

(2) The term does not apply to educational institutions that conduct activities on behalf of departments or agencies or at which Federal employees are hosted unless specifically designated as such by the sponsoring department or agency.

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PART 4—ADMINISTRATIVE MATTERS

■ 3. Add Subpart 4.13, consisting of sections 4.1300 and 4.1301, to read as follows:

Subpart 4.13—Personal Identity Verification of Contractor Personnel

Sec.
4.1300 Policy.
4.1301 Contract clause.

4.1300 Policy.

(a) Agencies must follow Federal Information Processing Standards Publication (FIPS PUB) Number 201, “Personal Identity Verification of Federal Employees and Contractors,” and the associated Office of Management and Budget (OMB) implementation guidance for personal identity verification for all affected contractor and subcontractor personnel when contract performance requires contractors to have physical access to a federally-controlled facility or access to a Federal information system.

(b) Agencies must include their implementation of FIPS PUB 201 and OMB guidance M–05–24, dated August 5, 2005, in solicitations and contracts that require the contractor to have physical access to a federally-controlled facility or access to a Federal information system.

(c) Agencies shall designate an official responsible for verifying contractor employee personal identity.

4.1301 Contract clause.

The contracting officer shall insert the clause at 52.204–9, Personal Identity Verification of Contractor Personnel, in solicitations and contracts when contract performance requires contractors to have physical access to a federally-controlled facility or access to a Federal information system.

PART 7—ACQUISITION PLANNING

■ 4. Amend section 7.105 by revising paragraph (b)(17) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(17) *Security considerations.* For acquisitions dealing with classified matters, discuss how adequate security

will be established, maintained, and monitored (see Subpart 4.4). For information technology acquisitions, discuss how agency information security requirements will be met. For acquisitions requiring contractor physical access to a federally-controlled facility or access to a Federal information system, discuss how agency requirements for personal identity verification of contractors will be met (see Subpart 4.13).

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Add section 52.204–9 to read as follows:

52.204–9 Personal Identity Verification of Contractor Personnel.

As prescribed in 4.1301, insert the following clause:

PERSONAL IDENTITY VERIFICATION OF CONTRACTOR PERSONNEL (JAN 2006)

(a) The Contractor shall comply with agency personal identity verification procedures identified in the contract that implement Homeland Security Presidential Directive–12 (HSPD–12), Office of Management and Budget (OMB) guidance M–05–24, and Federal Information Processing Standards Publication (FIPS PUB) Number 201.

(b) The Contractor shall insert this clause in all subcontracts when the subcontractor is required to have physical access to a federally-controlled facility or access to a Federal information system.

(End of clause)

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 7, 11, 12, 16, 37, and 39

[FAC 2005–07; FAR Case 2003–018; Item III]

RIN 9000–AK00

Federal Acquisition Regulation; Change to Performance-based Acquisition

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense

Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) by changing the terms “performance-based contracting (PBC)” and “performance-based service contracting (PBSC)” to “performance-based acquisition (PBA)” throughout the FAR; adding applicable PBA definitions of “Performance Work Statement (PWS)” and “Statement of Objectives (SOO)” and describing their uses; clarifying the order of precedence for requirements; eliminating redundancy where found; modifying the regulation to broaden the scope of PBA and give agencies more flexibility in applying PBA methods to contracts and orders of varying complexity; and reducing the burden of force-fitting contracts and orders into PBA, when it is not appropriate. The title of the rule has also been changed to reflect the deletion of “service.”

DATES: *Effective Date:* February 2, 2006.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Michael Jackson, Procurement Analyst, at (202) 208–4949. Please cite FAC 2005–07, FAR case 2003–018. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 43712 on July 21, 2004, to which 15 commenters responded. In addition, three respondents submitted comments in response to FAR Case 2004–004, Incentive for Use of Performance-Based Contracting for Services, that the Councils determined are more relevant to this FAR case. The major changes to the proposed rule that resulted from the public comments and Council deliberations are:

(1) *FAR 2.101 Definitions.* REVISED the definition of PBA to clarify its meaning.

(2) *FAR 2.101 Definitions.* REVISED the definition of PWS to clarify its meaning.

(3) *FAR 2.101 Definitions.* REVISED the definition of SOO to clarify its meaning.

(4) *FAR 7.103(r) Agency-head responsibilities.* DELETED “and, therefore, fixed-price contracts” from the statement “For services, greater use of performance-based acquisition methods and, therefore, fixed-price contracts * * * should occur for follow-on acquisitions” because the Councils

believe the appropriate contract type is based on the level of risk and not the acquisition method.

(5) *FAR 11.101(a)(2) Order of precedence for requirements documents.* DELETED “or function” because the Councils concluded that the term “function” could be confused with “detailed design-oriented documents” at 11.101(a)(3) thus confusing the order of precedence for requirements documents.

(6) *FAR 16.505(a)(3) Ordering (IDIQ).* CHANGED “performance work statements must be used to the maximum extent practicable” to “performance-based acquisition methods must be used to the maximum extent practicable” since either a SOO or PWS can be used in the solicitation.

(7) *FAR 37.000 Scope of subpart.* ADDED “or orders” after “contracts” to clarify the Subpart applies to contracts and orders.

(8) *Various Subparts in Part 37.* CHANGED the terminology from “performance-based service acquisitions” to “performance-based acquisitions” since Part 37 only relates to service acquisitions.

(9) *FAR 37.102(e), Agency program officials responsibility.* ADDED a requirement that the agency program officials describe the need to be filled using performance-based acquisition methods to the maximum extent practicable to facilitate performance-based acquisitions.

(10) *FAR 37.601, Performance-based acquisitions.* General provisions as follows:

(a) REBASELINED the rule to the current baseline. Updated baseline used in the proposed rule to reflect the current FAR baseline.

(b) DELETED 37.601(a) of the proposed rule which stated the principal objectives of PBAs since the principal objectives are addressed in the definition.

(c) RELOCATED and revised the detailed provisions for performance standards to a new FAR section, 37.603, to permit expanded coverage. The Councils clarified the language to indicate that performance standards must be measurable and ADDED “method of assessing contractor performance” to the required elements of a PBA since the quality assurance surveillance plan is not a mandatory element and contractors should know how they will be assessed during contract performance.

(d) REVISED the performance incentives coverage to simply refer to the provisions at 16.402–2 since the only unique requirement for PBAs is the requirement that performance

incentives correspond to the performance standards.

(11) *FAR 37.602, Performance work statements:*

(a) In paragraph (b) REVERTED back to the existing FAR coverage with minor modifications because the Councils believe the prior coverage correctly detailed the requirements.

(b) In paragraph (c), REVISED SOO coverage to clarify that the SOO is a solicitation document and that performance objectives are the required results.

(12) *FAR 37.603, Performance standards.* ADDED coverage to clarify that performance standards must be measurable and structured to permit assessment of the contractor’s performance.

(13) *FAR 37.604, Quality Assurance:*

(a) RETITLED the section to Quality Assurance Surveillance Plans to be consistent with FAR terminology.

(b) REVISED the coverage to simply refer to Subpart 46.4 since the same requirements apply for PBAs.

(c) ADDED coverage to clarify that the Government prepares the quality assurance surveillance plan when the solicitation uses a PWS and that contractors may be required to submit a quality assurance surveillance plan when the solicitation uses a SOO.

(14) *FAR 37.602–3, Selection procedures.* DELETED the coverage since there are no unique requirements for PBAs.

(15) *FAR 37.602–4, Contract type.* DELETED the coverage since there are no unique requirements for selecting contract type for PBAs.

(16) *FAR 37.602–5, Follow-on and repetitive requirements.* DELETED the coverage since there are no unique requirements for PBAs.

The Councils made changes based on the belief that performance-based acquisitions share many of the features of non-performance-based acquisitions. Only those features that are unique to PBA are set forth in subpart 37.6. Features that are similar, such as the Government’s ability to take deductions for poor performance or non-performance of contract requirements under the Inspections clause, were not included. Therefore, the absence of a specific authority in subpart 37.6 should not be construed as meaning that the authority does not exist under another part of the FAR.

Disposition of Public Comments

a. Definitions FAR 2.101.

Comment(s): Performance-Based Acquisition. One commenter said the definition of performance-based acquisitions is unclear, wordy and

obscure and that the demand for “clear, specific, and objective terms with measurable outcomes” was especially troublesome. The same commenter also said the definition appears to encompass both supplies and services and asked if “structuring all aspects” means “describing service requirements.” Another commenter said a performance-based service acquisition is a subset of performance-based acquisitions and recommended developing a separate definition for performance-based service acquisitions and deleting the last sentence from the definition of performance-based acquisitions. Another commenter recommended revising the definition to permit “objective or subjective terms” since 37.601(c)(2) clearly permits the use of subjective standards.

Disposition: The Councils revised the definition to state performance-based acquisition “means an acquisition structured around the results to be achieved as opposed to the manner by which the work is to be performed.” The Councils note the performance-based acquisition definition does encompass both supplies and services; however, the Councils do not believe a separate definition for performance-based service acquisitions is needed and believe adding a definition for performance-based service acquisition would necessitate a new definition for performance-based supply acquisition with the only difference being one definition would say “service” and the other would say “supply.”

Comment(s): Performance Work Statement (PWS). (a) One commenter recommended defining a PWS as “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.” The same commenter also questioned the difference between technical, functional, and performance characteristics and said it will be hard to implement the requirement for “clarity, specificity, and objectivity” at the working level “especially for long term contracts (one year or longer).” Another commenter recommended defining a PWS as “a statement that identifies the agency’s requirements in clear, specific, measurable, and objective terms that describe technical, functional, and performance characteristics” because many PWSs are vague and impossible to measure and the lack of measurable outcomes allows the Government to apply subjective judgment that may lead to unfair contractor penalties. Another commenter recommended changing the definition to specifically state that the

PWS is a type of SOW so that readers would understand that they are essentially the same type of document and replacing “objective terms that describe” with “that identifies the agency requirements in clear specific, outcome or results-based terms, and with specific deliverables and tasks identified”. The same commenter also questioned how to “describe a requirement objectively.”

Disposition: The Councils revised the definition to say “a statement of work for performance-based acquisitions that describes the required results in clear, specific, and objective terms with measurable outcomes.” The Councils believe the results must be described in “clear, specific, and objective terms” to ensure both parties understand the requirements. The Councils also agree that the outcomes must be measurable and revised the rule at FAR 37.602–2 (now 37.603) to require that performance standards be measurable and structured in a way to permit assessment of the contractor’s performance.

(b) One commenter said the “desired outcome and/or performance objectives” terminology at 37.601(d) for performance incentives was inconsistent with the definition of a performance work statement at 2.101.

Disposition: The Councils agree the terminology was inconsistent. Instead of revising the language, the Councils deleted that part of the coverage since performance incentives are covered at FAR 16.402–2. When performance incentives are used, the rule at 37.601(b)(3) requires that the performance incentives correspond to the performance standards set forth in the contract.

Comment(s): Statement of Objectives (SOO). One commenter said the proposed definition could lead requirements and contracting personnel to think that a contract need contain only a SOO instead of a PWS. Another commenter said the definition is so broad that it is meaningless. The same commenter questioned the meaning of “high-level” and recommended adding “as they relate to the instant procurement” after “key agency objectives.”

Disposition: The Councils revised 37.602 to clarify that the SOO is a Government prepared document for use in a solicitation that will form the basis for a PWS.

Comment(s): Quality Assurance Surveillance Plans. One commenter recommended adding a definition for quality assurance surveillance plan to be consistent with the July 2003

Interagency Task Force on Performance-Based Service Acquisition.

Disposition: Quality assurance surveillance plans are clearly addressed in FAR 46.401. The Councils are not aware of any issues related to the requirements in FAR 46.401. As these same requirements apply to Part 37, the Councils do not believe a new definition is necessary.

b. Agency-head responsibilities, FAR 7.103(r).

Comment(s): Three commenters said the assumption at 7.103(r) that greater use of performance-based service acquisitions methods and, therefore, fixed-price contracts should occur for follow-on acquisition was incorrect since the determination of appropriate contract type is based on level of risk and not the acquisition method, *i.e.*, performance-based service acquisitions.

Disposition: The Councils agree the appropriate contract type is based on the level of risk and not the acquisition method and revised the rule accordingly.

Comment(s): One commenter asked what checks are in place to ensure that agency heads actually prescribe procedures for ensuring that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies.

Disposition: Issues of compliance with the FAR are beyond the scope of this rulemaking. The Councils note that the Government Accountability Office and other agency auditing functions (*e.g.*, DoD Inspector General) have responsibility for assessing agency compliance with the established regulations.

c. Content of written acquisition plans, FAR 7.105.

Comment(s): One commenter recommended revising the rule at FAR 7.105 to require an explanation of the agency’s compliance with the order of precedence for requirement documents at Part 11.101(a).

Disposition: Contracting officers are required to document the choice of product or services description types used in the acquisition plan - see FAR 7.105(b)(6). Therefore, additional coverage is not needed.

Comment(s): One commenter said the requirement at FAR 7.105(b)(4)(i) to “provide rationale if a performance-based service acquisitions will not be used or if a performance-based service acquisitions is contemplated on other than a firm-fixed price basis” should be changed since determining the appropriate contract type is independent of the acquisition approach used.

Disposition: The Councils agree that determining contract type is independent of the acquisition method used; however, the Councils believe it is appropriate to document why performance-based acquisition methods and firm-fixed prices were not used given the statutory order of precedence reflected in FAR 37.102(a)(2). The Councils note that these provisions were not changed by this rule.

d. Describing agency needs, FAR 11.101. One commenter said the rule revised the order of precedence for requirements documents by elevating function-oriented documents above detailed design-oriented documents and other standards or specifications. The commenter also recommended adding example of PWS or SOO to clarify the performance and function-oriented documents.

Disposition: The Councils did not intend to change the order of precedence at FAR 11.101. The Councils added “function-oriented” to “performance-oriented” documents to attempt to differentiate between a PWS and a SOO. Based on this comment, and after further deliberation, the Councils concluded that the term “function” could be confused with “detailed design-oriented documents” thus potentially changing the order of precedence for requirements documents. To avoid further confusion, the Councils deleted the term “function-oriented.” The Councils also added examples of what is meant by a “performance-oriented document.”

e. Types of contracts, FAR 16.505.

One commenter said the rule at FAR 16.505(a)(3) that requires performance work statements to be used to the maximum extent practicable contradicts the reason for defining the SOO in the FAR. Another commenter said the provision should say performance-based service acquisitions must be used to the maximum extent possible instead of PWS since both PWS and SOO are acceptable alternative methods for solicitations.

Disposition: The Councils agree “performance-based acquisitions” not “performance work statements” should be used to the maximum extent practical and the rule was revised accordingly.

f. Scope of Part 37. One commenter recommended revising the rule at FAR 37.000 to reflect a “preference” instead of a “requirement” for the use of performance-based service acquisitions to be consistent with the statutory provisions.

Disposition: The Councils believe “requiring” performance-based acquisition methods to the maximum

extent practicable has the same meaning as the statutory “preference” for performance-based acquisition. The Councils note the provisions discussed above were not changed by this rule.

g. Service contracts policy, FAR

37.102. One commenter recommended revising the rule at FAR 37.102(a)(1) to say “performance work statements and quality assurance surveillance plans” instead of “performance-based service acquisition methods” because the term “performance-based service acquisitions methods” is needlessly vague.

Disposition: While performance work statements and quality assurance surveillance plans are important elements of performance-based acquisitions, they are not the only elements, e.g. SOO, performance standards. The Councils believe it would be redundant to list all of the elements of performance-based acquisition each time the term is used.

h. Contracting officer responsibility

FAR 37.102. One commenter recommended revising the rule at FAR 37.103(c) to clarify that the technical/program personnel initiating the procurement must provide input to the contracting officer to enable the contracting officer to ensure performance-based contracting is used to the maximum extent possible.

Disposition: DoD, GSA, and NASA agree that the program personnel initiating the procurement need to describe the need to be filled using performance-based acquisition methods and revised the rule accordingly. However, the Councils revised FAR 37.102(e) instead of FAR 37.103(c) as suggested by the commenter since agency program official responsibilities are described in FAR 37.102(e).

i. Scope of subpart for performance-based service acquisition, FAR 37.600.

One commenter recommended revising the rule at FAR 37.600 to specify that the subpart is applicable to “delivery” orders as well as “task” orders since performance-based service acquisitions are not limited to service acquisitions.

Disposition: While performance-based acquisitions encompass both supplies and services, the provisions in Part 37 only relate to contracts for services. Therefore, a reference to “delivery” orders in Part 37 is inappropriate because “delivery” orders are used to acquire supplies see FAR 16.501–1. The rule at FAR 37.000 has been revised to indicate that FAR Part 37 applies to orders for services, as well as contracts.

j. General provisions for performance-based service acquisition, FAR 37.601.

Comment(s): One commenter recommended revising the language at

FAR 37.601(a) of the proposed rule to 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” instead of “expressing the Government’s needs in terms of required performance objectives and/or desired outcomes, rather than the method of performance.”

Disposition: The Councils agree the requirements should be expressed in terms of the results the contractor is expected to achieve and revised the terminology throughout the rule.

Comment(s): One commenter said the rule ignores the provisions the Councils recently added to FAR 37.601(a) to implement Section 1431 of the Services Acquisition Reform Act of 2003 (SARA) which provided governmentwide authority to treat certain performance-based contracts or task orders for services as commercial items under certain circumstances.

Disposition: The commenter is addressing provisions the Councils added in FAR case 2004–004, Incentives for Use of Performance-Based Contracting for Services, which implemented sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004. That rule reorganized the existing provision at FAR 37.601 into a new paragraph (a) and added a new paragraph (b) which references FAR 12.102(g) for the use of Part 12 procedures for performance-based contracting. The Councils acknowledge the proposed rule did not properly reflect the changes made by FAR case 2004–004. The Councils have revised the rule to reflect the provisions added in FAR case 2004–004 modified to reflect the revised terminology, i.e., change performance-based contracting to performance-based acquisitions.

Comment(s): One commenter recommended changing the proposed rule at FAR 37.601(c)(1) to say a PBSA contract or order shall include “PWS or SOO.”

Disposition: While solicitations can include either a PWS or a SOO, the resulting contract or order must include only a PWS. Therefore, the Councils did not revise the rule as recommended.

Comment(s): One commenter recommended replacing “measurable performance standards” with “clear performance standards.” Another commenter recommended revising the rule to require use of commercial language and practices when establishing performance standards and measuring performance against standards. Another commenter suggested using the terms “quantitative” and “qualitative” in lieu of “objective”

and “subjective” because the terms are more appropriate and less open to misinterpretation. Another commenter said the rule addressed the critical element of measurable performance standards but recommended additional provisions to require the standards to be practicable, reliable, and valid and where feasible, use customary commercial language and practices.

Disposition: Performance standards must be measurable to enable assessment of the services performed. The Councils agree the performance standards can be quantitative or qualitative but believes it is not necessary to say so. As to using customary commercial language and practices, the Councils believe customary commercial language and practices may not always fully satisfy the Government’s needs. Therefore, the Councils did not mandate their use; however, the Councils note nothing in the rule precludes their use.

Comment(s): Performance incentives, FAR 37.601.(a) One commenter said the rule eliminates the link between performance and payment since incentives and disincentives are now optional which means contractors can be paid in full when performance is less than acceptable as long as the Government describes its requirements objectively. Another commenter said that “to have a PBSC without incentives is to render the whole concept of measuring performance meaningless – especially if by default the only available remedy for sub par performance is termination for default.” The same commenter also said the rule should use “damages” instead of “negative incentives” because the term “negative incentives” implies penalties that are not necessarily proportionate to the damage done to the Government. Another commenter said the “Inspections of Services” clauses dating from 1984 and 1993 mandate negative incentives and the proposed rule suggests that negative incentives are optional.

Disposition: The requirements for using performance incentives for performance-based acquisitions are no different than those for any other acquisition method, i.e., performance incentives should be used when the quality of performance is critical and the incentives will likely motivate the contractor’s performance. As stated in FAR 16.402–2(a), the performance incentives should relate profit or fee to the results achieved by the contractor compared with the specified targets, i.e., the performance standards in the contract. The Councils note that performance incentives relate the

amount of profit or fee payable under the contract to the contractor's performance, not the Government's actual "damages", and that the term "negative incentives" is used in the provisions at FAR 16.402-2(b). Performance incentives, when included in a contract, are in addition to the Government's rights under the Inspection of Services clause. The Councils revised the rule to clarify that performance incentives for performance-based service acquisitions are the same as performance incentives for non-performance-based contracts.

(b) One commenter said the rule should refer to FAR Subpart 16.4 if other types of incentive such as cost incentives apply and recommended clarifying that performance incentives are not always needed for performance-based service acquisitions contracts.

Disposition: Incentives other than performance incentives may be appropriate for performance-based service acquisitions and the rule does not preclude the use of those other incentives. The rule addresses performance incentives because the Councils believe it is necessary to ensure that, when used, the performance incentives are tied to the performance standards specified in the performance work statement. The Councils agree that performance incentives are not always appropriate for performance-based service acquisitions and notes that the rule does not mandate their use, *i.e.*, the rule says "if used."

Comment(s): One commenter applauded the change to remove the requirement for price or fee reduction since the "Inspection of Services" clause gives the Government adequate recourse.

Disposition: The Councils agree that price or fee reduction flows from the inspection, warranty, and other clauses and that additional coverage is not needed in Part 37.

k. Performance work statements and statements of objectives, FAR 37.602.

Comment(s): One commenter recommended a more complete description of the SOO to clarify that the resulting PWS is included in the contract. Another commenter recommended using the language in the proposed rule at FAR 37.602-1(c) as the definition of a SOO in FAR 2.101 because the language at FAR 37.602-1(c) is clearer and more detailed and meaningful.

Disposition: The Councils revised the rule to clarify that a SOO is only used in the solicitation and that the resulting contract must include a PWS. The Councils also revised the definition of

SOO to clarify its meaning; however, the revised definition does not identify the elements of a SOO as suggested by the commenter because the Councils believe simply listing the elements would not adequately define the meaning of a SOO.

Comment(s): Another commenter recommended making the proposed coverage for performance work statements consistent with the definition at FAR 2.101 to avoid confusion.

Disposition: The final rule revises the wording of FAR 37.602(b) to emphasize that the purpose of the performance work statement is to express the results the Government desires.

Comment(s): One commenter said the Government is writing performance work statements with "100% of the time" as the target performance and the rule should address when 100 percent is appropriate, *e.g.*, for mission critical systems.

Disposition: Contracting officers and program personnel must have the flexibility to decide the appropriate level of performance based on the specifics of the acquisition. The Councils do not believe it is feasible or necessary to define when "100%" is the appropriate performance level.

Comment(s): One commenter said that while implied in the proposed rule at FAR 37.601(b) and 37.601(c), the rule does not specifically state that a PWS must be developed and incorporated into the contract or order when the solicitation includes a SOO.

Disposition: The Councils note that the proposed rule at FAR 37.601(c) and the final rule at FAR 37.601(b)(1) both require performance-based contracts, including orders, include a PWS; however, the final rule at FAR 37.602 clearly states that the SOO does not become part of the contract.

l. Quality assurance surveillance plans, FAR 37.604

Comment(s): One commenter recommended revising the rule to say quality assurance surveillance plans are internal government documents that should not be incorporated into contracts because the Government should not make its quality assurance plan contractually binding or disclose the plan to the contractor since unannounced inspections are often essential to sound quality assurance. Two other commenters recommended making quality assurance surveillance plans mandatory elements of performance-based acquisition. One of the commenters also said the rule does not clearly state whether or not quality assurance surveillance plans are required and questioned whether the

quality assurance surveillance plans were required for non-performance-based acquisitions procurement.

Disposition: The Councils agree the FAR should not require inclusion of quality assurance surveillance plans in all performance-based acquisitions; however, the Councils believe there may be circumstances when it could be appropriate to include the quality assurance surveillance plans in the contract, *e.g.*, the quality assurance surveillance plans outlines the method of assessing contractor performance against the performance standards. The Councils note that nothing in the rule requires that the QASP be incorporated in the contract. While the Councils believe the FAR should not mandate inclusion of a quality assurance surveillance plans in all performance-based acquisitions, the Councils do believe all performance-based acquisitions should contain the method of assessing contractor performance against performance standards and the Councils revised the rule accordingly. Lastly, the Councils believe the quality assurance coverage in FAR Subpart 37.6 has led to significant confusion and notes that much of the quality assurance coverage in FAR Subpart 37.6 duplicates coverage in FAR Subpart 46.4, Government Contract Quality Assurance. As the same requirements apply to performance-based acquisitions, the Councils eliminated the duplicative coverage from FAR Subpart 37.6.

Comment(s): One commenter recommended replacing the term "desired outcomes" with "requirements" to be consistent with the definition of a performance work statement at FAR 2.101.

Disposition: The Councils agree the terminology was inconsistent with the performance work statement definition and the rule no longer uses the terminology.

Comment(s): One commenter recommended adding the responsibilities of the Government, including the responsibility to provide performance feedback to the contractor on a regular basis and in an objective fashion, to the rule.

Disposition: The Councils believe Government personnel notify contractors when they believe the contractors are not meeting the contract quality requirements in the contract; however, the contractor, not the Government, is responsible for meeting the contract quality requirements. As with any acquisition, the level of contract quality requirements and Government contract quality assurance surveillance will vary based on the

particular acquisition. In some cases, the quality assurance surveillance may be limited to inspection at time of acceptance.

Comment(s): One commenter recommended changing the title of FAR 37.602-2 from "Quality Assurance" to "Quality Assurance Surveillance Plan" (QASP) to be consistent with the "Seven Steps Guide" or changing the title to "Performance Management Plan" or "Performance-Based Management Plan" to ensure the plans do not become checklists to measure performance.

Disposition: The Councils renamed the section of the rule to "Quality Assurance Surveillance Plan" to be consistent with FAR terminology. The Councils do not understand how changing the title would ensure that the plans were not used as checklists.

m. Selection procedures, FAR

37.602-3. One commenter said requiring agencies to use competitive negotiations when appropriate suggests that competitive negotiations 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 and 6.401(b).

Disposition: The Councils agree the rule was inconsistent with the definition of best value and the provisions at FAR 6.401 that permit use of competitive proposals when sealed bids are not appropriate. The Councils deleted the provisions at FAR 37.602-3 because they believe the competition requirements and best value are adequately addressed in FAR 6.401(b) and 2.101, respectively.

n. Contract type and follow-on and repetitive requirements, FAR 37.602-4 and 37.602-5.

One commenter said assuming 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. Another commenter recommended deleting the first sentence of the proposed FAR 37.602-4 because 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. Another commenter said contract type should not limit performance-based service acquisitions use. Another commenter said the proposed language at FAR 37.602-4 (Contract Type) and 37.602-5 (Follow-on and repetitive requirements) adds to the general misconception that fixed-price contracts or task orders go hand-in-hand with performance-based service acquisitions. The commenter recommended changing both references to say the type of contract or order

issued should be appropriate for the type of work to be performed.

Disposition: The Councils agree that the rationale for selecting the appropriate contract type for performance-based acquisitions is no different than the rationale for selecting the appropriate contract type for non-performance-based acquisitions. Fixed-price contracts are appropriate when the risk involved is minimal or can be predicted with an acceptable degree of certainty and a reasonable basis for firm pricing exists. While recognizing the statutory order of precedence at FAR 37.102(a)(2), nothing in the statutory order of precedence changes the rationale for selecting contract type. To avoid further confusion, the Councils eliminated the coverage from Subpart 37.6.

o. General.

Comment(s): One commenter expressed concern that the September 7, 2004, Office of Federal Procurement Policy (OFPP) memorandum, entitled "Increasing the Use of Performance-Based Service Acquisition," rescinded the 1998 OFPP "Guide to Best Practices for Performance-Based Service Contracting" without any suitable replacement. The commenter said the Seven Steps to PBSA Guide does not provide sufficient guidance to meet the demonstrated needs of the agencies and entire acquisition community. The commenter hopes the Services Contracting Center of Excellence required by the SARA will provide meaningful information to assist Federal agencies with their performance-based service acquisitions efforts.

Disposition: The OFPP memorandum, guide, and Acquisition Center of Excellence for Service Contracting are beyond the scope of the Councils. They note OFPP is working with an interagency team to incorporate current policy, regulations, and vetted samples into the Government-wide PBSA guide, Seven Steps to PBSA. The Councils sent this recommendation to OFPP for its consideration.

Comment(s): One commenter recommended repealing the term "performance-based contracting" because the rule does not clearly override the current FAR terminology.

Disposition: As detailed in the summary of the proposed rule in the **Federal Register**, the Councils are changing the term from "performance-based contracting" to "performance-based acquisition." Additionally, once the final rule is published, the FAR will no longer have a definition for performance-based contracting.

Comment(s): One commenter said that performance-based acquisitions is

broader than PBSC and could be used for more innovative ways of procurement but just changing the name will not get people to do more performance-based work. Another commenter said the proposed rule is a strong and needed step toward clarifying actions and responsibilities, especially in addressing definitions and acquisition planning. Another commenter commends the Councils on this proposed guidance particularly on the encouragement of fixed-price contracts.

Disposition: The Councils agree that simply changing the name will not increase the use of performance-based acquisition; however, the rule also clarifies performance-based terms and elements. The Councils intend these clarifications to help increase the use of performance-based acquisition. Also, they revised the rule to clarify that the rationale for determining contract type is no different for performance-based acquisition than any other acquisition. While the Councils encourage the use of fixed-price contracts whenever appropriate, the Councils do not encourage the use of fixed-price contracts when it is not appropriate (*i.e.*, too much risk or no reasonable basis for firm pricing).

Comment(s): One commenter said the rule should contain a strong statement to emphasize that performance-based contracting requires an end product or service that can be measured and that labor hour instruments are level-of-effort contracts with no definite deliverable.

Disposition: By definition, all contracts require delivery of supplies or performance of services. The deciding factor for performance-based acquisitions is whether or not the contract has measurable performance standards. The Councils believe that T&M/LH contracts can have measurable performance standards. Therefore, the rule does not preclude the use of T&M/LH contracts for performance-based acquisitions.

Comment(s): Two commenters recommended consistent use of "contract or order" throughout the entire proposed rule.

Disposition: The Councils do not believe it is necessary to state "or order" after each use of "contract," and to simplify the rule, the Councils identified orders in the Scope of part.

Comment(s): One commenter said use of the term "to the maximum extent practicable" is vague and will provide an easy way to avoid performance-based acquisitions.

Disposition: The Councils believe the term "to the maximum extent

practicable” provides Contracting Officers the appropriate flexibility to determine when performance-based acquisition methods should be used to fulfill the agency’s requirements.

Comment(s): One commenter said the rule does not address performance plans which are highlighted in AFI 63–124. The commenter also said the rule addresses contractor assessment but fails to address contract assessment and oversight which is required in Public Law 107–107. The Air Force uses a performance plan to document both contract and contractor assessment. Suggest you address contract oversight in this section.

Disposition: The requirements of Section 801 of Public Law 107–107 are unique to DoD. DoD unique requirements are addressed in the Defense Federal Acquisition Regulations and are beyond the scope of this rule.

Comment(s): One commenter stated “low-bid contracting” is valuable for purchasing services in the context of fair pre-qualification requirements and that the rule does not clearly provide for the two-step process. The commenter requested the Councils clarify when low-bid would be appropriate for performance-based acquisitions.

Disposition: The Councils assume the commenter is referring to sealed bidding procedures. Under those procedures, “low-bid” is only appropriate when the award will be based on price and price-related factors.

p. The following comments were submitted under FAR case 2004–004, but pertain to this FAR case.

Comment(s): One commenter recommended changing the term “quality assurance” with “performance assessment” in FAR 37.601(a)(2) to be consistent with DoD’s “Guidebook for Performance-Based Services Acquisitions.”

Disposition: Quality assurance is the term consistently used throughout the FAR to monitor contractor performance and to ensure compliance with contract requirements. The instructions contained in the referenced Guidebook pertain only to the Department of Defense.

Comment(s): One commenter suggested that the Councils move the reference to quality assurance surveillance plans from FAR 37.601(a)(2) and make it a new subparagraph (5) to emphasize the importance of quality assurance surveillance plans.

Disposition: See paragraph l for the discussion of changes to the rule for quality assurance surveillance plans.

Comment(s): One commenter recommended changing the language in

FAR 12.102(g)(1)(iv) to: “Includes appropriate quality assurance provisions (see 12.208)” instead of “includes a quality assurance surveillance plan.”

Disposition: The Councils deleted the requirement to include a quality assurance surveillance plan in the contract to be consistent with provisions in Part 37.

Comment(s): One commenter recommended revisions to FAR 37.601(a) to provide for additional flexibility when using performance-based contracts for services.

Disposition: FAR 37.601(a) was revised to provide clarification to agencies and the acquisition community on the use of performance-based service acquisitions techniques.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any costs on either small or large businesses.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 2, 7, 11, 12, 16, 37, and 39

Government procurement.

Dated: December 22, 2005.

Gerald Zaffos,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 7, 11, 12, 16, 37, and 39 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 7, 11, 12, 16, 37, and 39 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by removing the definition “Performance-based contracting” and adding, in alphabetical order, the definitions “Performance-based acquisition (PBA)”, “Performance Work Statement”, and “Statement of Objectives (SOO)” to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Performance-based acquisition (PBA) means an acquisition structured around the results to be achieved as opposed to the manner by which the work is to be performed.

Performance Work Statement (PWS) means a statement of work for performance-based acquisitions that describes the required results in clear, specific and objective terms with measurable outcomes.

* * * * *

Statement of Objectives (SOO) means a Government-prepared document incorporated into the solicitation that states the overall performance objectives. It is used in solicitations when the Government intends to provide the maximum flexibility to each offeror to propose an innovative approach.

* * * * *

PART 7—ACQUISITION PLANNING

■ 3. Amend section 7.103 by revising paragraph (r) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(r) Ensuring that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies. For services, greater use of performance-based acquisition methods should occur for follow-on acquisitions.

* * * * *

■ 4. Amend section 7.105 by—

■ a. Removing from the last sentence of the introductory text “contracting” and adding “acquisition” in its place;

■ b. Revising the last sentence in paragraph (b)(4)(i); and

■ c. Removing from paragraph (b)(6) “contracting” and adding “acquisition” in its place.

The revised text reads as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(4) *Acquisition considerations.*

(i) * * * Provide rationale if a performance-based acquisition

will not be used or if a performance-based acquisition for services is contemplated on other than a firm-fixed-price basis (see 37.102(a), 16.103(d), and 16.505(a)(3)).

* * * * *

PART 11—DESCRIBING AGENCY NEEDS

■ 5. Amend section 11.101 by revising paragraph (a)(2) to read as follows:

11.101 Order of precedence for requirements documents.

(a) * * *

(2) Performance-oriented documents (e.g., a PWS or SOO). (See 2.101.)

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.102 [Amended]

■ 6. Amend section 12.102 in paragraph (g)(1)(iii) by removing “contracting” and adding “acquisition” in its place.

PART 16—TYPES OF CONTRACTS

■ 7. Amend section 16.505 by revising paragraph (a)(3) to read as follows:

16.505 Ordering.

(a) * * *

(3) Performance-based acquisition methods must be used to the maximum extent practicable, if the contract or order is for services (see 37.102(a) and Subpart 37.6).

* * * * *

PART 37—SERVICE CONTRACTING

■ 8. Amend section 37.000 by revising the second and third sentences to read as follows:

37.000 Scope of part.

* * * This part applies to all contracts and orders for services regardless of the contract type or kind of service being acquired. This part requires the use of performance-based acquisitions for services to the maximum extent practicable and prescribes policies and procedures for use of performance-based acquisition methods (see Subpart 37.6). * * *

■ 9. Amend section 37.102 by—

■ a. Removing from the first sentence of the introductory text of paragraph (a) “contracting” and adding “acquisition” in its place; and removing from the second sentence “contracts,” and adding “contracts or orders,” in its place;

■ b. Removing from paragraph (a)(1) “contracting” and adding “acquisition” in its place; and

■ c. Adding a sentence to the end of paragraph (e) to read as follows:

37.102 Policy.

* * * * *

(e) * * * To the maximum extent practicable, the program officials shall describe the need to be filled using performance-based acquisition methods.

* * * * *

37.103 [Amended]

■ 10. Amend section 37.103 by removing from paragraph (c) “contracting” and adding “acquisition” in its place.

■ 11. Revise Subpart 37.6 to read as follows:

Subpart 37.6—Performance-Based Acquisition

Sec.

37.600 Scope of subpart.

37.601 General.

37.602 Performance work statement.

37.603 Performance standards.

37.604 Quality assurance surveillance plans.

37.600 Scope of subpart.

This subpart prescribes policies and procedures for acquiring services using performance-based acquisition methods.

37.601 General.

(a) Solicitations may use either a performance work statement or a statement of objectives (see 37.602).

(b) Performance-based contracts for services shall include—

(1) A performance work statement (PWS);

(2) Measurable performance standards (i.e., in terms of quality, timeliness, quantity, etc.) and the method of assessing contractor performance against performance standards; and

(3) Performance incentives where appropriate. When used, the performance incentives shall correspond to the performance standards set forth in the contract (see 16.402–2).

(c) See 12.102(g) for the use of Part 12 procedures for performance-based acquisitions.

37.602 Performance work statement.

(a) A Performance work statement (PWS) may be prepared by the Government or result from a Statement of objectives (SOO) prepared by the

Government where the offeror proposes the PWS.

(b) Agencies shall, to the maximum extent practicable—

(1) Describe the work in terms of the required results rather than either “how” the work is to be accomplished or the number of hours to be provided (see 11.002(a)(2) and 11.101);

(2) Enable assessment of work performance against measurable performance standards;

(3) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work.

(c) Offerors use the SOO to develop the PWS; however, the SOO does not become part of the contract. The SOO shall, at a minimum, include—

(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.

37.603 Performance standards.

(a) Performance standards establish the performance level required by the Government to meet the contract requirements. The standards shall be measurable and structured to permit an assessment of the contractor's performance.

(b) When offerors propose performance standards in response to a SOO, agencies shall evaluate the proposed standards to determine if they meet agency needs.

37.604 Quality assurance surveillance plans.

Requirements for quality assurance and quality assurance surveillance plans are in Subpart 46.4. The Government may either prepare the quality assurance surveillance plan or require the offerors to submit a proposed quality assurance surveillance plan for the Government's consideration in development of the Government's plan.

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

39.104 [Amended]

■ 12. Amend section 39.104 by removing from paragraph (b) “contract” and adding “acquisition” in its place. [FR Doc. 05–24548 Filed 12–30–05; 8:45 am]

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