

Revisiting the Duty of Good Faith and Fair Dealing in Construction Contracts

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The Federal Circuit's decision in *Metcalf Constr. Co., Inc. v. United States*,¹ heralded an unexpected revival of the implied duty of good faith and fair dealing in federal government contracts, including federal construction contracts.² While the Federal Circuit certainly returned the principle to its doctrinal roots, the practical impact of *Metcalf* on government contractors pursuing a claim for the government's breach of the duty of good faith and fair dealing, while significant, has been somewhat more limited than initially anticipated. The third anniversary of the *Metcalf* decision provides an excellent opportunity to assess the impact of *Metcalf* in federal contracts, as well as the doctrine of good faith and fair dealing more generally in private construction contracting. Such an assessment shows, on balance, while *Metcalf* indeed breathed new life into the implied duty for federal contracts, parties continue to find it challenging to actually prove a breach of that duty whether in government or private construction projects.

***Metcalf*: Returning the Covenant of Good Faith and Fair Dealing to Its Roots**

Assessing the jurisprudential impact of *Metcalf* requires understanding the context for the Federal Circuit's landmark decision. In *Metcalf*,³ the Federal Circuit clarified the contractor's burden of proof on claims for breach of the implied duty of good faith and fair dealing. Before *Metcalf*, trial courts had developed a requirement that the contractor must prove the government "specifically targeted" the contractor to trigger a breach of the duty.

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The genesis of the trial court's misunderstanding in *Metcalf* of the doctrine arose from an earlier Federal Circuit decision, *Precision Pine & Timber, Inc. v. United States*.⁴

In *Precision Pine*, a government contractor alleged the U.S. Forest Service breached both express and implied duties in its contract by suspending a forestry contract to undertake an environmental consultation with the U.S. Fish and Wildlife Service. After five years of discovery, a twenty-four day bench trial, and extensive supplemental briefing, the trial court determined the government breached both an express contractual warranty and the implied duty of good faith and fair dealing.⁵ The trial court then issued a series of decisions, culminating in the award of \$3,343,712 in damages to the contractor.⁶ The Federal Circuit reversed.⁷

On the issue of the government's liability for the breach of the implied duty of good faith and fair dealing, the Federal Circuit began its analysis with the general premise that "[n]ot all misbehavior . . . breaches the implied duty of good faith and fair dealing owed to other parties to a contract."⁸ Instead, the court reasoned that cases in which the government has been found to violate the implied duty of good faith and fair dealing "typically involve some variation on the old bait-and-switch."⁹ The Federal Circuit analyzed prior cases and found that a breach of the duty typically involves a "double cross []," a "bait-and-switch," or some other action "specifically designed to reappropriate the benefits the other party expected to obtain from the transaction."¹⁰ The court reasoned that the "prototypical examples of this modus operandi" showed actions "specifically targeted at the plaintiffs' contract rights."¹¹

Although *Precision Pine* received some early criticism,¹² courts regularly relied on the "specifically targeted" standard to deny contractors relief.¹³ One court that adhered closely to the standard developed in *Precision Pine* was the Court of Federal Claims in *Metcalf Construction Company v. United States*.¹⁴ The trial court concluded that a breach of the duty of good faith and fair dealing claim against the government can "only be established by a showing that it was '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.'"¹⁵ Moreover, the trial court further stated 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.'"¹⁶

On appeal, the Federal Circuit rejected this “unduly narrow view of the duty of good faith and fair dealing.”¹⁷ The Federal Circuit determined the discussion in *Precision Pine* regarding the “typical” cases involving a “variation on the old bait-and-switch,” including its use of the “specifically targeted” language, was limited to the facts discussed in those prior cases.¹⁸ Going forward, the Federal Circuit emphasized in *Metcalf* that “general standards for the duty apply” and that the implied duty of good faith and fair dealing will depend on the parties’ “bargain in the particular contract at issue.”¹⁹ In this regard, the Federal Circuit endorsed the general standards as stated in *Centex*, specifically that “the covenant of good faith and fair dealing . . . imposes obligations on both contracting parties that include 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*.”²⁰ The Federal Circuit observed that while “[i]dentifying some acts as breaches of the duty, like subterfuges and evasions, may require little reference to the particular contract,” in general “what that duty entails depends in part on what that contract promises (or disclaims).”²¹

Assessing the Impact of *Metcalf* on Government Contract Claims for Breach of the Covenant of Good Faith and Fair Dealing

The “contract-by-contract” approach emphasized by the Federal Circuit in *Metcalf* certainly increased the volume of claims for breach of the duty of good faith and fair dealing. Indeed, in the three years since the Federal Circuit “loosened” the standard for the implied duty, over fifty decisions have been issued in courts and administrative boards relying on the holding to analyze a contractor’s claim for breach of the duty. Those decisions, however, have not always applied the standards consistently.

For example, the court in *Meridian Engineering Company v. United States*²² found there could be no claim for breach of the implied duty where the court had previously determined that the government did not breach the contract’s provisions regarding payments, differing site conditions, or design specifications. Emphasizing that the implied duty depends on the parties’ bargain in the particular contract at issue, the court held that its prior determination that the government had not breached the contract meant there could not be a claim for the breach of the implied duty: “Meridian has not demonstrated that the [government] otherwise violated a duty not ‘proscribed by the [C]ontract expressly.’”²³ The court determined mere “conclusory statements based on the same arguments made in support of its breach of contract claims” would not support a claim for breach of the implied duty: “finding that the [government] breached the implied duty of good faith and fair dealing here would ‘expand [the government]’s contractual duties beyond those in the express contract or create duties inconsistent with the [C]ontract’s provisions.’”²⁴

In contrast, in *ASI Constructors, Inc. v. United States*,²⁵ the government moved to dismiss a contractors’ claim for breach of contract, differing site conditions, constructive acceleration, superior knowledge and breach of the duty of good faith and fair dealing. The trial court found all claims were adequately alleged, denying the government’s motion. Specific to the contractor’s claim for the government’s alleged violation of the implied duty, the government complained that the contractor’s claim was expressly redundant to the contractor’s other claims. But the court declined to determine this claim on a motion to dismiss, even where the claims “appear to overlap substantially with those that form the basis for ASI’s DSC, superior knowledge, and constructive acceleration claims.”²⁶ Despite this “substantial overlap” however, the contractor also alleged additional facts, specifically “the failure of the Corps to provide guidance and direction to [the contractor’s] performance.”²⁷ The court determined those alleged facts were sufficient to deny the government’s motion to dismiss.²⁸

The contract-by-contract approach has enabled fairly creative assertions of the claim for a breach of the duty of good faith and fair dealing. Consider the claim of the contractor in *Mansoor Int’l Dev. Servs., Inc. v. United States*.²⁹ There, the contractor alleged that the government breached the implied duty by refusing to pay certain shipping invoices. The contracting officer denied the shipping invoices based in part on an audit of the contractor’s claims that relied on a statistical analysis comparing the shipping invoices against historical shipping data to create a “pay-out” expectation.³⁰ The contractor claimed this statistical analysis of its invoices violated the duty of good faith and fair dealing because it relied on data derived from unrelated contracts and it did not consider the merits of each shipping invoice. The contractor further contended this methodology was “neither contemplated by the parties nor consistent with the express terms of the contract.”³¹

The court denied the government’s motion to dismiss, relying both on *Metcalf* as well as an arguably more expansive view of the government’s duty. First, the court cited *Metcalf* for the principle that the implied duty exists “because it is rarely possible to anticipate in contract language every possible action or omission by a party that undermines the bargain.”³² Going further, the court rejected the government’s argument, which relied “solely on express terms of a contract” to define the duty.³³ The court held this argument “would eliminate any possibility that the implied duty of good faith and fair dealing could itself provide the basis for a claim that a contract was breached. That is wrong. The implied duty stems from the consensual terms reflected in an express contract, but it addresses the parties’ reasonable expectations that may not have been embodied in explicit contractual language.”³⁴ Thus, the *Mansoor* court took an even broader view of the implied duty of good faith and fair dealing, holding that its application is not limited to express contract terms and can extend to “candid

but unfair” dealings in evaluating contractor’s claims.³⁵

Subsequent courts have endorsed this broader standard in *Mansoor*. One such decision is *Baistar Mech., Inc. v. United States*,³⁶ where the court stated: “Although proving a breach of the implied duty of good faith and fair dealing is difficult, a plaintiff is not required to identify a violation of an express contract provision. . . . Rather than deriving solely from the express terms, the implied duty is based upon the parties’ reasonable expectations of the contract.”³⁷

Just as contractors have enjoyed only limited success in proving breaches of good faith and fair dealing since *Metcalf* breathed new life into the doctrine, contractors have found new and creative ways to assert the theory in construction contracts.

Covenant of Good Faith and Fair Dealing as an Element of Material Breach

Just as contractors have enjoyed only limited success in proving breaches of good faith and fair dealing since *Metcalf* breathed new life into the doctrine, contractors have found new and creative ways to assert the theory in construction contracts. Perhaps the most significant example of this occurred where a government contractor successfully relied on the doctrine of good faith and fair dealing as an element of proving the government’s material breach of a construction contract. In *Kiewit-Turner, A Joint Venture v. Dep’t of Veterans Affairs*,³⁸ the Civilian Board of Contract Appeals granted declaratory relief permitting a contractor to immediately stop work and walk away from an ongoing federal construction project estimated to cost over \$1 billion due to the government’s material breach of the contract.

The core dispute in *Kiewit-Turner* involved a request for declaratory relief from the Board regarding the parties’ obligations under a hospital construction contract. The Board ultimately held that the contract obligated the government to provide a design that could be built for the amount of \$582,840,000. The Board further held the government breached its obligation by failing to provide a design that could be built for that amount, thereby entitling the contractor to stop work on the project.

In deciding that the government had materially breached its contract with the contractor, the Board noted that both the Board and the Federal Circuit consider the Restatement (Second) of Contracts § 241 as setting forth factors for finding material breach.³⁹ These factors are:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
- (e) ***the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.***⁴⁰

In this way, a claim of material breach necessarily includes an analysis of whether a party’s performance comports with its obligations under the duty of good faith and fair dealing. The Board in *Kiewit-Turner* cited *Metcalf* with favor: “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. Failure to fulfill that duty constitutes a breach of contract, as does failure to fulfill a duty imposed by a promise stated in the agreement.”⁴¹ The Board articulated a broad vision of the duty of good faith and fair dealing, as one that “requires the Government, as well as other parties to contracts, not only to avoid actions that unreasonably cause delay or hindrance to contract performance, *but also to do whatever is necessary to enable the other party to perform.*”⁴²

Applying these principles and examining the acts and omissions of the government as proven by the contractor at trial in *Kiewit-Turner*, the Board found “the behavior of the [government] has not comported with standards of good faith and fair dealing required by law.”⁴³ The behavior of the government that did not comport with its duty of good faith and fair dealing included: (1) the government’s failure to control its design team; (2) the government’s failure to heed the value engineering suggestions made by the contractor or the government’s own construction manager to bring costs below the contractually required amount; (3) the government’s failure to accept the VA’s own internal cost reduction measures to bring the costs below the contractually required amount; (4) the government’s delays to construction and its delayed processing of design changes and change order requests; and (5) the government’s rejection of cost estimates developed by the contractor and the government’s construction manager in favor of a cost estimate developed by its own design team, (i.e., the party responsible for design cost overruns).

In particular, the Board criticized the government’s use of its own design team to develop a cost estimate for the project, where the design team had a vested interest in the outcome of that cost estimate. As the Board reasoned, “[t]he agency adopted as an independent government estimate a document which was neither independent (it was developed by a subcontractor to the [design team,] an

entity which had a strong interest in the result), nor by the Government (it was by the [design team]), nor an estimate (it was by admission of the chief estimator an academic exercise).⁴⁴ Despite the dubious accuracy of this estimate, the government “ultimately directed the [contractor] to continue its construction work for the [firm target price], even though the agency refused to fund that work appropriately.”⁴⁵ As discussed earlier, the Board determined the government was responsible for providing a design that could be built for \$582,840,000. Based on these government acts and omissions, and where the estimated project cost was estimated at between \$769 million and \$1.085 billion, the Board found “beyond doubt,” the government’s “breach of its contract with KT was material.”⁴⁶

The Board ultimately held that the contractor could immediately stop performance, citing Federal Circuit precedent that “[u]pon material breach of a contract the non-breaching party has the right to discontinue performance of the contract.”⁴⁷ The Board explained further, “[t]he choice of remedy is generally with the non-breaching party, and only in exceptional circumstances will equity require the non-breaching party to continue to perform the remainder of the contract.”⁴⁸ Moreover, “[i]f a contract is not clearly divisible, in accordance with the intention of the parties, the breaching party cannot require the non-breaching party to continue to perform what is left of the contract.”⁴⁹ Accordingly, the Board enabled the contractor to stop work and cease performing under a construction contract that could ultimately cost over one billion dollars.⁵⁰

Although Revived After *Metcalf*, the Doctrine Is Not “Limitless”

Construction contractors have had difficulty successfully proving government breaches of the duty of good faith and fair dealing even after the loosened standards in *Metcalf*. Moreover, recent Board decisions have further emphasized that the duty is not a “limitless” doctrine and will not expand the parties existing rights and obligations under the contract. In *CAE USA, Inc. v. Dep’t of Homeland Sec.*,⁵¹ a contractor developed a flight simulator it intended to use to provide training services under a five-year contract with the government for two types of aircraft. The Coast Guard met minimum ordering requirements at the outset for one type of aircraft, but canceled the program as to the more advanced type of aircraft. The Coast Guard was to provide an advanced avionics program one year before training began to allow the contractor to fully develop the flight simulator. When the training was canceled, the Coast Guard did not provide the avionics package. The contractor argued it should be entitled to use the avionics package for the full five-year term of the contract, and brought a claim for the breach of the duty of good faith and fair dealing for not making the package available to it.

The Board undertook an extended analysis of the theory of the duty of good faith and fair dealing in government contracts, before ultimately concluding the government

did not breach this duty where no affirmative obligation under the contract supported the contractor’s complaint.

Would it have been nice of the Coast Guard to let CAE hold the AIU avionics for a longer period of time? Certainly. But the good faith and fair dealing duty “is not limitless.” . . . If the Government is not *contractually* obligated to do certain things, it is not financially liable—under a breach of contract theory—for failing to do them. Unless CAE’s right to retain the AIU GFE for the full life of this contract was “a bargained-for benefit of” the contract, that right was not “a ‘fruit’ of” the contract, and the “obligation of the government” to grant that right could not “be abrogated when no such obligation existed.”⁵²

The Board therefore emphasized the limiting principles of the doctrine, so as to avoid what it perceived to be a boundless expansion of this theory of recovery for aggrieved contractors. In doing so, the Board defined the contours of the claim as coextensive with the contours of the contract. While consistent with decisions like *Meridian* and the Federal Circuit in *Metcalf*, this reasoning is arguably inconsistent with the broader applications of the doctrine by the Court of Federal Claims in *Man-soor* and *Baistar*.⁵³

Beyond Government Construction Contracts: The Continuing Vitality of the Duty of Good Faith and Fair Dealing in Construction Law

The duty of good faith and fair dealing is one of a number of obligations that can be implied in a private construction contract. These implied duties can be particularly important in the consideration of delay, inefficiency, or other schedule impact claims. Implied duties have also been recognized in a number of other contexts, including as a principle to limit contract terminations and as a limiting principle in certain exculpatory provisions such as a “no-damages-for-delay” provision. The duty can be described in different ways—a duty to schedule or coordinate, a duty not to interfere with another’s work, a duty to cooperate, or even a duty to disclose.⁵⁴ If the duty of good faith and fair dealing has enjoyed a measured renaissance as a federal construction claim after *Metcalf*, what is the continuing vitality of the duty of good faith and fair dealing in private construction contracts?

The Covenant of Good Faith and Fair Dealing as a Limiting Principle in Terminations

Construction contracts often grant one (or both) parties a right to terminate the contract for its own convenience. However, courts routinely recognize that a unilateral right to terminate a contract without cause or for the convenience of one of the parties must be exercised in good faith and not inconsistently with the reasonable expectations of the parties, based on all relevant facts and circumstances.

For example, in *RAM Eng'g & Const., Inc. v. Univ. of Louisville*,⁵⁵ the Kentucky Supreme Court held that while a public owner may terminate a contract for its convenience, that right cannot supersede its duty to “do everything necessary” to carry out the contract.⁵⁶ Thus, the court held procurement code requirements allowing for a termination for convenience must be read in light of procurement code requirements holding the government to the same standard of good faith and fair dealing as private parties. “Interpreting termination for convenience clauses required by the Code in the light of the duty of good faith and fair dealing obligations of that same Code is reasonable.”⁵⁷ Interestingly, the court continued by deciding that the government must, therefore, show a change in circumstances to justify a termination, even a termination for the government’s convenience. “And if we must presume that government officials act in good faith to contract in their best interest at the time of the agreement . . . then a change in circumstances is necessary for the contract to no longer be in the government’s best interest when terminating for convenience.”⁵⁸ However, most courts generally do not recognize the duty of good faith and fair dealing as allowing such a severe restriction on a party’s express contractual right to terminate a contract.⁵⁹

The Duty of Good Faith and Fair Dealing as a Principle Limiting the Impact of “No-Damages-For-Delay” Provisions

A “no-damages-for-delay” provision in a construction contract usually limits an owner’s (or prime contractor’s) liability by allowing a contractor (or subcontractor) more time, but not more compensation, in the event of a delay in contract performance. The practical impact of these provisions can be substantial, particularly for extended delays on projects with significant general conditions costs. While some jurisdictions rigidly enforce these “no-damages-for-delay” provisions, other jurisdictions will allow a contractor to recover delay damages only where the delaying party has acted in bad faith.⁶⁰ Some jurisdictions have found “no-damages-for-delay” provisions void where enforcing the provision, despite an owner’s deliberate and wrongful interference with the performance of a contract, would amount to a pre-injury waivers of future liability for gross negligence.⁶¹

However, New York courts will grant parties significant latitude where the contract contains a no-damage-for-delay provision. For example, in *Plato Gen. Constr. Corp./EMCO Tech Constr. Corp. v. Dormitory Auth. of State*,⁶² the court reasoned that the very purpose of a no-damages-for-delay clause was to allow the owner (or here, the owner’s agent) certain latitude to cause “ordinary” interference with a contractor’s performance. While the contract contained an implicit obligation of good faith and fair dealing, “the clause exonerates the defendant for delays caused by inept administration or poor planning, a failure of performance by the defendant in ordinary,

garden variety ways, or a failure of performance resulting from ordinary negligence, as distinguished from gross negligence.”⁶³ Finding such actions to be a breach would “render inapplicable the no-damages-for-delay clause.”⁶⁴

However, proving the type of bad faith or gross negligence required in states like New York in order to avoid the harsh application of the “no-damages-for-delay” provision is typically a more difficult task than proving mere “lack of good faith,” as in a breach of the duty of good faith and fair dealing. In this regard, some courts have considered the duty of good faith and fair dealing as providing a remedy to contractors where the owner did not act in good faith, but was not found to have acted in bad faith.⁶⁵

Even where the duty of good faith and fair dealing could conceivably provide a contractor a potential claim for delay, courts may still subject the claim to notice requirements in the contract. Depending on the relevant state’s interpretation and application of the implied duty, claims for breach of this duty may be available in cases even where the contract otherwise grants significant discretion to the contractor or owner in scheduling. However, the duty does not transcend other express provisions such as the contract’s claim notice requirements, which courts will continue to enforce. In *Elec. Contractors, Inc. v. Fid. & Deposit Co. of Maryland*,⁶⁶ for example, the court granted summary judgment against a subcontractor on its claims for the breach of the implied covenant of good faith and fair dealing. Even though the court determined the claims were not necessarily extinguished by the existence of a no-damages-for-delay provision in the subcontract, the subcontractor had failed to provide requisite notice of its implied warranty claim.

The court reasoned that the implied covenant of good faith and fair dealing arguably provides the subcontractor with a basis for a claim against the prime contractor, even where the subcontract unambiguously grants the prime contractor complete discretion over the scheduling and sequencing of the subcontractor’s work, because “an entirely unreasonable use of that discretion might amount to a breach of the implied covenant.”⁶⁷ However, the court determined it did not need to reach that issue because the subcontractor failed to produce evidence to rebut the prime contractor’s contention that timely written notice of the subcontractor’s claims was not provided, as required by the subcontract.⁶⁸ Thus the claim, even if arguably valid, was waived.

The Covenant of Good Faith and Fair Dealing and the Parties Duty to Cooperate

Some courts have held that an implied duty to cooperate is encompassed within the duty of good faith and fair dealing implied in every contract such that the violation of the duty to cooperate can amount to a material breach. In one such case, *McPhee Elec. Ltd., LLC v. Konover Constr. Corp.*,⁶⁹ the court found a construction manager owed a duty to its subcontractor to schedule and

coordinate the work properly. However, the court found the subcontractor owed a “correlative duty” to cooperate with the construction manager and coordinate with other subcontractors.⁷⁰ The court determined the subcontract granted the construction manager “broad powers” to modify the schedule and direct the subcontractor’s work, and no claim existed where there was no evidence that construction manager acted “wrongfully or unreasonably in fulfilling its obligations to schedule, sequence, and coordinate the work. . . .”⁷¹ In contrast, in *ACG, Inc. v. Southeast Elevator, Inc.*,⁷² the Tennessee Court of Appeals held that Tennessee law implies a duty that parties to a contract will not interfere with the performance of the contract work. The court determined that a contractor’s untimely issuance of a notice to proceed prevented a subcontractor from timely performing its work. This was held to constitute an intentional and active interference with the subcontractor’s ability to perform and thus was a breach of contract giving rise to liability for damages.⁷³

In *Coppola Const. Co., Inc. v. Hoffman Enterprises Ltd. P’ship*,⁷⁴ an owner attempted to claim a breach of the covenant of good faith and fair dealing where a contractor’s failure to pay its subcontractors resulted in excessive mechanic’s liens. This claim was soundly rejected by the court, which found no authority indicating that a claim for breaching the implied covenant of good faith and fair dealing arises where a contractor’s failure to pay its subcontractors and suppliers in a timely fashion resulted in the filing of mechanic’s liens against the owner’s property: “The court rejected the defendant’s argument, noting that the defendant had failed to provide, nor had the court itself found, any authority indicating that such allegations could support a claim for breach of the implied covenant of good faith and fair dealing. We agree.”⁷⁵

Some States Foreclose the Use of the Duty of Good Faith and Fair Dealing and the Parties’ Duty to Cooperate

Finally, not all states recognize the covenant of good faith and fair dealing as an implied obligation in every construction contract. For example, in *Electro Assocs., Inc. v. Harrop Constr. Co.*,⁷⁶ the Texas Court of Appeal held that a subcontractor was not entitled to a jury charge on the issue of good faith and fair dealing. The court held that this common law duty only applies under Texas law where a “special relationship” exists between the parties to a contract. The court held that such a relationship does not apply to a contractor/subcontractor relationship. The Florida Supreme Court has clarified that “Florida contract law does recognize an implied covenant of good faith and fair dealing in every contract,” and that such claims are not allowed “(1) where application of the covenant would contravene the express terms of the agreement; and (2) where there is no accompanying action for breach of an express term of the agreement.”⁷⁷ Other states have similarly limited the scope and impact of the doctrine. 

Endnotes

1. 742 F.3d 984 (Fed. Cir. 2014).
2. *See, e.g.,* Stu Nibley & Amy Conant, *The Fed. Cir. Breathes New Life into the Government’s Contractual Obligation to Observe the Duty of Good Faith and Fair Dealing*, 56 CONTRACTOR 11, ¶ 82 (2014).
3. 742 F.3d 984, 992 (Fed. Cir. 2014).
4. 596 F.3d 817 (Fed. Cir. 2010).
5. *Id.*
6. *Id.* at 824.
7. Precision Pine, 596 F.3d at 817.
8. *Id.* at 829.
9. *Id.* at 829.
10. *Id.* (citing Centex Corp. v. United States, 395 F.3d 1283, 1304–07 (Fed. Cir. 2005), and First Nationwide Bank v. United States, 431 F.3d 1342, 1350–51 (Fed. Cir. 2005)).
11. *Id.*
12. *See, e.g.,* Fireman’s Fund Ins. Co. v. United States, 92 Fed. Cl. 598, 677 (2010) (“Precision Pine’s two-part test for whether the Government breaches the implied duty of good faith and fair dealing must be read in this particular context, a situation where the Government’s alleged wrongful conduct does not arise directly out of the contract, i.e., key to the alleged breach are actions involving another government actor or a third party.”); D’Andrea Bros. LLC v. United States, No. 08-286C, 2013 WL 500346 (Fed. Cl. Feb. 8, 2013) *aff’d*, 547 Fed. App’x. 993 (Fed. Cir. 2013).
13. *See, e.g.,* Scott Timber Co. v. United States, 692 F.3d 1365, 1374–75 (Fed. Cir. 2012) (denying relief where contractor “has not established specific targeting”); Westlands Water Dist. v. United States, 109 Fed. Cl. 177, 205 (Fed. Cl. 2013) (“liability only attaches if the government action ‘specifically targeted’ a benefit” of the government contract at issue) (citing Precision Pines, 596 F.3d at 830); Bell/Heery v. United States, 739 F.3d 1324, 1335 (Fed. Cir. 2014) (the implied covenant of good faith and fair dealing “guarantees that the government will not eliminate or rescind contractual benefits through action that is specifically designed to reappropriate the benefits and thereby abrogate the government’s obligations under the contract.”) (emphasis added).
14. 102 Fed. Cl. 334 (Fed. Cl. 2011).
15. *Id.* at 346 (emphasis added).
16. *Id.* at 346–347.
17. Metcalf Constr., 742 F.3d at 989.
18. *Id.* at 993.
19. *Id.* at 993–994.
20. *Id.* at 991 (citing Centex 395 F.3d at 1304).
21. *Id.* (citing Precision Pine, 596 F.3d at 830) (internal citations omitted).
22. 122 Fed. Cl. 381 (2015).
23. *Id.* at 425.
24. *Id.* (citing Metcalf, 742 F.3d at 991).
25. 129 Fed. Cl. 707 (2016).
26. *Id.* at 721.
27. *Id.*
28. *Id.*
29. 121 Fed. Cl. 1 (2015).
30. *Id.* at 2.
31. *Id.* at 6.
32. *Id.* at 6 (citing Metcalf, 742 F.3d at 991).
33. *Id.*
34. *Id.*
35. *Id.* at 17.
36. 128 Fed. Cl. 504 (Fed. Cl. 2016).
37. *Id.* at 524, citing Metcalf, 742 F.3d at 994, and Mansoor, 121 Fed. Cl. at 6.
38. CBCA No. 3450, 15-1 B.C.A. 35820 (Dec. 9, 2014).
39. *Id.* (citing Lary v. U.S. Postal Serv., 472 F.3d 1363, 1367 (Fed. Cir. 2006) and Kap-Sum Properties, LLC v. General Services Administration, CBCA 2544, 13 B.C.A. (CCH) ¶ 35,446).
40. Restatement (Second) of Contracts § 241 (emphasis added).
41. *Id.* at 15.

42. *Id.* at 15 (emphasis added). Subsequent Board decisions have cited Kiewit-Turner in support of this more expansive standard. See Choc-taw Transp. Co., Inc., v. Dep't of Agric., CBCA 2482, CBCA 2653, 16-1 B.C.A. (CCH) ¶ 36579 (Dec. 9, 2016) ("The duty of good faith and fair dealing requires the Government, as well as other parties to contracts, not only to avoid actions that unreasonably cause delay or hindrance to contract performance, but also to do whatever is reasonably necessary to enable the other party to perform.")

43. *Id.* at 16.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* (quoting Stone Forest Indus., Inc. v. United States, 973 F.2d 1548, 1550 (Fed. Cir. 1992)).

48. *Id.* at 17 (quoting Stone Forest, 973 F.2d at 1552).

49. *Id.*

50. Mark Matthews, *VA Warned Repeatedly about Cost Overruns of \$1.7 Billion Aurora Hospital: Newly-released Investigation into VA Overruns Details Leadership Failures as Aesthetics Were Put above Price*, THE DENVER POST, Sept. 21, 2016, <http://www.denverpost.com/2016/09/21/aurora-va-officials-warned-repeatedly>.

51. CBCA 4776 16-1 B.C.A. (CCH) ¶ 36377 (May 26, 2016).

52. *Id.*

53. *Compare* Meridien, 122 Fed. Cl. at 425, which held there could be no breach of the duty of good faith and fair dealing where the government had not breached an express term of the contract, *with* Mansoor, 121 Fed. Cl. at 6 (rejecting the government's argument that the doctrine is solely defined by the express terms of the contract), *and* Baistar, 128 Fed. Cl. at 522 ("a plaintiff is not required to identify a violation of an express contract provision [to prove a breach of the implied duty of good faith and fair dealing] Rather than deriving solely from the express terms, the implied duty is based upon the parties' reasonable expectations of the contract.")

54. This article uses the terms "implied duty of good faith and fair dealing" and "covenant of good faith and fair dealing" interchangeably.

55. 127 S.W.3d 579 (Ky. 2003).

56. *Id.* at 585.

57. *Id.*

58. *Id.*

59. See Eagle Sys. & Servs., Inc. v. Exelis Sys. Corp., No. 1:12-cv-00303-RBJ, 2015 WL 59315, at *4 (D. Colo. Jan. 2, 2015) ("the implied covenant of good faith and fair dealing does not limit a party's express contractual right to terminate a contract without cause, particularly where the termination for convenience clause was agreed between sophisticated corporate government contractors."); see also New Vision Programs Inc. v. State, Dep't of Soc. & Health Servs., No. 46914-6-II, 2016 WL 1230324, at *3-4 (Wash. Ct. App. Mar. 29, 2016) ("No implied duty of good faith and fair dealing exists where a party has unilateral authority to do or not do something under a contract . . . contract provisions permitting a party to cancel an agreement at will do not imply a duty of good faith."); Mb Oil Ltd., Co. v. City of Albuquerque, 382 P.3d 975, 980 (N.M. Ct. App. 2016) (Aligning itself with "with those courts that have refused to apply an implied covenant of good faith and fair dealing to override express provisions addressed by the terms of an integrated, written contract[,] the Court held a termination for convenience was "neither a breach of the Contract nor a breach of the covenant of good faith and fair dealing.")

60. See, e.g., Clifford R. Gray, Inc. v. City Sch. Dist. of Albany, 277 A.D. 2d 843 716 N.Y.S.2d 795 (App. Div. 2000) (recognizing that New York law embraces various common law exceptions to the enforceability of a no-damage-for-delay clause, including delays caused by owner bad faith or willful conduct); but see Law Co., Inc. v. Mohawk Const. & Supply Co., Inc., 702 F. Supp. 2d 1304, 1319-21 (D. Kan. 2010) (gathering cases on the principle, the district court declined to extend the holding in Clifford Gray beyond New York, holding that an owner's "fundamental breach" of the contract due to bad faith will not overcome a "no-damages-for-delay provision").

61. Zachry Constr. Corp. v. Port of Houston Auth. of Harris Cty., 449 S.W.3d 98, 116 (Tex. 2014).

62. 932 N.Y.S.2d 504 (App. Div. 2011).

63. *Id.* at 823.

64. *Id.* at 824. See also Pellerin Constr., Inc. v. Witco Corp., 169 F. Supp. 2d 568, 584 (E.D. La. 2001) (refusing to recognize "active interference" by a party as an exception to 'no damages for delay' clauses under Louisiana law and refusing to find a breach of the obligation of good faith where record showed only ordinary "derelictions"); Asset Recovery Contracting, LLC v. Walsh Constr. Co. of Ill., 980 N.E.2d 708, 729-30 (Ill. App. Ct. 2012) (refusing to recognize "active interference" by a party as an exception to 'no damages for delay' clauses under Illinois law).

65. Questar Builders, Inc. v. CB Flooring, LLC, 978 A.2d 651, 675 (Md. 2009) ("[T]he obligation of good faith and fair dealing requires a party exercising discretion to do so in accordance with the 'reasonable expectations' of the other party."); Renaissance Mgmt. Co. v. Conn. Hous. Fin. Auth., 281 Conn. 227, 240 (2007); SAK & Associates, Inc. v. Ferguson Const., Inc., 357 P.3d 671, 676 n. 32 (Wash. Ct. App. 2015); Vila & Son Landscaping Corp. v. Posen Const., Inc., 99 So. 3d 563, 567-68 (Fla. Dist. Ct. App. 2012).

66. No. 3:13-cv-00514 (MPS), 2015 WL 1444481, *7-8 (D. Conn. Mar. 30, 2015).

67. *Id.* at *7.

68. *Id.*

69. No. CV075009694S, 2009 WL 4846555, at *25-26 (Conn. Super. Ct. Oct. 22, 2009).

70. *Id.*

71. *Id.* at *26.

72. 912 S.W.2d 163 (Tenn. Ct. App. 1995).

73. See also Beacon4, LLC v. I & L Investments, LLC, No. E2015-01298-COA-R3-CV, 2016 WL 4545736, at *37 (Tenn. Ct. App. Aug. 30, 2016), *appeal denied* (Dec. 15, 2016), which held the actions of an owner's construction manager did not comport with the notion of "honesty in fact" where it rescinded its agreement to pay retainage on certain claims. The court held these actions were in bad faith, motivated by the construction manager's desire to implement a "scorched earth" policy. "When [the construction manager] received [the contractor's] initial demand letter, his response and advice to [the owner] was for 'the fire for the "scorched earth"[to be] ignited.' This is a 'long way' from impartiality. This also reflects an intent by [owner] to use whatever was at its disposal to take advantage of [the contractor]." *Id.* at *38-39.

74. 117 A.3d 876 (Conn. App. Ct. 2015).

75. *Id.* at 914.

76. 908 S.W.2d 21 (Tex. Ct. App. 1995).

77. QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc., 94 So. 3d 541, 548 (Fla. 2012).