GSA

GSA Office of the Chief Acquisition Officer

SEP 21 2004

MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: LAURIE A. DUARTE
SUPERVISOR
REGULATORY SECRETARIAT

SUBJECT: FAR Case 2003-018, Performance-Based Service Acquisition

Attached are comments received on the subject FAR case published at 69 FR 43712; July 21, 2004. The comment closing date was September 20, 2004.

Response Number	Date Received	Comment Date	Commenter
2003-018-1	08/06/2004	08/06/04	Office of Justice Programs
2003-018-2	08/16/04	08/16/04	Logistics Management Institute
2003-018-3	09/20/04	09/20/04	Distributed Solutions, Inc.
2003-018-4	09/02/04	09/02/04	Department of Treasury
2003-018-5	09/03/04	09/03/04	U.S. Consumer Product Safety Commission
2003-018-6	09/10/04	09/10/04	Business Management Research Assoc; Inc.
2003-018-7	09/12/04	09/12/04	Vernon J. Edwards

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

Response Number	Date Received	Comment Date	Commenter
2003-018-8	09/12/04	09/12/04	Ronne A. Rogin
2003-018-9	09/15/04	09/15/04	U.S. Army Contracting Agency SFCA-CP
2003-018-10	09/16/04	09/16/04	Lisa Diernisse
2003-018-11	09/16/04	09/16/04	PESystems, Inc.
2003-018-12	09/20/04	09/20/04	Becky Gebhard Air Force
2003-018-13	09/20/04	09/20/04	CODSIA
2003-018-14	09/20/04	09/20/04	Anteon
2003-018-15	09/20/04	09/20/04	Associated Builders and Contractors, Inc.

Attachments

2003-018-1

"Moore, Mary" <Mary.Moore2@usdoj.gov>

08/06/2004 02:24 PM

To: farcase.2003-018@gsa.gov
cc:
Subject: PBSC to PBA

Performance base acquisition is more broad than performance based service contracting and could be used for more innovative ways of procurement. I see this as a positive. On the flip side, people can mandate performance based "anything." While the name change is better, I don't think it's going to push people to do more performance based work.

Just an opinion.

Mary Helen Moore, Contracting Officer
Office of Justice Programs
810 7th Street NW, Room 3616
Washington, DC 20531
202-305-9845 COMM
202-307-0086 FAX
mary.moore2@usdoj.gov

2003-018-2

GMACFARLAN@lmi.org

08/16/2004 09:15 AM

To: farcase.2003-018@gsa.gov
cc:
Subject: Federal Register, July 21, 2004

To whom it may concern:

The propsoed rule on PBA and PBSA is a strong and needed step toward clarifying actions and responsibilities, especially in addessing definitions and acquisition planning.

Greg Macfarlan
Logistics Management Institute

2003-018-3

"Tuttle, Peter"
<PeterT@distributedinc.com>

09/20/2004 09:08 AM

To: farcase.2003-018@gsa.gov
cc:
Subject: FW: FAR Case 2003-18 Performance-Based Service Acquisition - Proposed Rule

Dear Ms. Duarte:

Distributed Solutions Inc. (DSI) is a small business founded in 1992 in Northern Virginia specializing in the manufacture of a robust contract management software solution suite of products called the Automated Acquisition Management System (AAMS). AAMS is currently deployed in more than twenty federal agencies. We appreciate the opportunity to provide the below comments on the proposed rule:

1. 2.101 Definitions. Add a definition for Quality Assurance Surveillance Plans (QASP). Rationale: This would be consistent with the recommendation on Page 2, Para II.A.1 of the July 2003 Interagency Task Force on Performance-Based Service Acquisition.

2. 37.601 General. Under Para 37.601 (c) add Quality Assurance Surveillance Plans (QASP) to the list. Rationale: This would be consistent with the recommendation on Page 3, Para 4 "Revise Subpart 37.6 to read as follows..." of the July 2003 Interagency Task Force on Performance-Based Service Acquisition. The inclusion of the QASP in the list will ensure that all parties understand the plan behind how the contractor's performance will be assessed against the measurable performance standards. Listing the measurable performance standards without providing the plan that buttresses those standards may lead to misunderstanding, unfortunate ambiguities, and future disputes.

Please call either Ron Falcone or Peter Tuttle at (703) 471-7530 if you have any questions or require additional input.

Thanks.

Peter Tuttle, CPCM
Distributed Solutions, Inc.

2003-018-4

Clementine.Caudle-Wright@fms.treas.gov

09/02/2004 05:26 PM

To: farcase.2003-018@gsa.gov
cc:
Subject: performance based contracting

I am reviewing contracts and task orders that have "performance work statements" and are "Labor Hour". I'm having difficulty explaining to my staff, as the Division's Procurement Analyst that performance based contracting requires an end product or service that can be measured and that labor hour instruments are a level of effort contracts with no definite deliverable. Am I off kilter? If not, a strong statement in the proposed rule to emphasize the elements of the PWS and performance based contracting will help many of us who battling this issue.

thank you.

tina Caudle-Wright
Procurement Analyst
AMD/FMS
(202) 874-6728

2003-018-5

"Hutton, Donna M."
<DHutton@cpsc.gov>
09/03/2004 03:04 PM

To: farcase.2003-018@gsa.gov
cc:
Subject: FAR case 2003-018

I would like to commend the Councils on this proposed guidance, particularly on the encouragement of fixed price contracts. For follow-on contracts, contracting officers generally have sufficient information to fix pricing, thereby reducing risks to the Government. I would like to suggest the following comment regarding the content of PBSA solicitations and awards for purposes of clarity:

Comment on Proposed Rule:
Although it is certainly implied by the proposed 37.601(b) which states that a solicitation for a PBSA may use either a PWS or a SOO, and by 37.601(c) that PBSA contracts or orders must include a PWS, the language does not specifically state that if the solicitation includes a SOO, then a PWS must be developed and incorporated into the resulting contract or order which is based on responses received to the solicitation. I believe this is clearly the intent of the proposed language at 37.602-1(a). For purposes of clarification and direction to contracting personnel, I suggest that the following language, or a similar statement, be added as paragraph 37.602-1(d): If a SOO is used in a solicitation, a PWS, proposed by the offeror and accepted or revised through negotiations, as appropriate, must be incorporated into the order or contract resulting from the solicitation.

Donna Hutton
Director, Division of Procurement Services
Directorate for Administration
U.S. Consumer Product Safety Commission
4330 East-West Hwy.
Bethesda, MD 20814

2003-018-6

"Michael Miller"
<mmiller@bmra.com>
09/10/2004 09:47 AM

To: farcase.2003-018@gsa.gov
cc: jlynch@bmra.com
Subject: Comments

Dear FAR staff

COMMENTS ON DRAFT CHANGES TO FAR PART 37

Recommendations

1. Revise 37.601(c) to read as follows:

(2) Measurable performance standards. These standards may be objective (e.g., response time) or subjective (e.g., customer satisfaction), but shall reflect the level of service required by the Government to meet mission objectives. Standards shall enable assessment of contractor performance to determine whether performance objectives and/or desired outcomes are being met. Standards must be commercially practicable, reliable, and valid. Where feasible, contractor officers shall use customary commercial language and practices in establishing standards and measuring performance against standards.

Rationale: The FAR ought to establish standards for writing standards. "Commercially practicable" means writing standards that do not put both parties at risk – such as an AQL of 100% when the costs of meeting that AQL are astronomical compared with the costs of attaining an AQL of 85%. "Reliable" means standards that are consistently applied by different inspectors – that is, the standards ought not to be vague or ambiguous. "Valid" means that the standards actually measure what they purport to measure and truly represent the Government's actual need. "Commercial language and practices" would reduce the risks and uncertainty resulting from use of words and quality assurance procedures that differ from what is customary in the commercial market.

2. Revise 37.601(d) to read as follows:

(d) PBSA contracts or orders must include performance incentives to promote contractor achievement of the desired outcomes and/or performance objectives articulated in the contract or order. The Government may provide in the contract for actual or liquidated damages for specified levels of substandard performance, against the performance standards set forth in the contract or order. The Government may also establish award fee, award term, or other incentives for specified levels of performance that exceed the performance standards set forth in the contract or order.

Rationale: To have PBSC without incentives is to render the whole concept of measuring performance meaningless - especially if by default the only available remedy for subpar performance is termination for default.

As importantly, we would prefer references to damages rather than references to "negative incentives". The term "negative incentives" implies penalties that are not necessarily proportionate to the damage done to the Government mission by subpar performance. To the extent that the Government considers reduction in pay for subpar performance, that consideration should be predicated on the standards established by section 11.5 of the FAR, to wit: "Liquidated damages are not punitive and are not negative performance incentives (see 16.402-2). Liquidated damages are used to compensate the Government for probable damages.

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Therefore, the liquidated damages rate must be a reasonable forecast of just compensation for the harm that is caused by"[the subpar performance]. . . . Use a maximum amount or a maximum period for assessing liquidated damages if these limits reflect the maximum probable damage to the Government. . . . (c) The contracting officer must take all reasonable steps to mitigate liquidated damages . . . ."

All of these protections in section 11.5 ought to apply not only to reductions in pay for late delivery but also to any attempt to reduce the pay of a contractor against any performance parameter. Thus, consideration ought to be given to rewriting section 11.5 so that it applies to instances of subpar performance other than late delivery and 16.402-2 to remove the implication that the Government ought to be able to penalize subpar performance out of proportion to the damages incurred by the Government. Such changes would bring the FAR into conformance with contract law generally.

UCC § 2-718. Liquidation or Limitation of Damages; Deposits.

"(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty."

"Sometimes business contracts contain a "liquidated damages" provision, providing for payment of a certain fixed amount in the event of a breach. These provisions typically are upheld if the actual damages would have been extremely difficult to ascertain and the amount of the liquidated damages is reasonable. Courts generally do not enforce liquidated damages that are intended to serve as a penalty or are far in excess of the amount of damages the parties may reasonably forecast." –
http://law.freeadvice.com/general_practice/legal_remedies/liquidated_damaged.htm

Sincerely

Michael Miller
Vice President
Business Management Research Associates, Inc.
703 691 0868

2003-018-7

vernon.edwards@att.net

09/12/2004 06:26 PM

To: farcase.2003-018@gsa.gov
cc:
Subject: FAR Case 2003-018 - Performance-based service acquisition

I am submitting for your consideration the following comments about the subject proposed rule of July 21, 2004.

1. Proposed FAR 2.101 - The proposed definition of *performance-based acquisition* is unclear. It appears that the intent is to encompass both supplies and services within the proposed definition. That would be a mistake. The concept of performance specifications for supplies is old, well-established, and well understood. It is the concept of performance-based services acquisition that has been unclear, and the new definition does not make it clearer.

The proposed definition, which is based on OFPP's ten year old definition, is wordy and obscure. What does "structuring all aspects" mean? Does it mean *describing service requirements*? If so, why not say that? Especially troublesome is the demand for "clear, specific, and objective terms with measurable outcomes." There is an extensive literature in the fields of law, economics, and marketing, going back more than 30 years, which attests to the inherent difficulty of specifying services and of developing objective standards of satisfactory performance. The demand for specificity, objectivity, and measurability makes it very difficult, in some cases impossible, for agency requirements and contracting personnel to implement performance-based service contracting.

Instead of adhering to OFPP's original definition, why not define *performance-based services acquisition* more simply and directly, as follows: *Performance-based services acquisition means specifying service requirements in terms of the results that the contractor must produce instead of the processes that it must use when performing.* This definition is simpler, much clearer, and more to the point than the proposed definition.

2. Proposed FAR 2.101 - The proposed definition of *performance work statement* is needlessly obscure. What is the difference between "technical," "functional," and "performance" characteristics? Do the words mean different things? If so, what things? And again, the requirement for clarity, specificity, and objectivity will make it difficult for personnel at the working level to implement performance-based contracting, especially when trying to contract for long term (one year or longer) services, which defy attempts at specificity and objectivity. Why not define *performance work statement* more simply and directly, as follows: *Performance Work Statement (PWS) means a statement of work that describes service requirements in terms of the results that the contractor must produce instead of the processes that it must use when performing.*

3. Proposed FAR 2.101 - The proposed definition of statement of objectives (SOO) is inadequate. It could lead requirements and contracting personnel to think that a contract need contain only a SOO, instead of a PWS. A much better definition is in MIL-HDBK-245D, page 25:

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"The SOO is a Government prepared document incorporated into the RFP that states the overall solicitation objectives. It can be used in those solicitations where the intent is to provide the maximum flexibility to each offeror to propose an innovative development approach. Offerors use the RFP, product performance requirements, and SOO as a basis for preparing their proposals including a SOW and CDRL. Note: The SOO is not retained as a contract compliance item."

Note that a SOO is not to be used in the resulting contract. A SOO is an RFP document that should be the basis for offeror development of a proposed PWS, and the definition in FAR 2.101 should make that clear. Why not adopt the MIL-HDBK-245D definition? You can eliminate the reference to "CDRL."

4. Proposed FAR 37.102(a)(1). The reference to "performance-based service acquisition methods" is needlessly vague. Why not get to the point and say: "Write performance work statements and quality assurance surveillance plans to the maximum extent practicable, except for... ."

5. Proposed FAR 37.601(a). Instead of saying, "expressing the Government's needs in terms of required performance objectives and/or desired outcomes, rather than the method of performance," why not say: "describing the Government's requirements in terms of the results that the contractor must produce instead of the processes that it must use when performing"? I think that the latter is clearer and more direct.

6. Proposed FAR 37.601(c)(1). I recommend that you replace "measurable performance standards" with "clear performance standards." Agencies are wasting a lot of time and energy trying to quantify the unquantifiable (or that which is quantified only with difficulty), and this is a major obstacle to the implementation of performance-based services acquisition. Standards need only be clear; they need not be quantified. Also, replace the tiresome and obscure phrase "performance objectives and/or desired outcomes" with the word "results." (This comment applies to all references to "performance objectives and/or desired outcomes.")

7. Proposed FAR 37.601(d). You say that PBSA contracts and orders may include performance incentives. If a PBSA contract includes a performance incentive, must it also include a cost incentive or constraint, as per FAR 16.402-1(a) and 16.402-4(b)? If so, perhaps you should refer the reader to FAR Subpart 16.4, since not everyone is sufficiently familiar with the FAR to be aware of the requirement for a cost incentive or constraint. You might also want to point out that an incentive is not essential in order to make a contract a PBSA contract. Many persons now believe that a contract must include an incentive in order to be performance-based, and the change of language from the current FAR may be too subtle for some to notice what appears to me to be a policy shift.

8. Proposed FAR 37.602-1(a) through (c). What are you trying to say in this subsection? This material does not clearly explain the SOO concept, at least not as it is described in MIL-HDBK-245D, which describes the concept as originally employed by the Air Force. I suggest that you either provide a more complete description of the SOO concept or refer the

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reader to a more complete description. If you do not, some readers are going to think that all they need in a contract is a SOO.

9. Proposed FAR 37.602-2. I suggest that you say that quality assurance surveillance plans are internal government documents and that they are not to be incorporated into contracts, which is what many persons now believe. It is not in the best interests of the government to make its plan for quality assurance contractually binding. You might also state that it is not always in the government's interest to disclose its surveillance plan to the contractor. Disclosure is helpful when the contractor must participate actively, but unannounced inspections are often essential to sound quality assurance.

10. Proposed FAR 37.602-3. Your statement that agencies "shall" use competitive negotiations "when appropriate" is not only vague (when is it appropriate?), but it seems to suggest that competitive negotiation is better than other contracting methods when it comes to obtaining best value, which seems to be inconsistent with the definition of best value in FAR 2.101. Under the definition, best value is not associated with any particular method of contracting. It also might be interpreted as being inconsistent with FAR 6.401(b), which specifies the statutory criteria for use of competitive negotiation ("competitive proposals").

11. Proposed FAR 37.602-4. The notion reflected in the second sentence, that services that can be "defined objectively" lend themselves more readily to fixed pricing than other services, has no basis in contracting fact or theory. One can know "clearly, specifically, and objectively" what one wants, but not know "with an acceptable degree of certainty" (see FAR 16.103(b)) what it will cost to produce it. Both the current FAR and the proposed rule are misleading in this regard. Instead of making a misleading statement, why not say: "Agencies shall use fixed-price contracts whenever practicable, in accordance with the guidance in Part 16."

Vernon J. Edwards

2003-018-8

TAP4GOLF@aol.com
09/12/2004 10:23 AM

To: farcase.2003-018@gsa.gov
cc:
Subject: FAR Case 2003-018

To the FAR Council:

These are my comments on the proposed rule, published 7/21/04. Prior to my retirement from the Treasury Department, I was instrumental in drafting the OFPP Task Force Report that was issued July 2003. Overall, I'm extremely pleased to see this proposed rule, but I believe strongly that some changes to the language need to be made. I will comment by FAR reference.

1. In Part 7.103(r), the last sentence says,"For services, greater use of performance-based service acquisition (PBSA) methods and, therefore, fixed-price contracts (see (37.602-4) should occur for follow-on acquisitions."

Comment: In theory, follow-on efforts could be fixed-price if the risks and unknowns are put to rest. In reality, there are some types of work (e.g., software development) where firm, fixed-price is simply not appropriate. It's important to remember that contract type is about the level of risk perceived by the contractor and the Government - it's NOT related to the acquisition approach (i.e., PBSA). My suggestion here is to incorporate one of the seminal points of the Clinger-Cohen Act of 1996: If the work can be done in modules/phases, it may be possible to do one or more modules/phases using firm, fixed-price contracts or task orders. Otherwise, the whole issue of contract type should be removed from subparagraph (r).

Additionally, we must think about some of the very large programs being worked at the US Border Protection Agency, the US Coast Guard, the Department of Commerce, etc. It would be very difficult to say that over time, risks are decreased to the point where a firm, fixed-price contract/task order could be contemplated. These programs are so highly complex, with so many stakeholders involved, that a project may never get to that place (the exception to this would be maintenance of a system once development has been completed and full implementation has been achieved). Again, we need to separate contract type from acquisition approach.

2. In FAR 7.105(b)(4)(i), one of the acquisition considerations is to "[P]rovide rationale if a PBSA will not be used or if a PBSA is contemplated on other than a firm-fixed-price basis...."

Comment: As stated above, contract type should be independent of the acquisition approach used. I do agree that if PBSA techniques are ***not*** *going to be used for a service contract or task order, there should be a justification in the file. However, the contract type is a result of perceived risks---the notion of PBSA being tied to firm, fixed-price is just incorrect.*

3. In Part 16.505(a)(3), ordering under IDIQ contracts, the proposed rule says "Performance work statements must be used to the maximum extent practicable...."

Comment: The whole point of putting the definition of a statement of objectives (SOO) in the FAR was to give the acquisition community an alternative to the performance work statement. I see three alternatives for this particular section: (a) Delete it; (b) change the wording to "performance work statements or statements of objectives..."; or simply state "PBSA techniques must be used to the maximum extent practicable if the contract or order is for services."

4. In Part 37.601(c)(1), my recommendation is to change it to: "A PWS or SOO....."

5. Part 37.601(d) recommends using the appropriate incentives for the contract or task order. I applaud the Government's change here to allow more flexibility and specifically, to remove the requirement for price or fee reduction. (The "Inspection of Services" clause would give the Government that flexibility in any case.)

2003-018-8

6. The proposed language at FAR 37.602-4 (Contract Type) and 37.602-5 (Follow-on and repetitive requirements) raises again the issue of contract type with respect to PBSA. The second sentence of 37.602-4 states "[f]ixed-price contracts or orders are generally appropriate for services that can be defined objectively and for which the risk of performance is manageable."

Comment: This sentence adds to the general misconception that fixed-price contracts or task orders go hand-in-hand with PBSA. This is simply not the case. There are times that the risks inherent in a project just will not permit fixed prices. My recommendation is to change this sentence to read as follows: "The type of contract or order issued should be appropriate for the type of work to be performed (see FAR 37.102(a)(2)."

Thank you for the opportunity to comment on this proposed rule.

Respectfully submitted,

Ronne A. Rogin
13711 Springhaven Drive
Chantilly, VA 20151

2003-018-9

"Friedrich, Robert Mr ACA" <robert.friedrich@hqda.army.mil>

09/15/2004 10:38 AM

To: "'farcase.2003-018@gsa.gov'" <farcase.2003-018@gsa.gov>
cc: "Love, Kathy Ms ACA" <kathy.love@hqda.army.mil>, "Binney, Barbara Ms SAALT" <barbara.binney@us.army.mil>, "Rider, Melissa D Ms SAALT" <melissa.rider@hqda.army.mil>, "Kley, Bill Mr SAALT" <bill.kley@us.army.mil>
Subject: Public Comment on FAR Proposed Rule 03-018

Recommend deleting the 1st sentence of the proposed 37.602-4 and substitute the following:

"Contract types most likely to motivate contractors to perform at optimal levels shall be chosen that are consistent with the order of precedence set forth in 37.102(a)(2)."

Rationale for comment: I believe that it is critical to continue to stress the importance of selecting a contract type that motivates a contractor to perform at optimal levels while complying with the order of precedence.

Thank you for the opportunity to comment on this proposed rule.

Robert Friedrich
U.S. Army Contracting Agency
SFCA-CP

2003-018-10

"Lisa Diernisse"
<ldiernisse@caci.com>

09/16/2004 12:18 PM

To: farcase.2003-018@gsa.gov
cc:
Subject: COMMENTS ON PROPOSED RULE 2003-18

Please see the attached comments. Please note, the comments are submitted by me as a private individual and do not necessarily represent the views of CACI International Inc

(See attached file: Proposed Rule_PBSA 7-21-04_Comments.doc)

Thank you --

Lisa Diernisse

Proposed Rule_PBSA 7-21-04_Comments

2003-018-10

COMMENTS ON FEDERAL REGISTER, PROPOSED RULE
submitted by Lisa Diernisse

Rule dated July 21, 2004

Performance Based Service Acquisition

Comments:

1. Recommend that the new Performance based acquisition (PBA) definition in 2.101 not say "objective terms", but rather, say "objective or subjective terms", since the rule at 37.601(c)(2) clearly would permit use of subjective standards.

2. Recommend that language similar to the following be added to the 2.101 definition of PWS:

"A statement of work that meets the definition of performance based is a performance work statement (PWS). A PWS is a type of SOW." This would tie the use of the term PWS to the use of the term SOW in other parts of the FAR so that readers would understand that they are essentially the same type of document. For example, the latest update to FAR part 8 on federal supply schedule ordering makes extensive use of the term SOW.

3. For the definition of PWS at 2.101, recommend taking out "objective terms that describe" which is difficult to understand in this context, and state "that identifes the agency's requirements in clear, specific, outcome or results-based terms, and with specific deliverables and tasks identified". The proposed rule states that a PWS must describe technical, functional and performance characteristics in objective terms. This is very vague and difficult to interpret. How does one describe a requirement objectively? For example, if the requirement is for the contractor to attend meetings and assist the Government in establishing a plan of action, how would you describe this requirement "objectively"? The term objective refers to a manner of evaluating or judging something, not the manner of describing something. Why not say instead "describe requirements in terms of deliverables, specific tasks outcomes and results"?

4. The definition of statement of objectives (SOO) at 2.101 is so broad, it is essentially meaningless. What does "high level requirement" mean - -how can Government contracting officers possibly interpret and apply this term? Also, recommend adding after "key agency objectives": "as they relate to the instant procurement".

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5. At 37.600, since PBSA isn't just limited to services acquisitions, recommend that the language state that the term includes "and performance based delivery orders" after "task orders". Delivery orders are the same thing as task orders except delivery orders apply to indefinite delivery contracts for supplies and task orders apply to indefinitely delivery contracts for services. A delivery order (a purchase primarily of supplies) could feasibly include some elements of services such as training, maintenance, installation, etc. Why not apply PBSA to both delivery and task orders?

6. At 37.601, the way performance based acquisition is now explained in the proposed rule, there is no longer any link between performance and payment. A key element of PBSA has traditionally been to withhold paying the contractor the full contract price if its performance did not meet the contract's minimum requirements. This tenet of PBSA has now been eliminated since incentives and disincentives are optional. In accordance with this new rule, as long as the Government describes its requirements objectively, the contractor can be paid in full even if its performance is evaluated as less than acceptable. This type of contract arrangement would still meet the proposed rule's requirements to be considered "performance based". This seems to fall short of longstanding Government policies on PBSA.

7. At 37.601(d), wouldn't the purpose of incentives be to promote achievement of required contract performance standards, not "desired outcomes or objectives"? As described in the proposed rule, the contract/order would not contain "desired outcomes and objectives", these would only be stated in the solicitation document but would be converted to requirements in the actual awarded contract/order. Per the proposed new definition at 2.101, a PWS will state *requirements*, not "desired outcomes or objectives". If the intent is that a PWS can still contain desired outcomes and objectives, the new definition at 2.101 should be re-written to make this clear.

8. At 37.602-1(b) recommend making this description consistent with the PWS definition at 2.101. They are different and this is confusing and inconsistent.

9. At 37.602-1(c), why not match the description here of a SOO to the definition at 2.101? Recommend removing the proposed definition as written at 2.101 and replace it with the 37.602-1(c) language which is much clearer and more detailed and meaningful.

10. Recommend adding language at 37.103(c) that makes it clear that while the agency contracting officer is responsible for ensuring services acquisitions use PBSA to the maximum extent practicable, that agency technical/program personnel who are responsible for initiating the procurement, also shall provide input to the contracting

officer to enable the contracting officer to meet this FAR requirement. For example, they should be required to provide, as appropriate and if practicable, input on the desired/required outcomes, objectives, performance standards, quality assurance surveillance plans (how to monitor and measure performance), the purpose of the work to be performed, the level of performance required, etc. It is impossible for contracting officers to "ensure" a procurement is done as PBSA unless the technical personnel are required to provide this information. In large part, the lack of success in the PBSA area can be attributed to the lack of FAR language requiring technical/program personnel to participate in "ensuring" contracts are PBSA. The contracting officers cannot do it alone. They do not have the technical understanding of the work the contractor will do to write these portions of a PBSA document. Adding this language to the FAR will assist the contracting officers in documenting and explaining those cases where they cannot use PBSA. They will be able to document that the technical personnel could not provide PBSA input to them.

11. At 37.602-2(a), the same comment as at comment #7, above, regarding replacing the term "desired objectives". Also recommend adding after "contract": "or order".

12. At 37.601 -- since per 37.602-2, a QASP is obviously a document used as part of PBSA, why not add under 37.601(c) that PBSA contracts or orders should contain a QASP, unless the contractor's quality assurance system will be used to ensure quality?

As currently written in the proposed rule, it's unclear whether a QASP is really required or not. 37.602-2(a) seems to say all services procurements must have a QASP (in fact, per the new proposed rule language they are required even if the services procurement is not PBSA), unless you can rely on a contractor's QA system. Is this intended (for a QASP to be required even on a non-PBSA procurement)?

If so, this would be extremely burdensome, since oftentimes the contractor does not have an established, formal, documented QA system for services it sells but yet these are the very types of acquisitions that don't lend themselves to PBSA. A contracting officer would nonetheless be required to develop a QASP for these procurements. Examples are when the Govt buys research and development services, subject matter expert services, technical and financial management services, and other types of highly specialized, customer-specific consultant services. When neither the Government nor the contractor can predict, establish and describe firm taskings and deliverables at the time of contract award, and the services are commercial but the contractor does not have a QA system that covers its consulting work, and the Government determines it is not feasible to use PBSA, why would a contracting officer be required to develop a QASP at the time of

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contract award? How would they write a QASP with performance standards and evaluation methods when even the contractor's specific tasks and deliverables cannot be described and identified in the contract? Most SOWs/PWS list only taskings that the contractor "might" be asked to perform and give examples of deliverables that the contractor "might" be required to develop at a later date. There are no specifics on when, where, how many, format, content, due dates, etc. in the actual contract. These requirements are communicated to the contractor verbally after the contractor personnel report to the Government worksite and begin taking direction from the Government, days, weeks or months after the contract was awarded.

13. Recommend saying "contract or order" throughout the entire proposed rule language vs. just "contract".

2003-018-11

"Ellen Campbell" <ecampbell@PESYSTEMS.COM>

09/16/2004 10:03 AM

To: farcase.2003-018@gsa.gov
cc:
Subject: Comments on FAR Case 2003-018

** Low Priority **

1. Section 2.101 should define Performance Work Statement as "a statement that identifies the agency's requirements in clear, specific, MEASURABLE, and objective terms that describe technical, functional and performance characteristics." Too many PWSs are vague and impossible to measure. This makes it difficult to validate that the objective cited has really been met which further opens the door for conflicts between the Government and contractor if there is some question about the objective and whether it has been met. It also allows the Government to apply subjective judgements which may lead to unfair contractor penalties.

2. Section 7.103 specifies that the agency-head must ensure that knowledge gained from prior acquisitions be used to further refine requirements and acquisition strategies. How can this be measured and validated? What checks are in place to ensure that this really happens?

3. Sections 16.505, 37.000, 37.102 and 37.602-5 all use the term "to the maximum extent practicable". This is too vague and will promote a simple way of avoiding the implemention of any performance based acquisitions. This should be defined with specific examples and quidelines.

4. Section 37.602-2 should also reflect the responsibilities of the Government. This includes the responsibility to provide performance feedback to the contractor on a regular basis and in an objective fashion.

The Government may also have responsibility to perform some of the surveillance or measurement activities - either because they choose to or the contractor is not in a position to collect the data (ex. "No customer complaints" is an objective but the contractor has no access to customers). The contractor must then rely on the Government to collect the appropriate data. If the Government does not carry out this responsibility, contractors may be penalized for data collection that is not in their pervue to collect or view.

5. PWSs are being written with "100% of the time" as the target performance. In many cases, this is impossible to meet. There should be a definition of when using "100%" is appropriate (such as, for mission critical systems).

Regards,

Ellen Campbell
PESystems, Inc
703-246-9773

2003-018-12

"Gebhard Becky A Civ HQ AFMC/PKV" <Becky.Gebhard@wpafb.af.mil>

09/20/2004 05:39 PM

To: "'farcase.2003-018@gsa.gov'" <farcase.2003-018@gsa.gov>
cc:
Subject: FAR case comments 2003-018

Comments on FAR Case 2003-018
Para 7.103 (r) The statement is made"... therefore fixed-priced contracts (see 37-602-4) should occur for follow-on acquisitions." The reference cited at FAR 37.602-4 states "Fixed-price contracts are generally appropriate for the services that can be defined objectively..." The reference site does not make fixed contracts mandatory but rather says "are generally appropriate" which is less directive and does not support the dictate that because something is PBSA, it is "therefore fixed-price". There is no exemption for PBSA based on contract type, and likewise contract type shouldn't limit PBSA use.
Para 37.601 (d) The requirement for a negative incentive is established in the "Inspection of Services" clauses dating from 1984 and 1993. This paragraph seems to suggest that negative incentives are optional. In fact, they are mandatory and serve as the accountability portion of PBSA. This is also supported in the Gov't Performance and Results Act.
Para 37.602-1 There is no mention of performance plans as highlighted in AFI 63-124. While this section addresses contractor assessment, it does not mention contract assessment and oversight which is required in PL 107-107. The AF uses a performance plan to document both contract and contractor assessment. Suggest you address contract oversight in this section.
Para 37.602-4 Same comment regarding fixed price as is mentioned in the first comment.

Becky Gebhard, CPCM
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2003-018-13

Council of Defense and Space Industry Associations
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September 20, 2004
CODSIA Case No.04-05

General Services Administration
Regulatory Secretariat (VR)
Room 4035
1800 F Street, N.W.
Washington, D.C. 20405

Attn: Ms. Laurie Duarte

Re: FAR Case 2003-018 Performance-Based Service Acquisition

Dear Ms. Duarte:

The undersigned members of the Council on Defense and Space Industry Associations (CODSIA) appreciates the opportunity to submit comments on the proposed FAR rule on performance-based service acquisition (PBSA) published in the Federal Register (69 F.R. 42712) on July 21, 2004.

Formed in 1964 by the industry associations with common interests in the defense and space fields, CODSIA is currently composed of six associations representing over 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary. A decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

CODSIA member associations have been strong supporters of the increased use of performance-based services acquisition techniques by federal agencies. For more than twenty years, the Federal Government has had a variety of policies and initiatives to expand the use of performance-based federal procurements. More recently, Congress enacted provisions in the 2001 National Defense Authorization Act to encourage the Defense Department to increase the percentage of awards made using performance-based techniques and enacted provisions in the Services Acquisition Reform Act of 2003 to encourage all federal agencies to increase the percentage of awards made using performance-based techniques.

We applaud the FAR Council's efforts to clarify the FAR to give agencies greater flexibility in applying PBSA techniques. Several of our associations contributed to the work of the OFPP interagency task force on PBSA. Our detailed comments on this proposed rule are included in the attachment to this letter. However, on June 18, 2004, the FAR agencies published an interim rule (69 F.R. 34226) implementing Section 1431 of the Services Acquisition Reform Act of 2003 providing government-wide authority to treat certain performance-based contracts or task orders for services as commercial items under certain

2003-08-13

circumstances. That rule includes a revision to FAR 37.601(a) that would be overridden by this proposed rule. We urge the FAR Council to move expeditiously to review these and other comments submitted on this proposed rule, reconcile the changes in the interim rule with these proposed changes, and promptly develop a final rule addressing both topics.

We also compliment the Office of Federal Procurement Policy for its September 7, 2004 memorandum to Chief Acquisition Officers and Senior Procurement Executives entitled "Increasing the Use of Performance-Based Service Acquisition." However, we are concerned that this memorandum rescinds the 1998 OFPP "Guide to Best Practices for Performance-Based Service Contracting" without any suitable replacement. In our view, the "Seven Steps Guide" does not yet provide sufficient guidance to meet the demonstrated needs of the agencies and the entire acquisition community. Hopefully, the Services Contracting Center of Excellence, required by the Services Acquisition Reform Act of 2003 to be established within OFPP, will in the near future provide meaningful information to assist federal agencies with their PBSA efforts.

We also note that, on September 13, 2004, the Director of Defense Procurement and Acquisition Policy issued a memorandum entitled "Requirements for Service Contracts." While we generally concur with the information in this memo, we have some concerns with the discussion of the transition from PBSA to fixed-price contracts; we do not believe the memo implies that PBSA awards should be fixed priced. We will address those issues directly with DoD.

We appreciate the opportunity to comment on this proposed rule. If you have any questions, please contact Alan Chvotkin of the Professional Services Council, who serves as our point of contact for these comments. Alan can be reached at (703) 875-8059 or at Chvotkin@pscouncil.org.

Sincerely,

Alan Chvotkin
Senior Vice President and
Counsel
Professional Services Council

Chris Jahn
President
Contract Services Association

-continued-

018-13

Peter Steffes
Vice President, Government Policy
National Defense Industries Association

Dan Heinemeir
President
GEIA

Terrence Marlow
Vice President, Government
Division
Aerospace Industries Association

Cynthia Brown
President
American Shipbuilding Association

018-13

DETAILED CODSIA COMMENTS ON JULY 21, 2004 PROPOSED FAR RULE ON PERFORMANCE-BASED SERVICE ACQUISITION

A. Part 2-Definitions of Words and Terms

1) This section proposes to amend FAR 2.101 by replacing the current definition of "performance-based contracting" with a new definition of "performance-based acquisition (PBA) and then adding new definitions of "performance work statement" and "statement of objectives."

2) It is not clear that the proposed rule overrides the current FAR definition of "performance-based contracting." We recommend that any final rule clearly repeal the term "performance-based contracting."

3) In addition, the proposed rule includes the term PBSA within the definition of the term PBA. While a PBSA is a subset of PBA, we believe the FAR would be clearer if the term PBSA were a separately defined term. Thus, we recommend deleting the last sentence from the proposed definition of the term "PBA" and adding a new definition in appropriate alphabetical order as follows:

"*Performance-based Service Acquisition* (PBSA) is a PBA for services."

4) We have no objection to the definition of the terms "performance work statement" or "statement of objective."

B. Part 7- Acquisition Planning

1) 7.103. This section proposes to revise FAR 7.103(r) regarding agency responsibilities. However, the second sentence of this revision draws an unsubstantiated conclusion that the follow-on acquisition to a PBSA (and only a PBSA?) should be a fixed-price contract. The section cross-references to the change proposed to Part 37.602-4. We concur with the revision to 37.602-4, but neither existing FAR 16.1 nor proposed FAR 37.602-4 or proposed 37.602-5 presumes that any particular contract type meets the standard for a fixed-price contract or order. We strongly recommend deleting this second sentence, or, at a minimum, revising this second sentence to state: "For follow on acquisitions for services that used PBSA techniques, follow 7.105(b)(4)."

2) 7.105. This section proposes to revise FAR 7.105 regarding the content of written acquisition plans. In addition to the material proposed to be added, we recommend that the acquisition plan also include an explanation of the agency's compliance with the order of precedence proposed to be added in Part 11.101(a).

C. Part 11-Describing Agency Needs

This section proposes to revise FAR 11.101 by revising the order of precedence for requirements documents by elevating performance or function-oriented documents above detailed design-oriented documents

and other standards or specifications. We support this priority but are concerned that the terms are meaningless on a stand-alone basis. At a minimum, we recommend adding an example of such documents. For example, add before the period at the end of that phrase "(e.g. a PWS or an SOO (see 37.602)). An alternative reference could be to proposed 2.101.

D. Part 16-Types of Contracts

This section proposes to revise FAR 16.505 on ordering mechanisms. We do not accept that a "PWS" must be used "to the maximum extent practicable" if the contract or order is for services. We do agree that a "performance-based service acquisition" should be used to the maximum extent practicable. As properly addressed in proposed FAR 37.602-1, either a PWS or an SOO are acceptable alternative methods for an agency to use in a solicitation.

E. Part 37-Service Contracting

1) 37.000. This proposed revision states that this part of the FAR "requires" the use of PBSA to the maximum extent practicable. Neither the laws nor the FAR policy requires the use of PBSA. Rather, as the supplemental information accompanying the proposed rule clearly and properly states, law and regulation state a "preference" for the use of performance-based acquisitions, but only a preference. This point is reinforced in proposed 37.102(a). We recommend that 37.000 be modified to provide that "(T)his part provides a preference for the use of PBSA…".

2) 37.601. As noted in the cover letter, on June 18, 2004, the FAR agencies published an interim rule (69 F.R. 34226) implementing Section 1431 of the Services Acquisition Reform Act of 2003 providing government-wide authority to treat certain performance-based contracts or task orders for services as commercial items under certain circumstances. That rule includes a revision to FAR 37.601(a) that is overridden by this proposed rule.

2. 37.601(c). This section addresses the critical element of measurable performance standards for PBSA. While we agree that the proposed text provides a minimal description of performance standards, we recommend that additional coverage would enhance the meaning and effectiveness of this section. We recommend adding at the end of the 37.601(c)(2) the following:

> "Standards must be practicable, reliable, and valid. Where feasible, use customary commercial language and practices in establishing standards and measuring performance against standards."

In our view, "practicable" means writing standards that do not unreasonably put both parties at risk. "Reliable" means standards that are consistently applied; the standards cannot be vague or ambiguous. "Valid" means that the standards actually measure what they purport to measure and truly represent the Government's actual need. Using "customary commercial language and practices" should reduce the risks and uncertainty resulting from use of words and quality assurance procedures that differ from what is customary in the commercial market.

3. 37.602-2. This section addresses quality assurance plans.

We recommend changing the title of the heading from "Quality Assurance" to "Quality Assurance Surveillance Plan" (QASP), the term used in the "Seven Steps Guide" and in the body of the provision. However, to ensure that these plans do not simply become checklists to measure performance, a better term to be used throughout might be "performance management plan" or "performance-based management plan." In addition, in the third sentence of subparagraph (a), we recommend adding before the period after the phrase "performance standards contained in the contract" the phrase "or order".

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2003-018-14

"McHugh, Michael" <MMcHugh@anteon.com>

09/20/2004 04:07 PM

To: farcase.2003-018@gsa.gov
cc:
Subject: Comments on FAR Case 2003-18

Comments

on

FAR Case 2003-018

We have one suggestion for altering the proposed language. We suggest changing the proposed language in FAR paragraph 37.601(c)(2). Our added text appears in bold.

Suggested change to 37.601(c)(2)

37.601 General.

(c) PBSA contracts or orders shall include—

(2) Measurable performance standards. These standards may be ~~objective~~ **quantitative** (e.g.,response time) or ~~subjective~~ **qualitative** (e.g., customer satisfaction), but shall reflect the level of service required by the Government to meet mission objectives. Standards shall enable assessment of contractor performance to determine whether performance objectives and/or desired outcomes are being met. **Standards must be objective and measurable, even when subjective. (For example, the subjective measure "customer satisfaction" could be made objective and measurable if captured in periodic survey or ongoing feedback recording.)**

Rationale for Comment on 37.601(c)(2)

The proposal states that the standards may be "objective" or "subjective." The proposed word "subjective" risks the interpretation that performance standards can be subject to varying opinions and individual client moods (i.e., "customer satisfaction"). This language weakens the basic premise of this subject paragraph – that standards must be "measurable." This language, in turn leaves the door open to disagreement about performance levels and even to potential litigation over the same point. Official literature on performance based service acquisition acknowledges that performance standards can be quantitative (e.g., response time) or qualitative (e.g., customer satisfaction). See Step Five in the Seven Steps to PBSA at www.acqnet.gov for an example of this. We suggest the qualitative and quantitative distinction is more appropriate here – and less open to misinterpretation. And since even qualitative matters should be measurable objectively, we offer the example of survey results as a means of objectively

2003-018-14

measuring the qualitative and subjective "customer satisfaction" standard.

POC: Mike McHugh, Anteon GWAC GSA Program Center, (703)246-0751. mmchugh@anteon.com

2003-018-15

JStrock@abc.org
09/20/2004 03:46 PM

To: farcase.2003-018@gsa.gov
cc:
Subject: FAR case 2003-018

September 20, 2004

Laurie Duarte
General Services Administration
Regulatory Secretariat [VR]
1800 F Street, NW, Room 4035
Washington, DC 20405

Dear Ms. Duarte:

Associated Builders and Contractors, Inc. (ABC), a national trade association representing over 23,000 construction contractors, subcontractors, suppliers, and related firms, appreciates this opportunity to comment on the Federal Acquisition Regulation Case 2003-018, performance-based service acquisition rulemaking.

As we interpret this proposal, construction is not included. However, many of our members provide non-construction services, such as maintenance, which would be affected by the proposal.

ABC generally supports performance-based service acquisition with limitations. Low-bid contracting is valuable for purchasing services in the context of a fair pre-qualification requirement. Without this safeguard, contracts could be awarded too easily at the sole discretion of the contracting officer. The regulatory proposal does not seem to clearly provide for this two-step process, and ABC would welcome this clarification. The proposal provides a presumption that performance-based service acquisition is preferred, but it is not evident when low-bid would be appropriate. That "test" must be clear in the regulation.

Thank you for taking the time to review our concerns. We hope that our comments will be considered throughout the rulemaking process. Please let me know if you have questions or need more information.

Sincerely,

John Strock
Policy Manager