

BREACH OF COVENANT NEED NOT BE SUBMITTED TO CONTRACTING OFFICER WITH EQUITABLE ADJUSTMENT CLAIM

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The Court of Federal Claims recently ruled that a breach of contract (i.e. a breach of the covenant of good faith and fair dealing, or “Covenant”) does not occur until a claim for an equitable adjustment is wrongly denied by a contracting officer. When such an equitable adjustment is denied, the contractor can add the allegation of breach of the covenant to its appeal—no further submission to the contracting officer is necessary. *Aries Const. Corp. v. United States*, No. 22-166C (Fed. Claim Feb. 21, 2023).

Ares received a contract from the National Park Service (“NPS”) for installation of a water pipeline system. When Aries encountered hard rock requiring additional equipment and labor to remove it, this resulted in delays. When Aries informed NPS officials, NPS instructed Aries to proceed, and additional expense was incurred. When Aries submitted Contract Disputes Act claims to the contracting officer for funds to cover the additional work, the claims were denied. Aries alleged in this action that the denial of its claims breached both the contract and the Covenant. The NPS moved to dismiss the action based on violation of the Covenant.

To demonstrate that there was a breach of the Covenant, a plaintiff must show that a “specific promise” in the contract was undermined by the government, as well as subterfuge or evasion of the spirit of the bargain in the contract, or failure to cooperate, as well as reappropriation of a reasonably expected benefit. In this case, the submission of the claim to the contracting officer placed the contracting officer on notice that if he denied an equitable adjustment that Aries was entitled to, Aries could allege that the contracting officer had the facts and legal basis that would support a claim for breach of the Covenant. Furthermore a breach of the Covenant in this case does not occur until the claim for equitable adjustment was denied. And, the Court noted that there is no need to submit a *separate* claim for breach of the Covenant. The contracting officer had all the facts, and the denial triggers the opportunity for the contractor to pursue different theories in the litigation for why the denial was wrongful.

Takeaway. You can’t submit a claim for violation of the covenant until, in a claim for equitable adjustment, the claim has been wrongly denied. But the contractor in that case need not submit a second claim to the contracting officer, if it decides to appeal the claim denial. The contractor can merely amend its complain to allege violation of the Covenant.

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