Can the Government Property Clause Finally Achieve First-Rate Standing Under the Christian Doctrine?

An examination of the controversy created by the boards of contact appeals regarding the question of whether the government property clause should be read into a contact under the G.L. Christian Doctrine.

BY JOHN B. WYATT III

The author dedicates this article to Professor Joseph R. Clements CPCM, Fellow,[2] lifelong proponent of contract management education.

First-rate can be defined as something which is "of the first order of size, importance, or quality."[3] Conversely, second-rate is an oft used term to describe something that is "(1) of second or inferior quality [or] (2) mediocre."[4] Second-rate is a most befitting adjective to describe the historical treatment and controversy created by the boards of contract appeals regarding the question of whether the government property clause is "significant enough" to be read into a contract by operation of law under the G.L. Christian Doctrine.

This article will address how the Armed Services Board of Contract Appeals (ASBCA) in the *Chamberlain*[5] decision declared that the government property clause is not worthy of being incorporated by operation of law. Next, we will examine other decisions that have reached the opposite conclusion and have found that the clause is "significant enough" to warrant Christian Doctrine application. Finally, this article will discuss how the rewrite (FAR Case 2004-025)[6] of Part 45 of the *Federal Acquisition Regulation (FAR)*, with its new mega-government property clause, may provide additional support so that the second-rate standing may become first-rate. Or, will the new mega-government property clause suffer the similar fate of its predecessors and be likewise cloaked with the same inferior status?

Background of the Christian Doctrine and its Interpretation and Application

The Christian Doctrine is a unique concept within the realm of federal government procurement. The doctrine is commonly understood to state that if a contract clause is required either by a statute, regulation or executive order, then the required clause is automatically incorporated by operation of law into an existing contract. The phrase "incorporated by operation of law" is a fancy way of saying that a required or mandatory clause is now "read into" a contract as if it had been there all along, although it was not.

Historical Beginnings of the Christian Doctrine

The Christian Doctrine originated in G.L. Christian and *Associates v. United States*.[7] In that landmark case, G. L. Christian and Associates was awarded a fixed-

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price contract for over $32 million to construct 2,000 housing units for military personnel at Fort Polk, Louisiana.[8] However, Christian decided against doing the work itself and sold all of its interest in the government construction contract to a joint venture called Centex-Zachry (C-Z). Per this arrangement, C-Z was to perform all of the contractually required construction work and receive all profits from the contract. Christian was to receive a $250,000 "finder's fee" for its efforts in initially obtaining the construction contract from the government.

The government's district engineer initially verbally approved Christian's assignment of all contract responsibilities to C-Z, but subsequently determined that such an assignment was invalid. Notwithstanding, the government consented to C-Z being designated as a subcontractor and performing all of the work required by the contract. Christian and C-Z then signed a subcontract agreement whereby C-Z agreed to perform all work in place of Christian, and C-Z indemnified Christian for all liability or loss resulting from the construction contract. The finalized contract with the government reflected Christian as the prime contractor. About six months after the final contract with the government was executed, the government notified Christian, as the prime contractor of record, that it was terminating the construction contract for its convenience due to the deactivation of Fort Polk. This termination came at a time when C-Z had completed only about two percent of the construction work.

Since Christian had no real financial interest in the contract and was a prime contractor in name only, this termination of convenience caused Christian no adverse financial ramifications. However, it was financially devastating to C-Z, who had paid Christian the $250,000 finder's fee for the assignment of the contract based on the estimation of the anticipated profit C-Z would receive after completing the job. Because the government was terminating the construction contract for its convenience, C-Z now stood to lose at least $95,000 instead of making an anticipated profit of approximately $5,000,000.[9] In a termination for convenience, the government does not reimburse the contractor for unearned anticipatory profit.[10]

C-Z (under Christian's name as the prime contractor) appealed the government's convenience termination of its contract. One of C-Z's main arguments was that the government lacked the power to terminate the contract because the contract did not contain the necessary termination for convenience clause. Without the power bestowed upon the government by the clause, the government had no contractual right to terminate the contract for its convenience; thus, such action constituted a breach of contract by the government. If C-Z's breach of contract action was successful, then C-Z would be able to recover as part of its damages its unearned anticipatory profits instead of incurring a loss.

Thus, the Christian Doctrine was created when the Court of Claims held that the termination for convenience clause, although not physically present in the subject contract, was nonetheless incorporated into the contract by operation of law. The court reached this conclusion because procurement regulations issued under statutory authority had the force and effect of law, and the termination for convenience clause was required by the regulation to be in all construction contracts exceeding $1,000. Even though there was debate as to whether the clause was intentionally omitted, the court also noted that the government must not have intended to exclude the clause since there were four other references to such a clause throughout the contract. The court further declared that the termination for convenience power of the government was a "deeply ingrained strand of public procurement policy."[11]

The court noted that "it has been a major government principle…to provide for the cancellation of defense contracts when they are no longer needed, as well as for the reimbursement of costs actually incurred before cancellation, plus a reasonable profit on that work, but not to allow anticipatory profits."[12] As will be seen, the phrases "deeply ingrained strand of public procurement policy" and "major government principle" have become very significant in the mindset of the boards and courts in deciding whether to apply the Christian Doctrine and incorporate an omitted but required clause by operation of law.

The General Engineering Interpretation

The interpretation and application of the Christian Doctrine by the U.S. Court of Appeals for the Federal Circuit (CAFC) has relied heavily on the "deeply ingrained strand of public procurement policy" and "major government principle" language from the *Christian* decision. CAFC's perspective is best illustrated in the decision of *General Engineering & Machine Works v. O'Keefe,*[13] which declares that the Christian Doctrine does not permit the automatic incorpora-

tion of every required clause into a contract. CAFC admonishes that the doctrine applies only to mandatory clauses that express "a significant or deeply ingrained strand of public procurement policy." Simply put, the court is saying that every required clause is not necessarily "required."

General Engineering's "significant public procurement policy standard" has been reaffirmed numerous times by the courts and boards.[14] In its interpretation of the *General Engineering* standard, the ASBCA has created a two-prong prerequisite test for Christian Doctrine application: (1) the omitted clause must be mandatory, and (2) the omitted clause must express a fundamental procurement policy or the clause is not written to benefit the party seeking the clause's incorporation.[15]

The *Chamberlain* Decision Declares that the Government Property Clause Is Second-Rate

In *Chamberlain Manufacturing Corporation*,[16] various items of government-furnished property that were held by a contractor under a facilities contract were later authorized by the government for use (loan) on an "as-is" basis on a production contract. The government subsequently claimed that the contractor (Chamberlain) failed to perform in accordance with the contract's terms and assessed a partial termination for default on the production contract. Chamberlain alleged that the delays or deficiencies in its performance on the production contract were due to the government-furnished property that was loaned from the facilities contract not being suitable for use. However, there was no government property clause in the contractor's production contract.

The applicable government property clause in effect at that time contained a provision stating that the government warranted the government property as being suitable for use.[17] Since the production contract did not contain such a government property clause, Chamberlain could not avail itself of that warranty in its defense to the partial termination for default. In Chamberlain's mind, in order to succeed in its defense, it had to somehow get the government-furnished property clause read into the contract, and thus, the warranty would then be an express contractual term. The solution appeared to be to convince the ASBCA to read the government-furnished property clause into the production contract under the Christian Doctrine.

Chamberlain's argument to the ASBCA was quite simply that since the termination for convenience clause—which was required by regulation—was read into a contract by the Court of Claims in the *Christian* decision, the same result should hold true for the government-furnished property clause, as it is likewise required by regulation.[18] Chamberlain's logical assumption was that the board would treat these two mandatory clauses equally.

The Surprise Reasoning of the *Chamberlain* Decision

To Chamberlain's astonishment, the ASBCA determined that the government property clause would not be read into a contract through the doctrine. The ASBCA acknowledged that the government property clause was in fact a mandatory clause that was required to be included in a contract when government property was either furnished to or acquired by the contractor. Nonetheless, the board declined to incorporate that clause into the contract by operation of law.

The ASBCA reasoned that such a clause

> bespeaks no procurement policy comparable to the policy against allowance of anticipated profits that the court in *Christian* determined to be of such paramount importance that incorporation of the termination for convenience clause into the contract by operation of law was mandated.[19]

The board concluded that the court's decision in *Christian* was grounded principally on the public procurement policy that justified the government's power to terminate a contract for its convenience. That policy was the prohibition against the recovery of anticipated but unearned profits—which was both significant and fundamental. The board, while categorizing the property clause as not unimportant, determined that "nothing contained in th[at] clause approaches the stature of a public procurement policy so as to require its incorporation into the contract by operation of law."[20]

The ASBCA further characterized the incorporation of a clause into a contract by operation of law as an extraordinary action that should be undertaken only under extraordinary circumstances. The board determined that such circumstances were not present in the *Chamberlain* case. The ASBCA

attempted to explain its decision by stating that it believed that the absence of the government property clause did not preclude the contractor from effectively defending against the default termination. The board felt that a contractor could still effectively argue that the government's supplying of defective property as an excusable cause of default, even without the warranty of suitability of use being incorporated as an express term of the contract. As further affirmation of the board's conclusion that the circumstances present in the *Chamberlain* case were not extraordinary enough to warrant utilizing the Christian Doctrine, the board stated that "the law of bailment [in the absence of the government-furnished property clause]...provides for administrative resolution of problems that would otherwise be the bases for breach of contract."[21]

The outcome of the *Chamberlain* decision was that the regulation-required government property clause was second-rate under the Christian Doctrine. Required clauses (like the termination for convenience clause), that could achieve first-rate status, were those that expressed a significant, deeply ingrained fundamental procurement policy.

Chamberlain's Progeny—Decisions Agreeing with Its Reasoning

Many other cases in consideration of other clauses have either expressly agreed with the reasoning of the *Chamberlain* decision or have adopted a similar logical analysis. These cases generally have provided that before the Christian Doctrine can be used; a mandatory clause had to be one that implemented or embodied a fundamental, significant, or deeply ingrained government procurement policy, although the forums have not uniformly used the same exact words.[22]

The following board decisions have likewise specifically refused to read a government property clause into a contract by operation of law utilizing the Christian Doctrine by either expressly or impliedly agreeing with *Chamberlain's* reasoning. In *American Bank Note, Appellant*,[23] the government sought to incorporate by operation of law the government property *FAR* clause (FAR 52.245-2, Government Property Fixed-Price Contracts) (DEC 1989) into a contract where the contractor was to provide secure storage and distribution of boxes of food coupon books used in the food stamp program. In denying Christian Doctrine application, the Agricultural Board of Contract Appeals found that

> the government has not demonstrated that the [government property] clause expresses a significant or deeply ingrained strand of public procurement policy so as to be deemed a part of the contract by operation of law. The government has demonstrated neither that it is appropriate nor necessary to augment the contract.[24]

As will be discussed, *American Bank Note* is the most recent case to address the question of Christian Doctrine incorporation by operation of law of the government property clause and is highly critical of the ASBCA's decision in *Rehabilitation Services*.[25]

Likewise, in *Appeal of Computing Application Software Technology, Inc.*,[26] the ASBCA refused to read into a contract an omitted but required government property clause (NASA Clause 18-52.245-72, Liability for Government Property Furnished for Repair or Other Services). The contract incorporated by reference the *FAR*-required government property clause (FAR clause 52.245-2, Government Property Fixed Price Contracts) (DEC 1989). Of particular significance is the contracting officer's admission before the board that she mistakenly put the *FAR* clause in the contract when she meant to include only the NASA clause:

> I inadvertently left it out and put in the wrong government property clauses. I did not intend to omit clause 18-52.245-72; had I so intended, I would have sought through my chain of command deviation authority from NASA Headquarters to do so.[27]

The board noted that "[t]he *FAR* clause, in addition to being included by reference, is cited elsewhere in the contract as the clause under which the appellant is accountable for the GPS simulator..."[28] It also found that "[t]he NASA clause seeks to shift the risk of loss from NASA to appellant and is thus for NASA's benefit. Accordingly, it may not be incorporated unless it is found to express "a significant or deeply ingrained strand of public procurement policy."[29] "Thus, the NASA clause does not, in our view, express a significant or ingrained policy, but a *limited policy intended only to shift the risk of loss in limited*

circumstances."[emphasis added in italics][30]

Accordingly, the board refused to incorporate the NASA clause into the contract especially in light of the fact that: (1) the *FAR*'s fixed-price contract government property clause was already there, and (2) the NASA clause reflected a very limited (not fundamental or significant) policy to reallocate risk of loss. Accordingly, the *Chamberlain* decision assured that the Christian Doctrine would not become a savior to remedy the mistake of this humbled contracting officer.

Chamberlain's Nemeses—Decisions Declaring that the Government Property Clause Is "First-Rate"

The following three cases stand in direct contrast to *Chamberlain* and its progeny, which have declared that the government property clause is not significant enough to warrant utilization of the Christian Doctrine to incorporate the clause into a contract by operation of law. All three of these case decisions (that reach the conclusion that the government property clause is worthy of Christian Doctrine application) are by the ASBCA, the same board that originally decided *Chamberlain*. Only one of these decisions actually references *Chamberlain*; the other two completely ignore it.

The first of these three decisions is *Appeal of Dayron Corporation*.[31] In *Dayron*, the contractor was producing fuses that utilized government-furnished detonators that were defective and caused explosions. As in *Chamberlain*, the *Dayron* contract did not contain the required government property clause, and the contractor needed the government property clause to be read into the contract to be able to argue that the detonators were not suitable for use. In contrast to *Chamberlain*, the *Dayron* contract included the "government property furnished as-is" clause, which provided that the government property was provided without any warranty of suitability for use.[32] To succeed, the contractor had two objectives—it had to convince the board to read in the government property clause while at the same time reading out the "as-is" clause.

The contractor in *Dayron* was successful in achieving both of its objectives. In its decision, the board noted that the as-is clause, by its specific language, required the insertion of the standard government-furnished property clause as a prior condition to the inclusion of the as-is clause. Therefore, citing the *Christian* case and making no reference to the prior *Chamberlain* decision, the board read the standard government-furnished property clause into the contract. Such action was justified since there was no evidence that the mandatory inclusion of that clause was waived by a government official having authority to do so. Likewise, the board never addressed the question of whether the government property clause was significant or indicative of a deeply ingrained fundamental procurement policy per the *General Engineering* standard.

Regarding the contractor's second objective of having the board read out the as-is clause, the board never addressed the presence of the as-is clause or the legal effect of its provisions. By declaring that the government-furnished property clause was to be read into the contract by operation of law and that the defective detonators should have been suitable for use, the board implicitly read the as-is clause out of the contract. In essence, the board applied reverse-*Christian* reasoning since it determined that the detonators were neither suitable for use nor being supplied as-is.

In *Appeals of Hart's Food Service, Inc., d/b/a Delta Food Service*,[33] the government property clause was likewise read into the contract by the Christian Doctrine. In this case, the contractor was to provide food services in government dining facilities. The contractor was required to use government-provided equipment and facilities that were in poor condition. The government did not dispute that its equipment and facilities were in poor condition. The government did question whether the equipment or facilities complicated or prevented the contractor from performing the work in accordance with the contract requirements. As expected, the contract did not contain the requisite government property clause that was nonetheless required to be inserted into the contract. The contract also failed to contain a listing of the government-furnished property.

Without referencing *Chamberlain* or its "second-rate" classification of the government property clause, the board determined that because the property clause was required by the applicable regulation, it was therefore included in Hart's contract by operation of law. Again, no mention was made by the board of the government property clause satisfying the *General Engineering* significant public procurement policy standard.

The third and final board case supporting the argument that the government property clause is entitled to Christian Doctrine first-class status is *Appeal of Rehabilitation Services of Northern California*.[34] In *Rehabilitation Services*, the contractor was appealing numerous monetary deductions from the final payment due from the government under a commissary shelf-stocking contract. The monetary deductions were assessed for the contractor's failure to comply with contractual specifications for dusting shelves. The contractor argued that its failure to perform in accordance with the contract's dusting requirements was due to a malfunctioning government-furnished floor burnisher that caused the dusty conditions. The contract did not include a government-furnished property clause.[35]

Judge Tunks, writing the majority opinion for the ASBCA, determined that the government property clause was mandatory and wrongfully excluded from the contract. Judge Tunks supports this conclusion by stating the following:

> The [government-furnished property] GFP clause expresses a significant strand of public procurement policy. At the end of fiscal year 1992, Department of Defense contractors possessed GFP costing over $83 billion. FAR 52.245-2 is a mandatory clause that expresses a significant and deeply [i]ngrained strand of public procurement policy and we have deemed the clause incorporated by operation of law. (citing *Appeal of Hart's Food Service, Inc.* and *Appeal of Dayron Corp.*) *Appeal of Rehabilitation Services of Northern California*, at 3.

Unlike her predecessors in *Dayron* and *Harts Food Service, Inc.*, Judge Tunks acknowledges the *Chamberlain* decision, but characterizes its determination that the government property clause is "nothing ...th[at]... approaches the stature of a public procurement policy so as to require its incorporation into the contract by operation of law"[36] as mere dicta.[37] Dicta is defined as "opinions of a judge that do not embody the resolution or determination of the court."[38]

Not all of the ASBCA judges who participated in the *Rehabilitation Services* decision agreed with the majority opinion written by Judge Tunks. For example, Judge Kienlen, in his dissent, is highly critical of the majority's refusal to follow the *Chamberlain* reasoning.[39] He first characterizes the board's reliance on the *Hart's Food Service, Inc.* and *Dayron Corp.* decisions as foolhardy since "neither case discussed the government-furnished property clause in relation to procurement policy; thus, neither case stands for the proposition that the government-furnished property clause is 'a deeply ingrained strand of public procurement policy.'"[40]

Judge Kienlen was particularly incensed by the majority's characterization of the analysis and reasoning of the *Chamberlain* decision as pure dicta and emphasizes that its logic has never been expressly overruled. He also vehemently objects to the bootstrapping manner in which the majority has, without substantiation, somehow elevated the government property clause to the status of being representative of fundamental procurement policy. In Judge Kienlen's words,

> ...[T]his board has made the opposite finding in *Chamberlain*. The majority in this case dismiss that finding with the appellation that it was dicta. Even if it were dicta, (and it was not treated as dicta by the board cases which cited it, nor by the Federal Circuit in *S.J. Amoroso Construction Co., Inc. v. United States...the analysis and reasoning of* Chamberlain *are still valid today.*
>
> *Thus, there is no factual or precedential predicate for the majority's finding that the government-furnished property clause is "a deeply ingrained strand of public procurement policy." Absent such a predicate, the finding is a mere assertion and fails the [General Engineering] test...*
>
> The majority reiterates information, of uncertain validity, that in fiscal year 1992, [Department of Defense] DOD contractors possessed government furnished property "costing over $83 billion." *The unstated premise is apparently that $83 billion expresses a significant and deeply ingrained strand of public procurement policy.* The source didn't reveal how much of that $83 billion represented the cost of good equipment and how much represented the cost of inadequate or junk equipment, like that provided in the instant case; nor, did the source reveal how much that $83 billion in cost was actually worth. It seems to me that the only thing that $83 billion demonstrates is that compared to $83 million, $83 billion is 1,000 times bigger. *The point is, the iteration of the*

> *$83 billion figure is irrelevant to the issue of deeply engrained strand of public procurement policy in the context of the analysis and reasoning of* Chamberlain*, in particular,* and S.J. Amoroso Construction Co., Inc., General Engineering & Machine Works, and G.L. Christian, in general.[41] [emphasis added in italics].

As will be discussed in the conclusion, this vast disparity in perspective between the majority and dissenting opinions in *Rehabilitation Services* are extremely indicative of the confusion that the ASBCA has created as to the significance of the government property clause relevant to Christian Doctrine incorporation.

The "Mega-Property" Clause of *FAR* Case 2004-025 May Resolve the Issue in Determining that the Government Property Clause is First Rate

On September 19, 2005, the Civilian Agency Acquisition (CAA) Council and the *Defense Acquisition Regulations (DAR)* Council proposed a rule (FAR Case 2004-025) to amend FAR Part 45, which addresses government property. This *FAR* Case, which has become known as the "FAR Part 45 rewrite," was adopted as a final rule on May 15, 2007.[42] This rewrite successfully proposed a new all-inclusive "mega-government property clause" (FAR 52.245-1). The new mega-government property clause at 52.245-1 replaces the *FAR* clauses at 52.245-1, Property Records; 52.245-2, Government Property (Fixed-Price Contracts); 52.245-5, Government Property (Cost-reimbursement, Time and Material, or Labor-hour Contracts); and 52.245-19, (Government Property Furnished 'As Is'). In essence, all of these former separate government property clauses are now combined into one new mega-clause.

Obviously, combining these primary government property clauses into one new mega-clause means that the new clause will be of paramount importance within the realm of government property administration. However, the question is whether this mega-clause will be viewed as significant enough to warrant Christian Doctrine incorporation.

By way of a much too subtle hint in its introductory summary to proposed FAR Case 2004-025, the CAA and *DAR* insinuate the importance of these regulatory changes, (including the creation of the mega-clause at 52.245-1) by stating

> The Civilian Agency Acquisition Council and the *Defense Acquisition Regulation* Council are proposing to amend the *Federal Acquisition Regulation (FAR)* to simplify procedures, clarify language, and eliminate obsolete requirements related to the management and disposition of government property in the possession of contractors...[and]... the...[applicable]... *FAR* parts...[and clauses]... are amended *to implement a policy that fosters efficiency, flexibility, innovation, and creativity, while continuing to protect the government's interest in the public's property."*[43] [emphasis added in italics]

Unfortunately, *FAR* Case 2004-025 is void of any explicit statements that demonstrate how a government property clause that implements a policy to protect the government's interest in its property constitutes a significant deeply ingrained fundamental federal procurement policy. This is indeed regretful because the drafting of *FAR* Case 2004-025 was a herculean effort that took more than 10 years to accomplish.[44] Such a tremendous long-term commitment of time and government resources arguably would further demonstrate that government procurement officials view government property and its associated clauses as an extremely important part of federal acquisition. What is manifestly clear is that CAA and *DAR* intend that the new rewrite simplify and efficiently implement an extremely important and significant fundamental policy—the protection of the government's interest in its property furnished to or acquired by a contractor. The next logical question—does such an interest merit being classified as expressing a significant or deeply ingrained strand of public procurement policy?[45]

Conclusion

As the foregoing discussion has demonstrated, there is ample evidence to support the conclusion that the government property clause deserves to be designated as first-rate, meaning that it is indicative of a deeply ingrained fundamental procurement policy. The problem is that the boards of contract appeals (particularly the ASBCA) cannot seem to make up their minds

regarding the status of the government property clause. When analyzing the logic on both sides, it becomes apparent that each perspective of this controversy has its own particular quirks and weaknesses.

First, consider those decisions that advocate that the government property clause is important enough to warrant Christian Doctrine inclusion. Neither *Dayron* nor *Hart's Food Service, Inc.* declare that the government property clause did in fact articulate a fundamental procurement policy. Nor did the board in *Dayron* or *Hart's Food Service, Inc.* expressly overrule *Chamberlain*.

Rehabilitation Services is the one decision that proclaims the government property clause's entitlement to fundamental public procurement policy ranking and discusses *Chamberlain's* reasoning; however, it also fails to expressly overrule *Chamberlain*. Instead, Judge Tunks sidesteps all of *Chamberlain's* pronouncements (relevant to Christian Doctrine incorporation of the government property clause by operation of law) by portraying its assertions as mere dicta. This attempted "death as dicta" of *Chamberlain's* analyses and assertions has been highly criticized and that criticism was reaffirmed by the Agriculture Board of Contract Appeals (AGBCA) in the *American Bank Note* decision.[46] Judge Tunks would have better served the contract management profession by forthrightly announcing that the *Chamberlain* decision was wrong, and expressly overruled instead of attempting to render it an implied or covert death by being designated as dicta.

Notwithstanding, Judge Tunks deserves significant credit for her good judgment in taking notice of the huge amount of taxpayer dollars wrapped up in government property and in the possession of contractors. She astutely and logically built upon that premise to substantiate why the interest of the government in protecting such property does entail an extremely important fundamental procurement policy.

Chamberlain's progeny has its own problems. The strongest support for *Chamberlain* (assuming that it has survived its potential "death as dicta") is found in *American Bank Note*, which is a decision rendered by the AGBCA and not the ASBCA. Although the AGBCA in *American Bank Note* reaffirms that a clause must express a significant or deeply ingrained strand of public procurement policy to utilize the Christian Doctrine, the board does not mention *Chamberlain*. The AGBCA did a "back door affirmation" of *Chamberlain* by applauding the analysis of the dissenting opinion of Judge Kienlen in *Rehabilitation Services* (which extraordinarily praised the logic and reasoning of *Chamberlain*).[47] So, at least in the eyes of the AGBCA, the *Chamberlain* decision appears to be alive and well, while its viability at the ASBCA still remains questionable.

Only time will tell whether a board or court will determine that the new property mega-clause reflects significant fundamental procurement policy. The drafters of *FAR* Case 2004-025 may have wasted an excellent opportunity to proclaim that the new government property clause possesses such status, which could have served as a catalyst for a board or court to reach the same conclusion.[48] Notwithstanding, maybe another judge will be as insightful as Judge Tunks[49] and take notice of (1) the tremendous amount of money involved in government property; (2) the years and painstaking effort that went into the drafting the new rewrite with its mega-clause; and (3) the invaluable, significant fundamental role that government property administration plays in the overall federal government procurement scheme. Assuming that all the foregoing are duly considered, the only logical conclusion is that the second-class government property clause has now become first-rate. ***JCM***

ENDNOTES

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3. *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster, Inc., 1984), 466.
4. Ibid., 744.
5. 74-1 BCA 10368, ASBCA No. 18103 (1974).
6. 72 Fed. Reg. 27364-02, 2007 WL 1406839 (F.R.) (May 15, 2007); see also original proposed rule at 70 Fed. Reg. 54878-01, 2005 WL 2252672 (F.R) (Sept. 19, 2005)
7. 160 Ct. Cl. 1, 312 F. 2d 418, *reh'g denied* 160 Ct. Cl. 58, 320 F. 2d 345 (1963).
8. For a detailed discussion of the facts of the *Christian* case, see Wyatt, "The Christian Doctrine: Born Again But Sinfully Confusing," *Contract Management*, November 1993.
9. See Shedd, "The Christian Doctrine, Force and Effect of Law, and Effects of Illegality on Government Contracts," 9 Pub. Cont. L. J. 1 (June 1997), at 6, where the author surmises that C-Z's unearned anticipatory profit on the work not performed and terminated was approximately $5,000,000. The profit on the 2.036 percent of the work that was performed by C-Z was only about $155,000. Since C-Z contractually committed to pay Christian a $250,000 "finder's fee," in the best case C-Z would net a $95,000 loss.
10. FAR 52.249-2 (48 CFR 52.249-2).
11. *Christian*, 312 F. 2d 418, at 425.
12. Ibid., 425.
13. 991 F.2D 775 (Fed. Cir. 1993).
14. See *S.J. Amoroso Const. Co. v. United States*, 12 F. 3d 1072 (1993) ("Under the so-called *Christian* doctrine, a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law," at 779); *Ryco Const, Inc. v. United States*, 55 Fed. Cl. 184 (2002) ("court may insert a clause into a government contract by operation of law if that clause is required under the applicable federal administrative regulations… [t]he *Christian* doctrine applies to mandatory contract clauses reflecting 'a significant or deeply ingrained strand of public procurement policy,'" at 199); *United States v. Schlesinger*, 88 F. Supp. 2d 431 (2000) (Federal regulations which are based upon a grant of statutory authority 'have the force and effect of law, and, if they are applicable, they must be deemed terms of the contract even if not specifically set out therein, knowledge of which is charged to the contractor (citing *General Engineering*) at 443); *Appeal of Lambrecht & Sons, Inc.*, 97-2 BCA §29105, ASBCA No. 49515, 1997 WL 381265 (A.S.B.C.A.) (1997) (The Christian doctrine permits the incorporation by operation of law of mandatory contract clauses which express a significant or deeply ingrained strand of public procurement policy…[i]t has also been applied to incorporate less fundamental or significant mandatory clauses if they were not written to benefit or protect the party seeking the incorporation," at 4); *Appeal of F2M, Inc.*, 97-2 BCA §28982, ASBCA No. 49719, 1997 WL 233100 (A.S.B.C.A.) (1997) ("The Christian Doctrine does not permit the automatic incorporation of every required clause; rather it applies to mandatory clauses which express a significant or deeply ingrained strand of public procurement policy," 6); see also cases cited in note 22.
15. See Jackson, "ASBCA Redefines the Christian Doctrine," available on WESTLAW at 43-MAY Fed. Law. 41 (May 1996).
16. *Chamberlain*, 74-1 BCA 10368.
17. ASPR 7-104.24(a) 'GOVERNMENT PROPERTY (FIXED PRICE) (1968 SEP).'
18. FAR 45.106 (48 C.F.R. 45.106).
19. *Chamberlain*, 74-1 BCA 10368, at 10368.
20. Ibid., at 10369.
21. Ibid.
22. See *e.g. Appeal of Ward Meat Co., Inc.*, ASBCA No. 20847 77-1 BCA ¶12,249 (1976) (amendment to a published military specification was not incorporated into a contract by operation of law as it was not expressive of a deep seated procurement policy); *Appeal of William Poindexter, d/b/a Modern Property Service*, 78-1 BCA ¶12,904, HUDBCA No. 77-6 (1997) (the board, in *dicta*, states that the Disputes Clause Standard Form 19 is a mandatory clause embodying a fundamental procurement policy and thus required to be read into a Purchase Order); *Appeal of R.C. Hedreen Co.*, ASBCA No. 21695, 78-2 BCA ¶13,254 (1978) (the Payment of Interest on Contractor's Claim clause was found to be mandatory and expressing a significant public procurement policy, therefore it was deemed to be contained in the contract); see also *S.J. Amoroso Const. Co*, 12 F. 3d 1072.
23. 05-1 BCA §32867, AGBCA No. 2004-146-1, 2005 WL 242664 (Ag.B.C.A.) (2005).
24. Ibid., at 21.
25. See *infra* note 47.
26. *Appeal of Computing Application Software Technology, Inc.*, 96-1 BCA §28204.
27. Ibid., at 4.
28. Ibid., at 2.

29. Ibid., at 5.

30. Ibid., at 6.

31. ASBCA No. 24,919, 84-1 BCA §17213 (1984) For a detailed discussion of this case, see "Is the Government Property Clause Second Rate?" by John B. Wyatt III, *The Property Professional*, December 1993.

32. See FAR 52.245-19 "GOVERNMENT PROPERTY FURNISHED 'As Is'" [actual case clause was DAR 9-104.24(3) (1965 APR)].

33. 89-2 BCA §21789, ASBCA No. 30756, 3057, 1989 WL 47610 (A.S.B.C.A.).

34. 96-2 BCA §28324, ASBCA No. 47085, 1996 WL 223717 (A.S.B.C.A.).

35. The applicable clause that the court considered for Christian Doctrine incorporation is FAR 52.245-2 GOVERNMENT PROPERTY (DEC 1989).

36. See *supra* notes 19 and 20.

37. Judge Tunks dismissed *Chamberlain's* numerous arguments outlining why the government property clause was not worthy of Christian Doctrine incorporation by depicting it as dicta with the following statement, "(dicta suggesting clause should not be incorporated)," Appeal of *Rehabilitation Services* 96-2 BCA § 28324 at 3.

38. *Black's Law Dictionary* (4th ed. 1968).

39. *Appeal of Rehabilitation Services* 96-2 BCA § 28324 at 8.

40. Ibid., at 9.

41. Ibid., at 8–9.

42. See *supra* note 6.

43. 70 Fed. Reg. 54878-01, 2005 WL 2252672 (F.R.) (Sept. 19, 2005) at 54886 (see section entitled "Summary.")

44. See Goetz, "The Rewrite of FAR Part 45: Government Property and Its Associated Clauses," *Contract Management*, July 2006, where the author recounts how the *FAR* government property rewrite literally has been years in the making and has involved thousands of hours of effort.

45. See comments of this author in response to the proposed rule of *FAR* Case 2004-025 at **http://acquisition.gov/comp/far/PublicComments/2004-025.pdf**.

46. See *supra* notes 39–41 and *infra* note 47.

47. *American Bank Note*, 05-1 BCA §32867, where the AGBCA praised Judge Kienlen's opinion in *Rehabilitation Services* as a "commendable dissent;" at 21.

48. See *supra* notes 41 and 42.. [This author is suggesting that the language in the original proposed *FAR* Case could have been reworded in various sections to specifically state that the government's interest in its property reflects inherent significant public procurement policy. As one example, the SUMMARY section could have been reworded as follows: "Various *FAR* parts and their corresponding clauses are amended to implement a policy that fosters efficiency, flexibility, innovation, and creativity, while continuing to protect the Government's *significant and fundamental procurement policy* interest in the public's property;" [suggested changes in italics] at 54,878. This additional clarification of the significant governmental procurement policy interest may have been enough "food for thought" to convince a court or board in the future to declare that the government property clause is first rate.]

49. *Appeal of Rehabilitation Services* 96-2 BCA § 28324.