



04 JRBAAC
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Joint Review Board Advisory Committee

A CBI Specialist Body For Government Profit Formula Matters

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Willy Hockin, OBE - Chairman

Office of Federal Procurement Policy,
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For the attention of Mr Raymond J. M. Wong

Dear Sirs

CAS 2009 Overseas Exemption

Please find set out below our response to The Office of Federal Procurement Policy, Cost Accounting Standards (CAS) Board's request of April 23rd with respect to the review of whether the overseas exemption from CAS at 48 CFR 9903.201-1(b)(14) should be retained, eliminated, or revised, and if revised, how should it be revised.

These comments are offered and have been endorsed by CBI, SBAC, DMA and JRBAAC.

Background to representation

The Confederation of British Industry (CBI) is a not-for-profit organisation that was incorporated by Royal Charter in 1965. It is the premier representative organisation for UK business on national and international issues helping to create and sustain the conditions in which businesses in the United Kingdom can compete and prosper for the benefit of all. It works with the UK government, international legislators and policymakers to help UK businesses compete effectively.

The Society of British Aerospace Companies (SBAC) is the UK's national trade association representing companies supplying civil air transport, defence, homeland security and space. SBAC represents over 2,600 companies, assisting them in developing new business globally, facilitating innovation and competitiveness and providing regulatory services in technical standards and accreditation.

The Defence Manufacturers Association (DMA) was founded in 1976 and is a not for profit, Defence and Public Security, Trade Association. It has over 650 members which range from large corporations to smaller companies and consultancies, all of whom have involvement in defence and public security business, with many seeking to sell into home or overseas markets, or both.

The Joint Review Board Advisory Committee (JRBAC) is a body comprising representatives of the CBI and those trade associations and companies that have a particular interest in non-competitive Government contracts. This committee acts under delegation from the Confederation of British Industry, to represent industry on a range of matters.

Context

Our members undertake a substantial volume of work, at both prime and subcontract level, which is subject to Federal Acquisition Regulations. We would expect our members to use, where applicable, the exemptions set out in 48 CFR 9903.201-1(b). We understand that to the extent that the contractor is not entitled to an exemption that contractor is required to flow the CAS requirements to its subcontractors unless the subcontractor is exempt.

Many of the larger UK contractors undertaking work for the US Government are also significant suppliers to the UK Ministry of Defence (MoD) and are therefore required to follow for their full business activity the cost accounting practices set out in their disclosure statement (Q-MAC and supplementary Q-MAC filed with the MoD in accordance with 48 CFR 9903.202-1(e)). It is possible that some UK contractors with a filed disclosure statement may not pursue exemption for the US Government contracts under 48 CFR 9903.201-1(b)(14) on contracts that are "executed and performed entirely outside the United States, its territories, and possessions". Conversely, some UK subcontractors are companies who have not filed a disclosure statement with MoD in accordance with 48 CFR 9903.202-1(e) and who while executing and performing their work entirely outside the United States are likely to make full use of the exemption.

Question 3

If the overseas exemption is eliminated, what problems will that cause you?

- a. as a procuring entity (e.g., procurement office, higher tier contractor) awarding contracts/subcontracts; or*
 - b. As the contractor/subcontractor claiming the applicability of the overseas exemption?*
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- a. Significant additional administration in managing and implementing FAR requirements when it is likely that the entity is already subject to Home Country regulations and UK prime control. Disincentive for the supplier to contract with the procuring entity will exist where accounting requirements are:
 - i. Uncertain e.g. the contractor has no history as to how the rules are enforced
 - ii. Unclear-
 - i. The contractor's language is not English
 - ii. Difficulty in securing regulation interpretation advice

- iii. Costly to implement
 - i. The contractors accounting system and controls may require additional expenditure to comply
 - ii. Cost and availability of resource to manage
 - iii. Cost of compliance advice
 - iv. Cost impact on the overall business cost base
 - v. Cost of additional record retention
 - iv. Conflict with business strategic direction
 - i. The business may see additional regulations as harmful to its core business.
- b. Problems for the procuring entity will exist where the accounting requirements cause
- i. Prices to increase
 - i. Additional fee to offset supplier disincentives
 - ii. Recognition of additional costs
 - ii. Timescales to extend
 - i. Longer time required to secure price agreement
 - ii. Different supplier to be secured
 - iii. Impasse where it is impractical to change supplier e.g. the equipment is the only one certified for use and certification of new equipment cannot be accommodated within the timescales

Question 4

How does the overseas exemption help, or not help, to implement the CASB's mandate "to achieve uniformity and consistency in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the United States"?

The CAS Board may consider that provisions contained within the Federal Acquisition Regulations on Certified Cost or Pricing Data and FAR part 31 Cost Principles provide the Government with sufficient protection, where the exemption requires compliance with comparable standards. Also in many instances the organisation will be covered by International Accounting Standards, which in recent years has seen a significant increase in scale and coverage.

Question 5

What are the arguments for, and against, the requirement in the overseas exemption to require execution of the contract overseas?

For the contract to require execution overseas to maintain the exemption.

- For the contract to require execution overseas to maintain the exemption.
- The requirement for the contract to be executed entirely overseas is clearly achieved when neither of the contracting parties is based in the USA and it therefore provides a clear gate where neither of the contracting parties is a US contractor or is acting on behalf of an affiliate US contractor.

Against the contract to require execution overseas to maintain the exemption.

- "executed" lacks a clear definition within the regulation
- Execution of the contract overseas does not seem to be material to the contractual obligations and the application of the exemption. It is an unnecessary restriction. The nature of a contract does not change merely because it is executed overseas.

Question 6

What are the arguments for, and against, the requirement in the overseas exemption to require performance of the contract overseas?

For:

- None

Against

- Restricts the ability of the contractor executing the contract to provide VFM to US Government and is an impediment to meeting the contract deliverables.
- The current wording of “performed entirely outside” is problematic and too restrictive. Changing the wording to “substantially performed outside” would remove “attendance at one Project Management meeting in the US” triggering a loss of exemption. It would also make clear that components sourced from the US by an overseas contractor would not similarly trigger a loss of exemption.

In summary, removing the exemption is seen as detrimental to the US DoD as with globalisation of the supply chain it will stifle competition and innovation going forward. Clearly maintaining a technological capability is key for USG.

Yours faithfully,



Chairman JRBAC