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Book Reviews

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BOOK REVIEWS

GOVERNMENT CONTRACTS AND PROCUREMENT, Proceedings of the Southwestern Legal Foundation's Third Annual Institute on Government Contracts, Dallas, Texas, 14-16 November 1963; Commerce Clearing House, Chicago, 1964; pp. 242. $17.50

A detailed study of business policies and practices in this country over the past two decades probably would indicate that the most important single factor influencing these policies and practices has been the impact of government procurement. The effect upon our domestic economy of the staggering amount of government spending for goods and services, particularly in the field of national defense, is widely recognized, but the significance of the contracts under which these funds are expended frequently is not fully appreciated in the business community. A government contract contains many provisions unrelated to the hardware or services being purchased, and these may be classified broadly in the areas of business management (accounting, insurance, overtime, etc.), economic matters (required preferences to small businesses, labor surplus area concerns, American-made products, etc.), and social and political matters (nondiscrimination in employment, working conditions, military security requirements, etc.). The Government's *method* of contracting not only has created a new field of law but also has necessitated a specialized business expertise in a rapidly changing environment.

Government Contracts and Procurement consists of seven lectures dealing with various aspects of this unique legal and business environment. The subjects include Incentive Contracting: Government Point of View; Incentive Contracting: Industry Point of View; Recent Developments in Defense Procurement; Administrative Pricing Problems in Defense Sales; Technical Data and Patents under Government Contracts; Prime and Sub-contractor Relationships; and Principles and Techniques of Negotiation. Of these, the reviewer has selected three for brief discussion.

Lieutenant Colonel Raymond M. Staley of the Air Force Directorate of Procurement Policy presents the government point of view of incentive contracting. An "incentive" contract is an attempt by the Government to provide a substitute for the performance motivation which cannot, for various reasons, be supplied by the market place in the particular procurement. As performance (measured by cost, delivery and quality) improves, profits improve. Incentive provisions are at least as old as the contract with the Wright brothers, who received a bonus or a penalty depending upon the speed attained by the plane. After discussing the

history of, and results of recent experience under, incentive contracts, Col. Staley discusses the various types of incentive provisions currently used. The most common, as might be expected, is the cost incentive in which the contractor's fee or profit is increased by a percentage of each dollar of cost less than, and reduced by a percentage of each dollar of cost greater than, an agreed "target" or estimated cost. Other types of performance incentives, such as time of delivery or product capability, are more difficult to utilize. Careful consideration must be given to identification (determining the qualities of performance to be emphasized), definition (specifying the quality factors in measurable terms), and balance (assigning values to the selected factors as well as cost). The incentive contract offers advantages to both parties, and the most significant factor is that the more profit the contractor makes the more money the Government saves.

An interesting discussion of the problems caused by the doctrine of privity of contract is included in the lecture on Prime and Subcontractor Relationships by Frederick Sass, Jr., Counsel, Bureau of Naval Weapons. The lack of a direct contractural relationship between the Government and subcontractors often poses problems for both, and in these instances the prime contractor frequently is "caught" in the middle. After discussing the origin and development of the privity concept, Mr. Sass concludes that retention or abandonment of the concept in the field of government contracts should depend upon the way such concept serves the policies of minimizing the size of government and permitting private industry to make the business decisions that move our economy. The doctrine of privity has already been narrowed or limited by four principal means: (1) specific statutes in limited circumstances; (2) contractual provisions creating privity between the Government and subcontractors; (3) common-law exceptions such as third party beneficiary contracts; and (4) special procedural techniques permitting the subcontractor to act in the name of the prime contractor. In order to illustrate the criteria which should be used to determine whether or not there should be direct access between subcontractors and the Government, Mr. Sass analyzes the problems involved in the specific areas of indemnification, progress payments, cost and pricing data, auditing and price adjustment. The conclusion is that the number and complexity of the problems precludes an easy solution and probably does not permit any single adequate solution.

The considerations in the last lecture—Principles and Techniques of Negotiations by Paul R. McDonald—may be applied to nearly every aspect of business and private relationships. Although directed specifically toward negotiations involved in the field of government contracts, factors such as the effect of attitudes, opinions, emotions and temperament, attributes of a good negotiator and the use of strategy and tactics in negotiations, have much broader application. The reader frequently relates past experience to the discussion of the psychological importance of the offensive, defensive, and offensive-defensive positions. The detailed treat-

ment of the subject is illustrated by the importance attached to the wording of a question during the negotiation process which, Mr. McDonald states, should depend upon one of at least ten possible purposes or requirements of the particular situation. Even the seating arrangement at the negotiation table is discussed, but several techniques mentioned in the oral delivery of the lecture heard by the reviewer were noticeably absent, such as placing the opposition near a heat duct to add to their discomfort or facing the opposition toward a window so that the glare from the light adds to the normal strain. The principal lessons to be learned from this lecture are the importance of selection and coordination of the negotiating "team" and, even more important, thorough preparation.

Several factors detract significantly from the value of this book for general use or reference. Government procurement is perhaps the most rapidly changing area in the field of law or business, yet the publication date of this book is approximately one year after the lectures were presented. Some of the items discussed in the lecture entitled Recent Development in Defense Procurement were "advance information" when delivered but now already are obsolete. In many instances, the "broad brush" treatment of a variety of subjects gives little permanent value to the information. This reviewer must conclude that the price of the book is disproportionate to its contribution to the literature in the field.

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COMPETITIVE PRIVATE ENTERPRISE UNDER GOVERNMENT REGULATION, by Malcolm A. MacIntyre. The Charles C. Moskowitz Lectures, New York University Press, 1964, pp. 61.$2.50

In this brief series of lectures, brought together in book form, Mr. MacIntyre attempts to defend the position that the CAB has not done the regulatory job required of it by today's jet age. He proceeds quickly and directly to the heart of the CAB problem and does not release the pressure until the last few pages of the book.

The plethora of government regulatory agencies constitute a fourth branch of government, argues MacIntyre, answerable to no one but themselves. While creation of a new "super agency" to oversee present regulatory bodies may not be practical, something must be done to rationalize their power.

The Civil Aeronautics Board, a prime example of a powerful regulatory body, issues repeatedly inconsistent decisions which are substituted for the judgment of management. To illustrate the point, MacIntyre develops what he calls the "failing company doctrine" established in the United-Capital merger. This doctrine holds that a large carrier which would not otherwise be certificated, is permitted to take over routes simply because the operating firm is failing financially. Couple the "failing company" doctrine with the "leveling" doctrine of the Board, which permits weak carriers to be strengthened by receiving lucrative but competitive long-haul routes, and a situation results in which ". . . it seems nothing fails like success!" Such changing policy, says MacIntyre, is frustrating to management. He concedes, however, that it will continue as long as CAB members are short-term political appointees who have had little or no airline experience.

While management is accountable for the cost elements of the profit picture, they have no control over revenues. The power of the Board to set maximum and/or minimum rates greatly cramps management's style and ability. Such power, MacIntyre believes is the result of a basic misconception of air transport regulatory needs. Current CAB policy is patterned after that of public utilities which assumes a natural monopoly. This basic tenet of regulation has never been true of air transportation. From the earliest days, and even more so in recent times, airlines have had to fight trains, autos, buses and trucks for passengers, mail and cargo.

MacIntyre concludes that, "though not perfect, so far it (CAB regulation) has worked, as measured by public acceptance, progress, and importance." He maintains that a regulated competitive industry best serves the public interest when it retains the most elements of private enterprise. The role of government should be confined to protecting the public against extremes.

MacIntyre's views are by no means new or unique. They are, however, refreshing in this day of expanding government. In *Competitive Private Enterprise Under Government Regulation,* MacIntyre concisely and elo-

quently rests his case. It would indeed be easy to accuse him of "sour grapes" after his recent and trying experience as President of Eastern Airlines. Quite the contrary, his is a surprisingly objective but theoretical approach to the problem of regulation in air transport.

*L. Martin LeBus**

CATASTROPHIC ACCIDENTS IN GOVERNMENT PROGRAMS, by Albert J. Rosenthal, Harold L. Korn and Stanley B. Lubman. National Security Industrial Association, Washington, D.C., 1963, pp. 166. Appendix. $7.50

This volume was prepared for the publisher as an independent research project under the auspices of Columbia University's Legislative Drafting Research Fund. It has a distinguished list of consultants and foreign advisers. Two-thirds of the study is devoted to the question of domestic catastrophes and surveys the type of hazards, the present law, the availability of resources for the payment of damages, the problems of suits against the government and the like. A substantial number of recommendations follow, designed to meet the problems noted.

The rest of the study deals with the United States-involved catastrophes abroad: the present law, remedies of victims and their governments, United States treaty obligations and the like. Recommendations are also offered for unilateral and international arrangements for meeting these nuclear-space age problems. A brief appendix deals with product liability in France and Germany. The study is recommended for the shelf of any lawyer or official involved in government programs, national and international, having a substantial risk of harm for participants and for the public.

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ASTRONAUTICS AND AERONAUTICS, 1963, prepared by the NASA Historical Staff, Office of Policy Planning, Washington, D.C., 1964, pp. 610. $2.00

The National Aeronautics and Space Administration has published a chronological list of events happening in 1963 concerning the Space Age. NASA Historian Eugene M. Emme admits that this is no historical assessment but hopes that it will provide the reader with some perspective on the rapid development in this field. The book reads much like a diary, going day by day through 1963 and jumping from Houston to Washington to then Cape Canaveral in an attempt to capture and set down the ever-changing present tense in the Space Age. Even though the chronological organization of these events renders the book of limited value for most reference and research purposes, it does provide one with a perspective, perhaps the one intended, on the breadth and speed of the development.

Lee M. Schepps