

Show me the money (Or GFE): FAR 52.245-1 required contracting officer to consider equitable adjustment for missing equipment

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In *BGT Holdings Inv. v. United States*, 984 F.3d 1003 (Fed. Cir. 2020),¹ the Federal Circuit held that FAR 52.245-1 requires the Government to consider an equitable adjustment when it fails to provide Government-furnished equipment (GFE) required by the contract.

FAR 52.245-1 grants the Government the right to change the amount of GFE it provides, but also states that the contracting officer “shall consider” an equitable adjustment under the contract.

The contract in question required the Government to furnish equipment for the construction and delivery of a gas turbine generator. After award, the Government stated that it would not provide the contractually-required equipment, unless BGT reduced the contract price.

In response, the contractor purchased the equipment itself, and sought reimbursement under FAR 52.245-1. FAR 52.245-1 grants the Government the right to change the amount of GFE it provides, but also states that the CO “shall consider” an equitable adjustment under the contract.

The Government did not grant an equitable adjustment, and BGT asserted several theories related to FAR 52.245-1.

The Court of Federal Claims agreed with the Government that BGT’s breach count was insufficiently pled because, under FAR 52.245-1, the contracting officer must only “consider” the equitable adjustment – with any adjustment allowance being discretionary – and thus a decision to deny an adjustment is not a breach.

The Federal Circuit reversed. First, the Court held that the Government’s interpretation of “shall consider” an equitable adjustment would “produce absurd results” and provide the Government with the “unfettered right to withdraw promised GFE from a contract without consequence.”

The Court remanded for a determination of whether the contractor was “entitled to an equitable adjustment as fair compensation for the [Government’s] failure to deliver those GFE items.”

Second, the Court remanded to the trial court to determine whether the contracting officer “ratified” the actions of subordinates who communicated with the contractor about the GFE.

The Court held that the contractor did not “waive” this ratification argument by signing a contract with a Changes clause that admonishes the contractor to only follow the written directions of the contracting officer.

Third, the Court held that the contracting officer can “waive” the Changes clause requirements and thus allow subordinates to give authorized change orders, and the Court remanded on this issue as well.

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The Federal Circuit’s decision is an important reminder for contractors that the Government cannot make changes to a contract without ensuring that the contractor is compensated for the impact of those changes.

Notes

¹ <https://bit.ly/3qzqvqG>

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