

# GOVERNMENT CONTRACT COSTS, PRICING & WEST® ACCOUNTING REPORT®

VOLUME 4, ISSUE 4

JULY 2009

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## FEATURE ARTICLE

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### ***Geren v. Tecom, Inc.*: The Federal Circuit Creates A New FAR Cost Principle**

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#### **Introduction**

A contractor is sued by a third party. The contractor incurs legal fees and other costs in defending the litigation. The allegations, if proven, could equate to contract violations. The outcome of the litigation, as in most cases, cannot be predicted with anything approaching certainty, and the contractor settles the case. The costs of defending the third-party litigation, according to a recent decision of the U.S. Court of Appeals for the Federal Circuit, are unallowable unless the contractor obtains a determination from the contracting officer that the litigation had “very little likelihood of success.” No cost principle and no judicial precedent compels this result. Indeed, the decision overturns decades of contrary precedent. Nor, we may safely assume, is it likely that a CO will be willing to approve reimbursement of costs based on a finding that any such litigation has “very little likelihood of success.”

Nevertheless, this is precisely the holding in *Geren v. Tecom, Inc.*,<sup>2</sup> in which the Federal Circuit reversed the Armed Services Board of Contract Appeals, which

held that the costs involved were allowable.<sup>3</sup> In so doing, the Court dramatically extended the questionable precedent of *Boeing N. Am., Inc. v. Roche*, 298 F.3d 1274 (Fed. Cir. 2002), and in effect created a new cost principle that cannot be derived from Federal Acquisition Regulation pt. 31. The Court’s holding runs counter to the policy of Congress that regulators should ensure that Government contract cost principles are clear and explicit, so that contractors and Government administrators do not doubt the applicable limitations.<sup>4</sup> Given this seeming rejection of congressional policy, one would expect that the Court’s *Tecom* holding was compelled by the most iron-clad of judicial precedents and regulatory provisions. In this instance, neither the cost principles nor the *Boeing* decision require, or even support, the result in *Tecom*. To the contrary, *Boeing* is particularly inapposite, since it rests on an interpretation of the fraud-related cost principle, FAR 31.205-47, which is irrelevant to a third-party action that is not based on or related to fraud-like behavior.

Instead, the Court rested its decision on two independent but related pillars—a 1963 decision of the U.S. Court of Claims, and the language of FAR 31.201-2, “Determining Allowability,” which the Court traced back to what it represented as the FAR provision’s origin in 1959 and 1960. Relying on these authorities, the Court held that litigation and settlement costs that relate to an activity that, if proven, would violate some provision of the contract are unallowable.<sup>5</sup>

The policy implications of this holding, which are substantial, we leave to another time. Instead, this article examines the two pillars of the Court’s decision, demonstrates that neither provides the slightest support for the Court’s holding and concludes that the decision suffers from lack of attention to the issues. The decision also illustrates the peril of the Court’s venture into the complex area of cost

determination without either its own expertise or expert guidance from the parties. In effect, the *Tecom* panel has created a new cost principle, a process that is properly left in the hands of the regulatory body, which first seeks information from Government and public sources, and publishes draft rules for public comment before issuing a final rule.

## The Court's Misplaced Reliance on *Dade*

### *The Court's Discussion of Dade*

Citing the Court of Claims 1963 decision in *Dade Bros., Inc. v. U.S.*,<sup>6</sup> the *Tecom* panel asserted that “[u]nder the decision ... costs resulting from a breach of a contractual obligation are not allowable costs under the contract.” Adding that the contract in *Dade* “was very explicit that the cost of defending third-party suits was generally allowable,” the panel stated that the contract in *Dade* also included a provision that “[t]he contractor will abide by all the terms and conditions of the [relevant] Union Agreement.”<sup>7</sup> The state court in the third-party action found that the contractor violated that provision. The *Tecom* panel quoted the following, representing it as the holding of the *Dade* opinion:

[T]here is no ground for recovery against the Government. Neither the wording nor the policy of the litigation reimbursement article of the government contract authorizes reimbursement of expenses incurred because the contractor breached its agreement with the Government or failed to perform that contract faithfully.<sup>8</sup>

The Federal Circuit's discussion of *Dade* is not an accurate description of the contract terms, nor of the events that triggered the litigation, nor of the result reached by the Court of Claims.<sup>9</sup>

### *The Facts in Dade*

The cost-type contract in *Dade* was entered into in May 1952. Contrary to the *Tecom* Court's statement, the contract provision referring to reimbursement of third-party litigation costs did *not* provide that such costs were generally allowable. Instead, the clause vested broad discretion in the CO to allow such costs or not, depending on his assessment of the best interests of the Government:

In the event the Contracting Officer shall determine *that the best interests of the Government require that the Contractor initiate or defend litigation in connection with claims of third parties* arising out of the performance of this contract, the Contractor will proceed with such litigation in good faith and the cost and expense of such litigation ... shall be reimbursable under this contract.<sup>10</sup>

Both the entire case before the Court of Claims and the earlier two board decisions in *Dade* focused on the issue of the CO's proper exercise of his discretion under the quoted clause.

The contract also required *Dade* to conform to the terms and conditions of a union agreement covering certain warehouse employees.<sup>11</sup> In late 1952, 54 *Dade* employees sued the union local and *Dade*, alleging two independent violations of the union contract: (1) non-payment of holiday, vacation and Sunday pay or pay differentials; and (2) a conspiracy between the union and *Dade* to violate the seniority rights of the complainants in daily selections for employment. In the second charge, the employees alleged willful and malicious action by *Dade* and requested punitive damages.<sup>12</sup>

*Dade* acknowledged liability for the violations of the union agreement with respect to holiday, vacation and Sunday pay, and agreed to the entry of partial summary judgment on those counts. As the trial commissioner<sup>13</sup> noted, there was no issue with the propriety of Government reimbursement of those costs:

The judgment was thereafter paid by *Dade*. Defendant [*the Government*] subsequently approved reimbursement to *Dade* for the amount of the judgment and other disbursements and for the major portion of the attorney fees incurred in that phase of the litigation.<sup>14</sup>

Thus, the violation of the union contract was not even at issue in *Dade*. The issue was the more serious charge that *Dade* willfully and maliciously conspired with the union to deprive employees of their seniority rights.

On that remaining count, a jury found that *Dade* conspired with the union to deprive 43 complainants of their seniority rights, and awarded both compensatory and punitive damages.<sup>15</sup> An intermediate appellate court affirmed the decision that *Dade* was guilty “of the tortious conduct complained of.”<sup>16</sup>

The Supreme Court of New Jersey affirmed without opinion.<sup>17</sup> *Dade* thus presented a situation in which a jury and two appellate state courts found that the contractor engaged in willful and malicious acts to deprive the workers of their seniority rights.

### **The CO and Board Decisions**

During the pendency of the suit, the CO notified Dade that he was withholding the exercise of his discretion to permit reimbursement of third-party litigation costs in the “best interests of the Government” under the contract clause quoted above.<sup>18</sup> After the suit was concluded, Dade submitted a claim for reimbursement. The CO denied the claim except for the portion related to the holiday, vacation and Sunday pay. The denial explained that (1) the award of punitive damages “establishes that Dade Brothers maliciously and willfully perpetrated a wrong upon each of the plaintiffs,” and “maliciously and wantonly agreed to perpetrate and to commit a tort”; (2) the acts complained of “flauntingly violated” the contract provisions requiring Dade “faithfully and diligently [to] administer performance of this contract”; (3) the “litigation did not arise out of the faithful performance of the contract” and was not covered by the reimbursement clause that limited reimbursement to third-party actions “arising out of the performance of this contract”; and (4) the state court determination conclusively established that Dade “willfully and wantonly violated” its obligation to abide by the terms of the union agreement.<sup>19</sup> The issue for determination in the ensuing proceedings was thus whether the CO properly exercised the discretion the clause granted him.

Dade appealed to the Corps of Engineers Board of Contract Appeals, which, in April 1957, affirmed the CO’s decision, finding that Dade was “guilty of the tortious conduct of entering into a conspiracy with the defendant Union to deprive certain Union members of their seniority rights,” and that “a contractor who commits a malicious and willful tort in derogation of the contract provisions cannot be said to be in the commission of such tort acting within the framework of the contract within the meaning of” the article addressing third-party litigation costs. The board stated, “In other words, the conspiracy cannot be considered as arising out of the performance of the contract; it was an act beyond the intentment and beyond the scope of the contract.” The board added,

It would be unreasonable to hold that the contract requires the Government to reimburse a contractor for the litigation costs arising out of a willful and malicious action not only violative of the rights of third parties but in contradiction to the very terms of the contract itself .... *[W]e are not dealing with negligent conduct but with conduct found by the Courts to be willful and malicious*, nor are we dealing with the acts of minor employees, but with the torts of a Vice President and a Labor Relations Manager, both representatives of top management.<sup>20</sup>

Dade next appealed to the ASBCA, which likewise denied the claim. The ASBCA noted that it was reviewing a CO decision for reasonableness on the record and that Dade had the burden of proving error on the CO’s part. It concluded that Dade “willfully breached its contract with the union and in the same act breached its contract with the Government”; and that only “in the rarest of circumstances” would the board “transform a breach of contract into faithful performance of the contract.”<sup>21</sup>

### **The Decision of the Court of Claims**

The Court of Claims issued its opinion in the context of the board rulings upholding the CO’s exercise of discretion. The court first noted that the New Jersey courts determined that Dade and the union “acted in concert in willfully and maliciously interfering with plaintiffs’ right to employment under the collective bargaining agreement.”<sup>22</sup> The court then quoted—but only partially—the third-party litigation reimbursement article quoted more fully earlier.<sup>23</sup> The court briefly described the CO’s findings, merely noting that “the contractor had violated its obligations under its contract with the United States by engaging in the conspiracy found by the state courts,” and that the litigation accordingly “did not arise out of the proper performance by the contractor of its contract.”<sup>24</sup> The per curiam opinion of the Court of Claims thus only partially described the actions that prompted the CO to make the decision against reimbursement.

Next, the court referred to a prior phase of the case, the understanding of which is critical to its actual holding. The court had earlier remanded the matter to a trial commissioner for a determination whether the decision of the ASBCA was arbitrary, capricious or unsupported by substantial evidence, and noted the negative answer provided by the commissioner.<sup>25</sup> The

actual holding of the court was thus its affirmation of the commissioner's recommended decision, and its determination that the ASBCA was free to make the findings it did, i.e., upholding the discretion of the CO under the particular clause in question:<sup>26</sup>

We hold that the Board was free to reach these conclusions and was not required, on the record before it, to decide in the contractor's favor.<sup>27</sup>

Not stopping there, however, the court went on to offer the additional comment quoted by the *Tecom* panel:

Neither the wording nor the policy of the litigation-reimbursement article of the government contract authorizes reimbursement of expenses incurred because the contractor breached its agreement with the Government or failed to perform that contract faithfully.<sup>28</sup>

Contrary to the characterization of this statement in the *Tecom* panel opinion, this was not the holding in *Dade*. More seriously, it was not even an accurate summary of the result reached in the case. Both the CO and the Engineer Board had awarded *Dade* the costs of the claim that related to violation of the union agreement with respect to vacation, holiday and Sunday pay. It was the *nature* of the other New Jersey court findings that led to the CO's denial of reimbursement—findings that the contractor engaged in a malicious and willful conspiracy to deny the union members their seniority rights.

Finally, the willful and malicious contractor actions discussed at all levels of review of the *Dade* reimbursement claim, beginning with the CO, were based on state court *findings* to which judicial finality had attached. Nothing in *Dade* suggested that the Court of Claims, either boards or even the CO would have extended the determination that these costs were unallowable to a situation in which such finality did not exist, for example, in which the state court action was settled short of a finding that the contractor had in fact committed the alleged acts. The Court of Claims itself drew this important distinction:

In litigation like that instituted against the contractor here, the Government cannot tell whether its contract has been breached until the conclusion of the case; it is not required to make that determination at the outset before the merits of the matter are known.<sup>29</sup>

In summary, *Dade* involved a situation in which part of the costs of a third-party action involving the contractor's violation of its contract were clearly reimbursable, but the costs related to a *proven* willful and malicious tortious conspiracy resulting in the imposition of punitive damages were not reimbursable. The decision in *Dade* was premised on the interpretation of a specific contract clause addressing reimbursement of third-party litigation costs, vesting wide discretion in the CO to approve reimbursement or not, *after* a final adjudicated decision was reached in the third-party action.<sup>30</sup> No such clause existed in *Tecom*, nor was there any element of malice in *Tecom*, nor was there any final adjudicated decision on the third-party action in *Tecom*. All in all, the *Tecom* panel's reliance on *Dade* was misplaced.

## The Federal Circuit's Flawed Resort to ASPR Regulatory History to Bolster Its Erroneous Interpretation of *Dade*

### *The Use of Regulatory History in Government Contract Analysis and Interpretation*

Development of Government contracts law has for the most part occurred since the beginning of World War II.<sup>31</sup> It has emerged from a combination of regulatory actions, judicial decisions in both the courts and the boards of contract appeals, contributions of contractor and Government representatives and associations, and scholarly treatises and articles produced by the Government, private attorneys and academics, many of whom have devoted their professional lives to this area. One highly valued component has been the records of the Armed Services Procurement Regulations and Defense Acquisition Regulation committees, and later the FAR Committee and its subcommittees, charged with developing governing regulations and contract clauses. It has long been recognized by the courts and boards that the histories of these regulatory deliberations are a critical source of illumination if a particular provision or clause becomes the subject of debate.<sup>32</sup> It has been a shared ethic of all those who participate in this process that proper use of this regulatory history demands accurate and meticulous research and analysis.

### *The Tecom Panel's Flawed Use of Regulatory History*

The *Tecom* panel cited two 1958 and 1960 *Federal Register* and Code of Federal Regulations references,

asserting that they refer to regulations establishing a rule that allowable contract costs are limited to those that are not incurred in breach of contract provisions.<sup>33</sup> The Court stated,

After the date of the contract in *Dade*, the government regulations were amended to include this principle, which has been explicitly articulated in uniform government contract regulations since 1958. 32 CFR § 7.203-4 (Cum. Supp. 1960) (stating that costs must be “allowable in accordance with ... [t]he terms of the contract”); see 23 Fed. Reg. 6345, 6347 (Aug. 19, 1958).<sup>34</sup>

The *Tecom* Court thus represented that these references were components of the history of the current regulation, FAR 31.201-2, defining the elements of allowability. In fact, they are not. The Court’s citations are *not* to cost principles or regulations at all, but to the “Allowable Cost and Payment” clause included as ASPR 7.203-4.<sup>35</sup> That clause, as of 1959, stated in part,

For the performance of this contract, the Government shall pay to the Contractor ... (i) The cost thereof ... determined to be allowable in accordance with ... Subpart B of Part 15 [the cost principles] ... and ... the terms of this contract.

Seizing upon the words “in accordance with the terms of this contract” in the clause, the Court baldly asserted that the phrase was inserted to encapsulate the rule that it erroneously perceived the Court of Claims to have articulated in *Dade*, and that it thus strained to discover in FAR 31.201-2.<sup>36</sup> Review of the actual regulatory history of FAR 31.201-2 compels a different conclusion.

## The Actual Regulatory History of FAR 31.201-2

### *The 1949 ASPR Edition*

The regulatory history of FAR 31.201-2 begins with the initial publication of the ASPR cost principles effective March 1, 1949.<sup>37</sup> These cost principles, although abbreviated compared to later versions, included the direct ancestor of the “terms of the contract” provision cited by the *Tecom* panel. Moreover, the 1949 language makes clear that the provision

served a completely different purpose from that presumed by the *Tecom* panel. Thus, § 414.201, “General Basis for Determination of Costs,” stated in part,

The tests used in determining the allowability of costs also include (a) reasonableness, (b) application of generally accepted accounting principles and practices, and (c) *any limitations as to types or amounts of cost items* set forth in this subpart [§ 15] *or otherwise included in the contract*.<sup>38</sup>

In other words, the first edition of the ASPR recognized that allowable costs under a contract may be specified in two ways—application of a standard cost principle enumerated in the ASPR, *or* a separate contract-unique provision. In this regard, the ASPR represented continuation of a well-established contractual device. Such provisions are known to both Government and contractor personnel. They include, for example, prescribed limits on overhead or general and administrative costs for a particular contract, limits on facilities acquisition, stipulations of maximum labor rates, “limitations of cost” and many other similar provisions that are independent of the standard cost principles.<sup>39</sup> In fact, in § 414.502, the 1949 ASPR listed a number of cost categories that might require such special contract provisions. Among them was “Liability to third persons.”

The 1949 ASPR listed “[l]egal, accounting, and consulting services and related expenses” as allowable costs,<sup>40</sup> but cross-referenced another section, which made unallowable “[l]egal, accounting and consulting services and related expenses incurred in connection with organization or reorganization, prosecution of patent infringement litigation, defense of anti-trust suits, and the prosecution of claims against the United States.”<sup>41</sup> This was the only limitation on the costs of third-party actions at that time, absent a contract clause in a particular contract.

As of May 1952, the date of the contract in *Dade*, the relevant ASPR provisions had not changed from the 1949 edition.<sup>42</sup>

### *The 1959 Revision to the ASPR Cost Principles*

The next significant change to the ASPR occurred when the Department of Defense undertook a complete rewrite of the cost principles, culminating in the 1959 edition of the ASPR. In the course of this

lengthy and thorough analysis, the ASPR Committee touched many times on the analog of the 1949 ASPR provision defining the elements of allowability, and confirmed that it defined allowability in terms of (1) the standard cost principles, and (2) any special clauses peculiar to a particular contract.

Thus, in 1954, the Section XV Cost Principles Subcommittee provided a draft revision to the ASPR Committee that included in the factors affecting allowability of costs “any limitations as to types or amounts of cost items set forth in this Part 2 of Section XV or otherwise included in the contract.”<sup>43</sup> Two years later, in 1956, the Editing Subcommittee recommended a slight variation of the provision, making it even more explicit: “any limitations set forth in this Part 2 or otherwise included in the contract as to types or amounts of cost items.”<sup>44</sup>

The cost principles issued in December 1959 retained the substance of this provision.<sup>45</sup> In § 15-201.2, the 1959 cost principles stated the factors defining cost allowability:

Factors to be considered ... include (a) reasonableness, (b) allocability, (c) application of those generally accepted accounting principles and practices appropriate to the particular circumstances, and (d) any limitations or exclusions set forth in this subpart [the cost principles] or otherwise included in the contract as to types or amounts of cost items (emphasis added).

Thus, contrary to the Court’s assertion in *Tecom*, the phrase “terms of the contract” did not appear in the regulation at or near the time of the *Dade* contract or for several decades thereafter. The regulation consistently stated the factors affecting allowability as including (1) the standard cost principles and (2) other specific contract terms “as to types or amounts of cost items.” Nothing in the regulation or its history supported the view that the language added to the Allowable Cost and Payment clause in 1959 and cited by the *Tecom* panel was intended to mean anything different, and it thus reflects the policy consistently stated since 1949 and embodied in ASPR 15-201.2.<sup>46</sup>

### **The Transition to the FAR Did Not Effect a Substantive Change**

The wording of the 1959 ASPR 15-201.2 persisted unchanged through the life of the ASPR and the suc-

cessor DAR until 1984,<sup>47</sup> when a change in wording occurred coincident with the first publication of the FAR.<sup>48</sup> The FAR drafters dropped the former language of ASPR/DAR 15-201.2 and substituted the language of the Allowable Cost and Payment clause. The FAR drafters made it clear that their intent was to codify and simplify the regulatory language of the predecessor regulations, the DAR and the Federal Procurement Regulation, but not to alter the substantive meaning:

The fundamental purposes of the FAR are to reduce proliferation of regulations; to eliminate conflicts and redundancies; and to provide an acquisition regulation that is simple, clear and understandable. The intent is not to create new policy.<sup>49</sup>

In the case of this provision, the drafters apparently decided to adopt the simpler language that had existed in the Allowable Cost and Payment clause—“terms of the contract.”<sup>50</sup> That wording existed side by side with the ASPR and DAR language of § 15-201.2 for more than 25 years, and it seems clear that the intended meaning of the “terms of the contract” not only had nothing to do with the situation in *Dade* or *Tecom*, but did not diverge in intended meaning from the more explicit companion provision in the definition of allowable cost—the direct ancestor of today’s FAR 31.201-2.

### **The Cost Principle Has Been Consistently Applied**

Prior to the *Boeing* and *Tecom* decisions, the allowability of the costs of third-party litigation was consistently applied for decades in adjudicative proceedings. One of the most disturbing aspects of *Tecom* is that it reflects no awareness that the panel was overturning decades of settled law.

A clear statement of the settled rule appears in *Hirsch Tyler Co.*, ASBCA 20962, 76-2 BCA ¶ 12075 at 57,985-6, which involved a claim of employment discrimination, similar to the sexual harassment claim in *Tecom*:

[W]e conclude that an ordinarily prudent person in the conduct of a competitive business is often obliged to defend lawsuits brought by third-parties, some of which are frivolous and others of which have merit. In either event, the restraints or requirements imposed by generally-accepted sound business practices dictate

that, except under the most extraordinary circumstances, a prudent businessman would incur legal expenses to defend a litigation and that such expenses are of the type generally recognized as ordinary and necessary for the conduct of a competitive business.

The *Hirsch Tyler* case was decided after *Dade*, but *Dade* was seen as supplementing rather than overturning the rule that had been applied for many years.

In *Ravenna Arsenal, Inc.*, ASBCA 17802, 74-2 BCA ¶ 10937, at 52,067-8, the board found that the contractor's decision to settle rather than litigate Title VII employment discrimination lawsuits was an exercise of prudent business judgment, and the costs were allowable. In *Hayes Int'l Corp.*, ASBCA 18447, 75-1 BCA ¶ 11076, at 52,723-5, the contractor entered into a consent decree settling an employment discrimination lawsuit brought by the Equal Employment Opportunity Commission. The Government challenged the allowability of the costs, relying on *Dade*. The board found *Dade* inapplicable because there was no willful or malicious conduct, nor a court judgment finding Hayes in violation of the 1964 Civil Rights Act. As in *Hirsch Tyler* and *Ravenna Arsenal*, the board found these third-party litigation costs to be ordinary and necessary costs of doing business.

These cases, decided more than three decades ago, applied the rule in a manner consistent with *Dade*. Without acknowledging this precedent, the *Tecom* panel has overturned settled law and established a new cost principle making the costs of defending all but the most frivolous of third-party claims unallowable.

## Conclusion

The *Tecom* panel's misreading and mischaracterization of *Dade*, coupled with inaccurate regulatory history research, led the Federal Circuit to assign a regulatory intent to the words "terms of the contract" in FAR 31.201-2 that is directly contrary to the unambiguous intent of the drafters.

Given these conclusions and the Court's attempt to legislate a new cost principle in contravention of the regulatory framework, the stated policy of Congress and almost half a century of established precedent, the *Tecom* decision marks a sad day in Government contracts jurisprudence.

Out of the legislation abolishing the Court of Claims and creating the Federal Circuit, practitioners, contracts professionals and academics, in and out of Government, envisaged an appellate court that would embody the highest standards of expertise in the complex field of Government contract law, carrying forward the outstanding record of the Court of Claims. It is discouraging that this has not been the result.<sup>51</sup>

The Federal Circuit is the only circuit that has specialized jurisdiction. Judges appointed to the boards of contract appeals must have at least five years experience in Government contracting. And although there is no corresponding requirement for appointment to the U.S. Court of Federal Claims, some judges have qualifying experience before their appointment and others acquire it rapidly in the adjudicative process. Judges on the Federal Circuit, on the other hand, are not required to have expertise in the specialized area of Government contracts in which they render decisions, and the docket of the Court is not sufficiently rich in Government contract issues to offer a meaningful education in the subject. For this reason, aside from the benefit that would accrue from appointment of judges with qualifying experience, it should be incumbent on the judges of the Federal Circuit to be especially circumspect and to ground their decisions in an adequately developed record and sound research.

In *Tecom*, the lack of these qualities has contributed to the creation of a new cost principle without any opportunity for public comment and discussion, and has overturned decades of consistent policy and adjudicated law without recognizing its existence.

## ❖ Endnotes

- 1 The authors are partners in the firm of Smith Pachter McWhorter PLC. The authors wish especially to acknowledge the research assistance of Stephanie Spear, a second-year student at Catholic University Law School.
- 2 No. 2008-1171, May 19, 2009.
- 3 A previous article by some of the same authors analyzed the board decision. "Allowability of Legal Cost of Third-Party Lawsuits Following *Tecom, Inc.*," 3 CP&A Report ¶ 12.
- 4 10 USCA § 2324(f)(1), P.L. 99-145, Nov. 8, 1985, 99 Stat. 682 ("such provisions shall define in detail and in specific terms those costs which are unallowable"). See *Bill Strong Enters., Inc. v. Shannon*, 49 F.3d 1541, 1548-49 (Fed. Cir. 1985).
- 5 Slip Op., at 5, 9.
- 6 163 Ct. Cl. 485, 325 F. 2d 239 (1963) (per curiam).
- 7 This quote is taken, not from the contract language or the decision but from the Government's Feb. 28, 1963 brief before the Court

- of Claims. The Federal Circuit disregarded the commissioner's finding on this language. See below, note 11.
- 8 325 F.2d at 240.
- 9 A full picture of the facts and the preceding Engineer Board and ASBCA opinions can only be obtained by review of the Court of Claims publication, 163 Ct. Cl. 485, which includes the full Commissioner's Report. The *Tecom* panel did not cite or refer to this valuable source, and the *Tecom* opinion does not reflect that the panel was even aware of its existence.
- 10 163 Ct. Cl. at 491 (emphasis added).
- 11 *Id.*, at 492. "The provisions of the contract required Dade in the performance thereof to abide by all the terms and conditions of a union agreement with the Marine Warehousemen's Local affiliated with the International Longshoremen's Association covering warehouse employees." The commissioner's findings then quoted extensively from the terms of the union agreement with respect to seniority rights of employees as well as rights to vacation, holiday pay and the like.
- 12 *Id.*, at 493.
- 13 The Court of Claims referred the case to a trial commissioner before issuing its opinion.
- 14 *Id.*, at 494 (emphasis added).
- 15 *Id.*
- 16 *Id.* at 498.
- 17 *Id.*
- 18 *Id.* at 499–500.
- 19 *Id.*, at 505–507.
- 20 *Id.*, at 508–509 (emphasis added).
- 21 *Id.*, at 510–511.
- 22 325 F.2d, at 239, quoting the state court decision of the Appellate Division.
- 23 *Id.*
- 24 *Id.*, at 239–240.
- 25 *Id.* at 240.
- 26 *Id.*
- 27 *Id.*
- 28 *Id.*
- 29 *Id.* Under the governing cost principle at the time, the 1949 edition of the Armed Services Procurement Regulation (ASPR), the Court of Claims and Board decisions could just as well have been based on the "reasonableness" test for allowable costs, since the state court determinations that Dade had conspired with the union to deprive workers of their rights rendered the costs of defending as well as the judgments manifestly unallowable as unreasonably incurred. See 14 Fed. Reg. 683, Feb. 16, 1949, § 414.201.
- 30 No such clause or cost principle currently exists in the FAR. See FAR 31.205-33.
- 31 See James F. Nagle, *A History of Government Contracting* (Geo. Wash. U. Press, 2d Ed. 1999), at 409–426.
- 32 E.g., *Morrison-Knudsen v. U.S.*, 427 F.2d 1181, 1184–85 (Ct. Cl. 1970); *The Boeing Co. v. U.S.*, 480 F.2d 854, 864–65 (Ct. Cl. 1973); *Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227–28 (Fed. Cir. 1997; *Gen. Dynamics Corp.*, ASBCA 10254, 66-1 BCA ¶ 5680, at 26,500; *Teledyne Indus., Inc.*, ASBCA 20900, 77-1 BCA ¶ 12416, at 60,131; *McDonnell Douglas Corp.*, ASBCA 19842, 80-1 BCA ¶ 14223, at 70,055; *Data Design Labs.*, ASBCA 21029, 81-2 BCA ¶ 15190, at 75,171; *Eaton Corp.*, ASBCA 34355, 93-2 BCA ¶ 25743, at 128,092-093; *Rockwell Int'l Corp.*, ASBCA 46544, 96-1 BCA ¶ 28057, at 140,107-110.
- 33 Slip Op. at 5,9,11.
- 34 Slip op. at 11 (emphasis added).
- 35 23 Fed. Reg. 6345, 6347 (Aug. 19, 1958).
- 36 As noted below, the 1949 ASPR cost principles, which were in effect on the date of the *Dade* contract, included the direct ancestor of FAR 31.201-2, but neither the Court of Claims nor any of the reviewing officials or boards in *Dade* cited or referred to it.
- 37 Note, "Determination of Cost in Military Procurement Cost-Plus-A-Fixed-Fee Contracts," 65 Harv. L. Rev. 1035, 1036, n. 12 (1952). The regulation was published in 14 Fed. Reg. 683-687 (Feb. 16, 1949). For brevity we omit the earlier history of proto-cost principles contained in the World War II "Green Book," "Explanation of Principles for Determination of Costs Under Government Contracts," War and Navy Departments, April 1942.
- 38 34 CFR § 414.201, 14 Fed. Reg. 683 (Feb. 16, 1949) (emphasis added).
- 39 E.g., *Dynalectron Corp.*, ASBCA 20240, 77-2 BCA ¶ 12835, at 64,475-476; *Am. Elec., Inc.*, ASBCA 16635, 76-2 BCA ¶ 12151, at 58,471-478.
- 40 34 CFR § 414.204(i) (1949).
- 41 *Id.*, § 414.205 (l).
- 42 See 32 CFR § 414 (1951); 32 CFR § 414 (1952). The CFR did not reprint the ASPR in full each year, but limited publication to any changes to the 1949 edition. The history of the subsequent 1959 revision of the cost principles, discussed *infra*, confirms that the quoted provision had survived substantially unchanged since 1949.
- 43 ASPR Case 53-44, April 20, 1954 Memorandum for the Chairman, ASPR Committee, from the Chairman, Section XV Subcommittee, Attachment, p. 1 (emphasis added).
- 44 ASPR Case 53-44, March 9, 1956 Memorandum for the ASPR Committee from the Editing Committee, Tab B, p. 1 (emphasis added).
- 45 47 Fed. Reg. 10644 et seq. (Dec. 24, 1959).
- 46 The regulatory history of this revision of the Allowable Cost and Payment clause would dispel any lingering doubt, but is not yet available.
- 47 See DAR § 15-201.2, Factors Affecting Allowability of Costs, published in 32 CFR pt. 32, July 1, 1984.
- 48 48 Fed. Reg. 42102 (Sept. 19, 1983), § 31.201-2.
- 49 See 46 Fed. Reg. 40221 (Aug. 7, 1981).
- 50 Time has not permitted obtaining the history of the FAR changes to the ASPR/DAR 15-201.2, which are available under the Freedom of Information Act, but with considerable delay.
- 51 No judge of the Federal Circuit has any substantial background in Government contracts.