December 5, 2011

Office of Federal Procurement Policy
ATTN: Mr. Raymond J. M. Wong
725 17th Street, N.W.
Room 9013
Washington, D.C. 20503

Re: Cost Accounting Standards: Clarification of the Application of the Exemption from CAS at 48 CFR 9903.201-1(b)(15) for Firm Fixed Price (FFP) contracts and subcontracts Awarded on the Basis of Adequate Price Competition without Submission of Cost or Pricing Data

Dear Mr. Wong:

Thank you for the opportunity to comment on the Cost Accounting Standards (CAS) Board’s clarification entitled “Clarification of the Exemption From Cost Accounting Standards for Firm-Fixed-Price Contracts and Subcontracts Awarded Without Submission of Cost or Pricing Data” (76 FR 61660, October 5, 2011). Founded in 1981, the Project On Government Oversight (POGO) is an independent nonprofit that investigates and exposes corruption and other misconduct in order to achieve a more effective, accountable, open, and ethical federal government. POGO has a keen interest in government contracting matters, especially those relating to the ongoing activities of the CAS Board.

The reason given by the CAS Board is the August 30, 2010 Federal Acquisition Regulation (FAR) final rule (75 FR 53128) clarifying the distinction between “certified cost and pricing data” and “data other than certified cost or pricing data,” as well as to clarify requirements for submitting of such data. In essence, the FAR revised the definitions to include the identical types of data under both terminologies.

POGO disagrees with the proposed change to the CAS Board’s rules for a number of reasons. First, although the “clarification” is described as bringing the CAS “(b)(15) exemption” in line with the FAR, this does not appear to us to be a very convincing argument. It begs the question, does CAS control or does the FAR control on matters of cost determination and definitions of what constitutes cost data? Based on recent actions taken by the CAS Board, this once distinguished authoritative body now seems to regard itself as a mere committee of the FAR Council.

More substantively, if the newly revised terms “certified cost or pricing data” and “data other than certified cost or pricing data” refer to the identical types of data except for the certification, how does an accounting standards setting body distinguish between these two types of data other than by relying upon the artificial distinction of the written “certification”? Is “certification” an accounting concept, and if it is not, what accounting basis would the CAS Board use to define the two “concepts”?
One reason provided by some commenters for distinguishing between “certified” and “uncertified” data is that allegedly, in the latter instance, the contracting officer has not relied upon the data to determine or negotiate contract price. However, this description has always struck POGO a “red herring” because it then begs the question, “Why was the data requested?” and how can the data be relied upon if it is not required to be “accurate, complete and current”? In short, the certification distinction seems to be a highly artificial one especially if the exact same accounting data may be submitted in both certified and uncertified forms.

Until 2000, the CAS Board’s rules did not distinguish between “certified” and “uncertified” data, deeming both, if derived form the contractor’s accounting records, to be equally susceptible to CAS coverage. Only in 1999, did Congress amend the Office of Federal Procurement Policy (OFPP) Act to establish a CAS exemption for adequate price competition, and only then when cost or pricing data was not submitted. While it is true that the 1999 OFPP Act amendments uses the phrase “certified cost or pricing data”, as the CAS Board has previously recognized, the Truth in Negotiations Act (TINA) does not use this phrase. Rather, TINA refers to “cost or pricing data” and then describes such data as requiring certification. POGO does not agree that the phrase “cost or pricing data” can mean anything other than “certified cost or pricing data” given the statutory definitions contained in both 10 U.S.C. § 2306 and 41 U.S.C. § 3502. Accordingly, we see no need for the proposed changes to “(b)(15)”.

More troubling, however, is the notion that the CAS Board feels compelled to amend an accounting rule based upon a change to the FAR. POGO would urge the CAS Board to resist this continuing assault on its authority, and to provide a cost accounting rationale for the definitions and exemptions provided, especially when it appears that the chief concern of the rule is to avoid CAS coverage when cost data has been requested or submitted by a prospective contractor. These actions strike us as antithetical to the entire purpose of establishing the Cost Accounting Standards.

Sincerely,

Scott H. Amey
General Counsel