Pub K
PUBLIC CONTRACTS | LAW

PubKGroup | 700 6th St. NW Ste. 430, Washington, DC 20001
www.pubkgroup.com | 1-844-PUBKLAW (1-844-782-5529) | admin@pubkgroup.com

Does the Christian Doctrine Apply to Commercial-Item Contracts? The Federal Circuit Misses the Mark in *K-Con, Inc. v. Secretary of the Army*

By Robert Nichols, Rick Claybrook, Jason Lynch, and Andrew Victor

Special to PubKLaw

Robert Nichols

Rick Claybrook

Jason Lynch

Andrew Victor

In *K-Con, Inc. v. Secretary of the Army*, No. 2017-2254, the Federal Circuit applied the *Christian* doctrine[1] to read FAR clause 52.228-15, requiring the contractor to provide performance and payment bonds, into a construction contract—even though the Army designated the procurement as commercial-item pursuant to FAR Part 12 and omitted that clause. In doing so, the Federal Circuit left two key issues unresolved: whether construction can be procured as a commercial item, and how the *Christian* doctrine applies to a commercial-item contract, where countervailing procurement policies may undermine the argument for incorporating certain clauses that would otherwise be read in. How did the Federal Circuit avoid these key issues? By letting the Justice Department flip-flop the Army's positions regarding commerciality, and by sidestepping the findings from the underlying ASBCA opinion that the *Christian* doctrine applies to commercial-item contracts. The upshot is more questions than answers.

The case involved two contracts at Camp Edwards, Massachusetts, for the procurement of prefabricated shelters—a laundry facility and a communications equipment shelter. The Army issued the solicitations as commercial-item procurements using Standard Form 1449. The solicitations and the contracts did not include any requirement for performance or payment bonds.

After awarding the commercial-item contracts to K-Con, the Army told K-Con that it must obtain performance and payment bonds as required by the Miller Act, 40 U.S.C. §§ 3131-3134, and FAR 52.228-15. K-Con replied that it had not anticipated obtaining bonding, since the solicitation and contract did not include any such requirements and, in any event, it could not obtain the bonds immediately. Rather than terminating the contract for convenience, the Army decided to wait for K-Con to try to acquire the bonds. Two years later, K-Con did so, and the government issued notices to proceed and modified the contracts to include the bonding requirements. K-Con asked the Army to pay the costs of the bonds and the costs incurred for increased material and labor due to the two-year delay. The Contracting Officer agreed to pay the bond costs but not the delay costs.

K-Con appealed the final decision to the ASBCA. At the Board, K-Con stressed that the contracts were solicited and awarded as commercial-item contracts and had not included FAR 52.228-15. The ASBCA found that, notwithstanding that the Army had conducted the procurement on a commercial-item basis, the Miller Act bonding requirements apply as a matter of law to all construction contracts, so FAR 52.228-15 must be read into the contract as a matter of law via the *Christian* doctrine. That doctrine holds a certain clause may be incorporated by law if (1) it was mandatory; and (2) it expresses a significant or deeply ingrained strand of public procurement policy. See *K-Con, Inc.*, ASBCA Nos. 60686, 60687, 17-1 BCA ¶ 36,632, 2017 WL 372992 (Jan. 12, 2017).

Appealing to the Federal Circuit, K-Con argued that Miller Act bonding requirements and FAR 52.228-15 do not apply to commercial-item contracts under the *Christian* doctrine because FAR 52.228-15 is not a mandatory clause; the *Christian* doctrine applies only to contract administration-type matters, not performance requirements; and applying the *Christian* doctrine in this way would require K-Con to provide a service that it did not offer.

The U.S. Department of Justice, representing the Army at the court, reframed the issue entirely. It asserted that there was an ambiguity as to whether the contracts truly were commercial-item contracts. DOJ acknowledged that the Army had solicited and awarded the procurement using the commercial-item form (SF 1449), but stressed that the requirements included construction services for which FAR 52.228-15 applied mandatorily. This discrepancy created a patent ambiguity that required interpretation.

In an opinion issued this past Monday, the Federal Circuit agreed with DOJ that the contracts are "patently ambiguous as to whether they are construction contracts" because "there were many indications that the contracts were for construction, not commercial items." Accordingly, the court ruled, K-Con had an obligation to inquire as to whether the Army was really buying a commercial item or was buying construction

services that, by law, would have required bonding. Since K-Con had not raised that concern with the Army pre-award, K-Con could not now hide behind the fact that the Army had formulated the procurement as being commercial-item.

The decision by the Federal Circuit is troubling in a number of respects.

First, the Federal Circuit discounted the fact that the Army sought to purchase pre-fabricated shelters and installation services on a commercial-item basis. This procurement method seems acceptable given the definition of *commercial item* in FAR 2.101:

> "Commercial item" means—
>
> (1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and— (i) Has been sold, leased, or licensed to the general public; or (ii) Has been offered for sale, lease, or license to the general public; [and]
>
> (5) Installation services . . . if—(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and (ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government . . . .

Indeed, it was only later—when DOJ entered an appearance—that the Army flip-flopped and stated that the solicitation and contracts were ambiguous as to whether the Army was using commercial-item standards. The Federal Circuit seized on DOJ's ambiguity argument and then proceeded to analyze whether contracts were either commercial item or for construction services. In doing so, however, the Court did not expressly rule on whether a contract can be both commercial item and for construction services—an issue that has been murky for years.[2] Whereas the ASBCA's decision in *K-Con* seems to accept that a construction contract can be undertaken on a commercial-item basis, the Federal Circuit's decision evidences the opposite view, but does not expressly so state.[3]

Second, although the ASBCA used the *Christian* doctrine to read bond clauses into a commercial-construction contract, the Federal Circuit merely ruled that the *Christian* doctrine applies to *construction* contracts. Because the court never addressed whether these construction contracts were *also* commercial, and indeed cast those categories as mutually exclusive, it is not clear whether the Federal Circuit agrees that the *Christian* doctrine even applies to commercial-item contracts.

Third, by sidestepping these first two issues, the Federal Circuit also missed directly ruling on perhaps the most important issue: should the *Christian* doctrine apply to commercial-item contracts at all, and if so, how should it apply? In this case, both the ASBCA and the Federal Circuit went through the traditional *Christian* analysis of showing how the Miller Act bonding requirements contained in FAR 52.228-15 are mandatory and express a significant or deeply engrained strand of public procurement policy. Yet neither the Board nor the

Court weighed that against the procurement policies that underlie commercial-item contracting.

Congress enacted the Federal Acquisition Streamlining Act of 1994 (FASA) (S. 1587; Pub.L. 103–355) to overhaul the federal government's cumbersome and complex procurement system by streamlining the procedures and contract clauses for purchasing items from the commercial marketplace. Yet the *K-Con* decisions at both the Board and the Court would appear to undermine this intent. They put the burden on commercial-item contractors to make sure that government contracting officers (a) have made a proper determination to use commercial-item contracting, and (b) have properly determined whether they have included all regulatory clauses that might be read in under the *Christian* doctrine.

This is anything but commercially-friendly. We suggest that, going forward, the Boards and Courts give greater consideration to how the *Christian* doctrine should apply in the commercial context, given the intent of the FASA and related statutes. If a considered determination is made that the *Christian* doctrine is to apply to commercial-item contracts, then the Courts and Boards should consider the second *Christian* prong—whether the clause at issue expresses a significant or deeply ingrained strand of public procurement policy—accordingly. In a commercial construction contract, for example, it may be less "deeply ingrained" that the contractor must obtain payment and performance bonds.

Finally, the Board's and Court's decisions not only incorporated a new performance requirement via the *Christian* doctrine, but also forced K-Con to bear at least part of the cost of the Army's mistake. The Army agreed to pay for the bonds but not for the delay costs while K-Con undertook the effort of adding that service. Normally, a party that makes a unilateral mistake must bear the consequences. But here, the ASBCA and Court both forced the bonding requirement on K-Con through the *Christian* doctrine and then refused to hold the Army responsible for its mistaken omission of the clause in the first place. Surely this outcome was not only unexpected but deeply unfair. The government should take accountability for its mistakes in omitting clauses and not shift the cost risks of those mistakes to contractors.

---

1 The *Christian* doctrine arises from the case *G.L. Christian & Assocs. v. United States*, 312 F.2d 418 (Ct. Cl. 1963), in which the Court of Claims first held that some contract clauses are so important to public procurements that they must be incorporated into a contract by operation of law even though the government failed to include them.

2 Compare 48 CFR 512.203(c) (where GSA permits construction on a commercial item basis in limited circumstances) with Office of Management and Budget, Executive Office of the President, Office of Federal Procurement Policy Memorandum Applicability of FAR Part 12 to Construction Acquisitions (July 3, 2003) (stating that commercial item contracting should rarely be used for construction).

3 Contrast ASBCA decision at 6 (holding "we conclude that the Miller Act applies to construction contracts, even when those contracts are solicited as commercial items . . . .") with Federal Circuit decision at 6 (implying, but not expressly analyzing or finding, that construction contracts cannot be commercial item contracts).

ABOUT THE AUTHORS

Robert Nichols is a partner at Nichols Liu LLP, and a former partner and co-chair of the Government Contracts group at Covington & Burling. He has served both at the White House and as a Judge Advocate General at the Army Corps of Engineers.

Rick Claybrook is of counsel at Nichols Liu LLP and a former partner at Crowell & Moring. He also independently runs his own practice Claybrook LLC.

Jason C. Lynch is an associate at the firm and a former trial attorney at the DOJ.

Andrew Victor's legal career has included positions as an associate at large law firms, a clerkship for a U.S. District Judge, and service as a Trial Attorney at the U.S. Department of Justice.