DON'T FORGET THE CHRISTIAN DOCTRINE

Under the "Christian Doctrine," the standard bond requirements in construction contracts are incorporated by operation of law, even if the Contracting Officer fails to include them. As readers of this blog know, under the "Christian Doctrine" a contract will be read to include a required clause even though it is not physically incorporated in the document. *G.L.Christian & Assocs. v. United States,* 312 F. 2d 418*, reh'g denied*, 320 F. 2d 345 (Ct. Cl. 1963), *cert denied,* 375 U.S. 954 (1963). The Christian case dealt with the termination for convenience clause, and stands for the proposition that a clause will be "read into" a contract and included if (1) the clause is mandatory; and (2) it expresses a significant or deeply ingrained strand of public procurement policy.

The recent case is *K-Con, Inc. v. Secy of the Army*, No. 2017-2254 (Fed. Circuit, Nov. 5, 2018). The solicitation for pre-engineered metal buildings did not include an express requirement that K-Con provide performance and payment bonds, nor did the solicitation include FAR 52.228-15, Performance and Payment Bonds-Construction. After holding that the contracts at issue were for construction, the Federal Circuit found as follows:

- The bonds are required by the Miller Act, 40 U.S.C. §§3131-34, which is implemented at FAR 28.102-1.
- Based on long standing statute (Miller Act, which has been in effect since 1935), performance and payment bonds are "deeply ingrained" in procurement policy.

  Note: Performance bonds protect the government by ensuring that a contract will be completed with no further cost to the government, even if the contractor defaults; payment bonds are intended to provide security for those who furnish labor and materials (subcontractors and suppliers) in the performance of government contracts—and provide an alternative remedy to subcontractors and suppliers who cannot place a lien on government property.

Based on this analysis, the Federal Circuit held that the standard bond requirements in construction contracts were incorporated into K-Con's contracts as a result of the Christian Doctrine (i.e. by operation of law) at the time the contracts were awarded.

The takeaway. Contractors should be careful never to assume that a clause was intentionally left out of a solicitation or contract, when in fact, it will be read into the contract under the Christian Doctrine. There is no official road map to all the clauses that will be read into a contract under the doctrine, but here's an incomplete list of six such clauses:

- Termination for convenience clause. *G.L.Christian & Assocs. v. United States, Id.*
- Clause requiring plaintiff to exhaust administrative remedies before bringing suit for breach of contract. *Clem Perrin Marine Towing, Inc. v. Panama Canal Co*., 730 F.2d 186 (5th Cir.), *reh'g and reh'g in banc denied*, 734 F.2d 1479, *cert. denied*, 469 U.S. 1037 (1984).

- Clause promoting uniform treatment of "major issues" such as cost or pricing data when more than one military department is purchasing an item). *SCM Corp. v. United States,* 645 F.2d 893, (Ct. Cl. 1981).
- Clause outlining proper pre-award negotiation procedures. *Schoenbrod v. United States*, 410 F.2d 400 (Ct. Cl. 1969).
- Clause implementing requirements of the Buy American Act. S.*J. Amoroso Constr. Co. v. United States*, 26 Cl. Ct. 759 (1992).
- Acquisition Regulation clause preventing double payments for material handling costs (DAR 7-103.7). *Gen. Engr Mach. Works. v. O'Keefe,* 991 F. 2d 775 (Fed. Cir. 993).

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