

Good Faith In Procurement Contracts

Parties may be obligated to act in good faith during a contract's negotiations, performance and enforcement

by Marvin J. Huberman

Is there a general duty of good faith, independent of contractual duties, in Canadian contract law? Probably not—at least not yet. However, the courts can imply a duty that the parties to a commercial contract—including procurement agreements—deal with each other in good faith in certain circumstances.

For contracts, the concept of good faith is used as a standard of conduct. It means behaving decently and avoiding bad faith. It may also mean acting honestly and exercising a discretion or power on proper grounds. A contract's parties may be obligated to act in good faith when negotiating, during contractual performance and during contract enforcement.

A rationale for imposing a duty of good faith is that it satisfies the parties' expectations and supplements their agreement to better reflect expectations of written terms and the context of their relationship. In *Transamerica Life Canada Inc. v. ING Canada Inc.*, the Ontario Court of Appeal noted that Canadian courts historically have been conservative in recognizing a duty of good faith in contracts. As well in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, the Supreme Court of Canada held there are three situations where contractual terms will be implied:

1. Based on an established custom or usage where the term is implied as a matter of presumed intention;
2. As a matter of presumed intention where it's necessary to give business efficacy to a contract; and
3. As an incident of a particular class of relationship.

In deciding whether to imply a contract term, the court isn't trying to improve a contract. Rather, the court interprets the actual contract. It's concerned with determining the parties' intentions and to the express contract terms to see if the proposed implication is necessary and consistent with what's agreed on and the nature of what, if anything, should be implied.

In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, it was submitted that a

bidding contract included the implied term that the contractor promise to accept the lowest compliant bid. The Supreme Court held there was an implied term that only a compliant bid would be accepted. But since the bidding contract contained an express privilege clause providing that the lowest bid wouldn't necessarily be accepted, the court held there was no implied term. Generally, a term won't be implied if it's inconsistent with the contract's existing wording.

The M.J.B. Enterprises Ltd. case illustrates this. An owner must comply with the terms of individual bid contracts and with an overarching duty of procedural good faith when evaluating and accepting (or rejecting) a tender. But where a privilege clause forms a term of the bid contract, an owner is under no contractual duty to award the construction contract to a particular tenderer, since the privilege clause in the bidding contract shows a contrary intention.

Despite the courts' cautious approach, the doctrine of good faith in contracts is developing and the courts will use it in appropriate circumstances to secure a contract's performance and enforcement or to ensure the parties don't behave in a way that defeats the contract's purposes. The Ontario Court of Appeal has referred positively to Professor John McCamus's comments in his text *The Law of Contracts* where he puts good faith in contract performance cases into three groups:

1. Where there's a duty to cooperate in achieving the objectives of the agreement;
2. Where there's a limit on the exercise of discretionary powers provided for in the contract to the extent that the discretion must be exercised fairly and having regard to the interests of the other contracting party; and
3. Where a party is precluded from acting to evade contractual duties, such as by engaging in conduct not strictly prohibited by the letter of the terms of their agreement but that has the effect of defeating rights under the agreement.

As the law develops and evolving procurement methodologies emerge, there will be more cases where duties of contractual good faith performance or enforcement are imposed. This may be contained in a contractual term—express or implied, even from traditions and standards of a particular industry, or by operation of law. Parties should be prudent and remain consistent with a duty to act in good faith. Depending on circumstances, a court might imply such a duty.

B2B



Marvin J. Huberman, LLM, (www.marvinhuberman.com) is a Toronto trial and appellate lawyer, mediator and arbitrator.