

Government Furnished Property Problems

Written by Nick Sanders

Tuesday, 29 December 2020 12:47

FAR Table 15-2 establishes the standard format for providing certified cost or pricing data. It lists the types of cost or pricing information and how that information should be organized. As part of the Table, the first page of a contractor's proposal is discussed. In that section, the instructions state that the contractor must identify "whether you will require the use of Government property in the performance of the contract, and, if so, what property."

We don't know whether FAR Table 15-2 was part of the BGT Holdings, LLC (BGT) proposal to the U.S. Navy to "construct and deliver a gas turbine generator." We only know that BGT was awarded an \$8.25 million fixed-price contract in 2014 to do so. The contract identified at least two Government Furnished Equipment (GFE) items: an exhaust collector and engine mounts. Those items were to be provided by the Navy so that BGT wouldn't need to source them.

Presumably, when the Navy and BGT agreed on the contract price, both parties knew that certain items were going to be provided to BGT as GFE. Presumably, the agreed-upon price was lower than it otherwise would have been, because BGT didn't include costs associated with GFE in its proposal. Those are big presumptions; however, they seem reasonable because that's how GFE normally works.

Another big presumption (on BGT's part) was the presumption that the GFE would show up on time, and in working condition. The contractor was going to base its price (and schedule) on that presumption. And if the GFE didn't show up on time (or in working condition) then BGT was going to have a problem.

Another big presumption (on BGT's part) was that the Navy was not going to hold the contractor hostage. Very few people would expect the Navy to withhold the GFE and refuse to provide it "unless BGT provided a 'cost savings' to the Navy, i.e., a decrease in the contract price commensurate with the amount BGT would save by not having to procure the exhaust collector and engine mounts on its own." Yet, that was exactly the behavior that BGT alleged it experienced during contract performance.

Allegedly, when BGT refused to provide a cost savings, it was told that "that the exhaust collector and engine mounts had been reallocated as fleet assets and would no longer be made available to BGT." BGT then purchased those items (at a cost of \$610,775) and submitted a request for equitable adjustment to the contract price to the Navy contracting officer. The REA

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was denied and BGT filed an appeal at the Court of Federal Claims, citing five grounds for relief.

The Court of Federal Claims dismissed BGT's first three counts and BGT appealed to the Federal Circuit, which vacated and remanded on two of the three counts. We want to discuss the appellate decision because it has important information for contractors that deal with Government Furnished Property (or Government Furnished Equipment). Sometimes, a prime contractor will offer to procure and provide certain items to a subcontractor, and [this decision](#) would be relevant to those transactions as well. So let's discuss.

The three Judges that heard the case and concurred with the decision (which was written by Judge Bryson) summarized their reasoning thusly:

The most straightforward claim in BGT's amended complaint is that the Navy breached the government property clause, 48 C.F.R. § 52.245-1, by failing to provide an equitable adjustment after it withheld the GFE items it had agreed to deliver under the contract. While the Navy was entitled to withdraw GFE under the government property clause, it was not free to do so without consequence.

Further, by refusing to provide an equitable adjustment when the Government Property clause in the contract provided for one, the Navy had breached the contract. The government disagreed but the Court was not persuaded.

The government argues that BGT's claim under subsection (d)(2)(i) [of the Government Property clause] 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.' 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 withdrawal of the exhaust collector and engine mounts. We reject the government's interpretation of the term 'shall consider' because it would produce absurd results under the government property clause.

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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 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. The government's interpretation of 'shall consider' would invite subversion of that responsibility.

(Internal citations omitted.)

BGT also argued that it was entitled to an equitable adjustment under the contract's Changes clause, wholly apart from the language of the contract's Government Property clause. The Appellate Court did not rule on the merits of that argument, but it did vacate the Court of Federal Claims' decision and remand for another trial, in which the Court of Federal Claims will "determine whether BGT pleaded facts sufficient to support its ratification theory and, if so, whether BGT can prove that the contracting officer ratified the withdrawal of the exhaust collector and engine mounts." The Appellate Court also remanded to the Court of Federal Claims to determine whether BGT's third count was supported by facts.

In summary, this is a puzzling case. The Navy awarded an \$8.25 million fixed-price contract and, in doing so, had to find that the contract price was fair and reasonable. That contract price was based on certain items being provided by the Government to the contractor. It is unclear why the Navy would ask for a second price decrease during performance for those same items. (Which is what BGT alleged to have happened.)

More generally, contractors and subcontractors who rely on GFP/GFE and customer-furnished property to perform their contracts are taking risks. They should be aware of those risks and have risk mitigation plans in place. They should be alert to possible contract changes related to the GFP/GFE and be prepared to submit requests for equitable adjustment when they believe their contract had been changed because of delayed or faulty GFP/GFE.

We will have to see how BGT fares back at the Court of Federal Claims. Hopefully, the parties have had enough litigation and will be able to settle this dispute outside of a decision on the

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merits. But if that's not the case, then the Federal Circuit has provided the Court of Federal Claims with a roadmap to resolve the matter.