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Book Review [Basic Techniques of Public Contracts Practice]

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BOOK REVIEW

BASIC TECHNIQUES OF PUBLIC CONTRACTS PRACTICE. Edited by W. Harwood Huffcut and Marvin Haiken. Berkeley, California: California Continuing Education of the Bar. 1977. Pp. xix + 507. Cloth. \$50.00.

*Reviewed by James A. Lande**

The single largest market for goods and services in the United States is the government. In attempting to contract for these goods and services, whether at the federal, state or local level, a lawyer must be prepared to deal with a complex body of procurement regulations, "boilerplate" contract clauses, and decisional law developed by government agency contract appeals boards, the United States Comptroller General, the Court of Claims and other courts. For either the uninitiated or the specialist in the area of public contracts, *Basic Techniques of Public Contracts Practice* is a practical handbook that can reorient the business lawyer more accustomed to commercial arrangements between private parties and can serve as a handy desk reference for counseling a client about government procurement or resolving a public contracts problem.

The book is conveniently organized into five parts consisting of: federal contracting procedures; contract performance; contract termination or closeout; renegotiation; audits and claims; and state and local procurement. This volume replaces CEB's 1964 book, *Government Contracts Practice* and embodies a wealth of new material. For example, the section on state and local procurement deals with California public contracts and is a welcome addition to the available literature. Additional topics of practical importance to counsel and their clients are included, such as a new chapter covering General Accounting Office (GAO) audits of government contractors and expanded coverage of claims and remedies. Useful checklists, charts, forms, and practical tips appear throughout the work. At its close is an excellent bibliography of law review articles and other publications. The index could be more detailed, but the tables of statutes, regulations, rules, cases, and forms are quite adequate.

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In its conceptual make-up, the book is not the work of a single author or several authors who have collaborated, but is a compilation of chapters prepared by different authors each of whom has an expertise in the area addressed by him. The authors include former counsel for the government who presently are in private practice, professors, counsel in corporate law departments and attorneys with law firms specializing in federal procurement law. Two individuals associated with an accounting firm prepared the chapter on cost accounting. Despite the diversity of backgrounds and styles among the individual authors, the book is well edited with readily accessible cross references typical of a CEB publication.

A notable shortcoming of this work, however, is its omission of material on patents and data which had been covered in the previous edition. Most government contracts contain patent and data provisions and the general practitioner should have some understanding of the policies regarding government and contractor rights of title and license of inventions developed under government contracts. In addition, patent indemnification and authorization and consent by the government for the contractor's use of patents of the United States are matters of moment to many government contractors. Furthermore, technical data requirements of a government contract and protection of the contractor's proprietary information, such as trade secrets, may be of considerable concern to many contractor clients. While the general practitioner may want to refer such matters to a specialist he should at least be given the opportunity to educate himself as to the principles involved in a book dealing with basic techniques of public contracts practice. This is an evolving area of law, as may be noted by the publication in the July 13, 1977 *Federal Register* of new patent and data regulations of the U.S. Energy Research and Development Administration. Indeed, government procurement in the field of energy may undergo other changes once the recently created Department of Energy assumes full scale operations in 1978. Patent and data provisions can be of major significance in energy related research and development projects, as well as other R&D procurement. Unfortunately, this book lacks coverage of these topics.

Despite this shortcoming, the treatment of the material provided generally is complete and presented in a straightforward fashion. Part I covers federal contracting procedures in chapters dealing with advertised procurement, negotiated procurement, the contract and contract interpretation. The fol-

lowing passage from the chapter on contract interpretation typifies the readable format of this work:

Federal contract law, including contract interpretation, is a special application of the principles of general contract law, as modified by federal laws and regulations and the use of standard, "boilerplate" clauses in federal contracts. Decisional law is primarily developed in the Court of Claims, contract appeal boards, and decisions of the Comptroller General (citation). The standard secondary references, e.g. RESTATEMENT OF THE LAW OF CONTRACTS, the Williston Treatise, and the Corbin Treatise, are frequently cited by the courts in federal contract law cases. The Court of Claims and agency contract appeals boards have also recognized the importance of the Uniform Commercial Code in interpreting government contracts. . . .

State law may be a secondary source in interpreting federal prime contracts, and general contract law will be used rather than the law of a particular state of contract performance. . . . Subcontracts are frequently interpreted in accordance with state law.¹

Part II of the book deals with contract performance in chapters that address topics that frequently have been or presently are major problem areas: performance impossibility, formal and constructive change orders, changed or differing site conditions in construction contracts, state and local government interference with performance, delays, inspection and acceptance, warranties, bonds and insurance, and cost accounting standards. The chapter on impossibility of performance presents a good synthesis of the case law and provides practical advice for the private practitioner. The chapter on formal and constructive change orders is oriented to the preparation of claims against the government. In the chapter on delays there is a helpful chart of notice requirements for presenting various types of claims arising from delay based on specific government contract clauses and procurement regulations. The chapter on state and local government interference includes material on taxes in the previous CEB edition as well as new material on the federal jurisdiction, state and local licenses and permits, and actions against a state, municipality or the federal government. The chapter on inspection and ac-

1. W.H. HUFFCUT & M. HAIKEN, BASIC TECHNIQUES OF PUBLIC CONTRACTS PRACTICE 67-68 (1977).

ceptance is well presented from a pragmatic, problem solving point of view. An added chapter on warranties contains a helpful contractor checklist for reviewing government warranty provisions. Specific cost accounting standards, their effective date, applicability and effect are set forth in a useful table in the new chapter on cost accounting standards.

Part III is devoted to contract termination or closeout. While the chapter on recovery for government breach provides somewhat limited coverage and lacks up-to-date citations, the chapters on contractor default, termination for convenience of the government, payment and closeout are more than adequate for a handbook of this type.

More innovative treatment is provided in Part IV's chapters on GAO audit of government contractors, and claims and remedies. The latter chapter provides excellent coverage of types of claims, investigating and preparing claims, presenting claims before the contracting officer, appeal procedure, judicial relief, claims before the General Accounting Office, bid protest procedures, and extraordinary contractual relief. In addition to a clear exposition of the applicable law, rules and regulations, this chapter includes a chart of events giving rise to claims, various useful checklists and forms as well as advice on strategy.

The final part of the book focuses on California public contracts practice. While in many respects the state procedures, such as those for competitive bidding, are similar to those applicable to federal procurement, there are some significant differences. It may be noted, for example, that California governmental agencies are prohibited from entering into purchase contracts with violators of orders or regulations of the California Water Resources Control Board and the Air Resources Board (unless no other source of supply exists). Furthermore, California public agencies have the discretion to terminate contracts for environmental considerations. State and local public contract principles often parallel those at the federal level and a good understanding of federal procurement practices will be of considerable value for California public contracts practice.

In summary this CEB publication provides a very good overview and understanding of federal procurement practices outside of the patent and data area. It should serve as a useful handbook for any attorney called upon to deal with government procurement matters, whether the business lawyer whose clients occasionally make business arrangements with govern-

ment agencies or the attorney practicing regularly in this field. CEB is to be commended for providing the profession with this practical book on public contracts practice.

