The Federal Acquisition Streamlining Act of 1994 (FASA), signed into law by then President Bill Clinton, created opportunities for the Federal government to enter into multiple award ID/IQ contracts (called in the legislation “task or delivery order contracts”. Almost immediately, questions arose as to how such contracts should be valued for purposes of compliance with Truth-in-Negotiation Act (TINA) and Cost Accounting Standards (CAS). To our knowledge, while the contract valuation issue may have been addressed by the FAR Councils in some *dicta-like* rule-making comments, no regulatory policy-making entity has squarely addressed the issue in the form of a regulation, and thus it has never been
officially
answered—at least, to our satisfaction. Moreover, as we shall explore, to the limited extent the FAR Councils did address the issue with respect to TINA and CAS applicability, they reached *opposite conclusions*
. In other words, the FAR Councils advocated a position for TINA contract valuation purposes that was diametrically opposed to their position for CAS contract valuation purposes. Such a situation, of course, is (logically speaking) utter rubbish—and indicates the superficiality of the analyses behind the Councils’ positions.

Why is this even an issue?

TINA applies to negotiated contract actions valued in excess of a certain value (currently $700,000), unless an exemption applies. If your contract action is valued at less than the TINA threshold, then that action is not subject to TINA and you are not submitting “certified cost or pricing data” and you are not at risk of an allegation of “defective pricing”. Similarly, CAS applies to negotiated contracts valued at $700,000, unless an exemption applies. (There used to be ten

CAS exemptions; **now there are nine** .) If your contract action is valued at less than $700,000, then it is exempt from CAS and you are not at risk of a CAS noncompliance with respect to that contract action. Moreover, in the world of CAS, there is an important threshold at $50 Million in contract value (whether from a single contract award or aggregated from multiple awards); if you are below that number then you are free from some burdensome CAS requirements (such as submitting and maintaining a CASB Form DS-1 “Disclosure Statement”); but if you are above that number then you’re in the deep end of the pool. So, you see, it’s quite important to know the correct value of your contract in order to determine compliance requirements and to identify risks associated with non-compliance.

Accurate contract valuation, at the time of award, is essentially impossible for ID/IQ contract types.

The very nature of the ID/IQ type means that neither the Government nor the contractor knows the final contract value until after the performance period (which is different than the ordering period) expires. Each ID/IQ contract award has a minimum order value as well as a maximum order value, but within those parameters the final contract value is unknowable at the outset. The contractor has a best-case and worst-case assessment of what it *thinks* the aggregate order value will be, and the Government has an independent estimate of what it *thinks* the aggregate order value will be—but nobody knows until all the orders have been placed—and performed. So, since nobody knows, how do such contracts get valued for purposes of TINA and/or CAS compliance?

Dealing with TINA and CAS aren’t the only issues presented by ID/IQ contract types. “Don Acquisition” over at WIFCON noted that the Limitation on Subcontracting clause (52.219-14) is subject to the same lack of clarity, with GAO opining (in 1997) that the clause was applicable at the “whole contract” level but not at the task/delivery order level—but never discussing why that

would be so. Further, “Don Acquisition” also noted that there is potential confusion with other clauses. He **wrote** —

What about the clause at FAR 52.232-20, Limitation of Cost? Do the notification requirements apply at 75% of the estimated cost of the task or delivery order, or at 75% of the estimated cost of the indefinite delivery contract? What about the clause at FAR 52.216-8, Fixed Fee? Does the $100,000 fee withholding limitation apply to each task or delivery order, or to the whole IDIQ contract? The questions are endless. Contracting officers have answers to these questions, but they are not all the same. Without a clear set of rules, it’s hard to argue that anybody is wrong.

“Don Acquisition” also discussed the disparate treatment to TINA and CAS given by the FAR Councils in their promulgating comments associated with recent rulemaking. According to “Don Acquisition,” in the comments to FAR Case 2008-012, the Councils asserted—

In the case of IDIQ contracts, it is commonly understood that it is the estimated total value of orders for the specified period at the time of contract award, as well as the individual value of any subsequent discrete orders, to which the TINA thresholds apply.

“Don Acquisition” agreed with that position, but disputed that it was “commonly understood.” He wrote—

‘It is commonly understood…’ is the equivalent to saying ‘Well, everybody knows…’ which is not an answer that I would accept from a student nor is it one that the public should be accepting from the FAR Councils. Further, the FAR Councils' use of ‘commonly understood’ raises the question: Commonly understood by whom? Based on my experience, ‘commonly debated’ would be a more apt description. …

If it's ‘commonly understood’ that TINA applies to task and delivery orders, why isn't there a standard FAR clause for use in task and delivery order contracts that compels the submission of cost or pricing with a task or delivery order proposal when applicable? There's a standard FAR provision at FAR 52.215-20, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data (Oct 1997), that can be used to compel offerors to submit cost or pricing data when submitting offers for a basic IDIQ contract. There's also a standard FAR clause at FAR 52.215-21, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data—Modifications (Oct 1997), that compels submission of cost or pricing data when pricing contract modifications (if applicable). Where is ‘Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data—Task and Delivery Orders’? Why not have offerors agree to submit cost or pricing data (if applicable) with subsequent task and delivery order proposals?

Delving deeper, “Don Acquisition” noted that the FAR Councils reached the *exact opposite conclusion* with respect to CAS applicability. He found the FAR Councils’ logic behind that position to be (in our words) insupportable. He wrote—

[The FAR Councils wrote that] ‘As for the issue of CAS-covered versus non-CAS-covered tasks, a contract cannot contain both CAS-covered and non-CAS-covered tasks. In order for

CAS-coverage to differ between tasks, each task would have to be a separate contract. In such cases, the definition of affected CAS-covered contracts would exclude the non-CAS covered tasks from the computation of the cost-impact.' …

Thus, a determination of CAS applicability is made only when placing the basic IDIQ contract. If an IDIQ contract is subject to CAS, all orders under the contract are subject to CAS. If an IDIQ contract is not subject to CAS, none of the orders under the contract are subject to CAS.

So, according to the FAR Councils, a contracting officer must determine applicability of TINA when awarding a basic IDIQ contract and issuing any subsequent orders, but need only determine the applicability of CAS once—when awarding a basic IDIQ contract.

This raises another yet another question—how is a CO supposed to know this? …

By asserting that CAS determinations are not made at the task or delivery order level, the FAR Councils must be using a definition of 'contract' that is different than what appears at FAR 2.101. What definition are they using and why does that definition exclude task and delivery orders? I don't get it.

Of course "Don Acquisition" is absolutely spot-on when he calls out the FAR Councils for their specious logic. In order to value a contract, one first needs to define what a contract is. And the FAR does that—in the Definitions Subsection at 2.101. That's the definition that must be used by Administrative Contracting Officers, auditors, lawyers, and even contractors. So when "Don Acquisition" says the FAR Councils are ignoring the FAR's own definition of "contract" when they publish their comments, that's a pretty powerful indictment.

In fact, it's a violation of the FAR.

See FAR 1.108(a). ("*Words and terms*. Definitions in Part 2 apply to the entire regulation unless specifically defined in another part, subpart, section, provision, or clause. Words or terms defined in a specific part, subpart, section, provision, or clause have that meaning when used in that part, subpart, section, provision, or clause. Undefined words retain their common dictionary meaning.")

So when the "Don Acquisition" asserts that the FAR Councils are ignoring the definition of "contract" found at FAR 2.101 in order to reach their conclusions regarding the applicability of CAS to ID/IQ type contracts, he's really saying that they are violating their own regulatory conventions in order to do so.

To which we can only say, "Nice." (Note use of sarcastic tone of voice.)

Subsequently, "Don Acquisition" noted that the DAR Council, in its promulgating comments with respect to DFARS Case 2010-D004, "unequivocally stated that the definition of "contract" included task and delivery orders. The DAR Council opined—

In accordance with FAR 2.101, a contract includes all types of commitments that obligate the Government to an expenditure of appropriated funds. Task orders and delivery orders obligate funding, and if they utilize funds appropriated or otherwise made available by the DoD Appropriations Act for Fiscal Year 2010 that are in excess of $1 million, the section 8116 restriction would apply.

So now we have the FAR Councils asserting that the term “contract” definitely encompasses a task or delivery order—but only with respect to evaluating whether a TINA exemption is applicable. We have the DAR Council clearly stating that the term “contract” definitely encompasses a task or delivery order with respect to mandatory arbitration. But so far nobody has taken the next logical step—which would be to find that the term “contract” encompasses a task or delivery order for purposes of applying CAS.

For its part, DCAA has asserted the CAS can only be determined at the contract level, and an ID/IQ contract value is equal to the ID/IQ ceiling amount, even though a contractor may never see that level of task or delivery order awards. In support of the agency’s position, DCAA auditors normally point to FAR 1.108(c), which states—

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

When the above FAR convention is applied to priced options, we concur. When it is applied to unpriced—and, indeed, *never proposed and never awarded*—task or delivery orders, then we must respectfully disagree.

First, and as previously noted, “contract value” must apply to a “contract” and that term is already defined in FAR 2.101. Moreover, in analogous contexts the FAR Councils and the DAR Council have clearly agreed that the term “contract” clearly encompasses a task or delivery order.

Second, the term “ceiling price” may not be the same as an ID/IQ contract’s maximum order value. In fact, it is much more likely to apply to a fixed-price incentive (firm target) contract rather than a multiple-award task/delivery order contract.

Third, we need to remember that statute reserved to the CAS Board the exclusive right to interpret CAS. While it is true that the rule-makers incorporated the CAS regulations and Standards into FAR Part 99 (unwisely, in our view), that action did not—*and could not*—grant authority to the FAR Councils to interpret CAS regulations.

Only the CAS Board can define “contract value” with respect to CAS—and so far they have declined to do so.

So to point at a FAR convention and use that to support a position regarding CAS coverage and applicability is, in our view, somewhat like skating on thin ice. Someday some Judge is going to run through the logic we just ran through, and DCAA's position that felt so solid is going to melt like ice on a Canadian lake in the summer sun.

In fact, one Judge just issued a warning that such a day may be coming sooner that DCAA and the FAR Councils may think, incidentally answering one of "Don Acquisition's" rhetorical questions posed above.

Armed Services Board of Appeal (ASBCA) Administrative Judge Peacock, issuing an opinion for the Court on cross-motions for summary judgment in the matter of WestWind Technologies, Inc. (ASBCA No. 57436, July 21, 2011), addressed the matter of how fee retainage should work on Cost-Plus Fixed-Fee (CPFF) task orders under an ID/IQ type contract.

According to the opinion, between 2001 and 2004, WestWind performed 31 individual task orders under its contract with the U.S. Army (Rock Island Contracting Center). "Each task order was priced on a cost-plus-fixed-fee basis and paid with funds from one of two individual paying activity codes …" WestWind received a second ID/IQ contract from the same contracting authority, under which it performed 87 individual task orders during the period 2005 through 2007.

In accordance with the terms of paragraph (b) of each of the base contracts' Fixed Fee clause, when making payment to the contractor, the contracting officer withheld 15% of the negotiated fixed fee (up to $100,000) in each task order issued against both base contracts. … By letter dated 7 July 2010, WestWind submitted a certified claim, in the amount of $367,273.14, in which the contractor alleged that the government was withholding in excess of the amount authorized under FAR 52.216-8(b).

WestWind told its Contracting Officer—

FAR 52.216-8(b), which you cited in the referenced correspondence, allows the government to withhold **the lesser of** 15% of the fixed fee portion of the contract **or** $100,000. In this case, the government has withheld a portion of the fixed-free [sic] under the two contracts at issue, which exceeds $100,000 as to each contract. Under the clear language of FAR 52.216-8(b), the maximum amount of withholding as to each contract is $100,000. Furthermore, WTI is entitled to 75% of the $100,000 withheld on each contract, based upon its satisfaction of the requirements for same found in FAR 52-216-8(b). You acknowledged WTI's entitlement to 75% of the fee withheld in your letters referenced above. Therefore, the total holdback on each contract should, at this point, be no more than $25,000 per contract. Based on the clear language of the FAR, the government is improperly withholding at least $367,273.14 of fixed fee, which WTI should be allowed to invoice immediately.

Judge Peacock wrote that the clause in question applied to individual task orders and not to the contract as a whole. He wrote—

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

Paragraph (a) says that the government shall pay, for performance of ‘this contract,’ the ‘fixed fee specified in the Schedule.’ The contract schedule does not specify any fixed fee, so the reference ‘specified in the Schedule’ must be to the fixed fee specified in the schedule of each of the individual orders.

Similarly, the first clause of the first sentence of paragraph (b) refers to payment of the fixed fee being made as ‘specified in the Schedule.’ Again, the reference must be to the fixed fee specified in the schedule of each of the individual orders. The second clause of that sentence refers in tum to ‘payment of 85 percent of the fixed fee.’ The words ''the fixed fee’ relate back to the fixed fee described in the first clause, namely the fixed fee in each of the individual orders. That is the fee as to which payment of 85 percent must be made. The second sentence then says: ‘This reserve shall not exceed 15 percent of the total fixed fee or $100,000, whichever is less.’ Considering that 15 percent represents the remainder after 85 percent is paid, ‘fixed fee’ again refers to the fixed fee in each of the individual orders. The word ''total"', in context, refers to the total of the fixed fee due under each individual order. The third sentence states ‘The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of the certified final indirect cost rate proposal covering the year of physical completion of this contract.. ..’ This sentence suggests that there may be multiple withholds under the contract, consistent with the interpretation that the government may withhold 15 percent or $100,000, whichever is less, under each individual order. The sentence then states explicitly, in contrast to the prior two sentences, that 75 percent of all of the withholds under ''this contract’ shall be released. We conclude, therefore that the proper interpretation of the Fixed Fee clause is that the government may withhold 15 percent of the fixed fee or $100,000, whichever is less, on each individual order until such time as the contracting officer receives the certified final indirect cost rate proposal, as more particularly specified in the clause, at which time it must release 75 percent of all fee withholds under the contract.

While not a happy outcome for WestWind Technologies, the ASBCA decision does provide an answer to “Don Acquisition’s” question and clarifies for other Government contractors how the fee retainage works on CPFF task or delivery orders under an ID/IQ type contract. Moreover—and more importantly from our point of view—it is yet another nail in the coffin of the FAR Council’s dubious interpretation of how contract value is to be determined on an ID/IQ type contract for purposes of applying CAS requirements.

It is time for the CAS Board to address this issue. In the meantime, it is past time for the FAR Councils to admit their mistakes in logic and admit that CAS should be applied to individual task or delivery orders within an ID/IQ type contract. If those bodies fail to act, then the Courts will have to do it for them, sooner or later.

