



PROFESSIONAL SERVICES COUNCIL
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STATEMENT OF
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BEFORE THE
COMMITTEE ON HOMELAND SECURITY
U.S. HOUSE OF REPRESENTATIVES

**“PERFORMANCE-BASED ACQUISITIONS:
CREATING SOLUTIONS OR CAUSING PROBLEMS”**

May 8, 2008



MERGED 2008



Introduction

Mr. Chairman, thank you for your invitation and the opportunity to appear before this committee to address the provocative question in the title of today's hearing: "Performance-Based Acquisitions: Creating Solutions or Causing Problems." I submit that performance-based acquisitions as a technique are neither the solution nor the cause of problems within the Department of Homeland Security or other federal agencies. Understanding the characteristics of federal performance-based acquisitions and the appropriate roles and responsibilities of each of the parties involved in the formation, execution and monitoring of these awards will raise a different set of question and likely lead this committee and others to a different set of answers.

I am Alan Chvotkin, Executive Vice President and Counsel of the Professional Services Council (PSC). PSC is the national trade association of the government professional and technical services industry. This year, PSC and the Contract Services Association of America merged to create a single, unified voice representing the full range and diversity of the government services sector. Solely focused on preserving, improving, and expanding the federal government market for its members, PSC's more than 330 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association's members employ hundreds of thousands of Americans in all 50 states.

I have been at the association for more than seven years. Prior to my joining PSC, I had the privilege of working for a large telecommunications company where I had senior program management responsibility as well as supervising the contracting, pricing and proposal development teams. I have won and lost federal performance-based acquisitions.

I can tell you without fear of contradiction that a performance-based acquisition is among the hardest types of contracts for the government to write and for a contractor to successfully compete for and execute. It requires a knowledgeable, well-trained, government acquisition workforce, including program managers, agency senior managers, and others who have a critical role in formulating the agency's requirements and desired outcomes. It also requires a willingness by the agency to work in partnership with the contractors awarded these contracts. It takes innovation and risk-taking by contractors, too.

It is also clear that when properly executed, performance-based acquisitions can and often do generate substantial benefits for the government agency. A true performance-based approach incentivizes and rewards innovation and enables the government to identify and take advantage of solutions that might not otherwise have been evident. A true performance-based acquisition also effectively balances the substantial risk assumed by the performing contractor with appropriate rewards.

The Department of Homeland Security, among others, has been working diligently to create that balance and incentivize that innovation. While some have criticized performance-based acquisition because it appears to give contractors too much control over a program and its elements, the fact is that when such an acquisition is properly structured and managed, the

government establishes the program requirements and retains full control over the program. At the same time, one of the fundamental purposes of performance-based approaches is to enable the presentation of new and different solutions. Thus, it is essential that the contractor be given appropriate latitude to propose such solutions.

In short, from the perspective of the private sector, performance based acquisition is a highly desirable form of contracting yet is also a highly risky and sometimes feared strategy. Done right, it works exceptionally well. However, done poorly, performance-based acquisition places inordinate attention and risk on the contractor. Moreover, one cannot cherry pick the elements that are critical to the success of a performance-based acquisition. It is a strategy with many intertwined parts, each of which must be properly executed.

PSC has long been active in the congressional and regulatory discussions about performance-based acquisitions. In addition, from 2005 through 2007, we co-chaired a working group of six trade associations that participated extensively in presenting information to, and commenting on the work of, the Services Acquisition Reform Act Acquisition Advisory Panel.¹

What is a Performance-Based Acquisition?

The Federal Acquisition Regulations define the term “performance-based acquisition” (PBA) to mean an acquisition structured around the results to be achieved as opposed to the manner in which the work is to be performed.² It is an “outcome-oriented” approach rather than a “design-oriented” approach. Congress has provided that the use of performance-based acquisition is the preferred method for acquiring services³ and PBA methods should be used to the maximum extent practicable except for specifically designated services, such as construction or utilities, with separate contracting approaches.⁴ The Office of Management and Budget’s Office of Federal Procurement Policy (OFPP) issued a memorandum in May 2007, titled “Using Performance-Based Acquisition to Meet Program Needs—Performance Goals, Guidance and Training,” that provided performance goals and PBA learning assets to ensure that the acquisition strategy is used effectively.⁵ A second memo, issued in December 2007, provided fiscal year 2008 performance-based performance goals.⁶ In compliance with the OFPP guidance, the Department of Homeland Security has issued its own goals.

Occasionally, you may see references to “performance-based contracting” or “performance-based services contracting” or “performance-based services acquisition.” There are differences between these terms. In fact, PBA is not a “contracting” exercise. It requires a broad, integrated acquisition strategy that relies on much more than the active involvement of a contracting officer. As such, today I will use the term “performance-based acquisition” or “PBA” as defined in the Federal Acquisition Regulations (FAR).

¹ Created by Congress in Section 1423 of the Services Acquisition Reform Act (Title XIV of the FY 2004 National Defense Authorization Act (P.L. 108-136). Often referred to as the “1423” Panel or the Acquisition Advisory Panel, the Panel submitted its final report to Congress in January 2007. See

<http://acquisition.gov/comp/aap/finalaapreport.html>

² See Part 2.101 of the Federal Acquisition Regulations (FAR)

³ See Section 821 of the FY2001 National Defense Authorization Act (P.L. 106-398)

⁴ See FAR 37.102(a)(1)

⁵ The memo is available at: http://www.whitehouse.gov/omb/procurement/pbsa/pba_revised_052207.pdf

⁶ The memo is available at http://www.whitehouse.gov/omb/procurement/pbsa/pba_2008_memo.pdf

The FAR lists three (but actually identifies four) primary characteristics of a PBA. The first required characteristic is for a performance work statement or statement of objectives. A statement of objectives (SOO) is prepared by the government and includes six mandatory minimum elements: (1) purpose; (2) scope or mission; (3) period and place of performance; (4) background; (5) performance objectives (i.e. required results); and (6) any operating constraints.⁷ A performance work statement (PWS)—a statement of work that describes the required results in clear, specific and objective terms with measurable outcomes⁸— may be prepared by the government from the SOO and provided as part of a solicitation or prepared by a contractor as part of their bid responding to an agency’s solicitation that contains only an SOO.⁹

This performance work statement is perhaps the most important element of a PBA and the single greatest predictor of success. The FAR is explicit that agency program officials are responsible for accurately describing the need to be filled, or the problem to be resolved, through a contract in a manner that will ensure full understanding and responsive performance by contractors.¹⁰ The full involvement of senior managers within the agency and the multi-disciplinary team led by the program manager or end user are essential to the development of the performance statement; without them, the prospect for success drops significantly because there is less chance that the SOO or PWS will accurately reflect the current state and the desired end-state. It is also at this point that the government must be alert to the risk of morphing the PWS into a “design spec” that minimizes the opportunity for bidders to offer innovative approaches to the identified solution—one of the principle reasons for using the performance-based approach.

The second characteristic is having measurable performance standards (i.e. in terms of quality, timeliness, quantity, etc.).¹¹ These performance standards establish the performance level required by the government for the contractor to meet the contract requirements. The standards must be measurable and structured to permit a fair and accurate assessment of the contractor’s performance.¹² Yet these measures must also be directly tied to the outcomes to be achieved, should be limited in number and scope, and must take into account the cost to the government and the contractor of developing and reporting on any specific measure.

But these performance standards should not be rigid and perpetual. At the outset of the procurement, it is possible that both the government and the contractor will not be able to identify the best set of performance indicators to measure the desired outcomes. As time passes and the government’s and the contractor’s experience grows in implementation, there should be a regular reassessment of the measurements used to determine outcome achievement to ensure that the parties are measuring the right thing. This is not meant to, and should not be used to, let either party “off the hook” for poor performance or merely to “re-baseline” a procurement to hide problems.

⁷ See FAR 37.602(c)

⁸ See FAR 2.101; emphasis added.

⁹ See FAR 37.602(a)

¹⁰ See FAR 37.102(e)

¹¹ See FAR 37.601(b)(2)

¹² See FAR 37.603

The third characteristic is the method of assessing contractor performance against the performance standards.¹³ The most common method for assessing contractor performance is the requirement for the government to have a quality assurance surveillance plan (QASP). The government may either prepare the QASP or require the contractor to submit a proposed plan for the government's use with its proposal.¹⁴ Here again, the FAR clearly places important responsibilities on the government to ensure that "sufficiently trained and experienced officials are available within the agency to manage and oversee the contract administration function."¹⁵

The fourth characteristic is the use of performance incentives where appropriate. In my experience, performance incentives should be used in PBAs as part of a well-thought out business arrangement. When used, these incentives must correspond to the performance standards set forth in the contract.¹⁶ Incentives can be monetary or non-monetary, but they should be "positive" in nature and focused on the outcomes to be achieved. Of course, the contract should include appropriate remedies for the government where the contractor's performance warrants. But there is an important point to be made here: the contractor can and should be held accountable for the performance under its control. Too often all of the risk is shifted to the contractor and "blame" and penalties are imposed on the contractor for contract funding shortfalls, changed government requirements, or program issues beyond its control. As an example of this risk shifting, in the fiscal year 2008 DHS Appropriations Act, Congress limited the department's use of award fee contracts unless those contracts are linked to successful acquisition outcomes, specified in terms of cost, schedule, and performance;¹⁷ While we acknowledge the premise that a contractor should not be rewarded for its own non-performance, neither this provision nor its legislative history shows any appreciation for the effect of actions wholly outside the contractor's control. We are awaiting the implementing guidance for this provision from the department.

In addition to these characteristics, Congress has provided an order of preference of contract types to be used by agencies in achieving its mission needs. They are: (1) a firm-fixed price performance-based contract or task order; (2) a performance-based contract or task order that is not firm-fixed price; and (3) a contract or task order that is not performance-based.¹⁸ Too often, however, the government misreads the provision and explores only firm-fixed price contracts for PBAs. As the committee knows, in a firm-fixed price contract, the contractor generally assumes all of the risk of performance—and it prices that risk and the competitive marketplace accordingly when competing for work. The use of only firm-fixed price contracts could be a short sighted approach that excludes other appropriately recognized acquisition strategies which might better meet the agency's need and foster even greater competition among offerors.

Finally, there is the important element of contract administration—to make sure that the program and contract are implemented according to the acquisition strategy. At this stage, it is essential that the oversight community, which has an important role to play in validating performance,

¹³ See FAR 37.601(b)(2)

¹⁴ See FAR 37.604

¹⁵ See FAR 37.102(h)

¹⁶ See FAR 37.601(a)(3)

¹⁷ See Section 556 of the fiscal year 2008 Department of Homeland Security Appropriations Act, included in Division E of the Consolidated Appropriations Act (P.L. 110-161)

¹⁸ See footnote 3 supra; See FAR 37.102(a)(2)

does not come in after the fact and audit to an unrelated set of agency regulations and “design” rules inapplicable to the PBA.

PBAs are Not New

PBAs are not a new technique. One of the earliest government documents addressing them is the 1980 pamphlet issued by the Office of Management and Budget’s Office of Federal Procurement Policy (OFPP) entitled “A Guide for Writing and Administering Performance Statements of Work for Services Contracts.” In April 1991, OFPP issued a superceding policy letter (91-2) on services contracting that also focused on performance-based contracts. While that policy letter has also been rescinded, the FAR has been updated more recently to address the calendar year 2000 congressional direction for the preferred use of the PBAs and other more recent experiences.

Seven Steps Guide

Early in this decade, six federal agencies, led by the Commerce Department, in conjunction with the private sector firm Acquisition Solutions, prepared and widely distributed the “Seven Steps to Performance-Based Services Acquisition;”¹⁹ this seven steps guide is a valuable resource for federal agencies to understand the regulatory requirements and provide practical information on how to prepare for and implement a PBA. But it is just a guide and all of us who work with PBAs recognize that there is no “one size fits all” PBA; it must be tailored to the specific agency needs. In fact, it is not a coincidence that the first five of the seven steps are required to be executed by the government before ever issuing the solicitation. Selecting the contractor is step six! The final step is managing performance after contract award.

Acquisition Advisory Panel Recommendations

As I noted above, the congressionally chartered Acquisition Advisory Panel was tasked, in part, with reviewing performance-based acquisitions.²⁰ The Panel made several findings and offered ten recommendations for action to improve the usefulness of PBAs.

Of significance, the Panel concluded that agencies remain unsure of when to use PBAs, incentives are not used effectively, and poor data makes it difficult to understand where and how PBAs are used. In fact, the Panel found that many of the awarded contracts listed in the Federal Procurement Data System failed to comply with one or more of the FAR’s characteristics of a PBA. When asked to verify the proper coding of contracts, many agencies could not or would not validate this designation. We have seen examples of where agencies have coded contracts as performance-based because of the goals that have been levied on agencies, only to have to subsequently reclassify them after careful post-award analysis.

PSC was pleased to co-chair a multi-association working group that actively participated in the public sessions of the panel; our working group provided testimony before that panel, submitted extensive written material to the panel on examples of successful PBAs, and submitted extensive

¹⁹ “Seven Steps To Performance-Based Acquisitions,” available at http://acquisition.gov/comp/seven_steps/index.html

²⁰ See footnote 1, supra, and specifically Chapter 2

comments on the interim and final Panel recommendations. Our full comments on the panel's final report on PBAs are included as an attachment to this statement.²¹

Conclusion

At the outset, I suggested that greater information about PBAs might lead the committee to ask a different set of questions and pursue a different set of solutions.

It is not whether PBA, as an acquisition technique, uniquely creates solutions or causes problems. Success or failure is not wholly dependent on the acquisition methodology. The better question to ask is whether a department or agency has the skills and resources to use this PBA technique since there is a greater responsibility put on the acquiring agency to get the "upstream" issues right, including most significantly the statement of objectives, the performance work statement and the measurement techniques.

As to the better answers, this committee is well aware of the management challenges facing the Chief Procurement Officer (CPO) at the Department of Homeland Security and its operating agencies. It starts, but certainly doesn't stop, with attracting and retaining qualified acquisition professionals and ensuring they have the tools and resources to successfully execute the department's mission. They've been hard at it, but the competition among agencies for this skilled workforce is intense, not just in the Washington area but across the country.²² Contractors are competing for this same talent pool.

The CPO has developed some useful internal oversight techniques, including requiring business cases, conducting investment review board sessions, and creating an Acquisition Program Management Division to provide oversight and support to the department's programs. These are valuable steps that can have a beneficial impact on the department's acquisitions over time, including those major acquisition programs that are already under contract. We salute the department for the strides it has made to date, and stand ready to support them in any way we can.

But more can and should be done.

There needs to be an emphasis on the important role of program management within the department, including their training on necessary critical skills and the use of PBAs. There needs to be an acknowledgement of the impact of the business relationship between the agency and the contractor during the agency's internal formation of the acquisition strategy applicable to any procurement, not just to PBAs. Finally, there needs to be up front coordination with the independent oversight organizations so that their post-award reviews appropriately evaluate the contract.

²¹ The full text of the Industry Working Group's comments on the Acquisition Advisory Panel's final report is also available at: <http://www.pscouncil.org/pdfs/MAResponseTo1423Panel.pdf>

²² For example, in response to the "Gansler" Commission report, the new Army Contracting Command is committed to hiring more than 700 contracting professionals around the country over the next three years plus an additional 200 interns in each of the next three years. See "Army Contracting Command to hire mid-career employees, interns," Federal Times, April 21, 2008, at 4

Mr. Chairman, performance-based acquisitions are a valuable tool that must be available to the agency to bring innovation and experience to fulfilling an agency's mission. But PBAs require a different level of expertise in the agency, the contractor, and the oversight community. When done right, the results are impressive. We are committed to finding those solutions to ensuring it is done right.

Thank you for the invitation to provide this testimony. I would be pleased to answer any questions.