**APTAC Body of Knowledge Competency Guide**

 **D. Specialized Knowledge**

 **D.5 Service Contracting**

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**Description:**

“The service sector represents the largest and fastest growing segment of the economies of the United States and other developed countries. In the United States, services accounted for well over 85 percent of employment in the year 2007. This growth of services in the overall economy has been mirrored by the growth of services acquisition in private-sector companies and in the government.”1 In fiscal year 2015, nearly two thirds of federal government contract obligations were spent on services such as Information Technology (IT) support and facilities management rather than on products such as ammunition and food.2 Given the federal government’s increasing reliance on service contractors, procurement counselors need to understand the government’s regulations, contracting methods, and processes associated with the acquisition of services.

Per FAR 37.101, “**Service contract** means a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task 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: (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, real property, and systems; (6) communications services; (7) architect-engineering services; (8) transportation and related services; and (9) research and development.” 3

**Learning Objectives:** With the background information and resources listed in this BoK topic, the PTAC Advisor will be able to help businesses understand the federal government’s regulations and processes related to the acquisition of services.

**Discussion & Insights**:

Although FAR Part 37 prescribes policy and procedures that are specific to the acquisition and management of services by contract, procurement counselors should be aware that FAR Part 35 provides additional guidance on research and development services, FAR Part 36 covers architect-engineering services; FAR Part 39 addresses information technology services and FAR Part 47 provides guidance on transportation services. FAR Parts 35, 36, 39, and 47 take precedence over FAR Part 37 in the event there are any inconsistencies.3

In accordance with Public Law 106-398, Section 821, **performance-based acquisition** is the preferred method for acquiring services. Federal agencies must use performance based acquisition methods to the maximum extent practicable except when acquiring architect-engineer services, construction, utility services, and services that are incidental to supply purchases. Additionally, PL 106-398, Section 821(a) establishes the following order of precedence in acquisition method and contract type when acquiring services: (1) a firm-fixed price **performance-based contract (PBC)** or task order, (2) a PBC that is not firm-fixed price, and (3) a contract or task order that is not performance-based.4

Other major federal policies related to the acquisition of services include: 4

(1) Agencies shall generally rely on the private sector for commercial services.

(2) Agencies shall not award a contract for the performance of an **inherently governmental function**. Per FAR Subpart 7.3 -- Contractor Versus Government Performance and the revised [Office of Management and Budget Circular A-76 Performance of Commercial Activities](https://obamawhitehouse.archives.gov/omb/circulars_a076_a76_incl_tech_correction/) dated May 29, 2003, “... An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.” However this does not preclude **contractor service support** and **advisory and assistance** contracts where the contractor does not have the authority to decide on a course of action, but is tasked to develop options or implement a course of action, with agency oversight.5

(3) Agencies must ensure **non-personal service contracts** are proper under general contracting authority. A non-personal services contract is a contract under which the personnel providing the services are not subject, either by the contract terms or the manner in which it is administered, to the supervision and control usually prevailing in relationships between employers and employees. In contrast, a “**Personal services contract**” means a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees.6 “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.” 7 The use of Personal services contracts as an alternative to performance by government employees may be subject to substantial variability from circumstance to circumstance and often varies with the administration currently in power. (See FAR 37.104 for additional policies, regulations and restrictions related to the use of personal services contracts).

(4) 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. This is generally accomplished with a **Statement of Work** (SOW) in non-performance based contracts and via a **Statement of Objectives (SOO)** or **Performance Work Statement (PWS)** when using a **performance-based acquisition method**. Instead of providing detailed descriptions on how to accomplish the work or the number of hours required to accomplish the work, the government-prepared SOO states the overall performance objectives. A PWS describes the required results in clear, specific, and objective terms with measurable outcomes. The SOO and PWS are used in solicitations when the Government intends to provide maximum flexibility to each offeror to propose an innovative approach to solve the government’s challenges and requirements.6

(5) Agencies shall establish effective management practices in accordance with the [Office of Federal Procurement Policy (OFPP) Policy Letter 93-1, Management Oversight of Service Contracting](https://obamawhitehouse.archives.gov/omb/procurement_policy_letter_93-1) to prevent fraud, waste, and abuse in service contracting.

(6) Agencies shall obtain services in the most cost-effective manner, without barriers to full and open competition, and free of any potential conflicts of interest.

In the event an existing services contract has been completed, it is likely that the government may have a continuing need for those services and may recompete the effort under a FAR Subpart 6.1 Full and Open Competition or FAR Subpart 6.2 Full and Open Competition After Exclusion of Sources acquisition strategy. If that is the case, the incumbent contractor will most likely vie for the follow on contract award. Also, it is widely believed that the current contract holder has an edge in the reprocurement because they understand the work and have an ongoing working relationship with the government. However, it should be noted that many incumbent contractors do not win follow-on contracts because of complacency, failure to interject new and effective approaches, focusing on maintaining jobs rather than proposing a rightsized solution, believing their past performance on the incumbent contract is all that is needed to win, starting their recompete preparations too late, and/or underestimating their competitor’s ability to innovate and control transition risk.

“When services contracts are recompleted, it is important that contracting officers avoid, neutralize, and/or mitigate the following potential **Organizational Conflicts of Interests (OCIs)**: (a) “Biased Ground Rules - the incumbent prepares the requirement and then is allowed to compete; (b) “Unequal Access to Information” – the incumbent gains access to non-public information that gives them a competitive advantage; and/or (c) “Impaired Objectivity” - the incumbent provides technical assistance during a recompetition or evaluates its own proposal, or those of a competitor, without proper safeguards to ensure objectivity to protect the government’s interests.

In addition to mitigating potential OCIs, contracting officers should ensure the source selection is conducted fairly and without any bias that favors the incumbent contractor. Potential problems include including overly restrictive requirements in the solicitation that only the incumbent can perform and/or penalizing an offeror based upon their non-incumbency.”8

(7) Agencies shall ensure that service contracts that require the delivery, use, or furnishing of products are consistent with the acquisition policies at FAR Part 23 -- Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace.

**Performance-Based Acquisition (PBA)**

FAR Subpart 37.6 prescribes policies and procedures for acquiring services under performance-based acquisition methods. "Performance-based acquisition (PBA)" means an acquisition structured around the results to be achieved as opposed to the manner by which the work is to be performed.6

The government uses the following seven step process when conducting PBA: (1) establish the government’s Integrated Project Team, (2) describe the government’s problem that needs to be solved, (3) conduct market research to examine potential public and private sector solutions, (4) develop the Performance Work Statement (PWS) or Statement of Objectives (SOO), (5) decide how to measure and manage performance, (6) select the right contractor, and (7) manage contract performance.9 Although the above steps primarily outline government actions and decisions, procurement counselors can help clients influence the government’s PBA strategies, increase the company’s competitiveness, and reduce the contractor’s performance and cost risk under a performance-based contract (PBC). To accomplish those goals, the procurement counselor can help the client draft a tailored response to an agency’s sources sought notice; advise the client how to craft a proposed PWS and associated methods of performance that provide achievable, low-risk solutions; and ensure the client’s proposed work standards and metrics are measurable, achievable and controllable. Additionally, the procurement counselor can provide advice on how to develop quality plans that demonstrate the contractor has processes and controls in place to ensure successful contract completion.

Specific PBA strategies may vary depending upon the agency and nature of the required services, however most performance-based contracts have the following attributes:

(1) Requirements are described in terms of the results required, rather than requiring government specified methods of performance. For example, instead of telling a contractor how to perform aircraft maintenance or stating how many mechanics should be assigned to a crew, the contract should state the contractor is accountable for ensuring that a minimum of 85 percent of the aircraft will be mission capable as defined in the Performance Work Statement (PWS) at a certain time.

Under PBA, the PWS describes the work in terms of the required results. The PWS may be prepared by the government. Alternately, the government may develop a Statement of Objectives (SOO) that provides the overall performance objectives and then require prospective offerors to develop the PWS, performance metrics and measurement plan, **Performance Requirements Summary (PRS)** and quality assurance and surveillance plans.

There are no set formats for a PRS but it usually contains a summary of the desired outcomes, performance objectives, performance standards, and **Acceptable Quality Levels (AQLs)**. AQLs define the maximum allowable leeway or variance from a standard before the government will reject a service. AQLs can be expressed as a number, a percentage, or a quantity per number of units inspected. See the Courses/Resources section of this BoK Topic for a link that provides a sample PRS and Quality Assurance Surveillance Plan (QASP).

(2) The performance-based contract (PBC) requires the government to assess work performance against measurable performance standards. These standards and the government’s **Quality Assurance Surveillance Plan (QASP)** may be developed by the government or proposed by the offeror for consideration and incorporation into the government’s performance assessment, monitoring and oversight surveillance plan. “The latter approach is especially suitable when the government uses a SOO because the solution is not known until proposed. With a SOO, offerors are free to develop their own solutions, so it makes sense for them to develop an internal **Quality Assurance Plan (QAP)** or **Quality Control Plan (QCP)** and proposed government Quality Assurance Surveillance Plan (QASP) that are tailored to their solution and commercial practices. If the agency were to develop the QASP, it could very well limit what contractors can propose.”9 Whether the government or contractor prepares the QASP, it is important for prospective offerors to negotiate acceptable service quality levels and performance metrics that are achievable, measurable and under their control. Requirements for quality assurance and quality assurance surveillance plans are contained in FAR Subpart 46.4 -- Government Contract Quality Assurance.

(3) Where appropriate, a PBC may include positive and negative performance incentives related to the performance standards set in the contract. As such, it is extremely important that prospective offerors have the requisite capabilities and capacity to meet the contract’s acceptable quality levels (AQLs) and work performance standards. If the PBC includes multiple incentives, such as technical, quality, delivery and cost incentives, the proposed contract incentives should motivate the contractor to strive for outstanding results in all incentive areas; and, if necessary, compel trade-off decisions among the incentive areas that are consistent with the government’s overall acquisition objectives.10

As noted previously, PBA is the government’s preferred method for acquiring services. It is preferred because, among other potential benefits, it increases the likelihood of meeting the agency’s mission needs, places the focus on intended results, not processes, allows for a variety of potential solutions, enhances competition, and provides better value and enhanced performance.11 Contractors that have innovative and unique solutions should seek out PBA opportunities because there are no detailed specifications, statements of work or prescribed methods of performance. Under PBA, the contractor has the flexibility to propose innovative and/or commercial solutions to the government’s needs, thus potentially making them more competitive. Additionally, contractors may have the opportunity to earn additional profit or fee if the PBC includes performance incentives for surpassing minimum performance work standards. Conversely, the contractor should be aware that the PBC will most likely contain negative performance incentives should the contractor not meet the minimum performance standards.

**Service Contract Labor Standards (SCLS) - Formerly called the Service Contract Act (SCA)**

The SCLS requires contractors and subcontractors performing services on covered federal or District of Columbia contracts in excess of $2,500 to pay service employees in various classes no less than the monetary wage rates and to furnish fringe benefits found prevailing in the locality or in a collective bargaining agreement. Service employee means any person engaged in the performance of a contract other than any person employed in a bona fide executive, administrative, or professional capacity, as these terms are defined in Title 29, Code of Federal Regulations, Part 541.

The compensation requirements of the SCLS are enforced by the Employment Standards Administration’s Wage and Hour Division within the U.S. Department of Labor. The SCLS safety and health requirements are enforced by the Occupational Safety and Health Administration within the Department of Labor.

Contracting professionals need to be aware of the potential impact of this law on prospective service contracts, such as the need to comply with [Department of Labor (DOL) wage determinations](https://www.wdol.gov/). Each contractor and subcontractor performing work subject to the SCLS shall maintain certain records for each employee performing work of the covered contract. Additionally, contractors should ensure transparency in employee pay stubs by separating out wages and fringe benefits to show clear compliance with the Act.

Procurement counselors and supported businesses should be aware that the penalties for noncompliance with the SCLS are severe, including fines and possible debarment. Detailed guidance on compliance requirements can be found on the [Department of Labor Wage and Hour Division (WHD) website](https://www.dol.gov/whd/contracts/sca.htm). Additional information on SCLS compliance can be found on [Centre Law and Consulting’s website](http://www.centrelawgroup.com/legal/service-contract-act/). This website is particularly insightful because it provides the top ten ways to minimize the risk of SCLS violations and facts every contractor should know about the SCLS.

**Service Contract Act Prevailing Wages & Fringe Benefits**

Per [The Fringe Benefit Group](https://contractorsplan.com/complete-solution/compliance/service-contract-act), “many contractors pay the fringe benefit portion of the prevailing wage as additional cash wages, not realizing that it's inflating their bids and costing them more in payroll taxes. The reason contractors save money by offering bona fide benefits plans is that when the fringe portion of the prevailing wage is used to provide benefits for hourly workers, this amount is not subject to payroll costs such as FICA, FUTA, general liability, state unemployment taxes and in most states, workers compensation insurance. Although there are variances in the rates, these taxes represent conservatively an additional 17-25 cents on each dollar paid as cash wages”. Procurement counselors should advise their clients that their proposed price may not be as competitive as possible if they elect to pay the Department of Labor (DOL) required minimum benefits as additional cash wages. See John Allen and Chris Tromly’s APTAC Fall 2012 presentation titled [“Understanding Davis-Bacon Act and Service Contract Act”](http://aptac.mymemberfuse.com/resources2/view/profile/id/18990) for cost comparisons and additional insight into this issue.

**Advisory and Assistance Services (A&AS)**

FAR Subpart 37.2 prescribes policies and procedures for acquiring advisory and assistance services.

“**Advisory and assistance services** means those services provided under contract by nongovernmental sources to support or improve: Organizational policy development; decision-making; management and administration; program and/or project management and administration; or R&D activities. It can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering and technical nature). Outputs may take the form of information, advice, opinions, alternatives, analyses, evaluations, recommendations, training and the day-to-day aid of support personnel needed for the successful performance of ongoing Federal operations. All advisory and assistance services are classified in one of the following definitional subdivisions:

(1) **Management and professional support services**, i.e., contractual services that provide assistance, advice or training for the efficient and effective management and operation of organizations, activities (including management and support services for R&D activities), or systems.

(2) **Studies, analyses and evaluations**, i.e., contracted services that provide organized, analytical assessments/evaluations in support of policy development, decision-making, management, or administration.

(3) **Engineering and technical services**, i.e., contractual services used to support the program office during the acquisition cycle by providing such services as systems engineering and technical direction to ensure the effective operation and maintenance of a weapon system or major system or to provide direct support of a weapon system that is essential to research, development, production, operation or maintenance of the system.” 6

Per FAR 37.202, “the definition of advisory and assistance services does not include: (1) routine information technology services unless they are an integral part of an A&AS contract; (2) architectural and engineering services; and (3) research on theoretical mathematics and basic research involving medical, biological, physical, social, psychological, or other phenomena.”

Contract advisory and assistance services may be used to improve government services and operations, and help government managers achieve maximum effectiveness or economy in their operations. However prospective offerors and procurement counselors need to understand the limitations on the use of advisory and assistance services contracts. Per FAR 37.203(c), “the government shall not use advisory and assistance service contracts to:

(1) Perform work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials;

(2) Bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures;

(3) Contract for on a preferential basis to former government employees;

(4) Aid in influencing or enacting legislation; or

(5) Obtain professional or technical advice which is readily available within the agency or another federal agency.”

In addition to the above limitations, agencies must ensure that contractors performing advisory and assistance services do not perform inherently governmental functions as defined in [Office of Management and Budget Circular A-76 Performance of Commercial Activities](https://obamawhitehouse.archives.gov/omb/circulars_a076_a76_incl_tech_correction/) dated May 29, 2003.

**Counselor Tips**

**Quality Assurance Surveillance Plan (QASP) Relation to the Quality Control Plan (QCP)**

It is important to understand the differences and relationship between a contractor’s Quality Assurance Plan (QAP) or Quality Control Plan (QCP) and the government’s Quality Assurance Surveillance Plan (QASP). Since both types of plans may be developed and proposed by prospective offerors under a performance-based services solicitation, these terms are sometimes incorrectly used and interchanged.

The QASP provides the government with a systematic method to evaluate contract performance. It states what will be monitored, how monitoring will take place, who will conduct the monitoring and how monitoring efforts and results will be documented. The QASP does not detail how the contractor accomplishes the work. Rather, the QASP is created with the premise that the contractor is responsible for management and quality control actions to meet the terms of the contract. The contractor’s QAP or QCP represents the way in which the contractor will ensure its quality and timeliness of services, as defined in the Performance Work Statement (PWS). Although both types of quality plans support the respective parties’ responsibilities and interests, they should be viewed as mutually dependent and complementary quality programs that help ensure successful contract performance.

The QASP is intended to be a “living” document and reviewed as performance warrants. Consequently, the method and degree of performance assessment may change over time depending on the government’s level of confidence in the contractor. The Contracting Officer’s Representative (COR) normally is the person responsible for recommending changes to the QASP, however those changes should be negotiated and executed via a bi-lateral contract modification between the contractor and a warranted contracting officer. Additionally, if there are added costs of performance associated with the change(s), the contractor should consider submitting a request for equitable adjustment (REA) to the contracting officer.

**Department of Labor Wage Determinations**

Occasionally DOL issues different Wage Determination (WD) rates for the same labor category and geographic area. This may happen when the DOL WD contains caveats or exceptions for a certain labor category. Procurement counselors should advise their clients that they should carefully review the WDs to ensure the contracting officer identified the correct labor category and, if applicable, the correct labor category exception. The use of an incorrect WD rate could cause the contractor to propose a higher wage rate than necessary or a rate that doesn’t meet the correct minimum DOL WD rate.

**Courses/Resources**

Defense Acquisition University (DAU) Continuous Learning Module (CLM) Course Number CLC 013

Services Acquisition

DAU CLM Course Number CLC 064 Wage Determinations for Service and Construction Contracts

DAU CLM Course Number CLL 011 Performance Based Logistics (PBL)

DAU CLM Course Number CLL 031 Performance Based Logistics (PBL) Contracting Strategies

DAU CLM Course Number CLM 031 Improved Statement of Work

DAU CLM Course Number FAC 046 Davis-Bacon Act and Other Labor Standards Involving Construction

Govology Course [Understanding Certified Payroll Requirements on Government Construction Contracts](http://training.govology.com/product/understanding-certified-payroll-requirements-government-construction-contracts/)

Centre Law & Consulting Course [Service Contract Labor Standards: A Practical Course to Avoid Common Mistakes](http://www.centrelawgroup.com/course/service-contract-act/)

Centre Law & Consulting Course [Davis Bacon Act](http://www.centrelawgroup.com/course/davis-bacon-act/)

Centre Law & Consulting Course [What Every Federal Contractor Needs To Know About Employment Law](http://www.centrelawgroup.com/course/labor-employment-law-compliance)

[29 CFR Part 4 - LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS](https://www.law.cornell.edu/cfr/text/29/part-4)

[Department of Labor (DOL) Wage Determinations Online](https://www.wdol.gov/)

[DOL Compliance Guide](https://www.dol.gov/compliance/guide/sca.htm)

[Department of Labor FAQs – Wages and Work Hours](https://www.dol.gov/whd/regs/compliance/web/SCA_FAQ.htm)

[Office of Federal Procurement Policy (OFPP) Policy Letter 93-1, Management Oversight of Service Contracting](https://obamawhitehouse.archives.gov/omb/procurement_policy_letter_93-1)

[Seven Steps to Performance-Based Acquisition](https://www.acquisition.gov/seven_steps/introduction.html)

Barton, C. (2012), From SOW to SOO (PWS, Too): An Overview of Performance-Based Contracting, Contract Management, November 2012, PP 62-73

Morgan, C. (2013), Best Practices of Developing Performance-Based Acquisitions to Save the U.S. Federal Government Money, Journal of Contract Management, Summer 2013, pp 77-86

Gilliland, K.C., (2014), Recompeting a Services Contract: Common Issues in Dealing with an Incumbent, Contract Management, July 2014, pp 88-95

[Sample Quality Assurance Surveillance Plan (QASP) and Performance Requirements Summary (PRS)](https://www.gsa.gov/graphics/fas/QualityAssuranceSurveillancePlan.doc)

**APTAC Related Material**

John Allen, Fringe Benefit Group, and Chris Tromly, National Fringe Benefits presentation [Conf F12 - Understanding Davis-Bacon Act and Service Contract Act (SCA)](http://aptac.mymemberfuse.com/resources2/view/profile/id/18990), November 5, 2012

**References**

**1**  Rendon, R.G., Apte, U.M., and Apte, A., (2012) Services Acquisition in the DoD: A Comparison of Management Practices in the Army, Navy, and Air Force, ARJ, January 2012, Vol. 19 No. 1: 003 — 032, pp 4

**2** Annual Review of Government Contracting 2015 Edition, National Contract Management Association (NCMA) and Bloomberg Government, pp 10

**3** FAR 37.000 – Scope of FAR Part 37 Service Contracting

**4** FAR 37.102 – Policy

5 [Office of Management and Budget Circular A-76 Performance of Commercial Activities](https://obamawhitehouse.archives.gov/omb/circulars_a076_a76_incl_tech_correction/) dated May 29, 2003

6 FAR 2.101 – Definitions

7 FAR 37.104 -- Personal Services Contracts

8 Gilliland, Kenneth C., “Recompeting a Services Contract: Common Issues in Dealing with an Incumbent”, Contract Management, July 2014, pp 88-95

9 [Seven Steps to Performance-Based Acquisition](https://www.acquisition.gov/seven_steps/introduction.html)

10 FAR 16.402-4 -- Structuring Multiple-Incentive Contracts

11 [Benefits of Performance-Based Acquisition](https://www.acquisition.gov/seven_steps/introduction.html#benefits)

**Keywords**

Services Acquisition, Services Contracting, Performance-Based Contracting (PBC), Performance-Based Services Acquisition (PBSA), Personal Services Contract, Nonpersonal Services Contract, inherently governmental function, Organizational Conflicts of Interest (OCI), Service Contract Labor Standards, OMB Circular A-76, Performance of Commercial Activities, advisory and assistance services, DOL Wage Determinations, Service Contract Act (SCA), Davis Bacon Act (DBA), prevailing wages, benefits, certified payroll, Statement of Objectives (SOO), Performance Work Statement (PWS), Performance Requirements Summary (PRS), Acceptable Quality Level (AQL), Quality Assurance Surveillance Plan (QASP), Quality Assurance Plan (QAP), Quality Control Plan (QCP)