

particular contract, is an undue administrative burden, or is otherwise not in the Government's best interests.

Under the rule, provisional award fee payments can be discontinued or reduced as deemed appropriate by the contracting officer. In applying this rule, it is anticipated 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 fee determining official. However, there could be other instances, such as pending bankruptcy proceedings, which may require the contracting officer to act without first consulting the award fee board or fee determining official. In any case, it is anticipated that the contracting officer will use sound business judgment and not make an arbitrary and capricious decision.

For further information, see the DoD Response to Comment 6 (administrative and financial burden), Comment 9 (role of the fee determining official), Comment 8 (contractor disputes), Comment 5 (overpayments), and Comment 10 (timing of provisional payments).

22. *Comment:* The incentive effect and cash flow benefits of provisional award fee payments will be achieved only if the provisional award fee payment provision is introduced as a customary practice. Fee is paid during performance on cost-plus-fixed-fee and cost-plus-incentive-fee contracts, and it should be the same for cost-plus-award-fee contracts. Since the Government is protected from risk by the terms included in the provisional award fee payment provision, there should be no hesitancy in making its use a customary and desirable incentive feature. Successfully performing contractors should be able to benefit from the improved cash flow that provisional award fee payments facilitate. Establishing criteria that standardize use of the provisional award fee payment, subject to the contracting officer's determination of continued successful performance, will encourage use of this important new provision, while not diminishing the ability of the contracting officer to discontinue or reduce the provisional award fee payment if the contractor's performance warrants a reduction. Recommend changing the last sentence in 216.405-2(b)(3) of the proposed rule to read: "The contracting officer should include provisional award fee payments in a cost-plus-award-fee contract when the period of performance for the contract

exceeds 12 months, provided those payments \* \* \*."

*DoD Response:* Do not concur. As indicated in the DoD Response to Comment 4, the rule is optional, because a mandatory requirement to use provisional award fee payments could result in such payments being applied in situations where they would be inappropriate.

23. *Comment:* DoD should strive to establish parity in how fee is billed for cost-plus-award-fee contracts, compared to how fee is billed under other incentive arrangements. Cost-plus-incentive-fee and fixed-price-incentive contracts both include provisions for billing target fee or profit at a rate consistent with contractor performance. Just as contemplated in the provisional award fee payment approach, there is a provision for adjusting the fee or profit if the contractor's performance is above or below the projected target. In the case of the cost-plus-award-fee contract, where there is no pre-set formula, the best indication of projected performance is the contractor's performance evaluation from prior periods. Successfully performing contractors should continue receiving provisional award fee payments at the level they have demonstrated in prior periods, similar to the target with appropriate adjustments made in cost-plus-incentive-fee and fixed-price-incentive-fee contracts. This approach poses no risk to the Government, since the contracting officer can reduce or eliminate the provisional award fee payment when performance is not commensurate with the provisional payment, and any overpayment is fully recoverable. Such an approach will also simplify administration of the provisional award fee payments. Recommend replacing paragraph 216.405-2(b)(3)(B)(1) of the proposed rule with the following: "For subsequent award fee periods, the evaluation score for the prior evaluation period shall be used as the provisional award fee payment rate."

*DoD Response:* Do not concur. The rule establishes a reasonable outside boundary, i.e., not to exceed 80 percent of the evaluation score for the prior evaluation period, assuming continued contractor performance at current levels of performance. The rule is not intended to create an automatic entitlement to award fee at the same level as that previously earned for the prior evaluation period. In addition, as indicated in the DoD Response to Comment 14, a ceiling of 80 percent should reduce the number of overpayments.

24. *Comment:* Follow-on contracts represent a continuation of effort from the prior contract. Assuming successful performance on the prior contract, continuation of provisional award fee payments at the same rate experienced on the prior contract is appropriate, instead of reducing the rate to 50% for the first period of the follow-on contract. Suggest the following language be added to 216.405-2(b)(3)(B)(3): "(3) For follow-on contracts, the rate for the initial period will be the same as that awarded in the last period of the immediately preceding contract."

*DoD Response:* Do not concur. See the DoD Response to Comment 9.

25. *Comment:* The training of the acquisition workforce and industry counterparts is essential for success and for achieving the desired result.

*DoD Response:* Concur that training is important. 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."

26. *Comment:* Recommend that DoD initiate the process to make these provisions applicable on a Governmentwide basis through FAR revisions.

*DoD Response:* Do not concur, since individual agencies (e.g., the National Aeronautics and Space Administration) craft their own versions of award fee provisions, and their own guidance for the use of those provisions. Governmentwide application of this coverage would only be appropriate if it is someday deemed advisable to create a single award fee provision and policy for use by all Government agencies.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

## B. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule applies only to cost-plus-award-fee contracts. Most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*