IS THE ENTIRE FEDERAL ACQUISITION REGULATION (FAR) INCORPORATED IN YOUR GOVERNMENT CONTRACT?

The Federal Acquisition Regulation ("FAR") is found in Title 48 of the Code of Federal Regulations. It consists of 37 Chapters (Chapter 1, some 2,000+ pages, which applies to all agencies, and then various agency supplements plus the Cost Accounting Standards). In all, the FAR is thousands of pages long. Are all of the relevant parts of the FAR incorporated into your government contract? The simple answer is "NO," but first a bit of background.

A recent Court of Federal Claims Case, *James M. Fogg Farms, Inc. v. United States,* No. 17-188C (Fed. Cl. Sept. 27, 2017), considered a similar issue. The question in *Fogg* was whether federal statutes (specifically, an Agriculture Conservation Program in the Farm Bill, title 16 of the U.S. Code) was incorporated in their contract with the Department of Agriculture for that specific program, and whether the government had breached that term in the law. The Court held that there was no specific term in *their* contract that gave rise to Fogg's claim of breach, and ruled against Fogg. The Court further explained that it is "reluctant to find that statutory or regulatory provisions are incorporated into a contract with the government unless the contract explicitly provides for their incorporation," citing *St. Christopher Assocs., LP v. United States*, 511 F. 3d 1376, 1384 (Fed. Cir. 2008), further citing *Smithson v. United States,* 847 F. 2d 791, 794 (Fed. Cir. 1988). Both of the two Federal Circuit cases make it clear that wholesale incorporation of regulations into a contract could allow a contracting party to choose among many regulations as to a particular cause of action, rather than the specific requirements in the actual contract.

So exactly what is the FAR, and when is it (or part of it) incorporated into a government contract. FAR 1.101 says that

> The Federal Acquisition Regulations system is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR.

FAR 2.101 also states that "Acquisition" means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated and evaluated.

You may search high and low in the FAR, but you will find nothing that states that the FAR is incorporated into government contracts as a whole. *See Edwards & Nash, "The FAR: Does It Have Contractual Force and Effect?" 31 Nash & Cibinic Report NL ¶10 (Feb. 2017).* The Court cases (and this Edwards and Nash article) make it clear that in order for a specific FAR sentence or section to be included in your contract, the contract must explicitly so state or be incorporated by reference.

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There are certain clauses that incorporate a FAR section by reference. For example, the clause on "Allowable Cost and Payment" states:

> The Government will make payments to the Contractor…in amounts determined to be allowable …in accordance with the Federal Acquisition Regulation (FAR) subpart 31.2 in effect on the date of this contract and the terms of this contract.

FAR 52.216-7, Allowable Cost and Payment. This cause has explicitly incorporated FAR subpart 31.2 into the contract, in addition to the specific contract terms written into the contract.

The conclusion is simple: a contractor's (and the Government's) obligations must be set forth in the contract, either by explicit language or incorporation by reference (as in FAR 52.216-7 above). Nothing in the FAR magically "appears in" or is "included" in your contract because it is in the FAR or the U.S. Code. If the Government wants to incorporate a section of the FAR into your contract, the Contracting Officer knows (or should know) precisely how to do it.

The only possible exception is the "Christian Doctrine". Under the Christian Doctrine, a contract will be read to include a required clause even though it is not physically incorporated in the document. *G.L Christian & Assocs. v. United States*, 312 F.2d 418, reh'g denied, 320 F.2d 345 (Ct. Cl. 1963), cert. denied, 375 U.S. 954 (1963). The doctrine permits the incorporation by operation of law of mandatory contract clauses which express a significant or deeply ingrained strand of public procurement policy. In the landmark *Christian* case, which dealt with the termination for convenience clause, the court concluded the purpose and effects of the clause to be a "deeply ingrained strand of public procurement policy" and a "major government principle," thereby requiring incorporation into a contract even though it was omitted from the text. Id. at 426. However, the Christian Doctrine is limited to those types of clauses—not the many run of the mill government contracts clauses which are in FAR Part 52 and are either not mandatory clauses, deeply ingrained strands of public procurement policy or major government principles. Indeed, the courts and boards have never identified all the FAR clauses that would be incorporated into a contract by the Christian Doctrine. We do know, however, that the termination for convenience clause is one of them, and there is a small number of others that have been considered on a case by case basis for inclusion by the Christian Doctrine.

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