

# CRS Report for Congress

## Federal Prison Industries

Updated July 13, 2007

Nathan James  
Analyst in Social Legislation  
Domestic Social Policy Division



Prepared for Members and  
Committees of Congress

# Federal Prison Industries

## Summary

UNICOR, the trade name for Federal Prison Industries, Inc. (FPI), is a government-owned corporation that employs offenders incarcerated in correctional facilities under the Federal Bureau of Prisons (BOP). UNICOR manufactures products and provides services that are sold to executive agencies in the federal government. FPI was created to serve as a means for managing, training, and rehabilitating inmates in the federal prison system through employment in one of its industries. The question of whether UNICOR is unfairly competing with private businesses, particularly small businesses, in the federal market has been and continues to be an issue of debate. The debate has been affected by tensions between competing interests that represent two social goods — the employment and rehabilitation of offenders and the need to protect jobs of law abiding citizens. At the core of the debate is UNICOR's preferential treatment over the private sector. UNICOR's enabling legislation and the Federal Acquisition Regulation require federal agencies, with the exception of the Department of Defense (DOD), to procure *products* offered by UNICOR, unless authorized by UNICOR to solicit bids from the private sector. While federal agencies are not required to procure *services* provided by UNICOR they are encouraged to do so. It is this "mandatory source clause" that has drawn controversy over the years and is the subject of current legislation.

Of the eligible inmates held in federal prisons, 19,720 or 18% are employed by UNICOR. By statute, UNICOR must be economically self-sustaining, thus it does not receive funding through congressional appropriations. In FY2005, FPI generated \$765 million in sales. UNICOR uses the revenue it generates to purchase raw material and equipment; pay wages to inmates and staff; and invest in expansion of its facilities. Of the revenues generated by FPI's products and services, approximately 74% go toward the purchase of raw material and equipment; 20% go toward staff salaries; and 6% go toward inmate salaries.

In recent years, the Administration has made several efforts to mitigate the competitive advantage UNICOR has over the private sector. Going beyond the Administration's efforts, Congress has taken legislative action to lessen the adverse impact FPI has caused on small businesses. For example, in 2002, 2003, and 2004, Congress passed legislation that modified FPI's mandatory source clause with respect to procurements made by the Department of Defense and the Central Intelligence Agency (CIA); in 2004, Congress passed legislation limiting funds appropriated for FY2004 to be used by federal agencies for the purchase of products or services manufactured by FPI under certain circumstances. Legislation introduced in the 110<sup>th</sup> Congress would address many of the same issues as legislation in the 109<sup>th</sup> Congress. Like legislation in the 109<sup>th</sup> Congress, legislation introduced in the 110<sup>th</sup> Congress, S. 1407, S. 1547, and S. 1548, would eliminate the requirement that some or all executive agencies purchase products or services from FPI in most cases. This report will be updated as warranted.

## Contents

Introduction .....	1
Background .....	2
Authority .....	2
Activities .....	3
Impact of UNICOR on the Federal Prison System and Society .....	4
Characteristics of Federal Inmates .....	5
Effects of FPI on Recidivism Rates .....	6
Costs and Benefits of FPI .....	8
Recent Administration Efforts to Reform FPI .....	9
Legislative History .....	10
The Anti-Drug Abuse Act of 1988 .....	10
The National Defense Authorization Act for FY2002 .....	11
The Bob Stump National Defense Authorization Act for FY2003 ...	11
The Consolidated Appropriations Act of 2004 .....	11
Intelligence Authorization Act for FY2004 .....	11
Legislation in the 110 <sup>th</sup> Congress .....	12
S. 705 .....	12
S. 1547 and S. 1548 .....	13
Issues for Congress .....	14
FPI's Mandatory Source Clause .....	15
Customer Satisfaction .....	16
Questions Facing Congress .....	17
Conclusion .....	17
Appendix A .....	19
Elimination of the Mandatory Source Clause .....	19
Exceptions to the Elimination of the Mandatory Source Clause .....	20
Transitional Period .....	21
FPI as a Subcontractor .....	21
Other Provisions .....	22

## List of Figures

Figure 1. Federal Inmates Employed in FPI for Selected Years .....	4
Figure 2. Federal Prison Population in Selected Years .....	5
Figure 3. Percentage of Federal Inmates By Drug-Related and Violent Offenses .....	6

# Federal Prison Industries

## Introduction

UNICOR,<sup>1</sup> the trade name for Federal Prison Industries, Inc. (FPI), is a government-owned corporation that employs offenders incarcerated in correctional facilities under the Department of Justice's (DOJ's) Federal Bureau of Prisons (BOP).<sup>2</sup> UNICOR manufactures products and provides services that are sold to executive agencies in the federal government. Although UNICOR industries are located within various federal prisons, they operate independently from the prison. FPI was created to serve as a means for managing, training and rehabilitating inmates in the federal prison system through employment in one of its eight industries.

UNICOR's enabling legislation<sup>3</sup> and the Federal Acquisition Regulation (FAR)<sup>4</sup> require federal agencies, with the exception of the Department of Defense (DOD) and the Central Intelligence Agency (CIA), to procure *products* offered by UNICOR, unless authorized by UNICOR to solicit bids from the private sector.<sup>5</sup> (See discussion below, under the "Legislative History" section.) Such waivers can be granted by UNICOR to executive agencies if its price exceeds the current market price for comparable products.<sup>6</sup> Federal agencies, however, are not required to procure *services* provided by UNICOR but are encouraged to do so pursuant to FAR.<sup>7</sup> It is this "mandatory source clause"<sup>8</sup> that has drawn controversy over the years and is the subject of current legislation.

---

<sup>1</sup> UNICOR and the FPI are used interchangeably throughout this report.

<sup>2</sup> This report does not cover industries in state prison, often referred to as the Private Sector/ Prison Industry Enhancement Certification (PIE) program. The PIE program was authorized by Congress in 1979 in the Justice System Improvement Act (P.L. 96-157).

<sup>3</sup> See 18 USC §4121 *et seq.*

<sup>4</sup> FAR was developed in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974 (P.L. 93-400).

<sup>5</sup> Under current law (18 USC §4124(a)) and regulations (48 C.F.R.), federal agencies, with the exception of the DOD and the CIA, must procure products from FPI, unless granted a waiver by FPI (48 CFR 8.604), that are listed as being manufactured by UNICOR in the corporation's catalog or schedule of products.

<sup>6</sup> See Bureau of Prisons Program Statement 8224.02, *FPI Pricing Procedures*.

<sup>7</sup> FAR encourages federal agencies to treat UNICOR as a "preferential source" in the procurement of services. See 41 CFR §101-26, 107; 48 CFR §302-5, 8.002, 8.602, 8.603, 8.605(f), and 8.704.

<sup>8</sup> Also referred to as "superpreference," "sole source," or "preferential status."

This report opens with a discussion of FPI's background and its impact on the federal prison system as well as society. It then summarizes the statutory history of FPI and other laws affecting the industry. It also discusses legislative activity in the 109<sup>th</sup> Congress. The report concludes with an examination of some of the policy issues surrounding the debate with respect to the elimination of FPI's mandatory source clause. This report does not address the related debates on inmate labor, criminal rehabilitation, or competitive versus noncompetitive federal government contracting.

## Background

As the federal prison system was established in the first decade of the 20<sup>th</sup> century, factories were constructed within the prisons to manufacture products needed by the federal government. Labor organizations had been making arguments against prison industries since the late 1800s due to the poor conditions in which inmates were working and their perception that the industries were taking jobs away from law abiding citizens. The Depression of the 1930s and the resulting high levels of unemployment crystalized the debate. UNICOR was established in 1934 under an executive order issued by President Franklin Delano Roosevelt.<sup>9</sup> The purpose of UNICOR was to consolidate the operations of all federal prison industries in order to provide training opportunities for inmates and “diversify the production of prison shops so that no individual industry would be substantially affected.”<sup>10</sup>

**Authority.** FPI is administered by a six-person Board of Directors that is appointed by the President. Its enabling act<sup>11</sup> requires that representatives of industries, agriculture, labor, and retailers and consumers serve as board members.<sup>12</sup> The board's decision-making regarding products to be manufactured and areas of expansion are driven by a goal of employing the greatest possible number of inmates.<sup>13</sup>

---

<sup>9</sup> See Executive Order 6917.

<sup>10</sup> Franklin Delano Roosevelt, *The Public Papers and Addresses of Franklin D. Roosevelt*, vol. 3 (New York: Random House, 1938), p. 497. These principles are reflected in the current statutory authority for FPI, see 18 USC §4122(b).

<sup>11</sup> See 18 USC §4121.

<sup>12</sup> In addition to the five board members who must be from the aforementioned groups, the Attorney General and the Secretary of Defense (or their designee) also serve as board members.

<sup>13</sup> Under 18 USC §4122(b)(1), this goal is explicit, along with other goals to “diversify, so far as practicable, prison industrial operations,” and to “so operate the prison shops that no single private industry shall be forced to bear an undue burden of competition from the products of the prison workshops, and to reduce to a minimum competition with private industry or free labor.”

**Activities.** Of the eligible inmates held in federal prisons, 21,250 or 18% are employed by UNICOR.<sup>14</sup> UNICOR has 108 factories in federal prisons representing seven different industrial operations.<sup>15</sup> UNICOR's seven industrial operations are comprised of roughly 150 different types of products and services. UNICOR's industrial operations include the following:

- clothing and textiles;
- electronics;
- fleet management and vehicular components;
- industrial products;
- office furniture;
- recycling activities; and
- services (which includes data entry and encoding).<sup>16</sup>

UNICOR is economically self-sustaining and does not receive funding through congressional appropriations. In FY2006, FPI generated \$718 million in sales.<sup>17</sup> UNICOR uses the revenue it generates to purchase raw material and equipment; pay wages to inmates and staff; and invest in expansion of its facilities. Of the revenues generated by FPI's products and services, approximately 77% go toward the purchase of raw material and equipment; 18% go toward staff salaries; and 5% go toward inmate salaries.<sup>18</sup> Inmates earn from \$0.23 per hour up to a maximum of \$1.15 per hour, depending on their proficiency and educational level, among other things. Under BOP's Inmate Financial Responsibility Program, all inmates who have court ordered financial obligations must use at least 50% of their FPI income to satisfy those debts, which accounted for \$2.7 million in FY2005; the rest may be retained by the inmate.<sup>19</sup>

---

<sup>14</sup> UNICOR's 2006 Annual Report at [<http://www.unicor.gov/information/publications/pdfs/corporate/catar2006.pdf>], hereafter, "UNICOR 2006 Annual Report."

<sup>15</sup> There are currently 114 federal institutions in the United States. U.S. Department of Justice, Bureau of Prisons, *FY2008 Performance Budget, Congressional Submission, Federal Prison System, Buildings and Facilities*.

<sup>16</sup> UNICOR 2006 Annual Report.

<sup>17</sup> *Ibid.*

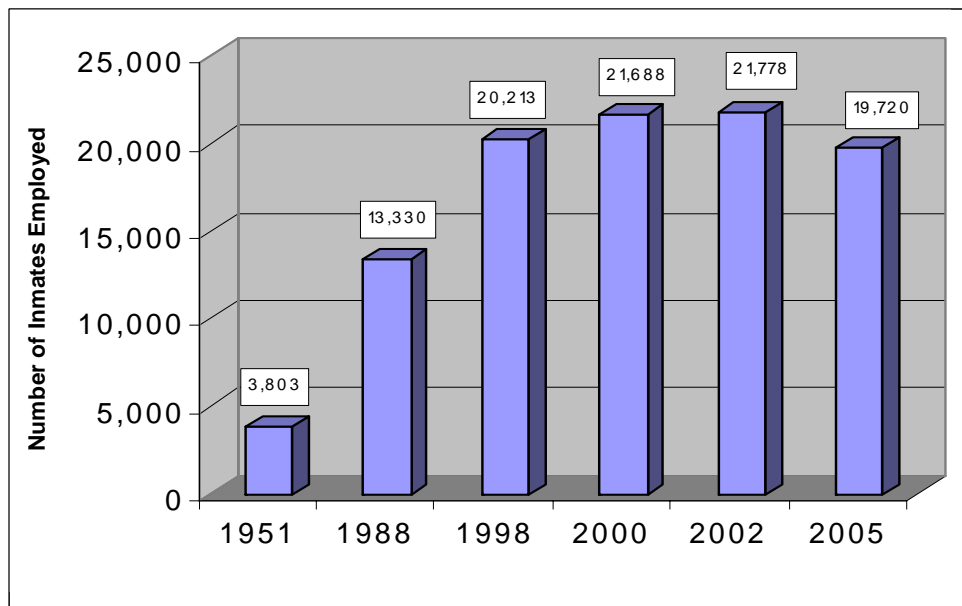
<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*; John W. Roberts, *Work, Education, and Public Safety: A Brief History of Federal Prison Industries*, at [[http://www.unicor.gov/about/organization/history/overview\\_of\\_fpi.cfm](http://www.unicor.gov/about/organization/history/overview_of_fpi.cfm)].

## Impact of UNICOR on the Federal Prison System and Society

Under current law, all physically able inmates who are not a security risk are required to work.<sup>20</sup> Those inmates who are not employed by UNICOR have other labor assignments in the prison. Until FY2003, UNICOR had seen an increase in the number of inmates working in its industries, primarily due to the increase in the federal prison population, as discussed below. For example, in FY1951, UNICOR employed 3,803 federal inmates, which represented 22% of the *total* inmate population. In FY2002, however, the percentage of inmates employed by UNICOR dropped to 13% and in FY2005 the percentage dropped to 10% (see **Figure 1**).<sup>21</sup>

**Figure 1. Federal Inmates Employed in FPI for Selected Years**



**Source:** CRS presentation of UNICOR's Annual Reports (FY1951, FY1988, FY1998, FY2000, FY2002, and FY2005).

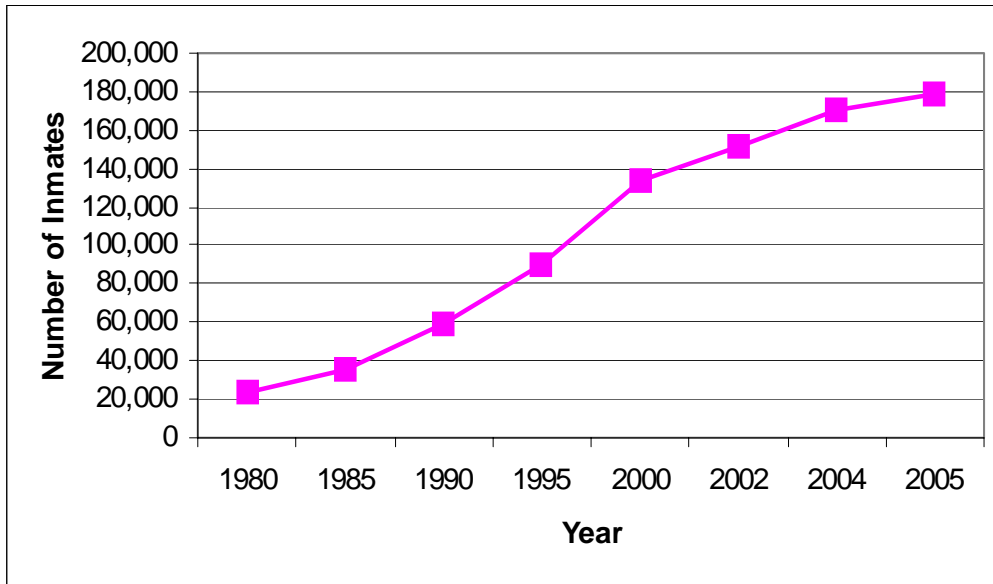
The increase in federal inmates working at a UNICOR industry can be attributed in part to the increase in the federal inmate population, which has led to FPI expanding its industries. As **Figure 2** depicts, the federal inmate population has

<sup>20</sup> Title XXIX, §2905 of the Crime Control Act of 1990 (P.L. 101-647) required that all offenders in federal prisons must work (the act permitted limitations to this rule on security and health-related grounds).

<sup>21</sup> According to BOP Congressional Affairs office, the number of *eligible* inmates (as opposed to total inmate population as discussed above) employed in FPI has decreased in recent years (FY2001 - 22,650 [25%]; FY2002 - 21,778 [22%]; FY2003 - 20,274 [19%]; FY2004 - 19,337 [18%]; and FY2005 - 19,720 [17%]).

increased more than 650% since 1980, ranging from about 24,000 in 1980 to approximately 179,000 in 2005.<sup>22</sup>

**Figure 2. Federal Prison Population in Selected Years**



**Source:** CRS presentation of Table 6.13.2005 from *The Sourcebook of Criminal Justice Statistics* and DOJ's Bureau of Justice Statistics Bulletin, *Prisoners in 1994*.

## Characteristics of Federal Inmates

As Congress began to define and expand crimes eligible for federal penalties in the late 19<sup>th</sup> century, such perpetrators were being prosecuted at an increasing rate, which contributed to the overcrowding in state and local correctional facilities. As a result, Congress authorized the establishment of the first federal prisons in 1891.

Federal inmates in the 19<sup>th</sup> and the first part of the 20<sup>th</sup> centuries tended to be nonviolent offenders who committed property or public order-related offenses. Such offenders stand in contrast to federal offenders in the latter part of the 20<sup>th</sup> century and currently whose crimes are increasingly more violent and/or are often incarcerated for drug-related offenses. For example, in 1980, 34% of the federal prison population consisted of violent offenders and 25% consisted of offenders who committed drug-related crimes.<sup>23</sup> While the number of federal inmates incarcerated for violent offenses has consistently declined since 1980, the number of federal inmates incarcerated for a drug-related offense has consistently risen since 1980 (see

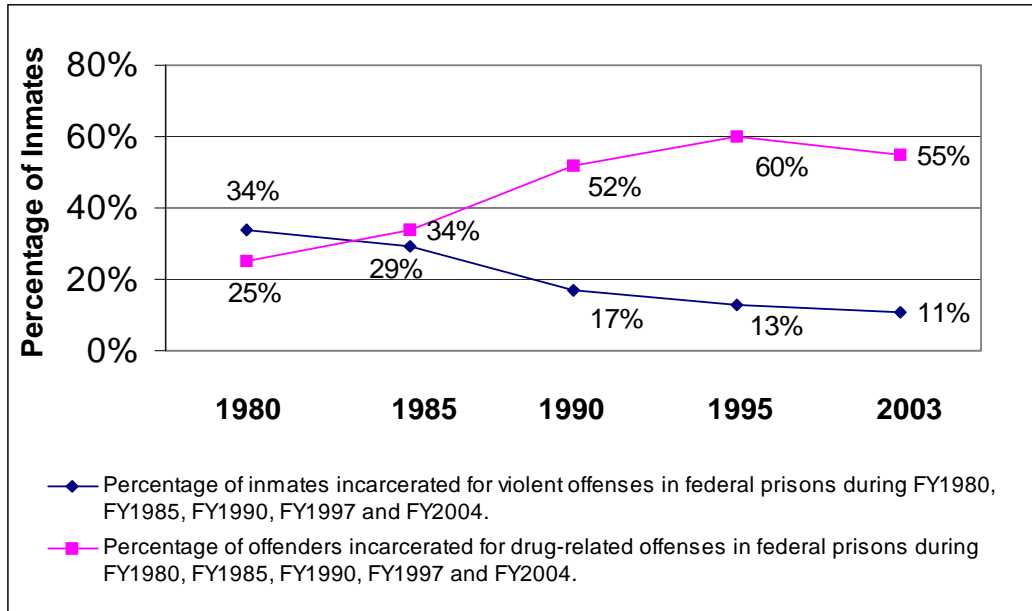
<sup>22</sup> Ann L. Pastore and Kathleen Maguire, eds. *Sourcebook of Criminal Justice Statistics (Online)*, Table 6.13.2005, at [<http://www.albany.edu/sourcebook/>]; Bureau of Justice Statistics, *Prisoners in 1994*, NCJ 151654, August 1995, at [<http://www.ojp.usdoj.gov/bjs/pub/pdf/pi94.pdf>].

<sup>23</sup> See Bureau of Justice Statistics, *Bulletin, Prisoners in 1994*, and U.S. Department of Justice, Federal Bureau of Prisons, *Sourcebook of Criminal Justice Statistics 2002*, p. 516.



**Figure 3).** Correctional authorities had to accommodate to a more frequent history of violence in the inmate population under their jurisdiction.

**Figure 3. Percentage of Federal Inmates By Drug-Related and Violent Offenses**



**Source:** CRS presentation of DOJ's Bureau of Justice Statistics Bulletins, Prisoners in 1994 and Prisoners in 2005.

## Effects of FPI on Recidivism Rates

The majority of incarcerated individuals will be released back into society. According to testimony at a Senate hearing, “during the three-year period from 2000 to 2002, the Bureau [Federal Bureau of Prisons] released back to local communities an average of approximately 40,000 inmates per year...”<sup>24</sup> Many scholars assess the effects of prison on an inmate's ability to successfully reintegrate into society and the recidivism rate<sup>25</sup> is widely used to measure such effects.

Although there have been many studies on the recidivism rate<sup>26</sup> and societal factors that may contribute to it, there have not been many studies on the impact of inmates who participate in prison industries work on recidivism. Several studies

<sup>24</sup> Testimony of Harley G. Lappin, in U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on Financial Management, the Budget, and International Security, *Making Federal Prison Industries Subject to Competitive Bidding*, hearing on S. 346, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., April 7, 2004 (Washington: GPO, 2004).

<sup>25</sup> Recidivism used in this section is defined as a new conviction (due to a new crime being committed) for a person who had been previously convicted and released.

<sup>26</sup> Recidivism used in the section refers to an individual returning to prison after either a violation of the terms of his conditional release (parole) or being convicted for a new offense.

conducted at the state level found that, on average, 47% of inmates recidivate within one year of being released from prison.<sup>27</sup> Some of the studies also found that the rate of inmates who recidivate goes up each subsequent year.<sup>28</sup> While these studies did not control for inmates who held a prison industry job, other studies did control for such a variable and found that inmates who did participate in a prison industry job were less likely to recidivate than non-participating counterparts, as discussed below.

A recent study compared the post-release employment and recidivism rates of inmates that were employed in state prison industries,<sup>29</sup> those employed in traditional prison industries, and those who were not employed at all while they were incarcerated.<sup>30</sup> The study found that inmates that participated in state prison industries were able to find post-release employment quicker than inmates that were employed in traditional prison industries or those that were not employed at all. In addition, inmates that were employed in state prison industries retained their first job longer than inmates that were not employed in state prison industries. State prison industries participants also earned higher wages than those inmates that did not participate. Inmates that were employed in state prison industries were also arrested, convicted and incarcerated at slower rates than inmates who were employed in traditional prison industries, or inmates who were not employed while they were incarcerated.

Those proponents of FPI who contend that prison industries improve public safety by reducing crime cite studies that have examined the recidivism rate for inmates who worked in prison industry jobs prior to their release. According to some scholars, on average, inmates who participate in FPI are 24% less likely to return to criminal behavior than those who do not, and 14% more likely to be employed following their release from prison than their nonparticipating peers.<sup>31</sup>

---

<sup>27</sup> Arizona Department of Corrections, *ACI's Impact on Recidivism*, see [<http://www.adc.state.az.us/FACTSHEETS/Fact%20Sheet%2003-01.htm>]; Criminal Justice Policy Council Report to Senate Criminal Justice Interim Committee, *Recidivism Rates and Issues Related to TDCJ Substance Abuse Treatment Programs*, March 13, 2003; the Metropolitan Crime Commission, *The Project Return Program, Measuring Recidivism in the Reintegration Program for Ex-Offenders*, May 2000; and the Massachusetts Sentencing Commission, *Comprehensive Recidivism Study*, June 1, 2002.

<sup>28</sup> Ibid.

<sup>29</sup> Under current federal law, most prisoners are not allowed to work in jobs that produce goods that are sold in open markets. However, the Prison Industries Enhancement Certification Program (PIECP) (P.L. 96-157), makes limited exceptions to the law. Under PIECP, the Bureau of Justice Assistance (BJA) certifies that state and local prison industries meet all of the necessary requirements to be exempt from restrictions place on prison-made goods under federal law. For more information on PIECP, see Bureau of Justice Assistance, *Program Brief: Prison Industries Enhancement Certification Program*, March 2004, at [<http://www.ncjrs.gov/pdffiles1/bja/203483.pdf>].

<sup>30</sup> Cindy J. Smith, Jennifer Bechtel, Angie Patrick, Richard R. Smith and Laura Wilson-Gentry, *Correctional Industries Preparing Inmates for Re-entry: Recidivism and Post-release Employment*, June 2006, at [<http://www.ncjrs.gov/pdffiles1/nij/grants/214608.pdf>].

<sup>31</sup> William G. Saylor and Gerald G. Gaes, *PREP: Training Inmates Through Industrial Work* (continued...)

Opponents contend, however, that prison industries do not have an effect on whether inmates recidivate. According to some critics, other factors such as the inmate's readiness to return to society; the community's acceptance of the inmate; the inmate's participation in rehabilitation programs; the inmate's educational level; the inmate's work experience; and job availability are all critical in determining if an inmate will successfully reintegrate into society.<sup>32</sup>

## Costs and Benefits of FPI

It is heavily debated whether correctional industries programs (both FPI and state and local correctional industries programs) are beneficial or costly to society. For example, proponents contend that it is more costly to run a prison where the inmates are idle, which could lead to disruptive behavior. They assert that prison industries can lower expenditures on day-to-day prison operations and decrease the likelihood of having to expend resources to thwart disturbances.

With respect to societal benefits, proponents argue that prison labor leads to increased production of goods and services, which provides an increase in the overall national economic output. Additionally, some assert that prison industries must purchase raw materials and equipment from businesses, thus creating and maintaining jobs in communities (see discussion below).

Opponents, on the other hand, contend that FPI levies extensive costs on society by taking jobs away from law abiding citizens. They argue that industries such as furniture and textile continue to lose jobs, which could be attributed, in part, to lost contracts to FPI.

Opponents also assert that FPI does not reduce the cost to taxpayers of housing prisoners. It costs, on average, \$40 billion annually, to incarcerate prisoners at the local, state and federal levels; and, at least at the federal level, none of the wages earned by inmates or FPI's profits goes towards the actual cost of incarcerating inmates.<sup>33</sup>

---

<sup>31</sup> (...continued)

*Participation, and Vocational and Apprenticeship Instruction*, U.S. Federal Bureau of Prisons, September 24, 1996; Maguire, Kathleen E., Flanagan, Timothy J. and Terrence P. Thornberry, "Prison Labor and Recidivism," *Journal of Quantitative Criminology*, vol. 4, no. 1 (1998), p. 3; Ohio Department of Rehabilitation and Correction, Office of Management Information Systems Bureau of Planning and Evaluation, *Evaluation of the Impact of Participation in Ohio Penal Industries on Recidivism*, November 1995; and the State of New York, Department of Correctional Services, *Follow-up Study of Industry Training Program Participants 1993*.

<sup>32</sup> Kathleen E. Maguire, Timothy J. Flanagan, and Terrence P. Thornberry, "Prison Labor and Recidivism," *Journal of Quantitative Criminology*, vol. 4, no. 1 (1998), p. 3; the Metropolitan Crime Commission, *The Project Return Program: Measuring Recidivism in the Reintegration Program for Ex-Offenders*, May 2000.

<sup>33</sup> With respect to earnings made by federal inmates who work in FPI, opponents contend that the amount of money they earn is low (anywhere between \$.23 and \$1.15 per hour) and (continued...)

## Recent Administration Efforts to Reform FPI

In recent years, UNICOR has made several efforts to lessen the impact of its industries on small businesses by leveling the playing field with respect to its mandatory preference over the private sector. Efforts have also been taken to reduce FPI's reliance on its mandatory source preference.<sup>34</sup>

For example, in May 2003 UNICOR's Board of Directors adopted a resolution that raises the threshold for mandatory use of FPI from \$25 to \$2,500. By raising the threshold, FPI's Board of Directors in essence eliminated FPI's mandatory source clause for purchases up to \$2,500 and is now allowing federal agencies to go directly to the private sector for any purchase under \$2,500. On a related matter, FPI's Board of Directors adopted a resolution that now requires that FPI approve requests for waivers in all cases where the private sector provides a lower cost. Prior to the board's decision regarding waivers, FPI, on average, granted 87% of waivers that were requested.<sup>35</sup> Its Board of Directors also directed FPI to waive its mandatory source status for products where the FPI's share of the federal market is in excess of 20%. Finally, the Board of Directors requires prison-made products sold by FPI to have at least 20% of its value contributed by inmate labor.<sup>36</sup>

In addition to FPI's Board of Director's decisions, federal agencies began to evaluate FPI's contract performance. According to testimony at a recent Senate hearing on FPI, "while this [the evaluation of FPI's contract performance] did not change FPI's mandatory preference status, it was an important first step in helping FPI better monitor and improve its own performance ... [which would assist] FPI as they move toward being more competitive in the federal marketplace."<sup>37</sup>

---

<sup>33</sup> (...continued)

that under current UNICOR policy 50% of inmates' wages must go towards court ordered obligations.

<sup>34</sup> A previous effort to eliminate FPI's mandatory source clause came during the Clinton Administration in 1993 when Vice President Al Gore recommended that the mandatory source provision be eliminated and that UNICOR be exempt from the FAR in order to better compete with the private sector in terms of delivery schedules and costs.

<sup>35</sup> CRS analysis of FPI waiver data from FY1994 to the first six months in FY2004.

<sup>36</sup> Some critics contend that FPI is purchasing products that have already been assembled, which requires very little labor on the part of inmates.

<sup>37</sup> Testimony of Jack R. Williams, Jr., in U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on Financial Management, the Budget, and International Security, *Making Federal Prison Industries Subject to Competitive Bidding*, hearing on S. 346, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., April 7, 2004 (Washington: GPO, 2004).

## Legislative History

While UNICOR was originally authorized in 1934 through P.L. 73-461 and Executive Order 6917, the *current* statutory authority for UNICOR was first codified in the 1948 revision of the “Crimes and Criminal procedure” statutes.<sup>38</sup> The only amendments to the statute were relatively recent provisions added in 1988, 1990, 1992, and 2002.<sup>39</sup>

The question of whether UNICOR is unfairly competing with private businesses, particularly small businesses, in the federal market has been and continues to be an issue of debate. In 1989, Congress considered a proposal that would have provided the private sector with greater opportunity to compete for DOD contracts. In 2002, Congress passed legislation that modified FPI’s mandatory source clause with respect to the DOD,<sup>40</sup> see discussion below.

The absence of legislative activity on this issue for over a half century (from 1934 to 1988) is notable. The following developments in recent decades, however, have increased congressional interest in FPI:

- the erosion of the nation’s manufacturing sector, which has resulted in lower levels of employment in that sector;
- the increase in the federal inmate population at the same time the federal government was downsizing, resulting in a reduction of UNICOR’s federal market; and
- the need to develop more aggressive inmate management techniques in federal prisons as the profile of the federal offender population changed from non-violent offenders to those convicted of violent crimes.

Only those laws that made substantial changes to the operation of FPI will be discussed below.

**The Anti-Drug Abuse Act of 1988.** The Anti-Drug Abuse Act of 1988 (P.L. 100-690) required that UNICOR meet specific requirements to ease the impact of its activities upon the private sector. Before approving the expansion of an existing product or the creation of a new product, the act required UNICOR to

---

<sup>38</sup> P.L. 80-772, codified at 18 USC §4121 *et seq.*

<sup>39</sup> The 1988 Anti-Drug Abuse Act (P.L. 100-690) authorized UNICOR to borrow from and invest in the U.S. Treasury and added the “*reasonable share*” language regarding market capture. The 1990 Crime Control Act (P.L. 101-647) required federal agencies to report information on the purchase of UNICOR products and services. The Small Business Research and Development Enhancement Act of 1992 (P.L. 102-564) modified the reporting requirements so that federal agencies provide separate reports of UNICOR purchases to the Federal Procurement Data System.

<sup>40</sup> See 10 USC §2410n.

- prepare a written analysis of the likely impact of UNICOR's expansion on industry and free labor;
- announce in an appropriate publication the plans for expansion and invite comments on the plan;
- advise affected trade associations;
- provide the UNICOR board of directors with the plans for expansion prior to the board making a decision on the expansion;
- provide opportunity to affected trade associations or relevant business representatives to comment to the Board of Director on the proposal; and
- publish final decisions made by the Board of Directors.

**The National Defense Authorization Act for FY2002.** The National Defense Authorization Act for FY2002 (P.L. 107-107) required the Secretary of Defense to use competitive procedures for the procurement of the product if it is determined that the product is not comparable in price, quality and time of delivery to products available from the private sector. In doing so, the act required the Secretary of Defense to conduct research and market analysis with respect to the price, quality and time of delivery of FPI products prior to purchasing the product from FPI to determine whether the products are comparable to products from the private sector.

**The Bob Stump National Defense Authorization Act for FY2003.** Similar to P.L. 107-107, the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (P.L. 107-314) also required the Secretary of Defense to use competitive procedures for the procurement of the product if it is determined that the product is not comparable in price, quality and time of delivery to products available from the private sector. With respect to the market research determination, the act made such determinations final and not subject to review. The act required that FPI perform its contractual obligations to the same extent as any other contractor for the DOD. It prohibits a DOD contractor or potential contractor from using FPI as a subcontractor and it also prohibits the Secretary of Defense from entering into a contract with FPI under which an inmate worker would have access to sensitive information.

**The Consolidated Appropriations Act of 2004.** The Consolidated Appropriations Act of 2004 (P.L. 108-199) eliminated FPI's mandatory source clause during FY2004 by prohibiting funds appropriated by Congress for FY2004 to be used by any federal executive agency for the purchase of products or services manufactured by FPI unless the agency making the purchase determines that the products or services are being provided at the best value, which are in line with government-wide procurement regulations.

**Intelligence Authorization Act for FY2004.** The Intelligence Authorization Act for FY2004 (P.L. 108-177) required the Director of the Central

Intelligence Agency to only make purchases from FPI if he determines that the product or service best meets the agency's needs.<sup>41</sup>

## Legislation in the 110<sup>th</sup> Congress

Two bills introduced in the 109<sup>th</sup> Congress (the Federal Prison Industries Competition in Contracting Act of 2005, H.R. 2965 and S. 749) would have, in essence, permanently eliminated FPI's mandatory source clause. See **Appendix A** for a brief discussion of both bills. Three bills introduced in the 110<sup>th</sup> Congress, S. 705, S. 1547, and S. 1548, would modify FPI's mandatory source clause in some manner. S. 705 would require all government agencies to use competitive procedures when procuring products from FPI. Section 824 of both S. 1547 and S. 1548 would modify the way in which DOD procures products from FPI.

**S. 705.** S. 705 would amend the Office of Federal Procurement Policy Act (41 U.S.C. §403 et seq.) to establish a government-wide requirement that government agencies use competitive procedures when procuring products that are authorized to be sold by FPI. The bill would require the head of an executive agency to notify FPI of the procurement at the same time as other possible bidders and to consider an offer from FPI in the same manner as other offers. The bill would not allow an executive agency to purchase products or services from FPI unless it is determined that the product or service is comparable to products or services offered by the private sector. The head of the executive agency would have to ensure that FPI performs its contractual obligations to the same extent as any other contractor.

S. 705 would provide for some exceptions to the government-wide requirement for using competitive procurement procedures. It would allow an executive agency to use non-competitive procedures to enter into a contract with FPI only if:

- The Attorney General determines within 30 days after FPI has been notified of the procurement opportunity that (1) FPI cannot reasonably expect fair consideration in a competitive competition for the contract; and (2) the award of the contract to FPI is necessary to maintain work opportunities not otherwise available at a correctional facility, and the loss of such work opportunities could create circumstances that would significantly endanger the safe and effective administration of the facility.
- The product is only available from FPI.
- The head of the executive agency determines that the product would be produced, in whole or in significant part, by prison labor outside the U.S.

---

<sup>41</sup> H.R. 5020 would amend P.L 108-177 to require the intelligence community (as defined in 50 U.S.C. §401a(4)) to only make purchases from FPI if it determines that the product or service best meets the agency's needs. H.R. 5020 passed the House on May 1, 2006.

The determination made by the Attorney General must be supported by specific findings by the warden of the correctional facility with the FPI workshop that would perform the contract, or supported by specific findings by FPI regarding the reasons why it does not expect to be selected for the contract if a competitive process is used. The bill would ensure that contractors are not required to use FPI as a subcontractor or a supplier of products or provider of services. The bill would prohibit executive agencies from (1) including provisions in the solicitation for offers that requires a contractor to use or specify products or services of FPI in the performance of the contract; (2) inserting clauses in the contract that requires the contractor to use specific products or services offered by FPI in the performance of the contract; or (3) modifying the contract to require the use of products or services of FPI in the performance of the contract. The bill would also require a contractor that uses FPI as a subcontractor or supplier in providing a commercial product pursuant to a contract to implement management procedures to prevent the introduction of an inmate-made product into the commercial market.

The bill would prevent executive agencies from entering into contracts with FPI in cases where inmate workers would have access to (1) data that is classified, or would become classified if merged with other data; (2) any geographic data regarding the location of infrastructure providing communications or water or electrical power distribution; (3) any geographic data regarding the location of pipelines for the distribution of natural gas, bulk petroleum products, or other commodities or other utilities; or (4) any personal or financial information about any citizen, including information relating to the person's real property, without the prior consent of the individual.

The bill would allow any prison or jail work program that is providing services for sale in the commercial market through inmate labor on October 1, 2007, to continue to provide commercial services until either (1) the expiration date specified in the contract or other agreement; or (2) September 30, 2011, if the work program is providing services directly to the commercial market. The bill would allow prison or jail work programs to continue to use inmate labor to provide services for the commercial market beyond the two dates specified above if the program has been certified pursuant to 18 U.S.C. §1761(c)(1),<sup>42</sup> and is in compliance with the requirements of the law and the accompanying regulations. The bill would allow a for-profit business that has an agreement with FPI on the enactment date, whereby federal inmates are providing services for the commercial market, to continue to provide services for the duration of the agreement.

**S. 1547 and S. 1548.** Section 824 of both S. 1547, the National Defense Authorization Act for Fiscal Year 2008, and 1548, the Department of Defense Authorization Act for Fiscal Year 2008, would amend current law to require the Secretary of Defense to do market research to determine whether an FPI product is comparable to products available from the private sector that best meet the needs of

---

<sup>42</sup> 18 U.S.C. §1761 (c)(1) states that whoever transports goods, wares, or merchandise manufactured, produced, or mined by convicts or prisoners who are participating in prison work programs certified by the Prison Industry Enhancement Certification Program (PIECP) would not be subject to penalties outlined in the 18 U.S.C. §1761(a).



DOD in terms of price, quality, and time of delivery before purchasing a product that FPI produces in which FPI does not have a significant market share. If the Secretary of Defense determines that an FPI product is not comparable to private sector products in terms of price, quality, or time of delivery, the Secretary of Defense would use competitive procedures for the procurement of the product, or make an individual purchase under a multiple award contract in accordance with the competition requirements applicable to such a contract. The Secretary of Defense would be required to consider a timely offer from FPI when conducting a competition for procurement of the product. In cases where FPI is determined to have a significant market share, section 824 of both bills would allow the Secretary of Defense to purchase a product from FPI only if the Secretary uses competitive procedures for procuring the product, or makes an individual purchase under a multiple award contract in accordance with the competition requirements applicable to such a contract. In conducting a competition for procurement of a product, the Secretary of Defense would be required to consider a timely offer from FPI. Under section 824 of both bills, FPI would be treated as having a significant market share for a product if the Secretary of Defense, in consultation with the Administrator of Federal Procurement Policy, determines that FPI's share of the DOD market for a product is greater than 5%. Both bills would require the Secretary of Defense to publish a list of product categories for which FPI's share of the DOD market is greater than 5%, based on the most recent fiscal year for which data are available. The list of product categories could be modified at any time if the Secretary of Defense determines that newly available data require adding or removing a product category from the list.

## Issues for Congress

Over the past decade, congressional awareness of FPI and its unique status has increased. FPI has maintained that its objective “is to prepare as many inmates as practical for a successful transition into mainstream society ... without jeopardizing the job security of the American taxpayer.”<sup>43</sup> Critics contend, however, that FPI's mandatory source clause has chipped away at the growth of small businesses. While many view FPI as being necessary in the management and rehabilitation of federal inmates, and its mandatory source clause as paramount to keeping FPI operating, others view it as having monopoly-like powers that usurp and supplant the bidding process for federal contracts.

Of equal significance is the contention that the FPI operation is based on a manufacturing, mass-production, low-skilled labor economy of the 1930s, which is not efficacious training in today's market. Inmates employed in FPI are working in “a labor-intensive manner” where the emphasis is on employing as many inmates as possible with each inmate producing little output.<sup>44</sup> While proponents maintain that inmates learn critical skills such as good workplace habits, accountability and the

---

<sup>43</sup> UNICOR's 2002 Annual Report, p. 5 at [<http://www.unicor.gov>].

<sup>44</sup> Statement of BOP Director Kathleen Hawk Sawyer, in U.S. Congress, House Committee on the Judiciary, *Federal Prison Industries*, hearings, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., October 5, 2000.

importance of being dependable, some critics contend that some of the industries FPI inmates work in are shrinking and the chances of them obtaining employment in that industry once they are released from prison are low.

## **FPI's Mandatory Source Clause<sup>45</sup>**

The debate on UNICOR's impact on the free market has been affected by tensions between competing interests that represent two social goods — the employment and rehabilitation of offenders and the need to protect jobs of law abiding citizens. At the center of the debate is FPI's mandatory source status, which many argue has deprived small businesses from competing effectively for government contracts.

Opponents of FPI's mandatory source clause assert that it prohibits full and open competition, preventing federal agencies from purchasing products in a free enterprise market. They argue that FPI's mandatory source clause has contributed to U.S. workers being displaced from their jobs.

Opponents also argue that FPI's mandatory source clause allows the industry to set prices for its goods and services (FPI's mandatory source clause only requires FPI to deliver products at market price),<sup>46</sup> which are often higher than the prices set by private companies for comparable products and services. They also contend that the mandatory source clause does not require FPI to compete using the same quality and delivery standards as private businesses.

Opponents of FPI's mandatory source clause also argue that, by law, FPI regulates itself and is not subject to federal laws (and in some cases state laws) that restrict businesses' operations with respect to occupational, safety, health and employment discrimination. On a related issue, opponents contend that through the mandatory source clause, FPI has expanded its authority with respect to its product and service lines without congressional approval.

Proponents for FPI argue that the federal prison population has grown significantly (see **Figure 2**), and that FPI is a necessary component in federal correctional facilities that prevents inmate idleness and contributes to the management of inmates. They also contend that FPI provides inmates with job skills, job readiness, responsibility and accountability, which are critical for a successful reintegration into society. Proponents contend that by eliminating FPI's mandatory source clause, inmate idleness would set in, which would undermine the safety and security of federal prisons.

---

<sup>45</sup> FPI mandatory source clause only applies to *products* it manufactures. In 1999, FPI announced plans to start selling *services* and while FPI is not a mandatory source for services as it is for products, it is a preferential source and federal agencies may purchase services from FPI without going through a competitive procurement process.

<sup>46</sup> FPI's authorizing statute and FAR require that the price FPI charges cannot exceed the "current market price." Critics contend, however, that the statute and FAR do not define "current market price."

Proponents also contend that an unintended benefit of FPI is that it keeps work in the United States that would otherwise go overseas. They argue that in today's climate of outsourcing low-skill, low-wage jobs, FPI's mandatory source clause has become increasingly more important to keeping jobs in the United States. Proponents credit FPI with creating jobs for private companies. They argue that on average, 74% of FPI's revenues are poured back into the economy through the private sector with the purchasing of raw material and equipment from the private sector.<sup>47</sup> Moreover, they contend that UNICOR's sales represent less than 2% of federal government purchases.

Proponents cite a study that was mandated by Congress as further support that FPI's impact on the private sector is negligible. Deloitte and Touche, an independent accounting firm, was commissioned by Congress in 1990 to conduct a market analysis of UNICOR. The study found that UNICOR's sales amounted to only two percent of the federal market for the types of products and services it provided. While the study found that UNICOR's operations were concentrated in labor-intensive industries, it also found that UNICOR's employees (federal inmates) accounted for only one-quarter of the output of workers in the private sector. The study's finding also found that UNICOR's mandatory source advantage was offset by its competitive disadvantages.<sup>48</sup>

## Customer Satisfaction

Opponents maintain that studies conducted by the General Accounting Office (GAO) prove that FPI's customers are not satisfied with the corporation's business. For example, a 1988 GAO study that examined customer satisfaction with respect to FPI's delivery performance found that "... customer agency officials showed wide variation in FPI delivery performance, customer agency officials ... had mixed views on FPI's delivery performance...."<sup>49</sup>

Another study conducted in 1985 by GAO concluded that "overall, UNICOR customers appeared satisfied with its prices," quality of the products and services, and waivers granted by UNICOR. While GAO found UNICOR's customers generally satisfied with the corporation, it also found that UNICOR does not complete required market checks "... to ensure compliance with the law that its prices not exceed market prices...."<sup>50</sup>

---

<sup>47</sup> According to FPI data, in FY2003 FPI spent 75% of its revenue in purchasing raw material and equipment from the private sector; in FY2002 the percentage was 74%; in FY2001, 73%; in FY2000, 72%; and in FY1999, 75%. April 29, 2004 telephone conversation with the DOJ's BOP Congressional Affairs Office.

<sup>48</sup> Deloitte and Touche, *Independent Market Study of UNICOR, Federal Prison Industries, Inc.*, Executive Summary, August 7, 1991.

<sup>49</sup> U.S. General Accounting Office, *Federal Prison Industries: Delivery Performance Is Improving But Problems Remain*, GAO/GGD-98-118, June 1998.

<sup>50</sup> U.S. General Accounting Office, *UNICOR Products: Federal Prison Industries Can Further Ensure Customer Satisfaction*, GAO/GGD86-6, November 1, 1985.

Opponents, on the other hand, turn to the study that was commissioned by Congress in 1990 as evidence of their assertion of UNICOR's poor customer service record. As discussed above, Deloitte and Touche conducted a market analysis of UNICOR and found, among other things, that UNICOR'S customer service and delivery ratings were below average in some of its product lines in comparison with the private sector. In one particular industry where FPI's largest customer is DOD (the apparel industry), FPI had a contract delinquency rate of 21% in the first six months of 2000; between 1992 and 1999, FPI had an average delinquency rate of 31%.<sup>51</sup> However, Deloitte and Touche did not report comparable data for private sector contractors.

## Questions Facing Congress

As the debate continues with respect to the proper role of FPI in training and rehabilitating federal offenders and its role in providing products and services to federal agencies, Congress is faced with several questions.

- In general, should the mandatory source requirement be maintained, stricken, or softened?
- How can UNICOR expand product and service lines to keep an increasing number of inmates productive without adversely affecting the private sector?
- How can UNICOR expand its product line, which is primarily in old economy sectors that have seen employment declines, into new economy sectors without impacting private businesses?
- Do the benefits of rehabilitating offenders and providing them with useful skills balance with the economic hardship imposed on law abiding workers who may lose job opportunities because the employer cannot compete for federal contracts?

## Conclusion

Since UNICOR's establishment in 1934, business and labor interests have consistently argued that UNICOR undercuts the free enterprise system. Due to the mandatory source requirement, corporations that wish to do business with the federal government are restricted in the areas in which they can submit bids. Opponents contend that citizens who have not committed crimes may lose their jobs due to their employers not being able to secure federal contracts. Furthermore, FPI opponents contend that some of the industries in federal prisons such as the domestic apparel

---

<sup>51</sup> Statement of George H. Allen, Deputy Commander, Defense Supply Center Philadelphia, Defense Logistics Agency, in U.S. Congress, House Committee on Education and the Workforce, *Federal Prison Industries: Proposed Military Clothing Production Expansion — Assessing Existing Protections for Workers, Business, and FPI's Federal Agency Customers*, hearings, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., October 5, 2000.

industry are shrinking, thus leaving very little demand for inmates once they are released from prison. These critics argue that inmates should be trained in a growing industry that can afford to lose volume and is able to employ inmates upon their release from prison.

Proponents contend that FPI has taken significant precautions to avoid harm to the private sector. They argue that the majority of the sales generated from FPI go towards the purchase of raw materials from small businesses, which generates business for those companies. Proponents also maintain that FPI's enabling legislation and policy is such that it is limited to one market — the federal government; and within that market, FPI can never sell more than a certain percentage of merchandise in any product area.<sup>52</sup> As further evidence that FPI does not harm private businesses, proponents assert that UNICOR's Board of Directors is constantly assessing its impact on the private sector. For example, on June 26, 2003, the Board of Directors adopted resolutions that require FPI to limit the application of the mandatory source clause to products for which FPI's share of the federal market is less than 20%.<sup>53</sup>

---

<sup>52</sup> See UNICOR, *Factories with Fences*, at [[http://www.unicor.gov/history\\_of\\_success.htm](http://www.unicor.gov/history_of_success.htm)].

<sup>53</sup> See [[http://www.unicor.gov/information/purchasing\\_made\\_simple/resolutions.cfm#res06](http://www.unicor.gov/information/purchasing_made_simple/resolutions.cfm#res06)].

## Appendix A<sup>54</sup>

Two bills introduced in the 109<sup>th</sup> Congress (the Federal Prison Industries Competition in Contracting Act of 2005, H.R. 2965 and S. 749) would have, in essence, permanently eliminated FPI's mandatory source clause. It is possible that the 110<sup>th</sup> Congress will address some of the same issues. A discussion of the major similarities and differences between the bills introduced in the 109<sup>th</sup> Congress follows.

### Elimination of the Mandatory Source Clause

H.R. 2965, as amended, and S. 749 would have required competitive procedures in the procurement of products authorized for sale by FPI, unless otherwise determined by the Attorney General, as discussed below. Both bills would have required executive agencies to solicit an offer from FPI when making a purchase that is authorized for sale by FPI in excess of \$2,500. In making purchase considerations, both bills would have required executive agencies to notify FPI of the procurement at the same time and in the same manner as other potential offerors. Both bills would have also required executive agencies to consider a timely offer from FPI in the same manner as other potential offerors without limitation to the amount of the proposed purchase, unless the contract opportunity has been reserved for competition exclusively among small businesses pursuant to the Small Business Act. H.R. 2965, as amended, however, would have permitted offers made by FPI to exclude the following costs: (1) costs related to securing the facilities at which the contract will be performed; (2) costs of educating and training the prison work force performing the contract; (3) excess capital costs of machinery and excess inventories used within a prison environment that are the result of the unique environment of prison life; and (4) other related costs of performing the contract. Both bills would have required FPI to perform its contractual obligations to the same extent as any other contractor for the executive agency.

H.R. 2965, as amended, would have required a contract award be made to FPI using noncompetitive procedures by the BOP *if* the product or service would

---

<sup>54</sup> This section discusses legislation that would have eliminated FPI's mandatory source clause. It does not discuss other FPI related legislation. S. 3629, the Prisoner Opportunity, Work, and Education Requirement (POWER) Act, would have required all federal prisoners to work not less than 50 hours per week and to engage in job training and education and life skill training; would have required FPI to employ inmates in manufacturing positions by subcontracting with private sector employers; would have required wages the inmate earned to be used for paying the cost of incarceration, to provide for victim restitution, and to pay for inmate expenses; would have repealed certain provisions in law relating to the funding of, and purchasing of products from FPI; would have required the Attorney General to establish the Foreign Labor Substitute Panel that would have reviewed pilot projects by U.S. companies for using federal inmate labor to produce goods that would be produced by foreign labor; would have amended current law to restate the mission, operating objectives, performance standards, and contracting requirements for FPI; and would have required the Comptroller General to conduct an annual evaluation of the operations of FPI and report the findings to Congress.

otherwise be done by a contractor performing the work outside of the United States. S. 749 did not have a similar provision.

H.R. 2965, as amended, would have permitted the chief executive officer of FPI to appeal a contracting decision to the head of the executive agency wherein FPI was denied a contract; such appellate decisions would be final. S. 749 did not have a similar provision.

Both bills contain language that would have prohibited executive agencies from making purchases from FPI unless it is determined that the product or service is comparable to products and services from private businesses with respect to price, quality and time of delivery.

## **Exceptions to the Elimination of the Mandatory Source Clause**

Both bills would have permitted the Attorney General to make an exception to the open competitive process under certain circumstances, including when

- FPI cannot reasonably expect fair consideration with respect to procuring a contract on a competitiveness basis; and
- the contract is necessary to maintain work opportunities otherwise unavailable at the penal facility to prevent unrest.

S. 749 would have also permitted an exception to the open competitive process if the product or service is only available from FPI or the executive agency determines that the product would otherwise be produced by prison labor outside the United States.

Both bills would have required that competitive process exception determinations made by executive agencies be

- supported by specific findings by FPI regarding why it does not expect to win the contract on a competitive basis;
- supported by specific findings by the warden of the correctional facility that the contract is necessary to maintain work opportunities otherwise unavailable at the penal facility to prevent unrest; and
- made and reported in the same manner as a determination made pursuant to 41 U.S.C. 253(c)(7).<sup>55</sup>

Both bills would have required the Attorney General to make a determination with respect to the aforementioned within 30 days after FPI has been informed of the contracting opportunity.

---

<sup>55</sup> 41 U.S.C. 253(c)(7) permits heads of executive agencies to use noncompetitive procedures in the procurement of goods and services if it is determined that "... it is in the public interest to use procedures other than competitive procedures in the particular procurement concerned...."

## Transitional Period

H.R. 2965, as amended, would have provided a five-year transitional period that would have required federal agencies to first solicit FPI for the procurement of products or services that are authorized for sale by FPI. During the transition period, the bill would have required the noncompetitive award of a contract to FPI if it is determined

- that the product offered by FPI will meet the procurement activity;
- that it can reasonably be expected that FPI will achieve timely performance; and
- the negotiated price does not exceed a fair and reasonable price.

H.R. 2965, as amended, would have required FPI and the federal agency making the purchase to negotiate the terms and conditions of the contract. The bill would have prohibited the price negotiated to exceed a “fair and reasonable price” pursuant to FAR.

During the five-year transitional period, H.R. 2965, as amended, would have prohibited FPI’s mandatory source sales from exceeding a certain percentage of FPI’s total sales during the base year. For example, in FY2007, FPI would not have been able to use its mandatory source status in more than 90% of sales made during the base year; in not more than 85% in FY2008; in not more than 70% in FY2009; in not more than 55% in FY2010; and in not more than 40% in FY2011. The bill would have also required the Attorney General to report to Congress on the effects of this limitation. The bill would have set an October 1, 2011 termination date for FPI’s mandatory source status. S. 749 did not contain a transitional period provision.

With respect to products FPI produces, H.R. 2965, as amended, would have required market research to be conducted by the executive agency to determine whether the FPI products are comparable to products available from the private sector that best meet the needs of the executive agency with respect to price, quality and time of delivery. The bill would have set forth procedures the agency must follow if it is determined that FPI products are not comparable to products available from the private sector. S. 749 did not contain a similar provision.

## FPI as a Subcontractor

Both bills would have permitted federal contractors to *voluntarily* enter into subcontracts with FPI but would have prohibited the sale of FPI’s products and services directly in the commercial market. H.R. 2965, as amended, however, would have prohibited FBI from being a subcontractor or supplier if the product or service is to be acquired by a federal agency pursuant to 41 U.S.C. 48, or the produce to be acquired by the federal agency is subject to 10 U.S.C. 2533(a) (determinations of public interest under the Buy American Act). Additionally, both bills contained language that made explicit that contractors would not be compelled to use FPI as a subcontractor or a supplier.



## Other Provisions

S. 749 would have prohibited executive agencies from entering into contracts with FPI wherein inmates would be exposed to classified and sensitive information. H.R. 2965, as amended, did not have a similar provision.

H.R. 2965, as amended, had a provision that would have made explicit the statutory prohibition on the sale of services performed in FPI and other correctional facilities (i.e., state and local correctional facilities) to industries engaged in interstate or foreign commerce. The bill, however, would have exempted state and local correctional facilities that participate in the Prison Industry Enhancement (PIE) program from the provision.<sup>56</sup> S. 749 had a similar provision, however, it would have permitted the sale in interstate commerce services related to the resale of disassembled products and scraps to achieve landfill avoidance. Unlike H.R. 2965, as amended, S. 749 would have permitted for the completion of existing agreements made on or before October 1, 2005, under certain circumstances.

H.R. 2965, as amended, would have required public participation in the Board of Directors' decision-making process in determining whether FPI should add a new product or service line, or expand an existing product or service line. It would have also required the Board of Directors to approve all subsequent offers as well. Moreover, the bill would have also required a market analysis to determine whether the private sector would be adversely impacted with respect to FPI adding a new product or service line, or expanding an existing product or service line. H.R. 2965, as amended, would have also set forth limitations with respect to FPI's Board of Directors' power to authorize a new product or service line, or expand an existing product or service line. H.R. 2965, as amended, would have restructured FPI's Board of Directors from a six-member board to an 11-member board. S. 749 did not have similar provisions.

H.R. 2965, as amended, would have required a minimum hourly rate of \$2.50 for inmates who are employed in an FPI and whose term of imprisonment will expire in two years or less. The bill set forth criteria the Board of Directors must meet with respect to inmate wages and increasing such wages. S. 749 did not have similar provisions.

H.R. 2965, as amended, would have created rehabilitative, educational and vocational assessment and training programs within federal prisons to help prevent inmate idleness and prepare inmates for reentry into society. The bill would have required the programs to be created in at least 25% of federal prisons no later than two years after the act was enacted; in at least 50% of federal prisons no later than four years after the act was enacted; in 75% of federal prisons no later than six years after the act was enacted; and in all federal prisons no later than eight years after enactment of the act. In addition to the educational and vocational assessment and training programs, the act would have permitted inmates employed in an FPI to

---

<sup>56</sup> PIE is a federally sponsored grant program that provides funding to states once they have been certified for work industries in state and local correctional facilities. The PIE program was authorized by Congress in 1979 in the Justice System Improvement Act (P.L. 96-157).

secure work assignments with an eligible entity, such as a private for-profit business, so long as participation in such program conforms with the requirements and limitations set forth in the act. S. 749 would have created new inmate job opportunities through selling or donating FPI products to charities and permitting FPI to expand or produce new products that are manufactured outside of the United States.