

WHEN THE GOVERNMENT BREACHES THE COVENANT OF GOOD FAITH AND FAIR DEALING...

By Richard D. Lieberman, Consultant and Retired Attorney

It's rare that a contractor can prove that the Government has breached a contract, but violation of the covenant of good faith and fair dealing by the Government will result in such a breach. That was the situation in *Teresa A. McVicker, P.C.*, ASBCA Nos. 57487, 57653, Aug. 17, 2012. The covenant "imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp. v. U.S.*, 395 F. 3d 1283, 1304 (Fed. Cir. 2005).

In *McVicker*, Walter Reed Army Medical Center intended to hire two Physician Assistants ("PA") and a Technician from an incumbent contractor, in order to make them federal employees. However, Walter Reed could not reach mutually satisfactory employment agreements, and the incumbent contract was rapidly expiring. During the negotiations for the new 8(a) contract Walter Reed urged the contractor to hire the 2 PAs and one technician but never advised McVicker of the Government's intention to hire them directly as federal employees. The Government made an 8(a) award to McVicker on September 23, 2009. Within days after McVicker's contract was awarded, the Government successfully processed federal employment applications for the two PA's, and hired them on October 30, 2009. Government personnel called McVicker's program manager on October 30, 2009, and informed him that the two PAs "are no longer your employees as of yesterday." McVicker was shocked to learn this.

The Board noted that the Government's intentions to bring these PA services in-house and to hire two contractor employees remained unchanged through both contracts—but these intentions were never disclosed to McVicker. The Board noted that the Government action was a *de facto* partial termination of McVicker's contract (there was one line item left in the contract beyond the PAs.) The Board said that "the Government's conduct here was akin to the "bait and switch" type of government behavior deemed a breach of the duty of good faith and fair dealing by the Federal Circuit in *Precision Pine & Timber, Inc. v. U.S.*, 596 F. 3d 817, 829 (Fed. Cir 2010) whereby the government awards a significant contract benefit to a contractor only to improperly eliminate it soon thereafter...."

Finally, the Board noted that there was no evidence showing the Government acted with malice or with specific intent to injure appellant, but *such evidence was not necessary to establish the breach of the duty of good faith and fair dealing.*" The Board ordered Walter Reed to pay all profits anticipated by McVicker during its first full contract year, but none for options since they had not yet been exercised.

TIPS: (1) Bait and switch is an improper tactic, whether done by a contractor that includes people in its proposal that it doesn't intend to use, or by the Government, who asks a contractor to hire someone that the Government intends to hire directly in a short time.

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(2) Both contractors and the Government must act in a manner so as not to interfere with the other party's performance and not to destroy the reasonable expectations of the other party regarding the outcome/output of a contract.