



THE UNDER SECRETARY OF DEFENSE

3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

MAY 10 2010

The Honorable Carl Levin
Chairman, Committee on Armed Services
United States Senate
Washington, DC 20510-6050

Dear Mr. Chairman:

The explanatory statement to the "Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009," Public Law 110-329 requests the Secretary of Defense submit a report to the congressional defense committees on a plan to implement section 827 of the National Defense Authorization Act of Fiscal Year 2008, Public Law 110-181. The Department's report to Congress is enclosed.

Similar letters are being submitted to the chairman and ranking members of the other congressional defense committees.

Sincerely,

A handwritten signature in black ink that reads "Ashton B. Carter".

Ashton B. Carter

Enclosure:
As stated

Cc:
The Honorable John McCain
Ranking Member

**Department of Defense
Report to Congress on the Plan for
Implementing Section 827 of the
National Defense Authorization Act
of Fiscal Year 2008**



**Under Secretary of Defense
(Acquisition, Technology & Logistics)**

April 2010

DEPARTMENT OF DEFENSE
PLAN FOR IMPLEMENTING SECTION 827 OF THE NATIONAL DEFENSE
AUTHORIZATION ACT OF FISCAL YEAR 2008 (PUBLIC LAW 110-181)
MODIFICATION OF COMPETITION REQUIREMENTS FOR PURCHASES FROM
FEDERAL PRISON INDUSTRIES
APRIL 2010

The explanatory statement to the "Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009", Public Law 110-329, enacted September 30, 2008, requested the Secretary of Defense to report to the congressional defense committees a plan to implement section 827 of the National Defense Authorization Act of Fiscal Year 2008, Public Law 110-181. The specific explanatory statement and reporting request is as follows:

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"FEDERAL PRISON INDUSTRIES

"The Bureau of Prisons considers Federal Prison Industries (FPI) an important correctional tool that plays a critical role in reducing inmate recidivism and idleness. To ensure the success of the FPI program, United States Code (USC) Title 18, Chapter 307 requires Federal departments and agencies to purchase products from FPI 'as meet their requirements and may be available'. However, Congress has expressed concern that this provision of law could impose on the Department of Defense a requirement to procure products that do not meet the needs of the Department in terms of price, quality and timeliness of delivery. To meet this concern, section 827 of the National Defense Authorization Act of Fiscal Year 2008 (public Law 110-181) requires the Secretary to use competitive procedures for the procurement of certain products offered for sale by the FPI. The Secretary is directed to report to the congressional defense committees no later than 45 days after the enactment of this Act on a plan to implement this new requirement [sec 827], consistent with the requirements of USC Title 18, Chapter 307, Section 4124(d)."

Prior to submitting a report on the sec 827 implementation, the Defense Subcommittee of the House Committee on Appropriations, requested the Department submit a response electronically. The request was transmitted via email to DoD Legislative Affairs on September 30, 2009. The committee asked specifically:

"The Subcommittee is concerned that the Department of Defense is confronting two seemingly contradictory statutory directives on Federal Prison Industries (FPI), and I am seeking clarification from the Department on how it is reconciling the two. Specifically, section 4124 (d) of Chapter 307, 18 USC requires Federal departments and agencies to purchase products from FPI 'as meet their requirements and may be available.'

However, section 827 of the FY 2008 NDAA requires the Secretary of Defense to use competitive procedures for the procurement of certain products offered for sale by the FPI. What are the Department's plans or procedures for meeting and/or reconciling the demands of these two provisions?"

The Department forwarded the following coordinated response electronically on October 2, 2009, to the Defense Subcommittee of the House Committee on Appropriations.

"Technically there is no conflict for DoD between 18 U.S.C. 4124(d) and section 827 of P.L. 110-181. 10 U.S.C. 2410n first appeared in the 2002 National Defense Authorization Act. Since this statute is later in time than 18 U.S.C. 4124, it is specific to the Department of Defense, and thus supersedes 4124.

Section 827 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, changed the requirements for purchases from Federal Prison Industries (FPI) and required the Department of Defense (DoD) to publish an initial list of product categories for which FPI share of the DoD market is greater than five percent. The items that meet this criterion must be competed. DoD implemented section 827 in the Defense Federal Acquisition Regulation Supplement 208.6 as an interim rule. DoD worked collaboratively with UNICOR and OMB to determine the approach and methodology for identifying the product categories to be competed. DoD issued the initial list of Federal Supply Codes (FSCs) to be competed on March 28, 2008. Based on more recent data from the Federal Procurement Data System (FPDS), DoD issued an updated list of FSCs to be competed effective July 3, 2009. Section 827 states that DoD may modify the list of items to be competed at any time when new data requires adding a product category to the list or omitting a product category from the list. DoD reviews the certified year-end data from FPDS on an annual basis to determine the updated list of FSCs to be competed."

While the information provided on October 2, 2009, satisfied the Committee at the time, the Committee communicated to the Department on February 1, 2010, that they still would like a written report from the Department.

Department's Implementation of Section 827

Section 827 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, changed the requirements for purchases from Federal Prison Industries (FPI) and required the Department of Defense (DoD) to publish an initial list of product categories for which FPI share of the DoD market is greater than five percent, based on the most recent fiscal year for which data is available. The items that meet this criterion

must be competed. DoD worked collaboratively with UNICOR and OMB to determine the approach and methodology for identifying the product categories to be competed.

The law required DoD to publish the initial list not later than 60 days after the date of the enactment of the National Defense Authorization Act of Fiscal Year 2008. DoD met this ambitious schedule and issued the initial list of Federal Supply Codes (FSCs) to be competed on March 28, 2008. Concurrently, DoD implemented section 827 in Defense Federal Acquisition Regulation Supplement (DFARS) 208.6 as an interim rule. The final DFARS rule was published in the Federal Register on November 19, 2009.

Section 827 states that DoD may modify the list of items to be competed at any time when new data requires adding a product category to the list or omitting a product category from the list. DoD reviews the certified year-end data from the Federal Procurement Data System (FPDS) on an annual basis to determine the updated list of FSCs to be competed. Since the publication of the initial list, DoD has issued two updated lists of FSCs to be competed. The updated lists were effective on July 3, 2009, and on April 18, 2010.

Certain issues have emerged since the implementation of section 827 that require an update to the procurement regulations. A DoD component asked whether section 827 applies to priced options on existing contracts. In response, the Defense Acquisition Regulation Council (DARC) opened DFARS Case 2010-D005 to develop an interim rule. The DARC approved the interim rule on March 31, 2010, which will be published in the Federal Register with a 60-day comment period.

The Department has incorporated the section 827 provisions into training at the Defense Acquisition University (DAU). The training is included in DAU continuous learning module (CLC 055), "Competition for DoD Acquisition," and DAU advanced contracting course "Advanced Business Solutions for Mission Support" (CON 353).

As with any change in law, issues may emerge during the initial implementation of a statutory change that may require an update to policy. The Department will continue to assess the section 827 implementation.