

May 26, 2008

Office of Federal Procurement Policy
ATTN: Mr. Raymond J. M. Wong
725 17th Street, N.W.
Room 9013
Washington, D.C. 20503

Via Email: casb2@omb.eop.gov

Re: Cost Accounting Standards: Exemption From Cost Accounting Standards for Contracts Executed and Performed Entirely Outside the United States, Its Territories, and Possessions – Notice of request for information

Dear Mr. Wong:

Thank you for the opportunity to comment on the Cost Accounting Standards (CAS) Board's "request for information" entitled "Cost Accounting Standards: Exemption From Cost Accounting Standards for Contracts Executed and Performed Entirely Outside the United States, Its Territories, and Possessions" (74 FR 18491, April 23, 2009). Founded in 1981, the Project On Government Oversight (POGO) is an independent nonprofit that investigates and exposes corruption and other misconduct in order to achieve a more effective, accountable, open, and ethical federal government. POGO has a keen interest in government contracting matters, especially those relating to the ongoing activities of the CAS Board, and urges the CAS Board to remove the CAS exemption for contracts and subcontracts executed and performed entirely outside the United States.

Although the CAS Board's notice is entitled a "request for information," POGO takes issue with the very narrow question set posed by the Board. The questions appear to be aimed solely at contractors and contracting offices of the federal government. It would surprise us if any government contractors supported lifting the current exemption. Similarly, given the anti-oversight refrain that has dominated government contracting discussions for the past fifteen years, it is unlikely that many contracting offices would dare raise their voice to support increased CAS coverage.

Nevertheless, POGO wishes to offer the following general comments supporting removal of the current exemption. As the Board knows, the primary reason for the exemption is concern with the so-called "extra-territorial" application of CAS under the Defense Production Act (DPA). First, POGO would point out that the statutory basis for CAS is no longer the DPA, but rather the Office of Federal Procurement Policy (OFPP) Act Amendments of 1988. The OFPP Act Amendments contain no territorial restrictions as were contained in the old DPA.

Next, POGO remains concerned that the term “executed” no longer has much meaning in the context of electronic commerce and other modern forms of communication. Gone are the days when a contract was physically executed by parties and the location of the parties at the time of “execution” was easily defined. Today, contracts are executed by parties who are often remote from one another and even in different countries or continents at the time of “execution.” The parties may never see the same exact physical copies of the contract, but only computer generated representations. Moreover, why should a contract that is executed and performed entirely overseas involving the U.S. Government and a U.S. company or subsidiary thereof enjoy an exemption from CAS coverage?

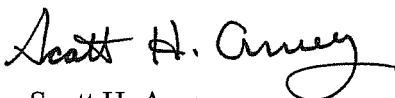
To further muddy the waters, flexibly-priced contracts are subject to the cost principles contained in Federal Acquisition Regulation (FAR) Part 31, which incorporate various CAS provisions in many cases. In other words, the current CAS exemption may elevate form over substance. For example, arguments about the difficulties of CAS compliance with overseas contracts and subcontracts could also be made about the application of FAR Part 31. Indeed, those arguments could be more compelling. For instance, foreign subcontractors may not have even fundamental accounting systems. If so, how are they expected to comply with Part 31? Yet this issue has not been raised by the contracting industry primarily because they know that it would doom the use of cost-type contracting for overseas work, which they do not wish to see happen.

It seems to POGO that the principal issue to be considered by the CAS Board is that if CAS is not made applicable to contracts and subcontracts executed and performed entirely outside the U.S., then some sort of accounting system must be put in place to ensure that billings under cost-type contracts are reasonable, allowable, and allocable. If the argument is that CAS cannot be used for this purpose because foreign contractors and subcontractors will not have adequate systems in place, then how is it that these firms are eligible to receive cost-type contracts?

In summary, contractors cannot have it both ways by claiming that a CAS exemption should apply to contracts and subcontracts executed and performed entirely outside the U.S. while still being permitted to accept cost-type contracts and applying the FAR Part 31 cost principles to these contracts. To permit such a situation clearly illustrates why the CAS overseas exemption should not continue. Contractors’, particularly U.S. contractors’, ability to shield themselves from CAS compliance on the sole basis that a contract is executed and performed entirely outside the U.S. while asserting that all costs submitted in billings to the government are reasonable, allowable, and allocable is an exercise in false logic.

Accordingly, POGO urges the CAS Board to remove the CAS exemption for contracts and subcontracts executed and performed entirely outside the United States.

Sincerely,



Scott H. Amey
General Counsel