

6. *Agency procedures.* One respondent submitted the following comments:

a. The need for the rule is not evident, since the prescription in FAR 32.502–4(e) directs contracting officers to provide special contract instructions for severable work, where accounting segregation is needed, and furthermore, FAR 32.503–5(c) provides guidance to treat task orders under existing indefinite-delivery contracts as if they were separate contracts.

*Councils' response:* No change. Although the prescription at FAR 32.502–4(c) directs that special contract instructions be provided for severable work, the existing language at FAR 32.503–5(c) establishes a default requirement for separate administration of progress payments on delivery orders. There is a need for accompanying standard language in the clause at FAR 52.232–16, rather than requiring that special provisions be constructed for each occurrence of a fairly common situation. If special instructions were determined to be the solution to this inconsistency and those provisions were not written into a contract through an oversight, then the inconsistency would be incorporated into the contract. This would result in complications in the administration and payment of progress payments under the affected contract.

b. To fully implement the policy changes of the proposed rule, the first sentence of existing coverage in FAR 32.503(c) should be revised to add the phrase “or the contract” after the phrase “unless agency procedures.”

*Councils' response:* No change. The recommended language is redundant because a provision should not be in the contract if it does not comply with the procedures of the awarding agency.

c. In the second sentence of FAR 32.503(c), recommend changing “if the awarding agency wants the administration\* \* \*” to “when the awarding agency’s procedures, the contract administration office’s procedures, or the contract\* \* \*” require the contract administration to be on a basis other than order-by-order.

*Councils' response:* No change. The recommended language contains potential conflicts, e.g., if the awarding agency procedures and the contract administration office procedures are not in step. Furthermore, the Councils regard referencing the contract in this sentence as redundant, since an alternate procedure should not be in the contract unless it complies with the awarding agency procedures. The central point of the sentence under discussion is that progress payments will be administered on an order-by-

order basis if the contract is administered by an agency other than the awarding agency, unless the awarding agency has previously coordinated that alternate arrangement with the administering agency. This point is diluted if an alternate procedure can be established simply by putting it in the contract.

d. In FAR 52.232–16(l), the FAR Council recognizes the appropriateness of special attention to the terms of the contract, but fails to take into account special agency procedures that may exist, and that are covered under existing FAR 32.503–5(c). To fully implement the policy and maintain consistency within the FAR, we recommend revising the phrase “unless otherwise specified in the contract” to “unless agency procedures or the contract provide otherwise.”

*Councils' response:* No change. The Councils believe that the language in the proposed rule for FAR 52.232–16 obtains the desired affect, is consistent with the language in the proposed rule for FAR 32.503–5, and does effectively implement the policy. Specifically, by limiting the exceptions in FAR 52.232–16(l) to other contractual provisions, this language eliminates the potential for a requirement to be expressed in agency procedures, but not executed in the contract itself. This existing proposed rule enforces consistency between regulation and contract.

7. *Concurrence of the CAO.* The respondent recommended that the case be revised to require that the contracting officer obtain the concurrence of the contract administration office if the awarding agency wants the administration of progress payments to be on a basis other than order-by-order. This change would remove any ambiguity with regard to whether coordination with the contract administration office constitutes concurrence.

*Councils' response:* No change. The Councils recognize that the term “coordination” may not always be construed to mean that the awarding office will obtain the agreement of the administering office prior to deciding that progress payments will be administered on a basis other than order-by-order. However, the term “coordinate” provides more flexibility, which may be appropriate at certain times.

8. *Performance-based payments.* One respondent stated that the FAR should be revised to include a similar concept for performance-based payments. Specifically, language should be inserted into FAR part 32.10 and FAR 52.232–32, Performance-Based

Payments, to provide that, under indefinite-delivery contracts, the performance-based payments would be administered under each individual order as if the order constituted a separate contract, unless agency procedures provide otherwise. In addition to the language proposed for FAR 32.1007, this recommendation includes accompanying proposed language to be inserted in the Performance Based Payments clause at FAR 32.232–32. In addition, the FAR should be revised to provide that, for indefinite-delivery contracts, that performance-based payments be used only on individual delivery orders or task orders, and not on the basic contract.

*Councils' response:* The Councils believe that these recommendations are beyond the scope of the subject case.

This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify 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 most contracts awarded to small entities have a dollar value less than the simplified acquisition threshold and, therefore, do not have the progress payment type of financing.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose 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 Parts 32 and 52

Government procurement.

Dated: March 12, 2003.

Laura G. Smith,  
Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 32 and 52 as set forth below:

1. The authority citation for 48 CFR parts 32 and 52 continues to read as follows: