

Recommendation 30: Reshape CAS program requirements to function better in a changed acquisition environment.

Problem

There has long been a sentiment within the government and defense industry that CAS program requirements lack sufficient nimbleness to accommodate the evolving acquisition environment. Except for changes in monetary thresholds, CAS program requirements have remained relatively static since the 1970s. This condition exists despite substantial changes in what DoD purchases, how DoD conducts purchases, and what contract vehicles DoD uses.

This condition also exists despite major legislative initiatives that have changed the landscape of government acquisition, such as the Competition in Contracting Act and the series of commercial item acquisition reforms such as the Federal Acquisition Streamlining Act (FASA), Federal Acquisition Reform Act (FARA), and Services Acquisition Reform Act (SARA).¹ Congress has prescribed preferences for both full and open competition and use of commercial items for acquiring products and services to satisfy government needs. Such prescribed preferences did not exist in the 1970s when CAS program requirements were instituted.

Independent studies conducted over time have consistently demonstrated that the government has faced substantial barriers to accessing important technologies because supplies exist that will not accept a CAS-covered contract.² CAS program requirements are not only incompatible with how business is conducted in today's marketplace, but they are incompatible with the way the government conducts its own business. The more prevalent concerns involving CAS program requirements are discussed below.

Background

CAS program requirements were instituted in the 1970s and generally have remained unchanged. The Section 809 Panel evaluated the compatibility of these requirements with modern government acquisition policies, procedures, and practices. Changes are needed that would help make CAS less of a burden for the defense acquisition community and less of a barrier to entry for companies looking to work with DoD. The panel's assessment focused on CAS applicability and exemptions (48 CFR 9903.201-1), types of CAS coverage (48 CFR 9903.201-2), and disclosure statement submission obligations (48 CFR 9903.202-1). CAS program requirements for foreign concerns and educational institutions are not part of this assessment.

As discussed above, Congress created the CAS Board (CASB) in 1970 to promulgate standards in the cost accounting practices followed by defense contractors.³ The standards were applicable to

¹ Deficit Reduction Act of 1984, Pub. L. No. 98-369 (1985). Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355 (1994). FY 1996 NDAA, Pub. L. No. 104-106 (1996). FY 1996 NDAA, Pub. L. No. 104-106 (1996). FY 1996 NDAA, Pub. L. No. 104-106 (1996). FY 2004 NDAA, Pub. L. No. 108-136 (2003).

² The following are examples of such studies. Jacques S. Gansler, *Democracy's Arsenal: Creating a Twenty-First Century Defense Industry*, Cambridge, Mass.: The MIT Press, 2011, 34, 140-142, 186, 270-271. Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, accessed March 28, 2018, https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

³ An Act to Amend the Defense Production Act of 1950, and Other Purposes, Pub. L. No. 91-379 (1970).

negotiated national defense contracts in excess of \$100,000, except when the price negotiated was based on (a) established catalog or market prices of commercial items sold in substantial quantities to the general public (i.e., ‘commercial item exemption’) or (b) prices set by law or regulation. Congress directed that “In promulgating such standards, the Board shall take into account the probable costs of implementation compared to the probable benefits.”⁴

CAS program requirements were initially instituted in 1972.⁵ CAS applied to all negotiated national defense contracts in excess of \$100,000. The only exemptions were those established by Congress: a commercial item exemption and contracts for which prices were set by law or regulation. Contracts exceeding \$100,000 were referred to as *CAS-covered contracts*. What *in excess of \$100,000* meant was not expressly defined by either Congress or CASB. CASB’s preamble to the initial CAS program requirements referred to prime contract awards of negotiated national defense contracts.⁶ This concept was understood in practice to mean the face value of a negotiated national defense contract at the time of award.

CAS program requirements on filing disclosure statements, which is a contractor’s written description of its cost accounting practices, were also initially instituted in 1972. A separate disclosure statement was required to be submitted for each profit center, division, or similar organizational unit if their costs included in the face value of a negotiated national defense contract exceeded \$100,000. To lessen the administrative burden imposed on defense contractors at that time, the disclosure statement requirement was limited to companies which together with their subsidiaries received net awards of negotiated national defense prime contracts during FY 1971 totaling more than \$30 million. What was meant by *net awards* was not defined by CASB.

Any negotiated national defense contract in excess of \$100,000, unless exempted, was to contain the CAS clause. Procedurally, any solicitation for a negotiated national defense contract that might result in an award in excess of \$100,000 was to include the CAS notice alerting offerors that the contract might become CAS-covered and that a disclosure statement might be required. The CAS clause also set forth the obligation for prime contractors to apply CAS program requirements to subcontractors in the same manner as applied to prime contractors.

After the institution of CAS program requirements in 1972, CASB amended program requirements a number of times in a continuous effort to strike a balance, as Congress had directed, between the probable costs of implementing CAS and the probable benefits received. The more substantial amendments relevant to issues discussed here were the following (all of these amendments were later revised):

- In 1974, CASB added an exemption for CAS-covered contracts less than \$500,000.⁷ That is, although the CAS-covered contract threshold specified by Congress would continue to be \$100,000, CAS would not become effective until a contractor received a CAS-covered contract of \$500,000 or more. This contract was called the *trigger contract*. Once a trigger contract was

⁴ Ibid, Sec. 103.

⁵ 37 Fed. Reg. 4139 (Feb. 29, 1972).

⁶ Preamble A: Original Publication of Part 401, 2-29-72, FAR Appendix B.

⁷ 39 Fed. Reg. 44389 (Dec. 24, 1974).

awarded, all CAS-covered contracts subsequently awarded to that contractor would become subject to CAS.

- In 1977, CASB created two levels of CAS coverage: *modified* and *full*.⁸ Modified CAS coverage required compliance with only two standards: CAS 401, Consistency in Estimating, Accumulating, and Reporting Costs, and CAS 402, Consistency in Allocating Costs Incurred for the Same Purpose. These standards became known as the *consistency standards*. Full CAS coverage required compliance with all standards (presently, there are 19 standards).

Modified CAS coverage was available for any business unit which in its immediately preceding cost accounting period received less than \$10 million in CAS-covered awards, providing that the sum of such awards was less than 10 percent of the business unit's total sales during that period. Anything above this threshold required full CAS coverage.

Similar changes were also made to the threshold requiring disclosure statement submission. A disclosure statement was required for a single CAS-covered award of \$10 million or more. Also, a disclosure statement was to be submitted by any business unit, or segment of a company, receiving a CAS-covered contract if it received net awards of CAS-covered contracts totaling \$10 million or more in its preceding cost accounting period.

- In 1980, CASB added an exemption for any firm-fixed-price (FFP) contract or subcontract awarded without submission of any cost data, provided that the failure to submit such data was not attributable to a waiver of the requirement for certified cost or pricing data.⁹ At the time, CASB declined to narrow the exemption to *certified* cost or pricing data because, in the opinion of CASB, any cost data submitted would presumably be used by contracting officers; thus, the government would benefit from the application of CAS.

The CASB ceased operations in 1980.¹⁰ The prevailing view was that CASB had completed its mission to promote uniformity and consistency in cost accounting practices used in defense contracting. CASB's regulations, including its standards, however, continued to apply to existing and future negotiated national defense contracts. It was not long before it became obvious that some form of governance over CAS was needed to administer CASB regulations and standards.

A *new* CASB was established under the OFPP Act of 1988.¹¹ It had a different organizational placement, structure, membership, and staffing than the original CASB.¹² The most substantial effect of reestablishing CASB under OFPP was making CAS program requirements applicable to all federal contracts instead of only negotiated national defense contracts.

⁸ 42 Fed. Reg. 45625 (Sept. 12, 1977). The CASB also added an exemption for small business concerns.

⁹ 45 Fed. Reg. 62011 (Sept. 18, 1980). The proviso reflected CASB's concern that contracting officers could exempt CAS by waiving the submission of certified cost or pricing data. This proviso was removed in 1993.

¹⁰ The CASB was defunded by Congress for FY 1981.

¹¹ An Act to Amend and Extend the Office of Federal Procurement Policy Act, Pub. L. No. 100-679 (1988).

¹² These are often referred to as the *original CASB* (1972-1980) and *new CASB* (1988-present).

Government Accountability Office (GAO) CASB Review Panel

The most recent assessment of CAS program requirements was conducted by the GAO CASB Review Panel in 1999. As requested by Congress, GAO established a panel of CAS experts to make recommendations to Congress in view of the “far-reaching procurement reforms of recent years.”¹³ Consistent with Congress’s direction in 1970, the GAO panel sought to strike a balance between the probable costs of implementing CAS and the probable benefits received.

New to what was recognized to be included in CAS implementation costs was the GAO panel’s acknowledgement that, as several other studies had shown, some companies refused to do business with the government if the resulting contract was to be CAS-covered.¹⁴ The GAO panel learned through public testimony that some companies created isolated CAS-covered business units for the purpose of doing business with the government while keeping their other business units free from CAS exposure. The GAO panel understood that when companies refused to accept CAS-covered contracts, the government was denied access to benefits that went beyond measurable costs. Simply put, CAS is a barrier to market access.

The GAO panel’s assessment of CAS program requirements included a sensitivity analysis that measured the scope of CAS coverage in terms of dollars covered and business segments covered over varying monetary thresholds. Specifically, the analysis considered variations in the trigger contract threshold (then \$1 million) and full CAS-coverage threshold (then \$25 million).¹⁵ Varying the individual CAS-covered contract threshold (then \$500,000) was not considered to be a meaningful assessment.

The GAO panel noted that the government’s Federal Procurement Data System (FPDS), at that time, did not adequately capture CAS-coverage data. FPDS did not identify contract actions that were CAS-covered, and FPDS did not collect contract actions by CAS-covered business segments. The GAO panel instead used surrogate data developed from the Defense Contract Audit Agency’s (DCAA’s) defective pricing database. DCAA augmented this data with information obtained from its field offices on CAS-covered contracts not included in its defective pricing database. The surrogate data covered the 12-month period from April 1997 to March 1998.

The GAO panel’s sensitivity analysis is summarized in Table 4-1. The then *current state* for comparison purposes, as portrayed in the second column, was \$72 billion in CAS-covered contracts and 588 CAS-covered business segments under both full CAS coverage and modified CAS coverage.

¹³ GAO, *Future Role of the Cost Accounting Standards Board*, GAO SP-99-1, accessed February 27, 2018, <https://www.gao.gov/products/SP-99-1>.

¹⁴ The following are examples of such reports. H.R. Committee on Armed Services Structure of U.S. Defense Industrial Base Panel, *Report Future of the Defense Industrial Base* (1992). Acquisition Law Advisory Panel to the United States Congress, *Streamlining Defense Acquisition Laws*, accessed June 6, 2017, <http://www.dtic.mil/docs/citations/ADA262699>. Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, accessed March 28, 2018, https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

¹⁵ The trigger contract was limited to deciding between modified and full CAS-coverage. A contractor was not required to implement full CAS coverage until it received \$25 million in CAS-covered awards *and* one CAS-covered contract exceeded \$1 million.

**Table 4-1. GAO Panel’s Analysis of CAS Coverage in DoD Under Varying Scenarios
 April 1997 to March 1998 (Dollars in Billions)**

	Full Coverage = \$25 million & Trigger = \$1 million	Full Coverage = \$50 million & Trigger = \$5 million	Full Coverage = \$50 million & Trigger = \$7.5 million	Full Coverage = \$50 million & Trigger = \$10 million
Dollars Covered	\$72	\$71	\$70	\$69

Coverage Types	Number Segments	Number Segments	Number Segments	Number Segments
Full CAS	280	189	189	185
Modified CAS	308	173	<i>Unknown</i>	94
Total	588	362		279

The GAO panel observed that (a) raising the full CAS-coverage threshold from \$25 million to \$50 million and (b) raising the trigger contract threshold to \$5 million yielded a negligible reduction in CAS-covered dollars (i.e., from \$72 billion to \$71 billion) but substantially reduced the number of CAS-covered business segments (i.e., from 588 to 362).

Although the GAO panel was satisfied with recommending an increase in the threshold for full CAS coverage to \$50 million, it was concerned about raising the trigger contract threshold from \$5 million to \$10 million. At a trigger contract threshold of \$10 million, the number of CAS-covered business segments under modified CAS coverage would be reduced from 588 business segments to 94 business segments, with the sharpest decrease being in modified CAS coverage. The decrease in full CAS coverage was generally unaffected after a trigger contract threshold increase to \$5 million (i.e., from 189 to 185). The GAO panel did not elaborate on its concern about the reduction in modified CAS coverage and ultimately settled on recommending a trigger contract threshold of \$7.5 million.

The GAO panel’s recommendations were taken up by Congress under the FY 2000 NDAA as Streamlined Applicability of Cost Accounting Standards.¹⁶ The CASB implemented the Act’s provisions in 2000.¹⁷

The GAO panel’s efforts of 1999 stand as the most recent assessment of CAS program requirements. The panel’s deliberations included a variety of issues and perspectives presented in public hearings by government officials, defense contractors, commercial companies, professional and trade associations, and others regarding CAS program requirements.¹⁸ Other than recommending changes to the CAS monetary thresholds, with one exception regarding the exemption for certain FFP contracts, the GAO panel did not take up any of the other issues regarding CAS program requirements.

¹⁶ FY 2000 NDAA, Pub. L. No. 106–65, Section 8 (1999).

¹⁷ 65 Fed. Reg. 5990 (Feb. 7, 2000).

¹⁸ The GAO panel conducted public hearings June 16–18, 1998. Testimonies were offered by 30 interested parties.

Current Data on CAS Coverage

Since the GAO panel's review in 1999, enhancements in FPDS structure and processes have provided an improved view into DoD CAS-covered contracts, albeit still an imperfect view because there remain limitations in FPDS data collection protocols (e.g., actual CAS-covered contracts, type of CAS coverage, identification of CAS-covered business segments, CAS-covered subcontracts, CAS application to orders). The FPDS process has become more rigorous in that contracting officers must complete a contract action report (CAR) and confirm its accuracy prior to release of a contract award.¹⁹ The CAR must then be imported into FPDS within 3 business days after contract award. The chief acquisition officer of each agency must submit to GAO an annual certification that the agency's CAR data for the preceding fiscal year was complete and accurate.²⁰ These requirements are intended to improve the quality of reported FPDS data.

FPDS has a specific data element for CAS coverage. Data Element 6L (Cost Accounting Standards Clause) asks if the CAS clause has been included in the awarded contract. Possible answers include the following:²¹

- Y = Yes, CAS clause included in the awarded contract
- N = No, CAS waiver approved
- X = Not applicable, exempt from CAS

The CAS clause, in its present form, could be regarded as self-deleting in that the CAS clause contains wording that states CAS applies unless the contract is otherwise exempt. Inclusion of the CAS clause in a contract, in and of itself, does not mean that the contract is actually CAS-covered. The contract could be exempt on a number of grounds.

Other than FPDS, there is no management information system within DoD that captures CAS-coverage information across DoD's supplier base. The Defense Contract Audit Agency (DCAA) no longer maintains the databases that were used to develop surrogate CAS-coverage data for the GAO panel in 1999. The Mechanization of Contract Administration Services (MOCAS) used by the Defense Contract Management Agency (DCMA) has limited value because its database is populated from the same original source that populates FPDS and only includes contracts over which DCMA has contract administration cognizance.

Despite these limitations, FPDS still provides a credible means for assessing the CAS program requirement issues discussed here. FPDS was queried for all contract actions that contained "Yes" in Data Element 6L for initial contract awards (identified as "Modification 0") occurring during the 5-year period spanning FY 2012 through FY 2016. The query was designed to return certain information, such as contract number, solicitation number, contract value, contract type, extent of competition, submission of cost or pricing data, and small business identification. Inspection of the query results

¹⁹ Responsibilities, FAR 4.604(b).

²⁰ Ibid, (c).

²¹ GSA, *Federal Procurement Data System-Next Generation (FPDS-NG) Data Element Dictionary, Version 1.4*, accessed March 28, 2018, https://www.fpds.gov/downloads/Version_1.4_specs/FPDSNG_DataDictionary_V1.4.pdf.

illuminated the need to analyze contract awards in two separate groupings: definitive contracts and indefinite delivery vehicles (IDVs). Summary results are presented in Table 4-2 below.

**Table 4-2. Prime Contract Awards Containing CAS Clause Per FPDS Base and All Options Value^(Note 1)
 FY 2012 through FY 2016 (Dollars in Billions)**

	2012	2013	2014	2015	2016
Dollars ^(Note 2)	\$74	\$50	\$46	\$38	\$105
Contracts	995	907	801	859	947
IDVs					
Dollars ^(Note 3)					
Contracts	744	715	706	742	735

Totals exclude contracts awarded to educational institutions, governmental entities, and small businesses, as best as could be determined from FPDS coding protocols.

Notes:

(1) CAS coverage is determined by face value of a contract at the time of award. Subsequent modifications (unless they add new work) and funding actions do not affect this determination. The Base and All Options Value (FPDS Data Element 3A) was considered the most appropriate value for determining CAS-covered dollars.

(2) Definitive contract dollar totals were somewhat skewed by the award of three unusually large TRICARE managed care support contracts by the Defense Health Agency (one in 2012; two in 2016).

(3) The Base and All Options Value for an IDV is meaningless because it bears no meaningful relationship to the value of orders that are actually placed under the IDV. The Base and All Options Value for some IDVs under a given solicitation was the same full amount of the total anticipated acquisition, and thus would vastly overstate DoD's CAS coverage. In other instances, the Base and All Options Value for some IDVs had no awarded value (i.e., face value = 0).

The amounts shown in Table 4-2 are not intended to be a tabulation of DoD CAS-covered awards for FY 2012 through FY 2016. Instead, the results were used to identify CAS coverage under certain conditions for a more directed assessment. The FPDS search tools, copies of contracts and related solicitations, and other databases, such as MOCAS, provided additional information about contract awards.

Discussion

The Section 809 Panel examined CAS program requirements with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage. The acquisition environment in which CAS was created in 1972 is not the acquisition environment of today. Not only have DoD acquisition policies, procedures, and practices evolved, but also improvements in areas such as technology, business practices, pricing policies, and oversight have lessened the government's contract cost accounting risks.

CAS Monetary Thresholds

There are four monetary thresholds within CAS program requirements that determine the nature and extent of CAS-coverage:

- The CAS-covered contract threshold is tied to the Truth in Negotiations Act (TINA) threshold, which was recently raised from \$750,000 to \$2 million, effective July 1, 2018.²² The CAS-covered

²² FY 2013 NDAA, Pub. L. No. 112-239 (2012), as amended through Pub. L. No. 115-91, Sec. 811 (2017).

contract threshold automatically changes when the TINA threshold is changed.²³ The GAO panel did not recommend any change to the CAS-covered contract threshold.

- The trigger contract threshold is now \$7.5 million, based on the GAO panel’s recommendation. CAS does not apply until a contractor receives a CAS-covered award of \$7.5 million or more. Once that threshold is reached, all CAS-covered contracts subsequently awarded to that contractor are subject to CAS.
- The current full CAS-coverage threshold, based on the recommendation of the GAO panel, is a CAS-covered contract of \$50 million or more. Contracts below this threshold are subject to modified CAS-coverage. In 1993, CASB added CAS 405, Accounting for Unallowable Costs, and CAS 406, Cost Accounting Period to modified CAS-coverage.²⁴
- Presently, the threshold for requiring a disclosure statement is \$50 million in total CAS-covered contracts. A disclosure statement is not required, however, for individual business segments of a contractor that have CAS-covered contracts that are valued at less than \$10 million and represent less than 30 percent of sales.

Since the GAO panel’s recommended threshold increases in 1999, the Consumer Price Index for all urban consumers has risen 47 percent. To set a floor for considering threshold increases, the thresholds for the trigger contract, full CAS coverage, and disclosure statement should be increased by 47 percent. The results are shown in Table 4-3. The CAS-covered contract threshold is evaluated separately because of its ties to TINA threshold increases that have occurred since 1999 based on the Consumer Price Index for All Urban Consumers.

Table 4-3. Effect of Increasing CAS Monetary Thresholds Based on Consumer Price Index for All Urban Consumers (Dollars in Millions)

Threshold	Now	Indexed	Minimum
Trigger contract threshold	\$7.5	\$11	\$10
Full CAS-coverage threshold	\$50	\$74	\$75
Disclosure statement threshold	\$50	\$74	\$75

The results displayed in Table 4-3 suggest that the trigger contract threshold be raised to not less than \$10 million and the full CAS-coverage and disclosure statement thresholds be raised to not less than \$75 million. This approach merely applies the effects of inflation on the thresholds, as of 2017. Given the challenge presented to the Section 809 Panel, other ways of structuring monetary thresholds within CAS program requirements should be considered.

When the \$500,000 trigger contract exemption was created in 1974, CASB was persuaded—only 2 years after instituting the initial CAS program requirements— that “maximum benefit to the Government

²³ The TINA threshold is to be periodically adjusted for inflation. Prior to the recent threshold increase to \$2 million, the inflation adjustment was aligned with the Consumer Price Index for All Urban Consumers (base year = 1994). Now, the inflation adjustment will be made under the provisions of Inflation Adjustments of Acquisition-Related Dollar Thresholds, 41 U.S.C. § 1908 (base year = 2000).

²⁴ 58 Fed. Reg. 58798 (Nov. 4, 1993).

with minimum cost can be achieved by limiting the mandatory application of its standards to contractors who receive awards which constitute a substantial majority of the national defense procurement dollars.”²⁵ The CASB essentially adopted the Pareto Principle which postulates that roughly 80 percent of the effects come from 20 percent of the causes. The CASB observed the following regarding the volume of DoD prime contract awards for FY 1973:

*[S]ome 70 percent of the prime contractors of the Department of Defense did not receive one or more negotiated awards in excess of \$500,000 in Fiscal Year 1973. Thus, only 30 percent, or approximately 750 prime contractors, who received contract awards totaling \$20 billion, would continue to be covered. The exemption [trigger contract] would remove coverage from only about 10 percent of the dollar value of annual DOD awards.*²⁶

The CASB’s observation matched what was reported by DoD for prime contract awards for FY 1973.²⁷ Specifically, that report aggregated DoD prime contract awards by size and competitive status.²⁸ Pertinent amounts for negotiated awards, both competitive and noncompetitive, are shown below in Table 4-4.

²⁵ Preamble F to Amendments of 12-24-74, FAR Appendix B.

²⁶ 39 Fed. Reg. 44389 (Dec. 24, 1974).

²⁷ OASD (Comptroller), *Prime Contract Awards - Size Distribution Fiscal Year 1973 (ADA954446)*, Table 4, accessed May 3, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a954446.pdf>.

²⁸ CASB did not exempt negotiated FFP contracts awarded without submission of any cost data until 1980.

Table 4-4. Negotiated Prime Contract Awards FY 1973 (Dollars in Millions)

Award Size	Awards	Distribution	Dollars	Distribution
More than \$500,000	6,758	27%	\$19,637	86%
Between \$100,000 and \$500,00	18,001	73%	\$3,291	14%
Totals	24,759	100%	\$22,928	100%

As shown in DoD’s report on prime contract awards for FY 1973, by installing the trigger contract at \$500,000, the CAS coverage would still be applied to 86 percent of the dollars for negotiated prime contract awards.²⁹ Yet, at the same time, the CAS administrative requirements associated with 73 percent of prime contract awards would be removed. In other words, by applying CAS to only 27 percent of awards, 86 percent of the dollars would be covered by CAS.

The GAO panel performed a similar type of analysis in 1999.³⁰ Raising the threshold for full CAS coverage from \$25 million to \$50 million and raising the trigger contract threshold from \$1 million to \$7.5 million would reduce dollars covered by \$2 billion (i.e., from \$72 billion to \$70 billion, roughly 3 percent).³¹ At the same time, the number of business segments covered would be reduced from 588 to between 362 and 279 (about 45 percent), and almost all of that reduction was in modified CAS-coverage.³²

FPDS, notwithstanding its limitations, still provides the means to take a fresh look at CAS coverage. What can be said about FPDS is that it has captured the universe of potentially CAS-covered contracts. Contracts shown in FPDS as not containing the CAS clause would not be regarded as potentially CAS-covered contracts. Once the FPDS database is further culled to remove likely circumstances of exempted contracts, such as awards less than \$2 million (recently increased CAS-covered contract threshold); formally advertised awards; and awards to educational institutions, governmental entities, and small businesses, then the database becomes more usable for CAS analysis purposes. Using 5 years of contract award data, as opposed to the 1-year period previously used by CASB in 1974 and the GAO panel in 1999, adds credibility to the analysis.

The Section 809 Panel analyzed contract awards containing the CAS clause for DoD-definitive contracts awarded from FY 2012 through FY 2016, as reported by FPDS. IDVs were excluded because of their nature and distortive effect. Also removed from the analysis were the three TRICARE managed care support contracts, as they were likely to distort the results. A summary of reductions in CAS coverage at various breakpoints for potential CAS-covered contract thresholds is shown in Table 4-5.

²⁹ OASD (Comptroller), *Prime Contract Awards - Size Distribution Fiscal Year 1973 (ADA954446)*, accessed May 3, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a954446.pdf>.

³⁰ GAO, *Future Role of the Cost Accounting Standards Board*, SP-99-1 (1999).

³¹ *Ibid.*, 28.

³² *Ibid.*, 29.

Table 4-5. Definitive Contracts with CAS Clause Per FPDS Impact on Percent of CAS-Coverage at Various CAS-Covered Contract Thresholds FY 2012–FY 2016

CAS-Covered Contract Threshold	Dollars Covered	Contracts Covered	Contractors Covered ³³
\$2 million ^(Note)	100%	100%	100%
\$5 million	99%	70%	61%
\$10 million	96%	49%	44%
\$25 million	92%	29%	28%

Note: The \$2 million threshold represents the current state, effective July 1, 2018. Per FPDS, there were 711 contractors receiving 3,326 contracts worth \$233.2 billion in definitive contracts containing the CAS clause (net of exclusions discussed above).³⁴

As shown in Table 4-5, raising the CAS-covered contract threshold had a relatively modest effect on reducing dollars of CAS coverage, but the reduction of CAS-covered contracts and, by implication, CAS-covered contractors was significant. One reason for this is that the size of DoD contract awards has increased substantially over the years. For example, in FY 1973, only about 2 percent of total negotiated prime contracts over the then existing CAS-covered contract threshold of \$100,000 in DoD exceeded \$10 million.³⁵ For FY 2012 through FY 2016, about 36 percent of definitive contracts over \$750,000 containing the CAS clause exceeded \$10 million, and they accounted for 96 percent of the dollars.

The results shown in Table 4-3 almost mirror what was observed by CASB in 1974 when installing the trigger contract: by applying CAS to only 28 percent of awards, 92 percent of the dollars would be covered by CAS. If 92 percent of DoD prime contract dollars can still be CAS covered at a \$25 million threshold, then the CAS-covered contract threshold should be decoupled from the TINA threshold altogether and set accordingly. At \$25 million, the threshold would be high enough to render the trigger contract unnecessary, and it could be eliminated as well.

The results shown in Table 4-3 and Table 4-5 raise the question of not only how much to increase CAS monetary thresholds, but more importantly, how to structure the CAS-covered contract threshold for the future. TINA and CAS serve different purposes. TINA provides the government with remedies for contractor-supplied pricing data that was not accurate, not complete, or not current. TINA is a specific remedy to a specific contract action. CAS imposes systemic requirements on contractor cost accounting practices, whether at modified or full CAS-coverage levels. CAS contractually imposes an obligation for the contractor to adjust contract prices if that contractor decides to change its cost accounting practices during the life of the contract. As such, CAS has broader ramifications than TINA, and this is why CAS is a major reason companies refuse to accept a CAS-covered contract.

³³ FPDS does not record CAS coverage by business segment. To simplify analysis, definitive contracts awarded to the same contractor at different contractor locations were consolidated into a single contractor name, as best as could be determined.

³⁴ Section 809 Panel analysis of FPDS data collected September 2017.

³⁵ OASD (Comptroller), *Prime Contract Awards - Size Distribution Fiscal Year 1973 (ADA954446)*, Table 4, accessed May 3, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a954446.pdf>.

In setting the CAS-covered contract threshold at \$25 million, there are other important risk mitigation factors to consider. First, the FAR imposes what is essentially modified CAS-coverage to all contracts falling under FAR Part 31 cost principles.³⁶ A comparison between modified CAS-coverage and the corresponding FAR provisions is shown in Table 4-6. Simply put, any contractor finding relief from a CAS-covered contract threshold of \$25 million would still be subjected to essentially the same requirements under the FAR. The difference would be that such contracts would not be deemed CAS covered and subjected to CAS administrative requirements.

Table 4-6. Modified CAS Coverage vs FAR Cost Principles

Cost Accounting Standard	Federal Acquisition Regulation
CAS 401, Consistency in Estimating, Accumulating, and Reporting Costs	No specific FAR requirement, although some principles are applied elsewhere (e.g., TINA)
CAS 402, Consistency in Allocating Costs Incurred for the Same Purpose	31.202, Direct Costs 31.203, Indirect Costs
CAS 405, Accounting for Unallowable Costs	31.201-6, Accounting for Unallowable Costs
CAS 406, Cost Accounting Period	31.203, Indirect Costs

With passage of the Sarbanes-Oxley Act of 2002, there have been improvements in the private sector’s efforts to build effective safeguards into risk management infrastructure.³⁷ Although Sarbanes-Oxley’s principal focus is on financial reporting, including compliance with GAAP, a higher degree of importance is placed on a company’s internal controls. The underlying assumption is that an enhanced compliance structure increases confidence in a company’s financial reporting. Compliance with contract obligations is an area of focus. For government contractors, compliance includes safeguards over government contract cost accounting. From a CAS perspective, the basic elements found in modified CAS coverage would need to be present in a defense contractor’s internal control systems.

CAS & Hybrid Contracts

A hybrid contract describes a situation in which portions of a given contract (i.e., contract line item number (CLIN)), have different pricing and payment terms. Examples of such situations could be as follows:

- Part of a contract was awarded based on adequate pricing competition with no certified cost or pricing data provided by the contractor, but other parts of the same contract were not included in the evaluated price for contract award. This situation might occur when the government intends to negotiate pricing for the other parts after contract award, possibly with the submission of certified cost or pricing data.

³⁶ Several FAR cost principles also adopt cost accounting measurement and allocation requirements from certain standards.

³⁷ Sarbanes–Oxley Act of 2002, Pub. L. No. 107–204 (2002).

- Part of a contract contained commercial items that were priced using commercial pricing techniques without submission of certified cost or pricing data, but other parts of the same contract were based on negotiated pricing using certified cost or pricing data. This situation might occur when part of a contract for commercial items contains an item not considered a commercial item (i.e., major modification not performed commercially) and the price for that item was separately negotiated with submission of certified cost or pricing data.
- A contract has different contract type structures among the various CLINs, such as FFP pricing for some CLINs (e.g., unit prices for supplies and services) and cost reimbursement terms for other CLINs (e.g., travel, other direct charges).

In hybrid contracts, parts of a contract could be otherwise exempt from CAS program requirements if those parts had stood alone as a separate contract. The overriding question in such situations is if parts of a contract can be considered exempt from CAS and, if so, how such exemptions would be applied to CAS program requirements. For example, should a \$20 million contract that contained \$15 million in FFP CLINs awarded without submission of certified cost or pricing data be regarded as a \$20 million contract or \$5 million contract for CAS purposes? The answer would impose different CAS program requirements.

Even if hybrid contracts do not involve a portion that would be considered otherwise exempt, there still can be administrative concerns. For example, when aggregating CAS-covered contracts for purposes of determining the cost effects of changes in cost accounting practice, how should hybrid contracts be treated?

The CASB has long been aware of the hybrid contract issue. The CASB acknowledged the existence of such conditions as early as 1974:

Reduction of contract price by exclusion of commercial items. Some commentators, in reading the introductory comments to the Board's initial publication of this exemption, interpreted the phrase "minimum contract amount requiring compliance" in a manner not at all intended by the Board. These commentators interpreted this phrase to permit the price of a contract subject to standards to be reduced by the value of those individual contract items or subassemblies of final contract items whose prices could be considered to be "catalog" or "market" prices, if sold separately. They requested that the regulation be clarified to reflect their interpretation of the Board's introductory comments.

Those requesting this clarification misunderstood the Board's intentions. The Board does not intend that the price of a contract be adjusted to exclude the price of items or subassemblies which, if purchased separately, might be exempt from the Board's promulgations. Consequently, the change in the regulation requested by commentators on this point would be completely inappropriate.³⁸

The issue of hybrid contracts in 1974 was mostly related to contracts for commercial items. Portions of the contract were based on established catalog prices; other portions were based on cost data. The full contract was regarded as CAS-covered. Subsequent commercial item acquisition reforms that occurred

³⁸ 39 Fed. Reg. 44389 (Dec. 24, 1974).

in the 1990s, including creating a uniform contract format for commercial items that did not contain the CAS clause, partially alleviated the concern. The issue persists today in other areas as the government consolidates its requirements under omnibus contracts with multiple acquisition options (e.g., competed, sole source), proposal data requirements (i.e., certified cost or pricing data, cost or pricing data, other cost or pricing data), and payment provisions (e.g., FFP, time and material [T&M], cost reimbursement). In the past, private industry on multiple occasions had asked CASB to provide guidance, but without success.³⁹ Private industry presented testimony before the GAO panel on the issue, also without any action taken. For example, the Government Electronic and Information Technology Association stated:

[T]he CAS Board has not yet acted on the issue of hybrid commercial contracts ... This might occur, for example, on a firm-fixed price contract for commercial items, which contains a relatively minor provision ... for on-site maintenance to be paid on a time and materials basis. Assuming that the time and materials contract line item does not qualify for an exemption, is the entire contract CAS-covered or just the time and materials contract line item? In deciding the extent of CAS-coverage and Disclosure Statement obligations is the determining value the entire contract or just the time and materials portion?⁴⁰

DoD contracting officers are instructed to prepare multiple CARs when the contract action includes line items with more than one type of contract pricing arrangement (e.g., fixed-price, cost-plus-fixed-fee).⁴¹ A separate CAR is required for each type of contract pricing arrangement having a dollar value greater than \$5 million for that type. During FY 2012 through FY 2016, FPDS reported 204 definitive contracts with multiple CARs, denoting the presence of hybrid contracts. The number of hybrid contracts is likely to be larger in view of the \$5 million reporting criterion for each hybrid CLIN.

To present a more specific understanding of the nature and purpose of hybrid contracts, the Section 809 Panel selected a sample of hybrid contracts from the definitive contract population for electronic copies of selected contracts and obtained associated solicitations. Pertinent information was also acquired via the FPDS search tool. A synopsis of selected acquisitions is presented below.

- In 2016, the Air Force awarded a contract, with full and open competition, for computer facilities management services covering a base period and five option periods. The awarded value was \$72.9 million. The contract contained 274 CLINs, of which 231 were FFP, 35 were cost reimbursement for incidental costs (e.g., travel, supplies, directed overtime), and six were award fee provisions. The cost reimbursement CLINs accounted for about 17 percent of the contract value with the estimated values being inserted in the solicitation by contracting officers and not evaluated for award. Certified cost or pricing data were expressly not required, but supporting data other than certified cost and pricing data were requested for indirect labor rates. Because a portion of the contract requirements was on a cost reimbursable basis, offerors

³⁹ For example, Council of Defense and Space Industry Associations letters to Dr. Steven Kelman, CASB Chairman, May 15, 1996, and July 30, 1997.

⁴⁰ Dan C. Heinemeier, "Issues on the Applicability of Cost Accounting Standards," in *Future Role of the Cost Accounting Standards Board* (Collingdale, PA: Diane Publishing, 1999), 316-317.

⁴¹ Reporting Data, DFARS PGI 204.606(1)(ii)(A)(2).

were instructed to provide a copy of their disclosure statement; identification of CAS compliance, if applicable; and any CAS violations and subsequent corrections.

- In 2014, the Army awarded a contract, with full and open competition, for information technology and telecom facility operation and maintenance covering a base period and five option periods. The awarded value was \$516.7 million. The contract contained 73 CLINs, of which 12 were FFP, 21 were fixed-price-incentive (FPI), 20 were cost-plus-fixed-fee (CPFF), and 20 were T&M. The FPI arrangement, which represented 66 percent of the contract price, included both cost and performance incentives. Section L of the solicitation did not specify if certified cost or pricing data were required, although FPDS indicated that none were requested. Offerors were instructed to submit price proposals in a preset template.

Certain contracts awarded by the Defense Health Agency (DHA) possibly reveal another type of hybrid contract involving costs included in the contract value that are not actually incurred by the contractor in the performance of the contract. These might be described as *pass-through* expenditures. In 2015, DHA issued a solicitation for managed care support for DoD's TRICARE program covering 6 years (plus an option for 6 additional months). The award was to be based on adequate price competition, and no cost or pricing data were required. The resulting contract would contain 30 CLINs of which 11 were FFP, seven were CPFF, five were cost reimbursement, and seven were fixed fee. The CPFF CLINs were for patient claims that were to be reimbursed by the contractor under TRICARE guidelines and then vouchered to the government paying office. The claims were not costs of performance incurred by the contractor, but rather, they were obligations incurred by the TRICARE beneficiaries (e.g., doctor bills, hospital bills). The remainder of the contract is essentially FFP awarded on the basis of adequate price competition and otherwise exempted from CAS program requirements. The patient claims represented 94 percent of the two contracts (\$55 billion of \$58 billion) awarded under this particular solicitation. The two contracts contained the CAS clause.

The concern about hybrid contracts is not curtailing government practices for creating contracting vehicles intended to promote economy and efficiency in acquiring supplies and services. It is instead about the lack of CASB guidance on how to treat hybrid contracts when applying CAS program requirements. It seems appropriate to expressly recognize within CASB regulations existence of hybrid contracts and to provide guidance on how to apply CAS program requirements. The benefit would not only be a more precise application of CAS, but it might also bring more companies into the government marketplace if such application were better understood.

CAS and IDVs

IDVs enable government purchasers to establish contracts with single or multiple sources to satisfy requirements over an extended period.⁴² Industry has referred to IDVs as *hunting licenses*, mostly because they impose contract obligations and require resources solely for the future chance to win work under the IDV. According to FPDS, the predominant contract type has been indefinite delivery contracts (IDC), but basic ordering agreements (BOAs) and blanket purchase agreements (BPAs) have been used for the same reason.

⁴² Definitions, FAR 4.601, defines IDVs as an indefinite delivery contract or agreement having one or more ordering provisions.

The FPDS data for IDVs have limited value; although data are collected at the IDV level, the important events occur at the order level. Examining IDVs by dollars is meaningless because the amounts bear no relationship to the value of orders actually placed under IDVs. FPDS does, however, provide some insight into issues concerning CAS program requirements for IDVs, shown in Table 4-7.

**Table 4-7. Number of IDV Awards Containing CAS Clause Per FPDS
 FY 2012–FY 2016**

Type	2012	2013	2014	2015	2016
BOA	80	59	68	79	96
BPA	14	13	4	6	6
IDC ^(Note)	650	643	634	657	633
Total	744	715	706	742	735

Note: FAR 16.5 defines indefinite delivery contracts as definite-quantity contracts, requirements contracts, and indefinite-quantity contracts.

The 3,642 IDVs reported for FY 2012 through FY 2016 together amounted to 2,435 acquisitions. The data reported at the IDV level tended to be FFP contracts (65 percent), awarded under full and open competition (47 percent), with no submission of cost or pricing data (53 percent). Many multiple award IDVs provided the mechanism for placing an order under a variety of circumstances, which included the possibility of requiring the submission of certified cost or pricing data during order placement.

To gain a better insight into the nature of IDVs, the Section 809 Panel selected a sample of IDCs for each service from among the largest acquisitions in terms of numbers of separate contracts issued under a particular solicitation. Electronic copies of selected contracts and associated solicitations were obtained. Some information was acquired via the FPDS search tools. A synopsis of each sampled acquisition is presented below. Each of these contracts, according to FPDS, contained the CAS clause.

- In 2013, the Army awarded multiple IDCs to 41 different contractors for support services through FY 2018. The awards were made with full and open competition, and no cost or pricing data were obtained. Offerors were instructed to propose ceiling labor rates for base and option periods. The contract contained different pricing terms for various CLINs (i.e., FFP, CPFF, cost reimbursement) which allowed pricing arrangements to be established separately for each order. The cumulative total of all task orders was not to exceed \$495 million, and the contract minimum was \$2,500. The face value of each of the 41 contracts awarded was \$495 million (aggregated as \$20.3 billion in FPDS). As of the end of FY 2016, funds totaling about \$193 million had been obligated, with almost 90 percent going to just five contractors. Obligations for the contract minimum had been issued to 24 contractors.
- In 2012, the Navy awarded multiple IDCs to 43 different contractors for training services through FY 2020. The awards were made with full and open competition, and no cost or pricing data were obtained. Offerors were instructed to provide direct labor rates and indirect expense rates for evaluation purposes only that were expressly not considered to be certified cost or pricing data. The contract contained different pricing terms for various CLINs (i.e., FFP, FPI, CPFF, CPIF) which allowed pricing arrangements to be established separately for each order. The contract provided for the possibility that cost or pricing data might be obtained at the time

of order placement. The cumulative total of all task orders was not to exceed \$780 million, and the contract minimum was \$1,000. The face value of each of the 43 contracts awarded was \$780 million (aggregated as \$33.5 billion in FPDS). As of the end of FY 2016, task orders obligations totaling roughly \$58 million had been issued, with 97 percent going to just five contractors. Obligations for the contract minimum had been issued to 37 contractors.

- In 2015, the Air Force awarded multiple IDCs to 25 different contractors for training systems through FY 2025. The awards were made with full and open competition, and no cost or pricing data were obtained. Offerors were instructed to propose FFP level-of-effort (FFP/LOE) wrap rates for labor. As adequate price competition was expected, no additional cost information was requested. The contract type would be established per individual task order (i.e., FFP, FFP/LOE, FPI, LH, T&M, CPIF, CPFF). The contract provided for the possibility that cost or pricing data might be obtained at the time of order placement. The cumulative total of all task orders was not to exceed \$20.9 billion, and the contract minimum was \$1,000. The face value of each of the 25 contracts awarded was \$20.9 billion (aggregated as \$522.5 billion in FPDS). According to FPDS, task orders obligations totaling about \$57 million had been issued, with 99 percent going to just four contractors. Obligations for the contract minimum had been issued to 20 contractors.

In each case the IDC was structured as an administrative vehicle for placing orders during the base year and option periods under a variety of pricing arrangements. Each sampled contract was conducted under full and open competition. Each solicitation in different ways expressly stated that the pricing information was not *certified* cost or pricing data. Subsequent orders would be placed under a variety of possible acquisition methods, order types, and price evaluation methods. Very few of the awarded contracts had received orders beyond the minimum.

In 1976, one of the first issues addressed by the DoD CAS Working Group concerned the question of CAS applicability to basic agreements and BOAs. The question posed was whether a basic agreement or BOA should include in its overall valuation for CAS threshold purposes individual orders that were valued less than the CAS-covered contract threshold (then \$100,000). The question was answered from a broader perspective; that is, because basic agreements and BOAs were expressly not contracts according to the ASPR (now FAR), CAS applicability was to be determined separately for each order.⁴³ This guidance has not been incorporated into CASB regulations or the FAR, but it is understood to still be in effect.⁴⁴ There is no DoD CAS Working Group guidance concerning IDCs which, unlike basic agreements, BOAs, and BPAs, are considered to be contracts. IDCs include definite-quantity contracts, requirements contracts, and indefinite-quantity contracts (see FAR Subpart 16.5).

In addition to the obvious hybrid contract issues concerning IDVs, excluding basic agreements, BOAs, and BPAs, 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. As seen from

⁴³ DoD CAS Working Group Paper 76-2, "Application of CAS to Contract Modifications and to Orders Placed Under Basic Agreements – Interim Guidance," (Feb. 24, 1976) in *Code of Federal Regulations, 1949-1984*, U.S. Government Printing Office, 1980.

⁴⁴ DCAA, *Contract Audit Manual*, 8-102.2b, accessed March 28, 2018, http://www.dcaa.mil/Content/Documents/cam/Chapter_08_-_Cost_Accounting_Standards.pdf.

the examples, the face value of many IDCs awarded under a given solicitation was the full projected value of the acquisition. Also, in many other cases, the face value of the IDC was \$0.

As the sampled IDCs reveal, the CAS clause was included in the IDC based on the prospect (however unlikely) of obtaining certified cost or pricing data at order placement. 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. Given the widespread use of IDCs, guidance is needed in this area for much the same reasoning as with hybrid contracts. CASB regulations should adopt the DoD CAS Working Group guidance for all IDVs, including IDCs, notwithstanding their inherent legal differences from basic agreements, BOAs, and BPAs.

CAS and Commercial Items

From the outset, CAS program requirements have been exempted on contracts for commercial items. Until 1994, this exemption was expressed as “contracts where price was based on established catalog or market prices of commercial items sold in substantial quantities to the general public.”⁴⁵ This same exemption had long been applied to TINA.

During the 1990s, there was a movement toward greater use of commercial items to satisfy government requirements. One of the impediments was the obsolete wording of the CAS (and TINA) commercial item exemption. The notion of a catalog price of something sold in substantial quantities to the general public was far too static to be applied in the rapidly evolving commercial marketplace. *Something sold* implied something was available in the market that was sold enough times to become a *substantial quantity*. This view denied the government access to the newest products and leading-edge commercial technologies. The commercial marketplace was progressing toward more bundled solutions as opposed to market basket offerings suggested by the notion of catalog pricing. If the government was going to achieve its goal of greater use of commercial items, then it needed to change its perception of catalog and market price. Accordingly, Congress in 1994, under FARA, replaced the catalog and market price wording to simply “contracts and subcontracts for the acquisition of commercial items.”⁴⁶

At the time, CASB chose not to use the wording adopted by Congress and instead limited the exemption to FFP contracts and FP contracts with economic price adjustment (FFP/EPA), provided that the price adjustment was not based on actual costs incurred.⁴⁷ This choice caused an immediate conflict with the FAR because there were more contract types permitted by Congress for the acquisition of commercial items than recognized by CASB. The conflict was further exacerbated by CASB’s failure to keep up with the pace of change as more permissible contract types were added for the acquisition of commercial items.

Why CASB found it necessary to single out FFP/EPA based on actual costs incurred was never adequately explained. The CASB admitted that such contracts were “rarely used, if ever.” The controls imposed by the FAR on FFP/EPA based on actual costs incurred would seem to have negated the

⁴⁵ 37 Fed. Reg. 4139 (Feb. 29, 1972).

⁴⁶ FY 1996 NDAA, Pub. L. No. 104–106, Sec. 4205 (1996), codified at Cost Accounting Standards, 41 U.S.C. § 1502(b)(1)(C)(i).

⁴⁷ 62 Fed. Reg. 31294 (Jun. 6, 1997).

necessity to apply CAS to this contract type (see FAR 16.203-4). The risks to the government had to be miniscule. Moreover, in taking this action, CASB created another hybrid contract situation: part of the FFP/EPA contract would be FFP, and part would be cost reimbursement.

The commercial item exemption in its current state under CAS program requirements is as follows (48 CFR 9903.201-1(b)(6)):

Firm fixed-priced, fixed-priced with economic price adjustment (provided that price adjustment is not based on actual costs incurred), time-and-materials, and labor-hour contracts and subcontracts for the acquisition of commercial items.

On October 5, 2011, CASB approved a proposed rule for publication to bring the commercial item exemption wording in line with what had been adopted by Congress: “contracts and subcontracts for the acquisition of commercial items.”⁴⁸ The proposed rule was not published until a year later.⁴⁹ Few public comments were received, with none of them having any import to the proposed change. What was proposed by CASB was simply the wording used by Congress and codified at 41 U.S.C. § 1502(b)(1)(C)(i). A final rule has not yet been issued by CASB.

CAS and Cost Data

Since the initial installation of CAS program requirements in 1972, there has been an on-going debate over the appropriateness of applying CAS to contracts for which price was not based on cost data. There was no progress until 1980, when CASB added an exemption for FFP contracts awarded without submission of cost data.⁵⁰ The CASB continued to hold the narrow view that any cost data submitted, no matter the reason, should make contracts subject to CAS. The CASB stated:

Situations occur in which cost data are submitted in support of a price but are not certified because the award is designated as adequate price competition. Whether the data are used in a particular case can be difficult to establish. The Board however is satisfied that such data would not be submitted unless they were to be used.

Subsequently, it has been argued that cost data submitted by a contractor for reasons other than establishing contract price should not make contracts subject to CAS. Examples of other reasons for submitting cost data included cost data used for price realism purposes (i.e., assessing an offeror’s understanding of program requirements) or used for evaluating compensation plans (i.e., assessing an offeror’s ability to attract skilled technicians needed to perform the work). During this time, in concert with the commercial item acquisition reforms, there was a movement within the government to better define what was and what was not certified cost or pricing data. In 1995, the government created a *bright-line test* by creating two categories of cost data: (a) cost or pricing data and (b) information other

⁴⁸ Minutes of the October 5, 2011 CASB Meeting, accessed March 28, 2018, https://obamawhitehouse.archives.gov/sites/default/files/omb/procurement/casb/minutes/casb-70-meeting_minutes.pdf.

⁴⁹ 77 Fed. Reg. 69422 (Nov. 19, 2012).

⁵⁰ 45 Fed. Reg. 62011 (Sept. 18, 1980).

than cost or pricing data.⁵¹ Cost or pricing data meant certified cost or pricing data. All other cost or pricing data was information other than cost or pricing data.

The cost data issue was taken up by the GAO panel in 1999. The GAO panel recommended that CAS be exempt on FFP contracts for which the government did not obtain certified cost or pricing data at the time of award. The GAO panel reached this conclusion because when certified cost or pricing data were not obtained, the safeguards provided by CAS would, consequently, not be necessary.

The GAO panel's recommendation was enacted by Congress under the FY 2000 NDAA, as previously mentioned. Congress added the phrase "on the basis of adequate price competition" to the exemption—something the GAO panel had not recommended. The added phrase has the effect of being more limiting because "adequate price competition" is just one of the techniques set forth in the FAR to perform price analysis, as opposed to cost analysis. Certified cost or pricing data is not obtained when performing price analysis. The legislative history is unclear on why Congress included this phrase. The CASB implemented Congress's version in 2000.⁵²

A later advisory panel concluded in 2007 that, notwithstanding the so-called bright-line test, confusion remained about what cost or pricing data should be obtained by contracting officers to assess price reasonableness.⁵³ That panel observed instances in which cost or pricing data had not been obtained in situations when such data should have been obtained and placed blame on the bright-line test. In 2010, in response to that advisory panel's recommendations, the categories of cost data set forth in the FAR were reagggregated from two groupings into three groupings at FAR 2.101: (a) certified cost or pricing data, (b) cost or pricing data, and (c) data other than certified cost or pricing data.⁵⁴

The FAR's new three categories of cost data created an immediate conflict with CASB's exemption which had been based on the FAR's previous two categories of cost data. On October 5, 2011, CASB published a proposed rule to change the exemption wording to "submission of *certified* cost or pricing data" [emphasis added] in order to be compatible with the FAR's new definition.⁵⁵ A final rule was only recently issued by CASB.⁵⁶ Presently, the exemption at 48 CFR 9903.201-1(b)(15), in its limiting form, is as follows: "Firm-fixed-price contracts or subcontracts awarded on the basis of adequate price competition without submission of cost or pricing data."

Notwithstanding CASB's pending rule exempting FFP contracts awarded without submission of certified cost or pricing data, practical problems remain. First, there are fixed-price contract types, other than FFP, where price is not based on certified cost or pricing data. The universe of fixed-price type contracts is much broader than FFP contracts (see FAR 16.2). Second, the present wording does not recognize that adequate price competition is just one of the price analysis techniques described in

⁵¹ 60 Fed. Reg. 48208 (Sep 18, 1995).

⁵² 65 Fed. Reg. 5990 (Feb. 7, 2000).

⁵³ Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, January 2007*, accessed March 28, 2018, https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

⁵⁴ 75 Fed. Reg. 53135 (Aug. 30, 2010). FPDS does not presently capture the distinction between certified cost or pricing and noncertified cost or pricing data. FPDS only records whether cost or pricing data was obtained.

⁵⁵ 76 Fed. Reg. 61660 (Oct. 5, 2011).

⁵⁶ 83 Fed. Reg. 8634 (Feb. 28, 2018).

FAR 15.404-1 for evaluating pricing proposals. Price analysis does not rely on the submission of certified cost or pricing data. As it stands, the exemption at 48 CFR 9903.201-1(b)(15) runs counter to many of the procurement reforms installed over the years. To be fully useful, the exemption needs to apply to any fixed-price type contract whose price is based on price analysis without the submission of certified cost or pricing data. The three conditions of (a) fixed-price type contract, (b) price analysis, and (c) no certified cost or pricing data should be enough control the application of such an exemption.

CAS Notices and Clauses

When CASB published its CAS notice and CAS clause in 1972, it was reasonably clear that CASB intended the CAS notice be inserted in solicitations *likely* to result in a CAS-covered contract and that the CAS clause be inserted *only* in contracts that were actually CAS covered. Today, as made obvious from the FPDS data for the 5-year period FY 2012 through FY 2016, the CAS clause is being placed in contracts that are not likely to have been CAS covered. For example, Table 4-8 shows the number of contracts containing the CAS clause that were awarded under full and open competition or did not require the submission of cost or pricing data. Both conditions could be a reason for exempting the contract from CAS, although it is recognized that CAS might still apply in certain situations (e.g., CPFF contract awarded with full and open competition, hybrid contracts).

Table 4-8. Percentage of Contracts Awarded by Numbers of Actions Full and Open Competition or No Cost or Pricing Data Per FPDS FY 2012—FY 2016

Type	Definitive Contracts (Note 1)	Acquisitions Using IDCs (Note 2)
Full & Open Competition	51%	50%
No Cost or Pricing Data	43%	54%

Notes:

(1) Based on definitive contracts valued over \$750,000 at time of award.

(2) Based on acquisitions using IDCs valued over \$750,000 at time of award. IDCs aggregated by acquisitions rather than by contracts to avoid distortive effect of multiple contracts awarded under a single acquisition (see discussion on IDVs).

This condition was caused, in part, by the way the CAS clause was initially crafted by CASB. The CAS clause begins with the provision, “Unless the contract is exempt under 9903.201–1 [exemptions] and 9903.201–2 [modified CAS-coverage].”⁵⁷ This verbiage creates the impression that the CAS clause is self-deleting or, as some have observed, self-initiating. Such an approach may have been reasonable in 1972 given the low monetary threshold for a CAS-covered contract (then \$100,000) and the few exemptions available. Almost all prime contract awards of negotiated national defense contracts would have been CAS covered in 1972. This approach, though perhaps expedient, is not reasonable for today’s acquisition environment; it is poor contract construction for imposing a clause of such importance.

Another contributing factor is how the CAS notices and CAS clauses work under the FAR, which was created in 1984 during the period when CASB did not exist. In 1984, the Armed Services Procurement Regulation and Federal Procurement Regulation were combined into the FAR. In addition to

⁵⁷ Contract Clauses, 48 CFR 9903.201-4.

combining and reshaping procurement policies and practices, the FAR changed how the solicitation and contract award process functioned. The Uniform Contract Format for negotiated contracts at FAR 15.201-4 prescribes the structure for preparing solicitations and contracts. The structure of FAR Table 15-1 is shown in Table 4-9.

Table 4-9. FAR Table 15-1 Uniform Contract Format

Section	Title
Part I – The Schedule	
A	Solicitation/contract form
B	Supplies or services and prices/costs
C	Description/specifications/statements of work
D	Packaging and marking
E	Inspection and acceptance
F	Deliveries or performance
G	Contract administration data
H	Special contract requirements
Part II – Contract Clauses	
I	Contract Clauses
Part III – List of Documents, Exhibits, and Other Attachments	
J	List of Attachments
Part IV – Representations and Instructions	
K	Representations, certifications, and other statements of offerors or respondents
L	Instructions, conditions, and notices to offerors or respondents
M	Evaluation factors for award

The solicitation contains Parts I, II, III, and IV, which means the solicitation would normally contain the CAS clause, especially if the resulting contract were likely to be CAS-covered. The CAS clause itself, however, is incorporated by reference to the corresponding FAR provision, rather than being inserted in Section I by its full text. In preparing the resulting contract, contracting officers are instructed not to physically include Part IV but retain it in the contract file. A major part of the solicitation that determines CAS coverage, such as the instruction on submitting cost or pricing data or describing the extent of price competition, does not become part of the resulting contract. Stated another way, an important piece of information for activating the CAS clause’s self-deleting provision is unavailable to the contracting parties.

FAR 30.201-4(a) instructs contracting officers to insert the CAS clause in negotiated contracts *unless* the contract is exempted or the contract is subject to modified coverage. Logically, the CAS clause would be placed in any solicitation, as it is reasonable to put potential offerors on notice that the resulting contract might be CAS covered. More importantly, there is no instruction in the FAR advising contracting officers to remove the CAS clause from the Uniform Contract Format if it is not CAS

covered.⁵⁸ In practice, as FPDS clearly shows, contracting officers tend to leave the CAS clause in the resulting contract.

As a practical matter, there are three problems with including the CAS clause, by reference, in contracts that are not CAS covered:

- Contracting officers (i.e., procuring contracting officer) leave the determination of CAS coverage up to other parties, which typically involves a different contracting officer (i.e., administrative contracting officer). The CARs prepared by contracting officers will be of little help because they only record if the CAS clause is in the contract. In cases for which discerning CAS coverage becomes necessary, such as having to perform a cost impact analysis due to a change in cost accounting practice, this effort often occurs well after contract award, resulting in a complicated and laborious process. Because Part IV (Sections L and M) has been removed from the awarded contract, key information for establishing CAS coverage may not be readily available or available at all. The CAR, FPDS, and MOCAS will be of no help.
- Some companies, as previously stated, will not pursue a government business opportunity if the resulting contract might impose CAS. That the CAS clause is self-deleting provides these companies little assurance. Their risk is too great. An abundance of caution causes such companies to pass on solicitations that may result in the CAS clause being included in the resulting contract. The lack of CASB guidance on hybrid contracts and IDVs only exacerbates the problem. As the GAO panel observed, a company's decision to not be a part of the government supplier base is not in the government's best interests.
- As long as contracting officers continue to include the CAS clause in contracts that are otherwise exempt, the FPDS database (and MOCAS) will be of little use on CAS matters. The reality is that DoD (or perhaps any federal agency) cannot say what the population of CAS-covered contracts actually is.

It is simply good contracting practice to place in contracts only those terms and conditions that are actually imposed on a contractor. Conversely, it is poor practice to place clauses in contracts that may or may not be activated, unless the situation calls for that type of clause, like a clause contingent on possible future events (e.g., disputes clause). The CAS clause imposes substantive systemic, financial, and administrative obligations on the part of the contractor, especially for full CAS coverage. Such obligations need to be more clearly understood between the contracting parties rather than communicated through a clause that is incorporated by reference to the FAR provision that may or may not be activated. Contracting officers should make an affirmative written determination at the time of award that a contract will be CAS-covered and provide contractors means to confirm or question contracting officers' determinations.

⁵⁸ Interestingly, Administration of Cost Accounting Standards, FAR 52.230-6(l)(1), instructs contractors to not use self-deleting CAS clauses in subcontracts.

Conclusions

Nothing should be taken from the discussion of issues about CAS program requirements as meaning that CAS does not provide a worthwhile means of oversight for cost accounting on DoD contracts. Any negotiated contract that *establishes its price* based on an accumulated cost build-up methodology, projected or actual, should be subjected to CAS program requirements, unless otherwise exempted.

The individual issues discussed, taken as a whole, expose CAS program requirements that are out of touch with today's business practices in the public and private sectors. CAS program requirements should be reshaped for the future as noted below:

- Decouple the CAS-covered contract monetary threshold from the TINA monetary threshold and set the monetary threshold at \$25 million. The monetary threshold should be stated at the outset of 48 CFR Chapter 99 and, thereby, eliminate the need for the monetary exemption at 9903.201-1(b)(2), which is used for inflation adjustments.
- Eliminate the trigger contract exemption at 41 U.S.C. §1502(b)(1)(C)(iv) and 48 CFR 9903.201-1(b)(7), as it would no longer be necessary if the CAS-covered contract monetary threshold were raised to \$25 million.
- Raise the full CAS-coverage monetary threshold to \$100 million.
- Raise the disclosure statement monetary threshold to \$100 million. The condition for not requiring a disclosure statement from a segment that has CAS-covered contracts totaling less than \$10 million and representing less than 30 percent of segment sales should be eliminated, as it would be no longer necessary.
- Revise commercial item exemption at 48 CFR 9903.201-1(b)(6) as proposed by CASB in 2012.
- Expand the CAS exemption at 48 CFR 9903.201-1(b)(15) to include any *fixed-price type contract* whose price is based on *price analysis* without the submission of *certified* cost or pricing data.
- Add specific guidance for hybrid contracts to 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. Add a definition of *hybrid contract* to the CAS definitions at 48 CFR 9903.301.
- Require contracting officers, to the maximum extent practicable, to identify the portions of the contract that are not CAS-covered when a hybrid contract is contemplated.
- Add specific guidance for indefinite delivery vehicles to CAS program requirements at 48 CFR 9903.201-1 that would determine CAS applicability at the time of order placement. Evaluate each order for CAS applicability on its own. Add a definition of *indefinite delivery vehicle*, using the existing definition at FAR 4.601.
- Place the CAS clause by full text in contracts that at the time of award are CAS-covered pursuant to CFR Part 9903. Require contracting officers to make an affirmative written

determination at the time of award that a given contract, in whole or part, will be CAS covered. Provide contractors means to confirm or question contracting officers' determinations.

- Revise the CAS clause to (a) remove the self-deleting provision for CAS coverage, (b) accommodate provisions for hybrid contracts and indefinite delivery vehicles, and (c) state that, if subsequent to award of the CAS-covered contract, it is established that the contract, or portions thereof, should not have been determined to be CAS covered, the CAS clause will be deemed inapplicable to the contract, or portions thereof.

Implementation

Legislative Branch

- Modify 41 U.S.C. § 1502 to accomplish the following:
 - Decouple monetary threshold for a CAS-covered contract from the TINA monetary threshold and set at \$25 million.
 - Eliminate the trigger contract exemption.
 - Remove the CAS exemption for firm, fixed-price contracts or subcontracts awarded on the basis of adequate price competition without submission of certified cost or pricing data as a legislative exemption (it duplicates what is already stated at 48 CFR 9903.201-1(b)(15)).

Executive Branch

- CASB should revise 48 CFR Chapter 99 to accomplish the following:
 - Raise CAS-covered contract threshold to \$25 million;
 - Eliminate trigger contract exemption;
 - Raise full CAS-coverage threshold to \$100 million;
 - Raise disclosure statement threshold to \$100 million and eliminate segment exemption;
 - Revise commercial item exemption;
 - Revise certified cost or pricing data exemption;
 - Provide guidance for hybrid contracts;
 - Provide guidance for indefinite delivery vehicles;
 - Prohibit placing CAS clause in contracts that are not CAS-covered; and
 - Remove self-deleting provision of the CAS clause.
- The FAR Council should harmonize all relevant sections of the FAR affected by CASB revisions to 48 CFR Chapter 99.

Implications for Other Agencies

- CAS applies to all federal agencies, and they would be affected by all of the recommended revisions to 41 U.S.C. § 1502 and 48 CFR Chapter 99.