THE DIFFERENCE BETWEEN REAS AND PROPOSALS

INTRODUCTION

A contractor submitting a Request for Equitable Adjustment ("REA") is required to provide "proposal-type" documentation supporting its position and proving its entitlement. In addressing REAs, some Contracting Officers choose (mistakenly or not) to treat a REA as a Proposal. Although a REA requires the contractor to submit information that justifies its request, the REA is governed by a different Federal Acquisitions Regulation (FAR) provision than a Proposal. Knowing the difference between these provisions, and identifying each properly, can be the difference in recovering certain costs.

DIFFERENCES

REAs are intended to provide equal and fair treatment to both contractors and the Government. (REA fundamentals found here). A REA starts as a written request by either party for a monetary adjustment or other contractual adjustment, due to unforeseen conditions that significantly impact performance and the associated costs of a contract. If a contractor chooses to submit a REA, it has 30 days from the date of a change or other impact to submit a written statement describing the change to its Contracting Officer.

Provided that adequate information regarding the REA is submitted to the Contracting Officer, the Contracting Officer has a duty to review the REA information and provide the decision to a contractor. If the REA is approved, either a monetary adjustment or a contractual adjustment is in order and a formal change order is issued to the contractor. Essentially, the REA is intended to make either the contractor or Government contractually "whole" so that neither party is unjustly enriched.

As part of a proposal, a contractor submits documentation to support its position and proves costs associated with work to be performed. Contracting Officers may attempt to apply FAR Part 15 "Contracting by Negotiation" to REAs, but that provision is specifically related to the acquisition process (and therefore, to proposals). A Request for Proposal (RFP) can be part of the post-award process, but it is different from the REA process.

The REA process deals with contract provisions such as FAR Part 43 "Contract Modifications" which pertains to any change that can cause associated time, labor, or costs to increase or decrease. (See FAR Part 43 "Contract Modifications") Recoverable costs under FAR 31.205-33 "Professional and Consultant Service Costs" are also associated with a REA.

WHY DIFFERENT TREATMENT?

One reason a Contracting Officer may choose to treat a REA as a Proposal is that certain costs that are allowable in the REA **are not** allowable in the Proposal process. If a Contracting Officer improperly treats a REA as a Proposal, costs such as outside consultant fees, preparation costs, and attorney's fees are then considered to be part of the bid and proposal costs, and can only be recovered if they are accepted by the Contracting Officer as indirect general and administrative expenses. However, such costs are independently allowable as part of a REA.

At times, Contracting Officers have applied FAR 31.205-47(f)(1) "Costs Related to Legal and Other Proceedings" instead of FAR 31.205-33 "Professional and Consultant Service Costs" when evaluating a REA. Treating a REA as a Proposal, and denying certain recoverable costs, can occur when a Contracting Officer uses the wrong FAR

section. If a Contracting Officer uses the **incorrect** FAR section and treats a REA as a Proposal, the Contracting Officer is able to deny certain costs which are not allowable under the Proposal process. According to FAR 31.205-33 "Professional and Consultant Service Costs," this provision provides that the costs of outside counsel and consultants are allowable costs of contract administration. This means that a contractor may recover attorney's fees and consultant costs incurred in connection with the **administration part** of the contract as part of a REA.

If the associated costs are incurred during **prosecution** of a claim asserted against the Government, they are not recoverable according to FAR 31.205-47(f)(1) "Costs Related to Legal and Other Proceedings" which states:

> Costs not covered elsewhere in this subsection are unallowable if incurred in connection with – (1) Defense against Government claims or appeals or the prosecution of claims or appeals against the Government (see 33.201).

Click here for further discussion on the recoverability of consultant and attorney's fees, including an analysis of *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995), and *Tip Top Construction, Inc. v. Patrick R. Donahoe*, 2012 U.S. App. LEXIS 19683 (Federal Circuit, September 19, 2012).

CONCLUSION

Most Contracting Officers attempt to limit the Government's liability to a contractor for costs to the extent possible. The Government will not volunteer when a contractor has failed to include items in its REA that are recoverable despite the fact that the request should be an "equitable" adjustment that is fair to both parties.

Depending on which FAR provision a Contracting Officer uses, a contractor may be led to believe that costs associated with obtaining expert advice and guidance will be unrecoverable. A contractor who does not seek expert advice may risk losing recovery of more than it assumes it is entitled to recover.

Assistance by a consultant should be seriously considered to protect a contractor's interests properly and thoroughly. The experts at Excell Consulting International, Inc. can assist and evaluate your company's position and provide valuable and cost-effective guidance for your business.

In the end, you will be glad you made the call.

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