208.601–70 Definitions.

As used in this subpart—

Competitive procedures includes the procedures in FAR 6.102, the set-aside procedures in FAR subpart 19.5, and competition conducted in accordance with FAR part 13.

Market research means obtaining specific information about the price, quality, and time of delivery of products available in the private sector and may include techniques described in FAR 10.002(b)(2).

■ 3. Sections 208.602 and 208.606 are revised to read as follows:

208.602 Policy.

(a)(i) Before purchasing a product listed in the FPI Schedule, conduct market research to determine whether the FPI product is comparable to products available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery (10 U.S.C. 2410n). This is a unilateral determination made at the discretion of the contracting officer. The procedures of FAR 8.605 do not apply.

(ii) Prepare a written determination that includes supporting rationale explaining the assessment of price, quality, and time of delivery, based on the results of market research comparing FPI products to those available from the private sector.

(iii) If the FPI product is comparable, follow the policy at FAR 8.602(a).

(iv) If the FPI product is not comparable in one or more of the areas of price, quality, and time of delivery—

(A) Acquire the product using—

(1) Competitive procedures; or

(2) The fair opportunity procedures in FAR 16.505, if placing an order under a multiple award task or delivery order contract;

(B) Include FPI in the solicitation process and consider a timely offer from FPI for award in accordance with the requirements and evaluation factors in the solicitation, including solicitations issued using small business set-aside procedures; and

(C) When using a multiple award schedule issued under the procedures of FAR subpart 8.4—

(1) Establish and communicate to FPI the requirements and evaluation factors that will be used as the basis for selecting a source, so that an offer from FPI can be evaluated on the same basis as the schedule holder; and

(2) Consider a timely offer from FPI.

208.606 Exceptions.

For DoD, FPI clearances also are not required when—

(1) The contracting officer makes a determination that the FPI product is not comparable to products available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery; and

(2) The procedures at 208.602(a)(iv) are used.

■ 4. Sections 208.670 and 208.671 are added to read as follows:

208.670 Performance as a subcontractor.

Do not require a contractor, or subcontractor at any tier, to use FPI as a subcontractor for performance of a contract by any means, including means such as—

(a) A solicitation provision requiring a potential contractor to offer to make use of FPI products or services;

(b) A contract specification requiring the contractor to use specific products or services (or classes of products or services) offered by FPI; or

(c) Any contract modification directing the use of FPI products or services.

208.671 Protection of classified and sensitive information.

Do not enter into any contract with FPI that allows an inmate worker access to any—

(a) Classified data;

(b) Geographic data regarding the location of—

(1) Surface and subsurface infrastructure providing communications or water or electrical power distribution;

(2) Pipelines for the distribution of natural gas, bulk petroleum products, or other commodities; or

(3) Other utilities; or

(c) Personal or financial information about any individual private citizen, including information relating to such person's real property however described, without the prior consent of the individual.

PART 219—SMALL BUSINESS PROGRAMS

■ 5. Section 219.502–70 is added to read as follows:

219.502–70 Inclusion of Federal Prison Industries, Inc.

When using competitive procedures in accordance with 208.602(a)(iv), include Federal Prison Industries, Inc. (FPI), in the solicitation process and consider a timely offer from FPI.

■ 6. Section 219.508 is added to read as follows:

219.508 Solicitation provisions and contract clauses.

(c) Use the clause at FAR 52.219–6, Notice of Total Small Business Set-Aside, with 252.219–7005, Alternate A, when the procedures of 208.602(a)(iv) apply to the acquisition.

(d) Use the clause at FAR 52.219–7, Notice of Partial Small Business Set-Aside, with 252.219–7006, Alternate A, when the procedures of 208.602(a)(iv) apply to the acquisition.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Sections 252.219–7005 and 252.219–7006 are added to read as follows:

252.219–7005 Alternate A.

Alternate A (Dec 2003)

As prescribed in 219.508(c), substitute the following paragraph (b) for paragraph (b) of the clause at FAR 52.219–6:

(b) *General.* (1) Offers are solicited only from small business concerns and Federal Prison Industries, Inc. (FPI). Offers received from concerns that are not small business concerns or FPI shall be considered nonresponsive and will be rejected.

(2) Any award resulting from this solicitation will be made to either a small business concern or FPI.

252.219–7006 Alternate A.

Alternate A (Dec 2003)

As prescribed in 219.508(d), add the following paragraph (d) to the clause at FAR 52.219–7:

(d) Notwithstanding paragraph (b) of this clause, offers will be solicited and considered from Federal Prison Industries, Inc., for both the set-aside and non-set-aside portion of this requirement.

[FR Doc. 03–28440 Filed 11–13–03; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

48 CFR Part 216

[DFARS Case 2001–D013]

Defense Federal Acquisition Regulation Supplement; Provisional Award Fee Payments

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address the use of provisional award fee payments under cost-plus-award-fee contracts. The rule provides for successfully performing contractors to receive a portion of award fees within an evaluation period prior to a final evaluation for that period.

DATES: *Effective date:* January 13, 2004.

Applicability date: The DFARS changes in this rule apply to solicitations issued on or after January

13, 2004. Contracting officers may, at their discretion, apply the DFARS changes to solicitations issued before January 13, 2004, provided award of the resulting contract(s) occurs on or after January 13, 2004. Contracting officers may, at their discretion, apply the DFARS changes to any existing contract with appropriate consideration.

FOR FURTHER INFORMATION CONTACT: Mr. Ted Godlewski, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–2022; facsimile (703) 602–0350. Please cite DFARS Case 2001–D013.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule provides for the payment of provisional award fees within an evaluation period prior to a final evaluation for that period. The provisional payments would be based on (1) successful evaluations for prior evaluation periods, and (2) the expectation that payment of provisional fee amounts will not reduce the overall effectiveness of the award fee incentive. 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.''

DoD published a proposed rule at 67 FR 70388 on November 22, 2002. Seven respondents submitted comments on the proposed rule. A discussion of the comments is provided below. Differences between the proposed and final rules are explained in the DoD Response to Comments 5 and 10.

1. *Comment:* The proposed policy appears to conflict with the Defense Finance and Accounting Service (DFAS) DFAS-IN Regulation 37–1, Table 8–1, which states that award fee must not be obligated until its amount is determined. If provisional award fee is allowed, the DFAS regulation should be revised to preclude confusion.

DoD Response: Concur that DFAS may need to review its regulations to determine if revisions are required based on this DFARS rule.

2. *Comment:* It is not clear what the difference is between doing provisional award fee determinations and simply doing more frequent final award fee determinations. Presumably, the process for doing a provisional award fee payment would not be as formal as that for doing a final award fee determination. Suggest that the policy state that the agency should use a streamlined process for doing a provisional award fee determination.

DoD Response: DoD concurs with using a streamlined process for doing a provisional award fee determination, but this approach (*i.e.*, the payment of part of available award fee without using all the formalities of a full-scale award fee determination) is already implied by the wording of the rule. The rule provides a framework, with the flexibility for contracting officers to implement the rule using processes that best fit their particular business needs.

3. *Comment:* It may be advisable to establish a ceiling on the amount that may be given as a provisional award fee.

DoD Response: Concur that there should be a ceiling; however, the rule already establishes a ceiling at 216.405–2(b)(3)(B)*(1)* and *(2).* The rule states that provisional award fee payments may not exceed 50 percent of the award fee available for the initial award fee period, and may not exceed 80 percent of the evaluation score for the prior evaluation period times the award fee available for the current period. Contracting officers are free to establish lower provisional award fee amounts if they deem it to be in the Government's best interests.

4. *Comment:* The policy should recognize that provisional award fees might not be feasible or appropriate in all situations. The agency may need to consider the ability of the vendor to provide data on incurred costs. It is common for a vendor with subcontractors to be several months behind in billing. Thus, a provisional determination linked to the value of work performed might be inaccurate. Or if the award fee is based on achievement of a milestone by a particular date, the argument could be made that giving a provisional award fee payment would actually reduce the effectiveness of the incentive. Therefore, the policy should cite examples of situations in which a provisional award fee payment would be appropriate.

DoD Response: Partially concur. DoD agrees that provisional award fee payments may not be feasible or appropriate in all situations and, therefore, should be optional. The rule provides contracting officers the flexibility to determine where and how provisional award fee payments can best be employed. The rule reflects this position at DFARS 216.405–2(b)(3), which states ''The CPAF contract *may* include provisional award fee payments.'' (emphasis added) However, it is not prudent to cite examples of situations in which a provisional award fee payment would be appropriate, because examples may be misinterpreted as the only situations in which this type of payment may be used.

5. *Comment:* If the provisional award fee payment process is too informal, it would be subject to abuse or misapplication, *e.g.*, if given without adequate justification or if given based on inaccurate data. This could lead to overpayment of award fee. Therefore, the policy should address recovery of any overpayment (*e.g.*, by setoff or reduction in future award fee payments).

DoD Response: Concur that the rule should address recovery of an overpayment. The proposed rule, at 216.405–2(b)(3)(C), required the contractor to either credit any overpayment on the next payment voucher or refund any overpayment, in accordance with directions from the contracting officer. Since the overpayment is actually a debt due the Government, the final rule contains a change in this paragraph to require the contracting officer to collect the debt in accordance with FAR 32.606, Debt determination and collection.

6. *Comment:* The rule defeats the purpose of an award fee contract. By giving the contractor provisional payments on a monthly basis, you are in a sense turning an award fee contract into a fixed fee contract. The award fee pool is supposed to be tied to contractor performance, and provisional payments circumvent that by paying out a large percentage of the pool prior to the end of the evaluation period. Where is the incentive to perform? Furthermore, how can a contractor, deemed to have an adequate accounting system to support a cost-type contract, experience cash flow problems, especially when a large business can voucher for allowable costs every two weeks. In addition, has DoD considered the administrative burden of monthly provisional payments on the Government, *i.e.*, monthly modifications?

DoD Response: Provisional award fee payments do not turn an award fee contract into a fixed fee contract. The issue of entitlement is significantly different from the issue of timing. Provisional award fee payments only change the timing of the payments, not the entitlement to those payments. The contractor is incentivized, since the contractor must earn the award fee in exactly the same way as if there were no provisional award fee payments, *i.e.*, entitlement to the award fee continues to be tied to contractor performance. Should the Government determine that the contractor is not entitled to the award fee, the contractor must return the provisional payments to the Government.

As to the observation that contractors can voucher for all allowable costs on cost-type contracts every two weeks, it should be noted that not all unallowable costs are unavoidable. Contractors normally rely on the partial payment of fee for work accomplishment to cover unallowable costs, and to keep them out of a loss position on the contract as a whole. In particular, on high-dollar award fee contracts, the amount of award fee that is being held pending a formal award fee determination can be significant. As such, a standard award fee structure, instead of motivating and rewarding outstanding performance, can be a financial negative for a contractor. Without provisional award fee payments, some contractors may well prefer a smaller fixed fee that they know will arrive on a monthly basis to an award fee that, while possibly larger in amount, will be paid less frequently (*e.g.*, not paid until the end of the award fee period).

The use of provisional award fee payments is entirely optional. Contracting officers may choose to not employ provisional award fee payments when they believe such use would dilute the effectiveness of the award fee in a particular contract, would be an undue administrative burden, or would otherwise not be in the Government's best interests.

7. *Comment:* Award fee administration is a very time consuming process. In accomplishing performance evaluations, great care is taken to adequately support awarding or withholding of award fee. This effort is done in a very careful, concise, and professional manner to avoid any appearance of arbitrary or capricious application of award fee criterion and to ensure that the contractor receives appropriate consideration for performance efforts.

The ''Background'' information in the **Federal Register** notice of the proposed rule stated, ''Cost-reimbursement contracts containing award fees typically provide for an award fee payment no more frequently than every 6 months.'' However, the respondent's experience in working with cost-reimbursement contracts is that ''no more frequently'' is more appropriately ''no less frequently.'' Many of these contracts begin with 6-month evaluation periods. As complexity or dollar value increase, evaluation periods are reduced to as low as 3-months (quarterly).

Prior to awarding cost-reimbursement contracts, audits are requested to ensure that the contractor has a financial system in place to support adequately identifying cost and that the company has the financial capability to perform the contract. Normally the proposed award fee periods are identified in a solicitation, putting the contractor on notice of the Government's intent for award fee evaluation. Also, there is no prohibition against a contractor requesting contracting officer consideration for reducing the length of award fee periods should the contractor begin experiencing ''an undue financial burden.''

If a contracting officer implements this rule, it would result in an arbitrary determination of potential award fee earnings based on past performance. This practice would not only increase Government administration of the process, but could potentially allow a contractor the use of Government funds prior to a true determination of actual earnings with no consideration (such as interest) being afforded the Government, should the funds ultimately be credited back to the Government following a proper performance evaluation. Award fee should always be earned, not paid on a credit or assumptive basis in order to fulfill the intended purpose of award fee, which is to incentivize a contractor's performance. Unless the provisional payment is tied to some performance period, it could be construed as a form of advance payment. Also, since other remedies are available should a contractor (probably a large business) experience ''undue financial burden,'' no need exists for this provision.

DoD Response: Do not concur. Provisional award fee payments do not result in an arbitrary determination of potential award fee earnings based on past performance. The issues of entitlement, administrative burden, incentive to perform, and contractor cash flow are addressed in the DoD Response to Comment 6. With respect to the issue of interest on overpayments, as explained in the DoD Response to Comment 5, the final rule requires contractors to return any overpayment in accordance with FAR 32.606. FAR 32.610, Demand for payment of contract debt, states that any amounts not paid within 30 days from the date of the demand for payment will bear interest.

Furthermore, provisional award fee payments are different from advance payments, since the amount of the payment for periods subsequent to the first evaluation period is based on performance in the prior evaluation period.

8. *Comment:* The pitfalls associated with this proposal are greater than whatever benefits there may be for either party. The concept of award fees was established 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 negates the concept of award fee to provide incentive for performance and, instead, establishes a means of cash payment 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.

The Government assumes a greater share of risk when using cost-reimbursable contracts, 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 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 change 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?

DoD Response: Do not concur. With respect to the comments on the incentive for performance, cash flow, entitlement, and administrative burden considerations, see the DoD Response to Comment 6.

With respect to the comment on modifying existing contracts to include the requirement for provisional award fee payments, such modification could

only be considered if the contracting officer obtained adequate consideration. For future contracts, the rule relies upon agency procedures and contracting officer business judgment to determine if provisional award fee payments are appropriate for a particular contracting environment, rather than a ''one size fits all'' requirement.

As to the respondent's perceived legal problems, the provisional award fee payment requirement falls within the award fee provisions of the contract, including the requirements in the FAR. FAR 16.405–2(a) states ''* * * The amount of the award fee to be paid is determined by the Government's judgmental evaluation of the contractor's performance in terms of the criteria stated in the contract. This determination and the methodology for determining the award fee are unilateral decisions made solely at the discretion of the Government.'' Although the determinations are unilateral, the United States Court of Appeals in *Burnside-Ott Aviation Training Center* v. *Dalton, Secretary of the Navy,* 107F.3d 854 (Fed. Cir. 1997), held that disputes concerning the amount of the award fee are subject to the Contract Disputes Act. The Court also held that award fee determinations could continue to be committed to the discretion of contracting officers under the terms of the contract and would be upheld as long as they were not arbitrary or capricious. Therefore, the rule cannot state that provisional award fee payments are or are not disputable, since that determination may depend on other factors.

This rule does not impose any significant additional risk of litigation. For periods subsequent to the initial evaluation period, the payments are based on the evaluation for the prior period. Thus, provided the prior evaluations are not arbitrary and capricious, there would be little, if any, basis for determining the provisional award fee payments to be arbitrary and capricious.

However, should a dispute arise, such dispute would not alter or hinder ongoing contract performance. Paragraph (i) of the clause at FAR 52.233–1, Disputes, states ''The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.''

9. *Comment.* There is a need for an initial assessment of contractor performance by the fee determining official before the contracting officer pays any provisional award fees. This initial assessment can be done during the first interim evaluation. In return (for the initial wait), recommend up to 80% (vice proposed 50%) be awarded. In addition, also recommend that provisional award fee payments apply to fixed-price contracts with award fees.

DoD Response: Do not concur. The role of the fee determining official in the provisional award fee payment process should be determined by the DoD department or agency based on the particular contracting environment. Accordingly, there is no standard guidance on the role of the fee determining official or even a standard award fee clause used throughout DoD. Buying activities may provide implementing guidance to the extent they deem it necessary to provide additional information regarding the role of the fee determining official in the payment of provisional award fees.

Since the contractor's ''track record'' of performance on the contract will be limited for the initial award fee evaluation, it may be difficult to conclude that the contractor's performance for the initial contract period reflects a reasonable expectation of the performance for subsequent periods. Thus, it would not be prudent to build a higher limitation (*i.e.*, 80 percent) for the initial period.

Although DoD does not concur with increasing the ceiling for the initial period, a DoD department or agency may consider granting an individual, one-time deviation to this requirement if the department or agency believes that a specific contract is essentially a continuation of prior contracts for the same item or service and, hence, the 50 percent limitation on the initial provisional payment is not really needed to protect the Government's interests.

As to the use of provisional award fees in fixed-price-award-fee contracts, it should be noted that FAR 16.404(a)(1) indicates that a fixed-price-award-fee contract is a fixed-price contract that already has a normal profit included in the fixed price, which is paid for satisfactory performance. When other types of incentives cannot be used, a separate award fee provision can be added to a fixed-price contract to provide additional motivation and reward to a contractor for various achievements. The rationale that a provisional payment of award fee is necessary in order to allow the contractor to receive some profit or fee on work accomplished is greatly diminished, because a normal profit is already included within the fixed-price-award-fee contract structure. However, it is within a DoD department's or agency's deviation authority, on a one-time basis, to permit the use of provisional award fee payments under a fixed-price-award-fee contract if it is in the best interests of DoD.

10. *Comment:* The following sentence from the rule (DFARS 216.405–2(b)(3)) is misleading: ''A provisional award fee payment is a payment made within an evaluation period prior to an interim or final evaluation for that period.''

The fee determining official must make a determination that contractor performance warrants payment of the interim award fee amount. This ''interim evaluation'' may be confused with any interim performance evaluations called out in the award fee plan that are not linked to periodic billings (and which may or may not occur before a periodic award fee billing).

Suggest changing the sentence in the rule to read: ''A provisional award fee payment is a payment made within an evaluation period prior to the final determination for that period.''

DoD Response: Concur that the rule may not be clear as to the timing of a provisional award fee payment. The rule was intended to define a provisional award fee payment as any payment made prior to an evaluation for the period. The language in the proposed rule could be misinterpreted to mean that, when provisional payments are used, they must provide for payments prior to any interim evaluation period. The rule is intended to provide flexibility to contracting officers in determining when to permit provisional payments, rather than requiring such payments prior to interim evaluation periods. Therefore, the sentence has been revised to read: ''A provisional award fee payment is a payment made within an evaluation period prior to a final evaluation for that period.''

11. *Comment:* Recommend DFARS address the following:

a. Contractor's performance must be commensurate with the provisional award fee payment.

b. Contractor shall liquidate the debt as prescribed in FAR 32.6, Contract Debts, for overpayments made to the contractor by the Government.

c. Provisional award fee payment determinations are/are not disputable.

d. Role of the fee determining official in the provisional award fee payment process.

DoD Response:

a. Concur. The proposed rule already contained language at 216.405–2(b)(3)(D) that ties the payment of provisional award fees to the contracting officer's determination that the contractor is performing at an

appropriate level commensurate with the proposed provisional award fee payment. This language has been retained in the final rule.

b. Concur. DoD has added a reference to FAR 32.606 in the final rule at 216.405–2(b)(3)(C). Also see the DoD Response to Comment 5.

c. Do not concur. See the DoD Response to Comment 8.

d. Do not concur. See the DoD Response to Comment 9.

12. *Comment:* The proposed change should not be incorporated as drafted. The reason stated for the change is that cost-reimbursement award fee contracts typically provide for an award fee payment no more frequently than every 6 months and that this may place an undue financial burden on a contractor. This premise seems unfounded. It is hard to rationalize that a contractor faces an undue financial burden under a contract arrangement that provides for the Government to reimburse all allowable contract costs as frequently as every two weeks (FAR 52.216–7, Allowable Cost and Payment). In cost-reimbursement contracts, it is the Government that assumes a greater share of the risk and compensates for this by providing the contractor with frequent billing provisions. Furthermore, contractor cash flow considerations are not factors in determining whether or not to have award fee provisions in the first place and are not factors in determinations of performance in award fee periods.

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

13. *Comment:* This change would have the unintended consequence of defeating a prime benefit of an award fee contract. In an award fee type contract, the Government is able to hold the contractor's motivation and focus, since the contractor knows the award fee is not a given and is only obtained through successful performance each and every period. The proposed change diminishes this performance incentive concept and instead establishes a means of cash payment to contractors for reasons other than incentive. In fact, the 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 formal determinations and related outlays have been made. Also, there is no mention of base fee in this proposed change. Recommend, if this change is incorporated, that the provisional award fee payment only be used in cost-plus-award-fee contracts with zero base fee.

DoD Response. Do not concur. See the DoD Response to Comment 6 for a discussion of performance incentive and cash flow. Regarding the recommendation that provisional award fee payments only be employed in contracts with zero base fees, the rule leaves that determination to the management discretion of DoD departments and agencies.

14. *Comment:* Although there are procedures in the proposed rule for reimbursing the Government if the actual award fee determination is less than the provisional payment, the reality is that once received, the contractor is not going to be motivated to give the money back, thus leading to increased probability of disputes and potentially requiring significant additional time and effort to resolve. This type of ''tug of war'' will not add value to the contract administration process or to Government/contractor relationships.

DoD Response: Do not concur. The maximum amount permitted for provisional payments (after the initial payment) is calculated at 80 (not 100) percent of the evaluation score for the prior evaluation period times the award fee available for the current period. Therefore, it is anticipated that a very limited number of provisional award fee payments will be more than the actual award fee determinations for the current period. However, for those limited situations in which there are overpayments, see the DoD Response to Comment 5, which addresses Government procedures for collecting debt, and to Comment 8 for a discussion of contractor disputes.

15. *Comment:* The change could create potential legal problems when the instances of DFARS 216.405–2(b)(3)(D) are imposed, whereby the contracting officer reduces or discontinues the provisional payment. Since this is proposed as a contracting officer determination, without mention of the award fee board or fee determining official, how does one protect the contracting officer's 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?

DoD Response: As indicated in the DoD Response to Comment 14, it is anticipated that the overpayment of a provisional award fee payment will happen in a limited number of circumstances. However, when it does occur, it is expected 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 the fee determining official. However, there could be other instances, such as pending bankruptcy proceedings, which may make it necessary for the contracting officer to act without first consulting the award fee board or the fee determining official. In any case, it is anticipated that the contracting officer will use sound business judgment and will not make an ''arbitrary and capricious'' decision. If there is a dispute, the dispute would not alter or hinder ongoing contract performance, as explained in the DoD Response to Comment 8.

16. *Comment:* The need for additional documentation and funding tracking will put an additional burden on program offices and may discourage the use of award fee arrangements, since the Government may not believe that the expected benefits are sufficient to warrant the additional effort and cost involved with managing and administering a more resource demanding award fee process. Program offices may also believe that the process of giving the contractor part of the award fee without having the payment tied to an interim evaluation (based on the award fee plan's criteria) dilutes the effectiveness of interim evaluations as motivators for increased performance.

DoD Response: Partially concur. Although this type of payment may be administratively burdensome, its use is entirely optional. However, as explained in the DoD Response to Comment 6, DoD does not concur that provisional award fee payments will dilute the effectiveness of the interim evaluations.

17. *Comment:* This proposed change blurs the line between a cost-plus-award-fee and a cost-plus-fixed-fee type contract. A cost-plus-award-fee contract should not be used when a cost-plus-fixed-fee contract is more appropriate, but since there is a 15% statutory fee limitation on a cost-plus-fixed-fee contract, but not on a cost-plus-award-fee contract, contractors may use this change as an increased opportunity for optimal fee by pushing the Government to use a cost-plus-award-fee contract when a more appropriate type would be cost-plus-fixed-fee. Because the contract types are distinctively different, the payment of fee on a cost-plus-award-fee contract was not intended to be handled the same way it is handled on a cost-plus-fixed-fee contract. This proposed change moves award fee payment from the realm of subjective evaluation of fee earned to a type of numerical calculation (which is based on projected performance). A policy of interim payments based on assessments of

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

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.*

List of Subjects in 48 CFR Part 216

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

■ Therefore, 48 CFR Part 216 is amended as follows:

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

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

PART 216—TYPES OF CONTRACTS

■ 2. Section 216.405–2 is amended by adding paragraph (b)(3) to read as follows:

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 a final evaluation for that period. The contracting officer may include provisional award fee payments in a CPAF contract on a case-by-case basis, 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 × 80 percent) of the award fee available for the current period;

(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 contracting officer shall collect the debt in accordance with FAR 32.606; 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.

* * * * *

[FR Doc. 03–28442 Filed 11–13–03; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 579

[Docket No. NHTSA 2001–8677; Notice 7]

RIN 2127–AJ21

Reporting of Information and Documents About Potential Defects

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Correcting amendment.

SUMMARY: This document corrects a provision in the early warning reporting regulation under the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act. As noted in a petition for reconsideration, the due date for one-time historical reports was extended to a date that is not consistent with schedules of many of the manufacturers that must provide the reports. This corrects the reporting date from December 31, 2003 to January 15, 2004.

DATES: This final rule is effective November 14, 2003.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, contact Jonathan White, Office of Defects Investigation, NHTSA (phone: 202–366–5226). For legal issues, contact Andrew DiMarsico, Office of Chief Counsel, NHTSA (phone: 202–366–5263).

SUPPLEMENTARY INFORMATION:

I. Background

On July 10, 2002, the National Highway Traffic Safety Administration (NHTSA) published a final rule implementing the early warning reporting (EWR) provisions of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, 49 U.S.C. 30166(m) (67 FR 45822).

We received a number of petitions for reconsideration of the final rule, and have responded to most of them in three separate rulemaking notices. These notices were published on April 15, 2003 (Notice 4, 68 FR 18136), and on June 11, 2003 (Notice 5, 68 FR 35132; Notice 6, 68 FR 35145). Notice 6 amended the EWR reporting dates. In response, we received one petition for reconsideration of the due date for the filing of the one-time historical report. We now make a technical correction in light of that petition.

II. Extension of Due Date for the One-Time Historical Report

Notice 6 deferred the initial reporting dates of EWR information for a calendar quarter and the date for submitting the one-time historical report required by 49 CFR 579.28(c), 68 FR 35148. Currently, the latter report must be filed no later than December 31, 2003. On July 28, 2003, the Alliance of Automobile Manufacturers (Alliance) petitioned for reconsideration of this date, asking that it be changed to January 15, 2004. The Alliance asserted that the December 31 date ''falls during a traditional winter holiday period, during which most Alliance member offices in the United States are closed.'' This request does not affect the initial due date for filing of the initial quarterly report, which remains December 1, 2003.

At the time that we published Notice 6, we were primarily concerned with deferring reporting by one quarter and with adopting a schedule that staggered the submission of field reports and one-time historical reports to dates later than the reports of incidents and statistical data. We did not specifically consider whether a December 31 due date would pose any problems. If we had taken into account the practices noted by the Alliance, we would not have adopted that date. We do not believe that safety will be compromised by deferring the reporting date of historical information by two weeks in order to accommodate the practice of members of the Alliance, as well as other vehicle and child restraint system and tire manufacturers, and are amending the introductory text of subsection 579.28(c) accordingly.

IV. Privacy Act Statement

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://dms.dot.gov.*

V. Rulemaking Analyses

This notice extends, by 15 days, a reporting date adopted in Notice 6. The changes made to the EWR regulation by this notice do not alter the burdens and impacts discussed in the Regulatory Analyses of Notice 6. To the extent that