

Proposed FAR Regulations Would Make Agency Use of GPO Optional

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On May 3, 2002, Office of Management and Budget (OMB) Director, Mitchell Daniels, issued a memorandum requesting new Federal Acquisition Regulations (FAR) allowing agencies to buy their own printing directly from private sector printers (without going through the US Government Printing Office (GPO)). GPO and its supporters, including those in Congress, quickly pointed out that such a regulation would be in direct violation of 44 U.S.C. 501, which requires federal government agencies to go through GPO for their printing procurement.

OMB's response was that the Department of Justice Office of General Counsel issued opinions that 44 U.S.C. 501 was unconstitutional in 1996 under the Clinton Administration, and again in 2002 under the Bush Administration.

The new FAR regulations were scheduled to be released on August 31, 2002. They were held up for an extended period of time after OMB received input from the Library community, the printing industry, and its agency customers. Based on this input, OMB revised and expanded the originally planned FAR changes to address these stakeholders' concerns.

The proposed FAR regulations were finally issued on November 5, 2002. Interested parties will have 30 days to comment. A full copy of the proposed regulations is available in the Federal Register, on the OMB website, and www.printlaw.com.

The proposed FAR regulation has received the endorsement of the country's largest printing trade organization, Printing Industries of America (PIA).

Here is a summary of what the regulations, if adopted, would do:

1. Agencies are permitted to purchase printing directly from private sector printers, based on the best combination of price, quality, delivery and service—without going through the GPO.
2. Any agency buying a printing job with an estimated value in excess of \$2,500 directly from the private sector must post the opportunity on www.fedbizopps.gov. This rule is unique for printing, because all other products, commodities and services purchased by the federal government do not have to be placed on www.fedbizopps.gov, unless the expected purchase exceeds \$25,000.
3. In the event GSA issues multiple award schedules (MAS) for the acquisition of printing, any job bought on the MAS schedule with an expected value of more than \$2,500 must be publicized on the GSA's electronic "e-buy" system at www.gsaadvantage.gov.
4. Agency publishers and print users would be able to deal directly with the printers, without having to go through GPO (and presumably, without going through their

own agency print procurement department), in an effort to eliminate confusion and delay in the purchase of print jobs.

5. Although there is some confusion in the proposed rule, it appears that the intention is to allow agencies to use GPO as their purchasing agent only if the agencies determine that GPO offers them the best combination of price, quality and service. It also appears that if GPO wishes to print agency work in its own plant, it will have to bid on that work on an equal footing with private sector printers.
6. The use of agency in-plant printing and duplicating operations would be limited by requiring agencies to use the private sector, unless they determine that the in-plant offers the best combination of price, quality and service, after public-private competition, taking into account all of the agency's cost for operation of the in-plant.
7. To address concerns from the library and information community and Capitol Hill about the dissemination of government publications in a decentralized agency print buying system, the proposed FAR provides, for the first time in an executive branch regulation, that all government agencies must furnish an electronic copy of all government publications to the GPO's Superintendent of Documents. The Su Docs then handles distribution to the 1300 depository libraries throughout the country, and to GPO's bookstores, and mounts the pub on the GPO's public access website, www.gpo.gov. The proposal also attempts to provide a mechanism for GPO's Superintendent of Documents to "ride" agency print orders by adding its order for additional depository library and distribution copies of government publications purchased by agencies directly from private sector printers.
8. Purchases of printing by agencies would be made under existing FAR regulations that govern agency purchases of products and services, not under GPO's regulations.

This new proposed FAR regulation is far more detailed and comprehensive than the original draft proposal that came out in the summer of this year. It clearly attempts to address problems raised by the printing community, agencies and the library community.

Of course, there are a number of significant issues that still have to be resolved:

1. The proposed FAR does not adopt GPO's Quality Assurance Through Attributes Program, and as a result, there would be no government-wide guidelines for product quality, quality levels, proofs, etc. Presumably, agencies could specify that a particular QATAP quality level was applicable to a job they purchase. It would probably be far more efficient to adopt those quality standards in the new FAR regulation, so that there would be a government-wide system, instead of hundreds of different systems.
2. While the proposed FAR does require web-based publication of job opportunities, it only applies this requirement to jobs over \$2,500. About 80% of the government printing jobs currently going through the GPO are less than \$2,500.

These smaller jobs are almost routinely performed by small businesses, which usually receive notification of those job opportunities typically through a bid service that obtains the job opportunity postings from GPO. It is unclear if or how small businesses would obtain these tens of thousands of small job opportunities under the proposed FAR.

3. There are other questions and potential problems that will undoubtedly be addressed as comments on the proposed FAR come in from agency customers and the printing community.

GPO IS NOT GOING AWAY ANYTIME SOON. Whether or not the proposed FAR regulation is adopted, it seems clear that GPO will maintain a majority of government printing business for some time to come. Major GPO agency customers have already indicated that they do not plan on leaving GPO. They believe GPO provides them the best combination of quality, timely delivery and price. In addition, many have determined that they cannot replace the services provided by GPO for the percentage fees that GPO charges (averaging about 5.6% of print dollars spent by the agency through GPO). Agencies are also pleased by GPO's pledge to transition to a "best value" type contract awards.

The GSA system, although excellent for many products and services, does not lend itself to purchasing a customized product like printing, that can require highly knowledgeable procurement officials in order to get the right job at the right price. While GSA only charges a 1% industrial funding fee for products and services bought on its MAS schedules, it provides very little purchasing support, and no spec writing or contract administration. If agencies don't obtain those services from GPO or GSA, they will simply have to provide them at the agency level. Is duplicating those GPO services in a number of different agencies cost effective?

OMB has recognized the value GPO can offer to many agencies, and under the proposed FAR change, it appears that agencies will be able to continue to use GPO as their print procurement agent (but perhaps not their printer) if they determine that GPO offers them the "best deal."

FUGITIVE DOCUMENTS. There are those on Capitol Hill and in the information and library communities who remain concerned that a decentralized agency system will magnify the number of "fugitive documents." Fugitive documents are government publications which do not reach the Superintendent of Documents, and are therefore not distributed to the depository libraries, and not placed on the GPO's public access website. However, this concern may be unfounded. Consider the fact that, under the current GPO centralized print procurement system, the number of fugitive documents runs as high as 50% of all government publications, depending on whose analysis you rely on. So the GPO centralized system has failed to make all government publications available to the public. Why? Despite 44 U.S.C. 501 requiring agencies to go through GPO, GPO only processes about half of the government printing which should go to it under the statute (GPO contracts about 75% of Agency printing to the private sector). Printing that doesn't go through the GPO is unlikely to filter through to the

Superintendent of Documents for distribution. Add to this problem the fact that a number of government publications are not being issued in print, but only being published electronically, and its not hard to see why the fugitive documents problem has gotten out of hand, despite the apparent centralized control by GPO.

What the system has not had – until this proposed FAR regulation - is an Executive Branch regulation in the FAR printing requirements making it mandatory for agencies to furnish copies of their government publications to the Superintendent of Documents. The proposed FAR section should go a long way towards resolving the fugitive documents problem, because it provides an Executive Branch “order” to agencies to make sure that the Superintendent of Documents gets a copy of each and every government publication. Combine that rule with the fact that OMB has pledged to enforce it, and we may see a substantial increase in government publications going to GPO Superintendent of Documents and the Library, for the first time in recent history.

THE LEGAL ISSUE. Despite how agencies or printers may perceive the proposed FAR regulation, there remains an overriding legal issue: the new proposed FAR regulation is in direct conflict with 44 U.S.C. 501. OMB is confident in relying on opinions from the Department of Justice Office of General Counsel, issued under both Democratic and Republican administrations, that 44 U.S.C. 501 is simply unconstitutional and unenforceable. This may be a reasonable position, given that no one seems to be aware of any enforcement actions against any agency for a violation of 44 U.S.C. 501 in the last several years.

On the other hand, there is a not insignificant number of elected representatives in Congress who are very upset that OMB appears to be resolving what Justice Department feels is a separation of powers problem by taking on the role of Congress and/or the Supreme Court, and declaring a statute unconstitutional and unenforceable. Those members believe that OMB should either obtain a decision from a federal court, or convince Congress to repeal Section 501 before adopting its new FAR regulations. However, it seems unlikely, given OMB Director Daniels’ strong position on this issue, that OMB will wait for judicial or Congressional confirmation of the Justice Department opinion.