

As to the observation that contractors can voucher for all allowable costs on cost-type contracts every two weeks, it should be noted that not all unallowable costs are unavoidable. Contractors normally rely on the partial payment of fee for work accomplishment to cover unallowable costs, and to keep them out of a loss position on the contract as a whole. In particular, on high-dollar award fee contracts, the amount of award fee that is being held pending a formal award fee determination can be significant. As such, a standard award fee structure, instead of motivating and rewarding outstanding performance, can be a financial negative for a contractor. Without provisional award fee payments, some contractors may well prefer a smaller fixed fee that they know will arrive on a monthly basis to an award fee that, while possibly larger in amount, will be paid less frequently (e.g., not paid until the end of the award fee period).

The use of provisional award fee payments is entirely optional. Contracting officers may choose to not employ provisional award fee payments when they believe such use would dilute the effectiveness of the award fee in a particular contract, would be an undue administrative burden, or would otherwise not be in the Government's best interests.

7. *Comment:* Award fee administration is a very time consuming process. In accomplishing performance evaluations, great care is taken to adequately support awarding or withholding of award fee. This effort is done in a very careful, concise, and professional manner to avoid any appearance of arbitrary or capricious application of award fee criterion and to ensure that the contractor receives appropriate consideration for performance efforts.

The "Background" information in the **Federal Register** notice of the proposed rule stated, "Cost-reimbursement contracts containing award fees typically provide for an award fee payment no more frequently than every 6 months." However, the respondent's experience in working with cost-reimbursement contracts is that "no more frequently" is more appropriately "no less frequently." Many of these contracts begin with 6-month evaluation periods. As complexity or dollar value increase, evaluation periods are reduced to as low as 3-months (quarterly).

Prior to awarding cost-reimbursement contracts, audits are requested to ensure that the contractor has a financial system in place to support adequately identifying cost and that the company has the financial capability to perform

the contract. Normally the proposed award fee periods are identified in a solicitation, putting the contractor on notice of the Government's intent for award fee evaluation. Also, there is no prohibition against a contractor requesting contracting officer consideration for reducing the length of award fee periods should the contractor begin experiencing "an undue financial burden."

If a contracting officer implements this rule, it would result in an arbitrary determination of potential award fee earnings based on past performance. This practice would not only increase Government administration of the process, but could potentially allow a contractor the use of Government funds prior to a true determination of actual earnings with no consideration (such as interest) being afforded the Government, should the funds ultimately be credited back to the Government following a proper performance evaluation. Award fee should always be earned, not paid on a credit or assumptive basis in order to fulfill the intended purpose of award fee, which is to incentivize a contractor's performance. Unless the provisional payment is tied to some performance period, it could be construed as a form of advance payment. Also, since other remedies are available should a contractor (probably a large business) experience "undue financial burden," no need exists for this provision.

DoD Response: Do not concur. Provisional award fee payments do not result in an arbitrary determination of potential award fee earnings based on past performance. The issues of entitlement, administrative burden, incentive to perform, and contractor cash flow are addressed in the DoD Response to Comment 6. With respect to the issue of interest on overpayments, as explained in the DoD Response to Comment 5, the final rule requires contractors to return any overpayment in accordance with FAR 32.606. FAR 32.610, Demand for payment of contract debt, states that any amounts not paid within 30 days from the date of the demand for payment will bear interest.

Furthermore, provisional award fee payments are different from advance payments, since the amount of the payment for periods subsequent to the first evaluation period is based on performance in the prior evaluation period.

8. *Comment:* The pitfalls associated with this proposal are greater than whatever benefits there may be for either party. The concept of award fees was established to provide incentive for performance such that if performance

was provided in excess of certain thresholds, an award fee determining official would so declare after review of findings from an award fee board. The proposed change negates the concept of award fee to provide incentive for performance and, instead, establishes a means of cash payment to contractors for reasons other than incentive. In fact, this proposed change does nothing other than to establish cash flow expectations on the part of contractors that bear no relationship to fee earned in current periods until well after such determinations could be made AND related outlays have already been made.

The Government assumes a greater share of risk when using cost-reimbursable contracts, and compensates for this by providing the contractor with frequent billing provisions to cover all aggregated costs and fees incurred in each billing period (usually on a monthly basis). Therefore, contractor cash flow considerations are NOT factors in deciding whether or not to have award fee provisions in the first place, and they are also NOT factors in determinations of performance in award fee periods.

The proposed change, if adopted, would pressure program managers to incorporate these provisions into existing contracts, especially those large systems contracts involving millions of dollars. Such adoption would subsequently give rise to the inherent presumption of entitlement during current award fee periods, even though actual entitlement determinations would not take place until after funds have been disbursed. As a result, additional administrative burdens on top of those already created by award fee provisions would be placed on program managers and contracting officers. This would be especially true in instances cited in proposed DFARS 216.405-2(b)(3)(C).

This change would also create potential legal problems, especially in instances where DFARS 216.405-2(b)(3)(D) would be imposed. How does one protect the contracting officer determination from being appealed as being "arbitrary and capricious," and how would such disputes alter or hinder ongoing contract performance until such matters are resolved?

DoD Response: Do not concur. With respect to the comments on the incentive for performance, cash flow, entitlement, and administrative burden considerations, see the DoD Response to Comment 6.

With respect to the comment on modifying existing contracts to include the requirement for provisional award fee payments, such modification could