

## **IMPLIED OBLIGATIONS IN CONSTRUCTION CONTRACTS**

**By R. Carson Fisk (as seen in *Texas Construction* November 2008)**

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Absent complicated, superfluous or outdated language, the terms of a contract should be easily understood. In some cases, however, a party may risk breaching a contract by acts or omissions even if express terms do not address the applicable issue.

Many states impose a duty of good faith and fair dealing on parties to a contract. Essentially, that requires that the parties to a contract exercise "honesty in fact in the conduct or transaction concerned." Evasive conduct may violate the obligation of good faith in performance even if one believes certain conduct is justified. While bad faith may be overt or consist of inaction, fair dealing may require more than honesty.

Texas law generally does not impose this duty on parties to a contract except when there is a special relationship, such as that between an insured and its insurance carrier or a fiduciary relationship. While this implied duty is not applicable as a general matter, parties to a construction contract should understand that there are several implied obligations that do exist and that this list is by no means exclusive. While Texas courts are reluctant to impose a duty of good faith and fair dealing on all contracts, numerous implied obligations and covenants have been held to exist in the context of a construction contract.

Contractual covenants will be implied only when there is a satisfactory basis in the contract that makes it necessary to imply certain duties and obligations. It must appear from the express terms of the contract that an implied covenant was so clearly contemplated by the parties that they deemed it unnecessary to express it, or that it is necessary to imply such a covenant in order to give effect to and effectuate the purpose of the contract as a whole. Terms will not be implied simply to make a contract fair, wise or just.

Despite the lack of a general implied duty of good faith and fair dealing, some Texas courts have recognized that accompanying every contract is a duty to perform the parties' contractual obligations with care, skill, reasonable expedience and faithfulness. A party to a contract to perform services generally owes a duty to perform with ordinary care and skill. One Texas court has recognized that a contractor is excused from performance where the owner refuses to permit the contractor to proceed, fails to provide the required means to complete the contract or fails to make payments, including installment payments, provided by the contract. As for the contractor, it has been recognized that there is an implied obligation to comply with relevant municipal and county codes so that the project is suitable for its intended purpose.

Texas law also recognizes an implied promise that a party will not act to delay or prevent the other party from performing its part of the contract. Basically, an owner has the implied obligation to cooperate in the performance of a contract and it is not permitted to take advantage of an obstacle to performance that it has created or that it could remove. Some courts recognize that an owner has an implied obligation to provide adequate plans and specifications.

Implied covenants can assist in outlining the respective parties' contractual responsibilities. In some circumstances, these implied obligations may be altered by the express terms of a contract. If a contractor negotiates a term that it is not responsible for compliance with applicable codes, that term should be enforceable absent some legal defense. If an owner places responsibility for the review of plans and specifications on the contractor, the contractor should be aware that it is perhaps ultimately responsible if the plans and specifications are inadequate. Ignorance as to what implied covenants or obligations might require may be problematic. This is especially true if the parties enter the agreement with the belief that the other party will be responsible for a specific item that is, in fact, the responsibility of the misinformed party.