

LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

For centuries contracts have been indispensable tools for carrying on business in the western world; now they have become almost equally important in conducting the affairs of government. Construction of public works, procurement of defense materials, and vital research and development are performed to a substantial extent under the terms of contracts entered into between government and private organizations. Indeed, the government frequently even contracts out to private concerns—especially universities and nonprofit corporations—the task of determining how well it is doing its own job in various fields.

The businessman doing business with the government, or the lawyer who advises him, soon discovers that a government contract is quite distinct from its private counterpart. In some respects the concept of a “meeting of the minds,” a concept which pervades the law of contracts, is unrealistic when applied to a government contract. The businessman confronted with a lengthy document containing innumerable general conditions and standard clauses, which he soon discovers are not subject to bargaining and which, therefore, he often neither reads nor understands, might doubt that any such “meeting” has taken place. Furthermore, the government contractor will find that, in addition to the words of the contract itself, he is bound by a host of statutes and, to an undetermined extent, by the provisions of official regulations and directives. Consequently, he may seek to transfer the negotiating process into the hall of Congress or sessions of the governmental committees concerned with drafting procurement regulations.

The businessman who relies on a man’s word as his bond may soon learn to his sorrow that oral agreements entered into by government officials, or waivers they grant of contractual stipulations, do not serve to bind their principal. Similarly the doctrine of apparent authority has far less relevance than in transactions between private parties. And, if a dispute should arise between the contractor and the government, he will discover that he has already bound himself to let representatives of the government decide the dispute and so has entrusted his rights to the fairness and impartiality of the adverse party.

After learning of the rigor with which competitive bidding requirements are sometimes applied by the government and after being constantly informed that the government is determined to reduce its costs—occasionally at his expense—the

businessman may be puzzled by the presence of numerous conditions in government contracts which tend ultimately to increase the costs paid by the government. In this regard the basic issue concerns the extent to which the quickest, cheapest achievement of a specific goal by the government should be compromised by conditions placed in its contracts with a view to accomplishing some collateral objective—such as helping small firms, providing employment for members of minority groups, encouraging collective bargaining, or reducing labor surpluses in distressed areas.

There are instances when the government contractor discovers that he has received an unexpected windfall—as when he can claim some immunity from state taxation or regulation because he is engaged in a transaction with the federal government. But pitfalls are more common—as when a compliance officer calls the contractor to account because his hiring practices appear to discriminate against a minority group, or worst of all, when he finds himself in the glare of a congressional investigation prompted by allegations that he has obtained his contracts through favoritism or influence or as a result of some official's conflict of interest.

For some businessmen and lawyers government contracts constitute a labyrinth; and for them this symposium should serve as a guide so that in the future they may pass safely through the maze to the promised land of profits. More important, the editors hope that for all our readers this symposium will provide better perspective for understanding some of the problems that have been presented by the expanding partnership of government and business in our society.

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