



# **Removing Federal Services Acquisition Barriers And Balancing Public and Private Interest**

## **Task Force on Service Contracting**

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**Established by**

**Contract Services Association**

**In Conjunction With**

**Professional Services Council  
National Defense Industrial Association  
Information Technology Association of America**

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# **EXECUTIVE SUMMARY**

## ***I. EXECUTIVE SUMMARY***

*A service is considered to be any “thing,” or “class of procurement,” that is not manufactured, or does not require manufacturing – in other words, a service is not a tangible product, even though the service itself may produce some tangible outcome or output.*

Over the past decade, Federal spending has shifted from primarily acquiring goods (hardware or supplies and weapons systems) to acquiring services. As of 2004, Federal dollars spent on services exceeded 50% of the total Federal budget for the Department of Defense (DOD), and more than 75% is being spent within NASA and the civilian agencies. Just as the Federal budget demographics have shifted so has the private sector, with service contractors reaping the benefits and expanding their businesses; traditional hardware suppliers are moving into the service contracting arena; and increasing numbers of small business are participating in the Federal services market.

The service contracting sector endorses the acquisition and post-award administration processes used in the commercial marketplace. However, even though the service provider business area is becoming one of the fastest growing segments within the Federal government, the ability to successfully compete in the Federal marketplace for services is more difficult than it should be. This difficulty results from the myriad of unique Federal rules and regulations, the uncertainties associated with performance-based processes and procedures used in the Federal arena, and the impact of various special Federal labor laws, (e.g., Service Contract Act, etc.) that may apply. The Federal acquisition community should work to ensure that the Federal government utilizes the best the commercial market has to offer while adhering to the core public laws that form the basis for Federal acquisitions.

To date, service contracting has been a lowly stepchild compared with its “sexier” counterpart in hardware procurements; and reforming the way services are acquired has lagged behind improvements in hardware and weapons systems acquisition. The passage of the 2003 Services Acquisition Reform Act (SARA) was a major step forward in improving the contracting practices for services in order to provide the Federal government with access to the best in commercial practices for services.

Yet SARA is only the tip of the iceberg. Recognizing this fact, the Contract Services Association, in conjunction with several of its industry partners, established a *Service Contracting Task Force*. The purpose of the Task Force was to review – with a clean slate approach – relevant statutes and regulations, starting with Part 37 (Service Contracting) of the Federal Acquisition Regulation (FAR). The Task Force also was charged with balancing the rights of both the private and public sectors, ensuring that any recommendations were in the best interests of the Government and the U.S. taxpayer. In mid-2004, four working groups were established. The Task Force members determined that these four working groups covered the dominant issues affecting service contracting: categories of services, performance-based acquisition (which evolved into acquisition management and planning), multiple agency contracting vehicles (e.g., Federal services schedules and other multiple award contracts), and Part 37 (Service Contracting regulations).

*“If we were to start from scratch, where would we go?”* was the premise with which each working group began. The findings include:

*Categories of Services.* The initial effort focused on developing a listing of the dominate categories of services, and analyzing any unique characteristics that might impact on the acquisition of that category. Ultimately, it was determined that services could simply be broken into two components, commercial services and non-commercial or developmental services – no

separate listing of categories is needed beyond that. The Task Force proposes three legislative recommendations relating to commercial services, Time and Material/Labor Hour commercial contracting, and Assistance and Advisory Services. The key regulatory recommendation of the Task Force is to amend FAR Part 2.1 (Definitions) to place “services” on an equal footing with items. In addition, the Task Force recommends moving cost reasonableness requirements of catalog and market prices to FAR Parts 12, 13 and 15 since assessing cost reasonableness is a critical component of sound commercial service acquisition.

*Performance-based Acquisition.* Originally, the intent was to examine the broader scope of “service” contracting versus the recent trend toward performance-based acquisition (PBA). It was determined that by highlighting “performance-based” contracting, officials focus their attention on methodology, rather than the necessary and broader focus on acquisition planning – a strategy or approach that asks: “what is the requirement” and “how best can the needs of the Government be met?” With regard to PBA, no further legislative changes are needed since Congress already has taken significant steps toward promoting PBA. Rather, a greater emphasis on “services” and contract methodology will enhance and support the FAR and the procurement/project management community in acquisition planning, to include post-award management and oversight. With that in mind, a thorough review of the FAR was undertaken, and the Task Force recommends several regulatory changes (e.g., to FAR Part 7 and 15). It should be noted that specific agency FAR supplements and implementing guidance also may require revision.

*Multiple Agency Contracting Vehicles.* Where Schedules contracts and other multiple award vehicles were long reserved for spares and support to weapons in the inventory, these same mechanisms increasingly are the contract vehicles of choice for services. There also is a significant shift away from agency unique contract vehicles and agency unique requirements. The Task Force recommendations focus on the General Services Administration Schedules, and methods to improve the ability of agencies to maximize the clear and unique benefits afforded by the Schedules.

*Part 37 (Service Contracting).* Originally formed to review small business issues, it was determined that attempting to resolve “hot button” issues such as contract bundling, set-asides or size standards is easily the subject for a future Task Force. Therefore, the focus turned to a section-by-section analysis of FAR Part 37 (Service Contracting) to determine which sections needed general revision, and which needed some modifications to provide contracting officers sufficient guidance in using small businesses as service providers. The Task Force recommends several initial revisions to FAR Part 37. The Task Force, however, believes that further analysis is necessary to determine whether the policies in FAR Part 37 would be better realigned in other Parts of the FAR.

In sum, the Task Force determined that many of the processes, procedures, and policies contained in the Federal Acquisition Regulation and its various supplements need to be revisited to assure the Government has full and free access to all commercial capabilities available. Issues such as those outlined in this report, as well as contract type, labor laws, and non performance-based requirements need a critical analysis to ensure that as many barriers to the Federal services sector be eliminated. Certain barriers (e.g., the need for security clearances and the lengthy resulting screening process) may never be effectively reduced – and were outside the purview of this review. Those barriers, however, that inhibit sound business practices need to be viewed with a critical eye to ensuring the Federal services sector takes advantage of the efficiencies and innovations available from the commercial services marketplace.

## **ACKNOWLEDGMENT**

*Much of the work of the Task Force was built on the on-going efforts already being done by various industry coalitions, particularly the Acquisition Reform Working Group.*

*In addition to the leadership of the Contract Services Association, the Task Force consisted of representatives from the Professional Services Council, the National Defense Industrial Association, and the Information Technology Association of America. Dozens of volunteers from individual companies and law firms, as well as the Defense Acquisition University and individual procurement specialists within the Army and Air Force shared their expertise with the Task Force.*

*While space does not permit acknowledging and thanking each one individually, without their dedicated support, the work of the Task Force could not have been possible. The commitment and dedication of the acquisition community, both public and private, to improving Government processes is tremendous.*

# **GENERAL OVERVIEW**

## **II. GENERAL OVERVIEW**

In mid-2004, a multi-association Service Contracting Task Force was established to review laws, regulations and policies affecting service contracting. This work should complement on-going Government and industry efforts, including the Acquisition Advisory Panel (1423 Panel) enacted by the Services Acquisition Reform Act, and organized in February 2005.

The Task Force created four working groups, focused on the dominant themes in service contracting, to accomplish this mission:

- ❖ Categories of services;
- ❖ Performance-based acquisition (which evolved into acquisition management and planning);
- ❖ Contract vehicles (e.g., Federal services schedules and other multiple award contracts); and
- ❖ Part 37 (Service Contracting regulations).

Each group was tasked with considering the following questions:

- ✓ From an overall policy perspective, if we could start today with a clean slate, how should we look at Government service contracting?
- ✓ What are the various categories of service contracting?
- ✓ How does FAR Part 37 (Service Contracting) interact (or conflict) with other FAR provisions? Should there be a separate service contracting section in today's more integrated acquisition environment?
- ✓ What are the relevant contracting laws, policies, agency guidelines, regulations and supplements?
- ✓ What regulations are potential obstacles? What currently works? What is no longer necessary (e.g., are special rules still needed to govern advisory and assistance services)?
- ✓ What are the key procurement tools (e.g., type of contract, contract clauses, incentives)?

The objective of each working group was to develop recommendations to improve Government service contracting. Throughout the process, the Task Force met with Government contracting representatives as appropriate.

*Is current FAR guidance adequate to cover services?* That was the primary question with which the Task Force began its review. At one point, the Task Force even considered whether having a separate part in the Federal Acquisition Regulation (FAR) for service contracting was still necessary. In the end, the Task Force determined that interim revisions should be made to Part 37 (Service Contracting), reserving for a future date an analysis of whether Part 37 policies and procedures would be better realigned elsewhere in the FAR. The Task Force reviewed other FAR sections that are relevant to service contracting, including:

<u>FAR Part</u>	32
2	35
11	36
15	38
16	39
19	41
22	42
27	46
28	49
31	52

Concurrently, the Director of Defense Procurement and Acquisition Policy for the Department of Defense (DOD) commissioned Jefferson Solutions to summarize major provisions of Federal laws, regulations (proposed and final rules), and policies that relate to service contracting. A matrix of such provisions was submitted to DOD in August 2004. In addition, Jefferson Solutions was tasked with proposing improvements to:

- ❖ *Protecting the best interests of the Government;*
- ❖ *Ensuring effective, efficient and fair award of contracts for services;*
- ❖ *Ensuring that policies and regulations provide appropriate guidance concerning the post-award administration of contracts for services;*
- ❖ *Incorporating commercial best practices wherever possible; and*
- ❖ *Eliminating inconsistencies in, and among existing laws, regulations and policies.*

The work of this industry Task Force, and that of the Defense Department, should be viewed as complementary efforts aimed at recommending improvements in the service contracting arena that will provide the best value for the taxpayer and protect the interests of the Government customer.

In addition, section 1423 of the 2003 Services Acquisition Reform Act (SARA) authorized the creation of an Acquisition Advisory Panel to review laws and regulations related to commercial practices, which was fully established in February 2005. It is hoped that the Panel will include the Task Force recommendations in its discussions, and build on the work already done.

Furthermore, a March 2005 report (GAO-05-274) by the Government Accountability Office (GAO) noted that the Department of Defense (DOD) is the largest purchaser of contract services. DOD spent over \$118 billion in fiscal year 2003, representing a 66 percent increase since fiscal year 1999, and 57% of DOD's procurement dollars. GAO also noted that the upward trend is expected to continue as DOD relies more on contractors to execute specific aspects of its mission. This dependence on private sector contractors reinforces the need to ensure that laws and regulations governing service contracts are adequate, and provide contracting officials with the tools necessary to obtain the best value for the taxpayers, using the best commercial practices available. The relevant issues are addressed throughout this report.

# **CATEGORIES OF SERVICES WORKING GROUP**

### ***III. CATEGORIES OF SERVICES WORKING GROUP***

#### **A. Executive Summary**

The services segment of Federal spending now exceeds product and item spending. As a result, the industrial base is changing rapidly with new entrants, large corporations acquiring niche companies, and very large omnibus contracts, etc.

The “Categories of Services” working group’s initial efforts were to develop a listing of major categories of services, and analyze any unique characteristics that might impact the acquisition of that particular category. The working group collectively felt that essentially all services categories could be narrowed to two major acquisition components – commercial services and non-commercial or developmental services. As part of its research, the working group reviewed existing legislation and conference report language to fully understand the legislative intent of relevant services acquisition-related measures. It seemed clear that legislation in the services area continued to focus on expanding the Government’s access to commercial capabilities under similar terms and conditions that the services are offered to the general public. But some of the enacted legislative measures also established Government unique controls designed to assess the value and reasonableness of each commercial item or service transaction. In particular, the limitations on the use of Time and Material/Labor Hour (T&M/LH) contracting was viewed as a barrier impacting commercial acquisitions. The Task Force recommends statutory revisions to the commercial service definition, as well as clarifications related to the use of T&M/L-H commercial contracting, and the performance period for Advisory and Assistance Services.

In addition, the working group undertook a review of all relevant parts of regulatory guidance under the Federal Acquisition Regulations (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS) to identify any regulatory revisions that might facilitate the Task Force’s objectives. In general, the Task Force believed that the regulatory guidance for non-commercial or developmental services was balanced, and protected both public and private sector interest – and needed no major revision.

In addressing commercial service acquisition, however, the Task Force makes several recommendations. The Task Force proposes amendments to FAR 2.1 (Definitions for Commercial Items and Services) to place “services” on an equal footing with items. Additional proposed revisions include moving the cost reasonableness requirements of catalogue and market prices to FAR subparts 12, 13 and 15. It was collectively recognized that assessing cost reasonableness is a critical component of sound commercial service acquisition; however, these references in FAR 2.1 add no value and potentially introduce confusion in the definition. The Task Force has developed line in /line out revisions to FAR 2.1, 12, 13 and 15. These revisions include a discussion and justification for all proposed changes.

#### **B. Initial Findings**

The current realities in the Federal marketplace indicate that all sectors of Government acquisition are now spending more on services support of mission requirements than is spent for supplies and equipment. This fact has resulted in a need for a comprehensive review of how the Federal government acquires and manages services requirements.

The working group’s initial efforts were to develop a listing of major categories of services, and analyze any unique characteristics that might impact the acquisition of any particular category. It was assessed that each of the major categories set forth below did not require special treatment to acquire these particular services.

Engineering Services	Financial / Insurance Services
Communication Services / Internet / Van Services	Profit / Non-profit Services
Security and Guard Services	Construction Services/ Masonry, Carpentry, Paving, Roofing etc.
Advisory and Assistance Services	Food/ Catering Services
Consulting Service	Child Care Services
Mechanical, Electrical, HVAC, Plumbing Services	Fire Support Services
Telecommunication Services / wire and wireless	Janitorial / Lawn Maintenance Landscaping /Painting Services
Research and Development Services	Laboratory Services
Travel Services	Moving Services
Commercial Aviation and Transportation	Rental / Leasing Services
Aviation Maintenance and Flight Services	Printing Services
Accounting and Legal Services	Mortuary Services
Medical / Dental Services	Information Technology Services
Training Services	
Automotive and Mechanical Services	
Architectural Services	

It was determined that these services categories could be narrowed to two major acquisition components – commercial services, and non-commercial or developmental services. The Task Force also developed the following definition for “services:”

*A service is considered to be any “thing,” or “class of procurement,” that is not manufactured or does not require manufacturing, i.e. a service is not a tangible product, even though the service itself may produce some tangible outcome or output.*

The Task Force developed this definition to provide clarity in its discussions. However, the Task Force decided there was no need to insert this definition into the Federal Acquisition Regulation (FAR) since to do so may cause some confusion in the FAR as it relates to commercial services.

### **C. Legislative Review**

The working group reviewed existing legislation and conference report language to fully understand the legislative intent of services acquisition measures. It seemed clear that legislation in this area continued to focus on expanding the Government access to commercial capabilities under similar terms and conditions as services as are offered to the general public. At the same time, additional legislation also established Government unique controls designed to assess the value and reasonableness of each commercial item or service transaction.

The regulatory implementation of the 1994 Federal Acquisition Streamlining Act (FASA) left open areas for continued improvement in the methods the Government uses to obtain commercial products and services. Additional issues were addressed by the 1996 Clinger-Cohen Act, which further refined the Truth in Negotiations Act (TINA) and the Cost Accounting Standards (CAS) application to commercial services. Regulatory revisions bolstered market research and price analysis techniques for commercial items, and enabled subcontractors to share the benefits of commercial item financing and performance-based payments. Further attempts to address commercial practices related to the acquisition of services were accomplished through the 2003 Services Acquisition Reform Act (SARA). However,

notwithstanding these impressive legislative and regulatory efforts, a number of troubling issues remain unresolved.

The Task Force proposed legislative revisions in the following three areas:

- ❖ Commercial Services Definition
- ❖ Time and Material Commercial Contracting
- ❖ Advisory and Assistance Services

Each of the above changes are summarized below, and more fully addressed in the attachments.

### Commercial Services Definition

The 1994 Federal Acquisition Streamlining Act (FASA), and its implementing regulations, contained significant and important new language defining a commercial item. In simple terms, FASA defines a “commercial item” as any item that is sold or leased or licensed to non-Government customers or is offered for sale, lease or license, including those items that evolve from commercial technology, and those commercial items that are modified for Government purposes. Thus, the Federal government is able to have greater access to previously unavailable advanced commercial products and technologies, which has resulted in millions of dollars in savings to the taxpayer. The 1996 Clinger-Cohen Act took additional steps to ensure that the Federal government had access to commercial practices when buying products and services. However, while “services” was covered, the primary focus for both FASA and Clinger-Cohen was on the acquisition of hardware. Recognizing that “services” are an increasingly important component of Government contracting, Congress enacted the 2003 Services Acquisition Reform Act (SARA) to provide Government acquisition officials with the necessary tools to acquire “services” using best commercial practices.

However, today buyers and sellers of commercial services are still confronted by two difficult requirements. First, FASA defines “commercial item” in such a way that, in order to qualify, services have to be sold in the commercial marketplace at established catalog or market prices for specific tasks. Second, in implementing FASA, the Government interpreted FASA’s accompanying conference report to bar contracts based on hourly rates – that is, Time and Materials (T&M) and Labor Hour (LH) contracts. In combination, these two restrictions present a formidable barrier to market entry, and create a market condition that is contrary to customary commercial practice. This leaves buyers and sellers with few alternatives. The 2003 SARA attempted to clarify these two issues but, fell short of a complete solution.

The multi-association/ multi-industry Acquisition Reform Working Group (ARWG) annually develops a number of legislative proposals that are aimed at bringing Government procurement policies closer to customary commercial practices. The ARWG annual report regularly includes recommendations on the acquisition of commercial items and services – and has sought clarification for some of the outstanding issues. For example, working with the Senate Armed Services Committee, language was developed that encouraged the Department of Defense (DOD) to authorize use of other than firm-fixed price (FFP) contracts for the acquisition of ancillary commercial services when such contracts are commonly used in sales to the general public. ARWG also has recommended a sweeping definition for “commercial services” to be included in the definition of “commercial items.” The ARWG definition has yet to be accepted by Congress.

The Task Force believes that the definition of commercial services does not need to be conceptually different from commercial items. If the service is of a type offered and sold in the commercial marketplace, establishing a credible basis for demonstrating its market acceptance, then the service should qualify as a commercial item. Beyond that, the definition does not need to state that:

- ✓ The service can be performed by a different source or time as the item;
- ✓ The service has to be sold at a catalog or market price; or
- ✓ The service cannot be bought under T&M contracts.

Furthermore, the Task Force noted that, in the commercial market, there is no practical difference between ancillary and non-ancillary services.

*Attachment 1* outlines the Task Force's rationale for the recommended legislative revision to the "commercial services" definition.

### *Time and Material / Labor Hour Contracting*

The use of Time and Material (T&M) and Labor Hour (LH) contracts and subcontracts for the acquisition of services is a common commercial practice. The 2003 Services Acquisition Reform Act (SARA) provides statutory authority for the limited use of T&M/LH contracts to acquire commercial services where award by the Government is based on competition. However, it was silent on the use of T&M/LH prime and subcontracts for commercial services in sole source procurement situations. Normally, the statutory authority granted to the Government applies to prime contractors in performance of their contracts. Historically, statutory authority granted at the prime contract level is typically applied at the subcontract level. Thus, it could be inferred from SARA that the use of T&M/L-H subcontracts for commercial services would be restricted to procurements based on competition. It is a virtual certainty that contracting officers and prime contractors would view it that way.

In competitive awards of Firm Fixed Price (FFP) service contracts, prime contractors are free to use any type of subcontract that best satisfies performance of the contract. The price reasonableness of the prime contract has been established by the competition, and the prime contractor assumes the risk of performance. Conversely, in competitive awards of Cost Reimbursement service contracts, prime contractors are restricted to subcontract types that satisfy Government compliance requirements, in particular those set forth in the "Allowable Cost and Payment" clause. The price reasonableness of the prime contract will be based on an audit, negotiation, and settlement of actual allowable costs incurred. This situation is unacceptable to most commercial companies.

The Task Force recommends that the appropriate statutes be amended so that the requirement for competition or justified sole source be permitted in the award of commercial service T&M/LH. Pursuant to the above, *Attachment 2* develops the Task Force's legislative recommendations to fully apply the ability to use T&M/LH contracts in commercial item and services acquisition.

### *Advisory and Assistance Services*

In the FAR, Advisory and Assistance Services (A&AS) are defined as services provided to support or improve agency organizational policy development, management and administration. Furthermore, A&AS services are used to obtain outside points of view, advice, opinions, and the skills of noted experts to support complex operational organizations. While A&AS contracts are segregated in the FAR, the assessment of what is and what is not A&AS is somewhat unclear when considering all the components of service contracts – which provide an identifiable task, rather than furnishing an end item of supply, and may be either a non-personal or personal contract. As a result, the lines between what is and what is not A&AS can be subjective and often blurred in the FAR.

With this background, Congress addressed, in the FY2005 National Defense Authorization Act, the performance period for multi-year task and delivery order contracts, which can be issued for a base five year term with an extension for up to an additional five years. However, Congress did not change the

performance period for A&AS contracts. A&AS continues to have a total five (5) year period of performance limitation. The similarities, and in some cases the overlap, between other service contract efforts and those defined as A&AS raise the question of why the A&AS as a subcategory of services should have contracting limitations different from those now permitted for all other service or item acquisitions. The Task Force sees no need for a different performance period for A&AS contracts versus other types of task and delivery order contracts, and recommends that this distinction be eliminated. The Task Force's recommendation, and rationale, is in *Attachment 3*.

## **D. Regulatory Review**

The working group also undertook a review of all relevant parts of regulatory guidance under the FAR and DFARS to identify whether further regulatory revisions might facilitate the Task Force's objectives. The working group determined that for the most part the regulatory guidance for non-commercial or developmental services was balanced, and protected both public and private sector interests. Accordingly, no revisions have been proposed to these elements of the FAR or DFARS.

The Task Force focused its recommendations on regulatory revisions affecting commercial contracting of services. It is important to recognize the guiding principals of the FAR to maximize the use of commercial products or services and the regulatory flexibility established in the FAR 1.102 (d) that states:

*In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interest of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.*

In addressing commercial items or services, the Task Force proposed amendments to FAR 2.1, (Definitions for Commercial Items and Services). The first change would be to place "services" on an equal footing with items. Additional proposed revisions were to move the cost reasonableness requirements of catalog and market prices to FAR subparts 12, 13 and 15. It was recognized that assessing cost reasonableness is a critical component of sound commercial services acquisition; these references in FAR 2.1, however, add no value and potentially introduce confusion in the definition. It was the belief of the Task Force that this guidance more properly belongs in the elements of the regulations that addresses price reasonableness and pricing policy.

An additional recommended revision is to remove from the definition those categories of services such as installation services, maintenance services, repair services and training services, which also are known as ancillary services. As a practical matter, in the commercial market place there is no substantive difference between ancillary and non-ancillary services. The bifurcation of services within the commercial item definition has caused confusion in the Government marketplace because they conceptually overlap.

The Task Force also proposed revisions to selected subparts of FAR Parts 12, 13 and 15 with the objective to bolster the guidance to the contracting officers in evaluating commercial item and services prices. This revision stressed that reasonableness can be assessed through a variety of methods, including through competition, market surveys, or a review of past vendor contracts. It is important to note that the General Services Administration's (GSA) Federal Supply Schedule pricing practices relies heavily on past contract prices in negotiating and establishing schedule prices. The Task Force recognized the practical realities that commercial services could be acquired either competitively or on a sole source basis. The Task Force identified several examples of unique commercial services that could be justified for sole source procurements under the FAR. Accordingly, it is important to remove competition as a mandated standard in commercial item acquisition. It is the view of the Task Force that it should be clear

that sole source acquisitions of commercial services should require further market research to assess the reasonableness of a vendor's price.

The Task Force recommends revising the current guidance in FAR Part 12 (Acquisition of Commercial Items) to recognize "services" on an equal footing with commercial item acquisitions, and that price reasonableness can be assessed by a review of past contracts. The Task Force also recommends adding language to FAR subpart 13.106-3 (Award and Documentation), with the intent to solicit vendors to provide documentation on previous and current sales to further support price reasonableness assessments. As stated above, this is an established practice in GSA. Furthermore, the Task Force would clarify in this subpart that price catalogues are not always maintained by commercial service vendors, or may not be kept current in hard copy catalogues. To this end, the Task Force recommends amending FAR 15.402 (Pricing Policy) to add to the reference of "catalogue prices" a review of vendor web pages, including a review of active and/or previous contracts for similar items or services.

The regulatory revisions outlined above can be found in *Attachments 4-9*.

## **Attachment 1 – Legislative Recommendation to Redefine Commercial Services**

The Task Force believes that the definition of commercial services does not need to be conceptually different from commercial items. If the service is of a type offered and sold in the commercial marketplace, establishing a credible basis for demonstrating its market acceptance, then the service should qualify as a commercial item.

### **Rationale**

The 1994 Federal Acquisition Streamlining Act (FASA) divided services into two groupings. These groupings were contained in the commercial item definition at paragraph 5 (installation services, maintenance services, repair services, training services – also known as ancillary services) and paragraph 6 (services for specific tasks performed or specific outcomes – also known as professional and technical services).

These groupings of services are an outgrowth of the 1993 Acquisition Law Advisory Panel (commonly known as the Section 800 Panel). Initially, the definition of commercial item focused on manufactured products. The Section 800 Panel later realized that ancillary services needed to be included in the definition of commercial item, as well. It made no sense to the Section 800 Panel to permit streamlined commercial item acquisition methods for manufactured products but not permit the same methods for the services necessary to install, maintain, and repair the manufactured products. The Section 800 Panel did not conclude that non-ancillary services should be excluded. Rather, the Section 800 Panel stated that there was not enough information, at that time, to consider the question of non-ancillary services.

As a practical matter, in the commercial market place there is no substantive difference between ancillary and non-ancillary services. The bifurcation of services within the commercial item definition has caused confusion in the Government marketplace because conceptually they overlap. For example, installation services, maintenance services, repair services, training services also are services for specific tasks performed or specific outcomes to be achieved.

The Task Force offers the following comments on specific provisions to which changes are being proposed; the recommended statutory changes, with a line-in/line out, follows this discussion –

- *Paragraph (1) Any item other than real property, that is of a type customarily used by the general public or by non-governmental entities for other than government purposes*

Comment: This initial element of the definition of commercial items requires the item or service to be used by non-governmental entities to qualify. It seems reasonable that some elements of the state and local government marketplace generally has, and continues to use, commercial items and services. For example, commercial communications services routinely are used in local and state government public safety missions. Commercially available, interoperable hardware items and systems also are used by these entities to link critical elements of state and local government police and fire departments. Under the definition above, however, these commercial items (sold to non-Federal entities) would not be defined as a commercial item. As a result the Government may be establishing a barrier that may limit its access to a broad range of commercially available items and services routinely used by state and local governments.

- *Paragraph (5)(i): Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item.*

Comment. The addition of this provision was intended to address a provision originally included in FASA, which required ancillary services to be provided to the Government with the same workforce as used to provide services to the general public. This FASA provision proved to be unworkable and was removed by Congress (ref. Section 805 of the FY 2000 National Defense Authorization Act).

Inasmuch as Paragraph (5)(i) merely voids a provision previously imposed by FASA, it does not have to be part of any new definition. The basic thrust of the FAR's structure at FAR 1.102-4(e) which states: "... *absence of direction should be interpreted as permitting the Acquisition Team to innovate and use sound business judgment that is otherwise consistent with law and within the limits of their authority.*" In other words, it is unnecessary to state that commerciality of services does not rest on "whether such services are provided by the same source or at the same time as the item."

- *Paragraph (5)(ii): The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government*

Comment. This provision also was recommended by the Section 800 Panel so that the Government and commercial services are provided by the same workforce, plant, or equipment. The Section 800 Panel concluded that there must be some reasonable expectation that the service provided to the Government also will be provided to the general public. However, requiring that services be provided by the same workforce, plant, or equipment already has been acknowledged to be unworkable and removed by Congress.

That similar services be contemporaneously provided to the general public clearly falls within the present definition of commercial item, which requires the commercial item to be "of a type customarily used by the general public." There should be no issue with respect to terms and conditions since Government purchaser establishes the terms and conditions, as expressed at FAR 52.212-4 and FAR 52.212-5. Plus, it is well known that the Government imposes terms that are unlike those applied in the commercial marketplace (e.g., FAR 52.212-5, "Statutes and Executive Orders").

- *Paragraph (6)(first sentence): Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.*

Comment. The provision related to "services of a type offered and sold competitively" clearly falls within the present definition of commercial item which requires the commercial item to be "of a type customarily used by the general public."

The provision related to "substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved" is a carryover from a provision that had been contained in the Truth in Negotiations Act (TINA) as an exception. This provision was removed from TINA by the 1996 Clinger-Cohen Act. This provision, unfortunately and unnecessarily, makes pricing a condition to meeting the definition of commercial item. Guidance on established catalog or market pricing already is expressed at FAR 15.403-3(c). As it is, this provision is laying the foundation for bad law (see *Envirocare of Utah*, U.S. Court of Federal Claims, No. 99-76C).

- *Paragraph (6)(second sentence): This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved.*

Comment. The provision has been interpreted to mean that Time and Material (T&M) and Labor Hour (LH) contracts are not permitted for the purchase of commercial services. This prohibition is more appropriately dealt with at FAR 12.207 on contract types and under 16.601(A) addressing types of contracts. It does not need to be part of the definition of commercial services.

- *Paragraph (6)(i) and (ii): This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved. “Market prices” means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.*

Comment. This provision is strongly opposed by industry as perpetuating concepts that are widely acknowledged to be outmoded and obsolete, especially price catalogues are not always maintained by commercial service vendors, or may not be kept current in hard copy catalogues. These paragraphs are no longer needed.

### **Recommendation:**

Based on the rationale outlined above, the Task Force proposes the following line in line out revision to the statutory definition of “commercial items”

“Commercial item” means -

(1) Any item, other than real property, that is of a type customarily used by the general public or by ~~non-governmental~~ other than Federal Government entities for purposes other than Federal Government purposes, and-

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for-

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) Any ~~Installation services, maintenance services, repair services, training services, and other services if~~ Service of a type offered and sold in the commercial marketplace for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

~~(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and~~

~~(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;~~

~~(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved. For purposes of these services—~~

~~(i) **“Catalog price” means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and**~~

~~(ii) “Market prices” means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.~~

(6) Any item, combination of items, or service referred to in paragraphs (1) through (5) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(7) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

## **Attachment 2 – Legislative Recommendation to Time and Material Contracts**

The Task Force recognizes that the use of Time and Material (T&M) and Labor-Hour (LH) contracts and subcontracts for the acquisition of services is a common commercial practice. Indeed, the Task Force questioned if T&M/L-H contracts are prevalent in the commercial sector, then why is not this fact the test for determining acceptability for the Government? Legislative and regulatory provisions addressing T&M/LH commercial contracts should address this fact.

The commercial customer knows in advance the fixed rate per day or hourly basis but may not, in many instances, be able to precisely determine how long the services will be required. For example, Otis Elevator contracts with thousands of building managers to maintain and repair, as necessary, building elevators. Since there is no way to determine, prior to trouble-shooting, exactly what the problem is and what parts will be required to repair the elevator and get it back into running order, a traditional fixed-price contract is not appropriate. Commercial contracts generally provide for repair parts at fixed prices but do not limit the number or type of parts for individual repairs. The customer will pay only for the effort required and both parties know that the services can be terminated or extended at the customer's discretion. This is seen as a positive cost control measure. The competitive forces of the commercial marketplace demand that quality services are provided in an efficient manner so that unnecessary time and material and labor hours are not spent.

### **Rationale:**

The 2003 Services Acquisition Reform Act (SARA) provided statutory authority for the limited use of T&M contracts to acquire commercial services where award by the Government is based on competition. However, it was silent on the use of T&M and LH prime contracts and subcontracts for commercial services in sole source procurement situations. Normally, the statutory authority granted to the Government applies to prime contractors in performance of their contracts. Historically, the statutory authority granted at the prime contract level is typically applied at the subcontract level. Thus, it could be inferred from SARA that the use of T&M subcontracts for commercial services would be restricted to procurements based on competition. It is a virtual certainty that contracting officers and prime contractors would view it that way.

A prevailing business model is for Government prime contracts for services to be issued to "Government qualified" segments of multi-segment corporations. Many such corporations also have commercial segments providing world class services that will not do business with the Government either directly or indirectly. These commercial segments are unwilling to invest in the infrastructure necessary to establish compliant contract cost accounting systems that would bill the Government in accordance with the unique terms and conditions of Government contracts (e.g., "Allowable Cost and Payment" clause). These commercial segments normally do business with their commercial customers on a Firm Fixed Price or T&M/LH basis.

In competitive awards of Firm Fixed Price service contracts, prime contractors are free to use any type of subcontract that best satisfies performance of the contract. The price reasonableness of the prime contract has been established by the competition, and the prime contractor assumes the risk of performance. Conversely, in competitive awards of Cost Reimbursement service contracts, prime contractors are restricted to subcontract types that satisfy Government compliance requirements, in particular those set forth in the "Allowable Cost and Payment" clause. The price reasonableness of the prime contract will be based on an audit, negotiation, and settlement of actual allowable costs incurred. This situation, however, is unacceptable to most commercial companies.

SARA now authorizes T&M/LH contracts, if awarded competitively, and basically accepts the notion that price reasonableness of hourly rates can be established by competition. The Task Force recommends that while competition does support price reasonableness, competition should not be viewed as the only method to secure price reasonableness. Market surveys and review of past contracts also provide insight into the reasonableness of offered prices. The Task Force believes that awards of T&M/LH contracts should be permitted on both a competitive as well as sole source basis, if properly supported. Under T&M/LH contracts, the prime contractor assumes the risk of performance against negotiated T&M/LH rates. The same logic also follows for T&M/LH subcontracts. In addition, since many corporations do not conduct competition for interdivisional work, the requirement for competition may preclude the use of interdivisional resources. Applying SARA's competition rule to subcontracts and interdivisional transfers would limit the Government's access to these commercially available services.

### **Recommendation:**

The Task Force recommends that the appropriate statutes be amended so that the requirement for competition, or justified sole source, be permitted in the award of commercial service T&M/LH contracts. The Task Force further recommends that appropriate statutory, and regulatory guidance reference the fact that prime contractors have clear authority to subcontract on a T&M/LH basis for services that are sold to the general public on a T&M/LH basis. This recognizes that the prime contractor has the responsibility for establishing subcontracts and justifying contract type, terms and conditions. The Task Force also recommends congressional report language to address the subcontracting concerns outlined above; this statement also should be included in any implementing policy guidance.

### **AMENDMENT**

*Section 8002(d) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355; 108 Stat. 3387; 41 U.S.C. 264 note) is amended-----*

*by adding after subparagraph (B) (as so redesignated) the following new subparagraph:*

*“(C) subject to paragraph (2), authority for use of a time-and-materials contract or a labor-hour contract for the procurement of commercial services that are commonly sold to the general public through such contracts and are purchased by the procuring agency on a competitive basis **or if fully justified on a sole source basis**”;*

### **CONGRESSIONAL REPORT AND POLICY GUIDANCE LANGUAGE**

*Prime contractors should be free to use Time and Material (T&M) and Labor Hour (LH) commercial subcontracts for services in contract performance, subject to periodic Government review of purchasing operations through the Contractor Purchasing Systems Review process.*

### **Attachment 3 – Legislative Recommendation to Advisory and Assistance Services**

It was the Task Force’s position that the realities of what is and what is not A&AS, as defined in the FAR can be confusing and often blurred in contract requirements. The similarities between other task order contracting and the A&AS raises the question of whether this distinction is still necessary? At a minimum, the Task Force recommends providing Advisory and Assistance Services Contracts with the same performance period as other multi-year task and delivery order contracts.

#### **Rationale:**

Section 813 of the Fiscal Year 2005 National Defense Authorization Act extends the performance period for “multiyear task and delivery order contracts” awarded by the Department of Defense (DOD) from a fixed maximum five-year term to a base five-year term with an extension for up to an additional five years. The agency also can make a determination in writing that exceptional circumstances warrant a longer contract period. However, this revision did not change the five-year maximum period of performance for a subset of task orders, called advisory and assistance services (A&AS) contracts, which are covered under 10 U.S.C. Section 2304b.

Both types of contracts should be treated the same, with the same flexibility provided to the Defense Department and the contracting officer to determine the appropriate period of performance necessary to meet agency needs. The rationale that Congress applied when adopting the changes to task order contracts covered by Section 813 also applies to A&AS contracts. Following standard procurement rules, these contracts are competed in both the base performance period and again on each task order over \$100,000.

Permitting inclusion of these contracts would provide the following advantages:

- Minimizes Government acquisition time and costs.
- Complements and is consistent with Congress’ recent legislation (Section 803 of the Fiscal Year 2002 National Defense Authorization Act) requiring task order competition for all DOD multiple-award contracts for task orders greater than \$100,000 in value.
- Minimizes bid and proposal (B&P) costs, thus reducing overall costs to the Government.
- Avoids the large disruptions in ongoing support due to prime contract re-competition when the Government has multiple successfully performing prime contractors.
- Avoids wholesale movement of large workforces from one contractor to another and resulting in adverse impact to employee retirement benefits for those who have not completed the required vesting period or those who have to meet another vesting requirement with the new employer.
- Enables the Government to avoid program risk during critical program stages due to loss of program corporate knowledge of ongoing program activities.

#### **Recommendation:**

The Task Force recommends that Congress amend title 10, United States Code, to provide similar periods of performance for *all* types of task and delivery order contracts. The amendment below provides a conforming amendment to the existing coverage on advisory and assistance services:

*Sec. \_\_\_\_ Section 2304b(b) of title 10, United States Code, is amended by striking all after the phrase “options, modifications, or otherwise,” and inserting “may be for any period up to five years and may extend the contract period for one or more successive periods pursuant to an option provided in the contract or a modification of the contract. The total contract period as extended may not exceed 10 years unless the head of an agency determines in writing that exceptional circumstances necessitate a longer contract period.”*

## **Attachments 4-8 – Line-in/Line-out of proposed FAR (Parts 2, 12, 13, 15) and DFARS revisions**

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### **Attachment 4 – Line-in/ Line out of proposed FAR revisions to Commercial Services Definition**

The definition in (Acquisition of Commercial Items) Part 2.1 for commercial items provides only limited treatment of commercial services. Further, this definition provides guidance to evaluate catalog or market prices which seems misplaced since there currently is a substantial body of regulation in FAR Parts 12, 13 and 15 currently addressing price reasonableness issues. These FAR references, however, continue to limit their application to commercial items, and fail to address commercial services sufficiently.

The current definition of a commercial item (FAR Subpart 2.101) does not provide the contracting officer with an effective definition of commercial services to provide an avenue to acquire commercial services using customary commercial practices. Contracting officers are faced today with a definition of services that either defines the services as being in support of a commercial item [Section (5) of the current definition] or details a definition of stand-alone services [Section (6) of the current definition] that is unnecessarily restrictive. The unnecessary restrictions in the definition of stand-alone services include the requirement for demonstrating that the services are sold competitively, in substantial quantities, and based on established catalog or market prices. These concepts are outmoded, having been removed from the Truth in Negotiations Act by the 1996 Clinger-Cohen Act (P.L. 104-106), and serve no useful purpose in the definition of commercial services.

#### **Rationale:**

The construction of the commercial item definition at FAR 2.101 makes the purchase of commercial services unnecessarily difficult or impossible at a time when commercial services are being sought by the Government more frequently than ever before. The alternative of purchasing commercial services under other than FAR Part 12 (Acquisition of Commercial Items) procedures is not an attractive option in many circumstances because providers of commercial services have not invested in systems necessary to comply with non-FAR Part 12 requirements – such systems simply are not required in the commercial marketplace. Accordingly, the most efficient mechanism to acquire commercial services is through the use of commercial practices as close as practicable to those experienced by commercial companies under normal market conditions.

#### **Recommendation:**

The Task Force recommends amending FAR Subpart 2.101 (Definitions of Commercial Items) to clarify the definition of stand-alone commercial services. The Task Force recognizes that this recommended revision would require a statutory change. [The corresponding recommendations addressing the legislative changes have been discussed and supported in Attachment 1 of this report]. The full text of this proposed amendment is provided below:

#### **FAR 2.101 Definitions of Commercial Items.**

**Commercial item means —**

(1) Any item, other than real property, that is of a type customarily used by the general public or ~~by non-governmental~~ Other than Federal Government entities for purposes other than Federal governmental purposes, and

—  
(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for —

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) Any ~~Installation services, maintenance services, repair services, training services, and other services if~~ Service of a type offered and sold in the commercial marketplace for use by the general public or other than Federal Government entities for specific task performed or specific outcomes to be achieved and under customary commercial terms and conditions.

(i) ~~Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and~~

(ii) ~~The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;~~

(6) ~~Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved. For purposes of these services —~~

(i) ~~Catalog price means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and~~

(ii) ~~Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.~~

(6) Any item, combination of items, or service referred to in paragraphs (1) through (5) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(7) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

## **Attachment 5 – Recommended FAR revision on Determination of Price Reasonableness**

While competitive acquisition is obviously a preferred acquisition approach, practical realities clearly indicate that in some limited circumstances commercial items and services may only be available from a sole provider. The FAR guidance must recognize that commercial item acquisition can be either competitive or sole source if properly justified. References to catalogue and market prices also must be reflective of current business environment. Catalogues and price lists are not necessarily published and, in some cases, discounting policies often are considered proprietary in commercial organizations. Recognizing the current services acquisition realities, and the evolving legislative revisions, it is important that FAR sections 12, 13 and 15 be updated to reflect approaches to fully assess price reasonableness.

### **Rationale:**

In the current acquisition environment, the regulations need to advance the recognition of commercial services on equal standing with commercial items. The Task Force believes that commercial items referred to a tangible product and is clearly different than a commercial service. The Task Force interpreted a commercial service as: *a service is considered to be any “thing” or “class of procurement,” that is not manufactured or does not require manufacturing – in other words, a service is not a tangible product, even though the service it self may produce some tangible outcome or output.* The Task Force further felt that additional guidance would be beneficial to clarify that reasonableness can be assessed through a variety of methods. These include competition, markets surveys of past or current contracts for the same or similar items, and catalogues or web-based published prices.

### **Recommendation:**

The Task Force recommended expanding the references to commercial items to include commercial services. The guidance should provide clarity to the full range of methods for assessing the reasonableness of prices for commercial items and services. Market survey information, including reviews of active and past commercial contracts, could be an effective metric in validating a commercial vendor’s pricing. Specifically, the Task Force recommended amending FAR Subpart 12.209 (Determination of Price Reasonableness) by adding references to commercial services, following the references to commercial items in the first and second sentence. This change clearly places services on equal footing with commercial items, and reflects the practical realities of today’s Federal acquisition environment. This revision provides guidance on the variety of methods that could be considered in assessing the reasonableness of commercial items or services. The full text of this proposed amendment is provided below:

### **FAR 12.209 Determination of Price Reasonableness.**

While the contracting officer must establish price reasonableness in accordance with FAR 13.106-3, 14.408-2, or subpart 15.4, as applicable, the contracting officer should be aware of customary commercial terms and conditions when pricing commercial items **and services**. Commercial items **and services** prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements. **Reasonableness can be assessed in a variety of ways including competition, market surveys that include a review of past or active vendor contracts, and review of any catalogue or other published prices if available.** The contracting officer must ensure that contract terms, conditions, and prices are commensurate with the Government’s need.

## **Attachment 6 – Recommended FAR Revision to Award and Documentation**

While competitive acquisition is obviously a preferred acquisition approach, practical realities clearly indicate that in some limited circumstances commercial items and services may be provided by a sole provider. The FAR guidance must recognize that commercial item acquisition can be either competitive or sole source if properly justified. Therefore, FAR Subpart 13.106.3 (Award and Documentation) must recognize that commercial item and services acquisitions may be awarded on either a competitive, which is the preferred approach, or on sole source basis if properly justified.

### **Rationale:**

It is equally important to clarify in this section of the FAR that the contracting officer can request commercial item or service vendors to provide supporting documentation which might support the commercial price as part of their proposal or to support negotiation. It is important that vendors dealing with the Federal government recognize the overarching need for data that support the reasonableness of all prices offered. This vendor obligation is particularly critical in a justified sole source acquisition of a commercial item or service.

The Task Force recognizes the absolute and legitimate obligation for the Federal government to assess and make determination regarding the reasonableness of any proposed vendor prices prior to making any award. The proposed changes are intended to clarify this obligation. These proposed changes recognize that in justified sole source awards further market research might be necessary to adequately judge the reasonableness of any vendor's proposed prices. The Task Force also believes it important to clarify that, in today's business environment, vendors may not have current published price list of catalogs to assist in the assessment of reasonableness. Consistent with the other proposed amendments, the Task Force notes that these changes should ensure that services are on equal footing with commercial items.

### **Recommendation:**

The Task Force recommends amending FAR 13.106-3 (1) (Award and Documentation) to add language to clarify that, in assessing the reasonableness of any proposed price, awards can be made on either a competitive basis or through a justified sole source basis. If a sole source award is made, further market research likely would be required. Therefore, the Task Force recommends amending paragraph (ii) of FAR 13.106-3 to clearly establish an obligation for vendors to provide supporting information to the contracting officer to allow the assessment of reasonableness of all proposed prices. This data could include providing copies of current or past contracts for similar items. The Task Force also recommends amending paragraph (iii) of FAR 13.106 to recognize that current price lists or published catalogs may not be available. Finally, the Task Force recommends amending paragraph (3) of FAR 13.106-3 to recognize commercial services on equal standing in the regulation with commercial items.

The full text of this proposed amendment is provided below:

### **FAR 13.106-3 Award and documentation.**

(a) Basis for award. Before making award, the contracting officer must determine that the proposed price is fair and reasonable.

(1) Whenever possible, base price reasonableness can be achieved through competition quotations or offers. Determining reasonableness in sole source awards requires further market research.

(2) If only one response is received, include a statement of price reasonableness in the contract file. The contracting officer may base the statement on —

(i) Market research;

(ii) Comparison of the proposed price with prices found reasonable on previous purchases including requesting vendors provide supporting documentation of current or previous contract sales;

(iii) Current price lists, catalogs, or advertisements if available. However, inclusion of a price in a price list, catalog, or advertisement does not, in and of itself, establish fairness and reasonableness of the price;

(iv) A comparison with similar items in a related industry;

(v) The contracting officer's personal knowledge of the item being purchased;

(vi) Comparison to an independent Government estimate; or

(vii) Any other reasonable basis.

(3) Occasionally an item or service can be obtained only from a supplier that quotes a minimum order price or quantity that either unreasonably exceeds stated quantity requirements or results in an unreasonable price for the quantity required. In these instances, the contracting officer should inform the requiring activity of all facts regarding the quotation or offer and ask it to confirm or alter its requirement. The file shall be documented to support the final action taken.

(b) File documentation and retention. Keep documentation to a minimum. Purchasing offices shall retain data supporting purchases (paper or electronic) to the minimum extent and duration necessary for management review purposes (see subpart 4.8). The following illustrate the extent to which quotation or offer information should be recorded:

(1) Oral solicitations. The contracting office should establish and maintain records of oral price quotations in order to reflect clearly the propriety of placing the order at the price paid with the supplier concerned. In most cases, this will consist merely of showing the names of the suppliers contacted and the prices and other terms and conditions quoted by each.

(2) Written solicitations (see 2.101). For acquisitions not exceeding the simplified acquisition threshold, limit written records of solicitations or offers to notes or abstracts to show prices, delivery, references to printed price lists used, the supplier or suppliers contacted, and other pertinent data.

(3) Special situations. Include additional statements —

(i) Explaining the absence of competition if only one source is solicited and the acquisition does not exceed the simplified acquisition threshold (does not apply to an acquisition of utility services available from only one source); or

(ii) Supporting the award decision if other than price-related factors were considered in selecting the supplier.

(c) Notification. For acquisitions that do not exceed the simplified acquisition threshold and for which automatic notification is not provided through FACNET or an electronic commerce method that employs

widespread electronic public notice, notification to unsuccessful suppliers shall be given only if requested or required by 5.301.

(d) Request for information. If a supplier requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the contract award decision shall be provided (see 15.503(b)(2)).

(e) Taxpayer Identification Number. If an used, the contracting officer shall ensure that the copy of the award document sent to the payment office is annotated with the contractor's Taxpayer Identification Number (TIN) and type of organization (see 4.203), unless this information will be obtained from some other source (e.g., centralized database). The contracting officer shall disclose to the contractor that the TIN may be used by the Government to collect and report on any delinquent amounts arising out of the contractor's relationship with the Government (31 U.S.C. 7701(c)(3)).

## **Attachment 7 – Recommended FAR Revision on Pricing Policy**

The current FAR Pricing Policy (FAR 15.403) fails to provide direction to the contracting officers that price support may be available in other than an established catalogue price list. Consistent with the other proposed recommendations, the FAR should reference that web-based technology has in some cases eliminated published catalogues. Further, the guidance should reference the need to review current or past relevant contracts to support a market price assessment.

### **Rationale:**

It is a standard commercial practice to provide pricing information to customers, but not actual cost data. Therefore, the FAR language related to pricing policy should provide clear guidance to contracting officers that assessing the reasonableness of a proposed vendor's price need not be limited to published catalogues. As a result of the current web technology business environment, most vendors have replaced expensive catalogue publication with company internet web pages that may provide elements that support the obligation to assess the reasonableness of published prices. However, the Government should be able to request vendors to provide support in the form of past or current contracts to assist the contracting officer in performing market research and validating the reasonableness of prices offered. The FAR pricing policy (FAR 15. 403) provides guidance to contracting officers on methods to pursue in assessing the reasonableness of a proposed price.

### **Recommendation:**

The Task Force recommends amending FAR 15 402 (i) to establish that vendor prices can be established through electronic or company web pages. The FAR should be further clarified to state that the contracting officer can assess market prices by requesting and reviewing active or previous contracts that contain prices for similar items or services. The Task Force also recommends amending paragraph (3) of this section to include a cross-reference to FAR 15.403-1, which provides prohibitions on obtaining cost or pricing data.

The full text of this proposed amendment is provided below:

### **FAR 15.402 Pricing policy.**

Contracting officers must —

(a) Purchase supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer must not obtain more information than is necessary. To the extent that cost or pricing data are not required by 15.403-4, the contracting officer must generally use the following order of preference in determining the type of information required:

(1) No additional information from the offeror, if the price is based on adequate price competition, except as provided by 15.403-3(b).

(2) Information other than cost or pricing data:

(i) Information related to prices (e.g., established catalog prices, electronically published prices on company web pages or market prices or from a review of active or previous contract prices for similar items or services), relying first on information available within the Government; second, on information obtained from sources other than the offeror; and, if necessary, on information obtained from the offeror. When obtaining information from the offeror is necessary, unless an exception under 15.403-1(b) (1) or

(2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.

(ii) Cost information, that does not meet the definition of cost or pricing data at 2.101.

(3) Cost or pricing data. Except as provided by 15.403-1 the contracting officer should use every means available to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data. Contracting officers must not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources.

(b) Price each contract separately and independently and not —

(1) Use proposed price reductions under other contracts as an evaluation factor; or

(2) Consider losses or profits realized or anticipated under other contracts.

(c) Not include in a contract price any amount for a specified contingency to the extent that the contract provides for a price adjustment based upon the occurrence of that contingency.

## **Attachment 8 – Recommended Revisions to the DFARS**

The Defense Federal Acquisition Regulation Supplement (DFARS) guidance at DFAR 212.301 (f) (ii) sets forth the requirement to request “Representations and Certifications” for all commercial item acquisitions over the simplified acquisition threshold. This reference in the DFARS also should include “services” along with commercial items. The acquisition of services now dominates discretionary spending in the Federal government, and the DFAR should similarly recognize commercial services on equal footing with commercial items.

### **Rationale:**

As noted previously, the Task Force determined that commercial items may refer to a tangible product or manufactured end item. Services also may result in products as defined below by the Task Force:  
*a service is considered to be any “thing,” or “class of procurement,” that is not manufactured or does not require manufacturing – in other words, a service is not a tangible product, even though the service it self may produce some tangible outcome or output.*

### **Recommendation:**

The Task Force recommends amending DFAR 212.301 (ii) (Solicitation provisions and contract clauses for acquisition of commercial items) to add references to commercial services. The full text of this proposed amendment is provided below:

#### **DFARS 212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

(f)(i) Use one of the following provisions as prescribed in part 225:

(A) 252.225-7000, Buy American Act —Balance of Payments Program Certificate.

(B) 252.225-7020, Trade Agreements Certificate.

(C) 252.225-7035, Buy American Act —Free Trade Agreements —Balance of Payments Program Certificate.

(ii) Use the provision at 252.212-7000, Offeror Representations and Certifications —Commercial Items, in all solicitations for commercial items **and services** exceeding the simplified acquisition threshold. If an exception to 10 U.S.C. 2410i applies to a solicitation exceeding the simplified acquisition threshold (see 225.770-3), indicate on an addendum that “The certification in paragraph (b) of the provision at 252.212-7000 does not apply to this solicitation.”

(iii) Use the clause at 252.212-7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items, in all solicitations and contracts for commercial items, completing paragraphs (a) and (b), as appropriate.

(iv) Use the provision at 252.209-7001, Disclosure of Ownership or Control by the Government of a Terrorist Country, as prescribed in 209.104-70(a).

(v) Use the clause at 252.232-7009, Mandatory Payment by Governmentwide Commercial Purchase Card, as prescribed in 232.1110.

(vi) Use the clause at 252.211-7003, Item Identification, as prescribed at 211.274-3.

**ACQUISITION MANAGEMENT AND PLANNING  
WORKING GROUP**

## ***IV. ACQUISITION MANAGEMENT AND PLANNING WORKING GROUP***

### **A. Executive Summary**

Over the last 10 years, Federal spending has shifted from primarily goods and real property to increasingly more dollars expended for services. By 2004, spending by the Department of Defense (DOD) for services exceeded 50% of the total DOD budget, and 75% of many civilian agency budgets.

Corresponding to this shift in budget demographics, there also has been a shift in the contracting mechanisms. Although indefinite delivery/indefinite quantity (ID/IQ) contracts were long reserved for spares and support to weapons in the inventory, as a result of the 1994 Federal Acquisition Streamlining Act (FASA) and the 1996 Clinger-Cohen Act these same mechanisms became the norm and the contract mechanism of choice. The concept or notion of a “contract” as executed 10 or more years ago has shifted to “orders” against base vehicles as the primary contracting norm – for both hardware and services. This shifting focus likewise appears to have created a shift in how agencies approach contracting, and the planning mechanisms used to ensure adequate controls are in place.

The working group’s initial focus or mission was to examine the broader scope of “services” versus a focus on Performance-based acquisition as the identifying nomenclature. This approach resulted in the working group identifying various issues with the current Federal Acquisition Regulation’s (FAR) treatment of services. The working group immediately recognized that the FAR is broad in scope. While specific rules have been created based on Government purchases and practices dating back many years, the FAR focus on goods and real property may have resulted in a culture wherein the workforce failed to recognize the overarching FAR principles applicable to services as well. In reviewing the FAR, and identifying those sections covering services, the working group questioned and discussed the actual FAR provisions and need for change.

In its review, the working group concluded that the current focus on technique, in this case “performance based,” has the effect of shifting the attention from the “requirement,” and selecting a procurement method based on the “requirement,” to the technique as the driver. Therefore, the working group concluded that the focus should be shifted to “Services Acquisition” as the primary domain or nomenclature, with the term “performance-based” being reserved as but one mechanism or tool for acquiring services, but not necessarily the only one. And the selection of contract approach is best based on sound business rationale.

Furthermore, moving away from a hardware focus to a service focus still requires many of the basic acquisition skills commonly associated with hardware acquisitions. The working group recognized that service acquisitions can be extremely complex, and program management skills, tools and processes need to be applied to services acquisitions. The use of such tools as Integrated Master Plans and Integrated Master Schedules apply equally to a weapon system, an Engineering Support Contract for multiple functions or locations, or an Information Technology support contract. Encouraging the use of “systems thinking and planning” would improve services acquisition.

One point noted is that the FAR does not define the term “services.” The Task Force concluded that a service could be defined as:

*A service is considered to be any “thing“ or “class of procurement”, that is not manufactured or does not require manufacturing, i.e. a service is not a tangible product, even though the service it self may produce some tangible outcome or output.*

While this working definition was considered critical, it was not determined to be necessary to change the FAR to incorporate the definition. It was believed, however, that such a distinction was necessary to disassociate the concept of physical products, and to have a point of departure for “performance based” as a tool or mechanism and not the end result.

Many of the issues and problems discussed overlapped with the other areas identified, particularly the “Categories of Services” and Part 37 working groups. For that reason, the issues of price reasonableness, competition and service contracting regulations are discussed therein. The following section outlines the initial findings of the “Acquisition Management and Planning” working group as it relates to those issues on which the working group focused.

## **B. Initial Findings**

In its review, the working group considered the following issues and problems:

1. Pre-award – Acquisition Planning. The Task Force concluded that the pre-award and acquisition planning that specifically focused on services appeared to be missing and considered that the FAR’s focus on goods, and perhaps weapon systems, created a culture that failed to recognize the differences between those types of acquisitions and the planning required for services. The working group determined that a discipline and skill for acquisition planning was just as necessary in service acquisitions as in hardware and weapons acquisitions. Such issues as market research, critical thinking about the requirement, life cycle support, and availability in the marketplace are equally pertinent in a service acquisition.
2. Types of contracts. The working group discussed whether FAR Part 16 (Types of Contracts) coverage was sufficient, challenging whether or not service contracts required a different pricing arrangement. An industry norm for services is Time and Material (T&M) and Labor Hour (LH) type of pricing arrangements. An additional point of discussion was payment terms; with the general consensus being that milestone billing or performance-based payments may be more appropriate for service contracts. It was determined that Part 16 coverage should be expanded to specifically address T&M/LH, or other contract pricing arrangements, with respect to services. In addition, performance-based as a technique more appropriately is covered in FAR Part 11 (Describing Agency Needs).
3. Award. The working group discussed the present requirements for best value, and the source selection process, including the evaluation itself and the use of past performance information. It was determined that not only may changes be required to the FAR but, in addition, many Service Source Selection Guides and other supporting information may need to be revised as well to reflect a focus on services. One challenge may be the potential emphasis on past performance as a major factor for selection in a service environment. The Task Force concluded there has been insufficient attention paid to a mechanism for developing past performance, although the Contract Performance Assessment Report System (CPARS) refers to service contracting across the Government. The CPARS information collected for hardware or weapons systems contractors focuses on schedule and cost, metrics which may not be the best measurement for services delivery. Schedule and cost, while important in the hardware and systems environment, are not necessarily the only or best indicator of future performance in the service sector. Such metrics as quality of service, responsiveness to client, in addition to cost control, may be better indicators for the service sector. In addition, it is not

unusual to have no CPARS prepared for service contracts. Although, the Past Performance Retrieval System (PPIRS) was a limited initial effort to capture service sector past performance information, its use has not been completely successful. To the extent that the source selection authority relies on past performance as indicators, work to create credible metrics and better application for services is required.

4. Incentives. Traditional hardware and systems contract strategies consider multiple contract incentive structures to motivate contractors – these include cost, schedule and performance generally linked to improving performance of the system or ensuring early delivery and reduced cost where appropriate. However, service providers or the services sector generally will not have such finite and concrete specification driven outcomes or performance requirements. Within the current cost and pricing framework, Award Fee is perhaps the most applicable method for motivating performance. However, Award Fee is subjective. When using Performance-based Acquisition, identifying the critical outcomes required, versus improved or enhanced delivery, can be difficult. Incentives and their application to Services requires additional work.
5. Post Award. The working group questioned whether the Defense Contract Management Agency (DCMA) infrastructure for the Department of Defense (DOD), and if requested for the Federal agencies, was sufficiently prepared for the oversight and administration of service contracts. Where DCMA in recent years has focused more on contractor systems and certification of those systems, services and the associated contractors systems are very different. There may be little investment in physical plants, manufacturing equipment, or quality systems. The General Accountability Office (GAO) has confirmed in their review of service contracts that administration is either weak or missing. Of 90 contracts reviewed, the report identified 26 where quality assurance was either lacking or completely absent with no personnel assigned to administer the contract. It is likewise this apparent lack of oversight that caused Congress to enact for DOD service contracts a requirement to create a management structure similar to that for major weapons systems (see Section 801 of the Fiscal Year 2003 National Defense Authorization Act, PL 107-107). Each of the military departments have implemented this provision using different management models.
6. Professional vs. Non-professional. The working group considered that in the field of services the distinction between professional and non-professional is blurring as technology has altered the specific service being provided and the manner performed. The distinction between the Davis Bacon, Walsh-Healy, and Service Contract Acts, although necessary when formed, may no longer be pertinent. No additional recommendations were considered, except that certain legislative requirements will most likely not be changed (e.g., the Service Contract Act or the Davis Bacon Act). Additional research and/or study is required to determine if these statutes are still pertinent, or how they may be updated, in the context of today's environment.

As the working group struggled through a “definition of services,” it became fairly clear that one issue predominates, especially for the Congress – the determination of “fair and reasonable” as it relates to the pricing of service contracts. It was recognized that the Congress and the Federal agencies rightfully are concerned with the Government receiving a fair and reasonable price. This issue was discussed and coordinated with the “Categories of Services” working group for resolution.

## **C. Recommendations**

In order to gather more definitive information and data regarding industry tools and techniques for buying services, the working group distributed a questionnaire to the membership of the respective industry associations. It is not known whether it was due to the timing of the questionnaire (in December, before

the holidays) or the wording of the questions, but the response to the survey was very limited. Therefore, the survey and its results cannot be considered with any statistical validity. The Task Force believes that a questionnaire to industry has merit, for the Government and Congress, in assessing true commercial industry practices. It is recommended that the questionnaire be refined, perhaps by the Acquisition Advisory Panel, and issued again to gather additional data and information on industry practices in acquiring services. The Task Force survey is found in *Attachment 9*.

The Task Force concluded that “performance-based” was a tool or technique, not an end result in, and of, itself. However, it also noted that industry and Government program managers may need increased awareness of the advantages in using a performance-based approach. *Attachment 10* outlines the benefits for both industry and Government. It is recommended that these be issued by Federal agencies to both project and contracts personnel as a guide for both Government and industry, and to encourage both parties to explore a greater reliance on the use of performance-based as a tool, regardless of the item being procured. This will further emphasize the critical relationship between requirements/project personnel and contract offices. It is further recommended that FAR Part 37.6 be moved to Part 11 (Describing Agency Needs) – retitled “Performance Based Acquisition” – and made applicable to all requirements’ descriptions. Performance-based is a technique or tool that can apply to all procurements, whether for supplies or services, that merit a statement of work or statement of objectives.

While the Task Force determined that no legislative changes were required, it did conclude that more focus on the term “services” would enhance and support the FAR and the procurement/project management community. For example, FAR Part 7 (Acquisition Planning) provides an outline for an Acquisition Plan. Throughout that document are references to products or systems. Acquisition plans are roadmaps for the acquisition, and provide a valuable tool to ensure that all elements of the requirements are addressed in the acquisition. Enhancing this outline or creating a new one for services would improve the buying process. *Attachment 11* addresses recommended changes to the FAR requirements on Acquisition Planning. In addition, questions remain on the application of FAR Part 7 to procurements accomplished under FAR Part 8 (Required Sources of Supplies and Services) or 13 (Simplified Acquisition Procedures). The Task Force would suggest that the concept of acquisition planning should apply across all acquisitions based on dollar value, including FAR Parts 8, 12 and 13.

A similar issue involves FAR Part 15 (Contracting by Negotiation), where the Task Force recommends adding the word “services” to several sections to further emphasize the importance of applying FAR Part 15 principles to service contracting. *Attachment 12* outlines the Task Force’s recommended minor revisions to this Part.

While not making any specific recommendations on the education and training of the acquisition workforce, the Task Force likewise discussed and debated the “culture change” required within the acquisition community. It is recognized that better integration is necessary between the requirements and contracting domains. Reinforcing this integration and ensuring better education/training within both domains is critical to improving the acquisition process for both hardware/systems and services. The contracting domain cannot fix requirement’s issues or problems. Changing this culture to recognize the underlying uncertainty in “requirements” definition, and the complexity associated with subsequent contract strategies, remains a challenge. Inherent in any “culture change” is also the associated management structures and reward systems to encourage appropriate and reasonable risk to achieve successful outcomes.

## **Attachment 9 – Survey on Performance-based Acquisition**

Industry Questions on Performance-based Acquisition approaches:

1. Briefly describe your company’s approach to the acquisition or contracting for services?
2. What type of contract does your company use when purchasing commercial services?
3. Given a Government preference for a “performance-based approach to contracting for services”, please identify your perceived technical and contractual risks with a performance-based approach?
4. If your company operates both in the Government and commercial market place, please describe how your company purchases commercial goods and services from your suppliers as opposed to the Government?
5. What are the top three factors that you focus on to improve supplier performance?
6. Please describe your internal measures of effectiveness to assess supplier performance.
7. What would you recommend to the Government to improve or encourage enhanced use of the performance-based contracting approach for service requirements?

## **Attachment 10 – Synopsis of Benefits of Performance Based Acquisition**

### **SELLING PBA TO GOVERNMENT PROGRAM MANAGERS (AND THEIR CONTRACTOR COUNTERPARTS)**

Persuading Government program managers to “buy into” performance based acquisition (PBA) takes more than fiat. They need to know the tangible benefits to both parties; as well as the unique risks of PBA to both parties. Benefits and risks also are metrics, for PBA works best when both parties fully realize the potential benefits and effectively mitigate the potential risks. A related question is whether guidance in regulation and other sources promotes or impedes the ability of the parties to maximize benefits and mitigate risks.

#### 1. Potential Benefits for the Government Program Manager.

- *You pay only for the performance that you get.* This is of great value for commercial services that are continuously performed, such as janitorial services, when rework is meaningless because the service is repetitively performed – leaving the Government with the choice of either paying in full or terminating for default. Performance-based contracts often include “tables of deductions,” which are a form of “liquidated damages” that allows the Government to reduce pay when performance does not meet standards.
- *You shift liability for performance from the Government to the contractor.* When the Government uses “how to” specifications, those specifications come with an implied warranty; as long as the contractor complies with the specs, the contractor is not liable for performance problems.
- *You may obtain better competition.* “How to” specifications restrict competition to those firms which are willing and able to meet those specifications – that is, to do it your way. The further the “how to” specifications vary from commercial norms, the fewer the contractors able and willing to meet them – often the only competitor is the incumbent. The use of output oriented requirements also allows the potential offerors more flexibility in proposing differing approaches. These different approaches can become the discriminators in source selections.
- *You permit consideration of all potential commercial solutions.* The authors of “how to” specifications often lock themselves into a single technical solution – usually the tried and true approach last acquired; thus denying themselves the opportunity to benefit from advances in the commercial state of the art and the opportunity to compete solutions rather than the contractor’s ability to conform to last year’s solution.
- *You benefit from the expertise of the entire supply chain.* “How to” specifications are “flow down” specifications, thus squandering the often considerable performance expertise of firms on the lowest rungs of the supply chain.
- *You improve probability of satisfying the end user’s actual need.* Contracts with tight “how to” specifications focus on compliance with specifications rather than on satisfying the Government’s actual needs. The result is often suboptimal performance from the perspective of the intended beneficiaries of the service. Also with tight “how to” specifications the post award oversight process becomes more bureaucratic since the flexibility to make changes in methods of performance is more difficult. The use of performance requirements permits greater opportunities to improve the outputs and objectives of the acquisition.
- *You reduce Government quality assurance overhead.* In services contracts, “how to” specifications ordinarily take the form of methods – this, step by step, is how the Government expects the contractor to perform. This translates into monitoring the contractor’s performance every step of the way, in terms of whether or not its employees are performing exactly as dictated

by the contract. In performance-based acquisitions, the contractor has to worry about supervising the workers; the Government worries only about outcomes – whether or not performance targets were attained.

## 2. Potential Risks for the Government Program Manager.

- *The risk of selecting the wrong technical solution from the wrong contractor.* “How to” specifications put all the competitors on the same playing field, with the only source selection question being: Which contractor is going to provide the effort at the lowest cost, which reduces the opportunities to make best value decisions and trade-off of costs for better performance. When the competition is performance-based, the question is which of the proposed technical solutions is most likely to succeed in accomplishing the Government’s objectives – this in addition to the question of whether the contractor offering the most promising solution actually has the wherewithal to deliver the solution promised. The more non-commercial the service, the harder these questions become. When the competition is based on Statements of Objectives, the source selection challenge is even more daunting, because now you are evaluating competing statements of work and quality assurance surveillance plans against one another even for like technical solutions. The more varied the technical solutions, the more difficult for the Government to find the expertise to compare one against the other.
- *Greater likelihood of mistakes in estimating the costs of performance.* Generally, it is relatively easy to estimate the degree and type of effort required to perform against a “how to” specification. It is harder when the two parties are both estimating the cost of attaining performance standards without benefit of knowing exactly how the work is to be performed. The less commercial the service being acquired, the greater the risk of mistakes in estimating the effort required to perform.
- *The possibility that the costs and lead-time of trade-off analyses may outweigh benefits of performance-based contracting.* When competing solutions, you have to weigh and evaluate the cost effectiveness of each competing solution, in terms of satisfying the performance targets. The more varied the competing technical solutions, the more difficult and time-consuming the trade-off analysis. On larger, more complex acquisitions, this may stretch the lead time for award by months.
- *The challenge of writing objectively measurable, reliable, valid, and commercially practicable performance parameters.* The Achilles heels of performance-based contracting are the performance targets; the standards for measuring attainment of performance, and the methods and processes used in the post award performance phase. If the performance parameters are vague, invalid in terms of representing the Government’s actual need, or verge on the impossible, it will be hard to hold the contractor accountable for its performance. Most disputes are over the meaning of the words that describe the performance.

## 3. Potential Benefits for Contractors

- *Greater flexibility in accomplishing Government objectives.* Not being locked into a “how to” means that the contractor is free to employ whatever approach it deems best.
- *Greater opportunities to profit from intellectual capital and past investments.* If the Government dictates a performance that varies in methods, equipment, and the like from the contractor’s commercial norms, the contractor has to reinvest and take the risks associated with debugging changes in its methods and practices.
- *Greater opportunities to profit from the expertise of the entire supply chain.* This in fact has proven to be the most valuable benefit of the introduction of supply chain management.

Corporate America has in large measure shifted from flow-down of design specs to flow-up of design expertise; the results have been astounding in terms of reducing production lead-times; slashing costs, and improving quality.

#### 4. Potential Risks for Contractors

- *Greater liability for performance*; the flip side of the shift in liability for performance problems from the Government designers to the contractor's designers.
- *Greater financial risks due to the preference for firm fixed price contracts*. To the extent that the Government insists on firm fixed price compensation arrangements, there is greater risk to the contractors especially when the service to be performed is not commercial.
- *Increases in proposal risks since the offeror has to be more imaginative in their proposed approaches and not simply proposing to a consistent solution set*.
- *Uncertainties about procedures and criteria for reducing pay*. Contractors have to worry about deductions for poor performance, worries exacerbated when the performance standards are vague, ambiguous, commercially impracticable, or not prioritized. This risk grows geometrically with the number of metrics. It may become difficult to determine where to focus managerial attention and contractor resources when chasing too many will-o'-the-wisps.
- *Uncertainties about procedures and criteria for award fee or other incentives*. Contractors cannot bank on reward when award criteria are vague, ambiguous, commercially impracticable, or not prioritized. As with deductions, this risk grows geometrically with the number of metrics. Focusing managerial attention and contractor resources again may be difficult to achieve.

The magnitude of these risks for the contractor is often related at least in part to the contractor's past experience in providing the service. When a contractor can offer a work design that has proven to be a winner in commercial markets, the risk is less and prospects for successful performance and maximizing the award criteria are greatest. When the service is noncommercial, there is a correspondingly higher risk of both technical and financial failure in meeting performance parameters at a price that yields a reasonable profit, or otherwise contributes to the financial goals of the business entity.

From the standpoint of the Government, the greater the uncertainty for the contractors, the less likely that the best contractors will even bid or submit a reasonable price (since the price has to be high enough to offset perceived monetary risks).

In short, performance-based contracting is no panacea. The contracting officer must take the time to weigh the benefits and mitigate the risks to both parties. However, when the acquisitions are planned, conducted and monitored correctly, the benefits to the Government outweigh the risks.

## **Attachment 11 – Recommended Revisions to FAR Part 7 (Acquisition Planning and Service Contracting)**

FAR Part 7 (Acquisition Planning) provides an outline for an Acquisition Plan. Throughout that document are references to products or systems. Acquisition plans are roadmaps for the acquisition, and provide a valuable tool to ensure that all elements of the requirements are addressed in the acquisition. Enhancing this outline or creating a new one for services would improve the buying process. The Task Force’s recommendations are highlighted in red in the appropriate text.

### **Recommendation:**

#### **FAR Part 7**

“Order” means an order placed under a—

- (1) Federal Supply Schedule contract; or
- (2) Task-order contract or delivery-order contract awarded by another agency, (~~i.e.,~~ e.g.,

Governmentwide acquisition contract or multi-agency contract).

#### **7.102 Policy.**

(a) Agencies shall perform acquisition planning and conduct market research (see Part 10) for all acquisitions in order to promote and provide for—

(1) Acquisition of commercial items or, to the extent that commercial items/services suitable to meet the agency’s needs are not available, nondevelopmental items, to the maximum extent practicable (10 U.S.C. 2377 and 41 U.S.C. 251, *et seq.*); and

(2) Full and open competition (see Part 6) or, when full and open competition is not required in accordance with Part 6, to obtain competition to the maximum extent practicable, with due regard to the nature of the supplies or services to be acquired (10 U.S.C. 2301(a)(5) and 41 U.S.C. 253a(a)(1)).

(3) Acquisition of services whether commercial or unique to satisfy and agency mission, requirement, or need.

(b) This planning shall integrate the efforts of all personnel responsible for significant aspects of the acquisition. The purpose of this planning is to ensure that the Government meets its needs in the most effective, economical, and timely manner. Agencies that have a detailed acquisition planning system in place that generally meets the requirements of 7.104 and 7.105 need not revise their system to specifically meet all of these requirements.

(a) Acquisition background and objectives—

(1) *Statement of need.* Introduce the plan by a brief statement of need. Summarize the technical and contractual history of the acquisition. Discuss feasible acquisition alternatives, the impact of prior acquisitions on those alternatives, and any related in-house effort. If services are being acquired, describe the nature of the service, the underlying requirement generating the need and the availability of the service in the commercial market place.

(2) *Applicable conditions.* State all significant conditions affecting the acquisition, such as—

(i) Requirements for compatibility with existing or future systems or programs if intended acquisition is hardware related; and

(ii) Any known cost, schedule, and capability or performance constraints, whether hardware or services.

(iii) Whether the services to be acquired are of a non-recurring or recurring nature. If the services are of a recurring nature, describe the previous history and previous acquisition history.

(3) *Cost*. Set forth the established cost goals for the acquisition and the rationale supporting them, and discuss related cost concepts to be employed, including, as appropriate, the following items:

(i) *Life-cycle cost*. Discuss how life-cycle cost will be considered. If it is not used, explain why. If appropriate, discuss the cost model used to develop life-cycle-cost estimates.

(ii) *Design-to-cost*. Describe the design-to-cost objective(s) and underlying assumptions, including the rationale for quantity, learning-curve, and economic adjustment factors. Describe how objectives are to be applied, tracked, and enforced. Indicate specific related solicitation and contractual requirements to be imposed.

(iii) *Application of should-cost*. Describe the application of should-cost analysis to the acquisition (see 15.407-4).

(iv) Service Costs. Describe the manner and method for estimating the anticipated acquisition cost related to the service being acquired. If costs are based on hourly rates, describe the underlying rate methodology, i.e. Department of Labor, Commercial items.

(4) *Capability or performance*. Specify the required capabilities or performance characteristics of the supplies and/or services or the performance standards of the services being acquired and state how they are related to the need.

(5) *Delivery or performance-period requirements*. Describe the basis for establishing delivery or performance-period requirements (see Subpart 11.4). Explain and provide reasons for any urgency if it results in concurrency of development and production or constitutes justification for not providing for full and open competition. Explain the delivery or performance period for the contemplated services.

(6) *Trade-offs*. Discuss the expected consequences of trade-offs among the various cost, capability or performance, and schedule goals.

(7) *Risks*. Discuss technical, cost, and schedule risks and describe what efforts are planned or underway to reduce risk and the consequences of failure to achieve goals. If concurrency of development and production is planned, discuss its effects on cost and schedule risks. Discuss the technical, cost, and schedule risk associated with the contemplated services to be acquired. If the services are research and development, describe any technical risk in performing the contemplated effort.

(8) *Acquisition streamlining*. If specifically designated by the requiring agency as a program or service acquisition subject to acquisition streamlining, discuss plans and procedures to—

(i) Encourage industry participation by using draft solicitations, presolicitation conferences, and other means of stimulating industry involvement during design and development, or in acquiring services in recommending the most appropriate application and tailoring of contract requirements;

(ii) Select and tailor only the necessary and cost-effective requirements; and

(iii) State the timeframe for identifying which of those specifications and standards, originally provided for guidance only, shall become mandatory.

(b) Plan of action—

(1) *Sources*. Indicate the prospective sources of supplies or services that can meet the need. Consider required sources of supplies or services (see Part 8) and sources identifiable through databases including

the Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies available at [www.contractdirectory.gov](http://www.contractdirectory.gov). Include consideration of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns (see Part 19), and the impact of any bundling that might affect their participation in the acquisition (see 7.107) (15 U.S.C. 644(e)). When the proposed acquisition strategy involves bundling, identify the incumbent contractors and contracts affected by the bundling. Address the extent and results of the market research and indicate their impact on the various elements of the plan (see Part 10).

(2) Competition.

(i) Describe how competition will be sought, promoted, and sustained throughout the course of the acquisition. If full and open competition is not contemplated, cite the authority in 6.302, discuss the basis for the application of that authority, identify the source(s), and discuss why full and open competition cannot be obtained.

(ii) Identify the major components or subsystems. Discuss component breakout plans relative to these major components or subsystems. Describe how competition will be sought, promoted, and sustained for these components or subsystems. (Not required for service acquisition)

(iii) Describe how competition will be sought, promoted, and sustained for spares and repair parts, or for services. Identify the key logistic and service milestones, such as technical data delivery schedules and acquisition method coding conferences, or preferred source/supplier efforts, that affect competition. If the services are of a recurring nature, describe how competition will be sustained and promoted over the life of the services.

(iv) When effective subcontract competition is both feasible and desirable, describe how such subcontract competition will be sought, promoted, and sustained throughout the course of the acquisition. Identify any known barriers to increasing subcontract competition and address how to overcome them.

(3) *Source-selection procedures*. Discuss the source-selection procedures for the acquisition, including the timing for submission and evaluation of proposals, and the relationship of evaluation factors to the attainment of the acquisition objectives or requirement objectives (see Subpart 15.3).

(4) Acquisition considerations.

For each contract contemplated, discuss contract type selection (see Part 16); use of multiyear contracting, options, or other special contracting methods (see Part 17); any special clauses, special solicitation provisions, or FAR deviations required (see Subpart 1.4); whether sealed bidding or negotiation will be used and why; whether equipment will be acquired by lease or purchase (see Subpart 7.4) and why; and any other contracting considerations. Provide rationale if a performance-based contract will not be used or if a performance-based contract for services is contemplated on other than a firm fixed price basis (see 37.102(a) and 16.505(a)(3)). Discuss the need for commercial item/service pricing methods. Discuss any contemplated organizational conflict of interest concerns. (9.5) Discuss unique terms and conditions contemplated and explain why required. The use of non-standard terms and conditions should be minimized.

(ii) For each order contemplated, discuss—

(A) For information technology acquisitions, how the capital planning and investment control requirements of 40 U.S.C. 1422 and OMB Circular A-130 will be met (see 7.103(t) and Part 39); and

(B) Why this action benefits the Government, such as when—

(1) The agency can accomplish its mission more efficiently and effectively (*e.g.*, take advantage of the servicing agency’s specialized expertise; or gain access to contractors with needed expertise); or

(2) Ordering through an indefinite delivery contract facilitates access to small business concerns, including small disadvantaged business concerns, 8(a) contractors, women-owned small business concerns, HUBZone small business concerns, veteran-owned small business concerns, or service-disabled veteran-owned small business concerns.

(5) *Budgeting and funding.* Include budget estimates, explain how they were derived, and discuss the schedule for obtaining adequate funds at the time they are required (see Subpart 32.7).

(6) *Product or service descriptions.* Explain the choice of product or service description types (including performance-based contracting descriptions) to be used in the acquisition. Explain the type of service and how performance based approaches will be used.

(7) *Priorities, allocations, and allotments.* When urgency of the requirement dictates a particularly short delivery or performance schedule, certain priorities may apply. If so, specify the method for obtaining and using priorities, allocations, and allotments, and the reasons for them (see Subpart 11.6).

(8) *Contractor versus Government performance.* Address the consideration given to OMB Circular No. A-76 (see Subpart 7.3).

(9) *Inherently governmental functions.* Address the consideration given to OFPP Policy Letter 92-1 (see Subpart 7.5).

(10) *Management information requirements.* Discuss, as appropriate, what management system will be used by the Government to monitor the contractor’s effort.

(11) *Make or buy.* Discuss any consideration given to make-or-buy programs (see 15.407-2).

(12) *Test and evaluation.* To the extent applicable, describe the test program of the contractor and the Government. Describe the test program for each major phase of a major system acquisition. If concurrency is planned, discuss the extent of testing to be accomplished before production release. (May not be required for services)

(13) *Logistics considerations.* (Not required for services) Describe—

(i) The assumptions determining contractor or agency support, both initially and over the life of the acquisition, including consideration of contractor or agency maintenance and servicing (see Subpart 7.3) and distribution of commercial items;

(ii) The reliability, maintainability, and quality assurance requirements, including any planned use of warranties (see Part 46); (iii) The requirements for contractor data (including repurchase data) and data rights, their estimated cost, and the use to be made of the data (see Part 27); and

(iv) Standardization concepts, including the necessity to designate, in accordance with agency procedures, technical equipment as “standard” so that future purchases of the equipment can be made from the same manufacturing source.

(14) Services. Describe any unique conditions associated with the services being acquired. Describe conditions under which the service will be delivered, and administered.

~~(14)~~ (15) Government-furnished property. Indicate any property to be furnished to contractors, including material and facilities, and discuss any associated considerations, such as its availability or the schedule for its acquisition (see Part 45).

~~(15)~~ **(16)** *Government-furnished information.* Discuss any Government information, such as manuals, drawings, and test data, to be provided to prospective offerors and contractors.

~~(16)~~ **(17)** *Environmental and energy conservation objectives.* Discuss all applicable environmental and energy conservation objectives associated with the acquisition (see Part 23), the applicability of an environmental assessment or environmental impact statement (see 40 CFR 1502), the proposed resolution of environmental issues, and any environmentally-related requirements to be included in solicitations and contracts.

~~(17)~~ **(18)** *Security considerations.* For acquisitions dealing with classified matters, discuss how adequate security will be established, maintained, and monitored (see Subpart 4.4).

~~(18)~~ **(19)** *Contract administration.* Describe how the contract will be administered and identify the personnel or activity performing the administration. In contracts for services, include how inspection and acceptance corresponding to the work statement's performance criteria will be enforced. Identify the specific methodology or technique for ensuring that services are delivered in accordance with the specified outcomes. For large service acquisitions or high dollar value service acquisitions identify the methods and techniques for program oversight and how such oversight will be maintained throughout the performance period.

~~(19)~~ **(20)** *Other considerations.* Discuss, as applicable, standardization concepts, the industrial readiness program, the Defense Production Act, the Occupational Safety and Health Act, foreign sales implications, and any other matters germane to the plan not covered elsewhere.

~~(20)~~ **(21)** *Milestones for the acquisition cycle.* Address the following steps and any others appropriate:

Acquisition plan approval.

Statement of work.

Specifications.

Data requirements.

Completion of acquisition-package preparation.

Purchase request.

Justification and approval for other than full and open competition where applicable and/or any required D&F approval.

Issuance of synopsis.

Issuance of solicitation.

Evaluation of proposals, audits, and field reports.

Beginning and completion of negotiations.

Contract preparation, review, and clearance.

Contract award.

~~(21)~~ **(22)** *Identification of participants in acquisition plan preparation.* List the individuals who participated in preparing the acquisition plan, giving contact information for each.

#### **7.106 Additional requirements for major systems.**

(a) In planning for the solicitation of a major system (see Part 34) development contract, planners shall consider requiring offerors to include, in their offers, proposals to incorporate in the design of a major system—

(1) Items which are currently available within the supply system of the agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source; and

(2) Items which the Government will be able to acquire competitively in the future if they are likely to be needed in substantial quantities during the system's service life.

(b) In planning for the solicitation of a major system (see Part 34) production contract, planners shall consider requiring offerors to include, in their offers, proposals identifying opportunities to assure that the Government will be able to obtain, on a competitive basis, items acquired in connection with the system that are likely to be acquired in substantial quantities during the service life of the system. Proposals submitted in response to such requirements may include the following:

(1) Proposals to provide the Government the right to use technical data to be provided under the contract for competitive future acquisitions, together with the cost to the Government, if any, of acquiring such technical data and the right to use such data.

(2) Proposals for the qualification or development of multiple sources of supply for competitive future acquisitions.

(c) In determining whether to apply paragraphs (a) and (b) of this section, planners shall consider the purposes for which the system is being acquired and the technology necessary to meet the system's required capabilities. If such proposals are required, the contracting officer shall consider them in evaluating competing offers. In noncompetitive awards, the factors in paragraphs (a) and (b) of this section, may be considered by the contracting officer as objectives in negotiating the contract.

## **Attachment 12 – Recommended minor revisions to FAR Part 15 (Contracting by Negotiation)**

Consistent with its overall review, the Task Force recommends several sections in FAR Part 15 (Contracting by Negotiation) be revised to include the word “services,” or other changes made, in order to ensure the proper focus on service contracting when using FAR Part 15. The Task Force’s recommendations are highlighted in red in the appropriate text.

### **Recommendation:**

#### **15.203 Requests for proposals.**

(e) Letter RFPs may be used in sole source acquisitions and other appropriate circumstances. Use of a letter RFP does not relieve the contracting officer from complying with other FAR requirements. Letter RFPs should be as complete as possible and, at a minimum, should contain the following:

- (1) RFP number and date;
- (2) Name, address (including electronic address and facsimile address, if appropriate), and telephone number of the contracting officer;
- (3) Type of contract contemplated;
- (4) Quantity, description, and required delivery dates for the item or services;
- (5) Applicable certifications and representations;
- (6) Anticipated contract terms and conditions;
- (7) Instructions to offerors and evaluation criteria for other than sole source actions;
- (8) Proposal due date and time; and
- (9) Other relevant information; *e.g.*, incentives, variations in delivery schedule, cost proposal support, and data requirements.

#### **15.209 Solicitation provisions and contract clauses.**

(b)(1) The contracting officer shall insert the clause at 52.215-2, Audit and Records-Negotiation (10 U.S.C. 2313, 41 U.S.C. 254d, and OMB Circular No. A-133), in solicitations and contracts except those for—

- (i) Acquisitions not exceeding the simplified acquisition threshold;
- (ii) The acquisition of utility services at rates not exceeding those established to apply uniformly to the general public, plus any applicable reasonable connection charge; or
- (iii) The acquisition of commercial items and services exempted under 15.403-1.

#### **15.302 Source selection objective.**

The objective of source selection is to select the proposal that represents the best value to the Government.

#### **15.402 Pricing policy.**

Contracting officers must—

(a) Purchase supplies and services from responsible sources at fair and reasonable prices. (See FAR 12.209 for Price Reasonableness for Commercial items and services). In establishing the reasonableness of the offered prices, the contracting officer must not obtain more information than is necessary. To the extent that cost or pricing data are not required by 15.403-4, the contracting officer must generally use the following order of preference in determining the type of information required:

- (1) No additional information from the offeror, if the price is based on adequate price competition, except as provided by 15.403-3(b).
- (2) Information other than cost or pricing data:
  - (i) Information related to prices (*e.g.*, established catalog prices, electronically published prices on company web pages or market prices or from a review of active or previous contract prices for similar

items or services), relying first on information available within the Government; second, on information obtained from sources other than the offeror; and, if necessary, on information obtained from the offeror. When obtaining information from the offeror is necessary, unless an exception under 15.403-1(b)(1) or (2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.

(ii) Cost information, that does not meet the definition of cost or pricing data at 2.101.

(3) *Cost or pricing data*. Except as provided by 15.403-1 The contracting officer should use every means available to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data. Contracting officers must not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources.

**15.403-1 Prohibition on obtaining cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b).**

(b) *Exceptions to cost or pricing data requirements*. The contracting officer shall not require submission of cost or pricing data to support any action (contracts, subcontracts, or modifications) (but may require information other than cost or pricing data to support a determination of price reasonableness or cost realism)—

(1) When the contracting officer determines that prices agreed upon are based on adequate price competition (see standards in paragraph (c)(1) of this subsection);

(2) When the contracting officer determines that prices agreed upon are based on prices set by law or regulation (see standards in paragraph (c)(2) of this subsection);

(3) When a commercial item or service is being acquired (see standards in paragraph (c)(3) of this subsection);

(4) When a waiver has been granted (see standards in paragraph (c)(4) of this subsection); or

(5) When modifying a contract or subcontract for commercial items or services (see standards in paragraph (c)(3) of this subsection).

(B) The determination that the proposed price is based on adequate price competition, is reasonable, and is approved at a level above the contracting officer; or

(iii) Price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items or services, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition.

**15.404-1 Proposal analysis techniques.**

(2) The Government may use various cost analysis techniques and procedures to ensure a fair and reasonable price, given the circumstances of the acquisition. Such techniques and procedures include the following:

(iii) Comparison of costs proposed by the offeror for individual cost elements with—

(A) Actual costs previously incurred by the same offeror;

(B) Previous cost estimates from the offeror or from other offerors for the same or similar items or services;

**MULTI-AGENCY CONTRACTING VEHICLES  
WORKING GROUP**

## ***V. MULTI-AGENCY CONTRACTING VEHICLES WORKING GROUP***

### **A. Executive Summary**

Contracting through the Federal Supply Schedules (FSS) managed by the General Services Administration (GSA) remains an extremely desirable and productive approach for fulfilling Federal agency requirements. The Schedules provide streamlined acquisition methods that provide Federal buyers broad flexibility to engage in best value service contracting. Recent changes to FAR Subpart 8.4 (Federal Supply Schedules) provide Federal buyers and sellers with clear guidance on the ground rules governing placing Schedule orders, and should serve to eliminate much of the confusion that previously surrounded the ordering process.

Starting from this perspective, the working group chose to focus on the GSA Schedules. A number of recommendations are made that are intended to further enhance the productivity of GSA Schedule contracts for services acquisitions. These recommendations improve the utility of Schedule contracts by providing increased transparency in the Government's proposed requirements (thereby promoting competition), process improvements and additional acquisition tools to make it easier for customers to use the Schedules, and greater training and awareness regarding the appropriate uses of Schedule contracts.

In addition, these recommendations seek to change the current perception within the acquisition community, particularly for the Department of Defense (DOD), that Schedule contracts are not preferred contract vehicles. GSA and DOD have a great deal invested in the success of the Schedule program. Historically, DOD has been the largest user of Schedule contracts. The Task Force urges these two agencies to continue a constructive dialogue for ensuring that the Schedules continue to support DOD's procurement needs, and that DOD buyers have the ability or discretion to access these contracts under appropriate circumstances.

### **B. Initial Findings**

In undertaking its review, the working group began with the following questions and considerations:

- ✓ What is good about the current state of Schedule contracting?
- ✓ What is bad or problematic about the current state of Schedule contracting?
- ✓ What is the source of problems in the current Schedule environment?
- ✓ How can transparency be improved in GSA Task Order Placement?
- ✓ What structural changes, if any, should be made to the Schedules Program?
- ✓ What improvements need to be made in the Acquisition Tools?
- ✓ How should the problem of "revolving" reforms be address?
- ✓ Does an agency's use of an FSS contract or an external GWAC present unique problems or issues that would not arise under a "home grown" multiple award indefinite delivery indefinite quantity (IDIQ) contract?
- ✓ What new developments might be affecting agency (particularly DOD) use of GSA Schedules and Government-wide Acquisition Contracts (GWACs)?

### **C. Recommendations:**

The Task Force believes the recommendations outlined below will improve Federal service contracting, and assist all Federal agencies to maximize the clear and unique benefits afforded by Schedule contracts.

1. Enhancements to E-Buy. Enhancements to e-Buy and the use of e-Buy would enable GSA to better serve Federal buyers and would promote greater transparency, and therefore competition, in the placement of GSA orders.

- e-Buy is currently capable of transmitting Schedule opportunities across multiple SINs and schedules. By transmitting opportunities across schedules or schedule SINs, more vendors will become aware of opportunities, which in turn should enhance competition. It also would allow vendors to anticipate contract scope concerns, and propose solutions involving alternative or multiple schedule vehicles. There appears, however, to be a lack of awareness within the agency buying community of these capabilities. To address this problem, the Task Force recommends that the acquisition community request from GSA comprehensive e-Buy training to familiarize itself with these capabilities. This would enable agency buyers to utilize e-Buy in a manner that provides greater transparency and minimize concerns regarding out of scope contracting.
- At the same time, GSA should communicate to the GSA vendor community that opportunities are not necessarily confined to one Schedule vehicle and that vendors are encouraged to offer solutions that may offer alternative or additional Schedule vendors from the vehicles (if any) identified in the Government's solicitation
- Agency buyers frequently express frustration with having to enter procurement data into multiple databases when utilizing Schedule vehicles. First, the data must be entered into e-Buy. Then it must be entered in the unique procurement data base maintained by the various service branches or buying activities. An elegant solution to this process would be to incorporate into e-Buy a capability to "punch out" procurement data entered into e-Buy directly into the customer database.
- Buying agencies are collecting "spend analysis" and other data on the effectiveness of other agency contracting vehicles. This data should be required to be available for future evaluation to enable agencies' ability to assess the efficacy of other agency contract vehicles. Because the obligation to collect this data may become an obstacle to use of GSA Schedule vehicles, it would be desirable to incorporate into e-Buy the capability to generate the kinds of data agencies seek to collect and evaluate. GSA cannot, however, determine for the agencies the types of data to collect. The Task Force, therefore, recommends that the agencies be encouraged to reach out to GSA for assistance in identifying the types of data to be collected to enable GSA to support customer requirements to collect and analyze post performance contract data.
- An enhanced e-Buy capable of fulfilling the objectives described above would greatly assist DOD buyers in complying with the requirements of the October 29, 2004 DOD Policy Memorandum regarding the "Use of Non-DOD contracts."

2. Categorization of Services. The issue of service categories as presented on the various schedule vehicles was repeatedly cited as a source of confusion in the discussions. In particular, a concern was expressed that the present organization of services on the various services Schedules contributed to confusion regarding contract scope issues. As a preliminary step to addressing this concern, the Task Force recommends that GSA examine the service categorization that are needed to support various approaches (particularly those being used by DOD) for procuring services in the future.

3. Distinguishing "Assisted"(third Party) Procurement from "Unassisted" (Requiring agency) Procurement. There continues to be some confusion in the difference between "assisted" and "non-assisted" or direct procurement. Assisted procurement is where the agency requiring organization

forwards its requirement outside the agency for procurement by a third party using a third party agreement. A non-assisted procurement is where the agency has the authority to procure under the term of the third party agreement and uses its contracting officers to contract for the requirement – even from another agency. It would seem apparent that the agency would have greater control in a non-assisted procurement since the order would be placed under the discipline established within the agency. The Task Force expects that an agency contracting officer, applying agency discipline would present less a risk for funding and scope compliance than an assisted procurement. Accordingly, agency regulations should reflect this risk difference. In line with that, the Task Force fully supports the principals of the “Get it Right” campaign.

4. Clarifying the Message. Notwithstanding the statement in the October 2004 DOD Policy Memorandum allowing the use of third party vehicles, the reaction of the services in local implementation guidance seem to discourage the use of the proven acquisition tools like GSA Schedules. As noted above, there have been problems with assisted buys, but relatively little adverse information on unassisted buys. Given the clear benefits offered by the Schedules program, the message communicated to the acquisition community should recognize that the use of the Schedules is still perfectly appropriate when the requirements of the FAR and agency supplements are executed.

5. Training vs. Marketing. Notwithstanding the recent revisions to FAR Part 8.4 (Federal Supply Schedules) and GSA training efforts, many buying activities lack a working knowledge regarding the process for placing direct orders against Schedule contracts. In addition, many of these buying activities appear to feel that they have been compelled or herded by GSA in the direction of seeking assisted buying services. This, in turn, has lead to possible resentment by the buying activities that GSA is primarily interested in marketing assisted buying services, as opposed to providing training on the use of the Schedules. To address this concern, the Task Force has two recommendations:

- Agencies should be encouraged to request that GSA provide hands-on training on placing orders from Schedule vehicles.
- In recognition of the fact that there are instances where agency buyers will need active assistance to consummate procurement, agencies should be encouraged to request that GSA provide a reduced form of assisted buying services (think of it as “Assisted Light”) wherein GSA representatives come into the agency and perform the assisted services on the customer’s site.

6. Acquisition Tools. The development of enhanced acquisition tools would be highly beneficial to promote the use of Schedule contracts. Examples include templates for developing and documenting Acquisition Plans, and fulfilling the requirements of the October 29, 2004 DOD Policy Memorandum on the “Use of Non-DOD Contracts.” The agencies and GSA should collaborate on these tools to provide the maximum benefit to the acquisition community.

## **PART 37 WORKING GROUP**

## ***VI. PART 37 WORKING GROUP***

### **A. Executive Summary**

Recognizing that increasing numbers of small businesses are participating in the Federal services market, a small business working group initially was created to review the legislative and regulatory guidance related to small business service contracting.

However, once established the working group determined that it was beyond its scope to resolve “hot button” issues such as contract bundling, set-asides, subcontracting goals or size standards; those issues would be better addressed by a future taskforce. Indeed, the Contract Services Association and the Professional Services Council also are involved in a separate special task force focused specifically on the issues centered around contract bundling. Therefore, the working group’s efforts were refocused on doing a thorough section-by-section analysis of FAR Part 37 (Service Contracting) to determine which sections needed to be modified, or changed, particularly with an eye to providing contracting officers sufficient guidance in using small businesses as service providers.

There was an initial discussion amongst the working group as to whether FAR Part 37 was necessary – or should it be eliminated, and references to service contracting be “beefed up” in other relevant FAR sections? The “Acquisition Management and Planning” working group also discussed the need for FAR Part 37, but deferred the full review to the Part 37 working group. If FAR Part 37 is to be retained, the Task Force felt that references to small business were lacking, or even non-existent in FAR Part 37. If a contracting officer solely relied on FAR Part 37 to conduct service contracting, that individual would never know that there are specific requirements that must be fulfilled relating to small business. The Task Force, therefore, recommends initial changes to FAR Part 37 to address those small business contracting concerns – as well as a number of other substantive changes to FAR Part 37. The Task Force, however, believes that further analysis is necessary to determine whether the policies in FAR Part 37 would be better realigned elsewhere in the FAR.

### **B. Initial Findings and Recommendations**

The following summarizes the Task Force’s recommendations for changes to FAR Part 37 to incorporate references to small business. The Task Force also made several general recommendations on the relevancy of certain sections of FAR Part 37 in today’s contracting environment, and in light of the other Task Forces’ analysis.

- Under scope, the Task Force suggests that the language referencing other service type contracting, as well as the Service Contract Act, might be more appropriately handled (or is already addressed) in other sections of the FAR. The Task Force also recommended adding a reference to requirements for set-aside contracts for small businesses.
- Under definitions, consistent with the findings of the “Categories of Services” working group, the Task Force determined that it was not necessary to identify individual categories of services – and instead recommended a minor clarification to the definition of a service contract. The Task Force recommends deleting the special definition for childcare services; whether it should be incorporated elsewhere in the FAR is left to the FAR Council to decide.
- As to Policy guidance, the Task Force recommended that a new section be added requiring the agency to recognize and utilize, where possible, socioeconomic provisions for small businesses found in FAR Part 19. The Task Force also recommends including language related to competition requirements

(moved from FAR Part 37.105), and also moving a provision related to inherently governmental functions to a new section, entitled “special acquisitions.” Other language that is more appropriately addressed (or is already covered) in other sections of the FAR should be eliminated.

- The Task Force recommended that a new paragraph be added to FAR 37.103 (Contracting Officer Responsibilities) to ensure that due consideration is given to whether the acquisition should be reserved for small businesses.
- Language authorizing small business set-asides is recommended for inclusion in FAR 37.104 (Personal services contracts).
- Relative to the requirements in FAR Part 37.105 (Competition and Service Contracting), the Task Force recommends deleting this separate subpart and incorporating it into the policy statement at subpart 37.102.
- The Task Force recommends eliminating the separate reference (at FAR Part 37.108) to the Small Business Administration’s Certificate of Competency and moving it to FAR Part 37.102 (Policy). The separate reference to the Service Contract Act (at FAR Part 37.107) would be moved to a new section (FAR Part 37.109) that also covers uncompensated overtime.
- Several other subparts in FAR Part 37.1 are recommended for deletion.

A line-in/ line-out of the specific recommendations to FAR Part 37.1 is found in *Attachments 13*. *Attachment 14* includes suggestions are how the various subparts in Part 37 may be realigned with other parts of the FAR should that eventually be considered.

## **Attachment 13 Line-in/ Line-out Recommendations of FAR Part 37 (Service Contracting)**

### **37.000 Scope of part.**

This part prescribes policy and procedures that are specific to the acquisition and management of services by contract. This part applies to all contracts for services regardless of the type of contract or kind of service being acquired. This part requires the use of performance-based contracting to the maximum extent practicable and prescribes policies and procedures for use of performance-based contracting methods (see Part 11) (see Subpart 37.6). **This part also requires that contracting officers set-aside for small businesses all procurements for services performed in the United States exceeding \$100,000 if there is a reasonable expectation of receiving offers at fair market value prices from at least two responsible small businesses concerns ( see Subpart 19.502-2(b)).** Additional guidance for research and development services is in Part 35; architect-engineering services is in Part 36; information technology is in Part 39; and transportation services is in Part 47. Parts 35, 36, 39, and 47 take precedence over this part in the event of inconsistencies. This part includes, but is not limited to, contracts for services to which the Service Contract Act of 1965, as amended, applies (see Subpart 22.10).  
[Strikeout should be moved to another section – to be determined.]

### **37.101 Definitions.**

As used in this part-

~~"Child care services" means child protective services (including the investigation of child abuse and neglect reports), social services, health and mental health care, child (day) care, education (whether or not directly involved in teaching) foster care, residential care, recreational or rehabilitative programs, and detention, correctional, or treatment services.~~

~~"Nonpersonal services contract" means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.~~

~~"Service contract" means a contract that requires that the directly engages the time and effort of a contractor whose primary purpose is to perform primarily perform an identifiable task which results in a deliverable other than a supply or product rather than to furnish an end item of supply. A service contract may be either a nonpersonal or personal contract. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis. Some of the areas in which service contracts are found include the following:~~

- ~~(1) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization or modification of supplies, systems or equipment.~~
- ~~(2) Routine recurring maintenance of real property.~~
- ~~(3) Housekeeping and base services.~~
- ~~(4) Advisory and assistance services.~~
- ~~(5) Operation of Government owned equipment facilities, and systems.~~
- ~~(6) Communication services.~~
- ~~(7) Architect Engineering (see Subpart 36.6).~~
- ~~(8) Transportation and related services (see part 47).~~
- ~~(9) Research and development (see Part 35).~~

### 37.102 Policy.

~~(a) Performance based contracting (see Subpart 37.6) is the preferred method for acquiring services (Public Law 106-398, section 821). [The strikeout should be moved to Part 11]~~

(a) When acquiring services, including those acquired under supply contracts, agencies must-

(1) Use performance-based contracting methods to the maximum extent practicable, as set forth in Part 11.

~~(i) — Architect engineer services acquired in accordance with 40 U.S.C. 541-544 (see Part 36);~~

~~(ii) — Construction (see Part 36);~~

~~(iii) — Utility services (see Part 41); or~~

~~(iv) — Services that are incidental to supply purchases, and~~

(2) Use the following order of precedence (Public Law 106-398, section 821(a));

(i) A firm-fixed price performance-based contract or task order.

(ii) A performance-based contract or task order that is not firm-fixed price.

(iii) A contract or task order that is not performance-based.

~~(b) Agencies shall generally rely on the private sector for commercial services (see OMB Circular A-76, Performance of Commercial Activities, and Subpart 7.3)~~

~~(c) Agencies shall not award a contract for the performance of an inherently governmental function.~~

*[Strikeouts moved to old Subpart 37.114 (new 37.108)]*

~~(d)~~ (b) Non-personal service contracts are proper under general contracting authority.

~~(e)~~ (c) Agency program officials are responsible for accurately describing the need to be filled, or problem to be resolved, through service contracting in a manner that ensures full understanding and responsive performance by contractors and, in so doing, should obtain assistance from contracting officials, as needed.

~~(f)~~ (d) Agencies shall establish effective management practices in accordance with Office of Federal Procurement Policy (OFPP) Policy Letter 93-1, Management Oversight of Service Contracting, to prevent fraud, waste, and abuse in service contracting.

~~(g)~~ (e) Services are to be obtained in the most cost-effective manner, without barriers to full and open competition, and free of any potential conflicts of interest.

~~(h)~~ (f) Agencies shall ensure that sufficiently trained and experienced officials are available within the agency to manage and oversee the contract administration function.

(g) Agencies shall establish procedures to ensure that service contracts are awarded to small businesses to the maximum extent possible and that on contracts awarded to other than small businesses there are subcontracting plans in place to ensure that the maximum subcontracting opportunities are available for small businesses.

(h) In those service contracts for which the Government requires the highest competence obtainable, as evidenced in a solicitation by a request for a technical/management proposal and a resultant technical evaluation and source selection, the small business Certificate of Competency procedures may not apply (see Subpart 19.6).

(i) Unless otherwise provided by statute, contracts for services shall be awarded through sealed bidding whenever the conditions in 6.401(a) are met, (except see 6.401(b)).

(j) The provisions of statute and Part 6 is this regulation requiring competition apply fully to service contracts. The method of contracting used to provide for competition may vary with the type of service being acquired and may not necessarily be limited to price competition.

### **37.103 Contracting officer responsibility.**

- (a) The contracting officer is responsible for ensuring that a proposed contract for services is proper. For this purpose the contracting officer shall-
- (1) Determine whether the proposed service is for a personal or nonpersonal services contract using the definitions at 2.101 and 37.101 and the guidelines in 37.104;
  - ~~(2)~~ **(2) Determine whether there are small businesses available to perform the service.**
  - ~~(3)~~ (3) In doubtful cases, obtain the review of legal counsel; and
  - ~~(4)~~ (4) Document the file (except as provided in paragraph (b) of this section) with-
    - (i) The opinion of legal counsel, if any,
    - (ii) A memorandum of the facts and rationale supporting the conclusion that the contract does not violate the provisions in 37.104(b), **and the conclusion that there are no small businesses available to perform the services.**
    - (iii) Any further documentation that the contracting agency may require.
- (b) Nonpersonal services contracts are exempt from the requirements of paragraph (a)(3) of this section.
- (c) Ensure that performance-based contracting methods are used to the maximum extent practicable when acquiring services.
- (d) Ensure that reasonable efforts are undertaken to ascertain whether it is likely that the agency will receive offers from at least two small businesses capable of performing the work.

~~Ensure that contracts for child care services include requirements for criminal history background checks on employees who will perform child care services under the contract in accordance with 42 U.S.C. 13041, as amended and agency procedure.~~

*[Strikeout should be moved to another section (to be determined) and combined with definition of "child care services" in 37.101 – if it is determined that this reference should remain]*

### **37.104 Personal services contracts.**

- (a) A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.
- (b) Agencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C.3109) to do so. **Agencies shall set aside personal service contracts for award to small businesses if there is a reasonable expectation of receiving offers at fair market prices from at least two responsible small business concerns.**
- (c)(1) An employer-employee relationship under a service contract occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee.
- (2) Each contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract. The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial

number of contractor employees would have to be taken strongly into account (see (d) of this section).

(d) The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature:

- (1) Performance on site.
- (2) Principal tools and equipment furnished by the Government.
- (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
- (4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
- (5) The need for the type of service provided can reasonably be expected to last beyond 1 year.
- (6) The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to:
  - (i) Adequately protect the Government's interest;
  - (ii) Retain control of the function involved; or
  - (iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

(e) When specific statutory authority for a personal service contract is cited, obtain the review and opinion of legal counsel.

(f) Personal services contracts for the services of individual experts or consultants are limited by the Classification Act. In addition, the Office of Personnel Management has established requirements which apply in acquiring the personal services of experts or consultants in this manner (*e.g.*, benefits, taxes, conflicts of interest). Therefore, the contracting officer shall effect necessary coordination with the cognizant civilian personnel office.

#### ~~37.105 Competition in service contracting.~~

~~(a) Unless otherwise provide by statute, contracts for services shall be awarded through sealed bidding whenever the conditions in 6.401(a) are met, (except see 6.401(b)).~~

~~(b) The provisions of statutes and Part 6 is this regulation requiring competition apply fully to service contract. The method of contracting used to provide for competition may vary with the type of service being acquired and may not necessarily be limited to price competition.~~

~~[Strikeouts moved to 37.102(i) and (j)]~~

#### **37.1056 Funding and term of service contracts.**

(a) When contracts for services are funded by annual appropriations, the term of contracts so funded shall not extend beyond the end of the fiscal year of the appropriation except when authorized by law (see paragraph (b) of this section for certain service contracts, 32.703-2 for contracts conditioned upon availability of funds, and 32.703-3 for contracts crossing fiscal years).

(b) The head of an executive agency, except NASA, may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed one year (10 U.S.C. 2410a and 41 U.S.C. 2531). Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority.

(c) Agencies with statutory multiyear authority shall consider the use of this authority to encourage and promote economical business operations when acquiring services.

#### 37.107 Service Contract Act of 1965.

~~(a) The Service Contract Act of 1965 (41 U.S.C. 351-357) (the Act) provides for minimum wages and fringe benefits as well as other conditions of work under certain types of service contracts. Whether~~

~~or not the Act applies to a specific service contract will be determined by the definitions and exceptions given in the Act, or implementing regulations.~~  
*[Strikeout moved to old 37.115 (new 37.109)]*

#### ~~37.108 Small business Certificate of Competency~~

~~In those service contracts for which the Government requires the highest competence obtainable, as evidenced in a solicitation by a request for a technical/management proposal and a resultant technical evaluation and source selection, the small business Certificate of Competency procedures may not apply (see Subpart 19.6).~~  
*[Strikeout moved to 37.102(h)]*

#### ~~37.109 Service of quasi-military armed force:~~

~~Contracts with "Pinkerton Detective Agencies or similar organizations" are prohibited by 5 U.S.C. 3108. This prohibition applies only to contracts with organizations that offer quasi-military armed forces for hire, or with their employees, regardless of the contract's character. An organization providing guard or protective services does not thereby become a "quasi-military armed force," even though the guards are armed or the organization provides general investigative or detective services. (See 57 Comp. Gen. 524.)~~  
*[Strikeout should be moved to other section (to be determined)]*

### **37.106 ~~110~~ Solicitation provisions and contract clauses.**

- (a) The contracting officer shall insert the provision at 52.237-1, Site Visit, in solicitations for services to be performed on Government installations, unless the solicitation is for construction.
- (b) The contracting officer shall insert the clause at 52.237-2, Protection of Government Buildings, Equipment, and Vegetation, in solicitations and contracts for services to be performed on Government installations, unless a construction contract is contemplated.
- (c) The contracting officer may insert the clause at 52.237-3, Continuity of Services, in solicitations and contracts for services, when-
  - (1) The services under the contract are considered vital to the Government and must be continued without interruption and when, upon contract expiration, a successor, either the Government or another contractor, may continue them; and
  - (2) The Government anticipates difficulties during the transition from one contractor to another or to the Government. Examples of instances where use of the clause may be appropriate are services in remote locations or services requiring personnel with special security clearances.
- (d) See 9.508 regarding the use of an appropriate provision and clause concerning the subject of conflict-of-interest, which may at times be significant in solicitations and contracts for services.
- (e) The contracting officer shall also insert in solicitations and contracts for services the provisions and clauses prescribed elsewhere in 48 CFR Chapter 1, as appropriate for each acquisition, depending on the conditions that are applicable.

### **37.107 ~~111~~ Extension of services.**

Award of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of contracting offices. Examples of circumstances causing such delays are bid protests and alleged mistakes in bid. In order to avoid negotiation of short extensions to existing contracts, the contracting officer may include an option clause (see 17.208(f)) in solicitations and contracts which will enable the Government to require continued performance of any services within the limits and at the rates specified in the contract. However, these rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance thereunder shall not exceed 6 months.

### ~~37.112— Government use of private sector temporaries~~

~~Contracting officers may enter into contracts with temporary help service firms for the brief or intermittent use of the skills of private sector temporaries. Services furnished by temporary help firms shall not be regarded or treated as personal services. These services shall not be used in lieu of regular recruitment under civil service laws or to displace a Federal employee. Acquisition of these services shall comply with the authority, criteria, and conditions of 5 CFR part 300, Subpart E, Use of Private Sector Temporaries, and agency procedures.~~

~~[Strikeout should be moved to other section (to be determined)]~~

### ~~37.113— Severance payment to foreign national~~

#### ~~37.113-1— Waiver of cost allowability limitations~~

~~(a) The head of the agency may waive the 31.205-6(g)(6) cost allowability limitations on severance payments to foreign nationals for contracts that~~

~~(1) Provide significant support services for—~~

~~(i) Members of the armed forces stationed or deployed outside the United States, or~~

~~(ii) Employees of an executive agency posted outside the United States; and~~

~~(2) Will be performed in whole or in part outside the United States.~~

~~(b) Waivers can be granted only before contract award.~~

~~(c) Waivers cannot be granted for—~~

~~(1) Military banking contracts, which are covered by 10 U.S.C. 2324(e)(2); or~~

~~(2) Severance payments made by a contractor to a foreign national employed by the contractor under a DOD service contract in the Republic of the Philippines, if the discontinuation of the foreign national is the result of the termination of basing rights of the United States military in the Republic of the Philippines (section 1351(b) of Public Law 102-484, 10 U.S.C. 1592, note).~~

#### ~~37.113-2— Solicitation provision and contract clause~~

~~(a) Use the provision at 52.237-8, Restriction on Severance Payments to Foreign Nationals, in all solicitations that meet the criteria in 37.113-1(a), except for those excluded by 37.113-1(c).~~

~~(b) When the head of an agency has granted a waiver pursuant to 37.113-1, use the clause at 52.237-9, Waiver of Limitation on Severance Payments to Foreign Nationals.~~

~~[Strikeouts should be moved to other section (to be determined)]~~

### **37.108 Special acquisition requirements.**

**(a) Agencies shall generally rely on the private sector for commercial services (see OMB Circular No. A-76, Performance of Commercial Activities and Subpart 7.3).**

(b) Contracts for services which require the contractor to provide advice, opinions, recommendations, ideas, reports, analyses, or other work products have the potential for influencing the authority, accountability, and responsibilities of Government officials. These contracts require special management attention to ensure that they do not result in performance of inherently governmental functions by the contractor and that Government officials properly exercise their authority. Agencies must ensure that-

~~(a)~~ **(i)** A sufficient number of qualified Government employees are assigned to oversee contractor activities, especially those that involve support of Government policy or decision making. During

performance of service contracts, the functions being performed shall not be changed or expanded to become inherently governmental.

(b) (ii) A greater scrutiny and an appropriate enhanced degree of management oversight is exercised when contracting for functions that are not inherently governmental but closely support the performance of inherently governmental functions (see 7.503(c)).

(c) (iii) All contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties are required to identify themselves as such to avoid creating an impression in the minds of members of the public or Congress that they are Government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. They must also ensure that all documents or reports produced by contractors are suitably marked as contractor products or that contractor participation is appropriately disclosed.

### **37.109 ~~115~~ Service Contract Act of 1965 and Uncompensated overtime.**

#### **37.109-1 Scope.**

The policies in this section are based on the Service Contract Act of 1965 (41 U.S.C. 351-357) and Section 834 of Public Law 101-510 (10 U.S.C. 2331).

#### **37.109-2 General policy.**

(a) The Service Contract Act of 1965 (41 U.S.C. 351-357) (the Act) provides for minimum wages and fringe benefits as well as other conditions of work under certain types of service contracts. Whether or not the Act applies to a specific service contract will be determined by the definitions and exceptions given in the Act, or implementing regulations.

(a) (b) Use of uncompensated overtime is not encouraged.

(b) (c) When professional or technical services are acquired on the basis of the number of hours to be provided, rather than on the task to be performed, the solicitation shall require offerors to identify uncompensated overtime hours and the uncompensated overtime rate for direct charge Fair Labor Standards Act-exempt personnel included in their proposals and subcontractor proposals. This includes uncompensated overtime hours that are in indirect cost pools for personnel whose regular hours are normally charged direct.

(c) (d) Contracting officers must ensure that the use of uncompensated overtime in contracts to acquire services on the basis of the number of hours provided will not degrade the level of technical expertise required to fulfill the Government's requirements (see 15.305 for competitive negotiations and 15.404-1(d) for cost realism analysis). When acquiring these services, contracting officers must conduct a risk assessment and evaluate, for award on that basis, any proposals received that reflect factors such as-

- (1) Unrealistically low labor rates or other costs that may result in quality or service shortfalls; and
- (2) Unbalanced distribution of uncompensated overtime among skill levels and its use in key technical positions.

#### **37. ~~115~~ 109-3 Solicitation provision.**

The contracting officer shall insert the provision at 52.237-10, Identification of Uncompensated Overtime, in all solicitations valued above the simplified acquisition threshold, for professional or technical services to be acquired on the basis of the number of hours to be provided.

## **Attachment 14 – Recommendations related to relocation of sections of FAR Part 37**

There was an initial discussion as to whether FAR Part 37 was necessary – or should it be eliminated, and references to service contracting be “beefed up” in other relevant FAR sections? While deciding to maintain Part 37 at this time, with recommended interim revisions, the Task Force believes that further analysis is necessary to determine whether the policies in FAR Part 37 would be better realigned elsewhere in the FAR.

The following recommendations should serve as a starting point for that review.

- Definitions in Section 37.101 should be moved to FAR Part 2.101 (other than the definition of “child care services”, which should be embedded with the one sentence policy in 37.103(d)).
- Section 37.102 (Policy) and paragraph (e) of 37.103(Contracting Officer Responsibility) should be merged with Subpart 37.6 and relocated in Part 11 (Describing Agency Needs).
- Sections 37.103 (Contracting Officer Responsibility), 37.104 (Personal Services Contracts) and 37.112 (Government Use Of Private Sector Temporaries) should be merged and relocated in Part 11 (Describing Agency Needs).
- Section 37.105 (Competition In Service Contracting) should be deleted.
- Section 37.106 (Funding And Term Of Service Contracts) and paragraph (c) of 37.110 (Solicitation provisions and contract clauses) should be relocated in Subpart 32.7 (Contract Funding).
- Section 37.107 (Service Contract Act) should be deleted (see Subpart 22.10).
- Section 37.108 (Small Business Certificate of Competency) should be relocated in Part 9 (Contractor Qualifications).
- Sections 37.109 (Services of Quasi-Military Armed Forces) should be relocated in Part 11, (Describing Agency Needs).
- Paragraphs (a) and (b) of Section 37.110 (Solicitation provisions and Contract Clauses) should be relocated in Part 11 (Describing Agency Needs).
- Paragraphs (d) and (e) of Section 37.110 (Solicitation provisions and Contract Clauses) should be deleted.
- Section 37.111 (Extension of Services) should be relocated in Subpart 32.7 (Contract Funding).
- Section 37.113 (Severance Payments To Foreign Nationals) should be relocated in Part 31, (Contract Cost Principles and Procedures).
- Section 37.115 (Uncompensated Overtime) should be relocated to Subpart 22.1 (Professional Employee Compensation).

- Sections 37.2 (Advisory and Assistance Services) and 37.114 (Special Acquisition Requirements) should be merged with Subparts 9.5 (Organizational and Consultant Conflicts of Interest) and 7.5 (Inherently Governmental Functions).
- Section 37.3 (Dismantling, Demolition, Or Removal of Improvements) should be relocated in Part 36 (Construction and Architect-Engineer Contracts).
- Section 37.4 (Nonpersonal Health Care Services) should be relocated in Part 11 (Describing Agency Needs).
- Section 37.5 (Management Oversight of Services Contracts) should be relocated in Part 46 (Quality Assurance).
- Section 37.6 (Performance-Based Contracting) should be relocated in Part 11 (Describing Agency Needs). The name of Part 11 should be changed to “Performance-Based Acquisition”; and the applicability should be to any contract for services, and also to any other contract that requires a statement of objectives or statement of work.

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