

METCALF: A GAME-CHANGER FOR GOVERNMENT CONTRACTORS AND DESIGN-BUILD CONTRACTORS

Part I: Duty of Good Faith and Fair Dealing

INTRODUCTION

The U.S. Court of Appeals for the Federal Circuit (CAFC) recently reversed an opinion by the U.S. Court of Federal Claims (CFC) that is already being called the most important federal construction opinion of the last decade. In [*Metcalf Constr. Co. v. United States*](#), 742 F.3d 984 (*Fed.Cir. 2014*), the CAFC clarified two important issues that will strengthen contractors' positions in disputes with government contracting personnel. Each of these issues will be addressed in a two-part series. This Part I will discuss the Government's revived duty of good faith and fair dealing. Part II will discuss the case's impact on allocation of risk regarding differing site conditions in a design-build context.

THE GOVERNMENT'S DUTY

The Government's duty of good faith and fair dealing is alive and well. The CAFC recently revived this duty in *Metcalf*, and in doing so opened up the Government's potential liability for breach of contract when it fails to reasonably administer its construction contracts. Contractors must be aware of this duty - what it is and how to identify it - in order to protect their interests against unreasonable or arbitrary conduct by Government contracting personnel.

The Plaintiff in *Metcalf*, Metcalf Construction Company (Metcalf), entered into a contract with the U.S. Navy to design and build housing units on a Marine Corps base in Hawaii. Metcalf sought to recover a \$27 million cost overrun that it claimed was the result of maladministration by the Navy. Metcalf filed a lawsuit in the CFC, which found that the Navy acted unreasonably in the following ways: the Navy failed to promptly investigate a differing site claim; an overzealous Navy inspector acted in a retaliatory manner; the Navy used bullheaded tactics in forcing Metcalf to withdraw certain claims; and the Contracting Officer displayed a general lack of experience and ability.

Despite these findings, however, the CFC denied Metcalf's breach of contract claim. The CFC interpreted the standard set forth in [*Precision Pine & Timber, Inc. v. United States*](#), 596 F.3d 817 (*Fed.Cir. 2010*) to mean that the Government can only breach its duty of good faith and fair dealing when its actions 'specifically target' the contract to reappropriate any benefits guaranteed by it.

The CAFC reversed the CFC decision, stating that the lower court interpreted the standard too narrowly. The CAFC then clarified the standard for both parties' duty of good faith and fair dealing. The CAFC explained that the duty imposes obligations on both parties, including a duty to not interfere with the other party's performance, and "not to act so as to destroy the *reasonable expectations* of the other party (i.e., to cooperate) regarding the *fruits*

of the contract.” *Metcalf*, at 9. The duty of good faith and fair dealing is an implied duty, and is focused on honoring the reasonable expectations created by the express terms of the contract. The duty cannot require acts that are outside the scope of the contract, and breach of the duty does not require a violation of an express provision in the contract. Therefore, conduct by either party that is inconsistent with the contract’s *purpose* may breach the duty of good faith and fair dealing.

POTENTIAL EFFECTS

The *Metcalf* decision provides contractors the assurance that the Government will be held accountable for acting unreasonably in administering its contracts. This accountability should aid contractors both in considering potential claims and in assessing the risk of potential projects.

CONCLUSION

The court in *Metcalf* revived the duty of good faith and fair dealing, which many feared was dead. The duty requires the Government to act reasonably and not interfere when administering construction contracts. If they do not, they may be liable for breach of contract. The success of future claims for breach of contract will rely heavily on the facts surrounding the claim. Thus, it will be important for contractors to consult with an expert in determining whether certain facts may constitute breach.

Excell Consulting International, Inc. is available to assist contractors in the analysis of maladministration resulting from unreasonable or arbitrary Government conduct. Previously, contractors had no relief for such maladministration unless the contractor could prove bad faith, which required near “irrefragable proof” of malicious intent to injure the contractor. *Metcalf* has changed the game by relieving contractors from meeting this nearly impossible burden of proof. Under *Metcalf*, Government personnel are now subject to consequences for such maladministration, which was previously unattainable.

Perhaps the most significant impact of the *Metcalf* decision is the recognition that a breach of contract entitles a contractor to recovery of ALL costs incurred for violation of the implied duty of good faith and fair dealing. Excell’s experience in preparing comprehensive cost summaries recouping all damages for breach can provide contractors with the opportunity for total cost recovery. Give Excell a call!

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

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