

2936.604 Performance evaluation.

(a) The HCA must establish procedures to evaluate architect-engineer contractor performance as required in FAR 36.604. Normally, the performance report must be prepared by the contracting officer's authorized representative or other official who was responsible for monitoring contract performance and who is qualified to evaluate overall performance. DOL Agency/Office procedures must prescribe instructions for review of the report, before distribution, as prescribed in FAR 36.604(b).

(b) Performance reports must be made using Standard Form 1421, Performance Evaluation (Architect-Engineer) as prescribed in FAR 36.702(c). Details covering unsatisfactory performance, including Government notification to the contractor and written comments by the contractor, must also be attached to the report.

PART 2937—SERVICE CONTRACTING

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Subpart 2937.1—Service Contracts-General

2937.103 Contracting officer responsibility.

The HCA is responsible for establishing internal review and approval procedures for service contracts in accordance with OFPP Policy Letter 93-

1 (Reissued), "Management Oversight of Service Contracting". As defined by FAR 37.101, contracts for personal services are permitted under the circumstances in 5 U.S.C. 3109.

2937.103-70 Department of Labor checklist to aid analysis and review of requirements for service contracts.

Contracting specialists and contracting officers must work in close collaboration with the beneficiaries of the services being purchased to ensure that contractor performance meets contract requirements and performance standards.

(a) *General.* Following is a checklist to aid analysis and review of requirements for service contracts.

(1) Is the statement of work complete, with a clear-cut division of responsibility between the contracting parties?

(2) Is the statement of work discussed in terms the market can satisfy?

(3) Does the statement of work encompass all commercially available services that can meet the actual functional need (eliminates any non-essential preferences that may thwart full and open competition)?

(4) Is the statement of work performance-based to the maximum extent possible (*i.e.*, is the acquisition structured around the purpose of the work to be performed, as opposed to either the manner by which the work is to be performed or a broad and imprecise statement of work)?

(b) *Cost effectiveness.* If the response to any of the following questions is negative, the agency may not have a valid requirement or not be obtaining the requirement in the most cost effective manner.

(1) Is the statement of work written so that it supports the need for a specific service?

(2) Is the statement of work written so that it permits adequate evaluation of contractor versus in-house cost and performance?

(3) Are the choices of contract type, quality assurance plan, competition strategy, or other related acquisition strategies and procedures in the acquisition plan appropriate to ensure good

contractor performance to meet the user's needs?

(4) If a cost reimbursement contract is contemplated, is the acquisition plan adequate to ensure that the contractor will have the incentive to control costs under the contract?

(5) Is the acquisition plan adequate to address the cost effectiveness of using contractor support (either long-term or short-term) versus in-house performance?

(6) Is the cost estimate or other supporting cost information adequate to enable the contracting office to effectively determine whether costs are reasonable?

(7) Is the statement of work adequate to describe the requirement in terms of "what" is to be performed as opposed to "how" the work is to be accomplished?

(8) Is the acquisition plan adequate to ensure that there is proper consideration given to "quality" and "best value?"

(c) *Control.* If the response to any of the following questions is negative, there may be a control problem.

(1) Are there sufficient resources to evaluate contractor performance when the statement of work requires the contractor to provide advice, analysis and evaluation, opinions, alternatives, or recommendations that could significantly influence agency policy development or decision-making?

(2) Does the quality assurance plan provide for adequate monitoring of contractor performance?

(3) Is the statement of work written so that it specifies a contract deliverable or requires progress reporting on contractor performance?

(4) Is agency expertise adequate to independently evaluate the contractor's approach, methodology, results, options, conclusions or recommendations?

(d) *Conflicts of interest.* If the response to any of the following questions is affirmative, there may be a conflict of interest.

(1) Can the potential offeror perform under the contract to devise solutions or make recommendations that would influence the award of future contracts to that contractor?

(2) If the requirement is for support services (such as system engineering or technical direction), were any of the potential offerors involved in developing the system design specifications or in the production of the system?

(3) Has a potential offeror participated in earlier work involving the same program or activity that is the subject of the present contract, wherein the offeror had access to source selection or proprietary information not available to other offerors competing for the contract?

(4) Will the contractor be evaluating a competitor's work?

(5) Does the contract allow the contractor to accept its own products or activities on behalf of the Government?

(6) Will the work under this contract put the contractor in a position to influence government decision-making, e.g., developing regulations that will affect the contractor's current or future business?

(7) Will the work under this contract affect the interests of the contractor's other clients?

(8) Are any of the potential offerors, or their personnel who will perform the contract, former agency officials who—while employed by the agency—personally and substantially participated in the development of the requirement for, or the procurement of, these services within the past two years?

(e) *Competition.* If the response to any of the following questions is negative, competition may be unnecessarily limited.

(1) Is the statement of work defined so as to avoid overly restrictive specifications or performance standards?

(2) Is the contract formulated in such a way as to avoid creating a continuous and dependent arrangement with the same contractor?

(3) Is the use of an indefinite quantity or term contract arrangement appropriate to obtain the required services?

(4) Will the requirement be obtained through the use of full and open competition?

Subpart 2937.2—Advisory and Assistance Services

2937.203 Policy.

(a) HCAs having a requirement for certain advisory and assistance services are required by the Department of Labor Manual Series (*See* DLMS 2 836) to prepare a written justification for such services. Written justification must be submitted to the Assistant Secretary for Administration and Management for review by the Procurement Review Board, for Assistant Secretary for Administration and Management approval.

(b) Regardless of the type of action planned, the justification in paragraph (a) of this section must include the following:

(1) A statement of need, which certifies that the requested services do not unnecessarily duplicate any previously performed work.

(2) Nature and scope of the need, and the results expected.

(3) Extent to which in-house staff availability was assessed, and the reasons why procurement of outside services is necessary.

(4) Any additional information or data that support the requirement for a contract.

(5) Name(s) and title(s) of official(s) who will be assigned as project officer(s) to work with the contractor, and who can be contacted for additional Information.

(6) A statement that the Government policy on advisory and assistance services has been reviewed and complies with FAR 37.203.

Subpart 2937.6—Preference for Performance-Based Contracting (PBC)

2937.602 Elements of performance-based contracting.

(a) Performance-based contracting is defined in FAR 37.101 and discussed in FAR 37.6. Although FAR Part 37 primarily addresses services contracts, PBC is not limited to these contracts. PBC is the preferred way of contracting for services. (*See* exceptions listed in FAR 37.102.) Generally, when contract performance risk under a PBC specification can be shifted to the contractor to allow for the operation of objective incentives, a contract type with objectively measurable incentives (*e.g.*, Firm-Fixed-Price, Fixed-Price-Incentive-Fee, or Cost-Plus-Incentive-Fee) is appropriate. However, when contractor performance (*e.g.*, cost control, schedule, or quality/technical) is best evaluated subjectively using qualitative measures, a Cost-Plus-Award-Fee contract may be used.

(b) A labor hour level-of-effort contract is not considered a PBC.

PARTS 2938–2941 [RESERVED]