NAVIGANT

GOVERNMENT CONTRACT COMPLIANCE

STEVE COLLINS
Director
617.748.8312
scollins@navigant.com

navigant.com

About Navigant

Navigant Consulting, Inc. (NYSE: NCI) is a specialized, global professional services firm that helps clients take control of their future. Navigant's professionals apply deep industry knowledge, substantive technical expertise, and an enterprising approach to help clients build, manage and/or protect their business interests. With a focus on markets and clients facing transformational change and significant regulatory or legal pressures, the Firm primarily serves clients in the healthcare, energy and financial services industries. Across a range of advisory, consulting, outsourcing, and technology/analytics services, Navigant's practitioners bring sharp insight that pinpoints opportunities and delivers powerful results. More information about Navigant can be found at navigant.com.

YOUR CONTRACT REQUIREMENTS AREN'T ALWAYS IN THE WRITTEN CONTRACT – THE CHRISTIAN DOCTRINE

INTRODUCTION

One of Navigant's clients was awarded a contract to design and build a military base in Afghanistan. The contract included a vast amount of performance requirements, U.S. government standard forms, special requirements concerning the Buy American Act and other similar procurement provisions, preferred use of a local Afghan work force requirements, and an extensive list of Federal Acquisition Regulations ("FAR") clauses. Despite the client's substantial experience performing government contracts, it was ***not*** aware that certain FAR clauses were incorporated into its contract as a matter of law in the absence of the clauses in its written contract. Since a formative case in 1963, courts and boards have read into government contracts FAR and Defense of Defense Federal Acquisition Regulations ("DFAR") clauses that were ***not*** included in written contracts but were nonetheless held to be in full effect as if they were included in the extant contracts. This paper discusses the various aspects and consequences of and recent developments concerning the Christian Doctrine, derived from the benchmark case that provided contracting officers and contractors notice that their contracts may include requirements (and performance risks) beyond those included in their written contracts.

WHAT IS THE CHRISTIAN DOCTRINE?

G.L Christian & Associates v. United States is a case where the court that held that a mandatory clause required by statute may be considered incorporated into the government contract even if the parties failed to include the clause.

The U.S. Army Corp of Engineers ("USACE") awarded a contract to G.L. Christian in 1956 to construct army housing units at Fort Polk in Louisiana for $32.9 million. G.L. Christian then assigned the contract to a joint venture called Zachry-Centex. The Department of Army deactivated Fort Polk in 1958 and, thereafter, USACE terminated the contract. The contractor then submitted a claim against the government for its incurred costs as well as settlement costs and lost profits.[1] The Government argued that "... although the Fort Polk housing contract did ***not*** contain any provision expressly authorizing the Government to terminate the contract for its convenience, the Government contends that the contract should be read as if it did contain such a clause."[2]

1. Because Zachry-Centex lacked contractual privity with the Government, they sued in the name of G.L Christian and Associates.
2. 312 F. 2d 418 – *Christian and Associates v. United States.*

The Government based its argument substantially on the standard termination for convenience clause in Section 8.703 of the Armed Services Procurement Regulations ("ASPR"), "... the following standard clause shall be inserted in all fixed-price construction contracts amounting to more than $ 1,000."[3] "As the ASPR were issued under statutory authority, those regulations, including Section 8.703, had the force and effect of law."[4] Therefore, a contract meeting these requirements must be read to include a termination clause even though the written contract did ***not*** include one. Under the termination for convenience clause, FAR 52.249-2 (48 CFR 52.249-20) the Government does ***not*** compensate a contractor for anticipated profits.

The contractor argued that because the contract did ***not*** include a termination for convenience clause, the Department of Army's cancellation of the contract constituted a breach of contract for which the contractor sought damages including lost profits. The United States Court of Claims (now the U.S. Court of Federal Claims) decided that even though the termination for convenience clause was ***not*** included in the contract, "As the Armed Services Procurement Regulations were issued under statutory authority, those regulations, including Section 8.703, had the force and effect of law."[5] The court added,

> "We are not, and should not be, slow to find the standard termination article incorporated, as a matter of law, into plaintiff's contract if the Regulations can fairly be read as permitting that interpretation. The termination clause limits profit to work actually done, and prohibits the recovery of anticipated but unearned profits. That limitation is a deeply ingrained strand of public procurement policy."

The doctrine established two key principles; one, that the government should ***not*** be bound by the unauthorized actions or inactions of contracting officers and its other agents during contract formation and, two, that government procurement policies ***are*** applicable to all parties to government contracts.

WHICH CLAUSES MAY BE READ INTO CONTRACTS?

The application of the Christian Doctrine has primarily involved the FARs and DFARs. However, other federal agencies such as the U.S. Post Service have their own procurement regulations. Whether or ***not*** the doctrine is expanded to include the regulations of other agencies has ***not*** yet been subject to adjudication.

With regard to which clauses are mandatorily required to be included in contracts, a threshold condition from the Christian Doctrine's decision cited in multiple cases requires a clause to involve "... a deeply ingrained strand of public procurement policy." This opaque condition is subject to interpretation by adjudicating bodies regarding which clauses cross this threshold. Coupled with the FAR and Code of Federal Regulations ("CFR"), which include a dense population of requirements that involve numerous conditional statements and cross referencing to disseminate in order to determine applicability, there is a strong potential for contractor confusion regarding which clauses may be deemed mandatory and, therefore, introduced into their contracts under the Christian Doctrine.

ARE THE CONTRACTOR'S INTERESTS PROTECTED UNDER THE CHRISTIAN DOCTRINE?

Since the government is the author of contracts, the question arises as to whether or ***not*** the Christian Doctrine protects contractors against the omission of clauses favorable to contractors. One author notes that "... Initially, rules involving statutes and regulations were used only for the benefit of the government."[6]

Several years after *Christian* a U.S. Court of Claims decision established that the Christian Doctrine was operable for the benefit of contractors as well as for the Government. Subsequent rulings also indicate that the doctrine could be applied for the benefit of contractors. In *Moran Brothers, Inc. v. United States*, 346 F. 2d 590, 171 Ct. Cl. 245 (1965), the court determined that a contractor's appeal was filed in a timely manner, or within sixty calendar days following a final decision by a contracting officer's decision, because CFR (10 CFR § 3.11) allowed a sixty day time period filing an appeal as a matter of law. The extant contract provision stated that an appeal filing was required within 30 calendar days.

It is observed that "... a primary function of the Christian Doctrine is to protect private contractors from the government's inconsistent or biased application of its own rules in a manner that creates an unlevel playing field, benefitting the government at the contractor's expense."[7]

3. Ibid.
4. Ibid.
5. *G. L. Christian and Associates v. The United States* - No. 56-59 United States Court of Claims - 160 Ct. Cl. 1, *10; 312 F.2d 418, **423.
6. See Contract Administration Rules and Their Sources, John Cibinic, Ralph C. Nash, and James F. Nagle- pg. 26.
7. See *Beyond the FAR: Applying the Christian Doctrine to Other Regulatory Schemes*, Carrie F. Appel and Damien C. Specht, Federal Contracts Report, 96 FCR 399, October 18, 2011.

DOES THE DOCTRINE EXTEND TO SUBCONTRACTORS AS WELL?

It is well established that prime contractors are covered by the Christian Doctrine. However, *Christian* did ***not*** address whether its decision was applicable to subcontractors. (It is notable that Centex-Zachry were themselves subcontractors until the prime contract was assigned to them by G.L. Christian.) Nonetheless, the issue of whether or not the doctrine was applicable to subcontractors remained unaddressed for 50 years.

Since subcontractors may ***not*** be aware of a prime contractor's obligations to an owner unless the prime contractor flows down FAR clauses to them, a subcontractor's lack of knowledge of clauses in effect by the rule of law could pose a risk to both the subcontractor and the contractor for possible errors in performance. Such errors could lead to terminations for convenience, default, financial or other risks. The first time that a court addressed the issue of applicability of the Christian Doctrine to a subcontract is believed to have been a 2013 case involving the U.S. District Court for the District of Columbia in *UPMC Braddock v. Harris*.

The court's decision involved the imposition of socio-economic contract requirements on subcontractors awarded contracts by University of Pittsburgh Medical Center ("UPMC") in its role as prime contractor to operate hospitals. The subcontracts did ***not*** include Equal Opportunity clauses that were required to be included in all government contracts by Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and Section 400 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

Three hospitals affiliated with UPMC (UPMC McKeesport, UPMC Southside and UPMC Braddock) were the plaintiffs in the case. The hospitals entered into subcontracts in 1995 with a health maintenance organization ("HMO") to provide services and medical supplies to patients covered by the HMO. In 2000, the HMO entered into a contract with the government to provide insurance coverage through the Office of Personnel Management ("OPM"). Because the HMO provided medical services to federal employees, among others, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") determined that the three UPMC hospitals qualified as federal subcontractors under 41 CFR §60-1.3 and, therefore, were subject to the Equal Opportunity requirements. The OFCCP expected to audit the three hospitals' compliance with the Equal Opportunity requirements; however, the hospitals argued that they did not hold government contracts and refused to be subject to the federal audits.

The OFCCP brought administrative complaints against the hospitals in 2006 to enforce the Equal Opportunity requirements. The OFCCP received judgements against the hospitals from an Administrative Law Judge in 2006 and the Department of Labor's Administrative Review Board in 2008. The hospitals appealed these decisions to the District of Columbia District Court.

Even though the OPM and HMO contract limited the definition of "subcontractor" to exclude "... providers of direct medical services or supplies ..." the District Court ruled in 2013 that the hospitals and Office of Personnel Management could ***not*** agree to a definition of "subcontract" different than the definition used by the Department of Labor. Because the Department of Labor definition of subcontractor does ***not*** exclude medical service providers and the Department of Labor ***is*** authorized to enforce Equal Opportunity requirements, the court determined that the Department of Labor definition would supersede the parties' contract definition.

With respect to the court's reliance on the Christian Doctrine to require that the socio-economic requirements be incorporated into the hospitals' contract with the HMO, (where the government lacks contractual privity) one author has opined—

> "Where the Government is empowered to swoop in at any time (as the OFCCP is often wont to do) and to impose extra-contractual obligations on any company in the supply chain line, the risks of doing business in that market are incalculable. Moreover, granting the Government such a "right" simply tramples on the rights of the other commercial entities – entities that have actually *negotiated* and *reached agreement* as to the contractual terms that will control their ongoing relationship. But those considerations were simply brushed off by the court, which preferred to allow for the broad incorporation of regulations into their private contracts, irrespective of the consequences."[8]

THE CHRISTIAN DOCTRINE HAS BEEN APPLIED WHEN THE EXISTENCE OF A CONTRACT ITSELF WAS IN QUESTION

On March 8, 2010, ASFA Construction Industry and Trade, Inc. ("AFSA") sought $478,000 via a request for equitable adjustment or, alternatively, a termination for convenience settlement based on its alleged implied-in-fact contract with the Joint Contracting Command-Iraq/Afghanistan ("JCC") Regional Contracting Center. The alleged contract involved repair and operation of an

8. See "Playing Cards With a Government that Stacks the Deck – .D.C District Court Radically Expands the "Christian Doctrine" to Subcontracts" by Sheppard Mullin on April 29, 2013.

asphalt plant and rock crusher at Logistics Support Area ("LSA") Anaconda in Balad, Iraq. The government denied the claim but ASFA appealed the government's decision to the Armed Services Board of Contract Appeals ("ASBCA"). JCC argued that the Board had ***no*** jurisdiction as there was ***no*** contract between the parties. The Board denied the government's motion to dismiss due to factual issues concerning the actions of the parties.

It was acknowledged by ASFA that there was ***no*** written contract agreement executed between the parties such as a contract that would typically follow a firm fixed price contract award. Instead, ASFA alleged that there was mutual intent between the parties for ASFA to repair the rock crusher and asphalt plant in order to produce asphalt for the LSA and that all the elements necessary to establish an implied-in-fact contract were met. However, the government lacked funds for the repair parts for the equipment and later abandoned the LSA without compensating ASFA for the cost of the repair parts and work on the equipment performed before the government ordered the demobilization of the equipment back to the U.S. when the LSA was to be abandoned. ASFA argued that the government provided it with technical expertise to identify necessary repair parts. Furthermore, ASFA argued that the fact that the government's allowed it to take possession of the equipment and perform repairs in absence of a written agreement between the parties further established the basis of an agreement between the parties.

The government argued that an implied-in-fact contract between it and ASFA did ***not*** exist. The government noted that ASFA was told by a government Contracting Officer that ASFA did ***not*** have a contract with the government after the officer observed ASFA continuing with repairs the government deemed deficient. The government also argued that ASFA failed to establish an offer and acceptance. The government added that ASFA's expenditures to purchase repair parts and perform repairs was insufficient to establish consideration and that the government received no benefit.

In its July 2015 decision, the ASBCA found that the parties ***had*** reached agreement that ASFA would install government-purchased parts on the equipment and in return, the government would allow ASFA the use of the equipment and award ASFA a contract to supply asphalt. "We have found that ASFA offered to repair the non-operational asphalt plant and rock crusher in exchange for use of the repaired equipment in future on-base asphalt competitions, an unambiguous offer." The ASBCA established acceptance of the offer via the Contracting Officer's agreement to allow ASFA to repair the equipment using government furnished parts. ASFA provided consideration by agreeing to install the government furnished parts and perform necessary repairs.

The ASBCA determined that an implied-in-fact contract existed between the parties. The question remained whether or ***not*** ASFA could recover on its claim for either an equitable adjustment or termination for convenience basis. Because the government chose to abandon the JLA Anaconda base, the ASBCA determined that the government constructively terminated the implied-in-fact contract for the government's convenience. "Under the Christian Doctrine, we incorporate the standard termination for convenience clause, FAR 52,249-2, Termination for Convenience of the Government (FIXED-PRICE) (May 2004), into the parties' implied-in-fact contract."[9]

The ASFA case provides an example of circumstances under which an adjudicator's insertion of a mandatory clause into a contract via application of the Christian Doctrine protected the rights and interests of a contractor.

DOES THE CHRISTIAN DOCTRINE APPLY TO SOLICITATIONS?

The Christian Doctrine established that certain mandatory clauses are incorporated by law into federal contracts even if the contracting agency fails to include the clause in the contract. However, in a 2016 decision concerning a bid protest, the Government Accountability Office ("GAO") denied and partially dismissed a protest involving award of a Navy maintenance contract on the basis that the Navy did ***not*** have to adhere to a FAR clause that it did ***not*** include in its solicitation. This decision suggests a difference of opinion between the GAO and the U.S. Court of Federal Claims concerning application of the Christian Doctrine to solicitations.

NCS/EML Joint Venture LLC protested the 2015 Navy award of a small business set aside contract to Pegasus Support Services LLC for maintenance center equipment services at a Marine Corps Logistics Base in Georgia.[10] The award was to be made on a best value basis to the Navy that involved the lowest technically acceptable bid. The RFP indicated that the three lowest-priced proposals would be evaluated on non-price factors involving experience, technical capabilities, safety, and past performance. Both NCS/EML and Pegasus were assigned deficiencies by the Navy's technical evaluation team. The Navy subsequently determined the Pegasus proposal to offer the best value to the Navy.

9. ASBCA – *Appeal of ASFA Construction Industry and Trade, Inc.* Under Contract No. 000000-00-0-0000 ASBCA No. 57269 8 July 2015.
10. United States Government Accountability Office – *Decision in the matter of NCS/EML JV, LLC* – File No. B-412277L B-412277.2; B-412277.3 dated January 14, 2016.

NCS/EML protested the award by challenging the Navy's evaluation of Pegasus' proposal that resulted in the contract award to Pegasus. In addition to challenges involving Pegasus' technical experience and past performance, and allegations that the Navy's award did ***not*** properly adhere to award criteria included in the RFP, NCS/EML argued that the Navy's award violated FAR 52.219-4, Limitations on Subcontracting.[11] NCS/EML acknowledged within its protest that this FAR clause was not included in the RFP. NCS/EML argued that "… the clause 'is incorporated [into the contract] by operation of law pursuant to the Christian doctrine.'" The GAO concluded that

> "This assertion is without merit. The "Christian Doctrine" provides only for incorporation by law of certain mandatory contract clauses into otherwise validly awarded government contracts; it does not stand for the proposition that provisions are similarly incorporated, by law, into solicitations."[12]

One author notes that the GAO's decision appears to depart with the position held by the Court of Federal Claims regarding applicability of the Christian Doctrine to solicitations. The author states,

> "In *Transatlantic Lines LLC v. United States*, 68 Fed. Cl. 48 (2005), COFC was faced with a similar situation where, despite the fact FAR 19.508(e) required the inclusion of FAR 52.219-14 in the subject solicitation, the contracting officer neglected to incorporate that clause into the solicitation. … While *Transatlantic Lines* did not depend on the Christian Doctrine — arguing instead that the subcontracting limitation was by required by law for small business set asides — COFC seemingly rejected the government's argument that the Christian Doctrine did not apply to solicitations, noting that 'solicitations for government contracts are interpreted in the same manner as the contracts themselves; the same rules of construction apply.' … The contrast between GAO's decision in *NCS/EML JV, LLC*, and COFC's decision in Transatlantic Lines, reflects that the two primary federal bid protest forums do not always agree on the application of substantive law."[13]

CONCLUSIONS

The Christian Doctrine ensures that the government's and contractor's rights and interests are protected from the possible omission from written contracts of clauses that remain in full effect as if written in the extant contract. Although the doctrine has been in existence since the 1960's, it is Navigant's perspective that awareness of the doctrine and its associated risks and safeguards for contract execution is mixed among the contractor community. Many contractors, and most subcontractors, continue to rely solely on what is written within the four corners of their contracts. Therefore, contractors need to be increasingly vigilant in identifying both written and unwritten contract clauses in their prime contracts. Contractors should ensure that these clauses are conveyed to and understood by subcontractors, who lack contractual privity with the government and may otherwise rely solely on the written contents of their subcontracts to identify their contractual obligations.

Coupled with the government agencies' and courts' seemingly varying application of the Christian Doctrine to subsequent contracts, both government and contractor parties need to be mindful of mandatory clauses that may be read into their contracts even when the parties intend to exclude certain clauses from contracts. Careful scrutiny of solicitations and a comprehensive understanding of applicable contract clauses can help mitigate contractual risk at the outset of project execution.

11. FAR 52.219-14 requires, in summary, that a contractor must self-perform at least fifty percent of contracted work.
12. See page 12 – United States Government Accountability Office – *Decision in the matter of NCS/EML JV, LLC* – File No. B-412277L B-412277.2; B-412277.3 dated January 14, 2016.
13. See "GAO's Refusal to Apply the Christian Doctrine to Solicitations May Reflect a Split with the U.S. Court of Federal Claims" by Adam L. Lasky – February 5, 2016.

©2016 Navigant Consulting, Inc. All rights reserved. 00006075

Navigant Consulting is not a certified public accounting firm and does not provide audit, attest, or public accounting services.
See navigant.com/Licensing for a complete listing of private investigator licenses.