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Allowability Of Legal Costs Of Third-Party Lawsuits Following *Tecom, Inc.*

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Introduction

Following the decisions of the U.S. Court of Appeals for the Federal Circuit in *Caldera v. Northrop Worldwide Aircraft Servs., Inc.*² and *Boeing North Am., Inc. v. Roche*,³ Government contractors have faced a confused landscape as they try to determine whether legal fees and settlement expenses related to third-party litigation (“third-party legal costs”) will be considered allowable costs. Instead of applying the traditional test for the allowability of costs incurred in connection with operating a business as set forth in Federal Acquisition Regulation 31.201-2, these cases confused the concepts of allowability and allocability (*Northrop*) on the one hand, and instituted a bizarre new test of allowability not found anywhere in the FAR cost principles (*Boeing*) on the other hand. *Northrop* and *Boeing* demonstrate the old adage, “bad cases make bad law.” Both cases involved third-party allegations of fraud against the Government, and the Federal Circuit decisions appear to be result-driven. Contractors now face the prospect of proving that the Government “benefited” from the contractor’s defense of the lawsuit or that the third party would have had

little chance of prevailing on the merits had the case not been settled.

It remained to be seen whether these tests would be applied to disallow third-party litigation costs in non-fraud-related cases.⁴ Recently, in *Tecom, Inc.*⁵, the Armed Services Board of Contract Appeals sorted through the *Northrop* and *Boeing* decisions in deciding whether the legal fees and the cost of a settlement (together, legal costs) stemming from an employee’s suit for sexual harassment should be treated as allowable. The board concluded that the costs incurred by *Tecom* were allowable and, in reaching its decision, provided a thoroughly analyzed *Northrop* and *Boeing*. The Government has appealed *Tecom* to the Federal Circuit.

The Issues in *Tecom*

In performing a cost-reimbursement contract to manage military family housing at Fort Hood, Texas, *Tecom* was sued for sexual harassment by a former employee who worked on the contract. *Tecom* initially defended the lawsuit, filed in federal court in the Western District of Texas, and ultimately settled with the plaintiff. As the board noted, the underlying claim was not “linked in any way to any allegations of submission of false claims, misrepresentation or fraud against the government.”⁶ The board also noted that the settlement did not include back pay or any admission of wrongdoing by *Tecom*.⁷

Tecom invoiced the Government for its legal fees, litigation costs and the settlement amount because the company viewed these expenses as incurred in connection with its performance of the cost-type contract. *Tecom* asserted that the sexual harassment accusations were false, but that it would have cost twice the settlement amount

to try the case. Thus, it was a prudent business decision to settle the lawsuit without admitting guilt. The contracting officer questioned and eventually disallowed the costs, arguing that they were not allocable to the contract because there was no benefit to the Government, despite the contractor's claim that the legal fees and settlement expense were necessary to the overall operation of its business.⁸

The CO initially objected on the grounds of *allocability*, citing *Northrop*, and argued that Tecom failed to show any benefit to the Government resulting from these legal costs.⁹ On appeal to the board, however, the Government reframed its argument in terms of *allowability* and asserted that, under the recently decided *Boeing* case, the settlement costs and legal fees were unallowable unless the appellant could affirmatively prove that the claim of sexual harassment, if litigated, had very little likelihood of success on the merits. The Government further asserted that—regardless of the outcome of this “*Boeing* test”—the actual settlement amount was not allowable in this case because it was “similar or related” to a penalty for wrongdoing under FAR 31.205-15, “Fines, penalties and mischarging costs.”¹⁰

Both parties sought partial summary judgment on whether the costs were unallowable (1) under the *Boeing* test and (2) because they were “similar or related” to a penalty for wrongdoing. The board described the issues before it as follows:

[D]oes *Boeing* require appellant to prove in this appeal that the former employee had “very little likelihood of success on the merits” in her sexual harassment lawsuit against appellant, as argued by the government, or is this *Boeing* standard of “very little likelihood of success on the merits” limited solely to costs of legal defense and settlement of lawsuits involving directly, or indirectly allegations of fraud or false claims against the United States by the contractor, as contended by appellant (see 298 F.3d at 1289); and is the settlement expense similar to, or related to fines and penalties as defined and made unallowable in FAR 31.205-15(a).¹¹

In arriving at its answer to these two questions, the board undertook a detailed review of *Northrop* and *Boeing*. This review provides a framework for

determining the allowability of third-party legal costs.

Pre-*Northrop* Background

Although the board in *Tecom* began its analysis with the *Northrop* line of cases, the pre-*Northrop* standard for determining the allowability of third-party legal costs formed the backdrop of the discussion and was asserted by Tecom to be the correct standard for the facts of this case. The pre-*Northrop* standard relied on FAR 31.201-2, “Determining allowability.” The language of the FAR has changed, from the original language designating “factors to be considered” to the current language of “requirements” with which compliance must be demonstrated. FAR 31.201-2(a) now states as follows:

A cost is allowable only when the cost complies with the following requirements: (1) Reasonableness. (2) Allocability. (3) Standards promulgated by the CAS Board (4) Terms of the contract. (5) Any limitations set forth in this subpart.

This standard is explained further in FAR 31.201-3, “Determining reasonableness.” FAR 31.201-3(a) states in part:

A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.

FAR 31.201-3(b) explains that reasonableness is determined by whether the cost is “generally recognized as ordinary and necessary for the conduct of the contractor’s business.” Reasonableness determinations should account for whether inurrence of the cost was consistent with “generally accepted sound business practices” and the contractor’s responsibilities to its owners, employees, the Government, other customers and the public at large. Under the pre-*Northrop* standard, most third-party legal costs would be deemed reasonable pursuant to these factors.

Allocability of costs is addressed in FAR 31.201-4, “Determining allocability,” which states:

A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable

relationship. Subject to the foregoing, a cost is allocable to a Government contract if it –

- (a) Is incurred specifically for the contract;
- (b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or
- (c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

These FAR cost principles, FAR 31.201-2, -3 and -4, establish the traditional standard for determining the allowability of Government contract costs.

The allowability of the cost of defending against third-party lawsuits as a normal part of doing business was most clearly stated in *Hirsch Tyler Co.*:

[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. Accordingly, legal expenses incurred in defending a civil litigation brought by a third-party, regardless of the outcome thereof, are *prima facie* reasonable and are allowable, unless shown to have been incurred unreasonably or reimbursement is expressly prohibited by an exclusionary cost principle.¹²

In *Tecom*, the contractor asserted that the traditional standard of cost allowability applies to the circumstances of its case. It argued that the costs of defending against and settling employee lawsuits are routinely incurred in today's business and legal climate, and simply represent a normal cost of doing business.¹³

The Government, on the other hand, asserted that the costs are unallowable pursuant to *Northrop* and *Boeing*, arguing that sexual harassment is arguably worse conduct than the breach of fiduciary duty and underlying fraud in *Boeing*.

The Board's Review of *Northrop*

The board began its review with an extensive discussion of *Northrop*, which involved costs related to a wrongful termination lawsuit in Oklahoma state court by former employees who claimed that they were fired for refusing to participate in fraud against the Army in connection with a cost-type maintenance contract. Although the Army's Criminal Investigation Division concluded that there was insufficient evidence to prosecute Northrop for fraud, the jury in the wrongful termination lawsuit found for the employees. As a result of this verdict, the CO, who originally paid some of Northrop's legal fees, disallowed the remainder of the costs and demanded repayment of those already paid.

Northrop appealed the CO's decision to the ASBCA, and the board issued three decisions—two on motions for summary judgment and one following a hearing on the merits. The board in *Tecom* highlighted the following features from the ASBCA decisions in *Northrop*:

- The Government's central argument was that "the legal fees were not *allocable* to the contract because the lawsuit 'did not involve the Government as a party, did not benefit the contract work, and did not result in any benefit or thing of value to the Government.'" ¹⁴
- The *Northrop* board held that "the criterion for allocation is extremely broad and does not require a finding of a connection between the cost incurred and a government contract."¹⁵ The board never addressed the allocability of the costs directly, but recognized that the costs had to be allocable for them to be allowable and implicitly found them allocable in holding that they were allowable.¹⁶
- The *Northrop* board identified the "more appropriate issue" as one of *allowability*, "which involved the consideration of the reasonableness of the costs," namely, "whether the costs were of the type that would be incurred by a prudent person

in the conduct of competitive business.”¹⁷

- On the merits, the *Northrop* board held that “Northrop’s actions in incurring costs to defend the litigation were reasonable and that the costs were reasonable and, therefore, allowable.” The *Northrop* board found that the state court verdict “was not determinative of the question of the reasonableness of costs under FAR 31.201-2, which depended more on the circumstances at the time the costs were incurred,” and concluded that the evidence did not indicate that Northrop had engaged in fraud.¹⁸

The Government appealed the board’s *Northrop* decision to the Federal Circuit. On appeal, the Government argued that the legal costs were not allocable to Government contracts under FAR 31.201-4 because the Government did not benefit or receive anything of value. In reversing, the Federal Circuit articulated two grounds for its decision: (1) “the Board failed to grant preclusive effect to the Oklahoma state court proceedings” on the issue of whether the underlying litigation involved a claim of fraud; and (2) “the government did not benefit from Northrop’s defense in the Oklahoma lawsuit.”¹⁹

Although the Federal Circuit’s *Northrop* opinion has been widely criticized (as even Government counsel acknowledged in their *Tecom* briefs), presumably for its woeful misunderstanding of the concept of cost allocability, the *Tecom* board interpreted *Northrop* so as to place it within the context of the traditional FAR allowability standards and the Cost Accounting Standards, as follows:

As we understand *Northrop*, the Court’s decision denying reimbursement of the legal costs was based both on the allocability principle of FAR 31.201-4, and implicitly, the allowability cost principle that rendered unallowable legal costs incurred in legal proceedings in which there is a finding of contractor liability involving fraud or similar misconduct. Moreover, since allocability of costs is one factor to be considered together with reasonableness of the costs, standards promulgated by the CAS

Board if applicable, terms of the contract, and limitations set forth in FAR subpart 31.2, FAR 31.201-2 merely codifies the general principle that a cost is not allowable if that cost cannot be allocated to a government contract. Therefore, the “benefit to government work” test expressed in *Northrop* addresses the accounting principle stated in FAR 31.201-4 that “[a] cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship,” and is allocable to a government contract if it is, *inter alia*, “necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.”²⁰

Thus, the board identified the operative principle in the Federal Circuit’s *Northrop* decision as the allowability cost principle that classifies as unallowable costs related to lawsuits in which there is a finding of contractor fraud or similar misconduct. The board explained that, because allowability was the operative finding, the Federal Circuit’s statements regarding allocability were rather uncontroversial findings regarding the “relative benefits” language of FAR 31.201-4 in the specific context of fraud, and they were thus in accord with the traditional rule that a cost having no relationship (read by the Federal Circuit in *Northrop* as “benefit”) to a Government contract is not allocable to it, and thus not allowable under FAR 31.201-2. In providing this analysis of *Northrop*, the *Tecom* board essentially followed the *Boeing* decision, which sought to limit *Northrop* to its specific facts.

The Board’s Review of *Boeing*

Boeing involved a shareholder derivative action brought in California state court alleging that the board of directors of Rockwell International Corp. (whose defense units were acquired by Boeing in 1996) breached its fiduciary duty to shareholders because it did not establish sufficient internal controls. The suit alleged that, as a result of the lack of internal controls, misconduct under Government contracts was facilitated, hidden and defended, exposing the corporation to continuing legal expenses and possible debarment. Boeing and the Government agreed that five instances of underlying misconduct were alleged in the state

court suit, all of which related to fraud or false statements, and several of which had resulted in guilty pleas or fines.

The shareholder litigation was settled, and Rockwell included the legal fees and settlement amounts in its corporate overhead, a substantial portion of which was allocated to cost-type and flexibly priced Government contracts. The CO disallowed these costs, asserting that the costs were both unreasonable and similar or related to unallowable fines or penalties (FAR 31.205-15) or unallowable fraud defense costs (FAR 31.205-47). The *Tecom* board noted, “The contracting officer asserted that *but for* the admitted and proven misconduct, civil fraud, and other contractor [wrongdoings], that lawsuit would not have been filed.”²¹

Boeing filed a claim to recover these costs and appealed the CO’s denial of its claim to the ASBCA. Relying on the *Northrop* standard of “no discernible benefit to the government,” the board held that the costs were not allocable to Boeing’s Government contracts and denied the appeal.²² Boeing then appealed to the Federal Circuit.

The *Tecom* board summarized several key points in the Federal Circuit’s *Boeing* decision. The Federal Circuit first tried to undo some of the damage that had been done by the poorly reasoned *Northrop* decision. The *Boeing* court noted that it was “of course” bound by *Northrop*, but described the holding in *Northrop* as based on the *allowability* rather than the *allocability* of the costs at issue, which contradicted the plain language of *Northrop*. The *Tecom* board summarized this part of the *Boeing* opinion as follows:

[T]he deciding issue in *Northrop* was the allowability issue arising from the Oklahoma litigation and the Board’s error in not considering the preclusive effect of that litigation. Except as it may be related to allowability under FAR 31.201-2, there was no discussion in *Northrop* concerning allocability, particularly as an accounting concept under CAS. Moreover, ... the allocability issue was not contested in *Northrop*.²³

According to the *Tecom* board, the *Boeing* court characterized *Northrop* as holding that a contractor’s “legal costs are unallowable when incurred in the

unsuccessful defense of a lawsuit that involved a judicial determination that the contractor sought to induce its employees to commit fraud against the government by the contractor.”²⁴

With regard to allocability as a factor in determining the allowability of a cost, the *Boeing* court held that it was not bound by the *Northrop* court’s conclusion that third-party legal costs were not allocable. Allocability, according to *Boeing*, is an accounting concept for determining the assignment of costs in accordance with CAS, which the *Northrop* court did not consider, and allowability is to be determined under the FAR pt. 31 cost principles. The *Tecom* board again quoted *Boeing* as follows:

Even where costs are unallowable, CAS Part 405 prescribes standards governing the identification and accounting treatment of such unallowable costs. The CAS Part 405 standards are “predicated on the proposition that costs incurred in carrying on the activities of an enterprise—regardless of the allowability of such costs under Government contracts—are allocable to the cost objectives with which they are identified on the basis of their beneficial or causal relationships.” ...²⁵

The board also quoted another section of *Boeing* holding that the proper inquiry for recovery of third-party legal costs is one of allowability, not allocability, as follows:

Thus, we agree with Boeing that allocability is an accounting concept and that CAS does not require that a cost directly benefit the government’s interest for the cost to be allocable. The word, “benefit” is used in the allocability provisions to describe the nexus required for accounting purposes between the cost and the contract to which it is allocated. The requirement of a “benefit” to a government contract is not designed to permit contracting officers, the Board, or this court to embark on an amorphous inquiry into whether a particular cost sufficiently “benefits” the government so that the cost should be recoverable from the government. The question whether a cost should be recoverable as a matter of policy is to be undertaken by applying the specific allowability regulations, which embody the government’s view, as a matter of “policy,” as to whether the contractor may permissibly charge particular costs to the government (if they are otherwise allocable).²⁶

Thus, the *Boeing* court neatly disposed of *Northrop*, stripping it of any meaningful precedential value while paying lip service to its status as binding precedent.

The *Boeing* court also clarified *Northrop*'s "benefit to the government" requirement for allocation of cost as merely the "nexus required for accounting purposes between the cost and the contract to which it is allocated," adding that, if allocation is claimed based on necessity to the overall operation of the business, such benefit should be interpreted broadly.²⁷

The Federal Circuit's decision in *Boeing* was based on its interpretation of FAR 31.204, "Application of principles and procedures." In particular, FAR 31.204(d)—FAR 31.204(c) at the time—provides:

Section 31.205 [regarding selected costs] does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable. The determination of allowability shall be based on the principles and standards in this subpart and the treatment of similar or related selected items.

Thus, the court focused not only on the question of whether the third-party legal costs were made unallowable under a specific cost principle but also whether they were "similar to" or "related to" unallowable costs. Again, the *Boeing* court tried to rehabilitate the tattered *Northrop*, stating that the costs at issue in *Northrop* were not explicitly covered in the FAR cost principles, so the *Northrop* court determined allowability based on "similar" categories of costs, which the court defined as "closely comparable" costs. The court looked at the similarity of the legal costs at issue to the unallowable costs of FAR 31.205-47, "Costs related to legal and other proceedings." As the *Tecom* Board noted, the *Boeing* court considered this to be the central holding of *Northrop*:

Properly understood, *Northrop* and FAR § 31.205-47 taken together establish a simple principle—that the costs of unsuccessfully defending a private suit charging contractor wrongdoing are not allowable if the "similar" costs would be disallowed under the regulations.²⁸

As for the costs at issue in *Boeing*, i.e., the costs of defending and settling a shareholder derivative action involving fraud allegations, the Federal Circuit held that the costs were not "similar" to those fraud-related costs made unallowable by FAR § 31.205-47. Even so, the court concluded that an issue remained on whether the costs were " 'related' to a category of disallowed costs, that is, costs of defending against government charges of wrongdoing."²⁹

On this issue, the *Boeing* court rejected both the contractor's proposal that only costs incurred in a frivolous defense should be disallowed, and the Government's proposal that any costs that would not have been incurred "but for" the contractor's misconduct should be disallowed. The court stated that the concept of "related" costs requires a more direct relationship between the cost at issue and a prohibited cost than provided by the "but for" test. Under the "but for" test, even the cost of defending against a frivolous claim of a "lack of adequate controls over employee misconduct related to government contracts" would be rendered unallowable. Instead, the court adopted a standard that neither side had proposed: that legal costs of defending against third-party lawsuits would be allowable (as not sufficiently directly "related to" an unallowable cost under FAR 31.201-47) if the CO determined that there was "very little likelihood that the third party [plaintiffs] would have been successful on the merits."³⁰

The *Tecom* board summarized the holding in *Boeing* as follows:

Since there was no judicial determination made, the Court in *Boeing* turned to the regulations for guidance with respect to the treatment of settlement agreements. FAR 31.205-47(b)(4) provided ... that if the disposition of the matter is by consent or compromise and could have led to any of the outcomes (conviction, determination of contractor liability as a result of a finding of fraud or similar misconduct, monetary penalty, final decision to debar or suspend the contractor, etc.) listed in subparagraphs (b)(1) through (3), the defense cost should be disallowed unless the government specifically agrees that they should be allowable. The Court held that in such cases, in order

for such costs to be allowable, the contractor must show that the allegations in the action giving rise to the incurrence of legal costs had “very little likelihood of success on the merits.”³¹

In adopting this standard, the *Boeing* court borrowed language from FAR 31.205-47(c)(2), which specifically applies only to third-party qui tam lawsuits under the False Claims Act. Few believe that the “very little likelihood of success on the merits” test will prove to be workable in practice.³²

The Board’s Holding in *Tecom*

Having reviewed the *Northrop* and *Boeing* decisions, the *Tecom* board returned to the Government’s contention in the current case—that the *Boeing* test required the contractor to prove that the now-settled sexual harassment suit had “very little likelihood of success on the merits.”³³

The board concluded that *Boeing* turned on the underlying lawsuit’s relation to charges of fraud or similar misconduct against the Government, and found that the facts in this case did not meet the *Boeing* standard:

The litigation in question did not involve a criminal prosecution; did not require a finding, absent a settlement, of contractor liability based on fraud or similar misconduct or imposition of a monetary penalty where the proceeding did not involve an allegation of fraud or similar misconduct; or did not require a final decision by an appropriate official of an executive agency to disbar or suspend appellant, or to rescind or void the contract, or to terminate the contract for default by reason of the contractor’s violation or failure to comply with a law or regulation. Accordingly, we hold that FAR 31.205-47 does not present an allowability bar to appellant’s recovery of its legal costs, as part of its reimbursement of [general & administrative expense], in defending the lawsuit filed by its former employee.³⁴

The board also found that the settlement did not constitute a fine or penalty, so the third-party legal costs were not unallowable under FAR 31.205-15. The board granted *Tecom*’s motion for summary judgment.

The Allowability of Third-Party Legal Costs after *Tecom*

For now, *Tecom* has clarified to the extent possible the Federal Circuit’s ill-considered opinions in the area of the allowability of third-party legal costs. Following *Boeing*, little remains of *Northrop* and its allocability test other than its holding in the specific case. *Boeing*, although it correctly distinguished allocability from allowability, set another impractical standard by adopting a “probability of success on the merits” test, which would require proxy trials and would conflict with the confidentiality provisions of most third-party settlements.³⁵ In this regard, *Tecom* helps by holding that the *Boeing* standard applies only if the underlying suit involves allegations of fraud against the Government or similar misconduct and was settled before a final judgement. The *Tecom* decision strongly suggests that the FAR 31.201-2 allowability provision should remain the baseline for determining the allowability of third-party legal costs.

Unfortunately, however, the *Tecom* precedent may have a short life. The Government appealed *Tecom* to the Federal Circuit January 22.

❖ Endnotes

- 1 Richard C. Johnson and D. Joe Smith are partners, and Matthew L. Haws is an associate at the law firm of Smith Pachter McWhorter PLC.
- 2 *Caldera v. Northrop Worldwide Aircraft Servs., Inc.*, 192 F.3d 962 (Fed. Cir. 1999).
- 3 *Boeing North Am., Inc. v. Roche*, 298 F.3d 1274 (Fed. Cir. 2002).
- 4 See *Postscript: Allocability and Allowability of Costs*, 16 N&CR ¶ 45 (addressing reader concern that “Contracting Officers will improperly misinterpret *Boeing* to apply ... to any third-party civil cases filed against government contractors.”).
- 5 *Tecom, Inc.*, ASBCA 53884, 54461, 07-2 BCA ¶ 33674.
- 6 *Tecom*, at 166,720.
- 7 *Id.*
- 8 *Id.*
- 9 *Id.* at 166,721.
- 10 *Id.*
- 11 *Id.*, at 166,725–6.
- 12 *Hirsch Tyler Co.*, ASBCA 20962, 76-2 BCA ¶ 12075 at 57,985-6.
- 13 *Tecom*, supra at 166,725.
- 14 *Id.* at 166,726.
- 15 *Id.*
- 16 *Id.* at 166,727.
- 17 *Id.* at 166,726.
- 18 *Id.* at 166,727.

- 19 Id.
20 Id. at 166,727–8.
21 Id. at 166,729 (emphasis added).
22 Id.
23 Id. (citation omitted).
24 Id. (quoting *Boeing* at 1281).
25 Id. (quoting *Boeing* at 1283).
26 Id. (quoting *Boeing* at 1284).
27 Id. at 166,730.
28 Id. (quoting *Boeing* at 1286).
29 Id.
30 *Boeing*, supra at 1288.
31 *Tecom*, supra at 166,731 (quoting *Boeing* at 1289).
32 The Government's brief in *Tecom* suggested how unworkable the test would be:

The Army does not look forward to litigating the underlying strength or weakness of settled lawsuits as required by the Federal Circuit in [the] *Boeing* decision. Delving into fraud, sexual harassment, and other non-contract matters will be distasteful but necessary. The much-criticized "benefit" standard in *Northrop* [*Caldera v. Northrop Worldwide Aircraft Servs., Inc.*, 192 F.3d 962, 972 (Fed. Cir. 1999)] presented a far more

manageable burden for both parties than the new "little likelihood of success" standard. However, the auditors and private bar derided the CAFC's *Northrop* decision and now we have *Boeing*. The old adage is once again proven—"be careful what you ask for." *Tecom*, supra at 166,724–5.

- 33 As a practical matter, the standard advocated by the Government would have been incredibly burdensome, not least because it would have required the Board to try a settled case by proxy. The case would have presented significant evidentiary and jurisdictional problems, in part because the settlement was confidential. The Government moved to compel *Tecom* to waive the confidentiality and breach provisions of the settlement agreement, but the Board denied the motion, holding that "the jurisdiction to modify or lift the protective order was retained by the U.S. District Court for the Western District of Texas, and that we had no jurisdiction to require the release of any employee information covered thereunder when that Court retained jurisdiction to modify or lift the restriction of the confidentiality agreement." Id. at 166,733. The cost of conducted trials by proxy likely would negate the savings that motivated the contractor to settle the underlying lawsuit in the first place.
- 34 Id.
- 35 *Boeing* is just one example of the disturbing rulings issued by an appellate court with minimal expertise, and little apparent interest, in the complex field of Government contract law. See also the cases cited in S. Knight, "Federal Circuit Cost Decisions Bode Ill for Contractors," *Procurement Lawyer*, vol. 39, no. 2 (Winter 2004).

