Construction contractors: The government contractor defense is alive and well in the Fifth Circuit

By Alex Sarria, Esq., Raymond Biagini, Esq., Daniel Russell Jr., Esq., and Kassie Maldonado, Esq.
Covington & Burling

Construction contractors take note: the government contractor defense is alive and well in the Fifth Circuit. In *Sewell v. Sewerage and Water Board of New Orleans*, the Fifth Circuit recently confirmed that construction companies can successfully assert the government contractor defense in response to tort lawsuits that arise from their performance of federal public works and infrastructure projects.

This is a welcomed decision in the Fifth Circuit, which had signaled in recent years that a higher level of proof may be required to establish the first element of the defense — *i.e.*, that the government meaningfully reviewed and approved reasonably precise specifications for the allegedly defective construction feature.

The *Sewell* case illustrates that — with the right litigation strategy and a skillfully crafted evidentiary record — construction contractors may well prove the defense in cases involving even "rudimentary or general construction features."

THE MODERN GOVERNMENT CONTRACTOR DEFENSE

The Supreme Court established the modern government contractor defense in *Boyle v. United Techns. Corp.*, which provides that government contractors are immune from suit under state tort law if they can establish: (1) the United States meaningfully reviewed and approved reasonably precise specifications for an allegedly defect design feature; (2) the contractor's work conformed to the Government-approved specifications; and (3) the contractor warned the United States about dangers that were actually known to the contractor but not the Government. *See* 487 U.S. 500 (1988).

THE FIFTH CIRCUIT'S *IN RE KATRINA* DECISION

In 2010, the Fifth Circuit issued a decision that some viewed as constraining the viability of the defense in tort cases involving construction and other public works projects — *In re: Katrina Canal Breaches Litigation*.

In that case, a site remediation contractor was sued for its role in "backfilling" excavated areas that allegedly caused levees and floodwalls in New Orleans to fail during Hurricane Katrina. *See* 620 F.3d 455, 457-59 (5th Cir. 2010). According to the suit, the contractor had selected the wrong backfill material and used an improper "compaction" method to refill the excavated site. *See Id.* at 459.

The defendant successfully asserted the government contractor defense at the district court by relying on evidence that the government had approved the project statement of work and other detailed work plans. *Id.* at 458-59.

But the Fifth Circuit reversed, finding that the evidence was insufficient to establish that the United States "*made*" the contractor use a particular composition of backfill material or "*require[d]*" the contractor to employ a specific compaction method. *Id.* at 461-62, 463 n.9 (emphasis added).

Unfortunately, this ruling emboldened some to argue that the Fifth Circuit requires a higher level of proof to establish the first *Boyle* prong in construction cases — both as to the specificity of the allegedly defective design features and the robustness of the government's review.

DISTRICT COURT DECISION IN *SEWELL*

The *Sewell* case, however, confirms that the first element of the government contractor defense can be established even in cases where the government has substantively reviewed and approved the specifications of general construction features and processes.

In *Sewell*, three construction companies were sued as third-party defendants in a state court action brought by several local businesses and homeowners who allegedly sustained property damage as a result of a federally-funded flood control project in New Orleans. *See* D. Ct. Op., Civ. A. No. 15-3117 et al. (E.D. La. Dec. 21, 2016).

(From L-R) **Alex Sarria** is special counsel in **Covington & Burling**'s Washington office. An experienced government contracts counselor and litigator, he advises clients on a range of risk-mitigation techniques under federal law and defends contractors in high-stakes tort cases arising from military operations, national security programs and environmental remediation projects. He can be reached at asarria@cov.com. **Ray Biagini** is a partner in the firm's Washington office. A distinguished counselor and litigator, he has risen to national prominence in a number of high-profile tort cases defending government contractors. He is widely recognized for his expertise in the government contractor defense with several published decisions in the federal district and appellate courts. He can be reached at rbiagini@cov.com. **Daniel Russell Jr.**, of counsel in the firm's Washington office, represents government contractors in complex, high-stakes litigation. He has over a decade of experience litigating cases that implicate significant national defense interests, including tort suits involving border-security technologies and suits arising from wartime incidents. He can be reached at drussell@cov.com. **Kassie Maldonado** is an associate in the firm's litigation group in Washington, where she specializes in complex civil litigation. She also maintains an active regulatory practice, advising on a broad array of matters including government contractor intellectual property rights, participation in federal health care programs and federal agency investigations. She can be reached at kmaldonato@cov.com.
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Among other things, the claimants alleged that the contractors had negligently performed an array of construction activities, including pile driving, erecting temporary and permanent retaining structures, dewatering, jet grouting, concrete breakage and debris removal, excavating and earth moving, emissions of noise, dust, and vibrations, generally, and traffic management. *See Id.* at 6.

Upon being sued, the contractors removed the case to federal court pursuant to the "federal officer removal statute," 28 U.S.C. § 1442(a)(1), which grants federal jurisdiction over lawsuits filed against an entity that was "acting under" the direction of a federal officer and can assert a "colorable federal defense" to the claim (e.g., the government contractor defense). *Id.* at 2.

The contractors then filed a motion for summary judgment with the federal district court based on the government contractor defense. *Id.*

Recognizing the strength of this defense, but not entirely convinced that summary judgment was appropriate at such an early stage of the case, the district court ordered the parties to engage in discovery that was limited to the issues raised in the defendants' motion. *Id.* In total, the claimants were afforded fourteen months to conduct discovery relating to the contractors' motion.

Ultimately, the court ruled that the contractors had provided enough evidence to establish all three prongs of the government contractor defense.

With regard to the first prong, the court found that the government had "considered each offending [design] feature and had in place specifications that effectively removed all critical design choices from the Contractors' discretion." *Id.* at 6.

For example, there was evidence that the government had "requested and independently approved" the "predetermined location and manner" for pile driving, as well as the "detailed designs" for "temporary retaining structures and dewatering systems." *Id.*

Perhaps most notably, however, the court also found the first prong was satisfied by evidence that the government meaningfully reviewed and approved "*[l]ess detailed, yet still reasonably precise specifications ... either directly or indirectly ... [of] more rudimentary or general construction features*." *Id.* at 6 (emphasis added).

"These specifications included, inter alia, actionable monitoring protocols for vibrations and sound, generally; mandatory use of sound muffling devices on construction equipment, implementation of dust prevention techniques, and application of traffic mitigation measures." *Id.* at 6-7.

According to the court, the government's review and approval process "typically" consisted of a "years-long design period," followed by "multiple stages of government of government vetting," which produced "detailed instructions" that had been "substantively blessed" by the government." *Id.* at 7.

In doing so, the court rejected the claimants' argument "that the specifications lacked detail regarding the composition of materials on certain construction features," *Id.*, thereby validated the trial court's ruling that *Boyle*'s first prong may well be satisfied even in cases involving "more rudimentary or general construction features," D. Ct. Op., at 6.

Finally, the Fifth Circuit found "the government's level of participation" in the design process, which included approving "hundreds of pages of plans and specifications" over several years, was sufficient to satisfy the first element of the defense. *See* Ct. App. Op., at 8. On that basis, the court of appeals affirmed summary judgment in the contractors' favor.

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After finding that the contractors had also satisfied the second and third elements of the *Boyle* test, the court granted summary judgment to the defendants. *Id.* at 7-10.

THE FIFTH CIRCUIT'S DECISION IN *SEWELL*

On appeal at the Fifth Circuit, the claimants argued primarily that the specifications governing the contractors' work were not sufficiently precise to warrant summary judgment. *See* Ct. App. Op., No. 17-30089 (5th Cir. Aug. 28, 2017).

The court addressed this argument by explaining first that "[t]he crux of the first prong is ... the contractor cannot have been delegated *all* discretionary design decisions and reap the benefit of the immunity defense." *Id.* at 7-8. (emphasis added).

In other words, the government must exercise its "discretion over *significant* details and all *critical* design choices," and it must engage in a "substantive review or evaluation" of those features. *Id.* (emphasis added).

Then, relying on the record developed below, the court agreed that the "critical design choices" implicated by the plaintiffs' claims had been closely considered and approved by the government. *Id.*

LESSONS LEARNED FROM THE *SEWELL* CASE

The *Sewell* decision offers a few helpful reminders for government contractors that may be sued in tort for their work on federal construction or infrastructure projects:

First, the government contractor defense is alive and well in the Fifth Circuit and, with the right approach, construction companies can successfully assert the defense in response to a tort lawsuit. In particular, the *Sewell* decision is an important example of how the defense may be viable even in cases involving less than detailed, yet still reasonably precise, specifications for seemingly basic construction processes (e.g., site-safety procedures, material composition, environmental/site monitoring activities).

The decision also reaffirms that contractors need not prove the government itself dictated every detail of the specifications for the allegedly defective design feature. Rather, as the Supreme Court held in *Boyle*, "[t]he design ultimately selected [by the Government] may well reflect a significant policy judgment by Government officials *whether or not the contractor rather than those officials developed the design*." 487 U.S. at 513 (emphasis added).

Though several positives emerge from the *Sewell* case, construction contractors should remain mindful of decisions in the Fifth Circuit, such as *In re Katrina*, which could be interpreted as imposing a higher standard of proof on these issues.

Second, when asserting the government contractor defense in any case, the quality and quantity of your contemporaneous evidence is extremely important. In *Sewell*, both the district court and Fifth Circuit emphasized that the government had considered "hundreds of pages of plans and specifications" for various design features, some of which were more detailed than others.

Realistically, not every aspect of a construction project will require highly detailed specifications, and the government is not always willing to engage in a lengthy, substantive review of each and every feature.

But because the costs of tort liability are often revisited on the Government in the form of higher contract prices and requests for litigation support, contractors and the Government have a mutual interest in generating at least some "review and approval" evidence for each phase and critical design element of a construction project — e.g., through preliminary design reviews, critical design reviews, site inspections, and modification/change control procedures. As the *Sewell* case demonstrates, such evidence can be invaluable when asserting the government contractor defense in litigation.

> The *Sewell* case confirms that the first element of the government contractor defense can be established even in cases where the government has substantively reviewed and approved the specifications of general construction features and processes.

Third, immediately removing a case to federal court and then filing an early, well-supported government contractor defense motion can be a powerful way to take control of a tort lawsuit. Regardless of the subject matter, this approach can help convince a court to limit discovery to your government contractor defense motion, rather than allow costly merits discovery. *See, e.g., Martinez v. Science Applications Int'l Corp.*, 2015 WL 11109381, at *1 (S.D. Tex. Jun. 29, 2015).

Such a motion also can be critical in shaping the court's view of a case and may support other arguments down the road on important issues, such as general and specific causation. *See Id.* at 8-9. WJ