At the end of June, 2018, the Section 809 Panel issued another report, numbered Volume 2 of 3. You remember the Section 809 Panel, right? We've written about it several times before, including **this article** discussing the Volume 1 Report from January, 2018. The Section 809 Panel is "charged with making recommendations that will shape DoD's acquisition system into one that is bold, simple, and effective." To this end, the Panel is peopled with individuals who have long and distinguished pedigrees in government contracting—from both within government and without.

Or, as somebody (not us) has pointedly noted, the same people who didn't solve these challenges at the time they arose are now here, long afterwards, to suggest some fixes.

Anyway, we had some really good things to say about the Volume 1 Report's recommendations. We objected to nothing and embraced everything. As we've noted, some (but not all) of those recommendations made their way into the 2019 National Defense Authorization Act (NDAA). It's obvious that somebody read the Volume 1 report and liked some (but not all) of what they read.

With respect to the Volume 2 report, we have fewer good things to say. That's not because we don't like what we read, but instead because those things weren't written in the same way. Volume 1 was marked by really concrete, actionable, recommendations that were supported by lots of detail. In contrast, Volume 2 seems to be marked by a higher-level discussion and more summary recommendations. That's not to say there is a lack of meaty, important, recommendations in Volume 2; but they are harder to find (and presumably take action upon) than they were in Volume 1.

We are not going to recap the entire Volume 2 report. As always, we encourage you to read it for yourselves. Here's **a link** for you to follow. Rather than discuss the entire report, we are instead going to focus on Section 4, Cost Accounting Standards. Not only is it the Section that interests us the most; we also think it's an outstanding exemplar of what's good (and not so good) about the format and content of Volume 2.

Volume 2, Section 4, Cost Accounting Standards (CAS) starts out by establishing a foundational assertion, which becomes the theme of the entire Section. That assertion is "*Reinvigorating the Cost Accounting Standards Board and updating Cost Accounting Standards would ease*

compliance burden, yet retain appropriate oversight for cost accounting.
" (Italics in original.) Following the foundational assertion, two recommendations are provided. Note that these recommendations are numbers 29 and 30 (counting serially from the recommendations in Volume 1 and the prior three Sections of Volume 2). The first CAS recommendation is:
Revise 41 U.S.C. §§ 1501-1506 to designate the Cost Accounting Standards Board as an independent federal organization within the executive branch.
The second CAS recommendation is:
Reshape CAS program requirements to function better in a changed acquisition environment.

See what we mean about the nature of the Volume 2 recommendations?

With respect to the first recommendation (technically, Recommendation #29), the report states that the problem is that the Office of Federal Procurement Policy (OFPP) hasn't been doing its job with respect to operating the CAS Board. (That is a lament often made on this website.) The report states—

The CASB's current configuration within OFPP is ineffective at providing oversight for application of CAS to federal government contracts. CASB has only rarely met in recent years, and member positions often go unfilled for long periods. Meanwhile, changes to government contracting require ongoing updates to the standards and resolution of questions about CAS applicability. Because CASB has not been responsive to these changes, contractors are overly burdened by the need for added layers of compliance to many rules that have not kept pace with new business models. CASB needs to be reinvigorated as an independent organization and removed from OFPP. …

The most pressing problem with the current CASB formulation is the administration of the board at OFPP, partly due to a lack of leadership and subject matter expertise. The OFPP administrator position changes frequently and is often vacant, leaving the role in the hands of an acting administrator, most often a career civil servant versed in procurement policy, but without the requisite authority or experience in accounting and contract management to push forward needed CAS reforms. … As a practical matter, when there is no Senate-confirmed administrator, nothing of substance happens at the CASB. Even when there is someone in the job, most OFPP administrators are not accountants, have not previously shown an interest in the issues within the board's jurisdiction, and are not experientially well-qualified to lead the board. Based on CASB's consistent lack of activity, OFPP administrators clearly have not prioritized CAS.

Again, how can anybody who follows the CAS Board's (lack of) activity and the resulting litigation before the ASBCA and CoFC argue with the foregoing? *It's all absolutely true.* Making the OFPP Administrator the CAS Board Chair has been a disaster and has caused an untold amount of wasted resources as Contracting Officers and contractors both try to apply outdated CAS rules to an evolving acquisition environment.
But so what?
Where is the actionable recommendation?

Oh, there it is, buried within the word-wall of page upon page of discussion. While traversing the discussion, one finds a more actionable recommendation, as if coming upon a pirate's treasure:

… the Section 809 Panel recommends that any statutory enactment enabling the physical move of CASB out of OFPP also designate the OMB director as the principal officer over CASB with the authority to delegate CASB members to act as officers of the United States. OFPP should remain responsible for the mechanics of publishing the regulations in the Code of Federal Regulations, where they have been located since 1993, but it will have no responsibility for determining the substance of the CAS requirements

Contining on ... finally--after nearly seven printed pages of discussions--one finds specific recommendations. Only they are not called recommendations. They are called "conclusions" because … *reasons*. Apparently, this is all an academic exercise. Unlike the Volume 1 Report, which had sub-recommendations under many of the recommendations, Volume 2 has taken a different tack—and, in our opinion, that decision is to the detriment of the Report's potential impact.

The "conclusions" are:

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CASB should be physically located in GSA, which will provide office space and facilities, including clerical support. GSA will have no responsibility for CASB's substantive work.

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CASB should have a budget sufficient to support a full-time, permanent staff of at least three people.

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CASB should be part of the Executive Branch, but completely independent of any department of any other agency.

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The existing requirements for CASB to meet at least quarterly and to publish minutes of its meetings should be retained.

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Section 820 of the FY 2017 NDAA creating a Defense CASB should be repealed.

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CASB should have five members….

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Authority to appoint the members of the CAS Board should be vested in the Director of OMB.

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There should be rules for member appointment, including the chair, that include limits on removal; appointment terms consistent with the length of experience necessary to govern, administer and reform CAS; and that provide for independence in the decisional and regulation process free from supervision by OMB.

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The statute creating CASB should also direct that the board's standards and regulations will continue to be published by OFPP, and/or other relevant regulatory bodies, in Part 99 of 48 CFR.

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Disestablish the Cost Accounting Standards Board and remove its statute from chapter 15 of Title 41 ('Division B, Office of Federal Procurement Policy'). Create a new independent board codified in Title 31 ('Financial Management').

Okay. By our count that's 10 sub-recommendations. But you have to get through *a lot* of words to get to them, and when you get to them you might miss them, because they aren't even called "recommendations". Note: we are not saying we disagree with those recommendations; most of them are quite reasonable and would go a long way to reduce CAS-induced acquisition confusion. However, given the potential streamlining implications of their enactment, we have to wonder why they seem to be buried. The word "
hidden
" comes to mind. Just like a pirate's treasure.

So much for Recommendation #29.

With respect to Recommendation #30 the problem is stated as "… 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." Again, how can anybody who has to deal with CAS argue with that statement?

Despite what seems to us to be a certain amount of "obviousness" of the problem statement, the report goes on for more than 20 pages of history, discussion, tables and footnotes—which no doubt provides a solid foundation for the recommendations to come, if only readers have the patience to slog through it all. Seriously, some if it seems like the kind of padding one would find in an undergraduate term paper. Did readers really need Table 4-9, which provides an illustration of the Uniform Contract Format? Are people unaware of it? Seems to us that, if such a reiteration was deemed necessary, then a simple FAR reference would have sufficed.

After skimming through 20 pages or so of historical recap interspersed with various issues

caused by the *Ancien Régime* of CAS, one finally gets to the recommendations. Only (as before) they are not called “recommendations” because they are called “conclusions”. *Okay.*
There are eleven recommendations. They are as follows:

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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.

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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.

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Raise the full CAS-coverage monetary threshold to $100 million.

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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.

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Revise commercial item exemption at 48 CFR 9903.201-1(b)(6) as proposed by CASB in 2012.

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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.

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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.

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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.

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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.

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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.

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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.

As before, we think those are all good, important, recommendations that, if implemented, would go a long way toward solving a lot of CAS-caused problems and disputes. There are still any

number of CAS-related issues that need to be addressed, including (but not limited to) the definition of “increased cost in the aggregate” and appropriate treatment of concurrent changes in cost accounting practice; but the foregoing recommendations represent a good start in the right direction.

We only hope that somebody finds them within the report, and acts on them.