On August 23, 1996, the Section submitted comments to the General Services Administration regarding its proposed rule implementing a CAS exemption for commercial items.

The Section stated that the proposed provision, attempting to implement Section 4205 of the Federal Acquisition Reform Act of 1996 ("FARA"), is unnecessary and confusing. The CAS Board already has implemented the statutory exemption for commercial items.

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August 23, 1996

FAR Secretariat (MVRS)
Room 4037
General Services Administration
Washington, D.C. 20405

Proposed Rule Implementing CAS Exemption for Commercial Items

Dear Sir or Madam:

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 Section submits that the proposed provision at FAR 12.214 contained in the above-referenced proposed rule is unnecessary and confusing. The proposed FAR rule attempts to implement Section 4205 of the Federal Acquisition Reform Act of 1996 ("FARA"), which created a new CAS exemption for commercial

item contracts and subcontracts. The proposed FAR rule provides that CAS generally will not apply to commercial items but that CAS may apply pursuant to the CAS Board regulations. The background statement accompanying the proposed provision asserts that "CAS requirements can still be invoked as a matter of policy by the CAS Board" in connection with commercial item contracts and subcontracts.

The proposed FAR rule was issued prior to the CAS Board's action. The Section can understand why, in the absence of any action by the CAS Board to implement the statutory exemption, the FAR Council could have perceived the need to propose an implementing rule.

The promulgation of an exemption from CAS, however, is appropriately within the jurisdiction of the CAS Board, and the CAS Board has now acted. Subsequent to promulgation of the proposed FAR rule, the CAS Board issued its own interim rule revising the CAS applicability criteria to exempt firm, fixed-price contracts and subcontracts for the acquisition of commercial items from CAS requirements. 61 Fed. Reg. 39360 (July 29, 1996). The Section will be submitting separate comments to the CAS Board on its proposed interim rule.

Compliance with the CAS can be a significant obstacle facing a commercial vendor seeking to sell commercial items to the federal Government. Congress sought to provide relief in Section 4205 of FARA. Consistent with the new bright-line exemption from TINA for commercial items provided for elsewhere in FARA, Section 4205 of the Act amends the CAS statutory exemptions by eliminating the exemptions for contracts based on established catalog or market prices and for firm, fixed-price contracts or subcontracts (without cost incentives) for commercial items. In their place, Section 4205 of FARA provides for a new straight-forward statutory provision which states plainly that CAS is not mandatory in connection with:

(i) Contracts or subcontracts for the acquisition of commercial items; and
(ii) Contracts or subcontracts where the price negotiated is based on prices set by law or regulation.

Section 4205 of FARA, Pub. L. 104-106 (to be codified at 41 U.S.C. 422(f)(2)(B)). (Emphasis supplied.)

The need for any independent action by the FAR Council has passed. With the CAS Board's action, it is now inappropriate for the FAR Council to do any more than to restate the statutory and CAS Board language. At a minimum, if the FAR Council decides to retain a rule addressing the exemption for commercial item contracts and subcontracts, the statement "CAS requirements can still be invoked as a matter of policy by the CAS Board" should be deleted, and the phrase "CAS generally will not apply to commercial items" should be made less ambiguous by deleting the word "generally."

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
    Lynda Troutman O'Sullivan
    Marshall J. Doke, Jr.
    Frank H. Menaker, Jr.
    John B. Miller
    Alan C. Brown
    Council Members
    Chair and Vice Chairs of the Commercial Products and Services Committee and Accounting, Costs, and Pricing Committee
