implementing the Act, including the 'set-aside mandates' apply only in the United States or its outlying areas.

According to Congressional sources, this exemption is outdated and has resulted in the exclusion of more than \$20 Billion in yearly procurements – for over a decade – from the reaches of our small business constituency and the oversight of the SBA’s Government Contracting Office and its Procurement Center Representatives (PCR).

Further, FAR 8.404, provides yet another example where the FAR fails to adhere to the mandates of the Act. FAR8.404 also exempts all Federal Supply Schedule (FSS) purchases (the bread and butter of the procurement system) from the mandates of the Act.

In direct contradiction of the Act's mandate, FAR 8.404(a) provides that the small business set-aside procedures and policies do not apply to Blanket Purchase Agreements (BPA) and orders placed against schedules using Part 8 procedures. FAR 8.405-5 goes even further to emphasize that the mandatory preference programs of Part 19 - also in a contradictory manner to the Act's mandate - do not apply to orders placed against schedule contracts and indicates only that agencies should consider (but are not required to do so) the socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA. Espinosa claims, "This additional exemption deprives our constituency of more than \$44 Billion dollars in contracts."