

Government Contracts Blog

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FAR Councils Issue Interim Rule Taking Aim at the Use of Award-Fee Contracts

On October 14, 2009, the Civilian Acquisition Council and the Defense Acquisition Regulation Council issued an interim rule that limits the use of award-fee contracts, modifies how a contractor earns an award fee, and prohibits the rollover of unearned award fees. The interim rule implements § 814 of the John Warner National Defense Authorization Act (NDAA) for Fiscal Year 2007, § 867 of the Duncan Hunter NDAA for Fiscal Year 2009, and the Office of Federal Procurement Policy Guidance Memorandum dated December 4, 2007 entitled "Appropriate Use of Incentive Contracts." The interim rule significantly revises Federal Acquisition Regulation (FAR) Part 16, adds FAR Part 16.401(e), and makes other general housekeeping changes.

Among the more important changes, the addition of FAR 16.401(e):

- Requires that award fees be linked to an offeror's performance in the areas of cost, schedule, and technical performance;
- Prohibits award fees if the contractor's overall performance is below satisfactory in a given evaluation period;
- Mandates the contracting officer document an award-fee determination;
- Places sole discretion in the government to devise the methodology and determine the award fee; and
- Requires an award-fee plan that establishes an award-fee Board for conducting the award-fee evaluation and the procedures for evaluating the award fee.

In rendering award-fee determinations, FAR 16.401(e) specifies the use of pre-determined adjectival ratings and associated descriptions. This evaluation scheme is set forth in Table 16-1, contains five adjectival ratings, provides an accompanying description of the rating, and specifies an exact percentage range of award fee a contractor may earn based on each rating. The percentage of award fee corresponding to each rating is as follows:

Award-Fee Adjectival Rating	Award-Fee Pool Available To Be Earned
Excellent	91%-100%
Very Good	76%-90%
Good	51%-75%
Satisfactory	No Greater than 50%
Unsatisfactory	0%

Additionally, although § 867(b)(6) of the Fiscal Year 2009 NDAA requires amendments to the FAR for non-Department of Defense agencies to provide direction as to when it may be appropriate to roll-over award fees that are not earned in one award period to a subsequent period, 16.401(e)(4) prohibits rollover of award fees altogether. The Councils explain their belief that permitting rollovers "diminishes the effectiveness" of the award-fee rating in a given evaluation period, since the unearned award fee could be earned in a subsequent evaluation period. One must question how the Government is harmed in these circumstances, since such roll-over fee is only earned where the contractor's performance warrants it.

As a result of this interim rule, contractors are subject not only to a potentially more formalized system, but one with potentially harsh results for which future recovery is precluded.

Interested parties must submit comments to the Regulatory Secretariat by December 14, 2009.

Authored By:

[John S. Tobey](#)
(202) 469-4920
jtobey@sheppardmullin.com