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¶ 11 PERFORMANCE WORK STATEMENTS: The Policymakers' Monster—Where Is Our Theseus?

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Sooner or later, someone asks: What is the difference between a *performance work statement* (PWS) and a *statement of work* (SOW)? Good question. According to Federal Acquisition Regulation 2.101: “*Performance Work Statement (PWS)* means a statement of work for performance-based acquisitions that describes the required results in clear, specific and objective terms with measurable outcomes.” And see FAR 37.602:

37.602 Performance work statement

(a) A Performance work statement (PWS) may be prepared by the Government or result from a Statement of objectives (SOO) prepared by the Government where the offeror proposes the PWS.

(b) Agencies shall, to the maximum extent practicable—

(1) Describe the work in terms of the required results rather than either “how” the work is to be accomplished or the number of hours to be provided (see [FAR] 11.002(a)(2) and 11.101);

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

(3) 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.

So, a *performance work statement* is a kind of *statement of work*, one that describes service *results* in objective terms with *measurable standards*. Presumably, plain old statements of work do not describe results, or do not describe them in measurable terms. So, there it is—which prompts four questions: What is a service? What kind of thing is a service result? What do you describe when you describe a service result? What does “measurable” mean?

Origin Of The Performance Work Statement—Air Force Regulation 400-28 (1979)

The term *performance work statement* was introduced to the world of Government contracting 39 years ago by Air Force Regulation (AFR) 400-28, *Base Level Service Contracts*, dated 26 September 1979, Change 1, dated 13 April 1982. The original version of AFR 400-28 had used the term *state-*

ment of work, which it defined as: “A document that describes, accurately, the essential and technical requirements for items, materials, or services, including the standards used to determine whether the requirements have been met.” Change 1 replaced *statement of work* with *performance work statement*, but used the same definition. Chapter 3 of AFR 400-28 was originally entitled “Writing the Statement of Work.” Change 1 replaced that title with “Writing the Performance Work Statement,” but did not change the content of the chapter.

AFR 400-28 applied to requirements for base operations and maintenance (O&M) services contracts valued in excess of \$25,000. The Air Force was increasing its reliance on service contractors in the 1970s. Air Force personnel performing O&M work had to comply with extensive and detailed Air Force regulations and technical manuals. Base procurement offices writing contracts for O&M services specified them by incorporating those regulations and technical manuals into statements of work by reference. But that led to conflicts when contractors found simpler, less costly, and better-adapted ways to get the job done. Their Air Force customers often reacted by demanding strict compliance with the regulations and manuals, regardless of whether it made business sense to do so.

The regulation sought to replace incorporation by reference by applying systems analysis and manufacturing quality assurance methods to services. It prescribed (1) a systematic process of service requirements analysis, (2) specification of “output” instead of process, (3) specification of measurable standards for output, (4) random sample inspection by attributes, and (5) payment based on inspection results. Contracting Officers were to accomplish all that by writing contracts that included *performance work statements*, which were to include *performance requirements summaries* (PRS) and nonperformance price deduction percentages, and by developing quality surveillance checklists and *quality assurance surveillance plans* (QASPs). Section 1-4 of the regulation, “Air Force Policy,” stated:

- a. The performance work statement (PWS) for a service contract includes the standards of performance and acceptable levels of quality.
- b. Quality control [as distinct from quality *assurance*] is a contractor responsibility.
- c. A PWS must not contain detailed Air Force procedures unless absolutely necessary.
- d. References to Air Force directives in the PWS should be held to a minimum.

The regulation's guiding spirit was classical transactional contracting—*sharp in by clear agreement; sharp out by clear performance*—but it shifted the focus of contract specification and inspection from process to “output.”

AFR 400-28 defined *service* as: “A job performed to the standard and within the acceptable quality level. The contractor must do the specific job, meet the standard, and meet the acceptable quality level before one can say that performance has been acceptable and that he or she should be paid.” It defined *output* as: “The amount of something produced by a system or process during a given span of time.” It defined *standard* as; “An acknowledged measure of comparison.” It defined *acceptable quality level (AQL)* as:

The maximum percent defective (or the maximum number of defects per hundred units) that, for purposes of random sampling, may occur before the Government will effect the price computation system in accordance with the Performance Requirements Summary and the Inspection of Services Clause. When the method of surveillance is other than random sampling, the AQL is defined as the number of

defectives or maximum percentage defective in the lot that may occur before the Government will effect the price computation system in accordance with the Performance Requirements Summary and the Inspection of Services Clause.

So a *service* was a job; an *output* was a quantity of “something”; a *standard* was a measure of something; and an *acceptable quality level* was an acceptable number of defects. Those definitions strike us today as somewhat obscure and a little strange, just as they struck me in 1979, when I was an Air Force CO.

In October 1980, at the suggestion of Darleen Druyun, an Air Force official doing a stint at the Office of Federal Procurement Policy as a deputy associate administrator, the OFPP adopted the still-new AFR 400-28 as *Office of Federal Procurement Policy Pamphlet No. 4, Supplement 2 to OMB Circular No. A-76, A Guide for Writing and Administering Performance Statements of Work for Service Contracts*. The OFPP's purpose was to provide guidance for the development of statements of work for use in Office of Management and Budget Circular A-76 “contracting out” cost comparisons. OFPP Pamphlet No. 4 was almost identical to AFR 400-28 except for edits that replaced references to the Air Force and to regulations with “the government” and “document.”

Government personnel struggled throughout the 1980s to apply the hazy ideas and methods described in AFR 400-28 and OFPP Pamphlet No. 4 and to develop performance work statements. See Tomlinson, *Performance Works Statement for Air Terminal Services* (Thesis, Naval Postgraduate School, Dec.1985); Paddock, *Performance Work Statements: Significant Problems in the Preparation Process* (Thesis, Naval Postgraduate School, June 1987); Hamlin, *Privatization of Aircraft Maintenance: Maximizing Contract Effectiveness* (Air War College, 1990).

The notion of specifying service outputs instead of processes was, and still is, intuitively appealing. There might be real benefits if it could be done. But Government personnel struggled to write performance work statements for four reasons: *first*, the policymakers did not have a clear concept of a service; *second*, they did not have a clear concept of output and standard; *third*, the acquisition workforce did not have the education, training, and cultural orientation necessary for requirements analysis and specification of service output; and *fourth*, many service outputs are intangible, and while it is relatively easy to know what you like or dislike about an intangible after you have gotten it, it can be very difficult to specify what you will like or dislike about it in advance.

The Air Force canceled AFR 400-28 in 1994, replacing it with an updated version designated Air Force Manual (AFMAN) 64-108, *Service Contracts*, dated 4 November 1994. The major change was that it applied to “all service contracts, not just base level service contracts.” AFMAN 64-108 was canceled in 1999, replaced by Air Force Instruction (AFI) 63-124, *Performance-Based Service Contracts*, dated 1 April 1999, from which the systems analysis method of requirements analysis and the detailed PWS content prescriptions had been deleted. The OFPP rescinded its Pamphlet No. 4 in 1995, replacing it with a stripped down “best practices” guide in 1998 and then with a website, eventually abandoning, like the Air Force, the demanding “systems” approach and detailed PWS content prescriptions. But neither the Air Force nor the OFPP abandoned the policy that agencies must contract for services by specifying outputs instead of processes and procedures.

OFPP Policy Letter 91-2, Service Contracting

The OFPP issued Policy Letter No, 91-2, *Service Contracting*, on April 15, 1991, 56 Fed. Reg. 15110. It defined *services* as “the performance of identifiable tasks rather than the delivery of an

end item of supply,” and *performance-based contracting* as “structuring all aspects of an acquisition around the purpose of the work to be performed as opposed to either the manner by which the work is to be performed or broad and imprecise statements of work.” (Another obscure definition.) The policy letter required that agencies use performance-based contracting methods to the maximum extent practicable when acquiring services and specify services in terms of the required output instead of the process or procedure to be used. It also directed the Federal Acquisition Regulatory Council to issue implementing FAR regulations within 120 days of the policy letter's May 15, 1991 effective date. They did it six years later, in Federal Acquisition Circular 97-01, Item VII, 62 Fed. Reg. 44813 (Aug. 22, 1997). The policy letter asserted that performance-based contracting “should” improve the quality and prices of services. We do not know on what bases, other than theoretical or fanciful, OFPP developed such expectations.

The FAR implementation created a new section, FAR 37.602-1, “Statements of work,” which provided as follows:

37.602-1 Statements of work.

(a) Generally, statements of work shall define requirements 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 [FAR] 11.105). In the case of task order contracts, the statement of work for the basic contract need only define the scope of the overall contract (see [FAR] 16.504(a)(4)(iii)). The statement of work for each task issued under a task order contract shall comply with paragraph (b) of this subsection. To achieve the maximum benefits of performance-based contracting, task order contracts should be awarded on a multiple award basis (see [FAR] 16.504(c) and 16.505(b)).

(b) When preparing statements of work, agencies shall, to the maximum extent practicable—

(1) 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 (see [FAR] 11.002(a)(2) and 11.101);

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

(3) 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

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

The challenge lay in specifying service *output* and *measurable standards*. You must have a clear concept of something in order to specify it, and the policymakers did not have, and still do not have, a clear concept of either.

Thinking Things Through

What kind of thing is a service *output*? You need a clear concept of *service* to answer that question. The OFPP's policy letter defined *services* as “the performance of identifiable tasks rather than the delivery of an end item of supply.” That definition reflected no original or critical thinking, despite the fact that by 1991 there was extensive body of scholarly literature about the nature of services. In 1977, 14 years before issuance of the policy letter, economist T. Peter Hill wrote what is still the most widely respected definition of a service: “A service may be defined as a change in the condition of a person, or of a good belonging to some economic unit, which is brought about as the result of the activity of some other economic unit, with the prior agreement of the former person or economic

unit.” See Hill, *On Goods and Services*, 23 REV. INCOME & WEALTH 315 (Dec. 1977). See also Office of Management and Budget and U.S. Department of Commerce, *Economic Classification Policy Committee; Initiative To Create a Product Classification System, Phase I: Exploratory Effort To Classify Service Products*, 64 Fed. Reg. 18984, 18986 (Apr. 16, 1999): “Conceptual Definition of a Service Product: A service is a change in the condition of a person, or a good belonging to some economic entity, brought about as the result of the activity of some other economic entity, with the approval of the first person or economic entity.” Thus, a service can be understood as a change process, a service contractor as a change agent; and a service output as a change produced. (Even “maintenance” entails making changes.) Hill's definition of services strikes us as having more explanatory power than the definition in the policy letter and as being a better “north star” for requirements analysts.

Acquisition ideas, theories, and policies should be grounded in research, evidence, argument, and critical thinking. Acquisition policymakers should keep up with the pace of thought in their own and related fields. They should be thought-readers, thought-producers, and thought-leaders. Why, 43 years after Hill's article and many others, does FAR 37.101 *still* mindlessly and circularly define *service contract* as “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”? Is it just a matter of being close enough for Government work?

Suppose that you define a service as work done by a service provider in order to change an existing *state of affairs* pertaining to a person or thing that is of concern to a service recipient. (A car will not start; the owner wants a mechanic to repair it. A child has not been inoculated against measles; the parent wants a doctor to inoculate it. An agency's software has become outdated; the agency's chief information officer wants a contractor to update it.) In such cases, the service result will be a new state of affairs. (The car will start. The child is inoculated. The agency's software is up to date.) Now define a state of affairs as a complex of environment, conditions, and circumstances attributable to or encompassing the person or thing that is the object of the service (the car, the child, the software). Thus, in order to specify a service you must describe (1) its object, (2) the current state of affairs pertaining to the object, and (3) the state that you want to pertain, which is the result that you want. That analysis may help clear up the notions of *service* and *result*, but it does not necessarily make specification any easier. If you are hiring a contractor to provide service in the future, you must anticipate and predict states of affairs. But it can be difficult to specify a long-term complex service that involves dynamic states of affairs occurring at various instances over an extended period of time. States of the future in such cases can be unpredictable, and specification of something that is not immediately present in the mind is a notoriously difficult task.

The Present State Of Performance Work Statements

Almost every request for proposals for services that we see at the Governmentwide Point of Entry (beta.SAM.gov) contains a document labeled “performance work statement.” It is easy to find such performance work statements in requests for proposals. Go to beta.SAM.gov and search contracting opportunities for “performance work statement.” They will pop up by the dozen, like worms in a lawn. We did that and downloaded some samples. Here are four.

1. A Department of Housing and Urban Development 35-page PWS for loan underwriting. The performance standard of the task of underwriting read as follows:

Performance Standards

STD: Perform loan due diligence and underwriting.

AQL: within thirty (30) calendar days.

2. A Department of Energy 14-page draft PWS for development of a natural resource damage assessment and restoration plan for the Los Alamos National Laboratory (LANL). Task 2.1.11 read as follows:

The Contractor shall quantify the total volume of injured groundwater and the associated lost services. The Contractor shall estimate the probable migration of existing groundwater contaminant plumes, both on and off site, under a reasonable range of likely remedial scenarios. The Contractor shall facilitate agreement among the Trustees on a method and one or more thresholds for calculating adverse impacts to natural resources and associated lost services by releases at or from LANL.

We found no performance standard of any kind for that task or for any other.

3. A Navy 8-page PWS for Musician/Director for Catholic Worship at the Washington Navy Yard. Task 7.6 was:

Provide piano accompaniment at Sunday Mass, as well as musical direction and/or piano accompaniment for Holy Days: Ash Wednesday, Holy Thursday, Good Friday, Holy Saturday, Ascension, Assumption, Immaculate Conception, and Christmas Eve.

There were no performance standards.

4. An Air Force 13-page PWS for “Calibration, Inspection, & Repair Services for Liquid Particle Counting System,” which described the work as follows:

The contractor shall perform all calibration and repairs on the LPCS equipment in accordance with the Federal Standard 791D specifications and requirements, and shall ensure the equipment functions per Federal Standard 791D specifications upon completion of calibrations and repairs. According to Federal Standard 791D, “Prior to daily analysis, run a sample of filtered solvent to verify particle cleanliness level.

We looked up, downloaded, and examined FED-STD-791D, November 6, 2007. It is a 460-page detailed procedural document.

We looked at other PWSs as well, but the above examples are all that space permit and are representative of the majority of PWSs we found. Do not take our word for it. Look yourself. Those examples are what pass for performance work statements 40 years after the publication of AFR 400-28 and OFPP Pamphlet No.4, 29 years after the publication of OFPP Policy Letter 91-2, and 22 years after implementation of the OFPP policy letter by FAC 97-01.

What Happened? What Should Happen Now?

From 1979 to the present day OFPP and agency acquisition policymakers have devoted a lot of time and effort to leading federal agencies into a labyrinth of half-baked thinking and service contracting policy confusion, at the heart of which they placed the idea of the performance work statement, a policy minotaur. They wanted agencies to write transactional contracts for the performance of long-term, multi-function/multi-task services. Such services require integration of contractor and Government organizations and tend to be relational in nature, not transactional. Think of marriages and mergers.

Stuck in a *sharp in by clear agreement, sharp out by clear performance* transactional mindset about contracts, the policymakers have wanted agencies to specify, before contract award, measurable results in clear, specific, and objective terms. That was something that anyone who had any ex-

perience with such contracts knew, or should have known, could not easily be done, if at all, which is why contracting agencies specify processes instead of results. It is a practical adaptation to reality. The OFPP and the other advocates of performance-based contracting did not understand services, did not meditate on the distinction between transactions and relations, and did not put much thought into the problem.

Instead of trying to specify results for long term and complex services and price them in advance as if they were standard transactions, perhaps it would be easier and wiser to contract on the basis of partnership protocols for specification and pricing on an ad hoc basis during contract performance and for jointly managing to a budget. Of course, that would call for a new way of thinking about the nature of contracts, a way other than *sharp in by clear agreement, sharp out by clear performance*. In short, the best way to meet the challenges of long-term and complex services acquisition might be to contract relationally rather than transactionally. See Snyder et al., *Relational Contracting in a Digital Age*, 11 TEX. WESLEYAN L. REV. 675 (2005); and Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974). A relational contract for a service might stipulate only a scope of work and a protocol agreement. Contractor selection might be based on offeror qualifications, as it is for architect-engineer services, instead of proposal essays and price competition. See Edwards and Nash, *A Proposal for a New Approach to Performance-Based Services Acquisition*, DEF. ACQUISITION REV. J. 353 (Sept. 2007). As a practical matter, we see some of that now in task order contracting, but without conscious recognition and embrace of its relational nature.

Summary And Conclusion

AFR 400-28 and OFPP Pamphlet No. 4 were attempts to apply systems thinking and manufacturing quality assurance concepts to the problem of specifying operations and maintenance support services. Such contracts required contractors to repetitively perform more or less standard tasks, like cutting grass, mopping floors, and doing laundry. That might explain the definition of “output” as “a quantity of something” and the requirements for performance standards, random sample inspection by attributes, acceptable quality levels, and quality assurance surveillance plans, ideas and things you would expect to find in a widget factory. Those attempts morphed into the vague notion of “performance-based contracting” that was promoted by the OFPP in its Policy Letter 91-2 and subsequent pronouncements and ballyhoo during the 1990s. And to think that it all started with the conjuring of an imaginary thing—the performance work statement, the minotaur in the maze of confusion.

A 2002 report, Government Accounting Office, GAO-02-1049, *Contract Management: Guidance Needed for Using Performance-Based Service Contracting* (Sept. 23, 2002), stated:

Though our review [of what agencies called performance-based contracts] focused on a small sample of contracts, it raises concern as to whether agencies have a good understanding of performance-based contracting and how to take full advantage of it. Some agency officials said that they would like better guidance on performance-based contracting, particularly with respect as to how it can be applied in more complex situations. Agency officials also said that there is a need for better criteria on which contracts should be labeled as performance based.

The Office of Federal Procurement Policy recognizes that this is a problem....

The guidance was inadequate because the concept was unsound.

Lingering policy and guidance about what we now call performance-based acquisition is mainly

refuse from the Clinton Administration's campaign to “reinvent” Government during the 1990s. References to that guidance can still be found in the “stacks” of organizations like the Defense Acquisition University (DAU), but little remains of the specific instructions that were contained in AFR 400-28/OFPP No. 4. You can still find a version of the once renowned “Seven Steps to Performance-Based Services Acquisition” material at a DAU website: <https://www.dau.edu/tools/Documents/SAM/home.html>.

Some of the COs and contract specialists that we talk to sense that there is something phony about the notion of performance work statements and performance-based contracting, and it troubles them. Others simply go along with the program. We have been told that DAU intends to update and improve the guidance on preparing performance work statements. We think that would be a terrible mistake. It is time to put an end to a 40-year policy fraud. The OFPP should slay its minotaur. Maybe if President Biden retains Michael Wooten as OFPP Administrator he will be our Theseus, kill off performance work statements once and for all, and launch a new era of thinking and policy about service contracting. *VJE*