

OFFICE OF MANAGEMENT AND BUDGET
Office of Federal Procurement Policy
48 CFR Part 9903
Cost Accounting Standards Board; Applicability of Cost Accounting Standards Coverage

AGENCY: Cost Accounting Standards Board, Office of Federal Procurement Policy, OMB.

ACTION: Final rule.

SUMMARY: The Cost Accounting Standards (CAS) Board is revising the applicability criteria for application of CAS to negotiated Federal contracts. This rulemaking is authorized pursuant to Section 26 of the Office of Federal Procurement Policy Act, 41 U.S.C. § 422. The Board is taking action on this topic to adjust CAS applicability requirements in accordance with Section 4205 of Pub. L. 104-106, the "Federal Acquisition Reform Act of 1996."

EFFECTIVE DATE: This rule is effective June 6, 1997.

FOR FURTHER INFORMATION CONTACT: Richard C. Loeb, Executive Secretary, Cost Accounting Standards Board (telephone: 202-395-3254).

SUPPLEMENTARY INFORMATION:
A. Background

On July 29, 1996, the Cost Accounting Standards Board (CASB) issued an interim rule with request for comment, 61 FR 39360, implementing Section 4205 of Pub. L. 104-106, the "Federal Acquisition Reform Act of 1996" (FARA), also known as the "Clinger-Cohen Act". This law amends 41 U.S.C. § 422(f)(2)(B) to revise clause (i) and delete clause (iii). The phrase "contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public" has been replaced with the phrase "contracts or subcontracts for the acquisition of commercial items." The CAS Board is today finalizing its interim applicability regulations, solicitation provision and contract clauses in recognition of this change. As amended, firm fixed-price contracts and subcontracts as well as fixed-price contracts and subcontracts with economic price adjustment (provided that adjustments are not based on actual costs incurred), for the acquisition of commercial items (see 48 CFR, Chap. 1, Part 12) will be exempt from CAS requirements. This exemption (b)(6) supersedes all other exemptions

for the acquisition of commercial items under 9903.201-2.

To accomplish these changes, the Board is finalizing the interim amendments to Section 9903.201-1(b)(6) of its rules. Additionally, the interim solicitation provision found at 9903.201-3, the contract clauses at 9903.201-4, and the definition found at 9903.301 are finalized to reflect this change.

The Conference Report to Pub. L. 104-106 directs the CAS Board, in consultation with the Director of the Defense Contract Audit Agency, to issue guidance, consistent with commercial accounting systems and practices, to ensure that contractors appropriately assign costs to commercial item contracts, other than firm fixed-price commercial item contracts. At the present time, however, commercial item contracts are limited by regulation to the firm fixed-price and fixed-price with economic price adjustment (FPEA) variety. The Board recognizes that one of the three varieties of FPEA contracts authorized for use provides for adjustment of price based upon actual incurred costs for labor and material. Consequently, in order to reconcile the Conference Report language with the expansion of this CAS exemption to cover FPEA contracts, the Board's exemption for FPEA contracts does not include those contracts where adjustment is based on actual costs incurred (see FAR 16.203-1(b)).

The Board's inquiry of a number of Federal procuring agencies, including the Department of Defense, has indicated that FPEA contracts with adjustments based on actual costs incurred are rarely, if ever, used (DOD could not identify any contract awards of this type that had been made in the last year). Accordingly, after further consideration and review of this issue, the Board has concluded that development of the requested guidance should appropriately await the time when other than firm fixed-price or fixed-price with economic price adjustment commercial item contracts are authorized, or until another need for such guidance arises. At the time that a need arises for guidance to address the allocation of costs to other than firm fixed-price or fixed-price with economic price adjustment commercial item contracts as exempted by this rule, the Board will, of course, pursue the development of guidance to address the issue.

B. Paperwork Reduction Act

The Paperwork Reduction Act, Public Law 96-511, does not apply to this rulemaking, because this rule imposes

no paperwork burden on offerors, affected contractors and subcontractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

C. Executive Order 12866 and the Regulatory Flexibility Act

The economic impact of this rule on contractors and subcontractors is expected to be minor. As a result, the Board has determined that this final rule will not result in the promulgation of a "major rule" under the provisions of Executive Order 12866, and that a regulatory impact analysis will not be required. Furthermore, this rule will not have a significant impact on a substantial number of small businesses because small businesses are exempt from the application of the Cost Accounting Standards. Therefore, this rule does not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980.

D. Public Comments

This final rule is based upon the Board's interim rule that was issued on July 29, 1996, 61 FR 39360. Six public comments were received, including five timely comments, and one late comment. The comments received and the Board's actions taken in response thereto are summarized below:

Comment: Four commenters, representing industry associations, the private bar and Government, supported the issuance of the interim rule.

Response: The Board thanks the commenters for their supportive comments.

Comment: Two commenters opposed the rule. They stated that there was no cost accounting basis for the rule. These commenters argued that whether a contract was subject to DAS should be dependent on the size of the contract (dollar amount) and whether contractor cost information had been submitted to assist or support contract negotiations or contract pricing, and not the product description or nomenclature used to describe the Government's intended purchase; i.e., a "commercial item".

Response: The Board believes that the commenters raise valid conceptual accounting concerns. However, inasmuch as Congress has given the Board what it believes to be direction to create this new CAS exemption, the Board believes it would be remiss if it were not to implement the Congressional initiative. In addition, the Board believes that the absence of any agency audit clause from "commercial item" contracts renders an enforceability and compliance scheme

for CAS, as applied to this contract type, a moot issue.

Comment: Three commenters, including the private bar, objected to or questioned the Board's procedural process for issuing an interim rule. Two of the three commenters believe that the Board must use its statutory "four-step" rulemaking process in issuing the new exemption. Another commenter requested a more specific explanation of the authority for issuance of the interim rule.

Response: The Board agrees that it would normally have processed a new regulatory exemption to CAS coverage in accordance with the "four-step" rulemaking process normally appertaining to CAS rules. However, in this specific instance, the Board believes that it was following Congressional direction, as embodied in new statutory language contained in FARA, increasing the subject CAS exemption. In this instance, in which a statutory authorization has changed, the Board believes that it is merely implementing a Congressional initiative with respect to CAS. As such, the Board regards the new statutory language as representing a specific circumstance that creates an exception to the Board's regular "four-step" rulemaking process.

Comment: Two commenters, representing industry associations, recommended that the Board authorize contracting officers to waive all CAS requirements, for all commercial item contracts, entered into since October 13, 1994, the date of enactment of the Federal Acquisition Streamlining Act (FASA), Pub. L. 103-355.

Response: The Board believes that the present CAS exemption for commercial item contracts, as well as the agency CAS waiver authority that was previously in effect prior to the promulgation of the interim rule, were sufficient to address CAS commercial item contracting issues under both FASA and FARA. In this regard, the Board notes that the effective date of the interim rule was some five months prior to the effective date of the commercial item contracting changes made in the FAR as a result of the enactment of FARA. In addition, the Board is unaware of any contracts in which CAS has served as an impediment with respect to the acquisition of commercial items since the effective date of the FASA commercial item contracting rule on October 1, 1995.

Comment: Two commenters, representing Government and the private bar, recommended that the CAS commercial item exemption be expanded to include both firm fixed-price contracts and fixed-price contracts

with economic price adjustment (FPEA). These commenters pointed out that only these two contract types are authorized for the acquisition of commercial items.

Response: The Board agrees with the commenters. However, the Board again notes that the Conference Report to Pub. L. 104-106 directs the CAS Board, in consultation with the Director of the Defense Contract Audit Agency, to issue guidance, consistent with commercial accounting systems and practices, to ensure that contractors appropriately assign costs to commercial item contracts, other than firm fixed-price commercial item contracts. In promulgating the interim rule, the Board chose not to issue this guidance, at the present time, on the basis that it is unnecessary, provided that the CAS commercial item exemption is limited to firm fixed-price commercial item contracts.

However, the Board is also persuaded that failure to include FPEA contracts within the CAS commercial item exemption might tend to contract rather than expand the intent of the Board's previous "catalog or market price" exemption for commercial items that was in effect prior to the passage of FARA. Moreover, the Board recognizes that one of the three varieties of FPEA contracts authorized for use, provides for adjustment of price based upon actual incurred costs for labor and material. In order to reconcile the Conference Report language with the expansion of this CAS exemption to cover FPEA contracts, the Board is expanding the exemption provided in the interim rule to include a CAS exemption for FPEA contracts, provided that price adjustments are not based on actual costs incurred (see FAR 16.203-1(b)). The Board believes that this approach to FPEA contracts comports with both the intent of the statute and the Conference Report by expanding the CAS commercial item exemption to FPEA contracts in a manner that will avoid the allocation of costs to cost objectives based on actual contractor incurred costs.

List of Subjects in 48 CFR Part 9903

Costs accounting standards,
Government procurement.

Richard C. Loeb

Executive Secretary, Cost Accounting Standards Board.

Accordingly, the interim rule amending 48 CFR Part 9903 which was published at 61 FR 39360 on July 29, 1996, is adopted as a final rule with the following changes:

PART 9903—CONTRACT COVERAGE

Subpart 9903.2—CAS Program Requirements

1. The authority citation for part 9903 of chapter 99 of title 48 continues to read as follows:

Authority: Pub. L. 100-679, 102 Stat 4056, 41 U.S.C. § 422.

2. Section 9903.201-1 is amended by revising paragraph (b)(6) to read as follows:

§ 9903.201-1 CAS applicability.

* * * * *

(b) * * *

(6) Firm fixed-priced and fixed-price with economic price adjustment (provided that price adjustment is not based on actual costs incurred) contracts and subcontracts for the acquisition of commercial items.

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3. Section 9903.201-4 is amended by revising the clause heading and paragraph (d) of the clause entitled Cost Accounting Standards; and by revising paragraph (d)(1) of the clause entitled Disclosure and Consistency of Cost Accounting Practices, to read as follows:

§ 9903.201-4 Contract clauses.

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Cost Accounting Standards

(May 1997)

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(d) The contractor shall include in all negotiated subcontracts which the Contractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other subcontracts, of any tier, including the obligation to comply with all CAS in effect on the subcontractor's award date or if the subcontractor has submitted cost or pricing data, on the date of final agreement on price as shown on the subcontractor's signed Certificate of Current Cost or Pricing Data. If the subcontract is awarded to a business unit which pursuant to 9903.201-2 is subject to other types of CAS coverage, the substance of the applicable clause set forth in 9903.201-4 shall be inserted. This requirement shall apply only to negotiated subcontracts in excess of \$500,000, except that the requirement shall not apply to negotiated subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 9903.201-1.

(End of clause)

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Disclosure and Consistency of Cost Accounting Practices

(May 1997)

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(d) * * *

(1) If the subcontract is awarded to a business unit which pursuant to 9903.201-2

is subject to other types of CAS coverage, the substance of the applicable clause set forth in 9903.201-4 shall be inserted.

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