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Bonds Required on Federal Construction Projects Even if Contract is Silent

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The Federal Circuit Court of Appeals very recently issued an important decision in *K-Con, Inc. v. Secretary of the Army* which requires a construction contractor to provide performance and payment bonds, even though the contract does not expressly require it. The Court relied on the *Christian Doctrine* to incorporate into the contract, as a matter of law, bond requirements from the Federal Miller Act that were not physically written in.

In *K-Con*, the Army awarded two contracts for pre-engineered metal buildings for an Army base in Massachusetts. After the contracts were awarded, the Army told the contractor that it was holding the notices to proceed until bonds were provided. It took two years for K-Con to give the bonds; the Army then issued the notices to proceed. Shortly thereafter, the contractor submitted delay claims for the two years of delay.

The Army denied the claims, and the contractor appealed to the Armed Services Board of Contract Appeals (ASBCA). The ASBCA also denied the claims, and the contractor took the appeal to the Federal Circuit. The Court sided with the Army.

On appeal, the contractor argued that the bonds were not required because the pre-engineered metal buildings were not construction projects, but instead were contracts to provide commercial items. The contractor pointed to the Army's use of the commercial items form, which even stated "[freight on board]FOB – Destination," a term typically found with a sale of goods.

On the other hand, the contract documents also had features typical of construction, such as referring to design-build obligations of the contractor, requiring payment of prevailing wages under the Davis-Bacon Act, and specifying that building permits were needed for the work.

Faced with this complicated assortment of facts, the Court held that the contract was so conflicted that it was "patently ambiguous." The contractor, therefore, was required to make a pre-bid inquiry. Because it did not do so, the contractor was precluded from arguing that the contracts were for commercial items.

The Court then went on to consider whether the *Christian Doctrine* applied. Named for a U.S. Court of Claims case from 1963, the *Christian Doctrine* states that a court may insert a clause into a government contract by operation of law if 1) that clause is mandatory, and 2) it "expresses a significant or deeply ingrained strand of public procurement policy."

As to the first element, bonds are required by the Miller Act in all government construction contracts above a \$100,000 threshold. The Federal Acquisition Regulation also requires a clause be inserted into such contracts to require bonding of the project. In short, bonds are required by statute and by regulation.

Second, payment bonds serve a very important public procurement policy. They help ensure that those providing labor and materials to federal projects are paid. They are needed because public projects are not subject to mechanic's liens. Performance bonds, in turn, help protect the government from a contractor default.

Accordingly, the Court held that performance and payment bonds had to be furnished even if the contract was silent as to the requirement.

The lessons of *K-Con* are two-fold. If there is an obvious omission or conflict in the bid documents, the contractor must make a pre-bid inquiry if the contractor wants to pursue a claim involving the problem. Second, government contracts that appear to require construction services are likely to be held subject to the Miller Act because of the important protections it gives to those who work on public projects.

As a practice tip, one who is assisting a subcontractor or supplier should ask the government for a copy of the bonds at the start of the project. If the government states it has no bonds, hard questions should follow based on *K-Con*.

Finally, it is expected that the *K-Con* holding will be considered by the courts in cases involving public contracts at all levels. Most states have laws modeled on the federal law, called "Little Miller Acts." Very similar arguments to those in *K-Con* could be raised. In some states, the public agency's failure to insist that bonds be furnished makes the agency liable to the bond claimant for its claims. Because of *K-Con*, it also seems likely that a claimant will try suing the federal government for its failure to obtain bonding to protect the subcontractors and suppliers. Previous attempts in such cases have not been successful, but the *K-Con* holding may be the game-changer.

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