

CRS Report for Congress

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Federal Prison Industries

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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 roughly 174,000 inmates held in federal prisons, about 22,000 or 12% are employed by UNICOR. In FY2002, UNICOR ranked 32nd out of the top 100 largest federal contractors. By statute, UNICOR must be economically self-sustaining, thus it does not receive funding through congressional appropriations. In FY2003, FPI generated \$667 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 74% go towards the purchase of raw material and equipment; 20% go towards staff salaries; and 6% go towards inmate salaries.

In recent years, the Administration has made several efforts to mitigate the competitive advantage UNICOR has over the private sector. Going beyond the Administration's efforts, Congress has taken legislative action to lessen the adverse impact FPI has caused on small businesses. For example, in 2002 and 2003, 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); and in 2003, 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. The 108th Congress is considering legislation that would, among other things, permanently eliminate the requirement that federal agencies must purchase products from FPI. The House passed the "Federal Prison Industries Competition Act of 2003" (H.R. 1829) on November 6, 2003. The Senate Committee on Governmental Affairs favorably marked up a similar bill (S. 346), after approving an amendment, on June 2, 2004. This report will be updated as warranted.

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Federal Prison Industries

Most Recent Developments

The House passed the “Federal Prison Industries Competition Act of 2003” (H.R. 1829) on November 6, 2003, which would, among other things, phase out over five years the Federal Prison Industries’ mandatory source clause. In essence, the act would eliminate the requirement for federal agencies to purchase products from the Federal Prison Industries (FPI) and would cease treating FPI as a preferential provider for services. The Senate Committee on Governmental Affairs favorably marked up a similar bill (S. 346), after approving an amendment, on June 2, 2004.

Introduction

UNICOR,¹ 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) Federal Bureau of Prisons (BOP).² 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 legislation³ and the Federal Acquisition Regulation (FAR)⁴ 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.⁵ (See discussion below, under “Legislative History” section.) Such waivers can be granted by UNICOR to executive agencies if its price exceeds the current market price for

¹ UNICOR and the FPI are used interchangeably throughout this report.

² 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).

³ See 18 USC §4121 *et seq.*

⁴ FAR was developed in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974 (P.L. 93-400).

⁵ 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.

comparable products.⁶ Federal agencies, however, are not required to procure *services* provided by UNICOR but are encouraged to do so pursuant to FAR.⁷ It is this “mandatory source clause”⁸ 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 provides a summary of the statutory history of FPI and other laws affecting the industry. It also discusses legislative activity in the 108th 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 non-competitive federal government contracting.

Background

As the federal prison system was established in the first decade of the 20th century, factories were constructed within the prisons to manufacture products needed by the federal government. Labor 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.⁹ 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.”¹⁰

Authority. FPI is administered by a six-person Board of Directors that is appointed by the President. Its enabling act¹¹ requires that representatives of industries, agriculture, labor, and retailers and consumers serve as board members.¹² The board’s decision-making regarding products to be manufactured and areas of

⁶ See Bureau of Prisons Program Statement 8224.02, *FPI Pricing Procedures*.

⁷ 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.

⁸ Also referred to as “superpreference,” “sole source,” or “preferential status.”

⁹ See Executive Order 6917.

¹⁰ 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).

¹¹ See 18 USC §4121.

¹² 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.

expansion are driven by a goal of employing the greatest possible number of inmates.¹³

Activities. Of the roughly 174,000 inmates held in federal prisons, about 22,000 or 12% are employed by UNICOR. In FY2002, UNICOR ranked 32nd out of the top 100 largest federal contractors. UNICOR has 111 factories in 71 federal prisons representing eight different industrial operations.¹⁴ UNICOR's eight industrial operations are comprised of roughly 150 different types of products and services. UNICOR's industrial operations include the following:

- clothing and textiles;
- graphics (which includes general printing services);
- electronics;
- fleet management and vehicular components;
- industrial products;
- office furniture;
- recycling activities; and
- services (which includes data entry and encoding).¹⁵

UNICOR is economically self-sustaining and does not receive funding through congressional appropriations. In FY2003, FPI generated \$667 million in sales.¹⁶ 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 74% go towards the purchase of raw material and equipment; 20% go towards staff salaries; and 6% go towards inmate salaries.¹⁷ 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 \$2.8 million in FY2003; the rest may be retained by the inmate.¹⁸

¹³ 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.”

¹⁴ There are currently 104 federal prisons in the United States.

¹⁵ UNICOR's 2002 Annual Report at [<http://www.unicor.gov>].

¹⁶ March 2004 telephone interview with BOP congressional liaison office.

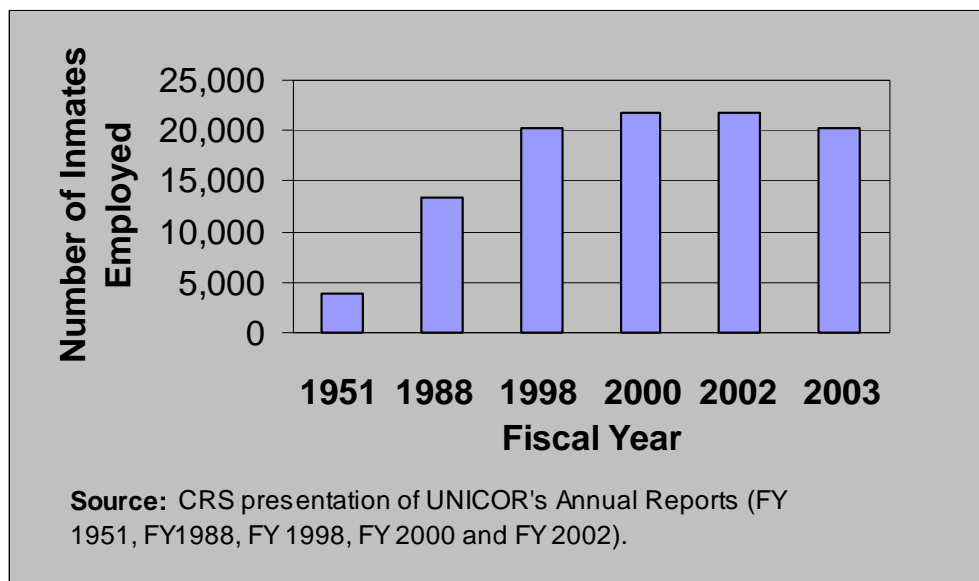
¹⁷ Ibid.

¹⁸ Ibid.

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.¹⁹ 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; and in FY2002, UNICOR employed 21,778 federal inmates (see **Figure 1**). In FY2003, however, the number of inmates employed in FPI declined slightly from FY2002, to 20,274.

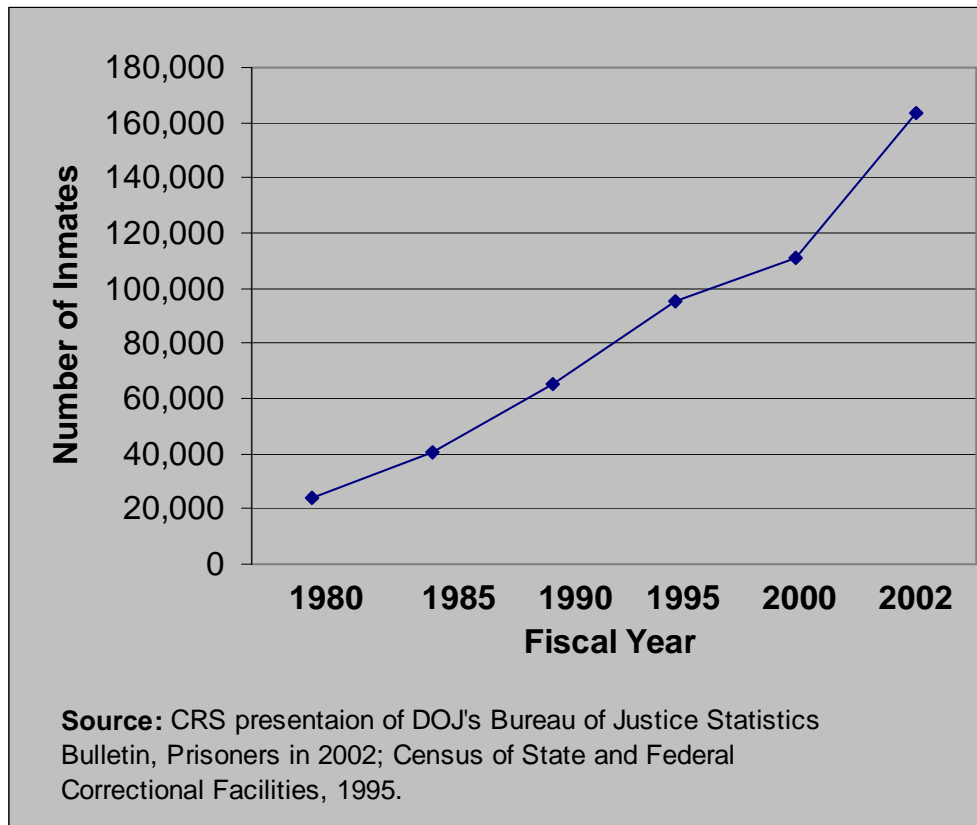
Figure 1. Federal Inmates Employed in FPI for Selected Years



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 over 100% since 1980, ranging from 24,000 in 1980 to 163,000 in 2002.²⁰

¹⁹ 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).

²⁰ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Bulletin, Prisoners in 2002, 1994; and Census of State and Federal Correctional Facilities, 2000, 1995.*

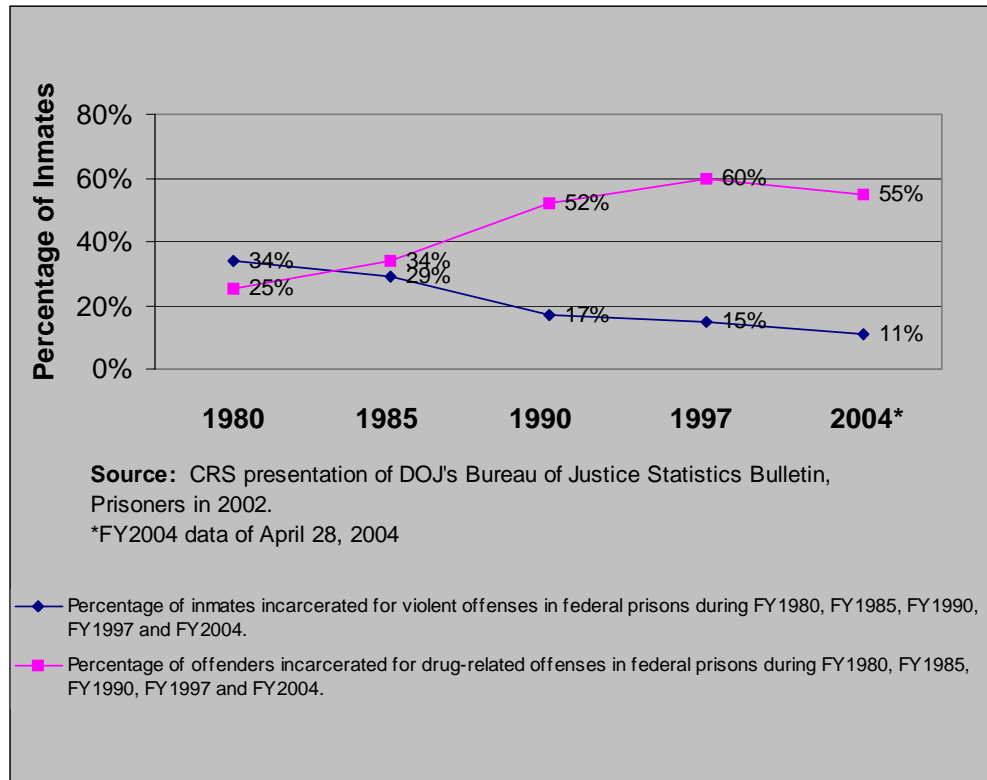
Figure 2. Federal Prison Population for Selected Years

Characteristics of Federal Inmates. As Congress began to define and expand crimes eligible for federal penalties in the late 19th 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 19th and the first part of the 20th 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 20th 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.²¹ 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.

²¹ 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



Effects of FPI on Recidivism Rates. The majority of incarcerated individuals will be released back into society. According to testimony at a recent 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....”²² Many scholars assess the effects of prison on an inmate’s ability to successfully reintegrate into society. The recidivism rate²³ is widely used to measure such effects.

While there have been many studies on the recidivism rate 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.²⁴ Some of the studies also found that the rate of

²² 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, 108th Cong., 2nd sess., Apr. 7, 2004 (Washington: GPO, 2004).

²³ Recidivism is the conviction (due to a new crime being committed) of a person who had been previously convicted.

²⁴ Arizona Department of Corrections, *ACI's Impact on Recidivism*, see (continued...)

inmates who recidivate goes up each subsequent year.²⁵ 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.

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.²⁶

Opponents contend, however, that prison industries do not have an effect on whether or not 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.²⁷

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.

²⁴ (...continued)

[<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*, Mar. 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.

²⁵ Ibid.

²⁶ 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, Sept. 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*, Nov. 1995; and the State of New York, Department of Correctional Services, *Follow-up Study of Industry Training Program Participants 1993*.

²⁷ 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; the Metropolitan Crime Commission, *The Project Return Program: Measuring Recidivism in the Reintegration Program for Ex-Offenders*, May 2000.

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.²⁸

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.²⁹

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.³⁰ 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

²⁸ 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 \$.23 and \$1.15 per hour) and that under current UNICOR policy 50% of inmates' wages must go towards court ordered obligations.

²⁹ 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.

³⁰ CRS analysis of FPI waiver data from FY1994 to the first six months in FY2004.

20%. Finally, the Board of Directors requires prison-made products sold by FPI to have at least 20% of its value contributed by inmate labor.³¹

In addition to FPI's Board of Director's decisions, federal agencies began to evaluate FPI's contract performance. According to testimony at a recent 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."³²

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.³³ The only amendments to the statute were relatively recent provisions added in 1988, 1990, 1992, and 2002.³⁴

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 Department of Defense contracts. In 2002, Congress passed legislation that modified FPI's mandatory source clause with respect to the DOD,³⁵ 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 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;

³¹ Some critics contend that FPI is purchasing products that have already been assembled, which requires very little labor on the part of inmates.

³² 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, 108th Cong., 2nd sess., Apr. 7, 2004 (Washington: GPO, 2004).

³³ P.L. 80-772, codified at 18 USC §4121 *et seq.*

³⁴ 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.

³⁵ See 10 USC §2410n.

- 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.

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) requires 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 requires 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 Fiscal Year 2003. Similar to P.L. 107-107, the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (P.L. 107-314) also requires 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 makes such determinations final and not subject to review. The act requires 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) eliminates 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) requires 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.

Legislation in the 108th Congress

Two bills have been introduced in the 108th Congress (The Federal Prison Industries Competition in Contracting Act of 2003, H.R. 1829; and S. 346) that would, in essence, permanently eliminate FPI's mandatory source clause. A discussion of the major similarities and differences between the bills follows.

Elimination of the Mandatory Source Clause. H.R. 1829 and S. 346 would require competitive procedures in the procurement of products authorized for sale by FPI, unless otherwise determined by the Attorney General, as discussed below. Both bills would require executive agencies to solicit an offer from FPI when making a purchase that is authorized for sale by FPI in excess of \$2,500. In making purchase considerations, S. 346 would require executive agencies to notify FPI of the procurement at the same time and in the same manner as other potential offerors. H.R. 1829 does not have a similar provision. S. 346 would also require executive agencies to consider a timely offer from FPI in the same manner as other potential offerors. H.R. 1829 does not have a similar provision. Both bills would require FPI to perform its contractual obligations to the same extent as any other contractor for the executive agency.

H.R. 1829 would permit the Chief Executive Officer of FPI to appeal a contracting decision to the head of the executive agency wherein FPI was denied a contract; such appellate decisions would be final. S. 346 does not have similar provisions.

Both bills contain language that would prohibit executive agencies from making purchases from FPI unless it is determined that the product or service is comparable to products and services from private businesses with respect to price, quality and time of delivery.

Exceptions to the Elimination of the Mandatory Source Clause. Both bills, however, would permit the Attorney General to make an exception to the more open competitive process under certain circumstances, including when

- FPI cannot reasonably expect fair consideration with respect to procuring a contract on a competitiveness basis; and
- the contract is necessary to maintain work opportunities otherwise unavailable at the penal facility to prevent unrest.

S. 346 would also permit an exception to the open competitive process if the product or service is only available from FPI or the executive agency determines that the product would otherwise be produced by prison labor outside the United States.

Both bills would require that competitive process exception determinations made by executive agencies be

- supported by specific findings by FPI regarding why it does not expect to win the contract on a competitive basis;
- supported by specific findings by the warden of the correctional facility that the contract is necessary to maintain work opportunities otherwise unavailable at the penal facility to prevent unrest; and
- made and reported in the same manner as a determination made pursuant to 41 U.S.C. 253(c)(7).³⁶

Both bills would require the Attorney General to make a determination with respect to the aforementioned within 30 days after FPI has been informed of the contracting opportunity.

Transitional Period. H.R. 1829 would provide a five-year transitional period that would require federal agencies to first solicit FPI for the procurement of products or services that are authorized for sale by FPI. During the transition period, the bill would require the noncompetitive award of a contract to FPI if the following is determined:

- that the product offered by FPI will meet the procurement activity;
- that it can reasonably be expected that FPI will achieve timely performance; and
- the negotiated price does not exceed a fair and reasonable price.

H.R. 1829 would require FPI and the federal agency making the purchase to negotiate the terms and conditions, including the price to be paid to FPI, of the contract. The bill would prohibit the price negotiated to exceed a “fair and reasonable price” pursuant to FAR.

During the five-year transitional period, H.R. 1829 would prohibit FPI’s mandatory source sales from exceeding a certain percentage of FPI’s total sales during the base year (the bill would define the base year as FY2002). For example, in FY2005, FPI cannot use its mandatory source status in more than 90% of sales

³⁶ 41 U.S.C. 253(c)(7) permits heads of executive agencies to use noncompetitive procedures in the procurement of goods and services if it is determined that “... it is in the public interest to use procedures other than competitive procedures in the particular procurement concerned....”

made during the base year; in not more than 85% in FY2006; in not more than 70% in FY2007; in not more than 55% in FY2008; and in not more than 40% in FY2009. The bill would also require the Attorney General to report to Congress on the effects of this limitation. The bill would set an October 1, 2009 termination date for FPI's mandatory source status. S. 346 does not contain a transitional period provision.

FPI as a Subcontractor. Both bills would permit federal contractors to *voluntarily* enter into subcontracts with FPI but would prohibit the sale of FPI's products and services directly in the commercial market. Additionally, both bills contain language that make explicit that contractors would not be compelled to use FPI as a subcontractor or a supplier.

Other Provisions. S. 346 would prohibit executive agencies from entering into contracts with FPI wherein inmates would be exposed to classified and sensitive information. H.R. 1829 does not have a similar provision.

H.R. 1829 has a provision that would require the Attorney General to provide rehabilitative, vocational and educational opportunities for federal inmates. S. 346 does not have a similar provision.

H.R. 1829 has a provision that would make explicit the statutory prohibition on the sale of services performed in FPI and other correctional facilities (i.e., state and local correctional facilities) to industries engaged in interstate or foreign commerce. The bill, however, would exempt state and local correctional facilities that participate in the PIE Program from the provision.³⁷ The introduced version of S. 346 had a similar provision, but it was stricken by the bill's author during its markup on June 2, 2004.

H.R. 1829 would require public participation in the Board of Directors' decision-making process in determining whether FPI should add a new product or service line, or expand an existing product or service line. Moreover, the bill would also require a market analysis to determine whether the private sector would be adversely impacted with respect to FPI adding a new product or service line, or expanding an existing product or service line. H.R. 1829 would also set forth limitations with respect to FPI's Board of Directors' power to authorize a new product or service line, or expand an existing product or service line. On a similar note, H.R. 1829 would restructure FPI's Board of Directors from a six-member board to an 11-member board. S. 346 does not have similar provisions.

During the markup of S. 346, the Senate Committee on Governmental Affairs approved an amendment that would create new inmate job opportunities through selling or donating FPI products to charities and permitting FPI to expand or produce new products that are manufactured outside of the United States.

The House passed H.R. 1829 on November 6, 2003. The Senate Committee on Governmental Affairs favorably marked up S. 346, amended, on June 2, 2004.

³⁷ PIE is a federally sponsored grant program that provides funding to states once they have been certified for work industries in state and local correctional facilities. See fn 2, *supra*.

Related Bills. Three bills, H.R. 1982; the Service Acquisition Reform Act of 2003 (H.R. 1837); and the FY2004 Transportation, Treasury and Independent Agencies Appropriations Act of 2004 (H.R. 2989), have been introduced in the 108th Congress that would, among other things, require federal agencies to determine whether FPI products represent the best value to the taxpayer before purchasing them and, if not, to require competition for federal contracts. With the exception of H.R. 1837, which was favorably reported out of the House Committee on Government Reform on May 19, 2003 and the House Judiciary Committee on September 3, 2003, the other bills have not received action.

Issues

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.”³⁸ 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.³⁹ 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 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.⁴⁰ 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.

³⁸ UNICOR’s 2002 Annual Report, p. 5 at [<http://www.unicor.gov>].

³⁹ Statement of BOP Director Kathleen Hawk Sawyer, in U.S. Congress, House Committee on the Judiciary, *Federal Prison Industries*, hearings, 106th Cong., 2nd sess., Oct. 5, 2000.

⁴⁰ 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.

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),⁴¹ 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.⁴² 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

⁴¹ 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."

⁴² 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.

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.⁴³

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...."⁴⁴

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...."⁴⁵

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; and between 1992 to 1999, FPI had an average delinquency rate of 31%.⁴⁶ However, Deloitte and Touche did not report comparable data for private sector contractors.

Summary. 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

⁴³ Deloitte and Touche, *Independent Market Study of UNICOR, Federal Prison Industries, Inc.*, Executive Summary, Aug. 7, 1991.

⁴⁴ U.S. General Accounting Office, *Federal Prison Industries: Delivery Performance Is Improving But Problems Remain*, GAO/GGD-98-118, June 1998.

⁴⁵ U.S. General Accounting Office, *UNICOR Products: Federal Prison Industries Can Further Ensure Customer Satisfaction*, GAO/GGD86-6, Nov. 1, 1985.

⁴⁶ 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, 106th Cong., 2nd sess., Oct. 5, 2000.

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.⁴⁷ 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 March 10, 2003, the Board of Directors adopted resolutions that require FPI to develop a plan to end the application of mandatory sourcing with respect to those products where FPI's share of the federal market exceeds 20%.⁴⁸

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

⁴⁷ See UNICOR, *Factories with Fences*, at [http://www.unicor.gov/history_of_success.htm].

⁴⁸ See [<http://www.unicor.gov/about/bodresmansource.htm>].