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FEATURE COMMENT: The Most Important Contract Disputes Decisions Of 2019

In 2019, a number of important cases were decided relating to Government contract disputes that have significant impacts on contractors. Specifically, the U.S. Court of Appeals for the Federal Circuit throughout this past year issued important decisions clarifying that a request for equitable adjustment can satisfy the requirements, with updates to the certification, of a certified claim under the Contract Disputes Act, as well as, more generally, whether nontechnical and intentional defects in claim certifications can be corrected. Along this same vein, the Armed Services Board of Contract Appeals clarified its prior decisions regarding the types of electronic signatures that can be used to validly certify a claim. In addition to the above, the Federal Circuit continued to provide guidance to contractors and the Government on the types of affirmative defenses that must be the subject of a contracting officer's final decision. The below addresses these important cases, as well as a few other important contract disputes decisions regarding jurisdiction and privilege issued throughout 2019.

No "Magic Words" Required for a Claim, Substance Over Form Prevails (*Hejran Hejrat Co. Ltd., v. U.S. Army Corps of Eng'rs*, 930 F.3d 1354 (Fed. Cir. 2019); 61 GC ¶ 237, rev'g, *Hejran Hejrat Co. LTD*, ASBCA 61234, 18-1 BCA ¶ 37,039)—In a case involving whether a contractor satisfied the requirements of the CDA for submitting a certified claim against the Government, the Federal Circuit reversed and remanded a decision by the ASBCA that dismissed a contractor's request for approximately $4 million for lack of jurisdiction.

The Federal Circuit held that the contractor satisfied the claim submission requirements even though its claim was styled as "Request for Equitable Adjustment," and specifically asked that the submission "be treated as an REA," because the contractor's submission nevertheless contained all the hallmarks of a certified claim. The Federal Circuit explained that the contractor's REA satisfied the CDA's claim submission and certification requirements because (1) there was no dispute that the written request "constituted a written demand for a specific amount of money" that described five grounds why the contractor was owed more money, (2) the demand was accompanied by a "sworn statement" by an officer of the contractor that "had full management authority to close out the contract" and (3) the CO characterized its denial of the REA as the "Government's final determination on the matter."

The Federal Circuit rejected all of the Government's arguments as to why the contractor's REA did not constitute a claim. First, relying on *Reflectone, Inc. v. Dalton,* 60 F.3d 1572 (Fed. Cir. 1995); 37 GC ¶ 411, the court summarily rejected the Government's primary argument, which was essentially rooted in form over substance, in that the contractor styled the demand for payment as an REA rather than a "claim." The Federal Circuit explained that the Government's arguments were directly contrary to the court's en banc decision in *Reflectone* that held "[the contractor's] REA satisfie[d] all the requirements listed for a [Contract Disputes Act (CDA)] 'claim.' " (alteration in original).

Second, the court dispensed with the Government's "magic words" argument in that the contractor did not specifically request a CO's final decision when making its request. The court explained that the applicable law does not require a contractor to use "particular words in its submission in order to constitute a request for a contracting officer's final decision." Citing *Maropakis Carpentry, Inc. v. U.S.*, 609 F.3d 1323 (Fed. Cir. 2010); 52 GC ¶ 225, the Federal Circuit explained that the Government's

position was inconsistent with the relevant precedent, which recognizes that a "CDA claim need not be submitted in any particular form or use any particular wording ... so long as it has a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim."

Third, the Federal Circuit afforded no import to the fact that the contractor's submission apparently alluded to an intent to later file a "certified formal claim" especially when the submission at issue included all the necessary elements. According to the court, it was notable that the CO treated the denial of the contractor's REA as a "final determination." Moreover, the court explained that the CO's suggestion after the final determination that the contractor should submit a formal claim could not retroactively turn a qualifying claim into something else.

Lastly, the court explained that, even if the contractor's certification in the REA was defective, "[a] defect in the certification of a claim does not deprive a court or an agency board of jurisdiction over the claim" and that "[p]rior to the entry of a final judgment by a court or a decision by an agency board, the court or agency board shall require a defective certification to be corrected."

This is an important decision for both contractors and the Government because the alternative conclusion would have created an untenable position. Specifically, if the court reached the alternative conclusion, contractors that submit an REA and receive a CO's final decision in response would either (1) follow the Government's direction and appeal, and then face a motion to dismiss for lack of jurisdiction or (2) treat an appeal as premature, wait, and then face the risk the Government will later assert the REA met the definitions of a claim and any appeal is late. Because the Government occasionally issues CO final decisions in response to REAs, some certainty was necessary. The Federal Circuit's decision in *Hejran* is an important reminder to contractors and the Government that the court will look to substance over form to determine whether a contractor has submitted a proper claim.

Because this case has the potential to result in disputes related to the allowability of costs when an REA is determined, in substance, to be a certified claim, contractors must carefully draft their submissions to the Government when making a specific request for payment, whether as an REA or as a certified claim. Similarly, the Government should recognize when the substance of a contractor's request, in reality, satisfies the appropriate claim requirements. Had both parties taken slightly different actions in *Hejran*, they could have likely avoided a protracted procedural dispute and, instead, focused on the underlying merits.

Contractor's Ability to Correct Nontechnical and Even Intentional CDA Certification Defects (*DAI Global, LLC fka Dev. Alts., Inc. v. Adm'r of the U.S. Agency for Int'l Dev.*, 945 F.3d 1196 (Fed. Cir. 2019); 62 GC ¶ 5, rev'g, *Dev. Alts., Inc. v. Agency for Int'l Dev.*, CBCA 5942, et al., 18-1 BCA ¶ 37,147)—In a case involving whether a contractor could correct a prior certification made with "reckless disregard" for the CDA certification requirements, the Federal Circuit reversed a decision by the Civilian Board of Contract Appeals and held that nontechnical and even intentional certification defects can be corrected.

Specifically, DAI Global LLC, formerly known as Development Alternatives Inc., was awarded five U.S. Agency for International Development contracts for developmental services in Afghanistan. DAI thereafter subcontracted with a company for its private security services. Pursuant to local laws capping the number of individuals permitted in a private security workforce, Afghanistan imposed on the subcontractor a $2 million fine, which the subcontractor paid and subsequently allocated a portion of the expense to each of DAI's five contracts. DAI, in turn, submitted to USAID (1) a cover letter characterized as a CDA certification, (2) five claims seeking reimbursement for the fine and (3) the subcontractor's certifications, each of which stated that the accompanying claim was made in good faith. The CO denied the claims upon concluding that DAI's submission failed to contain a CDA certification.

The CBCA agreed with the CO and dismissed DAI's appeals for lack of jurisdiction. Specifically, notwithstanding the CBCA acknowledging that contractors have the right to correct defectively certified claims pursuant to 41 USCA § 7103(b)(1), the CBCA dismissed the appeals on the grounds that the five claims were defectively certified. The CBCA reached this conclusion based on its determination that the certification, which bore "no resemblance" to the required statutory language set forth in 41 USCA § 7103(a)(1), was "not salvageable" since the defects were not "technical" in nature, but rather were made with "reckless disregard" for the CDA's certification requirements.

The Federal Circuit disagreed. In analyzing 41 USCA § 7103(b)(1), the court held that the plain language of the statute neither limits the correction of certification defects to those that are technical in nature nor limits a contractor's right to correct defects that were made with intentional, reckless or negligent disregard for the certification requirements (i.e., mens rea).

While *DAI Global, LLC* appears to remove the need to distinguish between nontechnical and technical certification defects for the purposes of establishing jurisdiction and preserving a contractor's right to cure defective claims, contractors should nonetheless properly certify their claims pursuant to the certification requirements of the CDA to avoid unnecessary procedural disputes.

Contractor's Electronic Signature Held to Be Valid Certification (*URS Fed. Servs., Inc.*, ASBCA 61443, 19-1 BCA ¶ 37,448)—In this case, the ASBCA held that certain electronic signatures comply with the claim certification requirement in the CDA, providing the ASBCA with jurisdiction.

The Government in this case, and other similar cases, asserted that contractors' electronically signed claims were not certified as required by 41 USCA § 7103(b)(2) and Federal Acquisition Regulation 33.207(a) because the use of a digital signature computer application did not meet the FAR's definition of a "signature." The FAR defines "signature" as "the discrete, verifiable symbol of an individual which, when affixed to a writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing." FAR 2.101. The FAR further confirms that this standard can be met with "electronic symbols." Id.

This likely became an issue because the ASBCA previously held that certain typewritten signatures did not meet the requirement to be a "signature." See, e.g., *NileCo Gen. Contracting LLC*, ASBCA 60912, 17-1 BCA ¶ 36,862 (a typewritten name of the company's director is not a "signature"); *Teknocraft Inc.*, ASBCA 55438, 08-1 BCA ¶ 33,846 (" '//signed//' is not a signature"). Whether a claim has an adequate signature is important because the ASBCA has held that claims with invalid signatures are treated as though they lacked signatures and were not certified, and therefore could not be corrected (as opposed to a defective certification that could be corrected). See, e.g., *Tokyo Co.*, ASBCA 59059, 14-1 BCA ¶ 35,590.

In *URS*, the ASBCA held that "the signature of appellant's Vice President, affixed to a claim through the use of a digital signature computer application that requires the use of a unique password and user identification, complies with the [CDA] claim certification requirement." Importantly, rejecting the Government's argument that "to be verifiable, an electronic signature must be capable of being authenticated with a 'validated, trustworthy certificate underlying the digital signature,' " the ASBCA recognized that "nothing in the CDA or any of our prior cases requires the exclusive use of an ink signature or imposes standards for digital signatures that are any more stringent than those that apply to such traditionally-accepted ink signatures."

This case provides necessary clarity that certain electronic signatures can validly satisfy the requirements for a CDA certification. It is noteworthy that this issue likely arose based on the ASBCA painting itself into a corner with its decision that (1) certain typewritten signatures (which are widely accepted elsewhere) did not validly certify a claim and (2) typewritten signatures did not result in defective certifications that could be corrected. An interesting question is whether this second holding (that invalid signatures are treated as a lack of signature that cannot be corrected) will be revisited based on the Federal Circuit's decision in *DAI*, discussed above.

CDA Claims and Affirmative Defenses—The Interpretation of *Maropakis* Continues (*Sec'y of the Army v. Kellogg Brown & Root Servs., Inc.*, 779 F. App'x 716 (Fed. Cir. 2019), aff'g, *Kellogg Brown & Root Servs.*, ASBCA 56358, et al., 17-1 BCA ¶ 36,779)—In a case involving a contractor's multiple breach of contract claims, the Federal Circuit once again clarified the reach of *Maropakis*, holding that the affirmative defense of prior material breach need not meet the jurisdictional requirements of the CDA.

In *Maropakis*, the Federal Circuit held that certain contractor defenses to Government claims are contractor claims that must be submitted to the CO for final decision and cannot be raised for the first time in litigation. The Federal Circuit reiterated its *Maropakis* holding four years later in *Raytheon Co. v. U.S.*, 747 F.3d 1341 (Fed. Cir. 2014); 56 GC ¶ 124, which held that a contractor seeking an equitable adjustment to the contract's terms as an affirmative defense to a monetary claim must meet the jurisdictional prerequisites of the CDA.

Since *Maropakis* and *Raytheon*, however, the Federal Circuit gradually has been seeking to nar-

row the broad holding in *Maropakis*. See *Securiforce Int'l Am., LLC v. U.S.*, 879 F.3d 1354 (Fed. Cir. 2018) (holding that the common-law affirmative defense of prior material breach under the contract as written need not be presented to the CO); 60 GC ¶ 31; *Laguna Constr. Co., Inc. v. Carter*, 828 F.3d 1364 (Fed. Cir. 2016) (holding that jurisdiction exists over the Government's defense of prior material breach under the contract as written); 58 GC ¶ 264; see also *Total Eng'g, Inc. v. U.S.*, 120 Fed. Cl. 10 (2015) (holding that the contractor was not required to submit its defective specifications defense as an affirmative CDA claim before asserting its defense because the contractor was not seeking any separate monetary relief or adjustment to the contract's terms); *Jane Mobley Assocs., Inc. v. Gen. Servs. Admin.*, CBCA 2878, 16-1 BCA ¶ 36,209 (explaining that if the rule of *Maropakis* applied to any contractor defense to a Government claim that was not seeking a contract adjustment or separate monetary relief, there could be the "drastic consequence" of a contractor's appeal never being heard on the merits, which would be contrary to the CDA's intent and purpose).

The Federal Circuit recently added to this conversation, albeit in a non-precedential decision, in *Kellogg Brown & Root Servs., Inc.*, 779 F. App'x 716 (Fed. Cir. 2019). As background, shortly after Kellogg Brown and Root Services Inc. (KBR) began contract performance in Iraq under the U.S. Army's Logistics Civil Augmentation Program (LOGCAP III contract), Iraqi insurgents began attacking KBR convoys. The Army and KBR held discussions on hiring private security contractors (PSCs) for KBR's defense. KBR, prior to the parties reaching agreement, hired PSCs to protect its employees and subcontractors performing KBR's duties under the LOGCAP III contract. Several Army commanding officers supported KBR's use of PSCs, and the Army paid the PSC costs without objection.

In early 2007, however, the Army changed course and decided that KBR's PSC costs were unallowable under the LOGCAP III contract. Because the Army had already paid KBR over $44 million for these costs, the Army recouped this amount by withholding payments due KBR from outstanding invoices. This Army withholding triggered three certified claims from KBR. KBR appealed the claims, on a deemed denied basis, to the ASBCA.

At the ASBCA, the Army moved to dismiss one of KBR's counts, a count that alleged that the Army breached its contractual obligation to provide adequate force protection and the use of PSCs was a permissible remedy (Count II), for lack of jurisdiction on grounds that KBR was required under *Maropakis* to first submit a claim to the CO. KBR moved for summary judgment in response.

The ASBCA ruled in favor of KBR, reasoning that the Army's withholding of payment for PSC costs previously paid constituted a Government claim, and also that Count II was an affirmative defense asserting prior material breach that need not first be presented to the CO as a certified CDA claim.

The Federal Circuit unanimously affirmed. In reviewing the ASBCA's decision on jurisdiction de novo, the Federal Circuit explored a number of prior cases regarding the extent of the ASBCA's or Court of Federal Claims' jurisdiction under the CDA over defensive claims. Whether advanced by the Government or a contractor, those affirmative defenses that arise from the contract and that do not seek adjustment of contract terms are clearly within the scope of the board's or COFC's jurisdiction. The Federal Circuit, thus, determined that Count II was an affirmative defense that fell under the terms of the LOGCAP III contract and need not first be presented as a certified claim to the CO. Specifically, KBR had "hired PSCs only because the Army first breached its force protection obligations" and was seeking only a denial of the Government's monetary claim, not a change to the contract's terms.

KBR seeks to further clarify that the distinguishing characteristic is whether the defense arises only from the contract to deny a Government monetary claim (requiring no CDA certified claim) or asserts a change to the contract's terms (requiring a CDA certified claim). Nevertheless, because the decisions stemming from *Maropakis* span nearly over an entire decade and are factually and procedurally complex, contractors should undertake the analysis to determine on an individual basis whether a potential defense qualifies as a claim under the CDA. This effort is particularly important because it may foreclose a viable defense if such defense either was not submitted to the CO prior to being at issue in the case or becomes barred by the CDA statute of limitations.

Alleging Misleading Discussions Was an Element of a CDA Claim, Not a Bid Protest (*Chugach Fed. Sols., Inc.*, ASBCA 61320, 19-1 BCA ¶ 37,380)—In this case, the ASBCA denied the Government's motion to dismiss for lack of jurisdiction, finding that

the contractor properly alleged a negligent negotiations claim, among other claims, based on the agency's alleged misleading discussions and negotiations that occurred during the contract's formation.

The thrust of the contractor's argument was that the agency, during the evaluation of proposals determined that the contractor's proposal had "significantly low" staffing, an apparent significant weakness. Instead of alerting the contractor to this potential significant weakness, the agency informed the contractor that its overall staffing was adequate. The agency's conduct, according to the contractor, violated FAR 15.306(d), which required the Government to conduct meaningful discussions that, at a minimum, required the CO to indicate to, or discuss with, Chugach Federal Solutions Inc. any deficiencies, significant weaknesses, and adverse past performance information to which Chugach did not yet have an opportunity to respond. The contractor asserted that the agency's failure to conduct meaningful discussions and its reliance on the agency's misleading statements in negotiations caused Chugach to negotiate staffing levels that were materially inadequate and that resulted in significant economic losses, entitling it to an equitable adjustment.

In response to these allegations, the agency moved to dismiss, asserting that this claim constituted an improper bid protest claim, insofar that it challenged the agency's evaluation of the contractor's proposal during the procurement process, which is not within the scope of the CDA. The board rejected the agency's argument and agreed with the contractor that its challenge was not a bid protest claim, but was a valid CDA claim "related" to the contract.

Notably, the contractor relied on the Federal Circuit's decision in *LaBarge Prods., Inc. v. West,* 46 F.3d 1547 (Fed. Cir. 1995); 37 GC ¶ 136, which held that the contractor properly asserted a contract reformation claim pursuant to the CDA even though it alleged violations of the FAR relating to bidding irregularities that occurred during contract formation. The Federal Circuit explained in *LaBarge* that where the claimant was an actual Government contractor, rather than a disappointed bidder, and sought an increase to its contract price based on the Government's improper actions even though such actions occurred during bidding, this did not establish that the claimant was seeking to set aside a contract and have a new contract awarded in the nature of a bid protest. Rather, such operative facts and the requested relief, i.e., reformation, clearly evidence that the basis of the contractor's claim "relates" to an awarded contract and thus constitutes a proper subject under the CDA.

The ASBCA agreed and held that, like in *LaBarge*, Chugach was an actual Government contractor (not merely a disappointed bidder) and properly asserted a claim relating to a contract it had been awarded insofar that it alleged that the Government's violations of its obligations regarding the conduct of discussions impacted Chugach's ultimate performance under the contract and the contract price for which it sought compensation. In this regard, Chugach's allegations that it would have increased staffing in its proposal had the agency properly brought its concerns to Chugach's attention were determined to be sufficiently "related" to its contract. Additionally, the board recognized that Chugach's negligent negotiations claim was really "just an element of [its] superior knowledge claims" that were not the subject of the Government's motion to dismiss.

In reaching this conclusion, the ASBCA also rejected the Government's policy argument that the failure to dismiss the negligent negotiations claim would lead to a flood of similar contract formation claims by future contractors losing money on performance of CDA contracts and would lead to a significant amount of discovery of source selection documents in search of such procedural violations that contractors will allege to be the source of their losses. The court rejected these assertions, noting that the binding precedent established by *LaBarge* is nearly 25 years old and not new law, and also that the flood of claims predicted by the Government never materialized after *LaBarge*.

This case highlights that a contractor may have valid CDA claims where the Government acts in violation of its obligations during the bidding process or in performance of other contractual functions. While the ASBCA was not convinced that Chugach was engaged in what the agency apparently perceived as an unjustified fishing expedition, contractors should expect the Government to advance this argument when contractors seek proposal and evaluation-related materials in a contract dispute.

Disclosures Made Pursuant to the Mandatory Disclosure Rule May Result in a Waiver of Attorney-Client Privilege (*Anderson v. Fluor Intercontinental, Inc. et al.* (case no. 1:19-cv-00289-LO-TCB))—In a recent discovery order, the U.S. District Court for the Eastern District of Virginia recently upheld an unsettling decision that contractor disclosures made under

the Mandatory Disclosure Rule (MDR), even when subject to an investigation conducted at the direction of counsel, may constitute a waiver of the attorney-client privilege.

During discovery in *Anderson v. Fluor Intercontinental, Inc.*, a wrongful termination case related to a Government contractor's internal investigation into whether an employee had undisclosed conflicts of interest with a subcontractor bidding on its subcontracts, the plaintiff-employee moved to compel production of discovery related to the contractor's internal investigation. The plaintiff asserted that a subject-matter waiver of the attorney-client privileged investigation had occurred through the contractor's disclosure of the investigation to the Department of Defense inspector general.

On Nov. 8, 2019, the court held that the contractor waived the attorney-client privilege due to four statements in its disclosure. The court held that the statements—Plaintiff "appears to have inappropriately assisted ... "; "Fluor considers [that] a violation ..."; Plaintiff "used his position ... to pursue [improper opportunities] and ... to obtain and improperly disclose nonpublic information ..."; and "Fluor estimates there may have been a financial impact ... [due to] improper conduct"—were legal conclusions that revealed attorney-client communications that were released to the DOD IG, a third party. The court further concluded that these disclosures were "voluntarily" made, as admitted via pleadings (i.e., the answer) and, therefore, determined that a subject-matter waiver occurred, meaning the privilege was waived as to the communications, their subject matter and the underlying details, as well as to fact work product regarding the disclosure.

Fluor Intercontinental Inc. moved for reconsideration arguing, in part and with additional support via an amicus brief, that the court misconstrued the disclosure requirements under the MDR. As related to this contention, the court held, on Dec. 20, 2019, that under the MDR, a contractor need only make a "timely, written disclosure, upon credible evidence," but that such disclosure need not be "comprehensive." Instead, the court held that the "natural reading [of the MDR] leads to the conclusion that the substance of the disclosure should be a notification that the contractor has credible evidence that a principal, employee, agent, or subcontractor of the contractor has committed a violation." That is all. The court determined that the "full cooperation" requirement is "separate and distinct from both the [MDR] and the other internal control system function, which is similar to the [MDR]."

Prior to this decision, it was common for contractors to provide rather comprehensive information, depending on the circumstances, under the MDR to be candid with their Government customers, while also preserving resources and enabling cost-savings to the extent additional investigations were unnecessary. It also was common for contractors to make disclosures even when the evidence obtained from an internal investigation did not necessarily satisfy a credible evidence standard in the contractor's opinion. Contractors might do so out of an abundance of caution so as to forestall any claim of noncompliance with the MDR.

As a result of this decision, contractors and their counsel must take care to only include high-level facts in a disclosure and to ensure that no legal conclusion, or characterization of the facts that can be viewed as a legal analysis or conclusion, is included in the disclosure. While being more circumspect in a disclosure may protect against a court finding a privilege waiver, the contractor must also anticipate the potential of frustration by the cognizant IG and audit community and the increased cost associated with the Government's effort to vet disclosures.

Two Additional Important Decisions Issued in 2019 That Will Cause Further Disputes—In addition to the above, two important decisions were issued this past year that could cause a significant amount of additional disputes between the Government and industry: (1) *Raytheon Co. v. Sec'y of Def.*, 940 F.3d 1310 (Fed. Cir. 2019); 61 GC ¶ 320, and (2) *Bechtel Nat'l, Inc. v. U.S.*, 929 F.3d 1375 (Fed. Cir. 2019); 61 GC ¶ 223. Because these cases previously were discussed in Manos, Feature Comment, "The Worst Government Contract Cost And Pricing Decisions Of 2019," 62 GC ¶ 1, we only briefly highlight the significance of these decisions.

First, in the *Raytheon* decision, the Federal Circuit affirmed the ASBCA decision that salary costs for employees participating in lobbying activities are expressly unallowable costs subject to penalties. In short, the ASBCA's decision effectively expanded the range of costs that may be classified as expressly unallowable and subject to penalties beyond the prior understanding that expressly unallowable costs must be named and stated to be unallowable. The Federal Circuit's decision represented another step in that expansion.

The Federal Circuit held that, "[c]osts unambiguously falling within a generic description of a 'type' of unallowable costs are also 'expressly unallowable.' " This conclusion could dismantle the industry's previous understanding of the rules regarding expressly unallowable costs. If broadly interpreted, this conclusion could represent a pivotal moment because the Government might now argue that any unallowable cost is "within a generic description of a type of unallowable costs," and thus expressly unallowable and subject to penalties. This type of broad interpretation could lead to significant additional disputes regarding the scope of expressly unallowable costs and, consequently, penalties. And even if more narrowly tailored, the decision still creates ambiguity and uncertainty that will be difficult to resolve without additional disputes. In light of this decision, contractors should reassess the costs included in their final indirect cost rate proposals, with close attention to the selected costs addressed in FAR 31.205, and especially those costs that may previously have been considered peripheral or related to unallowable costs.

Second, in the *Bechtel* decision, the Federal Circuit addressed, for the first time since *Geren v. Tecom, Inc.*, 566 F.3d 1037 (Fed. Cir. 2009); 51 GC ¶ 190, the allowability of third-party settlement costs. In general, contractor legal costs, including the costs to settle third-party lawsuits (i.e., suits brought against a contractor by an individual or non-governmental entity), are allowable if the costs are reasonable, allocable, consistent with the Cost Accounting Standards (or Generally Accepted Accounting Principles), comply with the terms of the contract, and are not limited by the cost principles of FAR subpt. 31.2. Since the Federal Circuit's decision in *Geren v. Tecom*, however, the allowability of settlement costs incurred in just about any type of third-party lawsuit has been unclear. Specifically, the *Tecom* decision and the allowability test identified therein, if read broadly, created a risk that nearly any type of third-party lawsuit could be characterized as a breach of contract and result in unallowable costs.

The Federal Circuit had the opportunity to address this issue in *Bechtel*. The Federal Circuit, despite the COFC reaching this issue in its decision and construing the *Tecom* breach-of-contract framework narrowly to the employment discrimination context, chose not to answer that question. Because the Federal Circuit refused to address this issue, the COFC's reading of *Tecom* remains persuasive authority on the subject.

As a practical matter, contractors and the Government should continue to assess the allowability of private settlement costs under the two-prong test articulated in *Tecom*, understanding that despite the COFC's clarification of *Tecom* and its scope in its *Bechtel* decision, there will likely be continued future disputes concerning the relevance of *Tecom* to third-party lawsuits not involving employment discrimination. Such an assessment of the potential allowability of settlement costs is relevant to a contractor's evaluation and comparison of the appropriateness of pursuing a lawsuit to conclusion, which could be more expensive but result in allowable costs if the contractor were to prevail, with the decision to settle and potentially have the costs deemed unallowable.

Conclusion—This Feature Comment discusses the most important Government contract disputes decisions of 2019. The decisions addressed above, primarily addressing CDA jurisdiction, certified claim requirements, the attorney-client privilege and cost allowability, are likely to have sustained impacts on contractors and the Government alike into the foreseeable future.

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