

(8/25/2009) Performance Incentives and Schedule Task Orders

Can Performance Incentives Be Included on Schedule Task Orders?

Can Schedule Task Orders Be of the "Fixed-Price Incentive" Type as Described in the FAR?

Multiple Award Schedule contracts are evaluated and awarded as commercial-type (FAR Part 12) acquisitions with all the clauses required for commercial contracts. As commercial Schedule contracts, their orders can be of any type permitted for commercial acquisition and not prohibited by the Schedule contract. (For example, Cost-Type contracts are not one of the permitted commercial Part 12 acquisition types. You cannot do those tasks under the Schedule contracts.)

1. What does the FAR say?

FAR 12.207 says there are four, and only four, specified permissible contract types for the acquisition of commercial items. This means there are no more than those four types of permissible Schedule task orders:

Firm Fixed Price (FFP)
Fixed Price with Economic Price Adjustment (FP w/ EPA)
Time and Material (T&M)
Labor Hour (LH)

In addition, FAR 12.207(d) says: "(d) The contract types authorized by this subpart may be used in conjunction with an award fee and performance or delivery incentives when the award fee or incentive is based solely on factors other than cost (see 16.202-1 and 16.203-1)."

Note that the referenced 16.202-1 is the description of "Firm-Fixed Price Contracts" and includes: "The contracting officer may use a firm-fixed-price contract in conjunction with an award-fee incentive (see 16.404) and performance or delivery incentives (see 16.402-2 and 16.402-3) when the award fee or incentive is based solely on factors other than cost. The contract type remains firm-fixed-price when used with these incentives." Notice that this doesn't specifically extend to the FAR 16.204 Fixed-Price Incentive (FPI) contracts.

The referenced 16.203-1 is the description of "Fixed-Price Contracts with Economic Price Adjustment" and includes: "(b) The contracting officer may use a fixed-price contract with economic price adjustment in conjunction with an award-fee incentive (see 16.404) and performance or delivery incentives (see 16.402-2 and 16.402-3) when the

award fee or incentive is based solely on factors other than cost. The contract type remains fixed-price with economic price adjustment when used with these incentives."

FAR 12.207(e) states: "(e) Use of any contract type other than those authorized by this subpart to acquire commercial items is prohibited."

2. What do the Schedule contracts say?

Performance incentives are handled in the same way regardless of Schedule. This means that Schedule 874 MOBIS handles the issue of performance incentives just like Schedule 871 PES or Schedule 70 IT. The Schedule contracts include the identical following clause, which does not contradict the FAR:

I-FSS-60 PERFORMANCE INCENTIVES (APR 2000)

(a) Performance incentives may be agreed upon between the contractor and the ordering office on individual orders or Blanket Purchase Agreements under this contract in accordance with this clause.

(b) The ordering office must establish a maximum performance incentive price for these services and/or total solutions, on individual orders or Blanket Purchase Agreements.

(c) Incentives should be designed to relate results achieved by the contractor to specified targets. To the maximum extent practicable, ordering offices shall consider establishing incentives where performance is critical to the agency's mission and incentives are likely to motivate the contractor. Incentives shall be based on objectively measurable tasks.

3. Is a Firm Fixed Price task order including performance incentives a permissible type of Schedule task order?

Yes. The PERFORMANCE INCENTIVES contract clause permits them and the FAR authorizes those performance incentives as long as they are based on factors other than cost.

This means that you can incentivize Schedule contractors for meeting/exceeding measured and evaluated performance measures tied to your PWS requirements.

(Similarly, there isn't anything to prohibit FP w/EPA, T&M, or LH task orders with similar performance incentives based on factors other than cost.)

4. Is a "Fixed-Price Incentive"(FPI)-type order permissible under the Schedules program?

Not if those performance incentives are based on any factor tied to cost. By definition (FAR 16.204), contracts in the FPI family are based on adjusting profit and establishing the final contract price based upon a formula relating final negotiated cost to total target

cost. FAR 16.402-1 notes that "(a) Most incentive contracts include only cost incentives...No incentive contract may provide for other incentives without also providing a cost incentive (or constraint)." A task order meeting the FPI-type definition, which includes a cost-based incentive in order to be called FPI, is not an appropriate use of the GSA Multiple Award Schedules. An FPI order (with a cost-based performance incentive factor, by definition) is not a permitted type of contract for the acquisition of commercial services of the type found on the Schedule contracts.

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