



# Set-Aside Alert<sup>TM</sup>

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## The government's good faith and fair dealing duty to government contractors

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One of the biggest challenges federal contractors face these days is the time agencies are taking to make decisions that impact the contractors' bottom lines.

These delays can be particularly damaging to firms performing government contracts that are in limbo while decisions are pending on routine contract administrative matters. Because such delays can have a significant impact on the timely, successful and profitable performance of a contract, contractors often have good reason to question whether the government is fulfilling its end of the bargain. They should know that the government has a duty of good faith and fair dealing, which may be considered breached if the government hinders the contractor's performance on the contract.

### Good faith & fair dealing duty

It is well settled that there is an implied promise in every contract for the parties to act in good faith and engage in fair dealing with each other. The covenant essentially imposes obligations on both parties, which include the duty to not interfere with the other party's performance and to not act so as to destroy the "reasonable expectations" of the other party regarding the fruits of the contract. This duty applies to the government no differently than it does to private parties.

### Basis for legal claims

Contractors often confront situations where the benefits they anticipated receiving from a contract are eroded because of government actions, or lack thereof. When these situations arise, the contractor may have a claim against the government.

The first place a contractor should look for relief when the government appears to be in breach is the contract itself. Contractors can

find remedies in Federal Acquisition Regulation clauses. For example, on many contracts, particularly for construction work, the FAR provides relief for government-caused delays.

Regardless of the remedies available to a contractor, often times the government's conduct destroys the contractor's reasonable expectations of what it expected to receive from the contract.

It is in those situations that contractors should question whether the government is acting in good faith and engaging in fair dealing in the performance of its obligations.

This does not mean that the contractor should accuse contracting personnel of bad faith whenever government actions or delays impact their bottom line. Such allegations are not only difficult to prove but also certain to undermine a constructive relationship.

Rather, when questioning whether the government has breached its implied promise of good faith and fair dealing, the contractor should consider the government's likely response.

Like the contractor, the government has expectations of its own from the contract. The contracting officer can rely upon the terms of the contract to establish the parties' obligations in response to the situation the contractor believes is destroying its expectation. Pointing to those clauses, the contracting officer can argue that the contractor's expectations should be tempered and measured by the terms of the contract.

To the extent the contract offers remedies, such as, for example, delays, a claim that the government has breached the duty of good faith and fair dealing may not be deemed to have much merit. With so many FAR clauses incorporated into a contract, the government clearly has an arsenal of arguments to establish the parties' expectations when disputes arise.

### Every case is unique

Nonetheless, every case is different. Just because it may be difficult to prove that there has been a breach of the duty of good faith and fair dealing does not mean a contractor may not still have a viable claim. Indeed, the U.S. Court of Appeals for the Federal Circuit recently ruled in favor of a contractor who made such a claim. Notwithstanding the existence of a contract clause through which remedies were available, the contractor's claim was allowed to proceed.

The appellate court also took a broader view of the covenant than the lower court and rejected the government's assertion that a violation of an express provision of the contract was a prerequisite to liability.

### Scope depends on context

Because the scope of the duties of good faith and fair dealing depends on the context of the particular contract, contractors should not discount it when dealing with the government. On the other hand, using the implied covenant as a sword to prompt favorable or expeditious government action could undermine the relationship with the government and its efficacy. However, with government delays and indecision destroying contractors' expectations of the benefits they anticipated receiving from their contracts, consideration should be given to asserting the claim when appropriate to get the benefits of the bargain.

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