

perform activities conducive to the use of VCS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Population

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this rulemaking.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. section 804(2). This rule will be effective February 14, 2011.

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 15, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

Authority: 42 U.S.C. 7401 *et seq.*

Dated: January 3, 2011.

Jared Blumenfeld,

Regional Administrator, Region IX.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 216 and 252

RIN 0750-AF51

Defense Federal Acquisition Regulation Supplement; Award-Fee Contracts (DFARS Case 2006-D021)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address award-fee contracts, including eliminating the use of provisional award-fee payments.

DATES: *Effective Date:* February 14, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, Defense Acquisition Regulations System, OUSD (AT&L) DPAP/DARS, 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060. Telephone 703-602-0302; facsimile 703-602-0350. Please cite DFARS Case 2006-D021.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** (75 FR 22728) on April 30, 2010, to revise guidance for award-fee evaluations and payments, eliminate the use of provisional award-fee payments, and incorporate DoD policy guidance on the use of objective criteria. A new clause entitled Award Fee sets forth the use of award fees in DoD contracts.

II. Discussion and Analysis

A. Analysis of Public Comments

In response to the proposed rule, DoD received comments from three respondents. A discussion of the comments is provided below:

1. Making 40 Percent of the Award-Fee Pool Available for the Final Evaluation

a. *Comment:* The respondents considered the language aligning fee distributions with contract performance and cost schedules. One respondent

stated that holding 40 percent of the award fee until the final evaluation does not consider the completion of individual contract line items or undefinitized work.

DoD Response: The purpose of making 40 percent of the award-fee pool available under the final evaluation period is to set aside a sufficient amount to protect the taxpayer's interest in the event a contractor fails to meet contractual obligations. Assuming the contract is properly structured, there is nothing in the rule that prohibits contractors from being paid for completed contract line items or work performed under undefinitized contracts.

b. *Comment:* The respondents expressed concern that holding 40 percent award fee until the final evaluation does not reward contract performance, particularly if a contract is terminated before the final evaluation. One respondent was concerned that by making a specified percentage of the award fee available for the final evaluation period, in the event of a termination for convenience, the contractor may not have the ability to earn that final award-fee percentage.

DoD response: The rule does not change the current procedures for terminations for convenience. In the event of a termination for convenience prior to the final evaluation period, contractors will be eligible to earn award fee available up to the point of the termination.

c. *Comment:* One respondent was concerned that holding of 40 percent of the award fee until final evaluation will negatively affect cash flow. The respondents were also concerned that the proposed rule will increase financial risk to Government contractors and result in an imbalance in the risk/reward relationship. One respondent was concerned, therefore, that the rule will unfavorably impact DoD's supplier base by adversely impacting suppliers' ability to attract debt and equity investment.

DoD Response: Contractors will continue to be paid incurred costs on cost-type contracts, completed work under fixed-price contracts with progress payments, or milestones achieved under fixed-price contracts with performance-based payments. Accordingly, a contractor's cash flow should not be significantly impacted. Since contractors who consistently meet contractual performance requirements will maximize the amount of award fee earned, there is no imbalance in the risk/reward relationship. There should be little, if any, impact on a superior

performer's ability to attract debt and equity investment.

d. *Comment:* One respondent commented that the 40 percent fee withhold until final evaluation is arbitrary. The respondent requested DoD to consider reducing the 40 percent of the award-fee amount held until final evaluation to a minimum of 20 percent.

DoD response: DoD agrees that under certain circumstances it may be appropriate to establish a lower percentage of award fee to be available for the final evaluation period. Therefore, DFARS 216.405-2(1) has been revised to state that the percentage of award fee available for the final evaluation may be set below 40 percent if the contracting officer determines that a lower percentage is appropriate, and this determination is approved by the head of the contracting activity.

2. Elimination of Provisional Award-Fee Payments

a. *Comment:* One respondent was concerned that the elimination of provisional award-fee payments will negatively affect cash flow. One respondent suggested that DoD should provide a definition of "provisional award-fee payments" and consider continuation of provisional award-fee payments, but with more restrictions.

DoD response: DoD understands the respondents' concerns. However, the payment of award fee prior to the end of an award-fee period is not appropriate since the contractor's performance has not been evaluated and the contractor may not earn that paid award fee during that period. Because DoD has made the policy decision that provisional award-fee payments are not appropriate, no definition of the term is required.

b. *Comment:* One respondent stated that payment for successful completion of elements of multiple-incentive contracts should not be affected by the proposed rule's elimination of provisional award fees.

DoD Response: DoD agrees. There is nothing in the rule that prohibits payment when a contractor has successfully completed elements of a multiple-incentive contract.

3. Selection of Contract Type

a. *Comment:* According to one respondent, limitations on cost-plus-award-fee (CPAF) contracts have the unintended consequence of encouraging the use of the less desirable cost-plus-fixed-fee (CPFF) contract type.

DoD Response: The purpose of the proposed rule is to ensure the amount of award fees paid on CPAF contracts is commensurate with the contractor's

performance. DoD expects contracting officers to utilize appropriate contract types.

b. *Comment:* One respondent suggested DoD delete the language at DFARS 216.45-2(3)(A)(1).

DoD Response: DoD believes the respondent meant proposed DFARS 216.405-2(3)(i)(A)(2) (renumbered from current DFARS 216.405-2(c)(3)(i)(A)(2)), which states that the CPAF contract should not be used to avoid developing objective targets so a cost-plus-incentive-fee (CPIF) contract can be used. This language has not been revised by this rule. CPAF contract types should not be used instead of a CPIF contract type where a CPFF contract type is appropriate.

4. Other Issues

a. *Comment:* One respondent recommended the reference to the "Government" be revised to reference the "Contracting Officer" in the proposed clause at DFARS 252.216-70XX.

DoD Response: DoD agrees. DFARS 252.216-7005 has been changed accordingly. Furthermore, the reference to "the Contracting Officer's final evaluation" in DFARS 216.405-2(2) has been revised for clarity to reference "the fee-determining official's final evaluation."

b. *Comment:* One respondent suggested that DoD clarify the definition of CPAF such that it includes only contracts that provide for fee only on an award-fee basis, and does not include any hybrid award-fee/incentive-fee contracts.

DoD Response: No change to the definition has been made. Award-fee portions of hybrid contracts shall be subject to the award-fee requirements of this rule.

c. *Comment:* Respondents suggested that the proposed rule should not be applied retroactively.

DoD Response: The incorporation into an existing contract of the new clause at DFARS 252.216-7005 would require a bilateral modification to that contract. The rule does not require contracting officers to insert DFARS 252.216-7005 into existing contracts. However, in cases where its use may be justified, the contracting officer may insert the clause via a bilateral modification in accordance with FAR 1.108(d).

d. *Comment:* Respondents suggested that award-fee contract funding modifications should be provided concurrent with the fee-determining official's rating.

DoD Response: This rule has no effect on the timeliness of funding modifications.

e. *Comment:* Respondents suggested that DoD should reconsider the policy that prohibits roll-over of unearned award fee.

DoD Response: Contractors should not be given a second opportunity to obtain unearned award fees when they fail to meet cost, schedule, and technical performance criteria specified in the contract. The roll-over of unearned award fee would provide a disincentive to contractors to meet cost, schedule, and technical performance criteria specified in the contract in a given evaluation period if the contractor believes they will be given additional opportunities to obtain that unearned award fee in subsequent evaluation periods.

B. Other Change

In addition to changes made in response to the public comments, the phrase "held for" has been replaced by the phrase "available for" in DFARS 216.405-2(1) to better reflect DoD policy.

III. Executive Order 12866

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. 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 most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive fixed-price basis and do not utilize award-fee type incentives. Of the 1.16 million contracts awarded to small businesses in Fiscal Year 2010, less than 0.1 percent were award-fee contracts.

The rule prohibits roll-over of unearned award fee, and requires that at least 40 percent of the award-fee pool be available for the final performance evaluation with the intent of incentivizing the contractor throughout performance of the contract. Any impact of these requirements on small businesses that do have award-fee contracts is mitigated by the fact that contractors will continue to be paid costs on cost-type contracts, and progress or performance-based payments on fixed-price contracts. Therefore, contractors' cash flow will not be impacted significantly unless there is a failure to meet the performance criteria in the contract.

Furthermore, the final rule provides more flexibility regarding the requirement that 40 percent of the award-fee pool must be available for the final evaluation period. With the approval of the head of the contracting activity, the contracting officer can determine that, in some cases, a percentage of less than 40 percent of the award-fee pool is appropriate to be made available for the final evaluation period.

Additionally, no comments were received in response to publication of the proposed rule with respect to the impact of the proposed rule on small entities.

V. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 216 and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 216 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 216 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 216—TYPES OF CONTRACTS

■ 2. Revise section 216.401, paragraph (e), to read as follows:

216.401 General.

* * * * *

(e) Award-fee plans required in FAR 16.401(e) shall be incorporated into all award-fee type contracts. Follow the procedures at PGI 216.401(e) when planning to award an award-fee contract.

■ 3. Add section 216.401–71 to read as follows:

216.401–71 Objective criteria.

(1) Contracting officers shall use objective criteria to the maximum extent possible to measure contract performance. Objective criteria are associated with cost-plus-incentive-fee and fixed-price-incentive contracts.

(2) When objective criteria exist but the contracting officer determines that it is in the best interest of the Government also to incentivize subjective elements of performance, the most appropriate

contract type is a multiple-incentive contract containing both objective incentives and subjective award-fee criteria (i.e., cost-plus-incentive-fee/award-fee or fixed-price-incentive/award-fee).

(3) See PGI 216.401(e) for guidance on the use of award-fee contracts.

■ 4. Revise section 216.405–2 to read as follows:

216.405–2 Cost-plus-award-fee contracts.

(1) *Award-fee pool.* The award-fee pool is the total available award fee for each evaluation period for the life of the contract. The contracting officer shall perform an analysis of appropriate fee distribution to ensure at least 40 percent of the award fee is available for the final evaluation so that the award fee is appropriately distributed over all evaluation periods to incentivize the contractor throughout performance of the contract. The percentage of award fee available for the final evaluation may be set below 40 percent if the contracting officer determines that a lower percentage is appropriate, and this determination is approved by the head of the contracting activity (HCA). The HCA may not delegate this approval authority.

(2) *Award-fee evaluation and payments.* Award-fee payments other than payments resulting from the evaluation at the end of an award-fee period are prohibited. (This prohibition does not apply to base-fee payments.) The fee-determining official's rating for award-fee evaluations will be provided to the contractor within 45 calendar days of the end of the period being evaluated. The final award-fee payment will be consistent with the fee-determining official's final evaluation of the contractor's overall performance against the cost, schedule, and performance outcomes specified in the award-fee plan.

(3) *Limitations.*

(i) The cost-plus-award-fee contract shall not be used—

(A) To avoid—

(1) Establishing cost-plus-fixed-fee contracts when the criteria for cost-plus-fixed-fee contracts apply; or

(2) Developing objective targets so a cost-plus-incentive-fee contract can be used; or

(B) For either engineering development or operational system development acquisitions that have specifications suitable for simultaneous research and development and production, except a cost-plus-award-fee contract may be used for individual engineering development or operational system development acquisitions

ancillary to the development of a major weapon system or equipment, where—

(1) It is more advantageous; and

(2) The purpose of the acquisition is clearly to determine or solve specific problems associated with the major weapon system or equipment.

(ii) Do not apply the weighted guidelines method to cost-plus-award-fee contracts for either the base (fixed) fee or the award fee.

(iii) The base fee shall not exceed three percent of the estimated cost of the contract exclusive of the fee.

(4) See PGI 216.405–2 for guidance on the use of cost-plus-award-fee contracts.

■ 5. Revise section 216.406 to read as follows:

216.406 Contract clauses.

(e)(1) Use the clause at 252.216–7004, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel, in all solicitations and contracts containing award-fee provisions.

(2) Use the clause at 252.216–7005, Award Fee, in solicitations and contracts when an award-fee contract is contemplated.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Add section 252.216–7005 to read as follows:

252.216–7005 Award Fee.

As prescribed in 216.406(e)(2), insert the following clause:

AWARD FEE (FEB 2011)

The Contractor may earn award fee from a minimum of zero dollars to the maximum amount stated in the award-fee plan in this contract. In no event will award fee be paid to the Contractor for any evaluation period in which the Government rates the Contractor's overall cost, schedule, and technical performance below satisfactory. The Contracting Officer may unilaterally revise the award-fee plan prior to the beginning of any rating period in order to redirect contractor emphasis.

(End of clause)

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