

**SMALL BUSINESS ADMINISTRATION  
Office of Government Contracting  
Area 2**

**SIZE DETERMINATION**

Case No. 2-2005-23 & 42

Date: February 3, 2005  
Firm: Federal Prison Industries a/k/a UNICOR  
Address: Washington, DC  
Solicitation No.: RFQ-DC-04-00083  
NAICS Code: 562219  
Size Standard: \$10.5 million

**INTRODUCTION:**

This size determination is issued by the Area 2 Office of Government Contracting, U.S. Small Business Administration, pursuant to 13 CFR §121.

On March 19, 2004, the Environmental Protection Agency ("EPA") issued a solicitation (solicitation # RFQ-DC-04-00083) for Recycling Electronics and Asset Disposition ("READ") Services under a Government Wide Acquisition Contract ("GWAC") as a small business set-aside. The solicitation was to acquire services under NAICS code 562219, 562920, and 562211. On December 16, 2004 eight awards were made under the READ GWAC, one of which, a National contract, went to the Federal Prison Industries ("FPI") a/k/a UNICOR. Unsuccessful offerors were notified by letter dated December 15, 2004 that successful offerors had been selected for this procurement.

Global Investment Recovery ("Global"), an interested party who was awarded the western portion of this contract, received notification of award to FPI via EPA's website. Global protested the award made to FPI on the basis that it is a large business and not an entity organized for profit and, as such, would not be eligible for a small business set-aside award.

Also, an unsuccessful offeror, Creative Recycling Solutions, Inc. ("Creative") filed an oral protest with the contract specialist on December 21, 2004 and filed a written protest on December 22, 2004, alleging that FPI is not eligible for award because it is not a small business concern. Creative provided financial statements and other documentation supporting its claim.

Both protests were timely and specific and were combined for purposes of making a size determination.

**EVIDENCE:**

Upon receipt of this protest, this office requested that FPI respond to the allegations, complete and return SBA Form 355, and provide Articles of Incorporation, bylaws, and complete financial statements and Federal income tax returns for the last three fiscal years preceding self-certification for this procurement.

FPI responded to the allegations by stating that it is eligible to compete for this procurement because recent changes in the law now define small business set asides as including FPI. FPI contends that the protest should be denied.

FPI stated that as part of the Consolidated Appropriations Act for FY 2004 (P.L. 108-199), Congress passed section 637 (Division F) which reads:

"None of the funds made available under this or any other Act for fiscal year 2004 shall be expended for the purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making such purchase determines that such offered product or service provides the best value to the buying agency pursuant to Government-wide procurement regulations, issued pursuant to section 25(c) (1) of the Office of Federal Procurement (41 U.S.C. 421 (c) (1)) that impose procedures, standards, and limitations of section 2410n of title 10, United States Code."

FPI stated that the above provision applies to both products and services and was renewed for fiscal 2005 and each year thereafter. Consolidated Appropriations Act for FY 2005, Division H, § 637 (P.L. 108-447).

In addition, FPI stated that on March 26, 2004, the Federal Acquisition Regulations ("FAR") Council issued an interim rule (published in volume 69 F.R. 16148-51) amending FAR Parts 8, 19, 42, and 52, in accordance with Section 637. FPI stated that FAR Part 19, Small Business Programs, was amended by adding section 19.504, which requires agencies to "include FPI in the solicitation process and consider a timely offer from FPI." FPI noted that FAR clause 52.219-6 was amended with respect to small business set-asides to include FPI. The amended clause reads as follows:

"(b) General. (1) Offers are solicited only from small business concerns and Federal Prison Industries, Inc. (FPI). Offers received from concerns that are not small business concerns or FPI shall be considered nonresponsive and will be rejected. (2) Any award resulting from this solicitation will be made to wither a small business concern or FPI."

FPI also noted that the Department of Defense issued a final rule on November 13, 2003, which amended the Defense Federal Acquisition Regulations (DFARS), which was identical to the interim rule noted above.

In summary, FPI contends that recent changes in the law allow it to compete for all competitive procurements, even those established as small business set-asides. FPI asserts that the protest must be denied. It is noted that FPI only provided a response to the allegations stated in the protests and did not provide any other documentation.

#### **FINDINGS:**

Under all three of the NAICS codes (562219, 562920, and 562211) for the solicitation issued by EPA, the applicable size standard is \$10.5 million in annual receipts. For the purpose of calculating annual receipts, 13 CFR 121.104 (c) (1) provides as follows:

Annual receipts of a concern that has been in business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three.

FPI's website provides financial information that reflects average revenues well over the applicable size standard of \$10.5 million. Moreover, FPI does not dispute or challenge its actual business size. Therefore, it is determined that FPI is other than a small business concern.

Besides exceeding the applicable size standard of \$10.5 million in annual receipts, FPI does not even qualify as a "business concern" eligible to bid on set asides for small business concerns. Our regulations at 13 CFR 124.105(a) state that a "business concern eligible for assistance from SBA as a small business is a business entity organized for profit..." FPI is a non-profit entity. Therefore, for this reason as well as its annual receipts, it is determined that FPI is other than a small business concern.

However, as outlined above, FPI nevertheless contends that amendments to FAR Parts 8, 19, 42, and 52 enable it to compete on small business set-aside procurements. It is noted that FPI's contentions would be correct if EPA were acquiring supplies rather than services. However, a significant fact that must be noted is that the instant procurement is for **services** and not **supplies**. The interim rule cited by FPI excepts services from the competitive process contained in FAR 8.602(b)(4) requiring the inclusion of FPI.

Initially, it is helpful to examine the language of FAR 19.504 which states that "[w]hen using competitive procedures in accordance with 8.602(b)(4), agencies shall include Federal Prison Industries, Inc. (FPI), in the solicitation process and consider a timely offer from FPI." Hence, it is clear that agencies are only required to include FPI in the solicitation process when using the competitive procedures contained in FAR 8.602(b)(4). In reading FAR 8.602(b)(4), it indicates that competitive procedures, including those under subpart 19.5 of the FAR, must include FPI for items listed on the FPI Schedule. However, there is no mention of services being included in the competitive procedures of FAR 8.602(b)(4). Moreover, subsection (c) goes on to state that "[t]he [competitive] procedures in paragraph (b) of this section do not apply if an exception in 8.605 applies and the purchase is made from a source other than FPI." In other words, FPI need not be included in the competitive process as outlined in 8.602(b)(4) if 8.605 contains an exception applicable to a particular solicitation. The pertinent exception in this case appears at 8.605(f) which provides that purchase from FPI is not mandatory if the solicitation involves "acquiring services." In light of this exception, FPI need not be included in the competitive process and, in fact, the solicitation does not contain Alternate II of FAR 52.219-6 soliciting offers from FPI in addition to small business concerns.

The argument raised by FPI for its inclusion in the competitive process presumes that the interim rule applies to the solicitation issued by EPA. The solicitation was issued on March 19, 2004, but the interim rule was not effective until March 26, 2004. Arguably, the interim rule applies to the subject solicitation even though the solicitation was issued a week after the rule's effective date since FAR 8.602(b) states that the interim rule applies to purchases made by civilian agencies using fiscal year 2004 appropriated funds. However, even if the interim rule (and its exception for services) is not applicable to this solicitation, FPI remains unable to compete in a solicitation for services for a total small business set aside. Prior to the interim rule, there is no authority requiring agencies to allow FPI, as a large business, to compete on a small business set aside for services. In fact, subsection (e) of the interim rule discusses acquisitions by civilian agencies using funds preceding fiscal year 2004 and, in so doing, sets forth FPI's previous priorities in competition. Subsection (e) does not contain any priority for services. Further, FAR 8.602 in effect prior to the March 26, 2004 amendment by the interim rule does not require agencies to include FPI in competitions for small business set asides for services. Consequently, whether or not the interim rule applies to EPA's solicitation, FPI may not participate in a competition with small businesses to provide services under a total small business set aside.

**CONCLUSION:**

The Area II Office of Government Contracting of the Small Business Administration finds that Federal Prison Industries, Inc. is other than a small business concern for the subject procurement.

This determination is effective immediately and remains in full force and effect unless and until reversed by the Office of Hearings and Appeals. Any person adversely affected by this decision has the right to file an appeal petition with SBA's Office of Hearings and Appeals (OHA). The specific procedures for filing an appeal are found at 13 CFR §134.

A concern determined to be other than small for a particular size standard is ineligible for any procurement or assistance authorized by the Small Business Act or the Small Business Investment Act, requiring the same or lower size standard, unless recertified by SBA. Following an adverse size determination, a concern cannot again self-certify as small within the same or lower size standard. If it does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). [13 CFR 121.1009(g)(3)].



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