# THE GOVERNMENT CONTRACTOR DEFENSE …
# Not Just For Procurement Contractors Any More

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The Government Contractor Defense is an affirmative defense that vests an independent contractor performing procurement work for the government with complete immunity from state-based tort claims in situations where the government itself is immune. If, for example, an aircraft manufacturer supplies the military with an aircraft according to specifications approved by the military, and the manufacturer performs in accordance with those specifications, the law has evolved so that the manufacturer cannot be held liable for claims arising out of a failure of the aircraft. When the manufacturer follows the criteria sanctioned by the military, the manufacturer essentially stands in the shoes of the military, and is immune from suit.

## Background of the Government Contractor Defense

The United States Supreme Court decision delineating the test which a manufacturer must satisfy to enjoy this immunity is found in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). In *Boyle*, the Supreme Court was faced with deciding whether "a contractor providing military equipment for the Federal Government can be held liable under state law for injury caused by a design defect." 487 U.S. 500, 502. The Supreme Court reasoned that "a few areas, involving 'uniquely federal interests,' ... are so committed by the Constitution and the laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed ... by the courts ...." *Id.* at 504-05. The Supreme Court held that when a "uniquely federal interest" is implicated, pre-emption of state law is appropriate when a "significant conflict" exists between the federal interest and the operation of state law. *Id.* at 507.

The *Boyle* Court determined that holding a military procurement contractor liable under state law for design defects implicated two areas involving "uniquely federal interests": (1) the United States' rights and obligations under its contracts and (2) the civil liability of federal officials for actions taken in the course of their duty. *Id.* at 504-05. The Court found a significant conflict between these federal interests and state law because the financial burden of state judgments against a contractor would be substantially passed through to the government.

In setting the parameters of the immunity available to government contractors, the *Boyle* Court focused on the "discretionary function" exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a), which exempts from the FTCA's consent to suit, "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused." *Id.* at 511.

The *Boyle* Court held that it makes little sense to subject a contractor to state tort suits for building aircraft that conform to designs fashioned or approved by a federal official when the federal official would be entitled to immunity from suits arising out of defects in those designs.

The Court formed a three pronged test, holding that government contractors supplying equipment would be immune from state law claims when: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512. The decision of the *Boyle* Court is predicated on the concern that state law, in certain circumstances, can frustrate an identifiable federal interest or policy requiring that state law be preempted.

The *Boyle* Rationale Has Logically Been Extended Beyond Procurement Contracts

Logic dictates that the same concerns of the *Boyle* Court are present whether the contract is one for *services* or one for *procurement*. Consequently, would it not follow that a company who has contracted with the government for services as opposed to procurement should be afforded the same immunity protections?

Post-*Boyle* courts have almost unanimously adopted the *Boyle* rationale in determining whether the government contractor defense applies in non-procurement contract situations. The Court of Appeals for the Fifth Circuit applied the government contractor defense to "failure to warn" cases, although it stopped just short of explicitly applying the defense to service contracts. *Kerstetter v. Pacific Scientific Co.,* 210 F.3d 431, 438-39 (5th Cir. 2000).

Several federal district courts have held that the government contractor defense applies to government service contracts. *See Askir v. Root and Brown Root Service,* 1997 WL 598587 at * 5-6 (S.D.N.Y. 1997) (stating that both *Yearsley* and *Boyle* provide authority for applying the government contractor defense to service contracts and holding the defendant's service contract was covered by the government contractor defense); *Guillory v. Ree's Contract Serv.,* 872 F. Supp. 344, 346 (S.D. Miss. 1994) (holding the government contractor defense applies to performance contracts); *Richland-Lexington Airport v. Atlas Properties, Inc.,* 854 F. Supp. 400, 420-22 (D.S.C. 1994) (holding the government contractor defense applies to service contracts and that "the dispositive issue is not one of performance versus procurement, but whether there is a uniquely federal interest in the subject matter of the contract"). The *Richland* decision relied on *Lamb v. Martin-Marietta Energy Sys., Inc.,* 835 F. Supp. 959, 966, n. 7 (W.D. Ky. 1993) and *Crawford v. National Lead Co.,* 784 F. Supp. 439, 445-46, n. 7 (S.D. Oh. 1989) (holding the government contractor defense is applicable to performance contracts).

Recent Victories for the Provider of Maintenance Services to the Government

Two recent opinions from the United States District Court for the Northern District of Alabama have extended the Government Contractor Defense to apply to DynCorp, a military maintenance service provider. These two cases, *Hudgens v. DynCorp* (hereinafter "*Hudgens"*) and *Crawford v. DynCorp.* (hereinafter "*Crawford"*) arose out of a crash, in Shelby County,

Alabama, of a United States Army UH-1H helicopter that was on a Medivac mission.[1] The vertical tail fin (the portion of the tail boom to which the tail rotor blade assembly is attached) separated from the helicopter, resulting in the crash, and seriously injuring both the pilot and co-pilot. The subsequent investigation revealed that the separation of the vertical tail fin was caused by the failure of the forward vertical tail fin spar.

DynCorp had a contract with the Army to inspect and maintain the helicopter fleet pursuant to the standards promulgated by the Army. Pursuant to this contract, DynCorp was not permitted to deviate or perform any inspection or maintenance on any Army aircraft that was not set forth in the Army technical manuals. The argument went that should not DynCorp, who had a service contract with the military (which itself was immune from civil suit by the plaintiffs), be afforded the same immunity protections as a manufacturer who contracts with the military for the procurement of a product?

Plaintiffs in both *Hudgens* and *Crawford* asserted that DynCorp was responsible for the inspection, maintenance, and repair of the subject helicopter. Plaintiffs further contended that DynCorp was aware of an Airworthiness Directive ("AD") issued by the Federal Aviation Administration ("FAA") in September 1997 and of a Military Alert Bulletin ("MAB") issued by Bell in April 1998, both of which advised of potential cracking problems with the vertical tail spar of UH-1 aircraft. The AD and MAB recommended changing the criteria the Army had established for inspection of the vertical tail spar. Plaintiffs asserted that DynCorp failed to implement the AD and MAB, and failed to detect and correct cracks, which resulted in the subject crash.

Based on these allegations, Plaintiffs alleged, in part, that: DynCorp was negligent in failing to properly maintain or repair the aircraft; DynCorp was guilty of wantonness in willfully and purposely failing to correct a dangerous condition on the aircraft; DynCorp knew of the dangers associated with the aircraft and was negligent in its failure to warn Plaintiffs of the dangers associated with the operation of the helicopter.

DynCorp subsequently moved for summary judgment based on the Government Contractor Defense. Plaintiffs argued that DynCorp was not entitled to summary judgment because the Government Contractor Defense did not apply to performance or service contracts, and even if it did, DynCorp did not meet the three-pronged *Boyle* requirements necessary to qualify for immunity under the defense.

A. Background of the *Hudgens* and *Crawford* Cases

The subject helicopter, a UH-1H/V aircraft, popularly known as the "Huey," was manufactured by Bell Helicopter/Textron ("Bell") and delivered to the Army on October 5, 1972. The UH-1s were designed and manufactured by Bell in conjunction with the Army. The Army sets maintenance and inspection standards for all Army-maintained aircraft. For the UH-1, these standards were promulgated by the Army and Bell.

[1] DynCorp was represented in these cases by Mendes & Mount, LLP and Hill, Hill, Carter, Franco and Black, P.C.

The Army maintains and inspects aircraft at three levels: the unit level, the intermediate level, and the depot level. Pursuant to the parties' contract, DynCorp was to inspect and maintain Army aircraft at the unit and intermediate levels at Fort Rucker, Alabama. The work was to be performed pursuant to the Army technical manuals. DynCorp did not have the authority to, nor was it contractually permitted to, perform any maintenance or inspections on the aircraft which were not specifically called for in the technical manuals.

Under the contract, only visual inspections of the vertical fin spar were permitted at the unit and intermediate levels, while the Army retained the more detailed and in-depth depot level maintenance responsibilities. In connection with the UH-1 fleet, the Army had a number of operational units, including, but not limited to, a unit charged with promulgating and approving technical manuals for the inspection and maintenance, as well as a unit responsible for ensuring that DynCorp properly performed its services under the contract. All Army units were located in the same facilities as DynCorp, and on a daily basis, these Army personnel reviewed DynCorp's maintenance and inspection procedures to verify that they met Army standards. In discovery, no evidence was ever produced that, prior to the subject crash, either the Army or any civilian maintainer of Hueys had ever discovered a crack in a vertical fin spar of these aircraft. It was further established that prior to the subject crash, the Army reviewed and had access to information relating to fatigue cracks in vertical fin spars, and to recommendations to enhance inspections at the unit and intermediate levels to aid in the detection of such cracks. Based on the Army's experience with its UH-1 fleet and the evaluation of its engineers, the Army decided not to modify inspection procedures at the unit and intermediate levels.

The district courts in both cases held that the selection of maintenance criteria for military aircraft was as much a uniquely federal interest as is the selection of specifications for military aircraft and that this interest significantly conflicts with state law, as the cost of state judgments would be substantially passed on to the Army, thus thwarting the very purpose of governmental immunity. Both courts held that DynCorp met the *Boyle* criteria in that 1) the Army maintenance and inspection criteria with which DynCorp was tasked in its contract with the Army was reasonably precise; 2) DynCorp's activities conformed to those specifications, and 3) DynCorp did not fail to warn the Army of dangers of which it was aware, but of which the government was not aware.

B. The Court's Rationale in Providing *Boyle* Protection to DynCorp.

The district court in the *Hudgens* case held that the Government Contractor Defense applies to DynCorp's contract as it implicates a "uniquely federal interest" and a "significant conflict" exists between an identifiable federal policy or interest and the operation of state law stating:

The *Boyle* Court determined that a 'significant conflict' existed because the selection of the appropriate design for military equipment is a discretionary function, involving 'not merely engineering analysis, but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater

combat effectiveness.' 487 U.S. at 511. The selection of appropriate inspection and maintenance procedures for military helicopters is similarly a discretionary function, requiring recourse to engineering analysis, and the balancing of technical, military and social considerations. Like the selection of military equipment, the selection of maintenance procedures for that equipment implicates the trade-off between safety and combat effectiveness.

The *Boyle* court also indicated that a 'significant conflict' existed where the 'financial burdens of judgment against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors would predictably raise their prices to cover, or to ensure against, contingent liability for the Government ordered designs.' 487 U.S. at 511. The concern with the government bearing the financial burden for judgments against contractors is as serious in suits against service contractors as it is against procurement contractors.

Because there is a uniquely federal interest in the maintenance of military equipment, and the duties imposed upon DynCorp by state tort law poses a significant conflict with those imposed by DynCorp's contract with the Army, the government contractor defense is available. If DynCorp can show its compliance with the three-pronged test articulated in *Boyle*, then it is entitled to the government contractor defense against all plaintiffs' claims. The undisputed evidence before the court establishes the existence of the three pre-conditions for invocation of the government contractor defense in this case.

(*Hudgens* Opinion pp. 28-29.) (Emphasis added).

The district court in *Crawford v. DynCorp.*, the companion case, reached a similar conclusion, holding:

Particularly here, where the service provided by DynCorp was the inspection and maintenance of military equipment, *Boyle's* rationale is apt. *Boyle* rested on the 'discretionary function' exception to the Federal Tort Claims Act, and raised concerns that state tort law could, in certain circumstances, frustrate an identifiable federal interest or policy, such that state law should be displaced. Those same concerns are present regardless of whether the contract is one for services or for procurement. *See Boyle*, 487 U.S. at 506 ('the federal interest justifying [the Court's holding in *Yearsley*] surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction.').

Indeed, the performance of the service contract is more analogous to the liability of federal officials for performing their duties than a contractor's design and manufacture of equipment for the government.

This court thus must begin by determining whether a 'uniquely federal interest' is implicated. The establishment of standards for maintenance and inspection of military equipment unquestionably is an area of 'uniquely federal interest.' Next, this court must determine whether a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law.'" *Boyle*, 487 U.S. at 507. It seems clear that the Army's

determination of standards for maintenance and inspection of its aircraft present the potential for 'significant conflict' with the operation of state law.

(*Crawford* Opinion at pp. 20-21.) (Emphasis added).

C. Application of the *Boyle* Test to DynCorp in *Hudgens* and *Crawford*

The following discussion details the application of each of the three *Boyle* prongs to DynCorp by the district court.

i. The Army Approved Reasonably Precise Specifications for Maintenance.

With the Government Contractor Defense, the first prong that must be established is that the United States approved reasonably precise specifications. The maintenance of UH-1s performed by DynCorp pursuant to its contract with the Army requires DynCorp to inspect and maintain the aircraft in accordance with the Army technical manuals, as promulgated and modified by the Army. DynCorp clearly demonstrated that they did not have the authority to and were not permitted to perform any maintenance or inspections on the UH-1s not specifically called for in the technical manuals.

Federal courts have treated the government's involvement in compiling maintenance manuals as analogous to the government's involvement in design and manufacturing requirements, as was recognized in *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598, 604 (D. Conn. 1988) (holding that the government's decision on the contents of a maintenance manual involves the same balancing of technical, military and even social considerations protected in *Boyle*.); *see also Motley v. Bell Helicopter Textron, Inc.*, 892 F. Supp. 249 (M.D. Ala. 1995) (government contractor defense applicable because content of maintenance manual was dictated by the Army).

In the *Hudgens* and *Crawford* cases, the Army retained complete control over the contents of the technical manuals. The Army dictated the detailed inspection and maintenance criteria for the subject aircraft, including the procedures to be followed by DynCorp in inspecting the vertical fin spar. Therefore, DynCorp was able to successfully demonstrate that they satisfied the first *Boyle* criteria.

ii. DynCorp Fulfilled its Contractual Obligations.

The second prong under *Boyle* is that the equipment procured conformed to the specifications. In these cases, DynCorp demonstrated that it fulfilled its contractual obligations under the service contract. In both cases, Plaintiffs alleged that DynCorp failed to perform its obligations pursuant to Army specifications; however, both district courts held that plaintiffs' assertions were without merit.

In Plaintiffs' summary judgment motions, numerous assertions were made in an unsuccessful attempt to defeat the second prong of *Boyle*. The following describes a few of the means by which DynCorp was able to defeat plaintiffs' arguments:

a. DynCorp Was Not Aware of Problems With Cracks in the Vertical Fin Spars.

In Plaintiffs' motions, they inferred that DynCorp failed to point out problems with cracks in the vertical tail fin of UH-1s; however, no evidence existed that any cracks in this fleet were visible prior to the subject crash. Indeed, not one crack was discovered in a vertical fin spar in a military UH-1 at the unit or intermediate maintenance levels prior to the Army changing its inspection criteria after the subject crash. It was undisputed that DynCorp's inspections complied with the inspection procedures set forth in the Army's technical manuals.

b. DynCorp's Mechanics Were Trained to Look for Cracks in the Vertical Fin Spar.

Plaintiffs also asserted that DynCorp's mechanics were not trained to look for cracks in the vertical fin spar. To the contrary, DynCorp mechanics were trained to look for and report visual cracks anywhere in the aircraft. The inspections of the vertical tail fin tasked to DynCorp included the daily maintenance inspections, the 150-hour phase inspections, and corrosion inspections. Each inspection required a visual inspection of the entire tail boom for cracks and other deficiencies. DynCorp's undisputed records established that all appropriate inspections were made.

c. Fatigue Cracks in the Fin Spar Were Not Visible Prior to the Crash and Their Presence Does Not Indicate a Breach of Contract.

Plaintiffs even went as far as to assert that the cracks were "detectable" prior to the crash if the proper maintenance procedures had been followed. However, Plaintiffs fail to identify by which methods or at which level of maintenance the subject cracks were "detectable." The method by which other cracks in the Fort Rucker fleet were detected – *i.e.*, examination by x-rays, was not permitted by the Army until after the subject crash. DynCorp performed all inspection procedures with which it was tasked – *i.e.*, visually inspecting for external cracks.

There was no evidence that DynCorp or the Army ever discovered a crack in a UH-1 vertical tail spar at the unit or intermediate levels prior to the time the Army instituted x-ray inspections post-crash. Plaintiffs assert the post-crash discovery of fatigue cracks in four other UH-1s at Fort Rucker is evidence of inferior maintenance by DynCorp. However, it was undisputed that those cracks were only found by x-ray, and were not visible to the eye. Therefore, DynCorp was able to successfully satisfy the second prong of *Boyle*.

iii. DynCorp Was Not Aware of Any Dangers That Were Unknown to the Army.

The last prong of *Boyle* is that the supplier warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States. Plaintiffs contended that DynCorp failed to properly warn the Army of the possibility of the vertical fin spar cracking and separating. However, a government contractor's duty to warn under the third element of the *Boyle* test extends only to dangerous conditions of which it has actual knowledge and of which the government is unaware. *See Quiles v. Sikorsky Aircraft*, 84 F. Supp. 2d 154, 170 (D. Mass. 1999). The third element of the *Boyle* test is met even when the government became aware of the alleged danger through sources independent of the government contractor. *See In Re Aircraft Crash Litigation Frederick, Maryland*, 752 F. Supp. 1326, 1339 (S.D. Ohio 1990) ("[I]f the Air Force knew of the defect independently of anything the Defendants did or did not do, this element is established.").

All of the evidence produced demonstrated that the Army was fully aware that fatigue cracks could develop in the vertical fin spar of UH-1 aircraft, which could cause a separation of the vertical tail fin. The Army was also aware such a failure could result in a serious accident. There was no evidence that DynCorp had knowledge about the vertical fin spar of which the Army was not aware. In fact, because of its experience with the aircraft and its communications with Bell, the Army had greater knowledge than DynCorp.

After considering Plaintiffs' arguments, the district court in the *Hudgens v. DynCorp* case held:

It is undisputed that DynCorp's inspections complied with the inspection procedures set forth in the Army's technical manuals. Indeed, it is undisputed that no crack in the vertical fin spar was ever discovered at the unit or intermediate maintenance levels prior to the Army changing its inspection criteria following the subject crash. [citation omitted]. Therefore, because plaintiffs proffer no evidence from which a reasonable jury could infer that DynCorp knew about any dangers involving the use of the accident helicopter or any other Army aircraft, plaintiffs' claims that DynCorp should have warned the Army of these dangers is without merit.

(*Hudgens* Opinion p. 39.)

In the *Crawford v. DynCorp* case, the court reached a similar conclusion stating:

There is no evidence that DynCorp withheld knowledge from the Army about problems with the vertical fin spar, or that the Army otherwise was not aware of such problems. Moreover, DynCorp had no separate duty to warn UH-1H helicopter pilots, such as Plaintiff Frances Mark Crawford. ... Accordingly, the court concludes plaintiff's failure-to-warn claim must fail.

(*Crawford* Opinion p. 29.)

Current Status

Both district courts thus found that DynCorp demonstrated compliance with each of the three requirements of the *Boyle* test, and granted DynCorp's Motions for Summary Judgment. The *Hudgens* and *Crawford* cases are both currently being appealed to the United States Court of Appeals for the Eleventh Circuit. If the Court of Appeals affirms the holdings of the Distrcit Courts, it will be the first of such affirmations in that Circuit, and it can be expected to give a big boost to service providers throughout the United Stated seeking government contractor immunity under the *Boyle* doctrine.