

Government's failure to grant REA can constitute breach of contract

(February 9, 2021) - Bradley Arant Boult Cummings LLP attorneys Aron Beezley and Sarah Osborne discuss a recent Federal Circuit decision refining the government's obligations under finite conditions when a contractor seeks an equitable adjustment.

The U.S. Court of Appeals for the Federal Circuit, in *BGT Holdings LLC v. United States*,¹ recently held that the government does not have the discretion to deny a contractor's request for equitable adjustment (REA) under [Federal Acquisition Regulation \(FAR\) 52.245-1](#) (Government Property) where the conditions specified in that clause are present and the contractor is able to show financial loss.

As discussed below, the Federal Circuit's decision in this regard is a welcome development for government contractors because the court's basic reasoning extends to all FAR clauses that direct that the government "shall" or "must" consider or make an equitable adjustment if the conditions set forth in the applicable FAR clause are present.

The facts

BGT Holding LLC filed a complaint with the U.S. Court of Federal Claims alleging, among other things, that the U.S. Navy breached its contractual duty to provide BGT an equitable adjustment after failing to deliver government-furnished equipment (GFE) that the Navy had agreed to deliver to BGT.

The Court of Federal Claims dismissed BGT's complaint, finding that BGT's claim in this regard was precluded by the terms of the contract. BGT then filed an appeal with the U.S. Court of Appeals for the Federal Circuit.

On appeal, the Federal Circuit specifically addressed BGT's claim that the Navy breached [FAR 52.245-1](#) by failing to provide an equitable adjustment for the Navy's non-delivery of GFE. The Federal Circuit noted that two subsections of [FAR 52.245-1](#) govern GFE non-delivery by the government.

First, under subsection (d)(3)(i), the contracting officer "may, by written notice, at any time — (A) Increase or decrease the amount of government-furnished property under this contract." In such a case, subsection (d)(3)(ii) directs that the contracting officer "shall consider an equitable adjustment."

Second, under subsection (d)(2)(i), if the GFE "is not delivered to the Contractor by the dates stated in the contract, the Contracting Officer shall ... consider an equitable adjustment."

The government argued on appeal that BGT's claim under subsection (d)(2)(i) is untenable because the contracting officer was required only to "consider BGT's request for an equitable adjustment — not to grant the adjustment to BGT." (emphasis added).

Under the government's theory, the phrase "shall consider" gave the contracting officer discretion to grant or deny an equitable adjustment and imposed no duty to grant an adjustment, even if BGT could prove financial loss due to the government's non-delivery of the GFE.

The Federal Circuit, however, rejected the government's argument, stating:

We reject the government's interpretation of the term "shall consider" because it would produce absurd results under the government property clause. ... To illustrate, assume that the committed GFE in this case had a total value nearing \$5 million, well over half of the contract price of \$8.25 million. *See* J.A. 24-25. If the Navy had withdrawn all GFE, as the contract allows, it would be implausible to posit that the Navy's only obligation would be merely to "think over" BGT's request for an equitable adjustment before denying it. It is dubious, to say the least, that the drafters of the FAR's government property clause, [48 C.F.R. § 52.245-1](#), envisioned that the government would essentially have an unfettered right to withdraw promised GFE from a contract without consequence.

The Federal Circuit went on to state:

The correct interpretation of "shall consider" in this contract setting does not give the government absolute discretion, but instead holds the government to a duty of good faith and reasonableness. ... Moreover, the FAR demands that the contracting officer exercise impartiality, fairness, and equitable treatment when considering requests for equitable adjustments. *See* [48 C.F.R. § 1.602-2](#) ("Contracting officers shall ... (b) Ensure that contractors receive impartial, fair, and equitable treatment; ..."). The government's interpretation of "shall consider" would invite subversion of that responsibility.

Accordingly, the Federal Circuit vacated the dismissal of BGT's claim that the Navy breached its duty to provide an equitable adjustment after it failed to deliver the GFE. The Federal Circuit directed that, on remand, the Court of Federal Claims "must determine whether BGT is entitled to an equitable adjustment as fair compensation for the failure to deliver those GFE items."

The takeaway

The Federal Circuit's decision in *BGT Holdings LLC v. United States* highlights the government's duty of good faith and reasonableness in addressing government contractors' REAs.

Where the FAR makes equitable adjustment available as relief to a contractor facing certain conditions, the government does not have the discretion to ignore a contractor's request for adjustment and, instead, has a duty of good faith and reasonableness not only to consider but grant such relief where due.

This is a welcome development for contractors because the Federal Circuit's reasoning discussed above extends to all FAR clauses that direct that the government "shall" or "must" consider or make an equitable adjustment if the conditions set forth in the applicable clause are present.

Accordingly, we will likely see contractors rely on the Federal Circuit's holding in *BGT Holdings LLC* to argue that the government committed a breach of contract by failing to grant the contractor an equitable adjustment under a variety of clauses.

For instance, the Federal Circuit's basic reasoning may apply to the following FAR clauses, each of which states that the contracting officer shall make an equitable adjustment when certain conditions are present:

- [FAR 52.204-2](#) (Security Requirements)
- [FAR 52.233-3](#) (Protest After Award)
- [FAR 52.236-2](#) (Differing Site Conditions)
- [FAR 52.242-14](#) (Suspension of Work)

- [FAR 52.242-15](#) (Stop-Work Order)
- [FAR 52.243-1](#) (Changes — Fixed-Price)
- [FAR 52.243-2](#) (Changes — Cost-Reimbursement)
- [FAR 52.243-4](#) (Changes)
- [FAR 52.243-5](#) (Changes and Changed Conditions)
- [FAR 52.246-20](#) (Warranty of Services)

Notes

1 <https://bit.ly/39s14rC>

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