The Christian Doctrine

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INTRODUCTION

- In both commercial and Government contracting, written contracts usually reflect the entire scope of the contracting parties' agreement.
- In Government contracts, however, the written agreement does not always reflect all of the rights, obligations, and responsibilities of the contracting parties.
- Since 1963, both the courts and Boards of Contract Appeals have used the Christian Doctrine to incorporate, "as a matter of law," mandatory procurement clauses into Government contracts.
- The Christian Doctrine has been used to insert clauses unintentionally left out of the contract as well as mandatory clauses that the parties, in good faith, believed they had negotiated out of the contract.
- Insertion of a previously omitted mandatory clause can fundamentally alter the bargain struck between the parties and potentially force a contractor to incur additional costs or obligations not anticipated at the time of contract execution.
- The Christian Doctrine is one of the most unique and important principles in Government contracting.

BACKGROUND

- The Christian Doctrine derives its name from the Court of Claims' decision in *G.L. Christian and Associates vs. United States*, 312 F.2d 418 (Ct. Cl. 1963).
- In that case, a construction contractor sought to recover damages, including lost profits, for the Government's alleged breach of contract that resulted from the Government's unilateral termination of a contract that contained no express termination for convenience clause.
- In its simplest terms, the Christian Doctrine provides that if a statute or a regulation with the "force and effect of law" mandates the inclusion of a clause in a Government contract, the courts and boards will interpret the contract as if it contains the omitted clause.
- The court's or board's willingness to reform an integrated written agreement based on the Christian Doctrine converts a Government contract from an agreement that represents an arms-length bargain between the contracting parties to a bargain that is made, at least in part, by the regulations of the administrative agency.
- Invoking the Christian Doctrine does not require a detailed factual analysis; the analysis turns on whether the omission of a mandatory clause, or the inclusion of a clause that is inconsistent with law or regulation, will frustrate or circumvent a fundamental – and often **deeply ingrained** – procurement policy.

DISCUSSION

- The court based its decision on a very fundamental policy concern – it wanted to ensure that procurement policies set by higher authority could not be avoided or evaded (deliberately or negligently) by lesser officials.
- A proper Christian Doctrine analysis does not depend upon whether the omission of the mandatory clause was inadvertent or intentional – the crux of the analysis is whether the omission of a mandatory clause that is inconsistent with law or regulation would cause a **deeply ingrained procurement policy** to be avoided.
- Everyone is charged with knowing United States statutes at large – Federal Register, Internet.
- Over the years, the boards and courts have expanded the reach of the Christian Doctrine – today they will rely upon the Christian Doctrine not only to incorporate omitted mandatory clauses that reflect **deeply ingrained procurement policies**, but also to incorporate less fundamental or significant mandatory procurement clauses that were written for the benefit or protection of the party seeking the regulation's protection.

DISCUSSION

- The Christian Doctrine does not require the courts and boards to read every procurement regulation into a contract – instead, a regulation has the force and effect of law only if the regulation is promulgated pursuant to a statue that reasonably contemplates the regulation. Also, the Government must have published the regulation in accordance with the requirements imposed by Congress and applicable acts.
- Courts and boards have incorporated omitted mandatory clauses relating to the following areas pursuant to the Christian Doctrine: the covenant against contingent fees, the anti-discrimination clause, the prohibition against cost-plus-percentage-of-cost contracts, TINA, the Buy American Act in construction contracts, the Government furnished property clause, the Fair Labor Standards Act, and the Service Contract Act.
- The Christian Doctrine will also be used to replace an incorrect version of a contract clause with the correct version.
- With regard to mandatory clauses that do not concern a **deeply ingrained procurement policy**, the probability of a court or board incorporating an omitted clause will depend upon for whose benefit the Government promulgated the regulation.

DISCUSSION

- The courts and boards must also find that the contractor had either actual or constructive knowledge of a regulation. However, since such clauses are published in the Federal Register, neither the courts or boards have had any trouble finding that contractor had either actual or constructive knowledge of the clauses that relate to **deeply ingrained procurement policies**.
- The Christian Doctrine is limited to the incorporation of mandatory contract clauses into an otherwise properly-awarded Government contract.
- Although the Christian Doctrine's reach has expanded over the years to include other mandatory clauses that do not necessarily concern a **deeply ingrained procurement policy**, the courts and boards do not apply the doctrine to every case in which a mandatory policy has been omitted – the courts and boards will not invoke the Christian Doctrine to incorporate an internal regulatory guideline into a contract that was promulgated for the benefit of the Government.
- In addition to incorporating a clause into a contract as a matter of law pursuant to the Christian Doctrine, the courts and boards will also remove from a contract a clause that is inconsistent with law or regulation.

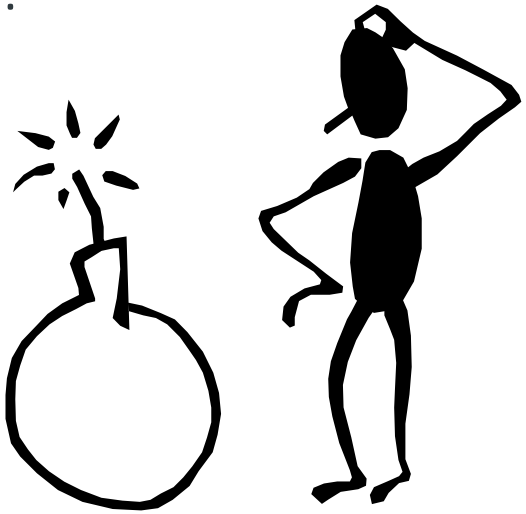
CONCLUSION

Some of the questions a procurement professional should consider when confronted with an omitted mandatory clause or a clause that appears to be inconsistent with a law or regulation include:

- Does the statute or regulation have the force and effect of law?
- Is the clause mandatory pursuant to a statute or procurement regulation?
- Does the statute or procurement regulation concern a **deeply ingrained procurement policy**?
- Was there actual or constructive notice of the statute or procurement regulation?
- Was the mandatory procurement regulation written to benefit or protect the party seeking the incorporation of the regulation?
- Does the statute or procurement regulation authorize the agency to deviate from the procurement regulation?
- Did the authorized procurement official grant a deviation from the mandatory procurement provision?
- Is the inclusion or exclusion of the clause within the contracting officer's discretion?

CONCLUSION

- To avoid being taken by surprise, Government contractors must stay aware of required regulations to ensure that they are not disadvantaged by a mandatory clause that was not included in the original written contract.
- If the contract does not contain an authorized deviation for an omitted clause, or if a contracting officer mistakenly concluded that a clause did not apply, the contractor may be forced to incur costs or obligations that were not anticipated when the contractor submitted its proposal.
- Since it will do no good to argue “Hey, I didn’t agree to that!”, offerors must be aware of the risks associated with the Christian Doctrine.



QUESTIONS/COMMENTS

RESOURCES

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