

## GOVERNMENT ACTS IN BAD FAITH DIFFER FROM BREACHING THE COVENANT

By Richard D. Lieberman, Consultant and Retired Attorney

The Department of Housing and Urban Development (“HUD”) issued a solicitation for marketing and management services on HUD properties. Two contracts were awarded, one to Sigma Services, Inc., and one to another contractor. The contract stated that “each vendor will be assigned an equal number of the outstanding unsold inventory in the contract area...” When performance began, Sigma received *fewer* unsold properties than the other contractor. At the Civilian Board of Contract Appeals, Sigma alleged that HUD breached its implied duty of good faith and fair dealing by refusing to respond to Sigma’s many requests for its contractual share of the properties. HUD moved to dismiss the complaint, arguing that the appellant had failed to state a claim upon which relief could be granted because Sigma did *not* allege “bad faith.” *Sigma Servs., Inc.*, CBCA 2704, Nov. 5, 2012.

The Board denied the motion to dismiss, noting that the covenant of good faith and fair dealing is inherent in every contract. While Government officials are presumed to exercise their duties in good faith, a claim, such as Sigma’s, that HUD breached the implied covenant of good faith does *not* require a showing of bad faith. *Centex Corp. v. United States*, 395 F. 3d 1283, 1304 (Fed. Cir. 2005). The Court explained the following:

This is because a claim that the government breached the covenant of good faith and fair dealing is not the same as the claim that the government acted in bad faith. An allegation of breach of the covenant of good faith and fair dealing is an allegation that the party’s contracting partner deprived it of the fruits of the contract...while bad faith is motivated by malice...and does not necessarily result in a deprivation of the fruits of the contract.

Furthermore, the Court noted that the covenant of good faith and fair dealing can be breached upon proving such things as lack of diligence, negligence or a failure to cooperate. “In fact, one can violate the obligation of good faith through [subterfuges and evasions...even though the actor believes his conduct to be justified.” *Restatement (Second) of Contracts* § 205(D) (1981) (emphasis added).

TIPS: Contractors need not allege or provide bad faith in order to demonstrate that the Government has violated the covenant of good faith and fair dealing. Lack of diligence, negligence or even a failure to cooperate demonstrates that the Government has violated that covenant. Bad faith, on the other hand is shown by clear and convincing evidence that a government official acted with malice, or an intent to harm the contractor. If the government violates the covenant, you should allege that fact in your claim to the Contracting Officer.

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