



Government Contracts Advisory

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CBCA Further Narrows Scope of Allowable FCA Legal Defense Costs

The Civilian Board of Contract Appeals (“CBCA”) has issued a decision prohibiting contractors from recovering legal costs that are common to both successful and unsuccessful False Claims Act (“FCA”) claims (“common costs”). This decision significantly limits the ability of contractors to recover FCA defense costs in certain circumstances and may require contractors to modify how they account for legal costs associated with FCA claims.

On December 14, 2010, the CBCA issued its latest decision in *Boeing Co.* CBCA Nos. 337, 338, 339, 978 (Dec. 14, 2010) (*Boeing II*). In *Boeing II*, a contractor sought to recover legal costs incurred while defending itself, with varying degrees of success, against several FCA allegations brought by the United States government and an individual relator. In a prior decision, the CBCA held that the contractor was entitled to recover costs incurred defending itself in the underlying FCA litigation only where those costs were expended in defense of counts and/or claims on which the contractor prevailed. *Boeing*, CBCA Nos. 337, 338, 339, 978, 09-BCA ¶ 34,026 (2008) (*Boeing I*). *Boeing I* did not address the contractor’s entitlement to common costs.

The *Boeing II* decision focuses on the contractor’s ability to recover common costs. *Boeing II* holds that the contractor is not entitled to recover *any* common costs, even when the contractor prevailed in the majority of the claims brought against it. In so holding, the CBCA notes that “[w]e see nothing . . . indicating that the Government must prevail entirely, or even to a substantial degree, in order for all defense costs to be disallowed. *All that is required is a finding of liability.* Defense costs are simply not allowable when contractors are found liable.” *Boeing II* (emphasis added).

The *Boeing II* decision is significant because, although the underlying contract is with the Department of Energy, the CBCA relies upon contract language that is substantially similar to the Federal Acquisition Regulation cost principle covering FCA defense costs¹ and the Department of Defense Authorization Act of 1986, which is the premise for all regulations disallowing defense costs for FCA actions. As a result, the logic of this decision could be easily applied to contracts that include FAR 31.205-47, which governs the allowability of FCA defense costs for most government contractors.

If the *Boeing II* decision’s logic is extended to FAR 31.205-47, the decision will have far-reaching implications for contractors defending FCA cases. After *Boeing II*, it will be critical for contractors to identify legal costs with specific FCA claims when possible to enable recovery in the event that the contractor is successful in defending some, but not all, of the FCA claims brought against it. Contractors must also seek to minimize common costs, which should now be

viewed as “high risk” costs because a contractor must prevail on all of the claims underlying the common costs to recover the costs. In the event that a contractor is presented with FCA allegations, it should immediately begin working with counsel to develop appropriate time tracking and billing mechanisms to implement the above suggestions.

¹ The contract clause at issue in Boeing II (DEAR 970.3102-20) states that:

Costs incurred in connection with defense of any (1) criminal or civil investigation, grand jury proceeding, or prosecution, (2) civil litigation, or (3) administrative proceedings . . . are unallowable when the charges which are the subject of the investigation, proceedings, or prosecution, involve fraud or similar offenses (including filing of a false certification) on the part of the contractor, its agents or employees, and result in conviction . . .

FAR 31.205-47(b) states that:

Costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government for violation of, or a failure to comply with, law or regulation by the contractor (including its agents or employees), or costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730, are unallowable if the result is--(1) In a criminal proceeding, a conviction; (2) In a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct or imposition of a monetary penalty where the proceeding does not involve an allegation of fraud or similar misconduct.

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