

## Activity 6.1: Legislative and Regulatory Changes Rothe Example

### ROTHE CASE - CONSTITUTIONALITY OF FEDERAL CONTRACTING PROGRAMS FOR MINORITY-OWNED AND OTHER SMALL BUSINESSES (CLASS EXAMPLE)

*Note: The Rothe case is complete, but we will examine it as if it were a proposed regulatory change.*

In 1990 the Air Force awarded a \$5.75 million computer services contract to International Computer and Telecommunications (ICT), an Asian-American owned business. The Air Force used the 10% Price Evaluation Adjustment Factor authorized by 10 U.S.C. 2323 to award the contract to ICT over the Rothe Development Corporation, whose bid was \$5.57 million. Rothe filed suit in 1998, claiming that the award was unconstitutional under the Due Process Clause of the Fifth Amendment.

10 U.S.C. 2323, enacted in 1986

- Sets a goal of 5% for contracts and subcontracts to Small Disadvantaged Businesses, Historically Black Colleges and Universities (HBCU), Minority Institutions (MI), Hispanic-Serving Institutions, Native Hawaiian Institutions and Alaska Native-Serving Institutions
- Provides for technical and infrastructure assistance for the targeted institutions
- Allows advanced payments to targeted institutions
- Allows less than full and open competition
- States a goal of 5% for DoD, NASA and the US Coast Guard for SDBs and allows the agencies to use set-asides, price evaluation factors, and incentives for prime contractors to award subcontracts to SDBs.

Rothe alleged that Congress had not demonstrated sufficient discrimination to justify providing the advantage to SDBs. The U.S. Court of Appeals eventually found in favor of Rothe in November of 2008, and determined that 10 U.S.C. 2323 was unconstitutional.

The court's injunction, coupled with the fact that 10 U.S.C. 2323 had expired in 2009, resulted in the FAR council removing all of FAR 19.11 Price Evaluation Adjustment for SDBs and FAR 19.12, the SDB Participation Program. The change also affected several other parts of the FAR that related to the authority of 10 U.S.C. 2323.

Subsequently, the DAR council removed the parts of the DFARS that implemented 10 U.S.C. 2323, such as set-asides for HBCU/MIs and other areas relating to SDBs authority under 10 U.S.C. 2323.