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Part IV

Department of Defense General Services Administration National Aeronautics and Space Administration

48 CFR Chapter 1
Federal Acquisition Regulations; Purchases
from Federal Prison Industries—
Requirement for Market Research and
Small Entity Compliance Guide; Interim
Rules

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

comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 8, 19, 42, and 52

Government procurement.

Dated: March 22, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2001–21 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001–21 are effective March 26, 2004.

Dated: March 22, 2004.

Deidre A. Lee,

Director, Defense Procurement and Acquisition Policy.

Dated: March 18, 2004.

David A. Drabkin,

Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: March 18, 2004.

James A. Balinskas,

Acting Assistant Administrator for Procurement, National Aeronautics and Space Administration.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 8, 19, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 8, 19, 42, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 2. Revise subpart 8.6 to read as follows:

Subpart 8.6—Acquisition from Federal Prison Industries, Inc.

Sec.

8.601 General.

8.602 Policy.

8.603 Purchase priorities.

8.604 Waivers.

8.605 Exceptions.

8.606 Evaluating FPI performance.

8.607 Performance as a subcontractor.

8.608 Protection of classified and sensitive information.

8.601 General.

(a) Federal Prison Industries, Inc. (FPI), also referred to as UNICOR, is a self-supporting, wholly owned

Government corporation of the District of Columbia.

(b) FPI provides training and employment for prisoners confined in Federal penal and correctional institutions through the sale of its supplies and services to Government agencies (18 U.S.C. 4121–4128).

(c) FPI diversifies its supplies and services to minimize adverse impact on private industry.

(d) Supplies manufactured and services performed by FPI are listed in the FPI Schedule, which can be accessed at <http://www.unicor.gov> or by submitting a written request to Federal Prison Industries, Inc., Department of Justice, Washington, DC 20534.

8.602 Policy.

(a) Agencies shall purchase required supplies of the classes listed in the Schedule of Products made in Federal Penal and Correctional Institutions (referred to in this subpart as “the FPI Schedule”) at prices not to exceed current market prices, using the procedures in this subpart.

(b) For purchases made by civilian agencies using fiscal year 2004 appropriated funds, and for all purchases made by DoD (Section 637 of Division F of Public Law 108–199, the Consolidated Appropriations Act, 2004; 10 U.S.C. 2410n), agencies shall—

(1) Before purchasing an item of supply listed in the FPI Schedule, 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. This is a unilateral determination made at the discretion of the contracting officer. The arbitration provisions of 18 U.S.C. 4124(b) do not apply;

(2) Prepare a written determination that includes supporting rationale explaining the assessment of price, quality, and time of delivery, based on the results of market research comparing the FPI item to supplies available from the private sector;

(3) If the FPI item is comparable, purchase the item from FPI following the ordering procedures at <http://www.unicor.gov>, unless a waiver is obtained in accordance with 8.604; and

(4) If the FPI item is not comparable in one or more of the areas of price, quality, and time of delivery—

(i) Acquire the item using—

(A) Competitive procedures (e.g., the procedures in 6.102, the set-aside procedures in subpart 19.5, or competition conducted in accordance with part 13); or

(B) The fair opportunity procedures in 16.505, if placing an order under a multiple award delivery-order contract;

(ii) Include FPI in the solicitation process and consider a timely offer from FPI for award in accordance with the requirements and evaluation factors in the solicitation; and

(iii) When using a multiple award schedule issued under the procedures in subpart 8.4 or when making an award using the fair opportunity procedures in 16.505—

(A) Establish and communicate to FPI the requirements and evaluation factors that will be used as the basis for selecting a source, so that an offer from FPI can be evaluated on the same basis as the contract or schedule holder; and

(B) Consider a timely offer from FPI.

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

(d) In some cases where FPI and a JWOD participating nonprofit agency produce identical items (see 8.603), FPI grants a waiver to permit the Government to purchase a portion of its requirement from the JWOD participating nonprofit agency. When this occurs, the portion of the requirement for which FPI has granted a waiver—

(1) Shall be purchased from the JWOD participating nonprofit agency using the procedures in subpart 8.7; and

(2) Shall not be subject to the procedures in paragraph (b) of this section.

(e) For civilian agency purchases made using other than fiscal year 2004 appropriated funds, the following policy applies:

(1) Agencies shall purchase required supplies of the classes listed in the FPI Schedule at prices not to exceed current market prices following the ordering procedures at <http://www.unicor.gov>, unless a waiver is obtained in accordance with 8.604.

(2) If the contracting officer believes that the FPI price exceeds the market price, the matter may be referred to the cognizant product division identified in the FPI Schedule or to the FPI Washington office for resolution.

(f) Disputes regarding price, quality, character, or suitability of supplies produced by FPI, except for determinations under paragraph (b)(1) of this section, are subject to arbitration as specified in 18 U.S.C. 4124. The statute provides that the arbitration shall be conducted by a board consisting of the Comptroller General of the United States, the Administrator of General Services, and the President, or their representatives. The decisions of the

board are final and binding on all parties.

8.603 Purchase priorities.

FPI and nonprofit agencies participating in the Javits-Wagner-O'Day (JWOD) Program (see subpart 8.7) may produce identical supplies or services. When this occurs, ordering offices shall purchase supplies and services in the following priorities:

(a) *Supplies.* (1) Federal Prison Industries, Inc. (41 U.S.C. 48).

(2) JWOD participating nonprofit agencies.

(3) Commercial sources.

(b) *Services.* (1) JWOD participating nonprofit agencies.

(2) Federal Prison Industries, Inc., or commercial sources.

8.604 Waivers.

FPI may grant a waiver for purchase of supplies in the FPI Schedule from another source. FPI waivers ordinarily are of the following types:

(a) General or blanket waivers issued when classes of supplies are not available from FPI.

(b) Formal waivers issued in response to requests from offices desiring to acquire, from other sources, supplies listed in the FPI Schedule and not covered by a general waiver. Agencies shall process waiver requests in accordance with the procedures at <http://www.unicor.gov>.

8.605 Exceptions.

Purchase from FPI is not mandatory and a waiver is not required if—

(a) The policy at 8.602(b) applies to the acquisition and—

(1) The contracting officer makes a determination that the FPI item of supply is not comparable to supplies available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery; and

(2) The item is acquired in accordance with 8.602(b)(4);

(b) Public exigency requires immediate delivery or performance;

(c) Suitable used or excess supplies are available;

(d) The supplies are acquired and used outside the United States;

(e) Acquiring listed items totaling \$2,500 or less; or

(f) Acquiring services.

8.606 Evaluating FPI performance.

Agencies shall evaluate FPI contract performance in accordance with subpart 42.15. Performance evaluations do not negate the requirements of 8.602 and 8.604, but they may be used to support a waiver request in accordance with 8.604.

8.607 Performance as a subcontractor.

Agencies shall not require a contractor, or subcontractor at any tier, to use FPI as a subcontractor for performance of a contract by any means, including means such as—

(a) A solicitation provision requiring a potential contractor to offer to make use of FPI supplies or services;

(b) A contract specification requiring the contractor to use specific supplies or services (or classes of supplies or services) offered by FPI; or

(c) Any contract modification directing the use of FPI supplies or services.

8.608 Protection of classified and sensitive information.

Agencies shall not enter into any contract with FPI that allows an inmate worker access to any—

(a) Classified data;

(b) Geographic data regarding the location of—

(1) Surface and subsurface infrastructure providing communications or water or electrical power distribution;

(2) Pipelines for the distribution of natural gas, bulk petroleum products, or other commodities; or

(3) Other utilities; or

(c) Personal or financial information about any individual private citizen, including information relating to such person's real property however described, without the prior consent of the individual.

8.704 [Amended]

■ 3. Amend section 8.704 in paragraph (c) by removing "clearance (8.605)" and adding "waiver (8.604)" in its place.

PART 19—SMALL BUSINESS PROGRAMS

19.502–1 [Amended]

■ 4. Amend section 19.502–1 in paragraph (b) by removing "Federal Prison Industries,".

■ 5. Add section 19.504 to read as follows:

19.504 Inclusion of Federal Prison Industries, Inc.

When using competitive procedures in accordance with 8.602(b)(4), agencies shall include Federal Prison Industries, Inc. (FPI), in the solicitation process and consider a timely offer from FPI.

■ 6. Amend section 19.508 by adding a sentence to the end of paragraphs (c) and (d) to read as follows:

19.508 Solicitation provisions and contract clauses.

* * * * *

(c) * * * Use the clause at 52.219–6 with its Alternate II when including FPI in the competition in accordance with 19.504.

(d) * * * Use the clause at 52.219–7 with its Alternate II when including FPI in the competition in accordance with 19.504.

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PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

42.1503 [Amended]

■ 7. Amend section 42.1503 in the seventh sentence of paragraph (b) by removing "clearance request (see 8.605)" and adding "waiver request (see 8.604)" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Amend section 52.212–5 by revising the date of the clause; and adding paragraphs (b)(5)(iii) and (b)(6)(iii) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (MAR 2004)

* * * * *

(b) * * *

(5) * * *

____ (iii) Alternate II (MAR 2004) of 52.219–6.

(6) * * *

____ (iii) Alternate II (MAR 2004) of 52.219–7.

* * * * *

■ 9. Amend section 52.219–6 by adding Alternate II to read as follows:

52.219–6 Notice of Total Small Business Set-Aside.

* * * * *

Alternate II (MAR 2004). As prescribed in 19.508(c), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) *General.* (1) Offers are solicited only from small business concerns and Federal Prison Industries, Inc. (FPI). Offers received from concerns that are not small business concerns or FPI shall be considered nonresponsive and will be rejected.

(2) Any award resulting from this solicitation will be made to either a small business concern or FPI.

■ 10. Amend section 52.219–7 by adding Alternate II to read as follows:

52.219-7 Notice of Partial Small Business Set-Aside.

* * * * *

Alternate II (MAR 2004). As prescribed in 19.508(d), add the following paragraph (d) to the basic clause:

(d) Notwithstanding paragraph (b) of this clause, offers from Federal Prison Industries, Inc., will be solicited and considered for both the set-aside and non-set-aside portion of this requirement.

[FR Doc. 04-6800 Filed 3-25-04; 8:45 am]

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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Chapter 1****Federal Acquisition Regulation; Small
Entity Compliance GUIDE**

AGENCIES: Department of Defense (DoD),
General Services Administration (GSA),

and National Aeronautics and Space
Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2001-21 which amends the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2001-21 which precedes this document. These documents are also available via the Internet at <http://www.arnet.gov/far>.

FOR FURTHER INFORMATION CONTACT:

Laurie Duarte, FAR Secretariat, (202) 501-4225. For clarification of content, contact Ms. Linda Nelson at (202) 501-1900.

*** Purchases From Federal Prison
Industries—Requirement for Market
Research (FAR Case 2003-023)**

This interim rule amends FAR parts 8, 19, 42, and 52 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.

Dated: March 22, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

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