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PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



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# Long Live Reasonableness: Reinforcing the Implied Duty of Good Faith and Fair Dealing in Government Contracts

*By Justin M. Ganderson and Bryan M. Byrd\**

*The authors of this article examine two recent U.S. Court of Federal Claims decisions arising from the same case that reinforce the implied duty of good faith and fair dealing as a mechanism to protect a party's reasonable expectations under a government contract (even in the absence of a specific contractual provision on point).*

In *CanPro Investments Ltd. v. United States*,<sup>1</sup> the U.S. Court of Federal Claims (“COFC” or “court”)<sup>2</sup> denied the government’s motion for reconsideration and reaffirmed its prior decision that CanPro Investments Ltd. (“CanPro”) may continue to litigate its claim against the government for breach of the implied duty of good faith and fair dealing. CanPro alleged that the government breached the implied duty by receiving an unreasonable number of visitors at the building it leased from CanPro—despite their being no specific contractual provision regulating the number of permitted visitors. Both *CanPro Investments* decisions are important because they reinforce the implied duty as a mechanism to protect a party’s reasonable expectations arising from a government contract.

## BACKGROUND

In 2012, the General Services Administration (“GSA”) leased certain office space in Boca Raton, Florida from CanPro for a local Social Security Administration (“SSA”) office. Although the lease did not include a specific provision limiting the amount of visitors to the SSA, CanPro indicated that the government represented during negotiations that visitors to the SSA during

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<sup>1</sup> No. 16-268C, slip op. (Fed. Cl. Apr. 10, 2017), *available at* [https://ecf.cofc.uscourts.gov/cgi-bin/show\\_public\\_doc?2016cv0268-32-0](https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0268-32-0) (Op. on Mot. for Recon.).

<sup>2</sup> 130 Fed. Cl. 320 (2017), *also available at* [https://ecf.cofc.uscourts.gov/cgi-bin/show\\_public\\_doc?2016cv0268-20-0](https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0268-20-0) (Op. on Mot. to Dis.).

“peak times” would not exceed 250 per day. The lease also included a release provision under which CanPro waived any claims arising from “the Government’s normal and customary use of the leased premises.”

Shortly after the amended lease term commenced, the SSA’s West Palm Beach location closed, and CanPro experienced an “overwhelming amount of visitors” in its Boca Raton building, which resulted in CanPro incurring significant additional expenses.

Following unsuccessful discussions between the parties, in November 2014, CanPro filed a certified claim with the GSA contracting officer alleging, among other things, that “GSA ‘materially breached’ the lease and the ‘implied covenant of reasonable use’ by scheduling and accommodating approximately 500 visitors daily.” CanPro demanded \$250,000 and termination of the lease. Almost five months later, the contracting officer issued a final decision denying the claim in its entirety, emphasizing that the lease failed to contain a specific clause limiting the number of daily visitors. CanPro appealed to the court.

Shortly after filing its complaint, CanPro faced a motion to dismiss. The court ultimately granted the majority of the government’s motion, leaving intact only CanPro’s claim for breach of the implied duty of good faith and fair dealing “premised on the allegation that the SSA’s use of the leased space is unreasonable and beyond the use intended by the parties.” The government moved for reconsideration, which the court denied in April 2017.

### **ANALYSIS OF THE COURT’S DECISION ON THE MOTION TO DISMISS**

The court rejected the government’s arguments to dismiss CanPro’s claim that the government breached the implied duty of good faith and fair dealing, which the court noted “can also be phrased as ‘the implied duty not to hinder and the implied duty to cooperate.’ ”<sup>3</sup>

*First*, the government asserted that there was “no breach of contract because no lease provision limits, or even refers to, the volume of SSA visitors.” The court disagreed. Although the court acknowledged that “no provision in the lease refers to a specific number of visitors,” the court reminded the government that a “contract must be viewed in its entirety.” The court found that the release provision in the contract, which precluded recovery arising from the “normal and customary use of the leased premises,” supported an interpretation that the GSA and/or the SSA were “required to use” the office space “in a ‘normal and customary’ manner.” Accordingly, pursuant to the implied duty, the govern-

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<sup>3</sup> 130 Fed. Cl. at 349 (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 827 (Fed. Cir. 2010)).

ment was “obligated to limit the daily visitor volume” to a “reasonable number”—which may ultimately be 250 persons per day.

*Second*, the government argued that “because CanPro remains able to perform its obligations under the lease by providing the leased space, neither the GSA nor the SSA has acted to ‘interfere with CanPro’s performance of the lease.’” In finding this argument unpersuasive, the court recognized that “Government actions that are unreasonable under the circumstances” can violate the duty not to hinder, and a “failure to provide assistance at the request of a contractor has amounted to a breach of the duty to cooperate.”<sup>4</sup> Thus, although CanPro was able to continue performing its obligations under the lease, its allegations were “sufficient to plausibly demonstrate that its performance has been hindered.”

*Third*, the government contended that, because GSA continued to pay the contractually specified rent, neither GSA nor SSA acted to deprive CanPro of its expectations under the lease. The court found this argument to be unduly restrictive, recognizing that the implied duty of good faith and fair dealing “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 [its] contemplated value.”<sup>5</sup> The court concluded that the government’s actions may have “den[ie]d CanPro its reasonably expected value of consideration due to the significant increased costs it has incurred.”

*Finally*, the government contended that “the presumption that Government officials act in good faith” requires a plaintiff to “allege and prove facts constituting malice” to succeed on a claim for breach of the implied duty. In finding this argument misplaced, the court explained that “‘[t]he presumption of good faith conduct of government officials has no relevance’ to the implied duty of good faith and fair dealing [because] [t]he presumption only arises where conduct ‘approaching fraud or quasi-criminal wrongdoing’ is involved.”<sup>6</sup>

#### **ANALYSIS OF THE COURT’S DECISION ON RECONSIDERATION**

In its motion for reconsideration, the government argued that the court “erroneously imputed an implied duty of good faith and fair dealing on the part of the GSA and/or the SSA.” Specifically, the government argued that the implied duty “must attach to a specific substantive obligation,” and in this instance, “the lease contains no duty or implied duty related to the Government’s use or the number of visitors that could have been breached.”

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<sup>4</sup> *Id.* (quoting *Northrop Grumman Corp. v. United States*, 47 Fed. Cl. 20, 78 (2000)).

<sup>5</sup> *Id.* at 350 (quoting *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014)).

<sup>6</sup> *Id.* (quoting *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 771 (2005)).



The court found that this argument lacked merit because “[r]equiring the implied duty of good faith and fair dealing to literally ‘attach’ to a specific contractual duty, rather than be grounded in contractual provisions generally to ensure that the reasonable expectations of the parties are respected, . . . would render the implied duty wholly superfluous.”<sup>7</sup> The court emphasized that “[a]n aggrieved party need only show interference with its ‘reasonable expectations . . . regarding the fruits of the contract.’ ”<sup>8</sup>

The court concluded: “In sum, the existence of a provision addressing the ‘normal and customary use’ of the premises (whatever it may be), the incorporation of building specifications into the lease, and basic common sense—or any of these, standing alone—indicate that defendant cannot plausibly argue that the parties reasonably expected an unlimited number of daily visitors to the SSA office.”

## IMPLICATIONS

### The Implied Duty Continues to Protect Reasonable Expectations

As reflected in the court’s decisions, a contractor can present a viable breach of contract claim under the implied duty not to hinder and to cooperate by alleging that the government interfered with the contractor’s reasonable expectations “regarding the fruits of the contract.”<sup>9</sup> A specific contractual provision need not be breached, and bad faith (or a lack of good faith) need not be demonstrated.<sup>10</sup> As a result, this doctrine helps to instill fairness and to

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<sup>7</sup> Slip op. at 4 (citing *Centex Corp. v. United States*, 395 F.3d 1283, 1306 (Fed. Cir. 2005)).

<sup>8</sup> *Id.* (quoting *Centex*, 395 F.3d at 1304, and citing Restatement (Second) of Contracts § 205 cmt. a).

<sup>9</sup> Compare *CanPro Investments with, TranBen, Ltd. v. Department of Transportation*, CBCA 5448, slip op. (Jan. 26, 2017) (discussing the unique “reasonable expectations” under an indefinite delivery, indefinite quantity contract, and finding that the government actions “at issue were simply too far removed from the express contract terms, and the reasonable expectations they created, to constitute a breach” of the implied duty of good faith and fair dealing).

<sup>10</sup> This principle was also recently reinforced by the U.S. Court of Appeals for the Federal Circuit in *Agility Pub. Warehousing Co. KSCP v. Mattis*, slip op. (Fed. Cir. Apr. 4, 2017) available at <http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/16-1265.Opinion.4-3-2017.1.PDF>. In that case, the Federal Circuit reversed the Armed Services Board of Contract Appeals’ determination that it “need not decide whether the government . . . breached its implied duty of cooperation [because] whether the government breached the contract comes down to contract interpretation.” Slip op. at 22. In doing so, the court emphasized that a “breach of the implied duty of good faith and fair dealing does not require a violation of an express provision in the contract.” *Id.* (quoting *Metcalfe Constr. Co.*, 742 F.3d at 991). Rather, the Federal Circuit reiterated: “A party might breach this implied duty by interfering with another party’s performance or acting in such a way as to destroy the reasonable expectations of the other party

ensure that parties act in a reasonable manner under government contracts. Of course, contractors still should consider including any important requirements (or expectations) in the contract itself. It often is easier to argue that an express contract provision has been breached versus an implied duty arising from that contract.

### **Unreasonable Impediments to Performance may be Actionable Even if a Contractor Can Continue to Perform or Has Received Payment**

These decisions demonstrate that the government should not be able to defeat a claim for breach of the implied duty merely by asserting that the contractor was able to continue performance or that it paid the contractor. Accordingly, even when a contractor is able to continue performance or has been paid, allegations of unreasonable impediments to performance caused by the government may be sufficient to plausibly demonstrate that the contractor's performance has been hindered or that the contractor has not reaped the expected benefits under the contract.

### **The Implied Duty Still Has Limits**

Contractors should be cognizant that the implied duty has its limits. For example, in its 2014 *Metcalf Construction* decision, the U.S. Court of Appeals for the Federal Circuit eloquently explained that an action “will not be found to violate the duty (which is implicit in the contract) if such a finding would be at odds with the terms of the original bargain, whether by altering the contract’s discernible allocation of risks and benefits or by conflicting with a contract provision.”<sup>11</sup> In other words, contractors should not view the implied duty as a tool to change (*e.g.*, expand) the underlying obligations in the contract.<sup>12</sup> The language in the contract matters; read and negotiate carefully.<sup>13</sup>

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regarding the benefits provided by the contract.” *Id.* (quoting *Centex*, 395 F.3d at 1304).

<sup>11</sup> *Metcalf Constr. Co.*, 742 F.3d at 991. *See also TranBen, Ltd.*, CBCA 5448, slip op. at 8 (commenting that the “implied duty of good faith and fair dealing does not entitle a contractor to damages for every dubious action by the contracting agency that impairs the value of the contract”).

<sup>12</sup> *See also Precision Pine & Timber, Inc.*, 596 F.3d at 831 (“The implied duty of good faith and fair dealing cannot expand a party’s contractual duties beyond those in the express contract or create duties inconsistent with the contract’s provisions.”).

<sup>13</sup> Contractors also should note that, in some instances, the more stringent “specifically targeted” test may apply to an implied duty claim instead of the “reasonableness” test. *See Metcalf Constr. Co.*, 742 F.3d at 993 (stating that “specifically targeted” test would apply to an implied duty claim when the government’s actions resulted from “the authority of other government entities or on responsibilities imposed on the contracting agency independent of contracts”). *See also Precision Pine & Timber, Inc.*, 596 F.3d 817 (discussing the “specifically targeted” test); Jason Workmaster, Justin Ganderson & Luke Meier, *Fed. Circ. Metcalf Ruling—A Major Boost To*

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*Contractors*, Law360 (Feb. 19, 2014) available at <https://www.law360.com/articles/511088/fed-circ-metcalf-ruling-a-major-boost-to-contractors> (analyzing the Federal Circuit's *Metcalf Construction* decision, and discussing the "specifically targeted" and "reasonableness" tests).