BNA

Federal Contracts Report™

Contract Administration

Beyond the FAR: Applying the *Christian* Doctrine to Other Regulatory Schemes

BY CARRIE F. APFEL AND DAMIEN C. SPECHT

Beginning with the 1963 ground-breaking decision, *G.L. Christian & Assoc. v. United States*, in which the Court of Claims incorporated into a contract an omitted but mandatory clause, courts and boards alike routinely have read into government contracts mandatory provisions that the parties have failed to include. The *Christian* doctrine thus has provided adjudicators a ready mechanism to ensure that the parties to an agreement do not escape the statutory and regulatory landscape within which they negotiate and execute contracts.

In the half century following the decision in *Christian*, contractors and government contracts law practitioners have been on notice that their contracts may be found to include additional terms beyond those included within the four corners of the contract document. Indeed, both civilian and defense contractors have become somewhat comfortable with the counter-intuitive concept that contracts may include more than appears on the written page because, under the *Christian* doctrine, their contracts will be interpreted as if they include mandatory Federal Acquisition Regulation or Department of Defense FAR Supplement (''DFARS'') clauses. However, the question remains whether the Christian doctrine reaches outside of both the FAR and DFARS (and related agency FAR supplement) contexts to include the regulations of agencies governed by different statutory scheme. Given the lack of guidance in this area, even experienced contractors may ask if the *Christian* doctrine applies to their existing contracts with non-FAR/DFARS covered agencies. And both contractors and government contracts law practitioners may ask themselves if extension of the doctrine into these other contexts is a good idea.

Carrie F. Apfel and Damien C. Specht are attorneys in the Government Contracts group at Jenner and Block, LLP.

I. Christian and Contracting Through the Operation of Law. Although many government contracts practitioners are familiar with the general contours of the *Christian* doctrine, understanding the specifics of the doctrine is key to evaluating whether extension of this doctrine is in the best interest of government contractors. In *G.L. Christian & Assoc. v. United States*,[1] the Court of Claims held that where published procurement regulations mandate the inclusion of a provision in a contract, there is a legal requirement to include that provision, and thus contracts omitting mandatory terms must be read as though these terms are actually included in the first instance. The *Christian* doctrine is somewhat limited. For it to apply, the procurement regulations at issue must be published, have the force and effect of law, and express a significant or deeply ingrained strand of public policy. In other words, the doctrine cannot be used to incorporate any and all omitted provisions, but rather is limited in the types of clauses within its reach.

Through application of the *Christian* doctrine, contractors expect that mandatory contract clauses required by the governing regulations will be read into their agreements even in those instances in which the particular clauses failed to make it into the text of the document. This assurance protects contractors from discretionary action by the government that results in the omission of required terms and conditions. Indeed, a primary function of the *Christian* doctrine is to ''guard[] the dominant legislative policy against *ad hoc* encroachment or dispensation by the executive'' and to prevent ''hobbl[ing] the very policies which the ap-

[1] 312 F.2d 418, 424-25, *reh'g denied*, 320 F.2d 345 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1963),

 ISSN 0014-9063

pointed rule-makers consider significant enough to call for . . . mandatory regulation.''[2] At the same time, the doctrine may be employed by the government to ensure that those mandatory but omitted provisions that serve its interests are likewise read into the contract.

How does this doctrine work? The facts of *Christian* itself are instructive. In *Christian*, the contract at issue failed to include ''any provision expressly authorizing the Government to terminate the contract for its convenience.''[3] However, the Armed Services Procurement Regulations (''ASPR'') in effect at the time expressly provided that a termination clause must be inserted ''in all fixed-price construction contracts amounting to more than $1,000.''[4] Because the ASPR ''was issued under statutory authority,'' it ''had the force and effect of law,'' and thus any contract meeting these requirements must be read to include a termination clause, whether or not one was expressly provided in the contract.[5] Accordingly, the ASBCA read the contract as incorporating a termination for convenience clause, protecting the government's interest and ability to terminate contracts as required by the governing regulations.

Consistent with this principle, courts and review boards routinely apply the *Christian* doctrine where the governing regulations require inclusion of various clauses into government contracts. Indeed, several decisions have read into contracts missing but mandatory procurement provisions, treating mandatory contract clauses as part of the contract even if not expressly stated in the contract itself.[6]

Indeed, courts and boards have applied the *Christian* doctrine to incorporate provisions that go beyond just the fundamental aspects of government procurement law, such as the ability of the government to terminate a contract for convenience that was at issue in *Christian* itself. For example, in *Harry Pepper & Associates, Inc.*, the construction contract at issue failed to include FAR 52.229-2, a provision concerning North Carolina state tax that notes that for fixed-price contracts, the contract price includes the state and local sales and use taxes, and for cost-reimbursable contracts, these taxes are allowable costs. Under the FAR, contracting officers must include this clause in all construction contracts performed in the state of North Carolina.[7] Given that the FAR mandated inclusion of this provision, the ASBCA concluded that ''[e]ven though it was initially omitted from the contract as awarded, under Christian it must be considered as included therein by operation of law.''[8] The ASBCA once again explained that ''[w]here a contract clause is made mandatory by a duly published regulation of general application, even though it is not written into the contract, it is deemed to be included.''[9] The *Christian* doctrine has even been used to include the long version of a short form clause: in *Guard-All of America*, the Armed Services Board of Contract Appeals concluded that the *Christian* doctrine required the use of the long form of the termination for convenience clause though the contract itself contained the short form.[10] Several other courts and boards have likewise incorporated mandatory provisions into a contract by operation of law.[11]

II. Expanding the Breadth of the Christian Doctrine. As discussed above, the *Christian* doctrine has been used to incorporate into contracts all sorts of mandatory but omitted FAR and DFARS clauses, including seemingly minor provisions such as the long version of a short form clause. However, to date, with just a few exceptions, use of the *Christian* doctrine has been limited to the ASPR and its successors, the FAR and DFARS. Though this encompasses a large majority of federal procurements, there are other federal agencies operating under different regulations—for example, the Federal Aviation Administration, the United States Post Office,[12] and, until recently, the Transportation Security Administration,[13] to name a few—and whether or not the *Christian* doctrine applies to contracts executed under these different statutory schemes remains an open question.

Given the limited practical reach of the *Christian* doctrine to date, contractors and government contracts practitioners should contemplate whether extension of the doctrine beyond FAR and DFARS procurements is in the best interest of the contractors. A review of the

---

[2] *See S.J. Amoroso Const. Co., Inc. v. United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993) (quoting *G.L. Christian & Associates*, 320 F.2d at 351).

[3] *G.L Christian & Associates*, 312 F.2d at 424.

[4] *Id.*

[5] *Id.*

[6] *SeeTodd Construction, L.P.*, 94 Fed. Cl. at 110 (quoting *SCM Corp. v. United States*, 645 F.2d 893, 904 (1981)); *see also General Engineering & Machine Works v. O'Keefe*, 991 F.2d 775, 780 (Fed. Cir. 1993) (''[f]ederal regulations which are based upon a grant of statutory authority have the force and effect of law, and, if they are applicable, they must be deemed terms of the contract even if not specifically set out therein'') (internal quotation marks omitted).

[7] *Harry Pepper & Associates, Inc.*, ASBCA No. 35558, 88-3 BCA ¶ 20,872.

[8] *Id.*

[9] *Id.* (citing *Optic Electronic Corp.*, ASBCA No. 24962, 83-2 BCA ¶ 16,667).

[10] ASBCA No. 22167, 80-2 BCA ¶ 14,462 (April 30, 1980).

[11] *See, e.g., Todd Construction, L.P.*, 94 Fed. Cl. at 107-10 (applying the *Christian* doctrine and concluding that omitted FAR clause was required); *Dublinsky v. United States*, 43 Fed. Cl. 243, 248 n.16 (1999) (noting that ''mandatory clause for fixed-price supply contracts'' was ''incorporated into the contract under the *Christian* doctrine''); *Chris Berg, Inc.*, 426 F.2d at 317 (noting that ''[t]he ASPR is law which governs the award and interpretation of contracts as fully as if it were made a part thereof,'' and thus reading missing ASPR provision into contract); *Cf Scan-Tech Sec., L.P. v. United States*, 46 Fed. Cl. 326, 333 n.5 (2000) (noting that though the court had not seen the contract, it ''can surmise that the contract contained either the LOC or LOF clause, pursuant to [governing procurement regulations] or as a result of the *Christian* doctrine'').

[12] The Postal Service Board of Contract Appeals has applied the *Christian* doctrine in at least one case, explaining that, ''Postal Service regulations (Findings 18, 19) having the force and effect of law required that the Termination for Convenience clause as set forth in Respondent's Procurement Manual be included in Appellant's contract, and the provisions of the clause 'must be deemed terms of the contract even if not specifically set out therein, knowledge of which is charged to the contractor.' '' *Abscon Assocs., Inc.*, PSBCA No. 5291, 08-1 BCA 33,762 (Jan. 2, 2008)

[13] Application of *Christian* to the Transportation Security Administration Acquisition Management System is further complicated by the fact that these regulations were adopted from the Federal Aviation Administration but were not independently promulgated as the TSA AMS, though they were printed and easily accessible online and the predecessor FAA AMS had been properly promulgated.

  FCR ISSN 0014-9063

underlying purposes of the *Christian* doctrine as well as the impact its application has had in the FAR and DFARS context leads to the conclusion that application of the doctrine to contracts with agencies operating under alternate regulatory schemes is a good idea.

A. Protecting Parties Expectations. Perhaps the primary reasons for extending the *Christian* doctrine beyond contracts governed by the FAR and DFARS is to protect contractors' expectation that clauses that are supposed to be included in a contract will, in fact, be included regardless of any omission. Indeed, one of the primary purposes of the *Christian* doctrine is to protect parties' expectations. Where a governing regulation requires a contract to contain a particular provision, whether that contract is FAR-covered or not, failure to include that provision undermines the expectations within which the parties negotiated the deal. The *Christian* doctrine provides a mechanism by which parties can ensure that such mandatory terms—terms that the parties expect to be included in the contract—are, in fact, included in the contract even if they are not written within the text of the document. By ensuring the contract contains all the elements required by law, the *Christian* doctrine serves a critical role in protecting the parties' expectations. Indeed, there are some indications that the intent and expectations of the parties may eventually become the entire test for inclusion of omitted clauses, thus expanding *Christian* while abandoning the *Christian* test.[14]

B. Protecting Contractors' Interests. Another important reason for expanding the scope of the *Christian* doctrine is to protect the rights and interests of government contractors by providing a tool with which they can hold the government accountable for mandatory but omitted contract provisions that serve the contractors' interests. It is the government that drafts government contracts. For contractors, the choice is simple: take it or leave it. The *Christian* doctrine ensures that contractors' rights and interests are protected from the government's discretionary application of the governing rules and regulations within which the contracts are negotiated. It ensures that those mandatory provisions that are in the best interest of contractors are not left on the cutting room floor—intentionally or otherwise—after the contract has been executed.

Indeed, one of the primary purposes of the *Christian* doctrine is to protect a party from the omission of an otherwise mandatory provision that is in the party's best interest to include in a contract. To accomplish this goal, when determining whether to incorporate a provision into a contract, courts and boards look to the *purpose* of the governing statute or regulation to decide which party to the contract a given provision was designed to benefit.[15] For example, if a particular regulation is intended to benefit the government, a contractor cannot complain that the contract is invalid for failure to include the omitted provision.[16] However, where the purpose of the omitted provision indicates that it confers a benefit on the contractor, the contractor can rely on the *Christian* doctrine to ensure its rights and interests are protected and to achieve a reformation of the contract. In such cases, the contractor is not barred from seeking relief by any failure to protest, or by estoppel or acquiescence.[17]

C. Leveling the Playing Field. Relatedly, application of the Christian doctrine helps to level the playing field and makes sure that neither the government nor the contractor has a nonreciprocal ability to fundamentally alter the agreement after its execution through the use of the Changes clause. Absent the *Christian* doctrine, the government has the ability to incorporate omitted but desirable clauses by issuing contract modifications. The contractor, however, is empty-handed, unable to insist on contract changes to enforce omitted provisions that it meant to include to protect its own interests. Thus, expansion of the doctrine to other agency contexts serves to equalize the power the parties have to insist that the contract contain the terms required by the governing regulations.

Indeed, 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, benefiting the government at the contractor's expense. The doctrine also preserves the intent of the Congress and rulemakers and ensures that those provisions that they considered significant enough to deem mandatory are in fact included in relevant contracts.[18] Accordingly, the *Christian* doctrine ensures that no contract offends deeply engrained procurement policy by omitting a contract provision that governing law dictates must be included.[19]

D. Potential Risks to Consider. Though the benefits provided by the *Christian* doctrine tend to suggest that application of the doctrine beyond the FAR and DFARS serves the best interest of contractors, there remain some inherent risks in such an expansion that contractors should keep in mind. First, the *Christian* doctrine may, at times, frustrate the intent of the parties if they in fact purposefully omitted a mandatory provision that the doctrine requires to be read into the contract. As a result, when one of the parties changes, the *Christian* doctrine can be used to change the bargain. Second, courts and boards may not apply the *Christian* doctrine in a consistent manner. When determining whether the doctrine requires inclusion of a particular term, there remains some level of discretion. For example, for the doctrine to apply, a provision must embody a deeply ingrained strand of procurement policy, and different adjudicators may have different views as to what clauses qualify under this test. For example, all parties can agree that termination provisions are fundamental, but may disagree as to *Christian's* application to many

[14] For example, in *Appeal of Muncie Gear Works, Inc.*, 72-1 BCA ¶ 9429, ASBCA No. 16153, April 26, 1972, the Board noted that the *Christian* doctrine ''does not require the incorporation of a clause whose application is based on the exercise of judgment or discretion.'' This determination likely stemmed from an attempt by the Board to discern what the parties' intended when entering the contract, and its reluctance to incorporate a clause that would frustrate the intent of the parties.

[15] *Todd Construction*, 94 Fed. Cl. at 108.

[16] *Id*. at 109 (citing *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1451-52 (Fed. Cir. 1997)).

[17] *Id*. at 108 (citing *Applied Devices Corp. v. United States*, 591 F.2d 635, 640 (1979)).

[18] *See S.J. Amoroso Const. Co., Inc. v. United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993) (citing *G.L. Christian & Associates*, 320 F.2d at 351).

[19] *General Engineering & Mach. Works*, 991 F.2d at 779-80.

other clauses. Finally, use of the *Christian* doctrine, and particularly its use outside of the FAR and DFARS, may introduce a new kind of uncertainty into the procurement process, especially for small or inexperienced contractors who may not know what clauses are mandatory and thus required under *Christian*. These contractors may be surprised to learn that their contracts include requirements beyond those contained within the four corners of the document.

Conclusion. Given the expectations set by consistent application of the *Christian* doctrine to incorporate mandatory but omitted contract terms, it seems logical to extend its reach beyond the FAR and DFARS to include contracts governed by other regulatory schemes. Doing so provides contractors with a ready mechanism to protect their interest, level the playing field, and ensure that those mandatory provisions designed to serve their interests—whether they are aware of them or not—are included in their contracts. Careful consideration of the purpose and impact of the application of the doctrine indicates that extension of the doctrine to other agencies would benefit contractors, though there do remain some serious risks that contractors and government contracts law practitioners should keep in mind when advocating such an extension.

FCR ISSN 0014-9063