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July 9, 2003

Ms. Susan Schneider  
OUSD (AT&L) DPAP (DAR)  
IMD 3C132  
3062 Defense Pentagon  
Washington, D.C. 20301-3062

**Re:** DFARS Case 2002-D003  
Defense Federal Acquisition Regulation Supplement (DFARS)  
Competition Requirements for Purchases From a Required Source

Dear Ms. Schneider:

The following comments are being submitted on behalf of the Office Furniture Dealers Alliance (OFDA), regarding the proposed rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Sections 811/819 of the Fiscal Year's 2002-2003 National Defense Authorization Acts.

These comments focus on the issues of FPI being given small business status, market research, competition process, defining the intent of Congress, addressing the issue of micro-purchases, and resolution process.

As an industry that has been hit very hard by the current regulations governing the way Federal Prison Industries operates, we believe implementation of Sections 811/819 are important because for the first time since FPI's inception, we will have an opportunity to compete fairly for government business. This can only happen, if as written, the Final Rule is implemented immediately.

**Small Business Set-Asides:** The first point we would like to make is that FPI is not nor should it be considered a small business and therefore should not be able to bid on small business set-asides. FPI generates over \$678 million in sales and has over 500 employees and by the government's own standards does not meet the threshold as a small business. We oppose any final rule treating FPI as such. By doing so, the government would once again be giving FPI preferential treatment and creating separate rules that FPI would be able to manipulate at the expense of true small businesses. In the 15 May 2003 Federal

Register notice, DOD states on page 26266 that Congress "was silent on FPI's relationship to small business set-asides." Despite this, DOD has decided *on its own* that FPI is eligible for such preferences, solely because the definition of "competitive procedures" (as added by Section 819 and found at 10 U.S.C. 2302(2)) says, among other things, that it also includes the procedures for procurement conducted in furtherance of section 15 of the Small Business Act. According to the U.S.C. definition: "*The term 'competitive procedures' means procedures under which the head of an agency enters into a contract pursuant to full and open competition.*" Following that, the next sentence reads, "such term also includes..." and then it goes on to list subsections A,B,C,D and E. Subsection "D" is where the small business reference is found and is the focus of DOD's regulatory opinion. However, as OFDA reads it, the phrase, "also includes," does not necessarily mean, "must include," and thus the U.S.C. does not demand that FPI fall into a small business category in order for the definition of competition to apply to it. Therefore, OFDA urges DOD to change its proposed text to the rule to clarify that FPI is not a small business and should not be allowed to compete for small business set-asides.

**Market Research:** The proposed rule states "Section 811/819 requires DoD to conduct market research before purchasing a product listed in the FPI catalog, to determine whether the FPI product is comparable in price, quality, and time of delivery to products available from the private sector." The final rule should give contracting officers as much flexibility as they need to purchase goods for the Department of Defense. We believe contracting officers should not have their hands tied when procuring goods by narrow definitions of "comparable", "quality", and "delivery time". The final rule should make it clear that the contracting officer has the final authority to make the decision as to whether products are "comparable", are "quality" products, and meet their "delivery times", whether they are procured from FPI or the private sector. Each department within the Department of Defense may have different needs and the person best able to make these decisions is the contracting officer and their judgement should be relied upon in purchasing goods that fit the needs of their department. A "one-size fits all" approach will only dilute what we believe was the intent of Congress.

**Competition Process:** According to the proposed rule, if FPI's product is not comparable, DoD must use competitive procedures to acquire the product. In conducting such a competition, DoD must consider a timely offer from FPI for award.

The way this is worded it gives FPI two opportunities at continuing their mandatory source status. The way the proposed rule is written, if FPI's prices, quality, and delivery time aren't comparable, then they have a second chance to meet these criteria through the competition phase. If FPI can't meet the criteria the first time, why should they get a second opportunity to do so? We'd like to see the final rule incorporate language, which would allow contracting officers to review FPI's initial bid and then should the determination be made that they aren't "comparable", then contracting officers should be able to go directly to the private sector for bids without having to accept another bid from FPI. The way the current language reads it gives FPI two chances at meeting the specified criteria. This is not a luxury afforded to the private

sector. If the final rule is going to level the playing field, which we believe was the intent of Congress, then language needs to be incorporated that eliminates the requirement that contracting officers must accept a second bid from FPI for the same procurement.

Intent of Congress: This is important because the final rule, if written correctly, will provide the private sector the relief sought by Congress last year. We believe that the intent of Congress requires language in the proposed rule be clarified in a way that meets that goal.

The language in the proposed rule states that contracting officers can seek out competition from the private sector if FPI's products are not comparable in price, quality, and time of delivery to products from the private sector. This language needs to be clarified so that there is no misinterpretation of exactly what this means. It is our belief that the intent of Congress was that if FPI failed to meet any of the three criteria, then contracting officers would be able to use competitive procedures. The final rule needs to reflect this intent and new language needs to be inserted that makes this point very clear for contracting officers.

We believe that congressional intent was to eliminate mandatory source and replace it with competitive procedures that gives flexibility to contracting officers in their mission of procuring quality goods that meet their needs and their budgets. The intent of Sections 811/819 are just that and it is our hope that the final rule will incorporate the clarifications we have listed. These are clarifications that we believe were the intent of Congress. As currently drafted, the proposed rule still provides FPI with a definite competitive advantage over the private sector and especially our industry, which loses out on hundred of millions of dollars in potential business because of a statute that has clearly outlived its usefulness.

Micro-Purchases: Through reading some of the statements submitted a concern was raised that Sections 811/819 would apply to micro-purchases. If this is the correct interpretation, we would disagree. Currently anything procured under \$2,500 is considered a micro-purchase and can be purchased through the competitive process (without waivers from FPI). We believe that even with the implementation of Section 811/819 this is and should continue to be the case. We do not read that interpretation into Section 811/819, but because it was referenced in other comments, we felt it appropriate to reaffirm our reading of the rule. If this does in fact change the micro-purchase procedures can you please inform us and at that time we would like to submit additional comments on that point.

Resolution Process: We believe that the intent of Congress when enacting Sections 811/819 was that the decisions of contracting officers were final and not reviewable by the arbitration panel. If this rule is going to be effective and stay true to the intent of Congress, then the final rule needs to clearly state that the final decision-making in the hands of those people who know what their needs are -- contracting officers and not FPI. The problems in the past has been with FPI having control of the process, which they have been able

to manipulate for their benefit. We believe that was the intent of Congress and believe the final rule should clearly state that.

Conclusion:

Sections 811/819 should do the following:

- (a) make explicit that a DoD contracting officer is fully empowered to determine if a product offered by FPI is "comparable to products available from the private sector that best meet the Department's needs in terms of price, quality, and time of delivery";
- (b) provide a DoD contracting officer access to the full range of "market research" tools to make the required comparability determination and full discretion on how to use such tools;
- (c) make explicit that the full range of competitive procurement techniques are available to a DoD contracting officer, including making a purchase through GSA Multiple Award Schedule contract;
- (d) make very clear in the final rule that FPI is precluded from referring to the FPI Arbitration Review Panel established by Section 4124(b) of FPI's 1934 authorizing statute which prevents a potential FPI challenge to a DoD contracting officer's determination regarding the comparability of a product offered by FPI;
- (e) empower DoD contracting officers to ensure that FPI "performs its contractual obligations to the same extent as any other contractor to the Department of Defense";
- (f) prohibit inmate workers from having access to classified data, critical infrastructure data, and personal or financial data under any DoD service contract; and;
- (g) protect Federal prime contractors and subcontractors at any tier from being forced to use products or services furnished by FPI.

OFDA  
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Page 5

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,

A handwritten signature in black ink, appearing to read "Paul A. Miller". The signature is stylized with a large loop at the beginning and a long horizontal stroke at the end.

Paul A. Miller  
Director of Government Affairs