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Department Of Labor Attempts To Extend The "Christian Doctrine" To Subcontracts

By W. Bruce Shirk and Anne B. Perry

It has long been questioned whether the "Christian Doctrine," pursuant to which mandatory contract clauses reflecting core procurement policy are incorporated into government prime contracts by operation of law, can be used to incorporate such clauses into subcontracts. That question may now have an answer. In a non-CDA decision issued last year that has flown somewhat "under the radar," the Department of Labor's Administrative Review Board ("ARB") held that at least some such clauses are incorporated into *subcontracts* by operation of law. *OFCCP v. UPMC-Braddock,* ARB Case No. 08-048 ("*UPMC-Braddock*").

While the ARB does not have jurisdiction under the Contracts Disputes Act ("CDA"), it has jurisdiction over a significant number of disputes arising under many of the socio-economic government contract clauses, such as the various equal opportunity clauses mandated by Executive Order 11246 and certain ameliorative statutes that address the needs of the disabled and veterans. Moreover, the reasoning of the ARB might also appeal to tribunals with jurisdiction over CDA disputes when considering whether a given clause is incorporated into a subcontract by operation of law.

Given the number of contract clauses that the FAR mandates must be flowed down to contractors it would seem that a decision addressing this issue is long overdue. But in fact it has been some 47 years since the Court of Claims, in *G. L. Christian & Associates v. United States*, 312 F.2d 418, 426 (Ct. Cl. 1963), established the principle that contract clauses addressing "a deeply ingrained strand of public procurement policy" are "incorporated, as a matter of law, into [the] contract…." This holding, commonly referred to as the "Christian Doctrine," was quickly accepted by other tribunals because the policy underlying it makes sense: if Congress has directed that contractors are to comply with a given set of requirements, then neither they nor the contracting agency should be able to evade that direction simply by physically excluding the implementing clause from the contract document. The sensibility of the underlying policy, however, should not be confused with the sensibility of the Christian Doctrine itself. The Court of Claims could easily have held, consistent with that policy, that the contract itself was illegal, an unauthorized act for which the contracting officer had no actual authority, a decision that would have been consistent with the oft-cited case of *Federal Crop Insurance v. Merrill*. That,

then, would have left the parties to their rights under a *quantum meruit* theory, with recovery based on a standard legal theory customarily used by the courts when there is no contract.

It is not the purpose of this posting to revisit the wisdom of, or necessity for, the Christian Doctrine. It has been around too long and its principles are too settled to make that dialogue worth the effort. It has long been the law – for prime contracts. That policy that underlies the doctrine might arguably be thought to extend with equal felicity to subcontracts under government prime contracts, but – until *UPMC-Braddock* – we were aware of no Board of Contract Appeals or court that has so held. Perhaps this persistent silence reflected some vestigial respect for the concept of privity. If the Government is not a party to a contract, should it – a stranger to the bargain that owes no duty to and has no contractual liability to the subcontractor – be able to impose under that contract an obligation that the parties have excluded? Some might think the answer to that question would be a resounding "No." But the ARB apparently believes otherwise.

In *UPMC-Braddock*, the ARB, a tribunal with authority to decide disputes between the Office of Federal Contract Compliance Policy ("OFCCP") and contractors, decided that the equal opportunity requirements of Executive Order 11426, the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Act each express a significant or "deeply ingrained strand of public procurement policy" that is incorporated by operation of law into any subcontract under a federal prime contract – regardless of whether the parties to that subcontract included the clauses. In this regard, the two statutes in question explicitly require the inclusion of their implementing clauses in subcontracts. The Executive Order does not, stating, rather that "each [covered] contractor…shall file, and shall cause each of his subcontractors to file, Compliance Reports…." (Emphasis added).

The *UPMC-Braddock* decision arises from OFCCP policy of initiating enforcement proceedings directly against subcontractors at any tier and its determination that three hospitals holding HMO contracts with the University of Pittsburgh Medical Center ("UPMC"), which, in turn, had a prime contract with the Office of Personnel Management ("OPM") to provide medical services and supplies to federal government employees, were

(a) subcontractors under a federal prime contract and

(b) bound by the provisions of the three equal opportunity clauses because the clauses were incorporated into the subcontracts by operation of law.

By way of background, prior to this decision, health care providers never believed they were, nor had they ever been treated as, subcontractors under OPM's Federal Employees Health Benefits Acquisition Regulation ("FEHBAR"), 48 CFR 1600 *et. seq.* This belief stemmed from the FEHBAR definition of "subcontractor" as "any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor, except for providers of direct medical services or supplies pursuant to the Carrier's health benefits plan …." (Emphasis added). This definition was incorporated directly into the hospital HMO's

("hospitals") contracts with UPMC. As the HMOs in question were, in their view, something other than subcontractors, they never considered themselves covered by the requirements of the three Equal Opportunity laws, all of which (i) mandate that non-exempt *subcontracts* whose values exceed various specified thresholds incorporate the applicable equal opportunity clause and (ii) are implemented by the Secretary of Labor and his delegee the OFCCP. When the three hospitals first received letters from the OFCCP advising them that their contracts were covered under the three laws and scheduling compliance reviews of their operations, their managements politely declined either to provide the documents requested or to allow the agency to conduct onsite reviews of the HMOs' compliance with the three equal opportunity clauses.

The OFCCP sought injunctive relief that was granted by the ARB, which reasoned as follows:

(a) Pursuant to the Executive Order and the two statutes in question, UPMC's contract with OPM "explicitly required" that UPMC include the applicable equal opportunity clause in every subcontract.

(b) The FEHBAR (which the decision characterizes as a "FAR regulation") and contract provisions excluding "providers of direct medical services or supplies" from the definition of subcontractor was in direct conflict with the DOL regulations implementing the Executive Order and the two statutes, which collectively express "a significant or deeply ingrained strand of public procurement policy." The exclusion was, therefore, "invalid or void."

Just where does this holding take us? Well, maybe nowhere. UPMC-Braddock and its sister hospitals have appealed the ARB's decision to the U.S. District Court for the District of Columbia, arguing, among other things, that "[t]he affirmative action requirements that OFCCP seeks to impose . . . are not enforceable against a party which had never agreed to such requirements and which had never agreed to do business with the federal government." *UPMC-Braddock v. Solis,* D.D.C., Civ. A. No. 1:09-121-PLP (Complaint filed June 30, 2009). It would, of course, be refreshing if the court were to sustain the appeal and enforce the subcontracts as written, particularly since one might think that the HMOs had a justifiable basis for relying on the FEHBAR's explicit declaration that their agreements were not "subcontracts." The HMOs, it would seem, have both the language of their agreements and the language the FEHBAR on their side. One would hope that is enough.

But if it is not, again, where does that take us?

It is of course possible that its impact will be limited to those clauses over which the ARB has enforcement authority and that CDA tribunals will decline to extend it to every FAR clause that has ever been shoehorned into a prime contract via the Christian Doctrine. After all, four decades of silence on the issue suggests that the CDA tribunals have hardly been chomping at the bit to extend *Christian*. Moreover, the Government has a direct right of action against the prime contractor and can seek redress against the prime contractor for its failure to have discharged its contractual duty to flow the missing clause down into its subcontract and it would be

extraordinary for a tribunal now to hold that *Christian* dispenses with the rule of privity in regard to Government claims against subcontractors. That is a slippery slope down which the Government may not wish to slalom if, at the bottom, it eventuates in the collateral elimination of privity as a bar to subcontractor claims against Uncle Sam.

What about prime contractor claims against subcontractors seeking to impose duties under absentee clauses via the Christian Doctrine? Well, absent the litigation of the issue under an indirect, sponsored appeal agreement, those claims will not be heard by a CDA tribunal. State and local courts, and even federal district courts, do not live and breathe the federal common law and we would hazard a guess that the judges in those tribunals will not find the Christian Doctrine as easy a pill to swallow as do those that work every day in the sometimes arcane world of government contracts. They may well be reluctant – if not loath – to modify subcontracts for the benefit of a prime contractor that simply failed to have included certain clauses in the subcontracts in the first instance.

All of which means – we live in a world of uncertain legal obligations. Root for the appellants.

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