An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The text is centered within the hourglass shape.

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Report RL32380

*Federal Prison Industries*

Nathan James, Analyst in Crime Policy

January 13, 2009

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# Federal Prison Industries

**Nathan James**

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RL32380

**CRS Report for Congress**

*Prepared for Members and Committees of Congress*

## 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, 21,836 or 17% are employed by UNICOR. By statute, UNICOR must be economically self-sustaining, thus it does not receive funding through congressional appropriations. In FY2008, FPI generated \$854.3 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 80% go toward the purchase of raw material and equipment; 16% go toward staff salaries; and 4% go toward inmate salaries.

The Bush Administration has made several efforts to mitigate the competitive advantage UNICOR has over the private sector. Going beyond the Bush 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. In the 110<sup>th</sup> Congress, the National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181) modified the way in which DOD procures products from FPI. Legislation in the 111<sup>th</sup> Congress (S. 41) would, among other things, require FPI to employ inmates in manufacturing positions by subcontracting with private sector employers; would require the Attorney General to establish the Foreign Labor Substitute Panel that would have review pilot projects by United States companies for using federal inmate labor to produce goods that would otherwise be produced by foreign labor; and would amend current law to restate the mission, operating objectives, performance standards, and contracting requirements for FPI. This report will be updated as warranted.

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## 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.

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 111<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

<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."

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>

## Activities

Of the eligible inmates held in federal prisons, 21,836 or 17% are employed by UNICOR.<sup>14</sup> UNICOR has 109 factories in federal prisons representing seven different industrial operations.<sup>15</sup> UNICOR’s seven industrial operations are comprised of roughly 175 different types of products and services.<sup>16</sup> UNICOR’s industrial operations include the following:

- clothing and textiles;
- electronics;
- fleet management and vehicular components;
- industrial products;
- office furniture;

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<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.”

<sup>14</sup> UNICOR’s 2008 Annual Report at <http://www.unicor.gov/information/publications/pdfs/corporate/catar2008.pdf>, hereafter, “UNICOR 2008 Annual Report.”

<sup>15</sup> There are currently 114 federal institutions in the United States. U.S Department of Justice, Bureau of Prisons, *FY2009 Performance Budget, Congressional Submission, Federal Prison System, Buildings and Facilities*.

<sup>16</sup> UNICOR 2008 Annual Report.

- recycling activities; and
- services (which includes data entry and encoding).<sup>17</sup>

UNICOR is economically self-sustaining and does not receive funding through congressional appropriations. In FY2008, FPI generated \$854.3 million in sales.<sup>18</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 80% go toward the purchase of raw material and equipment; 16% go toward staff salaries; and 4% go toward inmate salaries.<sup>19</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>20</sup>

## 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>21</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 all inmates employed by UNICOR dropped to 14% and in FY2007 the percentage dropped to 12% (see **Figure 1**).<sup>22</sup>

<sup>17</sup> UNICOR 2008 Annual Report.

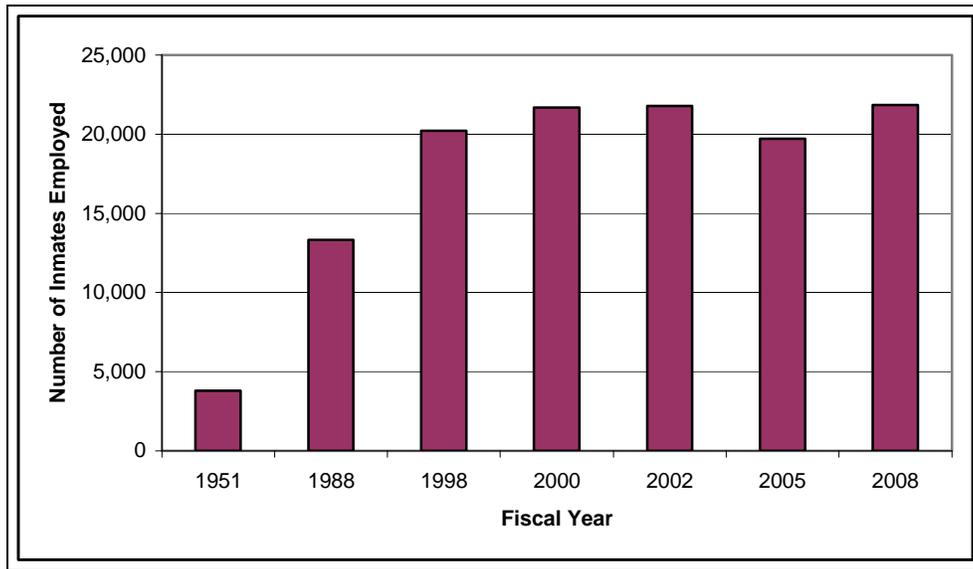
<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</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).

<sup>21</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).

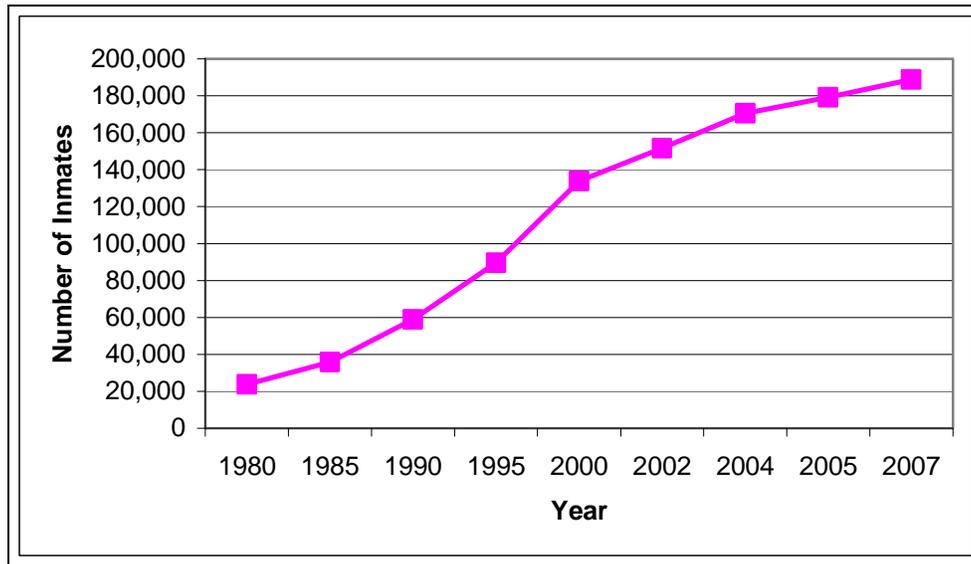
<sup>22</sup> According to BOP Congressional Affairs office, the number of *eligible* inmates (as opposed to total inmate population as discussed above) employed in FPI has decreased in recent years (FY2001-22,650 [25%]; FY2002-21,778 [22%]; FY2003-20,274 [19%]; FY2004-19,337 [18%]; FY2005-19,720 [18%], FY2006-21,205 [18%]; FY2007-23,152 [18%]; and FY2008-21,836 [17%]).

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

**Source:** CRS presentation of UNICOR's Annual Reports (FY1951, FY1988, FY1988, FY2000, FY2002, FY2005, and FY2008).

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 increased nearly 700% since 1980, ranging from about 24,000 in 1980 to approximately 189,000 in 2007.<sup>23</sup>

<sup>23</sup> Ann L. Pastore and Kathleen Maguire, eds. *Sourcebook of Criminal Justice Statistics (Online)*, Table 6.13.2007, 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>.

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

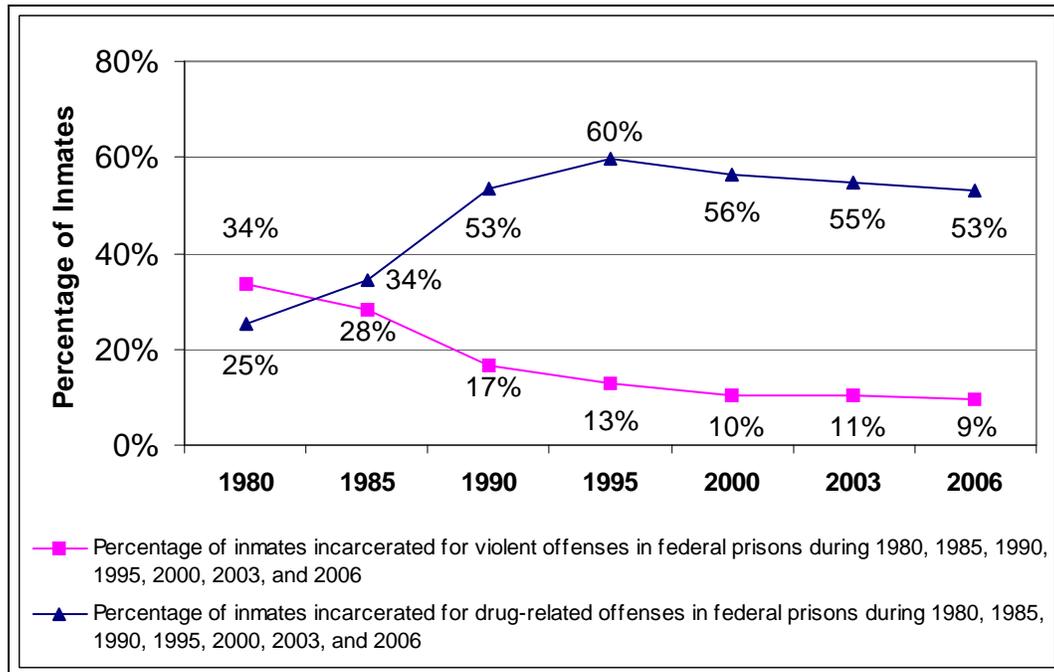
**Source:** CRS presentation of Table 6.13.2007 from *The Sourcebook of Criminal Justice Statistics* and DOJ's Bureau of Justice Statistics Bulletin, Prisoners in 1994.

## 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>24</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 **Figure 3**). Correctional authorities had to accommodate to a more frequent history of violence in the inmate population under their jurisdiction.

<sup>24</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. Percentage of Federal Inmates By Drug-Related and Violent Offenses**

**Source:** CRS presentation of DOJ's Bureau of Justice Statistics Bulletins, Prisoners in 1994, Prisoners in 2005, and Prisoners in 2006.

## 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>25</sup> Many scholars assess the effects of prison on an inmate’s ability to successfully reintegrate into society and the recidivism rate<sup>26</sup> is widely used to measure such effects.

Although there have been many studies on the recidivism rate<sup>27</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 conducted at the state level found that, on average, 47% of inmates recidivate within one year of being released from prison.<sup>28</sup> Some of the

<sup>25</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>26</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>27</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.

<sup>28</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.

studies also found that the rate of inmates who recidivate goes up each subsequent year.<sup>29</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>30</sup> those employed in traditional prison industries, and those who were not employed at all while they were incarcerated.<sup>31</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>32</sup>

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>33</sup>

<sup>29</sup> Ibid.

<sup>30</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>31</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>32</sup> William G. Saylor and Gerald G. Gaes, *PREP: Training Inmates Through Industrial Work 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>33</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.

## 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>34</sup>

## 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>35</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>36</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

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<sup>34</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 \$0.23 and \$1.15 per hour) and that under current UNICOR policy 50% of inmates' wages must go towards court ordered obligations.

<sup>35</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>36</sup> CRS analysis of FPI waiver data from FY1994 to the first six months in FY2004.

Directors requires prison-made products sold by FPI to have at least 20% of its value contributed by inmate labor.<sup>37</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 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>38</sup>

## 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>39</sup> The only amendments to the statute were relatively recent provisions added in 1988, 1990, 1992, and 2002.<sup>40</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>41</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.

<sup>37</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>38</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).

<sup>39</sup> P.L. 80-772, codified at 18 USC §4121 *et seq.*

<sup>40</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>41</sup> See 10 USC §2410n.

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

- 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.

### **The National Defense Authorization Act for FY2008**

The National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181) amended 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 Department of Defense (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 determines that an FPI product is not comparable to private sector products in terms of price, quality, or time of delivery, the Secretary must then 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. In cases where FPI is determined to have a significant market share, the Secretary of Defense can 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.

## **Legislation in the 111<sup>th</sup> Congress**

S. 41, the Prisoner Opportunity, Work, and Education Requirement (POWER) Act, was introduced on January 6, 2009, and referred to the Senate Judiciary Committee. The bill would amend the current law regulating FPI's operations and how other executive branch agencies procure FPI goods and services. The bill would require all eligible federal inmates to spend 50 hours per week either working, engaging in job training, or participating in education or life skills programs. The bill would expand work opportunities for eligible inmates by requiring FPI to utilize inmates in labor-intensive, light manufacturing activities through contracting with the private sector. Inmates participating in such a program would have to be paid wages that complied with the requirements of 18 U.S.C. §1761(c), which requires that inmate workers are paid wages that are not less than those paid to workers doing work of a similar nature in the some locality. The bill would also require contracts with private sector companies to contain provisions stating that all work will be conducted in an FPI facility; prohibit the company from displacing any of that company's existing domestic workers as a direct result of the contract with FPI; and require the contractor to terminate inmate laborers before terminating other employees performing the same work if the company has to reduce its workforce. The bill would also expand the ability of FPI to produce goods and services and for executive agencies to procure those goods and services by (1) repealing provisions in previous appropriations bills that prohibit federal agencies from using appropriated funding to purchase goods or services from FPI unless

the agency determines that the good or service is the best value;<sup>42</sup> (2) repealing a provision that prohibits appropriated funds for being used to conduct a public-private competition under the Office of Management and Budget Circular A-76 for work performed by FPI employees;<sup>43</sup> and (3) repealing the provision in current law that requires the Secretary of Defense to use, among other things, 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.<sup>44</sup> S. 41 would require the Attorney General to establish the Foreign Labor Substitute Panel that would review pilot projects by United States companies for using federal inmate labor to produce goods that would be produced by foreign labor. The bill would amend current law to exempt goods and services produced by FPI employees under a subcontract with the private sector or who are participating in a foreign labor substitute program from the prohibition of selling prisoner-made goods in the private market.<sup>45</sup> The bill would also amend current law to restate the mission, operating objectives, performance standards, and contracting requirements for FPI. Finally, the bill would require the Comptroller General to conduct an annual evaluation of the operations of FPI and report the findings to Congress.

## 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>46</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>47</sup> While proponents maintain that inmates learn critical skills such as good workplace habits, accountability and the importance of being dependable, some critics contend that some of the

<sup>42</sup> Section 637 of division F of the Consolidated Appropriations Act of 2004 (P.L. 108-199) and section 637 of division H of the Consolidated Appropriations Act of 2005 (P.L. 108-447).

<sup>43</sup> Section 214 of division B of the Consolidated Appropriations Act of 2008 (P.L. 110-161).

<sup>44</sup> 10 U.S.C. §2410n.

<sup>45</sup> See 18 U.S.C. §1761. Generally, it is illegal for an individual to transport prisoner-made goods in interstate commerce or from a foreign country. Exemptions are delineated for certain individuals on parole, probation, or supervised release. In addition, the prohibition on interstate commerce of prisoner-made goods does not apply to agricultural commodities or parts for the repair of farm machinery, nor to commodities manufactured in a federal, District of Columbia, or state institution for use by the federal government, or by the District of Columbia, or by any state or political subdivision of a state or not-for-profit organizations. 18 U.S.C. §1761 effectively prevents most jail and prison inmates in the United States from producing goods for sale in open markets.

<sup>46</sup> UNICOR’s 2002 Annual Report, p. 5 at <http://www.unicor.gov>.

<sup>47</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.

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>48</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>49</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.

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>50</sup>

<sup>48</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>49</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."

<sup>50</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.

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>51</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>52</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>53</sup>

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>54</sup> However, Deloitte and Touche did not report comparable data for private sector contractors.

<sup>51</sup> Deloitte and Touche, *Independent Market Study of UNICOR, Federal Prison Industries, Inc.*, Executive Summary, August 7, 1991.

<sup>52</sup> U.S. General Accounting Office, *Federal Prison Industries: Delivery Performance Is Improving But Problems Remain*, GAO/GGD-98-118, June 1998.

<sup>53</sup> U.S. General Accounting Office, *UNICOR Products: Federal Prison Industries Can Further Ensure Customer Satisfaction*, GAO/GGD86-6, November 1, 1985.

<sup>54</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.

## 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 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>55</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>56</sup>

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<sup>55</sup> See UNICOR, *Factories with Fences*, at [http://www.unicor.gov/history\\_of\\_success.htm](http://www.unicor.gov/history_of_success.htm).

<sup>56</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. Legislation in the 110<sup>th</sup> Congress

One piece of legislation in the 110<sup>th</sup> Congress, H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008, enacted into law on January 28, 2008 (P.L. 110-181), modified the way in which DOD procures products from FPI. Another bill introduced in the 110<sup>th</sup> Congress, S. 705, would have further modified FPI's mandatory source clause by requiring all government agencies to use competitive procedures when procuring products from FPI.

### The National Defense Authorization Act for Fiscal Year 2008

Section 827 of the National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181) amended 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 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 must then 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 is 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, the Secretary of Defense can 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 is required to consider a timely offer from FPI. Under section 827 of P.L. 110-181, FPI is 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%. Section 827 of P.L. 110-181 requires 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 can 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.

### S. 705

S. 705 would have amended 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 have required 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 have allowed 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 had to ensure that FPI performs its contractual obligations to the same extent as any other contractor.

S. 705 would have provided for some exceptions to the government-wide requirement for using competitive procurement procedures. It would have allowed 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.

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 have ensured that contractors are not required to use FPI as a subcontractor or a supplier of products or provider of services. The bill would have prohibited 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 have also required 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 have prevented 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 have allowed 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 have allowed 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), and is in compliance with the requirements of the law and the accompanying regulations. The bill would have allowed 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.

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