



Tecom: An M&O Perspective



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NREL is a national laboratory of the U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, operated by the Alliance for Sustainable Energy, LLC.

Background

- Secretary's Workforce Restructuring Memo, dated May 5, 2011, references *Geran v. Tecom* (*Tecom*) decision.
 - "Contractors should be aware of a recent development that significantly restricts the allowability of costs involved in settling legal claims. In *Geran v. Tecom, Inc.*, 566 F.3d 1037 (Fed. Cir. 2009), the Federal Circuit held that a government contractor's costs for settling an EEO case **were not allowable contract costs unless the contracting officer determined that there was "very little likelihood of success on the merits."** In analyzing contractor requests for reimbursement of costs associated with settlement of employment discrimination litigation, **DOE will take into account the results of any Office of General Counsel review of the contractor's diversity analysis.**
- NLDC raises *Tecom* with Secretary.
- Issue discussed by M&O General Counsels/Chief Counsels on monthly call with Acting General Counsel Sean Lev, who agreed to consider M&O views on *Tecom*'s applicability in context of the M&O Contract.

Background (cont.)

- Outside counsel (Wiley Rein LLP) representing the M&O Contractors managing and operating LANL, LLNL, NREL, ORNL, and University of California prepares legal analysis.
 - Evaluation focus on history of M&O Contract and its terms, with emphasis on Insurance-Litigation and Claims clause and *Tecom* decision.
 - Conclusion is that *Tecom* case leaves undisturbed the presumption of reimbursability for M&O Contractors of legal costs associated with third-party claims.
- Analysis endorsed by General Counsels on behalf of M&O Contractors for 15 laboratories/sites.
 - Costs for analysis absorbed by contractors as unallowable costs.
- Analysis provided to Acting General Counsel Sean Lev on July 22, 2011.

Background (cont.)

- Follow-on discussions with Sean, Eric, Tim, Gena, Bruce, and Shelley in October result in four questions for which DOE is seeking input.
- Responses provided on November 7, 2011 to Sean Lev on behalf of the General Counsels of the NLDC GC Working Group Steering Group (ANL, Fermi, LANL, LLNL, NREL, ORNL, and PNNL) and GCs for BNL, INL, and TJNAF.
 - Costs again absorbed by Contractors as unallowable.
- Senator McCaskill (Missouri) letter to NNSA (December 2011) regarding reimbursement of contractor defense costs in whistleblower case in light of *Tecom*.
- February 2011 Acting General Counsel Tim Lynch advises DOE has decided *Tecom* applies to M&Os at least in context of Title VII & Whistleblower.

M&O Concerns

- Need for Guidance on how *Tecom* will be applied.
- Potential impact of *Tecom* on settlement approval.
- Interplay between *Tecom* and finalization of 10 CFR §719.
- Potential impact of *Tecom* on Common Interest Defense.
- Potential DOE deviation request to Civilian Agency Acquisition Counsel (CAAC).
 - FAR 31.201-2(1)(4) – Terms of the contract
 - Proposal would enable DOE to reimburse Contractors on a sliding scale if more than “very little likelihood of success on the merits” (10-15%) and 51% (unallowable).
 - Would involve cost-sharing similar to “contributory negligence.”
 - Could potentially involve concept of allocability.

M&O Suggested Guidance

Four major Points to M&O's suggested guidance submitted to DOE In March 2012:

- Clarify limited application of *Tecom*.
- Focus on objective legal merits when applying *Tecom* standard.
- Field counsel should conduct the *Tecom* analysis without regard to the proposed settlement amount and the CO should decide allowability of settlement amount.
- Require both decisions within same prompt time frame.

M&O Suggested Guidance (cont.)

- Clarify limited application of *Tecom*.
 - Guidance should be explicit that *Tecom* standard only applies to Title VII and Whistleblower retaliation claims.
 - Other employment causes of action – wrongful termination, tort, breach of employment contract and other claims are excluded from its application.

M&O Suggested Guidance (cont.)

- Focus on objective legal merits when applying *Tecom* standard.
 - The *Tecom* decision and resulting guidance regarding allowability of legal settlements turns on the language, “very little likelihood of success on the merits.”
 - Focus on the definition of “merits” and that the term be strictly construed to mean the analysis of the specific facts to the relevant law presented in the case.
 - Analysis should be conducted on an objective, not subjective, standard.
 - Factors beyond the objective legal merits such as how employer is perceived, jury pool, risks at trial, etc., should not be considered.

Suggested Guidance (cont.)

- Field counsel should conduct the *Tecom* analysis without regard to the proposed settlement amount and the CO should decide allowability of settlement amount.
 - A high value case would be evaluated initially by the objective legal standard in the same way as a low value case for purposes of the *Tecom* merits analysis.
 - Legal merits decision should be reserved to, and made by, site counsel.
 - Initial indications are that DOE does not agree.
 - If it is determined *Tecom* standard for allowability has been met, Contracting Officer can weigh *all of the available factors* and reasons underlying the settlement request to determine reasonableness and hence allowability

Suggested Guidance (cont.)

- Require both decisions within the same prompt time frame.
 - Guidance should require, absent special circumstances, that those two decisions be made at or near the same time.

Conclusion

- **Decision to apply *Tecom* represents a sea change in the risk profile assumed by Contractors in managing and operating DOE/NNSA laboratories, plants, and sites.**