GSA

JUN 7 2004

GSA Office of Governmentwide Policy

MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RODNEY P. LANTIER, DIRECTOR Rodney P. Lantier
REGULATORY AND FEDERAL ASSISTANCE
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2003-023, Purchases From Federal Prison Industries-Requirement for Market Research

Attached are comments received on the subject FAR case published at 69 FR 16148 March 26, 2004. The comment closing is May 25, 2004.

Response Number	Date Received	Comment Date	Commenter
2003-023-1	04/28/04	04/28/04	Barbara Schrader
2003-023-2	04/29/04	04/29/04	Dan Cronin
2003-023-3	05/05/04	04/27/04	NOPA/OFDA
2003-023-4	06/04/04	05/21/04	U.S. EPA
2003-023-5	06/04/04	05/25/04	Chamber of Commerce
2003-023-6	06/04/04	05/25/04	U.S. Department of Justice
2003-023-7	06/04/04	06/04/04	FOLEY
2003-023-8	06/04/04	05/25/04	DLA/OGC
2003-023-9	06/04/04	05/25/04	American Apparel & Footwear Association

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
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Response Number	Date Received	Comment Date	Commenter
2003-023-10	06/04/04	05/25/04	Marine Corps Systems Command
2003-023-11	06/04/04	05/25/04	Contract Services Association of America
2003-023- 12	06/04/04	05/24/04	American Congress on Surveying and Mapping

Atachments

2003-023-1

"Barbara Schrader" <bschrader@bigenterprises.com>

04/28/2004 08:21 PM

To: farcase.2003-023@gsa.gov
cc:
Subject: FPI

Strongly in favor of proposed changes. Previous policies disadvantaged small businesses in favor of prisons.

Barbara Schrader, President
B.I.G. Enterprises, Inc.
8-a and HubZone Certified WOSB
with local offices located at:
<?xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarttags" />105 Paul Mellon Ct., Suite 15
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URL: www.bigenterprises.com

2003-023-2

"Cronin, Dan"
<Dan.Cronin@ssa.gov>

04/29/2004 08:53 AM

To: "'farcase.2003-023@gsa.gov'" <farcase.2003-023@gsa.gov>
cc:
Subject: FAC 2001-21, FAR Case 2003-023 Purchases from Federal Prison Industries ...

Thank you for the opportunity to comment on the interim rule.

Our comments are attached.

<<SSAComments-FARCase2003-023.doc>>

Dan Cronin, Director
Division of Policy and Information Management
Office of Acquisition and Grants
410-965-9540
dan.cronin@ssa.gov

SSAComments-FARCase2003-023.

2003-023-2

FAC 2001, FAR Case 2003-023

Comments from the Office of Acquisition and Grants, Social Security Administration

1. We think the procedure at 8.602(b)(4), which discusses competing a requirement for "non-comparable FPI items" needs clarification.

FAR 8.602(b)(4) directs the contracting activity to acquire certain items using competitive procedures, and (at 8.602(b)(4)(ii)) to "include FPI in the solicitation process…." We have the following concerns/questions relative to this process.

- How is FPI to be treated in the process? Is FPI considered to be just like any other vendor that is competing or does FPI receive special treatment or considerations? For example:

  - For a solicitation that is normally posted on FedBizOpps, is the contracting officer required to send a copy of the solicitation to FPI ? or;

  - Is FPI responsible for checking FedBizOpps and responding just like any other vendor?

- Since FPI must be included in the solicitation process and considered for award in accordance with the requirements and the evaluation factors in the solicitation, is FPI subject to the terms and conditions of the clauses in any given solicitation, and is FPI required to complete the representations and certifications included with the solicitation?

2. We also have a concern regarding the applicability of the procedures at 8.602(b) to purchases of $2,500 or less, *micro-purchases*. The FAR at 8.602(c) states that the procedures at 8.602(b) do not apply if an exception in 8.605 applies <u>and</u> the purchase is made from a source <u>other than FPI</u>. Purchases of $2,500 or less is one of the exceptions listed at 8.605. Therefore, if someone purchases an item from FPI totaling $2,500 or less, he/she must conduct market research and document the purchase file. This level of administrative and contracting activity for a micro-purchase is contrary to the guidelines found at FAR 13.202. We suggest revising 8.602(c) to read as follows:

> The procedures in paragraph (b) of this section do not apply -
>
> (1) To purchases at or below the micro-purchase threshold.
> (2) If an exception at 8.605(b), (c), (d), or (f) applies and the purchase is made from a source other than FPI.

Another suggestion would be to delete (e) from the exception listing and revise FAR Part 13.201(e) to read:

> Except for the requirements at Subpart 8.6, the requirements in Part 8 apply to purchases at or below the micro-purchase threshold.

2003-023-3

April 27, 2004

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

Re: FAC 2001-21, FAR case 2003-23
Federal Acquisition Regulations; Purchases From Federal Prison Industries
Requirement for Market Research

Dear Ms. Schneider:

The following comments are being submitted on behalf of the Office Furniture Dealers Alliance (OFDA), regarding the interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 637 of Division F of the Consolidated Appropriations Act, 2004.

As an industry that has been hit very hard by the current regulations governing the way Federal Prison Industries (FPI) operates, we believe implementation of Section 637 of the FY'04 Consolidate Appropriations Act (the Act) is important because for the first time since FPI's inception, small businesses will have an opportunity to compete openly and fairly for all Federal government business. No longer will FPI be in a position to dictate to contracting officers the products they must buy, at the price they must pay, or at the schedule FPI say's it will deliver the products to the agency. This can only happen, if as written, the Final Rule is implemented immediately and is made permanent.

Currently, Section 637 of the Act only allows for these procedures to be used by contacting officers until September 30, 2004 -- the end of the Federal governments calendar spending year. As of right now we are seeing contracting officers hesitating to utilize these new procedures because they are not officially published in the FAR. Your comment period ends May 25 and we would expect a short period of time thereafter to go by before any final rule is published. What we are looking at is a rule that will only essentially be in place for roughly four months. You also then factor in the time it will take for contracting

Rcvd 5/5/04

2003-023-3

officers to become fully aware of the new rule and what you are really talking about is a rule that will be in full force for all practical purposes for less than four months. Not a lot of time to for real competition to occur. Not a lot of time to fully assess whether mandatory source has outlived its value to the Federal government or FPI.

Although a step in the right direction, this new regulation can only be effective if it is made permanent. Only then will contracting officers be in the position of applying best value to their agencies and better utilize taxpayer dollars. Our concern is that with such a short process and no guarantees at this time of making this regulation permanent is that contracting officers in some cases may not become aware of the new rule until after the fact or they may choose not to change procedures because of the short time frame that this rule could be in effect. These are issues that are real and concerns we are already seeing playing out in some agencies.

It has taken the business and labor community years to be in a position to compete openly and fairly for Federal government contracts. Under this new regulation contracting officers will finally be able to buy its goods at the best value regardless of the vendor and not have to go through the very cumbersome and monopolistic waiver process controlled by FPI through their mandatory source status. This is definitely a step in the right direction, but is only a stopgap measure until this language is made permanent. The only way that this new regulation can provide for long-term competition is if it were to be made permanent immediately.

We appreciate the opportunity to submit these comments and would be happy to discuss this issue with you further should you deem it necessary for clarification on any of the points referenced in our submission.

Respectfully,

Paul A. Miller
Director of Government Affairs

2003-023-4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 21 2004

OFFICE OF
ADMINISTRATION
AND RESOURCES
MANAGEMENT

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035, Attn: Ms. Laurie Duarte
Washington, DC 20405

Dear Ms. Duarte:

The U. S. Environmental Protection Agency appreciates the opportunity to provide a comment relating to FAC 2001-21 (Purchases from Federal Prison Industries (FPI) - Requirement for Market Research), FAR Case 2003-023.

Our comment relates to the FAR 8.602(b)(4)(ii) requirement, whereby FPI is to be included in the solicitation process and to be considered for award. This seems inconsistent with FAR 8.602(b)(1), (2) and (4), by which the contracting officer makes a determination based on market research that the FPI item is not comparable, and therefore purchase is made using competitive procedures. Why would contracting officers still include FPI in the solicitation process at that point?

If you have any questions, please contact Larry Wyborski of the Policy and Oversight Service Center.

Sincerely,

John Oliver
for Ronald L. Kovach, Director
Policy, Training, and Oversight Division
Office of Acquisition Management

2003-023-5

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

May 25, 2004

General Services Administration
Attn: Ms. Laurie Duarte
1800 F Street, NW
Room 4035
Washington, DC 20405

Re: FAR Case 2003-023: Federal Acquisition Regulation; Purchases From Federal Prison Industries-Requirement for Market Research

Dear Ms. Duarte:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector and region, appreciates the opportunity to comment on the interim Federal Acquisition Regulation (FAR) rule implementing Section 637 of Division F of the Consolidated Appropriations Act for fiscal year 2004, as published in the *Federal Register* on March 26, 2004 (69 Fed. Reg. 16148). The Chamber generally supports this interim rule.

The U.S. Chamber has long advocated a fair and efficient federal procurement process, which benefits both the private and public sectors. Federal agencies should be afforded the opportunity through competition to purchase quality goods and services at the lowest price and best availability. Eliminating FPI's mandatory source status is fundamental to meeting this standard for our government and the American taxpayer. The recently enacted FPI reform provision is a significant step in the right direction.

Section 637 provides that no fiscal year 2004 funds shall be expended for the purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making such purchase determines that the offered product or service provides the best value to the buying agency pursuant to government-wide procurement regulations. Section 637 is compatible with Sections 811 and 819 of the FY02 and 03 Defense Authorization Acts, which afforded Department of Defense (DoD) contracting officials the opportunity to examine the existing marketplace to purchase the best products and services for the agency.

Section 637 requires all Federal agencies conduct market research before purchasing a product or service listed in the Federal Prison Industries (FPI) catalog, to determine whether the FPI product or service is comparable in price, quality, and time of delivery to products available from the private sector. If the FPI product or service is not

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comparable to what is available from the private sector, contracting officers must use competitive procedures to acquire the product or service. Section 637 also addresses limitations on the use of FPI as a subcontractor and on an inmate's access to classified or sensitive information.

We are pleased the interim rule includes clarifying language that explicitly states the contracting officers, not FPI, have unilateral authority to determine the most appropriate manner of which to procure the best products and services based on market research. The interim rule explicitly states these determinations are not subject to 18 U.S.C. 4124(b). Clarifying that the arbitration board process does not apply to a contracting officer's comparability determination is essential to prevent a potential FPI challenge to a contracting officer's decisions, which would seriously undercut the intent of Section 637. The interim rule also contains language explicitly stating that contracting officers are not required to obtain a clearance or waiver from FPI, pursuant to Section 8.605 (Clearances) of the Federal Acquisition Regulation Subpart 8.6, should market research reflect that the FPI product or service is not comparable in price, quality and time of delivery.

These clarifications are critical to ensure the contracting officer, not FPI, has the ultimate authority over agency purchases. Until the enactment of these reform measures, FPI, rather than federal agencies, determined whether FPI's products and services and delivery schedule met the agency's needs. For decades, FPI has exceeded its statutory authority and has been free to set any price they want within the range of market prices with no incentive to charge the lowest price. It is our understanding that contracting officers have been given and continue to receive false, misleading information regarding proper implementation of Sections 811, 819, 637, and recently adopted Board resolutions. To ensure proper implementation of these rules, we urge the FAR Council and agency contracting officials to monitor information disseminated to contracting officers by aggressive FPI marketing agents.

The interim rule includes language prohibiting inmate workers from having access to classified data, critical infrastructure data, and personal or financial data under any Federal contracts. Sensitive information of this nature should not be in the hands of convicted criminals. The American people would be outraged to know that prisoners can be given access to their credit card numbers, the address, value and tax assessments of their homes, as well as location information on our underground gas pipelines and other critical infrastructure that, if in the wrong hands, would severely threaten our national security.

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In addition, the interim rule also protects Federal prime contractors and subcontractors at any tier from being forced to use products or services furnished by FPI. FPI can no longer be forced upon private government contractors as a mandatory source for products or specified as a mandatory source on Federal contracts. We have seen this new, expansive authority, which was not enacted by Congress through legislation, but claimed by FPI through interpretation, used, for example, to force architects and engineers to include FPI products in their design specifications, even if those products are not the most efficient, cost effective or appropriate solution.

The Chamber continues to have concerns over the inclusion of FPI in FAR clauses for small business set-asides; this negatively impacts our nation's small entrepreneurs by subjecting them to unfair competition. Set-asides are designed to afford small businesses the maximum practicable opportunity to participate in the performance of federal government contracts. FPI has been defined by the Small Business Administration as an "other than small business" and, indeed, is listed in the ranks of the top 100 defense contractors – no small business is included on that list. The Chamber questions the inclusion of FPI in any small business set-aside programs.

On behalf of U.S. Chamber and our members that rely on an efficient, fair, competitive process in providing the federal government with goods and services to maintain and grow their businesses, we appreciate the opportunity to comment on the interim rule. Overall, the Chamber supports the intent of the interim rule.

Sincerely,

R. Bruce Josten

2003-023-6

U.S. Department of Justice
Federal Prison Industries

May 25, 2004

ATTN: Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street N.W.
Room 4035
Washington, DC 20405

RE: FAC 2001-21, FAR Case 2003-023
Federal Acquisition Regulation
Purchases from Federal Prison Industries
Requirement for Market Research (DOD/GSA/NASA).
Comments due May 25, 2004.

Dear Ms. Duarte:

Thank you for the opportunity to comment on Federal Acquisition Regulation (FAR) case 2003-023, the interim rule amending the FAR to implement Section 637 of Division F of the Consolidated Appropriations Act for Fiscal Year, 2004 (Pub. L. No. 108-199). As you know, FPI is a self-supporting, wholly owned Government corporation created by Congress in 1934 to provide work and training opportunities to Federal inmates. Since its inception, the FPI program has provided a vast array of products to Government agencies. As such, we remain committed to providing the Federal community with high quality products that best meet their needs.

We have the following comments on this interim rule:

Due to apparent confusion, we have seen numerous instances in which agencies have inappropriately combined comparability determinations with competitive procedures, thus thwarting the intent and plain language of Title 10 U.S.C. 2410n. The rule establishes a two-step process. The first step of this two-step process requires a determination as to whether FPI's product is "comparable" to private sector offerings. The term "comparable" is defined with its common dictionary meaning ("having sufficient features in common with something else offered to afford

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comparison"). This means that in order to be determined comparable, the FPI product does not need to be the "best available." Thus, it does not need be the lowest priced, highest quality, or fastest in delivery. Rather, at this first step, the price, quality and delivery of the FPI product each need only be similar to like products available from the private sector.

If, upon completion of the first step, the FPI product is determined not comparable, competitive procedures are to be used with FPI being afforded an opportunity to submit a timely competitive offer. It is not until this second step that the best value determination is to be made. We would ask that the final rule emphasize the two-step nature of the procedures or at least add the definition of "comparable" to 8.6.

We also believe there needs to be clarification on how to structure a contract for administrative convenience. Section 8.607 prohibits agencies from requiring a contractor to use FPI as a subcontractor. This language cannot be interpreted to circumvent an agency's obligation where a product made by FPI could be used in a project if it is deemed to be comparable. We agree with the conclusion that the requirements of 10 U.S.C. 2410n are imposed on the Government, not the contractor. As such, for any purchases involving FPI products, it will be incumbent upon the agencies to follow the necessary procedures. For instance, agencies are not permitted by law to procure office furniture as part of a consolidated or prime contract for the construction or renovation of a building, if such a contracting method is used to preclude the necessity for a comparability determination or competitive procedures pursuant to Section 637. Regardless of whether the product is provided to the agency directly or indirectly, a comparability determination and competitive procedures are required any time products offered for sale by FPI are purchased for government agencies. If FPI is found to be comparable, or is the competitive choice, then the agency is required to purchase from FPI, regardless of the procurement method. In such cases, the purchase would need to be made directly by the agency, following the strictures of Section 637 and not by the sub-contractor. The requirements of Section 637 and FPI's statute apply irrespective of procurement method.

Lastly, the interim rule states that an analysis was prepared under the Regulatory Flexibility Act, and that the rule may have a significant economic impact on a substantial number of small entities. It also states that the impact of the rule is unknown at this time. It further states that the "elimination of mandatory source" may have an impact on those small businesses that supply FPI with raw materials, equipment and services and that, however, the rule could benefit small business concerns that offer products comparable to FPI. We believe that the impact of this rule on those small business concerns that supply

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goods and services to FPI will be negative. In FY 2003, FPI purchased over $497 million of goods or services from private sector companies, and over fifty three percent of such purchases were from small business concerns. In addition, FPI offers a comprehensive Small Business Subcontracting Plan that allows FPI to furnish subcontracting information on individual contracts as required by Federal agencies. This allows Federal customers to receive credit and report subcontracting dollars on orders placed with FPI to help meet their agency overall small business program goals.

We appreciate your consideration of these comments. Thank you again for the opportunity to comment.

Sincerely,

/s/
Marianne S. Cantwell
General Counsel
Federal Prison Industries, Inc.

2003-023-7

FOLEY

May 25, 2004

FOLEY & LARDNER LLP
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CLIENT/MATTER NUMBER
425376-0006

Via Electronic Mail [farcase.2003-023@gsa.gov]
General Services Administration
FAR Secretariat (MVA)
Attn: Ms. Laurie Duarte
1800 F Street, N.W., Room 4035
Washington, D.C. 20405

Re: FAC 2001-21, FAR case 2003-023.

Dear Ms. Duarte:

This letter is in response to the March 26, 2004 issuance, by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council ("Councils"), of an interim rule (the Interim Rule) amending 48 C.F.R. Parts 8, 19, 42, and 52 to implement Section 637 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. No. 108-199, 118 Stat. 3, 358). The Councils have solicited comments to be considered in the formation of the final rule. Correctional Vendors Association, Inc., through counsel, hereby submits its comments for your consideration.

BACKGROUND

Correctional Vendors Association, Inc. (CVA) is a non-profit, trade association incorporated in Washington, D.C. in 1993. CVA represents approximately 40 vendors from across the Nation who sell products to Federal Prison Industries (FPI, also known as UNICOR). Products of CVA members are used by FPI in the federal prison work program, authorized by and operated pursuant to 18 U.S.C. §§ 4121-29, to manufacture finished goods for acquisition and use by federal agencies and departments. CVA member products include furniture components, textiles, electronic parts and metals.

Over many years, CVA members have invested substantial resources in their working relationships with FPI. Due to the unique nature and challenges of FPI's production programs, CVA members work closely with FPI so that FPI can maintain a high level of customer support for its federal agency customers. Generally, CVA members who sell components to FPI do not offer their finished products to federal agencies in competition with FPI. Due, at least in part, to these unique challenges of working with FPI, some commercial firms who could supply FPI with component parts decline to do so. Such firms instead often seek to sell their finished products directly to federal agencies, thus competing with FPI in the federal government marketplace.

CVA is dedicated to the pursuit of efforts that will protect the federal prison work program and its members' investments in their industrial relationships with FPI. CVA has brought litigation on behalf of its members against several federal agencies that have violated the requirements of 18 U.S.C. § 4124(a) (directing federal departments and agencies to "purchase at not to exceed current market prices, such products of the [federal prison] industries . . . as meet their requirements and may be available"),*Correctional Vendors Association v. West,* C.A. No. 97-932(LFO) (D.D.C.; filed

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May 1, 1997; dismissed as settled Oct. 17, 1997) and *Correctional Vendors Association v. Barram,* C.A. No. 98-633(RCL/ESH) (D.D.C.; filed Mar. 13, 1998; dismissed as settled Feb. 5, 2001, subject to district court retaining jurisdiction to enforce settlement stipulation) and has participated as an *amicus curiae* in yet other litigation challenging FPI's operations and status, *Coalition for Government Procurement v. Federal Prison Industries, Inc.,* 2004 WL 764124 (6th Cir., Apr. 12, 2004) [to be published at 365 F.3d 435]. CVA also has played an active role in legislative matters at the federal and state levels concerning FPI and various state correctional employment programs. CVA staff and its members have testified on correctional employment issues before Congressional and state legislative committees.

SECTION 637

Section 637 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. No. 108-199, 118 Stat. 3, 358), enacted January 23, 2004, provides as follows:

None of the funds made available under this or any other Act for fiscal 2004 shall be expended for the purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making such purchase determines that such offered product or service provides the best value to the buying agency pursuant to Government-wide procurement regulations, issued pursuant to section 25(c)(1) of the Office of Federal Procurement Act (41 U.S.C. 421(c)(1))[,] that impose procedures, standards, and limitations of section 2410n of title 10, United States Code.

The above-referenced Section 2410n of title 10, applicable solely to the Department of Defense ("DoD"), was first enacted December 28, 2001 (Pub. L. No. 107-107, Div. A, Title VIII, § 811(a)(1), 115 Stat. 1180) and was substantially amended, by revision and addition, the following December (Pub. L. No. 107-314, Div. A, Title VIII, § 819(a)(1), 116 Stat. 2612). DoD implementation of section 2410n has been through the DFARS, subpart 208.6, last revised December 15, 2003.

Practically speaking, 10 U.S.C. § 2410n restricts FPI's mandatory source status insofar as DoD acquisition of products offered by FPI is concerned. Section 637 extends that restriction to civilian departments and agencies subject to government-wide procurement regulations for fiscal year 2004. As the Councils noted in their Initial Regulatory Flexibility Analysis, such inroads into FPI's mandatory source can have an adverse impact on those businesses that supply FPI with raw materials, equipment and services. *See* 69 Fed. Reg. 16148, col. 3 (Mar. 26, 2004). Consequently, CVA and its members are vitally interested in the manner that Section 637 is implemented and administered.

SPECIFIC COMMENTS

Section 637 is temporary legislation. Well over 160 years ago the Supreme Court noted that "[i]t would be . . . unusual, to find engrafted upon . . . temporary appropriations, any provision . . . to have . . . permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed." *Minis v. United States,* 40 U.S. (15 Pet.) 423, 445 (1841). Thus, "if an appropriations bill changes existing law, any such change applies only to the fiscal year for which the bill was passed unless Congress clearly expresses a contrary intent." *Atlantic Fish Spotters Ass'n v. Evans,* 321 F.3d 220, 224 (1st Cir. 2003). In the present instance, Congress expressed no such contrary intent. Indeed, in the statutory language Congress made explicit that Section 637 applies only to "funds . . . for fiscal year 2004."

Hence, as matters now stand, the proscriptions of Section 637 expire September 30, 2004. That being the case, procurement regulations that go to implement Section 637 likewise are temporary and will be of no force and effect after September 30, 2004. The Councils recognize this within the language of section 8.602 of the Interim Rule by, *inter alia,* (i) specifying that the "procedures, standards, and limitations" of 10 U.S.C. § 2410n,insofar as they are imposed upon civilian agencies, apply only to "purchases . . . using fiscal year 2004 appropriated funds," 48 C.F.R. § 8.602(b), and (ii) setting forth the policy that applies to civilian agency purchases made using other than fiscal year 2004 appropriated funds, 48 C.F.R. § 8.602(e). CVA supports the Councils' approach in this respect and agrees that a differentiation must be spelled out.

Prohibitions on requiring the use of FPI as a subcontractor are effective only for fiscal year 2004 with respect to civilian agencies. Notwithstanding the Councils' recognition in section 8.602 of the Interim Rule that the life of Section 637 is limited to fiscal year 2004, they nonetheless have drafted section 8.607 in such a way as to imply permanence. For the reasons set forth above (e.g., *Minis* and *Atlantic Fish Spotters Ass'n*), the Councils' action in this respect is erroneous and must be corrected.

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In fact, CVA questions the propriety of section 8.607 of the Interim Rule in its entirety. Section 637 is directed toward requiring the purchasing agency to determine that the FPI product "provides the best value to the buying agency." This entails a two-step process, as demonstrated by sections 8.602(b)(3) and 8.602(b)(4) of the Interim Rule. Prohibitions on the use of FPI as a subcontractor are not germane to this inquiry. Hence, there is no legislative authorization for imposing section 8.607 on civilian agencies, even as regards fiscal year 2004. With respect to DoD, to whom the subcontracting prohibition does apply by statute, section 8.607 is unnecessary because DoD already has covered the subject matter in DFARS 208.670. Therefore, as an initial matter CVA requests that the Councils strike section 8.607 of the Interim Rule.

Alternatively, assuming that section 8.607 werewithin the authorization of Section 637, it can be of no more than temporary duration. Just as is the case with section 8.602(b) of the Interim Rule, section 8.607 of the Interim Rule derives from 10 U.S.C. § 2410n, specifically 10 U.S.C. § 2410n(e). One, of course, would expect that to be the case because the reason for the entire Interim Rule is the instruction within Section 637 to impose thestructure of 10 U.S.C. § 2410n upon civilian agency purchases from FPI that utilize fiscal year 2004 appropriated funds. Therefore, whatever procurement regulation that is crafted with respect to use of FPI as a subcontractor (assuming one is justified at all) can have a temporal reach no greater than the regulations dealing with market research, comparability determinations, and competitive requirements (i.e., section 8.602(b)).1

When other than fiscal year 2004 funds are involved, civilian agencies are bound to recognize FPI's mandatory source status and are not at liberty to evade the process by "over bundling." For example:

Congress has declared that federal agencies are required to purchase FPI products unless they procure a waiver from FPI. As . . . common sense demonstrate[s], the actual purchaser is not the contractor, but the federal agency for whom the contractor is constructing a facility. To allow a federal agency to escape the legal requirement of obtaining a waiver or purchasing furniture from FPI simply by purchasing furniture produced in the private sector using a subcontractor as a middle-man would subvert the will of Congress. Moreover, when FPI engages in this practice, it is not selling goods to the private sector because title for those goods passes directly to the federal agency for whom the facility is being constructed. Therefore, FPI's practice of requiring private contractors to purchase FPI furniture as part of a turn-key facility construction does not violate FPI's governing statutes.

Coalition for Government Procurement v. Federal Prison Industries, Inc., 154 F. Supp. 2d 1140, 1155-56 (W.D. Mich. 2001), *aff'd,* 365 F.3d 435, 2004 WL 764124 (6th Cir. 2004) ("The district court's straightforward response to the issue at bar is directly on target. . . . [A] sale to a private sector contractor as a means to enforce its statutory and regulatory mandatory source of supply for federal agencies and departments necessarily falls within [FPI's] authority.").

Section 637 gives no license to eliminate FAR provisions of subpart 8.6 that have no relation to implementation of Section 637 for fiscal year 2004. The Councils appear to have taken the opportunity presented by Section 637's reference to 41 U.S.C. § 421(c)(1) to wholly restructure FAR subpart 8.6 and in the process to eliminate various provisions that have no relation to the specific purpose of Section 637 – namely, determining with respect to expenditure of fiscal year 2004 funds whether an FPI "product or service provides the best value to the buying agency." With respect to FAR subpart 8.6 as it existed prior to March 26, 2004, the Interim Rule has deleted sections 8.602(b), 8.602(c), 8.603(b), and 8.605(b). While these provisions may play no roll in administration of the regime called for by Section 637, that regime is of limited duration. Upon expiration thereof and return to the policy set forth in Interim Rule section 8.602(e), these provisions should be as fully applicable as they were before March 26, 2004. The Councils have no authority from Congress to permanently delete these provisions. Therefore, they should be restored.

CONCLUSION

CVA appreciates this opportunity to comment on the Interim Rule. Should you or the Councils have any questions regarding the foregoing, please feel free to contact us.

Respectfully submitted,

/s/

Philip A. Nacke

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1 The same can be said with respect to Interim Rule sections 8.605(f) and 19.502-1. They likewise should be acknowledged as temporary and not portrayed as permanent. Taking the subject matter of section 8.605(f) as an example, Section 637 reaches only funds for fiscal year 2004. It provides no authority for providing a permanent exception to FPI's mandatory source status with respect to services.

023-7

/s/

David T. Ralston, Jr.

Counsel for Correctional Vendors Association, Inc.

2003-023-8

"Pavlak, Michele (HQ DLA)" <Michele.Pavlak@dla.mil>

05/25/2004 02:28 PM

To: '"farcase.2003-023@gsa.gov"' <farcase.2003-023@gsa.gov>
cc:
Subject: FAC 2001-21, FAR Case 2003-023

<<FAR2003-023.doc>>

I have the following comment on the above case regarding FPI and the applicability of Price Evaluations for HUBZONE and SDB. Please clarify whether a contracting agency may employ an evaluation preference when evaluating an offer from FPI that had been found non-comparable initially. Under the interim rule, small business set-asides are permitted with the acknowledgement that an offer from FPI could also be evaluated and awarded. Modifications to FAR 19.1034(a)(1) and 52.219-4 and 52.219-23 may be necessary to clarify that FPI may be considered for award but that an evaluation preference would be used in evaluating the FPI offer.

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FAR2003-023.doc

2003-023-9

25 May 2004

Attn: Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW, Room 4035
Washington, DC 20405

RE: FAC 2001-21, CAR Case 2003-023
Federal Acquisition Regulation; Purchases from Federal Prison Industries-Requirement for Market Research

Dear Ms. Duarte:

The American Apparel & Footwear Association (AAFA) is pleased to submit comments regarding the Interim Rule amending Federal Acquisition Regulation (FAR) to implement Section 637 of Division F of the Consolidated Appropriations Act, 2004.

AAFA is the national trade association representing over 800 companies in apparel, footwear and other sewn products companies, and their suppliers. A substantial number of AAFA's domestic manufacturing members supply specialized sewn goods products to the military. Due to the ever-decreasing opportunities for these domestic companies to sell to the commercial textile market in the United States, these manufacturers rely very heavily on military contract sales to sustain their businesses.

AAFA has been very supportive of the Federal Prison Industry (FPI) reforms that have been implemented over the past few years because AAFA members previously did not have the opportunity to compete for the contracts claimed by FPI due to the mandatory source. We are pleased to see the Interim Rule for this most recent reform and urge the prompt release of the Final Rule on Section 637. Since Section 637 is currently only applicable until the end of the fiscal year, which is September 30, 2004, it is essential to implement a Final Rule immediately. Although legislation is required to make Section 637 permanent, our ultimate goal in this regard is permanency, and we hope Congress will move forward on legislation to accomplish this before the legislative session expires this year.

AAFA would like to address a few specific aspects of the Interim Rule and urge these changes be made before implementing the Final Rule on Section 637. The general

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description of FPI under 8.601 (c) states, "FPI diversifies its supplies and services to minimize adverse impact on private industry." By statute, FPI is directed to "operate…(so) that no single private industry shall be forced to bear an undue burden of competition from the products of the prison workshops and to reduce to a minimum competition with private industry or free labor" (18 US Code 4122). We believe FPI has not fully abided by this requirement and has in some instances taken 100 percent of the market for particular items. For example, FPI sales of textiles and clothing for FY 2003 were 24% of their total sales elevating clothing and textiles to the top as the largest business segment for FPI. Therefore, AAFA respectfully requests that the description in (c) of 8.601 be modified so that it reads "FPI's statute requires FPI to diversify its supplies and services to minimize adverse impact on private industry."

Secondly, with regard to section (d) of the same section, which states that on items that JWOD produces that are identical to FPI, a waiver would allow JWOD to produce the item without competition. AAFA has interpreted the intent of Section 637 as directing agencies to open the procurement process and therefore there should be no set-asides for JWOD products if FPI is unable to meet the threshold for price, quality and delivery. The JWOD agency should have the right to participate in the open bidding process under this rule as with industry and FPI.

Finally, AAFA firmly objects to allowing FPI to compete for the small business set-asides. FPI/UNICOR, as stated in the general section, is a self-supporting, wholly owned corporation that netted $667 million in sales in FY 2003 and employs over 21,000 inmate workers. The Small Business Administration has numerous definitions of a small business, which is in the process of consolidation; however, not under any of the current definitions would FPI qualify as a small business. Surely this is a conflict of the purpose of the SBA to provide opportunities for the true small businesses of America that make-up the backbone of our economy. The purpose of this reform, as with those preceding this one, is to level the playing field and reduce the number of preferences FPI receives. In effect, allowing FPI to compete for the set-asides gives FPI a preference for which it does not qualify. AAFA urges this final alteration for the completed rule, recognizing FPI as a large corporation, and not a small business and unqualified to compete for small business set-asides.

AAFA appreciates the opportunity to comment on the interim rule. If you have any questions about AAFA's position on any of the above comments, please feel free to contact me at 703.797.9039.

Sincerely,

Felicia Cheek
Manager, Government Relations & Communications
American Apparel & Footwear Association

2003-023-10

"Galbo Mr Samuel J" <Galbosj@mcsc.usmc.mil>

05/25/2004 10:33 AM

To: "'farcase.2003-023@gsa.gov'" <farcase.2003-023@gsa.gov>
cc: "Marra Ann CIV" <ann.marra@navy.mil>
Subject: Comments on FAC 2001-21, FAR Case 2003-023

Attached hereto please find for your consideration comments on FAC 2001-21, FAR Case 2003-023.

v/r
Sam Galbo

SAMUEL J. GALBO, JR.
Deputy Counsel
Marine Corps Systems Command
220 Lester Street
Quantico, Virginia 22134
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COMMENTS ON FAC 2001-21 FPI.

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COMMENTS ON FAC 2001-21, FAR CASE 2003-023
PURCHASES FROM FEDERAL PRISON INDUSTRIES, INC.
FAR SUBPART 8.6

Comment:

1. It is unclear under FAR 8.602 and FAR 8.605 whether a sole source award to other than FPI, without notifying and considering a timely offer by FPI, is permitted when acquiring supplies totaling over $2,500 within the United States.

2. Also, Section 8.602(b) and 8.602(c) seem to conflict with FAR 8.605. FAR 8.602(c) states that 8.602(b) does not apply if an exception in 8.605 applies but the 8.605(a) requires compliance with 8.602(b) procedures.

Comment #1 Analysis:

When an FPI item is determined not to be comparable to supplies available in the private sector, FAR 8.602(b)(4) directs agencies to use "competitive procedures (e.g., the procedures in 6.102 . . .)" or the fair opportunity procedures in 16.505, if placing an order under a multiple award delivery-order contact. FAR Subpart 6.3 provides seven exceptions to the requirement in FAR Subpart 6.102 for full and open competition, including procurement under FAR 6.302-1 on a sole source basis as documented by an approved Justification and Approval. Similarly, FAR 16.505(b)(2) permits award of an order without complying with the fair opportunity process in certain circumstances, including if "only one awardee is capable of providing the supplies or services required . . . because the supplies or services ordered are unique or highly specialized" or because "the order must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued. . . ." FAR 8.605 identifies certain exceptions to purchasing items from FPI but does not address whether supplies over $2,500 purchased and used in the United States can be procured on a sole source basis. FAR 8.602(b)4) can be interpreted two ways: as mandating competitive procedures in all cases where FPI's item has been determined not to be comparable, even if only one product is available to meet the government's needs; or as mandating the use of competitive procedures except where FAR 6.3, 19.5, 13 or 16.505(b)(2) permit non-competitive procedures.

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Suggested Clarification Regarding Comment #1:

Modify FAR 8.602 by adding a new subparagraph 8.602(b)(5) to expressly state:

> Competitive procedures under FAR Parts 6, 19.5 or 13 or fair opportunity procedures in FAR 16.505 are not required when an exception under those parts applies and is justified in writing.

Alternatively, modify FAR 8.602 by adding a new subparagraph 8.602(b)(5) to expressly state:

> Competitive procedures under FAR Parts 6, 19.5 or 13 or fair opportunity procedures in FAR 16.505 are required when ever an FPI product is determined not to be comparable, even when an exception to competition or fair opportunity procedures would otherwise be permitted under those Parts.

Comment #2 Analysis:

Section 8.602(b) and 8.602(c) seem to conflict with FAR 8.605. FAR 8.602(c) states that 8.602(b) [which includes the requirement to use competitive procedures under FAR 6.102 or fair opportunity procedures under FAR 16.505] does not apply if an exception in 8.605 applies. However, the first exception in 8.605 [subparagraph (a)] states that purchase from FPI is not mandatory if the policy at 8.602(b) **does** apply, the contracting officer determines that the FPI item is not comparable and the item **is** acquired in accordance with 8.602(b)(4). Hence, while 8.602(c) says that 8.602(b) does not apply if an exception in 8.605 applies, 8.605(a) requires compliance with 8.602(b), including (b)(4).

Suggested Clarification Regarding Comment #2:

Modify FAR 8.602(c) to state:

> The procedures in paragraph (b) of this section do not apply if an exception in 8.605 [other than paragraph (a) of 8.605] applies and the purchase is made from a source other than FPI.

2003-023-11

May 25, 2004

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035
Washington, DC 20405

Re: FAR Case 2003-023: Federal Acquisition Regulation; Purchases from Federal Prison Industries – Requirement for Market Research

Dear Ms. Duarte:

The Contract Services Association of America (CSA) appreciates this opportunity to offer comments on the proposed Federal Acquisition Regulation (FAR) interim rule to implement Section 637 of Division F of the Consolidated Appropriations Act for fiscal year 2004, as published in the *Federal Register* on March 26, 2004 (Fed. Reg. Vol. 69 16148). CSA generally supports the intent of the FAR Council's rule.

By way of background, CSA is the premier industry representative for private sector companies that provide a wide array of services to Federal, state, and local governments. Our members are involved in everything from maintenance contracts at military bases and within civilian agencies to high technology services, such as scientific research and engineering studies. Many of our members are small businesses, including 8(a)-certified companies, small disadvantaged businesses, women-owned and veteran-owned businesses, HubZones, and Native American-owned firms. Our goal is to put the private sector to work for the public good.

Section 637 requires Government contracting officers to conduct market research before purchasing products or services that are listed in the catalog for the Federal Prison Industries (FPI), to determine whether the FPI product or service is comparable in price, quality and time of delivery to products or services available in the private sector. If the FPI product or service is not comparable, Government contracting officers must use competitive procedures to acquire that product or service.

Section 637 – and this rule – also expands FPI's limitations on classified or sensitive information work, as well as prohibits agencies from requiring contractors to use FPI as a subcontractor.

023-11

Background

The Federal Prison Industries (FPI) also known as UNICOR, was created in 1934 to employ Federal prisoners to manufacture products exclusively for all Federal agencies. But, as a mandatory source of supply, FPI has a virtual lock on the Federal market – putting the rights of felon's above the need for the Government to get the best value for its procurement needs, and the rights of law abiding businesses to bid on Government procurements. The only way around buying from the prisons is for an agency to request a waiver from FPI itself, which controls both the waiver and appeals process. This ties the hands of Federal managers on FPI designated items. The mandatory source requirement is contrary to normally required competitive procurement practices for Government contracting, especially to the bi-partisan efforts of the last several years to encourage greater commercial practices in the conduct of Federal acquisition procedures. These reform initiatives (*e.g.*, the 1994 Federal Acquisition Streamlining Act, the 1996 Clinger-Cohen Act, and the FAR Part 15 rewrite) have led to more performance based contracting – a concept fully supported by the Administration.

And, contrary to FPI's assertions, the General Accounting Office (GAO) has reported that the Federal Prison Industries cannot back-up its frequent claims about being a quality supplier to Federal agencies, furnishing products that meet their needs in terms of quality, price, and timeliness of delivery. Once FPI commandeers a product, it erodes, displaces, or eliminates private sector competition and opens the door for it to raise its future prices. Section 637 and the proposed rule is intended to address this inequity.

Section 637

The interim rule makes it clear that, Government-wide, FPI should be considered as a provider of goods and services only if it can prove that its products or services are the best quality, best priced, delivered in the most timely manner, and complies with its customers needs.

Section 637 is compatible with Sections 811 and 819 of the FY 02/03 Defense Authorization Acts. Section 811 requires market research to be conducted before the Department of Defense (DOD) purchases any products listed in the FPI catalog. If the FPI product is not compatible with that provided in the private sector in terms of quality, price and timeliness of delivery, then the defense department must use competitive procedures to obtain the product or service. Section 819 clarifies the market research requirement and prohibits contracting with FPI for classified or sensitive information or subcontract work.

Recent acquisition reform initiatives also require Federal agencies to conduct market research, have informal discussions with industry and take similar steps to assist agencies in identifying their needs. These reform initiatives have led to more performance based contracting, the issuance of more refined statements of work, a reduction in procurement lead times, and an improvement in quality control.

023-11

Section 637 ensures that contracting officers explore the market for products or services to determine if FPI's pricing is reasonable, and comparable in terms of cost and quality to the private sector, or other agency providers. Thus, Section 637 applies the acquisition reform initiatives (including market research) to FPI.
Section 637 clarifies further that FPI is prohibited from entering into any contract that would allow inmates access to sensitive or classified information, such as geographic data regarding location of pipelines or utilities as well as personal or financial information.

With regard to the use of FY04 funds, the statute, and the interim rule, clarifies further that a waiver (from FPI) is NOT required should any civilian agency determine FPI is not comparable. The determination of comparability is a unilateral decision made solely at the discretion of the department or agency. Furthermore, the comparability determination is based on whether FPI can provide the product or service on the basis of price, quality AND time of delivery.

Small Business Programs

CSA continues to be concerned about the inclusion of FPI in FAR clauses for small business set-asides; this presents a potential negative impact on our nations' small businesses. FPI has been defined as an "other than small business" and, indeed, is listed in the ranks of the top 100 defense contractors – no small business is included on that list. At a time when the Small Business Administration is considering a restructuring of its size standards that may force many small businesses into the "other than small" category overnight, the inclusion of FPI in the small business set-aside program can only be viewed as another attack on small business. CSA questions why FPI needs to be included in any small business set-aside programs.

Conclusion

Overall, CSA supports the implementation of the interim rule. Thank you for the opportunity to provide our comments. If there are any questions, or if we can be of assistance, please contact Cindy Hsu, CSA's director of Legislative and Regulatory affairs, at (703) 243-2020.

Sincerely,

Chris Jahn

Christopher Jahn
President

Contract Services Association of America
1000 Wilson Blvd, Suite 1800
Arlington, VA 22209

2003-023-12

"Curt Sumner"
<CSumner@ACSM.net
>

05/24/2004 02:24 PM

To: "'farcase.2003-023@gsa.gov'" <farcase.2003-023@gsa.gov>
cc:
Subject: FAC 2001-21, FAR case 2003-023

General Services Administration, FAR Secretariat (MVA)
1800 F. Street, NW
Room 4035, Atten: Ms. Laurie Duarte
Washington, DC 20405

Re: FAC 2001-21, FAR case 2003-023

Dear Ms. Duarte:

American Congress on Surveying and Mapping (ACSM) represents over 7,000 surveying and cartography professionals. We strongly support the proposed changes to the FAR regarding Federal Prison Industries set forth in the March 26, 2004 Federal Register Notice.

Many of our members are small businesses, who must compete fiercely for work with the Federal government; many times our members compete directly with FPI for that work. It is within the best interest of the Federal government and the tax paying public to require that any provider of services --- whether that provider is FPI or a private business --- provide the best value to the buying agency.

If you have any questions, or need more information, please feel free to contact me.

Curtis W. Sumner, LS
Executive Director, ACSM
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