On November 18, 1996, the Section submitted comments to the Cost Accounting Standards Board (Board) regarding its treatment of allocation of selling and marketing costs as set forth in its staff discussion paper.

The Section recommended that before the Board issues new rules on allocation of selling costs, the Board should consider whether the need exists for a new rule governing these costs. Specifically, the Section recommended that the Board consider established case law that addresses allocation of selling marketing costs. The Section suggested that if after reviewing the case law the Board determines that there are material inequities in the allocation of selling costs, it should identify the nature of these inequities and invite suggestions for their resolution.

November 18, 1996

Dr. Rein Abel
Director of Research
Cost Accounting Standards Board
Office of Federal Procurement Policy
725 17th Street, N.W.
Room 9001
Washington, DC 20503

Attn: CASB Docket No. 96-03

Re: Cost Accounting Standards Board; Allocation of Selling and Marketing Costs; 61 Fed. Reg. 49351 (Sep. 19, 1996)

Dear Dr. Abel:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Public Contract Law Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, 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 Association'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.

The staff discussion paper invites suggestions to be considered in formulating possible new rules for the
allocation of selling and marketing costs. We believe it is important to determine, first, whether the need
exists for a new rule governing these costs and, if so, the specific problems that a new rule should seek to
tackle. No current CAS standard specifically governs the allocation of selling costs. However, case law has
applied the cost allocation principle contained in the FAR to selling costs. FAR 31.201-4(b) and 31.203
require contractors to allocate costs equitably on the basis of the relative benefits received by the cost
objectives. The cost allocation principle in the FAR is consistent with CAS Board's stated objective that
allocations reflect the beneficial or causal relationship between the cost objective(s) to which costs are
requirement that a cost objective benefit equitably from allocated costs has been applied by the boards and
courts and have resulted in different conclusions in different factual settings. The boards and courts barred
the allocation of selling costs to all contracts through G&As where the facts indicated that it was not
appropriate (e.g., KMS Fusion, Inc. v. United States, 24 Cl. Ct. 582 (1991); Sanders Associates, ASBCA
18503, 75-2 BCA 11521, aff'd., 76-1 BCA 11743), and have permitted such an allocation in other
circumstances (e.g., Lockheed-Georgia Co., Div. of Lockheed Corp., ASBCA 27660, 90-3 BCA 22957). For
CAS-covered contracts, all costs, including selling costs, must be allocated consistently as either direct
or indirect costs in accordance with CAS 402. See, e.g., Aydin Corporation (West) v. Widnall, Secy. of the Air
Force, 61 F.3d 1571 (Fed. Cir. 1995).

Further research is required to determine whether the current state of the law would lead to suspected
inequities affecting a material amount of federal procurement spending on selling and marketing costs.
Many of the issues identified in the staff discussion paper have been addressed in case law decisions
applying the principles discussed above. For example, the appropriateness of an indirect allocation of selling
costs that are contingent upon the award of a contract, such as sales commissions, was addressed in Aydin
by the Federal Circuit and, in prior and subsequent proceedings, by the Armed Services Board of Contract
Appeals. In addition, the appropriateness of allocating selling costs for commercial or foreign sales over a
base that includes non-commercial U.S. Government contracts has been addressed in some of the decisions
cited above and others. Those decisions should be examined to determine whether they resulted in
inequities under the facts then at issue, and whether the principles applied in those cases would result in
inequities when applied to other likely scenarios.

If the CAS Board, through its staff, determines that material inequities in the allocation of selling costs are
likely to result under the present state of the law, we suggest that the CAS Board identify the nature of
these inequities and invite suggestions for their resolution. It would be inefficient and possibly
counterproductive to begin developing a new rule without first identifying the particular problem to be
resolved.

Assuming that a new rule is required, we believe that it should consist of simple principles. Complex or rigid
mechanical requirements can produce inequitable results when applied to unanticipated factual
circumstances. Simple principles remain viable in these instances because the parties or, in the case of a
dispute, a judge can apply the facts to the principles to reach an equitable result. These principles should
be consistent with the allocation principles in CAS 420 where the selling and marketing costs are similar in
purpose to bid and proposal and independent research and development costs.

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

Sincerely,

John T. Kuelbs
Chair, Section of Public Contract Law
CC: Marcia G. Madsen
    David A. Churchill
    Rand L. Allen
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    Marshall J. Doke, Jr.
    Frank H. Menaker, Jr.
    John B. Miller
    Alan C. Brown
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    Alexander J. Brittin

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