

105TH CONGRESS
1ST SESSION

H. R. 2758

To amend title 18, United States Code, to minimize the unfair competition for Federal contracting opportunities between Federal Prison Industries and private firms (especially small business concerns), to provide to Federal agencies in their dealings with Federal Prison Industries the contract administration tools generally available to assure quality performance by their other suppliers, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 29, 1997

Mr. HOEKSTRA (for himself, Mr. FRANK of Massachusetts, Mr. COLLINS, Mrs. MALONEY of New York, Mr. HILLEARY, Mr. SCHUMER, Mr. COBLE, Mr. CLAY, Mr. BARTLETT of Maryland, Mr. HAMILTON, Mr. DEAL of Georgia, Mr. TORRES, Mr. MANZULLO, Mr. DEFazio, Mr. STUMP, Mr. EHLERS, Mr. OXLEY, Mr. HEFLEY, Mr. TAYLOR of North Carolina, Mr. EWING, Mr. UPTON, Mr. EVERETT, Mr. ENGLISH of Pennsylvania, Mr. CHAMBLISS, Mr. LINDER, Mr. NETHERCUTT, Mr. CRANE, Mr. RIGGS, Mr. HOSTETTLER, Mrs. EMERSON, Mr. BILBRAY, Mr. BURR of North Carolina, Mr. KNOLLENBERG, and Mr. BALLENGER) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, to minimize the unfair competition for Federal contracting opportunities between Federal Prison Industries and private firms (especially small business concerns), to provide to Federal agencies in their dealings with Federal Prison Industries the contract administration tools generally available to assure quality performance by their other suppliers, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Federal Prison Indus-

5 tries Competition in Contracting Act of 1997”.

6 **SEC. 2. GOVERNMENT-WIDE PROCUREMENT POLICY RE-**
 7 **LATING TO PURCHASES FROM FEDERAL**
 8 **PRISON INDUSTRIES.**

9 Section 4124 of title 18, United States Code, is

10 amended to read as follows:

11 **“§ 4124. Government-wide procurement policy relat-**
 12 **ing to purchases from Federal Prison In-**
 13 **dustries**

14 “(a) IN GENERAL.—Purchases from Federal Prison

15 Industries, Incorporated, a wholly owned Government cor-

16 poration, as defined in section 9101(3)(E) of title 31, may

17 be made by a Federal department or agency only in ac-

18 cordance with this section.

19 “(b) SOLICITATION AND EVALUATION OF OFFERS

20 AND CONTRACT AWARDS.—(1) When a procurement ac-

21 tivity of a Federal department or agency has a require-

22 ment for a specific product or service that is authorized

23 to be offered for sale by Federal Prison Industries (in ac-

24 cordance with section 4122 of this title) and is listed in

25 the catalog referred to in subsection (h), the procurement

1 activity shall solicit an offer from Federal Prison Indus-
2 tries, if the purchase is expected to be in excess of the
3 micro-purchase threshold as defined by section 32(f) of the
4 Office of Federal Procurement Policy Act (41 U.S.C.
5 428(f)).

6 “(2) A contract award for such product or service
7 shall be made using competitive procedures in accordance
8 with the specifications and evaluation factors specified in
9 the solicitation (or other request for offers), unless a de-
10 termination is made by the Attorney General pursuant to
11 paragraph (3).

12 “(3) The procurement activity shall negotiate with
13 Federal Prison Industries on a noncompetitive basis for
14 the award of a contract if the Attorney General determines
15 that—

16 “(A) Federal Prison Industries cannot reason-
17 ably expect to receive the contract award on a com-
18 petitive basis; and

19 “(B) the contract award is necessary to main-
20 tain work opportunities otherwise unavailable at the
21 penal or correctional facility at which the contract is
22 to be performed to prevent circumstances that could
23 reasonably be expected to significantly endanger the
24 safe and effective administration of such facility.

1 “(4) A contract award shall be made with Federal
2 Prison Industries if the contracting officer for the procure-
3 ment activity determines that—

4 “(A) the prison-made product or service to be
5 furnished will meet the requirements of the procure-
6 ment activity (including any applicable
7 prequalification requirements and all specified com-
8 mercial or governmental standards pertaining to
9 quality, testing, safety, serviceability, and warran-
10 ties);

11 “(B) timely performance of the contract can be
12 reasonably expected; and

13 “(C) the contract price does not exceed a cur-
14 rent market price.

15 “(5) A determination by the Attorney General pursu-
16 ant to paragraph (3) shall be—

17 “(A) supported by specific findings by the war-
18 den of the penal or correctional institution at which
19 a Federal Prison Industries workshop is scheduled
20 to perform the contract;

21 “(B) supported by specific findings by Federal
22 Prison Industries regarding why it does not expect
23 to win the contract on a competitive basis; and

24 “(C) made and reported in the same manner as
25 a determination made pursuant to section 303(c)(7)

1 of the Federal Property and Administrative Services
2 Act of 1949 (41 U.S.C. 253(c)(7)).

3 “(6) If the Attorney General has not made the deter-
4 mination described in paragraph (3) within 30 days after
5 Federal Prison Industries has been informed of a con-
6 tracting opportunity by a procurement activity, the pro-
7 curement activity shall conduct a procurement for the
8 product in accordance with the procedures generally appli-
9 cable to such procurements by the procurement activity.

10 “(c) COMPETITIVE OFFERS FROM FEDERAL PRISON
11 INDUSTRIES.—A timely offer from Federal Prison Indus-
12 tries shall be eligible for award in accordance with the
13 specification and evaluation factors specified in any com-
14 petitive solicitation.

15 “(d) PERFORMANCE BY FEDERAL PRISON INDUS-
16 TRIES.—Federal Prison Industries shall be required to
17 perform its contractual obligations under a contract
18 awarded by a Federal department or agency to the same
19 extent as any other contractor under such a contract.

20 “(e) FINALITY OF CONTRACTING OFFICER’S DECI-
21 SION.—(1) A decision by a contracting officer regarding
22 the award of a contract to Federal Prison Industries or
23 relating to the performance of such contract shall be final,
24 unless reversed on appeal pursuant to paragraph (2) or
25 (3).

1 “(2) The Chief Executive Officer of Federal Prison
2 Industries may appeal to the head of a Federal depart-
3 ment or agency a decision by a contracting officer not to
4 award a contract to Federal Prison Industries pursuant
5 to subsection (b)(4). The decision of the head of a Federal
6 department or agency on appeal shall be final.

7 “(3) A dispute between Federal Prison Industries
8 and a procurement activity regarding performance of a
9 contract shall be subject to—

10 “(A) alternative means of dispute resolution
11 pursuant to subchapter IV of title 5; or

12 “(B) final resolution by the board of contract
13 appeals having jurisdiction over the procurement ac-
14 tivity’s contract performance disputes pursuant to
15 the Contract Disputes Act of 1978 (41 U.S.C. 601
16 et seq.).

17 “(f) REPORTING OF PURCHASES.—Each Federal de-
18 partment or agency shall report purchases from Federal
19 Prison Industries to the Federal Procurement Data Sys-
20 tem (as referred to in section 6(d)(4) of the Office of Fed-
21 eral Procurement Policy Act (41 U.S.C. 405(d)(4))) in the
22 same manner as it reports to such System any acquisition
23 in an amount in excess of the simplified acquisition thresh-
24 old (as defined by section 4(11) of the Office of Federal
25 Procurement Policy Act (41 U.S.C. 403(11))).

1 “(g) CATALOG OF PRODUCTS.—Federal Prison In-
 2 dustries shall publish and maintain a catalog of all specific
 3 products and services that it is authorized to offer for sale.
 4 Such catalog shall be periodically revised as products and
 5 services are added or deleted by its board of directors (in
 6 accordance with section 4122(b) of this title).”.

7 **SEC. 3. PUBLIC PARTICIPATION REGARDING EXPANSION**
 8 **PROPOSALS BY FEDERAL PRISON INDUS-**
 9 **TRIES.**

10 Section 4122(b) of title 18, United States Code, is
 11 amended —

12 (1) by redesignating paragraph (6) as para-
 13 graph (10); and

14 (2) by striking paragraphs (4) and (5) and in-
 15 serting the following paragraphs:

16 “(4) A decision to authorize Federal Prison Indus-
 17 tries to offer a new specific product or service or to expand
 18 the production of an existing product or service shall be
 19 made by its board of directors in conformance with the
 20 requirements of subsections (b), (c), (d), and (e) of section
 21 553 of title 5, and this chapter.

22 “(5)(A) The corporation shall prepare and furnish to
 23 the board of directors for its consideration a detailed anal-
 24 ysis of the probable impact on private sector firms and
 25 their employees of a proposal to authorize the sale of a

1 new specific product or service or to expand production
2 of a currently authorized product or service.

3 “(B) The analysis made pursuant to subparagraph
4 (A) shall identify and consider—

5 “(i) the number of vendors that currently meet
6 the requirements of the Federal Government for the
7 specific product or service;

8 “(ii) the proportion of the Federal Government
9 market for the specific product or service currently
10 furnished by small businesses during the previous 3
11 fiscal years;

12 “(iii) the share of the Federal market for the
13 specific product or service projected for Federal
14 Prison Industries for the fiscal year in which pro-
15 duction or performance will commence (or expand)
16 and the subsequent 3 fiscal years;

17 “(iv) whether the industry producing the prod-
18 uct in the private sector—

19 “(I) has an unemployment rate higher
20 than the national average;

21 “(II) has a rate of employment for produc-
22 tion workers that has consistently shown an in-
23 crease during the previous 5 years; or

24 “(III) has an import to domestic produc-
25 tion ratio of 25 percent or greater;

1 “(v) the total volume of domestic production
2 during each of the 5 previous years in the industry
3 producing the specific product in the private sector;

4 “(vi) whether the specific product is an import-
5 sensitive product;

6 “(vii) the requirements of the Federal Govern-
7 ment and the demands of entities other than the
8 Federal Government for the specific product or serv-
9 ice during the previous 3 fiscal years;

10 “(viii) the projected growth (or decline) in the
11 demand of the Federal Government for the specific
12 product or service;

13 “(ix) the capability of the projected demand of
14 the Federal Government for the specific product or
15 service to sustain both Federal Prison Industries
16 and private vendors; and

17 “(x) whether authorizing the production of the
18 new product or performance of a new service will
19 provide inmates with the maximum opportunity to
20 acquire knowledge and skill in trades and occupa-
21 tions that will provide them with a means of earning
22 a livelihood upon release.

23 “(C)(i) The board of directors may not approve a pro-
24 posal to authorize the production and sale of a new spe-
25 cific product (or continued sales of a previously authorized

1 product) unless the product to be furnished is a prison-
2 made product.

3 “(ii) The board of directors may not approve a pro-
4 posal to authorize the production and sale of a new prison-
5 made product or to expand production of a currently au-
6 thorized product if the product is—

7 “(I) produced in the private sector by an indus-
8 try which has reflected during the previous year an
9 unemployment rate above the national average; or

10 “(II) an import-sensitive product.

11 “(iii)(I) Federal Prison Industries is prohibited from
12 furnishing construction services relating to buildings,
13 structures, or other real property.

14 “(II) For purposes of this clause, the term ‘construc-
15 tion’ has the meaning given such term by section 36.102
16 of the Federal Acquisition Regulation (48 C.F.R. part
17 36.102), as in effect on July 1, 1997 (including the repair,
18 alteration, or maintenance of real property in being).

19 “(6) To provide further opportunities for participa-
20 tion by interested parties, the board of directors shall—

21 “(A) give additional notice of a proposal to au-
22 thorize the production and sale of a new product or
23 expand the production of a currently authorized
24 product in a publication designed to most effectively
25 provide notice to private vendors and labor unions

1 representing private sector workers who could rea-
2 sonably be expected to be affected by approval of the
3 proposal, which notice shall offer to furnish copies of
4 the analysis required by paragraph (5) and shall so-
5 licit comment on the analysis;

6 “(B) solicit comments on the analysis required
7 by paragraph (5) from trade associations represent-
8 ing vendors and labor unions representing private
9 sector workers who could reasonably be expected to
10 be affected by approval of the proposal to authorize
11 the production and sale of a new product or expand
12 the production of a currently authorized product;
13 and

14 “(C) afford an opportunity, on request, for a
15 representative of an established trade association,
16 labor union, or other representatives of private in-
17 dustry to present comments on the proposal directly
18 to the board of directors.

19 “(7) The corporation shall provide to the board of
20 directors its recommendation regarding action on the pro-
21 posal taking into consideration the comments received.

22 “(8) The board of directors shall consider a proposal
23 to authorize the sale of a new product or service (or to
24 modify the volume of sales for a currently authorized prod-
25 uct or service) and take any action with respect to such

1 proposal, during a meeting that is open to the public, un-
 2 less closed pursuant to section 5526 of title 5.

3 “(9) In conformity with the requirements of para-
 4 graphs (5) through (8) of this subsection, the board of
 5 directors may—

6 “(A) authorize the donation of products pro-
 7 duced by Federal industries and available for sale;
 8 or

9 “(B) authorize the production of a new specific
 10 product for donation.”.

11 **SEC. 4. FEDERAL PRISON INDUSTRIES REPORT TO CON-**
 12 **GRESS.**

13 Section 4127 of title 18, United States Code, is
 14 amended to read as follows:

15 **“§ 4127. Federal Prison Industries report to Congress**

16 “(a) IN GENERAL.—Pursuant to chapter 91 of title
 17 31, the board of directors of Federal Prison Industries
 18 shall submit an annual report to Congress on the conduct
 19 of the business of the corporation during each fiscal year
 20 and the condition of its funds during the fiscal year.

21 “(b) CONTENTS OF REPORT.—In addition to the
 22 matters required by section 9106 of title 31, and such
 23 other matters as the board considers appropriate, a report
 24 under subsection (a) shall include—

1 “(1) a statement of the amount of obligations
2 issued under section 4129(a)(1) of this title during
3 the fiscal year;

4 “(2) an estimate of the amount of obligations
5 that will be issued in the following fiscal year;

6 “(3) an analysis of—

7 “(A) the corporation’s total sales for each
8 specific product sold to the Federal depart-
9 ments and agencies;

10 “(B) the total purchases by each Federal
11 department or agency of each specific product;

12 “(C) the corporation’s share of such total
13 Federal Government purchases by specific prod-
14 uct; and

15 “(D) the number and disposition of dis-
16 putes submitted to the heads of the Federal de-
17 partments and agencies pursuant to section
18 4124(e) of this title;

19 “(4) an analysis of the inmate workforce that
20 includes—

21 “(A) the number of inmates employed;

22 “(B) the number and percentage of em-
23 ployed inmates by the term of their incarcer-
24 ation; and

1 “(C) the various hourly wages paid to in-
2 mates employed with respect to the production
3 of the various specific products authorized for
4 production and sale; and

5 “(5) data concerning employment obtained by
6 former inmates upon release to determine whether
7 the employment provided by Federal Prison Indus-
8 tries during incarceration provided such inmates
9 with knowledge and skill in a trade or occupation
10 that enabled such former inmate to earn a livelihood
11 upon release.

12 “(c) PUBLIC AVAILABILITY.—Copies of an annual re-
13 port under subsection (a) shall be made available to the
14 public at a price not exceeding the cost of printing the
15 report.”.

16 **SEC. 5. DEFINITIONS.**

17 Chapter 307 of title 18, United States Code, is
18 amended by adding at the end the following new section:

19 **“§ 4130. Definitions**

20 “As used in this chapter—

21 “(1) the term ‘assembly’ means the process of
22 uniting or combining articles or components (includ-
23 ing ancillary finished components or assemblies) so
24 as to produce a significant change in form or utility,

1 without necessarily changing or altering the compo-
2 nent parts;

3 “(2) the term ‘current market price’ means,
4 with respect to a specific product, the fair market
5 price of the product within the meaning of section
6 15(a) of the Small Business Act (15 U.S.C. 644(a)),
7 at the time that the contract is to be awarded (veri-
8 fied through appropriate price analysis or cost analy-
9 sis), including any costs relating to transportation or
10 the furnishing of any ancillary services;

11 “(3) the term ‘import-sensitive product’ means
12 a product which, according to Department of Com-
13 merce data, has experienced competition from im-
14 ports at an import to domestic production ratio of
15 25 percent or greater;

16 “(4) the term ‘labor-intensive manufacture’
17 means a manufacturing activity in the private sector
18 in which the ratio of the value of direct labor to the
19 value of the product prior to shipment exceeds 20
20 percent;

21 “(5) the term ‘manufacture’ means the process
22 of fabricating from raw or prepared materials, so as
23 to impart to those materials new forms, qualities,
24 properties, and combinations;

1 “(6) the term ‘prison-made products’ means
2 specific products that require labor-intensive manu-
3 facture or assembly employing Federal prison in-
4 mates for not less than 75 percent of the hours of
5 direct labor required for the production of the prod-
6 uct;

7 “(7) the term ‘reasonable share of the market’
8 means a share of the total purchases by the Federal
9 departments and agencies, as reported to the Fed-
10 eral Procurement Data System for any specific prod-
11 uct during the 3 preceding fiscal years, that does not
12 exceed 20 percent of the Federal market for the spe-
13 cific product;

14 “(8) the term ‘services’ has the meaning given
15 the term ‘service contract’ by section 37.101 of the
16 Federal Acquisition Regulation (48 C.F.R. part
17 36.102), as in effect on July 1, 1997; and

18 “(9) the term ‘specific product’ means a prod-
19 uct that is designed and manufactured to meet re-
20 quirements distinct in function and predominant ma-
21 terial of manufacture from another product, as de-
22 scribed by—

23 “(A) the 7-digit classification for the prod-
24 uct in the Standard Industrial Classification
25 (SIC) Code (or any successor classification sys-

tem) published by the Office of Management and Budget (or if there is no 7-digit code classification for a product, the 5-digit code classification); and

“(B) for purposes of reporting on sales by Federal Prison Industries, the current National Stock Number assigned to such product under the Federal Stock Classification System (including group, part number and section), as determined by the General Services Administration.”.

**SEC. 6. IMPLEMENTATION IN THE FEDERAL ACQUISITION
REGULATION.**

(a) PROPOSED REVISIONS.—Proposed revisions to the Government-wide Federal Acquisition Regulation to implement the amendments made by this Act shall be published not later than 60 days after the date of the enactment of this Act and provide not less than 60 days for public comment.

(b) FINAL REGULATIONS.—Final regulations shall be published not later than 180 days after the date of the enactment of this Act and shall be effective on the date that is 30 days after the date of publication.

(c) PUBLIC PARTICIPATION.—The proposed regulations required by subsection (a) and the final regulations

1 required by subsection (b) shall afford an opportunity for
2 public participation in accordance with section 22 of the
3 Office of Federal Procurement Policy Act (41 U.S.C.
4 418b).

5 **SEC. 7. RULE OF CONSTRUCTION.**

6 Subsection (e) of section 4124 of title 18, United
7 States Code, as amended by section 2, is not intended to
8 alter any rights of any offeror other than Federal Prison
9 Industries to file a bid protest in accordance with other
10 law or regulation in effect on the date of the enactment
11 of this Act.

12 **SEC. 8. EFFECTIVE DATE AND APPLICABILITY.**

13 (a) EFFECTIVE DATE.—Except as provided in sub-
14 section (b), this Act and the amendments made by this
15 Act shall take effect on the date of enactment of this Act.

16 (b) APPLICABILITY.—Section 4124 of title 18, United
17 States Code, as amended by section 2, shall apply to any
18 requirement for a product or service offered by Federal
19 Prison Industries needed by a Federal department or
20 agency after the effective date of the final regulations is-
21 sued pursuant to section 6(b), or after June 30, 1998,
22 whichever is earlier.

23 **SEC. 9. CLERICAL AMENDMENTS.**

24 The table of sections for chapter 307 of title 18,
25 United States Code, is amended—

1 (1) by inserting in lieu of the item relating to
2 section 4124 the following:

“4124. Government-wide procurement policy relating to purchases from Federal
Prison Industries.”;

3 (2) by inserting in lieu of the item relating to
4 section 4127 the following:

“4127. Federal Prison Industries report to Congress.”;

5 and

6 (3) by adding at the end the following new
7 item:

“4130. Definitions.”.

○