



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

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ORDER AND IS BEING RELEASED TO THE PUBLIC
IN ITS ENTIRETY ON MARCH 23, 2020**

DENIED: March 9, 2020

CBCA 5863

FUTURE FOREST, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Alan I. Saltman, Jacob W. Scott, and Alexander Gorelik of Smith, Currie & Hancock LLP, Washington, DC, counsel for Appellant.

Lori Polin Jones, Office of the General Counsel, Department of Agriculture, Washington, DC; and Andrew Moore, Office of the General Counsel, Department of Agriculture, Albuquerque, NM, counsel for Respondent.

Before Board Judges **VERGILIO, SHERIDAN**, and **ZISCHKAU**.

SHERIDAN, Board Judge.

The White Mountain Stewardship contract (WMSC) was an indefinite delivery/indefinite quantity (ID/IQ) contract under which respondent, United States Department of Agriculture, Forest Service (Forest Service), agreed to pay appellant, Future Forest, LLC (Future Forest), to treat and remove small diameter trees and biomass in the Apache-Sitgreaves National Forest in Arizona. Previously, the Board ruled that the contract minimum was 5000 acres per year for a total of 50,000 acres over the ten-year term of the

contract. *Future Forest, LLC v. Department of Agriculture*, CBCA 5764, 19-1 BCA ¶37,238 (2019).¹

In this appeal, Future Forest posits that the comments of the Forest Service employees created a “reasonable expectation” that the agency would provide Future Forest with 150,000 acres, and that the Forest Service violated the implied duty of good faith and fair dealing when it failed to fulfill Future Forest’s “reasonable expectation.” Future Forest further alleges that actions of the Forest Service interfered with that duty when 150,000 acres were not released.

The Forest Service moved for summary judgment and the Board ordered Future Forest to address only the threshold legal issue presented by the motion—whether the duty of good faith and fair dealing can be the basis for this claim for acreage amounts beyond the contract minimum in an ID/IQ contract.

Future Forest does not survive summary judgment because the premise underlying its theory of relief is unsustainable. There could be no legal “reasonable expectation” to receive 150,000 acres under this ID/IQ contract, as this ID/IQ contract did not create such an expectation. What Future Forest and certain agency personnel may have anticipated or hoped for at the time of contract signing or during post-award discussions represents inadmissible parole evidence. The written language of the contract with the guaranteed minimum dictates the parameters of reasonable expectations. Future Forest attempts to transform the ID/IQ contract into something it is not, such as a definite quantity or requirements contract. Legally, the theory as presented fails such that summary judgment is appropriate and the appeal is denied.

Background

I. Contract Terms and Performance

The Forest Service awarded the WMSC to Future Forest in August 2004. Despite the original pre-award project, in which the Forest Service anticipated releasing approximately 150,000 acres over the ten year contract, at regular intervals of 15,000 acres a year, the

¹ By modification 1, the parties authorized the Forest Service to offer task orders that met the minimum guarantee, either in acres or green tons, whichever was reached first. A conversion factor was included in modification 1 to derive the equivalency, and the parties agreed that 53,550 green-tons of material was the equivalent of the 5000 acre minimum guaranteed in the original contract.

competed and awarded contract expressly guaranteed a minimum of 5000 acres per year for a total of 50,000 acres over the ten-year term of the contract. *Future Forest*, 19-1 BCA at 181,270. The contract described the contract as an ID/IQ contract and stated the guaranteed amounts:

B.1.0. This schedule describes the type(s) of work the Contractor may anticipate under the White Mountain Stewardship Project (WMSP), Indefinite Delivery/Indefinite Quantity (ID/IQ) contract.

....

Minimum Guarantee: The Government will guarantee a minimum, for each program year of work, **of 5,000 (five thousand) acres for a total of 50,000 acres over the 10 year term of the contract** of forest land that is in need of landscape biomass management with approved environmental analysis.

The contract included the clause found at Federal Acquisition Regulation (FAR) 52.216-22, Indefinite Quantity (OCT 1995), which provides:

(a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the maximum. The Government shall order at least the quantity of supplies or services designated in the Schedule as the minimum.

48 CFR 52.216-22 (2019) (FAR 53.216-22).

Approximately one month into the contract, the parties entered into modification 1, that authorized the Forest Service to offer task orders that met the minimum guarantee, either

in acres or green tons, whichever was reached first. A conversion factor was included in modification 1 to derive the equivalency, and the parties agreed that 53,550 green-tons of material was the equivalent of the 5000 acre minimum guaranteed in the original contract.

²

Between September 2004 and May 2014, the Forest Service issued task orders releasing 71,737.90 acres, from which Future Forest treated 2,601,846.15 green tons of material. Future Forest operated the WMSC until the contract expired in August 2014.

II. Future Forest's Claims

In September 2015, Future Forest submitted a certified claim to the contracting officer alleging that in program years eight and ten the Forest Service failed to release the amounts of acreage required by the WMSC. Future Forest also claimed that it was entitled to \$14,743,430.72 in "lost gross profits" based on the Forest Service's alleged failure to provide a total of at least 150,000 acres over the ten-year period of contract performance. Future Forest appealed the deemed denial of its claim to the Board, where it was docketed as CBCA 5764.

In June 2017, Future Forest submitted its second claim, the one that underlies this appeal. In this second claim, Future Forest sought \$14,743,430.72 in "lost gross profits" based on the Forest Service's alleged breach of the duty of good faith and fair dealing in not releasing 150,000 acres during the ten years of contract performance. After the Forest Service denied the claim, Future Forest timely filed this appeal.

In its complaint, Future Forest alleges that:

[T]he Contracting Officer, the Forest Supervisor and her contracting staff made statements at meetings with all [the] offerors and elsewhere that, notwithstanding the Amendments [setting forth the guaranteed minimum of 5000 acres for a total of 50,000 acres over the term of the contract], the Forest Service would, nevertheless, still treat 150,000 acres over the term of the contract.

As a result of these representations, Future Forest states that the Forest Service created a "reasonable expectation" that it would release 150,000 acres. Future Forest further alleges that the Forest Service failed to fulfill this reasonable expectation as the result of animus of

² In referring to 5000 acres, we note that the Forest Service could also release an equivalent amount in green tons.

a Forest Service official toward Future Forest and the decision to direct funding to another Forest Service contract instead of the WMSC. The failure of the Forest Service to fulfill these reasonable expectations, Future Forest asserts, constitutes a breach of the duty of good faith and fair dealing. Finally, Future Forest describes the damages it seeks in this appeal as an alternative, not in addition to, the damages it seeks in CBCA 5764.³

Discussion

I. The Parameters of the Duty of Good Faith and Fair Dealing

Implied in every contract is a duty of good faith and fair dealing in its performance and enforcement. *Lakeshore Engineering Services, Inc. v. United States*, 748 F.3d 1341, 1349 (Fed. Cir. 2014); *Metcalf Construction Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014). It is well settled that the covenant of good faith and fair dealing “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. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). “What is promised or disclaimed in a contract helps define what constitutes ‘lack of diligence and interference with or failure to cooperate in the other party’s performance.’” *Metcalf*, 742 F.3d at 991 (quoting *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988)). “[T]he nature of that bargain is central to keeping the duty focused on ‘honoring the reasonable expectations created by the autonomous expressions of the contracting parties.’” *Id.* (quoting *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984)). “The implied covenant of good faith and fair dealing is limited by the original bargain: it 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 the contemplated value.” *Metcalf*, 742 F.3d at 991. However, the implied duty “cannot expand a party’s contractual duties beyond those in the express contract or create duties inconsistent with the contract’s provisions.” *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010); *see also Bell/Heery v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. 2014).

II. Ordering Obligations in ID/IQ Contracts

ID/IQ contracts provide that over the stated period of time the Government will order an amount of goods or services within the minimum and maximum order amount stipulated

³ Future Forest makes clear that it does not base its claim on allegations of bad faith on actions of Forest Service officials.

in the contract. FAR 16.504. This allows the Government considerable flexibility in meeting its needs, without some of the obligations of a requirements contract and can provide more latitude than a definite quantities contract. *Travel Centre v. Barram*, 236 F.3d 1316, 1318 (Fed. Cir. 2001) (citing *Stratos Mobile Networks U.S.A. v. United States*, 213 F.3d 1375, 1380 (Fed. Cir. 2000)); FAR 16.501-2. However, unlike a requirements contract where the contractor is entitled to an exclusive relationship to provide the Government with particular goods/services, the contractor in an ID/IQ contract is only guaranteed to receive the minimum quantity set forth in the contract. *Travel Centre*, 236 F.3d at 1319; FAR 16.503-.504. This minimum order quantity is the principal consideration provided by the Government in an ID/IQ contract. *TranBen, Ltd. v. Department of Transportation*, CBCA 5448, 17-1 BCA ¶ 36,635, at 178,430 (citing *Maxima Corp. v. United States*, 847 F.2d 1549, 1557 (Fed. Cir. 1988)).

The importance of the minimum guarantee terminology in this and other ID/IQ contracts is an essential element of the contract. Under the clear terms of the WMSC, the Forest Service was required to release 5000 acres each year. *Future Forest, LLC*, 19-1 BCA at 181,269. We do not look to extrinsic evidence, such as particular individuals' expectations, to interpret the WMSC provisions because they are clear on their face. *Id.* (citing *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996)). Simply put, intentions, plans, or anticipations on the part of agency officials, even a contracting officer, to order more than the stated minimums set forth in an ID/IQ contract do not equate to contractual commitments. *See Travel Centre*, 236 F.3d at 1319.

Despite these well-settled principles, *Future Forest* asserts that there were two "phases" in this contract, a "minimum guarantee ordering phase" in which the Forest Service was required to order at least the minimum set forth in the WMSC, and a "discretionary ordering phase" in which the Forest Service was required to place discretionary orders based on purported expectations. We find no support for the idea of a discretionary ordering phase in ID/IQ contracts, the WMSC, regulations, or case law, other than to note that an agency could, but was not required to, place orders after the minimum had been reached.

The Government's obligation under the WMSC was to release a minimum of 5000 acres a year. *Future Forest's* arguments improperly rely on parole evidence. Expressed or unexpressed expectations of contractor or agency officials regarding the ultimate volume to be purchased do not alter the written minimum guarantees. *Future Forest* or agency officials could have anticipated releasing a greater volume of work, but legally there can be no "reasonable expectation" that such hopes will be satisfied.

III. Interplay Between Contract Minimums and Duty of Good Faith and Fair Dealing

The Federal Circuit addressed the duty of good faith and fair dealing in *Travel Centre*, which involved an ID/IQ contract to purchase travel management services for federal agencies.⁴ Specifically discussing the ordering obligations in ID/IQ contracts, the Federal Circuit noted:

[W]hile an IDIQ contract provides that the government will purchase an indefinite quantity of supplies or services from a contractor during a fixed period of time, it requires the government to order only a stated minimum quantity of supplies or services. *That is, under an IDIQ contract, the government is required to purchase the minimum quantity stated in the contract, but when the government makes that purchase its legal obligation under the contract is satisfied.* Moreover, once the government has purchased the minimum quantity stated in an IDIQ contract from the contractor, it is free to purchase additional supplies or services from any other source it chooses. An IDIQ contract does not provide any exclusivity to the contractor. The government may, at its discretion and for its benefit, make its purchases for similar supplies and/or services from other sources.

Travel Centre, 236 F.3d at 1319 (citations omitted) (emphasis added). Regarding *Travel Centre*'s "reasonable expectations," the Federal Circuit concluded:

Regardless of the accuracy of the estimates delineated in the solicitation, based on the language of the solicitation for the IDIQ contract, *Travel Centre could not have had a reasonable expectation that any of the government's needs beyond the*

⁴ The General Services Administration (GSA) estimated that the contract was worth approximately \$2,500,000 per year, but the contract minimum guaranteed no more than \$100 of revenue. Prior to the start of the contract, GSA received notice that certain government agencies, comprising half of the expected revenue, would not be using the contract, but failed to pass that information on to prospective bidders. Although it received more than \$500,000 in gross sales, *Travel Centre* submitted a breach of contract claim to GSA alleging a breach of the duty of good faith and fair dealing.

minimum contract price would necessarily be satisfied under this contract.

....

In sum, when an IDIQ contract between a contracting party and the government clearly indicates that the contracting party is guaranteed no more than a non-nominal minimum amount of sales, purchases exceeding that minimum amount satisfy the government's legal obligation under the contract.

Id. (citations omitted) (emphasis added). Neither faulty estimates nor “less than ideal contracting tactics” are sufficient to overcome the Government's obligation to order only the minimum guaranteed in an ID/IQ contract. *Id.*

The gravamen of Future Forest's claim is that the duty of good faith and fair dealing required the Forest Service to order 150,000 acres to fulfill Future Forest's reasonable expectations regarding the quantities under the contract:

The Government is bound by its duty of good faith and fair dealing with respect to placing additional orders and cannot avoid violating that duty simply because it has fulfilled its minimum ordering obligation under the contract. Meeting the contract's minimum ordering requirement simply does not ensure that the Government will meet all the implied duties that continue to apply to placing orders during the subsequent discretionary ordering portion of the contract – a period that could well last for many years after the minimum has been ordered.

Future Forest acknowledges that “[a]n implied duty cannot expand any express contract duty, including the Government's express obligation under an ID/IQ contract to order the minimum amount specified,” but then asserts that “[b]ecause of the creation of a reasonable expectation with regard to the discretionary ordering portion of the contract, the Government had an implied duty not to take any action to prevent the ordering of an additional 100,000 acres in excess of the contract minimum.”

The duty of good faith and fair dealing applies while any contract is being performed, even after the minimum has been ordered. *See TranBen*, 17-1 BCA at 178,430. Implied

duties, such as a duty not to evade the spirit of the bargain and a duty not to hinder performance, continue during contract performance. Here, however, the bargain was that the Forest Service would order treatment of no less than 5000 acres a year. To find, based upon the representations and actions of Forest Service personnel, that the implied duty required the release of a greater number of acres would violate the contract's express terms and create obligations that are "inconsistent with the contract's purpose." *Metcalf*, 742 F.3d at 991.

Future Forest cannot have had "reasonable expectations" rooted in the duty of good faith and fair dealing that the Forest Service would have ordered more than the contract minimum because, in this ID/IQ contract, the Government's obligations regarding quantity were defined by the contract minimum. "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." *Metcalf*, 742 F.3d at 991 (citing *Precision Pine & Timber, Inc.*, 596 F.3d at 831). Contractors with the government "cannot rely on the implied covenant of good faith and fair dealing to change the text of their contractual obligations." *Century Exploration New Orleans, LLC v. United States*, 745 F.3d 1168, 1179 (Fed. Cir. 2014). To find otherwise would negate the parts of the contract addressing the minimum guarantee and the long-standing tenets associated with minimum guarantees in ID/IQ contracts. Future Forest's claim for damages based upon the implied duty of good faith and fair dealing fails because Future Forest could not have reasonable expectations that reformed the contract into something other than an ID/IQ contract with a minimum guarantee of 5000 acres a year.

Future Forest posits that the pending motion for summary judgment should be treated as a motion for failure to state a claim and, therefore, the Board must accept all of Future Forest's allegations as true. Future Forest also asserts that "[t]he implied duty also precluded the Government from not ordering those 100,000 acres for nefarious reasons." Accepting these statements as true, we still cannot allow the duty of good faith and fair dealing to expand the contract minimum on an ID/IQ contract because it would substitute an aspirational amount for the contract minimum. This Board is mindful that "[t]he 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." *TranBen*, 17-1 BCA at 178,431. Here the Board need not explore any purported dubious actions, because Future Forest seeks to impose on the Government extra-contractual obligations.

Future Forest relies upon *Burke Court Reporting Co.*, DOT BCA 3058, 97-2 BCA ¶ 29,323. In *Burke*, the contractor alleged a violation of the duty of good faith and fair dealing in the placing of orders for work over the contract minimum. The Board denied the Government's motion for summary judgment because the contractor had "a right to rely on

other contract provisions implying that it will be fairly considered for additional work, if required by the government.” *Burke Court Reporting*, 97-2 BCA at 145,801. Future Forest does not allege a violation of other provisions of the WMSC. Its allegations are rooted in the quantity to be ordered under the contract. The applicable provision on that point is the contract minimum; any statements made by agency officials as to ordering expectations were not contractual guarantees.⁵

Future Forest also relies on *ALK Services, Inc. v. Department of Veterans Affairs*, CBCA 1789, 10-2 BCA ¶ 34,518, in which the Board denied a motion for summary relief in favor of further discovery. Following fuller development of the record, the Board determined that *ALK* involved a requirements contract and involved allegations of bad faith. *See ALK Services, Inc. v. Department of Veterans Affairs*, CBCA 1789, et al., 13 BCA ¶ 35,260. That scenario is not applicable to this ID/IQ contract, and the assertion by Future Forest that the agency’s failure to order anticipated volumes constitute instances of lack of good faith that are compensable.⁶

Contrary to presumptions of Future Forest, expectations do not change the express nature of the minimum guarantee. *TranBen*, 17-1 BCA at 178,430 (“We know of no decision finding a breach of the duty where the Government satisfied its minimum ordering obligation under an ID/IQ contract.”); *Dot Systems, Inc. v. United States*, 231 Ct. Cl. 765, 769-70 (1982) (finding that it was not reasonable for the contractor to believe that it was entitled to an estimation rather than the stated minimum). In fact, the opposite conclusion has been reached consistently by courts and boards, which reveals the importance of the written agreement. *Travel Centre*, 236 F.3d at 1319; *Abatement Contracting Corp. v. United States*, 58 Fed. Cl. 594, 613 (2003); *VSE Corp. v. Department of Justice*, CBCA 5116, 18-1 BCA ¶ 36,928, at 179,92-13; *Electronic Data Systems, LLC v. General Services Administration*, CBCA 1552, 10-1 BCA ¶ 34,316 at 169,507; *Crown Laundry & Dry Cleaners, Inc.*, ASBCA 39,982, 90-3 BCA ¶ 22,993, at 115,481. Expectations do not increase purchasing obligations or alter the nature of a contract.

⁵ The decision in *Burke* was issued several years before the Federal Circuit’s clarifications in *Travel Centre* and *Metcalfe*.

⁶ The decision on summary relief was issued before the Federal Circuit’s decision in *Metcalf*.

Decision

For the foregoing reasons, respondent's motion for summary judgment is granted. The appeal is **DENIED**.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge