CHRISTIAN DOCTRINE INCLUDES SERVICE CONTRACT ACT CLAUSE

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Here is another board case where the Christian Doctrine mandated the inclusion of the Service Contract Act ("SCA") Clause, even though the agency failed to include it in the solicitation. *Innovative Tech., Inc.,* ASBCA Nos. 61686, 62185. There were a few clues in the solicitation that should have prompted the offeror's questions about the SCA clause.

The Defense Media agency issued a solicitation for a requirements contract for visual information/media system installation services and equipment, with the use of task orders. This contract was clearly for the furnishing of services in the United States through the use of service employees, so it was governed by the SCA. However, FAR 52.222-41, the SCA clause, was not included in full text or incorporated by reference in the solicitation, the contract or any of the task orders issued to Innovative. The contract and solicitation did include a wage determination (No. 94-2103 REV 35).

Although Innovative submitted two questions prior to submitting its offer, neither concerned the applicability of the SCA before the award. Based on a tip, as Innovative was completing its final task order, the Department of Labor ("DOL") began a labor enforcement investigation. Aside from adding the SCA clause, DOL's investigation charged Innovative with failure to pay prevailing wages and misclassification of employees. DOL made a $1.8 million assessment against Innovative requiring it to retroactively pay its workers, which was reduced to a settlement amount of $1.5 million.

Innovative subsequent submitted a Request for Equitable Adjustment for $1.5 million plus "applicable burdens" of $853,00, for a total of $2.4 million. Innovative argued it was entitled to this adjustment under FAR 22.1015 ("Discovery of Errors by DOL") but also based on equitable adjustment language in certain modifications.

The agency issued a final CO decision finding that Innovative was entitled to $569,000. Innovative challenged the final decision and sought $2.4 million in its appeal.

The Board held that this contract plainly fell within the purview of the SCA, regardless of whether Innovative interpreted the contract properly. Further, the agency omission of the SCA did not alter the fundamental nature of the contract, nor the applicability of the SCA. As a matter of law, the SCA's requirements and the wage determination applied to both parties from the inception of the contract. The Christian Doctrine requires that SCA provisions will apply to a government contract even where they are left out of the solicitation or contract. *Christian & Assocs., v. United Stated,* 312 F 2d 418 (Ct. Cl. 1963) applies because "mandatory contract clause expressing a significant public procurement policy will be incorporated into the contract by operation of law").

The Board further held that Innovative's claim did not fit the criteria for a FAR 22.1015 equitable adjustment—that section deals with errors or omissions in wage determinations, which wasn't the problem here.

The Board also found that Innovative was only entitled to an equitable adjustment where labor rates were actually below the later wage determinations. Finally, Innovative was not entitled to the $569,000 CO final decision because the Board reviews claims *de novo* and decides entitlement and quantum. There was sufficient information for the parties to calculate and agree on quantum, and the Board ordered the parties to submit a joint status report.

Takeaways:

1) If a solicitation appears to include the SCA (such as the inclusion of a wage determination), ask the CO a question. Get this matter clarified before preparing your bid.
2) If the CO does not fully respond, ask the DOL to provide guidance.
3) Whenever there is a wage determination, you will be bound to pay the prevailing wage rates, so do so.

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