# *Office of Dispute Resolution for Acquisition*
## Federal Aviation Administration
## Washington, D.C.

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| Contract Disputes of | ) | |
| | ) | |
| Morpho Detection, Inc. | ) | Docket No. 08-TSA-039 |
| | ) | |
| Under Contracts DTFA01-02-C-00023 and DTSA20-03-C-01900 | ) | |

**DECISION ON REQUEST FOR PARTIAL SUMMARY DECISION**

This Contract Dispute arises out of two contracts (the "Contracts") between Morpho Detection, Inc. ("MDI"),[1] and the Transportation Security Agency ("TSA"). MDI seeks a ruling from the Office of Dispute Resolution for Acquisition ("ODRA") that it is entitled to reimbursement from the TSA for taxes assessed by the State of Washington relating to performance of the Contracts. While the tax reimbursement issue could have been determined by the application of Acquisition Management System Clause 3.4.2-7, "Federal, State, and Local Taxes – Fixed-Price Noncompetitive Contract (April 1996)" ("Clause"), that Clause does not appear in either of the Contracts. According to MDI, however, the Clause should be deemed incorporated into the Contracts under the *Christian* doctrine, which takes its name from *G.L. Christian and Associates v. United States*, 160 Ct.Cl. 1, 312 F.2d 418 (1963). The TSA opposes MDI's argument primarily under the theory that the *Christian* doctrine does not apply to the Acquisition Management System ("AMS").

The issue of applying the *Christian* doctrine to AMS contracts is a matter of first impression. In a status conference held on October 21, 2010, both parties concurred in a request to limit the initial briefing to "a threshold matter, *i.e.*, whether the *Christian* doctrine is applicable to the issue presented in this case." *ODRA Status Conference*

[1] As described in Finding of Fact ("FF") 21, the original contractor to both contracts was InVision Technologies, Inc. The contractor's business identity changed through corporate acquisition to become GE Homeland Security, Inc, and subsequently changed again to become MDI. For simplicity, "MDI" will be used throughout this decision to refer to the contractor regardless of the formal corporate name at the time in question. This continues the practice established by MDI itself in its Initial Brief. *See MDI Initial Brief* at 3.

*Memorandum* of October 21, 2010, at 1. Since both parties rely on factual allegations and legal arguments, the ODRA treats the question presented as a request for partial summary decision under the ODRA Procedural Regulation, 14 C.F.R. § 17.29.

As discussed more fully below, the ODRA declines to adopt the *Christian* doctrine in this case. Rather, consistent with existing ODRA case law, in matters such as this involving an alleged unincorporated mandatory contract clause, the ODRA reviews the issue in the context of AMS requirements, applying contract interpretation principles and considering the contract as a whole in light of the intent of the parties and the actual authority of the Agency's representatives. Where warranted, the ODRA can exercise its broad remedial authority to reform or recommend that the Administrator reform an AMS Contract. In this case the ODRA finds a partial summary decision is precluded because a material issue of fact exists regarding whether TSA contracting officials made the preliminary determination required by the Prescription of the Clause.

## I. Findings of Fact for the Purpose of Summary Decision

### A. The Clause

1. During the time periods relevant to the formation of the contracts,[2] the AMS included the following clause and prescription.

> **3.4.2-7 Federal, State, and Local Taxes--Fixed-Price, Noncompetitive Contract (April 1996)**
>
> (a) Definitions:
>
> (1) "Contract date," as used in this clause, means the effective date of this contract and, for any modification to this contract, the effective date of the modification.

[2] This Finding of Fact cites the April 1996 version of the Clause rather than the later February 2003 version found in MDI Exh. Q. While the texts of the two versions are somewhat different, the language of the prescription – upon which this Decision is based – did not change. The ODRA quotes the earlier version because it was in effect during the negotiation period relating to the letter contract DTFA01-02-C-00023, which was executed in February 2002. *See MDI Exh.* A, *Rosen Decl*. ¶¶ 4 and 5. The record does not reveal when the solicitation for contract DTSA20-0-C-01900 was published.

(2) “All applicable Federal, State, and local taxes and duties,” as used in this clause, means all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract.

(3) “After-imposed tax,” as used in this clause, means any new or increased Federal, State, or local tax or duty, or tax that was excluded on the contract date but whose exclusion was later revoked or amount of exemption reduced during the contract period, other than an excepted tax, on the transactions or property covered by this contract that the Contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date.

(4) “After-relieved tax,” as used in this clause, means any amount of Federal, State, or local tax or duty, other than an excepted tax, that would otherwise have been payable on the transactions or property covered by this contract, but which the Contractor is not required to pay or bear, or for which the Contractor obtains a refund or drawback, as the result of legislative, judicial, or administrative action taking effect after the contract date.

(5) “Excepted tax,” as used in this clause, means social security or other employment taxes, net income and franchise taxes, excess profits taxes, capital stock taxes, transportation taxes, unemployment compensation taxes, and property taxes. 'Excepted tax' does not include gross income taxes levied on or measured by sales or receipts from sales, property taxes assessed on completed supplies covered by this contract, or any tax assessed on the Contractor's possession of, interest in, or use of property, title to which is in the Government.

(b) Unless otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties.

(c) The contract price shall be increased by the amount of any after-imposed tax, or of any tax or duty specifically excluded from the contract price by a term or condition of this contract that the Contractor is required to pay or bear, including any interest or penalty, if the Contractor states in writing that the contract price does not include any contingency for such tax and if liability for such tax, interest, or penalty was not incurred through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer.

(d) The contract price shall be decreased by the amount of any after-relieved tax. The Government shall be entitled to interest received by the Contractor incident to a refund of taxes to the extent that such

interest was carried after the Contractor was paid by the Government for such taxes. The Government shall be entitled to repayment of any penalty refunded to the Contractor to the extent that the penalty was paid by the Government.

(e) The contract price shall be decreased by the amount of any Federal, State, or local tax, other than an excepted tax, that was included in the contract price and that the Contractor is required to pay or bear, or does not obtain a refund of, through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer.

(f) No adjustment shall be made in the contract price under this clause unless the amount of the adjustment exceeds $250.

(g) The Contractor shall promptly notify the Contracting Officer of all matters relating to Federal, State, and local taxes and duties that reasonably may be expected to result in either an increase or decrease in the contract price and shall take appropriate action as the Contracting Officer directs. The contract price shall be equitably adjusted to cover the costs of action taken by the Contractor at the direction of the Contracting Officer, including any interest, penalty, and reasonable attorneys' fees.

(h) The Government shall furnish evidence appropriate to establish exemption from any Federal, State, or local tax when:

(1) the Contractor requests such exemption and states in writing that it applies to a tax excluded from the contract price and

(2) a reasonable basis exists to sustain the exemption.

**(End of clause)**

**PRESCRIPTION**

Shall be used in RFIs/RFPs and contracts when a fixed-price noncompetitive contracts [sic] is to be performed wholly or partly within the United States its possessions or Puerto Rico and *when satisfied that the contract does not contain contingencies for state and local taxes*.

*AMS Clause* 3.4.2-7, "*Federal, State, and Local Taxes--Fixed-Price, Noncompetitive Contract (April 1996)*" (emphasis in prescription added).

**B. Contract DTSA20-0-C-01900**

2. The TSA awarded Contract under DTSA20-03-C-01900 (the "Contract 01900") on August 5, 2003 to MDI. Contract 01900 was a firm fixed price Contract with indefinite delivery/indefinite quantity ("IDIQ") Contract Line Item Numbers (CLINs), as well as time and material ("T&M") CLINs. *MDI Exh.* C. at A-1 and B-1.

3. In general terms, the TSA used CLINs 0001, 0002, and 0003 of Contract 01900 to purchase Explosive Detection Systems ("EDS") to be used in baggage handling facilities at airports. *MDI Exh.* C at § C.3.0. Other CLINs provided for related baggage handling equipment and electronics. *Id.* at CLINs 0005, 0006A-E, and CLIN 0007. The specifications for the equipment are not material to the present Contract Dispute.

4. Section B of Contract 01900 stated, "CLIN 3000 will be used in the event that engineering support or installation services are ordered pursuant to Statement of Work, Section C.3.15." *MDI Exh.* C at B-3. CLIN 3000 included 16 separate labor categories with associated hourly rates, along with pricing for shipping, travel, and materials used for installation services. *Id.* at B-3 and B-4.

5. Work under CLINs 0001 to 0003 obligated the Contractor to properly package the equipment for shipment, but the Contractor was to "install and integrate" the equipment only "when directed by the [contracting officer] by individual delivery orders." *MDI Exh.* C at §§ 3.9.1 and 3.9.2. Installation services were billed to CLIN 3000. *Id.* at § 3.14.

6. The place of delivery or performance (other than for items on the Contract Data Requirements List) was to be specified in individual task orders. *MDI Exh.* C. at § F.5.

7. As demonstrated by special clause H.1, the TSA planned to have a "General Contractor and/or System Integration Contractor" ("General Contractor") at locations where the EDS units would be installed. Clause H.1 defined the level of cooperation expected from MDI and the General Contractor. *MDI Exh.* C. at § H.1.

8. Many standard AMS clauses were incorporated by reference into the Contract, but Section I does not contain the Clause at issue in this Contract Dispute. *MDI Exh.* C. at § I.

9. MDI's TSA Business Manager provided a declaration indicating that MDI did not include contingencies for taxes in the proposal. *MDI Exh.* O, *Rosen Supp. Decl*. ¶ 4.

**C. Contract DTFA01-02-C-00023**

10. On November 23, 2001, the Federal Aviation Administration ("FAA") issued Solicitation Number DTFA01-02-R-00808, seeking proposals for a firm fixed price contract with indefinite delivery/indefinite quantity ("IDIQ") Contract Line Item Numbers (CLINs), as well as time and material ("T&M") CLINs. *MDI Exh.* M at § M.

11. Solicitation Number DTFA01-02-R-00808 did not contain the Tax Clause at issue in this Contract Dispute. *See MDI Exh*. M. § I.

12. On January 11, 2002, MDI submitted a revised cost proposal in response to Solicitation Number DTFA01-02-R-00808. *MDI Exh.* M. The cost proposal expressly states that it "does not include any exceptions and deviation from the cost proposal instructions provided in Section L." *Id.* at Vol. V, page 1. It also stated, "This proposal includes only product manufacturing, time and materials work, and optionally after-warranty service." *Id.* at page 2.

13. On February 19, 2002, the FAA entered into a letter contract ("Letter Contract") with MDI. *MDI Exh.* E at 1; *see also MDI Exh.* A, *Rosen Decl.* at ¶ 5.

14. Bilateral modification 0002, signed on September 6, 2003, indicates that the Letter Contract was definitized as TSA Contract DTFA01-02-C-00023, and states that it "represents the agreement of the parties concerning the definitization from the letter contract to a fully integrated document." MDI *Exh.* E at 1.

15. As definitized, Contract 00023 provided for a mix of goods and services that is very similar to those provided under Contract 01900. *Compare MDI Exh.* E at § B *with* Exh. C § B. Both provided EDS units, electronics, and equipment. *Id.* Both also provided for 16 categories of labor in CLIN 3000, which would be "used in the event that engineering support or installations services are ordered pursuant to Statement of Work, Section C.3.15." *Id.*

16. Also like Contract 01900, Contract 00023 required EDS units to be installed only "when directed by the [contracting officer] by individual delivery orders." *MDI Exh.* E at § 3.9.2.

17. The definitized Contract 00023 did not contain the Tax Clause at issue in this Contract Dispute. *See MDI Exh*. E. § I.

18. On July 16, 2003, MDI provided TSA with "an estimate for the placement of two each CTX 90000s [a model of EDS provided under CLIN 0007] at Seattle Airport SQ 309." *MDI Exh*. G at 1. The document provides two separately priced alternatives, as well as the following statement:

> All work to be performed is in normal working hours. The structural review for the attachment to the buildings steel is by Others. Washington State gross sales tax of 8.8% has not been included in the above pricing if it is applicable. Access to the platform areas will need to remain open for the installation. It is our understanding that badging is not required for this area.

*Id.* at 2.

19. On April 27, 2004, the TSA executed bilateral modification "4" to "add a Contract Line Item Number 0009 for delivery of Installation and Rigging services." *MDI Exh.* F at 1. This modification did not add funds to Contract 00023, nor did it provide any quantities, or pricing for the new CLIN 0009. *Id.* The Statement of Work was also modified to add:

> Section 3.15 9 [sic] (CLIN 0009) – The Contractor shall provide rigging and installation services to support installation of EDS units and related equipment.

*Id.* at 2.

**D. DCAA Audit**

20. MDI's Exhibit P contains email correspondence dated February 6, 2002 with an attachment that provides answers to questions from the Defense Contract Audit Agency ("DCAA"). The date of the message falls between November 2001 when the FAA issued Solicitation Number DTFA01-02-R-00808, and the award of a letter contract in February 2002. *Compare MDI Exhibits* P (answers to DCAA questions) *with* E (definitized Contract 00023) and M (Solicitation Number DTFA01-02-R-00808). Close examination of Exhibit P, however, does not show whether it relates to Solicitation Number DTFA01-02-R-00808 or the resulting Contract 00023. *Id.* Specifically, the cover email, the questions, and the answers do not identify relevant offers, solicitations, items being priced, prices, or other information showing that Exhibit P relates to the Contracts at issue in this Contract Dispute. *Id*. Moreover, the two declarations provided by MDI do not authenticate Exhibit P, and further, do not mention audits or even questions from the DCAA. *See MDI Exhibits* A and O. For the purpose of this Decision, and in the light most favorable to the TSA, the ODRA finds that Exhibit P is neither reliable nor probative evidence. *See* 5 U.S.C. § 556(d).

**E. Change in Ownership**

21. The record does not provide details to the ODRA regarding the succession of interests from InVision, the original contractor under the Contracts, to the present party, Morpho Detection, Inc. Declarations, however, state that GE Homeland Security, Inc., which originally filed the Contract Dispute, was the successor in interest to InVision. *MDI Exh*. A., *Rosen Decl*. at ¶ 2. Morpho Detection, Inc. is the successor in the interests of GE Homeland Protection, Inc. *MDI Exh*. O, *Rosen Supp. Decl.* at ¶ 1.

**F. The Washington State Tax Assessment**

22. On April 22, 2008, the State of Washington assessed MDI taxes, penalties, and interest in the amount $5,423,645.00, for the period from January 01, 2002 through March 31, 2006. *MDI Exh.* H. The assessment was under Washington State tax laws pertaining to use tax/deferred sales tax, and business & operations ("B&O") tax. *Id*.; *see also MDI Exh.* I at 6.

23. MDI filed a "Petition for Correction of Assessment" ("Petition") with the Appeals Division of the State of Washington's Department of Revenue ("Tax Appeals Division"), on August 28, 2010. *MDI Exh.* I at 1.

24. An Administrative Law Judge ("ALJ") from the Tax Appeals Division issued a "Proposed Executive Level Determination" that denied MDI's Petition, and determined that GE Homeland owed both use taxes and B&O taxes. *MDI Exh. R* at 10. The ALJ's Findings of Fact state that GE Homeland "manufactured and sold 46 explosive detection system (EDS) machines that were ultimately installed in Washington International [sic] airports." *Id.* at 2. The ALJ cited only to Contract 01900, and makes no express reference to Contract 00023. *Id.* Throughout his decision, the ALJ uses the singular reference to "the contract."

*See e.g., id*. at 2, 4, 8, and 10.[3] As represented by MDI's counsel, the "Proposed Executive Level Determination" was issued on October 8, 2010. *GE Letter to the ODRA* dated October 14, 2010.

25. On July 20, 2011, the Department of Revenue for the State of Washington issued the "Final Executive Level Determination," which constituted the final action by the Department of Revenue, and required MDI to pay taxes in the amount of $5,757,554.24. MDI Letter to the ODRA dated August 9, 2011.

**G. The Contract Dispute Filed with the ODRA**

26. On December 24, 2008, GE Homeland filed its Contract Dispute with the ODRA. *Contract Dispute* at 1. GE Homeland filed an amended Contract Dispute on March 27, 2009.

27. At the request of the parties, the ODRA stayed its proceedings while GE Homeland's tax Petition was pending before the Tax Appeals Division.

28. On October 20, 2010, after the ALJ issued his "Proposed Executive Level Determination," the ODRA conducted a conference call with the parties. The Status Conference Memorandum of that call reflects:

> At the suggestion of MDI counsel, and with the concurrence of the TSA, it was decided that the adjudication at present would be limited to briefing and a decision on a threshold matter, i.e. whether the "Christian Doctrine" is applicable to the issue presented in this dispute.

*Status Conference Memorandum*, dated October 21, 2010, at 1. A briefing schedule was established. *Id.*

[3] The ODRA does not adopt the ALJ's Findings of Fact, but merely summarizes them for the purpose of explaining the basis of the ALJ's unpublished decision.

29. After the parties submitted briefs, the ODRA concluded that more information was required from the TSA, and directed counsel for the TSA "to provide a supplemental binder …, which must include the following materials:

> 1. All policy statements, guidance statements, and other toolset documents in the TSA Acquisition Management System ("AMS") regarding the interpretation of the word "shall."[1]
>
> 2. All policy statements, guidance statements, and any other toolset documents in the TSA AMS describing the authority of contracting officers to deviate from requirements in the TSA AMS. If authority is vested in an "Acquisition Executive," an Assistant Administrator, or other higher authority for approval, include all TSA AMS documents describing the authority and the approval process.
>
> 3. Provide all records, including but not limited to, all memorandum, approvals, and justifications, which support or relate to the omission of Clause 3.4.2-7, "Federal, State, and Local Taxes--Fixed-Price, Noncompetitive Contract," (April 1996), from any letter contracts, solicitations, amendments, resulting contracts, or modifications at issue in this matter. Only include within the response documents created before December 24, 2008, *i.e.*, before the filing of this Contract Dispute with the ODRA.
>
> All materials provided in response to this letter shall be indexed and separately tabbed as TSA exhibits.
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> ---
>
> [1] *Compare*, "Policy vs. Guidance," found in the Federal Aviation Administration (FAA) AMS, available at http://fast.faa.gov/toolsets/policy.htm.

*ODRA Letter* dated January 4, 2011.

30. At the request of the TSA, the ODRA conducted another conference call on January 21, 2011. TSA explained that it was having difficulties finding responsive materials, and sought leave to submit explanatory declarations if it was unable to comply with the ODRA's Letter dated January 4, 2011. With the concurrence of MDI's counsel, the ODRA permitted TSA to file such declarations if necessary. *Status Conference Memorandum* dated January 24, 2011.

31. On February 1, 2011, TSA filed two declarations to explain the effort to locate responsive documents, and to explain why documents were not available. One declaration is from the Director of the Acquisition Policy Office at the TSA ("Director's Decl."). He declared in part:

> 5. A separate and distinct TSA AMS policy and guidance was never published, codified, or otherwise formalized. Instead, TSA contracting officials relied on the FAA Toolset to obtain policy and guidance related to the AMS.
>
> 6. TSA's internal website contained an internet link that would connect users to the FAA Toolset. That link is no longer accessible. Based on my occasional review of contracts awarded it appeared that when inserting the FAA clauses, the contracting specialist would sometimes replace references to "FAA" with "TSA". There appeared to be some inconsistency in the use of the contract clauses and on occasions no change in the references would be made, or the changes would not be made to all references to "FAA" in the solicitation or contract.
>
> 7. In addition to the internet link to the FAA's Toolset, the TSA AMS policy, guidance, and the TSA AMS clauses were located on the TSA website. The Uniform Resource Locator for the internet link is unknown to me.

*Director's Decl.* ¶¶ 5-7.

32. TSA's second declaration comes from the current contracting officer on Contract 01900 ("CO's Decl."). She indicates that the contracting officer who originally signed both Contracts is no longer employed by the TSA. *CO's Decl.* ¶ 3. Additionally, she states:

> 5. I searched through the official contract file of Contract Number DTFA01-02-C-00023, [sic] I was unable to locate an electronic copy of the file. The official file contains the solicitation, the contract and the contract modifications. The file does not contain any supporting documentation for the contract or supporting documentation for any of the modifications. During my review of the file I did not locate any documentation to explain the absence of the TSA AMS Clause 3.4.2.7 in the contract.
>
> 6. I searched through the electronic and official contract file for Contract Number DTSA20-03-C-01900. The official contract file

> contains the contract and required supporting documentation. The supporting documentation includes a sole source agreement to sole source with InVision Technologies, Inc., a Federal Procurement Data System Report, and a memo to file signed by contracting officer John J. Handrahan that discussed the final outcome of contract negotiations. During my review of the file did not locate any documentation to explain the absence of the TSA AMS Clause 3.4.2.7 in the contract.

*Current Contracting Officer's Decl.* ¶¶ 5 and 6.

## II. Standard for Summary Decision

The ODRA treats the question before it as a request for partial summary decision under the ODRA Procedural Regulation at 14 C.F.R. § 17.29(e). Summary decision may be appropriate when the administrative record before the ODRA shows that there is no genuine issue of material fact, and that the moving party would be entitled to a decision in its favor as a matter of law. *See Consolidated Contract Disputes of Huntleigh USA Corp. v. Transportation Security Administration,* ODRA Nos. 04-TSA-008 and 06-TSA-025. The party seeking summary decision has the initial responsibility to demonstrate the portions of the record that demonstrate the absence of a genuine issue of material fact. *Id.* "When the moving party has shown an absence of evidence supporting the non-moving party's case, the burden shifts to the other party to establish that there is a genuine issue of material fact." *Contract Dispute of Astornet Technologies, Inc.*, 08-ODRA-00466 (citing *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554).

When considering dispositive motions, the ODRA is "mindful of the Supreme Court's guidance that trial courts 'should act … with caution in granting summary judgment.'" *Contract Dispute of Huntleigh USA Corporation, supra (*quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986). Thus, there is a strong preference at the ODRA and in the courts generally, for deciding cases on the merits, rather than by dispositive motion. *See Protest of Water & Energy Systems Technology Inc.*, 06-ODRA-00373.

## III. Discussion

The *Christian* doctrine has been used at the Boards of Contract Appeals, the Court of Federal Claims, the United States Court of Appeals for the Federal Circuit, and predecessor forums for nearly a half-century. The doctrine allows forums to insert mandatory clauses into contracts if the missing clause addresses a "deeply ingrained" strand of federal government contract law. *S.J. Amoroso Construction Co., Inc. v. United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993). The doctrine has been criticized, however, due to the necessarily subjective nature of determining whether a mandatory clause is so "deeply ingrained" that the clause should be part of the contract, and its failure to focus on the intent of the parties. *S.J. Amoroso Construction Co., Inc. v. United States*, 12 F.3d 1072, 1079 (Fed. Cir. 1993) (Plager, J., concurring).

The Contracts presently at issue were written and executed under the Acquisition Management System ("AMS"). The AMS is the product of special statutory authority vested in the Federal Aviation Administration. *See* 49 U.S.C. § 40110(d). The ODRA has never addressed the *Christian* doctrine, and by implication, no AMS clause has ever been incorporated into a contract using the *Christian* doctrine. As discussed more fully below, the Clause at issue here is conditionally mandatory, as the requirement to include it in the Contract depended on whether the contracting officer was satisfied that the contractor's price did not include contingencies for state and local taxes. The record before the ODRA reveals a question of material fact as to whether the contracting officer was satisfied that the price did not contain contingencies.

### A. The *Christian* Doctrine

The case of *G.L. Christian & Associates v. United States* concerned $5.1 million in claims, including anticipatory profits, associated with the termination for convenience of a construction contract for two thousand military housing units at Fort Polk, Louisiana. *Christian*, 312 F.2d at 419. The construction contract, however, did not contain the Armed Services Procurement Regulation (ASPR) Clause 8-703, "Termination for

Convenience of the Government (AUG 1953)" that would have prohibited claims for unearned, anticipatory profits. The prescription for that contract clause stated:

> The following standard clause shall be inserted in all fixed-price construction contracts amounting to more than $1,000, except that the Contracting Officers may, at their discretion, omit the termination clause from fixed-price construction contracts under $5,000 when the probability of termination for convenience is remote, as in contract for repair, improvements, or additions to existing structures[.]

ASPR § 8-703 (AUG 1953), *cited in Christian*, 312 F.2d at n.7 as "Subchapter A of Chapter I of Title 32, CFR (Rev. 1954)." Thus, given the size of the contract, the contracting officers did not have discretion over whether to use or not use the clause. *See Christian*, 312 F.2d at 424. Recognizing that the limitation found in the Termination for Convenience clause "is a deeply ingrained strand of public policy" found in a regulation that had the force and effect of law, the Court of Claims found that the clause was incorporated into the contract as a matter of law. *Id*. at 426.

Many cases since 1963 have invoked the *Christian* doctrine to incorporate into contracts mandatory clauses thought to be part of "deeply ingrained strand[s] of public policy." *See generally, The "Christian Doctrine": What is the Rule*?, 10 *Nash & Cibinic* Rep. ¶ 48 (September, 1996). Courts and boards have also used the *Christian* doctrine to incorporate "less fundamental or significant mandatory procurement contract clauses if not written to benefit or protect the party seeking incorporation." *General Engineering & Machine Works v. O'Keefe*, 991 F.2d 775, 780 (Fed. Cir. 1993). The *Christian* doctrine, however, is not without critics. The most notable critic is Judge Plager, who wrote a concurring opinion in *S.J. Amoroso Construction Co., Inc. v. United States*, 12 F.3d 1072, 1079 (Fed. Cir. 1993) (Plager, J., concurring). He noted that the *Christian* doctrine puts the Government in a more favored position than other contracting parties based on "abstract notions of 'public policy'" that "smacks more of autocratic rule than freedom of

contract." *Id.* Judge Plager also criticized the *Christian* doctrine for its reliance on "ingrainedness," and its failure to focus on the intent of the parties.[4] *Id.*

One line of cases reveals an important limitation on use of the *Christian* doctrine. Specifically, the doctrine is not used by rote to incorporate clauses that depend on the exercise of discretion by the contracting officer. For example, in *Muncie Gear Works, Inc.*, 72-1 BCA ¶ 9,429, the Armed Services Board of Contract Appeals (ASBCA) stated, "The *Christian* case does not require the incorporation of a clause whose applicability is based on the exercise of judgment or discretion." *Muncie Gear Works*, 72-1 BCA at 43,794. In *Muncie*, the contractor sought incorporation of ASPR Clause 6-605.2, "Duty-Free Entry – Canadian Supplies (1970 Feb)," which was required to be part of the contract "unless it is reasonably certain that no supplies will be imported from Canada by the contractor." *Id.*, (citing ASPR § 6-605.2). The contractor argued that the clause was required to be part of the contract because the contracting officer's files did not contain an affirmative, written finding that no supplies would be imported from Canada. The ASBCA rejected the argument because nothing in the regulations required that the determination be made in writing. *Id*. Instead, the ASBCA heard evidence from the parties to decide the question of whether the contracting officer "was 'reasonably certain' that the contract would contain no supplies that would be imported from Canada." *Id.* After finding that the contracting officer was reasonable in his belief that no supplies would come from Canada, the ASBCA did not incorporate the Duty-Free Entry clause into the contract. *Id.*

The ASBCA relied on *Muncie* years later in *Empresa de Viacao Terceirense*, ASBCA No. 49827, 00-1 BCA ¶ 30,796, as it considered a contract without a termination for convenience clause. The Government argued that the nature of the contract favored inclusion of the Short Form Termination for Convenience rather than the standard Termination for Convenience clause. *Id.* at 152,050. The Government favored the Short

[4] This last point -- intent of the parties – is particularly germane considering that one of the "Key Attributes" of the AMS is "*Flexibility* – the ability to make good decisions based on best practices for particular circumstances rather than rigid adherence to standard procedures." *AMS Policy* § 1.5 (October 2001), http://fast.faa.gov/archive/v1001/ams/ams1-5.htm.

Form clause because it limited the Government's liability. *Id.* The ASBCA, however, refused to incorporate the short form clause because the prescription required insertion only if:

> the Contracting Officer determines that because of the kind services required, the successful offeror will not incur substantial changes in preparation for and in carrying out the contract and would, if terminated for convenience of the Government, limit termination settlement charges to services rendered before the date of termination.

*Empresa*, 00-1 BCA at 152,049 (citing FAR 49.502(c). The ASBCA explained:

> The Short Form clause was authorized to be used only if the contracting officer made the determination set forth in FAR 49.502(c) (finding 7), which involved the exercise of discretion. We have authority to review the reasonableness of that exercise where the clause has been included in a contract. *Guard-All of America*, ASBCA No. 22167, 80-2 BCA ¶ 14,462 at 71,300. Here the clause is missing from the contract and we are asked by the Government to correct that omission by making the clause applicable as a matter of law. We do not have authority to take that action inasmuch it would require us to make the initial judgment as to the propriety of using the clause in the contract which is a function assigned by the regulation to the contracting officer. That is consistent with our holding in *Muncie Gear Works, Inc.*, ASBCA No. 16153, 72-1 BCA ¶ 9,429 at 43,794 that "the Christian case does not require the incorporation of a clause whose applicability is based on the exercise of judgment or discretion."

*Empresa*, 00-1 BCA at 152,050-51 (emphasis added). Thus, even forums that accept the *Christian* doctrine do not rush to incorporate clauses that depend on the contracting officer's judgment. Instead, those forums review whether that judgment was exercised appropriately.

Based on the foregoing, and mindful that the present Contract Dispute concerns a conditionally mandatory clause rather than a strictly mandatory clause, the ODRA declines to adopt the *Christian* doctrine in this case. *See, e.g., Sasol North America Inc. v. NLRB*, 275 F.3d 1106, 1113 (D.C. Cir. 2002).

### B. Intent of the Parties and Actual Authority

Although the ODRA does not adopt the *Christian* doctrine in this case, the ODRA will construe the contract consistent with both the intent of the parties and the authority of the agents who act on behalf of the Administrator. "The primary objective of contract interpretation is to give effect to the mutual intent of the parties at the time the contract was entered into." *Contract Dispute of Globe Aviation Corp.*, Docket No. 04-TSA-0007. Furthermore, contracting officers are the Administrator's agents who exercise delegated contracting authority under specific warrants and within published limitations found in the AMS. *Protest of Apptis, Inc.*, 10-ODRA-00557 (Findings and Recommendations of May 13, 2011). Contracting officers are obligated to comply with mandatory language found in the AMS, and waivers may only be obtained from the FAA Acquisition Executive. *Id.*; *AMS Statement on Acquisition Policy vs. Acquisition Guidance*, February 1999 Revision.[5] In this regard, the AMS prescriptions manifest for the public[6] at large: 1) clear limitations on the actual authority of FAA contracting officers, and 2) contract clauses that the Administrator expects to be included in FAA contracts. *See generally*, *Restatement (Third) of Agency*, § 2.01 (manifestation of actual authority).

This observation regarding the AMS as a manifestation of contracting authority and intent shows that the ODRA need not rely on the *Christian* doctrine. Rather, without much difficulty, the ordinary principles of agency and contract interpretation can supply an appropriate analytical framework for resolving questions of omitted clauses. For example, when a contract omits a strictly mandatory clause, a contractor has notice via the published requirements of the AMS of the Agency's intent to include the clause and the contracting officer's scope of authority. *See Restatement (Second) of Contracts*, §§ 153(b) and 161(c) (reason to know of mistake); *Restatement (Third) of Agency*, § 2.03

[5] This archived version is available at http://fast.faa.gov/archive/v1001/toolsets/policy.htm.

[6] The FAA announced in the Federal Register "the availability of the FAA Acquisition Management System standard clauses," and sought the "widest possible distribution and availability." *Announcement of Federal Aviation Administration Acquisition Management System Standard Clauses and Provisions*, 61 Fed.Reg. 31210-10 (June 19, 1996). The announcement indicated that the clauses were available on the FAA's internet service, and that copies could also be requested by mail. *Id.*

(apparent authority must be traceable to principal's manifestations); *see also Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). Moreover, consistent with the ODRA's broad authority to recommend remedies,[7] essential terms may be incorporated into the contract under the principles found in § 204 of the *Restatement (Second) of Contracts*, which provides that "when the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of the rights and duties, a term which is reasonable in the circumstances is supplied by the court." *Restatement (Second) of Contracts*, § 204; s*ee also, Pacific Gas and Elec. Co. v. United States*, 536 F. 3d 1282, 1289-90 (Fed. Cir. 2008). On this point, the comments to § 204 provide insightful guidance:

> Sometimes it is said that the search is for the term the parties would have agreed to if the question had been brought to their attention. Both the meaning of the words used and the probability that a particular term would have been used if the question had been raised may be factors in determining what term is reasonable in the circumstances. <u>But where there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process.</u>

*Restatement (Second) of Contracts*, § 204, cmt. d. (emphasis added). The ODRA, therefore, has at its disposal familiar contract principles and remedies that can effectuate the intent of the parties on a case-by-case basis.

### C. Analysis of the Present Contract Dispute

An analysis based on the intent of the parties is particularly appropriate for the present Contract Dispute, which involves a conditional clause that would be required only after an initial exercise of discretion by the contracting officer. FF 1. The ODRA must consider whether an initial determination regarding tax contingencies was rendered by the contracting officer, and if so, whether that determination was arbitrary, capricious or an abuse of discretion. *See Guard-All of America*, ASBCA No. 22167, 80-2 BCA ¶ 14462 (citing *Muncie, supra*.), cited by *Empressa, supra.* This approach dovetails perfectly into the AMS requirement that contracting officers must rely on a rational basis when exercising their vested discretion. *See generally, Statement on Acquisition Policy*

[7] *See* 14 C.F.R. § 17.23(f).

*vs. Guidance* (Archive Version, Revised February 1999). It also is consistent with the emphasis in the AMS on flexibility in response to the contractual circumstances. *See fn. 4, infra.*

Accordingly, this Contract Dispute involves an initial question of fact, i.e., whether the contracting officer was "*satisfied*" that the contract did not contain contingencies for state and local taxes. FF 1 (emphasis added). Relying on circumstantial evidence, MDI asks the ODRA to infer that the contracting officer must have been satisfied that the prices did not include contingencies for taxes. *MDI Initial Brief* at 9. Specifically, MDI offers evidence to show that its pricing during contract negotiation did not include contingencies for state and local taxes. *See* FF 9 and 11; *but see also* FF 20. MDI also highlights that the Contracts did not specify locations for such installation services (FF 5, 6, 15, and 16), and that therefore, MDI could not estimate an appropriate contingency for every possible jurisdiction. *MDI Initial Brief* at 9. But other circumstantial evidence conflicts with MDI's position. For example, the Contracts themselves omit the Clause (FF 8 and 17), and could support a reasonable factual inference that the omission was intentional rather than unwitting given that contractors presumably read and understand their contracts before signing. *See, e.g., Kernersville Builders & Remodeling*, DOTCAB No. 2906, 96-2 BCA ¶ 28552 (a contractor "is presumed to have read the contract before signing it, and to have had a reasonable understanding of its terms"). Further support for this inference lies in the fact that MDI offers no evidence showing that it requested inclusion of the Tax Clause during negotiations of these non-competitive contracts prior to execution, and Contract 00023 expressly describes itself as "fully integrated." FF 14. Finally, it should be noted that neither party cites testimony or other statements from the contracting officer in question.[8]

In light of the contradictory evidence, the ODRA finds that a material issue of fact precludes summary decision.[9] Furthermore, without a clear and undisputed record

[8] The specific contracting officer no longer works for the TSA. *See Current Contracting Officer's Decl.* ¶ 3.

[9] Under the *Christian* doctrine, the ODRA would face the same question of whether the contracting officer was satisfied that contingencies were not included in the contract price. *See Muncie* and *Empresa*, *supra*.

regarding whether the contracting officer made the requisite determination under the prescription for the Clause, other issues of fact and law also prevent a summary decision. Specifically, if the contracting officer failed to consider the issue, or if his determination lacked a rational basis, further material questions arise as to whether some form[10] of the Clause "is essential to a determination of the rights and duties" of the parties, and whether incorporation is "reasonable in the circumstances." *Jay Cashman, Inc. v. United States*, 88 Fed. Cl. 297, 307-8 (2009) (denying summary judgment) (quoting *Restatement (Second) of Contracts* § 204).

## IV. CONCLUSION

Treating the present question before the ODRA as a request for a partial summary decision, and finding that material issues of fact are present, the ODRA declines to apply the *Christian* doctrine in this case and denies the Request.[11]

_____
John A. Dietrich
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

_____
Anthony N. Palladino
Director,
FAA Office of Dispute Resolution for Acquisition

September 16, 2011

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[10] *See* footnote 2, *supra*, discussing the revision to the Clause that occurred while the Contracts were under negotiation.

[11] This is an interlocutory decision. It will become final and appealable once incorporated into a final agency order at the conclusion of this Contract Dispute.