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November 9, 2005

**VIA ELECTRONIC MAIL AND FACSIMILE**

Cost Accounting Standards Board  
Office of Federal Procurement Policy  
725 17<sup>th</sup> Street, N.W, Room 9013  
Washington, DC 20503

**Re: Staff Discussion Paper Regarding CAS Exemption for Contracts  
Executed and Performed Entirely Outside the United States, its  
Territories, and Possessions, 70 Fed. Reg. 53977 (Sept. 13, 2005)**

Dear Sirs:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced Staff Discussion Paper ("SDP"). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees have members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.<sup>1</sup>

By Federal Register notice published on Tuesday, September 13, 2005 (70 Fed. Reg. 53977) the Cost Accounting Standards ("CAS") Board requested comments on a SDP that proposes to remove the exemption of "Contracts and

<sup>1</sup> This letter is available in pdf format at <http://www.abanet.org/contract/Federal/regsgcomm/home.html> under the topic "Cost Allowability and Cost Accounting."

Subcontracts to be executed and performed entirely outside the United States, its Territories, and Possessions” (48 C.F.R. § 9903.01-1(b)(14)) from the CAS. In particular, the CAS Board seeks comments on six specific questions related to the necessity for the aforementioned exemption. The following discussion provides comments on each of the six questions.

- 1. Any statute that would require the CAS Board to retain this exemption. If any such statute exists, provide the specific statute and language that contain this requirement.**

The request for comments on the SDP explains the history for the subject exemption. Congress established the original CAS Board, which issued the exemption, under the Defense Production Act of 1950 (“DPA”). The DPA provided that certain of its provisions, including those that established the CAS Board, would be applicable to the “United States, its territories and possessions, and the District of Columbia.” Thus, because the rules of the original CAS Board could only apply within the United States and its territories, the original CAS Board concluded that its regulations could not apply to contracts executed and performed entirely outside of the United States, its territories and possessions. Congress established the current CAS Board, however, under the Office of Federal Procurement Policy Act, which does not include the preclusive language appearing in the DPA. Accordingly, the current CAS Board questions whether an exemption from the CAS that was based on that preclusive language of a now inapplicable statute negates the exemption.

Regardless of whether the enabling act for the CAS Board, old or new, includes preclusive language regarding the effect of its jurisdiction outside of the United States, the CAS Board must continue to be cognizant of implications regarding the extra-territorial effect of United States law. While we do not intend here to provide an essay on the subject of International Law, the CAS Board should consider that when Congress intends for laws to have extra-territorial effect, Congress usually expressly states that intention. Additionally, bilateral agreements between the United States and other countries might affect the application of the CAS to contracts and subcontracts performed and executed entirely outside of the United States. With the ever-changing dynamics of international relations, the CAS Board would be hard-pressed to insure that its regulations remain consistent with International Law and Trade Agreements. Accordingly, considering the greater context of international relations and law, an appropriate policy might be to retain the exemption to avoid a potential misapplication of the CAS and CAS Board regulations.

**2. How this exemption does or does not promote the CAS Board's primary objective of achieving "(1) an increased degree of uniformity in cost accounting practices among government contractors in like circumstances, and (2) consistency in cost accounting practices in like circumstances by individual government contractor or over periods of time."**

At least two factors are important regarding inquiry number 2. The first is that described above. Regardless of the charter of the CAS Board, it is inappropriate to apply the requirements of the CAS Board regulations extra-territorially. Second, the CAS Board must consider the material impact of the exemption. Based on anecdotal evidence, not having the benefit of a scientific survey, we suspect that contractors do not invoke the subject exemption frequently. Accordingly, the limited use of the exemption would not have a material impact on the objectives of the CAS Board.

**3. The significance of the location of contract execution to CAS applicability.**

If the contract is either executed or performed in the United States, it is likely appropriate to apply the CAS to that contract or subcontract. Contractors coming to the United States to do business should reasonably expect to comply with United States laws and regulations. Concerns regarding the preclusive effect due to restraints on extra-territorial application of United States law and regulation would occur when the contract is both executed and performed outside of the United States.

Other than for U.S. companies, where a contract is executed and performed entirely outside the United States, the application of CAS would be governed by local law and local accounting and business practices. The authority of the statute only has the weight of a contract term. The ability of the United States government to enforce such rules is limited by the local laws and regulations. Subsidiaries or divisions of U.S. companies normally follow the local legal, accounting and business practices of the region where they operate. Therefore, where the contract is executed is significant to the extent that the same requirement is being imposed on both foreign and U.S. concerns.

**4. The significance of the location of contract performance to CAS applicability.**

Despite the response to issue 3 above, the location of contract performance may be of greater significance. Certain geographic locations may have a dramatic impact on a contractor's ability to comply with CAS. When performing a contract

in a foreign territory, it is likely that necessary subcontractors and vendors will be foreign concerns that are exempt from CAS (48 C.F.R. § 9903.201-1(b)(4)) and may follow any of a variety of accounting practices normal to its region. Moreover, remote locations or war zones present unique challenges in the acquisition of supplies and services particularly when the need is urgent. Assuring even the most basic of accounting practices, such as proper invoices, may be near impossible in some locales. In such instances, it is appropriate to relax the CAS for such contracts. Furthermore, the existing exemption supports a policy of facilitating government procurements wholly outside the United States, especially in the context of readiness for war, disaster relief or other military action.

Although an U.S. company that executes and performs a federal contract in a foreign country may request a waiver from CAS, a waiver request is not practical due to process and time factors. Because CAS would not likely be applicable to foreign competitors, the additional costs of applying CAS in foreign operations could be significant. For example, the CAS applied to pension costs incurred in a foreign country under foreign law would require additional cost on the part of the U.S. company for actuarial calculations, but not its foreign counterpart.

**5. The advantages and disadvantages of exempting contracts and subcontracts from CAS that are executed and performed entirely outside the US.**

The advantages for exempting contracts that are executed and performed entirely outside the United States, its territories and possessions would be to ensure that both foreign and U.S. companies are on an equal footing. Another advantage is that U.S. companies would not have to impose cost accounting rules that are contrary to its foreign staff's education and experience. The federal government would be able to contract in a foreign country without the added burden of compliance with CAS to monitor and enforce. Additionally, as noted above, retaining the exemption does not materially affect the CAS Board's objective of uniformity of cost accounting practices for contracts obtaining such contracts.

A further advantage of exempting such contracts are that such a rule would only apply to U.S. companies. It would increase the cost of compliance for U.S. companies, thus placing them at a comparative disadvantage with foreign companies. Furthermore, the imposition of CAS on such contracts places an increased burden on United States procurement officials to enforce such requirements in foreign jurisdictions. *See also* response to issues 4, above.

**6. Contracting situations in which the exemption has historically been utilized.**

We decline to comment on this issue.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert L. Schaefer", with a stylized flourish at the end.

Robert L. Schaefer  
Chair, Section of Public Contract Law

cc: Michael A. Hordell  
Patricia A. Meagher  
Michael W. Mutek  
Carol N. Park-Conroy  
Patricia H. Wittie  
Hubert J. Bell, Jr.  
Mary Ellen Coster Williams  
Council Members  
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Cost and Pricing Committee  
David Kasanow



November 14, 2005

Cost Accounting Standards Board  
Attn: Mr. David Capitano  
Crystal Square 4, Suite 200A  
1745 Jefferson Davis Highway  
Arlington, Va. 22202

Dear Mr. Capitano:

Re: Staff Discussion Paper (SDP) – Cost Accounting Standards (CAS) Exemption for Contracts Executed and Performed Entirely Outside the United States

Dear Mr. Capitano:

The Aerospace Industries Association (AIA) is pleased to have the opportunity to respond to the issues raised in the above referenced Staff Discussion Paper, and we offer the following comments and recommendations.

48 CFR 9903.201-1(b) (4) exempts foreign concerns from all but CAS 401 and 402, while 9903.201-1(b) (14) applies to both domestic and foreign concerns and exempts contracts of those concerns that exceed \$100,000 and “are executed and performed in their entirety outside the United States (U.S.), its territories and possessions.” Both of these provisions exempt companies from all CAS requirements (not just the 19 Standards) when contracts are executed and performed outside the United States, its territories and possessions. But, as indicated previously, (b) (4) would still require foreign company compliance with 401 and 402 but no other CAS rules and regulations. If the Board eliminates (b) (14), a foreign company still could cite (b) (4) as its basis for just following 401 and 402, while a domestic concern would have to follow all the CAS rules and regulations regardless of where its contracts are executed and performed.

When this was reviewed in the early 1990s, it was decided by the Board in consultation with the Federal agencies to retain the exemption for contracts which are “executed and performed in their entirety outside the United States, its territories and possessions.” What has changed that would make this exception no longer applicable? We believe it remains impractical for a contractor that executes and performs a contract outside of the United States to follow the CAS rules and regulations promulgated in the United States. That contractor should be expected to follow the accounting conventions (rules and regulations) of the country where the contract is being performed.

In summary, we believe that the exemption provided by 9903.201-1(b) (14) should remain in effect. In this increasing global environment, it is desirable and necessary for the Government in certain cases to contract or subcontract with parties that execute and perform contracts outside the United States. This exemption permits a contractor following its national procurement and accounting rules to participate in the U.S. Government procurement process. Without the exemption, the above-mentioned contractor and its supply chain would likely find it prohibitive for many reasons to become CAS compliant. As you know, the necessity for complying with CAS has kept many commercial enterprises from participating in the U. S. Government contracting arena.

If you have any questions concerning the comments/recommendations, please contact Mr. Dick Powers of my staff. Dick can be reached at (703) 358-1042. His e-mail address is [dick.powers@aia-aerospace.org](mailto:dick.powers@aia-aerospace.org)

Sincerely,

A handwritten signature in black ink that reads "Elaine J. Guth". The signature is written in a cursive style with a large, stylized initial "E".

Elaine J. Guth  
Assistant Vice President  
Government Division

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**From:** Eisenberg, Allen [mailto:aeisenberg@nexant.com]  
**Sent:** Thursday, September 15, 2005 8:58 AM  
**To:** FN-OMB-casb  
**Subject:** exemption from CAS for foreign contracts

Thank you for the opportunity to comment.

When considering the exemption from CAS for contracts and subcontracts performed entirely outside the United States, please remember that the definition of Small Business Concern in FAR 19.001 requires a firm to have a place of business located in the United States and make a significant contribution to the US economy.

If the exemption for foreign contracts is not retained, foreign contractors who would otherwise be small businesses will be subject to limited (48 CFR 99.401 and 99.402) coverage. Those contractors will often not have the resources to revise their accounting practices to comply with CAS.

This will limit the government's ability to obtain necessary goods and services at reasonable prices, either by limiting the range of possible sources, or by the inclusion of the cost of compliance in the price to the government.

It will not promote the CAS Board's objective of achieving uniformity in cost accounting practices among Government contractors in like circumstances, by subjecting foreign small businesses to a different standard than U.S. small businesses.

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