RSC
Republican Study Committee
www.house.gov/pence/rsc

Rep. Mike Pence (R-IN), Chairman
Sheila Cole, Executive Director
426 Cannon House Office Building
Washington, DC 20515
Ph (202) 226-9717 / fax (202) 226-1633

# Legislative Bulletin……………………………….………September 13, 2006

**Contents:**


**<u>Summary of the Bills Under Consideration Today</u>:**

**<u>Total Number of New Government Programs</u>**: Several

**<u>Total Cost of Discretionary Authorizations</u>**: $445 million over 5 years

**<u>Effect on Revenue</u>**: $0

**<u>Total Change in Mandatory Spending</u>**: $0

**<u>Total New State & Local Government Mandates</u>**: Various, noted below

**<u>Total New Private Sector Mandates</u>**: 0

**<u>Number of *Bills* Without Committee Reports</u>:** 0

**<u>Number of *Reported* Bills that Don't Cite Specific Clauses of Constitutional Authority</u>:** 0

## H.R. 2965 — Federal Prison Industries Competition in Contracting Act of 2006 — *as reported* (Hoekstra, R-MI)

**<u>Order of Business</u>:** The bill is scheduled for consideration on Wednesday, September 13, 2006, under a structured rule (H.Res. 997), making five amendments in order.

A similar bill, H.R. 1829, passed the House during the $108^{th}$ Congress by a vote of 350-65 on November 6, 2003. It was not acted upon in the Senate.

**<u>Summary</u>:** H.R. 2965 would amend the federal criminal code to modify provisions that authorize the Federal Prison Industries (FPI) and how it operates. FPI is a wholly owned government corporation that produces goods and services for the federal government (not the private sector) with prison labor. According to CBO, under current law, "most federal agencies are required to award purchase contracts to FPI on a noncompetitive basis ***if FPI has products available to meet the agencies' needs and the cost would not exceed current market prices***" (*emphasis added*). The specific provisions of H.R. 1829 are as follows:

**Government-wide Procurement Policy on FPI Purchases**

- Establishes a government-wide procurement policy for purchases from FPI, which generally require the use of competitive procedures (defined in the bill and subject to certain exceptions);
- Requires federal departments or agencies (hereafter 'agencies') to solicit an offer from FPI for any specific product or service needed (that's offered by FPI) if the purchase price is expected to be in excess of the micro-purchase threshold (currently $2,500); in other words, federal agencies are free to purchase from the private sector for item costing up to $2,500 without first having to solicit a bid from FPI;
- Requires federal agencies to negotiate with FPI on a noncompetitive basis for a contract award if the Attorney General determines FPI cannot reasonably expect fair consideration to receive the contract award on a competitive basis and the contract award is necessary to maintain work opportunities at the correctional facility (given that other basic contracts requirements are met, and with certain exceptions);
- Authorizes a contract award to be made to FPI using non-competitive procedures: 1) if a product or service is only available from FPI; and 2) if the contract is from the Federal Bureau of Prisons (the Bureau);
- Requires each federal agency to report purchases from FPI to the Federal Procurement Data System;

**Public Participation in Expanding FPI Products**

- Authorizes FPI to offer a new specific product or service in response to a competitive solicitation by a federal agency, and the new product or service must be approved by the FPI board of directors prior to sale (and before another new product is offered);
- Requires that an analysis be made of the probable impact of a proposed expansion of sales within the federal market by FPI on private sector firms and their non-inmate workers whenever FPI proposes to authorize the sale of a new specific product or service, or to expand production of a current product or service;

**Transitional Mandatory Source Authority**

- Requires federal agencies, when needing a product produced by FPI, to first solicit an offer from FPI and make purchases on a noncompetitive basis (given that certain criteria is met); requires that a contract award be made on a noncompetitive basis to FPI if certain basic conditions are met (related to product quality, price, and timeliness), with certain exceptions;
- Prohibits the total dollar value of FPI sales to the government (under sole source contracting) in FY2007 through FY2011 from exceeding specified percentages of FPI sales for the base period: 90% for FY07, 85% for FY08, 70% for FY09, 55% for FY10, and 40% for FY11); requires an annual study to determine the effects of these limitations; in other words, ***this provision would effectively phase out sole source contracting with federal agencies;***
- Requires the Attorney General (AG) to determine annually the effect of the above percentage limitations (including whether they reduced inmate participation), and allows the ***AG to recommend additional authorizations of appropriations to provide additional alternative inmate rehabilitative opportunities*** and additional correctional staffing;
- Amends the Federal Property and Administrative Services Act of 1949 to require a federal agency: 1) to determine whether the FPI product is comparable to products available from the private sector (before purchasing a product listed in the latest edition

of the FPI catalog); and 2) if the product is not comparable, to use competitive procedures or make an individual purchase under a multiple award;

**FPI as Federal Subcontractor**

- Authorizes FPI to act as a subcontractor to another federal contractor to products in the performance of a federal contract; this is subject to certain limitations, and specifically prohibits the products provided by FPI from being sold in the commercial market;

**Inmate Wages**

- Authorizes the FPI Board of Directors to determine hourly wage rates for FPI employees, and authorizes the Director of the Federal Bureau of Prisons to determine hourly wage rates for other workers within the various federal correctional facilities;
- Requires a wage of at least $2.50 per hour to be paid for an inmate whose term prison term is set to expire within two years, except the amount in excess of a normal wage must be held in trust and paid only upon the expiration of the prison term; in other words, the prisoner gets a lump-sum payment of the difference when he gets out of prison; (currently, FPI inmate wages range from .23 cents per hour to a maximum of $1.15 per hour, based on proficiency, education, and various other factors);
- Requires the FPI Board, by September 30, 2008, to ***increase the maximum wage rate for FPI workers to an amount equal to 50 percent of the federal minimum wage*** (currently $5.15 per hour, though the House recently passed a $2.10 increase, raising it to $7.25 per hour by 2009); ***requires by September 30, 2013, to increase the maximum wage rate to equal the federal minimum wage;***
- Requires that wages earned by an inmate be paid in the name of the inmate, and deductions cannot be more than 80 percent of gross wages (and stipulates allowable deductions);

**New Rehabilitation Programs Established**

- ***Establishes two new programs within the Federal Bureau of Prisons***: 1) the Enhanced In-Prison Educational and Vocational Assessment and Training Program; and 2) the Cognitive Abilities Assessment Demonstration Program; authorizes $75 million for each fiscal year after 2008 (to remain available until expended);
- Mandates a staggered timeline for the above programs to be implemented: established in 25 percent of all prisons within 2 years of enactment; 50 percent within 4 years; 75 percent within 6 years, and 100 percent of all federal prisons must have the above mentioned programs established within 8 years of enactment;
- Adds a new section to the U.S. Code regarding "additional inmate work opportunities though public service activities," allowing inmates with FPI work assignments to work for an eligible entity (further defined in the text) pursuant to an agreement between the entity and a newly created position of Inmate Work Training Administrator; creates new non-inmate employee worker protections in an effort to ensure the non-inmate worker's job will not be abolished due to the work being performed by the inmate;
- Authorizes $5 million for each of the fiscal years 2008 through 2012 for paying wages of inmates (to carry out this program) and undertaking the maximum number of agreements with eligible entities; authorizes $3 million in each of the three fiscal years after FY2007 for conducting the new Cognitive Abilities Assessment Demonstration Program;
- Requires the Chief Operating Officer of FPI to develop proposals to have FPI donate products and services to eligible entities that provide goods or services to low-income individuals who would likely otherwise have difficulty purchasing those products or

services; authorizes $7 million for each of the fiscal years 2008 through 2012 to carry out this provision;

- Requires the Director of the Bureau to provide inmates opportunities to participate in programs and activities designed to help prepare such inmates to obtain employment upon release;
- Restructures the FPI Board of Directors (to include the expansion of the board from six to eleven members, and addresses other issues related to terms, appointments, etc.); and
- Requires the Comptroller General to undertake to have an independent study conducted on the effects of eliminating FPI's mandatory source authority. [***emphasis added***]

**Additional Background:** Federal Prison Industries is a government-owned corporation that employs inmates in federal correctional facilities under the Department of Justice's (DOJ's) Federal Bureau of Prisons (BOP). UNICOR is the trade name for FPI, and was established in 1934 under an executive order issued by President Franklin Roosevelt. By statute, UNICOR must be self-sustaining, and thus does not receive funding through congressional appropriations.

According to CRS, under current law (18 U.S.C. 4121 et seq.) and regulations (48 C.F.R.), federal agencies, with the exception of the DOD and the CIA, must procure available products from FPI when available and cost competitive, unless grated a waiver by FPI. For additional information on FPI, please see CRS Report RL32380.

The U.S has a prison population of approximately 2.1 million inmates, each costing roughly $30,000 to house every year (over $40 billion annually at the local, state, and federal level, according to CRS). CRS states that of the eligible inmates held in federal prisons, 19,720 or 17 percent are employed by UNICOR.

**Possible Conservative Concerns:** There has been ongoing debate among legislators and others regarding whether the FPI program is beneficial or detrimental to society.

Opponents of FPI contend that UNICOR unfairly competes with the private sector and negatively impacts jobs and private businesses. Critics point out that UNICOR has a competitive advantage in obtaining government contracts (FPI cannot sell to the private sector) because: 1) sole source contracting requires federal agencies to request bids and purchase available products from FPI with few exceptions, 2) FPI labor costs are artificially low since they have a workforce that earns no more than $1.25 per hour, therefore undercutting private sector businesses who must pay prevailing wages to employees. It is further argued that FPI has a substantial cost on society by taking jobs away from law abiding citizens – those that may be employed in similar industries making goods that are currently produced by FPI inmates.

Supporters point out that FPI was created to serve as a means for managing, training, and rehabilitating inmates in the federal prison system through employment in one of FPI's eight industries. In fact, FPI was created – in part – in response to decades of arguments by labor unions against prison labor that they were taking away jobs from private businesses and industries. President Roosevelt stated the purpose of UNICOR was to consolidate all federal prison industry operations in order to train inmates and "diversify the production of prison shops so that no individual industry would be substantially affected." Further, supporters point out that

FPI products and services save the government money in the vast majority of the cases, and waivers (allowing purchases from the private sector instead of FPI) are granted in almost all cases in which they are requested.

Proponents argue that it is significantly more costly, and dangerous (potentially leading to disruptive behavior), to run a prison where inmates are idle. Current law requires that all physically able inmates (who are not a security risk) are required to work (though not all under FPI). Thus, proponents argue, utilizing inmates as FPI employees: 1) teaches them discipline and a skill that may be used upon release to obtain gainful employment, 2) reduces recidivism relative to inmates not employed by FPI, and 3) reduces violence and negative behavior by keeping inmates busy. Also, current regulations require that at least 50 percent of inmate wages be used to pay victim restitution and outstanding debts (for those inmates who have court ordered financial obligations). Further, while the private market should be allowed to compete unfettered, the government has a vested interest in keeping these inmates occupied in a productive task. Reduces violence and recidivism - ultimately saving taxpayers money and sparing society untold misery.

Opponents counter that FPI does not reduce the cost to taxpayers of housing inmates, and none of FPI's profits goes toward the actual cost of incarcerating inmates (see Rep. Cuellar amendment summarized below). CRS notes that revenue generated from FPI products and services sold are used to pay staff and inmate salaries, buy raw materials, and reinvest in and expand current facilities.

**Problematic Provisions in the Bill:** Aside from the general concerns some have for and against FPI noted above, conservatives may have serious concerns with several of the specific provisions of the bill, notably:

- Further restricts sole source contract awards using non-competitive procedures, potentially weakening FPI's ability to obtain federal agency contracts to sell products and services.
- Sets caps on the total dollar value of FPI sales to the government using sole source contracting over the next five years, and lowers that cap each year; thus, this provision initiates phasing out sole source contracting to federal agencies, ***which will likely decrease inmate participation rates in FPI and potentially increase federal agency procurement costs.***
- ***Dramatically increases inmate hourly wages***: requires a 55 percent increase over current top wages by 2008, and a 78 percent increase over current top wages by 2013 (and could amount to a mandatory 100 percent increase over the lowest current hourly rate by 2013); many proponents of FPI would argue this significant labor cost increase will effectively kill the FPI program, or at the least substantially hamper its' ability to obtain federal agencies contracts to sell products and services. Also, as this labor increase would be reflected in the cost of good sold, this measure would increase government procurement costs when purchasing FPI products (which generally are lower than private sector prices and thus have saved the government money).
- ***Creates several new programs, and authorizes in excess of $400 million over the next five years to implement them*** (in contrast, FPI receives no annual authorization or appropriations).

**<u>Amendments</u>:** Below are the summaries of the five amendments made in order under the rule. Summaries are based on RSC staff's review of actual amendment text:

**1. Sensenbrenner (WI).** Updates 13 dates in various provisions within the bill to reflect the passage of time since the bill's introduction (and not modified in Committee consideration) and makes other clerical revisions; adds a new section to the bill establishing a cost accounting system (based on Rep. Issa amendment adopted during Committee consideration.

**2. Scott, Robert (VA).** Allows the Attorney General to direct agencies within the Department of Justice (DoJ) to award individual contracts to FPI on a non-competitive basis; under current bill language, a non-competitive contract may only be awarded to the Federal Bureau of Prisons. In other words, this increases the flexibility of the DoJ to obtain necessary products on a non-competitive basis from FPI.

**3. Lungren (R-CA) / Chabot (R-OH) / Scott, Robert (D-VA).** Postpones the scheduled phase-out of mandatory source (sole source) for one year if the percentage of inmates employed by FPI falls below 17 percent (based on Comptroller General of an independent firm retained by the FPI Board); requires the Attorney General to conduct a study to increase inmate participation in the FPI program, if participation falls below 17 percent.

**4. Cuellar (D-TX).** Inserts a new section in the bill, which would require inmates working for FPI to contribute a portion of their earnings to their living expenses at the prison (the amount of which would be at the discretion of the Director of the Bureau of Prisons).

**5. Scott, Robert (D-VA).** Allows FPI to continue providing to private, for-profit businesses those services of the type and to the extent it was performing prior to enactment of this Act. In other words, this amendment would allow the level of service contracts now being performed by FPI to continue at that level *without further expansion*. The amendment's sponsor states that "there is no mandatory source provision for service contracts, so they are already competitive… and most of the contracts involved work that would otherwise have been done offshore, so FPI's competition is foreign workers, not Americans."

**<u>Committee Action</u>:** H.R. 2965 was introduced on June 17, 2005, and referred to the Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security. Hearings were held, and the bill was considered and marked-up by the full Committee on July 14, 2006, and reported (amended) to the House by voice vote the same day (H. Rept. 109-591).

**<u>Administration Position</u>:** No Statement of Administration Position (SAP) was available at press time (and no SAP was available for the similar bill that passed the House in the 108th Congress).

**<u>Cost to Taxpayers</u>:** CBO estimates (assuming appropriation of the necessary amounts) that "**implementing H.R. 2965 would cost $445 million over the 2007-2011 period**. Federal agencies might be able to purchase some goods and services less expensively because of the added contracting flexibility the bill would provide, but CBO has no basis for estimating such savings. The bill would have no significant effect on net direct spending by FPI."

**Does the Bill Expand the Size and Scope of the Federal Government?:** Yes. The bill creates several new programs and expands regulations governing FPI.

**Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?:** Yes. According to CBO, H.R. 2965 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA), but the cost to state, local, and tribal governments for complying with this mandate would be insignificant and well below the threshold established in the act ($64 million in 2006, adjusted for inflation).

**Constitutional Authority:** The Judiciary Committee, in House Report 109-591, cites constitutional authority in Article I, Section 8, Clause 18 of the U.S. Constitution (power of Congress to make all laws *necessary* and *proper)*, but failed to cite a foregoing power to which this clause refers. House Rule XIII, Section 3(d)(1), requires that all committee reports contain "a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution." *[emphasis added]*

**RSC Staff Contact:** Derek V. Baker; derek.baker@mail.house.gov; 202-226-8585