Karen L. Manos, Chair

As this issue goes to print, we have just completed the Annual Meeting in Chicago. The program was exceptionally good, and even the weather cooperated, with beautiful blue skies, a slight breeze, and moderate temperatures. Congratulations to Immediate-past Chair Michael Mutek and Annual and Quarterly Programs Cochairs Nancy Harrison, Mark Langevin, and Greg Smith for an excellent program year.

On behalf of the Section, I would like to extend my thanks to Michael Mutek for his service to the Section over many years. Congratulations are also in order for the Procurement Fraud Committee for its selection as Committee of the Year.

As we look forward to another year, Annual and Quarterly Program Chairs Pat Meagher and Holly Svetz are already hard at work organizing programs for 2009-2010. The theme of the Fall Education Program, to be held on November 13, 2009, at Disney’s Contemporary Resort in Orlando, is “Emerging Issues: A Multifaceted Look at Federal Procurement.” Program Chairs Sharon Larkin and Dan Graham have put together a terrific program. The morning will begin with a “hot topics” panel that includes, as invited speakers, Mary L. Kendall, acting inspector general, Department of the Interior; Steve Linick, the Department of Justice Civil Fraud Division attorney with primary responsibility for the mandatory disclosure rule; Rob Burton, the former acting inspector general; and Alice M. Eldridge, vice president for ethics and business conduct, Lockheed Martin Corp. That session will be followed by a panel on “Government Contracts Law Practice at the Federal Circuit: A Dialogue Between the Bench and Bar.” The panel will be moderated by Judge Mary Ellen Coster Williams, and will include Federal Circuit Judges Daniel Friedman and Kimberly Moore; DOJ attorney Reid Prouty; and Marcia Madsen. The afternoon will start with a construction panel that will explore the effect of evolving procurement reform initiatives on federal construction contractors seeking stimulus funding under the American Recovery and Reinvestment Act. The construction panel coincides with the Public Contract Law Journal’s Fall 2009 “single subject” issue on construction. The fall program will conclude with a panel on trends in the regulation of personal and organizational conflicts of interest.

Rounding out the year:

• The 16th Annual Federal Procurement Institute will be held March 4-5, 2010, at our traditional location, Loews Annapolis Hotel. With two deans of the procurement bar—

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the sum at issue, but the amount at least contained costs associated with the plaintiff’s legal fees.

12. 298 F.3d at 1286 (“[t]he regulations disallowing particular items of cost do not address costs similar to the costs of defending a contractor’s directors from charges that they tolerated inadequate controls concerning possible fraud or similar misconduct”).

13. Id. at 1287.

14. Interestingly, while the plain language of the Boeing decision indicates that a relationship was never found between the costs at issue and costs deemed unallowable under the Legal Costs Principle, the opinion’s logic suggests that such a relationship existed. After concluding that the presence of a settlement agreement prevented the finding of a “direct relationship” through a judicial determination, the remainder of the opinion proceeds under the assumption that, had the contractor been unsuccessful in its defense of the suit, the costs would have been unallowable. This is most clear when the court, in addressing the need for determining the likelihood of success, states “[f]or costs to be allowable in a settlement situation (where the costs of an unsuccessful defense would be disallowed), a contractor must show that the allegations . . . had very little likelihood of success on the merits.” (emphasis added). For defense and settlement costs to be allowable under the Legal Costs Principle, the costs must fall outside costs expressly unallowable under the principle and not be “similar or related” to costs expressly unallowable under the principle. As the Federal Circuit readily states, the costs associated with the contractor’s shareholder derivative suit were clearly not expressly unallowable under the Legal Costs Principle. The Federal Circuit is likewise explicit that the costs were not “similar” to any costs expressly unallowable under the Legal Costs Principle. Thus, in order for the Federal Circuit’s premise—that the costs at issue would have been unallowable if the contractor was unsuccessful in defending the underlying suit—to be internally consistent with the remainder of the decision, the Federal Circuit must have determined that the costs were “related” to costs expressly unallowable under the Legal Costs Principle.

15. Boeing, 298 F.3d at 1288.

16. Id.

17. Id.

18. Id. at 1288-89.

19. ASBCA No. 53884, 07-2 BCA ¶ 33,674.

20. Id.

21. 566 F.3d at 1041.

22. The contract incorporated FAR 52.222-26, which required that the contractor, among other things, “not discriminate against any employee . . . because of . . . sex . . . .”

23. Tecon II, 566 F.3d at 1041-45 (citing FAR 31.201-2(a)(4) (“[a] cost is allowable only when the cost complies with all of the following requirements [including] . . . [terms of the contract]”).

24. Of course, the erosion of the requirement for fraud or similar misconduct is not necessarily new with Tecon II. The United States Court of Appeals for the Ninth Circuit recently held in Southwest Marine Inc. v. United States, 535 F.3d 1012 (9th Cir. 2008), that legal costs incurred in the unsuccessful defense of a third-party action brought under the Clean Water Act (CWA) were “similar or related” to costs incurred defending against a third-party action brought under the FCA and, therefore, unallowable under the Legal Costs Principle. The Ninth Circuit reasoned that a third-party action under the CWA is similar to a qui tam action under the FCA, although the Ninth Circuit did not discuss the requirement for fraud or similar misconduct.

Tecon II can likely be distinguished from Southwest Marine. In the latter case, the court relied on the fact that a third-party action under the CWA is similar to a qui tam action under the FCA to find the costs “similar or related.” In Tecon II, however, there is no similarity to the FCA or other costs specifically addressed in the Legal Costs Principle. In fact, Judge Lourie pointed out in his dissent that the facts of Tecon II do not “present the . . . opportunity for analogizing to cases brought under the [FCA].”


26. See FAR 31.201-3(a) (“[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”); see also Boeing Aerospace Operations, Inc., ASBCA Nos. 46274, 46275, 94-2 BCA ¶ 26,802 (“[a] contractor is given discretion in carrying out the performance of a Government contract and may exercise independent business judgment in deciding to incur costs”); McDonnell Douglas, 40 Fed. Cl. at 537, rev’d on other grounds, 182 F.3d 1319 (Fed. Cir. 1999) (when considering the allowability of contractor’s termination settlement costs with its subcontractors, court considered whether contractor engaged in “arm’s-length” bargaining and “sound business judgment” and held that “[t]he FAR does not encourage second-guessing of the exercise of business judgment”).

27. ASBCA No. 53884, 07-2 BCA ¶ 33,674.

28. 566 F.3d at 1046.

29. Care should be taken in communicating with the contracting officer. In situations where an allowability determination will require a contracting officer to address legal issues not in his or her traditional purview, or that of the contracting officer’s legal counsel, contractors should educate the contracting officer in the area of law involved. While this may be a demanding process, it will provide contractors with additional opportunities to communicate with the contracting officer and effectively advocate for the contractor’s desired outcome.

30. 566 F.3d at 1048.

31. See FAR 52.236-7.

32. 566 F.3d at 1045.

33. Id.

NEWS FROM THE CHAIR

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Marcia Madsen and Jim McCullough—as our program chairs, next year’s FPI promises to be an exceptional one.

• Kara Sacilotto and Aaron Silberman are the program chairs, and Washington State Chair Robert Burke is the honorary program cochair, for the 5th Annual State and Local Procurement Institute, which will be held May 14, 2010, at the Renaissance Hotel in Seattle.

• Finally, Rob Schaefer and Gail Zirkelbach are the program chairs for next year’s Annual Meeting, which will be held August 6-9, 2010, at the Westin St. Francis in San Francisco.

This year we welcome several new division and committee chairs and vice-chairs. I am confident that they will serve our Section well. I am excited to begin what I believe will be an eventful and productive year, and look forward to seeing you at the Fall Meeting.