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**Comptroller General  
of the United States**

**United States General Accounting Office  
Washington, DC 20548**

# Decision

**Matter of:** Federal Prison Industries, Inc.

**File:** B-290546

**Date:** July 15, 2002

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Marianne S. Cantwell, Esq., and William Robinson, Esq., Department of Justice, for the protester.

Julius Rothlein, Esq., and Edward N. Ramras, Esq., Headquarters U.S. Marine Corps, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

General Accounting Office will not review protest of agency's determination that Federal Prison Industry's (UNICOR) product was not comparable to private sector products, since UNICOR's enabling statute provides for binding resolution of such disputes by an arbitration board.

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## **DECISION**

Federal Prison Industries, Inc. (UNICOR) protests the U.S. Marine Corps's award of contracts to four Federal Supply Schedule (FSS) vendors for furniture to be installed at the Amphibious Warfare School (AWS), Quantico Marine Corps Base, Virginia.

We dismiss the protest.

At the time the Marine Corps identified its requirement for furniture, it was mandatory for the agency to use UNICOR products to meet the requirement. 18 U.S.C. § 4124 (2000); Federal Acquisition Regulation (FAR) § 8.602(a). Subsequently, the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. No. 107-107, § 811) enacted 10 U.S.C. § 2410n to require the Secretary of Defense (effective October 1, 2001) to conduct market research prior to purchasing UNICOR products, in order to determine whether the UNICOR product is "comparable in price, quality, and time of delivery to products available from the private sector." 10 U.S.C. § 2410n(a). If the product is determined not to be comparable, the Secretary must use "competitive procedures" and consider a timely offer from

UNICOR. 10 U.S.C. § 2410n(b). Interim implementing regulations (Defense Federal Acquisition Regulation Supplement (DFARS) §§ 208.602, 208.606, 210.001) became effective on April 26, 2002. 67 Fed. Reg. 20687 (2002).

The Corps began working with UNICOR in October 2000 to develop the parameters of its furniture requirement while the AWS space to be furnished was being renovated by another contractor. By March 2002 UNICOR had submitted design information and a final bill of materials. Since 10 U.S.C. § 2410n became effective during this period, in March the agency began proceeding in accordance with the provision. The Corps conducted market research to determine whether private sector vendors on the General Services Administration's FSS could meet the requirement; this research demonstrated that an FSS vendor could meet the requirement at a price lower than the price reflected in UNICOR's final bill of materials. Affidavits of Lt. Col. William E. Wetzelberger, June 4 and 14, 2002; Contracting Officer's Statement (COS) ¶ 7. In addition, the contracting officer understood that UNICOR needed a long lead time for delivery (90 days) and installation (an additional 3 weeks) and apparently could not meet the delivery schedule of complete installation by July 12 based on the Corps's inability to place the order before the end of April.<sup>1</sup> COS ¶¶ 4-5,7-8. Based on the apparent lead time needed by UNICOR and its higher price, the contracting officer then determined that UNICOR's products were not comparable to those offered by the FSS vendors. COS ¶ 8.

Following the non-comparability determination, in order to comply with the "competitive procedures" requirement, the contracting officer decided to conduct an FSS-type competition, without a formal solicitation, and in mid- to late March obtained e-mail verification of prices and delivery from the FSS vendors and UNICOR. COS ¶¶ 8-9. UNICOR's response included its price (which was higher than one of the FSS vendors' prices) and stated that it could meet a delivery/installation completion date of July 8, but also stated that "UNICOR will need to receive a purchase order by 1, April, 2002." Agency Report (AR) Tab 7. Since funding was not obligated for the project until on or about April 26 (Affidavit of Lt. Col. Wetzelberger, June 4, 2002), by May 1, well after UNICOR's April 1 purchase order deadline, the contracting officer determined that UNICOR's delivery terms would not meet the agency's needs. AR Tab 14. Based on this conclusion, as

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<sup>1</sup> The contracting officer's understanding was based on information from Capt. Clay Tipton and Lt. Col. Wetzelberger. According to these officers, UNICOR stated that it required 90 days notice from order to delivery and 3 weeks for installation, Affidavits of Capt. Tipton and Lt. Col. Wetzelberger (June 4, 2002); COS ¶ 5. According to Lt. Col. Wetzelberger, no decision on ordering furniture could be made until after a late-April walk-through of the AWS space being renovated, at which time the Corps would decide if it could move in by the beginning of the next academic year. Affidavit of Lt. Col. Wetzelberger, June 4, 2002.

well as UNICOR's higher price, the agency issued purchase orders to FSS vendors on May 3. Id. This protest followed.

## COMPARABILITY DETERMINATION

UNICOR challenges the Corps's determination that its products are not comparable to those of the private sector due to higher price and inability to meet the delivery schedule. The Corps asks that the protest be dismissed because, among other reasons, UNICOR's enabling statute provides for an arbitration board to resolve disputes between agencies and UNICOR. 18 U.S.C. § 4124(d).

Under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000), our Office's jurisdiction includes consideration of objections to solicitations, awards of contracts for the procurement of property or services, and protests "concerning an alleged violation of a procurement statute or regulation." 31 U.S.C. §§ 3551(1), 3552. However, where Congress has vested oversight and decision-making authority in a particular federal official or entity, we will not consider protests involving issues that are properly for review by that official or entity. Mississippi State Dep't of Rehab. Servs., B-250783.8, Sept. 7, 1994, 94-2 CPD ¶ 99 at 3 (disputes by state licensing agencies under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.); High Point Sec., Inc.--Recon. and Protest, B-255747.2, B-255747.3, Feb. 22, 1994, 94-1 CPD ¶ 169 at 2 (determinations by the Small Business Administration under the certificate of competency program pursuant to 15 U.S.C. § 637(b)(7)); ARA Envtl. Servs., Inc., B-254321, Aug. 23, 1993, 93-2 CPD ¶ 113 at 2 (protest of award under the Javits-Wagner-O'Day Act, 41 U.S. C. §§ 46-48c).

UNICOR's enabling statute provides that federal agencies "shall purchase at not to exceed current market prices, such products of [UNICOR] . . . as meet their requirements . . ." 18 U.S.C. § 4124(a). Where agencies and UNICOR are unable to agree as to whether these price and acceptability conditions have been met, they must have their disputes resolved by an arbitration board specifically established for this purpose. The statute provides in this regard as follows:

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

18 U.S.C. § 4124(b). This provision vests the board with binding authority to resolve disputes between agencies and UNICOR. Since 10 U.S.C. § 2410n made no express changes to the board's authority with regard to DOD purchases, we believe its authority to resolve disputes between DOD agencies and UNICOR remains intact. Further, while the board was created to arbitrate disputes related to mandatory UNICOR purchases, we find no basis for concluding that its authority now does not apply to DOD purchases, such as the one here, simply because they are subject to a

new process. This is particularly the case since the comparability determination provided for under § 2410n, which encompasses “price, quality and time of delivery,” involves essentially the same considerations covered by the board’s authority under § 4124(b), “price, quality, character, or suitability.”<sup>2</sup> We conclude that UNICOR’s disagreement with the Corps’s determination that UNICOR’s products are not comparable as to price or delivery to private sector products is subject to the board’s binding authority. Accordingly, our Office will not review the matter. Mississippi State Dep’t of Rehab. Servs., supra.

#### STATUTORY COMPLIANCE

UNICOR also argues that the Corps failed to comply with various requirements under § 2410n(b) and the implementing regulations, in particular, whether the agency’s FSS-type competition in lieu of a formal solicitation comported with the requirement that “competitive procedures” be used. (The Corps points out, correctly, that the term “competitive procedures” is defined in 10 U.S.C. § 2302(2) as including FSS purchasing procedures.) Noting that, even where a statute provides for exclusive jurisdiction in another forum (citing the Randolph-Sheppard Act), our Office will review an agency’s interpretation of implementing regulations, see Department of the Air Force–Recon., B-250465.6 et al., June 4, 1993, 93-1 CPD ¶ 431, UNICOR asserts that we should review its additional arguments notwithstanding our conclusion regarding the comparability determination issues.

We agree with UNICOR that issues related to the Corps’s compliance with the statute—as opposed to its comparability determination—appear to fall outside the board’s dispute resolution authority under 18 U.S.C. § 4124(b). However, because the initial step in the process is determining comparability, those issues become relevant only after the agency has made a proper comparability determination. In this regard, if the board made a binding determination that, contrary to the Corps’s finding, UNICOR’s products were comparable, the agency would be required to purchase UNICOR’s products, and the statutory compliance issues would be

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<sup>2</sup> We note that, while the comparability term “time of delivery” (in § 2410n) is not found in § 4124(b), we think the board’s authority to resolve disputes over “suitability” reasonably can be read as encompassing delivery.

academic. Thus, until the issue of comparability is resolved by the arbitration board, it would be premature for us to consider the merits of these additional issues.<sup>3</sup>

The protest is dismissed.

Anthony H. Gamboa  
General Counsel

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<sup>3</sup> The Corps argues that UNICOR's protest also is dismissible because the protest is untimely, and UNICOR is not an interested party under our Bid Protest Regulations. 4 C.F.R. §§ 21.0(a), 21.2(a)(2) (2002). We do not think either of these arguments would preclude our review in the future. First, even if the protest were not timely filed, the statutory interpretation issues would appear to constitute issues "significant to the procurement system," which we would review in accordance with 4 C.F.R. § 21.2(c). With regard to UNICOR's status as an interested party, the Corps notes that when a federal agency purchases UNICOR products, the exchange is an intragovernmental transfer, not a contract, 18 U.S.C. § 4124(c); the agency then cites our decision in American Fed'n of Gov't Employees, AFL-CIO, et al., B-282904.2, June 7, 2000, 2000 CPD ¶ 87 at 7, in which we found that unions and federal employees are not interested parties, in part, because they would not receive a contract to perform if an OMB Circular A-76 competition resulted in work being retained in-house. However, the absence of a contract was only one of several factors that led to our conclusion there; we do not think that the mere fact that an intragovernmental transfer uses a vehicle different from the contract the government typically enters into with a private firm would be a sufficient basis for finding that UNICOR is not an interested party.