

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 8, 19, 42, and 52**

[FAC 2001–21; FAR Case 2003–023]

RIN 9000–AJ91

**Federal Acquisition Regulation;
Purchases From Federal Prison
Industries—Requirement for Market
Research**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 637 of Division F of the Consolidated Appropriations Act, 2004. Section 637 provides that no fiscal year 2004 funds shall be expended for purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making the purchase determines that the offered product or service provides the best value to the buying agency.

DATES: *Effective Date:* March 26, 2004.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before May 25, 2004, to be considered in the formulation of a final rule.

ADDRESSES:

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

Submit electronic comments via the Internet to— *farcase.2003–023@gsa.gov*.

Please submit comments only and cite FAC 2001–21, FAR case 2003–023, in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755, for information pertaining to status or publication schedules. The TTY Federal Relay Number for further information is 1–800–877–8973. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501–

1900. Please cite FAC 2001–21, FAR case 2003–023.

SUPPLEMENTARY INFORMATION:**A. Background**

Section 637 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. 108–199) provides that none of the funds made available under that or any other Act for fiscal year 2004 shall be expended for the purchase of a product or service offered by Federal Prison Industries, Inc. (FPI), unless the agency making such purchase determines that the offered product or service provides the best value to the buying agency pursuant to Governmentwide procurement regulations issued pursuant to 41 U.S.C. 421(c)(1) that impose procedures, standards, and limitations of 10 U.S.C. 2410n.

This interim rule implements Section 637 by amending the FAR to incorporate the requirements of 10 U.S.C. 2410n with regard to purchase of products from FPI. The rule addresses—

- Requirements for conducting market research before purchasing supplies listed in the FPI Schedule;
- Use of competitive procedures if FPI supplies are found to be noncomparable to supplies available from the private sector;
- Limitations on an inmate worker's access to information; and
- Prohibitions on requiring use of FPI as a subcontractor.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the rule will permit small entities to compete with FPI for contract awards under certain conditions. An Initial Regulatory Flexibility Analysis has been prepared and is summarized as follows:

The rule implements the Consolidated Appropriations Act, 2004, Division F, Section 637 (Public Law 108–199). The Act imposes the procedures, standards, and limitations of 10 U.S.C. 2410n, which requires market research before purchasing a product listed in the FPI catalog, to determine whether the FPI product is comparable to products available from the private sector that best meet the agency's needs in terms of price, quality, and time of delivery. If the FPI product is not

comparable, the agency must use competitive procedures to acquire the product or must make an individual purchase under a multiple award contract. In conducting such a competition or making such a purchase, the agency must consider a timely offer from FPI. The impact of the rule is unknown at this time. The elimination of FPI as a mandatory source may have an impact on those small businesses that supply FPI with raw materials, equipment and services. However, the rule could benefit small business concerns that offer products comparable to those listed in the FPI catalog, by permitting those concerns to compete for Federal contract awards.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 8, 19, 42, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001–21, FAR case 2003–023), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement Section 637 of Division F of Public Law 108–199, the Consolidated Appropriations Act, 2004. Section 637 provides that no fiscal year 2004 funds shall be expended for 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 Governmentwide procurement regulations, issued pursuant to 41 U.S.C. 421(c)(1), that impose procedures, standards, and limitations of 10 U.S.C. 2410n. Section 637 became effective on January 23, 2004. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public