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An Innovative Approach to Performance-Based Acquisition: Using a SOO

By Chip Mather and Ann Costello

Performance-based contracting is not new. A decade ago, Office of Federal Procurement Policy (OFPP) Policy Letter 91-2, "Service Contracting," established that federal agencies should "use performance-based contracting methods to the maximum extent practicable." In fact, the history is deeper. Over twenty years ago, OFPP Policy Pamphlet #4, "A Guide for Writing and Administering Performance Statements of Work for Service Contracts," described "how to write performance into statements of work" and addressed job analysis, surveillance plans, and quality control.[1] Current guidance reflects the same concepts: The Office of Federal Procurement Policy's "Guide to Best Practices for Performance-Based Service Contracting"[2] says that the key elements of a performance-based statement of work are (1) a statement of the required services in terms of output; (2) a measurable performance standard for the output; and (3) an acceptable quality level (AQL) or allowable error rate.

Ominously, the pace of performance-based implementation thus far suggests that the new Administration's ambitious goals[3] may prove difficult for agencies to meet. We've had twenty-plus years. Have you seen a good performance-based statement of work?

Unfortunately, the truth is that the federal acquisition workforce, by and large, has not been able to embrace performance-based acquisition. There are many reasons. One is the (faulty) perception that this is a procurement issue (even though guidance is issued by the Office of Federal *Procurement* Policy). Responsibility for these acquisitions does not rest solely with the contracting community. *Performance-based acquisition must be planned, managed, and executed by cross-organizational teams, with significant participation and contribution by program offices.* Another reason is that the work itself is daunting. It takes a significant effort to do a job analysis, develop a performance-based statement of work (SOW) and quality assurance plan, and identify AQLs. It requires re-tooling the workforce with new knowledge, skills, and abilities at a time when resources are already strained. (Let's face it. It is much easier to write a time-and-materials contract for services.) Finally, another impediment, in our view, is the contracting process itself.

Performance based acquisition must be planned, managed, and executed by cross-organizational teams …

This *Advisory* defines performance-based contracting; examines the "typical" contracting process and its flaws; and proposes an alternative approach to "traditional" performance-based contracting that we are using with some of our innovative agency partners: use of a Statement of Objectives (SOO).

What is performance-based contracting?

"Performance-based contracting," as defined in FAR 2.101, means structuring all aspects of an acquisition around the purpose of the work to be performed with the contract 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.

What is the typical acquisition approach and what's wrong with it?

We have observed that most Government agencies follow a procurement process that first requires the development of a detailed statement of work or specification. Further, many who take this task on believe that a "tight spec is a good spec." There is a persistent belief that the contractor must be told exactly what to do, how to do it, what labor categories to provide, what minimum qualifications to meet, and how many hours to work. The fear, evidently, is the risk of unacceptable performance. But there's a flip side: What if the contractor follows the government's instructions and the end result is still unacceptable? It's the government's tightly specified "solution" that is at fault, not the contractor's performance. Unfortunately, this latter scenario is too often the case.[4]

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Still it persists. Most requesting organizations take the last RFP and tighten up the loose ends to form the next competition. Why? Well, it's easy for one thing. But another reason may be that this practice is a holdover from the days when "low cost, technically acceptable" was the standard for selection. Then, tight specifications *were necessary* to ensure that the low-cost provider would perform acceptably. In today's best-value selections, detailed government specifications are not only *not* required, but serve to limit the solutions that competitors can offer.

This practice leads the agency away from focusing on "what" needs to be achieved and takes the agency into the work itself, the "how" of the process. The result is that the agency often describes, in considerable detail in the SOW, what amounts to *the preferred or required solution* to the problem, thus locking in the approach that contractors must take.

Furthermore, without doing meaningful market research, the agency (after much agonizing thought) writes into the statement of work the minimum performance levels that contractors must meet. The measures do not reflect standard commercial practices and will cost more, but the agency is unaware of this fact and the competitors will probably not tell.

The offerors then "respond" to the agency requirement with their proposed "solution." The proposals are often remarkably similar. Why is that so?

Well, is it really any wonder? Offerors are expected or required to respond paragraph-by-paragraph to the tightly written specification.

Our assessment is that prospective contractors are very reluctant to challenge the government's "requirements" (solution) or even make recommendations for improvement. Few contractors are willing to tell the buyer that there are better ways to solve the problem. They do not want to take the chance that they may embarrass or anger the drafter of the specification/statement of work. Further, they are concerned that their competition could receive the benefit of their creative process should they recommend a better solution. (Industry knows that some contracting officers, mindful of the notion of a "level playing field," would take the idea, amend the solicitation, and let everyone compete to implement the better solution. What's level or fair about that?) Finally, if they do take the chance and offer what they consider to be a better solution, our experience has been that the government will often reject the proposal for failing to meet at least one "mandatory" requirement for award. ("We really liked that Internet idea, but, unfortunately, it failed to comply with statement of work paragraph C.3(b)(i)(2) and, therefore, you were ineligible for award.") Given those choices, it is far better for contractors to restate the government's "requirement" (solution) verbatim and provide information describing why they are "uniquely qualified" to do what the government has directed. The end result is that all offerors bid to the same government-directed solution. (We have queried a number of contractors and they all acknowledge that this is an accurate assessment of the proposal writing game.) But there's a final twist: Wait until after contract award and then propose the better solution as a sole source change request.

… the typical acquisition approach fails to put the task where the knowledge is.

In this process, awards are made to the firms with the better proposal writers rather than the better ideas. This is certainly an unintended consequence of the acquisition system!

Our bottom line is that the typical acquisition approach fails to put the task where the knowledge is. Consider this: The requesting activity understands (or should understand) the problem to be solved and the constraints that limit potential solutions, *but doesn't state the requirement in that manner*. (They must write some form of a statement of *work*, which by its very name connotes work processes, the "how.") In contrast, the contractors not only understand the potential solutions, they are in the business of delivering those solutions. So why not let the contractors write the statements of work? In fact, forthright government contractors will tell you this goes on regularly, but quietly, behind the scenes. And why? Because contractors do this well. So why not take the process out of the closet, add a performance mandate, and benefit from its application in a competitive environment?

What approach do we recommend?

We recommend turning the current process around and putting the task where the knowledge is. In our scenario, the government is tasked to identify the problem and constraints in a statement of objectives (SOO),

and the contractors are requested to offer solutions in the form of a statement of work (SOW). In addition, the offerors are asked to identify performance measures (based on their existing commercial practices) and service level agreements, which identify how their solution will meet the agency's stated objectives. As we have often said, it is significantly easier to recognize a good idea than it is to invent one. After best-value evaluation and award, the offeror-developed SOW and performance measures become part of the final contract.

How does the process work?

Together with our agency partners, we are conducting acquisitions that involve five key steps:

- Conduct market research.
- Develop statement of objectives and identify constraints.
- Conduct initial "competition."
- Support contractors during the "due diligence" phase.
- Conduct best-value evaluation and make award.

… the right kind of market research can dramatically shape an acquisition and draw powerful, solution-oriented ideas from the public sector.

For a major acquisition using FAR Part 15 source selection procedures, this entire process, from defining the requirement to award, can be completed in eight to ten months. Using Federal Supply Schedule contracts (FAR Subpart 8.4) or ordering from existing contracts under FAR Subpart 16.5 "fair opportunity" competitions, this cost-effective process can generally be conducted in two to eight months depending on the program's size and complexity.

Keep in mind that these time frames are for the *entire* acquisition process (not just contracting), *including the time it takes to describe the requirement*. In contrast, we have heard of one case where it required two years and $3 million to develop a detailed SOW.

A description of the steps in the SOO process follows.

Conduct market research.

As we described in more detail in our February *Advisory*,[5] the right kind of market research can dramatically shape an acquisition and draw powerful, solution-oriented ideas from the private sector. It can open up the range of potential approaches and solutions. It can support a fundamental rethinking about the nature of the requirement and deliver better results to the program office through performance-based partnerships with high performing contractors.

The right kind of market research, in our view, is one-on-one market research sessions with industry leaders (practitioners, not "marketeers") to learn about the state of the marketplace, commercial practices, and commercial performance metrics. Especially with regard to the latter, asking contractors to provide performance measures and collection

methods they are using on their existing contracts (both commercial and government) reveals what the contractors consider important in service delivery. In other words, knowing what they measure and where they set the bar for performance for their commercial (and government) customers provides significant insight into their understanding of the underlying service delivery requirement. The "good ones" have extensive knowledge and experience with measuring how the company's service delivery helps their customers achieve their objectives.

Develop statement of objectives and identify constraints.

Most guides on performance-based acquisition focus on "job analysis" as a key element.[6] In our view, this is not a good way to start, for several reasons. First, it tends to become a focus on the status quo. Second, it is often an analysis of process and "how" things are done … exactly the type of detail that is *not* supposed to be in a performance work statement. Third, it skips right past the very important first step of asking the question, "What is the contract supposed to achieve?"

The answer to "what the contract is supposed to achieve" is set forth in the statement of objectives. It reflects the agency's intended outcomes of the acquisition and answers the questions, "Why are we doing this effort, and how will we know if we are successful?" Importantly, under our process, these objectives will ultimately become the contractor's objectives as well. When the agency and the contractor share the same goals, the likelihood of successful performance rises dramatically. *Wherever possible, the objectives should be "grounded" in the plans and objectives found in agency strategic performance plans, program authorization documents, and budget and investment documents.*

… agencies have already developed the essence of the statement of objectives during the budget process.

In fact, for significant, mission-critical acquisitions, *agencies have already developed the essence of the statement of objectives during the budget process.* The promises made to acquire funding make excellent objectives. This links tightly together the budget and acquisition processes, which all too often are treated as separate and distinct processes. Our view is that agency promises made to acquire funding should be shared by the contractors.

The second element of this step involves identifying constraints on contractor solutions. Constraints can fall into many categories: statutory and regulatory, technological, socio-political, financial, or operational. The challenge is to limit constraints to those that are real and essential. Each one should be questioned. For example, is it really necessary to have the work performed in Washington, DC? Is it really necessary that existing resources be used? Is that directive still required? Must such constraints limit the agency's solution set?

Conduct initial "competition."

The SOO approach offers contractors maximum flexibility to propose an innovative approach or solution to the government. It also places a significant burden on the offerors to do more to respond effectively and

competitively to the government's solicitation. They must take the time to understand the agency's objectives, constraints, and history of performance, so they can craft an approach and solution to the agency's needs. To allow for this knowledge transfer, we insert into the competition a "due diligence"[7] process.

However, we understand that due diligence can be a costly procedure, and contractors typically require some sense of the likelihood of their success before investing in the process of becoming knowledgeable enough to compete. *One way*[8] to do this is through the FAR 15.202 advisory multi-step process. In short, this process permits an agency to publish a presolicitation notice that provides "a general description of the scope or purpose of the acquisition." The agency requests information that "may be limited to a statement of qualifications and other appropriate information (e.g., proposed technical concept, past performance, and limited pricing information)." On the basis of responses received, as provided by the FAR, the agency then notifies each respondent either that "it will be invited to participate in the resultant acquisition" or that "it is unlikely to be a viable competitor." (Ideally, the process will identify only the most competitive firms — those with the best likelihood of award — to go through due diligence.) Note that the advisory multi-step process is not like a competitive range decision: *the choice is the contractor's whether to continue to compete*.

… the advisory multi-step process [allows contractors to direct] … bid-and-proposal … costs toward competitions where they have a good likelihood for award.

During the public hearings on the proposed FAR Part 15 re-write in 1997, government contractors expressed broad support for the advisory multi-step process as a means to direct their bid-and-proposal efforts and costs toward competitions where they had a good likelihood for award. In practice, those contractors not chosen as viable competitors may complain and complain loudly. However, our experience is that not one such firm has either proposed or protested. They do not like being told that they are not considered a viable competitor, but once so notified, they "cut their losses" and do not continue to invest scarce bid-and-proposal dollars in the procurement.

Support contractors during the "due diligence" phase.

There is a simple truth: The more an offeror understands about an agency's objectives, problems, and constraints, the more likely that offeror is to provide a superior solution. The due diligence period provides offerors that opportunity.

In concept, due diligence allows the competitors full and open access to the government to ask questions, inspect actual conditions, and better understand the problem to be solved and the conditions under which they must work. The amount of time to be spent in due diligence should be commensurate with the size and complexity of the program. For major programs, this could be six weeks or more. Wherever possible, the agency should seek, during the due diligence phase, to provide complete and unfettered access to both managers and sites to verify existing conditions. Again, it is to the agency's advantage to have offerors who really

understand the objectives and use that information to craft superior solutions.

If job analysis (a component of traditional performance-based service contracting) has a role in the SOO approach to performance-based acquisition, it is here. Provide the contractors with all the background information that is available about how the project has run to date. How has the job been done? What are the steps? What has the work breakdown structure been? What does the existing contract look like? All these and more are legitimate questions and answers for the potential offerors.

Note that while this fundamental set of information should be collected and made available to the prospective offerors — often through a website — there is no prohibition against contractors asking questions and an agency responding. Even if the rule-laden FAR Part 15 procedures are used, due diligence is conducted *before* receipt of proposals, making communications with potential offerors "exchanges with industry before receipt of proposals" (FAR 15.201). That section provides (in pertinent part):

> *Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged. Any exchange of information must be consistent with procurement integrity requirements (see 3.104). Interested parties include potential offerors, end users, Government acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.*
>
> *The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government's requirements, and enhancing the Government's ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.*[9]
>
> *Information provided to a particular offeror in response to that offeror's request shall not be disclosed if doing so would reveal the potential offeror's confidential business strategy, and would be protected under 3.104 or Subpart 24.2.*

… it is to the agency's advantage to have offerors who really understand the objectives and use that information to craft superior solutions.

Note that if other acquisition approaches are used, such as use of Federal Supply Schedule contracts (FAR Subpart 8.4) or use of multiple-award, indefinite-delivery, indefinite-quantity contracts (such as GWACs and multiagency contracts) (FAR Subpart 16.5), there are even fewer provisions that address or limit communications with industry.

There is no requirement that due-diligence questions and answers be part of a written process. And, unless the question results in an amendment to the solicitation, there is certainly no rule that says every contractor should know what other contractors are asking and know the answers to those

questions as well. However, the "fair and equitable" standard does dictate that, if two contractors ask the same question, they get the same basic information in response … but it doesn't *have to be written*.

The essential fact is this: The whole objective of the SOO process is to enable contractors to apply their own unique abilities during due diligence and to develop unique solutions to meet the government's needs. The prospective offerors must not be required to meet with their competitors present. Operating a "fishbowl" acquisition will not lead to improved understanding or open communications or unique and innovative solutions.

Conduct best-value evaluation and make award.

If ever there was an acquisition approach that relies on commercial practices and permits true best-value evaluation, this is it. Offerors will submit in their proposals the statements of work that describe their unique solutions, as well as the performance measures that link each unique solution to the government's objectives. Solutions will vary, and the agency can truly differentiate contractors on the basis of that old evaluation criteria stand-by, "Understanding the Requirement." The quality of the proposed solution, the quality of the offered performance measures, the relationship of the measures to the objectives, and where the offeror sets the bar for performance … all become significant factors in the source selection decision.

… the agency can truly differentiate contractors on the basis of that old evaluation criteria stand-by, "Understanding the Requirement."

Note that negotiation and source selection under the SOO approach is both meaningful and subjective. (This is good.) The General Accounting Office recognizes broad agency discretion in selecting offerors for award and decides protests on the basis of whether the agency's actions were reasonable and in accordance with the solicitation's evaluation approach. The short standard is, "did the agency do what it said it would do?" Furthermore, GAO has, in fact, criticized "objective" mathematical approaches.

> *… It is improper to rely, as the agency did here, on a purely mathematical price/ technical tradeoff methodology. … In this case the tradeoff is inadequate because, beyond the mechanical comparison of the total point scores, the contracting officer made no qualitative assessment of the technical differences between the offers … to determine whether [awardee's] technical superiority justified the cost premium involved." [B-281693]*

"Objective" standards are easy to challenge. Show where an offeror failed to meet the standard and the award is in jeopardy. Subjective decisions, on the other hand, require the protestor to show that the decision was unreasonable, not in conformance with the evaluation criteria, and/or an abuse of discretion.

Our advice is to take the time to negotiate with the offerors … to really understand their approaches and their solutions. In large, complex, or mission-critical buys (and in other cases, too), award without discussions is *not* a good thing. Use the flexibility inherent in the source selection process

and exercise agency discretion. Identify discriminators among proposed solutions and document your decisions. The agency has significant discretionary authority in selecting contractors to meet agency needs, *as is appropriate*.

Conclusion

We believe the SOO approach to performance-based acquisition offers significant advantages. First, allowing contractors to solve the problem and identify the performance measures places an appropriate reliance on the private sector with few constraints to limit innovativeness. The government does its inherently governmental task (identifying needs, objectives, and constraints) and the private sector does the "inherently commercial" task of developing the business proposal to meet the needs and objectives.

Second, we seek and then rely on performance approaches proven in the private sector. We also tie the performance measures to the "real" objectives of the program and do not find ourselves "paving the cow path"[10] with the results of the job analysis of the current effort. We free industry and the government to do their best work.

Third, and perhaps most importantly, we have outlined an approach to performance-based acquisition that we believe will help agencies and the Administration meet the challenging objective before it: to dramatically increase the amount of performance-based contracting across the federal government. This approach certainly requires an adjustment in culture. In our view, however, that is preferable to the retooling and retraining of the existing acquisition workforce to handle such tasks as job analysis and development of quality assurance and surveillance plans that the traditional process requires … or the hiring of contractor support to do so at considerable expense to the government.

Tap the private sector (through the SOO process) to help … meet the government-wide performance-based goals.

The bottom line? Tap the private sector (through the SOO process) to help the Administration and your agency meet the government-wide performance-based goals.

Many innovations are possible under the existing Federal Acquisition Regulations and government-wide policies, as the above indicates. The challenge for our community is to reward the risk takers, tell their stories (without making them targets), and learn from their mistakes and their successes.

The Administration has mandated that agencies move aggressively into performance-based acquisition. Unfortunately, there is a very limited "case history" of successful acquisitions where "traditional" performance-based service contracting was used. We are aware of a small (and increasing) number of examples of the emerging practice of using the SOO approach. We are looking for further examples of both. Acquisition Solutions is the industry partner on an interagency team — led by Department of Commerce, and supported by the participation of the Departments of Agriculture, Treasury, and Defense; the General Services Administration;

and the Office of Federal Procurement Policy — to develop the web-based guide and knowledge center, "Seven Steps to Performance-Based Acquisition." We welcome your contributions.✧

Endnotes

[1] Both documents are now rescinded, having been replaced by provisions in FAR Subpart 37.6 (Performance-Based Contracting), and guidance in the OFPP document, "A Guide to Best Practices for Performance-Based Service Contracting." (See footnote on page 1.)

[2] http://www.arnet.gov/Library/OFPP/BestPractices/PPBSC/BestPPBSC.html (See footnote on page 1.)

[3] www.whitehouse.gov/omb/memoranda/m01-15.pdf (See footnote on page 1.)

[4] A true performance-based approach shifts the responsibility for solving the problem, and then carrying through in performance, onto the contractor. Performance-based contracting is *less risky* than a tightly specified requirement! But, for taking on that risk, the contractor must be offered the potential for rewards, not just the avoidance of negative incentives! A good performance-based acquisition strategy seeks and finds a balance between risk and reward. (See footnote on page 2.)

[5] The February *Advisory* is entitled, "A Program Manager's Guide to Realizing Marketplace Potential." (See footnote on page 4.)

[6] None of the guides we have reviewed on performance-based acquisition start, or even include in most cases, a discussion of agencies' strategic performance plans and objectives under the Government Performance and Results Act of 1993 … and how acquisitions should, or in the case of information technology must, be "grounded" in them. Yet this, we believe, is one of the very first steps. (The other is to establish the performance-based team.) (See footnote on page 5.)

[7] *Due diligence* is a term recently applied to acquisition by former OFPP Administrator Steven Kelman. The term is of legal origin, defined by Black's Law Dictionary as follows: "Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." It is used in acquisition to describe the period and process during which competitors take the time and make the effort to become knowledgeable about an agency's needs in order to propose a competitive solution. (See footnote on page 6.)

[8] For example, a similar process can be crafted using FAR Subpart 8.4 (FSS MAS contracts) or Subpart 16.5 (GWACs and multiagency contracts). (See footnote on page 6.)

[9] The FAR council should rewrite this provision, but its meaning is discernable. (See footnote on page 7.)

[10] This is an Acquisition Solutions euphemism for "continuing to do the same thing" (such as automating outdated processes), "but expecting different results" … which is Einstein's definition of insanity. (See footnote on page 9.)

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