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OHA AND SBA TAKE SIDES WITH SMALL BUSINESS CRUSADER IN HIS FIGHT TO END GOVERNMENT CONTRACTING ABUSE

***Test Case Finds the Air Force Abusing Small Businesses and Misleading SBA.
SBA Rules Against The Corps Group, Inc., and Precor, Inc. for Unlawful Affiliation
Advocacy Groups Form Coalition to Bring Attention to Issues and to Demand Compliance***

Access details and attachments at <http://www.prweb.com/releases/2005/10/prweb302024.htm>

JACKSONVILLE, FL., (PRWEB), Oct., 26th, 2005 – The failure of government contracting officials to follow the regulations and prevent ‘large’ companies from abusing the government’s ‘set-aside’ program at first frustrated him. The practice became an adversity that Raul Espinosa was determined to overcome. These circumstances have made him into an effective small business crusader leading a national effort to change the way the government handles contracting abuse. For over a decade, Espinosa has been advising advocacy organizations and small businesses on government contracting issues as CEO of FitNet, a government-purchasing group. Lately, policy making officials have been paying attention to his advice.

Espinosa knows that the SBA’s ‘size standards’ needs major changes to become both fair and effective. “*Size Standards has become a bureaucracy; penalties aren’t applied and there’s no enforcement power so the violators have nothing to fear when they get caught,*” he said.

Congress, through the Small Business Act, established the Government Set-Aside program to reserve 23 percent of all government purchases or over \$75 billion for small businesses. Large companies, however, have been illegally siphoning a large portion of these contracts¹ often with the apparent sanctioning of the respective contracting officials. Although, there is a SBA protest mechanism in place, Espinosa says, “*the current ‘size protest’ relies, for example, on the ‘IRS rule,’ absolutely the worse possible tool to count employees and determine the size of the business.*” Additionally, he claims there are loopholes in the system that allows affiliated companies, for example, to easily circumvent the regulations. What’s worse is the fact that ‘size protest decisions’ are often ignored by government agencies. He said, “*You might win the ‘size protest’, but you can’t claim the contract because the agency allowed delivery to take place and what’s worse, the penalties for the violations aren’t enforced.*”

The Government’s Office of Hearing and Appeals (OHA) recently confirmed and vindicated Espinosa’s claims of abusive contracting behavior on the part of the Air Force in a test case. Federal Judge Christopher Holleman in his (SIZ-2005-05-09-22) ruling said, “*The Air Force Actions here are negligent at best, at worst, deliberate attempts to mislead SBA and this Office.*”

OHA remanded the case to the SBA which, thanks to Espinosa’s intervention, has just ruled (6-2005-039) that the Corps Group, Inc., was affiliated with Precor, Inc., a large business – in violation of the Federal Acquisition Regulations (FAR) - to pursue set-aside contracts. “*There may be millions lost that could have gone through small and minority businesses through this arrangement since 1996,*” Espinosa said.

Anthony Robinson, Esq., CEO of the Minority Business Enterprise Legal Defense and Educational Fund (MBELDEF) [www.mbeldef.org], who, at Espinosa’s request, has been monitoring Air Force set-aside contract opportunities, said, “*What happened here was not only a violation of the letter and spirit of the law, but of the small business policy.*” He added, “*Without an appropriate enforcement mechanism, violators are gutting fundamental due process and the fairness of the system.*”

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¹ Proof of contracting abuse is detailed on the Eagle Eye report (<http://www.sba.gov/advo/press/04-41.html>) and in four (4) separate Inspector General (IG) reports (<http://www.sba.gov/ig/audits.html#med>). Additionally it is also described in a report by the Center for Public Integrity (<http://www.publicintegrity.org/pns/report.aspx?aid=387>.)

Neither the OHA nor the SBA decisions, however, appear to have stopped Precor from continuing to pursue set-asides and/or for the Air Force to stop displaying favoritism. In a separate case (FE461352730040) at **Warren AFB**, the Air Force used a 'sole-source contract' to allegedly circumvent the now unlawful arrangement that had existed since 1998 to acquire the Precor equipment as a set-aside. *"Very clever, but unethical,"* said Espinosa.

"For the last three years, I've been fighting both unethical interference in the set-aside program by large companies and unfair treatment by the Air Force contracting community," Espinosa stated. *"I only trust that the OHA and SBA rulings will bring more attention to the subject by the contracting community at a time when the regulations are being reviewed."*

Raul is no stranger to adversity. When he was 14 years of age, his parents made the greatest sacrifice of their lives to save him from communism, by shipping him, all alone, to the US from his native Cuba so he could live in freedom and achieve the American dream. This famous exodus, known as the Pedro Pan, or the Peter Pan Exodus, brought to America in excess of 14,000 children all of whom had to overcome adversity to succeed in America. The best known child from the group is current US Senator Mel Martinez.

It didn't take long for the Cuban American to overcome the odds and succeed in his new country. His athletic abilities and determination to climb the ladder of success helped him compete in collegiate sports and not only earn a Masters degree in International Business from The University of Texas, but also obtain enviable positions working for some of the country's most powerful and influential leaders. His resume demonstrates that hard work, determination and loyalty pays off. His superiors have included David Rockefeller, Chairman of the Chase Manhattan Bank and three former US Presidents!

Espinosa has used his negotiating and service-oriented skills, which he claims he learned from his former mentors in public office, to bring together twelve advocacy organizations into a major coalition to seek changes in the government set-aside program. Espinosa said, "The goal of the coalition is to convince policy making officials that it is time to begin applying the penalties on the books and make sure the regulations are enforced."

The coalition which supported his test case at OHA and his challenge against Precor, Inc., brought together advocacy organizations² and leaders with different views on how to address the SBA challenges, but one central goal: to end the abuse of the government set-aside program. It included such advocates as Anthony Robinson, Esq., of MBELDEF, Lloyd Chapman of ASBL and Roger Campos of MBRT just to cite a few.

"Small and minority business contracting is vital to the American Economy as it employs 80% of the US workforce," said Roger Campos, CEO of MBRT (www.mbrt.net) He added, *"Minority businesses are growing six times faster than the rest and these experiences are not helping our cause."*

The SBA has finished a tour of 11 cities designed to seek public comments aimed at fixing their 'size-standards' and determine which companies will receive legitimate small business status for such things as government contracts. *"I am convinced that the effort to fix 'size-standards' must also address 'size protests', 'penalties and their enforcement' plus 'dispute resolutions.'"*

Espinosa uses this analogy, *"Look, fixing 'size-standards' by only looking at size issues is like attempting to fix a flat tire on a car whose other three tires have no treads left!"*

"Perhaps the biggest mistake of the entire system," Espinosa claims, *"is that there is neither an enforcement mechanism nor a fair dispute resolution element in place as part of the system."* He added, *"these would apply sanctions and would fairly settle disputes."*

Espinosa suggests that the easiest and fastest way for the government to deter abuse is to start debaring violators. It will scare the large companies, which have been purposely abusing the system. Al Krachman, Esq., a Partner in the Blank Rome Law Firm, supports Espinosa's approach. In a June Article in Contract Management,³ Krachman details the approach. *"By making violations of the SBA actionable as a priority grounds for suspension or debarment, a significant new deterrent would likely impact the misconduct,"* Krachman said.

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² See attached list of Members of the Coalition

³ The link to the article is http://www.ncmahq.org/publications/cm/docs/CM_June05p30.pdf

Lloyd Chapman, President of the American Small Business League (ASBL) [www.asbl.org] agrees, “the system has severe penalties in place to deter abuse, but the government has been reluctant to prosecute the violators.” He added, “Federal Agencies must also be held accountable and threaten with the lost of funding and/or disciplinary actions whenever abuse is involved.”

When prompted for examples of Air Force abuse ⁴, Espinosa cited the **Hanscom’s AFB’s** award to **Precor, Inc.**, a large corporation which was the action which prompted Espinosa to bring the test case to OHA. Judge Holleman said, “The Air Force simply ignored the set-aside restriction in its own solicitation and awarded a contract set aside for small business to an admittedly large firm.”

The OHA decision has already caused the reversal of one contract eligibility for the affected businesses (M62204-05-Q-5040) after the test case brought by Espinosa. CIV Cody Wall, Senior Legal Counsel for the Marine Corps Logistics Base at Barstow, in a communication to Espinosa said, “The Corps Group and Precor are... not small businesses.” He acknowledged Espinosa for his efforts to bring awareness to the situation by saying, “I salute your desire to eliminate barriers to fair government contracting.”

Espinosa claims the Air Force contracting problems with small businesses is huge and goes far beyond the case at **Hanscom AFB**. In outlining other glaring examples, he cited **Malmstrom AFB** which has refused to honor a written agreement settling a contracting dispute or even to re-negotiate it after the deadline had passed; **Little Rock AFB**, allegedly lied to get him to withdraw a size protest. **Seymour Johnson AFB** which after admitting a mistake, promised him future contract consideration, but has yet to come through with their promise. **Pope AFB** which discarded his size dispute challenge which he had won. The **Air Force Academy**, which, he alleged, admitted ignoring his lowest competitive bid and simply apologized for their mistake; and two cases involving the **Air National Guard**. In one case, they covered up their mistake to justify the award and in the second case, they ignored a more capable and lower price bid offer when forced to consider an alternative to a sole source solicitation. “I have kept record of all of these cases because, eventually, the Air Force will have to address their abusive behavior.”

Winning a size protest under the current regulations, Espinosa claims, does not accomplish what Congress had envisioned. In the cases at **Hanscom AFB** and **Pope AFB**, for example, Espinosa had won size protests, but the Air Force had allowed delivery and he had nothing to show for his efforts to challenge the set-aside awards. “We spent thousands of dollars and resources in a process that it isn’t fair and it doesn’t work,” he said,

According to Espinosa, another major issue, which must be addressed, involves changing the attitude - primarily in Air Force circles – of those who initiate purchasing requests. “End users in the military think they can get any brand-name they specify, for example, regardless of the regulations.” He added, “The problem occurs when the contracting officer doesn’t question an end-user justification for a higher price offer – especially if the end user’s decision is challenged.”

“Rigging specifications to favor a particular product or vendor in a solicitation to avoid fair competition is another unlawful practice which is pervasive in Air Force contracting,” Espinosa claims. “It only takes, but a small change in a line item to unethically keep out potential competitors.” In a recent solicitation at **Wright Patterson AFB**, Espinosa said, “Restrictive language was added, on purpose, to an original sole-source solicitation after the ‘sole source status’ had been eliminated to still favor the original sole source vendor,” he said.

He added, “The Office of Federal Procurement Policy (OFPP) and/or the Secretary of the Air Force, could stop such practices through a procurement directive and a report card to keep track of contracting disputes and force a lost of future funding to contracting units with such cases on their record.” Espinosa believes the contracting community must be held accountable for their decisions.

Espinosa is committed to ensure fairness in the enforcement of government regulations and believes that entrepreneurs can supply most of the answers to the challenges facing the Small Business Act. He has authored two small business initiatives, which would rely on private industry, not the government, to supply solutions and make sure the Government Set-Aside Program works as Congress intended. “The plan could not only save the Federal government billions of dollars, but it will guarantee that legitimate small businesses will have easier and faster access to the \$75 billion in government procurement that is lawfully theirs,” he said.

⁴ See Attached Report on Contracting Abuse by the Air Force

Excerpt from the Small Business Act[15 USC 645(d)(2)(c)]

[United State Code](#)

[TITLE 15 - COMMERCE AND TRADE](#)

[CHAPTER 14A - AID TO SMALL BUSINESS](#)

U.S. Code as of: 01/26/1998

Sec. 645. Offenses and penalties

(a) False statements; overvaluation of securities

Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of obtaining for himself or for any applicant any loan, or extension thereof by renewal, deferment of action, or otherwise, or the acceptance, release, or substitution of security therefor, or for the purpose of influencing in any way the action of the Administration, or for the purpose of obtaining money, property, or anything of value, under this chapter, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both.

(b) Embezzlement, etc.

Whoever, being connected in any capacity with the Administration, (1) embezzles, abstracts, purloins, or willfully misapplies any moneys, funds, securities, or other things of value, whether belonging to it or pledged or otherwise entrusted to it, or (2) with intent to defraud the Administration or any other body politic or corporate, or any individual, or to deceive any officer, auditor, or examiner of the Administration, makes any false entry in any book, report, or statement of or to the Administration, or, without being duly authorized, draws any order or issues, puts forth, or assigns any note, debenture, bond, or other obligation, or draft, bill of exchange, mortgage, judgment, or decree thereof, or (3) with intent to defraud participates or shares in or receives directly or indirectly any money, profit, property, or benefit through any transaction, loan, commission, contract, or any other act of the Administration, or (4) gives any unauthorized information concerning any future action or plan of the Administration which might affect the value of securities, or, having such knowledge, invests or speculates, directly or indirectly, in the securities or property of any company or corporation receiving loans or other assistance from the Administration, shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than five years, or both.

(c) Concealment, etc.

Whoever, with intent to defraud, knowingly conceals, removes, disposes of, or converts to his own use or to that of another, any property mortgaged or pledged to, or held by, the Administration, shall be fined not more than \$5,000 or imprisoned not more than five years, or both; but if the value of such property does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(d) Misrepresentation, etc.

(1) Whoever misrepresents the status of any concern or person as a 'small business concern', a 'qualified HUBZone small business

concern'', a ''small business concern owned and controlled by socially and economically disadvantaged individuals'', or a ''small business concern owned and controlled by women'', in order to obtain for oneself or another any -

(A) prime contract to be awarded pursuant to section 638, 644, or 657a of this title;

(B) subcontract to be awarded pursuant to section [637\(a\)](#) of this title;

(C) subcontract that is to be included as part or all of a goal contained in a subcontracting plan required pursuant to section [637\(d\)](#) of this title; or

(D) prime or subcontract to be awarded as a result, or in furtherance, of any other provision of Federal law that specifically references section [637\(d\)](#) of this title for a definition of program eligibility, (FOOTNOTE 1) shall be subject to the penalties and remedies described in paragraph (2).

(FOOTNOTE 1) So in original. Following provision probably should be set flush with par. (1).

(2) Any person who violates paragraph (1) shall -

(A) be punished by a fine of not more than \$500,000 or by imprisonment for not more than 10 years, or both;

(B) be subject to the administrative remedies prescribed by the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801-3812);

(C) be subject to suspension and debarment as specified in subpart 9.4 of title 48, Code of Federal Regulations (or any successor regulation) on the basis that such misrepresentation indicates a lack of business integrity that seriously and directly affects the present responsibility to perform any contract awarded by the Federal Government or a subcontract under such a contract; and

(D) be ineligible for participation in any program or activity conducted under the authority of this chapter or the Small Business Investment Act of 1958 (15 U.S.C. 661 et seq.) for a period not to exceed 3 years.

(e) Representations under subsection (d) of this section to be in writing

Any representation of the status of any concern or person as a ''small business concern'', a ''HUBZone small business concern'', a ''small business concern owned and controlled by socially and economically disadvantaged individuals'', or a ''small business concern owned and controlled by women'' in order to obtain any prime contract or subcontract enumerated in subsection (d) of this section shall be in writing.

(f) Misrepresentation of compliance with section 636(j)(10)(I)

Whoever falsely certifies past compliance with the requirements of section [636\(j\)\(10\)\(I\)](#) of this title shall be subject to the penalties prescribed in subsection (d) of this section.

Source

(Pub. L. 85-536, Sec. 2(16), July 18, 1958, 72 Stat. 395; Pub. L. 88-264, Sec. 2, Feb. 5, 1964, 78 Stat. 8; Pub. L. 99-272, title XVIII, Sec. 18009, Apr. 7, 1986, 100 Stat. 368; Pub. L. 100-656, title IV, Sec. 405, Nov. 15, 1988, 102 Stat. 3875; Pub. L. 103-355, title VII, Sec. 7106(c), Oct. 13, 1994, 108 Stat. 3376; Pub. L. 105-85, div. A, title X, Sec. 1073(g)(4), Nov. 18, 1997, 111 Stat. 1906; Pub. L. 105-135, title VI, Sec. 603(c), Dec. 2, 1997, 111 Stat. 2632.)