



## **ELIMINATING THE PROCUREMENT ABUSIVE PRACTICE REFERRED TO AS 'UNFAIR END-USER JUSTIFICATIONS'**

The Office of Federal Procurement Policy (OFPP) in an effort to increase competition and eliminate the endemic practice involving the reported 'wiring' of procurements of commodities has issued, since 2006, four (4) separate directives to the procurement community <sup>1</sup> which address this issue. The *Fairness in Procurement Alliance* (FPA) which represents the procurement priorities of small and disadvantaged businesses, a 10 million constituency, has praised the OFPP efforts and has devoted one of its own *Procurement Advisories* to the subject.

FPA and its constituency believe, however, that the OFPP efforts has fallen short of its goal. The main reason being that the culprits are public servants originating the procurement requests. This constituency, obviously, has been unethically clever by disguising their requests to the procurement community through the use of 'unique' or 'patented' requirements of their preferred brand. The procurement community, on the other hand, has been clueless; have not questioned the justifications or they have taken sides with their clients. The public servants, in their effort to get what they want - have disregarded the typical higher costs often associated with their 'personal choices'; have allowed themselves to be influenced by their alleged 'preferred suppliers or vendors' or by the marketing hype of the manufacturers's literature. Their actions, nevertheless, have perpetuated the established monopoly that large businesses have enjoyed - for decades - over public procurement, including committing fraud by bidding and accepting contracts restricted for small businesses without fear of punishment. The 110<sup>th</sup> Congress has issued 12 separate pieces of legislation to bring transparency and oversight to government procurement and has ordered for GAO to report on the abuses. Two of these public reports have verified both the abuses and a trend for waste, fraud and abuse mismanagement <sup>2</sup>

In an effort to encourage additional OFPP action to end this endemic abusive practice, FPA has petitioned the Project on Government Oversight (POGO) and the SBA Office of the Inspector General (OIG) to investigate the proof FPA has gathered – in the form of public solicitations with alleged unfair justifications which have affected – in some cases - the outcome of contract awards - to demonstrate how these 'end-user unfair justifications' have been not only abusive towards the statutory rights of small businesses, but how end-users have cleverly diverted billions in procurements towards large businesses.

Additionally, FPA has submitted specific recommendations to OFPP, for a future directive(s) on how this unfair procurement practice might be ended.

---

<sup>1</sup> [http://www.whitehouse.gov/omb/procurement/memo/2008\\_brand\\_name.pdf](http://www.whitehouse.gov/omb/procurement/memo/2008_brand_name.pdf)  
[http://www.whitehouse.gov/omb/procurement/memo/fdcc\\_competition.pdf](http://www.whitehouse.gov/omb/procurement/memo/fdcc_competition.pdf)  
[http://www.whitehouse.gov/omb/procurement/memo/2006\\_brand\\_name.pdf](http://www.whitehouse.gov/omb/procurement/memo/2006_brand_name.pdf)  
[http://www.whitehouse.gov/omb/procurement/brandname\\_specs.pdf](http://www.whitehouse.gov/omb/procurement/brandname_specs.pdf)

<sup>2</sup> <http://www.gao.gov/new.items/d08857.pdf> and <http://www.gao.gov/new.items/d071255t.pdf>

## FPA RECOMMENDATIONS

FPA encourages interested investigative parties to review and report on the abusive practice through these examples, including their outcome. The history behind these solicitations will help demonstrate how 'end-users unfair justifications' have unfairly 'wired' (or attempted to wire) the procurements and/or how those efforts have affected the awards. Some of the outcomes even demonstrate how the government's own independent vehicles for 'dispute resolution' appear to be bias rather than 'neutral' in judging the 'unfair justification issue'. In other words, there is also a dire need for strengthening the 'size protests' process and for creating a new and truly independent alternative dispute resolution' vehicle for handling disputes..

FA2517-08-T-6100  
FA4427-08-Q-0013  
HSCG23-07-R-PMD241  
M0031806T0610  
F2B1AE8192A001

FA48800-08-Q-LN01  
N0018908TG095  
W804F23BN-08-007  
FEDBID BUY # 70279  
FEDBID BUY # 49582

*Details involving the disputes involving the above Cases are available through FPA*

What follows are recommendations from procurement experts, academicians and attorneys consulted on the subject of 'unfair justifications.' These recommendations might be consider for a new OFPP directive(s) addressing the culprit (i.e., end-users) to prevent the practice from affecting future public procurements.

- 1) Standardize all procurement set-aside thresholds – including identifying who shall review and approve them to make sure the statutory rights of small businesses (FAR 19) is honored.
- 2) Allow for external, independent expert(s) to verify that specifications are unbiased; publish all justifications on Fedbizopps' with copy which would read, "if you believe specifications unduly restrict competition, advise CO within 'X' days or they will be accepted as not unduly restrictive."
- 3) Recommend for COs to consult with interested vendors or industry association when specifications appear to be overly restrictive or if they are challenged.
- 4) Require end-users to submit their commodity requests with a 'form' which would assure the CO that the salient characteristics or features of the commodity(ies) desired have neither unique nor patented characteristics or features. State on the form that end-users will be held accountable for disciplinary action if their requests are proved to be false.
- 5) Recommend for Agency heads to acknowledge the abusive practice and advice their workforce that they will be held accountable for disciplinary actions when their request for purchases are found to contain improprieties.
- 6) Require the contracting community to publish ALL solicitations and ALL the award results – regardless of their amount - on fedbizopps.
- 7) Require the contracting community to automatically notify all interested parties to a solicitation of the details of the award on that particular solicitation.
- 8) Support the creation of an independent on-line database which would allow small businesses to post a) allegations of procurement abuse and b) result of protests (i.e., size protest, Agency protest and GAO protest and c) Ombudsman's decisions.

