SO YOU WANT SERVICE? ALL SERVICE ORDERS ARE NOT THE SAME

By Andrew Mohr and Kelly Kroll

No matter what an ordering activity may tell you, not all GSA Schedule task orders for services are issued on the same basis. The underlying terms and conditions of most GSA Schedule contracts allow for three different types of task orders: Time-and-Materials ("T&M"), Labor-Hour ("LH") and Firm-Fixed Price ("FFP"). Understanding the differences among these is key to successfully bidding on and receiving payment under a GSA Schedule task order.

An LH task order is based on the contractor's estimated hours for its labor categories multiplied by the overlying GSA Schedule contract hourly rates; a ceiling price is set to limit the agency's liability for payment, and materials may not be acquired under the order. A T&M task order functions substantially the same as a LH task order, but also covers the provision of materials. In LH and T&M task orders, the ceiling price is not the guaranteed price that the agency will pay, but rather a cap against actual hours expended. It can be exceeded, but only with the ordering agency's prior approval.

Fundamentally different from LH and T&M task orders is a task order that states it is "firm fixed price" or "fixed priced." Under an FFP order, the contractor is to be paid the total awarded price, regardless of the actual hours expended. The contractor bears the risk of underestimating the number of hours required to complete the task order's requirements. In other words, no matter how many hours are estimated or expended, the contractor is only entitled to the fixed fee. This is true even if the FFP task order was awarded using a vendor's GSA Schedule contract hourly rates multiplied by an estimated amount of hours to arrive at the requested fixed price.

In recent years, federal agencies have been strongly encouraged to use FFP task orders whenever possible and are required to document their rationale if they do not award on a FFP basis. Problems arise, however, when the contractor, agency, or both, realize that they don't understand how FFP service contracts are suppose to work. The most common mistake centers around how payments are to be made on a FFP services contract. Too often we see a FFP task order being awarded, but then the agency paying only for those hours a contractor can show have been expended on the project. This is simply wrong.

The problem lies in the absence of a FFP services payment provision in the GSA Schedule contract spelling out how payments under a FFP services order is to be made. The standard payment provision states only that payment shall be made for items accepted and delivered to the government. This is clearly geared toward product deliveries and of little help with respect to FFP service orders. Determining when services are delivered and accepted is not as easy as determining if a product has been delivered and accepted. Meanwhile, the more detailed payment provision included specifically for LH and T&M task orders makes clear that hours expended will be paid for only up to the ceiling price. Invoices are to be submitted on a monthly basis and hours expended are to be tracked and clearly set forth in the invoices.

In sum, there is no guidance in the GSA Schedule, and usually none in the order itself, on payment for FFP services. As a result, agencies and contractors alike often revert back to the old T&M/LH method, submitting payments for hours billed at the rates set forth in the contract. Using this method, however, disputes arise when the contractor tries to recover monies due under the FFP model when it completes the job with fewer hours expended than estimated.

To avoid these issues, a contractor should always carefully review the Request for Quote ("RFQ") language to determine what type of task order is contemplated. If the RFQ is unclear, it

is incumbent upon the contractor to seek a clarification. If not established in the RFQ, a FFP services contractor should make clear in its proposal how payments are to be made. Since the federal government is generally prohibited from paying in advance for services rendered, and a contractor normally can't afford to wait until the project is over to get paid, the FFP services contractor and agency should develop a payment outline. For example, the contractor could correlate amounts with milestones or deliverables, or a flat amount for a predetermined level of effort. As always in government contracting, an ounce of prevention is worth a pound of cure.

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