The *Christian* Doctrine — "Hey, I Didn't Agree to That!"

by Jerome S. Gabig Jr., Paul A. Debolt, and Johana A. Reed, CPCM

In both the private and the government contracting arena, written contracts usually reflect the entire scope of the contracting parties' agreement. In government contracts, however, the written agreement with the government does not always reflect all of the rights, obligations, and responsibilities of the contracting parties. Since 1963, both the courts and the boards of contract appeals have used the *Christian* doctrine[1] to incorporate, "as a matter of law," mandatory procurement clauses into government contracts. Generally speaking, there is no counterpart to the *Christian* doctrine in commercial contracting.

A court's or a board's decision to reform a contract to insert a previously omitted mandatory clause can have far-reaching implications for the unknowing or unwitting offeror. The *Christian* doctrine has been used to insert clauses unintentionally left out of the contract as well as mandatory clauses that the parties, in good faith, believed they had negotiated out of the contract. For this reason, the insertion of a previously omitted mandatory clause can fundamentally alter the bargain struck between the parties and potentially force a contractor to incur additional costs or obligations that were not anticipated at the time of contract formation. In light of the unanticipated risks and liabilities arising from the insertion of a previously omitted mandatory clause into a contract, the *Christian* doctrine remains a unique and important principle in government contracting.

To avoid the consequences of the *Christian* doctrine, government contractors should stay abreast of the mandatory clauses that the government must include in solicitations. Offerors should pay particular attention to the mandatory clauses concerning the following areas: the Truth in Negotiations Act (TINA), the Buy American Act (BAA), government-furnished property, the Fair Labor Standards Act (FLSA), the Service Contract Act (SCA), socioeconomic provisions, and general cost principles.

If an offeror determines that the government has not included a mandatory clause in a solicitation, the offeror should immediately bring the omitted clause to the contracting officer's (CO) attention to determine if the omission was by oversight or properly authorized. A clause may be properly omitted if the CO had the authority to exclude the omitted clause or if a deviation has been authorized by higher authority. Thus a detailed review of a solicitation is critical to a government contractor's determination of whether an omitted mandatory clause may present a potential risk to the contractor under the *Christian* doctrine.

This article provides a general overview of the *Christian* doctrine and identifies those general areas where the courts and boards have applied it. This article is not intended to provide the procurement professional with an exhaustive review of every instance in which a court or board has reformed a contract pursuant to the *Christian* doctrine. Nonetheless, this information should assist the procurement professional in assessing the doctrine's poten-

Jerome S. Gabig is an attorney in the Washington, D.C., office of Venable, Baetjer, Howard & Civiletti. He is an NCMA Fellow and a member of the Nova Chapter. Paul A. Debolt is an attorney in the Washington, D.C., office of Venable, Baetjer, Howard & Civiletti. He is a member of the Nova Chapter. Johana A. Reed is an attorney in the Washington, D.C., office of Venable, Baetjer, Howard & Civiletti. She is a CPCM, an NCMA Fellow, and a member of the Tysons Corner Chapter.

tial impact on current or future contracts with the government. To facilitate the identification of omitted mandatory clauses that the courts and boards have read into contracts "as a matter of law," refer to Figure 1, which identifies many of the clauses that have been reviewed by the courts and boards under the doctrine.

THE *CHRISTIAN* DOCTRINE

Procurement regulations control almost every aspect of the government's acquisition of supplies and services with appropriated funds. If a government contract does not comply with a regulation or statute that has the "force and effect of law," the following outcomes may occur: (1) the contract may be void or voidable by the government or (2) the contract may be reformed either to incorporate a mandatory clause or to exclude a clause that is inconsistent with a statute or regulation irrespective of which party the clause benefits.[2] The *Christian* doctrine applies where the government's failure to comply with a mandatory regulation or statute requires the court or board to reform the contract to either include an omitted clause or remove a clause that is inconsistent with law or regulation.

In its simplest terms, the *Christian* doctrine provides that if a statute or a regulation with the "force and effect of law" mandates the inclusion of a clause in a government contract, the courts and boards will interpret the contract as if it contains the omitted clause. Conversely, if a contract contains a clause that is inconsistent with a statute or regulation, the courts and boards will interpret the contract as if it does not contain the offending clause.[3] The courts' and boards' willingness to reform an integrated written agreement based on the *Christian* doctrine converts a government contract from an agreement that represents an arm's-length bargain between the contracting parties to a bargain made, at least in part, by the regulations of the administrative agency.[4] Consequently, vendors must always keep abreast of the procurement regulations for any agency with which they seek to do business.

Unlike many decisions involving a government contract dispute, a court's or board's decision to include an omitted mandatory clause pursuant to the *Christian* doctrine does not require a detailed factual analysis. Rather, a court's or board's analysis under the *Christian* doctrine turns on whether the omission of a mandatory clause, or the inclusion of a clause that is inconsistent with law or regulation, will frustrate or circumvent a fundamental—and often deeply ingrained—procurement policy. Consequently, the procurement professional should focus less on the facts surrounding the government's omission of a mandatory clause or inclusion of a clause that is contrary to law or regulation, and more on whether the omission or inclusion of the clause will frustrate or circumvent a fundamental procurement principle.

The *Christian* Decision

In *Christian* the government terminated a housing project before the project's completion. Although the parties to the construction contract at issue in *Christian* specifically negotiated out the provision authorizing the government to terminate the contract for convenience,[5] the government contended that the court should interpret the contract as if the contract contained the Termination for Convenience clause mandated by section 8.703 of the Armed Services Procurement Regulation (ASPR).[6] Ultimately, the court agreed with the government's position and inserted, by operation of law, the omitted Termination for Convenience clause into the contract, thereby precluding the contractor's recovery of anticipated profits.[7]

The court began its analysis by stating that since the ASPR "was issued under statutory authority," the regulation had the "force and effect" of law.[8] Thus, if the regulation applied to this class of contract, the contract had to contain the standard Termination clause. The court further stated that if the contract had to contain the standard Termination clause, the court would interpret the contract as if it contained the omitted Termination for Convenience clause.[9]

In its opinion, the court explained that it "should not be slow to find the standard termination article incorporated as a matter of law into the contract" because the Termination for Convenience clause's limitation on profits represented a deeply ingrained strand of public procurement policy.[10] Further, the court stated that an "experienced" government contractor should have been aware that the gov-

ernment may terminate the contract for convenience without breaching the contract.[11] Indeed, the court noted that the contract contained at least four separate references to the Termination for Convenience clause.

Although the facts surrounding the *Christian* decision appear complex, the court actually based its decision on a fundamental policy concern. The court read the contract as if it contained the omitted Termination for Convenience clause because the court wanted to ensure "that procurement policies set by higher authority not be avoided or evaded (deliberately or negligently) by lesser officials."[12] Further, the court stated that congressional enactments must govern federal contracts because legislative policies must be protected from the "*ad hoc* encroachment" of the executive branch.[13] Moreover, the court believed that it needed to prevent subordinates from sapping the significant procurement policies established by their superiors.[14]

Thus a proper *Christian* doctrine analysis does not depend on whether the omission of the mandatory clause was inadvertent or intentional.[15] Instead, the linchpin of the analysis is whether the omission of a mandatory clause or the inclusion of a clause that is inconsistent with law or regulation would cause a deeply ingrained procurement policy to be avoided. If it would, the courts and boards will interpret the contract as if it contains the omitted mandatory clause under the *Christian* doctrine.

Moreover, a contractor cannot avoid the impact of the *Christian* doctrine by arguing that it did not know of the regulation requiring the inclusion of the omitted clause or that it believed that the CO had the authority not to include a mandatory clause. Everyone is charged with knowledge of the U.S. Statutes at Large.[16] Similarly, the publication of an agency's rules and regulations in the *Federal Register* provides everyone constructive legal notice of those regulations. Finally, anyone who enters into a contract with the government runs the risk of having correctly ascertained the bounds of the employee's authority.[17]

Although some decisions have suggested that the courts and boards should invoke the *Christian* doctrine only "under extraordinary circumstances,"[18] the the courts and boards have used it on numerous occasions to insert omitted mandatory clauses into written agreements. In fact, over the years, the boards and courts have expanded the reach of the doctrine. Today the courts and boards rely on it, not only to incorporate omitted mandatory clauses that reflect deeply ingrained procurement policies but also to incorporate less fundamental or significant mandatory procurement clauses that were written for the benefit or protection of the party seeking the regulation's protection.[19]

To provide the procurement professional with a better understanding of the factors the courts and boards consider under their *Christian* analysis, each of the factors reviewed by the court in *Christian* are discussed more fully in the following paragraphs.

The Force and Effect of Law

The court in *Christian* held that "[r]egulations reasonably adapted to the administration of a Congressional act, and not inconsistent with any statute, have 'the force and effect of law.'"[20] Thus if an agency issues a regulation to implement an act of Congress, the regulation has the force and effect of law so long as the regulation does not contravene any statute. This characterization can be misleading, however, since all regulations legitimately enacted by federal agencies have a binding effect on the agency's personnel. Consequently, any regulation could arguably have the force and effect of law.[21]

Fortunately, the *Christian* doctrine does not require the courts and boards to read every procurement regulation into a government contract. Instead, for the purpose of the *Christian* doctrine, a regulation has the force and effect of law only if the regulation is issued pursuant to a statute that reasonably contemplates the regulation.[22] Additionally, the government must have published the regulation in accordance with the requirements imposed by Congress and the Administrative Procedure Act, 5 U.S.C. 553.[23] Regulations that meet these criteria have the force and effect of law because they result from Congress's delegation of its legislative powers to an executive agency.[24] Consequently, their legal status make the regulations binding on persons, including government contractors, regardless of the contractual agreement.[25]

Simply because a regulation has the force

and effect of law, however, does not mean that the regulation will be incorporated into a contract under the *Christian* doctrine. Rather, each regulation must be considered on a case-by-case basis, with the controlling element in each case being the purpose, scope, and underlying intent of the regulation itself.[26] Ultimately a court or board may have to decide whether the omitted clause relates to a deeply ingrained procurement policy. Over the years, however, a substantial body of law has developed concerning the types of procurement policies that the courts and boards have deemed deeply ingrained federal procurement policies. This body of law should assist procurement professionals in their review of omitted mandatory clauses.

Deeply Ingrained Procurement Policies

The courts and boards have incorporated omitted mandatory clauses relating to the following areas into government contracts pursuant to the *Christian* doctrine: the covenant against contingent fees, the Antidiscrimination clause, and the prohibition against cost plus a percentage of cost contracts.[27] Additionally, the boards and courts have found that provisions relating to TINA,[28] the BAA in construction contracts,[29] and the Government-Furnished Property clause also constitute deeply ingrained procurement policies.[30] In fact, at least one court has indicated that the *Christian* doctrine may require the incorporation of provisions that facilitate the sharing of cost and pricing data between departments within the Department of Defense (DOD).[31] The courts and boards also have incorporated clauses relating to the FLSA and the SCA.[32]

Thus, when reviewing a potential contract with the government, procurement professionals should pay particular attention to the mandatory clauses relating to these general areas. They also must be aware, however, of some nuances within these broad categories. Generally these nuances arise in the context of statutory requirements that are not always self-implementing, such as the Davis-Bacon Act (DBA).

The requirements of the DBA are incorporated into government construction contracts pursuant to Federal Acquisition Regulation (FAR) 22.407 required clauses. FAR 22.407 requires the insertion of certain clauses in solicitations and contracts for construction that exceed $2,000. Thus, if the government issues a contract that is clearly for construction, the DBA and its related required clauses are part of the contract irrespective of whether the clause has been included in the contract.[33]

If the contract is for other than construction, but it includes construction aspects, or construction is incidental to the contract, the contract may or may not be subject to the DBA. In these situations, unlike a construction contract, the DBA is not a self-implementing statute.[34] Instead, the CO must determine "that a particular contract is covered by the Act before the contract is subject to the Act."[35] Consequently, the boards and courts will not insert, as a matter of law, a DBA wage determination that is later found to be applicable. Indeed, the courts and boards will distinguish those contracts where the CO determined that the DBA did not apply from those contracts "where the Act clearly applied at the time of award where the omission was an administrative oversight."[36]

The implication of these decisions is that in cases where the contract is clearly for construction, the DBA is part of the contract as a matter of law regardless of whether the clause has been included in the contract.[37] If the contract includes construction aspects or if construction is incidental to the contract, but the contract does not include the DBA clauses, a prudent contractor should inquire whether the CO has made a DBA determination.

Arguably, if the government has determined that the DBA applies to the contract but it fails to include the appropriate Davis-Bacon clauses, the contractor may not be entitled to an equitable adjustment when the clauses are added.[38] Conversely, if the government has made a good-faith determination that Davis-Bacon does not apply and later decides to include the clauses, the contractor probably is entitled to an equitable adjustment.[39]

In addition to inserting omitted clauses, the boards and courts also will use the *Christian* doctrine to replace an incorrect version of a contract clause with the correct version of the clause. In one case, *DWS, Inc.*, the Armed Services Board of Contract Appeals (ASBCA) found that the government had incorrectly

placed the short-form Termination for Convenience clause in a contract for supplies and services.[40] The board could not find any reasonable basis for the CO's decision that "the contract would not provide a basis for a termination claim 'other than for services rendered'" as required in the applicable procurement regulation.[41] Thus by including the incorrect Termination for Convenience provision in the contract, the CO exceeded her authority. The board deleted the short-form Termination for Convenience clause and replaced it with the long-form Termination for Convenience provision pursuant to the *Christian* doctrine.[42]

With regard to omitted mandatory clauses that do not concern a deeply ingrained procurement policy, the probability of a court's or board's incorporating an omitted clause will depend on which party is to benefit from the clause. If the government promulgated a regulation with the force and effect of law for the benefit of government contractors, the courts and boards will protect the contractor's rights and interpret the contract as if it includes the omitted clause. One example of these types of clauses is the Bid Mistakes clause.[43]

If the government waives a nonlegislative regulation that benefits the government only, however, neither the contractor nor the government can avoid the waiver.[44] Moreover, if Congress did not pass a law or if the agency did not promulgate a regulation for the benefit of the party seeking the statute's or regulation's protection and the law or regulation does not concern a deeply ingrained procurement policy, the courts and boards will not incorporate the statute or regulation as a matter of law.[45]

Actual or Constructive Knowledge of the Regulation or Statute

In addition to determining that a regulation concerns a deeply ingrained procurement policy and has the force and effect of law, the courts and boards also must find that the contractor had either actual or constructive knowledge of a regulation. Since such clauses are published in the *Federal Register,* however, neither the courts nor the boards have had any trouble finding that contractors had either actual or constructive knowledge of the clauses that relate to deeply ingrained procurement policies. Moreover, the courts and boards will review the contract to determine whether any other contractual provision mentions the omitted clause. If other provisions of the contract reference the omitted mandatory clause, the courts and boards may construe this fact as evidence of the contractor's knowledge of the omitted mandatory provision.[46]

Limits on the *Christian* Doctrine

The *Christian* doctrine is limited to the incorporation of mandatory contract clauses into an otherwise properly awarded government contract.[47] Although the doctrine's reach has expanded over the years to include other mandatory clauses that do not necessarily concern a deeply ingrained procurement policy, the courts and boards do not apply the doctrine to every case in which a mandatory clause has been omitted. For example, the courts and boards will not invoke the doctrine to incorporate an internal regulatory guideline into a contract that was promulgated for the benefit of the government.

Similarly, the *Christian* doctrine may not apply to all lease provisions. In *Lombardo's Lakeview Resort, Inc.*, the court rejected the government's argument that a Termination for Convenience clause should be incorporated into a lease as a matter of law.[48] The court rejected the government's argument because no specific law required the inclusion of the FAR Termination for Convenience clause in leases. In another case, *Clem Perrin Marine Towing,* however, the Court of Appeals for the Federal Circuit invoked the *Christian* doctrine to make the Standard Form 32 part of a lease contract.[49] The court found that a valid regulation required the use of the form and therefore, the form was part of the contract as a matter of law because it was required by a valid regulation.[50]

The courts and boards also will not permit either party to use the *Christian* doctrine to replace a valid deviation from a mandatory procurement clause with a preferred FAR clause.[51] Likewise the General Accounting Office (GAO) has held that the *Christian* doctrine does not require the preaward incorporation of mandatory provisions when such clauses concern the contract formation process.[52] Moreover the doctrine cannot make

an unresponsive bid responsive.[53]

Similarly, the courts and boards will not use the *Christian* doctrine to replace an applicable FAR clause with a more narrowly drawn agency clause in those situations where the agency clause addressed a policy that was not significant enough to be addressed by the primary body of procurement policies concerning government property.[54] Finally, where the CO is given the discretion whether to incorporate a given clause, the clause will not be read into the contract.[55] This result assumes that the CO did not abuse his or her discretion in deciding not to include the clause.

In addition to the aforementioned limits on the *Christian* doctrine, there is authority that suggests that the courts and boards will not rely on the doctrine in cases involving a nonappropriated fund instrumentality (NAFI). In *F2M, Inc.*, the ASBCA found that the *Christian* doctrine did not require the incorporation of the Protest After Award clause into a NAFI contract because that clause did not meet any of the *Christian* doctrine criteria.[56]

First, the board stated that no specific statutory authority required the insertion of the clause into a NAFI contract. Second, the board found that the clause did not constitute a deeply ingrained procurement policy in the context of a NAFI procurement. More important, however, the board noted that the court in *Christian* had held that contracts of conventional NAFIs which "do not bind appropriated funds, do not create a debt of the United States, and may not be vindicated in this court." Such NAFIs were not included in, or subject to, procurement regulations.

An unresolved issue is whether the *Christian* doctrine applies to subcontracts where the statute or procurement regulations mandates that a clause be flowed down to subcontractors.[57] In light of the fact that there are several FAR clauses that must be flowed down to subcontracts, it is surprising that this matter has not been addressed by the courts or boards.[58] In one decision, the government argued that because the DOD clause on rights in technical data was required to be flowed down to the subcontractor, that clause was binding on the subcontractor under the *Christian* doctrine.[59] The court observed that "the government asks us to render a decision of first impression."[60] Regrettably, the court held that the appeal could be resolved without having to decide the issue involving the *Christian* doctrine.

There are numerous clauses that are not mandated by either law or procurement regulation to be flowed down to a subcontractor; however, it would be prudent for a prime contractor to flow many of the clauses into their subcontracts. For example, the failure to flow down a Termination for Convenience clause could make the prime contractor liable for anticipatory profits if the government terminates the contract for convenience.[61] If no statutory or regulatory mandate exists for the prime contractor to flow down a clause, it is highly unlikely that a court or a board would use the *Christian* doctrine to insert the clause into the subcontract.[62]

Reverse *Christian*

In addition to incorporating a clause into a contract as a matter of law pursuant to the *Christian* doctrine, the courts and boards also will remove from a contract a clause that is inconsistent with law or regulation.[63] In *Charles Beseler Company*, the board denied the appeal of a CO's decision rejecting two value engineering change proposals. The board found the ASPR's prohibition against the inclusion of the Value Engineering clause in a procurement for commercial items rendered the clause void and unenforceable.[64] Thus the government was not bound by the clauses. The courts and boards, however, infrequently use the *Christian* doctrine in this manner. In fact, one board, the Post Office Board of Contract Appeals, has stated that the *Christian* doctrine should not be used to delete a special clause agreed to by the parties from a contract.

FINAL CONSIDERATIONS

As shown by the preceding discussion, any analysis concerning the *Christian* doctrine requires the procurement professional to consider myriad factors. Some of the questions a procurement professional should consider when confronted with an omitted mandatory clause or a clause that appears to be inconsistent with a law or regulation are

- Does the statute or procurement regulation have the force and effect of law?

- Is the clause mandatory pursuant to a statute or procurement regulation?
- Does the statute or procurement regulation concern a deeply ingrained procurement policy?
- Was there constructive notice of the procurement regulation such as publication in the *Federal Register*?
- Was the mandatory procurement regulation written to benefit or protect the party seeking the incorporation of the regulation?
- Does the statute or procurement regulation authorize the agency to deviate from the procurement regulation?
- Did the authorized procurement official grant a deviation from the mandatory procurement provision?
- Is the inclusion or exclusion of the clause within the CO's discretion?

To avoid being taken by surprise, government contractors must keep abreast of required regulations to ensure that they are not at a disadvantage because a mandatory clause was not included in the original written contract. If the contract does not contain an authorized deviation for an omitted clause, or if a CO mistakenly concluded that a clause did not apply, the contractor may be forced to incur costs or obligations it did not anticipate when submitting its bid or proposal. Since it will do no good to argue, "Hey, I didn't agree to that!" a prudent offeror should be aware of the risks involving the *Christian* doctrine.

ENDNOTES

1. G.L. *Christian* & Assoc. v. *United States,* 160 Ct. Cl. 1, 312 F.2d 418 *rehearing denied,* 170 Ct. Cl. 58, 320 F.2d 345, *cert. denied,* 375 U.S. 954 (1963) (Termination for Convenience clause read into a construction contract by operation of law even though the clause had been deliberately omitted).
2. John Cibinic Jr. and Ralph C. Nash Jr., *Administration of Government Contracts* (Washington, D.C.: The George Washington University, 1985).
3. *See Charles Beseler Company,* ASBCA No. 22669, 78-2 BCA 13,483.
4. James M. Roberts, "Small Business Policy in the Government Procurement Process," 15 *J. Pub. L.* 30, (1966) at 32-33.
5. "Mandatory Clauses: The Regulations Override the Contract," *The Nash & Cibinic Report,* 27, (No. 2, February 1990).
6. *Christian,* 312 F.2d at 424.
7. *Id.* at 426, 427.
8. *Id.* at 424.
9. *Id.*
10. *Id.* at 426.
11. *Id.* at 427.
12. *G.L. Christian & Assoc. v. United States*, 320 F.2d 345, 351, *cert. denied*, 375 U.S. 954 (1963).
13. *Id.*
14. *Id.*
15. *S.J. Amoroso Const. Co., Inc. v. United States,* 12 F.3d 1072, 1075 (Fed.Cir. 1993).
16. *Federal Crop Ins. v. Merrill,* 332 U.S. 380, 384, 68 S. Ct. 1, 3 (1947).
17. *Id.*
18. *Chamberlain Mfg. Corp.*, ASBCA No. 18103, 74-1 BCA ¶10,368.
19. *Chris Berg, Inc. v. United States*, 426 F.2d 314, 317, 192 Ct. Cl. 176 (1970).
20. *Christian*, 320 F.2d at 350 (*citing* as examples *Maryland Casualty Co. v. United States,* 251 U.S. 342, 349 (1920); *United States v. Barnard,* 255 F.2d 583, 589 (10th Cir. 1958), *cert. denied*, 358 U.S. 919. *See also* Herman M. Braude and John Lane Jr., "Modern Insights on Validity and Force and Effect of Procurement Regulations-A New Slant on Standing and the *Christian* Doctrine," 31 *Fed. B. J.* 99 (Spring 1972).
21. *See Rehart v. Clark*, 448 F.2d 170, 173 (9th Cir. 1971) (the Court incorporated a Department of the Navy Bupers Instruction into an enlistment contract).
22. *See generally Chrysler Corp. v. Brown,* 441 U.S. 281, 300-304, 99 S. Ct. 1705, 1717-1718 (1979).
23. *Id.* at 303.
24. See John Cibinic Jr. and Ralph C. Nash Jr., "Legal Status of Government Manuals and Instructions," 1 *Nash and Cibinic Report* 169 (No. 10, 1987).

25. *Id.*

26. Braude and Lane, *supra* note 20, at 111.

27. *Chamberlain,* 74-1 BCA ¶10,368.

28. *University of California, San Francisco,* VABCA No. 4661 97-1 BCA ¶ 28,642.

29. *Amoroso,* 12 F.3d at 1075.

30. *Rehabilitation Services of Northern California,* ASBCA No. 47085, 96-2 BCA ¶ 28,234.

31. *SCM Corp. v. United States,* 645 F.2d 893, 904 (1981).

32. *Miller's Moving Co.*, ASBCA No. 43114, 92-1 BCA ¶24,707; *Telesec Library Service*, ASBCA 42968, 92-1 BCA ¶24,650.

33. *BUI Contr. Co. & Building Supply,* ASBCA No. 28707, 84-1 BCA ¶17,183.

34. *See Bell South Communications, Inc.*, ASBCA No. 45955, 94-3 BCA ¶27,231.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Miller's Moving Co.*, supra note 32.

39. *Bell South Communications,* Inc., supra note 34.

40. *DWS, Inc.*, ASBCA No. 29742, 29865, 90-2 BCA ¶22,696.

41. *Id.*

42. *Id.* In a recent case, *Mid-Atlantic Security Services, Inc.*, ENG BCA No. 6302, 1997 WL 305904, the board distinguished cases where a CO abuses his discretion in using the short form of the Termination clause, such as in *DWS, Inc.* versus the instant case where there was no abuse of discretion.

43. *Chris Berg, Inc. v. United States, supra* note 19 at 317.

44. *Transcontinental Cleaning Co.*, NASA BCA No. 1075-9, 78-1 BCA ¶13,081.

45. *Rough Diamond Co., Inc. v. United States*, 351 F.2d 636 (1965).

46. *See generally Christian*, 320 F.2d at 351.

47. *Community Asphalt Corp.*, B-249475; B-249475.2, 92-2 CPD ¶178.

48. *Lombardo's Lakeview Resort, Inc.*, ENGBCA No. 5873, 93-3 BCA ¶26,093; and *Patio Pools of Sierra Vista, Inc.,* 88-1 CPD ¶345 (unpublished).

49. *Clem Perrin Marine Towing, Inc. v. Panama Canal Company,* 730 F.2d 186, 188 (5th Cir. 1984).

50. *Id.*

51. *Old Dominion Sec., Inc.*, ASBCA No. 47001, 95-1 BCA ¶27,633; *see also Montana Refining Company,* ASBCA No. 44250, 94-2 BCA ¶26656.

52. *See Diemaco, Inc.*, B-246065, 91-2 CPD ¶ 414; *American Dredging Co.*, B-244790, 91-2 CPD ¶396.

53. *E.K. Gubin*, B-164797, 1968 CPD ¶ 62.

54. *Computing Application Software Technology, Inc.*, ASBCA No. 47554, 96-1 BCA ¶28,204.

55. *Muncie Gear Works, Inc.*, ASBCA 16153, 72-1 BCA ¶9,429.

56. *F2M, Inc.*, ASBCA No. 49719, 1997 ASBCA LEXIS 92.

57. *See generally*, Leslee A. Ellenson, "Flow-Down Clauses in Subcontracts," *Contract Management,* November 1993, at 10.

58. In *Christian*, Christian & Associates was referred to as the "nominal prime contractor" because the subcontractors were solely performing the contract. *Supra* at 422. The decision provides no insight regarding subcontractors. In this regard, since the Termination for Convenience clause is not a mandatory flow down clause, the issue of whether the clause should flow down by operation of law never arose.

59. *Decoto, Inc. v. Navy, 883 F.2d 774 (9th Cir. 1989).*

60. *Id.* at 777.

61. *See generally, Van Engers v. Perini Corp.*, 1993 WL 235911, WL Pg. 9 (E.D. PA, 1993) (subcontractor on highway contract able to recover anticipatory profits from prime contractor whose contract was terminated for convenience by the government).

62. In *K.L. Conwell Corp.*, EBCA No. 399-10-87, 88-2 BCA ¶ 20,712, the Department of Energy Board of Contact Appeals declined to use the *Christian* doctrine to insert the Disputes clause into a subcontract.

63. *Charles Beseler* Company, supra note 3.

64. *General American Transportation Corp., General American Research Division,* PSBCA No. 67, 74-2 BCA ¶10,935.

Figure 1

Applications of the *Christian* Doctrine

The footnotes form an integral part of this figure and should be read in conjunction with the table.

Provision or Clause*	How the Christian Doctrine Applies	Commentary
FAR 14.406 Mistakes in Bids	Protects class of persons (2)[i]	*Chris Berg, Inc. v. United States,* 426 F.2d 314, 318 (Ct. Cl. 1970).
FAR Subpart 25.2 Buy American Act— Construction Materials	Force of Law(1)[ii]	*S.J. Amoroso Constr. Co. v. United States,* 12 F.3d 1072, 1075 (Fed. Cir. 1993).
FAR Subpart 32.8 Assignment of Claims	1	*Rodgers Construction., Inc., and Fed. Ins.* Co., IBCA 2777; IBCA 2835; IBCA 2836, IBCA 2837; IBCA 2838, 92-1 BCA ¶24503 at 135,212.
FAR 37.107 Service Contract Act of 1965 (as amended 41 U.S.C. 35 et seq.)	1	*Miller's Moving Co.*, ASBCA 43114, 92-1 BCA ¶24707 at 123,326.
FAR 45.106 FAR 52.245-2 Government Property	1	*Rehabilitation Services of Northern California*, ASBCA 47085, 96-2 BCA ¶28324 at 141,426.
FAR 49.502 Termination for Convenience of the Government[iii] FAR 43.205(a)(4)Changes	1	*DWS, Inc.*, ASBCA No. 29865, 29742, 90-2 BCA ¶22696 at 113,987.[iv] *GAI Consultants, Inc.*, ENGBCA No. 6030, 95-2 BCA ¶27620 at 101,703.[v]
FAR 52.211-18 Variation in Estimated Quantity	N/A	*Lambrecht & Sons, Inc.,* ASBCA No. 49515, 1997 WL 722014 (November 17, 1997).
FAR 52.215-22 Price Reduction for Defective Cost or Pricing Data	1	*University of California, San Francisco,* VABCA No. 4661, 97-1 BCA ¶28642 at ___.[vi]
FAR 52.219-14 Limitations on Subcontracting	1	*Alphanumeric Systems., Inc.,* SBA No. 3152 at 6168 (1989).

FAR 52.222-6 Labor Clauses[vii]	1	*BUI Contr. Co. & Bldg. Supply*, ASBCA 28707, 84-1 BCA ¶17183 at 85,578. But see *BellSouth Communications Systems, Inc.*, ASBCA 45955, 94-3 BCA ¶27231 at 135,699-70.[viii]
FAR 52.222-14 Disputes Concerning Labor Standards	1	*Spectrum Am. Contractors*, ASBCA 33039, 87-2 BCA ¶19864 at 100,482-3.[ix]
FAR 52.222-26 Equal Opportunity	1	*Benjamin P. Garcia*, ASBCA 18035, 73-2 BCA ¶10196 at 48,066.[xi]
FAR 52.222-43 Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts)	1	*Telesec Library Service*, ASBCA 42968, 92-1 BCA ¶24650 at 122,987.
FAR 52.232-7 Payments	1	*General Eng'g & Mach. Works*, ASBCA 38788, 92-3 BCA ¶25055 at 124,870-71, affirmed, 991 F.2d 775, 780 (Fed. Cir. 1993).[xi]
FAR 52.232-16 Progress Payments	N/A	*B.M.S., Inc.*, ASBCA 35430, 90-2 BCA ¶22644 at 113,583-4.
FAR 52.233-1 Disputes	1	*Santa Fe-Andover Oil Co.*, ASBCA 35256, 88-2 BCA ¶20607 at 104,140.
FAR 52.233-1 Disputes (Subcontractors)	N/A	*K.L. Conwell Corporation*, EBCA No. 399-10-87, 88-2 BCA ¶20712 at 104,662.[xii]
FAR 52.233-3 Protest After Award	1	*COMSI, Inc*, ASBCA No. 34588, 88-1 BCA ¶20245 at 102,476.[xiii]
FAR 52.233-3 Protest After Award	N/A[xiv]	*F2M, Inc.*, ASBCA No. 49719, 1997 ASBCA LEXIS 92, 18 (1997).[xv]
FAR 52.248-1 Value Engineering	2[xvi]	*Linda Vista Indus., Inc.*, B-214447; Unpublished B-21447.2, 84-2 CPD ¶ 380 at 37,467.
FAR 52.249 Termination for Convencience of the Government	1[xvii]	*G.L. Christian & Assoc. v. United States*, 160 Ct. Cl. 1, 312 F.2d 418, 427, 160 Ct. Cl. 58, 320 F. 2d 345, cert. denied, 375 U.S. 954 (1963), 170 Ct. Cl. 902, cert. denied, 382 U.S. 821 (1965). *Aerolease Long Beach & Satsuma Investment, Inc. v. United States*, 31 Fed. Cl. 342, 374 (1994).

Authorized for Deviations		*Montana Refining Company*, ASBCA No. 44250, 94-2 BCA ¶26656 at 132,614.[xviii] *Old Dominion Security, Inc.*, ASBCA No. 47001. 95-1 BCA 27366 at 136,363.[xix]
Implied Patent Indemnity Agreements	1[xx]	*Hughes Aircraft Company v. United States*, 15 Cl.Ct. 550, 556-557 (1989).
Application of Weighted Guidelines	1[xxi]	*Bethlehem Steel Corporation v. United States*, 423 F.2d 300, 307 (1970).
Lease Contracts	N/A	*Lombardo's Lakeview Resort, Inc.*, ENGBCA No. 5873, 93-3 BCA ¶26093 at 102,323.[xxii]
NASA Clause 18-52.245-72 Liability for Government Property Furnished for Repair or Other Service	N/A	*Computing Application Software* Technology, Inc., ASBCA No. 47554, 96-1 BCA ¶28204 at 140,767
Sales Contracts	N/A	*Newhall Refining Co. Inc., et al.*, EBCA No. 363-7-86 to 369-7-86, 87-1 BCA ¶19630 at 99,373.[xxiii]

*The FAR was prescribed for use by all executive agencies in their acquisition of supplies and services with appropriated funds and became effective April 1, 1984.

i. If the law was enacted to protect a class of persons, the government cannot fail to include the clause in the contract if the contract is with the class of persons that the law seeks to protect.

ii. The law requires that this clause be incorporated into the contract. The contractor had constructive notice of the inclusion of the clause because it was published in the *Federal Register.*

iii. FAR 52.249-1, 52.249-2, 52.249-3, 52.249-4, 52.249-5.

iv. The board held that the *Christian* doctrine would incorporate the appropriate Termination for Convenience clause as a matter of law, regardless of which clause was actually incorporated into the contract.

v. This case deals with FAR 52.243-1 Changes—Fixed Price, which has several alternatives for various situations. The contract in question used the wrong alternative (ALT I versus ALT III) and the court found "as a matter of law" that the appropriate alternative would be read into the contract.

vi. TINA.

vii. The referenced case predates the FAR. In this case, the board incorporated the requirements of 40 U.S.C. §276a, the Davis-Bacon Act, into the contract under the *Christian* doctrine. The requirements of the Davis-Bacon Act are incorporated as part of the FAR 22.407 required clauses. FAR 22.407 provides that the following clauses be inserted in solicitation and contracts in excess $2,000 for construction within the United States: 52.222-6 Davis-Bacon Act; 52.222-7 Withholding of Funds; 52.222-9 Apprentices and Trainees; 52.222-10 Compliance with Copeland Act Requirements; 52.222-11 Subcontracts (Labor Standards); 52.222-12 Contract Termination-Debarment; 52.222-13 Compliance with Davis-Bacon and Related Act Regulations; 52.222-14 Disputes Concerning Labor Standards; and, 52.222-15 Certification of Eligibility. The application of the *Christian* doctrine to these other clauses is not certain, except as noted in other areas above.

viii. This case is distinguished from the *BUI Construction*. In *BellSouth*, the contract was primarily for the supply of telephone equipment and the construction work was an incidental component to the contract. In this case, the board held that "when a Davis-Bacon Act wage determination is found applicable after award, the contracting officer shall either terminate or 'Modify the contract ... and equitably adjust the contract price if appropriate.' FAR 22.404-9." *BellSouth* at 10,723. The board went on to say "The Davis-Bacon Act is not self-implementing. A determination must be made by the Government that a particular contract is covered by the Act before that contract is subject to the Act..In these circumstances, the *Christian doctrine* is not applicable. This is not a case where the Act was clearly applicable at time of award, and where the omission was a mere administrative oversight." *Id.* at 10,724. The implications of these decisions is that in cases where the contract is clearly for construction, then the Davis-Bacon Act is part of the contract as a matter of law, regardless of whether the clause has been included in the contract. *BUI Construction* at 33,129. If the contract is for other than construction, but it includes construction aspects, or construction is incidental to the contract, and the contract does not include DBA clauses, then the contractor should be on notice to inquire as to whether the government has made a Davis-Bacon Act determination. Arguably if the government has determined that Davis-Bacon applies, but fails to include the clauses, then the contractor may not be entitled to an equitable adjustment when the clauses are added. *Miller's Moving* at 15,632-33. Conversely, if the government has made a good faith determination that Davis-Bacon does not apply, and later determines that it does apply, the contractor is entitled to an equitable adjustment. *BellSouth* at 10,724.

ix. This decision dealt with a Defense Acquisition Regulation (DAR) clause, the applicable FAR clause is referenced in the table.

x. This is a pre-FAR decision dealing with 5 U.S.C. 7151 and Executive Order No. 11478. The purpose and intent of these two items are incorporated in the FAR clause.

xi. This was a DAR case dealing with the use of the proper Payments clause. The contract in this case used the DAR clause 7-103.7, which is equivalent to FAR 52.232-1, even though the contract type was a Time and Materials contract. The board, using the *Christian* doctrine, stated that the appropriate Payments clause should have been 7-901.6, which is equivalent to FAR 52.232-7. Arguably, all the Payment clauses are incorporated by law based on the contract type, regardless of which clause is actually used in the contract. Other Payment clauses are 52.232-2 Payments under Fixed-Price Research and Development Contracts, 52.232-3 Payments under Personal Services Contracts, 52.232-4 Payments under Transportation Contracts and Transportation-Related Contracts, 52.232-5 Payments under Fixed-Price Construction Contracts, and 52.232-6 Payments under Communication Service Contracts with Common Carriers.

xii. With two exceptions, the Disputes clause is not flowed down to subcontractors and the *Christian* doctrine will not require its inclusion. The two exceptions occur where either (1) the totality of the circumstances indicates that the subcontractor has privity with the government, or (2) the prime contractor is acting as a purchasing agent for the government.

xiii. Appropriated funds.

xiv. The *Christian* doctrine is not applicable to the particular clause/set of facts.

xv. Nonappropriated funds. Arguably the case could be extended to make the Christian doctrine inapplicable to any nonappropriated fund contract. In other words, the board appears to be saying that if the source of the funding is from nonappropriated funds, the parties get what they bargained for, and no additional clauses will be read into the contract.

xvi. The government argued that this clause was incorporated into the contract under the *Christian* doctrine. The court, in dicta, indicated that the clause was mandatory but decided the case against the contractor on a "no harm, no foul" basis. Thus it is not certain that this clause is included automatically under the *Christian* doctrine.

xvii. The *Christian* doctrine also can apply in cases where the government uses the wrong version of a particular clause. In *Carrier Corp.*, GSBCA 8516, 90-1 BCA ¶22,409 at 114,018, the government incorporated FAR 52.249-4 Termination for Convenience of the Government (Services) (Short Form) The appellant argued, and the board decided, that the appropriate

clause should have been FAR 52.249-2 Termination for Convenience of the Government (Fixed Price). See also *General Eng'g & Mach. Works,* ASBCA 38788, 92-3 BCA ¶25,055, *affirmed,* 991 F.2d 775 (Fed. Cir. 1993).

xviii. If there is an authorized FAR deviation, then the *Christian* doctrine will not apply. In this case, the contract was an indefinite quantity contract and the government attempted to invoke the *Christian* doctrine to replace an authorized deviation from the FAR's Termination for Convenience clause with the applicable FAR clause, to avoid responsibility for minimum quantities.

xix. This case dealt with an authorized deviation from FAR 52.222-43, GSAR 552.222-43, dealing with Department of Labor wage determinations.

xx. The court did not decide whether the patent indemnity agreements would be brought into the contract via the *Christian* doctrine but did note in dicta that these agreements may be read into the contract. The applicable FAR clauses can be found in FAR Subpart 27.2.

xxi. Although the court never refers to the *Christian* doctrine in the case, the court does state that contractors have the right to insist that the government use the weighted guidelines for determining profit policy, absent any other express agreement as to profit.

xxii. See footnote 23 regarding the use of the *Christian* doctrine in sales contracts. Here the government argued that the *Christian* doctrine would incorporate a Termination for Convenience clause. The court rejected the government's argument because there was no specific law requiring that the FAR Termination for Convenience clause be included in leases. Conversely, the court of appeals invoked the *Christian* doctrine to make the Standard Form 32 part of a lease contract in *Clem Perrin Marine Towing.* The court found that the form was part of the contract as a matter of law because it was required by a valid regulation. *Clem Perrin Marine Towing, Inc. v. Panama Canal Company,* 730 F.2d 186, 188 (5th Cir. 1984).

xxiii. The FAR only applies to acquisition contracts. Therefore so long as there is no other law requiring a particular clause to be included in Government Sales contracts, the *Christian* doctrine will not apply. In this case, the government attempted to invoke the *Christian* doctrine to use the Termination for Default clause.