IADC Committee Newsletter

CONSTRUCTION LAW AND LITIGATION

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Who should bear the cost of negotiating change orders and Request for an Equitable Adjustments ("REAs") in a government construction contract? This article focuses on helping contractors recover the costs of attorneys' fees for negotiating change orders and REAs as costs of contract administration.

Are Attorneys' Fees a Recoverable Cost of Contract Administration?

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ABOUT THE COMMITTEE

The Construction Law and Litigation Committee consists of lawyers who represent general contractors, design/build firms, subcontractors, construction lenders, architects, engineers and owners. The Committee provides an opportunity to keep up to date on the latest developments in construction law, as well as a good networking and referral source for experienced construction litigators throughout the country. Members can also obtain information on liability and damage experts with e-mail inquiries to the Committee. Learn more about the Committee at www.iadclaw.org.

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In a world filled with form contracts and boilerplate agreements, the construction contract largely remains a "custom made product" where "the conditions of performance are singular to a particular place and time."[1] Tailoring a construction agreement to a particular project often requires extensive negotiation, much of which is as likely to occur *after* the parties have signed on the dotted line.[2] New issues arising after the parties have executed their agreement often result in change orders, the value of which often becomes a point of contention between the parties. If the parties are unable to agree on an equitable value of the change order, the contractor may file a Request for an Equitable Adjustment ("REA"); failing that, adversarial claims can be filed.[3] This process is often expensive for all parties involved, and raises the question of who should bear the cost of negotiating the change order and REA?

For government contractors seeking to recover negotiation costs under federal claims procedure, contract administration costs are potentially recoverable.[4] A contractor can recover reasonable contract administration costs incurred for the genuine purpose of materially furthering the negotiation process, even if negotiation results in a claim under the Contracts Dispute Act ("CDA").[5] In *Tip Top Construction, Inc. v. Donohue*,[6] the United States Court of Appeals for the Federal Circuit clarified the confusion created by its prior decisions and held that a contractor could recover attorneys' fees incurred during the negotiation of an equitable adjustment to a construction project for the United States Postal Service ("USPS").[7] In reaching its decision, the Court drew a distinction between fees incurred in pursuit of negotiating an equitable adjustment's value, and fees incurred in pursuit of monetary recovery under the CDA.[8] The former is recoverable, whereas the latter is not, because fees incurred for the purpose of furthering negotiation are designed to *avoid* litigation.[9]

This article focuses on helping contractors to recover the costs of attorneys' fees in negotiating change orders and REAs as costs of contract administration. It looks to the jurisprudence surrounding the allocation of contract administration costs, and analyzes the Court's opinion in *Tip Top Construction*.

[1] Karl Silverberg, P.E., *Construction Contract Damages: A Critical Analysis of the "Total Cost" Method of Valuing Damages for "Extra Work"*, 17 ST. JOHN'S J. LEGAL COMMENT. 623, 624 (2003).

[2] These include unforeseen or unintended circumstances, such as government modification of the contract, differing site conditions, defective or late-delivered government property or issuance of a stop work order, causing an increase in contract performance costs. *Pacific Architects and Eng'rs Inc. v. United States*, 491 F.2d 734, 739 (1974).

[3] When the parties are unable to agree on an appropriate increase in payment, the contractor may file a REA. There are four methods generally used to compute the appropriate value of an REA; the actual cost method, the total cost method, the modified total cost method, and the jury verdict method. In calculating the appropriate value of an EA, the parties may dispute the costs associated with work added, work deleted, as well as the resulting changes to profit and overhead. CHARLES TIEFER & WILLIAM A. SHOOK, GOVERNMENT CONTRACT LAW IN THE TWENTY-FIRST CENTURY 331–333 (2012). Therefore, which costs are recoverable under the clauses of the contract becomes a highly contentious issue between the owner and the contractor.

[4] The CDA is implemented by the Federal Acquisition Regulations (FAR), 48 C.F.R §§ 1.1 to 53.3 (2012).

[5] 41 U.S.C.A. §§ 7101–7109. *See Bill Strong Enters., Inc. v. Shannon*, 49 F.3d 1541, 1549–50 (Fed. Cir. 1995).

[6] 695 F.3d 1276 (Fed. Cir. 2012).

[7] *Id.* at 1282.

[8] *Id.* at 1282–83.

[9] *Id.* at 1284.

Finally, this article uses the *Tip Top Construction* decision to discuss best practices for contractors looking to recover attorneys' fees under federal claim procedure.

I. Hitting a Moving Target: Walking the Fine Line of Compensable Costs

A government contractor can recover consultant costs and attorneys' fees incurred during the REA process when those costs are incurred to further the parties' negotiation.[10] The Federal Acquisition Regulations ("FAR") permit the recovery of "[c]osts of professional and consultant services" incurred in rendering services to the federal government, so long as those costs are "reasonable in relation" to those services.[11] In the context of construction contracts, the courts developed the "genuine purpose" test, which permitted contract administration costs to be recovered that were incurred "for the genuine purpose of materially furthering the negotiation process."[12] The "genuine purpose" test served as a metaphorical "line in the sand," distinguishing those contract administration costs that are recoverable because they are incurred during good faith negotiation, and those that not recoverable because they are costs incidental to prosecuting a claim under the CDA.[13] The *Tip Top* Court reasoned that consultant fees fell within the former category of recoverable contract administration fees *because* such fees are incurred as part of a good-faith negotiation process, regardless of whether any claim is actually filed.[14] In so doing, the *Tip Top* Court provided some clarity as to whether the "genuine purpose" test survived its own subsequent jurisprudence.[15] Therefore, the key to recovering contract administration costs is documenting that those costs are incurred as part of a good-faith negotiation of an REA, rather than in preparation of a CDA claim.

For a government contractor to prevail in recovering contract administration costs it must remain on the "right" side of the line in the sand; the contractor's costs must be incurred before its REA becomes a CDA claim. A problem arose, however, in the course of CDA/FAR jurisprudence as to where exactly this compensable line in the sand stood. For many years, the costs of contract administration, including REAs, were compensable under the FAR, so long as no CDA claim was filed, *i.e.*, a request for payment was not a claim so long it was not in dispute when submitted.[16] Based upon this historical delineation between claims in dispute versus those not in dispute, the courts formulated the "genuine purpose" test. The Court later moved the proverbial compensability line, holding that REAs, unto themselves, constituted a "claim;" therefore, costs incurred for REAs were not recoverable under the FAR, regardless of whether it concerned a matter not in dispute when submitted.[17] The *Tip Top* decision is important, because it reaffirms that the recoverability of the costs of contract administration depends upon the historical line in the sand — the "genuine purpose" test — and thereby makes any costs incurred in the course of contract administration recoverable, so long as those costs further negotiations, and not a claim under the CDA.

[10] *Id.* at 1283–84 (quoting *Bill Strong Enters.*, 49 F.3d at 1549–50).
[11] FAR 31.205-33.
[12] *Bill Strong Enters.*, 49 F.3d at 1549–50.
[13] *Id.*
[14] *Tip Top Const'n, Inc.*, 695 F.3d at 1284.
[15] *See generally Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995).
[16] *See Dawco Const'n, Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991).
[17] *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1995).

Thus, as a threshold matter, it is important to distinguish REAs from CDA claims. Contractors often use these two terms interchangeably, but their distinct meanings are the difference between recoverable administration costs, and unrecoverable costs.[18] The REA process is part of the contract administration process, whereas CDA claims are an adversarial action. The FAR provide:

> **Costs of professional and consultant services are allowable** . . . when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government[.][19]
>
> . . . .
>
> **Costs not covered** elsewhere in this subsection are unallowable if incurred in connection with-
>
> > (1) Defense against Federal Government claims or appeals or the **prosecution of claims** or appeals against the Federal Government [.][20]

Hence, the compensability of certain costs is a statutory directive under the FAR, about which the courts — and the Federal Circuit Court of Appeals, in particular — have staked out the breadth of "claims" versus the "[c]osts of professional and consultant services" for contract administration.

II. Moving the Line: Changing when a "Claim" became a "Claim"

REAs are considered to be contract administration costs, not litigation costs. Therefore, the costs associated with the preparation of REAs can be recoverable. The recoverability of attorney and consultant fees was dealt with at length in *Bill Strong Enterprises v. Shannon*.[21] In that case, Bill Strong Enterprises ("BSE") was awarded a fixed-price contract to complete renovations of family housing units at an Air Force base in Michigan.[22] The government released the units for renovation out of sequence, which significantly increased the cost of performance for BSE.[23] Shortly before the work was completed and accepted by the government on July 31, 1989, the Government requested the Defense Contract Audit Agency ("DCAA") audit BSE's claims for increased costs on June 16, 1989.[24]

On September 14, 1989, "in response to DCAA's requests for specific cost data and additional information, BSE hired Excell, Inc., a consulting firm, to revise its data for resubmission to the contracting officer ("CO").[25] The contract between Excell and BSE explicitly stated that work to be performed was "undertaken with no view toward litigation… [but was limited] to the pursuit of an administrative remedy."[26] Eventually, the parties reached an agreement settling the appropriate amount to award BSE for the increased cost of performance, but were unable to agree as to whether BSE's costs in hiring Excell, Inc. were recoverable.[27] This decision was left to the CO per a

[18] Lawrence Schor, *Claims under Federal Government Contracts*, 20 CONSTRUCTION LAW. 18 (2000).
[19] FAR 31.205-33 (b) (emphasis added).
[20] FAR 31.205-47 (f) (emphasis added).
[21] 49 F.3d 1541 (Fed. Cir. 1995) (*overruled on other grounds by Reflectone Inc., v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995)).
[22] *Id.* at 1542.
[23] *Id.*
[24] *Id.* at 1543.
[25] *Id.*
[26] *Id.*
[27] *Id.*

Memorandum of Understanding ('MOU') signed by all parties.[28] The CO concluded that Excell's costs were not recoverable since their claim preparation efforts occurred after BSE completed performance under the contract, and thus were "not incurred in connection with the actual performance of the work."[29] After the Armed Services Board of Contract Appeals ("ASBCA") affirmed this decision, BSE appealed the claim to the Court of Appeals for the Federal Circuit.[30]

To resolve the dispute, the Court closely analyzed the provisions of Part 31 of the Federal Acquisitions Regulations, titled, "Contract Cost Principles and Procedures."[31] FAR 31.205-33, titled, "Professional and consultant service costs," governs the recoverability of these costs, and provides that these costs are generally allowable, unless they are incurred in connection with the prosecution of claims against the government.[32] After analyzing the relevant history relating to the enactment of these provisions, the court concluded that legal, accounting, or consulting costs incurred as a cost of contract administration should be allowable.[33]

> In the practical environment of government contracts, the contractor and the CO usually enter a negotiation stage after the parties recognize a problem regarding the contract. The contractor and CO labor to settle the problem and avoid litigation… This negotiation process often involves requests for information by the CO or Government auditors or both, and, inevitably, this exchange of information involves costs for the contractor. These costs are administration costs, which should be allowable since this negotiation process benefits the Government, regardless of whether a settlement is finally reached or whether litigation eventually occurs because the availability of the process increased the likelihood of settlement without litigation.[34]

Thus, legal, accounting, and consulting services incurred as a cost of contract administration are recoverable, but costs incurred for these services incidental to the prosecution of a claim against the government are not.[35] To determine whether these costs are contract administration costs or incidental to prosecution of a claim, the court "should examine the objective reason why the contractor incurred the cost. If a contractor incurred the cost for the genuine purpose of materially furthering the negotiation process, such cost should normally be [an allowable] contract administration cost."[36] Applying these guidelines, the Court concluded that the cost of Excell's services were allowable contract administration costs.[37]

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[28] *Id.*
[29] *Id.* at 1544.
[30] *Id.* at 1544-1545.
[31] *Id.* at 1546.
[32] *Id.*
[33] *Id.* at 1550.
[34] *Id.* at 1549-50.
[35] *Id.*
[36] *Id.* at 1550.
[37] *Id.* at 1551. "Since a CDA claim did not arise before BSE incurred Excell's costs, there is a strong legal presumption that the costs incurred were not incurred in connection with the prosecution of such a claim against the Government. Since BSE and the Government were consistently in a negotiation posture and since the consultant costs were incurred as part of the exchange of information, the facts demonstrate that BSE hired Excell for the purpose of promoting contract administration and the BSE incurred Excell's costs in order to further a negotiation process that benefitted the Government." *Id.*

III. Moving the Line Again: Changing the Definition of a Compensable "Claim"

Additionally, the parties no longer need to be "in dispute" before a REA can be considered a claim. In *Reflectone, Inc. v. Dalton,* the Federal Circuit Court of Appeals elucidated the concept of a compensable CDA claim.[38] Reflectone entered into a fixed-price contract with the Naval Training Systems Center to update helicopter weapon systems trainers. The contract called for a phased delivery of the trainers. [39] However, the delivery of the trainers was delayed. Reflectone contended that the delay was caused by late, unavailable, or defective government-furnished property. The Navy denied responsibility for the delay.[40] Reflectone eventually submitted an REA to the CO demanding costs related to the government delay, the majority of which were denied.[41] When Reflectone appealed the CO's decision to the Armed Services Board of Contract Appeals ("Board"), relying upon *Dawco Constr., Inc. v. United States*,[42] the Board held that the REA was not a "claim" within the meaning of the CDA and concluded that it did not have jurisdiction over the appeal.[43] Reflectone then appealed that decision to the Federal Circuit Court of Appeals.

Noting that for the purposes of the CDA, FAR 33.201 defines "claim"[44], the Federal Circuit Court of Appeals held it "sets forth the only three requirements of a non-routine 'claim' for money: that it be (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain."[45] Significantly, in clarifying the definition of a "claim," *Reflectone* overruled *Dawco Constr., Inc. v. United States*, and its progeny.[46] *Dawco* interpreted FAR 33.201 to require that the parties be in dispute before *any* demand for payment to the CO would constitute a CDA claim. [47] The Court believed that the effect of *Dawco*'s holding was contrary to the goals of the CDA, which include the efficient and fair resolution of contract claims.[48]

Now a dispute as to either amount or liability is no longer a prerequisite to a claim when a contractor submits a payment demand to the CO for decision, unless that demand is a voucher, invoice, or other "routine request for payment."[49] As the Court said in *Reflectone*:

> [A]n REA is anything but a "routine request for payment." It is a remedy payable only when unforeseen or unintended circumstances, such as government modification of the contract, differing site conditions, defective or late-delivered government property or issuance of a stop work order, cause an increase in contract performance costs. *Pacific Architects and Eng'rs Inc. v. United States*, 491 F.2d 734, 739, 203 Ct.Cl. 499 (1974). A demand for compensation for unforeseen or unintended circumstances cannot be characterized as 'routine.' The Supreme Court has confirmed the non-routine nature of an REA by equating it with assertion of a breach of contract. *Crown Coat Front Co. v. United States*, 386 U.S.

[38] 60 F.3d 1572 (Fed. Cir. 1995).
[39] *Id. at 1573.*
[40] *Id.*
[41] *Id. at 1574.*
[42] 930 F.2d 872, 878 (Fed.Cir.1991).
[43] *Id.*
[44] The definition of claim can now be found at FAR 2.101.
[45] *Reflectone*, 60 F.3d at 1575.
[46] *Id*. at 1578.
[47] *Id*. at 1580-81.
[48] *Id*. at 1581.
[49] *Id*.

> 503, 511, 87 S.Ct. 1177, 1181, 18 L.Ed.2d 256 (1967) ("With respect to claims arising under the typical government contract, the contractor has agreed in effect to convert what otherwise might be claims for breach of contract into claims for equitable adjustment."). Thus, an REA provides an example of a written demand for payment as a matter of right which is not 'a routine request for payment' and, therefore, it satisfies the FAR definition of 'claim' whether or not the government's liability for or the amount of the REA was already disputed before submission of the REA to the CO.[50]

If the request for payment is "routine," a pre-existing dispute is still necessary for it to constitute a claim under the CDA.[51]

Therefore, claim and dispute are not synonymous. There are differences between a REA that is a claim, and a REA that is not a claim. The differences include that once a REA that is a claim is submitted, the costs associated with professional services cannot be asserted against the government.[52]

IV. Adding Certainty: *Tip Top Construction, Inc. v. Donohue* and Reaffirming the "Genuine Purpose Test" in the Construction Context

Tip Top gave the court the opportunity to clarify the "genuine dispute" standard that had been convoluted in its prior casees. In *Tip Top*, the Federal Circuit Court of Appeals applied the test from *Bill Strong* to reverse the decision of the Postal Service Board of Contract Appeals ("PSBCA") and remand the case with instructions for the Board to grant Tip Top's appeal in its entirety.[53] The PSBCA had previously determined that certain costs claimed by Tip Top were unrecoverable because they were not incurred as a result of the change order.[54] Focusing on Tip Top's objective purpose for hiring an attorney, the Court concluded that Tip Top's attorney's fees were "incurred for the genuine purpose of materially furthering the negotiation process," and thus, were recoverable costs of contract administration.[55]

Tip Top and the United States Postal Service ("USPS") entered into a contract in 2007 whereby USPS would assign individual projects to Tip Top via work orders.[56] On May 26, 2009, USPS issued a work order to Tip Top to replace the air conditioning system at the Main Post Office in Christiansted, Virgin Islands for a fixed price of $229,736.92.[57] Tip Top sent in its subcontractor's submittals two months later, which proposed specific air condensers that could be used with a few different types of refrigerant, but did not specify which refrigerant Tip Top planned to use.[58] USPS approved these submissions and Tip Top commenced work.[59] In September 2009, Tip Top sent a submittal that set forth its plans to use R-22 refrigerant.[60] USPS's construction manager, Mr. Morales, returned the submittal and informed Tip Top that R-410a refrigerant

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[50] *Id.*
[51] Generally, "[a] routine request is one incurred and submitted 'in accordance with the expected or scheduled progression of contract performance.'" *James M. Elliott Construction Co. v. United States*, 93 F.3d 1537, 1542-43 (Fed. Cir. 1996).
[52] FAR 31.205-47(f)(1).
[53] *Id.* at 2.
[54] *Id.* at 8.
[55] *Id.* at 15.
[56] *Id.* at 2.
[57] *Id.* at 3.
[58] *Id.* at 3.
[59] *Id.* at 4.
[60] *Id.*

should be used.[61] Tip Top's highest consultant on the project, Mr. Diaz, informed USPS that the equipment ordered could not be used with that type of refrigerant and asked USPS how they should proceed.[62] Mr. Morales responded requesting that Tip Top submit a proposal for the cost of equipment that would work with R-410(a) refrigerant.[63]

Between September and January, the parties negotiated this change, until January 12, 2010, when Mr. Morales directed Tip Top in writing to proceed with the equipment change as discussed, leaving the price open to further negotiation.[64] Between September 2009 and June of 2010 negotiations regarding the price were ongoing.[65] Tip Top's consultant, Mr. Diaz, spent significant time preparing the estimate of the increased cost of the work and in April 2010, Tip Top retained counsel to advise and assist with these ongoing negotiations.[66]

On June 23, 2010, the CO issued the final decision regarding this dispute, finding that Tip Top was entitled to $22,133.77 of its claim for increased costs, excluding recovery in the amount of $12,400 for the proposal preparation costs incurred by Mr. Diaz and Tip Top's attorneys.[67] The PSBCA mostly agreed with this conclusion, finding that the negotiation costs incurred after the approval of the substitute equipment were not recoverable, but that those incurred before this approval happened on October 15, 2009, were recoverable.[68] Tip Top was awarded an additional $2,656 for Mr. Diaz's services up to October 15, but the remaining $9,835 was denied and Tip Top appealed this decision.[69]

Relying on *Bill Strong*, the Court found that the costs of Mr. Diaz's work and the counsel's fees incurred through June 8, 2010 were incurred for the genuine purpose of materially furthering the negotiation process.[70] The CO's letter of January 15, 2010, which directed Tip Top to commence the project with the newly approved equipment, expressly left the issue of price open for negotiations, which is precisely what the parties engaged in until Tip Top submitted a claim under the CDA on June 18, 2010.[71] Regardless of the fact that litigation did eventually ensue, the parties were engaged in negotiation until the time that Tip Top submitted its claim under the CDA.[72] Consequently, the PSBCA's refusal to reimburse Tip Top for these costs was in error.[73]

V. Using the *Tip Top* Decision as a Tool

The Court's decisions in *Tip Top* and *Bill Strong* reveal important clues about what contractors should do when they seek to recover attorney's or other consultant's fees as costs of contract administration. Because the court looks at the contractor's objective purpose in incurring these costs, contractors are well-advised to take actions which convey a genuine purpose to resolve the dispute amicably.[74] Actions such as hiring outside consultants, including explicit statements regarding the goal of those consulting services in the agreements made with those parties, and keeping detailed hourly and daily

[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.* at 5.
[65] *Id.*
[66] *Id.* at 5-6.
[67] *Id.* at 6.
[68] *Id.* at 11.
[69] *Id.* at 7-8.
[70] *Id.* at 15.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 16.
[74] *See Tip Top Construction* at 15.

records of employees' efforts can demonstrate this intent. If the Court is convinced that a contractor's genuine purpose in spending additional money on the negotiation process is to materially further that process with the goal of reaching an amicable settlement, that additional money spent will be a recoverable cost of contract administration.[75]

Hiring outside consultants, as opposed to re-allocating the efforts of regular employees, can demonstrate a genuine intent to resolve the dispute amicably more clearly, because outside consultants are likely to have a more objective point of view regarding the issues. In another recent decision, *Versar, Inc.,* the ASBCA found that costs incurred in preparing a REA were not recoverable, because the contractor's project manager prepared and submitted the REA and there was "no evidence that appellant paid for any consultant or professional services in connection with the REA's preparation."[76] Although the court found the costs incurred by Tip Top's employee, Mr. Diaz, were recoverable, the rejection of Versar's costs demonstrates that the safer course of action is to hire outside consultants and counsel. [77]

Although BSE eventually filed a claim under the CDA for the costs incurred during price negotiations, when BSE first hired outside consultants to help prepare presentations and negotiate on BSE's behalf, the parties explicitly stated that the effort "was undertaken with no view towards litigation."[78] This fact, along with the fact that no claim was filed under the CDA until much later, provided strong evidence that the parties were in a negotiating posture while they paid Excell for their services. Explicit statements such as the one included in the contract between BSE and Excell, Inc. are an easy way to demonstrate genuine intent to resolve the dispute without resorting to litigation.

Detailed record keeping is always advisable for contractors, and this is especially true in the context of a REA. Detailed records including all correspondence related to a particular project, meeting minutes, internal memoranda, plans and specifications, schedules, job photographs and videos, subcontractor and supplier files, and daily records of each employee's time spent on the project can be invaluable for proving increased costs, including attorney's and consultant's fees.[79] In *Tip Top*, the government argued that Tip Top failed to present sufficient evidence to demonstrate the type of work Mr. Diaz performed during the contested period.[80] The Court rejected this argument, noting that Tip Top had submitted timesheets for Mr. Diaz and supplemented these with declarations from Mr. Diaz describing the work he performed.[81] The Court also noted that Tip Top submitted attorney billing records to support its claim for attorney's fees.[82] Unrebutted by the government, this evidence was sufficient to prove the costs Tip Top claimed were incurred during their negotiations with the government.[83]

VI. Conclusion

[75] *Bill Strong*, 49 F.3d at 1551.
[76] *Versar, Inc.*, ASBCA No. 56857 (Apr 23, 2012).
[77] *See Tip Top Const. Inc.*, at 15; *Versar, Inc.* at 57.
[78] *Bill Strong*, 49 F.3d at 1543.

[79] *See* Matt DeVries, *Best Practice: How to Track Increased Construction Costs for Proving Claims*, BEST PRACTICES CONSTRUCTION LAW (May 21, 2013, 9:18 AM), http://www.bestpracticesconstructionlaw.com/2013/05/articles/best-practices/best-practice-how-to-track-increased-construction-costs-for-proving-claims/
[80] *Tip Top Const*. at 10.
[81] *Id.* at 16.
[82] *Id.*
[83] Id. at 16-17.

In *Tip Top Const. Inc., v. Donohue*, the Federal Circuit Court of Appeals affirmed that *Bill Strong Enterprises* was not completely overturned by *Reflectone v. Dalton*. Relying entirely on the test put forth by *Bill Strong*, the Court concluded that Tip Top was entitled to recover its attorney and consulting costs incurred during price negotiations. The outcomes of these cases demonstrate that contractors may find it in their best interests to hire outside counsel to assist them in the negotiation process regarding the appropriate price of an equitable adjustment. Hiring outside counsel can provide an objective perspective, demonstrate a genuine intent to resolve the dispute amicably, and free up other employees to perform the jobs they were hired to perform. Outside counsel will provide critical legal expertise that a contractor's regular employees are less likely to have. Considering that the costs incurred by obtaining this expertise prior to the filing of a claim under the CDA can be recovered from the government, contractors have a strong incentive to consider this option the next time they find themselves in a construction dispute.

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