



# The Size Protest System Must be Fixed For the SBA Size Standards to Work

*Settlement for Future Contract Option Suggested*

*By Raul Espinosa*

The government procurement system is in a crisis as far as its dealings with the statutory rights of small and disadvantaged businesses. The SBA size protest process, for example, does not work as Congress had intended. On the one hand, Agencies are ignoring the process and on the other, if one wins a size protest, you cannot always collect the reward of your labor. Agencies must be held accountable for avoiding or circumventing their responsibilities and large businesses, must be prevented from bidding and/or accepting set-aside contracts. Regardless, the government has a responsibility – if they choose not to prosecute the violators – to reward small businesses abused by the process. Both contracting abuse practices are rampant, the penalties are not being enforced and there are out-of-the box entrepreneurial solutions with which to solve the problem.

The oversight and transparency efforts of the 110<sup>th</sup> Congress has unveiled Billions in set-aside contracts in FY 05 and FY06 that had illegally gone to large businesses. It also unveiled the efforts, by Federal Agencies, to count their set-aside awards in two, three or more disadvantaged business categories to appear as if they were meeting their own set-aside goals. Protest documentation from a Federal lawsuit by the American Small Business League (ASBL) has shown that the SBA protests *“lacked consistency and scrutiny for them to be of any meaning”* Granted, the SBA budget has been cut by more than 50% and their government contracting workforce has been doing double duty, for years, but that’s no excuse for allowing the abuse.

In 2003, I negotiated a settlement with Malmstrom AFB Contracting Office over a dispute involving a set-aside solicitation (24604-03-T-0011). I had convinced the Contracting Office that their client or end-user had given unlawful preferential treatment to a preferred large business, an abusive contracting practice<sup>1</sup> which – finally – is being investigated as I write this document. The Contracting Office had agreed to my offer to settle the dispute which I had elevated to the GAO level (B-292301), because frankly, I always thought size protests did not work and the Agencies did not honor them. The main reason I am raising this case here is because of the settlement option I had conceived to settle the dispute. I believe this option could easily become a new vehicle for settling all future size protests. The innovative agreement - approved by Air Force attorneys - called for my company to receive future contracts for bona-fide requirements of the Agency over a period of a year or more (time was subject to a mutually agreeable extension) for no less than twice the amount of the contract which I should have received, as long as my prices were deemed fair to the Air Force. Malmstrom AFB agreed to keep me abreast of all of the opportunities, but, frankly, they did not. On my own, I had found several opportunities I could have fulfilled and had made unsolicited offers to Malmstrom AFB, which they ignored or refused without giving me any reason. To make the story short, when a year was up, Malmstrom AFB Contracting Office simply breached their agreement thinking – as it is the case with most small businesses – *“they do not have the financial resources nor the time to fight Goliath who will outlast any of their efforts.”* It has been 4 years, but as you can see, I am now fighting back by sharing this experience to help change the system and make a difference.

To further my point, let me cite another case. The Contracting Office at Little Rock AFB, talked us once into not filing a protest involving Set Aside Solicitations F13SVS222401 and F13SVS222402 at the end of a fiscal year claiming *“they would loose the funding if I filed the protest.”* My compliant and timely offer had been ignored and the awards had been made, illegally, to preferred large suppliers ineligible to receive them. Little Rock verbally promised to negotiate future contracts, but delayed the negotiations until my time window to file a protest had expired. And then, Little Rock AFB told us, unethically and unfairly, to get lost!

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<sup>1</sup> <http://www.prweb.com/prfiles/2008/08/31/162468/FPAHowtoEndUnfairProcPractice.pdf>

In 2005, SBA basically ignored my claim on a size protest against an alleged front for Precor, Inc., a large business. To prove the point that size protests do not work, I appealed the case in Federal Court and won the appeal (SIZ-2005-05-09-22) forcing SBA to rule on my favor (Case 6-2005-039) in a historic case. The culprit, Precor, Inc. walked away untouched. I could neither get SBA to force the Agency to give me the contract Precor had illegally taken from me or even penalize Precor for illegally using its 'front' to win that contract. For years, that 'front' had accepted millions in set-aside contracts for Precor, but SBA never did anything about it.

In 2008, The Army National Guard, circumvented the size protest process by cancelling a set-aside award it had illegally issued when I protested the award (W912TF-08-P-0034.) The Contracting Office avoided forwarding the case to SBA and gave me, as an excuse, 'lack of funding.' When I appealed, SBA claimed it had no authority to prevent an Agency from cancelling an award even if it was done unethically to circumvent the protest. And, get a whole of this, the Agency went ahead and resolicit the same purchase (W912TF-08-T-0025) ... even though it had claimed, originally, that they "lacked funding." Who were they kidding?

SBA must be given the authority to penalize both the Agencies and the violations. Another avenue is to empower the victims to file suit, including Qui-Tam lawsuits or to negotiate a settlement for future contracts – as the one I had done. Regardless, SBA must make sure the Agencies fulfill their responsibilities.

In April 2008, for example, the Federal Communication Commission (FCC) found Precor, Inc., guilty of a violation against its own regulations and fined Precor, Inc., \$357,900.<sup>2</sup> SBA must be empowered to act in a similar manner in order to support its constituency when they get abused whether the culprit is a large business or a Federal agency.

Ever since my historic 2005 challenge, I have claimed that 'size standards' cannot be fixed without tackling ALL of its elements: a) regulations; b) penalties; c) protests and d) enforcement. Attempting to fix a single element of size standards – as SBA is currently attempting to do - without addressing its other parts is like attempting to fix a flat tire on a car, without engine, and with its other three tires bold and ready to pop!

The Fairness in Procurement Alliance (FPA), in conjunction with its think tank at the University of North Florida (UNF) have conceived a 'partnership initiative' which addresses solutions to the government procurement crisis. "The Umbrella Initiative will involve entrepreneurs – with government oversight and transparency - in making sure 'procurement set-asides' work the way Congress intended.



**Raul Espinosa is the Founder and Spokesperson for the Fairness in Procurement Alliance. The FPA mission is to bring fairness to public procurements so that small and disadvantaged businesses can both compete and prosper at the federal, state and local levels.**

*FPA represents the procurement priorities of a constituency of 10 million small and disadvantaged businesses Its mission is to bring fairness to public procurements so that small and disadvantaged businesses can both compete and prosper at the federal, state and local levels. FPA was founded in 2005 as a loose coalition of 14 small and disadvantaged business advocacy groups which had come together to support a 'size protest' test case (SIZ- 2005-05-09-22) filed against a 'front' for a large company to unlawfully secure 'set-aside contracts'. The victory' resulted in a purging of the CCR database and the establishment of new regulations on reporting small business status. The Coalition stay together and has succeeded at identifying regulations and practices that require changes, at conceiving initiatives and at publishing reports on contracting abuse. FPA has been credited with authoring, with the assistance of its Think Tank at the University of North Florida (UNF), such initiatives as the 'Free Universal Access' (FUA); the 'Contracting Abuse Resolution Board' (CARB) and 'The Umbrella Initiative'. Additionally, FPA has produced unsolicited reports detailing 'Contracting Abuse by the Air Force,' 'Reverse Auction Unethical Practices' and 'Unfair End-User Justifications.' FPA has also launched successful educational efforts in the form of Procurement Advisories aimed at creating awareness - within the procurement community - about the statutory rights of small and disadvantaged businesses.*

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<sup>2</sup> <http://www.fcc.gov/eb/Orders/2008/FCC-08-112A1.html>