

of the United States. EPA will submit a report containing these final rule amendments and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the final rule amendments in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This final rule will be effective on October 1, 2007.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and Recordkeeping requirements.

Dated: June 27, 2007.

Stephen L. Johnson,
Administrator.

■ For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is amended as follows:

PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart EEEEE—[Amended]

■ 2. Section 63.11148 is amended by revising paragraph (a)(2)(ii) to read as follows:

§ 63.11148 What are the standards and compliance requirements for existing sources using batch copper converters?

- (a) * * *

(2) * * *

(ii) During periods when no copper ore concentrate feed is charged to the smelting vessel but the smelting vessel remains in operation to temporarily hold molten material in the vessel before resuming copper production, you must exhaust the process off gas from the smelting vessel to an electrostatic precipitator, wet scrubber, or baghouse prior to discharge to the atmosphere.

* * * * *

■ 3. Section 63.11150 is amended as follows:

■ a. By revising paragraph (c) introductory text.

■ b. By redesignating paragraph (c)(4) as paragraph (c)(5).

■ c. By redesignating the second paragraph (c)(3) as paragraph (c)(4).

§ 63.11150 What General Provisions apply to this subpart?

* * * * *

(c) If you own or operate an existing affected source subject to § 63.11148,

your notification of compliance status required by § 63.9(h) must include the information specified in paragraphs (c)(1) through (5) of this section.

* * * * *

Subpart FFFFF—[Amended]

■ 4. Section 63.11153 is amended by revising the last sentence in paragraph (b) to read as follows:

§ 63.11153 Am I subject to this subpart?

* * * * *

(b) * * * Your secondary copper smelter is a new affected source if you commenced constructed or reconstruction of the affected source on or after October 6, 2006.

* * * * *

■ 5. Section 63.11157 is amended by revising paragraph (b)(5) to read as follows:

§ 63.11157 What General Provisions apply to this subpart?

* * * * *

(b) * * *

(5) This certification of compliance, signed by a responsible official, for the work practice standard in § 63.11155(g): "This facility has an approved monitoring plan in accordance with § 63.11155(g)."

[FR Doc. E7-12847 Filed 7-2-07; 8:45 am]

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OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

48 CFR Part 9903

Cost Accounting Standards Board; Time and Material and Labor Hour (T&M/LH) Contracts for Commercial Items

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

ACTION: Final rule.

SUMMARY: The Office of Federal Procurement Policy, Cost Accounting Standards (CAS) Board, has adopted, without change, a final rule to provide an exemption for T&M/LH contracts for commercial items. This rulemaking is authorized pursuant to Section 26 of the Office of Federal Procurement Policy Act.

DATES: *Effective Date:* July 3, 2007.

FOR FURTHER INFORMATION CONTACT:

Laura Auletta, Manager, Cost Accounting Standards Board, 725 17th

Street, NW., Room 9013, Washington, DC 20503 (telephone: 202-395-3256).

SUPPLEMENTARY INFORMATION:

A. Background

On January 4, 2006, the Cost Accounting Standards Board published a proposed rule with request for comment (71 FR 313) for the purpose of providing an exemption for T&M/LH contracts for commercial items. The final rule adopts the proposed rule without change, thereby exempting T&M/LH contracts from CAS coverage.

The Board's action is consistent with its previous actions to exempt those types of contracts permitted by Congress for the acquisition of commercial items. For example, on June 6, 1997, 1996, the Board issued a final rule implementing the Federal Acquisition Reform Act (FARA) by providing an exemption from CAS for contracts for the acquisition of commercial items that are firm fixed price and fixed price with economic price adjustment (except when the adjustment is made on the basis of actual costs). At the time the CAS Board implemented this exemption, FAR limited the permissible contract types for the acquisition of commercial items to firm fixed price and fixed price with economic price adjustment. Effective February 12, 2007, FAR was amended to add T&M/LH contracts as an acceptable contract type for acquiring commercial items. This final rule is consistent with that FAR amendment.

B. Public Comments

The Board received six sets of public comments in response to the Proposed Rule.

1. Support Issuance of the Proposed Rule

Comment: Three commenters supported the issuance of the final rule.

Response: The Board thanks the commenters for their comments.

2. The Proposed Exemption Is Not Required by SARA

Comment: One commenter opined that the proposed exemption is not required by SARA and that the CAS Board made an "erroneous leap of logic to state that a CAS exemption exists when the statute provides that CAS is not mandatory."

Response: The Board believes an exemption is appropriate at this time in light of the recently promulgated final FAR rule that implements Section 1432 of the National Defense Authorization Act for Fiscal Year 2004 (SARA) (Pub. L. 108-136), which expressly authorized the use of time-and-materials (T&M) and labor-hour (LH) contracts for the

acquisition of certain categories of commercial services. Based on the provisions in the final FAR rule, the Board believes there is no significant benefit to the application of CAS to T&M/LH contracts for commercial items. The Board's specific rationale is discussed below.

Under the FAR provisions, a T&M contract is composed of a "time" element and a "materials" element, while a LH contract is only composed of a "time" element. The time element in a T&M/LH contract is a fixed hourly rate by labor category. Under the FAR provisions for T&M/LH contracts for commercial items, these fixed hourly rates are determined based on adequate price competition without the submission of cost or pricing data. These fixed rates apply to both prime and subcontractor labor (except subcontracts for incidental services). These fixed hourly rates are akin to a firm fixed price contract awarded on the basis of adequate competition without submission of cost or pricing data. Such contracts are currently exempt from CAS requirements because there is no discernible benefit from applying CAS. The Board believes the same logic applies to these fixed hourly rates, and thus there is no benefit to applying CAS to the "time" element of a T&M/LH contract for commercial items.

In regards to the materials element, the FAR provisions for T&M contracts for commercial items define materials as including indirect costs, direct materials, and other direct costs. Under these FAR provisions, indirect costs are reimbursed at a fixed amount established at the time of contract award, *i.e.*, there is no adjustment for indirect costs based on actual costs occurred. Thus, consistent with the prior discussion regarding the fixed hourly rate, there is no benefit to applying CAS to these fixed amounts.

Conversely, the FAR provisions provide for reimbursement of direct materials and other direct costs based on actual costs. However, the FAR also includes some limitations on such reimbursement. For example, the FAR provides for reimbursement of the actual cost of these materials (less any rebates, refunds, or discounts received by the contractor that are identifiable to the contract) provided the contractor has made payments for the materials in accordance with the terms and conditions of the agreement or invoice, or makes these payments within 30 days of the submission of the Contractor's payment request to the Government. The FAR also requires the contractor to obtain the materials at the most advantageous prices available (with due

regard to securing prompt delivery of satisfactory materials) and to give credit to the Government for cash and trade discounts, rebates, scrap, commissions, and other amounts that are identifiable to the contract. Furthermore, the FAR provision limits reimbursement of other direct costs to those cost elements specifically listed in the contract.

Based on the above discussion, the Board believes the existing FAR provisions provide adequate coverage regarding the reimbursement of direct materials and other direct costs. As noted earlier, the remainder of the contract price/cost is based on fixed hourly rates and/or amounts established at the time of award based on adequate competition without the submission of cost or pricing data. Thus, the Board has concluded that it is appropriate to exempt T&M/LH contracts for commercial items from CAS coverage. The Board notes that this position is consistent with the Board's May 1992 Statement of Objectives, Policies and Concepts ("the cost of an accounting application should not exceed its benefit").

3. T&M/LH Contracts Should Be Considered Cost-Reimbursement Type Contracts

Comment: One commenter asserted that T&M/LH contracts should be considered cost-reimbursement type contracts because the premise that labor rates are fixed under a T&M/LH contract is faulty, and T&M/LH contracts "can never be subject to adequate price competition" because there is no price established at the time the contract is awarded. The commenter also opined that the proposed CAS exemption removes the protection against a contractor's double-counting of costs, the inclusion of unallowable costs and the inconsistent application of the accounting period under fixed T&M/LH contracts.

Response: As noted in those comments, there are some elements of a T&M contract for commercial items that are fixed (*e.g.*, fixed hourly rates and fixed indirect costs) and others that are based on actual cost (*e.g.*, direct materials and other direct costs). As such, it is necessary to analyze each aspect of the T&M/LH contract to determine if an exemption is appropriate, rather than trying to classify T&M contracts as "cost reimbursement" or "fixed price." The Board's rationale in response to Comment 2 provides this necessary analysis.

4. CAS Applicability to Large Dollar Sole Source T&M/LH Contracts

Comment: One commenter opined that the proposed rule should not exempt "very large dollar value T&M/LH task and delivery orders to be awarded on what is effectively a sole source basis without the protections afforded by CAS."

Response: The commenter asserts that this exemption may be used to exempt from CAS indefinite delivery/indefinite quantity contracts under which very large dollar value T&M/LH task or delivery orders are awarded on "effectively a sole source basis." The statute and the FAR provisions both require that awards be made on the basis of adequate competition without the submission of cost or pricing data. As such, the Board does not believe the contract could be awarded on a sole source basis and still comply with the statutory and regulatory requirements.

5. T&M/LH Contract Exceeding CAS Applicability Thresholds Should Be Subject to Some Existing Standards

Comment: One commenter suggests that the Board analyze which of its standards should be made applicable to T&M/LH contracts for the acquisition of commercial items or services, and take the necessary steps to ensure that these contracts comply with the selected standards. The commenter suggests that such contracts should be subject, at a minimum, to the provisions of CAS 401, 402, 405, 406, 407 and 411.

Response: The Board disagrees with the commenter since the application of CAS to T&M/LH contracts for commercial items and services would serve no purpose, regardless of the dollar value of a particular contract. As discussed in the response to Comment 2 above, the "time" element of T&M/LH contracts is fixed price, not cost reimbursable, and the contracts are awarded based on adequate price competition. In addition, the FAR provides limitations on the reimbursement of direct materials and other direct costs that the Board believes adequately protect the Government's interest. The application of CAS to these T&M/LH contracts would be of no benefit to the Government since it would not affect the contract price (but, see last sentence of response to comment 6).

6. The Board Is Required To Issue Guidance

Comment: One commenter asserted that the Board failed to implement the requirements of the Conference Report on Section 4205 of FARA because it did

not issue guidance for the allocation of costs to commercial item contracts when other than firm fixed-price and fixed price economic price adjustment contracts are authorized.

Response: The CAS Board recognizes the discussion in the Conference Report. However, the Board does not believe that guidance is needed at this time in light of the restrictions on the use of T&M and labor-hour contracts in the FAR. First, the Board believes that it was envisioned that reimbursable actual direct material and other direct costs will be incidental to the overall contract price. Second, the restrictions in the FAR provide the appropriate protections at this time. However, should the FAR requirements be revised or should direct material/other direct costs become more than incidental, the CAS Board will re-examine this issue.

7. CAS Applicability to Hybrid Contracts

Comment: One commenter opined that "CAS should not be applicable to portions of a contract whose price is not based on certified cost or pricing data or whose payment is not based on actual costs incurred" and urged the Board to place hybrid contracts on their near-term agenda. The commenter also recommended granting contracting officers the authority to determine CAS applicability to selected portions of a contract.

Response: Since the Board has determined that it is appropriate to exempt all T&M/LH contracts for commercial items from CAS coverage, the issue of whether a portion of the

contract should be exempt is moot. The Board will consider commenter's recommendation when it formulates its future agenda actions.

8. Other Contract Types for Commercial Items

Comment: Three commenters, while supporting the proposed revision, noted the difference between the permissible contract types specified at FAR 12.207 and the proposed CAS exemption. The commenters recommended that the Board adopt their interpretation of the exemption language contained at Section 4204 of the Clinger-Cohen Act (Pub. L. 104-106)—"contracts or subcontracts for the acquisition of commercial items."

Response: The Board did not deliberate this recommendation because it was outside the scope of the proposed rule to provide an exemption for T&M/LH contracts. The Board will consider this recommendation when it formulates future agenda items.

C. Paperwork Reduction Act

The Paperwork Reduction Act, Public Law 96-511, does not apply to this rulemaking, 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.*

D. Executive Order 12866 and the Regulatory Flexibility Act

The Board certifies that this rule will not have a significant effect on a substantial number of small entities within the meaning of the Regulatory

Flexibility Act, 5 U.S.C. 601, *et seq.*, because small businesses are exempt from the application of the Cost Accounting Standards.

List of Subjects in 48 CFR Part 9903

Accounting, Government procurement.

Paul A. Denett,

Administrator, Office of Federal Procurement Policy.

■ 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:

PART 9903—CONTRACT COVERAGE

■ 1. The authority citation for part 9903 continues to read as follows:

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

Subpart 9903.2—CAS Program Requirements

■ 2. Section 9903.201-1(b)(6) is revised to read as follows:

9903.201-1 CAS Applicability.

* * * * *

(b) * * *

(6) Firm fixed-priced, fixed-priced with economic price adjustment (provided that price adjustment is not based on actual costs incurred), time-and-materials, and labor-hour contracts and subcontracts for the acquisition of commercial items.

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[FR Doc. E7-12888 Filed 7-2-07; 8:45 am]

BILLING CODE 3110-01-P