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Case Number:	2001-D013
Case Title:	Provisional Award Fee Payments
Date Submitted:	12/10/2002
Submitter Information	
Company/Organization:	ESC/NGM
POC:	Christopher Smallis
Street Address:	11 Eglin Street
City, State Zip:	Hanscom AFB, MA 01731
Phone Number:	781-377-5418 (DSN 478)
E-mail Address:	Christopher.Smallis@hanscom.af.mil

Public Comments:

To: "dfars@acq.osd.mil", Robbins John Civ ESC/PKX
Subject: DFARS Case 2001-D013

My recommendation is to NOT include the proposed change into DFARS.

When the concept of award fees were established, it was meant to provide incentive for performance such that if performance was provided in excess of certain thresholds, an award fee determining official would so declare after review of findings from an award fee board. The proposed change takes the concept of award fee out of that premise and establishes a means of cash payment for to contractors for reasons other than incentive. In fact, this 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 determinations could be made AND related outlays have already been made.

Award fee criteria and pools are established at or before contract award. Cost considerations are made before award, including contractor cash flows. In the case of cost-reimbursable contracts, the Government assumes a greater share of risk and compensates for this by providing the contractor with frequent billing provisions to cover all aggregated costs and fees incurred in each billing period (usually on a monthly basis). Therefore, contractor cash-flow considerations are NOT factors in deciding whether or not to have award fee provisions in the first place, and they are also NOT factors in determinations of performance in award fee periods.

The proposed change, if adopted, would pressure program managers to incorporate these provisions into existing contracts, especially those large systems contracts involving millions of dollars. Such adoption would subsequently give rise to the inherent presumption of entitlement during current award fee periods, even though actual entitlement determinations would not take place until after funds would have been disbursed. As a result, additional administrative burdens on top of those already created by award fee provisions would be placed on program managers and contracting officers. This would be especially true in instances cited in proposed DFARS 216.405-2(b)(3)(C).

This clause would also create potential legal problems, especially in instances where DFARS 216-405-2(b)(3)(D) would be imposed. How does one protect the Contracting Officer 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?

I believe the pitfalls associated with this proposal are greater than whatever benefits there may be for either party, and I believe this change should NOT be adopted.

Christopher Smallis
ESC/NGM
11 Eglin Street
Hanscom AFB, MA 01731
781-377-5418 (DSN 478)

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