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Good Faith and Fair Dealing Upheld In Federal Construction Contracts

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Published On: Monday, March 9, 2015 11:07 AM



In United States v. Metcalf, the Federal Circuit Court of Appeals agreed to review a decision of the lower court. If upheld, it would make contractor claims against the government for the breach of the duty of good faith and fair dealing very difficult by requiring the contractor to show intentional bad faith by the government, as opposed to prior precedent that the contractor need only prove that the government objectively acted unreasonably.

The policy arguments for reversal of the lower court decision in Metcalf were straightforward and compelling. Contractors, when bidding work, must consider the risk of government-caused delays, impacts and changes. If the very high burden of proof for the breach of the implied duty of good faith and fair dealing applied, then contractors would either be forced to increase their price or forgo bidding government work. In either case, the market, the procurement process and the public would suffer.

In a far-reaching decision, the Court of Appeals reversed the lower court and set forth the standards for a claim of the breach of the duty of good faith and fair dealing. The court held that the contractor is not required to show intentional bad faith by the government, such as that the

government's actions were intended to specifically target a contractual benefit to the contractor in order to re-appropriate the benefit for the government. In addition, the contractor need not point to a specific contractual term violated by the government in order to make a claim of breach of the duty.

To the contrary, whether the government breached the duty of good faith and fair dealing may be demonstrated by showing "subterfuges" and "evasions" and a failure to adhere to the "faithfulness to an agreed common purpose and consistency with the justified expectations of the parties." The court held that one party cannot interfere with the other party's performance and act in a manner so as "to destroy the reasonable expectations of the other party regarding the fruits of the contract."

The court found that this subjective standard was required "because it is rarely possible to anticipate in contract language every possible act or omission by a party that undermines the bargain" because the duty of good faith and fair dealing is focused on "honoring the reasonable expectations" of the parties.

The court did confirm, however, that the implied duty cannot be expanded in the written terms of the contract. As a consequence, the court sent back to the trial court, for further hearings, the contractor's claim for more than \$25 million in damages based on the government's breach of the implied duty of good faith and fair dealing.

The holding in Metcalf is important to government contractors as it reinstates, and further explains, the basis for contractor claims, based on the breach of the duty of good faith and fair dealing, against the government for unfair or unreasonable actions that do not neatly coincide with, or constitute a breach of, express contractual terms. In doing so, contractors have regained an important line of protection and avenue for recourse from arbitrary and unreasonable government contract administration.

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Scott Cessar's practice at Eckert Seamans Cherin & Mellott, LLC covers a broad range of civil litigation with a primary focus on construction law. He has extensive trial and alternative dispute resolution experience representing clients before state and federal courts, arbitration panels and mediators across the country. Scott's construction law practice encompasses both public and private projects (commercial, heavy/highway, industrial, institutional and residential). Projects include hydroelectric plants, steel mills, bridges and highways, hospitals, office buildings, schools, laboratories, greenhouses, dams, pipelines, gas transmission facilities, water plants, sewer plants, mines, airports, glass furnaces, stadiums, hotels, pipelines, factories and process facilities and environmental remediation sites. Scott has handled all types of construction claims including delay, impact, loss of productivity, differing site condition, defective work, extra cost, architectural and engineering errors and omissions and overcharges, and bid and procurement protests; representing private owners, developers, public agencies, prime contractors, subcontractors, design professionals, equipment manufacturers and suppliers and sureties. Eckert Seamans Cherin & Mellott, LLC is a national law firm with over 375 attorneys located in offices throughout the eastern United States. The firm's clients represent nearly every facet of the economy, including multinational corporations, small businesses, nonprofit institutions, municipalities, government agencies and individuals. Scott D. Cessar can be reached at scessar@eckertseamans.com; 412.566.2581.

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