

Arnold & Porter

AIA Cost Principles Committee Legal Update

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CAS, TINA and Cost Allowability

Northrop Grumman Corp. ASBCA No. 61775 (Oct. 7, 2020)

- Northrop froze a defined benefit pension plan, triggering a CAS 413 requirement to calculate the difference between the plan's assets and liabilities.
 - The present value of liabilities exceeded assets by approximately \$98 million.
 - Based on overhead costs allocated to the government, Northrop determined that the government owed \$74 million and submitted a claim for this amount.
- The government objected to Northrop's interpretation of CAS 413-50(c)(12), which it argued did not require it to make up the difference in the plan's future liabilities.
 - The ASBCA disagreed, finding that the goal of CAS 413-50(c)(12) is to ensure the pension plan is fully funded.
- The government also objected to Northrop's use of updated mortality tables to calculate the plan's shortfall.
 - Citing the Prefatory Comments to the 1995 CAS, the government argued that Northrop was required to use the tables it had used in setting up the plan.
 - The ASBCA disagreed, finding that this rule was not intended to “prevent contractors from using assumptions that have been revised based on a persuasive actuarial study,” such as updated mortality tables.
- The ASBCA also dismissed the government's objection to Northrop's method of accounting for tax liability on the plan's income: it had discounted them by 35% rather than accounting for tax paid.
 - While the Board agreed the CAS require taxes on income from a pension plan to be treated as an administrative expense, the Board found the CAS violation resulted in no material cost difference.

DynCorp Int'l LLC, ASBCA No. 61950 (Sept. 29, 2020)

- DCMA determined that DynCorp improperly recovered costs of severance payments made to its former CEO that exceeded the FAR's cap on the recovery of compensation.
- DynCorp argued that severance payments do not meet the definition of compensation under FAR 31.205-6(p) and are thus not subject to the compensation cap.
- ASBCA found that severance pay is not compensation, but also that costs DynCorp incurred in making severance payments were not reasonable.
 - Severance payments were two times the CEO's salary, which itself exceeded the statutory cap on compensation.
 - "Bottom line: unallowable salary cost used in a severance pay calculation results in unallowable severance costs – unallowable in, unallowable out."

Kellogg Brown & Root Servs., Inc. v. Sec'y of the Army, 973 F.3d 1366 (Fed. Cir. 2020)

- KBR held contract for delivery of housing trailers to military camps in Iraq in 2003.
 - KBR subcontracted (FFP) with a Kuwaiti firm for manufacture and delivery of the trailers.
 - KBR alleged that the government breached the contract by failing to provide force protection for the convoys delivering the trailers in Iraq.
 - Resulted in idle trucks/drivers, and additional loading/unloading/storage of the trailers at Iraqi border.
 - KBR executed equitable adjustments with the subcontractor for these costs, then filed claim.
 - The COFD allowed only the costs for storing the trailers (\$3.7M of the claimed \$51.3M).
- ASBCA denied KBR's appeal, finding that KBR had not shown that its settlement costs with the subcontractor were reasonable.
 - The equitable adjustment was based on the sub's estimated, rather than actual costs.
 - ASBCA found the damages models "unrealistic," "inconsistent," "flaw[ed]," "unreasonable" and assumed a "perfect world."
- Fed. Cir. agreed with ASBCA that KBR's estimates were flawed & unsupported.
 - However, Fed. Cir. rejected the government's position that KBR was required to submit the actual costs incurred by its subcontractor; KBR need only show that costs were reasonable.
 - Failure to collect actual costs "bears on the reasonableness," but is not a separate requirement.

Alloy Surfaces Co., Inc., ASBCA No. 59625, 20-1 BCA ¶ 37574

- Alloy held an IDIQ contract with the U.S. Army for decoy flares.
- In Apr. 2006, the Army requested that Alloy provide a price proposal for tripling its usual monthly output of decoy flares.
 - To support its proposed costs, Alloy provided actual material and labor usage rates from delivery orders it completed in Aug. 2005 and Feb. 2006.
 - In negotiating the price, the Army used a weighted average of these two delivery orders.
- DCAA conducted a post-award defective pricing audit in Sept. 2006, using a weighted average of five delivery orders to recommend a \$13 million price adjustment.
- ASBCA decided that the job cost reports were not “cost and pricing” data as that term is defined in TINA.
 - The defective pricing clause was not a vehicle for repricing a contract deemed to be unreasonably priced.
 - The Army also failed to demonstrate that having more accurate data would have changed its decision to use a weighted average of the Aug. 2005 and Feb. 2006 orders.

SRA Int'l, Inc. v. Dept. of State, CBCA Nos. 6563, 6564, 20-1 BCA ¶ 37543

- SRA held a task order and a contract, both subject to incurred costs audits under FAR 52.215-2 and 52.216-7.
- In a 2018 disclaimer opinion on SRA's FY 2012-15 incurred cost proposals, DCAA questioned \$29 million.
 - DCAA stated that SRA failed to timely provide supporting documentation to substantiate claimed costs for subcontractors and ODCs were reasonable, allocable, and allowable.
 - During negotiations, SRA attempted to provide supporting documentation it did not submit to DCAA.
- The COFDs asserted claims against SRA for recovery of the \$29 million in disallowed costs & stated that SRA's failure to produce documentation during the audit violated FAR retention requirements.
 - DOS designated the COFDs as its complaints before the CBCA and attached the DCAA audit.
- SRA filed a motion to dismiss, alleging the COFDs (1) failed to provide adequate notice as to the basis and amounts of DOS's claims, and (2) failed to state a claim upon which the Board could grant relief.
 - CBCA denied both bases for dismissal, finding the audit report provided an explanation of DOS's claims and that DOS had asserted a plausible claim that SRA failed to support its incurred costs.