

Government's Duty of Good Faith and Fair Dealing

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Implied Duty in Every Contract

- "Implied in every contract is a duty of good faith and fair dealing that requires a party to refrain from interfering with another party's performance or from acting to destroy another party's reasonable expectations regarding the fruits of the contract." *Bell/Heery v. United States*, 739 F.3d 1324, 1334-35 (Fed. Cir. 2014).
- "The covenant . . . requires a party to respect and implement the contract in accordance with its terms." *First Nationwide Bank v. United States*, 431 F.3d 1342, 1350 (Fed. Cir. 2005).

What is the Duty of Good Faith and Fair Dealing?

“Although the existence of the implied duty of good faith and fair dealing is widely acknowledged, exactly what that duty entails has proven more difficult to define. At least one commentator has noted that “[g]ood faith is an intangible and abstract quality with no technical meaning or statutory definition.”

CAE USA, Inc. v. Dep't of Homeland Sec., 2016 CIVBCA LEXIS 193 (B.C.A. May 2016)

“The covenant of good faith and fair dealing, which is implied in government contracts, obligates the parties not to interfere with each other's contract performance so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.”

“The covenant “exists because it is rarely possible to anticipate in contract language every possible action or omission by a party that undermines the bargain” *Metcalf Constr. Co. v. United States, 742 F.3d 984, 991 (Fed. Cir. 2014)*.

Appeals of Temple Contract Station LC, 2014-1 B.C.A. (CCH) P35,669 (Postal Serv. B.C.A. July 16, 2014)

Its Roots

“One of the first and foremost commentators on the implied duty of good faith was Professor Robert Summers, who, in 1968, identified six types of violations of good faith duties that had been found to occur during contract performance:

1. Evading the spirit of the deal;
2. Willfully rendering imperfect or merely "substantial" performance;
3. Abusing powers to determine contractual compliance;
4. Interfering with the other party's contract performance; and
5. Failing to cooperate in the other party's performance.
6. B.J. Reiter, *Good Faith in Contract*, 17 Val. U. L. Rev. 705, 710 (1983) (citing Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 234-42 1968) [Summers I])”

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Provides Judge a “Safety Valve”

“The ultimate goal underlying all of these concepts is to ensure the availability of "a 'safety valve' to which judges may turn to fill gaps and qualify or limit rights and duties otherwise arising under rules of law and specific contract language.”

*Cite: CAE USA, Inc. v. Dep't of Homeland Sec.,
2016 CIVBCA LEXIS 193 (B.C.A. May 2016)*

What it is Not

“The 'implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions.”

"[A]n act will not be found to violate the duty . . . if such a finding would be at odds with the terms of the original bargain, whether by altering the contract's discernible allocation of risks and benefits or by conflicting with a contract provision.“

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Bad Faith Need Not Be Proven

“To show a violation of the duty of good faith and fair dealing, a party need not prove that the other party to a contract acted in bad faith.”

“To the contrary, ‘[p]arties can show a breach of the implied duty of good faith and fair dealing by proving lack of diligence, negligence, or a failure to cooperate,’ meaning that “[e]vidence of government intent to harm the contractor is not ordinarily required.” *TigerSwan*, 110 Fed. Cl. at 345-46.

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Examples of Government's Breach of Duty of Good Faith and Fair Dealing

The implied duty of good faith and fair dealing has been used where the Government engages in improper contract administration.

Examples of breach of the duty of good faith and fair dealing:

- Even if there is no specific provision requiring the Government to provide certain information, the implied duty to cooperate still requires the Government to timely supply essential information necessary for the contractor to address problems that arise under the contract. *Spectrum Leasing Corp., GSBCA Nos. 7,347, 7,379, 7,425-27, 90-3 BCA ¶22,984.*
- The Government breaches the duty to cooperate if it fails to timely respond to RFIs. *Hardie-TynesMfg. Co., ASBCA No. 20,582, 76-2 BCA ¶11,972.*
- Government does not act promptly on claims for constructive changes. *Nash Janitorial Serv., Inc., GSBCA 6390, 84-1 BCA ¶ 17,135.*
- Government enforces a contract provision that “produces an egregious, unfair, or unreasonable result.” *Forest Env'tl. Servs. Co. v. United States, 5 Cl. Ct. 774, 777 (1984)*

Breach of Duty of Good Faith VA Denver Medical Center Project

- In *Kiewit-Turner, a Joint Venture v. Department of Veterans Affairs, CBCA No. 3450 (December 9, 2014)*, the Civilian Board of Contract Appeals held that the VA breached its duty of good faith and fair dealing in the Denver VA Medical Center Project because:
 - The VA failed to provide a design that could be constructed within the funding limits;
 - The VA “delayed progress of construction, such as by delaying the processing of design changes and change orders;”
 - The VA disregarded cost estimates for work performed;
 - The VA’s independent government estimate was flawed and biased; and
 - The VA directed the contractor to perform work “even though the agency refused to fund that work appropriately.

Government Requests Contractor to Become Designer

***Hughes-Groesch Construction Corp, VABCA-5448,
2000-1 B.C.A. (CCH) P30,912 (2000):***

However, when the west riser began having problems, the VA did not go to the A/E who designed the project, but rather placed design responsibilities upon a Contractor who was not particularly equipped to accomplish such an assignment. The VA did breach the Contract by expanding it well beyond its scope to transform it from a construction contract to a design-build contract when it placed the entire redesign responsibility on HG. This is a cardinal change to the Contract, in effect a breach of contract.

Bad Faith Termination

UNIVERSAL HOME HEALTH AND INDUSTRIAL SUPPLIES, INC., CBCA 4012, (May 17, 2016)

There is a “presumption that public officials act ‘conscientiously in the discharge of their duties.

“To prove bad faith, appellant must provide facts to show by clear and convincing evidence that government officials had something akin to a ‘specific intent to injure’ appellant, engaged in a ‘proven conspiracy to get rid of’ appellant, or were ‘motivated alone by malice’ against appellant.” V.I.C. Enterprises, Inc. v. Department of Veterans Affairs, CBCA 1598, 09-2 BCA ¶ 34,284, at 169,363-64 (quoting Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1240 (Fed. Cir. 2002)).

“The mere fact that a contracting officer awards a contract to another company after terminating the plaintiff’s contract is insufficient to show bad faith.” Kalvar, 543 F.2d at 1302. Similarly, the contracting officer’s incorrect interpretation of the contract requirements or mistaken determination regarding the contract specifications is not sufficient to establish bad faith. Id. at 1302-03.

Absent this showing of bad faith or abuse of discretion, Universal’s remedies are limited. A contractor may not recover anticipatory profits or consequential damages CBCA 4012, 4013, 5083 14 when a contract has been properly terminated for convenience. Arbor III Realty Co., HUD BCA 96-C-114-C5, 98-1 BCA ¶ 29,344, at 145,901 (1997). Instead, the contractor may only recover the costs of performance up through the date of termination. Carol S. Best, HUD BCA 82-693-C17, 85-1 BCA ¶ 17,712, at 88,397 (1984).

Professor Nash's Perspective

I have taught for many years that in the long run the government benefits from actions that show industry that it is a fair contracting partner. A line of published judicial decisions that demonstrates that the government is not such a partner is one more of the many messages that tell companies they should sell to the government only when they can find no other customer. Surely, this is not the message that government agencies in need of products and services on the commercial marketplace want to convey to companies that can provide those products and services.

Many years ago when I came to Washington to work in the field of government contracting, I concluded that there was one major advantage to being on the government side of the negotiating table.

That advantage was that I was under no pressure to extract money from the contractor by unfair bargaining or unfair contract administration. To me fairness was an integral part of the job of a government employee. I still believe it and teach it. Thus, no matter what the outcome of the good faith and fair dealing litigation, I will continue to urge government employees that fair treatment of contractors is the only way to go.

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<http://www.wifcon.com/discussion/index.php?/blogs/entry/3042-the-governments-duty-of-good-faith-and-fair-dealing/>

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