



Billing Code 3110-01

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

48 CFR Part 9903

Cost Accounting Standards: Revision of the Exemption from Cost Accounting Standards for Contracts and Subcontracts for the Acquisition of Commercial Items

AGENCY: Office of Management and Budget, Office of Federal Procurement Policy, Cost Accounting Standards Board.

ACTION: Final rule.

SUMMARY: The Office of Federal Procurement Policy (OFPP), Cost Accounting Standards (CAS) Board, is publishing a final rule revising the exemption for contracts or subcontracts for the acquisition of commercial items. This final rule clarifies the types of contracts that are exempt from the application of Cost Accounting Standards when acquiring commercial items.

DATES: *Effective* **[insert date 30 days after publication in the Federal Register]**

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SUPPLEMENTARY INFORMATION: This final rule revises the exemption 48 CFR 9903.201-1(b)(6) for contracts or subcontracts for the acquisition of commercial items (hereafter referred to as the “(b)(6) commercial item exemption”).

A. Regulatory Process - Changes to 48 CFR Part 9903

The CAS Board’s regulations and Standards are codified at 48 CFR Chapter 99. This final rule amends a CAS Board regulation other than a Standard and, as such, is not subject to the statutorily prescribed rulemaking process for the promulgation of a Standard at 41 U.S.C. 1502(c) [formerly, 41 U.S.C. 422(g)].

B. Background and Summary

In November 2012, the CAS Board issued a proposed rule to clarify the exemption from CAS when acquiring commercial items. 77 FR 69422. The exemption enumerates the contract types that are authorized when procuring commercial items. Over the years, the CAS Board has issued several rules addressing the exemption to reflect statutory changes regarding the types of contracts that may be used in commercial item acquisitions. See 61 FR 39360 (providing an exemption for firm-fixed-price contracts and subcontracts for the acquisition of commercial items as authorized by section 4305 of the Clinger-Cohen Act of 1996 (FARA), Pub. L. 104-106); 62 FR 31294 (adding fixed-price contracts with economic price adjustments other than those based on actual incurred costs for labor and materials); and 72 FR 36367 (expanding the list of exempt contract types to include time-and-material and labor- hour contracts, in response to changes made by section 1432 of the Services Acquisition Reform Act of 2003, Pub. L. 108-136, which authorized these types of contracts for the acquisition of commercial items).

Since enactment of the Federal Acquisition Streamlining Act in 1994 (Pub. L. 103-355), the Federal Acquisition Regulation (FAR) has included an enumerated list of contract types authorized for use in acquiring commercial items. See 48 CFR Part 12.207. Similar to the CAS Board, the Federal Acquisition Regulatory Council has amended FAR 12.207 several times to reflect statutory changes and clarify the intent of the regulation. An inconsistency has developed between the list of contract types recognized for use in acquiring commercial items set forth in paragraph (b)(6) and that commercial item exemption and contract types reflected in FAR 12.207. For example, FAR 12.207 allows the use of firmed fixed price contracts in conjunction with award fee incentives or performance or delivery incentives, known as fixed-price incentive (FPI) contracts, when the award fee or incentive is based solely on factors other than cost. However, the (b)(6) exemption does not expressly recognize FPI contracts on the enumerated list of exempt contracts. Because of this discrepancy, some commenters on a prior CAS Board rulemaking expressed concern that these types of FPI contracts might be excluded under a literal reading of the (b)(6) exemption. See 72 FR 36367.

In its proposed rule, the CAS Board sought to address the inconsistencies between the lists in the (b)(6) exemption and FAR 12.207 by removing reference to specific contract types in the (b)(6) exemption and instead making simple reference to “contracts and subcontracts for the acquisition of commercial items.” The CAS Board explained that this generalized language would “obviate the continuing need to update and keep current a detailed listing of permissible contract types for the acquisition of commercial items, which continues to evolve with the passage of time.” 77 FR 69424. The CAS Board further explained that this language tracks the

exemption set forth in its authorizing statute at 41 U.S.C. 1502(b)(1)(C)(i) as well as the language in section 4205 of the Clinger-Cohen Act.

The CAS Board received several comments in response to the proposed rule. A discussion of the comments and the Board's responses are set forth in section C. Of particular note, some commenters raised concern that more general language may perpetuate ambiguities regarding what contract types are covered by the exemption. After review of the public comments and further deliberation, the CAS Board has concluded that the desired goal of clarification can be more effectively achieved by adding language to the exemption that cross references to FAR 12.207 and its enumeration of contract types authorized for the acquisition of commercial items. The CAS Board believes this approach has multiple benefits. This linkage will eliminate disparities between the FAR and CAS Board rules regarding the description of contract types authorized for commercial item acquisitions. In addition, by maintaining reference to an enumerated list of authorized contract types for commercial item acquisitions, this formulation will avoid the ambiguity that could have been created if the more generalized language in proposed rule were adopted. The CAS Board also hopes that this change will avoid the need for additional CAS Board rulemakings in the event of future statutory actions addressing allowable contract types for commercial item procurements.

Accordingly, this final rule amends the language at 9903.201-1(b)(6) to exempt contracts and subcontracts authorized in 48 CFR 12.207 for the acquisition of commercial items. The CAS Board intends to monitor the effectiveness of this rule in achieving the intent of the law regarding CAS exemptions.

C. Public Comments

The CAS Board published a Notice of Proposed Rulemaking (NPR) on November 19, 2012, proposing to revise the (b)(6) commercial item exemption to read: “[c]ontracts and subcontracts for the acquisition of commercial items,” (77 FR 69422). In response to the NPR, the CAS Board received comments from four entities, one of which supported the proposed rule without change and three of which raised concerns. A summary of concerns and the CAS Board’s response are below.

1. Lack of clarity. Three commenters raised concern that deletion of the more detailed explanation of what contract types are exempt from CAS will increase confusion. One commenter stated that the change “may be confusing to the inexperienced, including both contractors and Government representatives” who may not immediately understand how to interpret the phrase “contracts and subcontracts for the acquisition of commercial items” without further explanation. This commenter suggested that the exemption include a specific cross reference to statute or regulation so that the reader could more easily determine the exempt contract types. Other commenters warned that a blanket exemption could lead to overpayment. One of these commenters admonished the Board on the need to preserve a more tailored exemption that continues to clarify that the exemption does not apply to specific contract types that involve reimbursement or pricing based on actual costs.

Response: The Board agrees that readers need to be made aware of the specific contracts that are covered by the exemption. This specificity will help ensure easy, clear, and consistent application. As explained above, the Board believes that reference to FAR 12.207, which identifies contract types that may be used to acquire commercial items should accomplish this objective. In this regard, the CAS Board notes that amendments to the CAS Board’s authorizing

statute made by section 820 of the National Defense Authorization Act for FY 2017 make clear that the Board bears a responsibility to “minimize the burden on contractors while protecting the interests of the Federal Government.” The Board believes this goal is shared by the FAR Council, especially in light of direction provided in Executive Order (E.O.) 13771, Reducing Regulation and Controlling Regulatory Costs, which directs agencies to “manage costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.”

The Board intends to monitor the effectiveness of this final rule in achieving the intent of the law regarding CAS exemptions and retains the right to change the approach in the future should any changes to FAR 12.207 that the Board believes are inconsistent with this objective occur.

2. Disclosure statements. Two commenters recommended the CAS Board develop Cost Accounting Standards and Disclosure Statement requirements for commercial item acquisitions, as Congress had required in the Clinger-Cohen Act. One of those commenters stated that such steps were needed before the permissible contract types are expanded to include certain cost type contracts.

Response: Creating CAS and Disclosure Statements for commercial item acquisitions would be outside the scope of this rulemaking effort. The CAS Board is aware of the direction contained in the Conference Report to the Federal Acquisition Streamlining Act to “establish guidance, consistent with commercial accounting systems and practices, to ensure that contractors appropriately assign costs to contracts (other than firm, fixed-price contracts) that are covered by the exemption for 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.” That assessment was made by the CAS Board when promulgating the 1997 final rule. However, since the law currently prohibits the use of cost type contracts for the acquisition of commercial items, the Board believes there is little to be gained from developing and imposing Cost Accounting Standards and Disclosure Statement requirements at this time. However, the CAS Board continues to reserve the right to issue such cost accounting standards and disclosure statement requirements should the need arise in the future.

3. Hybrid and indefinite-delivery-indefinite-quantity (IDIQ) contracts. One commenter raised the question of how to determine whether CAS is triggered on a “hybrid” contract that contains contract line item numbers (CLINs) for both commercial items and non-commercial items where the total value of the contract exceeds the CAS applicability threshold. The commenter suggested that CAS be clarified to ensure CLINs for commercial items on a hybrid contract are not covered by CAS, irrespective of the value of the contract. The commenter further recommended clarification of the CAS triggers for IDIQ contracts, which are often used to acquire commercial items – in particular whether to value the contract based on the size of orders or the size of the umbrella contract.

Response: While issues related to the applicability of CAS to hybrid and IDIQ contracts are outside the scope of this rulemaking effort, the CAS Board takes note of these issues. The Board intends to review these issues more carefully to determine whether clarification of its rules is needed to ensure appropriate application of CAS coverage.

D. Paperwork Reduction Act.

The Paperwork Reduction Act (44 U.S.C. Chapter 35, Subchapter I) does not apply to this rulemaking, because this rule will impose no paperwork burden on offerors, affected contractors and subcontractors, or members of the public which requires the approval of OMB under 44 U.S.C. 3501, et seq. The purpose of this rule is to clarify the application of CAS to contracts for commercial items. In addition, this rule is consistent with the intent of the objectives of the “Streamlined Applicability of Cost Accounting Standards” set forth in Section 802 of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106-65).

E. Executive Orders 12866 and 13771, the Congressional Review Act, and the Regulatory Flexibility Act

This rule provides technical clarification on the application of exemptions from CAS for commercial item acquisitions consistent with authorities in the Clinger-Cohen Act. By cross referencing FAR 12.207 and its enumeration of contract types authorized for the acquisition of commercial items, the CAS Board expects to eliminate disparities between the FAR and CAS Board rules that has created confusion for contractors and subcontractors. The economic impact on contractors and subcontractors is, therefore, expected to be minor. As a result, the Board has determined that this rule will not result in the promulgation of an “economically significant rule” under the provisions of Executive Order 12866, and that a regulatory impact analysis will not be required, and the requirements of E.O 13771, *Reducing Regulation and Controlling Regulatory Costs*, do not apply. For the same reason, this final rule is not a “major rule” under the Congressional Review Act, 5 U.S.C. Chapter 8. Finally, this rule does not have a significant effect on a substantial number of small entities 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, 5 U.S.C. Chapter 6.

List of Subjects in 48 CFR Part 9903

Cost Accounting Standards, Government Procurement.

Lesley A. Field

Acting Chair, Cost Accounting Standards Board

For the reasons set forth in this preamble, 48 CFR part 9903 is amended as follows:

PART 9903—CONTRACT COVERAGE

1. The authority citation for part 9903 continues to read as follows:

Authority: Pub. L. 111-350, 124 Stat. 3677, 41 U.S.C. 1502.

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

9903.201-1 CAS applicability.

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(b) * * *

(6) Contracts and subcontracts authorized in 48 CFR 12.207 for the acquisition of commercial items.

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