

CONTRACTING OFFICER MUST CONSIDER REQUEST FOR EQUITABLE ADJUSTMENT “IN GOOD FAITH AND REASONABLENESS”

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The Federal Circuit recently considered the Federal Acquisition Regulation (“FAR”) language which requires a Contracting Officer to “consider an equitable adjustment to the contract” if required government furnished property in a contract is not delivered to the contractor. FAR 52.245-1(d)(2). See *BGT Holdings, LLC v. United States*, No. 2020-1084 (Fed. Cir. Dec. 23, 2020). Rejecting the Government’s and the Court of Federal Claims interpretation that the only obligation is to “think over” a contractor’s request for equitable adjustment (“REA”), the Federal Circuit makes it clear that such consideration holds the government to a duty of good faith and reasonableness.

BGT contracted with the Navy to construct and deliver a gas Turbine generator. The Navy agreed to supply certain government furnished equipment (“GFE”) that BGT would use to construct the generator. Two important items of GFE were an exhaust collector and engine mounts, items which the Navy ultimately never delivered to BGT.

The contract included the standard GFE clause, FAR 52.245-1, which requires the government to deliver GFE as described in the contract, and states that “[i]f the property is not delivered to the Contractor by the dates stated in the contract, the Contracting Officer, shall, upon the Contractor’s timely written request, consider an equitable adjustment to the contract.” The clause also gives the government the right to increase or decrease GFE under the contract, but if it does so, the Contracting Officer is required to “consider an equitable adjustment.”

The Navy informed BGT that the Navy would not deliver the exhaust collector and engine mounts unless BGT provided a “cost savings” to the Navy—a decrease in contract price. BGT declined to offer a cost savings for the items that were to be provided as GFE, and the Navy then reallocated these items as fleet assets, and notified BGT that they were no longer available. To continue performing under the contract BGT purchased those items on the commercial market for \$610,775. BGT then requested an equitable adjustment for that cost. When the Navy accepted the completed gas turbine generator it accepted it, but rejected BGT’s request for an equitable adjustment for the exhaust collector and engine mounts.

BGT’s appeal in the court was that the Navy breached the government property clause, FAR 52.245-1, by failing to provide an equitable adjustment after it withheld the GFE items it had agreed to deliver under the contract. Although there are other aspects of the case, this was the most important aspect of this case.

The Navy’s defense was that FAR 52.245-1(d)(2)(i) merely requires a contracting officer to “consider BGT’s request for an equitable adjustment—not to grant the adjustment to BGT.” The Court rejected the government’s interpretation of the term “shall consider” because it would produce “absurd results” under the government property clause. It is implausible to believe that the Navy’s only obligation would be to merely “think over” BGT’s request, before denying it. The Court held that the correct interpretation of “shall consider” in this contract setting doesn’t

give the government absolute discretion, but holds the government to a duty of good faith and reasonableness. Contracting officers must exercise their discretion in good faith, and perform that duty reasonably. The Court vacated the dismissal of BFT's claim, and remanded the case to the Court of Federal Claims.

Takeaway: When the FAR speaks of the contracting officer "considering an equitable adjustment" (such as in the Government Furnished Property clause or the Changes Clause), this does not mean just think it over. The Government must consider such an REA in good faith and grant relief that is appropriate to the contractor and consistent with the contract.

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