

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

Part I: Duty of Good Faith and Fair Dealing

INTRODUCTION

It has been 10 years since the landmark decision in [Metcalf Constr. Co. v. United States](#), 742 F.3d 984 (Fed.Cir. 2014) re-defined the standard for proving the Government's implied **Duty of Good Faith and Fair Dealing**,

Where a breach of that duty constitutes a breach of the contract, [Metcalf has enabled contractors everywhere to recover their costs](#) related to impacts from being **TREATED UNFAIRLY**, and to be in a stronger contractual position to negotiate change orders and Requests for Equitable Adjustment.

In fact, the *Metcalf* case has been relied upon and cited by **over 200 cases and administrative decisions**, and those are just the cases that have gone to trial and a judgment was issued. **This number does not include the thousands of settlements, change orders, and other contractual remedies** that have been successfully negotiated after contractors effectively demonstrate that the Government entity breached its duty of good faith and fair dealing. Contractors had previously blocked from this relief for decades, i.e., well over 20+ years.

10 years ago, the **U.S. Court of Appeals for the Federal Circuit** (the "Appellate Court") reversed an opinion by the U.S. Court of Federal Claims ("Claims Court") that is still being called **the most important federal construction opinion of the last decade**.

In the *Metcalf* decision, the CAFC clarified TWO IMPORTANT ISSUES that shifted the playing field to 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, with its "present day" applications, including maladministration, contractual threats, and/or contractual bias.

THE GOVERNMENT'S DUTY

Metcalf legally established that the **Government's duty of good faith and fair dealing is alive and well**, after being dormant and nearly impossible to prove for over 20 years. The court revived this duty in the *Metcalf* case, and in doing so opened up the Government's potential liability for breach of contract when it fails to reasonably administer its construction contracts. In essence, **ALL contractors must be aware of this duty** - what that duty is and how to identify it - to protect their interests against unreasonable or arbitrary conduct by Government contracting personnel.

The **Plaintiff** in *Metcalfe*, Metcalfe Construction Company (Metcalfe), entered into a contract with the U.S. Navy in 2002 in to design and build housing units on a Marine Corps base in Hawaii. Metcalfe sought to recover a \$27 million cost overrun (on its \$43mm contract) that it claimed was the result of maladministration by the Navy.

Metcalfe filed a lawsuit in the Court of Federal Claims, 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 Metcalfe to withdraw certain claims; and the court found that Contracting Officer displayed a general lack of experience and ability.

Despite these findings, however, the lower court erroneously denied Metcalfe's breach of contract claim. The lower court interpreted the **old 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.

Importantly, the appellate court **reversed** the lower court's decision, stating that the lower court interpreted the standard too narrowly. The appellate court then **clarified the standard for both parties' duty of good faith and fair dealing**. The Appellate Court explained that the duty imposes two obligations on both parties:

- The **duty to cooperate** with the other party, and
- The **duty to not interfere** with the other party's performance.

The court stated that these duties stem from the overarching responsibility "not to act so as to destroy the reasonable expectations of the other party (i.e., to cooperate) regarding the *fruits* of the contract."

The **duty of good faith and fair dealing** is an *implied duty* that 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 more importantly than that, breach of the duty does not require a violation of an express provision in the contract. Therefore, improper conduct by either party that is inconsistent with the contract's *purpose* may breach that contractor's duty of good faith and fair dealing.

DEMONSTRATED EFFECTS

The Metcalfe 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 *Metcalfe* **revived the duty of good faith and fair dealing after 20+ years**, which many feared was dead. **PREVIOUSLY**, contractors had no relief for government maladministration unless the contractor could prove bad faith, which required near "irrefragable proof" of malicious intent to injure the contractor—an almost impossible standard to meet.

However, *Metcalfe* has changed the game by relieving contractors from meeting this nearly impossible burden of proof. Under *Metcalfe*, Government personnel are now subject to consequences for hindering contractors' performance and maladministration, which was previously all-but unattainable, but is now compensable.

The re-defined 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.

Obviously, the success of future claims for breach of contract will rely heavily on the facts and documentation surrounding the claim. Thus, it will be important for contactors to consult with an expert in determining whether certain facts may constitute breach, and aid the contractor in the presentation and/or collection efforts to perfect a successful outcome.

In that regard, Excell Consulting International, Inc. is available to assist contractors in the analysis of maladministration resulting from unreasonable or arbitrary Government conduct and has a history of successfully doing so without the need to of formal litigation or arbitration.

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, to include Excell's consulting fees and contractor claim preparation costs. **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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