

CONTRACTOR LIABILITY USING PERFORMANCE REQUIREMENTS

With the current shift from manufacturing to design specifications to manufacturing to performance specifications, the contracting community is asking the question whether contractors bear an increased liability risk. Probably. Some argue that, by their very nature, performance specifications shift greater risk from the government to the contractor. For example, performance specifications may threaten the availability of the so-called "Government Contractor Defense" to tort liability, thus leaving contractors more vulnerable to product liability suits.

Under the "Discretionary Function" exclusion to the Federal Tort Claims Act (FTCA), the federal Government cannot be sued for the negligent acts of government employees when those acts involve policy judgments and decisions in which there was a weighing of competing concerns. Thus, for example, where the military is aware of a safety hazard but decides to accept a residual risk because of a performance trade-off, courts have refused to second-guess that discretionary decision-making process. Ordinarily, this exclusion from liability would leave the contractor as the sole target of a lawsuit, but under certain conditions the "Government Contractor Defense" protects the contractor who shared in the Government's discretionary decision-making. In Boyle v. United Technologies the Supreme Court outlined the elements of the defense as follows: (1) the Government approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the Government about the dangers in the use of the equipment that were known to the supplier but not to the Government. (108 S.Ct. 2510, 1988.) Subsequent decisions have further elucidated the exception and the conditions for its application.

In order for a contractor to be shielded from liability for its negligence, the Government must exercise the discretion, not the contractor. In Trevino v. General Dynamics Corp., the court held that the defense "protects government contractors from liability for defective designs if discretion over the design feature in question was exercised by the government...mere government acceptance of the contractor's work does not resuscitate the defense unless there is approval based on substantive review and evaluation of the contractor's choices." (865 F.2nd 1474, 5th Cir. 1989.) In other words, Government approval must have involved more than a mere "rubber stamp." In Kleeman v. McDonnell Douglas Corp., the court noted that it is extensive government involvement in the design process which "provides tangible evidence of the strong federal interest which justifies the creation of a federal common law defense for government contractors in the first place." (890 F.2d 698 (4th Cir. 1989.) The defense applied, then, where "the government maintained discretion over the design of the product throughout; it did not simply turn over such discretion, and the military decisions therein, to the private contractor." (Id.)

The above cases reflect that, for the government contractor defense to apply, there must be an interchange between the contractor and the Government. However, whether deleting design specifications effectively eliminates the Boyle defense is a controversial issue not yet fully addressed by the courts. Experts differ on the potential liability increase. Pentagon acquisition reform chief Colleen Preston didn't believe this issue would have a substantial impact. (See Is a

Risky Business Getting Riskier?, Defense Week, May 15, 1995.) She argued that in most cases companies were liable and Boyle didn't apply; "The only time companies were left off the hook is when they were clearly forced to do something that they believed to be inherently unsafe." (Id.)

Conversely, Herbert Fenster, (a partner in the Washington, D.C. law firm McKenna & Cuneo and a legal representative for General Dynamics) argues that the specification changes will not eliminate the Boyle defense because it is used so often. (Id.) Fenster believes that Boyle will still protect "government unique" products. He maintains that a company's argument that its product is government-unique will rely on two factors; the degree of Government involvement in design plans and the degree to which the final product appears and functions differently from any commercial product. Thus, he says, the specifications shift may make a difference, but only on the margins, with core weapons systems not significantly affected. Where the contractor translates performance requirements into design specifications, the Government will still be signing off on them. According to this argument, switching to performance specifications will be a "distinction without a difference," since contractors will still submit blueprints for approval. (Id.)

However, F. Barry Hennegan, general counsel for Lockheed Martin Astronautics Space Systems, said his company would be wary of performance and commercial specifications and standards, which, he said, introduce "a new element of risk into an already risky business." (Id.) Colleen Preston replied that she could "see his point that it is safer to go with the tried-and-true product than it is to develop a new product. But it's done all the time. What do the airlines do when they develop an aircraft?" She argued that "the only time they are going to be liable is if they have a defective design. That's why you do testing and all that. Is it going to cost the government money? Yes, because the company is obviously assuming a risk to develop the new product that they wouldn't have if they were selling us the old product." Preston also maintained that military contractors should be accountable for the design of their products in the same way the commercial sector is; "By us getting away from detailed specs, [contractors] will be under normal rules of having to produce product that meets certain standards...The industry wants to be treated as if they are commercial manufacturers...They ought to be working with the same standards that commercial manufacturers are." (Id.)

What does all this mean for our defense contractors? Ultimately the courts will have the final say. I have discussed this issue extensively with attorneys within the Army Materiel Command. Basically, we are in a holding pattern waiting for the first cases to test the waters. Some attorneys believe that contractors might soon be including the element of product liability risk in their cost proposals, but thus far contractors seem to believe they are still immune to this risk.

An inherent factor in the shift to performance specifications is that contractors may be more vulnerable to product liability claims; that may well be one of the factors driving the change. As evidenced in the above remarks of Deputy Undersecretary of Defense for Acquisition Colleen Preston, the Government does not have any obligation or responsibility to negate that risk or its

impact. Military contractors should be accountable for the design of their products in the same manner and degree in which the commercial sector is.

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