

IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

INTRODUCTION

*This article is a supplement to the Differing Site Conditions newsletter provided by Excell because the Implied Duty of Good Faith and Fair Dealing has just been decided (in the same case) in a most favorable light by the United States Court of Appeals for the Federal Circuit dated **February 11, 2014**. The original case information, as well as other information regarding this subject, is included as a link for ease of reference below.*

The Implied Duty of Good Faith and Fair Dealing in reference to Government Contracts is considered to be an integral part of Government claims as well as procurement principles ([Duty](#)). As explained in Cibinic & Nash's *Formation of Government Contracts*:

"The duty is stated in two forms: (1) a duty not to act in a way that will hinder performance, and (2) a duty to cooperate by taking affirmative action."

If a contractor is pursuing a claim of breach by the Government on the basis of the Duty of Good Faith and Fair Dealing, it is required to provide "...clear and convincing evidence". *Id.* The Implied duties are outlined further below.

ALABAMA V. NORTH CAROLINA, 120 S. CT. 2295, 2312 (2010)

The basic guidelines contained in the U.C.C. regarding Good Faith state that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." (See Restatement (Second) of Contracts § 205 (1981) ("Restatement") as stated in *Alabama v. North Carolina*. A breach of contract by the Government, for example, includes a failure to fulfill a duty as "...imposed by a promise stated in the agreement." (See Restatement § 235) (See [Metcalf Construction Company v. US](#))

PURPOSE

The essential purpose underlying recognition of the Implied Duty of Good Faith and Fair Dealing is to ensure that neither party acts or fails to act in a manner that would cause one party to benefit more or less than the other. This protection extends to provide that the parties to the contract cannot delay or hamper the other party and the parties must agree to cooperate with one another. (See [First Nationwide Bank v. US](#), 431 F.3d 1342, 1350 (Fed. Cir. 2005))

METCALF CONSTRUCTION COMPANY, INC. V. UNITED STATES

This very important case decision includes the Implied Duty of Good Faith and Fair Dealing issue i.e. *Metcalf Construction Company v. United States*. (See [Metcalf](#)) Metcalf Construction asserted a breach of the Duty of Good Faith and Fair Dealing against the Government and proved that the Government attempted to invalidate its own contractual obligations with Metcalf Construction by reallocating "...the benefits [that] the other party expected to obtain from the transaction...", thereby allowing the Government to benefit from the contractual obligation more than Metcalf Construction. *Id.*

As part of its defense, the Government alleged that Metcalf Construction could not produce a particular “provision” that had been breached; the US Court of Appeals for the Federal Circuit pointed out that the claim is for **Implied** Duty of Good Faith and Fair Dealing and as such, does not “...require a violation of an “express” provision in the contract.” *Id.* The Court then referenced *Racine & Laramie, Ltd. v. California Dep’t of Parks and Recreation*, 11 Cal. App. 4th 1026, 1031-32, 14 Cal. Rptr. 2d 335, 339 (1992) (internal quotation marks omitted) and stated that:

*“...the covenant is implied as a **supplement** to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party’s rights to the benefits of the contract.”* (Bold lettering added for emphasis)

The parties to a contract can differ on the interpretation of the provisions in the contract as well as any issues that arise during the course of carrying out the work. This is why there is an Implied Duty, which is meant to provide an even “playing ground” for all parties involved. Each party is expected to act in a reasonable manner and not make any attempt to hinder or prevent the other party from performing its duties. With respect to *Metcalf Construction Company v. United States*, Metcalf construction filed an appeal which resulted in the US Court of Appeals for the Federal Circuit ruling dated February 11, 2014 **agreeing with Metcalf.**

CONCLUSION

Contractors should be aware of situations that can occur, such as the breach of Implied Duty of Good Faith and Fair Dealing, as outlined above. Knowing that one party cannot “hinder or interfere” with performance by the other party is an important component to the Implied Duty of Good Faith and Fair Dealing. Contractors need to educate themselves in order to ensure that they (or the other contractual party) are compliant with the Implied Duty of Good Faith and Fair Dealing as well as all of the terms and conditions included in Government contracts and any other rules or guidelines that are in place. This case ([Metcalf](#)) is absolutely excellent in that regard and should be mandatory reading for construction managers.

Thus, retaining the assistance of a professional consultant should be seriously considered to protect a contractor’s interests properly and thoroughly. The experts at Excell Consulting International, Inc. have experience with contract provisions; express and implied, and stand ready to assist and evaluate your company’s position and provide valuable and cost-effective guidance for your business.

In the end, you will be glad you made the call; by the way, it’s a FREE CALL.

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