



AUG 18 2004

MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RODNEY P. LANTIER, DIRECTOR
REGULATORY AND FEDERAL ASSISTANCE
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2004-004, Incentives for Use of Performance-Based Contracting for Services

Attached are comments received on the subject FAR case published at 69 FR 34226; June 18, 2004. The comment closing date was August 17, 2004.

<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
2004-004-1	08/16/04	08/16/04	Kenneth J. Oliver
2004-004-2	08/17/04	08/17/04	Distributed Solutions, Inc.
2004-004-3	09/01/04	09/01/04	AIA

Attachments

2004-004-1



"Oliver Kenneth J
RCO-HI"
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rmy.mil>

To: farcase.2004-004@gsa.gov
cc:
Subject: Quality Assurance Surveillance Plans

08/16/2004 04:27 PM

Please provide guidance on subject.

1. References

a. Policy letter "Performance-Based Service Acquisition" dated 5 April 2000 from the Under Secretary of Defense



b. Guidebook for Performance-Based Service Acquisition in the Department of Defense

c. PART 37--SERVICE CONTRACTING

5. Revise section 37.601 to read as follows:

37.601 General.

(a) Performance-based contracting methods are intended to ensure that required performance quality levels are achieved and that total payment is related to the degree that services performed or outcomes achieved meet contract standards. Performance-based contracts or task orders--

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- (1) Describe the requirements in terms of results required rather than the methods of performance of the work;
 - (2) Use measurable performance standards (i.e., in terms of quality, timeliness, quantity, etc.) and quality assurance surveillance plans (see 46.103(a) and 46.401(a));
 - (3) Specify procedures for reductions of fee or for reductions to the price of a fixed-price contract when services are not performed or do not meet contract requirements (see 46.407); and
 - (4) Include performance incentives where appropriate.
- (b) See 12.102(g) for the use of Part 12 procedures for performance-based contracting.

2. The guidebook at reference 1b above states the term "quality assurance" does not accurately capture the true essence of performance-based service acquisition, since agencies do not "assure quality" - they assess contractor performance. Performance assessment is not surveillance. In a performance-based environment, it is the contractor that is contractually responsible for quality assurance. Henceforth, for accuracy, the term "performance assessment" will be used in place of "quality assurance". Also, a performance assessment plan describes how government personnel will evaluate and assess contractor

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performance.

2. The proposed revision at reference 1c above still address quality assurance surveillance plans.

3. What is the correct term to use? Does the guidebook still apply? Please advise. Thanks.

Kenneth J. Oliver

Contract Quality Surveillance Specialist

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2004-004-2



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

To: farcase.2004-004@gsa.gov
cc: "Falcone, Ron" <RonF@distributedinc.com>
Subject: FW: FAR Case 2004-004 Incentives for Use of Performance-Based Contracting for Services

08/17/2004 05:06 PM

Dear Ms. Duarte:

Distributed Solutions Inc. (DSI) is a small business founded in 1992 in Northern Virginia specializing in the manufacture of a robust procurement software solution set 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 interim rule:

1. Para 12.102 Applicability. Under subparagraph (g)(1) suggest adding the additional qualification "Includes a performance work statement" to the existing list in order to ensure consistency with other federal guidelines, such as OFPP's October 1998 "A Guide to Best Practices for Performance Based Service Contracting" and July 2003 "Performance-Based Service Acquisition – Contracting for the Future".
2. Para 37.601 General. Suggest revising 37.601 (a) (2) from "Use measurable performance standards (i.e. in terms of quality, timeliness, quantity, etc.) and quality assurance surveillance plans (see 46.103 (a) and 46.401 (a))" by removing the phrase "quality assurance surveillance plans (see 46.401(a))" from this subparagraph and establishing an additional subparagraph for it. The rationale for this suggestion is to provide consistency of the perceived level of importance of the QASP across various federal references, including GAO Reports.

Regards,

Peter Tuttle, CPCM
Distributed Solutions, Inc.
(703) 471-7530

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Aerospace Industries Association Comments on Incentives for Use of Performance-Based Contracting for Services

- Para. 12.102 (g) (1) (ii). Once the contracting officer has prepared the solicitation under Part 12 using the authority cited in the regulation, it would be very cumbersome to change back to Part 15 if the contract value ends up exceeding \$25 million. This limitation may delay awards or prevent the proper modification of an existing contract and drive creation of a new, separate contract.

-- Recommend changing to "(ii) Has an estimated value at time of solicitation of not more than \$25 million."

- Para. 12.102 (g) (1) (iv). This paragraph requires that all performance-based awards under this authority have a "quality assurance surveillance plan." Part 12.208 states that the government should use the contractor's existing quality assurance systems rather than a government specified quality system. The new language should not imply or create the need for a unique quality assurance surveillance plan where one already exists. This is reinforced by the language in 12.102(g) (1) (vii) which requires that a contractor meeting these criteria must already be performing the same or similar work in the commercial market. If the contractor is already doing the same or similar work in the commercial market, the government should not require creation of a quality surveillance plan different from the one in use in conjunction with providing commercial services.

-- Recommend the language be changed to: "(iv) Includes appropriate quality assurance provisions (see 12.208)."

- Para 12.102(g) (vii). This paragraph uses the terms "...under terms and conditions similar to those in the contract or task order." At the time the Government is making the decision with regard to the applicability of this subparagraph, the contemplated contract or task order may not yet exist. It would be more consistent to use language comparable to the 2.101 definition of a commercial item.

-- Recommend changing the last line to read: "...under terms and conditions similar to those being offered to the Federal Government."

- Para 12.102(g) (2). This paragraph states that the contracting officer "should" tailor paragraph (a) of 52.212-4 to ensure remedies exist to protect the government's interest. This language is more prescriptive in tone than the language in 12.302 regarding tailoring. This is likely to result in contracting officers regarding this as a mandate to tailor paragraph (a) in every case. Paragraph 12.302 states that "...contracting officers may, within the limitations of this subpart, and after conducting appropriate market research, tailor the ...clause at 52.212-4..." The language of 12.102(g) (2) should not supplement or conflict with the existing language in Part 12.

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-- Recommend revising to read "(2) If necessary to protect the Government's interest, contracting officers may tailor the clause at 52.212-4, Contract Terms and Conditions - Commercial Items, as prescribed in 12.302."

- Para 37.601(a) (2) requires the contracting officer to establish the requirement for government quality assurance surveillance plans. This is inconsistent with the requirements of 12.208 and 46.202-1. If the requirement is to be procured as a commercial item under Part 12, then the acquisition should follow the policies procedures contained in Part 12.

-- Recommend 37.601(a) (2) be revised to read "(2) Use measurable performance standards and appropriate quality provisions (see 46.103(a), 46.202-1 or 46.401(a), as appropriate);"

- Paragraph 37.601(a) (3) is worded in a manner that would require the use of reduction of price or fee in every circumstance. This is overly prescriptive, may be inappropriate for a commercial service and limits the contracting officer's ability to strike the most appropriate business arrangement for the Government. There may be circumstances when other provisions are more appropriate than these types of reductions.

-- Recommend the sentence be revised to read: "(3) Where appropriate, specify procedures for reductions of fee or for reduction to the price of a fixed price contract when services are not performed or do not meet contract requirements (see 46.407);"

- Paragraph 37.601(a)(4) provides far less direction and less emphasis with regard to the use of performance incentives than was provided in (a)(3) with regard to the use of negative incentives. The difference in the tone of paragraphs (3) and (4) does not represent a balance and sends a message to contracting personnel regarding the government's view of contractor performance...you must use negative remedies and only use positive incentives "where appropriate." This may provide the government with contractual rights, but it does nothing to ensure the end user gets the highest level of services achievable. We believe it would be far more appropriate to reverse paragraphs (3) and (4) to place the discussion of the positive performance incentive first, and provide additional language to encourage the appropriate use of performance incentives.

-- Recommend reversal of paragraphs (3) and (4) to provide emphasis on achieving positive performance first, and providing contractual remedies for poor performance as a last resort.

-- Recommend revise current paragraph (4) to read "(4) Where appropriate, include performance incentives such as the opportunity to earn incentive fee or extensions of the contract term to encourage contractor performance that meets the required level of results."