

Are Consultants' Fees Recoverable in a Claim?

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Recent guidance has come from the U.S. Court of Federal Claims regarding the ability of a contractor to include consultant's fees as a recoverable item in a claim. In this case, the Army Corps of Engineers awarded a contract for a building renovation to Plano Builders Corp. After encountering asbestos and an associated delay, Plano hired a consultant to track and document impacts and costs. Six months after the consultant finished his work, Plano filed a claim for a price increase.

The U.S. Court of Federal Claims ruled that the consultant fees, incurred long before the submission of a demand for money, were unallowable costs of prosecuting a claim. The issue here is the length of time between the consultant's services and the issuance of the claim.

The court cited the case of *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995), in which any written request is

considered a claim (a pre-existing dispute is not required), in that the consultant had worked in support of the prosecution of the claim and not in mere contract administration. The courts considered the consultant was hired to form the factual basis for and to support actual claims and not the preparation of a claim. Therefore, these consultant fees are not allowable under the Federal Acquisition Regulation.

It is possible that consultant fees can be recoverable if the services were in support of negotiations conducted prior to submission of a claim; and then, if the negotiations fail, in support of a claim. Consultant fees for services prior to the claim, or for services after the claim, might not be allowable.

Therefore, contractors should carefully consider the role and timing of when to call in a consultant in the preparation of a claim.



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