

DEPARTMENT OF JUSTICE

Federal Prison Industries

Product Development and Production: Public Involvement Procedures

AGENCY: Federal Prison Industries, Inc., Bureau of Prisons, Department of Justice.

ACTION: Notice.

SUMMARY: In this document, Federal Prison Industries, Inc. (FPI) requests comment on revised definitions of two key terms: new product and specific product.

DATES: Comments must be submitted by October 7, 1996.

ADDRESSES: Comments should be provided to Manager, Planning, Research, & Activation, Federal Prison Industries, Inc., 320 First Street, NW., Washington, D.C. 20534.

FOR FURTHER INFORMATION CONTACT: Mr. Todd Baldau, (202) 508-8440.

SUPPLEMENTARY INFORMATION: In 1988, Congress enacted legislation, codified at 18 U.S.C. 4122(b), requiring that whenever FPI proposed to produce a new product, or significantly expand an existing product, it was necessary to conduct a market study, seek industry comment, and refer the matter to the Board of Directors for a final decision. This process has come to be known as the Industry Involvement Guidelines process. A lengthy negotiation period ensued in which FPI, labor and private industry met to develop definitions of "new product", "specific product" and "significant expansion of an existing product," the key terms that were necessary to implement the legislation.¹ These definitions are based primarily on the SIC code of the Department of Commerce.

FPI has now had six years experience with the definitions of these key terms. On the positive side, the market studies using these definitions have supplied the Board with more and better information on impact of FPI's activities on the private sector than it had before the passage of the guidelines process. At the same time, it has become apparent that in some ways these definitions are unclear, suffer from unavailability of data, and draw upon indicators which are hard to keep track of and not always directly relevant. In addition, the government is moving away from the collection of data based on the narrowly

defined SIC categories, which lie at the heart of the current definitions of new product and specific product.

To redress these problems, we propose basing the definitions of "new product" and "specific product" on the 4-digit FSC categories, rather than the SIC categories, and developing market studies using the FSC approach as the basis for these studies.² Two immediate benefits would stem from this change in approach: first, sales information by FSC category is readily available; and second, the information applies directly to the federal market, which is the primary focus of the market impact study. (SIC information pertains to the total market, including the private sector market.)

A preliminary discussion paper recommending the use of the FSC system, and a new method of determining what constitutes a significant expansion of an existing product, was circulated to the members of FPI's Implementation Committee.³ The Committee members agreed that revisions to the existing definitions were called for, and that the new approach described herein looks promising. Yet one comment expressed that 4-digit FSC categories are in certain instances too broad.

FPI recognizes that in certain instances the 4-digit FSC categories may be too broad to serve as a definition for a new product, without further refinement. At the same time, we note that a particular 4-digit category may also be too narrow, given the fact that related items may appear in several categories. Therefore categories may occasionally be combined in a market study for purposes of measurement of the market.

To date we have not been able to develop a simple, single principle that can be applied in every situation to determine when to delete unrelated items from a 4-digit FSC categories and when to combine 4-digit FSC categories. Therefore, we propose the following process in lieu of an abstract definition.

FPI will adjust for the fact that in some cases the 4-digit FSC categories contain dissimilar items in the following manner: FPI will announce in the CBD its intent to produce any item that could reasonably be construed to be a new product, regardless of the fact that such an item falls in the same 4-digit category as an item that FPI is currently

making, or has made within the recent past, and is not considered by FPI to be sufficiently different from an existing item to be considered a new product. Moreover, FPI will commit to "over-report." That is, borderline cases will be announced in the CBD in order to allow for the full public scrutiny.

Of course, items which are located in 4-digit FSC codes in which FPI does not currently produce, will be treated as proposals which go through the guidelines process, and a market study will be conducted and made available for comment. The market impact study will measure the market based on the 4-digit FSC categories. In measuring the size of the federal market, we will make best efforts to delete unrelated items from the FSC category or categories. Commenters will have input into, and may comment on, the size of the market in the market study exactly as they do now.

Also, for reasons explained above, we have developed a new definition of "significant expansion of an existing product" which we believe is an improvement, in that the indicators of expansion which are clearer and directly relevant to the determination of impact on private industry.

We now publish the following definitions of "specific product", "new product", and "significant expansion of an existing product" for comment.

Revised Definitions

1. Specific Product

A specific product refers to the aggregate of items which are similar in function (e.g., bags and sacks), or which are frequently purchased for use in groupings (e.g., dormitory and quarters furniture) to the extent provided by the most current Federal Supply Classification (FSC) Code. There are currently 685 federal supply classes designated within the Federal Procurement Data System. FPI currently produces within 74 of these classes.

Specific products will equate to the most current 4-digit FSC Code, published by the General Services Administration, Federal Procurement Data Center (FPDC). As a general rule, products will be deemed to be different specific products if they are identified by a distinct 4-digit FSC code.

The following means will be used to determine how items should be treated:

—Items classified within the same 4-digit FSC code will be presumed to comprise a single specific product (unless otherwise determined by FPI, or with input from the relevant industry).

¹ The final definitions of "Specific Product" and "New Product" were published in the Commerce Business Daily (CBD) for December 4, 1989. The final definition of "Significant Expansion of Production of an Existing Product" was published in the CBD for January 2, 1991.

² The legislative history to the guidelines process provides that the definitions shall be reviewed periodically by the corporation and the board to assure continued relevance.

³ This committee was established following the "Summit Process" in 1992, to address any new or continuing issues.

—The predominant material of manufacture (e.g., nylon vs. canvas) will not ordinarily be a factor in defining an item as a separate specific product.

In certain instances, with approval of its Board of Directors, FPI may combine FSC codes where multiple FSC's comprise a particular industry. In requesting the Board to combine FSC's, FPI will give careful consideration, and be especially sensitive to, companies that manufacture products (such as various items of apparel) in multiple FSC codes. Moreover, situations should be avoided by FPI where it would have to request Board approval of production and/or expansion in several "specific products" (e.g., office seating, case goods, and systems furniture), each of which often involves many of the same companies within a single potentially affected industry (e.g., office furniture).

The rationale for any proposed combining of FSC's will be set forth in the market study. In all cases, FPI will seek input from the potentially affected industry, early in the stages of industry notification, and include all input received in its submission to the Board of Directors.

In some instances, an item may be considered separate from another product in the same 4-digit FSC category, if its function differs substantially. In such cases, the 4-digit Standard Industrial Classification (SIC) code may be used as a back-up measure to more accurately define the product.

SIC codes will continue to be used at the 4-digit level to determine the size of the domestic market for a particular product. For purposes of product definition in the domestic market, FPI will combine 4-digit SIC codes when the data suggests the product under examination may encompass several different 4-digit SIC codes, with no substantial difference in the product (e.g., men's vs. women's apparel).

2. New Product

A new product is a 'specific product' which FPI has not manufactured or produced within the past five years. In cases where it has been determined that more than one specific product exists within a 4-digit FSC, the 4-digit SIC code will be used as a secondary indicator to determine whether the product is "new". In such cases, a new product will be defined as a 'specific product' in the four-digit SIC which FPI has not produced within the past five years.

In cases where FPI plans to manufacture products of limited duration or volume, e.g., with sales of less than \$1 million in any given year,

and where its Federal market share will not exceed 5 percent, FPI will announce such plans in the *Commerce Business Daily* (CBD), in lieu of undertaking the Industry Involvement Guidelines process. Barring any objection, FPI will proceed with its production plans. If an objection is raised, FPI will meet with the relevant industry in an effort to reach an acceptable position. If an agreeable outcome cannot be reached, FPI will proceed to initiate the Industry Involvement Guidelines process. Moreover, should FPI's planned sales reach or exceed \$1 million, or FPI's market share exceed 5 percent, FPI will go through the Industry Involvement Guidelines process, as it would for any new product.

"Good Faith" CBD Announcements—Items not deemed by FPI to be a New Product

Under current procedures, management decisions as to whether production of an item constitutes a new product are made by FPI staff, based on the SIC classification system, without public involvement. Under the proposed new procedures, there may be circumstances in which FPI plans to produce items that FPI does not consider to be a new product, but which an affected party may reasonably construe to be a new product. In these circumstances, the items will be announced for comment in the *Commerce Business Daily*. The purpose of this provision is to give private industry an added level of input into such decisions made by FPI, since it is not possible to anticipate every possible situation or question that could arise within the proposed definition.

The parameters for publishing such internal decisions that are made and announced subject to this provision will be as follows: items that a reasonable person could construe to be a product separate and distinct from another item which FPI is making or recently made would be subject to announcement even though their function is similar. As an example, the production of extreme cold weather trousers would be announced, although FPI already produces bullet resistant fragmentation vests, and both are items of protective clothing.

Items that are essentially the same product, or those that are variations of an existing FPI product (e.g., a new style of seating) would not be subject to announcement of any kind. However, FPI will resolve any question as to whether to announce in favor of announcement.

In submitting comments to FPI, the following guidelines will apply:

—Comments will be due within 10 days of the date of publication;

—Relevant comments will focus on and address why the item should be considered a new product, separate and distinct from a similar item currently being produced by FPI. Comments may include such factors as: the manufacture of the item involves substantially different material and processes; companies that produce this item specialize in manufacturing only that item; the manufacturing processes are unique and are not easily adaptable to produce other similar items;

—Comments related to market share and/or the impact that such a production decision may have on the firm will not ordinarily be considered relevant for purposes of this provision;

—All comments received in response to these announcements will be considered by FPI. The commenter will be advised whether FPI decides to go through the guidelines process. As always, any interested party has a right to raise any question at any time with the Board of Directors (see 28 CFR 301.2), and thus may appeal to FPI's Board of Directors any issue or decision relating to whether a product is a new product. However, pending such review, FPI may proceed with its plans in accordance with the decision as announced in this process described above, unless and until the decision is reversed.

3. Significant Expansion of an Existing Product

Proposed production increases by FPI which may increase its market share will be reviewed during the Corporation's annual planning cycle and be deemed a significant product expansion under the following circumstances:

(1) Planned sales (measured in constant dollars) for the specific product will increase by more than 10 percent, or \$1 million, in any given year, whichever is greater; or

(2) In any case where FPI's market share is greater than 25%, any increase in FPI's market share resulting from an increase in FPI production would be deemed to be significant for purposes of triggering the guidelines process.

Discussion: When either criterion is met, an analysis of the federal government market for the specific product will be conducted and an estimate of FPI's current and projected market share will be developed. The production increase will be deemed "significant" when FPI's market share position changes in accordance with the following sliding scale. If FPI currently has a 15% or less share of the federal

market, any increase in market share would be permissible, provided that the particular increase does not result in FPI exceeding a 15% market share. If FPI has a market share greater than 15%, but less than 20%, FPI could increase its market share to 20%, before the increase would be deemed to be significant. If FPI has a market share of greater than 20%, but less than 25%, FPI could increase its market share to 25%, before the increase would be deemed to be significant.

Situations where FPI production remains constant, but market share increases as a result of other factors, including market changes, will not require FPI to initiate the guidelines process. The fact that 25% may "trigger" the guidelines does not necessarily mean the Board of Directors cannot approve an FPI production level resulting in a federal market share above 25%.

The prior three years' data will be used to determine the share of the federal government market, to ensure that annual fluctuations are taken into account and normalized.

FPI may produce at the rate of past year sales levels, adjusted for inflation, without initiating the guidelines process.

In cases where FPI sales inadvertently or insubstantially exceed authorized levels, FPI will take steps to adjust its

production by a corresponding amount the following year. If FPI plans call for continued growth, it will invoke the guidelines process without delay and seek Board approval of future production levels. Should the Board decide on a production level lower than that which FPI already achieved, FPI will adjust its future plans and, if necessary scale back, to comply with the Board's decision.

In cases of extreme public exigency, such as national disaster or national defense emergency, such as during Operation Desert Storm, FPI may exceed guidelines thresholds, provided FPI receives specific orders or requests from senior Department of Defense and/or Executive Branch officials. Increased sales resulting from national exigencies will not be considered a violation of guidelines ceilings in the year which they occurred. Such exceptional events will be subject to approval by FPI's Chief Operating Officer, with concurrence of FPI's Board of Directors.

Once these definitions are finalized and proposed revisions implemented, FPI's sales for the current fiscal year will be utilized as the base year for future application.

Prior decisions of FPI's Board of Directors will remain unaffected by these changes to the definitions.

These proposed procedures have been reviewed by FPI's Growth Strategies

Implementation Committee. The following officials are represented on the Committee:

Executive Vice President, Envelope Manufacturers Association of America
Vice President—Government Affairs, Screen Printing and Graphic Imaging Association International
Manager, Break-Out Procurement Center Representative Program, Small Business Administration
Former Senior Staff Member, Brookings Institution
Head of Office of Wages and Industrial Relations, AFL-CIO
President, State/Federal Correctional Vendors Association

Their comments and suggestions have been incorporated into this request for comment.⁴

We now seek comments to these proposed changes. All comments received in response to this request for comment before expiration of the comment period will be provided to the FPI Board of Directors for consideration prior to the final publication and implementation of the procedures.

Robert Grieser,
Manager, Planning, Research and Activation Branch.

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⁴ Of course, these officials and these organizations are not precluded from making further comment at this time.