

CLIENT ALERT

Under *Tecom*, COFC Confirms Unallowability of Settlement Costs Arising from Discrimination Lawsuits

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In *Bechtel National, Inc. v. United States*, the Court of Federal Claims determined that the government properly disallowed litigation costs that Bechtel incurred to defend two discrimination lawsuits arising under Bechtel's contract with the Department of Energy at Hanford. According to the court, Bechtel did not take issue with the CO's determination that the plaintiffs had more than very little likelihood of success on the merits, which would render the costs unallowable under the decision in *Geran v. Tecom*, 566 F.3d 1037 (Fed. Cir. 2009). Instead, Bechtel argued that *Tecom* was not applicable because the contract at issue contained a clause stating that a contractor "shall be reimbursed...[f]or liabilities...to third persons." The COFC disagreed, finding that the same clause contained an exception making the allowability of those costs "dependent upon whether they are otherwise allowable under the terms of the contract, a determination to which *Tecom* speaks with respect to contracts that include non-discrimination clauses...." According to the court, the clause's exception applied to the Bechtel situation because the contract contained a non-discrimination provision, FAR 52.222-26, which rendered "Bechtel's costs of defending against and settling the discrimination complaints unallowable." Bechtel argued that such an interpretation made the third-party liability clause "superfluous" and "internally inconsistent," given that it would be "difficult to conceive of a circumstance in which a third-party legal action would not, if successful, also establish a breach of contract[,] but the court rejected this argument, finding that the application of *Tecom* was limited and "does not necessarily extend to breaches of obligations other than the obligation not to engage in discrimination that is set forth in FAR 52.222-26."

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