

## DEPARTMENT OF JUSTICE

## Federal Prison Industries, Inc.

## 28 CFR Part 302

[BOP 1081-P]

RIN 1120-AA84

**Federal Prison Industries, Inc. (FPI) Standards and Procedures That Facilitate FPI's Ability To Accomplish Its Mission**

**AGENCY:** Federal Prison Industries, Inc., Justice.

**ACTION:** Proposed rule.

**SUMMARY:** This document proposes to codify Federal Prison Industries, Inc. (FPI)'s standards and procedures that facilitate FPI's ability to accomplish its mission. The publication of these procedures marks the culmination of a process that began several years ago in efforts to clarify certain provisions of FPI's statute, 18 U.S.C. 4121 *et seq.* It represents a continuing effort to make the use of FPI as a provider of goods and services to the Government as simple and efficient as possible. The document's provisions include: purpose and scope; definitions; a mission statement; roles and responsibilities of FPI's Board of Directors, Chief Executive Officer, Chief Operating Officer, and the Ombudsman; agency meeting procedures; inmate employment levels; provision of products as a mandatory source; provision of products as a non-mandatory source; provision of services to the commercial market; provision of products and services as a preferential source; waiver and appeal procedures; pricing; and new product development or expansion. FPI is codifying these procedures in order to clarify its procedures and to foster its relationship with its customers and suppliers by providing for public review and comment.

**DATES:** Comments due by March 8, 1999.

**ADDRESSES:** Rules Unit, Office of General Counsel, Bureau of Prisons, HOLC Room 754, 320 First Street, NW., Washington, DC 20534.

**FOR FURTHER INFORMATION CONTACT:** Marianne S. Cantwell, Corporate Counsel, Federal Prison Industries, Inc., phone (202) 305-3501.

**SUPPLEMENTARY INFORMATION:****Background***1. Why Is FPI Promulgating This Rule?*

Federal Prison Industries, Inc. (FPI) is proposing to issue this rule to codify its standards and procedures that facilitate

FPI's ability to accomplish its mission. FPI is promulgating this rule as a proactive measure in order to clarify its standards and procedures. It represents a continuing effort to make the use of FPI as a provider of goods and services to the Government as simple and efficient as possible. The rules are descriptive of the functions of FPI's Board and other managing officials, and are descriptive of existing standards and procedures utilized to accomplish FPI's mission.

*2. What Is FPI's Mission?*

The United States Congress created FPI in 1934, just four years after the creation of the Federal Prison System. The Congress immediately recognized the need for constructive work programs in the nation's prisons both to occupy inmates' time and train them to be productive citizens. FPI's mandate has remained the same since its creation: to train and employ the greatest number of inmates possible in a self-supporting manner. FPI is the most important correctional management program of the Federal Bureau of Prisons to relieve inmate idleness and to ensure the orderly operation of Federal prisons. FPI provides inmates with valuable training opportunities, teaches a work ethic, and prepares inmates for reintegration into the community.

FPI is statutorily required (see 18 U.S.C. 4122(a)) to: provide employment for the greatest number of those inmates in the United States penal and correctional institutions who are eligible to work as is reasonably possible; diversify, so far as practicable, prison industrial operations; operate the prison shops so 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.

*3. How Does This Rule Affect Previous FPI Guidelines Published in the Federal Register?*

In accordance with its statutory authority to announce in a publication designed to most effectively provide notice to potentially affected private vendors the plans to produce any new product or significantly expand production of an existing product, FPI previously published notices in the *Commerce Business Daily*. Revised guidelines for new product development were published in the **Federal Register** on August 7, 1996 (61 FR 41248) for notice and comment and were issued in a notice document on March 12, 1997 (62 FR 11465). These guidelines are now being incorporated

into FPI's proposed standards and procedures.

**Executive Order 12866**

The rule has been considered to constitute a "significant regulatory action" under section 3(f) of Executive Order 12866, and, accordingly, the Office of Management and Budget has reviewed the proposed rule.

**Executive Order 12612**

This rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it has been determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

**Regulatory Flexibility Act**

The Chief Executive Officer, FPI, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule and by approving it certifies that this rule will not have a significant impact on a substantial number of small entities within the meaning of the Act. The principal effect of these rules is that they will improve the ability of FPI to serve its customers and will help FPI's Board of Directors to comply with its statutory mandate of assuring that no single industry is unduly impacted by FPI's operations.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. The promulgation of this rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States companies to compete with foreign-based companies in domestic and export markets.

## Plain Language Instructions

We try to write clearly. If you have a suggestion on how to improve the clarity of this rule, please call or write: Roy Nanovic, Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW, HOLC Room 754, Washington, DC 20534; phone (202) 514-6655.

## Comments on Rule

Interested persons may participate in this proposed rulemaking by submitting data, views, or comments in writing to the Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW, HOLC Room 754, Washington, DC 20534. Comments received during the comment period will be considered before final action is taken. Comments received after the expiration of the comment period will be considered to the extent practicable. All comments received remain on file for public inspection at the above address. The proposed rule may be changed in light of the comments received. No oral hearings are contemplated.

## List of Subjects in 28 CFR Part 302

Prisoners.

Accordingly, pursuant to the order of FPI's Board of Directors, part 302 in chapter III of 28 CFR is proposed to be revised as set forth below.

**Steve Schwalb,**

*Acting Chief Executive Officer, Federal Prison Industries, Inc.*

## PART 302—FEDERAL PRISON INDUSTRIES, INC. (FPI) STANDARDS AND PROCEDURES THAT FACILITATE FPI'S ABILITY TO ACCOMPLISH ITS MISSION

Sec.

- 302.1 Purpose and scope.
- 302.2 Definitions.
- 302.3 Board of Directors: roles and responsibilities.
- 302.4 Chief Executive Officer: roles and responsibilities.
- 302.5 Chief Operating Officer: roles and responsibilities.
- 302.6 Ombudsman.
- 302.7 Meetings.
- 302.8 Inmate employment levels.
- 302.9 Mandatory source.
- 302.10 Provision of products as a non-mandatory source.
- 302.11 Provision of services to the commercial market.
- 302.12 Preferential source.
- 302.13 "Escape Proof" guarantee.
- 302.14 Waiver policy.
- 302.15 Appeals to waiver denials.
- 302.16 Pricing.
- 302.17 Industry involvement guidelines procedures.

302.18 Definitions and application of significant terms in product development guidelines process.

302.19 General comments on FPI business operations.

**Authority:** 18 U.S.C. 4122 and 4124, and by resolution of the Board of Directors of FPI.

### § 302.1 Purpose and scope.

It is the mission of FPI (also referred to as "the Corporation"), a wholly owned government corporation, to employ and provide skills training to the greatest practicable number of inmates in Federal correctional facilities necessary to ensure the safe and secure operation of such institutions, and in doing so, to produce market priced, quality goods in a self-sustaining manner that minimizes, to the extent feasible, potential impact on private business.

### § 302.2 Definitions.

(a) *Assembled* refers to the process of uniting or combining articles or components, so as to add value by producing a change in form or utility.

(b) *Contracting office* means any element of an entity of the Government that has responsibility for identifying and/or procuring Federal Government requirements for commodities or services. It includes the contracting officer and members of all offices within the definitions of "contracting activity," "contracting office," and "contract administration office" contained in the Federal Acquisition Regulation, 48 CFR 2.101.

(c) *Departments or agencies of the United States* means any entity of the Executive Branch, including military departments, government corporations, independent agencies, and appropriated or non-appropriated fund entities of the United States Government. The terms Federal departments and agencies, departments and agencies of the United States, Government departments and agencies, departments, and agencies are used interchangeably.

(d) *Inmate product* refers to products that are manufactured and/or assembled in whole or in part by prisoners. Inmate products may include component parts of such products, or items ancillary to such products, obtained from a commercial source, which are either physically attached, or not physically attached, to the end product. In determining whether such component parts or ancillary items are inmate products that may be supplied to the customer by prison industries, consideration will be given to such matters as the following: How closely is the item linked by utility to the basic product? Would separate purchase of the item by the customer involve

significant inconvenience, delay, and/or expense to the customer? Would refusal to supply the item result in justifiable waiver requests which could cause inmate idleness? Are such items routinely provided by commercial suppliers in connection with sale of the end product? Is the item relatively minor in relation to the end product?

(e) *Manufactured* refers to the process of fabricating products from raw or prepared materials, so as to impart new forms, qualities, properties, and combinations.

(f) *Schedule of Products* means the list of commodities and services offered by FPI to its customers for which FPI is a mandatory or preferred source.

(g) *Services* refers to both economic activity that is rendered in such a way that it does not culminate in a tangible product (e.g., laundry and administrative support services) and economic activity that does culminate in tangible products, especially when the services aspect of the operation is not ordinarily viewed as involving a manufacturing process. If the activity is sufficiently transformative, it will be viewed as manufacturing in nature and therefore a product rather than service. For example, repair work will ordinarily be considered a service, because in most instances, the operation does not transform the object into a new object, but involves restoration of the object to a prior condition and return to the original owner. For this reason, furniture refinishing is also ordinarily considered a service. However, when the operation performed is sufficiently transformative so as to result in a new item, it is no longer viewed as a service, but a product. Assembly, such as packaging of various items in bags or cartons, is considered a service. But assembly involving cut and sew operations, which produce a radically different end product from components through employment of manufacturing techniques, are considered products and not services. Examples of services currently provided by FPI include: data conversion; optical scanning; engine accessories repair and rebuilding; forklift repair and rebuilding; kit assembly; radio carrier modification; cable/electrical parts refurbishing; vehicular components repair and rebuilding; furniture repair; bag repair; equipment assembly; mail distribution; printing and data entry.

(h) The words *products*, *supplies* and *commodities* are used interchangeably.

(i) *UNICOR* is the trade name for Federal Prison Industries, Inc. (FPI). The term UNICOR is used interchangeably with FPI.

**§ 302.3 Board of Directors: roles and responsibilities.**

(a) FPI's Board of Directors consists of six directors appointed by the President of the United States, pursuant to 18 U.S.C. 4121. The Board determines in what manner and to what extent industrial operations shall be carried on in Federal correctional institutions, consistent with the statutory responsibilities created in Chapter 307 of title 18 United States Code.

(b) In addition, the Board has the following general responsibilities:

- (1) Amend FPI's bylaws as needed;
- (2) Review and approve general policies and long range corporate plans, including the annual operating plan and strategic plans;
- (3) Review and approve capital investments in excess of \$500,000;
- (4) Assure that the Corporation remains liquid, that its assets are properly valued and maintained, and that adequate reserves are established for this purpose;
- (5) Assure that there is a fair and adequate means for review of the impact of FPI on the private sector;
- (6) Hold meetings with the independent auditors regarding preparation and completion of the annual audit of the Corporation's financial performance, at which the Board will review the Corporate response to the auditor's Management Letter and provide comments to this response to the Department of Justice Inspector General;
- (7) Hold periodic reviews of finances to include sales, earnings, and operating cash as measured against expected objectives;
- (8) Meet routinely with the Ombudsman to receive reports of concerns or complaints from the public of FPI's impact, and other observations and suggestions;
- (9) Establish inmate employment levels, consistent with Bureau of Prisons' needs and FPI's mission and mandates.

**§ 302.4 Chief Executive Officer: roles and responsibilities.**

The Chief Executive Officer of FPI, who is also the Director of the Bureau of Prisons (BOP), is responsible for carrying out the duties and responsibilities of the Corporation, including but not limited to:

- (a) Making management decisions not delegated to the Chief Operating Officer;
- (b) Assuring that orders and resolutions of the Board are implemented;
- (c) Assuring that full and accurate accounts of receipts and disbursements in books belonging to the Corporation

are maintained, as well as other transactions of the Corporation, so that the proper and correct financial condition of the Corporation can be ascertained at any time.

**§ 302.5 Chief Operating Officer: roles and responsibilities.**

The Chief Operating Officer of FPI, who is also an Assistant Director of the BOP, is responsible for the day to day management of the affairs of the Corporation, so as to carry out the responsibilities of the Corporation, and to perform all duties and make all decisions, except where authority has been retained by the Board of Directors or the Chief Executive Officer. The Chief Operating Officer may re-delegate authority as deemed appropriate.

**§ 302.6 Ombudsman.**

(a) The position of Ombudsman was established by the Board of Directors to achieve improved relations with the private sector, to provide a mechanism for resolving customer issues, and to provide the Board with information in addition to that provided by the normal corporate chain of command. The Ombudsman reports directly to both the Chief Operating Officer and the Board of Directors. In addition, the Ombudsman meets with and provides reports to the Board of Directors.

(b) In order to assist with dispute resolution prior to any request for review pursuant to 18 U.S.C. 4124(b), the Board has established a waiver appeal process, and has vested the Ombudsman with independent authority to make decisions concerning issues arising in conjunction with the mandatory source waiver appeal process, and to make recommendations to the Chief Operating Officer concerning vendor and other customer issues.

**§ 302.7 Meetings.**

The Board will hold at least one regularly scheduled meeting each year in either Washington, DC, or at a location in proximity to one of the Federal prisons, and such additional or special meetings as it deems appropriate. Meetings may be held in person or through electronic means. Time will be set aside for the Board to meet in executive session at each meeting, if the directors so desire. In addition to these meetings, the Board may schedule periodic teleconferences to review the monthly financial reports and other matters.

**§ 302.8 Inmate employment levels.**

(a) Inmate employment levels in FPI will be commensurate with the needs of the BOP, and the mission and mandates

of FPI. Considerations shall include the interests of the public, including industry and labor. As the nature and size of the inmate population change, the need of the BOP for industrial jobs may also change. Thus, an annual assessment will be performed of the number and types of jobs necessary to fill the BOP's needs in such a way that FPI's mandates are also fulfilled. This assessment will take into account the fact that FPI has multiple missions, as set forth in its enabling statute and Executive Order. Two of the most important missions are the following: inmate employment must be maximized to combat idleness, to the extent consistent with the need to protect industry and free labor from undue impact; and, best efforts should be made so that the jobs that are created enhance inmate work habits and skills, so as to increase the probability that inmates will be able to succeed in the community upon release.

(b) It is the primary responsibility of both the Chief Executive Officer, and the Chief Operating Officer of FPI, working together, to determine the optimal mix of BOP and FPI jobs. It is the responsibility of the Board to assure that employment levels are consistent with FPI's mission and mandates and do not unduly impact the private sector.

**§ 302.9 Mandatory source.**

(a) By federal law, FPI is the mandatory source of products for all Federal departments, agencies, and all other Government institutions of the United States, provided that these products are available and meet the agency's requirements as set forth in this section. See, however, §§ 302.10 and 302.12(a).

(b) As a Government agency with a statutory mandate to provide employment for the greatest number of those inmates as is reasonably possible (18 U.S.C. 4122(b)(1)), FPI operates with a mandatory procurement preference granted by Congress (18 U.S.C. 4124(a)). Also, purchases from FPI are an exception to the rules that normally govern the way goods are procured by the United States because FPI's "sales" to other Government agencies actually constitute intergovernmental transfers of goods, rather than traditional sales. Therefore, purchases from FPI are not subject to the Federal Acquisition Regulation (FAR) provisions governing procurement from the private sector. See Memorandum from Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel (OLC) (Sept. 13, 1993). Thus, FPI need not abide by FAR provisions in its agreements with its customers in order

to remain a mandatory source for its products. However, in its discretion, FPI may include these terms in its agreements at the request of its customers.

(c) FPI is the mandatory source for all products on its Schedule of Products ("Schedule"). The Schedule is a general, though not an exhaustive, list of all the categories of products and services available to departments and agencies from FPI. Since it does not contain all permutations of options and features available for each product, it may not always be clear whether a particular product offered by FPI has the necessary features desired by a Federal customer. In case of doubt, the contracting officer or activity should contact FPI, and FPI will determine whether a particular product is included in the Schedule and whether an agency's requirement can be met by FPI. Copies of the Schedule are available from the FPI Customer Service Center at Lexington, Kentucky (1-800-827-3168); FPI's Washington, DC headquarters; from the customer's sales representative, or through the Internet at <http://www.unicor.gov>.

(d) A contracting activity should not solicit bids, proposals, quotations, or otherwise test the market for the purpose of seeking alternative sources to FPI. Thus, proposals should not be sought where FPI is the presumptive provider (i.e., where the product is listed in FPI's Schedule of Products) and a waiver has not been granted. Both the language and the purpose of FPI's statute are inconsistent with the idea that FPI, itself a part of the Government, shall enter into competition with private manufacturers in bidding for the business of other Government establishments. What is contemplated by the statute is not a sale, but a transfer of property from one Government establishment to another. 18 Comp. Gen. 627, 628 (1939).

(e) Neither efficiency, administrative convenience, interchangeability, compatibility, nor uniformity with non-FPI products constitute a basis for using commercial sources, without first obtaining a waiver.

(f) FPI is the mandatory source for products irrespective of whether they are deemed to be an integral or structural part of a building; FPI is also the mandatory source for products irrespective of whether the product is acquired and/or used outside the United States or abroad (but see § 302.14(f) regarding waiver policy); FPI is also the mandatory source for all products on the Schedule, irrespective of whether they are acquired via a consolidated procurement effort. Thus, in situations where FPI provides some, although not

all, of the products which are offered in a packaged solicitation, FPI remains mandatory for those products on its Schedule, and a waiver must be obtained pursuant to procedures in this subpart before products on FPI's schedule can be purchased pursuant to a consolidated procurement.

(g) FPI's status as a mandatory source extends to contractors when they provide products for Government use. The contracting activity shall insert in solicitations and contracts a clause which identifies the products which must be purchased from FPI as a mandatory source. Also, such contractors may use FPI as a supply source for services and non-mandatory products.

#### **§ 302.10 Provision of products as a non-mandatory source.**

(a) FPI may offer its products on a competitive basis and not as a mandatory source. Thus, for example, it may choose to follow competitive procedures in responding to a solicitation in the Commerce Business Daily (CBD) for a product which it currently does not produce (i.e., a "new product" as defined *infra*). In this situation, provided that FPI in no way relies on its status as a mandatory source, FPI need not seek Board approval pursuant to the guidelines process to produce this product. The public will be made aware of FPI's decision to competitively bid for a product by the publication of a notice in the CBD. Once a new product is produced by FPI competitively, the product will remain a competitive product, and will not be added to the Schedule as a mandatory source item. Whatever share of the market FPI acquires on a competitive basis will be deemed to be a reasonable share of the market.

(b) FPI may also waive its mandatory source status for certain products which it currently produces, provided such initiatives are announced to the public for comment and approved by the Board. Non-mandatory products also include products which are provided by FPI as a preferential source of supply pursuant to § 302.12, and products which are provided to such agencies as the U.S. Postal Service, which by statute are not subject to FPI's mandatory source of supply.

#### **§ 302.11 Provision of services to the commercial market.**

FPI may offer services to the commercial market, as approved by its Board of Directors.

#### **§ 302.12 Preferential source.**

(a) *Products.* FPI is a preferential source of supply where it is not a mandatory source. Thus, for example, products which are offered to the U.S. Postal Service, which agency by statute is exempted from FPI's mandatory source, may be purchased from FPI directly, without the contracting activity going through competitive procurement procedures.

(b) *Services.* FPI is a preferential, though non-mandatory, source of services for all Government departments and agencies. This means that services may be purchased from FPI without a contracting activity going through competitive procurement procedures.

#### **§ 302.13 "Escape-Proof" guarantee.**

FPI is committed to the complete and continual satisfaction of its customers. If at any time an item or service that FPI has provided does not entirely meet the expectations of the customer, FPI will promptly repair or replace it, entirely at the expense of FPI. For information on this warranty, contact the Customer Service Center at (800) 827-3168.

#### **§ 302.14 Waiver policy.**

(a) When a contracting office or activity believes a product on FPI's Schedule does not meet the customer's requirements, but that similar products from a commercial source will, and the contracting activity wishes to purchase the product from a commercial source, it must submit a request for a waiver to FPI and obtain a waiver prior to purchasing the product from the commercial source.

(b) A waiver request should include:

(1) A description of the product for which the waiver is requested;

(2) The justification for seeking a waiver, including specifics concerning price, quantity, and delivery date where such information is relevant to the waiver request;

(3) The name and title of the appropriate contact person, as well as the complete mailing address, phone and fax numbers, and e-mail address when available.

(c) Waivers will not ordinarily be given based on price, where FPI's product does not exceed current market price as determined by FPI.

(d) Waivers based on delivery will not ordinarily be granted when FPI's delivery schedule is consistent with deliveries for comparable products on the Federal Supply Schedule or under standard commercial practices. Delivery requirements inconsistent with those referenced on the GSA Federal Supply Schedule require written certification from the contracting officer. Thus,

where expedited delivery is needed, a written statement from the contracting activity is required, providing the reasons and attesting to the fact that the products required are available from an alternative source in the time frame required.

(e) When a waiver is requested based on an assertion that FPI's product will not perform to standards or does not represent best value, or in some other way does not meet the specifications of the customer, the contracting activity must provide, in writing, details describing the non-conforming characteristics of the FPI product compared to the product from a commercial source.

(f) Waivers are granted or denied on a case-by-case basis. Class waivers are not usually issued, except when the product is not available from FPI. However, FPI has granted a class waiver for all supplies that are acquired for use outside the United States when these supplies are both manufactured by and purchased from sources outside the United States.

(g) Generally, considerations of aesthetics are not an acceptable basis for a waiver. However, exceptions may be made, and waivers granted, for example, to achieve "match" with products that will be located in proximity to the required products.

(h) In order to avoid a situation where FPI exercises its status as a mandatory source after a commercial vendor has gone through the effort and expense of preparing a bid package, FPI will exercise special care with regard to procurements that inadvertently have been announced in the *Commerce Business Daily* (CBD). Although solicitations for products manufactured by FPI should not appear in the CBD without first obtaining a waiver from FPI, occasionally, through error, such solicitations do appear. The FAR (48 CFR 5.203) requires a 15 day waiting period between the date of the CBD synopsis and the issuance of solicitations. Therefore, FPI will ordinarily exercise its mandatory source status by requesting cancellation of the solicitation during this 15 day interval.

(i) Waivers will not be required where public exigency requires immediate delivery or performance. However, purchase from commercial sources pursuant to this provision must be simultaneously reported to FPI, with an explanation of the emergency necessitating the commercial procurement. The emergency must not be brought about by poor planning nor otherwise due to circumstances that could have been avoided through the exercise of reasonable prudence.

(j) Waiver decisions will ordinarily be issued within seven (7) working days from the date of the request, once all information necessary to make a decision is provided to FPI. Project level waiver requests may require longer to process because of their complex nature. Where the requester requires a reply in less than seven (7) working days, the requester should explain the reasons.

#### **§ 302.15 Appeals to waiver denials.**

If the waiver request is denied, the order must be awarded to FPI unless the decision is overturned on appeal. All appeals must be made as a matter of first instance to the FPI Ombudsman. The appeal should include the 7-digit waiver identification number found on the waiver denial letter, together with any supplemental information on why the waiver denial should be reversed. Appeals should ordinarily be filed within 7 working days of the notification of a waiver denial. Decisions of the Ombudsman will ordinarily be issued within 7 working days from the date of the appeal. A further appeal may be taken by either party under 18 U.S.C. 4124(b).

#### **§ 302.16 Pricing.**

(a) By federal law, the prices of FPI's products cannot exceed the current market price. The determination of what constitutes the current market price, the methodology employed to determine the current market price, and the conclusion that a product of FPI does not exceed that price is the responsibility of FPI to determine, subject to dispute under 18 U.S.C. 4124(b). FPI determines market price one of three ways:

(1) When a comparable product is available from private sector manufacturers, a review of commercial catalog prices will be used to establish a "range" for current market price;

(2) Where a comparable product cannot be identified, current market price is established through negotiating a price based on cost, including applicable overhead, plus a margin for earnings; and

(3) Where a purchasing activity executes "concurrent buys" (i.e., where the purchasing activity simultaneously purchases identical products from both FPI and a commercial supplier), FPI will provide the product at a comparable price, and at terms and conditions comparable to those provided by the commercial supplier.

(b) General Services Administration's Federal Supply Schedule (FSS) is relevant to, but not necessarily determinative of, the current market price for a product, as it may not

duplicate in all features the FPI product and FPI's costs. In many cases, there will be no exact comparability between FPI's product and a commercial product, and thus adjustments will be required to determine the comparable current market price. Factors to be considered in determining the price range will typically include similarity of materials, methods and costs of construction, product durability, presence of ancillary features, extent of warranties and nature of the market. Data collected by general market surveys do not establish current market price, but may be provided to FPI to be factored into its determination of current market price. A price established by FPI utilizing one of the methodologies identified in this section fulfills the obligations of a contracting officer to obtain a fair and reasonable price under FAR (e.g. 48 CFR part 15).

#### **§ 302.17 Industry involvement guidelines procedures.**

The following steps will be followed whenever FPI is considering producing a new product (§ 302.18(b)) or significantly expanding production of an existing product (§ 301.18(d)).

(a) Parties who are known to have an interest in a potential proposal by FPI to produce a new specific product or significantly expand in the production of an existing product will be contacted prior to the drafting of any market impact study to obtain relevant information for purposes of developing a comprehensive and fair study. The information sought may include, but is not limited to, how a specific product is defined, size of the market, future market trends, and dependence of industry providers on the federal market.

(b) All proposals to produce a new product or to significantly expand the production of an existing product shall be announced in the CBD, and a copy of the announcement shall be mailed to known interested parties.

(c) The announcement will state that interested parties may obtain a copy of the study which analyzes the impact, if any, on the private sector resulting from the proposed production initiatives by writing to the Manager, Planning, Research, and Activation, Federal Prison Industries, 320 First Street, NW, Washington, DC 20534. The announcement will further state that comments on the study should be submitted in writing to the Manager at the same address. It will further state that comments are due no later than 45 days from the date of the announcement and that the comments should address the issue of what percentage, if any, of

the government market for the specific product constitutes a reasonable share of the market. All comments related to definition of the product, determination of the size of the market, impact on the private sector, and study methodology must be submitted at this time, to allow time for adequate consideration of these comments prior to FPI's dissemination of its final study and recommendations. Failure to provide this information in a timely manner may result in the information not being considered or being given less weight by the Board or not being considered at all.

(d) FPI will contact known trade associations representing manufacturers of the relevant product, provide them with a copy of the announcement and the market analysis, and request their written and oral comments in an attempt to arrive at a mutually agreeable percentage figure as to what constitutes a reasonable share of the market. FPI will also provide a copy to the appropriate labor representatives. The same time frames apply as in paragraph (c) of this section.

(e) Public comments including all attachments should be kept as brief as possible and, without Board permission, no public submission may exceed twenty-five (25) pages.

(f) A recommendation will be prepared by FPI to be provided to the Board of Directors on what constitutes a reasonable market share for the specific product in question. The recommendation will address all comments which are timely and relevant.

(g) A copy of the written comments submitted in response to the announcement, FPI's responses to the comments, and FPI's final recommendation to the Board of Directors shall be made available to commenters who filed a timely submission. The material will be made available to the commenters no less than forty-five (45) days before the date of the Board meeting at which the proposal for production of the specific product at issue will be considered. In addition, all commenters will be advised, in an appropriate manner, of the date, time, and location of the Board meeting at which the proposal will be discussed, and advised of the opportunity to address the Board in person.

(h) A final submission for the sole purpose of commenting on FPI's recommended production levels may be provided by commenters to the Board for its consideration. The final submission, including any attachments, should be as brief as possible and, without Board permission, may not exceed ten (10) pages. Comments related

to the study methodology, i.e., how the specific product is defined, determination of the size of the market, and impact of FPI on the private sector, should be submitted within the 45 day review period after announcement of the study in the CBD (see paragraph (c) of this section), and not at this stage of the process, in order to be given due consideration by the Board. This final submission should be sent to the Manager, Planning, Research and Activation, for transmittal to the Board. If a commenter wishes to appear at the Board meeting to make a statement, that request should be made on the first page of the final submittal, together with the names of the individuals desiring to appear before the Board.

(i) All final submittals, together with any request to appear before the Board, must be received by the Manager at least fifteen (15) days in advance of the Board meeting.

(j) The following rules will apply at the in-person presentation:

(1) In order to accommodate the largest number of commenters, and to assure access by the Board to the fullest array of comments and opinions concerning expansion proposals by FPI, as a general rule hearings will be held in Washington, DC. However, the Board reserves the right to determine that a hearing should be held in a location other than Washington, DC, provided that sufficient notice is given to the public. The presentation to the Board is open to the public. However, the hearing may be closed, or other safeguards taken, where the Board determines that proprietary information must be safeguarded, or for other good and sufficient reason(s).

(2) A maximum of 30 minutes will be allotted to each commenter for presentation to the Board, unless the Board extends the time;

(3) The record before the Board at the time of the presentation is limited to the market study, comments and materials submitted in a timely manner in response to the market study, FPI's recommendations, and materials submitted by commenters in response to FPI's recommendations. No new documentation or arguments from commenters should be presented at the presentation that have not been submitted in compliance with the rules in this section, unless permitted by the Board. The Board reserves the right to exclude from consideration or give less weight to information which was not submitted in compliance with this section.

(4) The Chairman of the Board will preside at the hearing and impose such further rules as are reasonable to assure

a full and orderly presentation, covering such matters as who may address the Board, the order in which presentations are made, what documents will constitute the record, what issues are relevant, and any questions concerning how much time is to be allotted to each presentation. The Federal Rules of Civil Procedure and formal rules of evidence will not be followed.

(5) The Board members may direct questions to a commenter to elicit further information, and may request that additional material be provided for the record.

(6) The proceedings will be recorded and a transcript made available at the requestor's expense.

(k) The Board will determine whether a proposed new product may be produced or whether a proposed expansion of an existing product should be approved, and what the reasonable market share is with regard to the specific product in question. In determining the reasonable market share for a specific product, the Board will balance the interests of the Corporation with the interests of the affected private sector, employing the criteria spelled out in the relevant statutes, legislative history, and corporate regulations.

(l) The decision of the Board will be made by majority vote. In the case of a tie, the position of the group which includes the Chairman will prevail.

(m) The decision, together with the reasons for the decision, will be published in the CBD within 10 days of the date of the Board's decision.

(n) Any request for exception to the provisions of this section shall be made to the Board and shall be considered only in compelling circumstances. Requests should be addressed to Chairman, Board of Directors, Federal Prison Industries, Inc., 320 First Street, NW, Washington, DC 20534.

#### **§ 302.18 Definitions and application of significant terms in product development guidelines process.**

(a) Specific product. (1) 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. 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.

(2) The following standards will be used to determine how "items" should be treated:

(i) 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).

(ii) 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. Material will be considered as part of routine review in determination of what constitutes a specific product.

(iii) 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 will be avoided where FPI 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).

(iv) The rationale for any proposed combining of FSC's will be published by FPI in the CBD to seek input from the potentially affected industry. Input received in its submission will be forwarded by FPI to the Board of Directors for consideration and final determination.

(v) 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.

(vi) SIC codes will 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).

(b) 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.

(c) "Good Faith" CBD announcements.

(1) 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 CBD. 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 outlined definition.

(2) The parameters for publishing such internal decisions that are made and announced subject to this paragraph (c) 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.

(3) 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.

(4) In submitting comments to FPI, the following procedures will apply:

(i) Comments will be due within 21 days of the date of publication;

(ii) 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;

(iii) While the primary purpose of the comment provision will be to determine if an item should be defined as a new product, comments related to market share and/or the impact that such a production decision may have on the firm will also be considered to the degree they are relevant;

(iv) All comments received in response to these announcements will be considered by FPI.

(5) The commenter will be advised whether FPI decides to go through the guidelines process.

(6) As always, any interested party has a right to raise any question at any time with the Board of Directors (see § 302.19), 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 in this paragraph (c), unless and until the decision is reversed.

(d) "Significant expansion of an existing product".

(1) 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:

(i) 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

(ii) 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.

(2) 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. The allowable increase in market share from 15 to 20% in one year, should not allow FPI (assuming its sales increase by more than 10%) to increase its share again from 20 to 25% in a subsequent year without going through the guidelines process.

(3) Market shares will be calculated on the basis of FSC's for planning purposes. If based on initial assessment, it is determined that a comprehensive impact study, and Board approval, is likely to be required, a comprehensive analysis of market share will be undertaken to fully assess whether the guidelines process should be initiated.

(4) 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 previously achieved annual sales levels, adjusted for inflation, without initiating the guidelines process.

(5) In cases where FPI sales inadvertently or insubstantially exceed Board authorized levels, FPI will make every effort 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.

(6) In cases of extreme public exigency, such as national disaster or national defense emergency, 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. In such cases, the higher production levels achieved by FPI will be temporary, and will not be used as part of FPI's baseline for future calculations of significant expansion. Such exceptional events will be subject to approval by FPI's Chief Operating Officer, with concurrence of FPI's Board of Directors.

(7) Subject to other provisions noted in this paragraph (d), FPI's sales for

fiscal year 1997 will be utilized as the base year for future application.

**§ 302.19 General comments on FPI business operations.**

(a) Any interested party having any general comment concerning the business operations of FPI may write to the Chief Operating Officer, or to the Chairman of the Board of Directors, and bring such matters to the attention of either or both officials. Where appropriate, a response shall promptly be made. The Board shall be kept advised of all comments and responses.

(b) Correspondence should be addressed as follows:

(1) Chief Operating Officer, Federal Prison Industries, Inc., 320 First Street, NW, Washington, DC 20534, Attn: General Comments; or

(2) Board of Directors, Federal Prison Industries, Inc., 320 First Street, NW, Washington, DC 20534, Attn: General Comments.

(c) This section does not apply to inmate complaints which are properly raised through the BOP's Administrative Remedy Program (28 CFR part 542).

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