




# THE ADVISOR

*Timely legal and business information for government contractors.*

Fall 2000

VOLUME 2 ■ ISSUE 5



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Our attorneys guide clients through the maze of regulations to maximize a company's ability to secure government contracts. If you would like more information on this issue or any other government contracts issue, please contact us.

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## Innovations in Federal Procurement: Award Term Contracts

As part of their ongoing efforts to more closely emulate the way business is done in the private sector, federal agencies have recently introduced several innovative methodologies to the federal procurement process. Use of the Internet, electronic signatures, and oral proposals in procurement decision-making are examples of such new initiatives. So, too, is the use of reverse auctions – online price competitions where competing vendors submit progressively lower prices until an award is made.

Another groundbreaking concept that is currently being explored is the award term contract. Closely related to the award fee contract, the award term contract rewards exceptional contractors with term extensions of existing contracts based upon their assessed level of performance. It also penalizes poor performance by shortening contract terms.

Like award fee contracts, award term contracts are intended to motivate and reward high-quality contract performance. They will be used primarily in service contracting, although their utility could be extended to supply contracts as well. Award term contracts are suited not only for cost-plus-incentive fee contracts, but also for firm fixed-price and fixed-price incentive contracts. Evaluation of award term

contracts would be analogous to the award fee evaluation process, except that favorable performance evaluations would result in extended contract terms rather than additional fees.

Just now in its incipient stages in the federal arena, the award term contract is currently being explored by NASA in a pilot program. In instituting the pilot program, NASA recognized that a prime motivator of companies in the commercial sector is "a continuing business relationship." The NASA pilot program establishes a core period of performance, typically five years, during which performance is evaluated. Under NASA's scheme, contractors will earn nine months of additional performance for every year in which their performance is rated "excellent." They will lose nine months for every year in which performance falls below the "good" or "acceptable" range, although the contracts will contain a guaranteed minimum period of performance, usually three and a half years. For purposes of the pilot program, the total potential period of performance will typically be limited to ten years.

The first award term contract under NASA's pilot program was competitively awarded as an 8(a) small business set-aside by

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NASA's Glenn Research Center in Cleveland for test and research support services. Other NASA centers have proposed and approved acquisitions under the pilot program or are currently assessing their requirements to plan for future award term acquisitions.

Other agencies are following NASA's lead. A recent search of the Commerce Business Daily revealed no less than nine current solicitations involving award term contracts. Among these were the following:

➤ A Navy Space and Naval Warfare Systems Command engineering support contract with provision for a base five-year contract with the opportunity to increase to a maximum term of fifteen years with excellent performance. Poor performance could decrease the contract term to two years.

➤ A proposed contract of one year, plus five option years, plus four award option years, for an Air Force operation and maintenance contract for target ranges. Industry comment on this proposed RFP structure is being sought.

➤ A personal property shipping office management and operation contract to be awarded by the Army (Fort Drum, New York) with a base term of one year plus four option years, and an award term incentive that could add from one to ten years to the contract term based on performance.

Although not all agencies are currently using award term con-

tracts, it is anticipated that their use will increase in the next few years. Contractors interested in exploring the possibility of an award term contract should raise the issue in responding to draft RFPs or in other conversations with agency contracting representatives. Award term contracts would provide several benefits. Most obviously, they could result in significantly longer contracts for high-performing contractors. Those contractors with good working relationships with their government clients should be particularly interested in exploring this form of incentive. It should also be noted that extensions to existing contracts would be matters of contract administration not reviewable by GAO or any other bid protest forum in the way that a re-compete of an existing contract is reviewed.

Award term contracts are a new innovative procurement concept. However, many unresolved issues remain. For example, as with award fee determinations, the government's assessment of contractor performance likely would not be subject to legal challenge. Another uncertainty relates to the manner in which contractors will bid on such contracts. Some agencies may expect the contractor's price to remain the same throughout the entire contract term. Others may price award term years in the same manner as options. This would be a particular concern with longer-term contracts.

Another potential problem is implicated by statutory restrictions

on the length of certain types of contracts. For example, contracts subject to the Service Contract Act and certain task order contracts may not exceed five years absent specific authority to the contrary. 41 U.S.C. §§353(d), 253i(b). Such restrictions could make award term contracts less attractive in some instances, as agencies may be less inclined to use them if it means they will have to reconduct procurements more frequently in the event of less than stellar performance. In response to the criticisms, award term contracts, even for short periods of time, could be an enticement to agencies looking to jettison poor performers in the shorter-than-normal contract period without the administrative burden of a termination for default. Contracts could also be structured to avoid these perils. Contracts could be two years in length, for example, with the opportunity to extend for an additional three years with good performance, or award term extensions could be structured as options.

As with any new contracting technique, award term contracting should be approached cautiously. It has the potential to be a tremendous tool for federal agencies to encourage superior performance and a powerful instrument for contractors to further their relationships with government customers without undergoing frequent competitions.

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