

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 7, 11, 16, 37, 39****[FAR Case 2003–018]****RIN 9000–AK00****Federal Acquisition Regulation;
Performance-Based Service
Acquisition**

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

ACTION: Proposed rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) by: changing the terms “performance-based contracting (PBC) and performance-based service contracting (PBSC)” to “performance-based acquisition (PBA) or performance-based service acquisition (PBSA)” in areas of the FAR where appropriate; adding applicable PBSA definitions clarifying the order of precedence for requirements; modifying the regulation to broaden the scope of PBA and give agencies more flexibility in applying PBSA methods to contracts and orders of varying complexity and reduce the burden of force-fitting contracts and orders into PBA, when it is not appropriate.

DATES: Interested parties should submit comments in writing on or before September 20, 2004, to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2003–018 by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Agency Web Site: <http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.

- E-mail: farcase.2003-018@gsa.gov. Include FAR case 2003–018 in the subject line of the message.

- Fax: 202–501–4067.

- Mail: General Services Administration, Regulatory Secretariat (VR), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2003–018 in all correspondence related to this case. All comments received will be posted without change to <http://www.acqnet.gov/far/ProposedRules/proposed.htm>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Julia Wise, Procurement Analyst, at (202) 208–1168. Please cite FAR case 2003–018.

SUPPLEMENTARY INFORMATION:**A. Background**

Since the 1980s, performance-based contracting (PBC) and performance-based service contracting (PBSC) (now performance-based acquisition (PBA) and performance-based service acquisition (PBSA)) has been articulated in regulation, guidance, and policy. The intent has always been for agencies to contract for results describing their needs in terms of what is to be achieved, not how it is to be done. Law and regulation established a preference for PBA.

There are many laws and policies that impact how PBA methods are applied to contracts and orders. Among the most important of these reforms are the Government Performance and Results Act of 1993, the Federal Acquisition Streamlining Act of 1994 (FASA), and the Clinger-Cohen Act of 1996, Section 821(a) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Pub. L. 106–398), and Section 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (P.L. 108–136). All of these laws send an important message about performance in federal programs and acquisitions and that is that agencies should: (1) use PBA methods to the maximum extent practicable when acquiring services, and (2) carefully select acquisition and contract administration strategies, methods, and techniques that best accommodate the requirements.

Over the last two decades, agencies have made moderate progress in implementing PBA methods on service contracts but have experienced difficulties in applying PBA techniques effectively. In April 2002, the Office of Federal Procurement Policy (OFPP) convened an interagency working group to establish a broader understanding of the requirements of PBSA, and identify ways to increase agency use of PBSA. The group focused their efforts on three areas of change:

(1) Modifying the Federal Acquisition Regulation (FAR) to give agencies flexibility in applying PBSA;

(2) Modifying reporting requirements to ensure that PBSA is applied appropriately; and

(3) Improving the quality, currency, and availability of guidance.

In the interim, General Accounting Office (GAO) conducted an audit on performance-based service contracting and issued a report dated September 2002, “Contract Management: Guidance Needed for Using Performance-Based Service Contracting (GAO–02–1049),” that raised concerns as to whether agencies have a good understanding of performance-based contracting and how to take full advantage of it. The audit findings stated, that some agency officials said they would like better guidance on performance-based contracting, particularly with respect to how it can be applied in more complex situations. It further states that agency officials said that there is a need for better criteria on which contracts should be labeled as performance-based.

In July 2003, OFPP issued a report, “Performance-Based Service Acquisition: Contracting for the Future,” that captured the interagency working group’s PBA concerns, issues, and recommendations. The report includes recommendations to change current regulations and guidance to give agencies more flexibility in applying PBSA effectively, appropriately, and consistently (see www.acqnet.gov for the complete report). Most of the recommended FAR revisions are adopted in this proposed rule because the changes will make PBA more flexible, thus increasing agency use of PBA methods on services contracts and orders.

In addition, the OFPP is working with an interagency team to incorporate current policy, regulations, and vetted samples into the Governmentwide-PBSA guide, Seven Steps to PBSA (see www.acqnet.gov for the online guide); and interagency working group to develop appropriate guidance for reporting PBAs in the Federal Procurement Data System-Next Generation (FPDS-NG).

The proposed rule amends the FAR to modify—

- FAR Part 2 to include the definitions “performance work statement” and “statement of objectives” to support changes to FAR Part 37;

- FAR Parts 2, 7, 11, 16, 37 and 39 to incorporate the new PBA and PBSA terms, where applicable; and

- FAR Parts 11 and 37 to broaden the scope of PBSA, reduce the burden of

force-fitting requirements into PBAs when it does not apply, and give agencies more flexibility in applying PBSA techniques to contracts and orders of varying complexity.

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 Councils do not expect this proposed rule to 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 this rule affects the Government's use of PBA methods on service contracts and intends to give agencies more flexibility in applying PBA methods to service contracts and orders of varying complexity. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. The Councils invite comments from small businesses and other interested parties. We will consider comments from small entities concerning the affected FAR Parts 2, 7, 11, 16, 37, and 39 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 2003-018), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed 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, 16, 37, and 39

Government procurement.

Dated: July 13, 2004.

Laura Auletta,

Director, Contract Policy Division.

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

1. The authority citation for 48 CFR parts 2, 7, 11, 16, 37, and 39 is revised 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 by revising the definition “performance-based contracting,” and adding in alphabetical order, the definitions “performance

work statement” and “statement of work objectives” to read as follows:

2.101 Definitions.

* * * * *

Performance-based acquisition (PBA) means structuring all aspects of an acquisition around the purpose of the work to be performed with the contract or order requirements set forth in clear, specific, and objective terms with measurable outcomes as opposed to either the manner by which the work is to be performed or broad and imprecise statements of work. For services, a performance-based acquisition is commonly referred to as a performance-based service acquisition (PBSA).

Performance Work Statement (PWS) means a statement that identifies the agency's requirements in clear, specific and objective terms that describe technical, functional and performance characteristics.

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Statement of Objectives (SOO) means a statement that identifies the agency's high-level requirements by summarizing key agency objectives, desired outcomes, or both.

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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 service acquisition (PBSA) methods and, therefore, fixed-price contracts (see 37.602-4) should occur for follow-on acquisitions.

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4. Amend section 7.105 by revising the last sentences of the introductory paragraph and paragraph (b)(4)(i); and by revising paragraph (b)(6) to read as follows:

7.105 Contents of written acquisition plans.

* * * Acquisition plans for service contracts or orders must describe the strategies for implementing PBSA methods or must provide rationale for not using those methods (see Subpart 37.6).

* * * * *

(b) * * *

(4) *Acquisition considerations.* (i) * * * Provide rationale if a PBSA is not be used or if a PBSA is contemplated on other than a firm-

fixed-price basis (see 37.102(a), 16.103(d), and 16.505(a)(3)).

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(6) *Product or service descriptions.* Explain the choice of product or service description types (including PBSA descriptions) to be used in the acquisition.

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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 or function-oriented documents.

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PART 16—TYPES OF CONTRACTS

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

16.505 Ordering.

(a) * * *

(3) Performance work statements must be used to the maximum extent practicable, if the contract or order is for services (see 37.102(a) and 37.602-1).

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PART 37—SERVICE CONTRACTING

7. Amend section 37.000 by revising the third sentence to read as follows:

37.000 Scope of part.

* * * This part requires the use of performance-based service acquisition (PBSA) to the maximum extent practicable and prescribes policies and procedures for use of PBSA methods (see Subpart 37.6). * * *

8. Amend section 37.102 by revising the introductory text of paragraphs (a) and (a)(1) to read as follows:

37.102 Policy.

(a) Performance-based service acquisition (see Subpart 37.6) is the preferred method for acquiring services (Public Law 106-398, section 821). When acquiring services, including those acquired under supply contracts or orders, agencies must—

(1) Use performance-based service acquisition methods to the maximum extent practicable, except for—

* * * * *

9. Revise subpart 37.6 to read as follows:

Subpart 37.6—Performance-Based Service Acquisition

Sec.

- 37.600 Scope of subpart.
- 37.601 General.
- 37.602 Elements of a performance-based service acquisition.
- 37.602-1 Performance work statements (PWSs) and statements of objectives (SOOs).
- 37.602-2 Quality assurance.
- 37.602-3 Selection procedures.
- 37.602-4 Contract type.
- 37.602-5 Follow-on and repetitive requirements.

Subpart 37.6—Performance-Based Service Acquisition

37.600 Scope of subpart.

This subpart prescribes policies and procedures for use of performance-based service acquisition (PBSA) methods. PBSA includes performance-based contracts and performance-based task orders.

37.601 General.

(a) The principal objective of PBSA is to obtain optimal performance by expressing Government needs in terms of required performance objectives and/or desired outcomes, rather than the method of performance, to encourage industry-driven, competitive solutions.

(b) Solicitations for PBSA may use either a performance work statement (PWS) or a statement of objectives (see 37.602-1).

(c) PBSA contracts or orders shall include—

(1) A PWS (see 37.602-1); and
 (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.

(d) PBSA contracts or orders may include performance incentives to promote contractor achievement of the desired outcomes and/or performance objectives articulated in the contract or order. Performance incentives may be of any type, including positive, negative, monetary, or non-monetary. Performance incentives, if used, shall correspond to the performance standards set forth in the contract or order.

37.602 Elements of a performance-based service acquisition.

37.602-1 Performance work statements (PWSs) and statements of objectives (SOOs).

(a) A PWS may be prepared by the Government or result from a SOO prepared by the Government where the offeror proposes the PWS.

(b) A PWS shall describe the work in terms of the purpose of the work to be performed 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);

(c) When a SOO is used in lieu of a PWS in a solicitation, the SOO shall, at a minimum, include the following information with respect to the acquisition:

- (1) Purpose.
- (2) Scope or mission.
- (3) Period and place of performance.
- (4) Background.
- (5) Performance objectives and/or desired outcomes.
- (6) Any operating constraints.

37.602-2 Quality assurance.

(a) Quality assurance surveillance plans shall address the means for assessing contractor accomplishment of the Government’s performance objectives and/or desired outcomes stated in the contract and compliance with the appropriate inspection clauses. Agencies shall develop quality assurance surveillance plans when acquiring services (see 46.103 and 46.401(a)) or, as appropriate, rely on a contractor’s commercial quality assurance system (see 46.102). These plans shall recognize the responsibility of the contractor (see 46.105) to carry out its quality control obligations and shall contain measurable inspection and acceptance criteria corresponding to the performance standards contained in the contract. The quality assurance surveillance plans shall focus on the level of performance required by the PWS, rather than the methodology used by the contractor to achieve that level of performance.

(b) The level of surveillance described in the plan should be commensurate with the dollar value, risk, and complexity of the acquisition and should utilize commercial practices to the maximum extent practicable. For

example, in some simplified acquisitions the Government may decide that the inspection clauses in the contract or order provide adequate means of surveillance, without requiring a detailed quality assurance surveillance plan.

(c) Plans shall enable the contracting officer to take appropriate action in accordance with the contract or order and 46.407, as appropriate.

37.602-3 Selection procedures.

Agencies shall use competitive negotiations, when appropriate, to ensure selection of services that offer the best value to the Government, cost and other factors considered (see 15.304).

37.602-4 Contract type.

Agencies shall follow the order of precedence set forth in 37.102(a)(2) for selecting contract and order types. Fixed-price contracts or orders are generally appropriate for services that can be defined objectively and for which the risk of performance is manageable (see Subpart 16.1).

37.602-5 Follow-on and repetitive requirements.

When acquiring services that previously have been provided by contract or order, agencies shall rely on the experience gained from the prior contract or order to incorporate PBSA methods to the maximum extent practicable. This will facilitate the use of fixed-price contracts or orders for such requirements for services. (See 7.105 for requirement to address PBSA strategies in acquisition plans. See also 16.104(k)).

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

10. Amend 39.104 by revising paragraph (b) to read as follows:

39.104 Information technology services.

* * * * *

(b) Require the use of other than a performance-based service acquisition (see Subpart 37.6).

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