The allowability of contractor travel costs has long been a source of dispute between the Federal government and the contractors it hires to perform work. This issue often stems from the fact that the travel rules differ between Federal employees and employees of private sector contractors. That's not the entirety of the situation, of course, but those differences seem to spark feelings of … envy or jealousy (for lack of better terms). Government employees have so many difficult and complex rules that govern their reimbursable travel costs, and they so often lose money when in TDY travel status, that they seem to feel private sector employees should suffer as they do. Misery seems to love company.

And thus the rules governing the allowability of contractor travel costs are similarly complex and difficult, and what should be relatively straightforward rules become somewhat Byzantine and even self-defeating to a large extent—where the cost of compliance outweighs any potential travel savings. Yet regardless of compliance (or not), the perception that contractors are living large while billing the government persists: Contractors' travel-related costs receive extraordinary scrutiny from Contracting Officers, Contracting Officer Representatives, and from auditors.

The cost of airfare is one of the areas of extraordinary scrutiny.

Now in truth contractors do often seek to obtain upgrades to business or first class seats. Why that should be a problem goes to the heart of the differences in travel philosophy between the Feds and their contractors. Most Federal employees don't make a distinction between contractor executives and run-of-the-mill contractor employees. But contractors see a vast difference between those hierarchical levels, in terms of compensation and other perquisites. For example, most contractor executives expect to fly in first class, if they are not flying in the corporate jet. But because just about all government employees have to travel coach, they don't understand why *any* contractor employee, regardless of rank, should do otherwise. Consequently, both modes of air travel (first class and use of corporate jets) are heavily regulated and, as a result of the regulation, both generate a healthy share of unallowable costs.

But the equivalence is false. Not all contractor employees are the same, just as not all employees of the Federal government are the same. Secretary of Defense Ash Carter, for example, flies around the world in a large airplane owned by the Federal government. Military executives (e.g., generals and admirals) fly around in aircraft owned by the Department of Defense. Why can't contractor executives be extended the same courtesies?

Regardless of the lack of logic involved, the fact of the matter is that the rules governing the allowability of contractor airfare do not distinguish between contractor employees and contractor executives. They don't distinguish between direct-charged travel costs and the travel costs incurred by indirect employees. They make little distinction between casual TDY travel and the constant travel of salespeople and business development folks. It's a one-size-fits-all approach, and it's designed to put contractor employees on a general par with employees of the Federal government. Contractors who want to upgrade (at cost) or fly corporate jets do so at the cost of generating unallowable costs. See the **Cost Principle** at FAR 31.205-46, especially (b) and (c).

The Federal government's concern with contractor airfare costs soared to new heights (or fell to new lows) in late 2009, when the cost allowability rules were changed to limit allowable airfare costs to the lowest fare available to the contractor (instead of the standard coach fare offered to the public). We wrote about the rule change **here** . In that article, we said—

In addition, the rule seems to create a new class of unallowable air fare, which is fares paid in excess of that elusive 'lowest priced airfare' that was available at the time of booking. If the FAR Councils did not mean to create this new unallowable air fare, then the rule was crafted poorly. As written, each air fare incurred for each trip must be compared to the platonic ideal of a 'lowest priced airfare'—as that ambiguous term is interpreted by the contractor and its auditors.

While the FAR rule-makers were adding complexity to the airfare cost allowability criteria, the Department of Defense was asking for the rules to be relaxed for its employees on TDY travel, as we reported in **this article** . Remember that false equivalency in the travel rules we noted earlier? Yeah, it didn't get any better no matter how much pain the Federal government tried to put its contractors through. Indeed, the complex rules of contractor airfare cost allowability continue to generate **questions** , disputes, and litigation five years later.

One example of the issues generated by the rule change is the litigation between the Department of Defense and the giant defense contractor, The Raytheon Company. Now, we've known about this litigation for a while, but were unable to discuss it until there was something publicly available to discuss. And now there is, courtesy of the ASBCA in a **ruling** on dueling motions for summary judgment.

It's important to note that the decision linked to above is not precedential; it's merely a ruling on the motions before the Board. Indeed, Judge Dickinson's ruling is such that there will need to be a trial on the merits. But we want to explore the Judge's ruling because it provides such a great example of how the FAR Council's 2009 rule-change mucked-up the waters for defense contractors such as Raytheon.

The issue at hand is certain airfare costs incurred by Raytheon in 2005. In 2009, the DCAA questioned "certain of Raytheon's airfare costs" and, in 2012, the DCMA Corporate Administrative Contracting Officer (CACO) issued a Contracting Officer's Final Decision (COFD) found those costs to be expressly unallowable, and demanded penalties and interest on those unallowable airfare expenses. According to the CACO, there were four types of unallowable airfare costs. Judge Dickinson quoted the COFD at length to describe two of the four types, and so will we.

In the first category, based upon the review of the selected sample items, it was found that Raytheon did not always use the negotiated corporate discounts with airlines. There were a number of flights on which the traveler was on coach and that fare was incurred and charged by Raytheon, instead of the negotiated discounted airfare amount. When there was a discount airfare available and not used for those flights, the difference between the discount fare and coach fare is unallowable under FAR 31.205-46(b), 31.201-5 and 3l.201-2(d). The difference between the discount and coach fares is also unallowable under FAR 31.201-3, Determining Reasonableness. Fares charged in excess of those available to Raytheon through its negotiated corporate discounts are unreasonable. They exceed that which would be incurred by a prudent person in the conduct of competitive business.

In the second category, based upon the review of the selected sample items, Raytheon did not remove as unallowable additional amounts when premium airfares, for first class or business class seats, were not justified by the FAR travel cost principle. For the airfare costs which did not meet the requirements of the cost principle cited above, the unallowable cost is the difference between the premium airfare incurred and the standard coach fare based upon FAR 31.205-46(b). Raytheon incurred and included in its claimed costs airfare in excess of standard coach costs without meeting the requirements of the exception in FAR 31.205-46(b). Since the exception in FAR 31.205-46(b) is not applicable, the claimed costs are unallowable.

Obviously, one important issue is whether the 2009/2010 FAR revisions to 31.205-46 were, in fact, revisions—of if they were merely clarifications. If they were clarifications, then Raytheon

(and all other government contractors) were limited to the airfares they had negotiated, and not by the standard coach fares available to the general public. Judge Dickinson found there was ambiguity in the differing interpretations of the regulations, and declined to rule on the matter (motions for partial summary judgment denied).

Raytheon also argued that the government had not provided any evidence that it had failed to apply (to its contract costs) all airline discounts to which it had been entitled, and that “DCMA improperly relied on a misstatement of Raytheon policy” in disallowing otherwise allowable airfare costs. Judge Dickinson similarly declined to rule on those matters (motions for partial summary judgment denied).

The one victory for Raytheon was an uncontested motion for partial summary judgment on the issue that “Raytheon's airfare costs for commercial business are allocable to the Department of Defense contracts.” The Government did not oppose Raytheon’s partial motion for summary judgment on that issue, and Judge Dickinson granted it.

In conclusion, this case presents an outstanding illustration of the complexity involved in determining a contractor’s allowable airfare costs. It also illustrates the lengths to which the auditors, contracting officers, and government attorneys will go when they believe a contractor has treated its employees (of whatever rank) better than the rank-and-file Federal employees.

Regardless of your feelings on the merits of the parties’ positions, we suspect you’ll agree with us that it seems difficult to understand how the parties can be litigating costs incurred in 2005 ten years after the fact. Hopefully, Judge Dickinson’s future rulings in this case will put these issues to bed for other contractors, so that they don’t have to make similar arguments on airfare costs ten years from now.