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FOLEY LARDNER
ATTORNEYS AT LAW

June 25, 2002

VIA ELECTRONIC MAIL AND FACSIMILE

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

Re: **DFARS Case 2002-D003 (67 F.R. 20687)**

Dear Ms. Schneider:

This letter is in response to the Department of Defense's April 26, 2002 issuance of an interim rule (the Interim Rule) amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 811 of the Fiscal Year 2002 National Defense Authorization Act (Pub. L. No. 107-107, 115 Stat. 1180, to be codified at 10 U.S.C. § 2410n). The Department has solicited comments to be considered in the formation of the final rule. Correctional Vendors Association, Inc., through counsel, hereby submits its comments for your consideration.

BACKGROUND

Correctional Vendors Association, Inc. (CVA) is a non-profit, trade association incorporated in Washington, D.C. in 1993. CVA represents over 25 vendors from across the Nation who sell products to Federal Prison Industries (FPI, also known as UNICOR). Products of CVA members are used by FPI in the federal prison work program, authorized by and operated pursuant to 18 U.S.C. §§ 4121-29, to manufacture finished goods for acquisition and use by federal agencies and departments. CVA member products include furniture components, textiles, electronic parts and metals.

Over many years, CVA members have invested substantial resources in their working relationships with FPI. Due to the unique nature and challenges of FPI's production programs, CVA members work closely with FPI so that FPI can maintain a high level of customer support

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for its federal agency customers. Generally, CVA members who sell components to FPI do not offer their finished products to federal agencies in competition with FPI. Due, at least in part, to these unique challenges of working with FPI, some commercial firms who could supply FPI with component parts decline to do so. Such firms instead often seek to sell their finished products directly to federal agencies, thus competing with FPI in the federal government marketplace.

CVA is dedicated to the pursuit of efforts that will protect the federal prison work program and its members' investments in their industrial relationships with FPI. CVA has brought litigation on behalf of its members against several federal agencies that have violated the requirements of 18 U.S.C. § 4124(a) (directing federal departments and agencies to "purchase at not to exceed current market prices, such products of the [federal prison] industries . . . as meet their requirements and may be available") and Federal Acquisition Regulation (FAR) § 8.602(a). *Correctional Vendors Association v. West*, C.A. No. 97-932(LFO) (D.D.C.; filed May 1, 1997; dismissed as settled Oct. 17, 1997); *Correctional Vendors Association v. Barram*, C.A. No. 98-633(RCL/ESH) (D.D.C.; filed Mar. 13, 1998; dismissed as settled Feb. 5, 2001, subject to district court retaining jurisdiction to enforce settlement stipulation). CVA also has played an active role in legislative matters at the federal and state levels concerning FPI and various state correctional employment programs. CVA staff and its members have testified on correctional employment issues before Congressional and state legislative committees.

SECTION 811

As alluded to above, 18 U.S.C. § 4124(a) directs all federal departments and agencies to purchase from FPI those products manufactured by FPI that meet the acquiring agency's requirements and that may be available for sale. This mandatory source status of FPI is further reflected in FAR § 8.001(a)(iii) and FAR subpart 8.6. FPI's federal prison work program, however, is not capable of satisfying the tremendous demand volume of the entire federal government. For example, one relatively recent study covering fiscal year 1997 found that of those products and services available from FPI, FPI's portion of sales represented less than 4% of the federal government's total purchases of those same products and services. (*A Study of the Procurement Procedures, Regulations, and Statutes that Govern Procurement Transactions between the Department of Defense and Federal Prison Industries*, at 11 (April 1999).) Accordingly, FAR § 8.605 provides a procedure by which federal agencies may secure a clearance or waiver from FPI in order to allow purchase from another source of a product that FPI otherwise produces.

Section 811 of the Fiscal Year 2002 National Defense Authorization Act makes certain modifications to the above-described system insofar as Department of Defense (DoD) purchases of FPI products are concerned. Section 811 adds the following language as section 2410n to chapter 141 of title 10 of the United States Code:

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(a) **Market Research Before Purchase.**—Before purchasing a product listed in the latest edition of the Federal Prison Industries catalog under section 4124(d) of title 18, the Secretary of Defense shall conduct market research to determine whether the Federal Prison Industries product is comparable in price, quality, and time of delivery to products available from the private sector.

(b) **Limited Competition Requirement.**—If the Secretary determines that a Federal Prison Industries product is not comparable in price, quality, and time of delivery to products available from the private sector, the Secretary shall use competitive procedures for the procurement of the product. In conducting such a competition, the Secretary shall consider a timely offer from Federal Prison Industries for award in accordance with the specifications and evaluation factors specified in the solicitation.

CVA and its members are vitally interested in the manner that Section 811 is implemented and administered. DoD and its constituent agencies collectively represent FPI's most significant customer. The above-cited joint DoD/FPI study of procurement procedures and related matters, released in April 1999, reported that, for fiscal years 1995 through 1997, 60% of FPI's total sales were made to DoD (at 15). Summation of FPI sales data for fiscal year 2001 reported by four-digit FSC code and customer shows that DoD's prominence has increased, representing 70% of the market for FPI goods (\$360 million out of \$514 million) and 67% of the market for FPI goods and services combined (\$382 million out of \$573 million). Of each dollar in FPI sales, at least 50 cents, and possibly more, goes to fund purchases of component materials from private sector vendors including the members of CVA (the above-referenced April 1999 study placed the amount at 73 cents of each sales dollar). Moreover, 50% of FPI purchases of component materials are made from small businesses. Consequently, CVA has been an active participant in the instant rulemaking process, expressing a variety of comments and concerns in submissions to the DAR Council, and to OMB (OFPP and OIRA), both prior to issuance of the Interim Rule, and to the Office of the Director of Defense Procurement subsequent to issuance of the Interim Rule.

GENERAL REMARKS

Section 811 establishes a two-step process with respect to the purchase by DoD of products that are available from FPI. First, market research must be undertaken to determine whether the FPI product is comparable in terms of price, quality, and time of delivery to products available from the private sector. If the FPI product is comparable, acquisition is to proceed in conformity with FAR subpart 8.6. In other words, FPI's mandatory source status is to be

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observed unless a waiver is requested and granted by FPI. Only if it is determined that the FPI product is not comparable is DoD then allowed to proceed to procure the product through a competition, during which FPI is extended an opportunity to submit an offer.

Irrespective of the clear language of Section 811, various interests opposed to FPI's existence have misread and mischaracterized the statutory text. Indicative are the press releases of the Office Furniture Dealers Alliance (OFDA) (Attachment A) and of Haworth, Inc. (Attachment B), a major office furniture manufacturer. OFDA states that "[t]he passage of the FY'02 Department of Defense Authorization bill eliminates FPI's mandatory 'sole source' authority immediately within the Agency and replaces it with competitive options that now allows contracting officers to buy the best product at the best price. The DoD is no longer required to buy its products from FPI." This, of course, is not what Section 811 states. Equally misguided are Haworth's remarks:

DOD NO LONGER MUST BUY FROM UNICOR OR FOLLOW THE UNICOR WAIVER PROCESS.

Below you will find a memorandum from the Director of Procurement for the Department of Defense referencing Public Law 107-107, Section 811 of the National Defense Authorization Act 2002, which states clearly that DOD customers have the ability and responsibility to determine if UNICOR provides Best Value.

It is extremely important to get this information in front of our DOD customers immediately so that they can cancel UNICOR orders, cancel pending requirements to buy from UNICOR, and begin the planning process with Haworth for future projects.

The referenced memorandum, issued by Ms. Deidre A. Lee on March 4, 2002, says nothing of the sort alleged by Haworth. Rather, Haworth is referring to a counterfeit insert placed at the top half of the attachment to Ms. Lee's memorandum by someone other than DoD. (This fact can readily be confirmed by comparing Ms. Lee's memorandum (Attachment C) with Haworth's reproduction thereof (the third and fourth pages of Attachment B).)

Anecdotal evidence accumulated by CVA members reveals that there is rank confusion on the part of many DoD procurement personnel as to how Section 811 is supposed to work. Misinformation such as that described above no doubt exacerbates this problem. Unfortunately, the Interim Rule does little to ameliorate the situation because it is confoundingly brief and fails to address several key implementation issues. To the limited extent that the Interim Rule goes beyond the statutory text, CVA submits that it misconstrues, and hence takes positions contrary to, applicable law. CVA's specific concerns are set forth in the balance of this submission. CVA

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believes that attention to these matters will help to produce a more workable final rule that can be administered fairly and efficiently, and will be consistent with the law.

SPECIFIC ISSUES

Emphasizing the Two-Step Nature of the Process. Immediately above, we have demonstrated the two-step nature of the process that Section 811 requires. The text of the statute is clear in this regard. Nonetheless, certain DoD procurement personnel are bypassing the first step (market research to determine comparability) and proceeding directly to the second step to procure the product from the private sector, usually without apprising FPI of its opportunity to submit an offer, all contrary to law. This problem was addressed at some length during the DoD Public Meeting held June 3, 2002 concerning Section 811. CVA concurs with the views expressed at that time by Ms. Lee, Director of Defense Procurement, that a two-step process is mandated. To underscore this point, CVA recommends that contracting officers be required to memorialize their comparability/non-comparability determination in a Determination & Findings (see FAR subpart 1.7) to be made part of the contract file. Already, Deputy Assistant Secretary of the Army (Policy and Procurement) Kenneth J. Oscar in a March 14, 2002 "Memorandum for Principal Assistants Responsible for Contracting" has instructed that the contracting officer's determination as to comparability will be in writing. Specifying this requirement in the Rule itself will have a salutary effect.

Correcting the Purpose of Market Research. Section 811 requires that market research be undertaken "to determine whether the Federal Prison Industries product is comparable in price, quality, and time of delivery to products available from the private sector." Rather than repeat this purpose in the Interim Rule, DoD has elected to paraphrase the statute and in doing so has strayed impermissibly from the statutory text. DFARS § 208.602(a) states that the purpose of market research is "to determine whether the FPI product is comparable to products available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery." Nowhere in the statute is there any reference to products that "best meet the Government's needs." This insertion is inconsistent with the plain meaning of Section 811, directly at odds with the general purposes of market research as set forth in 10 U.S.C. § 2377 and FAR part 10, and goes to foster the very confusion that now exists as to whether Section 811 calls for a one-step or two-step process. Moreover, inclusion of this language raises once again the issue of impermissible reliance on legislative history that goes beyond and in fact contradicts the statutory text, which issue was keenly debated while the Interim Rule was in the process of formulation.

There is an obvious conflict between the statute, which employs the words "comparable to products available from the private sector" and the Interim Rule which speaks of "comparable to products available from the private sector that best meet the Government's needs." The Congress did not so skew the "step one" comparison to such a limited sample (i.e., those

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products that best meet the Government's needs) but instead left the comparison open and unrestricted. It is neither logical nor principled to suggest that the modifier "best meet the Government's needs" is implicit in the statutory text. In fact, the very nature of "market research," the term selected by Congress to describe the first step in the Section 811 process, belies the wording of the Interim Rule.

By statute, 10 U.S.C. § 2377(c)(2), the results of market research are to be used to determine whether there are commercial items available that meet the agency's requirements, not to determine which item best meets the agency's requirements. Market research is a preliminary undertaking in the procurement process. At this stage, the agency's "requirements" are broadly formulated in terms of (i) functions to be performed, (ii) performance required, or (iii) essential physical characteristics. 10 U.S.C. § 2377(a)(1). Hence, it is unrealistic to expect that market research will identify those products that best meet the Government's needs. This understanding of market research is confirmed by FAR part 10, which implements 10 U.S.C. § 2377. Nowhere does it identify determination of those products that best meet the Government's needs as a goal or purpose of the market research undertaking. See FAR § 10.001(a)(3). Instead, at the market research stage the agency determines if there are any sources or commercial items in existence that are capable of satisfying the agency's requirements.

Ascertaining products available from the private sector that can be compared with an FPI product is a separate and distinct task, and a far simpler one, from ascertaining which private sector products best meet the Government's needs. By the time a determination has been made as to which private sector products best meet the Government's needs, the contracting officer effectively is in the midst of a competition evaluating offers. The language chosen by Congress to express what it intended (i.e., market research) will not admit of DoD's revision. Section 811 mandates only market research, not selection of those products that best meet the Government's needs. The Interim Rule by purporting to require more contradicts Congress' clearly expressed intent.

What the language added by DoD does do is advance the individual agenda of Senator Carl Levin. At bottom, DoD appears to rely on floor remarks of Senator Levin, given October 2, 2001, for its unwarranted description of market research:

Under this provision, the Department of Defense, not Federal Prison Industries, would be responsible for determining whether Federal Prison Industries can best meet the Department's needs in terms of price, quality, and time of delivery. If DOD determines that the FPI product is not the best available in terms of price, quality, and time of delivery, the Department is directed to purchase the product on a competitive basis.

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147 Cong. Rec. S10040 (col. 1) (daily ed., Oct. 2, 2001). This statement was reprinted verbatim in the subsequent conference report. *See* H.R. Rep. No. 107-333, at 688 (Dec. 12, 2001). Senator Levin's remarks, which speak alternatively of "best meet[ing] DoD's needs" and of "best available" are patently at odds with the wording of the statute. Section 811 does not employ either term, nor can the actual language of section 811 be stretched to accommodate them. The differences between Section 811 and Senator Levin's remarks are significant and, we submit, not the product of casual oversight in draftsmanship or lack of attention to detail. The statute represents the intent of Congress, while Senator Levin's remarks are a back-door attempt at amendment of the statute without resort to the constitutionally prescribed requirements of bicameralism and presentment to the President. The intentions of a handful of Members, notably Senator Levin, cannot be taken to represent the intentions of the entire Senate and House, particularly where the statute reflects carefully crafted legislative compromises.

Legislative history cannot be used to show an "intent" at variance with the statute itself. While perhaps available to solve doubt or ambiguity, legislative history cannot be used to create doubt where none exists on the face of the statute. Where legislative history conflicts with the text of the statute, the statute obviously controls. These principles were reaffirmed by the Supreme Court as recently as February of this year in *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 122 S.Ct. 941 (2002). There the Commissioner of Social Security sought to rely on the remarks of two Senators in advancing an interpretation of certain statutory language which was bereft of direct support for the position asserted. The Court rejected the Commissioner's argument:

Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.

* * * * *

[W]ere we to adopt this form of statutory interpretation, we would be placing an obligation on Members of Congress not only to monitor their colleagues' floor statements but to read every word of the Congressional Record including written explanations inserted into the record. This we will not do. The only "evidence" that we need rely on is the clear statutory text.

122 S.Ct. at 954 & n.15. *See also In re Sinclair*, 870 F. 2d 1340 (7th Cir. 1989) (statutory limitation of Chapter 12 bankruptcy provisions to prospective cases only could not be trumped by legislative history (a conference committee report) indicating an "intent" to extend the benefits of Chapter 12 to already commenced cases under Chapter 11). In a related vein,

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legislative history cannot serve as the equivalent of an independent statutory source having the force of law, when the statute that it accompanies is silent with respect to the matter at issue. If Congress does not enact a particular provision, an agency has no authority to enforce the equivalent of such a provision because it is found in the legislative history. *See, e.g., Shannon v. United States*, 512 U.S. 573, 583-84 (1994) ("We are not aware of any case . . . in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute. . . . To give effect to this snippet of legislative history, we would have to abandon altogether the text of the statute as a guide in the interpretive process."); *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws."); *International Brotherhood of Electrical Workers v. NLRB*, 814 F. 2d 697, 712 (D.C. Cir. 1987) ("We believe that a cardinal principle of the judicial function of statutory interpretation is that courts have no authority to enforce principles gleaned *solely* from legislative history that has no statutory reference point.").

In conclusion with respect to this issue, CVA requests that DoD revise the Interim Rule to conform with the statutory text of Section 811 by deleting the phrase "that best meet the Government's needs" at each of the three locations where it currently appears; that is, sections 208.602, 208.606, and 210.001.

Curbing Arbitrary and Capricious Determinations. At the recent June 3, 2002 Public Meeting, DoD officials (Ms. Lee and the DARC) expressed the view that it is unnecessary to define "comparable" in the final rule. Nonetheless, CVA suggests that a modicum of guidance is needed to flesh out what constitutes "comparable" and what doesn't (i.e., what signals non-comparable). Continued silence on this score can only lead to conflicting determinations made by a host of individuals, each working from differing subjective understandings. Apart though from the question of definitional guidance, it is essential that contracting officer determinations, once made, be subject to review if they are the product of arbitrary and capricious decision-making. DoD's effort in the Interim Rule to preclude such review, by asserting in section 208.602 that "[t]his is a unilateral decision made solely at the discretion of the department or agency," amounts to yet another unjustified elaboration which is unsupported by the language of Section 811 and is contrary to existing law.

Section 4124(b) of title 18 states:

Disputes as to the price, quality, character, or suitability of [FPI] products shall be arbitrated by a board consisting of the Attorney General, the Administrator of General Services, and the President, or their representatives. Their decision shall be final and binding upon all parties.

Section 811 does not amend 18 U.S.C. § 4124, nor does it insulate contracting officer non-comparability determinations from review by the arbitration board or in any other manner permit

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DoD to arrogate unto itself unilateral discretionary authority. Consequently, if FPI disagrees with a contracting officer's non-comparability determination (which addresses price, quality, and time of delivery) the arbitration board is available to resolve the dispute.

Section 811 cannot be read as a repeal of 18 U.S.C. § 4124(b). When Congress intends one statute to repeal another or to supersede an earlier statute to the extent of a conflict, it says so in the subsequent statute, usually under captions such as "effect on existing law" or "construction with other laws." Section 811 contains no such provisions. The Supreme Court has cautioned that it "can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change." *United States v. Fausto*, 484 U.S. 439, 453 (1988). Consequently, repeals by implication are not favored. *See Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

Those who might contend that Section 811's mere silence with respect to 18 U.S.C. § 4124(b) is somehow sufficient to support DoD's claim of unreviewability overlook the Court's admonition that an inference drawn from congressional silence cannot be credited when that inference is contrary to other existing statutory text. The Court assumes that Congress will address major issues if a change is intended. As recently stated:

Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not hide elephants in mouseholes.

Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 468 (2001). *See also Director of Revenue of Missouri v. CoBank, ACB*, 531 U.S. 316, 323-24 (2001) ("it would be surprising, indeed," if Congress effected a "radical" change in the law "sub silentio" via "technical and conforming amendments"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 231 (1994) (conferring authority to "modify" rates did not confer authority to make filing of rates voluntary).

Accordingly, the task here is to read the two statutes, Section 811 and 18 U.S.C. § 4124(b), together in order "to give effect to each . . . while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). *See also Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 448-51 (2001); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017-18 (1984). An harmonious reading of the statutes can be achieved in this instance by deleting from the Interim Rule the wording "[t]his is a unilateral decision made solely at the discretion of the department or agency" and by acknowledging the availability of the arbitration board to review non-comparability determinations. CVA, therefore, requests that DoD do so.

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Clarifying the Circumstances When a Competition is Allowed. Subpart (b) of Section 811 ("Limited Competition Requirement") states: "If the Secretary determines that a Federal Prison Industries product is not comparable in price, quality, and time of delivery to products available from the private sector, the Secretary shall use competitive procedures for the procurement of the product." The specificity of this language is unquestionable. But rather than repeat this language in the Interim Rule, DoD dispenses with the description of what must be determined as not comparable and proceeds with only a clipped summary: "If the FPI product is not comparable use competitive procedures to acquire the product." DoD's editorial elision (i.e., deletion of "price, quality, and time of delivery") fosters a fundamental misunderstanding of Section 811. It eliminates Congress' explicit instruction that non-comparability must be found as to all three items of comparison and instead leaves to individual contracting officers the choice as to how much non-comparability must be found—one item, two items, or all three items of comparison—before proceeding with a competition. Any assertion by DoD to the contrary, that this is not the intended effect of the Interim Rule, was dispelled at the June 3, 2002 Public Meeting when Ms. Lee opined that in considering "price, quality, and time of delivery" not all of the three had to be reviewed in accordance with market survey principles.

Words that are not terms of art and that are not statutorily defined are customarily given their ordinary meanings. Use of the conjunctive "and" in a list means that all of the listed requirements must be satisfied. *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1292 (D.N.Mex. 1996). Use of the disjunctive "or" means that only one of the listed requirements need be satisfied. Congress in Section 811 used "and." Not only did Congress use "and" in subpart (a) when listing the characteristics to be surveyed during "phase one" market research, Congress once again used "and" in subpart (b) when stating the conditions that must exist before FPI loses its mandatory source status and a competition ensues.

Hence, it is abundantly clear from the statutory text that the FPI product must be found not comparable as to all three listed items, "price, quality, and time of delivery," before DoD can resort to a competition for the product. CVA, therefore, requests that DoD revise the Interim Rule to read: "If the FPI product is not comparable in price, quality, and time of delivery, use competitive procedures to acquire the product." At this juncture, it bears mention that the FPI clearance process (FAR § 8.605) remains available to DoD should it believe that non-comparability as to one or two of the items of comparison necessitates a waiver of FPI's mandatory source status.

Before passing to CVA's next specific issue, we wish to take a moment and assess Senator Levin's floor remarks, quoted earlier, insofar as they bear on the issue here under discussion. We do this not because DoD has adopted Senator Levin's approach on this particular matter, but to preserve CVA's appeal rights should DoD hereafter set a different course in the final rule. Senator Levin's statement was to the effect that: "If DoD determines that the FPI product is not the best available in terms of price, quality, and time of delivery, the Department is

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directed to purchase the product on a competitive basis." This wording purports to both magnify and shift the comparative burden placed on the FPI product. The statute speaks in terms of "comparable" and "not comparable." The statute does not demand equivalence on the part of the FPI product, much less superiority ("best available"). But going further, Senator Levin, by use of the conjunctive "and" in his "best available" formulation, seeks to expand the instances when DoD could resort to a competition. Not only must the FPI product be the "best available," it must be the best available as to all three factors of comparison. Merely being the best available as to one or two factors is not enough. In sum, whereas the statute, the actual language voted on and approved by the entire Congress and signed by the President, preserves FPI's mandatory source status whenever its product is "comparable" as to at least one of the three factors of comparison, Senator Levin strives to eviscerate FPI's position by requiring its product to be the "best available" as to each factor of comparison if it is to retain its mandatory source status. For reasons set forth earlier, legislative history is a false touchstone. The meaning of a statute cannot be impeached by manufactured legislative history. Only those provisions expressed in the statutory text itself have the authoritative status of law.

Specifying the Ground Rules for a Competition. When an FPI product has been determined to be not comparable in price, quality, and time of delivery to products available from the private sector, DoD is to conduct a competition and in doing so is to "consider a timely offer from [FPI] for award in accordance with the specifications and evaluation factors specified in the solicitation." The Interim Rule says as much. Yet experience since issuance of the Interim Rule has shown that greater specificity is needed to instruct contracting officers in the proper procedures to be followed. Provision must be made to accord FPI notice of the competition so that it may avail itself of the opportunity to submit a timely offer. Furthermore, procurement personnel must be alerted to the fact that, once there is to be a competition, they simply cannot acquire the product from GSA multiple award schedules. Because the second of these points drives the first, we discuss it initially.

Subpart (b) of Section 811 instructs DoD to use "competitive procedures." Certain DoD officials have advised CVA that this reference is sufficient to allow resort to GSA multiple award schedules for acquisition of the product. CVA vigorously disagrees. The "competitive procedures" reference to which these individuals allude is 10 U.S.C. § 2302(2). It is true that section 2302(2) defines competitive procedures to include those procedures established by the Administrator of General Services for the multiple award schedule program of the GSA. 10 U.S.C. § 2302(2)(C). However, an important point is overlooked. The definitions set forth in 10 U.S.C. § 2302 by the very words of that statute apply only "in this chapter." "This chapter" is chapter 137, which encompasses 10 U.S.C. §§ 2301-31. Section 811 has been designated for codification in chapter 141 of title 10, not chapter 137. Thus, the "competitive procedures" definition of section 2302(2) does not apply to Section 811 (i.e., 10 U.S.C. § 2410n).

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It is further instructive to observe that in pre-enactment drafts of Section 811, a definition section was included which would have given to "competitive procedures" the same definition as in 10 U.S.C. § 2302(2). This provision of the draft Section 811 (numbered as section 821 at the time) was deleted by Senate Amendment 1834 agreed to by voice vote on October 2, 2001. Consequently, not only did Congress recognize that affirmative action was necessary to import the competitive procedures definition of 10 U.S.C. § 2302(2) into Section 811, but the attempt to do so was rejected.

Finally, it should be emphasized that "competitive procedures" in subpart (b) of Section 811 must be read in accord with the balance of subpart (b). The balance of subpart (b) unmistakably evinces an intent that a full and open competition be conducted. Consideration of "a timely offer . . . for award in accordance with the specifications and evaluation factors specified in the solicitation" hardly squares with use of GSA multiple award schedules. A solicitation need not be pursued when using the multiple award schedules. FAR § 8.404(a). Instead, "orders" are placed against a GSA multiple award schedule and in a great majority of cases (orders exceeding the micro-purchase threshold but not exceeding the maximum order threshold) the ordering office merely reviews pricelists of three schedule contractors. FAR § 8.404(b)(2). Section 811 demands more than this. Congress' use of the term "solicitation" in conjunction with the expectation that it contain "specifications and evaluation factors" mandates a traditional "paper" procurement.

By virtue of the "solicitation" requirement and the deletion of the "competitive procedures" definition from the pre-enactment draft, Congress recognized that FPI's organizational framework was not compatible with a multiple award schedule approach. To adapt to a MAS approach, FPI would have to become a virtual private enterprise, hiring a sales force and warehousing supply for immediate delivery. Had Congress intended such a dramatic change in FPI, it would have amended FPI's organic act (18 U.S.C. §§ 4121-29). Congress chose not to do so and that decision must be honored.

Therefore, CVA requests that DoD amend the Interim Rule to state that "competitive procedures" for purposes of subpart (b) of Section 811 (i.e., 10 U.S.C. § 2410n(b)) do not include placement of orders against GSA multiple award federal supply schedules (FAR § 8.404). Additionally, contracting officers should be advised that, when proceeding under subpart (b) of Section 811, coordinated acquisition assignments to GSA (*see* DFARS subpart 208.70) are revoked as to any product type in the FPI catalog. Last, in order that FPI may make a timely offer, should it so choose, the rule should explicitly instruct that a copy of the solicitation for the product shall be provided to FPI at the same time and in the same manner as others are notified of the solicitation.

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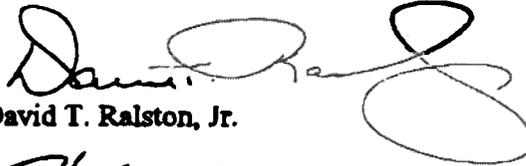
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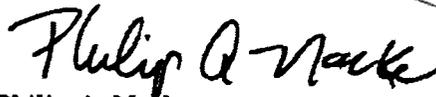
CONCLUSION

Correctional Vendors Association appreciates this opportunity to comment on the Interim Rule and looks forward to a satisfactory resolution of the foregoing issues. CVA urges that DoD make strong efforts to finalize the rule as soon as possible, consistent with full and reasoned deliberation, so that the Interim Rule does not dangle indefinitely.

Respectfully submitted,



David T. Ralston, Jr.



Philip A. Naeke

*Counsel for Correctional Vendors Association,
Inc.*

Enclosures with facsimile copy.

cc: Correctional Vendors Association, c/o Ms. Kathleen A. Leonard
Senator Phil Gramm
Mr. Mitchell E. Daniels, Jr. Director, Office of Management and Budget
Ms. Angela B. Styles, Administrator, Office of Federal Procurement Policy, OMB
Mr. Donald R. Arbuckle, Deputy Administrator, Office of Information and Regulatory
Affairs, OMB
Mr. David Haun, Office of Management and Budget



Office Furniture Dealers Alliance

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Looking Out for Your Interests

The OFDA is your voice in Washington and has dedicated professionals on Capitol Hill actively working to represent your interests and aggressively protect your business against expensive government regulations and unfair legislation.

New! OFDA "Doing Business with the Federal Government" Procurement Workshops

The OFDA is offering two-and-a-half day workshops in three key locations this summer to guide office furniture dealers through the government contracting process, including how to establish a company as a pre-approved GSA supplier. Dealers will get a comprehensive overview of the GSA program and learn how the government buys.

The OFDA's procurement experts will also share "tricks of the trade" including how pricing, discounts, costs, volume sales, terms and conditions, and sourcing all play key roles in the awards process. Dealers will also be given actual hands-on experience in drafting proposals and schedules.

The workshops will be held in three convenient locations: June 3-5, San Francisco, CA; June 19-21, Washington, D.C., and August 26-28, Dallas, TX.

The OFDA Government Procurement Workshop Series is sponsored by Daisytek International. For more information on the workshops, please call (800) 542-6672, ext. 124 or click below.

[More information.](#)
[Registration form.](#)

\$104 Million Victory for Independent Dealers

The passage of the FY'02 Department of Defense Authorization bill eliminates FPI's mandatory "sole source" authority immediately within the Agency and replaces it with competitive options that now allows contracting officers to buy the best product at the best price. The DoD is no longer required to buy its products from FPI. This was a major victory in the association's aggressive campaign to reform to how and where the federal government buys its products.

Customize the press release below to get the word out about this victory and let your local DoD buyers know that you are ready to do business!

[Press Release for Dealers on FPI Victory.](#)
[Congressional Voting Record on FPI](#)

Capitol Wiz Legislative Action Center

It's power to the people with the association's new Interactive Capitol Wiz Legislative Action Center! Now you can easily get information on your Congressional delegation, e-mail government officials, track legislation, and most importantly, make a difference! Capitol Wiz provides up-to-the-minute information on what's happening in Washington and how it impacts your business. We'll guide you through the process on key issues so you can make your voice heard!

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Department Of Defense - FPI Reform

EFFECTIVE IMMEDIATELY UNICOR IS REQUIRED TO COMPETE FOR ALL DEPARTMENT OF DEFENSE FURNITURE PROCUREMENTS BASED ON PRODUCT, PRICE, QUALITY, DELIVERY, AND SERVICE.

DOD NO LONGER MUST BUY FROM UNICOR OR FOLLOW THE UNICOR WAIVER PROCESS.

Below you will find a memorandum from the Director of Procurement for the Department of Defense referencing Public Law 107-107, Section 811 of the National Defense Authorization Act 2002, which states clearly that DOD customers have the ability and responsibility to determine if UNICOR provides Best Value.

It is extremely important to get this information in front of our DOD customers immediately so that they can cancel UNICOR orders, cancel pending requirements to buy from UNICOR, and begin the planning process with Haworth for future projects.

In support of this important reform, a special DOD customer promotion will follow within the next 10 days. We will also continue to provide sales support/positioning resource information to support your sales activities.

This is the victory that we have been fighting for, let's celebrate with our customers in providing them with this great news and relief from UNICOR, the quality products and services that they have been prohibited from purchasing, and with orders.

If you have any questions, please contact Thomas Walker at 616.393.3611.

Thank you for your strong, continued sales leadership of our government sales programs.

[FPI Reform Letter](#)

Save Up To An Additional 25% Over GSA Contract Pricing

Haworth is offering a limited time Special GSA Discount Promotion beginning February 15, 2002 and ending May 31, 2002. This promotion, targeted for Smart Card purchases presents Work Place Support Products offered at up to an additional 25% off over GSA contract pricing.

[Available Jobs At Haworth](#)

[Dealer Locator](#)

[The Haworth Story](#)

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Haworth Furniture: Haworth Inside & Out - Dealer Showrooms

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Products offered under this promotion include:

- lateral files
- pedestals
- storage units
- seating
- work tools.

Look at the promotion brochure by clicking on the icon at the bottom of this section.

This promotion is good on orders dated on or after February 15, 2002 through May 31, 2002. Normal lead times apply. There are no minimum quantities to qualify for this special pricing. Government Smart-Card orders as well as hard copy purchase orders are being accepted for the discount pricing. For additional information on how to order, contact your local Haworth Dealer or Haworth Market Manager. To identify a Haworth Dealer in your area, go to the Dealer Locator on this web page.

 [Promotion Brochure](#)

SPECIAL PROGRAMS AND NEW INFORMATION

SPECIAL Promotions:

GSA Customers Only! Haworth is providing a special Federal Government Emergency Response Supply Program. This program is established to help provide relief and assistance to Federal Government customers affected by the terrorist attack on September 11. Agencies that are certain to qualify include: Department of Defense agencies, FAA, FEMA, National Guard, Coast Guard Intelligence agencies, GSA, and Corps of Engineers. Other agencies may qualify depending on their tasks or missions. Specific products have been identified for this program. A list of those products can be obtained from your Haworth Dealer.

New Information:

SMED Products expand GSA Package Furnishings contract "turn-key solutions for the 21st century" offering! Haworth/KLN Steel Products GSA Partnership, one of the most responsive packaged furnishing contract programs, now offers increased product response through a simplified procurement, single order resource.

For information, please contact Craig Cannon, KLN Director-Government Programs, at 210-227-4747 or craig@kln.com.



ACQUISITION,
TECHNOLOGY,
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

March 4, 2002

MEMORANDUM FOR DIRECTOR OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS
MANAGEMENT, ASN(RD&A)/ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SA/AQC
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
EXECUTIVE DIRECTOR FOR LOGISTICS POLICY AND
ACQUISITION MANAGEMENT (DLA)

SUBJECT: Implementation of Section 811 of the National Defense Authorization Act,
FY 2002, Regarding Purchases from Federal Prison Industries

Section 2410a of title 10, United States Code, enacted by section 811 of the
National Defense Authorization Act, FY 2002 (Pub. L. No. 107-107), specifies under

2002 Defense Authorization Act Ends UNICOR's "Mandatory Status" For Defense Department Procurement

Public Law 107-107, Section 811, which is reproduced below, gives OOD procurement officials the ability and the responsibility to determine if UNICOR Federal Prison Industries products provide the Best Value to DOD. Before the new provisions were signed into law on 28 Dec 2001, UNICOR, not DOD procurement officials, made this determination through the waiver process detailed in FAR 8.6.

The new law is not intended to exclude UNICOR from DOD sales opportunities. It clearly states that UNICOR proposals must be given consideration just as offers from any other sources such as GSA contracts, or open market solicitations.

Note that the effective date stated in the legislation is 1 Oct 2001, and that no UNICOR products are excluded, i.e., the new requirements cover all UNICOR products.

Section 811 of Public Law 107-107

SEC. 811. APPLICABILITY OF COMPETITION REQUIREMENTS TO PURCHASES FROM A REQUIRED SOURCE.

(a) CONDITIONS FOR COMPETITION. (1) Chapter 141 of title 10, United States Code, is amended by adding at the end the following:

Sec. 2410a. Products of Federal Prison Industries: procedural requirements.

(a) MARKET RESEARCH BEFORE PURCHASE. Before purchasing a product listed in the latest edition of the Federal Prison Industries catalog under section 4124(b) of title 18, the Secretary of Defense shall conduct market research to determine whether the Federal Prison Industries product is comparable in price, quality, and time of delivery to products available from the private sector.

(b) LIMITED COMPETITION REQUIREMENT. If the Secretary determines that a Federal Prison Industries product is not comparable in price, quality, and time of delivery to products available from the private sector, the Secretary shall use competitive procedures for the procurement of the product. In conducting such a competition, the Secretary shall consider a timely offer from Federal Prison Industries for award in accordance with the specifications and evaluation factors specified in the solicitation.

(2) The table of sections at the beginning of such chapter is amended by adding at the end the following:

2410a. Products of Federal Prison Industries: procedural requirements.

(a) APPLICABILITY. Section 2410a of title 10, United States Code (as added by subsection (a)), shall apply to purchases initiated on or after October 1, 2001.



OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

March 4, 2002

MEMORANDUM FOR DIRECTOR OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS
MANAGEMENT, ASN(RD&A)/ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SA/PAQC
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
EXECUTIVE DIRECTOR FOR LOGISTICS POLICY AND
ACQUISITION MANAGEMENT (DLA)

SUBJECT: Implementation of Section 811 of the National Defense Authorization Act,
FY 2002, Regarding Purchases from Federal Prison Industries

Section 2410n of title 10, United States Code, enacted by section 811 of the National Defense Authorization Act, FY 2002 (Pub. L. No. 107-107), specifies under what circumstances the Department of Defense is not required to purchase mandatory items from Federal Prison Industries (FPI) (copy attached). This provision was effective on October 1, 2001, and takes precedence over the current Federal Acquisition Regulations (FAR) that address purchases from FPI. You should also be aware of 18 U.S.C. 4124 and consult with counsel in regard to such purchases.

While 10 U.S.C. 2410n is in effect and controlling, more definitive guidance will be forthcoming through an interim Defense FAR Supplement (DFARS) rule concerning DoD purchases from FPI. This interim rule has been forwarded to the Office of Management and Budget, Office of Information & Regulatory Affairs for approval. If you have any questions, please call Mr. Domenic Cipicchio, Deputy Director, Defense Procurement (Contract Policy & Administration) on (703) 697-0895 or Mr. Douglas Larsen, Deputy General Counsel (Acquisition & Logistics) on (703) 697-5387.

Deldre A. Lee
Director, Defense Procurement

Attachment:
As stated



NATIONAL DEFENSE AUTHORIZATION ACT, FY 2002
(Pub. L. No. 107-107)

SEC. 811. APPLICABILITY OF COMPETITION REQUIREMENTS TO PURCHASES FROM A REQUIRED SOURCE.

(a) **CONDITIONS FOR COMPETITION.**—(1) Chapter 141 of title 10, United States Code, is amended by adding at the end the following:

“§2410n. Products of Federal Prison Industries: procedural requirements

“(a) MARKET RESEARCH BEFORE PURCHASE.—Before purchasing a product listed in the latest edition of the Federal Prison Industries catalog under section 4124(d) of title 18, the Secretary of Defense shall conduct market research to determine whether the Federal Prison Industries product is comparable in price, quality, and time of delivery to products available from the private sector.

“(b) LIMITED COMPETITION REQUIREMENT.—If the Secretary determines that a Federal Prison Industries product is not comparable in price, quality, and time of delivery to products available from the private sector, the Secretary shall use competitive procedures for the procurement of the product. In conducting such a competition, the Secretary shall consider a timely offer from Federal Prison Industries for award in accordance with the specifications and evaluation factors specified in the solicitation.”

(2) The table of sections at the beginning of such chapter is amended by adding at the end the following:

“2410n. Products of Federal Prison Industries: procedural requirements.”

(b) **APPLICABILITY.**—Section 2410n of title 10, United States Code (as added by subsection (a)), shall apply to purchases initiated on or after October 1, 2001.