

## Expressly Unallowable Costs – Raytheon Wins Again

Written by Nick Sanders  
Thursday, 04 May 2017 00:00

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Three separate appeals of Contracting Officer Final Decisions (COFDs). Five separate issues. Four clear-cut victories. Raytheon proved, once again, why contractors that have the gumption to litigate when they believe they have been wronged tend to prevail in litigation.

To be fair, it's not sufficient to merely believe you have been wronged by a DCAA audit report and/or erroneous COFD. You also need to have a strong case, based on regulations and legal precedent. And you also need to have the financial wherewithal to hire the best attorneys.

Raytheon had all that, and won. At stake was some \$1,120,000 in assessed penalties and interest applied to allegedly expressly unallowable costs.

What's the story on assessment of penalties for expressly unallowable costs? See [this article](#) for background.

For a link to the actual ASBCA decision in the matter, [here](#) you go.

The decision devotes considerable discussion to the nature of expressly unallowable costs, and which party bears the burden of proof with respect to (1) identification of such costs, and (2) waiver of penalties when such costs are identified.

There were multiple issues, many of which were settled before the Board issued a decision, when Raytheon agreed to withdraw the costs and the government agreed to withdraw imposition of penalties. At the end of the day, there were five issues left to be determined. For each issue, the Board had to decide whether the disputed costs were, in fact, expressly unallowable costs, and, if so, whether the government should have waived penalties.

Here's a summary of the results:

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Raytheon's appeal of penalties and interest associated with \$336,900 in fractional airline expenses was sustained, meaning that the Board found those costs were not expressly unallowable.

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Raytheon's appeal of penalties and interest associated with \$63,000 in other executive airplane costs was sustained, meaning that the Board found those costs were not expressly unallowable.

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Raytheon's appeal of penalties and interest associated with \$200,000 paid to a software firm to design and build a Mergers & Acquisitions (M&A) database was sustained, meaning that the Board found those costs were not expressly unallowable.

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Raytheon's appeals of penalties and interest associated with roughly \$395,000 in consultant costs were sustained. The costs were alleged to be expressly unallowable because of a lack of work product (see 31.205-33(f)). In this instance, the Board went out of its way to find that the consultants' costs were not only not expressly unallowable, but also both reasonable and allowable.

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Raytheon's appeals of penalties and interest associated with roughly \$225,000 in lobbyists' salaries was denied, because the Board found that such expenses were expressly unallowable.

All in all, Raytheon won on roughly \$900,000 of the \$1,120,000 in dispute.

But more importantly (to us), Judge Scott, writing for the Board, listed certain facts that addressed how Raytheon identified and segregated unallowable costs. As we noted in our previous article on expressly unallowable costs (see link at top of page), a contractor seeking to persuade a contracting officer to waive penalties must do certain things. We wrote "Seems like

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a lot of effort, right? Well, it *>is<* a lot of effort. Obviously the efforts listed above need to be proportionate to the company's size and to the risk of inclusion of expressly unallowable costs. However, often the efforts can pay for themselves ....”

What kind of efforts did Raytheon undertake?

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At all relevant times Raytheon Corporate maintained a Corporate Government Accounting Office, which reported to the A&S Controller, and whose primary responsibilities were to oversee a government contract compliance program at Raytheon's segments and to provide guidance regarding application of the FAR and the CAS.

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Raytheon has an extensive library covering compliance with government contract laws and regulations, including those at issue.

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Raytheon's Government Contract Compliance Policy applied to all of its organizations doing business with the government. It provided that all segments ... were required to 'maintain adequate internal controls necessary to ensure compliance with' the FAR and the CAS, and that the 'Raytheon Corporate Office' was covered by the policy for applicable compliance program areas. Among guidelines for an effective compliance program, the policy provided that each segment have a documented procedure for preparing and submitting the final indirect cost rate proposal; its processes for screening and scrubbing for unallowable costs were adequate; and it have procedures to identify and segregate unallowable costs and directly associated costs such that they were excluded from billings to the government.

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Raytheon's Corporate Government Accounting Office also developed a detailed handbook to guide its personnel, at Corporate and throughout its business segments ... in the

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preparation of incurred cost proposals. For example, Raytheon's 'GUIDELINES-ACCOUNTING FOR SELECTED COSTS IN ACCORDANCE WITH FAR PART 31' (FAR Part 31 Guidelines), revision 1, was issued in June 2003. The handbook has been updated about annually.

In addition, personnel involved in preparing the corporate final billing rate proposal were well-trained in FAR and CAS matters. Raytheon's expert witness (D. Oyer) opined that Raytheon's tiered processes and controls, combined with the qualifications of its personnel, made the company an industry leader in government compliance.

Now, it's not at all clear that any of the foregoing influenced the Board's decision. However, contrast Raytheon's findings of fact with those of Exelis. (Again, [link to the article discussing Exelis at top of page.](#)) The contrast between the two contractors' approaches to compliance is stark. One invested heavily in processes, procedures, and personnel. The other did not come close.

While Raytheon's investments in contract compliance may not have directly contributed to the clear victories it won at the ASBCA, we are quite sure they influenced its decision to litigate. As we noted at the beginning of this article, filing an appeal is not simply a matter of feeling wronged: you also need to feel confident in your legal position. We believe that Raytheon's compliance investments contributed to its confidence and, thus, contributed to the willingness to litigate. Without that willingness, it would be looking at nearly a million dollars of penalties and interest.

We say it over and over: investments in contract compliance processes and controls and personnel tend to pay for themselves. This is yet another piece of evidence supporting that assertion.