The Military Contract Defense

By: M. P. Papadakis

On June 19th 1989 Justice of the Supreme Court Antonin Scalia penned the opinion (Broyle vs United Technologies, 487 US 500, 108 S. Ct. 2510) and " proved once again that the court always does its worst work just before summer vacation" (an alleged quote of a disgusted dissenting supreme court justice). Scalia and concurring justices leapt into the kitchen as chefs for newly defined defense immunity. The military industrial complex provided the recipe. The defense was served topped with high sounding verbiage such as " The procurement of equipment by the United States is an area of uniquely federal interest "and garnished that by stating in paraphrase that "The independent Contractor performing it's obligation under a Procurement Contract has the same interest in getting the Government works done."

Of course this is not true. The defense contractor serves his stockholders with profit as a motive. Such can not be said about the government. In the perverted sense the military industrial complex, that exists for profit motives, was anointed with higher purposes by the court. No one doubts for a second that the military man serves his country and may be expected to give his live in that service. Nowhere in the recruiting posters does it say that a military man is supposed to become a headstone in the cemetery of engineering mistake and defect, especially in peacetime.

The Contrary is true. The Navy Fliers' Creed states:

> *" I am a United States Navy Flyer. My countrymen built the best airplane in the world and entrusted it to me. They trained me to fly it. I will use it to the absolute limit of my power".*

It is easy for black robed justices whose most dangerous job is to avoid being bored to death, to make wrong determinations since they never sit in the seats of the machinery they anoint with immunity. Worse, it is obvious that the law clerks that actually caucused and decided on the Boyle wording were for the most part clueless as to military procurement procedures or else the wording in Boyle would be ever so simplified. All the wordsmiths needed was a lesson and government contracting to help them appropriately chose correctly the words used in Scalia's otherwise brilliant and balanced recitation. Had they done this the holding would not be confusing nor would it be open to interpretation. Under Boyle State tort law is displaced; immunity applies if it can be shown:

"A. The United States Government approved reasonably precise specifications.
B. The equipment conformed to those specifications.
and
C.The supplier warned the United States about dangers in the use of the equipment known to the supplier but not the United States. **"**

The defense is an affirmative defense available for the contractor to plead and with whom the burden of proof rests. The major problem with the contractor defense as written by Scalia is the fact that reasonably precise specification is not defined nor is the scope of the word government approval. Scalia's vagueness of wording and meaning makes entry into the military product litigation arena a minefield of uncertainty and contradiction.

1. Did Scalia mean that a sophisticated product accompanied by reasonably precise specifications deserved immunity even if the defect complained about were not described in those specifications?

By example he seems to suggest that a product whose specifications are silent in the area of the defect complained of should not have federal pre emption overrule state tort law and impose an immunity.

> *" If for example, the United States contracts for the purchase and installation of an air conditioner, specifying the cooling capacity, but not the precise manner of construction, the state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state prescribed duty of care. No one suggests that state law would generally be pre empted in this context ".*

2. Did Scalia deem a level of approval sufficient to warrant immunity for the widget design ?

The court further justifies its holding by stating that if elements one and two of the defense are met then the discretionary function of the Government has been shown sufficient to frustrate suits against the manufacturer. The court then states that such a discretionary function must be specific enough to consider the design feature in question and the approval must have resulted from a Government officer and not from the contractor itself. One surmises he meant a Government officer with sufficient stature to be endowed with approval authority and the ability to exercise a discretionary function for the government. A GS 4 janitor probably wouldn't suffice anymore than a employee of the manufacturer.

> *" The first two of these conditions assure that the suit is within the area where the policy of the " Discretionary function " would be frustrated-- i. e. they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself"*

3. Did Scalia intend to give immunity only to products designed and developed for

specific military purposes or was his purpose to immunize all products procured by the military including off the shelf items ?

If one believes that the court meant that a "Federal Procurement officer purchasing stock equipments by model number" is the same as the Government purchasing an already designed off the shelf item, then it may be the courts intention to withhold immunity for such a procurement since it would appear that the government had no significant interest in any particular design feature of the widget.

> *"If for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders a craft by model number can not sue for the manufacturers negligence because he got precisely what he ordered."*

The court discarded older contractor defense rulings that relied on Feres Doctrine applications stating that imposing a Feres application would be too broad. In this paragraph he again seems to say that an off the shelf item deserves no immunity.

> *" Too broad, because if the Government contractor defense is to prohibit suit against the manufacturer whenever Feres would prevent suit against the government, then even injuries caused to military personnel by a helicopter purchased from stock (in the example above), or by any standard equipment purchased by the Government , would be covered. [immune from liability]*

The worst part of Scalia's difficult to decipher message was that it was so misunderstood by the dissent team. Their blistering rebuttle to Scalia's reasoned, but poorly written holding, unleashed the doomsayers in interpreting Scalia's meaning to far greater extent than it appears even he had intended. It isentirely possible that the dissent did more harm than the holding, since everyone including other uninformed justices turned the original holding into the self fulfilling prophecy of the dissent.

Only the 5th Circuit in Trevino was able to cut the fog and reach the substance of Boyle. Simply stated Scalia wanted to bestow immunity on a Government manufacturer who in designing a product was essentially doing that which the Government in it's discretion had understood and deemed appropriate.

To better understand why Boyle vs United Technology is incomplete and therefore a bad holding one must first focus on and understand military procurement procedures.

Generally speaking when the Government contracts for the purchase of hardware it can only obtain hardware by three general methods:

1. A full scale development of a new military product.

2: Off the shelf military items that are to be extensively modified.

3. Off the shelf items.

An attorney must arm himself with the recent copy of the **FARs** (Federal Acquisition Regulations) and **DLARs** (Defense Acquisition Regulations) which precisely regulate government and defense procurement.These regulations may be purchased through the Government bookstores of the Government Printing Office. It may be ordered in Macintosh and CD format at a nominal cost. It could be downloaded from the web .These regulations define responsibilities and define terms utilized in Government contracting. It is clear that not one single federal judge feels it necessary to follow the intent of precise contractual requirements for federal procurement. My bet is that no judge has even cracked a page.

These rules state quite specifically who can approve or change contract requirements and technical specifications. For each Procurement Contract one Contracting officer (CO) is designated in writing. The designated Contracting Officer alone approve final specifications. He alone can change specifications. He alone can change the Contract. He alone can grant waivers and deviations to the Contract. The Contract Officer has many designated helpers called Contracting Officer's Technical Representatives (COTRs). They are impowered to disapprove specifications, and to watch verification and certification tests. They recommend approvals to the CO who is the only person empowered to approve specifications.

The Contracting Officer (CO) and with help from specified Contract Officer's Technical Representatives has the authority to change contract requirements or change specifications when approved by the Contracting Officer(CO). It is the Contracting Officer who is empowered to grant waivers and deviations. The (CO) is the person empowered with the governments discretionary power, with regard to military contracting. [This has to be what Scalia meant when he said " A Federal Government Procurement Officer "]

> *" The Contracting officer's Technical Representative or Technical Officer has been designated by the Contracting officer (CO) as having primary responsibility for overseeing the Contractor's performance. A letter of designation specifies the C.O.T.R.'s duties.....The COTR also determines whether contract deliverables meet functional, technical and performance specifications.....The COTR is the Technical advisor to the CO for all aspects of contract administration,* ***but must*** *request changes to the contract through the CO." (chapt. 2 paragraphs 1 and 2)*

One should look to history to determine what was the rationale for the development of these current procurement rules and regulations Historically, [prior to DOD Secretary McNamara] each service contracted independently, utilizing methods differing between services and differing between contracts. The disorganized contracting, tailored to the specific needs was efficient in one way and a fiscal nightmare in others. The non uniformity created bookkeeping and cost accounting methods that were different enough that contract control and cost control was difficult to achieve, and contract comparison was difficult.

A reasonable way to get a handle on contract administration [as between services] was to standardize the contracting procedure, accounting procedure and contract control administration throughout DOD. The prime interest was to achieve a definable goal in a acceptably technically efficient manner at the lowest total cost possible. Thus cost efficient contracting was born. Another goal was to stem the consistent cost overruns that were so typical in military - industry contracting.

To achieve these goals, cost control and scheduling control became the focus of management oriented contracting. It was understood that most contracts would differ. This truth was especially recognized for major developmental contracts. The essence of controlling costs from an accounting standpoint is to segment the contract into manageable and logical control units called **Phases** and subdivided internally to **Milestone** achievements. The purpose of subdividing a large contract into several phases and further into dozens or hundreds of milestone reviews is multi purposed :

1. To schedule and plan out time lines for accomplishment of the individual portions of the contract. [phases and milestones]

2. To cost apportion the contract. "Payment upon milestone or phase completion " .

3. To create logical phase developments where the government can logically change or back out of contractual continuation. [dispute resolutions and contractual changes]

4. To create a logical subdivision of work tasks so that the government can readily sense and control contract progress.

By subdividing large contracts into small phases and milestones the contracting office and the Contracting Representative can keep track of contract pricing and progress and to an extent control the contract process efficiently.

There are two basic examples of how to monitor a large contract:

First: The Procurement Contract : The Government example for a purchase or production run for 10,000 widget over 5 years would be to simply create lot sizes for delivery of 1,000 widget every 6 months. [Successful completion of a lot, initiates a payment and schedules a follow on lot if everything else is satisfied.

Second: The Development Contract: Logical subdivisions into milestones are created that may include research and development reviews, logical progress reviews, technical development accomplishment, time line compliance, engineering data submission and compliance, control drawing submissions etc. (Submission of documents for the government may be to simply fulfill a contract data requirement of a milestone).Such a transfer of documents may or may not require governmental review or approval beyond simple receipt. On the other hand such a transference of documents and final engineering work may have been a very thorough review and approval process by the Government.

There can be a major difference between acceptance and actual approval that Judge Higgenbotham seems to understand in **Trevino** With regard to most military contracts, these reasonably precise specifications and engineering support documents may be approved at some depth varying from automatic acceptance, rubber stamp to thorough review and approval. Some items previously accepted may be repurchased routinely if they are on a government approved purchase list. In such a case re approval is unneeded.

In Trevino vs General Dynamics (865 F.2d 1474) The learned Judge of the 5th Circuit Judge Higgonbotham suggests that for immunity to exist it is the manufacturers burden to show that design approval by the military consisted of more than a Rubber Stamp review.

> *" We hold that "approval " under the Boyle defense requires more than a rubber stamp.....When the government merely accepts, without any substantive review or evaluation, the decisions made by a government contractor, then the contractor, not the government, is excersising discretion. A rubber stamp is not discretionary function; therefore, a rubber stamp is not approval under Boyle***."**

In Trevino, the government must actually exercise it's discretion over the specific design features to meet the first element of the Boyle defense.To wit: [A. The Government approved reasonably precise specifications.] The defense applies only when the Government uses its discretion in choosing a specific design feature. Under the Trevino holding a manufacturer does not meet the burden of the first element of the Boyle tests when:

1. When it buys a product designed by a private manufacturer. (off the shelf items)

2. When the Government leaves critical design feature decisions to the manufacturer. (silence as to a design feature)
or

3. When the Government issues only concept requirements and general standards while the actual design features are left to the manufacturer.

"....The Government exercises its discretion over the design when it actually chooses a design feature. The government delegates the design discretion when it buys a product designed by a private manufacturer.; when it contracts for the design of a product or a feature of a product, leaving the critical design decisions to the private contractor; or when it contracts out the design of a concept generated by the government, requiring only that the final design satisfy minimal or general standards established by the government."

The implication is clear that for immunity to exist it should be shown that reasonably precise design specifications were sufficiently reviewed by an Government offices with approval authority. A continuous back and forth dialogue between manufacturer and approval authority for the government would suffice to show approval, but a rubber stamp would not. Perhaps most importantly, once the Government has relinquished or transferred its design discretion to the contractor that discretion remains with the contractor and does not revert back to the Government even if the Government retains the right of "final approval" or even an approval of a specific design without a substantive review or evaluation of the design features.

The question to be decided by the trier of fact is. Who exercised actual discretion over the design feature that is defective? If it was the Government, by virtue of an sufficient substantive approval, other than a rubber stamp,then the contractor deserves immunity. Note: the Rules concerning Government Contracting state the only person allowed to approve Final Specifications for the Government is the designated CONTRACT OFFICER (CO) .That approval must be signed by that Contracting Officer.

" *The requirement that the specifications be precise means that all significant details and critical design choices will be exercised by the government"*

In the Kleeman vs. McDonnel Douglas Corporation, 890 F.2d 698 the waters were muddied further since the fact situation was for a product that was clearly a full scale development program. Further there were included in the case a series of developments relating to the defective landing gear that had occurred years subsequent to the original design. In fact later the Navy issued a Notice of Defect **(NOD)** concerning the landing gears design . Still the gears design was held immune since at the time of design the design conformed to the then in effect precise specifications,

even if it may not have met some parts of the general guidelines and specifications.

> *"It is a salient fact of governmental participation in the various stages of the aircraft's development that establishes the contractor defense. Indeed, active governmental oversight is relevant to all three elements of the defendant's burden. Where as here, the Navy was intimately involved at various stages of the design and development process, the required governmental approval of the alleged design defect is more likely to be made out."*

The court extends the contractor defense beyond the design of the original aircraft to include post development and post production events. In the courts wording the implication is clear that he would give post design modifications immunity as well for so long as the modifications were conducted sufficient to meet the Boyle tests.

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> *" The ultimate design of the product is determined not only by the original procurement specifications and contract specifications, but also by specific engineering analysis developed during the actual production process."*

The Basic theory is that the Government exercised its discretion in choosing specific design features and thereby exercised a semblance of design control over the manufacturer. It is a variant of the old defense " It ain't my fault, he made me do it ".

The ultimate extension of Boyle to the absurd takes place in Harduvel vs. General Dynamics (878 f.2d 1311) where the court took the greatest liberties with the evidence in creating a defense for a military product. The court actually changed the plaintiff's nature of defect to design defect from a series of manufacturing flaws. The defendant had testified that it had no design problems only manufacturing problems and the plaintiff's had introduced many, many instances of wire chaffing in F -16 aircraft. The plaintiff had introduced evidence of sharp edges, wrong connectors, and oversized screws that would and had cut insulation. Still the learned judge enlarged the immunity with senile reasoning.

> *" If a defect is one inherent in the product or the system the Government has approved it will be covered by the defense. Where a defect is an instance of shoddy workmanship, it implicates no federal interest. This distinction between " aberrational " defects and defects occurring through an entire line of products is frequently used in tort law to separate defects of manufacture from those of design."*

Even worse in Lewis vs. Babcock, McDonnel Douglas Corp. and General Dynamics (985 f2d.83) the court held that a continued usage by the military of a defective component in an F - 111 aircraft was enough to trigger the contract defense. The reasoning was that since the Air Force later learned of the defect and continued using the defective part, even re ordering and installing a second one after the first was recognized defective, that this re ordering was sufficient to trigger the defense.

"*"We hold that when the government reordered the specific Babcock cable, with knowledge of its alleged design defect, the Government approved reasonably precise specifications for that product such that the manufacturer qualifies for the military contractor defense for any defects in the design of that product."*

We do not decide whether the contractor can invoke the military contractor defense where the Government merely tolerates a defect through continued usage of a product in the face of knowledge of a design defect acquired after the design stage ended".....

This fact situation and result clearly was not contemplated in Boyle, and it is highly speculative if this is the result desired by Scalia. There may be some justification in the result, however, since it is true that a manufacturer of the product can not unilaterally change or modify the product subsequent to it's delivery to the military. Only the military can change the form, fit or function after delivery. If the result is justified, it is realistically based on the fact that the military used it's discretionary function to assume the risk of usage of a known defective product, and therefore it was Government negligence that was the 100 % real cause of the accident. The result would be the same since the soldier would be barred from recovering under the Feres Doctrine. It is suggested by this author that the simple, direct and an appropriate writing of the Military contract defense should read.

A military contractor defined as a supplier of goods to the military (government) of the United States may have an affirmative defense and resulting tort law immunity for a defectively designed or manufactured product if :

1. He can prove that the defect in manufacture or design complained of by plaintiff was approved by the government Contract Officer after a sufficient review by the Government of reasonably precise specifications, control drawings, or contractual language so as to be able to state that the Government knew and approved of the defect in manufacture or design.

[In effect: The Government contract approved and made the manufacturer do it in the prescribed (defective) manner.]

and

2. The Manufacturer will have resulting immunity from any claim of marketing defect if the manufacturer shows that it did not conceal defects or otherwise fail to warn of defects known to the manufacturer and unknown to the government from any source.

The Military and Government Contractor Defense has nothing to do with national

defense or national security. What judge can say that national security or defense is enhanced by killing a soldier or losing an expensive piece of military hardware due to defect in peacetime. I suggest a thinking judge, a defense bar or a plaintiff bar would suggest that military readiness, national security and military moral is enhanced by defect free products. Military jet aircraft that have earned the nicknames, " Ensign Eater, Widow Maker, and Lawn Dart are not in the national interest unless filling our national cemeteries are a priority.

Morale is never good during a missing man fly over at a military burial service. No judge can believe that national interest was served as the B-1 bomber sat out Desert Storm because of design problems. Perhaps, discipline is served when we force an ensign to fly a defective aircraft. I remember that we called that sort of mission a " C.B. " or character builder. I guess that was what was meant by the phrase, " You buy your ticket, and you take your chances."
Let's take a deeper look at military contracting for the development of an aircraft.

I.

The military Contractors may buy hardware in three manners.

1. By Full Scale Development **(F.S.D.C.)** of a totally new product.
2. By extensive modification of an existing product
3. By off the shelf purchases of a existing product.

The Full Scale Development program for a new aircraft starts in the following manner. The Government funds a Full Scale Development Contract with several phases for the development and initial production of the new aircraft. In a Full Scale Development situation the Development Plan is usually divided into four logical phases or subsections, they are:

I. Development phase for engineering R and D studies
II. Development phase in test and mock up.
III. Development phase demonstration and flight testing.
IV. Production phase .

It is during the Full Scale Development phase [Phase I] that most design work is accomplished and most final controlling specifications are decided upon and memorialized in writing.

MILESTONES

Milestone is the terminology used to schedule and track design events. Basically, a milestone is a logical scheduling system that suggests dates certain events or milestones are to be completed. Milestones also are utilized in the procurement funding portion of a military contract to signify completion of an event to initiate transfer of money from the government to the contractor. Milestones are primarily

scheduling and accounting devices tied to engineering progress. **MILESTONE REVIEWS** are regularly conducted by the governmental contracting office to insure that the project is on schedule and that funding transfers from the Government to the manufacturer is warranted. These may include other technical reviews.

During the development phase [phase I.] the **PRIME MANUFACTURER** will always see the need to purchase or design items for installation and usage on the new aircraft.
He may do this in several ways:

1. The Government may order the prime manufacturer to utilize certain items already in the inventory or supply system. These Items are called **G.F.E.** or **G.F.A.E.** standing for government furnished equipment or aeronautical equipment. No new specifications are written.

2. The Prime may purchase certain items as off the shelf items,if they appear as an item on a **Government Approved List** . There is no qualification or verification required.

3. The Prime may approach a Sub Contractor to design and supply a new subcomponent part. In such a case , called PRIME ITEM DEVELOPMENT (P.I.D.), the prime contractor will issue preliminary specifications, milestones, testing and verification requirements that the subcontractor must meet. The Prime manufacturer oversees the progress of the subcontractor much as the government oversees the prime. A Critical Item Development Specification (C.I.D.s) signifies that government decided that a new subcomponent product design needed. The government undertook it's development and oversaw contract progress.

In the P.I.D. case the subcontractor will provide demonstration of the new widget to the prime through analysis, testing, and verification and qualification demonstrations. Further, the subcontractor will submit a Final Specification to the Prime manufacturer for the design of the new widget. It (the Final Specification) will reference compliance with all required previous specifications or it will include exceptions thereto).

In some cases of subcomponent development the government may participate in a **First Article Configuration Audit** of a subcomponent designed through a C.I.D. or a S.I.D. process. [This configuration audit settles what configuration the final item will take as it is subsequently procured]. The Prime Contractor is the usual approving authority for the Final Specification of a subcontractor's part or component.

4. The Prime Contractor may undertake to develop a new component in house.

In such case he will act a specification writer and verification and testing as well as approval authority. The Prime Manufacturer is responsible to meeting the Government's specifications and milestones.

As the development R and D phase nears completion [phase I.] the Prime Manufacturer has received and approved hundreds of such subcomponent Final Specifications supported by engineering and test verification data. The Prime is usually the approving authority for the subcontractor with little or no Government involvement therein, unless of course the development was done under a C.I.D., then the government is the approval authority.

During this time each such subcontractor and the prime are creating technical supporting and compliance and verification documents that may be required by the original Government contract or by the myriad of subcontracts. The documents that are required are listed on an attachment to the contract known as a Contract Data Requirement Listing, or in the case of a subcontract The Subcontractor Data Requirement List S.D.R.L.

So far we have shown great latitude of design to the manufacturer and little governmental interference. The subcontractors have received their approval (of P.I.D.S.) from the prime contractor. As the development phase moves into system and aircraft mockup [phase II.] the final product is beginning to emerge in hardware form. The Prime Contractor is having to show the government that it's design is jelling into a workable system. The prime contractor is in the spotlight to demonstrate that it's design will meet the Government's contract requirements.

Throughout the entire development phase the Government may and usually does conduct Design Reviews, Critical Design Reviews, and Safety Reviews of the prime contractor. The Government may conduct unannounced inspections of the prime or subcontractor at any time. When problems arise in design areas special Government attention may be triggered in the form of independent review team creation.
During Phase two the contractor is demonstrating system integration to the government.

In phase three III., as the Final Aircraft Design evolves during flight testing, almost all the specification writing is complete except for the final specification for the purchase of the aircraft. During Production test (where first the company and later military test pilots fly the final product) many problems are found and corrected. The aircraft is tested to see conformance to performance requirements and specifications.
If these tests are satisfactory and the Government wants to mass produce the machine it will begin to move toward the PRODUCTION PHASE IV..

At this point almost all the data has been collected sufficient to write a

complete and comprehensive " reasonably precise" specification for the final configuration of the finished aircraft. One step remains in which the Government is very deeply involved, that is the creation of the "Configuration Audit ". The government may have been presented several design options and a multitude of installed equipment options to be installed on the air vehicle. This is like going to the automobile dealer and special ordering your car with a number of special options. The Configuration Audit essentially baseline the aircraft and all aircraft produced under the production phase contract must be delivered identical to the one specified. The manufacturer can't change the design of the aircraft if such change effects form, fit or function without future Government approval. After such an audit is complete the Contractor writes a FINAL SPECIFICATION for the specific aircraft and forwards it to the government. It references other specifications and milspec and milstd. that have been complied with. Everything Must be approved in writing by the Contracting Officer **(CO)**

What makes up the Final Phase Four Procurement Contract of such an aircraft ? Usually it is the Contract itself, the Final Specification, The Configuration audit, a set of Control Drawings, A Contract Data Requirement List and included somewhere a listing of Deviations , Waivers and Exceptions to design specifications. (Such a listing notifies the government that during the development phases some of the original goals or specifications could not be met.)

After production has begun each aircraft is inspected and test flown as it comes off the line. After such an Acceptance Test a form DD2050 is signed by the government plant representative to take possession of the aircraft. The acceptance also triggers funding to the manufacturer for delivery of the aircraft. This document is signed by a Government underling who has the power to take possession of an aircraft that has not met the configuration audit. The military signer of the DD 2050 does not have local authority or discretionary function sufficient to waive design specifications. This is reserved for a technical representative of the contracting office .

Subsequent to delivery of the aircraft the only way changes can be made by the manufacturer are through ENGINEERING CHANGE PROPOSALS that must be approved and funded by the government.
or

Through Notice of Deficiency (NOD**)** which means that the Government has found that the manufacturer did not meet the original design specifications and so the manufacturer must fix the design at no cost to the government.

Perhaps one of the most important document utilized to determine whether or not there has been a true governmental review and approval process is to scrutinize the Contract Data Requirements Lists (C.D.R.L.) This listing is usually made part of each Phase of government contracts specifies what document submissions, reports and

control drawings are to be submitted to the Government. The submission of such reports does not definitely mean that the government conducted the a substantive review of those documents. It is proof, however, that certain documents were supposed to be turned over to the Government as part of the contract. These documents are certainly some evidence of governmental review.

When is a Specification a Reasonably Precise specification ?

During design and development of a new product it is incumbent upon the designer to meet certain design specifications, requirements and criteria. When the designer is done and the final product is complete a set of documents will have been created that in total make up the final specifications for the product. The final design specifications have metamorphisized from the underlying contract requirements. Let's take a look at how this comes about.

The original R and D development phase contract between the Government and the contractor will include normal contractual language and requirements to be performed. To delineate what is to be done the contract will usually include detailed and complete recitation of the work to be completed. It will include a section stating which Design Handbook criteria, military standards and military specifications are to be followed and met. It may include specialized preliminary design specifications for the to be developed system. It will include a Contract Data and Demonstration List of engineering data to be produced as well as a listing of engineering testing to be demonstrated. It will state what requirements **SHALL** be met for the contract to be met in terms of items to be reviewed and approved by the Government. At the point in time of the signing of the development contract all such specifications and requirements define the contract.

As the development proceeds the manufacturer is given design latitude within the contract as specifically how to accomplish these goals and requirements. If the manufacturer can not attain the requirements or specifications (those that **shall** be met) it is incumbent on the manufacturer to notify the Government of the impossibility in a timely fashion. When such requirements can't be met the manufacturer applies for a deviation or a waiver of the impossible element. The difference between a deviation or a waiver is that a deviation represents a temporary situation whereas a waiver is a permanent release from meeting a specification or contract requirement.

As the contract progresses to hardware stage it is usual for the contractor to be required to write an extremely complete finished product specification (end product specification) for the newly developed item and to supply the government with complete set of microfiche control drawings (blueprints) sufficient to build the end product. Often the contract will include a licensing agreement. Further the contract will state what engineering reports, analysis, and testing verification reports an

demonstrations must be supplied the Government to fulfill the Work Statement and Contract Data Requirements portions of the contract. This procedure may or not require actual governmental approval of these items.

Such a developmental protocol will almost undeniably result in the Government's receipt of many reasonably precise engineering documents. Such a protocol will result in transmittal of documents from the manufacturer to the Government. From the aspect of a contractor legal defense such a protocol does constitute transmittal to the government for the approval of reasonably precise design specifications. This aspect can only be determined by the amount of governmental review conducted for the purpose of design approval by the Government's Contracting Officer (CO) .

In many instances the design is left to the manufacturer and actual approval of the system is also left to the manufacturer. This is especially true for subcomponent parts of a system that were obtained through prime item specification controlled by the manufacturer and not the Government.

From a legal aspect having to do with the contractor defense the question of whether or not a manufacturer deserves immunity is determined by how much interface there was between the manufacturer and the Government concerning the issue of actual governmental approval of the manufacturers specific designs. The actual approval should come from a designated Government Contracting Officer.

CONCLUSION

At this point the plaintiff's attorney is armed with enough data to proceed against a military manufacturer. In a products case a plaintiff can still prevail if he can show that:

1. The design defect complained about was not actually covered by reasonably precise design specifications approved by the Government.

2. The design defect complained about was actually violative of the reasonably precise design specifications.

3. The approval of the design defect by the Government was only a rubber stamp of reasonably precise design specifications.

4. The approval of the design specifications came about as a result of fraud, deception or misrepresentation. (cheating on verification and qualification testing) Here plaintiff might attempt R.I.C.O., Whistleblower, 402b actions as well as standard product causes. (There is no Contract defense to RICO or WHISTLEBLOWER)

5. The product failed to comply with reasonably precise specifications. (the classic manufacturing defect)

6. The manufacturer concealed a defect from the Government that the Government didn't otherwise know about.

7. In full scale development programs many subcomponents have had little or no scrutiny by the Government. Many times the approval of the subcomponent was made entirely by the manufacturer and not the Government. Therefore there may be no approval of specific design features by the Government.

8. In off the shelf purchases the manufacturer draws up a set of specifications describing a already designed product. In many instances the Government conducts no reviews or minimal reviews insufficient to warrant immunity since the reviews were mere rubber stamps.

A military Contract case is a difficult and costly case to prepare, but all military cases should not be turned down simply because they are difficult. The fact that the law is open to many interpretations, and the fact that many facets of a military products design phase undergo various amount of Government scrutiny makes a military case equally difficult for the defense bar to evaluate. [Remember it is an affirmative defense and the burden of proof rests with the manufacturer claiming it] The defense bar will always attempt to persuade the plaintiff and the court that they are deserving of a contractor defense, while the fact situation may not support such an assertion.

For a plaintiff to have a chance to prevail in this litigation arena, the only way to move forward is to discover early precisely what documents and evidence exists to support the defendant in his assertion of his affirmative military contract defense. Every effort of the plaintiff should be concentrated in discovering what the defendant relies upon to prove up facts that would show that the government used its discretionary function while approving reasonably precise design specifications. In fact the plaintiffs first set of discovery documents should smoke out all aspects of a potential contractor defense. Once the plaintiff is apprised of the evidence in support of a contract defense she can evaluate the probabilities of prevailing in view of the various holdings.