



U.S. Department of Justice

Justice Management Division

Management and Planning Staff

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MEMORANDUM FOR BUREAU PROCUREMENT CHIEFS

FROM: Michael H. Allen
Senior Procurement Executive

SUBJECT: DOJ Procurement Guidance Document (PGD) 07-06
Guidelines on Comparability Determination Regarding Federal Prison Industries

I. Introduction

By statute, Federal Prison Industries (FPI) is a mandatory source for certain products. 18 U.S.C. § 4124(a). The Federal Acquisition Regulations (FAR), implementing 10 U.S.C. § 2410n and Section 637 of Pub. L. 108-199, set forth a limited exception to the mandatory source requirement in FAR § 8.602(a)(1), which provides that, before purchasing an item of supply listed in the FPI Schedule, "agencies shall . . . conduct market research to determine whether the FPI item is comparable to supplies available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery." 48 C.F.R. (FAR) § 8.602(a)(1). The FAR encourages agencies to purchase FPI supplies and services to the maximum extent possible. FAR 8.601(e). Consistent with this policy, the Attorney General, in a memorandum to Heads of Department Components, encouraged "strong support from DOJ components for the purchase of goods and services from the FPI program." Memorandum from the Attorney General to the Heads of Department Components, *Subject: Federal Prison Industries* (October 11, 2006).

Where an FPI item is found comparable, the FAR directs agencies to purchase the item from FPI, unless a waiver is obtained from FPI. FAR 8.602(a)(3). Where, however, an FPI item is found not comparable, the FAR directs agencies to acquire the item through competitive procedures or the fair opportunity process, but in either case the agency must include FPI in the solicitation process. FAR 8.602(a)(4). The FAR states that a determination of non-comparability "is a unilateral determination made at the discretion of the contracting officer," *id.*, but does not elaborate on the process that is to be followed in making the determination, and does not further elucidate the substantive meaning of comparability.

To avoid confusion, and to ensure consistency throughout the Department in making the comparability determination required by FAR 8.602(a)(1), this memorandum provides guidance to Department components and their procurement offices regarding the process Department

ordering activities must follow in making such determination and clarifies the substantive considerations.

II. The Comparability Standard

1. Comparability depends upon the circumstances, including particularities of the requirement at issue, and cannot be reduced to an objective standard or formula. Contracting Officers should base each comparability determination on the particular circumstances of the requirement and should consider specifically all three required comparability factors— price, quality, and time of delivery— in light of those requirements.
2. Comparability does not require superiority or equality in all (or any) characteristics. An item on the FPI Schedule may be found comparable although it is higher priced, of lower quality and/or offers a less favorable delivery time. Likewise, an item on the FPI Schedule may not be found non-comparable merely because the item is higher priced, of lower quality and/or offers a less favorable delivery time. Rather, Contracting Officers should consider the degree of difference in each of the three comparability factors in light of the requirements of the particular procurement.

III. Procedures for Comparability Determinations

1. (a) The responsibility for making comparability determinations rests with the Departmental component whose requirement is to be satisfied by the procurement. The determination shall be made through a Department Contracting Officer.

(b) Where another agency is conducting a procurement on the Department's behalf, the Department component for whom the procurement is being conducted shall designate a Department Contracting Officer to make a comparability determination, in accordance with paragraph (a), with respect to any FPI item of supply that is within the scope of the procurement, and shall communicate this comparability determination to the agency that is conducting the procurement.

(c) Where another agency is conducting a procurement on the Department's behalf, and the Department component whose requirement is being satisfied by the procurement concludes that it is not possible or practical to make the comparability determination itself, the component may make a written request to the Senior Procurement Executive that the agency conducting the procurement be allowed to make the required comparability determination. Such request must be supported by a statement from a Department Contracting Officer explaining why it is not possible or practical for the component to make the comparability determination for the particular procurement. The Senior Procurement Executive will decide upon the request within 15 days of receipt of the request unless he

informs the Department Contracting Officer in writing that additional time is required.

2. In conducting market research as part of the comparability determination process in accordance with FAR 8.602(a)(1), the Contracting Officer should adhere to the standard market research principles as set forth in FAR Part 10 and the definition of market research set forth in 10 U.S.C. § 2410n(g).
3. In conducting market research to consider the price comparability factor, a Contracting Officer should consider reasonably available price information, such as schedule or catalogue price lists and any volume discounts contained therein. A Contracting Officer may seek price discount information from vendors consistent with FAR Part 10 and 10 U.S.C. § 2410n(g), but shall not request firm price quotes or otherwise engage in price negotiations. Where a Contracting Officer seeks price discount information from a vendor, price discount information must also be sought from FPI.
4. Prior to making any final determination of non-comparability, the Contracting Officer shall notify FPI in writing of its tentative determination and the basis for the determination, and provide FPI a reasonable opportunity to respond in writing. If, after receiving and reviewing FPI's response, the Contracting Officer makes a determination of non-comparability notwithstanding, FPI's written response shall be included with the CO's final written determination of non-comparability required by FAR 8.602(a)(2).
5. When a component CO makes a finding of non-comparability under Paragraph 4, he shall provide his written determination, including FPI's written response, if any, to the Senior Procurement Executive for review and concurrence. A component shall not proceed with a procurement until the Senior Procurement Executive concurs. The Senior Procurement Executive will concur in the finding unless the Senior Procurement Executive determines that the finding is factually unsupported, or not in accordance with law or this guidance document. Where the Senior Procurement Executive makes such a determination, he shall notify the Contracting Officer in writing with an explanation of the reasons for his determination.
6. Where the Senior Procurement Executive determines that a Contracting Officer's finding of non-comparability under Paragraph 4 is factually unsupported, or not in accordance with law or this guidance document, the Contracting Officer shall review the Senior Procurement Executive's determination and reconsider his comparability determination in light of the deficiencies identified by the Senior Procurement Executive, including seeking additional information through market research or otherwise as warranted. If the Contracting Officer, after reconsideration, makes a finding of non-comparability, he shall resubmit the

finding to the Senior Procurement Executive in accordance with Paragraph III.5, above.

7. Where another agency is conducting a procurement on the Department's behalf in accordance with Paragraph III.1(b), and the Department component whose requirement is being satisfied by the procurement has received permission from the Senior Procurement Executive, in accordance with Paragraph III.1(c), for the agency conducting the procurement on the Department's behalf to make any required comparability determination, the Department component whose requirement is being satisfied by the procurement shall require that
 - (a) the Contracting Officer for the procuring agency comply with the requirements of Paragraphs III.2 and III.3 of this guidance document;
 - (b) where the Contracting Officer for the procuring agency makes a finding of non-comparability, it provide to the Department component a copy of the written determination and allow the Department component 20 days to review the finding; and
 - (c) within 5 days of receipt of the procuring agency Contracting Officer's determination as described in Paragraph III.7(b), forward the determination to the Senior Procurement Executive for review.

IV. Inclusion of FPI in the Procurement Process

1. Where a component makes a finding of non-comparability in accordance with FAR 8.602 and Paragraph III of this document, and acquires an item using competitive procedures or the fair opportunity process, the component must include FPI in the solicitation process and consider a timely offer from FPI for award in accordance with the item description or specifications, and evaluation factors in the solicitation. FAR 8.602(a)(4)(ii).
2. Where another agency is conducting a procurement on the Department's behalf in accordance with Paragraph III.1(b), and a finding of non-comparability is made pursuant to FAR 8.602 and this document, whether by the component or the procuring agency, the component shall ensure that the procuring agency include FPI in the solicitation process and consider a timely offer from FPI for award in accordance with the item description or specifications, and evaluation factors in the solicitation. FAR 8.602(a)(4)(ii).

Please disseminate this PGD as appropriate in your organization to ensure that all personnel involved in the procurement process are aware of its requirements and fully understand the procedures to be followed. If you have any questions, please contact H.B. Myers on 202/616-3758.