

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 7, 15, 16, 37, 46, and 52****RIN 9000-AH14****[FAR Case 95-311]****Federal Acquisition Regulation;
Service Contracting**

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation to implement Office of Federal Procurement Policy (OFPP) Policy Letter 91-2, Service Contracting (previously considered under withdrawn FAR Case 91-85, Services Contracting). The OFPP policy letter prescribes policies and procedures for use of performance-based contracting methods. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This action is not a major rule under 5 U.S.C. 804.

DATES: Comments should be submitted on or before September 30, 1996 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRs), 18th and F Streets, NW, Room 4037, Washington, DC 20405.

Please cite FAR case 95-311 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Peter O'Such at (202) 501-1759 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 95-311.

SUPPLEMENTARY INFORMATION:**A. Background**

This proposed rule amends FAR Parts 7, 15, 16, 37, 46, and 52 to establish policy for the Government's acquisition of services through the use of performance-based contracting methods.

B. Regulatory Flexibility Act

The proposed changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because of the burden associated with identifying uncompensated overtime hours and rates included in proposals and subcontractor proposals under the new provision 52.327-XX, Identification of Uncompensated Overtime. An Initial Regulatory Flexibility Analysis has been prepared and is summarized as follows:

The proposed rule amends the Federal Acquisition Regulation (FAR) Parts 7, 15, 16, 37, 46, and 52 to implement the Office of Federal Procurement Policy (OFPP) Policy Letter 91-2, Service Contracting, and makes other revisions to part 37. One of the revisions implements the statutory requirement of section 834, Public Law 103-510, concerning uncompensated overtime. Although the statutory requirement applies only to DOD, both GSA and NASA have agreed the language is appropriate for Governmentwide use. The Regulatory Flexibility Act applies only to the language being added to the FAR concerning uncompensated overtime. The rule will affect all small businesses that submit offers for services estimated at \$100,000 or more. Work hours provided, not the task to be performed, are addressed by this rule.

The requirements concerning uncompensated overtime in this proposed rule are currently in the Defense Federal Acquisition Regulation (DFARS). When this proposed rule is implemented in the FAR as a final rule, the DFARS language will be removed. There are no alternatives.

The Initial Regulatory Flexibility Analysis (IRFA) will be provided to the Chief Counsel for Advocacy for the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 95-311), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Public Law 104-13) is deemed to apply because the proposed rule contains information collection requirements. Accordingly, a request for approval of a new information collection requirement concerning the Service Contracting/

Solicitation provision, "Identification of Uncompensated Overtime", is being submitted to the Office of Management and Budget under 44 U.S.C. 3507(d), *et seq.* Public comments concerning this request will be invited through a Federal Register notice appearing in the *Notices* section of this issue.

List of Subjects in 48 CFR Parts 7, 15, 16, 37, 46, and 52

Government procurement.

Dated: July 25, 1996.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Parts 7, 15, 16, 37, 46, and 52 be amended as set forth below:

1. The authority citation for 48 CFR Parts 7, 15, 16, 37, 46, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 7—ACQUISITION PLANNING

2. Section 7.103 is amended by adding paragraph (q) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

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

3. Section 7.105 is amended in the introductory text by adding a sentence at the end of the paragraph; by revising paragraphs (a)(1), (a)(4), and (b)(6); by redesignating paragraphs (b)(18) through (b)(20) as (b)(19) through (b)(21) and adding a new (b)(18) to read as follows:

7.105 Contents of written acquisition plans.

* * * Acquisition plans for service contracts shall describe the strategies for implementing performance-based contracting methods or provide rationale for not using those methods (see subpart 37.5).

(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, the impact of prior acquisitions on those alternatives, and any related in-house effort.

* * * * *

(4) *Capability or performance.* Specify the required capabilities or performance characteristics of the supplies or the performance standards of the services

being acquired and state how they are related to the need.

* * * * *

(b) * * *

(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.

* * * * *

(18) *Contract administration.* Describe how the contract will be administered. In contracts for services, include how inspection and acceptance corresponding to the work statement's performance criteria will be enforced.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

4. Section 15.611 is amended in paragraph (c) by revising the second sentence to read as follows:

15.611 Best and final offers.

* * * * *

(c) * * * If discussions are reopened, the contracting officer shall, in accordance with agency procedures, issue an additional request for best and final offers to all offerors still within the competitive range.

* * * * *

PART 16—TYPES OF CONTRACTS

5. Section 16.104 is amended by adding paragraph (k) to read as follows:

16.104 Factors in selecting contract types.

* * * * *

(k) *Acquisition history.* Contractor risk usually decreases as the requirement is repetitively acquired. Also, product descriptions or descriptions of services to be performed can be more clearly defined.

6. Section 16.402-2 is amended by revising the heading and paragraph (a); by redesignating paragraphs (b) through (g) as (c) through (h) and adding a new paragraph (b); and by revising the newly designated paragraph (e) to read as follows:

16.402-2 Performance incentives.

(a) Performance incentives may be considered in connection with specific product characteristics (e.g., a missile range, an aircraft speed, an engine thrust, or a vehicle maneuverability) or other specific elements of the contractor's performance. These incentives should be designed to relate profit or fee to results achieved by the contractor, compared with specified targets.

(b) Performance incentives may be considered in connection with service contracts for performance of objectively measurable tasks when quality of performance is critical and incentives are likely to motivate the contractor.

* * * * *

(e) Performance tests and/or assessments of work performance are generally essential in order to determine the degree of attainment of performance targets. Therefore, the contract must be as specified as possible in establishing test criteria (such as testing conditions, instrumentation precision, and data interpretation), and performance standards (such as the quality levels of services to be provided).

* * * * *

7. Section 16.404-1 is amended by revising the introductory text of paragraph (b)(1), and the last sentence of paragraph (b)(2) to read as follows:

16.404-1 Cost-plus-incentive-fee contracts.

* * * * *

(b) *Application.* (1) A cost-plus-incentive-fee contract is appropriate for services or development and test programs when (i) * * *.

* * * * *

(2) * * * This approach may also apply to other acquisitions, if the use of both cost and technical performance incentives is desirable and administratively practical.

* * * * *

PART 37—SERVICE CONTRACTING

8. Section 37.000 is revised to read as follows:

37.000 Scope of part.

This part prescribes general policy and procedures for acquiring services by contract, and includes but does not limit coverage to only those services to which the Service Contract Act of 1965 applies (see 37.107). 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; distinguishes between contracts for personal services and those for nonpersonal services; and includes special conditions to be observed in acquiring advisory and assistance services. Dismantling, demolition, or removal of improvements is covered in subpart 37.3. This part does not regulate the obtaining of services by direct appointment, under normal civil service employment procedures, or by cooperative agreement.

9. Section 37.101 is amended by adding, in alphabetical order, the

definition "Performance-based contracting" to read as follows:

37.101 Definitions.

* * * * *

Performance-based contracting means structuring all aspects of an acquisition around the purpose of the work to be performed as opposed to the manner by which the work is to be performed or broad and imprecise statements of work.

* * * * *

10. Section 37.102 is amended by adding paragraph (d) to read as follows:

37.102 Policy.

* * * * *

(d) The preferred way of acquiring services is through use of performance-based contracting methods rather than on the basis of buying hours.

11. Section 37.103 is amended by redesignating paragraphs (d) and (e) and adding a new paragraph (d) to read as follows:

37.103 Contracting officer responsibility.

* * * * *

(d) Ensure that performance-based contracting methods are used to the maximum extent practicable when acquiring services.

* * * * *

12. Section 37.106 is amended by adding paragraph (c) to read as follows:

37.106 Funding and term of service contracts.

* * * * *

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

13. Sections 37.115 through 37.115-3 are added to read as follows:

Sec.

37.115 Uncompensated overtime.

37.115-1 Scope.

37.115-2 General policy.

37.115-3 Solicitation provision.

* * * * *

37.115 Uncompensated overtime.

37.115-1 Scope.

This section implements Section 834 of Public Law 101-510 (10 U.S.C. 2331).

37.115-2 General policy.

(a) 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.

(b) Use of uncompensated overtime is not encouraged.

37.115-3 Solicitation provision.

Use the provision at 52.237-XX, Identification of Uncompensated Overtime, in all solicitations valued at \$100,000 or more, for professional or technical services to be acquired on the basis of the number of hours to be provided.

14. Subpart 37.5, consisting of sections 37.500 through 37.502-5 is added to read as follows:

Subpart 37.5—Performance-Based Contracting

Sec.

37.500 Scope of subpart.

37.501 General.

37.502 Elements of performance-based contracting.

37.502-1 Statements or work.

37.502-2 Quality assurance.

37.502-3 Selection procedures.

37.502-4 Contract type.

37.502-5 Follow-on and repetitive requirements.

37.500 Scope of subpart.

This subpart prescribes policies and procedures for use of performance-based contracting methods. It implements OFPP Policy Letter 91-2, Service Contracting.

37.501 General.

Performance-based contracting methods provide the means to ensure that required performance quality levels are achieved and that with respect to fixed price contracts, payment is made only for services which meet contract standards. Performance-based contracts—

(a) Describe the requirements in terms of results required rather than the methods of performance of the work;

(b) Use measurable (i.e., terms of quality, timeliness, quantity, etc.) performance and quality assurance surveillance plans (see 46.103(a), and 46.401(a));

(c) Specify procedures for reduction of award fee or for reductions to the price of a fixed-price contract when services are not performed or do not meet contract requirements (see 46.407(f)); and

(d) Include performance incentives where appropriate.

37.502 Elements of performance-based contracting.

37.502-1 Statements of work.

Generally, statements of work shall define requirement in clear, concise language identifying specific work to be accomplished. Statements of work must be individually tailored to consider the period of performance, deliverable items, if any, and the desired degree of performance flexibility (see 11.105). However, in the case of task order contracts, the statement of work need only define the scope of the overall contract (see 16.504(a)(4)(iii)). Each task issued under a task order contract shall clearly describe all services to be performed (see 16.505(a)(2)). When preparing statements or work, agencies shall, to the maximum extent practicable—

(a) Describe the work in terms of “what” is to be the required output rather than either “how” the work is to be accomplished or the number of hours to be provided;

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

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

(d) Avoid combining requirements into a single acquisition that is too broad for the agency or a prospective contractor to manage effectively.

37.502-2 Quality assurance.

Agencies shall develop quality assurance surveillance plans when acquiring services (see subpart 46.2). These plans shall recognize the responsibility of the contractor (see 46.105) to carry out its quality control obligations and shall contain measurable inspection and acceptance criteria corresponding to the performance standards contained in the statement of work. The quality assurance plans shall focus on the level of performance required by the statement of work, rather than the methodology used by the contractor to achieve that level of performance.

37.502-3 Selection procedures.

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

37.502-4 Contract type.

Contract types most likely to motivate contractors to perform at optimal levels shall be chosen (see subpart 16.1). To

the maximum extent practicable, performance incentives, either positive or negative or both, shall be incorporated into the contract to encourage contractors to increase efficiency and maximize performance (see subpart 16.4). These incentives shall correspond to the specific performance standards in the quality assurance surveillance plan and shall be capable of being objectively measured.

37.502-5 Follow-on and repetitive requirements.

When acquiring services which previously have been provided by contract, agencies shall rely on the experience gained from the prior contract to incorporate performance-based contracting methods to the maximum extent practicable.

PART 46—QUALITY ASSURANCE

15. Section 46.103 is amended by revising paragraph (a) to read as follows:

46.103 Contracting office responsibilities.

* * * * *

(a) Receiving from the activity responsible for technical requirements any specifications for inspection, testing, and other contract quality requirements essential to ensure the integrity of the supplies or services (the activity responsible for technical requirements is responsible for prescribing contract quality requirements, such as inspection and testing requirements or, for service contracts, a quality assurance surveillance plan);

* * * * *

16. Section 46.401 is amended by revising paragraph (a) to read as follows:

46.401 General.

(a) Government contract quality assurance shall be performed at such times (including any stage of manufacture or performance of services) and places (including subcontractors' plants) as may be necessary to determine that the supplies or services conform to contract requirements. Quality assurance surveillance plans should be prepared in conjunction with the preparation of the statement of work. The plans should specify—

(1) All work requiring surveillance, and

(2) The method of surveillance.

* * * * *

17. Section 46.407 is amended by revising the introductory paragraph (c)(1), and adding a new second and third sentence to (f) to read as follows:

46.407 Nonconforming supplies or services.

* * * * *

(c)(1) In situations not covered by paragraph (b) of this section, the contracting officer shall ordinarily reject supplies or services when the nonconformance is critical or major. However, there may be circumstances (e.g., reasons of economy or urgency) when acceptance of such supplies or services is determined by the contracting officer to be in the Government's interest. The contracting officer shall make this determination, based upon—

* * * * *

(f) * * * For services, the contracting officer can consider identifying the value of the individual work requirements or tasks (subdivisions) which may be subject to price or fee reduction. This value may be used to determine an equitable adjustment for nonconforming services. * * *

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

18. Section 52.237-XX is added to read as follows:

52.237-XX Identification of uncompensated overtime.

As prescribed in 37.115-3, insert the following provision:

Identification of Uncompensated Overtime (Date)

(a) *Definitions.* As used in this provision—
Uncompensated overtime means the hours worked in excess of an average of 40 hours per week by direct charge employees who are exempt from the Fair Labor Standards Act, without additional compensation. Compensated personal absences such as holidays, vacations, and sick leave shall be included in the normal work week for purposes of computing uncompensated overtime hours.

Uncompensated overtime rate is the rate which results from multiplying the hourly rate for a 40 hour work week by 40, and then dividing by the proposed hours per week. For example, 45 hours proposed on a 40 hour work week basis at \$20 per hour would be converted to an uncompensated overtime rate

of \$17.78 per hour (\$20.00×40 divided by 45 = \$17.78).

(b) For any hours proposed against which an uncompensated overtime rate is applied, the offeror shall identify in its proposal the hours in excess of an average of 40 hours per week, by labor category at the same level of detail as compensated hours, and the uncompensated overtime rate per hour, whether at the prime or subcontract level. This includes uncompensated overtime hours that are in indirect cost pools for personnel whose regular hours are normally charged direct.

(c) The offeror's accounting practices used to estimate uncompensated overtime must be consistent with its cost accounting practices used to accumulate and report uncompensated overtime hours.

(d) Proposals which include unrealistically low labor rates, or which do not otherwise demonstrate cost realism, will be considered in a risk assessment and evaluated for award in accordance with that assessment.

(e) The offeror shall include a copy of its policy addressing uncompensated overtime with its proposals.

(End of provision)

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