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November 9, 2005

VIA ELECTRONIC MAIL AND FACSIMILE

Cost Accounting Standards Board
Office of Federal Procurement Policy
725 17th Street, N.W, Room 9013
Washington, DC 20503

**Re: Staff Discussion Paper Regarding CAS Exemption for Contracts
Executed and Performed Entirely Outside the United States, its
Territories, and Possessions, 70 Fed. Reg. 53977 (Sept. 13, 2005)**

Dear Sirs:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced Staff Discussion Paper ("SDP"). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees have members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, 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 ABA'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.¹

By Federal Register notice published on Tuesday, September 13, 2005 (70 Fed. Reg. 53977) the Cost Accounting Standards ("CAS") Board requested comments on a SDP that proposes to remove the exemption of "Contracts and

¹ This letter is available in pdf format at <http://www.abanet.org/contract/Federal/regscmm/home.html> under the topic "Cost Allowability and Cost Accounting."

Subcontracts to be executed and performed entirely outside the United States, its Territories, and Possessions” (48 C.F.R. § 9903.01-1(b)(14)) from the CAS. In particular, the CAS Board seeks comments on six specific questions related to the necessity for the aforementioned exemption. The following discussion provides comments on each of the six questions.

- 1. Any statute that would require the CAS Board to retain this exemption. If any such statute exists, provide the specific statute and language that contain this requirement.**

The request for comments on the SDP explains the history for the subject exemption. Congress established the original CAS Board, which issued the exemption, under the Defense Production Act of 1950 (“DPA”). The DPA provided that certain of its provisions, including those that established the CAS Board, would be applicable to the “United States, its territories and possessions, and the District of Columbia.” Thus, because the rules of the original CAS Board could only apply within the United States and its territories, the original CAS Board concluded that its regulations could not apply to contracts executed and performed entirely outside of the United States, its territories and possessions. Congress established the current CAS Board, however, under the Office of Federal Procurement Policy Act, which does not include the preclusive language appearing in the DPA. Accordingly, the current CAS Board questions whether an exemption from the CAS that was based on that preclusive language of a now inapplicable statute negates the exemption.

Regardless of whether the enabling act for the CAS Board, old or new, includes preclusive language regarding the effect of its jurisdiction outside of the United States, the CAS Board must continue to be cognizant of implications regarding the extra-territorial effect of United States law. While we do not intend here to provide an essay on the subject of International Law, the CAS Board should consider that when Congress intends for laws to have extra-territorial effect, Congress usually expressly states that intention. Additionally, bilateral agreements between the United States and other countries might affect the application of the CAS to contracts and subcontracts performed and executed entirely outside of the United States. With the ever-changing dynamics of international relations, the CAS Board would be hard-pressed to insure that its regulations remain consistent with International Law and Trade Agreements. Accordingly, considering the greater context of international relations and law, an appropriate policy might be to retain the exemption to avoid a potential misapplication of the CAS and CAS Board regulations.

2. How this exemption does or does not promote the CAS Board's primary objective of achieving "(1) an increased degree of uniformity in cost accounting practices among government contractors in like circumstances, and (2) consistency in cost accounting practices in like circumstances by individual government contractor or over periods of time."

At least two factors are important regarding inquiry number 2. The first is that described above. Regardless of the charter of the CAS Board, it is inappropriate to apply the requirements of the CAS Board regulations extra-territorially. Second, the CAS Board must consider the material impact of the exemption. Based on anecdotal evidence, not having the benefit of a scientific survey, we suspect that contractors do not invoke the subject exemption frequently. Accordingly, the limited use of the exemption would not have a material impact on the objectives of the CAS Board.

3. The significance of the location of contract execution to CAS applicability.

If the contract is either executed or performed in the United States, it is likely appropriate to apply the CAS to that contract or subcontract. Contractors coming to the United States to do business should reasonably expect to comply with United States laws and regulations. Concerns regarding the preclusive effect due to restraints on extra-territorial application of United States law and regulation would occur when the contract is both executed and performed outside of the United States.

Other than for U.S. companies, where a contract is executed and performed entirely outside the United States, the application of CAS would be governed by local law and local accounting and business practices. The authority of the statute only has the weight of a contract term. The ability of the United States government to enforce such rules is limited by the local laws and regulations. Subsidiaries or divisions of U.S. companies normally follow the local legal, accounting and business practices of the region where they operate. Therefore, where the contract is executed is significant to the extent that the same requirement is being imposed on both foreign and U.S. concerns.

4. The significance of the location of contract performance to CAS applicability.

Despite the response to issue 3 above, the location of contract performance may be of greater significance. Certain geographic locations may have a dramatic impact on a contractor's ability to comply with CAS. When performing a contract

in a foreign territory, it is likely that necessary subcontractors and vendors will be foreign concerns that are exempt from CAS (48 C.F.R. § 9903.201-1(b)(4)) and may follow any of a variety of accounting practices normal to its region. Moreover, remote locations or war zones present unique challenges in the acquisition of supplies and services particularly when the need is urgent. Assuring even the most basic of accounting practices, such as proper invoices, may be near impossible in some locales. In such instances, it is appropriate to relax the CAS for such contracts. Furthermore, the existing exemption supports a policy of facilitating government procurements wholly outside the United States, especially in the context of readiness for war, disaster relief or other military action.

Although an U.S. company that executes and performs a federal contract in a foreign country may request a waiver from CAS, a waiver request is not practical due to process and time factors. Because CAS would not likely be applicable to foreign competitors, the additional costs of applying CAS in foreign operations could be significant. For example, the CAS applied to pension costs incurred in a foreign country under foreign law would require additional cost on the part of the U.S. company for actuarial calculations, but not its foreign counterpart.

5. The advantages and disadvantages of exempting contracts and subcontracts from CAS that are executed and performed entirely outside the US.

The advantages for exempting contracts that are executed and performed entirely outside the United States, its territories and possessions would be to ensure that both foreign and U.S. companies are on an equal footing. Another advantage is that U.S. companies would not have to impose cost accounting rules that are contrary to its foreign staff's education and experience. The federal government would be able to contract in a foreign country without the added burden of compliance with CAS to monitor and enforce. Additionally, as noted above, retaining the exemption does not materially affect the CAS Board's objective of uniformity of cost accounting practices for contracts obtaining such contracts.

A further advantage of exempting such contracts are that such a rule would only apply to U.S. companies. It would increase the cost of compliance for U.S. companies, thus placing them at a comparative disadvantage with foreign companies. Furthermore, the imposition of CAS on such contracts places an increased burden on United States procurement officials to enforce such requirements in foreign jurisdictions. *See also* response to issues 4, above.

6. Contracting situations in which the exemption has historically been utilized.

We decline to comment on this issue.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert L. Schaefer", with a stylized flourish at the end.

Robert L. Schaefer
Chair, Section of Public Contract Law

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