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Navigating Choppy Waters for the Government Contractor's Defense in Trump Age

By Carl J. Schaerf and Lee C. Schmeer, published in *The Legal Intelligencer* on Jan. 29, 2018*

Companies contracting with the federal government should be aware that significant changes are likely under the Trump administration in the manner in which the government solicits and funds contracts and the extent to which the government recognizes knowledge of risks related to the goods or services subject to such contracts. When faced with litigation involving government contracts, companies often employ the Government Contractor's Defense, which shields a contractor that has complied with reasonably precise government specifications from liability provided the contractor has warned the government of risks not otherwise known to the government. Thus, determining what the government "knew" with respect to the subject of the contract is of utmost importance to litigants in a case involving the Government Contractor's Defense.

Federal government contracting is a significant component of the business of many manufacturers. A change in presidential administration can often cause administrative agency focus to shift, impacting contractors. The scope of the shift under this particular administration is significant, and will continue to be so. Businesses and attorneys need strategies to deal with the changes in how the government puts contracts out for bid, take appropriate steps to protect their legal and commercial interests, and plan for making effective arguments in litigation or on appeal regarding the important legal protections provided by the Government Contractor's Defense.

The Trump administration has made it clear that it prioritizes changing the current regulatory structure, and doing so quickly. Examples such as "environmental safety" and "safety regulations" have been placed squarely in the crosshairs. The purpose behind this article is not to praise or condemn the change, but to address what the shifting regulatory framework means for the business and legal communities in one critical area. The applicability of the Government Contractor's Defense is premised primarily on a differential in knowledge between the manufacturer and the government. Uncertainty is created when government purports to "know" different things today than it did under previous administrations.

Such uncertainty may have a significant impact on businesses, as the federal government is a prolific purchaser of goods, to the tune of hundreds of billions of dollars per year. In addition,

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responding to Federal Requests for Proposals is a complicated and lengthy process and in an age of ever-shrinking agency budgets, some profit margins are thinning. Given the amount of money at stake, American manufacturing will continue to pursue contracting opportunities at the federal level despite the expectation that federal agency belts will generally tighten.

The federal government makes very specific choices when it purchases equipment. Imagine, as an example, an electrical supply room at an airport. There is an unimaginable number of ways in which equipment in such a room can be specified, and a wide range of costs for such equipment depending on what is specified. A more cash-strapped government agency may choose to contract for that equipment differently due to budgetary concerns. Such choices are immunized when made by government, but what good would that be for the furnishing contractor if sued in injury litigation based on governmental choices? For this reason, a government contractor has no liability to injured third parties for providing equipment pursuant to government specification where: the government approved reasonably precise specifications; the equipment conformed to those specifications; and "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," as in Boyle v. United Technologies, 487 U.S. 500, 512 (1988). In essence, the Government Contractor's Defense exists to protect the government's discretionary function immunity for governmental design and purchasing decisions. It is a species of preemption, displacing state tort laws that might otherwise apply to cases involving both military and nonmilitary contractors.

The third factor in this defense is based on a differential in knowledge between the government and the supplier, since without it "the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability."

Proving government knowledge is going to present special challenges in the age of Trump. First, with shrinking budgets, agencies will be under more pressure to order the most stripped-down product options. Second, there is a new focus on minimizing what are perceived by agency officials as "extremist" positions on safety and toxicity. It may be difficult to anticipate whether, and when, Federal Agencies will now purport to know less about potential risks than in the recent past (i.e., under President Barack Obama). Third, the high level of turnover in personnel at key agencies removes and severs the institutional continuity that has been relied upon in the past to identify key witnesses for establishing what conversations occurred and what factors were discussed between supplier and government. Documentation, always critical in litigation, now becomes essential.

If you or your client finds yourself in litigation involving governmental decisions, do not be confident of your ability to depose or otherwise memorialize the decision-making processes of the key agency personnel. A formal request must be made following detailed regulatory procedures, and such a request may well be denied.

Because a manufacturer or supplier has no guarantees of being able to perpetuate the testimony of a decision-maker, documentation is essential. There are a number of strategies that may be employed, though some may meet resistance internally because they may chill the contracting process (the precise concern identified in the third Boyle factor). Among other possibilities:

- When stripped down equipment is ordered, consider a letter to the agency identifying other options, providing costs, and expressing the safety considerations underpinning the additional options;

- Prepare internal memos detailing all discussions with the government about any safety aspects of the contracting and specifying discussions;
- Consider proposing an additional warning package, as evidence that the government either accepted or rejected such warnings will go a long way in proving that the government knew the issues being flagged; or
- Preserve information (beyond historic document retention guidelines) as to past orders by the government. If the government has been ordering the same equipment, in the same way, throughout successive administrations, it strengthens the argument that the government knows what it is buying and wants what it is buying. It also potentially allows the "knowledge" of past agency administrations to serve as the measuring stick of agency "knowledge," as a government contractor typically does not have a duty to warn of dangers already known to the government. See, e.g., Lewis v. Babcock Industries, 985 F.2d 83, 89-90 (2d Cir. 1993) (contractor-manufacturer had no duty to inform the Air Force of dangers where "because of its experience with the aircraft, the Air Force had greater knowledge of the problem than [the manufacturer].")

When the paper trail is lacking, lawyers have to get more creative. The test of knowledge, both for government and agency, is actual, not constructive, knowledge. The knowledge of the specific purchaser (government specifier) is what matters, not the knowledge of the federal government at large, and knowledge of one agency should even be imputed to another where there is some tangible relationship between the agencies. However, nothing happens in a vacuum. There are norms of safety, and it will be easier to show deliberate decision-making regarding a product that complies with Federal and Industry Standards. If plaintiff's expert, for example, is theorizing a defect that is not based on standard violation, the question will be whether the manufacturer or the government had the requisite "knowledge." If the plaintiff is simply arguing that "you should have known," but there is no proof that either specifier or supplier "did know," there should be immunity.

A recent decision out of the U.S. District Court for the District of New Jersey is illustrative. In Siegman v. Schneider Electric, No. 15-7072, 2017 U.S. Dist. LEXIS 190485 (D.N.J. Nov. 17, 2017), the plaintiff, an experienced electrical installer, entered a live and fully energized transformer at the FAA facility at the Atlantic City Airport, triggering an arc that resulted in his injuries. The plaintiff's theory was that there should have been a cut-off device that either deenergized the transformer when the door was opened, or prevented the opening of the door without prior deenergization. The court focused not on whether such a device was necessary or would have enhanced safety, or whether such a device was better known to the manufacturer/supplier than to the government, but whether the risk of arc flash was equally known to government and supplier, thereby informing and immunizing the government strategy for addressing arc flash. Summary judgment was granted to the manufacturer, given appropriate evidence of the Government Contractor's Defense and the knowledge of risk, including the government's own specification of independent warnings and independent safety procedures.

In conclusion, we seem to be entering a time where government formally acknowledges fewer risks and hazards, and will be looking for ways to spend less in purchasing and contracting. Whether this will result in actual increases in harm to individuals working around or with the specified equipment remains to be seen, but certainly the plaintiffs bar can be expected to try to exploit political frustration and resistance sentiments before juries. Strategies for coping with the new landscape as outlined above are critical, and if followed, may create opportunities for

dispositive resolution of potentially large liability cases involving products furnished pursuant to government contracts.

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