

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

48 CFR Part 9903

Cost Accounting Standards Board; Applicability, Thresholds and Waiver of Cost Accounting Standards Coverage

AGENCY: Cost Accounting Standards Board, Office of Federal Procurement Policy, OMB.

ACTION: Final rule.

SUMMARY: The Office of Federal Procurement Policy, Cost Accounting Standards Board, is revising applicability, thresholds and procedures for the application of the Cost Accounting Standards (CAS) to negotiated government contracts. This rulemaking is authorized pursuant to Section 26 of the Office of Federal Procurement Policy Act. The Board is taking final action on this topic in order to adjust CAS applicability requirements and dollar thresholds in accordance with the provisions of the National Defense Authorization Act for Fiscal Year 2000.

DATES: This final rule is effective June 9, 2000.

FOR FURTHER INFORMATION CONTACT: Richard C. Loeb, Executive Secretary, Cost Accounting Standards Board (telephone: 202-395-3254).

SUPPLEMENTARY INFORMATION

A. Background

On February 7, 2000, the Cost Accounting Standards Board issued an interim rule with request for comment, 65 FR 5990. That rule, implemented Sec. 802 of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. 106-65, "Streamlined Applicability of Cost Accounting Standards." This final rule implements the provisions of Sec. 802 and provides responses to public comments received on the interim CAS Board rule. Many of the public comments received by the Board addressed issues that were beyond the scope of Sec. 802. The Board is limiting its revisions in this final rule to the items specified in Sec. 802.

B. Summary of Amendments

"Trigger contract": 48 CFR 9903.201-1(b) is amended by adding a new subparagraph (7) that exempts contracts and subcontracts from CAS coverage, provided that the business unit of the contractor or subcontractor is currently performing one or more CAS-covered

contracts or subcontracts of \$7.5 million or more.

"Firm-fixed price contract exemption": The Board is implementing this statutory exemption by amending 48 CFR 9903.201-1(b) to revise subparagraph (15) to exempt from CAS coverage, firm-fixed-price contracts and subcontracts awarded on the basis of adequate price competition without submission of cost or pricing data. The Board is using the term "cost or pricing data" rather than "certified" cost or pricing data in order to conform to the statutory requirements of 10 U.S.C. § 2306(h)(1) and 41 U.S.C. § 254(b), which defines "Cost or pricing data" as data that requires certification.

"Types of CAS coverage": 48 CFR 9903.201-2(a) is amended by revising the dollar threshold for "full CAS coverage" from \$25 million to \$50 million, and deleting the requirement that to be subject to "full CAS coverage", that a contractor or subcontractor have received at least one contract or subcontract that exceeded \$1 million (the previous "trigger contract" amount for initiation of "full CAS coverage"). 48 CFR 9903.201-2(b) is amended by revising the definition of "modified CAS coverage" to indicate that such coverage applies to covered contracts and subcontracts where the total value of CAS-covered contracts and subcontracts received by a business unit is less than \$50 million. Conforming amendments have also been made to the solicitation provisions and contract clauses appearing at 9903.201-3 and 9903.201-4, respectively.

"Waiver": 48 CFR 9903.201-5 is amended by revising this section to provide for agency CAS waiver authority under certain circumstances. "Disclosure requirements": 48 CFR 9903.202-1(b) is amended by revising the dollar amount for disclosure from \$25 million to \$50 million, and deleting the requirement that a contractor or subcontractor have received at least one contract in excess of \$1 million.

C. Paperwork Reduction Act

The Paperwork Reduction Act, Public Law 96-511, does not apply to this rule, because this rule imposes no paperwork burden on offerors, affected contractors and subcontractors, or members of the public which requires the approval of OMB under 44 U.S.C. § 3501, *et seq.* The purpose of this rule is to implement Pub. L. 106-65.

D. Executive Order 12866 and the Regulatory Flexibility Act

This rule serves to eliminate certain administrative requirements associated with the application and administration

of the Cost Accounting Standards by covered government contractors and subcontractors. The economic impact on contractors and subcontractors is therefore expected to be minor. As a result, the Board has determined that this is not a "major rule" under the provisions of Executive Order 12866, and that a regulatory impact analysis is not required. Furthermore, this rule will not have a significant effect on a substantial number of small entities because small businesses are exempt from the application of the Cost Accounting Standards. Therefore, this rule does not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980.

E. Public Comments

This final rule is based upon the Board's interim rule that was issued on February 7, 2000, 65 FR 5990. Thirteen public comments were received, including eleven timely comments and two late comments. The major comments received and the Board's actions taken in response thereto are summarized below:

Comment: Eight commenters generally supported the interim rule.

Response: The Board noted these supportive comments.

Comment: Four commenters opposed the rule, stating their belief that it provides too many opportunities for contractors to avoid CAS coverage, leaving the Government exposed to undue risk, primarily by permitting the use of inconsistent or inappropriate accounting conventions.

Response: The Board noted the commenters concerns. However, this rule is designed to implement the requirements of Sec. 802 of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. 106-65. In this respect, the Board believes that it is faithfully implementing the requirements of that law.

Comment: Seven commenters recommended that the Board retain the language of the previous CAS exemption found at 48 CFR 9903.201-1(b)(15), while adding the revised language found in the interim rule at 9903.201-1(b)(15), to constitute a new CAS exemption. These commenters believe that CAS should not apply regardless of whether a TINA waiver or exemption was granted.

Conversely, four commenters stated that they believed that the revised language at 9903.201-1(b)(15) represented a compromise, inasmuch as the statutory language at Sec. 802 appears to be designed to avoid encouraging contractors to seek TINA

waivers merely in order to be exempted from CAS requirements.

Response: Based on the legal, legislative and administrative history of this issue (including agency CAS waiver reporting requirements), the Board believes that it is adhering to the statutory intent of Sec. 802. As such, the language contained in the interim rule with respect to 9903.201-1(b)(15) is being adopted in this final rule.

Comment: Seven commenters recommended revisions to the language at 9903.201-1(b)(7) to define the term "currently performing". Four of the seven commenters recommended a definition(s) that would have the effect of exempting more contracts from CAS coverage; while three commenters recommended definition(s) that would have the effect of including more contracts within the scope of CAS coverage.

Response: The Board believes that the term "currently performing" is more than adequately defined in the Board's rules at 48 CFR 9903.301. "Currently performing", as used in the Board's rules, means that a contractor has been awarded a CAS-covered contract, but has not yet received notification of final acceptance of all supplies, services and data deliverable under the contract (including options). The Board would draw the commenters attention to the existence of this long-standing definition.

Comment: The Board also received a number of comments regarding additional CAS exemptions, waivers, dollar threshold and applicability changes, and other regulatory matters that would have the general effect of further reducing CAS applicability to contracts and subcontracts. In addition, one commenter opposed the delegation of any CAS waiver authority to the procuring agencies.

Response: While the Board has considered all the comments it has received, it is specifically limiting the scope of this rulemaking to those items required to be addressed by Sec. 802 of Pub. L. 106-65.

List of Subjects in 48 CFR Part 9903

Cost accounting standards,
Government procurement.

Nelson F. Gibbs,

Executive Director, Cost Accounting Standards Board.

For the reasons set forth in this preamble, chapter 99 of title 48 of the Code of Federal Regulations is amended as set forth below:

1. The authority citation for part 9903 of chapter 99 of title 48 continues to read as follows:

Authority: Pub. L. 100-679, 102 Stat 4056, 41 U.S.C. 422.

9903.201 [Amended]

2. Section 9903.201-1 is amended by revising paragraph (b)(7) and revising paragraph (b)(15) to read as follows:

9903.201-1 CAS applicability.

* * * * *

(b) * * *

(7) Contracts or subcontracts of less than \$7.5 million, provided that, at the time of award, the business unit of the contractor or subcontractor is not currently performing any CAS-covered contracts or subcontracts valued at \$7.5 million or greater.

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(15) Firm-fixed-price contracts or subcontracts awarded on the basis of adequate price competition without submission of cost or pricing data.

3. Section 9903.201-2 is amended by revising paragraphs (a)(1) and (2) and (b)(1) and (2) to read as follows:

9903.201-2 Types of CAS coverage.

(a) * * *

(1) Receive a single CAS-covered contract award of \$50 million or more; or

(2) Received \$50 million or more in net CAS-covered awards during its preceding cost accounting period.

(b) *Modified coverage.* (1) Modified CAS coverage requires only that the contractor comply with Standard 9904.401, Consistency in Estimating, Accumulating, and Reporting Costs, Standard 9904.402, Consistency in Allocating Costs Incurred for the Same Purpose, Standard 9904.405, Accounting for Unallowable Costs and Standard 9904.406, Cost Accounting Standard—Cost Accounting Period. Modified, rather than full, CAS coverage may be applied to a covered contract of less than \$50 million awarded to a business unit that received less than \$50 million in net CAS-covered awards in the immediately preceding cost accounting period.

(2) If any one contract is awarded with modified CAS coverage, all CAS-covered contracts awarded to that business unit during that cost accounting period must also have modified coverage with the following exception: if the business unit receives a single CAS-covered contract award of \$50 million or more, that contract must be subject to full CAS coverage. Thereafter, any covered contract awarded in the same cost accounting period must also be subject to full CAS coverage.

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4. Section 9903.201-3 is amended by revising the clause heading; by revising paragraph (c)(3) in Part I of the clause, by revising the CAUTION paragraph following paragraph (c)(4) in Part I of the clause; and by revising Part II of the clause, to read as follows:

9903.201-3 Solicitation provisions.

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Cost Accounting Standards Notices and Certification (April 2000)

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I. Disclosure Statement—Cost Accounting Practices and Certification

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(c) * * *

■(3) Certificate of Monetary Exemption.

The offeror hereby certifies that the offeror, together with all divisions, subsidiaries, and affiliates under common control, did not receive net awards of negotiated prime contracts and subcontracts subject to CAS totaling \$50 million or more in the cost accounting period immediately preceding the period in which this proposal was submitted.

The offeror further certifies that if such status changes before an award resulting from this proposal, the offeror will advise the Contracting Officer immediately.

(4) * * *

Caution: Offerors currently required to disclose because they were awarded a CAS-covered prime contract or subcontract of \$50 million or more in the current cost accounting period may not claim this exemption (4). Further, the exemption applies only in connection with proposals submitted before expiration of the 90-day period following the cost accounting period in which the monetary exemption was exceeded.

II. Cost Accounting Standards—Eligibility for Modified Contact Coverage

If the offeror is eligible to use the modified provisions of 9903.201-2(b) and elects to do so, the offeror shall indicate by checking the box below. Checking the box below shall mean that the resultant contract is subject to the Disclosure and Consistency of Cost Accounting Practices clause in lieu of the Cost Accounting Standards clause.

■The offeror hereby claims an exemption from the Cost Accounting Standards clause under the provisions of 9903.201-2(b) and certifies that the offeror is eligible for use of the Disclosure and Consistency of Cost Accounting Practices clause because during the cost accounting period

immediately preceding the period in which this proposal was submitted, the offeror received less than \$50 million in awards of CAS-covered prime contracts and subcontracts. The offeror further certifies that if such status changes before an award resulting from this proposal, the offeror will advise the Contracting Officer immediately.

Caution: An offeror may not claim the above eligibility for modified contract coverage if this proposal is expected to result in the award of a CAS-covered contract of \$50 million or more or if, during its current cost accounting period, the offeror has been awarded a single CAS-covered prime contract or subcontract of \$50 million or more.

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5. Section 9903.201-4 is amended by revising paragraph (c)(1) to read as follows:

9903.201-4 Contract clauses.

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(c) *Disclosure and Consistency of Cost Accounting Practices.* (1) The contracting officer shall insert the clause set forth below, Disclosure and Consistency of Cost Accounting Practices, in negotiated contracts when the contract amount is over \$500,000 but less than \$50 million, and the offeror certifies it is eligible for and elects to use modified CAS coverage (see 9903.201-2, unless the clause prescribed in paragraph (d) of this subsection is used).

* * * * *

6. Section 9903.201-5 is revised to read as follows:

9903.201-5 Waiver

(a) The head of an executive agency may waive the applicability of the Cost Accounting Standards for a contract or subcontract with a value of less than \$15 million, if that official determines, in writing, that the business unit of the contractor or subcontractor that will perform the work—

(1) Is primarily engaged in the sale of commercial items; and

(2) Would not otherwise be subject to the Cost Accounting Standards under this Chapter.

(b) The head of an executive agency may waive the applicability of the Cost Accounting Standards for a contract or subcontract under exceptional circumstances when necessary to meet the needs of the agency. A determination to waive the applicability of the Cost Accounting Standards by the agency head shall be set forth in writing, and shall include a statement of the circumstances justifying the waiver.

(c) The head of an executive agency may not delegate the authority under paragraphs (a) and (b) of this section, to any official below the senior policymaking level in the agency.

(d) The head of each executive agency shall report the waivers granted under paragraphs (a) and (b) of this section, for that agency, to the Cost Accounting Standards Board, on an annual basis, not later than 90 days after the close of the Government's fiscal year.

(e) Upon request of an agency head or his designee, the Cost Accounting Standards Board may waive all or any part of the requirements of 9903.201-4(a), Cost Accounting Standards, or 9903.201-4(c), Disclosure and Consistency of Cost Accounting Practices, with respect to a contract subject to the Cost Accounting Standards. Any request for a waiver shall describe the proposed contract or subcontract for which the waiver is sought and shall contain—

(1) An unequivocal statement that the proposed contractor or subcontractor refuses to accept a contract containing all or a specified part of a CAS clause and the specific reason for that refusal;

(2) A statement as to whether the proposed contractor or subcontractor has accepted any prime contract or subcontract containing a CAS clause;

(3) The amount of the proposed award and the sum of all awards by the agency

requesting the waiver to the proposed contractor or subcontractor in each of the preceding 3 years;

(4) A statement that no other source is available to satisfy the agency's needs on a timely basis;

(5) A statement of alternative methods considered for fulfilling the need and the agency's reasons for rejecting them;

(6) A statement of steps being taken by the agency to establish other sources of supply for future contracts for the products or services for which a waiver is being requested; and

(7) Any other information that may be useful in evaluating the request.

(f) Except as provided by the Cost Accounting Standards Board, the authority in paragraph (e) of this section shall not be delegated.

9903.202 Disclosure requirements.

7. Section 9903.202-1 is amended by revising paragraphs (b)(1) and (2) to read as follows:

9903.202-1 General requirements.

* * * * *

(b) * * *

(1) Any business unit that is selected to receive a CAS-covered contract or subcontract of \$50 million or more shall submit a Disclosure Statement before award.

(2) Any company which, together with its segments, received net awards of negotiated prime contracts and subcontracts subject to CAS totaling \$50 million or more in its most recent cost accounting period, must submit a Disclosure Statement before award of its first CAS-covered contract in the immediately following cost accounting period. However, if the first CAS-covered contract is received within 90 days of the start of the cost accounting period, the contractor is not required to file until the end of 90 days.

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