MEMORANDUM FOR BUREAU CHIEF PROCUREMENT OFFICERS

FROM: IRIS B. COOPER, SENIOR PROCUREMENT EXECUTIVE, OFFICE OF THE PROCUREMENT EXECUTIVE

SUBJECT: Incentive Contracts: Requirements for using an Award Term incentive contract

1. PURPOSE: This Acquisition Procedures Update (APU) is issued to amend the Department of Treasury Acquisition Procedure (DTAP) October 2016 edition version 1.0 for the purposes of supplementing FAR subpart 16.4, Incentive Contracts by establishing acquisition policy and procedure on the use of Award Term incentive contracts.

2. EFFECTIVE DATE: May 30, 2017

3. EXPIRATION DATE: Until otherwise canceled, superseded or included within a future edition of the DTAP.

4. BACKGROUND: Award terms are a form of incentive. Award terms are non-monetary and offer a contractor an opportunity to be awarded additional periods of performance rather than additional profit or fee as a reward for achieving prescribed performance measures. As such, depending on the market-place or circumstances and the requirement itself, the use of an award term incentive might be the best tool for motivating contractor performance towards achieving the desired outcome. Award term incentives work best when: (i) a contractor’s performance can be measured objectively; (ii) a performance-based approach can improve overall results for the agency; and the agency wants to drive not just acceptable performance, but superior performance. This is an important point in that Award terms are distinctly different than Options (see FAR subpart 17.2). A contractor is not eligible to be awarded an Award term just because they met contract requirements (i.e. acceptable performance\(^1\)) instead they have to meet defined criteria that demonstrate superior performance during the prescribed Award term evaluation period.

The Federal Government has used Award term incentives since the late 1990s. Yet, the Federal Acquisition Regulation (FAR) has yet to provide any coverage on Award terms and their use. As a result, a number of agencies have proceeded to establish such coverage within their FAR supplement (e.g. NASA, Dept. of Energy and EPA). Accordingly, in order to ensure standard and consistent application and use of this type of incentive across Treasury the SPE has determined that the issuance of this amendment\(^2\) to the DTAP is necessary.

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\(^1\) There are instance were the Government has been found to have exercised an option based on poor or marginal performance simply to continue services until such time a new award is made.

\(^2\) In development of this APU, OPE reviewed the aforementioned agencies’ award term policies and procedures. The review identified several consistencies across these agencies along with best practices which have been captured. OPE has also developed an Award Term Guide to further assist contracting personnel in understanding the use of this type of incentive.
5. Department of the Treasury Acquisition Procedures: The DTAP is amended as follows:

   A. ADD to section 1004.803 the following:

   (b)(70) Award fee or award term plans and documentation supporting the determination to award an award fee or award term.”

   B. REVISE subsection 1004.7102-1 as follows:

   FROM: (c) Other reviews. Legal counsel assistance should be obtained whenever the action is considered unusual or complex.

   TO: (c) Other reviews.

   (1) Legal counsel review is required for all acquisitions regardless of dollar value that include award fee or award term as an incentive.

   (2) Legal counsel assistance should be obtained whenever the action is considered unusual or complex.

   C. ADD to subpart 1016.4 the following:

   1016.470 Award term incentives.

   The use of this type of incentive contract is not suitable for every acquisition, but for certain acquisitions where both the Government and contractor benefit from the use of this type of incentive and the incentive successfully motivates the contractor to exceed Government’s expectations throughout the performance of the contract. Refer to OPE’s site for Treasury’s Award Term Incentive Guide and a sample award term plan for additional guidance and resources to support the use of this type of incentive.

   1016.470-1 Definitions.

   As used in this section—

   “Award term contract” is a non-monetary type of incentive contract that enables a contractor to become eligible for one or more award terms under a contract by achieving prescribed performance objectives and measures (e.g., acceptable quality levels (AQL)) which demonstrate contractor performance as having exceeded Government expectations during an established evaluation period.

   “Award term” is an additional period of performance defined in the contract that is available for possible award to a contractor based on the achievement of prescribed performance objectives and measures which demonstrated the contractor’s performance as having exceeded Government expectations during an established evaluation period.

   1016.470-2 General.

   (a) Applicability. A CO may use an award term contract for performance-based acquisitions where—

   (1) The quality and level of contractor performance is of high importance to the Government (i.e., specific mission needs or defined program risks such as cost, schedule and technical);

   (2) There is a direct benefit to the Government from contractor performance that exceeds Government expectations throughout contract performance (see FAR subpart 16.4).
The benefit to the Government must offset the administrative costs associated with monitoring and assessing contractor performance, as well as performing other tasks associated with using this type of incentive;

(3) The Government can establish clearly defined performance objectives and measures for evaluating contractor performance that are used to support the Government’s determination to award or not to award or cancel an award term; and

(4) The Government expects a continuing and reoccurring need for the services over a long period of time.

(b) Limitations.

(1) Award term contracts are only to be used for acquisitions of services that use performance based acquisition methods (see FAR subpart 37.6);

(2) An award term may not exceed twelve months;

(3) Eligibility to be awarded an award term is contingent on—

(i) Contractor performance exceeding the Government’s expectations as defined in the award term plan. Meeting the terms of the contract (e.g. acceptable or satisfactory performance) is not a sufficient justification for award of an award term;

(ii) The Government having a continued need for the service;

(iii) Funds being available;

(iv) The contractor being not listed in the System for Award Management (SAM) Exclusions (see FAR 9.405-1); and

(v) The award term being separately priced in the contract and was prior to award of the contract evaluated and considered by the Government during the source selection process.

(4) Award terms cannot be rolled over (i.e. the Government cannot provide an opportunity to make up award terms that were available to be awarded, but were not).

(c) Award term plans shall include at a minimum—

(1) Defined performance objectives and measures that provide the Government sufficient detail in order to evaluate contractor performance during an evaluation period in order to support the award term determination (see 1016.470-3(b)(2)(ii)).

(i) If the contract contains a quality assurance surveillance plan (QASP) (see FAR 37.604) that includes some of the same types of performance objectives and measures used in the award term plan, the award term plan must clearly explain the different purpose for which the objectives and measurers are being used in this plan.

(ii) Performance objectives and measures may differ between evaluation periods in order to support differences between requirements or services to be performed by the contractor during contract performance (e.g. there are different requirements between transition period and base period).

(2) The frequency and process for how the Government will monitor and assess contractor performance against the defined performance objectives and measures that, together with the limitations set forth in paragraph (b)(3) above, will be used to determine whether or not an award term has been earned during the prescribed evaluation period.

(3) Details surrounding the evaluation periods, evaluation schedules (e.g., 30 days after the end of the evaluation period), the total number of award terms available, and length of each of award term stated in months;

(4) A clear description of roles and responsibilities of the Government (e.g. who will be the award term determination official) and the contractor, if any. Divisions of responsibilities must mitigate the potential for conflicts of interest wherein the same Government official performs multiple roles; and
May include the opportunity for the contractor to provide the Government a self-assessment of its performance against the defined performance objectives and measures during a prescribed evaluation period.

1016.470-3 Use of award terms.

(a) General. Award terms may be used in conjunction with options (see FAR subpart 17.2) and can be structured to allow award terms to be earned during the base period of performance and each option period.

(b) Pre-award.

(1) Prior to use of this type of incentive the acquisition team shall—

(i) Conduct market research to—

(A) Demonstrate that the use of this type of incentive is suitable for the acquisition;

(B) Identify performance objectives and measures that are relevant, pertinent and meaningful in successfully motivating a contractor to exceed the Government’s expectations throughout the period of performance of the contract; and

(C) Determine if there is a reasonable expectation that meaningful competition, pricing or performance will be obtained.

(ii) Ensure that the use of such an incentive directly supports mission needs or defined program risks (e.g., cost, schedule, and technical).

(2) If the determination is to use this type of incentive, then the CO shall—

(i) Document the rationale for use of this type of incentive within the acquisition plan (see FAR 7.105(b)(3)).

(ii) Develop in coordination with the requiring activity performance objectives and measures that—

(A) Are clearly meaningful, measurable, outcome based and linked to mission needs or defined program risks (e.g., cost, schedule, and technical);

(B) Are relevant, pertinent and meaningful in successfully motivating a contractor to exceed the Government’s expectations throughout the period of performance of the contract;

(C) Provide a clear distinction between the various levels of performance (e.g., unacceptable, acceptable, very good, and exceptional performance) that the Government will assess the contractor during an evaluation period; and

(D) Demonstrate contractor performance that is above and beyond simply meeting contract requirements (e.g. acceptable and satisfactory) thereby support a contractor’s eligibility for award of an award term.

(iii) Structure award terms with consideration to the overall anticipated period of performance of the contract in a manner that provides adequate time for—

(A) Evaluating contractor performance (i.e. evaluation period);

(B) The Government to have sufficient information upon which to adequately evaluate contractor performance according to the terms of the award term plan;

(C) The Government to be able to make a determination based on its evaluation according to the terms of the award term plan in advance of the next period of performance; and

(D) As necessary, revision to the award term plan.

(iv) Develop an award term plan (see 1016.470-2(c) and 1016.470-5).
(3) In addition to conducting market research, a CO may allow offerors to propose or comment on the performance objectives and measures that the Government is proposing to use for the award term incentive as part of the solicitation process.

(c) Post-award.

(1) The award of an award term is effected by a unilateral contract modification issued by the CO.

(2) Award terms may be unilaterally cancelled or not awarded by the Government prior to the start of an award term at no cost to the Government. The CO shall notify the contractor of the Government’s determination and include within the notification the reasons why the award term is being canceled or not awarded. See 1016.470-2(b)(3) for reasons why the Government may cancel or not award an award term. The Government’s decision to cancel or not award an award term may impact the contractor’s ability to earn any remaining award terms based on the terms of the contract as well as the Government’s ability to exercise options, if included in the contract (see paragraph (4) below).

(3) The contractor has the unilateral right to decline the Government’s determination to award an award term. The contractor shall notify the CO of its decision to decline an award term within five days of receipt of the Government’s notification that the contractor is eligible to receive an award term. The contractor’s decision to decline an award term may impact its ability to earn any remaining award terms based on the terms of the contract.

(4) If award terms were used with options and either of the events described in paragraphs (c)(2) and (c)(3) above occur, a CO shall consider the Government’s next steps and the impact, if any, such events have on the Government’s ability to exercise any remaining options (see FAR subpart 17.2) and the various periods of performances described in the contract. For example, the CO may need to modify the contract in order adjust both the contract period performance and period of performance for each remaining award term and option in order to reflect an award term not being exercised. Alternatively, the CO may determine the Government no longer has a need for the requirement therefore the contract can be allowed to expire.

1016.470-4 Postaward responsibilities of the contracting officer.

After a contract containing an award term incentive is awarded, the CO shall—

(a) Conduct a postaward orientation (see FAR subpart 42.5 and subpart 1042.5) to ensure mutual understanding of the incentive. This also includes briefing the award term determination official (ATDO), any other rating officials as well as the contractor of their responsibilities as prescribed by the award term plan;

(b) Administer the contract and ensure compliance with the terms of award term plan (see 1016.470-3(c)). This includes ensuring that documentation provided by the ATDO and any other rating officials contain sufficient information to demonstrate whether the ratings and award term determination is warranted and in accordance with the terms of the award term plan;

(c) Maintain documentation related to the determinations made and other actions taken by the Government and pertinent correspondence regarding this incentive;

(d) Take steps to communicate early and often with the contractor throughout contract performance to avoid potential negative impacts to the Government resulting from poor or declining performance by the contractor, or a contractor’s decision to decline an award term (see 1016.470-3(c)(3)) where the Government still has a need for the services; and

(e) If applicable, revise the award term plan at in advance of the next evaluation period to address changes in the Government’s requirement or performance objective and measures.
(1) Revisions to an award term plan shall not apply to an evaluation period if the revision was executed within thirty (30) days of its start date. In such instance, the revised award term plan shall not take effect until the next evaluation period.

(2) Revisions to an award term plan are not intended to make it easier for a contractor to earn award terms (e.g. making satisfactory performance equate to exceptional performance), but to reflect actual Government changes.

(3) Revisions to an award term plan shall clearly state on the cover page the effective date of the revision, the revision number and general summary of the change.

(4) The CO shall document the file explaining the rationale for the Government’s need to revise the award term plan.

1016.470-5 Contract language.
(a) Insert language similar to what is provided in paragraph (b) below, formatted and revised according to its placement, in all solicitations and resulting contracts where an award term incentive is being used. This language can be placed within the award term plan or elsewhere within the contract.

(b) Language.
Award term incentive.
(a) Definition. As used in this contract;
“Award term” is an additional period of performance defined in the contract that is available for possible award to a contractor based on the achievement of prescribed performance objectives and measures which demonstrated the contractor’s performance as having exceeded Government expectations during an established evaluation period.

(b) General. This contract includes a non-monetary incentive in the form of an award term. This type of incentive enables the Government to extend the performance of the contract by exercising via a unilateral modification to the contract an award term. The Schedule provides the total number of award terms available, the length of each award term and a description of the services to be performed under the award term.

(c) Award term plan. The contract incorporates an award term plan, which establishes how the Government will monitor and assess the Contractor’s performance during the performance of the contract and, together with paragraph (d) below, serves as the basis for the Government’s award term determinations. The award term plan may be revised only by a bilateral modification to the contract.

(d) Performance. Contractor performance will be monitored and assessed by the Government based on the defined performance objectives and measures that are described in the award term plan. These performance objectives and measures provide sufficient detail to demonstrate the performance to be achieved by the Contractor to become eligible for award term. To be eligible for an award term—

1. The Contractor’s performance must demonstrate performance that is above and beyond Government expectations in terms of what is considered acceptable/satisfactory performance under the contract;

2. The Contractor must not be listed in the System for Award Management (SAM) Exclusions;

3. The Government must have funds available;

4. The Government must have a need for the service; and

5. The award term is separately priced in the contract and was prior to award of the contract evaluated and considered by the Government during the source selection process.

(e) Government Rights.
(1) The Government has the unilateral right not to award or to cancel an award term prior to its commencement when—
   (i) The Contractor has failed to achieve the performance objectives and measures for the corresponding evaluation period;
   (ii) The Government does not have funds available for the award term;
   (iii) The Government no longer has a need for the service;
   (iv) The Contractor is listed in the SAM Exclusions; or
   (v) The Government discovers the award term was not prior to award of the contract evaluated and considered by the Government during the source selection process.

(2) The Contracting Officer will notify the Contractor of the Government’s determination not to award or cancel an award term. This notification shall be provided to the Contractor prior to the commencement of the award term and include the reason as well as whether or not any remaining award term for which the Contractor remains otherwise eligible are effected.
   (i) If an award term is canceled based on paragraph (e)(1)(iii) above then any remaining award terms are also canceled.

(3) The Government’s determination not to award or to cancel an award term for any of the reasons set forth in paragraph (e)(1) above shall not be considered either a termination for convenience or termination for default, and shall not entitle the Contractor to any termination settlement or any other compensation.

(f) Contractor rights.
   (1) The Contractor has the unilateral right to decline prior to the commencement of the award term the Government’s decision to award an award term. The Contractor shall notify the Contracting Officer of its determination to decline an award term within five (5) days after receipt of the Government’s notification. The Contractor’s decision to decline an award term may impact its ability to earn any remaining award terms based on the terms of the contract.

   (2) The Contractor may request a review of an award term determination which has resulted in the Contractor being ineligible for the award term due to failing to achieve the performance objectives and measures for the corresponding evaluation period. The request shall be submitted in writing to the Contracting Officer within five (5) days after receipt of the Government’s notification.

   (g) Funds. Funds are not presently available for any award term. The Government's obligation under any award term is contingent upon the availability of funds from which payment can be made. No legal liability on the part of the Government for any award term payment may arise until funds are made available to the Contracting Officer for an award term and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.

6. REQUIRED BUREAU ACTIONS: Bureau Chief Procurement Officers shall—
   a. Ensure dissemination of this APU to all impacted personnel; and
   b. Update related Bureau policies and procedures impacted by this APU.

7. QUESTIONS: Questions regarding this APU can be directed to Mr. Thomas O’Linn at OfficeoftheProcurementExecutive@treasury.gov.