

**U.S. Department of Justice****Federal Bureau of Prisons***Office of the Director**Washington, DC 20534*

June 20, 2002

ATTN: Ms. Susan Schneider
Defense Acquisition Regulations Council
OUSD (AT&L) DP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

Dear Ms. Schneider:

We appreciate very much the opportunity to comment on the interim rule, DFARS case 2002-D003, to implement Section 811 of the National Defense Authorization Act of Fiscal Year 2002 concerning purchasing from Federal Prison Industries (FPI or trade name UNICOR). FPI was created by Congress in 1934 as a self-sustaining government corporation to provide work and training opportunities for federal inmates. FPI is one of the Bureau of Prisons' (BOP) most important correctional management programs to relieve inmate idleness. FPI reduces inmate idleness, a leading cause of violence and disruptive behavior in prison. Through FPI, the BOP also strives to reduce recidivism by preparing inmates for a productive life outside prison.

FPI has provided a vast array of products to the Department of Defense (DOD) for a number of years, and DOD is FPI's largest customer. We are committed to meeting DOD's needs and are confident that FPI will continue to provide DOD with high quality, comparable products. While we support DOD's efforts to implement Section 811, we also want to ensure that DOD's rule does not unduly affect the FPI program, which is so vital to public safety. We believe that a rule of such significance should provide comprehensive guidance and not conflict with other statutes. Accordingly, FPI requests that DOD consider and address its concerns in the final rule.

The following provides comments and concerns regarding the interim rule:

First, DOD should ensure that the provisions of the interim rule do not conflict with other statutes or lead to possible misapplication of applicable law. The provision in the draft interim rule, under Section 208.602(a), which states that "This is a unilateral decision made solely at the discretion of the department or agency" should either be stricken or clarified. It is recognized that DOD should be afforded discretion in making its decision. However, there must be adequate guidance provided to contracting officers setting forth the requisite criteria in order that such decisions not be arbitrary or capricious. FPI or other parties should be able to obtain a copy of such determinations.

This provision is unduly restrictive and could be misinterpreted by procurement staff to not permit a means by which to question whether a determination finding has been fairly or adequately made. Section 811 does not state that this analysis is a "unilateral decision." As currently worded, this provision also could be implemented in a manner that is contrary to existing federal law. Because Section 811 does not amend FPI's statute, the mandatory source provisions of FPI's statute remain in effect for DOD agencies unless the requirements of Section 811(a)(1)(a) are met. Section (a)(1)(a) requires that DOD agencies undertake pre-acquisition market research as to products produced by FPI. Only if DOD makes a determination that FPI's products are non-comparable would the mandatory source provisions of FPI's statute not apply. Therefore, if such a decision is not made in accordance with Section 811, then FPI's statute applies.

Section 811 also does not alter FPI's statute, 18 U.S.C. §4124, which provides a resolution process for questions concerning FPI's products. Specifically, this provision provides that disputes as to price, quality, character or suitability" of FPI's products "shall be arbitrated." The arbitration board consists of a representative of the Department of Justice, General Services Administration, and the Office of Management and Budget (OMB). OMB's designated representative is currently from DOD. By statute, the decision of this board is final and binding among the parties. We recognize that Section 811 gives DOD discretion as to whether FPI's products are comparable as to price, quality or delivery. However, the dispute resolution process in FPI's statute has not been altered by Section 811 and can be utilized. To the extent that the rule is written or interpreted to preclude the application of FPI's statute or to preclude review of such determinations under other federal statutes, we believe that this is not authorized by Section 811

and would be contrary to federal law. Even if this provision were to be included in the final rule, such a provision does not preclude the application of otherwise applicable federal law.

Second, FPI requests that sufficient detail be provided in the rule to provide guidance to contracting officers to ensure that Section 811 is fairly and consistently applied, and that such implementation does not conflict with FPI's statute. These concerns include:

(a) Clarification Needed of Certain Terms:

There are several terms used in Section 811 that should be further clarified in the rule to ensure fairness and consistency. Fair guidance needs to be given on what constitutes "comparable." To be comparable, an FPI product need not be the cheapest, highest quality, or have the best delivery, but rather be within the comparable range of private sector products.

The rule should clarify what constitutes "market research." There is already a definition provided in the Federal Acquisition Regulation. More specific guidance would be helpful that would define the level and extent of research needed. Comparability determinations, for example, should be equitably based on information provided or available. If another vendor is given the opportunity to give a presentation, FPI should be given the opportunity as well. The analysis should be based on issues of price, quality and delivery for the current requirement, preferably utilizing published pricing and delivery schedules, and not based on previous projects or past performance that no longer have relevance. Further guidance should also be provided to define the terms, price, quality and time of delivery as well as what constitutes a product.

In addition, Section 811 only applies to DOD and not to other departments or agencies. The rule should specify that these procedures are not applicable to purchases of products for other agencies. The rule should also specify the procedures to be followed when the General Services Administration (GSA) is purchasing products for DOD.

(b) Market Research and Comparability Determination:

As an initial step, Section 811 requires DOD to conduct market research to determine if FPI's product is comparable regarding "price, quality, and time of delivery." As a preliminary matter, this would require DOD to actually make such a determination and the analysis should be fairly and adequately

conducted. If DOD's market research determines that FPI is comparable, then FPI's statute applies and FPI is considered a mandatory source for the product. If the FPI product is determined not to be comparable, then competitive procedures are required to be conducted. As was stated by the Director of Defense Procurement at the June 3rd public meeting, these requirements take priority and apply, regardless of other potential sources.

The requirements of Section 811 and FPI's statute also apply regardless of whether such purchases are under the micro-purchase threshold (under \$2,500). Neither FPI's statute or Section 811 provide for such an exemption and Congress specifically struck a micro-purchase exemption draft provision and did not include such language in the final version of Section 811. Section 811 specifically requires DOD to conduct market research to determine comparability and DOD must receive a timely offer from FPI during a competitive process if FPI is deemed not to be comparable; this is regardless of the amount of the procurement. In some of the comments submitted regarding the interim rule, we have noted some suggestions being made that there be such an exemption. However, this is not legally permitted by applicable law. Also, it should be noted that over seventy-six percent of FPI's orders are for purchases under \$2,500. Thus, contrary to some of the comments, FPI also would be unduly impacted if such an exemption were to be improperly applied by contracting officers. Thus, the rule or DOD guidance should be issued to clarify that there is not a micro-purchase exemption for such purchases.

Regarding the non-comparability analysis and findings, the rule should contain guidance or procedures that further specify how such determinations should be made. At a minimum, the following issues should be addressed in the rule:

- (1) The rule should state the procedures for non-comparability findings. FPI should be provided a copy of the comparability evaluation. If deemed comparable, there is the requirement to purchase from FPI pursuant to FPI's statute.
- (2) The rule should specify the procedures to be followed when non-comparability is found, so that FPI is informed of the ensuing competition in which it is allowed to participate. For example, a provision needs to be made for prompt notification to FPI by sending it a copy of the solicitation at the same time and in the same manner as others are notified.
- (3) The rule should specify by whom and the manner in which the comparability analysis is made.

There are several types of purchases in which the comparability analysis should be deemed unnecessary:

(1) Section 811 only applies to products, not services.

(2) Similarly, Section 811 was intended to modify the application of FPI's mandatory source to DOD. Therefore, for products to which FPI's mandatory source does not apply, a comparability analysis should not be necessary.

(3) In addition, comparability is a term applicable to commercial items. A comparability analysis is not practical and should not be deemed necessary for MILSPEC items since such items, by definition, must be determined to meet all applicable military specifications and requirements.

(c) Competition Requirements:

Section 811 states that if a FPI product is deemed not comparable, then competitive procedures are to be conducted. During the competition process, Section 811 requires that DOD "receive a timely offer from FPI" for award in accordance with the specifications and evaluation factors specified in the solicitation." As such, FPI must be informed by DOD of a procurement and receive the solicitation in a timely manner. This is a separate and distinct process than the initial comparability analysis. Pursuant to Section 811, FPI must be able to respond and submit a timely offer in response to the solicitation as part of the competitive process. This requirement is stated in the interim rule and was clearly articulated by DOD procurement staff as a requirement during the June 3rd public meeting on Section 811 implementation. Although this interim rule is new in its implementation, FPI is already finding that DOD contracting officers are not complying with the requirement to obtain an offer from FPI during a competitive process, but rather are inappropriately bypassing FPI altogether after the initial comparability stage. Thus, to avoid non-compliance with Section 811, the DOD rule or DOD guidance should more clearly articulate the Section 811 requirement to obtain and receive a timely offer from FPI in response to a solicitation during the competitive process.

The rule also should set forth the procedures to be provided to ensure that FPI is fairly treated in a consistent manner. The plain language of Section 811 would require a solicitation to be issued when DOD deems a FPI product to be non-comparable and then pursues competitive procedures, rather than use of GSA multiple

award schedules. Section 811 requires that DOD receive a timely offer from FPI for award in accordance with "the specifications and evaluation factors specified in the solicitation." (Emphasis added.) In earlier draft versions of the DOD Authorization bill language, the language included a definitions section that gave "competitive procedures" as used in section §2410n(b) the same definition as 10 U.S.C. §2302(2). That definition recognizes use of GSA multiple award schedule contracts as a competitive procedure. Deletion of the definitions section from the final version of section 2410n suggests that the use of GSA schedules is not a competitive procedure for purposes of this particular legislation. Moreover, the definitions of section 2302(2) apply only to chapter 137 (10 U.S.C. §2301-2331); section 2410n is placed in chapter 141. Accordingly, the rule should clarify that when competitive procedures are to be invoked under Section 811, such procedures require that a solicitation be issued, and not usage of the GSA supply schedules for such purchases.

As stated above, Section 811 does not amend 18 U.S.C. §4124, and the waiver review and dispute process, specified in FAR 8.605 remains available for DOD agencies. If a product is deemed to be comparable, there is still the requirement to obtain that item from FPI unless a waiver is obtained from FPI for other reasons. FPI's waiver/dispute process can be utilized for such issues.

Finally, we note that the interim rule states in Section B that an analysis has been prepared under the Regulatory Flexibility Act, concluding that the rule may have a significant impact because the rule could benefit small business concerns that offer products comparable to FPI. This analysis fails to also state that the rule could also significantly affect FPI as well as the many small business concerns that supply goods or services to FPI in support of its making products. DOD's analysis should consider and include the impact on FPI and the small business concerns that support FPI. In FY 2001, FPI purchased over \$426 million of goods or services from private sector companies, and over sixty-six percent of such purchases were from small business concerns. To the extent that Section 811 is not properly followed, this will have an even greater impact on the many small business concerns that support FPI's mission.