JUN 14 2005

MEMORANDUM FOR ROBERT R. JARRETT
ACTING DEPUTY DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RALPH J. DESTEFANO, DIRECTOR
REGULATORY AND FEDERAL ASSISTANCE
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 70 FR 18954; April 11, 2005. The comment closing date was June 10, 2005.

Response Number	Date Received	Comment Date	Commenter
2003-023-1	05/06/05	05/06/05	DOD
2003-023-2	05/16/05	05/16/05	DOD/ODUSD
2003-023-3	06/09/05	06/09/05	Acquisition Management Center
2003-023-4	06/10/05	06/10/05	DOJ/UNICOR
2003-023-5	06/10/05	06/10/05	AAFA
2003-023-6	06/10/05	06/10/05	CSA

Attachments

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

2003-023-1

Agency : NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
Title : Federal Acquisition Regulation; Purchases From Federal Prison Industries--Requir for Market Research
Subject Category : Federal Acquisition Regulation (FAR): Federal Acquisition Regulation (FAR): Fec Acquisition Regulation (FAR): Purchase from Federal prison industries; market res requirement Purchase from Federal prison industries; market research requirement Purchase from Federal prison industries; market research requirement
Docket ID : RIN 9000-AJ91; FAR 2003-023
CFR Citation : 48 CFR 8, 25
Published : April 11, 2005
Comments Due : June 10, 2005
Phase : RULES

Your comment has been sent. To verify that this agency has received your comment, please contact the agency directly. If you wish to retain a copy of your comment, print out a copy of this document for you

Please note your REGULATIONS.GOV number.

Regulations.gov #: EREG - 1 Submitted May 06, 2005

Author : Mr. Thomas Carter
Organization : Department of Defense
Mailing Address :
Attached Files :

Comment : FAC 2005-03; FAR Case 2003-023
The response to comment 3 says that if an agency chooses to make a purchase at o below $2,500 from FPI, the agency must first conduct market research to comply v Section 637. This is inconsistent with the statement under SUPPLEMENTARY INFORMATION that FAR 8.602(b) (which implements Section 637) does not apı purchase of a service or to purchase of any item of supply that FPI has been autho by its Board of Directors to offer exclusively on a competitive (non-mandatory) ba The FPI 2004 Annual Report includes a statement from the FPI Board of Director initiatives undertaken by the Board, including □Eliminating the FPI program□s st as a mandatory source of federal supply for purchases valued at $2,500 or under.□ Board action is implemented by FAR 8.605, □Exceptions□, at (e). Logically, it w follow that purchases from FPI up to $2,500 are exempt from FAR 8.602(b) just a items offered by FPI for purchase on a non-mandatory basis. This would therefore remove any requirement for market research to be conducted when a Federal agen makes a purchase up to $2,500 from FPI.

2003-023-2

"Carter, Thomas, Mr, OSD-ATL"
<Thomas.Carter@osd.mil>
05/16/2005 11:42 AM

To "'linda.nelson@gsa.gov'" <linda.nelson@gsa.gov>
cc
bcc
Subject FAC 2005-03; FAR Case 2003-023

Ms. Nelson--

Attached is a comment on the subject FAR case that I posted at the portal. I was unable to attach the document, and when I copied and pasted the content I noticed there were some glitches.

Thanks very much--

Tom

Tom Carter
Staff Amalyst
ODUSD(Logistics & Materiel Readiness)(Logistics Plans & Programs)
Pentagon 2C263

(703) 614-6137

FAR Case 2003-023.doc

 2003-023-2

The response to comment 3 says that if an agency chooses to make a purchase at or below $2,500 from FPI, the agency must first conduct market research to comply with Section 637. This is inconsistent with the statement under SUPPLEMENTARY INFORMATION that FAR 8.602(b) (which implements Section 637) does not apply to purchase of a service or to purchase of any item of supply that FPI has been authorized by its Board of Directors to offer exclusively on a competitive (non-mandatory) basis. The FPI 2004 Annual Report includes a statement from the FPI Board of Directors of initiatives undertaken by the Board, including "Eliminating the FPI program's status as a mandatory source of federal supply for purchases valued at $2,500 or under." This Board action is implemented by FAR 8.605, "Exceptions", at (e). Logically, it would follow that purchases from FPI up to $2,500 are exempt from FAR 8.602(b) just as items offered by FPI for purchase on a non-mandatory basis. This would therefore remove any requirement for market research to be conducted when a Federal agency makes a purchase up to $2,500 from FPI.

2003-023-3

GSA Wanda S. Bowman
06/09/2005 02:57 PM

To: farcase.2003-023@gsa.gov
cc:
Subject: [Docket No: RIN 9000-AJ91; FAR 2003-023];[FR Doc: 05-06865];[Page 18954-18958]; Federal Acquisition Regulation (FAR): Purchase from Federal prison industries; market research requirement

PURCHASES FROM FEDERAL PRISON INDUSTRIES –REQUIREMENTS FOR MARKET RESEARCH

This is an interim rule effective April 11, 2005, implementing Section 637 of the Consolidated Appropriations Act of 2005 (Pub. Law 108-447). Two years ago Congress passed legislation requiring DOD to do market research when purchasing items made by FPI. Last year, Congress extended that requirement government wide for FY 2004. This interim rule makes the requirement permanent.

Background: FAR 8.601(e) states, "Agencies are encouraged to purchase FPI supplies and services to the maximum extent practicable." By statute agencies are required to purchase supplies of the classes listed in FPI's Schedule at prices not to exceed current market prices.

The procedures used by FPI in the past to "add" a product to its Schedule were as follows:

- FPI made a determination that a product could be provided by its inmates and adds it to FPI Schedule;
- FPI notified agencies of inclusion of new product, and notice was formally published;
- Mandatory preference triggered when the product was formally added to list;
- Waiver and appeals process was controlled by FPI;
- The product remained on list until FPI removed it.

Proposed Interim Rule:

The proposed rule amends the FAR to make permanent the requirement on ***all*** agencies to conduct market research to determine if an FPI Schedule product is ***comparable in terms of price, quality, and delivery*** to private sector suppliers before purchasing that product from FPI. If the market research determines that the FPI product is comparable in price, quality, and time of delivery to private sector suppliers, the award goes to FPI. If an FPI product is determined to be not comparable in price, quality, and time of delivery to private sector suppliers, the product is to be acquired using competitive procedures, and the award must go to the source offering the product or service determined by the agency to be the ***best value*** to the government. The determination of comparability is a unilateral decision made solely at the discretion of the procuring agency. Purchases at or below $2,500 are excluded from FPI mandatory source requirements. FAR 8.605(e). However, if an agency elects to make a purchase at or below $2,500 from FPI, the agency must first conduct market research. [There appears to be some confusion as to whether the requirement for market research applies to services as well products. The confusion stems from the following situation: FAR 8.002(a), which specifies mandatory source requirements for government supplies states that: "...agencies shall satisfy requirements for **supplies and services** from or through the sources and publications listed below...(iii) Federal Prison Industries, Inc...." (emphasis added). However, "services" are

2003-023-3

expressly excluded from FPI mandatory source requirements by FAR 8.605(g). The only way to reconcile these seemingly inconsistent statements is that FAR 8.002(a) speaks in terms of "supplies and services" in a broad manner and that the language at FAR 8.605(g) modifies and limits that mandate as it applies to the FPI. The requirement for market research of FAR 8.602(b) would therefore apply only to FPI Schedule supplies.]

Comments: This legislation effectively repeals the mandatory source preference for FPI Schedule products. Products which are on FPI's Schedule are now subject to competition. We can expect former product manufacturers to become Government suppliers. In recent years FPI has been making inroads into the services contracting area as well (mailing services, data services, telephone support, laundry, etc.), despite the fact that authorizing legislation was silent with respect to services. FAR 8.605(g) now expressly excludes services from FPI mandatory source requirements. This legislation promotes competition and should result in savings to our customers.

Wanda Bowman
Supervisory Procurement Analyst
Acquisition Management Center
703/605-2636

2003-023-4

U.S. Department of Justice
UNICOR
Federal Prison Industries, Inc.

Washington, DC 20534

June 10, 2005

ATTN: Laurieann Duarte
General Services Administration
Regulatory Secretariat (VIR)
1800 F Street N.W.
Room 4035
Washington, DC 20405

RE: FAC 2005-03, FAR Case 2003-023
Federal Acquisition Regulation
Purchases from Federal Prison Industries
Requirement for Market Research (DOD/GSA/NASA).
Comments due June 10, 2005.

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 H of the Consolidated Appropriations Act for Fiscal Year 2005 (Pub. L. No. 108-447). 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 continued confusion, we still see 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. As we know, 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 comparison"). This means that in order to be determined comparable, the FPI product does not need to be the "best available" nor does the FPI product yet need to be "best

2003-023-4

value." 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. It is not until completion of the first step, when an FPI product is determined to be non-comparable to products available from the private sector, that the second step, a best value determination, must be made using competitive procedures that include FPI being afforded an opportunity to submit a timely offer. We appreciate the clarification FAR Council has provided to emphasize the 2-step nature of the process. However, we continue to encounter numerous instances of competitive procedures being used prior to or in place of comparability determinations being made. Therefore, there may be a need in the future to provide more clarification of the definition of the term comparability and further emphasize that the competitive solicitation process shall occur after completion of the required comparability determination; and only in cases where FPI is deemed to be not comparable.

This second interim rule provides some clarification regarding structuring of contracts. We appreciate the clarification made that consolidation of requirements merely to avoid a comparability determination or competitive procedures pursuant to Section 637 would be improper, as would any other action taken to circumvent statutory or regulatory requirements. Therefore, while 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 also 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 2-step 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 does not include the agencies conducting and documenting a comparability determination, and affording FPI an opportunity to compete if determined not comparable. Regardless of whether the product is provided to the agency directly or indirectly, the same comparability determination and competitive procedures are required any time products offered for sale by FPI are purchased by or 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.

2003-023-4

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

Sincerely,

Marianne S. Cantwell

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

2003-023-5

10 June 2005

Attn: Ms. Laurieann Duarte
General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, NW, Room 4035
Washington, DC 20405

RE: FAC 2005-03, FAR Case 2003-023
Federal Acquisition Regulation; Purchases from Federal Prison Industries-
Requirement for Market Research (Interim)

Dear Ms. Duarte:

The American Apparel & Footwear Association (AAFA) appreciates the opportunity to submit comments regarding the Interim Rule amending the Federal Acquisition Regulation (FAR) to implement Section 637 of Division H of the Consolidated Appropriations Act, 2005. AAFA is the national trade association representing over 700 apparel, footwear and other sewn products companies, and their suppliers. These companies represent approximately 80% of U.S. wholesale apparel sales and over 100 of these companies supply specialized sewn goods and products to the military. These comments are offered predominantly on behalf of our domestic companies supplying the military that depend on a fair process to compete for the limited number of contracts from the U.S. military.

AAFA strongly endorses the establishment of a permanent requirement for all agencies to conduct market research in order to determine the comparability of a Federal Prison Industry (FPI) product to that of private industry before making a purchase from FPI. As stated in our previous comments on the extension of this requirement to all agencies beyond the Department of Defense, permanency was needed in order to see any real effect. We are pleased that the U.S. Congress has responded to the needs of private industry and understands the value of fair competition. These reforms requiring FPI to compete on the same level as private industry and allowing the government to make decisions based on standard market principles (price, quality and delivery) of buying the best value product from the company that can provide that item will require every competitor in the process to improve; however, there is still much to do.

3003-023-5

Even with these reforms FPI continues to overstep its boundaries by creative interpretations of the law, which furthers the need for more comprehensive reform as well as clarification of the current law. A recent instance substantiating the need for further reform is a recent solicitation where, in contrast to the FAR regulation 8.607(a) restricting such an act, FPI is the required producer of Bureau of Prison uniforms in the solicitation (No. CT1703-05). The FAR regulation specifically prohibits this kind of maneuvering, yet it continues.

Further, current interpretation allowing for FPI to participate in small business set-asides when an FPI product is found to be non-comparable to a private sector product is a perfect example of the need for further clarification. AAFA stands firm in our original assessment that this is an unintended loophole that should be rectified by Congress in a more comprehensive reform bill. It defies logic that the Congressional intent was to limit FPI's mandatory source status, while at the same time allowing FPI to compete for small business set-asides designed to give small businesses the competitive advantage. As if small businesses can compete with a company with sales of approximately $803 million in FY 2004. There is no rationale for this discrepancy other than oversight.

Finally, of FPI's $803 million in sales, clothing and textiles made up $184,465. "The vast majority of FPI's clothing/textiles sales were in support of the Department of Defense's war effort." (U.S. Department of Justice, Federal Prison Industries, Inc. FY 2004 Annual Report) These sales to the DoD by FPI are in direct competition with AAFA members and a serious detriment to the industrial base as military contracts continue to be a primary source of income for a majority of the remaining domestic textile and apparel manufacturers. The biggest reason these manufacturers have retained a presence in the United States is due to the Berry Amendment requiring the military to buy their uniforms and sewn products from U.S. companies containing all U.S. inputs, yet that is not enough to sustain even the current level and especially not in competition with FPI. FPI should pursue the government contracts outside of the DoD in order to retain the market for the domestic base of textile and apparel producers supplying the military.

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 Felicia Cheek at 703.797.9039.

Sincerely,

Kevin M. Burke

Kevin M. Burke
President & CEO

2003-023-6

June 10, 2005

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

Re: FAC 2005-03; FAR case 2003-023: Purchases from Federal Prison industries – Requirement for Market Research

Dear Ms. Duarte:

The Contract Services Association (CSA) appreciates this opportunity to offer comments on the proposed FAR interim rule to implement Section 637 of Division H of the Consolidated Appropriations Act for fiscal year 2005 (P.L. 108-147), as published in the *Federal Register* on April 11, 2005 (Fed. Reg. Vol. 70 18954). CSA supports the intent of the FAR Council's rule.

CSA is the nation's oldest and largest association of service contractors representing over 200 companies that provide a wide array of services to Federal, state, and local governments. CSA members do over $40 billion in Government contracts and employ nearly 500,000 workers, with nearly two-thirds of CSA companies using private sector union labor. CSA members represent the diversity of the Government services industry and include small businesses, 8(a)-certified companies, small disadvantaged businesses, women-owned, HubZone, Native American owned firms and global multi-billion dollar corporations. CSA promotes Excellence in Contracting by offering significant professional development opportunities for Government contractors and Government employees, including the only program manager certification program for service contractors.

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

The statute only applies to products and the proposed rules makes it clear that, government-wide, FPI should be allowed as a provider of goods (and services) only if it can prove that its products are the best quality, best priced, delivered in the most timely manner, and in line with its customers needs.

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Contract Services Association
Excellence in Government Contracting

2003-023-6

Section 637 is compatible with Sections 811 and 819 of the National Defense Authorization Acts for fiscal years 2002 and 2003 as well as with acquisition reform initiatives (*i.e.*, the 1994 Federal Acquisition Streamlining Act, the 1996 Clinger-Cohen Act and the FAR Part 15 Rewrite) requiring 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 also 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.

This section ensures that contracting offices have the freedom to explore the market for products to see if FPI's pricing is reasonable and compares 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 – and by doing so FPI, all Federal agencies and U.S. taxpayers will benefit.

However, CSA strongly recommends the FAR Council to strike out in section 8.601(e) the words *"and services"* since FPI does not have "mandatory source" status for services, nor has it ever been given the statuary right to branch out into services. Indeed, in the Council's response to one comment, it notes that "FPI is not a mandatory source for services."

CSA also remains concerned that the interim rule allows FPI to be included in small business set-asides. 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. CSA questions why FPI needs to be included in any small business set-aside programs."

Conclusion

Thank you for the opportunity to provide our comments. If there are any questions, please contact Cindy Hsu, CSA's Legislative and Regulatory Director at (703) 243-2020.

Sincerely,

Chris Jahn

Chris Jahn
President

1000 Wilson Boulevard, Suite 1800, Arlington, Virginia 22209 ★ tel 703 243 2020 fax 703 243 3601 ★ **www.csa-dc.org**