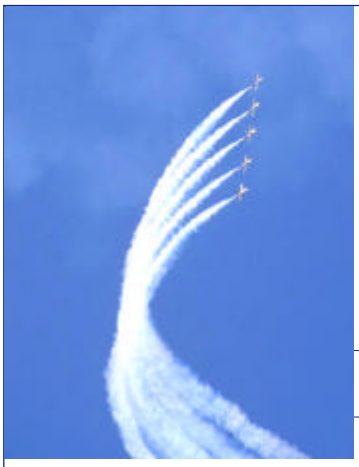

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Government Contractor Defense: Applies to Service Contracts

A recent decision in the U.S. Court of Appeals for the Eleventh Circuit affirms that the "government contractor defense" applies to service contracts as well as design defect cases.

In *Hudgens v. Bell Helicopters/Textron*, No. 02-12357, — F.3d ——, 2003 WL 1955173 (11th Cir. Ala. Apr. 25, 2003), the Eleventh Circuit held that the government contractor defense protects government contractors with service contracts from state tort liability. As a result, the contractor in *Hudgens* could not be held liable under state law for injuries resulting from a helicopter crash, allegedly due to a failure to properly maintain and/or make necessary repairs to the helicopter under an Army maintenance contract.

With proper precautions and preparation, companies contracting with the federal government for supplies or services may be able to avail themselves of this same immunity from liability.

The Government Contractor Defense

The government contractor defense has traditionally been asserted by contractors to defend against state law claims brought by persons allegedly injured by design defects in equipment furnished to the government. Contractors argue that the state tort law at issue imposes a duty on them that is contrary to the duty imposed by their government contracts. In doing so, the defense contractors seek to cloak themselves with the immunity of the United States. When the defense is found applicable, the contractor is immune from liability under the state law.

The Supreme Court, in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), explained the basis for this contractor immunity. The case involved a wrongful death action brought under state law against a contractor on behalf of a pilot killed in a helicopter crash. At issue was whether federal procurement involved a "uniquely

federal interest" that would preempt state law. The Court pointed to a provision of the Federal Tort Claims Act ("FTCA"),[1] which exempts the federal government and its employees from suit for claims arising from discretionary acts, as demonstrating the potential for significant conflict between federal interests and state law. The Court reasoned that the selection of the appropriate design for military equipment is assuredly such a discretionary function. In the Court's view, the selection of the design "often involves not merely engineering analysis but judgment as to the balancing of many technical, military and even societal considerations, including specifically the trade-off between greater safety and greater combat effectiveness."[2]

In the Supreme Court's view, permitting "second-guessing" of these judgments through state court actions against contractors would produce the same effects to be avoided by the FTCA discretionary function exception. The Court reasoned that the financial burden of an adverse judgment would be borne by the government, as contractors would raise their prices to cover or insure against contingent liability for government-ordered designs. To the Court, it made little sense to insulate the government against financial liability for the judgment that a particular feature is necessary when the government itself produces the equipment, but not when it contracts for production. Accordingly, the *Boyle* Court established a three-pronged test to determine when the defense applies: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[3]

Applicability to Service Contracts

In *Hudgens v. Bell Helicopters/Textron*, the Eleventh Circuit extended the government contractor defense to service contracts. In *Hudgens*, two Army pilots were severely injured when the tail fin separated from their helicopter, resulting in a crash. Investigators determined that the separation resulted from the rupture of a forward vertical fin spar caused by a crack at a rivet hole near the base of the spar. Before the crash, the Federal Aviation Authority ("FAA") had identified a problem with the fin spar and had issued an Airworthiness Directive that required civilian operators to modify the fin spar to facilitate inspection for cracks. Likewise, the manufacturer circulated a "Military Alert Bulletin" advising that cracks had been found on some aircraft and recommending "tap hammer" and fluorescent dye penetrant inspections within certain flight hour intervals.

The Army maintenance contract required the contractor to determine the airworthiness condition of the helicopters, based on inspection, operational checks and test flights. The Army, however, was not bound by the FAA or the manufacturer's bulletins in operating its own aircraft. Reasoning that its own helicopters had not been engaged in heavy lifting and had a history of use without incident, the Army did not adopt the recommended inspection protocols, but instead used a simple visual inspection technique. The plaintiffs in the lawsuit primarily asserted that the contractor was negligent under state law for failing to properly maintain the helicopter and/or to make necessary repairs. The contractor, in turn, asserted the government contractor defense, but the plaintiffs

[1] The Federal Tort Claims Act authorizes damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of government employees, to the extent that a private person would be liable under the law of the place where the conduct occurred. Several exceptions apply, including the so-called "discretionary function" exception. 28 U.S.C. § 1346(b) and § 2680(a).

[2] *Boyle v. United Technologies Corp.*, 487 U.S. 500, 511.

[3] *Id.* at 511- 512.

responded that the defense only applied to design defects and not to service contracts.

The Eleventh Circuit disagreed and held that, although *Boyle* referred to procurement contracts, the question is whether subjecting a contractor to liability under state law would create a significant conflict with a unique federal interest. The Circuit Court concluded that the potential for conflict was present in this case, reasoning that the articulation of maintenance protocols involves the exercise of the same discretion as formulating design specifications: "Holding a contractor liable under state law for conscientiously maintaining military aircraft according to specified procedures would threaten government officials' discretion in precisely the same manner as holding contractors liab[le] for departing from design specifications."[4]

In *Hudgens*, the Eleventh Circuit applied the three-part *Boyle* test, but modified it to require "reasonably precise maintenance procedures" rather than "reasonably precise specifications." The district court below had found that the Army's maintenance procedures constituted a comprehensive regime that the contractor was not expected to supplement, and that the precautions advised by the FAA and the manufacturer had been affirmatively and deliberately omitted from the prescribed procedures. The Eleventh Circuit agreed and went on to hold that the Army had dictated reasonably precise inspection procedures, that the contractor had complied with those procedures and that the Army was well aware of the danger that the FAA and Bell associated with not adopting certain precautions. The Circuit Court then concluded that the government contractor defense applied to the Army maintenance contract.[5]

Some Observations

Although there will continue to be questions about the applicability and scope of the government contractor defense, its significance as a defense to liability under state law seems to be expanding.[6] Contractors should consider the elements of the defense during the acquisition and contracting process. By doing so, they may be able to lay the foundation for the defense should the need arise. Showing that the design feature or maintenance procedure in question was considered by a government official, and not just by the contractor, is necessary to show the exercise of government discretion. Providing relevant information to the government and advising it of known risks during design reviews or in the development of maintenance and operating procedures will help show that a government official considered the feature or procedure and exercised discretion in directing or approving it.

Even during the contract negotiation process, contractors should try to incorporate in the government contract an acknowledgement that the specifications or maintenance procedures are detailed in nature and that the government has approved them. Contractors should also try to have the government acknowledge in inspection, delivery and acceptance documents that the contractor has in fact complied with the specifications or procedures. These statements will not be of help if they are contrary to the facts, but they can help, if it is a close call, to show what the parties intended.

Creating (and preserving) records of the government's involvement in the design process and in drafting maintenance procedures or statements of

[4] *Hudgens v. Bell Helicopters/Textron*, 2003 WL 1955173 at 4.

[5] *Id*. at 13.

[6] The recently enacted Homeland Security Law makes the government contractor defense a rebuttable presumption in lawsuits arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies approved by the Department of Homeland Security have been deployed. *See*, Section 863(d) of the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 ("Safety Act"), contained within the Homeland Security Act of 2002, Public Law 107-100, November 25, 2002.

work will go a long way in showing what discretion the government did exercise in approving the specifications for the product or the procedures for the service. In addition to documenting the facts of the government's involvement, anything the contractor can do to document the government's agreement about the preciseness of the specifications or the procedures, the government approval of them, the contractor's compliance with them, and the contractor's warning of known risks will be beneficial.

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