Public Comments Case Number CASB 2021-01

Notice on Whether and How to Amend CAS Rule To

Address the Application of Indefinite Delivery Vehicles

List of Commentors

1. **Aerospace Industries Association (AIA)**
2. **Capital Edge Consulting**
3. **CohnReznick, LLP.**
4. **Financial Executives International (FEI)**
5. **Forbush, Thomas**
6. **National Defense Industrial Association (NDIA)**
7. **Professional Services Council (PSC)**
8. **Redstone Government Consulting, Inc.**
9. **Romenius, Bill and Trautwein, Steven**
10. **TE Connectivity, Ltd.**
11. **Victura Consulting, LLC.**
12. **Wall, Richard**

August 16, 2024

Cost Accounting Standards Board
ATTN: John L. McClung
Office of Federal Procurement Policy
725 17th Street NW
Washington, D.C. 20503

Submitted via email to: OMBCASB@omb.eop.gov

RE: Aerospace Industries Association Comments on Application of Cost Accounting Standards to Indefinite-Delivery Vehicles, pursuant to 89 FR 51491 and CASB 2021-01 IDVS Notice dated June 18, 2024 ("the Notice")

Dear Mr. McClung,

The Aerospace Industries Association (AIA)[1] welcomes the opportunity to provide comments and recommendations as requested by the referenced Federal Register notice published by the Cost Accounting Standards Board (CASB or "the Board"). AIA appreciates the willingness of the CASB to engage with industry on the benefits and drawbacks associated with amending existing rules to address the application of Cost Accounting Standards (CAS) to indefinite-delivery vehicles (IDVs). To this end, AIA offers the following comments and recommendations.

Per FAR 16.501-2, indefinite-delivery contracts or IDVs as referenced by CASB "may be used to acquire supplies and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award." Indefinite-quantity contracts inherently face challenges in determining the contract value to determine the applicability of CAS at the time of initial award, since neither party knows the final contract value at the time of initial award.

In the referenced Federal Register notice, the Board provisionally identified six possible approaches for application of CAS coverage to IDVs. As will be discussed, **AIA strongly recommends that the Board establish clear and straightforward guidance in 48 CFR 9903.201-1 that supports CAS applicability being determined order-by-order (Alternative Approach I per the Notice).** Use of the other five approaches is problematic, for the reasons addressed in this letter.

To elaborate on our recommendation, AIA advises that CAS would apply only to those individual task orders and/or delivery orders whose values met the established CAS coverage thresholds and did not qualify for another CAS exemption. In addition to being the recommended approach by the Section 809 Panel (See the Panel's Recommendation No. 30), AIA believes this is the most logical approach, the easiest to administer on a consistent basis, and the approach that best meets the Board's objectives.

Why "Order-by-Order" is the Recommended Approach

[1] Founded in 1919, the AIA is the premier trade association advocating on behalf of more than 300 aerospace and defense (A&D) companies for policies and investments that keep our country strong, bolster our capacity to innovate and spur economic growth. AIA's members represent the United States of America's leading manufacturers and suppliers of aircraft and aircraft engines, helicopters, unmanned aerial systems, missiles, and space systems.

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703.358.1000

Use of individual orders, as awarded, to determine CAS applicability has the following positive benefits:

1. Use of individual orders is consistent with the definition of "contract" as found at 48 CFR 2.101.

Contract means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications.

Award of an IDV, without corresponding award of task or delivery orders, creates a binding contract, but only because the IDV award comes with a guaranteed minimum. Without the guaranteed minimum, no contract would be created. The guaranteed minimum amount does not require the contractor to incur any costs; therefore, there is no need to address CAS applicability until individual orders are awarded. It is the award of individual orders that creates a mutually binding legal relationship where appropriated funds are obligated and the contractor is responsible to perform—thus incurred/estimated costs that will be subject to the requirements of CAS or FAR Part 15. It is at the individual order level that the parties will address incurred costs. The parties simply should not be concerned about applicability of CAS with regard to estimated costs until an individual order's estimates are reviewed and a contract is awarded.

Further, DoD rule-makers appear to agree with this position. In the promulgating comments to DFARS Case 2010-D004 (75 FR 76295), the DAR Council wrote: "In accordance with FAR 2.101, a contract includes all types of commitments that obligate the Government to an expenditure of appropriated funds. Task orders and delivery orders obligate funding, and if they utilize funds appropriated or otherwise made available by the DoD Appropriations Act for Fiscal Year 2010 that are in excess of $1 million, the section 8116 restriction would apply."

AIA notes that DCAA's own guidance supports the notion that each task/delivery order is a separate contract. For instance, DCAA's "Information for Contractors" (DCAAM 7641-90) states, "5.a. Costs must be accumulated by contract in the same level used for billing costs (e.g. by delivery order, etc.) in order to determine their allowability per Government regulations." Similarly, DCAA's "Incurred Cost Submission Adequacy Checklist" states, "25. Is the cost detail at the same level required by each contract, as specified in the billing instructions per the contract clause, and likely also used for billing purposes (e.g., by delivery order, task order, contract line item (CLIN), etc.)?"

In summary, there is a consensus within the US Government that it is the awarded task or delivery order that establishes a "contract" for purposes of applying rules and regulations. We believe that application of CAS coverage at the awarded order level is consistent with that consensus.

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2. Use of individual orders is consistent with how the Truthful Cost-or-Pricing Data Act (formerly "TINA") is applied to contract actions.

   In the promulgating comments to FAR Case 2008-012 in FAC 2005-039 (75 FR 13414), the FAR Councils stated, "In the case of IDIQ contracts, it is commonly understood that it is the estimated total value of orders for the specified period at the time of contract award, as well as *the individual value of any subsequent discrete orders*, to which the TINA thresholds apply." (Emphasis added.) To the extent that the parties have no agreement on the value of the estimated total orders over and above the guaranteed minimum at the time of contract award—which is the most common scenario—then it would be solely the awarded individual orders that would be evaluated for applicability of the certified cost or pricing data disclosure requirements of the Truthful Cost-or-Pricing Data Act.

   It should also be noted that the DoD's PGI takes a similar position at 215.406-3 (Documenting the negotiation), stating, "(D) … To the extent individual task or delivery orders entail a negotiation (i.e. did not simply incorporate prices established at the basic contract level), a business clearance record for the individual task or delivery orders that exceed the prescribed dollar thresholds shall be uploaded to CBAR."

   Therefore, evaluating CAS applicability at the individual order level would be consistent with how the contracting parties apply "TINA".

3. Use of individual orders is consistent with how Limitation of Funds (FAR 52.232-22) and Limitation of Cost (FAR 52.232-20) clauses are implemented.

   In a 2017 decision[2], the Court of Federal Claims heard a dispute regarding whether, with respect to an IDIQ contract, the Limitation of Funds and Limitation of Cost clauses applied at the total contract level or at the individual order level.

   Here, the court finds, based upon its review of the base contract as well as Delivery Order No. 0002 together with the various modifications to both and the declarations, that the funding ceilings set in the individual delivery orders govern InterImage's right to payment. … The funding ceilings were set in the delivery orders. Accordingly, InterImage is only owed additional money from the government if it can establish that the amount sought for unpaid costs does not exceed the funding ceilings in the eleven delivery orders as modified.

   Given that DCAA guidance noted in (1) above indicates that the key cost accumulation point is the individual order level, it is unsurprising that the Court of Federal Claims found that is also the level to be used for applying the Limitation of Funds/Limitation of Cost clauses. AIA believes that the CASB should adopt a similar approach to determining CAS applicability.

4. Use of individual orders is consistent with how fee retainage is calculated by the contracting parties.

[2] InterImage, Inc. v. U.S., No. 15-582C & No. 16-1300C (Consolidated), July 18, 2017.

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The Armed Services Board of Contract Appeals (ASBCA) addressed the matter of how fee retainage should work on Cost-Plus Fixed-Fee (CPFF) task orders under an IDIQ type contract.[3] The ASBCA found that:

The question before us is whether the limitation that the 'reserve shall not exceed 15 percent of the total fixed fee or $100,000, whichever is less' applies to the contract as a whole or to the individual orders issued under it. We construe the quoted language as applying to the individual orders as a matter of textual analysis.

Paragraph (a) says that the government shall pay, for performance of 'this contract,' the 'fixed fee specified in the Schedule.' The contract schedule does not specify any fixed fee, so the reference 'specified in the Schedule' must be to the fixed fee specified in the schedule of each of the individual orders. … We conclude, therefore that the proper interpretation of the Fixed Fee clause is that the government may withhold 15 percent of the fixed fee or $100,000, whichever is less, on each individual order until such time as the contracting officer receives the certified final indirect cost rate proposal, as more particularly specified in the clause, at which time it must release 75 percent of all fee withholds under the contract.

For all the above reasons, AIA firmly believes that use of individual orders, as awarded is the most logical and administratively simple approach. Using this method will promote uniformity and consistency among government contractors.

Use of Any Other Approach is Problematic

Overall, IDVs serve as a strategic procurement tool that balances flexibility with structured guidelines, promoting efficiency, cost-effectiveness, and responsiveness in meeting Government needs across various sectors and scenarios. The order-by-order approach preserves these benefits. Conversely, other approaches would negate them, increasing acquisition lead times, administrative burden, and costs. Most concerning, the other approaches would delay delivery of needed capabilities to government end-users. Such outcomes contradict the intent of aligning the CAS with GAAP and are in opposition to the guiding principles of the federal acquisition system as outlined in FAR 1.102.

1. Use of the maximum award value—especially for multiple-award contract vehicles—ignores the established fact that many contract maximum "ceilings" are never reached. This approach applies CAS to unpriced, unawarded, orders.

The key issue with using IDV ceiling values as the basis for determining CAS applicability, even though in many cases the ceiling value will never be reached, is that doing so leads to situations where a non-CAS covered contractors is suddenly told they are subject to Full CAS coverage when, based on actual orders awarded, they should be subject to only Modified coverage or else remain exempt, since they may not even receive a $7.5 million trigger order award throughout the life of the IDV contract. This situation is manifestly inequitable to these contractors and should be avoided as it unnecessarily increases their administrative cost and compliance burden without an associated increase in risk to the Government.

[3] WestWind Technologies, ASBCA No. 57436, July 21, 2011.

AIA notes that the convention at FAR 1.108(c) states,

Unless otherwise specified, a specific dollar threshold for the purpose of applicability is the final anticipated dollar value of the action, including the dollar value of all options. If the action establishes a maximum quantity of supplies or services to be acquired or establishes a ceiling price or establishes the final price to be based on future events, the final anticipated dollar value must be the highest final priced alternative to the Government, including the dollar value of all options.

Although some in the acquisition community may point to FAR 1.108(c) as directing that the maximum award value of an IDV contract should be used for determining CAS applicability, AIA's more logical interpretation is that the dollar threshold for purposes of applying the convention is the final contract price assuming all priced options will be exercised. Unpriced options, which may or may not be exercised, should not be included when determining the "final anticipated dollar value of the action."

2. Use of the minimum award value is problematic because the minimum value is used to establish consideration rather than being a true estimate of costs to be incurred. Because the minimum is paid to the contractor regardless of cost incurrence, it is misleading to base CAS applicability on that value. Further, use of the minimum award value could lead to situations where an IDIQ is not CAS covered but individual orders exceed the threshold and should be CAS covered.

   AIA notes that DoD's Source Selection Procedures state, "In determining applicability of these source selection procedures, calculate the value of the contract action in accordance with FAR 1.108(c), except that the value of an indefinite delivery indefinite quantity (IDIQ) contract includes only the value of orders for which pricing terms are established in the basic contract." (Emphasis added.) Therefore, the minimum award value does not play a role in how DoD determines which source selection procedures to use.

   Finally, use of the minimum award value will lead to inappropriate results. For instance, if an IDV contract is terminated prior to award of any orders—and prior to incurrence of any costs by the contractor—then there is no entitlement to costs or profits other than the guaranteed minimum. This position is settled law. Both the ASBCA and Court of Federal Claims consistently have held that IDIQ contract values and government contract liabilities were limited to the minimum guaranteed values specified in the contracts at their inception, not the contract ceiling values. (See, e.g., Okaw Industries, Inc., ASBCA Nos. 17,863 and 17,864) and the COFC (Nos. 01-459 C, 03-2515 C, March 28, 2005. 64 Fed. Cl. 642)

3. Use of a cumulative threshold is problematic for non-CAS covered contractors because they cannot anticipate or control when orders are awarded. Therefore, the contractor has no ability to prepare for the application of new CAS Standards or Disclosure Statement requirements. Because the contractor will be unsure of when it will be subject to which requirements, it may inadvertently price orders using cost accounting practices that are not consistent with those it will use to account for and report costs in future periods, thus leading to a potential noncompliance with the requirements of CAS 401.

4. Use of an order-by-order approach for multiple-award IDVs coupled with a maximum award value for single-award IDVs suffers from the same drawbacks noted above with respect to maximum award values. While it may be more likely that contractors with single-award IDVs will reach contract maximums, there is no guarantee that will be the

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case. In many cases, maximum award ceilings are never reached (regardless of the number of contracts awarded). Therefore, use of maximums may lead to Full CAS coverage being applied when it should not have been, based on actual award dollars. Further, such an approach is inconsistent with AIA's view of the convention at FAR 1.108(c), which seems to focus on priced options rather than unpriced options.

5. Use of an order-by-order approach for multiple-award IDVs coupled with a cumulative threshold for single-award IDVs suffers from the same drawbacks previously noted with respect to cumulative award thresholds in general. The timing of new awarded orders—and hence CAS coverage applicability—is uncertain.

Single versus Multiple-Award Contract Vehicles

As AIA recommends the "order by order" approach, by doing so, we also recommend that there also should not be any distinction in application between Single-Award and Multiple-Award IDVs because each award is valued for application of CAS on an "order by order" approach. Such treatment also promotes uniformity and consistency concepts consistent with Cost Accounting Standards requirements.

Conclusion

For the above reasons, AIA urges the CASB to implement Alternative Approach I per the Notice, and have the contracting parties determine CAS applicability and coverage on individual orders, based on the negotiated value of each awarded order.

AIA appreciates the opportunity to provide feedback to the CASB on this important topic and welcomes further discussion. Please reach out to me with any questions at adam.garnica@aia-aerospace.org or (703) 358-1095.

Sincerely,

Adam D. Garnica
Senior Director, Acquisition Policy
National Security Policy Division

CAPITAL EDGE

VIA E-MAIL: OMBCASB@omb.eop.gov

August 16, 2024

ATTN: Mr. John L. McClung, Manager
Cost Accounting Standards Board (CASB)
Office of Federal Procurement Policy
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

RE: Application of Cost Accounting Standards to Indefinite Delivery Vehicles
Reference Case: 2021-01

The CASB has identified six potential approaches for addressing CAS coverage to Indefinite Delivery Vehicles (IDVs). Only one of the approaches, "Order-by-Order", is unambiguous and does not place undue burden in the application and administration of CAS.

Approach #1 - Order-by-Order. Each task order and/or delivery order (order) would be treated as an individual contract and CAS would apply only to those orders whose values met the coverage thresholds. This is the approach recommended by the NDAA established Section 809 Panel.

COMMENT: Approach #1 is desirable based on the following:

A. In practice, exemptions would be clearly asserted and administered by order, for example (not comprehensive):
    i. An IDV contract, regardless of order value was awarded to a small business concern;
    ii. The Contractor/Subcontractor is not currently performing a CAS "Trigger Contract" or Trigger order, or
    iii. An FFP order was awarded on the basis of adequate price competition without submission of certified cost or pricing data.

Approach #2 - Maximum Award Value. CAS would apply to all orders under an IDV, no matter the value of the order, if the ceiling amount of the IDV met the coverage thresholds.

COMMENT: Approach # 2 is not desirable based on the following:

A. Imposes CAS where exemptions may apply, e.g., FFP order less than the value or requirement for certified cost or pricing data;
B. Orders under the IDV may never equal or exceed a Trigger Contract value (if applicable) or threshold for certified cost or pricing data;

C. Requires contractors to prepare for CAS compliance and administration for anticipated award, with actual orders never triggering CAS coverage;
D. Following IDV award and a cost accounting practice (CAP) change, it is not clear if the IDV would still have a CAS applicability threshold exemption. 9903.201-1;
E. Creates complex administrative record keeping burden for CAS applicability, subcontractor flow down and notification requirements.

Approach #3 - Minimum Award Value. CAS would not apply to any orders under an IDV unless its minimum guaranteed amount met the CAS coverage thresholds, in which case CAS would apply to all orders.

COMMENT: Approach #3 is not desirable based on the following:

A. Creates inconsistency between Agencies and/or awards on application of CAS by setting a solicitation minimum order guarantee above or below the CAS coverage threshold;
B. Imposes CAS where exemptions may apply, e.g., FFP order less than the value or requirement for certified cost or pricing data, and
C. Creates complex administrative record keeping burden for CAS applicability, flow down and notification requirements.

Approach #4 - Cumulative Threshold. CAS would apply at the point where the cumulative value of the orders awarded crosses the dollar threshold for CAS coverage. At that point, the current order and all subsequent orders awarded would be covered by CAS.

COMMENT: Approach #4 is not desirable based on the following:

A. Creates inconsistent treatment with CAS, aggregating IDV order values across multiple orders and years versus for all other contracts of the Segment, the current 12 month fiscal period. 9903.201-2;
B. The cumulative threshold, imposes CAS where exemptions may otherwise apply, e.g., FFP order less than the value or requirement to submit certified cost or pricing data. Further, the approach does not consider all orders may be below $7.5M and the contractor is not currently performing any CAS-covered contracts or subcontracts valued at $7.5M or greater, and
C. Creates complex administrative record keeping burden for CAS applicability, flow down and notification requirements.

Approach # 5 - Order-by-Order for Multiple Award IDVs and Maximum Award Value for Single Award IDVs. For multiple award IDVs each order would be regarded as if it were an individual contract for CAS coverage (see approach #1). For single-award IDVs, coverage would be based on the maximum award value (see approach #2).

COMMENT: Approach #5 is not desirable based on the following:

A. By inclusion of approach #2.

Approach #6 - Order-by order for multiple award IDVs and cumulative threshold for single award IDVs. For multiple award IDVs each order would be regarded as if it were an individual contract for CAS coverage (see approach #1). For single-award IDVs, CAS would apply at the point where the cumulative value of the orders awarded crosses the dollar threshold for CAS coverage. At that point, the current order and all subsequent orders awarded would be covered by CAS (see approach #4).

COMMENT: Approach #6 is not desirable based on the following:

A. By inclusion of approach #4.

In addition to the Section 809 Panel Conclusions, the Panel recommended the CASB revise 48 CFR Chapter 99 to provide guidance for Hybrid Contracts[1]. The Panel expressed the benefit recognized would "…be a more precise application of CAS, [and] might also bring more companies into the government marketplace if such application were better understood". It would seem appropriate that the CASB address Hybrid Contracts at this time, perhaps associating contract SLINs/CLINs as comparable to IDVs.

Respectfully submitted,

pmb

Paul M. Bailey, CPA
Partner
Capital Edge Consulting, LLC
pbailey@capitaledgeconsulting.com

[1] Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, June 2018, CAS & Hybrid Contracts

From:	Jon Bencivenga
To:	MBX OMB CASB
Cc:	Kristen Soles; Christine Williamson; Jeff Shapiro; Rich Meene; John Doherty
Subject:	[EXTERNAL] Application of Cost Accounting Standards to Indefinite Delivery Vehicles - Public Comment
Date:	Monday, August 19, 2024 11:47:41 AM

Greetings,

Please see below for public comments RE: Case Number CASB 2021-01. Submitted by Jon Bencivenga, Director Government Contracting Advisory, and John Doherty, Manager, CohnReznick LLP.

CohnReznick LLP

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CAS Board Provisional Possible Approaches for Addressing CAS Coverage to IDV:

Option 1: Order-by-order - Each task order and delivery order would be treated as an individual contract and CAS would apply only to those orders whose values met the coverage thresholds.

Option 2: Maximum Award Value - CAS would apply to all orders under an IDV, no matter the value of the order, if the ceiling amount of the IDV met the coverage thresholds.

Option 3: Minimum Award Value - CAS would not apply to any orders under an IDV unless its minimum guarantee amount met the CAS coverage thresholds, in which case CAS would apply to all orders.

Option 4: Cumulative Threshold - CAS would apply at the point where the cumulative value of the orders awarded crosses the dollar threshold for CAS coverage. At that point, the current order and all subsequent orders awarded would be covered by CAS.

Option 5: Order-by-order for Multiple Award IDVs and Maximum Award Value for Single Award IDVs - For multiple award IDVs, each order would be regarded as if it were an individual contract for CAS coverage (see alternative no. 1). For single-award IDVs, coverage would be based on the maximum award value (see alternative no. 2).

Option 6: Order-by-Order for Multiple Award IDVs and Cumulative Threshold for Single Award IDVs - For multiple award IDVs, each order would be regarded as if it were an individual contract for CAS coverage (see alternative no. 1). For single-award IDVs, CAS would apply at the point where the cumulative value of the orders awarded crosses the dollar threshold for CAS coverage. At that point, the current order and all subsequent orders awarded would be covered by CAS (see alternative no. 4).

Clarifying Questions:

1. The Board states "None of the approaches described above are intended to change exemptions that otherwise would apply to contracts and subcontracts in accordance with 48 CFR 9903.201-1(b), such as for the acquisition of commercial items." This confirms existing exemptions will not be modified, however 48 CFR 9903.201-1(b) only addresses the $7.5M modified CAS threshold. It does not address the $50M full CAS coverage threshold contained in 48 CFR 9903.201-2 Types of CAS Coverage. Will the $50M threshold remain consistent? The answer to this question could have considerable impact.

2. Cumulative Option 4. Will the cumulative threshold be evaluated on an inception-to-date basis or within a cost accounting period with a lookback provision similar to current coverage?

Pros and Cons Observations:

Approach	Potential Likely Outcome	Pros	Cons
1) Order-by-order	• Minimal changes to CAS covered population	• IDV orders would be evaluated consistently with non-IDV awards.	• Inconsistencies between covered and not covered orders under the same IDV could lead to increased monitoring.
2) Maximum award value	• Increased CAS covered population	• Coverage consistency across all orders under the IDV. All are covered or not covered based on maximum award amount. • Increased covered population, therefore consistency, for instances where the maximum far exceeds the actual order activity.	• Maximum award values can sometimes not accurately reflect actual order activity which may be under current coverage thresholds. • Increased administrative effort in circumstances where the maximum far exceeds the actual order activity.
3) Minimum award value	• Decreased CAS covered population	• Coverage consistency across all orders under the IDV. All are covered or not covered based on minimum award amount. • Reduced CAS covered population and administrative burden for instances where actual order activity exceeds minimum value and coverage thresholds.	• Minimum award values can sometimes not accurately reflect actual order activity, which may be over current coverage thresholds. • Reduced CAS covered population and consistency for instances where actual order activity exceeds minimum value and coverage thresholds.
4) Cumulative threshold	• Increased CAS covered population	• Clearly delineates which orders are CAS covered and which are not.	• Inconsistent treatment of similar sized orders awarded before/after

		• Increased CAS covered population and therefore consistency, where single year (and lookback) would not exceed the coverage threshold, whereas cumulative inception-to-date would exceed the coverage threshold.	meeting threshold. • Potential for a small dollar order triggering full CAS coverage. • Increased CAS covered population and therefore administrative burden, where single year (and lookback) would not exceed the threshold, but cumulative would. • Complex to manage.
5) Order-by-order for multiple award IDVs and maximum award value for single award IDVs	• Increased CAS covered population	• Increased CAS covered population, and therefore consistency, for instances where competition is limited (e.g., single award IDV)	• Increased administrative effort in circumstances where the maximum far exceeds the actual order activity. • Inconsistency between types of IDVs. • Complex to manage.
6) Order-by-order for multiple award IDVs and cumulative threshold for single award IDVs	• Increased CAS covered population	• Increased CAS covered population and therefore consistency, where single year (and lookback) would not exceed the threshold, but cumulative would in situations where competition is limited (e.g., single award IDV).	• Increased CAS covered population and therefore administrative burden, where single year (and lookback) would not exceed the threshold, but cumulative would. • Inconsistency between types of IDVs. • Complex to manage.

Conclusion and Considerations:

Weighing the pros and cons of additional or decreased CAS coverage across the industry requires balancing the consistency achieved through CAS with the administrative burden of administering and managing CAS covered contracts.

The following list offers considerations to the Board when evaluating approaches:

- Increases and decreases to the CAS covered contract population would affect the following:
    - CAS coverage could be considered a barrier to entry for a certain subset of the contractor population. This could have an impact on the U.S. Government's pool of qualified bidders.
    - The U.S. Government's DFARS business system withhold capabilities.
    - The magnitude of CAS' impact in terms of dollars owed back to the U.S. Government and inverse administrative cost of compiling, managing, and auditing CAS impacts.
- The more complex the interpretation of the standards, the more administrative burden would be required for tracking CAS coverage for both the U.S. Government and Contractors. The Board may want to consider funding the development of a tracking mechanism that could be used universally.

Under each optional approach, the Board may want to consider also clarifying the pre-award criteria for submitting a first-time CASB DS-1 under FAR 52.230-1(b). A similar approach to a 1408 Pre-Award Survey could be adopted for proposals that could result in first time CAS coverage.

- Under each optional approach, the Board may want to consider also clarifying the alignment to the requirements for certified cost or pricing data as the thresholds are currently aligned.

Thank you,

Jon Bencivenga
Director
Government Contracting
Global Consulting Solutions
Tel: 703-744-7442
Fax: 703-744-6701
Jon.Bencivenga@CohnReznick.com
VCard | Bio

CohnReznick

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COMMITTEE ON GOVERNMENT BUSINESS

August 16, 2024

Cost Accounting Standards Board
ATTN: Mr. John L. McClung
Office of Federal Procurement Policy, Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Submitted via email to: OMBCASB@omb.eop.gov

Subject: Financial Executives International (FEI) Comments on CASB Case No. 2021-01, Regarding the Application of Cost Accounting Standards (CAS) to Indefinite Delivery Vehicles (IDVs)

Reference:
a) Recommendation 30, Volume 2 of the June 2018 Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel)

b) DoD CAS Working Group Paper 76-2, "Application of CAS to Contract Modifications and to Orders Place Under Basic Agreements – Interim Guidance" (February 24, 1976)

Dear Mr. McClung,

FEI is a leading international organization comprised of members who hold positions as Chief Financial Officers, Chief Accounting Officers, Controllers, Treasurers, and Tax Executives at companies in every major industry. This letter is submitted by FEI's Committee on Government Business (CGB) which formulates policy opinions on government contracting issues and represents the views of CGB and not necessarily the views of FEI or its members individually.

The purpose of this letter is to provide public comments pursuant to 41 U.S.C 1502 related to CAS Board Case No. 2021-01 published in the Federal Register on June 18, 2024, regarding whether and how to amend the Cost Accounting Standards (CAS) to address the application of CAS to Indefinite Delivery Vehicles (IDVs). In the Federal Register Notice, the CAS Board provisionally identified six possible approaches for addressing CAS coverage to IDVs.

1) Order-by-order. Each task order and delivery order would be treated as an individual contract and CAS would apply only to those orders whose values met the coverage thresholds.

2) Maximum award value. CAS would apply to all orders under an IDV, no matter the value of the order, if the ceiling amount of the IDV met the coverage thresholds.

3) Minimum award value. CAS would not apply to any orders under an IDV unless its minimum guarantee amount met the CAS coverage thresholds, in which case CAS would apply to all orders.

4) Cumulative threshold. CAS would apply at the point where the cumulative value of the orders awarded crosses the dollar threshold for CAS coverage. At that point, the current order and all subsequent orders awarded would be covered by CAS.

5) Order-by-order for multiple award IDVs and maximum award value for single award IDVs. For multiple award IDVs each order would be regarded as if it were an individual contract for CAS coverage (see alternative no. 1). For single-award IDVs, coverage would be based on the maximum award value (see alternative no. 2).

6) Order-by-order for multiple award IDVs and cumulative threshold for single award IDVs. For multiple award IDVs each order would be regarded as if it were an individual contract for CAS coverage (alternative no. 1). For single-award IDVs, CAS would apply at the point where the cumulative value of the orders awarded crosses the dollar threshold for CAS coverage. At that point, the current order and all subsequent orders awarded would be covered by CAS (alternative no. 4).

FEI strongly and fully supports the "order-by-order" approach (i.e., Alternative 1) with respect to addressing CAS coverage to IDVs because it is the most practical and logical approach. The "order-by-order" approach fully aligns with:

- Section 809 Panel Recommendation 30 (reference "a") which specifically addresses IDV contracts (also referred to as Indefinite Delivery Contracts or IDCs) and recommends that the CAS Board establish a rule that the determination of CAS coverage occurs at the time of order placement and that each order be evaluated for CAS applicability on its own; and,

- The treatment of orders under basic ordering agreements (BOAs). A BOA is unlike an IDV because it is not a contract by itself. However, the ordering process under a BOA is similar to the ordering process under an IDV. DoD CAS Working Group Paper 76-2 (reference "b") recognized that basic agreements and basic ordering agreements were not contracts under ASPR (now FAR) and specified that CAS applicability was to be determined separately for each order. Although IDVs are contracts under the FAR, the similarity of the ordering process under IDVs and BOAs means that similar treatment for determining CAS applicability would result in a logical, consistent, and practical approach.

The issue of the need for CAS Board guidance on the application of CAS to IDVs was covered in substantial detail in the Section 809 Panel recommendations. As noted by the Panel, the maximum value of the IDV is meaningless for the purpose of determining CAS applicability because at the time of award no one knows the monetary value of awards that will be made to a specific contractor. This is true even when the IDV is awarded to a single contractor because the government is under no obligation to award task orders/delivery orders (orders) beyond the identified minimum award value. Moreover, often awards made under an IDV contract are firm fixed price (FFP) with adequate price competition and no requirement for certified cost or pricing data and thus subject to a CAS exemption. This situation is further complicated by the fact that the issued orders may be hybrid contracts that include multiple contract types (i.e., FFP CLINs, cost type CLINs, and CLINs for commercial items). Based on these facts, Alternatives 2 and 5 are not viable options to resolve the problems with the application of CAS to IDVs.

FEI also does not believe that Alternatives 4 and 6 are practical options because contractors' business systems are not designed to track the cumulative value of orders, each of which is

established as a separate project in the accounting system. Consequently, the cumulative value tracking becomes a manual process that is subject to error and contrary to the CAS Board's stated objectives of helping the contracting parties manage risk, reduce the regulatory burden, and minimize complexity.

Since the requirements for CAS applicability can vary under an IDV depending on type of order (e.g., fixed price or cost type), basis of pricing and extent of competition and negotiation, the determination of CAS applicability should occur at the time the order is awarded. If the government seeks to encourage competition and incentivize new entrants in the Federal marketplace then contractors must know at the time of proposal submission whether the award will or will not be CAS covered. Therefore, the most practical and logical approach is Alternative 1.

If Alternative 1 is not selected, then FEI recommends that the CAS Board do nothing and simply apply the interpretation of Alternative 3 as established in existing case law (e.g., Future Forest, LLC vs. Department of Agriculture, CBCA 5863, March 9, 2020) which confirmed that CAS applicability to Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts is determined by the minimum stated value at the time of award. However, using the minimum award value as the determination of CAS applicability may not meet the CAS Board's stated objective of helping the contracting parties manage risk. It could be argued that if the government wants CAS to apply to a particular IDV contract, it could unilaterally raise the minimum award value to the CAS threshold. However, that may not be the most effective option in today's acquisition environment, particularly when the Panel is also recommending increases to the thresholds for CAS coverage as a means to streamline and improve the efficiency and effectiveness of the defense acquisition process.

Considering the above, FEI recommends that specific guidance for IDVs be added to the CAS program requirements at 48 CFR 9903.201-1 that would (1) determine CAS applicability at the time of order placement, (2) evaluate each order for CAS applicability on its own, and (3) add a definition of IDV, using the existing definition at FAR 4.601.

Additionally, although not specifically addressed in the subject notice, FEI also strongly recommends the CAS Board consider revisions to various CAS related applicability thresholds as addressed in the Section 809 Panel Recommendation 30 (reference "a") and summarized below. These recommendations align with the intent of CAS as stated in the Materiality section of the Cost Accounting Standards Board: Restatement of Objectives, Policies, and Concepts (August 1992) where "determining the measurement, assignment, and allocation of costs should not be so stringently interpreted that the desired benefits are negated by excessive administrative costs". Through consideration of the recommendations below, FEI believes that barriers to access the larger market will be reduced, thereby increasing competition, and ultimately benefiting both industry and the federal government.

1) Decoupling the CAS-covered contract monetary threshold from the FAR 15.403-4 (TINA) monetary threshold and raise the CAS monetary threshold to $25M while eliminating the trigger contract exemption;

2) Raise the full CAS-coverage monetary threshold and the disclosure statement monetary thresholds to $100M; and

3) Add specific guidance for hybrid contracts to the CAS program requirements at 48 CFR 9903.201-1 that would exclude exempted portions of contracts from CAS coverage, including the application of monetary thresholds.

FEI appreciates the CAS Board's consideration of our input. If you wish to engage with the FEI CGB on this matter or have any questions, please contact Ms. Christina Coulter, Manager, Technical Committee Operations, at (973) 765-1047 or email at ccoulter@financialexecutives.org. You may also contact me directly at (508) 309-8118 or david.k.ferrari@rtx.com.

Sincerely,

David K. Ferrari
Chair, Financial Executives International – Committee on Government Business

Distribution: Christina Coulter, Manager, Technical Committee Operations
FEI CGB Members

From: Tom Gmail
To: MBX OMB CASB
Subject: [EXTERNAL] Case 2021–01
Date: Tuesday, June 18, 2024 7:24:55 PM

The following is my opinion as a private citizen and does not represent an official position of DCMA, nor the Department of Defense:

It is my personal opinion that the Cost Accounting Standards (CAS) should be applied to indefinite delivery vehicles (IDVs) using option 3) Minimum award value.

The basis for applying this option is that each task order / delivery order is NOT a separate contract (versus under a Basic Ordering Agreements (BOA) where each action cut from the BOA is the contract).
It would not make sense to artificially "consider" each order under an IDV to be a contract, as orders would not comply with a legally enforceable contract and could result in costly litigation and unnecessary delays.

Applying that logic would remove from consideration options: 1) Order-by-order (i.e., each task order / delivery order would be treated as an individual contract; CAS applicability would be determined at the individual order level); 5) Order-by-order for multiple award IDVs and maximum award value for single award IDVs; and
6) Order-by-order for multiple award IDVs and cumulative threshold for single award IDVs.

Option 4) Cumulative threshold (CAS applied at the point where the cumulative value of orders exceeds CAS coverage threshold), would result in inconsistent treatment of cost on a given contract; where multiple years of costs could be incurred without the application of CAS; only to come in at a later date applying CAS which could result in costly litigation, unnecessary delays, unwarranted CAS Compliance audits, and unknown cost risk to contractors when the Government is unsure of its need.

Option 2) Maximum award value, also does not make sense when, as of the date of the contract, there is no assurance that the contractor will receive such contracted dollars. The application of CAS is intended only to the extent that the benefits of implementing CAS is not exceeded by the cost of implementing CAS. The CASB, or Congress (guess I'm not sure which), has established the threshold as enumerated in the CAS based on CONTRACT VALUE. The application of a theoretical level, maximum award value, has no nexus with the thresholds enumerated in the CAS itself.

Removing all other options, 3) Minimum award value, seems easiest to measure, objectively clear & guaranteed value, and most consistent application of the CAS.

Another option, not noted, would be to apply Modified CAS at the maximum award value and Full CAS at the minimum award level. Perhaps this would mitigate the Government's apparent concern for IDVs while applying a more reasoned approach considering contractors cost risk. However, this option would run into the same issues as option 2 with the contractual dollar value not known at the time of agreement and could create unnecessary confusion to the more simple and straightforward minimum award value.

In summation, if the Government wants to require contractors to comply with CAS, It should be required to "pony-up" the guaranteed value of the CONTRACT.

Note: when referencing contractor cost risk, I mean the risk the Government will pursue recovers (with associated compounding interest) under CAS clauses for unilateral cost accounting practices and/or CAS non-compliances.

Respectfully,
-Tom Forbush

Sent from my iPhone

2101 Wilson Boulevard, Suite 700, Arlington, VA 22201-3060 • (703) 522-1820 • (703) 522-1885 Fax • NDIA.org

August 19, 2024

Mr. John L. McClung
Office of Federal Procurement Policy, Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Submitted via email to: OMBCASB@omb.eop.gov

Subject: CASB Case No. 2021-01, Regarding the Application of Cost Accounting Standards (CAS) to Indefinite Delivery Vehicles (IDVs)

RE: a) Recommendation 30, Volume 2 of the June 2018 Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel)
b) DoD CAS Working Group Paper 76-2, "Application of CAS to Contract Modifications and to Orders Place Under Basic Agreements – Interim Guidance" (February 24, 1976)

Dear Mr. McClung,

As a 501(c)3 educational nonprofit, NDIA represents more than 1,700 corporate and over 65,000 individual members from small, medium, and large contractors. For more than 100 years, NDIA has provided a platform through which leaders in government, industry, and academia can collaborate and provide solutions to advance the national security and defense needs of the nation. NDIA's Procurement Division Finance Committee formulates policy opinions on government contracting issues for NDIA in line with the views of the membership.

The purpose of this letter is to provide public comments pursuant to 41 U.S.C 1502 related to CAS Board Case No. 2021-01 published in the Federal Register on June 18, 2024, regarding whether and how to amend the Cost Accounting Standards ("CAS") to address the application of CAS to Indefinite Delivery Vehicles[1] ("IDVs").[2]

NDIA Recommendation

In the "Cost Accounting Standards Board Notice to Elicit Public Views on Whether and How to Amend CAS Rule to Address the Application of Indefinite Delivery Vehicles Case Number CASB 2021-01"

[1] Consistent with the Section 809 Panel's description, IDVs comprise both Basic Ordering Agreements ("BOAs") and Blanket Purchasing Agreements ("BPAs") as well as indefinite delivery contracts (frequently referred to as IDIQs or requirements contracts). BOAs and BPAs are not considered contracts because they do not impose any obligation on the government and, therefore, fail for lack of consideration. By contrast, IDIQs must contain a stated minimum quantity and requirements contracts afford the contractor the exclusive right to fulfill the specified requirements and, therefore, these two contract types are considered binding contracts. To the extent this paper refers to the latter, they will be described as "IDCs."
[2] 89 Fed. Reg. 51491.

document[3], the CAS Board provisionally identified six possible approaches for addressing CAS coverage to IDVs. To summarize, the six possible approaches were:

1) Order-by-order,
2) Maximum award value,
3) Minimum award value,
4) Cumulative threshold,
5) Order-by-order for multiple award IDVs and maximum award value for single award IDVs, and
6) Order-by-order for multiple award IDVs and cumulative threshold for single award IDVs.

As discussed in further detail below, the NDIA views Approach No. 1, with additional clarification regarding IDV task order or delivery order CAS-exemptions, as the clearest and most logical approach that the CAS Board has provisionally identified. That is, while we agree that "CAS would apply only to those orders whose values met the coverage thresholds" as described in Approach No. 1, we also believe that task order or delivery order CAS applicability should be determined considering all other existing CAS exemptions that may apply, such as those for commercial item and negotiated orders with fixed prices awarded on the basis of adequate price competition without submission of certified cost or pricing data, and their component values in any hybrid task or delivery orders. Additionally, we believe that task order or delivery order CAS applicability should also consider any IDV level exemptions that may also apply, such as the exemption for contracts and subcontracts with small businesses. With that clarification of the approach, NDIA is in favor of Approach no. 1 over those described in Approaches 2 through 6.

Additionally, if it is the CAS Board's intent to impose the new rule change retroactively on existing, previously negotiated contracts, the NDIA believes that the CAS Board should make it clear that the new rule constitutes a "required change" in the implementation of the new regulations for CAS Administration purposes.

Adopting rules that are clear and predictable ensures contractors will know at the time of proposal submission whether the award will or will not be CAS covered. Providing clear rules can also encourage competition and incentivize new entrants in the Federal marketplace. NDIA supports the "order-by-order" approach (i.e., Approach No. 1), with the clarifications described above, because that approach is most likely to promote consistent CAS administration and reduce contract disputes.

Moreover, the "order-by-order" approach aligns with:

[3] CAS Board, Notice to Elicit Public Views on Whether and How to Amend CAS Rule to Address the Application of Indefinite Delivery Vehicles CAS Number CASB 2021-01, 2-3 (June 18, 2024), https://www.whitehouse.gov/wp-content/uploads/2024/06/CASB-2021-01-Application-of-CAS-to-IDVs-Notice-Public-Inspection-Copy-June-17-2024.pdf.

- Section 809 Panel Recommendation 30 (reference "a") which specifically addressed IDVs and recommended that the CAS Board promulgate a rule adopting the DOD CAS Working Group guidance for all IDVs, including IDCs;[4] and,

- The mandate that CAS Board regulation and interpretations be designed to achieve uniformity and consistency[5] and balance the advantages, disadvantages, and improvements anticipated in the pricing and administration of, and settlement of disputes concerning, contracts.[6]

Analysis of Possible Approaches

The acquisition community's need for CAS Board guidance on the application of CAS to IDVs was covered in substantial detail in the Section 809 Panel recommendations.[7] The CAS Board can bring greater clarity to this topic by issuing a rule which states that, notwithstanding any other clause in a contract, CAS applicability is determined on an order-by-order basis under IDVs.

As explained by the 809 Panel, NDIA believes the acquisition community has largely used the order-by-order approach for IDVs that are not contracts, i.e., BOAs, BPAs, etc.[8] The other approaches do not work for this class of IDV because BOAs and BPAs, standing alone, are not contracts.[9] CAS is applicable based on the existence of a covered contract and, therefore, if no binding contract or order value exists CAS cannot contractually apply unless and until each individual order is placed.[10] Each order is a severable, stand-alone contract, meaning CAS applicability may only be, and largely has been, determined for each order individually.[11] Accordingly, determining CAS applicability with each order issued under a BOA/BPA and similar "agreements to agree" is clear, logical, and consistent with the contractual relationship between the parties.

For IDIQ contracts the answer has not been as clear. For an IDIQ to exist and be binding, it must require the government to order, and the contractor to furnish, at least a stated minimum quantity of supplies or services.[12]

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[4] Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel), Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations (hereinafter "Report of the Section 809 Panel"), Volume 2, 122 (June 2018), https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Volume2/Sec809Panel_Vol2-Report_Jun2018.pdf.
[5] 48 C.F.R. § 9901.302.
[6] 48 C.F.R. § 9901.305.
[7] *See* Report of the Section 809 Panel, Volume 2, 122.
[8] *See id.* at 138-39.
[9] *Id.* at 138.
[10] Applying a minimum or maximum "award" value approach to the BOA or BPA frameworks is not consistent with the fundamental principle that CAS requirements are predicated on the existence of a CAS-covered contract.
[11] *See, e.g., LB & B Associates Inc. v. United States*, 68 Fed. Cl. 765, 768 (Fed. Cl. 2005) (where the underlying multi-award agreement did not contain a guaranteed minimum, the task order placed under the multi-award agreement was a new contract; if the underlying agreement is "simply an invitation to participate in future competitions for contracts," it is likely only a "framework" for future contracting).
[12] FAR § 16.504.

Importantly, an IDIQ contract takes one of two forms. Either it is: (1) an option contract that establishes all essential terms, including prices, for the optional orders that may be placed under the IDIQ (those beyond the stated minimum); or (2) the IDIQ establishes a framework for subsequent orders, but priced options do not exist. For the second type of IDIQ, each order after the stated minimum is a new pricing action and, therefore, constitutes the award of a new contract (potentially containing combined contract types).[13] Determining which type of IDIQ is at issue is crucial to determining whether the award of an order is simply the exercise of an option or is a contract modification, which will be considered to create a new contract between the parties.[14]

The CAS Board's provisional Approach No. 2, above, arguably makes sense for an IDIQ that contains a stated minimum quantity and priced options because such a contract is binding and contains a definitive award value equal to the stated minimum plus the value of priced options. When an IDIQ contract establishes prices for options, the orders placed under it do not require any contract modification or pricing action. The terms of the IDIQ contract will control[15] and, if such a contract was not exempt at the time of award and properly incorporates the CAS clause, the CAS clause would apply to the orders placed thereunder. This approach aligns with the CAS Board's definition of the term "net awards" considered for purposes of valuing contracts and determining whether the contract will be full or modified CAS covered.[16]

Approach No. 2 does not make sense, however, when an IDIQ contract does not establish priced options because the award value of such an IDIQ contract is only the stated minimum award value. In this circumstance, Approach No. 3 makes the most sense. Even here, however, ambiguity would remain as to whether the orders placed against such an IDIQ are separate pricing actions and, effectively, the award of new, potentially CAS-covered, contracts in the form of the individual task orders or delivery orders. One view is that these are not new contracts. CAS applicability is determined at the time of contract award and modifications or changes do not trigger CAS unless the modification results in the award of a materially different contract (i.e., a cardinal change). *See* DOD Working Group Paper.

On the other hand, if such an order were to be deemed a new contract, determining whether CAS or other contract clauses apply to that individual order arguably requires analysis of each individual order because it is that order that specifies a contract type, quantity and price and, therefore, is itself a separate contract.[17]

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[13] As did the 809 Panel, NDIA and the acquisition community will greatly benefit from the CAS Board's timely consideration and clarification regarding how CAS coverage is determined for hybrid or combined contract types.
[14] *See* FAR § 43.000(a) (issuance of an order under an IDIQ with a new pricing action clearly changes the terms of the IDIQ and will be memorialized in a supplemental agreement).
[15] FAR § 52.216-8.
[16] 48 C.F.R. § 9903.301 ("Net awards, as used in this chapter, means the total value of negotiated CAS-covered prime contract and subcontract awards, including the potential value of contract options, received during the reporting period minus cancellations, terminations, and other related credit transactions.").
[17] *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016) (holding that orders placed under pre-existing FSS contracts constitute new contracts that bind each party for three independent reasons: (1) such arrangement meets the ordinary, Black's Law definition of contract; (2) the contract gave the Government the option to buy, but it did not require the Government to make a purchase or expend funds; and (3) when placing

Additionally, orders placed under IDIQs are often firm fixed price ("FFP") with adequate price competition and no requirement for certified cost or pricing data and thus subject to a CAS exemption.[18] Those orders might, alternatively, involve only commercial products or commercial services, despite the existence of cost-reimbursement contract types in the base IDIQ. Recognizing that IDCs frequently are hybrids that combine contract types (i.e., FFP CLINs, cost type CLINs, and CLINs for commercial items), further underscores the importance of clarifying how CAS applicability should be determined for IDVs.

In these Hybrid Contracts, a significant portion of the contract award value is often commercially or competitively fixed price effort that would, by itself, be exempt from CAS. If the Hybrid contains a cost reimbursable element, i.e. for pass through costs, it would not be appropriate to force CAS coverage and bypass the CAS exemptions due to the Hybrid portion of the order that may not avail any of the CAS exemptions.

For these reasons, NDIA does not believe that Approach 2 is a viable option. This is particularly true if Approach 2 were to be implemented in a way that equates the "ceiling value" to equal the maximum order value rather than the stated minimum quantity plus the value of priced options, as explained above. The maximum order value, particularly for large multiple award contracts, frequently would subject many contracts to CAS-coverage, indeed full CAS-coverage, despite the fact the contractor might never receive any individual orders that surpass the $2M threshold, much less the threshold for a so-called "trigger" contract.

NDIA believes Approach 3 has merit with regard to IDIQs that contain only a stated minimum quantity and lack priced options. That said, as discussed above, because later orders may involve pricing actions it is fair to both parties that CAS-coverage be considered on an individual order-by-order basis.

NDIA does not believe that Approaches 4, 5, or 6 are workable approaches because they are not clear and easy to administer for either party. Contractors' business systems generally are not designed to track the cumulative value of orders against IDVs in such a way as to track CAS applicability being triggered, as contemplated under Approach 4. Accordingly, cumulative value tracking might require further compliance investment and cost or could, for some, become a manual process that is subject to error. These approaches, therefore, are largely contrary to the CAS Board's stated objectives of helping the contracting parties manage risk, reduce the regulatory burden, and minimize complexity.

In light of the above, NDIA recommends that specific guidance for IDVs be added to the CAS program requirements at 48 CFR 9903.2 that would (1) determine CAS applicability at the time each order is executed, (2) evaluate each order for CAS applicability as a separate, severable contract, (3) make clear

orders, agencies could sometimes seek different terms); *see also* Anderson, Accounting Government Contracts - Cost Accounting § 3.03 (2021) ("Technically, an IDIQ contract is only a contract to the extent that the work is completely priced and can be unilaterally ordered by the government. To the extent that the IDIQ contract contemplates newly priced offers to perform additional tasks, such work is not part of the originally awarded contract but is more in the nature of a basic ordering agreement.").

[18] 48 CFR 9903.201-1(b)(15).

that the rule applies to prime contracts and subcontracts; and (4) define what constitutes an IDV, which should be consistent with the existing definition at FAR 4.601.

As part of addressing the applicability of CAS to IDVs, NDIA recommends that the CAS Board adopt the Section 809 Panel Recommendation on Hybrid contracts. For Hybrid contracts, the exemptions at 9903.201-1(b) should be applied to any portion of a contract or subcontract where CAS would not apply if that portion were awarded as a separate contract or subcontract. The dollar value of the portion exempted should not be considered in applying any dollar threshold set forth in 9903.

Summary

As described above, NDIA supports changes to the CAS regulations as described in Approach No. 1 with additional clarifications regarding the applicability of other CAS exemptions for IDV task orders or delivery orders and confirm that any corresponding regulation changes impacting existing contracts would be "required changes" for CAS Administration purposes.

Additionally, although not specifically addressed in the subject notice, NDIA also strongly recommends the CAS Board consider revisions to various CAS related applicability thresholds as addressed in the Section 809 Panel Recommendation 30 (reference "a"), particularly given the significant inflation that has occurred since the Recommendations were made:

1) Decoupling the CAS-covered contract monetary threshold from the FAR 15.403-4 (TINA) monetary threshold and raise the CAS monetary threshold to $25M while eliminating the trigger contract exemption, and
2) Raise the full CAS-coverage monetary threshold and the disclosure statement monetary thresholds to $100M.

NDIA appreciates the opportunity to comment on this matter and stands ready to assist. If you have any questions related to these comments, please reach out to Chris Sax at csax@ndia.org or (703) 247-2571.

Sincerely,
The National Defense Industrial Association

PSC

August 19, 2024

Office of Federal Procurement Policy
725 17th Street, NW
Washington, DC 20503
ATTN: John L. McClung

RE: PSC Comments on "Application of Cost Accounting Standards to Indefinite Delivery Vehicles" (CASB Case 2021-01)

Dear Mr. McClung:

On behalf of the Professional Services Council (PSC), I am pleased to submit comments on the Office of Federal Procurement Policy (OFPP) Cost Accounting Standards Board (CASB or the Board) notice of availability on "Application of Cost Accounting Standards to Indefinite Delivery Vehicles" (CASB Case 2021-01), as published in the *Federal Register* on June 18, 2024.[1] This notice announced the availability of a CASB document entitled "Cost Accounting Standards Board Notice to Elicit Views on Whether and How to Amend CAS Rule to Address the Application of Indefinite Delivery Vehicles, Case Number CASB 2021-01,"[2] which refers to a 2018 recommendation of the Advisory Panel on Streamlining Acquisition Regulations[3] that the CASB address when cost accounting standards apply to indefinite delivery vehicles (IDVs). Highlighting the growing popularity of IDVs, the Panel noted that the CASB's lack of guidance in this area has led to some inconsistencies in government acquisitions. To help address this recommendation, the subject CASB notice outlines six different alternative approaches to addressing cost accounting standards (CAS) coverage of IDVs and seeks industry feedback on the benefits and drawbacks of these various alternatives.

As you may know, PSC is an industry association with more than 400 member companies—small, mid-sized, and large—that provide much-needed technology and professional services to all federal agencies with a significant presence within key national and economic security programs, some of which leverage IDVs to accomplish their missions. It is worth noting that PSC member companies and their workers throughout America and around the world have long demonstrated that they are as committed to U.S. Government missions as federal civilian and uniformed personnel. PSC supports our members and their federal government customers by promoting effective government practices and policies, improvements in federal contracting, and constructive dialogue between the federal government and industry officials. PSC tracked closely the Panel's

[1] https://www.federalregister.gov/documents/2024/06/18/2024-12225/application-of-cost-accounting-standards-to-indefinite-delivery-vehicles
[2] https://www.whitehouse.gov/wp-content/uploads/2024/06/CASB-2021-01-Application-of-CAS-to-IDVs-Notice-Public-Inspection-Copy-June-17-2024.pdf
[3] This panel, also known as the "Section 809 Panel", was established by section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92) "to deliver recommendations that could transform the defense acquisition system to meet the threats and demands of the 21st century." (https://discover.dtic.mil/section-809-panel/)

recommendations and appreciates the opportunity to provide feedback on the CASB's document and the different alternatives therein.

Toward that end, PSC circulated the notice to member companies to collect, consolidate, and provide industry feedback that is most useful to the CASB during consideration of possible amendments to its rules to address IDVs. Our comments below reflect input from PSC staff and member companies alike.

Of the six possible approaches proposed by the CASB, **several PSC member companies indicated support for the approach outlined in *Alternative i. Order-by-order*.** These companies observed that this alternative appears to provide the most feasible approach to meeting the Board's objectives, is likely the simplest approach to implement, and best supports the CASB evaluation criteria related to helping the contracting parties to manage risk, reduce regulatory burdens on both the Government and contractor, encourage commercial companies to consider the federal marketplace, and promote consistency.

These PSC member companies noted that ***Alternative i. Order-by-order*** uses "the most likely timeframe where all of the pertinent facts are known in order to apply the CAS exemptions, thresholds, and disclosure requirements to determine whether or not an order will be covered by CAS." This approach applies the CAS requirement at the **point of certainty of award**—rather than imposing CAS compliance on a contractor with merely a prospect that it *may* receive enough orders to surpass traditional CAS thresholds. Companies further stated this alternative promotes consistency in treatment for both single-award and multiple-award contracts.

In addition, PSC received input that cited the 41 U.S.C. 1501 et. seq, which requires the CAS to be applied to "contracts." While the statute does not define "contract," FAR 2.101 does defines the term to include "orders" as a type of contract. The issue of whether a task or delivery order is a "contract" was addressed by the Supreme Court in *Kingdomware Technologies, Inc. v. U.S.,* where the Court held that "orders" under Federal Supply Schedule contracts are contracts:

> within the ordinary meaning of that term. See *e.g.*, Black's Law Dictionary 389 (10th ed. 2014) ("[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law"). It also creates a "contract" as defined by federal regulations, namely, a "mutually binding legal relationship obligating the seller to furnish the supplies or services ... and the buyer to pay for them," including "all types of commitments that obligate the Government to an expenditure of appropriated funds and" (as a general matter) "are in writing."48 CFR §2.101 (2015).

Thus, according to this individual, orders under IDVs are "contracts"—and the CAS should thus apply to individual orders and not to the entire contract. Moreover, to apply the CAS to orders that would not individually qualify for CAS applicability could result in inconsistent treatment of contracts as defined by the FAR and *Kingdomware* in that some contracts would be exempt from the CAS while other similarly situated contracts would be subject to the CAS merely because they are orders under IDVs.

This feedback further noted that application of the CAS to all orders under an IDV could be inconsistent with 41 U.S.C. 1502, which requires the CAS to apply to contracts that exceed the cost or pricing data threshold. This limitation is implemented in section 9903.201-1 of the CASB's rules, exempting contracts below the cost or pricing data threshold "from all CAS requirements." Thus, application of the CAS to all orders under IDVs regardless of the dollar value of each order could result in application of the CAS to contracts that do not exceed the cost or pricing data threshold in potential contravention of law and regulation. The ***Order-by-order*** approach is therefore preferable.

The following comments pertain to the other alternatives offered in the CASB document:

- ***Alternative ii. Maximum award value*** appears to be an unreasonable approach, given that many contract maximum award values—particularly for multiple-award contracts—are rarely, if ever, reached. This approach would mandate full CAS compliance on small businesses and others who have received awards with potentially high-value "ceilings" when, in fact, the actual orders under this high-value award may actually be quite small. As stated by one PSC member, this alternative "has a bias to over-include CAS status on contracts that do not incur costs representative of the maximum value."

- ***Alternative iii. Minimum award value*** would have the opposite effect of granting CAS exemptions to contracts that incur costs in excess of the CAS thresholds. However, this alternative would not reflect the true estimate of costs to be incurred and therefore is not a consistent or reasonable approach to the application of CAS requirements. Of further concern, an IDV contract can be terminated prior to award of any orders, leaving a contractor with no entitlement to costs or profit.

- ***Alternative iv. Cumulative threshold*** assumes a contractor can forecast or control the timing or value of awards; contractors do not have the ability to anticipate the point at which the cumulative threshold would be tripped. Thus, this alternative would compel a contractor to comply with CAS requirements based on the *speculation* that the threshold would eventually be crossed. A PSC member further noted that the application of this *Cumulative Threshold* approach to multiple-award IDVs has the potential to push smaller non-CAS covered contractors into full- or modified-CAS coverage, based on the value of the orders with other larger awardees. In addition, this alternative would increase responsibilities of an administrative office by requiring notification to all awardees when the threshold is met; at that point, awardees would have to be notified that another award under the IDV—including to another awardee—would exceed the cumulative threshold.

- ***Alternative v. Order-by-order for multiple award IDVs and maximum single award IDVs*** has similar challenges as *Alternative ii* above in that there will be a bias to over-include CAS status on contracts that do not incur costs representative of the maximum value. According to a PSC member, "this approach would compel a contractor to comply with CAS requirements based on the speculation that the threshold will eventually be tripped." Another PSC member company noted, "Treating single award IDVs in this manner makes it less desirable to bid for contractors that do not already have Full-CAS covered contracts, where the maximum value would cause them to reach Full-CAS covered status," even when the actual costs incurred on the contract may not trigger additional CAS coverage.

- ***Alternative vi. Order-by-order for multiple award IDVs and cumulative threshold for single award IDVs*** also brings challenges as noted above regarding over-inclusion of CAS status. One PSC member company noted, "For single award IDVs, cumulating the order values may help non-Full-CAS contractors prepare for CAS coverage over time. However, as a hybrid approach, it treats the CAS status of multiple-award versus single award IDVs inconsistently, thereby creating a need for a new set of requirements… and increasing the overall administrative responsibilities of all parties."

PSC appreciates the OFPP's ongoing willingness to engage with industry on a range of issues that are important to our nation's security, defense, and economic well-being. This engagement, of course, is an iterative process, and it is one that could benefit from more forums for open dialogue and discussion. As an industry association representing a wide range of government contractors, we at PSC look forward to continued engagement and would be happy to facilitate such dialogue and discussion, as appropriate. Should you have any questions, please feel free to contact me at **policy@pscouncil.org**. Thank you for your consideration.

Sincerely,

Stephanie Sanok Kostro

Stephanie Sanok Kostro
Executive Vice President for Policy

Redstone
Government Consulting

Cost Accounting Standards Board
Office of Federal Procurement Policy
725 17th Street N.W.
Washington, DC 20503
ATTN: John L. McClung (email: OMBCASB@omb.eop.gov and john.l.mcclung2@omb.eop.gov)

RE: CASB2021–01
Application of Cost Accounting Standards to Indefinite Delivery Vehicles

Thank you for allowing us the opportunity to provide comments to the Advance Notice of Proposed Rulemaking Case No. CASB 2021–01 addressing the application of Cost Accounting Standards (CAS) to Indefinite Delivery Vehicles (IDVs).

We fully support the 809 Panel position that in most cases determination of CAS applicability should be made when the specific orders under the IDV are placed. Alternative (i) order-by-order is most likely the point at which all the facts are present to properly apply the CAS exemption outlined in CAS 9903-201-1(b).

However, we do believe there are cases where the IDV can be determined exempt from CAS upon the original award of the IDV contract. These cases are the following:

- The award of an IDV to a small business.
- The prices in the IDV are set by law or regulation.
- The products or services in the IDV are commercial as defined in FAR part 2.
- The prices in the IDV are firm-fixed-prices based on adequate price competition without submission of certified cost or pricing data, where quantity is the only factor used to determine the future value of orders. We believe this should include both products at fixed unit prices and services sold on the basis of fixed labor rates by labor category.

We believe, in these cases, the IDV should clearly be exempt from future CAS applicability on an order-by-order basis. This will help support the CAS Board's (CASB) evaluation criteria related to helping the contracting parties manage risk, reduce regulatory burden on both the Government and the contractor, encourage additional commercial company support of the Federal marketplace, minimize complexity, and promote consistency. To support this original IDV determination, we suggest the CASB consider a new CAS Clause for these cases to eliminate future second guessing of the contracting officer's intent and support consistency.

Thank you again for the opportunity to provide comments on this important proposed rulemaking.

August 16, 2024

To: *OMBCASB@omb.eop.gov.*

Subject: Response to Cost Accounting Standards ("CAS") Board Case 2021-01 – *Federal Register June 18, 2024* – Application of Cost Accounting Standards to Indefinite Delivery Vehicles ("IDVs") and *Federal Register June 27, 2024* – Conformance of Cost Accounting Standards to Generally Accepted Accounting Principles ("GAAP") for Operating Revenue and Lease Accounting.

We would like to provide to you our thoughts and comments relative to CAS Board Case 2021-01 that according to the *Federal Register* promulgations cover IDVs and adoption of GAAP for Operating Revenue and Lease Accounting.

By way of introduction, we have a great deal of experience working CAS matters accumulated through our work both in the private sector and within the Defense Contract Management Agency ("DCMA").

One of us (Bill Romenius) worked CAS issues at The Boeing Company, including providing staff support to the first Industry Representative to the reestablished CAS Board and subsequently was the Industry Representative to the CAS Board. After retiring from The Boeing Company, Bill, while employed at DCMA, developed CAS training modules and then provided training of those modules to DCMA's Cognizant Federal Agency Officials ("CFAOs") and their supervisors. He also worked directly with CFAOs in addressing their specific CAS issues. In addition, he developed CAS training modules that were used by the Defense Acquisition University. Bill was a member of the Section 809 panel – CAS Modernization sub-committee (more on that later). Currently, he is providing CAS training and on an extremely limited basis consultancy on CAS.

The other one of us (Steve Trautwein) was a long-time contracting officer in the Department of Defense with responsibilities at both the divisional and corporate levels. As a CFAO with final authority for Cost Accounting Standards issues, he resolved the entire gamut of issues arising in the CAS covered contract environment. Later in his federal career, Steve assumed responsibility for leading the DCMA contracting officers, who had CFAO responsibilities for the largest defense contractors. Steve was also a member of the Section 809 panel – CAS Modernization sub-committee. Subsequent to his federal career Steve has spent six years as a consultant, both teaching CAS as well as working with an array of clients on CAS related issues.

It is with this background, experience, perspective and yes, passion that the following thoughts and comments to the Cost Accounting Standards Board's Case 2021-01 are offered in our role as members of the CAS Modernization sub-committee to the Section 809 panel

I. IDVs – *Federal Register June 18, 2024*

We wish to call the CAS Board's attention to the Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, published in June 2018. This Advisory Panel, known as the "Section 809 Panel," was created under Section 809 of FY2016 Defense Authorization Act to review the acquisition regulations applicable to the Department of Defense with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage. IDVs was an area covered in detail by the Section 809 Panel. The Section 809 Panel concluded that changes to the monetary thresholds alone will not solve this problem. Instead, there needs to be a fundamental change in how CAS is applied to such contracting vehicles. Moreover, the face value of IDVs is irrelevant because, at the time of award, no one knows the volume of awards that will be made to a specific contractor. The Section 809 Panel recommended that CAS applicability on IDVs be determined at the time of order placement with each order evaluated on its own. We believe that this remains the correct position.

The membership of the CAS Board has changed significantly since the Section 809 recommendations were presented to the CAS Board. Accordingly, we believe that the current CAS Board would be well-served to place the Section 809 panel's recommendations on the CAS Board's agenda. This would include, in addition to IDVs and hybrid contracts, recommendations made by the Section 809 – CAS Modernization Sub-committee in the following areas:

1. Raising CAS-covered contract threshold to $25 million
2. Raising full coverage & Disclosure Statement thresholds to $100 million
3. Eliminating the CAS "trigger contracts"
4. Harmonizing commercial item exemption with the current law
5. Expanding the cost data CAS exemption to fixed-price type contracts using price analysis
6. Inserting the CAS clause only in contracts that are actually CAS covered
7. Updating the CAS Disclosure Statement
8. Addressing the entire cost impact process

We are sure that members of the Section 809 – CAS Modernization Sub-committee would welcome the opportunity to discuss these recommendations with the CAS Board.

II. **Revenue & Leases** – *Federal Register – June 27, 2024*

Impact

The intent of the Public Law 114-328 to harmonize CAS with GAAP is clear. However, all parties must recognize that mere harmonization is not likely to be very impactful in either lessening the CAS administrative burden or to increase competition by encouraging additional companies to provide their goods and services to the United States Government. Why? Since the accounting between CAS and GAAP are essentially the same in these areas to be harmonized, the elimination of a CAS provision is not necessarily going to translate into reduced administrative burden. We would like to suggest that a more impactful way for the CAS Board to embrace the spirit of Public Law 114-328, is to adopt the recommendations of the Section 809 Panel (a Panel that was also grounded in Public Law).

Guiding Principles

The June 27, 2024 promulgation associated with Case 2021-01 states that the CAS Board's "Guiding Principles" are to: "minimize burden on contractors, protect the interests of the Federal Government, and materially achieve uniformity and consistency in cost accounting, without bias or prejudice to either party." We would like to suggest that these CAS Board's "Guiding Principles" are a jumble of not very well-defined thoughts, that are not particularly helpful to those involved in CAS as they try to gain an understanding of the CAS Board's perspective.

Such terms as "minimize burden" "protect the interests of the Federal Government" "materially achieve uniformity and consistency" are imprecise and will likely result in significantly varying interpretations. The term "protect the interests of the Federal Government" is a good example of something that can produce inconsistency, if not havoc, since it is such a nebulous phase. Different perspectives will cause a wide-spectrum of viewpoints on how the interests of the Federal Government are protected. They could run from a myopic level focus solely on price/cost impact for a particular issue (as will be demonstrated on the comments below relative to "required Cost Accounting Practice changes") to a broader view realizing that developing CAS rules and regulations that encourage increased competition and access to the most modern technologies are a true benefit in protecting the interests of the Federal Government and should be recognized as such.

It is respectfully suggested that rather than the "Guiding Principles" included in the June 27, 2024 *Federal Register* promulgation that the CAS Board refer back to its *Statement of Objectives, Policies & Concepts – 57 Federal Register July 13, 1992 31036.*

Specifically, over the years the CAS Board, on three separate occasions, explained to interested parties the manner in which it would meet its legal obligation to design cost accounting standards "to achieve uniformity and consistency in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the United States." These promulgations are known as its "Statement of Objectives, Policies & Concepts" ("*Statement*"). The latest version of the *Statement* was promulgated in the *Federal Register* on July 13, 1992. The *Statement*, a detailed narrative, spells out each element that is considered in establishing, revising, eliminating, interpreting any standard or governing rule or regulation.

The specific provisions contained in the *Statement* provide not only the intent of the *Statement*, but also the intent of the CAS Board:

> Pursuant to Pub. L. 100-679, there is established within the Office of Federal Procurement Policy an independent board to be known as the Cost Accounting Standards Board. The Board is now publishing a Statement of its current objectives, policies and concepts. This Statement is intended to make known the current views of the Board, as it considers the cost accounting issues that come before it. As such, the Board intends for subsequent promulgations to be consistent with the objectives and concepts provided herein. Interested members of the public should, on the basis of this Statement, be better able to focus on the complex and difficult issues that the Board faces in promulgating and revising Cost Accounting Standards. Anticipating that the Board, from time-to-time, will revise this document, the Board welcomes the views of interested parties on the objectives, policies and concepts stated herein.
>
> **OBJECTIVES**
>
> The purpose of this Statement is to present the basic policies, procedures and objectives within which the Cost Accounting Standards Board carries out its functions under the authority of Pub. L. 100-679. The primary objective of the Board is to promulgate, amend, and revise Cost Accounting Standards designed to achieve (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

> contractors over periods of time. In accomplishing this primary objective, the Board takes into account (1) the advantages, disadvantages, and improvements anticipated in the pricing and administration of, and settlement of disputes concerning contracts, (2) the probable costs of implementation, including inflationary effects, if any, compared to the probable benefits of such Standards, and (3) the alternatives available.

Other objectives of the CAS Board as identified in the *Statement* include: the relationship between Allowability and Allocability, Fairness & Equity and Verifiability. Cost Allocation Concepts include: Materiality (which will be discussed further in the next section of this letter), Method of Accounting, Full Costing, Hierarchy for Allocating Costs. Finally, Operating Policies include: Relationship to Other Authoritative Bodies (which offers a sound basis for the CAS/GAAP Harmonization effort), Process of Development of Standards and Comparing Costs and Benefits.

It is important to note that the *Statement* does not specifically state that protecting the interests of the Government is a guiding principle. Rather it is the process itself that protects the interests of both parties. How? Uniformity allows reasonable assurance that proposals and their evaluations are on equal footing, performed on a level playing field. This benefits both the Government and the competing contractors. Consistency ensures that like costs, in like circumstances are treated in a like manner in estimating, accumulating and reporting costs (essentially a combination of CAS 401 and CAS 402). Again, this benefits both the Government and competing contractors. Objectives and concepts such as Fairness & Equity, Verifiability, Full Costing, the CAS "Rosetta Stone" of basing the assignment, measurement and allocation of costs on the beneficial or causal relationship between the cost and the cost objectives all benefit both the Government and its contractors. As the CAS Board states in its *Statement*:

> Benefits from the application of the Cost Accounting Standards to Government contractors include reductions in the number of time-consuming controversies stemming from unresolved aspects of cost allocability, as well as greater equity to all concerned. The Board also believes that additional benefits accrue through simplified contract negotiation, administration, audit, and settlement procedures. In addition, the Standards should serve to reduce the opportunities for the manipulation of accounting methods alleged to have existed prior to the establishment of the Standards. Finally, and most importantly, the availability of better cost data stemming from the use of Cost Accounting Standards permits improved comparability of offers and facilitates better negotiation of resulting contracts.

In short CAS was not put in place to protect just the interests of the Government[1]. Rather CAS must fairly protect the interests of both contracting parties by establishing a process, based upon the twin objectives of Uniformity and Consistency, that reduce "time-consuming controversies" by improving and simplifying the "contract negotiation, administration, audit, and settlement procedures." For these reasons the *Statement* should be used as the underlying basis for future revisions to CAS.

III. Required Change – *Federal Register – June 27, 2024*

The following perspective and comments are directed to the CAS Board discussion concerning required changes that was included in its Notice of Proposed Rulemaking ("NPRM") (on Operating Revenue and Lease Accounting) - June 27, 2024 *Federal Register*:

Let us first summarize our three points, to be then followed by more specific comments:

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We believe the CAS Board should:

1. Amplify guidance and give additional illustrations of cost accounting practice ("CAP") changes required to remain in compliance with the existing CAS and CAP changes that should be determined "desirable".

2. Address the observed lack of "required" and "desirable" CAP change determinations, with a view toward clarifying the intended application and giving CFAOs a better supported basis for appropriately making these determinations.

3. Provide additional materiality coverage in CAS including illustrations

Why the need to provide additional guidance on required and desirable CAP changes

All too often a CAP change is shaded in a negative light. This is unfortunate and causes an inaccurate determination as to the type of CAP change, i.e., required, desirable or unilateral and time-consuming cost impact negotiations.

[1] The CAS Board put in place the cost impact process to ensure that neither contracting party is harmed by nor benefits from either a cost accounting practice ("CAP") change or a CAS non-compliance. Specifically, the cost impact process ensures that the Government does not pay increased costs related to unilateral CAP changes or CAS non-compliances. However, it is equally important to recognize and acknowledge that this same cost impact process is there to provide contractors a vehicle to submit requests for equitable adjustments that are associated with required or desirable CAP changes. In summary, the cost impact process protects the interests of both contracting parties.

Understanding the genesis of a CAP change, first requires appreciation of the CAP itself. The CAP must be well-grounded in ensuring that the methods or techniques used in assigning, measuring and allocating the costs are each based upon the beneficial or causal relationship between the functions and activities that generate the cost and the cost objectives that receive the cost. Consequently, any CAP change must maintain that beneficial or causal relationship. As a result, CAPs will change as the business environment changes (e.g., increase/decreases in operations (caused by such events as mergers/acquisitions/divestments, recessions, pandemics, etc.), changes in production methods, significant contract awards, etc.). This is important since as the business environment changes, it is critical that a contractor has in place a robust process that periodically reviews its CAPs to ensure that those CAPs continue to maintain the beneficial relationship between functions/activities/cost and cost objectives. In short, maintaining compliant CAPs must be viewed as an on-going process. CAPs are not fixed and stagnant. Many CAP changes are not avoidable. Nor should CAP changes be viewed as something negative that warrants the contractor being penalized for making them. With the ever-changing business environment, one should expect CAPs changes to occur.

Required CAP Changes

The CAS Board acknowledged this expectation of an on-going need for CAP changes by establishing a process to administer all CAP changes, including two types of required CAP changes. The first is a CAP change required to be made to maintain CAS compliance with a revised CAS (as is the case with the CAS/GAAP harmonization.) The second is a CAP change required to be made on a prospective basis to maintain compliance with the existing CAS.

The determination as to when the first type of required CAP change occurs is generally clear-cut. The determination as to when the second type of required CAP change occurs is not as distinctive. The antonym to a required CAP change made on a prospective basis is a CAS non-compliance, if and when the absence of a CAP change results in the CAP no longer representing the beneficial or causal relationship and the cost impact is material. Accordingly, and as previously mentioned, it is quite important that the contractor's internal control calls out for periodic reviews of its CAPs to ascertain whether the CAPs are still CAS compliant; not only under the current business environment, but also as anticipated changes to that business environment occur. Otherwise, the contractor risks a CAS non-compliance if it is found that its existing CAPs failed to keep pace with the changing business environment and as a result the beneficial or causal relationship of those CAPs has been materially disrupted. In a nutshell the ever-changing business environment will lead contractors to change their CAPs on a prospective basis to maintain compliance with the existing CAS. This is a required CAP change.

Finally, note that a required CAP change is subject to a Request for Equitable Adjustment ("REA"). This fact in and of itself shows that the CAS Board, rather than viewing CAP changes as something negative, encourages contractors to make CAP changes to maintain compliance with the existing CAS by allowing contractors to submit a REA for such CAP changes.

Desirable CAP Changes

A desirable CAP is a type of a CAP change that allows a contractor to submit a REA. This again demonstrates the CAS Board's encouragement to make CAP changes, when appropriate.

FAR 30.603-2(b)(3) identifies factors that may be used in determining whether a CAP change can be determined to be desirable.

Additional factors are included in Armed Services Board of Contract Appeals (Lockheed Martin Corp., ASBCA No. 53822, 07-2 BCA ¶ 33,614.).

> "…relevant factors may include not only the magnitude of any increased costs but also: the extent of active government involvement in, and support for, the decision to institute the changed practices; the degree to which the changed practices increased the accuracy and precision of the cost measurement, assignment, and/or allocation process; the degree to which the changed practices increased the visibility, manageability and/or controllability of the costs in question; and, any other short or long term benefits to the government.

The additional factors identified by the ASBCA, have not been incorporated in CAS regulations. They should be incorporated.

Perhaps even more valuable in determining whether a CAP change is desirable is to review the benefits of CAS as described in the *Statement*. To reiterate in describing benefits of CAS, the CAS Board mentions in the *Statement* that benefits of CAS are to reduce "time-consuming controversies" by improving and simplifying the "contract negotiation, administration, audit, and settlement procedures." The same criteria exist for the determination of desirable CAP changes. If, for example, the CAP changes simplify the accounting and thereby reduce "time-consuming controversies" by improving and simplifying the "contract negotiation, administration, audit, and settlement procedures," then such CAP changes should be determined to be desirable.

Unilateral CAP Changes

A CAP change should be determined to be unilateral only when the CAP change does not meet: a) either of the two definitions of required CAP change

or b) the definition of a desirable CAP change. Said a little differently, a unilateral CAP change determination is the default type of CAP change that occurs only when the conditions/criteria for the other types of CAP changes are not met.

What is happening.

1. In our collective experience, determinations of a: 1) required change made on a prospective basis to maintain CAS compliance with the existing CAS or 2) desirable change are virtually non-existent. How can that be? It gets back to the negative connotation that some have with CAP changes. More to the point, CFAOs may be reticent to make such determinations because of the concern that the determination will be criticized, since it allows for REAs, (which then gets back to the incorrect belief that allowing for REAs does not "protect Government's Interests.") As a result, almost all CAP changes, regardless of the circumstances that triggered the CAP change, are determined to be unilateral and subject to the "no increased costs" limitation and denial of equitable adjustments. As has been discussed this position is not supported by the existing regulations.

2. The materiality criteria at CAS 9903.305 are not being applied consistently. This is important since no increased cost exists until and unless the results of the cost impact is material. Actual practice, as demonstrated by a long history of Government actions, appears to indicate an institutional view that the Government's interests are best protected by finding almost any cost impact associated with a unilateral CAP change is material and thereby subject to the "no increased costs" limitation. This highlights the flaws of using such nebulous and problematic terms as "protecting the Government's interests" in the CAS Board's "Guiding Principles."

3. The issue of cost impacts associated with CAP changes that occur simultaneously has added further complexity. Initially, court cases have found that the cost impact proposals associated with CAP changes that occur simultaneously must be computed separately; ignoring the impact of the other simultaneous CAP changes. Again, some believe this position protects the interests of the Government.

> However, this illogical position ignores a basic tenet of CAS. Specifically, the manner in which a proposal is estimated must be consistent with the manner in which incurred costs are accumulated and reported (CAS 401). The interests of both parties are adequately protected when the impacts of simultaneous changes are combined, since the combined impact will provide the true impact of simultaneous changes. Furthermore, the combined impact of simultaneous unilateral changes is still subject to the "no increased costs" limitation.

This continued misconstrued application of protecting the interests of the Government is a reason, why it should not be included in the aforementioned "Guiding Principles." It also highlights the problems associated with the other terms included in the "Guiding Principles."

The CAS is in place to protect both contracting parties. Both parties are to benefit from CAS. Neither party should be harmed by the CAS provisions. The *Statement* offers a sound baseline of the CAS Board's Objectives, Policies and Concepts. The "Guiding Principles" do not.

With this discussion of the three types of CAP changes as background, let us please briefly discuss the CAS Board stating that this required CAP change associated with the NPRM does not require a cost impact. The assumption that the impact of this CAP change, by its very nature and comments received to date, is immaterial makes complete sense.

The NPRM then goes on to say "The Board has provisionally determined that the change is required and that an exemption from the cost impact process is clearly warranted."

It is completely understandable, why the CAS Board would determine that there is no need for a cost impact for a REA associated with this CAP change, i.e., to limit the administrative burden associated with this CAP change that the CAS Board believes to be immaterial.

However, we suggest that the CAS Board be guarded in proffering whether a cost impact is required, even in this case. Contractors' systems are not the same. More importantly, it opens a door that could lead to contracting parties seeking an affirmative statement from the CAS Board as to whether a CAP change, required to maintain compliance with a revised CAS, is subject to a cost impact for a REA. Does the CAS Board really wish to become an umpire in determining on a case-by-case, company-by-company basis, when a cost impact for a REA is appropriate? Would it not be better for the CAS Board to state when a revision to a CAP is going to require a contractor to

change its CAPs to maintain compliance with the revised CAS and then leave it to the contractor to determine, whether it wishes to submit a cost impact for a REA?

The CAS Board's time would be well-spent, addressing the following CAP and cost impact issues:

1) Making clear that the interests of both contracting parties are protected by the process that CAS Board has put in place to achieve Uniformity and Consistency by using the "Rosetta Stone" of the beneficial or causal relationship between the functions/activities/costs and cost objectives in determining the method and techniques used to assign, measure and allocate cost.
2) Required and desirable CAP changes are valid types of CAP changes. They should be welcomed, not discouraged. It is only when the CAP change does not meet either of the two definitions of required CAP change or the definition of a desirable CAP change can the CAP change be determined to be unilateral.
3) Materiality determinations need to be based upon a common-sense approach in evaluating the Materiality criteria at 9903.305 and perhaps add a quantitative formula to assist in the determination of Materiality. It might also be beneficial to refer contracting parties to the Materiality discussion in the *Statement*.[2]
4) Cost impact proposals associated with simultaneous CAP changes must be computed simultaneously, consistent in the manner in which the impact will be accumulated and reported.

May we also recommend that the CAS Board place on its Agenda:

1. A review of the *Statement*
2. Request a presentation by representatives of the Section 809 - CAS Modernization Team of its recommendations concerning the modernization of CAS.

[2] Materiality must be considered in applying the Cost Accounting Standards because, as a practical matter, the cost of an accounting application should not exceed its benefit. Although uniformity and consistency in accounting are desired goals of the Cost Accounting Standards, the Board recognizes that the applications of accounting criteria must consider issues of practical application. Consequently, the application of Cost Accounting Standards in determining the measurement, assignment, and allocation of costs should not be so stringently interpreted that the desired benefits are negated by excessive administrative costs.

Thank you for the opportunity to respond to CAS Boa rd Case 2021-01. Any questions can be addressed to the contact information listed be low.

Respectively,

Bill Romenius
Section 809
CAS Modernization Team Member
williamromenius@yahoo.com

Steve Trautwein
Section 809
CAS Modernization Team Member
strwe[illegible]@aol.com

2900 Fulling Mill Road
Harrisburg, PA 17057

July 24, 2024

Via Email at OMBCASB@omb.eop.gov

Mr. John L. McClung
Office of Federal Procurement Policy
725 17th Street NW
Washington, DC 20503

Re: Comments on Application of Cost Accounting Standards to Indefinite Delivery Vehicles, 89 Fed. Reg. 51,491 (June 18, 2024)

Dear Mr. McClung:

TE Connectivity, a federal contractor that designs and manufactures cutting edge sensor and connectivity solutions, is pleased to offer comments in response to the Request for Comments, Application of Cost Accounting Standards (CAS) to Indefinite Delivery Vehicles (IDVs), by the Cost Accounting Standards Board (CAS Board), Office of Federal Procurement Policy (OFPP), Office of Management and Budget (OMB). The Request for Comments seeks public views on whether and how to amend the CAS Board's rules to address the application of CAS to IDVs.

TE Connectivity appreciates the CAS Board considering this important issue, which has long troubled the contracting community, given the lack of consistency in how IDVs are valued across the Government. This is especially true for multiple-award contract (MAC) IDVs, indefinite-delivery/indefinite-quantity (IDIQ) contracts, and other large contract vehicles—prime contracts and subcontracts—for which the stated value is often in the billions but individual contractors receive a small fraction of the actual work. TE Connectivity believes that the CAS Board should amend its rules to clarify that when considering the value of awards for the application of the CAS thresholds, contractors should not consider IDVs but only the value of orders awarded under IDVs. TE Connectivity proposes language below to amend the CAS rules to reflect this change.

I. Background

Under the CAS rules, full CAS coverage applies to contractor business units that: "(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." 48 C.F.R. § 9903.201-2 (a)(1)-(2). The CAS rules do not define "awards." *See generally id.* Ch. 99. "CAS-covered contract" is defined as "any negotiated contract or subcontract in which a CAS clause is required to be included." *Id.* § 9903.301. "Net awards" is defined as "the total value of negotiated CAS-covered prime contract

and subcontract awards, including the potential value of contract options, received during the reporting period minus cancellations, terminations, and other related credit transactions." *Id.*

The CAS rules also do not specifically address the applicability of CAS thresholds to IDVs. Federal Acquisition Regulation (FAR) 4.601 defines IDVs as any contract or agreement that contains a clause allowing orders to be placed. *See also* FAR Subpart 16.5. IDVs are contracts and subcontracts, including definite-quantity, indefinite-quantity, and requirements contracts, that often do not specify a fixed guaranteed value other than a minimum or maximum. *See* 48 C.F.R. § 16.501-1. Accordingly, the actual value of an IDV is often unknown until the IDV is closed out, as the Government or higher-tier contractor is obligated only to ordering the minimum quantity specified in the IDV. *Id.* § 16.501-2(b)(3). Even when the IDV is assigned a value such as a minimum, maximum, or estimated value, these often have little relationship to the actual value received by the contractor. Determining the value of IDVs is even more problematic for multiple-award and multi-year IDVs, which often have nominal guaranteed minimum quantities for contract consideration purposes and high maximum dollar amounts. Contractors, particularly those holding a multiple-award IDV, often have little chance of ever receiving orders up to the specified maximum and should not be subjected to the burdens of CAS based on such a nebulous estimate.

II. Comments

As will be addressed further below, TE Connectivity recommends that the CAS Board amends its rules to address the applicability of CAS to IDVs and specify that CAS will only apply at the order level.

A. The CAS Board Should Address the Applicability of CAS to IDVs

The Federal Register announced that the CAS Board issued a Notice, Case Number CASB 20-01, to elicit views on whether and how to amend the CAS rules to address the application of CAS to IDVs, and acknowledged that "the Board's lack of regulatory guidance on the application of CAS to IDVs has resulted in inconsistencies in determinations regarding when CAS applies to these vehicles." CASB 2021-01 at 1. This lack of guidance has led to great uncertainty for contractors that receive an IDV award that could subject them to CAS but have little to no other contracts. Contractors are faced with the choice to undertake costly CAS compliance measures out of an abundance of caution or risk the Government later finding a CAS noncompliance because it determines CAS applicability based on IDV minimum guarantees or maximum award values, even if the value of each order or even the cumulative value of orders received under the IDV is below the CAS threshold.

The Notice recognizes this uncertainty, and the myriad ways the CAS threshold has been inconsistently applied to IDVs, by proposing "***six*** possible approaches for addressing CAS coverage to IDVs." *Id.* at 2 (emphasis added). The six approaches are:

1. *Order-by-order*. Each task order and delivery order would be treated as an individual contract and CAS would apply only to those orders whose values met the coverage thresholds. (This is the approach described above that was recommended by the Section 809 Panel.).

2. *Maximum award value*. CAS would apply to all orders under an IDV, no matter the value of the order, if the ceiling amount of the IDV met the coverage thresholds.

3. *Minimum award value*. CAS would not apply to any orders under an IDV unless its minimum guarantee amount met the CAS coverage thresholds, in which case CAS would apply to all orders.

4. *Cumulative threshold.* CAS would apply at the point where the cumulative value of the orders awarded crosses the dollar threshold for CAS coverage. At that point, the current order and all subsequent orders awarded would be covered by CAS.

5. *Order-by-order for multiple award IDVs and maximum award value for single award IDVs*. For multiple award IDVs each order would be regarded as if it were an individual contract for CAS coverage (see alternative no. 1). For single-award IDVs, coverage would be based on the maximum award value (see alternative no. 2).

6. *Order-by-order for multiple award IDVs and cumulative threshold for single award IDVs*. For multiple award IDVs each order would be regarded as if it were an individual contract for CAS coverage (see alternative no. 1). For single-award IDVs, CAS would apply at the point where the cumulative value of the orders awarded crosses the dollar threshold for CAS coverage. At that point, the current order and all subsequent orders awarded would be covered by CAS (see alternative no. 4).

Id. at 2-3.

The CAS Board Should amend its rules to clarify how the Government will evaluate IDVs for determining CAS applicability.

III. The CAS Board Should Amend its Rules to Clarify that CAS Applicability will be Determined at the Order Level.

TE Connectivity believes that the CAS Board should amend its rules using Option 1 in the Board's Notice, such that IDVs are not considered at all when determining CAS applicability and instead each order is considered a separate contract, as recommended by the Section 809 panel. *Id.* at 2. This approach is most aligned with the current CAS rules explaining when full CAS coverage

applies, is the simplest for contractors and government auditors to track, and aligns the applicable thresholds with the most accurate value of the awards received.

Because of the uncertainty of the value of an IDV at the time of award, as explained above, the value of the IDV should not be used to determine CAS applicability, as in the Board's proposed Options 2, 3, and 5. *See id.* at 2-3. Under proposed Options 2 and 3, for example, an IDV could state that the minimum value is $10,000 and the maximum value is $50 million. If the minimum award value were used to determine CAS applicability, the IDV would not be covered by CAS even though the contractor may receive up to $50 million in orders in an accounting period. If the maximum award value were used to determine CAS coverage, the IDV would trigger the $50 million threshold subjecting the contractor to full CAS even though the contractor may only ever receive orders totaling $10,000 under the IDV. This could lead companies, particularly those that are primarily subcontractors, not to compete for large IDVs or to exit the government market altogether rather than invest significant resources to implement full CAS coverage for awards that often total a small fraction of the IDV's maximum value. Either approach would flout the purpose of the $50 million threshold in the CAS statute as amended, which is to ensure that the burdens of the CAS are fairly applied. 41 U.S.C. § 1502; *see also* 48 C.F.R. § 9903.201-2 (a)(1)-(2).

Proposed Option 5 would introduce unnecessary complexity by treating multiple-award IDVs differently from single-award IDVs. It also would assume that all single-award IDVs have accurate maximum amounts that reflect the true value of the award, which is often not the case, especially for single-award IDV subcontracts. *See* CASB 2021-01 at 3.

Using Option 1, with CAS applicability based only on order values, eliminates the need to distinguish CAS applicability for single- versus multiple-award IDVs and uncertainty about the true award value of an IDV. *Id.* at 2-3. Unlike the other options, this approach also would not require contractors to track orders received under single- or multiple-award IDVs separately and would thus simplify their accounting procedures. Just as with non-IDV contracts, Option 1 would require full CAS coverage if a contractor received any single order of $50 million or more or orders under single- or multiple-award IDVs and other CAS-covered contracts totaling $50 million or more in an accounting period.

To implement this approach, TE Connectivity proposes to amend the definition of "CAS-covered contract" by adding the below text in red:

48 C.F.R. § 9903.301 Definitions.

> CAS-covered contract, as used in this part, means any negotiated contract or subcontract in which a CAS clause is required to be included. For indefinite delivery vehicles as used in this part, each task order or delivery order is treated as an individual contract for purpose of determining CAS coverage under 48 C.F.R. § 9903.201-2. The indefinite delivery vehicle itself is not a CAS-covered contract as used in this chapter.

* * *

Indefinite delivery vehicle shall mean an indefinite delivery contract or agreement that has any clause allowing ordering, including contracts under 48 C.F.R. § 16.5.

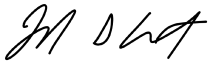
* * *

Net awards, as used in this chapter, means the total value of negotiated CAS-covered prime contract and subcontract awards, including the potential value of contract options, received during the reporting period minus cancellations, terminations, and other related credit transactions. Net awards shall not include indefinite delivery vehicles as used in this chapter, but shall include the total value of CAS-covered task orders and CAS-covered delivery orders under such indefinite delivery vehicles.

IV. Conclusion

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

Sincerely,



Joshua S. Carter
Americas Regional Counsel
Aerospace, Defense, & Marine
carterj@te.com

VICTURA® CONSULTING

August 18, 2024

Mr. John L. McClung
Manager
Cost Accounting Standards Board
Office of Federal Procurement Policy
725 17th Street NW
Washington, DC 20503

Subject: CAS Board Case 2021-01

Dear Mr. McClung:

We are submitting our comments in response to the CAS Board's ("Board") posted Notice in the Federal Register dated June 18, 2024, seeking comment on the Board's Case 2021-01 regarding the application of the Cost Accounting Standards ("CAS") to indefinite delivery vehicles ("IDVs).

We note that the Board has stated five (5) criteria in Case 2021-01 that it has used for purposes of the proposed CAS applicability alternatives it has requested input on. The five criteria are as follows:

1. Help each contract party to manage risk, especially price risk to the Government and cost risk to the contractor.
2. Reduce regulatory burden to both the Government (in the form of oversight) and to the contractor (in the form of compliance).
3. Encourage competition and robust participation in the Federal marketplace.
4. Minimize complexity by providing guidance that is clear and straightforward.
5. Promote consistency in the application of CAS.

We have attempted to utilize the Board's same criteria, in providing our comments and feedback to the Board's six (6) "Alternatives" that were included in Case 2021-01.

The following are the CAS Board Alternatives for addressing CAS coverage to IDVs:

CAS Board Alternative #1 – *Order-by-order.* Each task order and delivery order would be treated as an individual contract and CAS would apply only to those orders whose values met the coverage thresholds. (This is the approach … recommended by the Section 809 Panel.)

Victura Comments:
We agree with the Section 809 Panel's recommendation for application of CAS coverage on an order-by-order basis. For various reasons that we have provided feedback on the other Board alternatives, below, this would be the most straightforward and least burdensome administratively to both the Government and the Contractor to monitor and apply this requirement. This alternative may also encourage greater participation and increased competition for future government IDV procurements with this CAS applicability requirement. Potential contractors can be deterred from proposing on IDV opportunities where the CAS applicability determination will be based on the Maximum Award Value amount, with the knowledge that the likelihood of the actual values of the awarded Task Orders, both individual and cumulative, will typically be far less than the total IDV maximum award amount. In many instances the cumulative value of awarded task orders to an individual IDV contractor would be less than the $50 million CAS threshold for full CAS coverage.

Evaluation of CAS applicability to an individual order is straightforward for planning and monitoring purposes and does not present any of the potential complications that we note below related to the Board's other CAS applicability Alternatives for IDV contracts. While it is not explicitly stated in the Section 809 recommendation, we want to emphasize that CAS applicability should only apply to individual IDV task orders where certified cost or pricing data is provided in conjunction with the task order proposal and the original IDV contract vehicle contains the applicable FAR CAS clause. The applicability of CAS to the individual task order would still follow the same criteria for Contractor's current CAS status including the following:

- Trigger contract of a single CAS award of $7.5 million or greater (CAS 9903.201-1(b)(7)).
- Application of Modified or Full CAS coverage to the individual IDV task order based on CAS 9903.201-2, as applicable.

CAS Board Alternative #2 – *Maximum award value*. CAS would apply to all orders under an IDV, no matter the value of the order, if the ceiling amount (i.e., Maximum Award Value) of the IDV met the coverage thresholds.

Victura Comments:
This arguably is the current interpretation and application of CAS coverage for IDV contracts by the DoD (DCMA and DCAA) from our experience in assisting clients that are recipients of these types of contracts. This interpretation is supported by the Section 809 Panel's findings included in Volume 2 of their report dated June 2018 regarding CAS coverage applicability for IDV contracts which states:

> "The government was, in effect, postponing CAS coverage decisions until the time of order placement. The CASB regulations do not accommodate this condition because CAS determinations on contracts are made at the time of contract award."

The reality of most IDV contracts is that in many cases the actual amount of Task/Delivery Orders awarded to an individual contractor does not come remotely close to the maximum award value stated in the original IDV contract. In particular for multiple award contracts, it is by design and intent that the government will not award any single IDV contractor. This same reality is applicable in many instances for single award IDV contracts. Again, the Section 809 panel recognizes this same reality in stating the following:

> "… the question regarding IDCs is how to consider their value for purposes of applying CAS monetary thresholds when the contract price on the face of the contract has no meaning."

Utilizing the Maximum Award Value for purposes of determining CAS applicability for an IDV contract will subject countless contracts to full CAS coverage when the practical reality is that many of the awarded contracts will not receive actual task orders near the Maximum Award Value. Additionally, the prospect of facing Full CAS coverage based on the IDV contract maximum values stated in solicitations may serve as a deterrent to potential offerors responding. This negatively impacts the level of competition, which presumably is detrimental to the Government's interest and intent for solicitations. Perhaps the largest hurdle for a potential offeror that wishes to propose on a large IDV opportunity, that is not currently subject to full CAS coverage, would be the preparation and submission of a CASB Disclosure Statement which would accompany the contractor's proposal, per CAS 9903.202-1(b)(1) and FAR 52.230-1(b). Preparation of CASB Disclosure Statements are significant undertakings and can present significant future compliance risk to a contractor if not prepared properly. Preparation of a CASB Disclosure Statement in conjunction with the IDV proposal in many instances may serve as a barrier to participating for companies that are not already subject to full CAS coverage.

Finally the potential administrative burden on contractors and the Government of having to administer CAS for task orders under the IDV contracts where the dollar amount for the individual task orders would have been under the $7.5 million trigger contract threshold and/or the cumulative contract award threshold of $50 million for a single cost accounting period all impose considerable burden in terms of both time, resources and money to be incurred by contractors, not to mention the government resources to oversee and administer the compliance aspects of the contractor's CAS compliance. Also, as a reminder, many task orders in connection with multiple award IDVs don't require certified cost or pricing data which again should negate the application of CAS to these orders.

In summary, the Maximum Award Value alternative is an impractical alternative that will result in significant expenditure of resources by both the contractor and the government to comply with the CAS for what in many instances will be little contract activity (i.e., task orders) awarded to the contractor.

CAS Board Alternative #3 – *Minimum award value*. CAS would not apply to any orders under an IDV unless its minimum guarantee amount met the CAS coverage thresholds, in which case CAS would apply to all orders.

Victura Comments:
This would be a reasonable requirement for determination of CAS coverage, modified or full. Under this Alternative we recommend that the CAS coverage (modified or full) be only applicable to the individual task orders where certified cost or pricing data was provided in connection with the task order proposal. This clarification is meant to guard against the application of CAS to specific task orders which would ordinarily not be subject to CAS including the following situations (not all inclusive):

- Multiple award IDV contract task orders where there is a competitive award for an individual task order, where no certified cost or pricing data was required. Presumably under this proposed Alternative #3, this order would be a CAS covered task order.
- IDV Task orders where pricing is entirely based on commercial pricing? Again, under this Alternative #3 would this task order be subject to CAS coverage?

In the event of a contractor implementing a cost accounting practice change during the performance of the CAS covered IDV contract under Alternative #3, for the two hypothetical task order scenarios described above, is there any impact resulting from the change, when pricing for both was not based on cost? How do the contractor and the government address or calculate the cost impact for these respective task orders where the task order price was not based on cost?

In summary, Alternative #3 would be acceptable to contractors, we believe, with the clarification that this would only apply to Task Orders where certified cost or pricing data was required.

CAS Board Alternative #4 - *Cumulative threshold*. CAS would apply at the point where the cumulative value of the orders awarded crosses the dollar threshold for CAS coverage. At that point, the current order and all subsequent orders awarded would be covered by CAS.

Victura Comments:
As currently worded, Alternative 4 presents a number of practical challenges for application of CAS coverage to an IDV contract. Similar to our comments above regarding Alternative 3, the cumulative value should only include the orders where certified cost or pricing data was required for the order proposal. Without this clarification various scenarios can arise, where CAS coverage will result where we do not believe it is logical or rationale for CAS coverage to apply. The following are examples of the scenarios where we believe CAS coverage should NOT apply:

- All task orders received by an IDV contractor were competitively awarded and/or based on commercial pricing and contactor exceeded the cumulative value for CAS coverage. What if in this scenario all future task orders received by this contractor subsequent to meeting the CAS coverage are awarded on competitive basis and/or commercial prices. See our comments to Alternative 3 above. How do CAS compliance requirements get applied to these orders?
- An IDV contractor passes the cumulative CAS value threshold under Alternative 4 in the last year of a 5-year multi-year contract. Providing the government the benefit of the doubt in this instance, the newest task order pushing the IDV contract over the cumulative threshold is a $2 million award that required certified cost or pricing data, is it really the intention of the government to subject the IDV contractor to Full CAS coverage for this small task order in the final year of this subject contract?

There are numerous permutations of the above hypothetical scenarios where if the government does not limit the cumulative threshold to only include task orders where certified cost or pricing data was submitted, illogical and unnecessary compliance requirements associated with CAS coverage will be placed on IDV contractors. That said, we believe that there will be potential scenarios where even if the clarification for only orders requiring certified cost or pricing data to be included for purposes of Alternative 4, unnecessary application of Full CAS coverage will result. Consider the following:

- An IDV contractor receives multiple orders under its contract where all required certified cost or pricing data, but none of the orders were greater than $7.5 million and the cumulative threshold is met in year 3 of a 5-year contract. All remaining orders received by this IDV contractor still require certified cost or pricing data, but none exceeded $7.5 million. If these orders were evaluated as separate contracts, none would be subject to CAS coverage, yet under Alternative 4, all of the orders received by this contractor starting in year 3 would be subject to full CAS coverage.

There are a number of additional implications that Alternative 4 poses that the CAS Board needs to consider for how this will impact a contractor and its overall Federal contract business portfolio including the following:

1. What if none of the individual orders awarded to the contractor for the subject IDV exceeded $7.5 million, but the cumulative orders eventually exceed $50 million, will the contractor be subject to CAS coverage? Layered on top of this would be a scenario that all of the historical IDV order awards were competitive or commercial.
2. What is a contractor supposed to do regarding overall CAS coverage for their business, when the cumulative threshold is met for the single IDV contract under Alternative 4? As a hypothetical say the IDV contractor meets the cumulative threshold in year 3 of a 5-year IDV contract:

a. What if the subject contractor did not receive any single trigger CAS covered award (i.e., $7.5 million) in year 3, including the IDV order pushing the contractor over the cumulative threshold?
b. For a scenario where historically and prospectively, the contractor has not and does not expect to receive more than $50 million in CAS covered award(s) (single of cumulative) in any given fiscal year how will the requirements of this Alternative be applied? Will this mean that in the year the contractor exceeds the cumulative $50 million threshold for the IDV contract, that this satisfies the Full CAS coverage requirement for the Contractor's entire business?
c. To amplify the scenario in "b." above. What if the subject contractor did not receive cumulative CAS covered awards in year 3 that were greater than $50 million, including the IDV order awarded that pushed the IDV contract cumulative over the threshold? Is it the CAS Board's intent to subject the contractor to full CAS coverage for its entire Federal business when it would not otherwise be subject to these requirements but for this cumulative IDV requirement?
    i. A related technical or definitional point that the CAS Board needs to take into consideration is how to measure CAS covered awards, specifically:
        1. How is the subject IDV contract going to be defined for purposes of the CAS thresholds in the year that the cumulative amount is reached?
        2. Will the cumulative amount be defined as satisfying the "trigger contract" of $7.5 million?
        3. Same for the $50 million threshold.
        4. If the cumulative value will be used to measure the thresholds, does this make practical or equitable sense to include prior period activity in determining CAS coverage for a current period? As noted in the hypothetical above, in a year where a contractor does **NOT** (emphasis added) receive CAS covered awards that satisfy any CAS thresholds, but for the cumulative IDV contract, does this really logically make sense to impose CAS coverage on the contractor for all cost-based contracts going forward?
d. What about Disclosure Statements? There are several practical implications that the CAS Board will need to consider for this requirement. Some include the following:
    i. Will the Disclosure Statement be required to be submitted with the task order proposal that if awarded will push the contractor over the $50 million threshold for the IDV?

ii. Or will this requirement be the same as the current cumulative requirement stated in CAS 9903.202-1(b)(2), within 90 days of the start of the next cost accounting period?

In summary, we believe that Alternative 4 is impractical and will lead to even more confusion for contractors and industry regarding how CAS applies to IDV contracts going forward. A byproduct of this will be significant expenditure of contractor resources, money and time, in discussions and disputes over the application and implication of CAS requirements for the IDV contractor overall and not just limited to the IDV contract CAS coverage.

CAS Board Alternative #5 - *Order-by-order for multiple award IDVs and maximum award value for single award IDVs*. For multiple award IDVs each order would be regarded as if it were an individual contract for CAS coverage (see alternative no. 1). For single-award IDVs, coverage would be based on the maximum award value (see alternative no. 2).

Victura Comments:
We do not see the need to have the separation of the CAS applicability requirements between the multiple award and single award IDV contracts. While there may be a greater likelihood that a single award IDV contractor may obtain more volume in actual orders ultimately, we are unconvinced that actual orders received will equate in most instances to the maximum award value. We do not have any empirical data to provide, but from our discussions with clients and other single award IDV contractors, rarely does the maximum award value ever get awarded to an IDV contractor, multiple or single award. It is our understanding from our discussions that in many instances the actual orders received under these contracts are typically significantly less than the maximum award value. This same finding was highlighted by the Section 809 Panel in their report regarding IDV contractors.

See our comments provided for Alternative 2 above, regarding the maximum award value, which is still applicable to the single award IDVs.

CAS Board Alternative #6 - *Order-by-order for multiple award IDVs and cumulative threshold for single award IDVs*. For multiple award IDVs each order would be regarded as if it were an individual contract for CAS coverage (see alternative no. 1). For single-award IDVs, CAS would apply at the point where the cumulative value of the orders awarded crosses the dollar threshold for CAS coverage. At that point, the current order and all subsequent orders awarded would be covered by CAS (see alternative no. 4).

Victura Comments:
Again, we do not see the need to have the separation of the CAS applicability requirements between the multiple award and single award IDV contracts. See our response to Alternative 5, above.

We are in agreement with the order-by-order application of CAS for all IDVs, multiple award and single award (see our comments to Alternative 1). We do not agree with the use of the cumulative threshold for the single award IDVs. Our comments included in response to Alternative 4 above, outline our feedback for use of a cumulative threshold approach, regardless of whether the IDV contract is a multiple award or single award contract.

****

From actual experience assisting clients with FAR and CAS compliance matters for nearly 40 years, this subject has been the topic of countless hours of debate by contractors and industry as to how to interpret CAS applicability requirements for IDV contracts. For certain contractors this has also led to numerous discussions and debate with the government, auditors and contracting officers, as to how one interprets and applies CAS to these contracts, which typically is in the context of CAS compliance matters and resulting cost impact calculations.

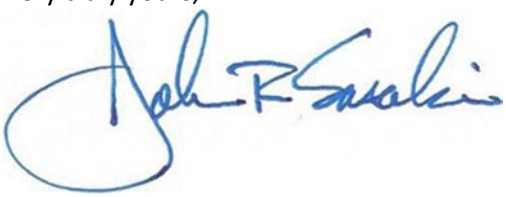
A clear and practical solution from the CAS Board for how to apply CAS coverage to IDV contracts going forward will save contractors/industry and the government countless hours and dollars by both sides spent debating and arguing over application of CAS requirements to these types of contracts. These interactions are invisible to the CAS Board and higher levels of the DCAA and DCMA, but these interactions are real, and the cost associated with these "debates" can be very significant, especially for contractors. Much of this can be eliminated going forward with clear, practical and easy to follow guidance and definition from the CAS Board.

Finally, and perhaps most importantly, without a clarification for the applicability of CAS coverage for IDV contracts, there will continue to be needless resources and expense being incurred by contractors and the government implementing, maintaining, overseeing and enforcing CAS requirements for contractors that in reality should not be subject to CAS coverage currently, if the basis for the contractor's CAS coverage is attributable to an IDV contract.

In summary, we agree with the Section 809 Panel's recommendation that CAS requirements should be applied to IDV contracts on an order by order basis (i.e., CAS Board Alternative 1), subject to our clarification to Alternative 1 described above. All of the other Alternatives proposed by the CAS Board, present needless complication and significant effort to draft the necessary updates to the CAS requirements to address the various unique and unintended consequences that may result associated with Alternatives 2 through 6.

We appreciate the opportunity to provide our feedback on this very important topic and agree that there is a need for clarification regarding the applicability of CAS to IDV contracts.

Very truly yours,



John R. Sasaki
Managing Director

Richard J. Wall
Alexandria, Virginia

August 12, 2024

Cost Accounting Standards Board
ATTN: John L. McClung
Office of Federal Procurement Policy
725 17th Street NW
Washington, D.C. 20503

Submitted via email to CASB@omb.eop.gov

Reference: Application of Cost Accounting Standards to Indefinite Delivery Vehicles (Federal Register, June 18, 2024, 51491) (CASB Case 2021-01)

Dear Mr. McClung:

I am responding to the Cost Accounting Standards Board's (CASB) request for public comments on the application of Cost Accounting Standards (CAS) to indefinite delivery vehicles (IDVs). The CASB is eliciting comments on whether and how to amend the CAS applicability rules on IDVs. The CASB described six possible approaches in an accompanying paper electronically linked to the notice.

By way of introduction, I was the Section 809 Panel's team leader for examining the CAS applicability rules at 48 CFR 9903.201-1. I am a former member of the DoD CAS Working Group and a former member of the CASB (2007-2014). I was also a leader in Ernst & Young's Government Contract Services practice and have dealt with CAS applicability issues over many years.

The Section 809 Panel was established by the 2016 National Defense Authorization Act with the objective to streamline and improve the efficiency and effectiveness of the defense acquisition process. The challenge presented to our team was to examine how compatible the CAS applicability rules were in view of the substantive changes in Government acquisition laws, regulations, policies, and practices that had occurred over the decades. The team's recommendations to "reshape CAS program requirements to function better in a changed acquisition environment" were published by the Section 809 Panel in June 2018 (Recommendation 30).

The team concluded that the CAS applicability rules had not been nimble enough to keep pace with the evolving Government acquisition environment. The rules had been forged in the 1970's and, in a large part, had remained unchanged over the ensuing decades. The acquisition environment that characterized the 1970's no longer existed, often resulting in an incompatibility between the CAS applicability rules and the nature and structure of Government contracts. Simply put, the rules did not fit what was actually taking place between the contracting parties. The two most obvious examples identified by the Section 809 Panel were "hybrid contracts" and IDVs. They either did not exist in the 1970's or were not used in the same manner and scope as used today.

As to "hybrid contracts," please refer to Recommendation 30 of the Section 809 Panel's report. This has been a well-known CAS administration problem for many years. The issues surrounding IDVs have much in common with "hybrid contracts."

In practice, the IDV basically functions as an "umbrella contract" that enables Government purchasers to establish contracts with multiple sources in order to satisfy requirements over an extended period of time. From industry's perspective, IDVs are merely "hunting licenses," mostly because they realistically only offer a chance to compete for orders to be placed under the IDV. The IDV, itself, does not guarantee business success for the supplier. Consequently, there is a conundrum between imposing CAS requirements at the "umbrella contract" level and not gaining enough business at the order level to justify the expenditure of resources to implement CAS.

To better understand the nature and practical use of IDVs, the team had sampled an IDV from each military service from among the largest acquisitions in terms of numbers of separate IDV contracts awarded during FY 2012 through FY 2016 (see Section 809 Panel Report). What the team discovered was this -

- Each sampled IDV contained the CAS clauses at 48 CFR 9903.201-4.

- Each sampled IDV was made with full and open competition with no cost or pricing data being submitted, although the IDV indicated that there remained a possibility that cost or pricing data might be obtained at the time of order placement.

- Each sampled IDV was largely structured as a fixed-price type contract with fixed-price contract line items (CLINs) that essentially functioned as ceiling prices. That is, IDV contractors could still offer lower prices when competing for orders. There were a few unpriced or "not separately priced" CLINs for potential items such as data, travel, other direct costs, but these costs seemed immaterial to the overall value of the acquisition.

- The face value of each IDV was meaningless, as the same dollar amount on each IDV contract reflected the combined value of all orders expected to be placed under the entire acquisition (as an aside, this practice resulted in a massively overstated extent of CAS-coverage in the Federal Procurement Data System - see Section 809 Panel report).

- Over 90% of the dollar value of orders actually placed under each IDV was concentrated in a relatively small number of IDV holders.

The team concluded that the issue with IDVs was not a cost accounting concern but rather a contract administration concern (as was with "hybrid contracts"). Simply put, the CAS applicability rules did not mesh well with the structure of IDVs because the most relevant action happens at the order level where the bargain actually takes place. With the "umbrella contract" approach, both the Government and the contractor end up in a fog over how "CAS-covered" the IDV and/or resulting order really is. The problem is exacerbated further when attempting to discern CAS-coverage in a post-award setting, such as when establishing the level of CAS coverage (i.e., full vs modified) and disclosure obligations or when evaluating the cost impact from a change in an accounting practice.

The Section 809 Panel's proposed solution for IDVs was borrowed from the DoD CAS Working Group's guidance for basic agreements, BOAs, and BPAs, notwithstanding their legal differences. The Section 809 Panel recommended that the applicability of CAS be evaluated at the time of order placement with full consideration given to the other CAS exemptions available at 48 CFR 9903.201-1 (e.g., dollar threshold, commercial items, adequate price competition, submission of cost or pricing data, etc.). The evaluation of each order should be conducted independently without regard to orders already placed or orders anticipated to be placed.

Pertinent to IDVs, the Section 809 Panel recommended the following actions and suggested specific changes to existing regulations. Other actions contained in Recommendation 30 would impact IDVs, as well.

- Add specific guidance for IDVs to CAS program requirements at 48 CFR 9903.201-1 that would determine CAS applicability at the time of order placement;

- Evaluate each order placed under the IDV for CAS applicability on its own (i.e., standing alone); and

- Add a definition of indefinite delivery vehicle, using the existing definition at FAR 4.601.

Turning to the six possible approaches suggested by the CASB, addressing the issue through the anticipated monetary value of an IDV, either singularly or accumulatively, is not a practical solution (i.e., CASB suggestions #2 thru #6). As discussed in the Section 809 report, the face value of an IDV contract is meaningless. Only the face value of an awarded order provides a rational basis for understanding and accepting CAS-coverage. Moreover, much depends upon how the order is placed (e.g., commercial item, price competition, etc.) and how the order is structured (e.g., fixed-price CLINs, hybrid CLINs, etc.). Suggestion #1, the recommendations made by Section 809 Panel, is the only approach that will work.

In closing, the CASB's attention should also be directed toward the other CAS applicability matters covered in Recommendation 30. While some CAS applicability issues dealt with therein have been resolved (e.g., commercial items, certified cost or pricing data), others still remain (in particular, "hybrid contracts"). Hopefully, the Section 809 Panel's recommendations will merit an elevation in the CASB's agenda, particularly given the Panel's initial charter.

If I can be of any further assistance, please do not hesitate to ask.

Respectfully,

Richard J. Wall
Section 809 Panel team member