Dear Ms. Rider:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The proposed rule would require that when a contract contains multiple accounting classifications and a provision for contract financing payments, the contracting officer is to provide instructions to the paying office adequate to permit the paying office "to distribute the contract financing payment in proportions that reasonably reflect the performance of work on the contract." The contracting officer would be required to use one of four alternative approaches to develop the payment instructions:

---

Distribution of Contract Financing Payments

August 4, 1997

Defense Acquisition Regulations Council
Attention: Ms. Melissa Rider
PDUSD (A&T) DP (DAR)
IMD 3D139
3062 Defense Pentagon
Washington, D.C. 20301-3062

Re: Defense Federal Acquisition Regulation Supplement
Case 97-D011, Distribution of Contract Financing Payments;
1. **Contract financing payments based on information supplied in accordance with contract requirements.** The regulations provide two examples: (a) a payment distribution profile prepared by the contracting officer based on a "contract funds status report" or other form of cost reporting that identifies actual funds usage by contract line item ("CLIN") or subline item ("SLIN"); or (b) information contractually required to be included on the contractor's payment request, identifying the amount of payment to be made for each CLIN or SLIN against which payment is requested.

2. **Contract financing payments based on a unique payment distribution profile.** The contracting officer would establish a payment profile at time of award, based on anticipated contract performance, that indicates a percentage apportionment by CLIN or SLIN for each anticipated payment. The payment distribution profile may be derived from information supplied by the contractor, contract administration office, program office, or other source.

3. **Contract financing payments distributed on a proportionate percentage basis.** Payments will be distributed among all CLINs/SLINs on a proportionate percentage basis when a best estimate of contractor work performance supports an assumption that work will be performed on all CLINs/SLINs in a relatively proportionate manner.

4. **Contract financing payments using oldest funds first.** This method is described as most typically applying to requirements funded by research, development, test and evaluation ("RDT&E") appropriations for successive fiscal years, and should be used only when other payment instruction options are not practicable.

The Section is concerned that this proposed regulation will impose a substantial burden on contracting officers, payment offices, and contractors, and result in delays in the payment of contract financing, with no countervailing benefits. The perceived need to impose these burdens on the contracting parties is nowhere articulated in the proposed rulemaking.

First, the proposal states that the proposed rule is not expected to have a substantial economic impact on a substantial number of small entities "because the rule primarily pertains to internal Government accounting procedures." The Section understands, however, that DoD attempts to match contract financing payments with accounting classifications have already resulted in instances of significant delays in the processing of progress payments owed to small businesses. If this has occurred in more than a few isolated instances, it is incumbent on DoD to acknowledge that striving for fiscal law purity may have deleterious effects on small businesses and factor that impact into its cost-benefit analysis.

Second, although the proposed rule disclaims any impact on contractors, it is apparent that all of the preferred options for developing payment profiles involve collecting the necessary information from the contractor. Options 1 and 2 above, for instance, contemplate contractor submission of information that is not currently required for receipt of progress payments.

Third, if DoD feels it necessary to proceed with this rulemaking, it should expressly clarify that the proposed requirements are not applicable to commercial item acquisitions.

The Section reiterates in closing that the proposed rule currently does not, but should, reflect consideration...
of the substantial burdens that it will impose on the entire contracting community (both industry and Government) versus the benefits, if any, to be achieved.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

John T. Kuelbs
Chair, Section of Public Contract Law

cc: Marcia G. Madsen
    David A. Churchill
    Rand L. Allen
    Lynda Troutman O'Sullivan
    Marshall J. Doke, Jr.
    Frank H. Menaker, Jr.
    John B. Miller
    Alan C. Brown
    Council Members
    Chair and Vice Chairs of the Accounting, Cost & Pricing Committee
    Alexander J. Brittin

Return to Regulatory Coordinating Committee Home Page