

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Federal Communications Commission.

James D. Bradshaw,

Deputy Chief, Audio Division, Media Bureau.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Oregon, is amended by adding Gearhart, Channel 227A, by removing Channel *251C1 at Madras, by adding Channel *243C1 at Madras, and by adding Manzanita, Channel 248C3.

[FR Doc. 2011-20340 Filed 8-9-11; 8:45 am]

BILLING CODE 6712-01-P

OFFICE OF MANAGEMENT AND BUDGET**Office of Federal Procurement Policy****48 CFR Part 9903****Cost Accounting Standards: Elimination of the Exemption From Cost Accounting Standards for Contracts and Subcontracts Executed and Performed Entirely Outside the United States, Its Territories, and Possessions**

AGENCY: Office of Management and Budget (OMB), Office of Federal Procurement Policy (OFPP), Cost Accounting Standards Board (Board).

ACTION: Final rule.

SUMMARY: The Office of Federal Procurement Policy (OFPP), Cost Accounting Standards (CAS) Board, is publishing a final rule to eliminate the exemption from regulations regarding Cost Accounting Standards for contracts executed and performed entirely outside the United States, its territories, and possessions.

DATES: *Effective Date:* October 11, 2011.

FOR FURTHER INFORMATION CONTACT: Raymond J. M. Wong, Director, Cost Accounting Standards Board (*telephone:* 202-395-6805; *e-mail:* Raymond_wong@omb.eop.gov).

SUPPLEMENTARY INFORMATION:

A. Regulatory Process—Changes to 48 CFR Part 9903

The CAS Board's regulations and Standards are codified at 48 CFR chapter 99. This notice concerns the amendment of a CAS Board regulation other than a Standard, and as such is not subject to the statutorily prescribed rulemaking process for the promulgation of a Standard at 41 U.S.C. 1502(c) [formerly, 41 U.S.C. 422(g)]. The document being published today is a Final Rule.

B. Background and Summary

The Office of Federal Procurement Policy (OFPP), Cost Accounting Standards (CAS) Board, is publishing a final rule to eliminate the exemption at 48 CFR 9903.201-1(b)(14) from the Cost Accounting Standards for contracts executed and performed entirely outside the United States, its territories, and possessions (hereafter referred to as the "(b)(14) overseas exemption").

The CAS Board is publishing a final rule which eliminates the (b)(14) overseas exemption from CAS for contracts and subcontracts executed and performed entirely outside the United States, its territories, and possessions.

Statutory Requirement

Section 823(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA FY 2009) required the CAS Board to: "(1) Review the inapplicability of the cost accounting standards, in accordance with existing exemptions, to any contract and subcontract that is executed and performed outside the United States when such a contract or subcontract is performed by a contractor that, but for the fact that the contract or subcontract is being executed and performed entirely outside the United States, would be required to comply with such standards; and (2) determine whether the application of the standards to such a contract and subcontract (or any category of such contracts and subcontracts) would benefit the Government." Section 823 further required the CAS Board to publish a request for information and to submit to the appropriate committees of Congress a report containing: (1) Any proposed revision to the CAS regulations as a result of the review and a copy of any proposed rulemaking implementing the revision or (2) if no revision and rulemaking are proposed, a detailed justification for such decision.

History of the (b)(14) Overseas Exemption

The (b)(14) overseas exemption was first promulgated in 1973 at Section 3-

1204 of the Armed Services Procurement Regulation (ASPR). See Defense Procurement Circular No. 115 (dated September 24, 1973). The reason given for promulgation of the (b)(14) overseas exemption was that the underlying authority for CAS, Section 2168 of the Defense Production Act (DPA), was applicable to the United States, its Territories and possessions, and the District of Columbia (Section 2163 of the DPA). The (b)(14) overseas exemption was intended to eliminate confusion that had existed at that time over the applicability of CAS outside the United States.

In 1980, the CAS Board ceased to exist under the DPA. Congress reestablished the CAS Board in 1988 under Section 22 of the OFPP Act, 41 U.S.C. 1501 [formerly, 41 U.S.C. 422]. Unlike the DPA, under the OFPP Act, CAS is not limited in applicability to the United States. However, in 1991, the CAS Board, after reviewing the rules and regulations applicable to the administration of CAS, opted to retain the (b)(14) overseas exemption.

The CAS Board later sought to reevaluate the (b)(14) overseas exemption. On September 13, 2005, the CAS Board published a notice seeking comment on the Staff Discussion Paper (SDP) discussing the appropriateness of continuing the exemption (70 FR 53977). Only three public comments were received, all of which supported retaining the exemption. The CAS Board took no further action at that time and published a notice discontinuing the review on February 13, 2008 (73 FR 8259).

In response to Section 823(a) of NDAA FY 2009, the CAS Board published on April 23, 2009, another notice requesting information on six general questions regarding the (b)(14) overseas exemption (74 FR 18491). In addition to this notice, the CAS Board requested assessments directly from three Federal agencies with significant volume of contracts performed outside of the United States—the Department of Defense (DOD), the Department of State (DOS) and the United States Agency for International Development (USAID). After reviewing the comments received from the notice and the assessments of the three Federal agencies, the CAS Board published a Notice of Proposed Rule (NPR) on October 20, 2010, proposing to eliminate the (b)(14) overseas exemption (75 FR 64684). A copy of the proposed rule was provided to the appropriate committees of Congress in accordance with Section 823.

Conclusions

The CAS Board has considered the comments received in response to the NPR, which are available to the public on the CAS Board's Web site at http://www.whitehouse.gov/omb/casb_index_public_comments/ and <http://www.regulations.gov>, and has concluded that the (b)(14) overseas exemption should be eliminated. Although the CAS Board's responses to specific comments received are discussed later in this notice, the principal reasons for eliminating the exemptions are as follows:

(1) The statutory basis originally used to justify the (b)(14) overseas exemption no longer exists. Absent such justification, the CAS Board must give deference to the existing CAS applicability statutes as mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the United States (41 U.S.C. 1502(b)(1)(B) [formerly, 41 U.S.C. 422(f)(2)(A)]).

(2) There is not an accounting basis for the (b)(14) overseas exemption. The place of contract execution and performance is not germane to the fundamental requirements and practices set forth in CAS used to measure, assign, and allocate the costs of contract performance.

(3) The CAS Board was not persuaded that the imposition of CAS in situations where the (b)(14) overseas had been applied would create hardships for Federal agencies, prime contractors, and subcontractors, particularly in view of mitigating factors. Foremost among these factors would be that a contractor would still have available the exemption at 48 CFR 9903.201-1(b)(4) which states "Contracts and subcontracts with foreign governments or their agents or instrumentalities or, insofar as the requirements of CAS other than 9904.401 and 9904.402 are concerned, any contract or subcontract awarded to a foreign concern." In the CAS Board's view, the imposition of CAS 401, "Consistency in Estimating, Accumulating and Reporting Costs," and CAS 402, "Consistency in Allocating Costs Incurred for the Same Purpose," are the minimal requirements necessary to meet the requirements of CAS. In the Board's view, these minimal requirements are not substantively different from what is already imposed under the Federal Acquisition Regulation (FAR).

C. Public Comments to the Notice of Proposed Rule

In response to the NPR, the CAS Board received a total of five comments from a Federal agency, consultant, public interest group, and industry and trade associations. The comments, which were all considered by the Board in its deliberations, reflected a difference of views on whether to retain or eliminate the (b)(14) overseas exemption. They are summarized and addressed in this section, grouped by common themes.

1. *Comment:* Two respondents supported the CAS Board's proposed rule to eliminate the (b)(14) overseas exemption.

Response: The CAS Board noted the agreement.

2. *Comment:* One respondent believed that eliminating the (b)(14) overseas exemption will have a very narrow impact in terms of the number of foreign concerns which will become subject to the consistency requirements of CAS 401 and 402, respectively, consistency in estimating, accumulating and reporting costs, and consistency in allocating costs incurred for the same purpose. Contract savvy foreign concerns will attempt to enter into contracts where another CAS exemption is applicable. To the contrary, another respondent opined that there is a misconception that some other CAS exemptions are applicable if the (b)(14) overseas exemption is eliminated. The respondent opined that the other CAS exemptions are of limited applicability, and that even the limited applicability of CAS 401 and 402 would be a deterrent to foreign concerns in accepting subcontracts to satisfy the U.S. contractors' offset requirements. A greater deterrent to foreign concerns are the requirements to submit a CAS Disclosure Statement and notifications of changes in accounting practice with cost impact analyses.

Response: The imposition of CAS 401 and CAS 402 are not likely to be a hardship, since they are already substantively applied by the FAR. The threshold for submitting a CAS Disclosure Statement was significantly increased in 2000 to \$50 million in recognition that this requirement should be applied to levels of contracting activity where a more formal disclosure was appropriate.

3. *Comment:* One respondent noted that there is an obvious accounting basis for retaining the (b)(14) overseas exemption, specifically, the differences between the fundamental accounting principles between U.S. GAAP (Generally Accepted Accounting

Principles) and IFRS (International Financial Reporting Standards).

Response: The CAS Board does not believe differences between GAAP and IFRS are relevant to the question of extending the (b)(14) overseas exemption.

4. *Comment:* Two respondents noted that the costs of CAS administration would exceed any benefits achieved from requiring CAS. One respondent noted that essentially no aspect of the CAS rulemaking during the past 37 years has received any input from entities otherwise exempt from all CAS requirements. Another respondent noted that foreign concerns will have difficulty understanding and interpreting the CAS Disclosure Statement, which is published only in English. The respondent also noted that not only foreign concerns will have administrative costs in implementing and administering CAS for foreign concerns; the Government, and higher tier subcontractors and prime contractors with foreign concerns as subcontractors will also have administrative costs associated with administering the CAS Disclosure Statement process, as well as the cost impacts for cost accounting changes and CAS non-compliances.

Response: For reasons previously discussed, the CAS Board does not agree that the administrative costs of essentially applying CAS 401 and CAS 402 will exceed the benefits received by the taxpayers. There presently are foreign concerns, unable to take advantage of the (b)(14) overseas exemption, that are able to comply with the applicable requirements of CAS. Moreover, the same requirements are in the FAR.

5. *Comment:* Two respondents raised concerns about an unintended consequence of imposing CAS on foreign concerns: the negative impact on exports which would result. The expressed concern was that the U.S. aerospace export sales would be endangered. The respondents stated that U.S. aerospace export sales have been enabled by the purchase of parts supplied by foreign concern subcontractors who are currently exempted from CAS, presumably by the (b)(14) overseas exemption. The respondents argued that contractors must satisfy offset requirements in order to make the sale to the foreign country. Offset requirements are host country industrial participation requirements imposed by the foreign host country as a condition of the contract. Contractors establish relationships with foreign subcontractors to develop potential offset placements to position themselves

for future contract awards for export sales. Such relationships are established and developed with strategic placement of subcontracts for contracts with the U.S. in anticipation of new export sales opportunities and related offset obligations.

Response: Based on these comments, the CAS Board sought additional guidance on the matter of exports. Aerospace sales to foreign countries are made through either foreign military sales (FMS) contracts with the U.S. Government as the party to the contract with the contractor or contracts executed directly between the foreign host country and the U.S. contractor as a "commercial sale." The CAS requirements are only imposed on sales to the U.S. Government (in this case, to the FMS contracts), and not on a commercial sale made directly with the foreign host country. U.S. Government funded FMS contracts do not have offset requirements, while foreign government funded FMS contracts may have offset requirements. In those instances when there are offset requirements in FMS contracts, the imposition of CAS 401 and CAS 402, if applicable, are not likely to be a hardship, since they are already substantively applied by the FAR for subcontracts. See the responses to Comments 2 and 4.

6. *Comment:* One respondent stated that the other CAS exemptions or applicability requirements are not applicable to foreign concerns, generally. Sealed bidding would not be effective for subcontracting to meet offset requirements where discussions are likely to be necessary. The CAS applicability threshold of \$650,000 (soon to be adjusted to \$700,000) still leaves many foreign concern subcontractors subject to it. The small business exemption from CAS only applies to U.S. businesses. While contracts and subcontracts with foreign governments or their instrumentalities are exempted from CAS, other foreign concerns are still subject to CAS 401 and 402, which would be a deterrent to foreign concerns accepting subcontracts to satisfy offset for U.S. contractors when they do not have CAS requirements for subcontracts with non-U.S. contractors. The larger deterrent for the larger subcontractors (who exceed the \$50 million CAS Disclosure Statement filing threshold) is the Disclosure Statement filing requirement. The CAS exemption applicable when the price is set by law or regulation is irrelevant to foreign concern subcontracts for aerospace products. The CAS exemption for firm-fixed price (FFP) contracts, fixed price contracts with economic price adjustments, and

contracts and subcontracts for commercial items has limited applicability. The CAS exemption for the NATO PHM Ship program has limited applicability, and is not germane to foreign concern subcontracts for aerospace products. The limited technical capabilities of the industrial bases of many countries with offset requirements make competition not tenable. Even in the most competitive emerging markets, i.e., India, South Korea, Saudi Arabia, and Turkey, competition in the award of subcontracts will be severely limited by the industrial base, limiting the applicability of the CAS exemption for FFP contracts and subcontracts awarded on the basis of adequate price competition without cost or pricing data.

Response: Whether or not another CAS exemption might apply, aside from the previously discussed exemption at 48 CFR 9903.201-1(b)(4), is not germane to the question of eliminating the (b)(14) overseas exemption. While it is likely that other exemptions might apply in certain situations, it is recognized that some exemptions would never apply. However, finding an alternative exemption that yields the same result as the (b)(14) overseas exemption is not the objective of this assessment. The relevant question is whether, given the absence of conditions which created the exemption in the first place, there are other sufficient reasons for retaining the exemption. As previously stated, the CAS Board has not been persuaded that there are other sufficient reasons for retaining the exemption.

7. *Comment:* A respondent noted that the CAS waiver process is not suitable in the foreign concern subcontracting context. A CAS waiver must be requested by an agency, rather than the contractor, considering the needs of the agency with supporting justification from the perspective of the agency. The waiver process is not conducive to the offset obligations of the contractor as the offset requirement may be contrary to the requirement to establish other sources to avoid a waiver in the future.

Response: The CAS Board agrees that the waiver process may be arduous. However, given that only CAS 401 and CAS 402 would be imposed in the absence of the (b)(14) overseas exemption, the CAS Board believes it is unlikely that a CAS waiver would be requested.

8. *Comment:* A respondent opined that the impact from the elimination of the (b)(14) overseas exemption on foreign concern subcontractors is understated. The respondent stated the impact of eliminating (b)(14) overseas

exemption will be most acute on foreign concern subcontractors, and the prime contractors and higher-tier subcontractors who have relied on the that exemption historically. Foreign concern subcontractor usage data is not readily available because there is no requirement to capture it. While everyone believes subcontractors will be affected, the scope of the impact is unknown.

Response: The CAS Board understands that the visibility into subcontracting activities of a prime contractor is limited, particularly foreign concern subcontractors. The CAS Board notes that this condition has also been given as reasoning for eliminating the (b)(14) overseas exemption. As previously discussed, the CAS Board believes there will be mitigating factors that lessen the impact on foreign concern subcontractors. If this proves to be unfounded, then the CAS Board can reconsider the (b)(14) overseas exemption.

9. *Comment:* Two respondents stated that the elimination of the (b)(14) overseas exemption is contrary to U.S. export and foreign economic development policies. There is a long standing belief that export of defense industry products benefit the US, and laws and regulations reflect that. NDAA FYs 1988 and 1989 (respectively, Pub. L. 100-202 and 100-456) made allowable the costs of promoting the export of US defense industry products. The March 11, 2010 Executive Order (EO) on the National Export Initiative established the Administration's goal to double exports over the next five years as a critical component to stimulate economic growth in US. Elimination of exemption would create competitive disadvantages for U.S. firms attempting to grow export sales of defense industry products as exports are linked to offsets. A key element of Government policy in war torn and economically underdeveloped countries is to require prime contractors to subcontract with host foreign country subcontractors. Imposition of CAS "will likely shrink the local competitive landscape, stymie host country economic development, potentially harm project missions, and stress relations with foreign governments."

Response: The CAS Board does not accept the notion that eliminating the (b)(14) overseas exemption is contrary to U.S. export and foreign economic development policies. No one within the Legislative or Executive Branches has made that claim at any time during the rulemaking process. The CAS Board has not been persuaded that the burden imposed by CAS 401 and CAS 402, as

well as perhaps the CAS Disclosure Statement, will be significant.

10. *Comment:* A respondent observed that the (b)(14) overseas exemption has not been identified as a cause for overseas subcontracting challenges in recent testimonies. On June 29, 2010, Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction, testified before the House Subcommittee on National Security and Foreign Affairs, and identified many subcontracting issues. However, he did not mention the (b)(14) overseas exemption from CAS as a cause for any of the issues, nor did he recommend the imposition of CAS coverage on foreign concern subcontracts as a potential solution. In the July 26, 2010 hearing on war zone subcontracting before the Commission on Wartime Contracting (CWC), none of the witnesses cited the (b)(14) overseas exemption from CAS as contributing to the subcontracting challenges identified during the hearings, nor did any witness recommend the imposition of CAS coverage as a solution to overseas subcontracting problems. None of the CWC commissioners spoke of, or inquired about, subcontractor CAS coverage or CAS compliance during opening statements or witness testimony.

Response: The CAS Board does not accept this reasoning for retaining the (b)(14) overseas exemption.

D. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35, subchapter I) does not apply to this rulemaking, because this rule imposes no additional paperwork burden on offerors, affected contractors and subcontractors, or members of the public which requires the approval of OMB under 44 U.S.C. 3501, *et seq.* The records required by this final rule are those normally maintained by contractors and subcontractors who claim reimbursement of costs under government contracts.

E. Executive Order 12866, the Congressional Review Act, and the Regulatory Flexibility Act

Because the affected contractors and subcontractors are those who are already subject to CAS but for the (b)(14) overseas exemption, and those who are subject to only CAS 401 and 402 under the (b)(4) foreign concern exemption, the economic impact of this final rule on contractors and subcontractors is expected to be minor. As a result, the CAS Board has determined that this final rule will not result in the promulgation of an “economically significant rule” under

the provisions of Executive Order 12866, and that a regulatory impact analysis is not required. For the same reason, the Administrator of the Office of Information and Regulatory Affairs has determined that this final rule is not a “major rule” under the Congressional Review Act, 5 U.S.C. chapter 8. Finally, this rule does not have a significant effect on a substantial number of small entities because small businesses are exempt from the application of the Cost Accounting Standards. Therefore, this final rule does not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980, 5 U.S.C. chapter 6.

F. List of Subjects in 48 CFR 9903

Government procurement, Cost accounting standards.

Daniel I. Gordon,

Chair, Cost Accounting Standards Board.

For the reasons set forth in this preamble, Chapter 99 of Title 48 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 9903—COST ACCOUNTING STANDARDS

■ 1. The authority citation for Part 9903 is amended to read as follows:

Authority: Public Law 111–350, 124 Stat. 3677, 41 U.S.C. 1502.

9903.201–1 [Amended]

■ 2. Section 9903.201–1 is amended by removing and reserving paragraph (b)(14).

[FR Doc. 2011–20212 Filed 8–9–11; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 110112022–1262–02]

RIN 0648–BA45

Atlantic Highly Migratory Species; Modification of the Retention of Incidentally-Caught Highly Migratory Species in Atlantic Trawl Fisheries

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This final rule modifies the permitting requirements and retention limits for Atlantic highly migratory

species (HMS) that are incidentally-caught in Atlantic trawl fisheries. This action will reduce regulatory dead discards of incidentally-caught Atlantic swordfish in the *Illex* squid trawl fishery by establishing a new Incidental HMS Squid Trawl permit for all valid *Illex* squid moratorium permit holders. The Incidental HMS Squid Trawl permit will allow up to 15 swordfish per trip to be retained. The final rule also establishes a retention limit for smoothhound sharks in all Atlantic trawl fisheries. These actions are necessary to achieve domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and to implement the 2006 Consolidated HMS Fishery Management Plan (Consolidated HMS FMP), including objectives in the FMP to monitor and control all components of fishing mortality, both directed and incidental, so as to ensure the long-term sustainability of HMS stocks, and to provide the data necessary for assessing HMS fish stocks and managing HMS, including addressing inadequacies in current data collection and the ongoing collection of economic and bycatch data in Atlantic HMS fisheries.

DATES: Effective *August 10, 2011*, except for the amendments to § 635.21(e)(3)(i), § 635.24(a)(7), and § 635.71(d)(18), which are delayed indefinitely. NMFS will publish a document in the **Federal Register** announcing the effective dates for this amendments.

ADDRESSES: Highly Migratory Species Management Division, 1315 East-West Highway, Silver Spring, MD 20910. Copies of the supporting documents—including the Environmental Assessment (EA), Regulatory Impact Review (RIR), Final Regulatory Flexibility Analysis (FRFA), small entity compliance guide, and the 2006 Consolidated Atlantic HMSFMP—are available from the HMS Web site at <http://www.nmfs.noaa.gov/sfa/hms/>. Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to the HMS Management Division (see above) and by e-mail to OIRA_Submission@omb.eop.gov, or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Rick Pearson at (727) 824–5399, Steve Durkee at (202) 670–6637, or Delisse Ortiz at (301) 427–8503.

SUPPLEMENTARY INFORMATION: North Atlantic swordfish and smoothhound shark species are managed under the