

contractor performance and fee determining official concurrence provides a much better framework than that set forth in the DFARS language.

*DoD Response:* Do not concur.

Provisional award fee payments do not change the contract from a cost-plus-award-fee to a cost-plus-fixed-fee contract. As explained in the DoD Response to Comment 6, provisional award fee payments only change the timing of the payments, not the entitlement to those payments.

Payment of a provisional award fee is not based purely on a numerical calculation. The numerical calculation merely establishes the maximum amount that might be paid as a provisional award fee. The actual amounts of provisional award fee payments are based on the assumption that the contracting officer has determined that those provisional payment amounts are commensurate with the contractor's performance.

The rule does not provide specific procedures or rigid requirements. Thus, contracting officers have significant flexibility to implement provisional award fee payments as they deem appropriate for their particular contracting environments, e.g., using interim payments based on assessments of contractor performance and fee determining official concurrence.

18. *Comment:* There are some differences between one DoD department's guidance and the proposed DFARS language. For example, DFARS—

a. Does not restrict provisional award fee payments to cost-plus-award-fee contracts with zero base fee;

b. Does not prescribe a monthly payment option;

c. Treats provisional payments almost as a normal business practice, which is appropriate since provisional payments benefit both the contractor and the Government. The contractor gets increased cash flow and the Government gets an increase in expenditures;

d. Does not reference FAR Subpart 32.6 with respect to overpayments;

e. Permits a smaller percentage (i.e., 50 percent) for the initial period;

f. Does not say the contracting officer has the unilateral right to reduce or suspend, but does say payments may be reduced or discontinued; and

g. Does not prescribe provisional award fee payments for fixed-price-award-fee contracts.

*DoD Response:* Concur that there may be differences between guidance issued by DoD departments and agencies, and the DFARS. DoD departments and agencies will be able to continue using

their guidance, provided such guidance does not fall outside the general framework of this DFARS rule. Since the DFARS rule does not provide specific procedures or rigid requirements, DoD departments and agencies have significant flexibility to implement provisional award fee payments as they deem appropriate for their particular contracting environments. This includes specifying when provisional award fee payments are appropriate (e.g., only when there is zero based fee) and the frequency of payments (e.g., monthly, every two months). Zero based fee is also addressed in the DoD Response to Comment 13.

DoD concurs with adding a reference to FAR Subpart 32.6 (see the DoD Response to Comment 5), and that the contracting office has certain unilateral rights (see the DoD Response to Comment 8). DoD does not concur with permitting the use of a percentage rate higher than 50 percent for the initial period (see DoD Response to Comment 9), or to the use of provisional award fee payments for fixed-price-award-fee contracts (see DoD Response to Comment 9).

19. *Comment:* The Financial Management Regulation and paragraphs 4.1 and 45.2 of the Air Force Material Command Award Fee guide may need to be revised to be consistent with the DFARS rule. Will the DFARS be revised to allow provisional award fee payments and interim payments on fixed-price-award-fee contracts also?

*DoD Response:* Other regulations and department/agency guidance may need to be revised based on implementation of this DFARS rule. However, as indicated in the DoD Response to Comment 18, DoD departments and agencies will be able to continue using their guidance, provided such guidance does not fall outside of the general framework of this rule.

Regarding the use of provisional award fee payments for fixed-price-award-fee contracts, as noted in the DoD Response to Comment 9, DoD does not concur with revising the DFARS to permit this type of payment under fixed-price-award-fee contracts.

20. *Comment:* There is concern that the financial incentive/motivation for outstanding performance will decrease if the contractor is paid a percentage of the potential award fee on a monthly basis prior to any type of formal evaluation/determination. What was once a true incentive contract is now a highbred cost-plus-fixed-fee type contract (with minimum incentive to control costs) with no financial tie into any type of performance based criteria

(or at least not until much later in the award fee period).

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

21. *Comment:* This puts the Government in a position to deal with additional administrative burden (i.e., modifications to add funding to a contract—as well as documentation to confirm that the contractor is performing successfully on a monthly basis) to pay the contractor a percentage of the award fee on a frequent basis. The intent is to use provisional award fee payments on a case-by-case basis, but will this really be true?

Will the contracting officer authorize the monthly payments unilaterally or will the fee determining official have input on the decision (along with documentation)? If it is a contracting officer determination, what will happen if the contracting officer discontinues the payments and the contractor disputes it? There are also serious concerns over the potential situation of having to collect overpayments if the contractor does not earn the fee determining official's final determination for the period. What happens if the contract is terminated? Or if the contractor files bankruptcy? How will the fiscal year rules apply to overpayments?

The Government is being placed in a position to relieve the financial burden (on a cost contract?) of a contractor. FAR 52.216-7 permits payments on reimbursable costs as frequently as every two weeks. It is difficult to believe that a contractor would be put into an undue financial burden when in this position. Will the contractor be required to provide justification to the Government on their undue financial burden?

If it has been determined that reducing the length of time between award fee periods is not feasible due to contract restraints, recommend that, if any type of partial payment is authorized, it should be tied directly to the interim evaluation based on the contractor successfully completing the evaluated performance criteria (i.e., one-time interim evaluation payment). This could be done approximately mid-point through the award fee period with the remainder of the potential award fee paid to the contractor at the end of the period, based on the fee determining official's final determination.

*DoD Response:* Do not concur. The use of provisional award fee payments is entirely optional. DoD departments and agencies may choose not to employ provisional award fee payments when they believe such use would dilute the effectiveness of the award fee in a