

BOOK REVIEW

Government Contracts and Procurement—Current Trends. Lectures presented at the Second Annual Institute on Government Contracts. Commerce Clearing House, Inc. 1963. Pp. 238, plus 24 Tables and Index. \$17.50.

Government contracting concerns a field of law that has a substantial effect on the economy of the country. More than half of our multi billion dollar annual federal budget is devoted to spending for defense, and most of this half is spent under defense contracts. As Assistant Secretary of Defense, Thomas D. Morris states in his chapter in this book, "Government contracting is the legal linkage among government and industry groups whose combined efforts produce the instruments of national and free world survival. These groups have generated national defense assets which today are valued at about \$149 billion."

With this awesome financial impact it is surprising that there is a paucity of textbook material published in this rapidly expanding field. "Government Contracts and Procurement-Current Trends" is a welcome addition to the relatively few books presently available.

This dearth of material is all the more surprising when we consider that government contracting is a specialized field. As Andrew R. Cecil of the Southwestern Legal Foundation points out in his introduction to this work, "We encounter in government contracts provisions and administrative requirements not usually found in commercial-business contracts." "For instance, the rights of unilateral change in certain requirements or of 'convenience terminations' are commonplace in military contracts but hardly are encountered in commercial contracts. The differences are not only in degree but also in kind. The contractor is not an equal contracting party when he deals with the government, and the hierarchical procurement organization is not 'the other free party' of a commercial contract."

To these observations may be added the comments that government contracts contain provisions pertaining to small business, labor surplus areas, taxes, labor disputes, wages and salaries, allowable costs and a multitude of other clauses not usually found in commercial contracts. We may also add the requirements pertaining to advertised procurements which are entirely foreign to private contracts.

The point, of course, is that the field of government contracting is so specialized that the general practitioner is not readily qualified to give the day-to-day advice required by so many clients, especially small business contractors. Nor is he aided by the present lack of adequate reference material.

"Government Contracts and Procurement-Current Trends" helps to fill the void. This book is a compilation of lectures presented at the Institute on Government Contracts in the fall of 1962 in Dallas, Texas under the auspices of the Southwestern Legal Foundation Institute. Every lecturer is an expert in the field of government contracting.

The "Current Trends" appendage to the title of this work may be mis-

leading. Although some of the chapters deal only with "current trends" most of the chapters review the past and existing law—the statutes, the regulations, the court decisions and the administrative decisions—and analyze the present status of the law, without limiting the material to "current trends."

The first two lectures, however, specifically deal with "current trends". Colonel Thybony, Chairman of the Armed Services Procurement Regulation Committee, presents the "Government Viewpoint in Current Government Contracting Trends." He discusses the statutory and regulatory changes made during the year preceding the lecture and forecasted others to come. Although certain of the regulations discussed by Colonel Thybony have since been revised, some of them drastically, his presentation at the Institute was a timely review of new regulations and a reliable prediction of events to come.

Elbert G. Bellows, an attorney for the DeLaval Separator Company, presents the "Industry Viewpoint in Current Government Contracting Trends." He discusses in some detail the effect on industry of recent statutory and regulatory changes, especially the changes in defense requirements, the decline of profits and the additional controls imposed by the government resulting in heavier administrative burdens on government contractors.

Colonel John D. Kookan, Chief, Procurement Law Division, Office of the Judge Advocate General, U.S. Army, also deals with "trends" in his chapter on "Proposals." He discusses multi-year contracting, new techniques in the evaluation of proposals, and other phases of the proposal and award procedure. In his comments on the Department of Defense's movement "in the direction of achieving maximum competition," Colonel Kookan includes a remark that may well indicate the most significant trend in the field of government contracting. He discusses, all too briefly, the "possibility of receiving too much competition" and concludes "that consideration must be given to more discriminating source selection." Colonel Kookan should have dwelt on this point in more depth. He poses the enigma of "maximum competition" and "discriminating source selection" knowing full well, to be sure, that the latter will eventually mean "limited sources" and consequently less "maximum competition." I do not necessarily disagree with Colonel Kookan. However, I think his remarks, almost in passing, are so significant and so fraught with "trends" that they warranted more detailed treatment.

Two other chapters that deal with recent innovations and current trends are Lieutenant General A. T. McNamara's chapter on the "Role of the Defense Supply Agency," and the chapter on "Better Performance and Control of Costs in Defense Contracting" by Thomas D. Morris, Assistant Secretary of Defense (Installations and Logistics). General McNamara, Director, Defense Supply Agency, describes the activities and accomplishments of his newly established procurement agency. Mr. Morris discusses current efforts to improve defense management—by both the government and industry. He finds an important step to be the regulatory changes which limit the use of cost-plus-fixed-fee contracts and which requires the use of fixed price or incentive type contracts. He also comments on management techniques, including PERT (Program Evaluation and Review Technique) and VE (Value Engineering). Assistant Secretary Morris' comments represent the

authoritative position of the Department of Defense in the procurement contracting field.

An area not encountered in quite the same way in commercial contracting concerns the relationship between a government prime contractor and a subcontractor. George M. Newsome, counsel for IBM, discusses this area in the chapter on "Trends in Relationships Between Prime Contractor and Subcontractor." This is the area where the government avoids many direct responsibilities because it has no contractual privity with a subcontractor but indirectly controls placement with and performance by subcontractors. Mr. Newsome discusses the subcontractor relationships from a government control viewpoint, from the position of the prime contractor and from the position of the subcontractor who finds imposed upon him many diverse contractual requirements. He discusses in some detail the effect of various clauses that are usually included in subcontracts (required or not) and recommends to subcontractors certain safeguarding language.

Three of the chapters in this book that will be of great interest to procurement lawyers are those by Jack Paul, Lola Dickerman, and Gilbert A. Cuneo. All are attorneys in private practice who are experts in the field of government contract law, a field where there are all too few practitioners, let alone experts. In these chapters many cases are cited and discussed. All have done considerable research. Each chapter is excellent reference material.

Mr. Paul's chapter on "Changes and Changed Conditions" is by far the longest in the book, and in my opinion, is one of the best. He discusses a subject that is relatively peculiar to government contracting—the right of the government in relation to a prime contractor, or a prime contractor in relation to a subcontractor, to change unilaterally certain provisions of a contract or subcontract with the right on the part of the prime contractor or the subcontractor to obtain an "equitable adjustment" in the price and other conditions of the contractual instrument. Mr. Paul has treated this matter in considerable detail and his discussions are replete with citations. Of special value is his discussion of the relationship between the "Changes" clause and other contractual provisions not directly affected by a Change Order. In this regard, however, I hesitate to agree with his statement that it is "not settled as yet" that in a cost type contract the contractor is entitled to a cost adjustment for a Change Order issued under a contract that contains the "Limitation of Cost" clause. In my opinion there is substantial authority and reasoning supporting the position that the contractor or the subcontractor to whom the Change Order is issued is entitled to an equitable adjustment in the estimated cost, regardless of the Limitation of Cost clause and no special saving provision is required. I would also take exception to Mr. Paul's discussion of cost-plus-a-percentage-of-cost contracting in relation to late pricing of Change Orders. Since the Changes clause permits submission of claims up to final payment it is difficult to understand how a cost-plus-a-percentage-of-cost situation could result. "Equitable adjustment" does not necessarily mean fee or profit on all costs incurred. Despite these minor disagreements, I believe Mr. Paul's extensive coverage and treatment of the subject of Change Orders and changed conditions are excellent.

Mrs. Dickerman's chapter on "Problems of the Work Statement in

Supply Contracts" is also excellent. One of these problems is the drafting of a proper, definitive contractual work statement for supply contracts. She discusses in detail the doctrine of "impossibility," the assumption of risk by the contractor, reliance on government drawings and specifications, ambiguities and other areas. This chapter has many citations of board and court cases, and like Mr. Paul's and Mr. Cuneo's discourses, is excellent reference material. As the title of the chapter indicates, Mrs. Dickerman's discussion concerns supply contracts. She points out, the problem is even more acute in the field of fixed-price development contracts. Unfortunately the scope of this chapter precluded a discussion of that problem. However, Mrs. Dickerman does make an interesting surmise: "Perhaps a review of the bundle of obligations which comprise a supply contract will place us in a position to judge and compare the obligations of the development contractor who is now going to guarantee at a fixed price to do that which has never before been done." The surmise is intriguing but I do not believe the comparison will help to resolve the problems inherent in drafting work statements and other contractual provisions for fixed-price development contracts.

Mr. Cuneo's subject, "Remedies of the Prime and Subcontractor", is one with which he is most familiar. As a former member of the Armed Services Board of Contract Appeals, as an author of the text, "Government Contracts Handbook" and many law review articles, as well as a successful practitioner, he writes with considerable authority. He covers the "Disputes" clause, the appeals procedures, the rights of subcontractors and the procedures of the Armed Services Board of Contract Appeals. He also discusses claims to the Comptroller General, appeals to the Court of Claims and the United States District Courts and remedies under the Contract Authorization Act. Mr. Cuneo's treatment of his subject is comprehensive and concise.

Meritt H. Steger, General Counsel, Department of the Navy, in the chapter on "Warranty and Correction of Defects" reviews the general subject of warranty clauses and implied warranties; especially in their relation to the standard "Inspection" clause in government contracts. He discusses the policies of the various departments of the Department of Defense in their use of warranty clauses and the problems involved in the administration of such clauses. In a very interesting discussion of the special problems involving warranty clauses in fixed-price incentive contracts, Mr. Steger makes the astute observation that standard clauses, including "Warranty" clauses, are not compatible with the new incentive provisions. He states "Many standard clauses used in the past do not mesh with the concepts or with other provisions of incentive contracts." "The ASPR Committee considered the conflicts between incentive price revision clauses and other ASPR clauses and tentatively adopted revisions of some standard clauses for use in incentive contracts. It is in the interest of government and industry that they be promulgated soon."

To those who know of the Renegotiation Act but know little about it, Barron K. Grier's chapter on the "Renegotiation Act of 1951" will be a pleasure to read. Mr. Grier is a practicing attorney and was formerly Chairman of the Navy Board of Contract Appeals and General Counsel to the

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Military Renegotiation Policy and Review Board. He covers the essential feature of the Act, the conduct of renegotiation and the procedures of the Board in layman's language without citations.

This book, written by experts for knowledgeable procurement personnel, lawyers as well as contract administrators, is primarily of value as reference material. It contains a Case Table, and a better than average index. It is a worthwhile addition to a procurement law library.

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