

only be considered if the contracting officer obtained adequate consideration. For future contracts, the rule relies upon agency procedures and contracting officer business judgment to determine if provisional award fee payments are appropriate for a particular contracting environment, rather than a "one size fits all" requirement.

As to the respondent's perceived legal problems, the provisional award fee payment requirement falls within the award fee provisions of the contract, including the requirements in the FAR. FAR 16.405-2(a) states "* * * The amount of the award fee to be paid is determined by the Government's judgmental evaluation of the contractor's performance in terms of the criteria stated in the contract. This determination and the methodology for determining the award fee are unilateral decisions made solely at the discretion of the Government." Although the determinations are unilateral, the United States Court of Appeals in *Burnside-Ott Aviation Training Center v. Dalton, Secretary of the Navy*, 107F.3d 854 (Fed. Cir. 1997), held that disputes concerning the amount of the award fee are subject to the Contract Disputes Act. The Court also held that award fee determinations could continue to be committed to the discretion of contracting officers under the terms of the contract and would be upheld as long as they were not arbitrary or capricious. Therefore, the rule cannot state that provisional award fee payments are or are not disputable, since that determination may depend on other factors.

This rule does not impose any significant additional risk of litigation. For periods subsequent to the initial evaluation period, the payments are based on the evaluation for the prior period. Thus, provided the prior evaluations are not arbitrary and capricious, there would be little, if any, basis for determining the provisional award fee payments to be arbitrary and capricious.

However, should a dispute arise, such dispute would not alter or hinder ongoing contract performance. Paragraph (i) of the clause at FAR 52.233-1, Disputes, states "The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer."

9. *Comment.* There is a need for an initial assessment of contractor performance by the fee determining official before the contracting officer pays any provisional award fees. This

initial assessment can be done during the first interim evaluation. In return (for the initial wait), recommend up to 80% (vice proposed 50%) be awarded. In addition, also recommend that provisional award fee payments apply to fixed-price contracts with award fees.

DoD Response: Do not concur. The role of the fee determining official in the provisional award fee payment process should be determined by the DoD department or agency based on the particular contracting environment. Accordingly, there is no standard guidance on the role of the fee determining official or even a standard award fee clause used throughout DoD. Buying activities may provide implementing guidance to the extent they deem it necessary to provide additional information regarding the role of the fee determining official in the payment of provisional award fees.

Since the contractor's "track record" of performance on the contract will be limited for the initial award fee evaluation, it may be difficult to conclude that the contractor's performance for the initial contract period reflects a reasonable expectation of the performance for subsequent periods. Thus, it would not be prudent to build a higher limitation (*i.e.*, 80 percent) for the initial period.

Although DoD does not concur with increasing the ceiling for the initial period, a DoD department or agency may consider granting an individual, one-time deviation to this requirement if the department or agency believes that a specific contract is essentially a continuation of prior contracts for the same item or service and, hence, the 50 percent limitation on the initial provisional payment is not really needed to protect the Government's interests.

As to the use of provisional award fees in fixed-price-award-fee contracts, it should be noted that FAR 16.404(a)(1) indicates that a fixed-price-award-fee contract is a fixed-price contract that already has a normal profit included in the fixed price, which is paid for satisfactory performance. When other types of incentives cannot be used, a separate award fee provision can be added to a fixed-price contract to provide additional motivation and reward to a contractor for various achievements. The rationale that a provisional payment of award fee is necessary in order to allow the contractor to receive some profit or fee on work accomplished is greatly diminished, because a normal profit is already included within the fixed-price-award-fee contract structure. However, it is within a DoD department's or

agency's deviation authority, on a one-time basis, to permit the use of provisional award fee payments under a fixed-price-award-fee contract if it is in the best interests of DoD.

10. *Comment:* The following sentence from the rule (DFARS 216.405-2(b)(3)) is misleading: "A provisional award fee payment is a payment made within an evaluation period prior to an interim or final evaluation for that period."

The fee determining official must make a determination that contractor performance warrants payment of the interim award fee amount. This "interim evaluation" may be confused with any interim performance evaluations called out in the award fee plan that are not linked to periodic billings (and which may or may not occur before a periodic award fee billing).

Suggest changing the sentence in the rule to read: "A provisional award fee payment is a payment made within an evaluation period prior to the final determination for that period."

DoD Response: Concur that the rule may not be clear as to the timing of a provisional award fee payment. The rule was intended to define a provisional award fee payment as any payment made prior to an evaluation for the period. The language in the proposed rule could be misinterpreted to mean that, when provisional payments are used, they must provide for payments prior to any interim evaluation period. The rule is intended to provide flexibility to contracting officers in determining when to permit provisional payments, rather than requiring such payments prior to interim evaluation periods. Therefore, the sentence has been revised to read: "A provisional award fee payment is a payment made within an evaluation period prior to a final evaluation for that period."

11. *Comment:* Recommend DFARS address the following:

a. Contractor's performance must be commensurate with the provisional award fee payment.

b. Contractor shall liquidate the debt as prescribed in FAR 32.6, Contract Debts, for overpayments made to the contractor by the Government.

c. Provisional award fee payment determinations are/are not disputable.

d. Role of the fee determining official in the provisional award fee payment process.

DoD Response:

a. Concur. The proposed rule already contained language at 216.405-2(b)(3)(D) that ties the payment of provisional award fees to the contracting officer's determination that the contractor is performing at an