

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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June 29, 2010

Defense Acquisition Regulations System
Attn: Mr. Mark Gomersall
OUSD (AT&L) DPAP (DARS)
3060 Defense Pentagon
Room 3B855
Washington, D.C. 20301-3060

RE: Defense Federal Acquisition Regulation Supplement (DFARS) Case 2006-D021,
Award-fee contracts

Dear Mr. Gomersall,

The Council of Defense and Space Industry Association¹ is pleased to provide comments on the Department of Defense Federal Acquisition Regulation Supplement (DFARS) Case 2006-D021, "Award-fee Contracts" that was published in the *Federal Register* on April 30, 2010. The stated purpose of the proposed rule is revise guidance for award-fee evaluations and payments and to eliminate the use of provisional award-fee payments. The intent of the Department of Defense's proposed policy is to structure fee distributions under award fee contracts that appropriately incentivize the contractor throughout the performance of the contract. CODSIA members acknowledge, but do

CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of eight associations – the Aerospace Industries Association (AIA), the American Council of Engineering Companies (ACEC), the Association of General Contractors (AGC), the American Shipbuilding Association (ASA), the Chamber of Commerce of the United States of America, the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), and TechAmerica (formerly AeA and ITAA). CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

not agree with, the Department of Defense's intent to completely eliminate provisional award-fee payments as described in DFARS 216.405-2. Such payments provide a significant incentive to contractor performance by enhancing cash flow during the award fee period. The industry *is* committed to supporting DoD's goals for development of award fee distributions that help to motivate successful contract performance and completion. We believe the proposed rule is unbalanced and will produce results that are contrary to its stated purpose.

We recommend the following changes in the final policy:

- Fee distributions should align with contract performance and cost schedules. The proposed rule's 40% fee withhold until final evaluation period is arbitrary and does not reward contract performance, particularly if a contract is terminated before the final evaluation.
- The proposed rule should not be applied retroactively
- Payment for successful completion of elements of multiple incentive contracts should not be affected by the proposed rule's elimination of provisional award Fee Payments
- Award fee funding should be provided concurrent with the fee determining official's rating.

The Proposed Rule's 40% Fee Withhold Until Final Evaluation Period is Unbalanced, Arbitrary and Contradicts Itself--Fee Distributions Should Align with Contract Performance and Cost Schedules

The proposed rule's specific direction to the Contracting Officer to retain an arbitrarily established 40% of available award fee for the final evaluation period creates an unnatural distribution that is neither mathematically nor programmatically supportable. Award fee contracts are usually used on high risk development efforts where technical

requirements are not well defined. Since design activities occur early in the development cycle, an objective analysis of the appropriate fee distribution would likely result in the majority of the fee in the earlier phases of contract performance, not with the final evaluation period. The proposed rule contradicts itself by requiring an *award fee that, "is appropriately distributed over all evaluation periods"* and a requirement for a 40% reservation of all available fees for the last evaluation period.

Another factor in the assignment of award fee pool amounts should be its alignment with the contractor's actual cost of performance during the life of a contract. For high risk and technically difficult developments, contracts have extended performance periods. Award fees on such contracts should align with the contract's cost expenditure profile to maintain contractor motivation. Often major performance milestones occur before the end of a contract, and the award fee pool should align with the most critical and important milestones, wherever they appear in performance.

The Proposed Rule should not be Retroactively Applied

Although the Government has the right to revise the award fee plan prior to the beginning of any rating period, policy changes should be applicable to only those contracts first solicited and subsequently awarded after the effective date of the new rule. The proposed rule's 40% allocation to the final evaluation period would change the contractor's business case. Restructuring an existing award fee plan to the extent envisioned in the proposed rule could have a serious negative impact on existing industry planning, budgeting, and investing strategies and projections. Had solicitations issued prior to the proposed rule contained such restrictions on fee withhold, the contractor's decision to submit a proposal and the pricing of that proposal would offer, would have been different.

Payment for Successful Completion of Objective Elements of a Multiple Incentive Contracts Should Not Be Affected by the Proposed Rule's Elimination of Provisional Award Fee Payments.

The proposed rule states:

“(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)”.

The proposed rule should make clear that payment for completion of objective criteria (i.e., incentive fee criteria) under a multiple-incentive or hybrid contract does not constitute a provisional payment. Payment for completion of objective criteria (i.e., incentive fee criteria) under a multiple-incentive or hybrid contract is permitted. This clarification should be in the revised language of DFARS sections 216 and 252 and in PGI Part 216.

The language in DFARS 216.405-2(b) should remain as it is. We believe the Contracting Officer should retain the ability to authorize and approve provisional award fee payments as another tool available to motivate contractor performance. The rule should make clear that provisional award fee payments are only applicable to subjective elements of performance in the award fee plan.

Award Fee Contract Funding Modifications Should be Provided Concurrent with the Fee Determining Official's (FDO's) Rating for the Award-Fee Evaluation

Although the proposed rule (see 216.405-2(2)) states “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”, this proposal does not require the contracting officer to provide the executed funding modification and authorization to bill within that same 45 day period. We would recommend that these terms be in alignment to avoid any potential for anti-deficiency issues to surface.

CODSIA believes it is in both the Government’s and industry’s best interests to revisit the policy that prohibits roll-over of unearned award fee (see FAR 16.401(e)(4)). CODSIA believes this technique can be used successfully to motivate contractor performance and therefore should remain available for use at the discretion of the contracting officer.

For the reasons stated above, including that the proposed rule fails to recognize the importance of cash flow in motivating behavior, we believe the proposed rule creates a significant disincentive to the contractor.

Satisfactorily addressing these issues is key to developing a workable rule that meets the goals of DoD’s policy on award fee contracts and ensuring the contractor remains appropriately incentivized to perform throughout the life of the contract. Unless these issues are addressed, we do not believe this rule should be issued at all.

We appreciate your consideration of these comments. If you have any questions or need additional information, please do not hesitate to contact Ms. Lisa Goldberg at AIA.

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Ms. Goldberg may be reached at lisa.goldberg@aia-aerospace.org or by phone at 703-358-1050.

Sincerely,



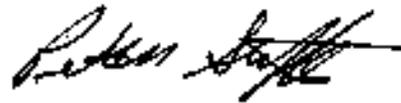
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Alan Chvotkin
Executive Vice President & Counsel
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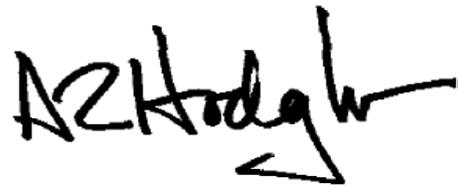
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A handwritten signature in black ink that reads "Cynthia Brown". The signature is written in a cursive, flowing style.

Cynthia Brown
President
American Shipbuilding Association