June 19, 2000

Via First Class Mail and E-mail

General Services Administration

FAR Secretariat (MVRS)

1800 F Street, N.W., Room 4035

Washington, D.C. 20405

Attn: Ms. Laurie Duarte


Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association (the "Section"), I am submitting comments on the above-referenced proposal. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain 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.

We appreciate the Council's efforts in trying to make a simpler, more streamlined proposal than the cost impact process detailed in the Cost Accounting Standards Board's controversial second supplemental notice of proposed rulemaking ("SNPRM-II"), which was published in the Federal Register on August 20, 1999. The Section has previously commented on the added administrative burden on both industry and the government that would result from the CASB's proposal. The Section agrees that CAS administration is a matter for the Executive Branch agencies and not the CASB.

I. The Proposed Rule Would Increase, Not Decrease, the Administrative Effort Necessary to Resolve Cost Impacts

It is not clear to us that the proposed rule would reduce the amount of administrative effort currently being expended to resolve cost impacts. To the contrary, the proposed rule may make the cost-impact process more administratively burdensome. Perhaps most significantly, while proposed FAR 30.604(d) does not require the contractor to submit, as part of the general dollar magnitude ("GDM") proposal, cost impact estimates or price adjustments for every CAS-covered contract/subcontract affected by the change in cost accounting practice, it does require the contractor to compute cost impact estimates or price adjustments for every affected CAS-covered contract/subcontract. Proposed FAR 30.604(d)(2) requires the GDM proposal to include, by contract type, an "All Other" category that reflects the
total cost impact for all affected CAS-covered contracts/subcontracts that are not separately identified in the listing of individual contracts/subcontracts to be submitted pursuant to proposed FAR 30.604(d)(1). A contractor must determine the cost impact of all affected CAS-covered contracts/subcontracts and then subtract the cost impact of the separately listed contracts/subcontracts in order to determine the amounts, by contract type, to be included in the "All Other" category. A contract-by-contract analysis requires a detailed estimate to complete for every contract, comparing the old and new practices. This is particularly burdensome where there is a cost accounting practice change that encompasses the reclassification of costs from direct to indirect or vice versa. The proposed GDM process essentially requires as much effort as would be required to prepare a detailed cost impact ("DCI") proposal.

A. The General Dollar Magnitude and Detailed Cost Impact Proposals Should Be Combined

The Section recommends that the GDM settlement proposal and DCI proposal phases be combined into a single phase that requires a contractor to list every affected CAS-covered contract/subcontract (grouped by contract type) that has a cost impact above some specified threshold. The Section recommends that the cost impact threshold be no lower than $100,000. A $100,000 threshold would capture all material cost impacts while minimizing the number of contracts/subcontracts potentially requiring price adjustment. In the Section's view, any potential cost savings/price adjustments that would be foregone as a result of this minimum threshold would be offset by the reduction of government and contractor time and resources devoted to the cost impact process. A minimum $100,000 contract cost impact threshold is actually lower than the thresholds suggested in the proposed subsection 48 CFR 9903.407-1 (Changes in Cost Accounting Practice-Illustrations) of the CAS Board's Supplemental Notice of Proposed Rulemaking ("SNPRM") dated July 14, 1997 and SNPRM-II. For example, proposed Illustration 9903.407-1(b)(1) includes a $500,000 cost impact threshold.

B. A Single Contract Should Be Subject to Only One Cost Impact Adjustment

Like the CAS Board's previously published SNPRM and SNPRM-II, the proposed FAR 30.605(a) distinguishes between a cost estimating noncompliance and a cost accumulation noncompliance. The cost impact of a cost estimating noncompliance (pursuant to 30.605(d)(3)(i)) is the difference between the negotiated contract cost/price and the cost/price that would have been negotiated had the contractor used a compliant practice. The cost impact of a cost accumulation noncompliance (pursuant to 30.605(d)(3)(ii)) is the difference between the costs accumulated and the costs that would have been accumulated had the compliant practice been applied. Using this approach, a single contract that is the subject of both a cost estimating noncompliance and a cost accumulation noncompliance potentially would be subject to two price adjustments, thus enabling the government to recoup more than the damages sustained as a result of the CAS noncompliance. This proposed process is both confusing and inequitable. In the Section's view, the procedure should be simplified to provide for a single contract cost impact measured either by the difference between the costs allocated to the contract under the noncompliant practices and the costs that would have been allocated to the contract had the noncompliance not occurred, or by the difference between the cost/price agreed to and the cost/price that would have been agreed to had the noncompliance not occurred. This measurement technique adequately covers any noncompliance that occurs as a result of either cost estimation or cost accumulation.

C. Further Streamlining Is Possible

The Section also believes that it is possible to streamline the proposed two-step procedure of an adequacy determination followed by a compliance determination, set forth in proposed FAR 30.202-7. For government contractors with ongoing CAS-covered contracts and subcontracts, the process of an adequacy and compliance review could be reduced to a single step. The Section recommends retaining the existing flexibility rather than requiring use of a two-step procedure in every circumstance.

D. The Proposed Rule Is Confusing in Certain Respects

To the extent the Council decides to retain the proposed GDM and DCI proposal, the Section recommends correcting the inconsistencies in the proposed steps related to the GDM and DCI proposals. For example, the requirements of proposed FAR 30.604(f)(1) and 30.604(d)(3), (4), and (6) for DCI proposals should also apply to GDM proposals, but it is not so stated in proposed FAR 30.604(d) and (f).
II. The Proposed Rule May Unduly Restrict Implementation of New Accounting Practices

Proposed FAR 30.603-2(b) would require a contractor to notify the cognizant federal agency official ("CFAO") at least sixty days before implementing a voluntary or desirable change to its accounting practices. Proposed FAR 30.603-1(b) would similarly require sixty days advance notification before implementation of a required change. The Section previously commented on this proposed requirement in response to the CASB's September 18, 1996 Notice of Proposed Rulemaking. The proposed rule is both cumbersome and overly restrictive. Contractors should not be forced to delay making necessary and beneficial changes to their cost accounting practices while awaiting Government review. Rather, they should be allowed to prepare cost proposals and negotiate contracts based on the new accounting practice during the period between the notification date and the effective date. Indeed, a contractor is not prohibited from adopting an accounting change even if the change is not accepted by the CFAO. Moreover, sixty days advance notification may not be practicable in a dynamic business environment.

III. The Proposed Rule for Voluntary Changes May Exceed the FAR Council's Statutory Authority

Proposed FAR 30.603-2(a) asserts that "[t]he Government may adjust the contract price for voluntary changes." The authority for this provision could well be challenged because the CAS Board has not made the determinations that Congress contemplated would be made before requiring contract price adjustments for voluntary changes.

Prior to the Office of Federal Procurement Policy ("OFPP") Act Amendments of 1988, the CAS Board's authorizing statute provided the Board with authority to promulgate regulations requiring contractors to agree to a contract price adjustment for any increased costs paid on account of the contractor's failure to follow disclosed practices or to comply with CAS. 50 App. U.S.C. § 2168(h)(1). Section 26(g) of the OFPP Act Amendments directs the CASB to promulgate regulations that, inter alia, provide for "a contract price adjustment, with interest, for any increased costs paid to such contractor or subcontractor by the United States by reason of a change in the contractor's or subcontractor's cost accounting practices or by reason of a failure by the contractor or subcontractor to comply with applicable cost accounting standards." The legislative history of the 1988 amendments confirms that this change in the statutory language was a conscious one. As Senate Report No. 100-424 explains:

An issue brought to the Committee's attention by industry is that the application of a CAS Board interpretation regarding the effect of contractor initiated changes in accounting systems may result in an inequity to the government or the contractor, when such accounting changes have the effect of reducing costs allocated to firm fixed-price contracts. While the Committee does not express any view on the merits of this issue, it fully anticipates the new CAS Board will analyze the circumstances under which such reduced cost allocations may or may not give rise to possible fiscal damage to the government and make any changes in existing rules or interpretations deemed appropriate as a result of the analysis.

The CASB has not conducted the contemplated analysis, and the change in the statutory language is not reflected in the CASB regulations.

While Congress gave the CASB the statutory authority to promulgate a regulation that would authorize contract price adjustments to recover "increased costs paid" on firm-fixed price contracts as a result of voluntary accounting changes as well as noncompliances, Congress expressly took no position on whether such a change in the regulatory interpretation was appropriate. Congress clearly intended the CASB to "analyze the circumstances under which such reduced cost allocations [to firm fixed-price contracts] may or may not give rise to possible fiscal damage to the government and to make any change in existing rules or interpretations deemed appropriate as a result of the analysis." Accordingly, to avoid an issue with regard to the FAR Council's statutory authority to promulgate the proposed rule, it may be prudent to wait until the CASB determines whether a change to its existing interpretation of "increased costs paid" is necessary.

IV. The Proposed Rule Improperly Restricts the Contracting Parties' Current Flexibility to Resolve Cost Impacts

Proposed FAR 30.606(a)(1) provides that "[t]he CFAO may resolve a cost impact attributed to a change in cost accounting practice or a noncompliance by adjusting a single contract, several but not all contracts, all contracts, or
any other suitable method." The Section applauds the Councils' desire to preserve the CFAO's flexibility to resolve cost impacts without making individual contract adjustments. We are concerned, nevertheless, that the proposed rule unnecessarily - and, we believe, improperly - limits the contracting parties' flexibility by restricting the use of alternate methods to circumstances under which the Government will not pay more than it would have paid in the absence of the alternate method. For example, proposed FAR 30.606(a)(2) would require that "[t]he CFAO must choose a method to resolve the cost impact that approximates the amount, in the aggregate, that would have resulted if individual contracts had been adjusted." Similarly, proposed FAR 30.606(c)(1) provides that "[t]he CFAO may use an alternate method instead of adjusting contracts to resolve the cost impact, provided the Government will not pay more, in the aggregate, than would be paid if the CFAO did not use the alternate method." Proposed FAR 30.606(d) would also restrict the uses of offsets, providing that: "the CFAO must not use the offset process if it would result in the Government paying more, in the aggregate, than would be paid had the offset process not been used."

The proper baseline for comparison under the CASB's authorizing statute is whether the Government would pay more, in the aggregate, than it would have paid in the absence of the change in cost accounting practices or CAS noncompliance, not whether the Government will pay more, in the aggregate, than it would have paid if individual contracts were adjusted or the offset process were not used. The following example may help illustrate this point.

Assume that a contractor has two $1,000 CAS-covered contracts, one firm fixed price and the other cost reimbursement, under each of which it is required to supply 100 widgets. Accordingly, the Government is buying 200 widgets for $2,000. Assume further that the contractor's failure to comply with a particular Cost Accounting Standard results in a shift of costs totaling $100 from the firm fixed price contract to the cost reimbursement contract. If as a result of the noncompliance the Government paid $1,000 on the firm fixed price contract and reimbursed costs of $1,100 on the cost reimbursement contract, it would have paid increased costs, in the aggregate, of $100. That is because the Government would have paid $2,100 for the 200 widgets instead of the $2,000 it originally expected to pay. However, if both contracts were subject to individual contract adjustments (i.e., if the price of the firm fixed-price contract were adjusted downward by $100 and the additional costs of $100 on the cost reimbursement contract were disallowed), the Government would pay only $1,900 for the 200 widgets. Notably, making individual contract adjustments under those circumstances would result in the Government recovering costs greater than the increased costs to the Government, in the aggregate, in contravention of the plain language of 41 U.S.C. ��422(h)(3), which provides that:

In no case shall the Government recover costs greater than the increased costs (as defined by the Board) to the Government, in the aggregate, on the relevant contracts subject to the price adjustment, unless the contractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of price negotiation and which it failed to disclose to the government.

Under the proposed rule, the CFAO would be precluded from using an alternate method or using the offset process if it would result in the Government paying more than the Government would have paid by making the individual contract adjustments, i.e., $1,900, even though making individual contract adjustments would result in an unlawful recovery of more than the increased costs paid by the United States. We recommend that the Council revise proposed FAR 30.606(a)(2), (c)(1), and (d)(2) to comport with the requirements of 41 U.S.C. ��422(h)(3) and to retain a reasonable degree of flexibility in resolving cost impacts.

V. The Proposed Rule Fails to Correct the Deficiencies in the "Desirable Change" Provision of the Existing Regulations

The proposed rule would require the CFAO to make an evaluation and notify the contractor as soon as practicable whether a change is or is not desirable. The Section applauds this effort, but based on past experience does not believe that this revision will result in many determinations that accounting practice changes are desirable and not detrimental. The Section recommends that the CFAO should be required to make a determination, within a stated period of time, whether or not the change is desirable and not detrimental. In addition, to avoid Antideficiency Act concerns, the determination should be made subject to the availability of funding. By alleviating this major obstacle, the Section believes that more CFAOs would be willing to make positive determinations of desirability.
VI. The Proposed Rule Appropriately Limits the Term "Cognizant Federal Agency Official"

Like the CASB's proposal, the proposed FAR 30.001 would add a new term, "Cognizant federal agency official" ("CFAO"), which, at least in the FAR, would replace the previous references to the cognizant Administrative Contracting Officer ("ACO"). In the CASB proposal, the term CFAO would not necessarily be limited to ACOs but, rather, would include "other agency officials authorized to perform in that capacity." 64 Fed. Reg. at 45720 (proposed 48 C.F.R. § 9903.201-8). Hence, for example, an auditor authorized to determine final indirect cost rates could presumably act as a CFAO under the CASB's proposal. The Section supports the Council's proposed limitation of the term "cognizant Federal agency official" to mean the contracting officer assigned to administer CAS for all contracts in a business unit.

Nevertheless, we are uncertain as to the reason for the adoption of another new term for ACO by either the CASB or the Councils. The use of the term ACO is longstanding and we are unaware of any difficulties arising from its use. Different agencies use different terminology to refer to the ACO including, among other titles, Divisional Administrative Contracting Officer ("DACO"), Corporate Administrative Contracting Officer ("CACO"), and Defense Corporate Executive ("DCE"). Adding a new term decreases rather than increases the public's understanding of the regulation.

In addition, we note that the proposed definition addresses the CFAO "assigned" to a contractor, whereas FAR 30.201-7 and 48 C.F.R. § 9903.201-7(b) refer to the contracting officer "authorized" by the cognizant federal agency to act with regard to a contractor. We believe that the term "authorized" is more accurate and reflects that the individual having the requisite contractual authority may act on behalf of the government. We therefore recommend that "authorized" replace the term "assigned."

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

Very truly yours,

Rand L. Allen
Chair
cc: Gregory A. Smith
Norman R. Thorpe
Mary Ellen Coster-Williams
Patricia A. Meagher
David A. Churchill
Marcia G. Madsen
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Kent R. Morrison
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