Much like the rule proposed on June 5, 1997, the November 1997 proposed rule would require that "[w]hen a contract contains multiple accounting classification reference numbers (ACRNs) . . . and includes a clause for progress payments, the contracting officer shall provide instructions to enable the paying office to distribute the progress payments to the ACRNs in proportions that reasonably reflect the performance of the work on the contract." In contrast to the earlier proposal, however, the proposed rule would require
distribution instructions at the ACRN level rather than at the contract line item number (CLIN) or subline item number (SLIN) level. Also in contrast to the earlier proposal, the proposed rule would be limited to contracts containing a progress payment clause, and, hence, would not be applicable to commercial item contracts. In addition, the new proposal would make clear that any information required of contractors need only be the contractor's "best estimate" and based on the contractor's existing accounting system. As well, the new proposal would not limit the contracting officer to only four approaches for developing payment instructions. Because of these changes, the proposed rule is an improvement over the rule proposed on June 5.

The Section submitted comments in response to the June 5 proposal, expressing the Section's concerns over the substantial burden the proposed rule would impose on contracting officers, payment offices, and contractors, the resultant delays in the payment of contract financing, and the lack of countervailing benefits. Notwithstanding the improvements, there remain several problems with the current proposal. First, although the proposed rule attempts to reduce the burden on contractors, it would still impose a substantial burden on contracting officers and payment offices, and the attempts to match progress payments with ACRNs are still likely to result in payment delays. Indeed, given that contract line items are frequently funded by multiple ACRNs, and that each ACRN, in turn, might be used on a number of different contract line items and subline items, the matching required by the proposed rule may be more difficult than the matching required by the June 5 proposal.

Second, the Section remains concerned that the proposed rule imposes a substantial burden on the progress payment process with no apparent countervailing benefit. As articulated by the proposed rule, imposing these burdens on the contracting parties is necessary to "facilitate compliance" with the so-called Purpose Statute, 31 U.S.C. s. 1301(a). Significantly, however, the proposed rule fails to explain how (or even whether) any of the various "best estimate" progress payment distribution methodologies would achieve the stated goal, or why compliance with the Purpose Statute with respect to progress payments is necessary for the Department of Defense but, presumably (given that the rule does not appear in the Federal Acquisition Regulation), not for other federal agencies.

Third, the proposed rule acknowledges, for the first time, the burden imposed by its information collection requirements, but still fails to acknowledge the potential deleterious effect of payment delays on small businesses. The statement that "most contracts awarded to small entities have a dollar value less than the simplified acquisition threshold, and, therefore, do not use the progress payments method of financing" is not accurate. In fact, many small businesses depend on progress payments to perform contracts in excess of the simplified acquisition threshold, and those businesses could be severely harmed by the payment delays that are likely to result from the proposed rule.

Fourth, the proposed rule would require that progress payments be liquidated by ACRN. Because many CLINs and SLINs could be funded by a single ACRN, this provision of the proposed rule could cause delays in the liquidation of progress payments, resulting in larger unliquidated balances and potentially greater risk for contractors in the event of termination for default.

In closing, the Section reiterates that the proposed rule should, but still does not, reflect consideration of the substantial burdens that it will impose on the entire contracting community versus the benefits, if any, to be achieved. If distribution of progress payments by accounting classification is, in fact, required by statute, then it would seem far most cost-effective to change the statute than to impose the burdens that inhere in this proposed rule.

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

Sincerely,

Marcia G. Madsen
Chair
Section of Public Contract Law

cc: David A. Churchill