FEDERAL CIRCUIT REJECTS NARROW STANDARD FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING CLAIMS

Over the years, the long-standing legal theory of breach of an implied duty of good faith and fair dealing has been eroding. Contractors seeking to sue the government for breaching this implied duty were frequently unsuccessful because of the difficult legal burden for proving such a claim. In a recent case with far-reaching implications, however, the Federal Circuit decided that the Court of Federal Claims erred when it applied the wrong legal standard to a government contractor's claim for breach of the duty of good faith and fair dealing.

In *Metcalf Construction Company, Inc. v. United States*, 742 F.3d 984 (Fed. Cir. 2014), the Federal Circuit examined a contract between the Navy and Metcalf Construction Company ("Metcalf") for the construction of military housing in Hawaii and explained that the duty of good faith and fair dealing imposes obligations on both contracting parties that includes the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

Metcalf had been awarded a Navy contract to build housing units at Marine Corps Base Hawaii. Before the Navy issued its initial request for proposals that led to the contract award, a government-commissioned report found that the soil at the project site had a "slight expansion potential," and the Navy's request for proposals required that the awardee conduct its own independent soil investigation. In questions and answers with potential bidders, the government also clarified that the contract would be amended if the contractor's post-award independent investigation found soil conditions significantly different from those described in the government's report.

After contract award, Metcalf retained its own soil consultant, who reported that the swelling potential of the soil was "moderate to high," not "slight," and recommended design changes to account for the soil conditions. Discussions with the Navy ensued, which delayed construction for roughly a year. Metcalf ultimately decided that the cost of waiting on the Navy to approve the recommended design changes had become too high, and Metcalf implemented its consultant's recommended design changes, which all told, cost Metcalf more than $4.8 million. There were other disputes and interruptions to Metcalf's completion of the project, and Metcalf filed a claim for damages with the Navy's contracting officer, arguing that the Navy had materially breached the contract and the implied duty of good faith and fair dealing under the contract. When the contracting officer denied the claim, Metcalf brought suit in the Court of Federal Claims under the Contract Disputes Act. The government counterclaimed for liquidated damages. The case went to trial, and the Court of Federal Claims entered final judgment for the government, which Metcalf appealed.

On appeal, the Federal Circuit examined Metcalf's claim for breach of the implied duty of good faith and fair dealing, and concluded that the Court of Federal Claims erred by applying a standard too narrow when it interpreted the earlier decision *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817 (Fed. Cir. 2010). The Federal Circuit explained that the Court of Federal Claims had taken an "unduly narrow view" of the duty of good faith and fair dealing, by requiring that the duty could only be established by a showing that the government "specifically

designed to reappropriate the benefits that the other party expected to obtain from the transaction, thereby abrogating the government's obligations under the contract."

The Federal Circuit continued that "[u]nderscoring its narrow view, the [Court of Federal Claims] added that incompetence and/or the failure to cooperate or accommodate a contractor's request do not trigger the duty of good faith and fair dealing, unless the Government 'specifically targeted' action to obtain the benefit of the contract or where Government actions were undertaken for the purpose of delaying or hampering performance of the contract." The Federal Circuit therefore vacated the judgment and remanded, making clear that specific targeting is not a general requirement for there to be a breach of the duty of good faith and fair dealing, and that a breach does not require a violation of an express provision in the contract.

Precision Pine had frequently been relied on by the government seeking to defeat contractors' claims for breach of the duty of good faith and fair dealing. The *Metcalf* decision ostensibly reverses *Precision Pine* as it expands the scope and breadth of the government's duty. For public contractors, it is important to note that courts will now look more subjectively to the essence of the parties' bargain in the particular contract at issue, rather than requiring a showing of nefarious actions or bad faith by the government.