This is the last article in a four-part series about the recent Raytheon victory at the ASBCA. Here's **a link** to the ASBCA decision.

In Part 1, we outlined the issues and discussed the allowability of Raytheon's premium class airfare. The Board decided that the government did not prove its contention that Raytheon's travel policy was noncompliant with the travel cost principle at 31.205-46.

In Part 2 we discussed the treatment of two similar issues: Raytheon's "Corporate Development" and "Government Relations" costs. The Board decided that the government did not prove that the disputed Government Relations costs were unallowable lobbying costs under the lobbying cost principle at 31.205-22, nor did the government provide that the disputed Corporate Development costs were unallowable organizational costs under the cost principle at 31.205-27.

In Part 3, we discussed the treatment of patent costs incurred at Raytheon Missile Systems (RMS). The costs in question were both internal labor and external legal costs. The Board decided that the government had failed to prove that the disputed internal costs were unallowable under the cost principle at 31.205-30. Further, the Board held that Raytheon's claimed external legal costs were allowable and allocable to its government contracts as claimed.

In this final article, we are going to discuss certain recruiting-related costs claimed by Raytheon, questioned by DCAA, and disallowed by DCMA, as well as some variable compensation costs that kind of snuck in to the complex decision.

Let's get to it.

Recruitment Costs

A. Recruiting Travel Costs

FAR 31.205-24 (“Recruitment Costs”) is one of those cost principles that lists stuff that is allowable but doesn’t really have much to say about stuff that is not allowable. The only item that is listed as being unallowable is “help-wanted advertising costs,” but only if “the advertising does not describe specific positions or classes of positions; or includes material that is not relevant for recruitment purposes …” Otherwise, pretty much anything that is connected with recruiting and reasonable should be found to be allowable.

If you’ve read along so far, you will be unsurprised to learn that DCAA and DCMA found a way to disallow certain of Raytheon Missile Systems (RMS) recruiting costs. Specifically, DCAA questioned (and the DCMA DACO subsequently disallowed) “$50,434 in airfare costs claimed for interviewees traveling to RMS’ Tucson, Arizona headquarters as [being] unallowable under FAR 31.201-2 for lack of supporting documentation, and $1,002 as excessive and unreasonable on the ground that the costs pertained to duplicate tickets. The DACO stated that the information RMS supplied did not show that interviews were actually completed or establish that the costs were for interviewees and not for their guests.”

Readers should note that this is a common theme running throughout all these consolidated appeals: the government seems to have taken the position that Raytheon must prove its costs to be allowable, or else they are unallowable. As has been shown by the other articles, that is not the case. While Raytheon (and other government contractors) have the obligation to maintain adequate documentation to support the claimed costs, *it is the government that bears the burden of proof to show that claimed costs are unallowable.*
If the government cannot meet its burden, the claimed costs are allowable.

Raytheon maintained adequate documentation to support its costs, and provided that documentation to both DCAA and the DCMA DACO. The Board listed the voluminous amount of documentation provided to the government to substantiate claimed costs. The Board described DCAA’s assessment of the evidentiary material as follows—

DCAA nevertheless concluded, with a few exceptions, that there was insufficient support to establish that the individuals whose costs were in question actually participated in an interview and that ‘interview panels’ were completed, making the costs unreasonable in DCAA’s view. For example, DCAA questioned, and the COFD disallowed, airfare costs for four interviewees. They flew to Tucson around June 19, 2007 for a hiring event held by RMS at the Westin La Paloma hotel. The supporting documentation submitted to DCAA showed that they had submitted their resumes and stayed at the hotel. The government wanted an initialed ‘Travel Interview

Reimbursement Form,' submitted by some of the interviewees. Otherwise, the government did not accept that the individual was brought in by RMS for an interview.

(Internal citations omitted.)

Some of the recruitment costs claimed by RMS included airfare for both candidates and their spouses or "guests." RMS withdrew those costs, but the rationale it provided—that the job involved a relocation and it would be easier to recruit candidates if their spouses/other were familiar with the area—seems reasonable to us. Given that there is nothing in the cost principle that states such costs are unallowable, that was a magnanimous gesture on Raytheon's part.

Back to the matter at hand, the government's position was, as noted above, that Raytheon had failed to retain sufficient documentation to support its assertion that the people who came for interviews were, you know, actually interviewed.

For its part, Raytheon argued that the questioned costs were in fact *expressly allowable* under the cost principle and that the cost principle did not specify any particular type of documentation in support of claimed costs. Raytheon asserted that it provided ample documentation, and that there was simply no basis in the FAR for the government to require specific types of documentation, such as forms signed by the interviewee, to prove that an interview occurred. Raytheon argued that the government's entire position was based on speculation that the interviews never took place.

Rather than use excessive verbiage to mock the government's position, the Board simply stated that the government had not met its burden to prove that the disputed recruiting costs were unallowable. Which seems a bit of a shame to us, but we are not lawyers and probably lack the required comity that admission to the bar would confer.

B. Recruiting Souvenirs

FAR 31.201-1 implements statutory requirements making the costs of "advertising designed to promote the contractor or its products" unallowable, specifically including "costs of promotional

items and memorabilia, including models, gifts, and souvenirs."

Raytheon provided potential employees with "recruitment reminders," that including such trinkets as "mouse pads, pens, pencils, coffee mugs, and possibly T-shirts, that bear Raytheon's logo, with at least some, if not all, showing its website, which, if accessed, would enable checking for available jobs." Pursuant to a prior agreement, Raytheon withdrew 85% of the costs of such items but claimed 15% under the theory that they were really recruiting inducements and therefore allowable under the recruitment cost principle (discussed above).

The government argued that the items were not costs associated with recruitment, but instead just souvenirs intended to call favorable attention to the company—and hence unallowable. The government's position was that the 15% of the total amount that Raytheon claimed in its 2008 costs was unallowable; moreover, the costs were *expressly* unallowable because Raytheon's agreement to withdraw 85% of the total amount indicated it knew the costs were unallowable.

The Board agreed with the government that the disputed costs were indeed unallowable souvenirs and not allowable recruiting costs. However, the Board declined to find that the costs were expressly unallowable, writing—

First, the government's argument that, due to its prior practice of withdrawing 85% of its RRI costs, Raytheon has tacitly acknowledged that its RRI costs are unallowable, is plainly wrong, as this litigation exemplifies. As we have found, in the past, DCMA and Raytheon resolved their RRI cost dispute with the stated cost allocation, but Raytheon continued to believe that its RRI costs were allowable. However, we conclude that the most reasonable reading of the regulations pertinent to this dispute is that the costs of the items in question are unallowable.

(Internal citation omitted.)

This was the single area in which Raytheon lost its appeal, albeit the amount in question was $17,780. Since the Board declined to find the costs in question were expressly unallowable, Raytheon owes the government a check for that amount—or, at least, that amount factored for the government's flexibly priced contract participation in the indirect cost pool where the costs were originally claimed.

Not that huge of a loss, in our view.

Variable Compensation Costs

Somehow government assertions that certain variable compensation costs (*e.g.*, bonus, incentive compensation, and restricted stock costs) for employees engaged in expressly unallowable activities were themselves expressly unallowable got mixed into the various disputes between Raytheon and the government.

The activities that the DCMA DACO claimed as being expressly unallowable were those previously discussed in Part 2 of this series—*i.e.*, Raytheon's "corporate development" costs. (See **Part 2** for details.)

Citing to a prior ASBCA decision, the government argued that "bonus, incentive compensation, and restricted stock awards paid to Raytheon employees performing unallowable activities under FAR 31.205-47 were expressly unallowable and that the same categories of payments to employees performing unallowable activities under FAR 31.205-22 and FAR 31.205-27 were unallowable."

Raytheon disagreed (duh), asserting that "the government has failed to meet its burden to prove that Raytheon owes it $1,368,175 in allegedly unallowable bonus, incentive compensation, and restricted stock awards [and] the evidence of record is paltry and insufficient to prove the government's claim."

The Board was able to differentiate the current circumstances from the ones that formed the basis of its prior decision. It wrote—

Unlike in that decision, we have not found any claimed costs to be unallowable under FAR 31.205-22, FAR 31.205-27, or FAR 31.205-47. Thus, the employees in question were not performing unallowable activities and any bonus, incentive compensation or restricted stock

payments associated with their allowable activities are not expressly unallowable or unallowable.

Thus, Raytheon won on this point, as well.

As we noted in the first article, our information is that the government will appeal the Board's decision. Accordingly, some of the interpretations in this decision may change. But in the meantime, this is a significant decision with which every government contractor should become familiar.