

ALLOWABILITY OF LEGAL COSTS



Allowable

GENERAL COSTS¹

Costs are allowable generally unless made unallowable elsewhere in FAR subpart 31.2.

To be allowable, costs must be:

1. Reasonable;
2. Allocable;
3. CAS Compliant; and
4. Not disallowed by terms of contract.

REQUESTS FOR EQUITABLE ADJUSTMENT

Unlike costs incurred defending or prosecuting claims against the Government, which are expressly disallowed in FAR 31.205-47(f)(1), contractors may recover their legal costs incurred to draft bona fide requests for equitable adjustment (REAs), as REAs are not claims and such costs are not disallowed anywhere in FAR subpart 31.2.

TERMINATION SETTLEMENTS³

Legal costs are allowable if reasonably necessary for:

1. Preparation and presentation of settlement claims to a contracting officer; or
2. Termination and settlement of subcontracts.

DEFENDING FALSE CLAIMS ACT OR GOVERNMENT/WHISTLEBLOWER ALLEGATION OF VIOLATION OF LAW²

Costs incurred defending False Claims Act or alleged violations of law are allowable up to 80% of reasonable costs incurred if:

1. The parties enter into a Consent Agreement that provides for allowability;
2. The parties settle and the Contracting Officer that whistleblower had "very little likelihood of success"
3. Determines the action was commenced by a state, local, or foreign government and the contracting officer determines the costs were incurred either (a) as direct result of specific term or condition of a federal contract, or (b) as a result of compliance with written direction of the contracting officer.

Note: The term "costs" includes costs of both in-house and outside legal services incurred before, during, and after commencement of a judicial or administrative proceeding. This includes investigations.

PROFESSIONAL AND CONSULTANT SERVICES⁴

Costs of services "to enhance . . . legal, economic, financial, or technical position" are allowable if not:

1. To improperly obtain or use protected data;
2. To improperly influence contents of solicitations or evaluation of proposals;
3. Otherwise resulting in violation of law or regulation; or
4. Inconsistent with the scope of the services contracted for.

LOBBYING AND POLITICAL ACTIVITY⁵

Costs related to certain lobbying activities may be allowable. These activities include:

1. Responding with hearing testimony or statements to a request by Congress or another legislative body for a technical and factual presentation on a topic related to the performance of a contract;
2. Influencing through communication with a legislative or government official the introduction or enactment of federal, state, or local legislation to reduce contract costs or to avoid material impairment of the contractor's authority to perform the contract; and
3. Activities specifically authorized by the contract.

SOURCES:

1. FAR subpart 31.201-2
2. FAR subpart 31.205-47
3. FAR subpart 31.205-42
4. FAR subpart 31.205-33
5. FAR subpart 31.205-22

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Unallowable

CONTRACTOR-CONTRACTOR DISPUTES²

Costs incurred in connection with lawsuits between contractors are unallowable if the lawsuits arise out of:

1. Arrangement of shared interest (teaming agreement or joint venture); or
2. Dual sourcing, coproduction, or similar programs except when incurred as a result of compliance with a contract and agreed to by contracting officer.

Note: Costs incurred in connection with regular sub/prime disputes are not expressly unallowable.

CLAIMS AGAINST THE GOVERNMENT²

Costs to defend or prosecute claims or appeals against the federal government are unallowable.

PROTESTS²

Costs incurred protesting federal solicitations or contract awards, or defending as an intervenor, are unallowable, unless they are incurred pursuant to a written request from the contracting officer.

Costs are unallowable if the procedure results in:

1. Conviction;
2. Contractor liability for allegation of fraud or similar misconduct;
3. Monetary penalty or order to take corrective action where fraud not alleged;
4. Suspension or Debarment;
5. Rescinded or voided contract;
6. Termination for Default;
7. Settlement if any of (1)-(6) could have happened and the contracting officer does not find very low likelihood of success; or
8. Any other proceeding that arises out of the same facts as a proceeding covered in (1)-(7).

PATENT INFRINGEMENT²

Costs of patent infringement litigation are unallowable unless otherwise provided in contract.

MERGERS AND ACQUISITIONS²

Costs of organization, reorganization, or resisting mergers and acquisitions are unallowable.

ANTITRUST DEFENSE²

Costs to defend antitrust suits are unallowable.

MAJOR FRAUD ACT²

Costs of defending against suits brought by employees or ex-employees under Section 2 of the Major Fraud Act of 1988 are unallowable if the contractor is found liable or settles.

ASSISTANCE TO OTHERS²

Costs incurred representing or assisting individuals, groups, or legal entities that the contractor is not legally bound to incur are unallowable if they arise from an action where the participant was convicted of a violation of a law or regulation or found liable in a civil or administrative proceeding.