

CONTRACTING OFFICERS: DO NOT VIOLATE THE COVENANT OF GOOD FAITH AND FAIR DEALING

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Two recent cases at the Armed Services Board of Contract Appeals (“Board”) demonstrate the importance and reach of the covenant (implied duty) of good faith and fair dealing.” The covenant is particularly important for contracting officers, whose actions are often called out as improper by the boards and the courts. This duty has been described by the Court of Appeals for the Federal Circuit as follows:

- “The covenant prevents parties from “act[ing] so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.” *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005).
- The covenant “imposes on a party ... the duty ... to do everything that the contract presupposes should be done by a party to accomplish the contract’s purpose.” *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1365 (Fed. Cir. 2009)
- The Restatement (Second) of Contracts § 205, Comment d (1981), explains that the duty of good faith and fair dealing prohibits “interference with or failure to cooperate in the other party’s performance.” See *LaBatte v. United States*, 899 F.3d 1373, 1379 (Fed. Cir. 2018).
- “The implied duty of good faith and fair dealing is limited by the original bargain: it prevents a party’s acts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract’s purpose and deprive the other party of the contemplated value. “ *Metcalf Const. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014)

Relyant, LLC

In *Relyant, LLC*, ASBCA No. 59809, 2018 WL 3387700, the Board considered an Army contract for pre-fabricated relocatable buildings for use at two different sites in Afghanistan. Relyant’s proposal was for use of a “sandwich panel” that would include Styrofoam as an insulator, instead of the separate insulation and gypsum drywall required by the solicitation. The Army awarded the contract to Relyant but did not adopt the change to the statement of work in the proposal.

The buildings that Relyant delivered to the first site passed a First Article test at that site, but were deemed noncompliant with the contract’s statement of work, and were not permitted at the second site. Relyant then shipped the building components it first delivered to the second site to the first site. The local accepting authority (who was not the contracting officer) apparently did not consider them noncompliant with the statement of work and accepted them. Relyant changed its method of manufacturing to provide components that satisfied the contracting officer (and contract requirements) at the second site. In April 2009, Relyant requested that the government allow it to use its proposed sandwich panel in a modification from the statement of work. Despite knowing that Relyant was incurring costs while waiting for its response, the Government did not finally reject the proposed modification until August 2009. Even though the

contract did not specify how long the government could review a modification request, the government incurred a significant delay in its review—and once it actually considered Relyant’s request, was able to review the request and obtain the contracting officer’s approval in less than a week. The Board found that one week would have been a reasonable time for review and either approval or disapproval. The Board held that the Government’s failure to act upon the modification request for four months was a breach of the duty of good faith and fair dealing. The government allowed Relyant to “twist in the wind” and government delay in decision making was potentially to the detriment of Relyant in terms of its incurring additional costs. The Board concluded that the government’s failure to act in a more timely manner was “inconsistent with the contract’s purpose and deprived [Relyant] of the contemplated value.”

NALCO

In *North American Landscaping, Const. and Dredge Co., Inc.* (“NALCO”), ASBCA 60235 et al, August 9, 2018, the Army Corps of Engineers awarded a contract for maintenance dredging in Maine to NALCO, using a sealed bid solicitation. Although the implied duty of good faith and fair dealing does not arise before a contract is awarded, the Board found that the pre-award actions were related to the duty of good faith. NALCO offered a very low price, but the dredge in its bid was not acceptable to the Corps, and the Corps asked NALCO to change its bid. NALCO agreed to offer a larger dredge, but asked for \$328,000 to compensate for its cost. The Corps refused the additional cost, but recalculated the independent government estimate based on NALCO’s bid in order to justify award to NALCO in violation of the certification on the government bid form that this was a proper estimate. The Corps had no right to ask NALCO to make changes in its bid—but only to reject it, award based on the original bid with smaller dredge, or cancel the solicitation. The Board noted that before award, the Corps had improperly recalculated the independent government estimate to support award to NALCO, improperly manipulated NALCO’s bid to justify award at a low price, and unfairly increased NALCO’s costs by requiring a larger dredge, and simultaneously planning to act to deprive NALCO of the cash flow it needed to perform the contract.

The contract included Defense FAR Supplement 252.236.7004, Payment for Mobilization and Demobilization, which granted the contracting officer discretion to use an alternative method for mobilization costs in the event of disagreement. The Board held that the contracting officer provided only for transportation costs, and not equipment costs. The Board held that the clause was ambiguous, and had to be interpreted against the Government’s reading of the clause, thereby allowing NALCO’s equipment costs. The Board held that invoking the DFARS clause (and improper interpretation) was an abuse of discretion, which interfered with NALCO by limiting its mobilization costs to \$101,000 rather than \$874,000, improperly denying NALCO \$773,000 it needed to perform the contract. The Corps’ improper preaward actions on the dredge contributed to this. The drastic reduction in cash flow destroyed NALCO’s reasonable expectation regarding the fruits of the contract, which constituted a breach of the implied covenant of good faith, fair dealing and non-interference. The Board also found that the government had coerced NALCO into signing a release for the Corps’ improper actions. Therefore the release was unenforceable.

The Takeaway. When the Government administers a contract, it must act in good faith to accomplish the purpose of the contract. The types of government actions in these two cases (unreasonable delay, improper interpretation of a clause, depriving of a contractor of money it needs to perform the contract) were serious mistakes, demonstrated bad faith, and will not be countenanced by the Boards or the Courts. Note that the covenant applies to the actions of the contractor as well.

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