Client Alert

pillsbury

Government Contracts
& Disputes

March 26, 2014

Who Says Life's Not Fair: Good Faith and Fair Dealing Prevails in Metcalf Case.

By C. Joël Van Over and Alexander B. Ginsberg

In a ruling highly anticipated among government contractors, the United States Court of Appeals for the Federal Circuit held on February 11, 2014, in Metcalf Construction Company, Inc. v. United States*, No. 2013-5041 (Fed. Cir. Feb. 11, 2014), that a contractor suing the government for breaching the implied duty of "good faith and fair dealing" need* not *show that the government's conduct was "specifically targeted" to reappropriate the contractor's benefits under the subject contract. Rather, the Federal Circuit reaffirmed the vitality of traditional standards used to prove a breach of the duty of good faith and fair dealing, such as where the government hindered or failed to cooperate with the contractor's performance so as to "destroy the [contractor's] reasonable expectations. . . regarding the fruits of the contract."*

In so holding, the Federal Circuit reversed the trial decision of the United States Court of Federal Claims, which itself had adopted the "specific targeting" standard from the Federal Circuit's own 2010 decision in *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817 (Fed. Cir. 2010). In *Metcalf*, the Federal Circuit held that the trial court applied "an unduly narrow view of the duty" and that the *Precision Pine* standard was limited to the context of that case.

The *Metcalf* decision provides a certain degree of clarity to a venerable doctrine – the duty of good faith and fair dealing – that recently has been obfuscated by cases like *Precision Pine*, where the court articulated a novel standard that it now explains applies in only very limited circumstances. *Metcalf* generally signals a return to the reasonable conduct standard that prevailed before *Precision Pine*.[1] The case, thus, also signals the ongoing viability for contractors of a cause of action for government breach of the duty of good faith and fair dealing.

[1] Citing *Metcalf*, the Federal Circuit reaffirmed its analysis of the good faith and fair dealing standard in *Century Exploration New Orleans, LLC v. United States*, No.2013-5041 (Fed. Cir. Feb. 11, 2014).

The Duty of Good Faith and Fair Dealing

Traditionally, the duty of good faith and fair dealing has included both the duty to cooperate and the duty not to hinder performance. For example, the Court of Federal Claims' predecessor court held the United States in breach of this duty where the government: unreasonably delayed acceptance of contractor's deliverables, *Kehm Corp. v. United States*, 119 Ct. Cl. 454 (1950); failed to make the work site available to allow for timely performance*, L.L. Hall Constr. Co. v. United States*, 177 Ct. Cl. 870 (1966); or failed to provide plans and drawings*, Cedar Lumber, Inc. v. United States*, 5 Cl. Ct. 539 (1984).

In each of these cases, the court assessed the *objective reasonableness* of the government's conduct, which is the same test the Federal Circuit traditionally applied*. See, e.g., C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1542 (Fed. Cir. 1993) ("[t]he government must avoid actions that unreasonably cause delay or hindrance to contract performance."); *Malone v. United States*, 849 F.2d 1441 (Fed. Cir. 1988) (adopting the analysis of the duty found in the Restatement (Second) of Contracts. Restatement § 205 comment d states: "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified.").

Metcalf and *Precision Pine*

Metcalf involved a U.S. Navy contract to build housing units at a Marine Corps base in Hawaii. From the outset, *Metcalf* experienced numerous performance problems and delays, many of them attributable to government fault. Indeed, at trial, the Court of Federal Claims observed that the Navy engaged in "overzealous" and "retaliatory" inspections and issuance of noncompliance notices, overbearing contract administration by an unqualified contracting officer, and "hard-nosed," coercive withholding of payments. Despite these facts, the court found that the government had not breached its duty of good faith and fair dealing because the government's actions were not "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 court expressly based this holding on the Federal Circuit's decision in *Precision Pine.*

Precision Pine, in turn, involved several U.S. Forest Service timber-harvesting contracts that contemplated a five-year period of performance. Roughly halfway through the period of performance, the U.S. Fish and Wildlife Service placed the Mexican spotted owl on the endangered species list. That listing triggered a variety of statutory and regulatory obligations under the Endangered Species Act, and compliance with those obligations – following an injunction issued by a federal district court – lasted more than a year. *Precision Pine* eventually sued the Forest Service alleging, in part, a breach of the duty of good faith and fair dealing relating to the Forest Service's delay in complying with the relevant regulations. After the trial court found that the government had breached its duty of good faith and fair dealing, the Federal Circuit reversed, holding that the government's actions were not "specifically targeted" to reappropriate the benefits of the contracts.

Again reversing the Court of Federal Claims, the Federal Circuit stated in *Metcalf* that the "trial court misread *Precision Pine*, which does not impose a specific-targeting requirement applicable across the board or in this case." The Federal Circuit went on to explain that the "specific targeting" standard applies where the government implements "a separate government authority and duty independent of the contract" – i.e., where the government action in question occurs in response to regulation by another government entity. As such, the "essential basis of *Precision Pine* was that the challenged conduct was not contrary to the contract bargain."

Conclusion

Accordingly, the Federal Circuit affirmed that *Precision Pine* did not overturn prior case law regarding the duty of good faith and fair dealing. The Federal Circuit stopped short, however, of explicitly reciting the generally-applicable standard or illuminating the range of circumstances where it may not apply. Thus, the court leaves the further evolution of the reasonableness standard, and the circumstances that will trigger the *Precision Pine* "specific-targeting" standard, to future cases. The apparent gulf between these standards may widen or narrow.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

C. Joël Van Over (bio)
Northern Virginia
+1.703.770.7604
joel.vanover@pillsburylaw.com

Alexander B. Ginsberg (bio)
Northern Virginia
+1.703.770.7521
alexander.ginsberg@pillsburylaw.com