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26th ANNUAL GOVERNMENT CONTRACTING CONFERENCE

Charting Success Through
Evolving Challenges



Closing Plenary Session: GovCon Legal Update

November 4, 2021

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GOVERNMENT CONTRACTING CONFERENCE

Agenda

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The ASBCA ruled on a allowability of:

- Government Relations Costs
- Corporation Development Costs
- Engineering Labor Overhead Patent Costs
- Outside Patent Legal Costs
- Airfare Costs
- Recruiting Travel Costs
- Bonus, Incentive Compensation, and Restricted Stock Costs
- “Souvenir” or “Reminder Items” Costs

On June 8, 2021, the ASBCA denied the Government's request for reconsideration and request for referral to the Senior Decision Group, holding that DCMA was essentially attempting to re-try the appeals

Raytheon – Government Relations Cost

- Raytheon in-house lobbyists would record their costs and time; but, would not record time outside of regular business hours.
- Raytheon removed unallowable business expenses that were recorded during normal business hours.
- DCMA questioned 100% of the costs – Felt that hours worked outside of normal business hours and non-lobbyist administrative staff costs led to an incorrect calculation.
- DCMA assessed a penalty for including expressly unallowable lobbying costs.
- The Board held that the Government failed to meet its burden of proof to demonstrate the costs were expressly unallowable.
 - + DCAA stated that lobbyists kept their time accurately
 - + Raytheon “strategy” adopted before audit

Polling Question #1

Does your company incur government relations cost with internal employees?

- Yes
- No
- n/a



Raytheon - Corporation Development Costs

- Raytheon had headquarters employees worked on strategic business activities such as mergers, acquisitions, and divestitures.
 - + Before decision to make an offer or go to market - employees would record their time as allowable under FAR 31.205-27
 - + After decision to make an offer or go to market - employees would record their time as unallowable under FAR 31.205-12
- DCMA's position was that all costs were unallowable organization costs.
- DCMA further objected to the employees' timekeeping practices, arguing that they were unreliable and insufficiently documented.
- Board found that Raytheon's practices were a reasonable interpretation of the regulations and the ASBCA's precedent in Dynalectron and Raytheon I.
- The Board also held that DCMA had failed to demonstrate that the employees' timekeeping practices were deficient.

Raytheon - Engineering Labor Overhead Patent Costs

- Raytheon had a process for reviewing potentially patentable inventions and determining whether to pursue a patent application or not.
 - + Included the costs for this administrative process in its allowable costs up to the point Raytheon decided to pursue a patent.
 - + After that point, Raytheon would designate the costs as unallowable.
- DCMA's view was that all costs relating to Raytheon's patent assessment process were unallowable under FAR 31.205-30, regardless if the costs were required by the contract with the Government.
- The Board held that both interpretations of FAR 31.205-30 were unreasonable and came to the following conclusions:
 - + Any costs related to a patent are patent costs under FAR 31.205-30.
 - + Patent costs required by the contract are allowable.
 - + All other patent costs are unallowable.
 - + If no patent ever results from an administrative review, the costs are allowable.

Raytheon- Outside Patent Legal Costs

- Raytheon used outside counsel to prepare and submit Raytheon's patent applications. Raytheon pooled these costs with the rest of its outside counsel legal costs and treated them as indirect costs.
 - + If the outside patent legal costs were incurred for a FAR 31.205-30 "subject invention" as part of a contract, Raytheon would include the costs with its allowable costs.
 - + If not, then Raytheon would include the costs with its unallowable costs.
- DCMA objected to this practice and argued that Raytheon should have charged the costs as direct costs to the particular contract.
- The Board disagreed with DCMA and upheld Raytheon's practices of treating the costs as allowable and allocable indirect costs.

Raytheon Airfare Costs

- There were two issues related to airfare:
 - + FAR 31.205-46 in effect during contract performance allowed airfare only to the extent of normal coach prices available to the general public.
 - FAR 31.205-46 amended after award of contract allowed airfare at the lowest rate available to the contractor
 - Despite the amendment taking force after contract award, DCMA disallowed costs in excess of the lower rate available to Raytheon.
 - + FAR 31.205-46 allowed for higher airfare rates if the lowest airfare rule would result in an unnecessary circuitous route, increased costs, or other difficulties.
 - Any request for a higher airfare would have to be supported by documentation.
 - Raytheon had a policy for these situations and DCMA disputed that the criteria were unreasonable.
- The Board held that the version of FAR 31.205-46 only disallowed costs in excess of what was available to the general public and that Raytheon's increased airfare policy was reasonable to accommodate the "physical or medical needs" of the traveler.

Polling Question #2

Has your company had airfare costs questioned by auditors?

- Yes
- No
- n/a



Raytheon - Recruiting Travel Costs

- Raytheon reimbursed several prospective employees for travel expenses during the recruitment process.
- DCMA questioned most of these costs on the grounds that Raytheon had not provided supporting documentation that the individuals had been interviewed.
- DCMA contended that the lack of supporting evidence demonstrated that the individuals were guests of other possible recruits.
- Raytheon voluntarily rescinded half of the costs at issue. For the remainder of the costs, the Board agreed with Raytheon that the FAR did not require the contractor to produce evidence signed by the potential recruit to recoup the recruitment costs.

Raytheon - Bonus, Incentive Compensation, and Restricted Stock Costs

- Raytheon paid bonuses to several employees who were engaged in work that DCMA characterized as unallowable under FAR 21.205-22, 31.205-27, and 31.205-47.
- Under DCMA's view, this made the bonuses unallowable as well.
- The Board rejected DCMA's interpretation because the Board had not found any costs that were unallowable under FAR 31.205-22, 31.205-27, or 31.205-47 in the proceedings.

Raytheon - “Souvenir” or “Reminder Items” Costs

- Raytheon distributed several items to potential recruits to encourage them to fill out applications online.
- Raytheon included the cost for these mementos with its recruiting costs and charged them to the Government.
- DCMA disallowed the costs on the grounds that they were unallowable promotion costs instead of recruitment costs.
- The Board sided with DCMA and held that the mementos were unallowable promotion costs.

- DCAA used statistical sampling during its audit of several of L3's ICPs, questioning over \$10 million in the process
- The Government issued COFDs that sustaining DCAA audit findings
- Once at the Board, the Contracting Officer withdrew the COFDs and the Government moved to dismiss for mootness
- L3 resisted the motion to dismiss, arguing that it would deny L3 the chance to get a ruling to prevent future audits from utilizing statistical sampling
- The Board dismissed the case for mootness. It held that neither exception to the mootness doctrine applied because the Government would not audit the same ICPs again in the future
- Judge Clark dissented

Lockheed Martin Corp., ASBCA No. 62377, 21-1 BCA ¶ 37783

- Lockheed and the Government had an MOU that the Fly America Act only applied to direct personnel performing direct work on covered contracts
- The Government withdrew from the MOU, stating that it no longer agreed with the MOU's interpretation of FAR 52.247-63. Lockheed submitted a claim to the CACO, demanding a final decision that set out the Government's interpretation of FAR 52.247-63 and the FAA.
- The COFD held that the Government's position was that FAR 52.247-63 and the FAA applied to indirect costs of international transportation as well. Lockheed appealed the COFD and sought declaratory relief that FAR 52.247-63 and the FAA only apply to direct costs.
- The Board dismissed the case for lack of a live dispute. The Board found there was no live dispute because the Government's withdrawal from the MOU did not compel Lockheed to change its practices and the Government had not disallowed any costs.

Bannum, Inc. v. U.S. 151 Fed. Cl. 755 (2021)

- Bannum won a Bureau of Prisons contract for re-entry services. A disappointed bidder filed a protest at the GAO.
- The Bureau of Prisons took corrective actions due to the protest and terminated the contract for convenience.
- The CO dismissed Bannum's termination settlement proposal and Bannum appealed to the COFC.
- Bannum's claim requested 7 different types of costs; the COFC rejected all 7.
- One of Bannum's rejected requests was for its preparatory costs incurred before the contract was terminated for convenience. The only evidence that Bannum provided to support its preparatory costs was a spreadsheet based on Bannum's general ledger.
- The COFC held that the spreadsheet was insufficient because there were no paystubs or payment documentation to support entries for labor or subcontractor costs.

- ATGI held several SBIR contracts
- ATGI submitted its ICP for FY 2007 on May 31, 2008 and its ICP for FY 2007 on June 15, 2010. Over six years after ATGI submitted its ICPs, DCMA issued final decisions that claimed that ATGI included unallowable marketing and patent legal costs. Both parties moved for summary judgment; the Board denied both.
- ATGI moved for summary judgment on the CDA's Statute of Limitations. The Board denied the motion because ATGI did not demonstrate that DCMA's claims actually accrued on the date that ATGI submitted its ICPs.
- DCMA moved for summary judgment on the grounds that all patent legal costs were unallowable. The Board denied the motion because contractually required patent legal costs are allowable and DCMA failed to demonstrate that the costs were not contractually required.

Pernix Serka Joint Venture v. U.S. 894 Fed. Appx. 928 (Fed. Cir. 2021)

- The Federal Circuit affirmed a CBCA opinion holding that a contractor with a firm-fixed price contract could not recover increased costs associated with its response to the Ebola outbreak in Sierra Leone.
- When approached for guidance on Ebola response, the Agency refused to provide direction. The contractor submitted a request for equitable adjustment for the \$1.26 million it incurred due to the disruption of work of demobilizing and remobilizing its personnel.
- CBCA determined FAR 52.249-10 limited the contractor's recovery to time, not money, for its excusable delays, and therefore could not justify recovery of costs.
- CBCA rejected the contractors' reliance on the theories of cardinal and constructive change
 - There was no cardinal change because the Government did not change the description of work; rather, the circumstances arose from the Ebola outbreak and the host country's response
 - There was no constructive change because the Government did not direct the contractor to take any action, nor was it required to

Polling Question #3

What types of relief can a contractor receive under a fixed-price contract due to unforeseen circumstances where the work scope of the contract was not changed?

- Price
- Schedule
- Both Price and Schedule
- No relief



Ology Bioservices, Inc., ASBCA No. 62663

- ASBCA granted the contractor's motion for summary judgment, holding a penalty the Government assessed against the contractor for seeking unallowable costs was unwarranted
- The CO determined Ology exceeded the cap for executive compensation in its FY2013 indirect cost rate proposal
- The Agency did not publish the FY2013 cap until 2016
- The Board held the appellant's "FY2013 executive compensation costs were not expressly unallowable at the time it certified its final indirect cost rate proposal because the FY 2012 cap was no longer applicable."

LAX Electronics v. United States 154 Fed. Cl. 115 (2021)

- The Court of Federal Claims denied a protest challenging a Defense Logistics Agency decision to remove the protester from its supply lists on the grounds that the removal violated procedures in a DoD manual.
- The Court held the DCMA manual was not binding law because it was informal guidance that had not been promulgated into regulation and therefore could not form the basis of a protest.

Northrop Grumman Mission Systems ASBCA No. 62596 (June 21, 2021)

- DCMA assessed NGMS a \$11.5 million penalty for submitting final indirect cost proposals that included expressly unallowable costs legal costs associated with an investigation into employees' mischarging time.
- ASBCA rejected NGMS's argument that DMCA needed to apportion costs between FAR 31.205-15 and 31.204-47, the provisions under which DCMA argued the costs were unallowable
- ASBCA rejected NGMS's argument that Count II, which claimed the costs were expressly unallowable under 31.205-47, failed to state a claim because DCMA stated in its final decision that the costs were "unallowable," not "expressly unallowable" under that provision.

Northrop Grumman Corp. ASBCA No. 62165, 21-1 BCA ¶ 37,922

- COFD alleged pension costs unallowable as “directly associated” to unallowable compensation; then challenged reasonableness under FAR 31.201-3 for first time in motion
- Board held that it could decide the “reasonableness” argument
 - Reasonableness is a factor in determining allowability
 - Facts and argument are not materially different from COFD: unallowable cost
 - Relied on DynCorp (2020 decision on severance in relation to compensation cap): based decision on reasonableness

Triple Canopy, Inc. v. Sect’y of the Air Force 14 F.4th 1332 (Fed. Cir. 2021)

- ASBCA held that Statute of Limitations had run on Contractor claim for Afghan after-imposed taxes when the penalty was assessed.
 - Triple Canopy submitted its claim within 6 years of the results of the appeal process with the Afghan government, which reduced the initial penalty, and its payment of the penalty
- Federal Circuit reversed
 - FAR 52.229-6, Foreign Taxes, requires the contractor to “take all reasonable action to obtain exemption from . . . any taxes . . .”
 - Appealing the taxes was a mandatory pre-claim procedure (citing *KBR*)
 - +Triple Canopy had sought an exemption and DOD supported that exemption request
 - +Claim did not accrue until Afghanistan issued its decision on Triple Canopy’s appeal

Polling Question #4

Would you like a follow-up call regarding:

- Statute of Limitations
- Cost Allowability
- Contract Changes
- No thank you



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Questions?

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