

appropriate level commensurate with the proposed provisional award fee payment. This language has been retained in the final rule.

b. Concur. DoD has added a reference to FAR 32.606 in the final rule at 216.405–2(b)(3)(C). Also see the DoD Response to Comment 5.

c. Do not concur. See the DoD Response to Comment 8.

d. Do not concur. See the DoD Response to Comment 9.

12. *Comment:* The proposed change should not be incorporated as drafted. The reason stated for the change is that cost-reimbursement award fee contracts typically provide for an award fee payment no more frequently than every 6 months and that this may place an undue financial burden on a contractor. This premise seems unfounded. It is hard to rationalize that a contractor faces an undue financial burden under a contract arrangement that provides for the Government to reimburse all allowable contract costs as frequently as every two weeks (FAR 52.216–7, Allowable Cost and Payment). In cost-reimbursement contracts, it is the Government that assumes a greater share of the risk and compensates for this by providing the contractor with frequent billing provisions. Furthermore, contractor cash flow considerations are not factors in determining whether or not to have award fee provisions in the first place and are not factors in determinations of performance in award fee periods.

*DoD Response:* Do not concur. See the DoD Response to Comment 6.

13. *Comment:* This change would have the unintended consequence of defeating a prime benefit of an award fee contract. In an award fee type contract, the Government is able to hold the contractor's motivation and focus, since the contractor knows the award fee is not a given and is only obtained through successful performance each and every period. The proposed change diminishes this performance incentive concept and instead establishes a means of cash payment to contractors for reasons other than incentive. In fact, the 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 formal determinations and related outlays have been made. Also, there is no mention of base fee in this proposed change. Recommend, if this change is incorporated, that the provisional award fee payment only be used in cost-plus-award-fee contracts with zero base fee.

*DoD Response.* Do not concur. See the DoD Response to Comment 6 for a

discussion of performance incentive and cash flow. Regarding the recommendation that provisional award fee payments only be employed in contracts with zero base fees, the rule leaves that determination to the management discretion of DoD departments and agencies.

14. *Comment:* Although there are procedures in the proposed rule for reimbursing the Government if the actual award fee determination is less than the provisional payment, the reality is that once received, the contractor is not going to be motivated to give the money back, thus leading to increased probability of disputes and potentially requiring significant additional time and effort to resolve. This type of “tug of war” will not add value to the contract administration process or to Government/contractor relationships.

*DoD Response:* Do not concur. The maximum amount permitted for provisional payments (after the initial payment) is calculated at 80 (not 100) percent of the evaluation score for the prior evaluation period times the award fee available for the current period. Therefore, it is anticipated that a very limited number of provisional award fee payments will be more than the actual award fee determinations for the current period. However, for those limited situations in which there are overpayments, see the DoD Response to Comment 5, which addresses Government procedures for collecting debt, and to Comment 8 for a discussion of contractor disputes.

15. *Comment:* The change could create potential legal problems when the instances of DFARS 216.405–2(b)(3)(D) are imposed, whereby the contracting officer reduces or discontinues the provisional payment. Since this is proposed as a contracting officer determination, without mention of the award fee board or fee determining official, how does one protect the contracting officer's 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:* As indicated in the DoD Response to Comment 14, it is anticipated that the overpayment of a provisional award fee payment will happen in a limited number of circumstances. However, when it does occur, it is expected that the contracting officer will have a reasonable basis for making such a decision. When the decision is based on a probability that the contractor is not going to earn the award fee, the contracting officer almost

certainly will have obtained input from the award fee board or the fee determining official. However, there could be other instances, such as pending bankruptcy proceedings, which may make it necessary for the contracting officer to act without first consulting the award fee board or the fee determining official. In any case, it is anticipated that the contracting officer will use sound business judgment and will not make an “arbitrary and capricious” decision. If there is a dispute, the dispute would not alter or hinder ongoing contract performance, as explained in the DoD Response to Comment 8.

16. *Comment:* The need for additional documentation and funding tracking will put an additional burden on program offices and may discourage the use of award fee arrangements, since the Government may not believe that the expected benefits are sufficient to warrant the additional effort and cost involved with managing and administering a more resource demanding award fee process. Program offices may also believe that the process of giving the contractor part of the award fee without having the payment tied to an interim evaluation (based on the award fee plan's criteria) dilutes the effectiveness of interim evaluations as motivators for increased performance.

*DoD Response:* Partially concur. Although this type of payment may be administratively burdensome, its use is entirely optional. However, as explained in the DoD Response to Comment 6, DoD does not concur that provisional award fee payments will dilute the effectiveness of the interim evaluations.

17. *Comment:* This proposed change blurs the line between a cost-plus-award-fee and a cost-plus-fixed-fee type contract. A cost-plus-award-fee contract should not be used when a cost-plus-fixed-fee contract is more appropriate, but since there is a 15% statutory fee limitation on a cost-plus-fixed-fee contract, but not on a cost-plus-award-fee contract, contractors may use this change as an increased opportunity for optimal fee by pushing the Government to use a cost-plus-award-fee contract when a more appropriate type would be cost-plus-fixed-fee. Because the contract types are distinctively different, the payment of fee on a cost-plus-award-fee contract was not intended to be handled the same way it is handled on a cost-plus-fixed-fee contract. This proposed change moves award fee payment from the realm of subjective evaluation of fee earned to a type of numerical calculation (which is based on projected performance). A policy of interim payments based on assessments of