

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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January 21, 2003
CODSIA Case No. 9-02

Ms. Sandra G. Haberlin
Defense Acquisition Regulations Council
OUSD (AT&L) DPAP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

Subject: DFARS Case 2001-DD013 - Proposed Defense Federal Acquisition Supplement Amendment to Incorporate Provisional Award Fee Payments under Cost-Plus-Award-Fee Contracts.

Dear Ms. Haberlin:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed rule published in the *Federal Register* on November 22, 2002 (67 Fed.Reg. 48649). We commend the Department of Defense on its progress in developing changes in award fee contracting that improve the incentive effect of award fee provisions, and will enhance the health of the defense industry. Formed in 1964 by the industry associations with common interests in the defense and space fields, CODSIA is currently composed of six associations representing over 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary. A decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

The Department of Defense (DoD) proposes to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to incorporate use of Provisional Award Fee Payments (PAFP) under cost-plus-award-fee (CPAF) contracts. Authorization of PAFP's assumes (1) successful evaluations for prior periods, and (2) the fee determining official's (FDO) expectation that the PAFP's will not reduce the overall effectiveness of the award fee incentive.

We are encouraged by the value the Department places on healthy defense businesses, and by DoD's efforts to make fee payments on cost plus award fee (CPAF) contracts comparable to payments on cost plus fixed fee (CPFF) and cost plus incentive fee (CPIF) contracts. Use of PAFP's as part of the incentive structure will have a very positive effect on the health of the defense industry, and strengthen contractor performance, as long as customary fee rates are not

decremented in structuring the CPAF contract. In addition, as a customary practice, there should be no need to require consideration for the contracting officer to include PAFP's in solicitations or resulting contracts, and no interest charged on credit payments.

This innovative contracting approach will benefit programs only if the PAFP provision is established as a customary feature of award fee contracts, and if its application is consistently applied across DoD. We offer comments in five areas:

- Criteria for customary use of PAFP's;
- A basis for establishing parity in payments under incentive contracts;
- Clarification of the use of PAFP's for follow-on contracts;
- A training approach to facilitate use of this important new provision; and
- Government-wide application.

Criteria for Customary use of Provisional Award Fee Payments

The incentive effect and cash flow benefits of PAFP's will be achieved only if the PAFP provision is introduced as a customary practice. Fee is paid during performance on CPFF and CPIF contracts and it should be the same for CPAF contracts. Since the government is protected from risk by the terms included in the PAFP 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 PAFP's facilitate. Establishing criteria that standardizes use of the PAFP, subject to the CO's determination of continued successful performance, will encourage use of this important new provision, while not diminishing the ability of the CO to discontinue or reduce the PAFP if the contractor's performance warrants a reduction.

We recommend changing the last sentence in proposed 216.405-2(b)(3) to read

"The contracting officer should include provisional award fee payments in a CPAF contract when the period of performance for the contract exceeds 12 months, provided those payments"

Parity in Payments under Incentive Contracts

The Department should strive to establish parity in how fee is billed for CPAF 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 is contemplated in the PAFP 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 CPAF 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 PAFP at the level they have demonstrated in prior periods, similar to the target with appropriate adjustments made in CPIF and FPIF contracts. This approach poses no risk to the government since the CO can reduce or eliminate the PAFP when performance is not commensurate with the provisional payment, and any overpayment is fully recoverable. Such an approach will also simplify administration of the PAFP's.

We recommend replacing paragraph 216.405-2(b)(3)(B)(1) 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."

Follow-on contracts

Follow-on contracts represent a continuation of effort from the prior contract. Assuming successful performance on the prior contract, continuation of the PAFP's 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. We suggest language to provide the PAFP rate for the first period of a follow-on contract.

We recommend adding new language to 216.405-2(b)(3)(B)(3) as follows:

"(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."

Training for Implementation

The training of the acquisition workforce and industry counterparts is essential for success and achieving the desired result. The training must develop an appreciation for the financial tools available to our business communities that have positive impacts on the health of the defense industry, and bolstering the operation of the incentive features in our programs. CODSIA members stand ready to partner with DoD in developing and deploying an effective training and education effort to implement this important new initiative.

Government-wide Application

As the Department considers these changes for use in DoD only, we recommend that the Department initiate the process to make these provisions (with the CODSIA changes) applicable on a government-wide basis through FAR revisions.

We appreciate the opportunity to comment on the proposed rule. We encourage the Department to move expeditiously to incorporate our recommendations and adopt a final DFARS rule. Additionally, CODSIA members pledge their support in working with DoD on appropriate training and implementation activities.

If you have any questions or need additional information, please contact Karen Wilson, the CODSIA Project Officer for this case, at (703) 465-3673.

Sincerely,

(SEE ATTACHED CODSIA SIGNATORIES)

Attachment:
Revised 216.405-2



Robert Marlow
Vice President, Government Division
Aerospace Industries Association



Alan Chvotkin
Senior Vice President
Professional Services Council



Cynthia Brown
President
American Shipbuilding Association



Gary D. Engebretson
President
Contract Services Association



Dan C. Heinemeier
President, GEIA
Electronic Industries Alliance



Lt. Gen. Lawrence P. Farrell, Jr., USAF (Ret.)
President and CEO
National Defense Industrial Association

Attachment

Attachment

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

(b)

(3) The CPAF contract may include provisional award fee payments. A provisional award fee payment is a payment made within an evaluation period prior to an interim or final evaluation for that period. The contracting officer ~~may~~ should include provisional award fee payments in a CPAF contract on a ~~case-by-case basis~~ when the period of performance for the contract exceeds 12 months, provided those payments

(A) Are made no more frequently than monthly;

(B) Are limited to no more than--

(1) For the initial award fee evaluation period, 50 percent of the award fee available for that period; and

(2) For subsequent award fee evaluation periods, ~~80 percent of the evaluation score for the prior evaluation period times the award fee available for the current period, e.g., if the contractor received 90 percent of the award fee available for the prior evaluation period, provisional payments for the current period shall not exceed 72 percent (90 percent x 80 percent) of the award fee available for the current period~~ the evaluation score for the prior evaluation period shall be used as the provisional award fee payment rate;

(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.

(C) Are superceded by an interim or final award fee evaluation for the applicable evaluation period. If provisional payments have exceeded the payment determined by the evaluation score for the applicable period, the contractor shall either credit the next payment voucher for the amount of the overpayment or refund the difference to the Government, as directed by the contracting officer; and

(D) May be discontinued, or reduced in such amounts deemed appropriate by the contracting officer, when the contracting officer determines that the contractor will not achieve a level of performance commensurate with the provisional payment. The contracting officer shall notify the contractor in writing of any discontinuance or reduction in provisional award fee payments.