

FINANCIAL EXECUTIVES INTERNATIONAL
COMMITTEE ON GOVERNMENT BUSINESS

CONFERENCE ON GOVERNMENT
BUSINESS:
THE JUDGES' PANEL

February 4, 2020

Panelists

- ▶ Hon. Stephanie Cates-Harman (Administrative Judge, Armed Services Board of Contract Appeals)
- ▶ Hon. Carol Park-Conroy (JAMS Mediation, Arbitration and ADR Services; Administrative Judge (ret.), Armed Services Board of Contract Appeals)
- ▶ Moderator: Stephen D. Knight (Smith Pachter McWhorter, PLC)

Agenda

- ▶ Cost-Effective Methods to Resolve Government Contract Cost Disputes
- ▶ Evidentiary Issues
- ▶ Government Claims
- ▶ Expressly Unallowable Costs

Cost-Effective Methods to Resolve Government Contract Cost Disputes

▶ Litigation

- Full discovery, trial, post-trial briefs
- Dispositive motions
- Mini-trials
- ASBCA Rule 11 – Submission without a hearing
- ASBCA Rule 12 – Expedited and Accelerated Procedures

▶ Alternative Disputes Resolution

- Mediation
- Arbitration
- Other methods?

▶ Constraints on Government Participation in ADR?

Evidentiary Issues

- ▶ Documents
 - Contents of Rule 4 Appeal File
 - Hard copy v. electronic
 - Affidavits
 - FAR 31.201-2, FAR 52.215-2, FAR 4.7
 - Spoliation
- ▶ Testimony
- ▶ Experts
- ▶ Helpful v. unhelpful evidence
- ▶ Collaboration among judges/ADR neutrals

Government Claims

- ▶ Increase in cost disputes, government claims?
- ▶ Definition of “claim”
- ▶ CO reliance on technical assistance, e.g., DCAA?
 - How familiar must a CO be with content of Government claim?
- ▶ Constraints on quantum calculations – are there any?
 - CDA certification on contractor claims
 - Constraints on Government claims?
- ▶ Government and contractor use of statistical sampling

What is a Claim?

- ▶ FAR 2.101: “Claim means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under 41 U.S.C. chapter 71, Contract Disputes, until certified as required by the statute. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim.”

Expressly Unallowable

- ▶ FAR 31.001: “Expressly unallowable cost means 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.”
- ▶ CAS 405:
 - “Directly associated cost means any cost which is generated solely as a result of the incurrence of another cost, and which would not have been incurred had the other cost not been incurred.”
 - “Expressly unallowable cost means 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

► *Raytheon Co. v. Sec’y of Defense*, 940 F.3d 1310 (Fed. Cir. 2019)

- “Costs unambiguously falling within a generic description of a ‘type’ of unallowable cost are also ‘expressly unallowable.’ Here, salaries of in-house lobbyists are a prototypical lobbying expense. [FAR 31.205-22] disallows ‘costs associated with’ activities such as ‘attempt[ing] to influence . . . legislation . . . through communication with any member or employee of the . . . legislature’ or ‘attend[ing] . . . legislative sessions or committee hearings.’ . . . Salaries of corporate personnel involved in lobbying are unambiguously ‘costs associated with’ lobbying.”

Expressly Unallowable?

- ▶ FAR 31.205-27: “expenditures in connection with . . . mergers and acquisitions . . . “
- ▶ FAR 31.201-2(a): “A cost is allowable only when the cost complies with all of the following requirements:
 - (1) Reasonableness.
 - (2) Allocability
 - (3) Standards promulgated by the CAS Board . . . generally accepted accounting principles and practices appropriate to the circumstances
 - (4) Terms of the contract.
 - (5) Any limitations set forth in this subpart”

Expressly Unallowable?

► FAR 31.201-6:

- “. . . When an unallowable cost is incurred, its directly associated costs are also unallowable.”
- “Salary expenses of employees who participate in activities that generate unallowable costs shall be treated as directly associated costs to the extent of the time spent on the proscribed activity, provided the costs are material . . . “

Questions

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