

13, 2004. Contracting officers may, at their discretion, apply the DFARS changes to solicitations issued before January 13, 2004, provided award of the resulting contract(s) occurs on or after January 13, 2004. Contracting officers may, at their discretion, apply the DFARS changes to any existing contract with appropriate consideration.

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**SUPPLEMENTARY INFORMATION:**

**A. Background**

This final rule provides for the payment of provisional award fees within an evaluation period prior to a final evaluation for that period. The provisional payments would be based on (1) successful evaluations for prior evaluation periods, and (2) the expectation that payment of provisional fee amounts will not reduce the overall effectiveness of the award fee incentive. A training module on the use of provisional award fee payments is available on the Defense Acquisition University Web site at <http://www.dau.mil>, under "Continuous Learning."

DoD published a proposed rule at 67 FR 70388 on November 22, 2002. Seven respondents submitted comments on the proposed rule. A discussion of the comments is provided below. Differences between the proposed and final rules are explained in the DoD Response to Comments 5 and 10.

1. *Comment:* The proposed policy appears to conflict with the Defense Finance and Accounting Service (DFAS) DFAS-IN Regulation 37-1, Table 8-1, which states that award fee must not be obligated until its amount is determined. If provisional award fee is allowed, the DFAS regulation should be revised to preclude confusion.

*DoD Response:* Concur that DFAS may need to review its regulations to determine if revisions are required based on this DFARS rule.

2. *Comment:* It is not clear what the difference is between doing provisional award fee determinations and simply doing more frequent final award fee determinations. Presumably, the process for doing a provisional award fee payment would not be as formal as that for doing a final award fee determination. Suggest that the policy state that the agency should use a streamlined process for doing a provisional award fee determination.

*DoD Response:* DoD concurs with using a streamlined process for doing a provisional award fee determination, but this approach (*i.e.*, the payment of part of available award fee without using all the formalities of a full-scale award fee determination) is already implied by the wording of the rule. The rule provides a framework, with the flexibility for contracting officers to implement the rule using processes that best fit their particular business needs.

3. *Comment:* It may be advisable to establish a ceiling on the amount that may be given as a provisional award fee.

*DoD Response:* Concur that there should be a ceiling; however, the rule already establishes a ceiling at 216.405-2(b)(3)(B)(1) and (2). The rule states that provisional award fee payments may not exceed 50 percent of the award fee available for the initial award fee period, and may not exceed 80 percent of the evaluation score for the prior evaluation period times the award fee available for the current period. Contracting officers are free to establish lower provisional award fee amounts if they deem it to be in the Government's best interests.

4. *Comment:* The policy should recognize that provisional award fees might not be feasible or appropriate in all situations. The agency may need to consider the ability of the vendor to provide data on incurred costs. It is common for a vendor with subcontractors to be several months behind in billing. Thus, a provisional determination linked to the value of work performed might be inaccurate. Or if the award fee is based on achievement of a milestone by a particular date, the argument could be made that giving a provisional award fee payment would actually reduce the effectiveness of the incentive. Therefore, the policy should cite examples of situations in which a provisional award fee payment would be appropriate.

*DoD Response:* Partially concur. DoD agrees that provisional award fee payments may not be feasible or appropriate in all situations and, therefore, should be optional. The rule provides contracting officers the flexibility to determine where and how provisional award fee payments can best be employed. The rule reflects this position at DFARS 216.405-2(b)(3), which states "The CPAF contract *may* include provisional award fee payments." (emphasis added) However, it is not prudent to cite examples of situations in which a provisional award fee payment would be appropriate, because examples may be misinterpreted as the only situations in

which this type of payment may be used.

5. *Comment:* If the provisional award fee payment process is too informal, it would be subject to abuse or misapplication, *e.g.*, if given without adequate justification or if given based on inaccurate data. This could lead to overpayment of award fee. Therefore, the policy should address recovery of any overpayment (*e.g.*, by setoff or reduction in future award fee payments).

*DoD Response:* Concur that the rule should address recovery of an overpayment. The proposed rule, at 216.405-2(b)(3)(C), required the contractor to either credit any overpayment on the next payment voucher or refund any overpayment, in accordance with directions from the contracting officer. Since the overpayment is actually a debt due the Government, the final rule contains a change in this paragraph to require the contracting officer to collect the debt in accordance with FAR 32.606, Debt determination and collection.

6. *Comment:* The rule defeats the purpose of an award fee contract. By giving the contractor provisional payments on a monthly basis, you are in a sense turning an award fee contract into a fixed fee contract. The award fee pool is supposed to be tied to contractor performance, and provisional payments circumvent that by paying out a large percentage of the pool prior to the end of the evaluation period. Where is the incentive to perform? Furthermore, how can a contractor, deemed to have an adequate accounting system to support a cost-type contract, experience cash flow problems, especially when a large business can voucher for allowable costs every two weeks. In addition, has DoD considered the administrative burden of monthly provisional payments on the Government, *i.e.*, monthly modifications?

*DoD Response:* Provisional award fee payments do not turn an award fee contract into a fixed fee contract. The issue of entitlement is significantly different from the issue of timing. Provisional award fee payments only change the timing of the payments, not the entitlement to those payments. The contractor is incentivized, since the contractor must earn the award fee in exactly the same way as if there were no provisional award fee payments, *i.e.*, entitlement to the award fee continues to be tied to contractor performance. Should the Government determine that the contractor is not entitled to the award fee, the contractor must return the provisional payments to the Government.