



## THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

Parties to a contract may have implied duties that are not clearly expressed in the contract. One of these implied duties, the duty of good faith and fair dealing, was recently affirmed in *Metcalf*<sup>1</sup> by the United States Court of Appeals. In that case, the court reaffirmed that even the government is required to act in good faith when performing its part of a contract. Further, the court held that the implied duty requires parties to cooperate, and to refrain from committing acts that will hinder performance of the other's duties. For construction contracts, this generally means that the parties must refrain from committing acts or omissions that are inconsistent with the contract's purpose or which impact the other party's performance of their end of the contract. Notably, parties can provide some definition to this implied duty by contractually specifying the notice and timing requirements for documents necessitating cooperation between the parties, such as, change orders, requests for information, and submittals.

A violation of the implied duty of good faith and fair dealing can even trump what appear to be clearly defined terms in a contract. One common term in construction contracts, "no damage for delay", will typically prevent a contractor from suing an owner for harm caused by delays on the project. However, a "no damage for delay" clause may not be enforceable if the party seeking to enforce it does not perform the contract in good faith and impedes the other party's performance. This can include an owner's failure to timely issue change orders or an owner creating an unreasonable delay issuing critical approvals. Thus, a party who fails to cooperate or otherwise act in good faith may not be able to hide behind terms they included in the contract to protect themselves otherwise.<sup>2</sup>

1. *Metcalf Const. Co v. United States*, 742 F.3d 984 (Fed. Cir. 2014).
2. *Triple R. Paving, Inc. v. Broward Cnty.*, 774 So.2d 50 (Fla. Dist. Ct. App. 2000).

For past newsletters go to: <http://www.gsmartinlaw.com/news/>

### What This Means For You

All contracts include implied terms and conditions such as the implied duty of good faith. A party who fails to act in good faith may be liable for damages arising out of that breach even though the term is implied.

### SIDE BAR

We would like to  
welcome our newest  
member of the firm:

**Scott Foss-Kilburn**

### Serving the Construction Industry

The attorneys of Gregory S. Martin & Associates are dedicated to representing those in the construction industry. Having represented national and international owners, contractors, design professionals and their carriers in Florida and throughout the country, our attorneys are committed to the highest professional standards and service. Mr. Martin and the members of his team have litigated multi-million dollar disputes involving, among others, construction and design defects, extra work, differing site conditions, schedule delays and acceleration, contract payment disputes, construction and mechanics' liens, payment/performance bonds and bid protests.

### Attorneys

### Contact

### Web

Gregory S. Martin, Managing Partner  
Frank J. Hild, Partner  
Jennifer G. Craddock, Attorney  
Megan A. Picataggio, Attorney  
Scott R. Foss-Kilburn, Attorney

Florida Office:  
555 Winderley Place,  
Suite 415  
Maitland, FL 32751  
Telephone (407) 660-4488  
Facsimile: (407) 660-4540

[www.gsmartinlaw.com](http://www.gsmartinlaw.com)

If you did not receive this email directly and wish to subscribe to future updates, please reply to this message with "Subscribe" in the subject line or simply click [subscribe](#).

If you no longer wish to receive these emails, please reply to this message with "Unsubscribe" in the subject line or simply click [unsubscribe](#).