



AIA Cost Principles Committee

Expressly Unallowable Costs:
Raytheon Co. v. Sec. Def.,
940 F.3d 1310 (Fed. Cir., 2019)

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Expressly Unallowable Costs – *Raytheon*

Unallowable v. Expressly Unallowable Costs:

- Some costs are “unallowable”, others are “expressly unallowable”
- An “expressly unallowable” costs is a:
 - “particular item or type of cost which, under the express provisions of an applicable law, regulation, or contract, is specifically named and stated to be unallowable.”*
- Expressly unallowable costs are subject to penalty

Expressly Unallowable Costs – *Raytheon*

FAR 31.205-22:

- designates as unallowable costs “associated with” various types of lobbying any political activities.
- Prior ASBCA precedent:
 - compensation and bonus and incentive compensation costs “associated with” lobbying activities are not expressly unallowable
 - compensation and BAIC are not “specifically named and stated” as unallowable under FAR 31.205-22
 - *Raytheon Co.*, ASBCA No. 57576 et al., 15-1 BCA ¶ 36,043

Expressly Unallowable Costs – *Raytheon*

Federal Circuit holds:

- salary costs associated with lobbying are expressly unallowable under FAR 31.205-22 under the “associated with” language.
- even though salary is not “specifically named and stated” in FAR 31.205-22, the Circuit reasoned:

“Costs unambiguously falling within a generic definition of a ‘type’ of unallowable cost are also ‘expressly unallowable.’ Here, salaries of in-house lobbyists are a prototypical lobbying expense.”

Expressly Unallowable Costs – *Raytheon*

- Elements influencing Court's opinion:
 - Inability to reconcile any other type of cost that the cost principle would be addressing (i.e., Salary)
 - Examination of administrative history. The court looked at the prior DAR language, which had specifically included salary within the prohibition, but was removed upon the promulgation of the FAR
- Misunderstanding regarding Raytheon's position about the removal of the word "salary" from the cost principle
 - Raytheon's position is that removal of the word salary shifted the status of the cost from expressly unallowable to merely unallowable.

Expressly Unallowable Costs – *Raytheon*

Implications:

- What other costs are “associated with” lobbying and political activity?
- How might this impact other Cost Principles and CAS provisions that use “associated with” and similar language?
 - What other costs “unambiguously” fall within a generic definition of a type of unallowable costs, or are prototypical expenses of an unallowable costs?
- Expect heightened audit scrutiny
- Potential CAS 405 considerations