On September 26, 1996, the Section submitted comments to the Cost Accounting Standards Board ("CASB") regarding its interim rule on the applicability of accounting standards coverage to contracts for acquisition of commercial items. The Section first noted the CASB's apparent lack of authority to issue an interim rule without first issuing a proposed rule for comment.

The Section went on to suggest an amendment of the interim rule to include within the exemptions from CAS "fixed-price contracts with economic price adjustment," so that the interim rule is consistent with FAR Part 12. The Section recommended that the CASB not limit its exemption to firm fixed-price contracts and subcontracts solely on the basis of ambiguous language in the Conference Report for the Federal Acquisition Reform Act.

September 26, 1996

Mr. Richard C. Loeb
Executive Secretary
Cost Accounting Standards Board
Office of Federal Procurement Policy
Room 9001
725 17th Street, N.W.
Washington, D.C. 20503


Dear Mr. Loeb:

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.


Section 4205 of FARA amended 41 U.S.C. \(422(f)\) by creating a new exemption from CAS for "contracts or subcontracts for the acquisition of commercial items." 41 U.S.C. \(422(f)(1)\). This exemption replaced the previous exemption for contracts or subcontracts for which the price was negotiated on the basis of established catalog or market prices of commercial items sold in substantial quantities to the general public. In addition, FARA deleted the exemption previously added by the Federal Acquisition Streamlining Act of 1994 ("FASA") for firm fixed-price contracts or subcontracts (without cost incentives) for commercial items.

To implement these changes, the CAS Board amended \(9903.201-1(b)(6)\) of its rules to exempt from CAS "firm fixed-price contracts and subcontracts for the acquisition of commercial items." Related solicitation provisions, contract clauses and definitions were also altered. The CAS Board rescinded its December 18, 1995, "Memorandum for Agency Senior Procurement Executives" authorizing CAS waivers for individual firm fixed-price contracts for the acquisition of commercial items, when cost or pricing data is not obtained. The Board justified its limitation of the exemption to firm fixed-price contracts by noting that commercial item contracts are currently limited by regulation to the "fixed-price variety." The Board further noted that the Conference Report on the legislation tasked the Board to issue guidance to ensure that contractors appropriately assign costs to other than firm fixed-priced commercial item contracts or subcontracts, but stated that development of such guidance should appropriately await the time when such guidance is needed.

At the outset, the Section notes that the authority of the CAS Board to issue an interim rule is unclear. While it can be argued that exemptions from CAS are not subject to the mandatory four-step process that 41 U.S.C. \(422(g)\) requires to be followed for cost accounting standards and interpretations thereof, the CAS Board lacks express authority to issue an interim rule without first publishing a proposed rule for comment. Certainly there was enough time, following passage of FARA early this year, to issue a proposed rule for comment rather than an interim rule.

The issue of authority aside, the Section has the following comments on the substance of the rule. We note, in connection with the CAS Board's limitation of the commercial item contract exemption to firm fixed-price contracts or subcontracts, that the statute itself places no limitation on the contract type that may be used to acquire commercial items, and the regulations in FAR Part 12 limit agencies to the use of "firm-fixed-price contracts or fixed-price contracts with economic price adjustment." FAR 12.207 (emphasis added). To be truly co-extensive with the regulatory limitation, the CAS Board exemption should be amended to include "fixed-price contracts with economic price adjustment." If the Board fails to do so, agency acquisitions of commercial items pursuant to fixed-price contracts with economic price adjustment clauses might be deemed subject to CAS coverage, a result at odds with Congressional intent. Further, since the legislation exempts all commercial item contracts from the mandatory application of CAS, and since the limitation of contract type to fixed price is only imposed by regulation, to be compliant with the legislation the CAS Board must be prepared to move quickly to expand its exemption if and when the regulation allows additional contract types.

The CAS Board's limitation of the commercial item exemption to firm fixed-price contracts and subcontracts appears to arise from the Conference Report direction to develop guidance for the assignment of costs to other than firm fixed-price contracts. The Section notes that the Report explicitly requires that the Board develop such guidance only for 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.

H.R. Conf. Rep. No. 104-450, 104th Cong., 2nd Sess. 967-68 (1996), U.S. Code. Cong. and Admin. News, March 1996, at 453 (emphasis added). This direction is confusing at best, because it refers to an exemption that was deleted in the very same legislation. We recommend that the CAS Board not artificially limit the CAS exemption solely in reliance on this arbitrary direction in the Conference Report.

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
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