Tecom Redux – The Federal Circuit Doubles Down on the Allowability of Costs to Defend Against Discrimination Suits

Litigation Alert
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Yesterday, the U.S. Court of Appeals for the Federal Circuit issued a decision in *Bechtel National, Inc. v. United States*, Docket No. 2018-2055, finding that costs incurred in defending against sexual and racial discrimination and retaliation suits are unallowable unless the contractor can demonstrate that the underlying suits had very little likelihood of success. In so doing, the court relied almost exclusively on its decision in *Geren v. Tecom, Inc.*, 566 F.3d 1037 (Fed. Cir. 2009)—even though there were material differences between the contract terms at issue in *Bechtel*, and those at issue in *Tecom*. A copy of the *Bechtel* opinion is available here.

Summary of Decision

The *Bechtel* opinion begins with a discussion of *Tecom*. In this regard, the court finds:

- In *Tecom*, the court had held that: (1) under FAR 31.201-2 (a standard provision incorporated into cost-reimbursement contracts), a cost must comply with the "[t]erms of the contract" in order to be allowable; and (2) any costs associated with a judgment in a Title VII case alleging sexual harassment and retaliation would therefore be unallowable because the contract in Tecom included FAR 52.222-26, which prohibits sex discrimination. *See Bechtel*, slip op. at 5 (summarizing *Tecom*).
- Given its finding that the costs associated with a judgment would be unallowable, the *Tecom* court then turned to the question of whether the costs of settlement in the Title VII sex discrimination context could be allowable. On this issue, the court relied on its decision in *Boeing North American, Inc. v. Roche*, 298 F.3d 1274 (Fed. Cir. 2002), and held that "settlement costs are also unallowable unless the contractor can establish that the plaintiff in the discrimination suit 'had very little likelihood of success on the merits.'" *Bechtel*, slip op. at 6 (summarizing *Tecom*) (quoting *Boeing*, 298 F.3d at 1046).
- At the same time, the *Tecom* court also expressly recognized that its analysis "could change if there was a contract provision 'dictat[ing] the treatment of specific costs.'" *Bechtel*, slip op. at 7 (summarizing and quoting *Tecom*, 566 F.3d at 1041).

The contract at issue in *Bechtel* had exactly the sort of "contract provision" that the *Tecom* court recognized could dictate a different outcome on the allowability of the costs to settle a discrimination case: in addition to FAR 31.201-2 and FAR 52.222-26, Bechtel's contract also incorporated DEAR 970.5204-31—which specifically provided for "reimbursement of contractor liabilities to third parties and 'litigation costs.'" *Bechtel*, slip op. at 7. This language expressly providing for the allowability of litigation costs should have been sufficient for the Federal Circuit to find that, even under *Tecom*, the costs at issue in *Bechtel* were allowable. But it wasn't.

Rather, the court focused on other language in DEAR 970.5204-31, which provided that costs "specifically disallowed elsewhere in this contract" or that "are otherwise unallowable by … the provisions of this contract" would not be reimbursed. *Id.* The court found that FAR 31.201-2 (as interpreted by the court in *Tecom*) was such a "provision[] of this contract" and so, to demonstrate allowability, *Bechtel* had to satisfy the *Tecom* test. In so holding, the court essentially found that the specific language of DEAR 970.5204-31—which expressly provided that "litigation costs" would be allowable—was trumped by the more general language of FAR 31.201-2—which does not even mention "litigation costs" (let alone "specifically disallow[]" them). At the very least, the court should have found that there was an ambiguity in the contract on this issue, and so taken into account the fact that the

Department of Energy had reimbursed for costs incurred in these identical circumstances in the past. *See Bechtel*, slip op. at 10-11.

Perhaps the one silver lining to the decision is that the court held back from finding that the *Tecom* test applies to all alleged breaches of contract, and not just breaches of the FAR 52.222-26 prohibition against discrimination. On this point, the court found that issue was "not presented, and we need not address it." *Bechtel*, slip op. at 11.

Takeaways

There are two principal takeaways for contractors from the *Bechtel* decision: (1) we are unlikely to see *Tecom* overruled, at least in the near future; and (2) the Federal Circuit remains committed to a "plain language" approach to contract interpretation that is resistant to attempts to introduce extrinsic evidence to demonstrate or resolve textual ambiguities.

Going forward, contractors will need to even more carefully assess the pros and cons of settling third-party litigation involving alleged breaches of contract, and the most conservative approach will be to assume that, in order to recover the costs associated with such settlements from the government, contractors will need to satisfy the *Tecom* test of demonstrating that the litigation at issue had very little likelihood of success.

For more information, please contact:

Jason N. Workmaster, jworkmaster@milchev.com, 202-626-5893

Abigail T. Stokes, astokes@milchev.com, 202-626-5944

The alert was also picked up by other publications, including "Friday Flash" by The Coalition for Government Procurement.
