CONTRACTOR ALERT!!!
CONSULTING AND LEGAL FEES ARE RECOVERABLE!

FEDERAL CIRCUIT CASES REAFFIRM THAT COSTS OF CONTRACT ADMINISTRATION ARE ALLOWABLE

INTRODUCTION

Before elaborating on the question of recovery of consulting fees and/or legal fees, let's be clear on a major point: *a claim situation does not exist until it is certified and filed*. All actions up to that point are designed to exhaust all administrative remedies available to the parties. Thus, consulting, legal and accounting fees are recoverable. Once the certification and filing of the claim takes place, it's a whole new ballgame, however.

The *Bill Strong* decision (1995) supports recoverability and allowability of consulting costs. Excell's Vice President, Judi Mattox, litigated the case and wrote the brief, with Oral argument by Chris Darby of Mattox and Associates. Bill Strong was the seminal case establishing recoverability of consulting costs under FAR 31.205-33. It has been applied consistently by the Federal Courts, and in *Johnson v. Advanced Eng. & Planning Corp*, the Court upheld the recovery of $270,017 for Contract Administration costs.

Case law supports the recoverability of such costs. In *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995), the Federal Circuit Court of Appeals upheld the allowability of consulting costs and attorney fees. The *Bill Strong* case specifically discusses three distinct categories of legal, accounting and consulting costs:

> *(1) costs incurred in connection with the work performance of a contract;*
>
> *(2) costs incurred in connection with the administration of a contract; and*
>
> *(3) costs incurred in connection with the prosecution of a CDA claim.* 49 F.3d at 1549.

The Court held that "costs that fall within the first and second categories are presumptively allowable if they are also reasonable and allocable." *Id.*

The opinion further explained that:

> *[in] classifying a particular cost as either a contract administration cost or cost incidental to the prosecution of a claim, contracting officers, the Board, and courts should examine the objective reason why the contractor incurred the costs.*

> *If a contractor incurred the cost for the genuine purpose of materially furthering the negotiation process, such cost should normally be a contract administration allowable expense under FAR 31.205-33, even if negotiation eventually fails and a CDA claim is later submitted. On the other hand, if a contractor's underlying purpose for incurring a cost is to permit the prosecution of a CDA claim against the Government, then such cost is unallowable under FAR 31.205-33.*

The *Bill Strong* case has been applied consistently by the Federal Courts and remains good law today.

RECOVERY OF COSTS UPHELD

In *Tip Top Construction, Inc. v. Patrick R. Donahoe*, 2012 U.S. App. LEXIS 19683 (Federal Circuit, September 19, 2012):

> "*The Court of Appeals sided with the contractor. A contract administration cost is one incurred with a genuine purpose of materially furthering the negotiation process even if negotiations eventually fail and a claim is later pursued. The Court ruled that these costs were genuine administrative and claim preparation costs concerning estimates and pricing over the changed work. The consultant and attorney directly involved themselves in the cost review and price negotiations and the Court held that these types of fees are recoverable even if the negotiations concerning a change order fail and litigation or actual claims are filed."*

The *Tip Top Construction* case has been applied consistently by the Federal Courts and remains good law today.

CONCLUSION

The value of an experienced consultant or attorney cannot be emphasized enough, because it is typically the difficult and/or complex issues that will end up as a dispute or claim. This value is compounded exponentially when these costs are compensable.

EXCELL CONSULTING: "HERE TODAY FOR YOUR TOMORROW"

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should it be relied upon as legal advice for your specific factual pattern or situation. – *Taylor Benson, Esq., Asst General Counsel*