

Advisory | Government Contracts & Projects



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Added Terms May Limit Government Discretion Not to Exercise Contract Options

Go-To Guide:

- Generally, the federal government maintains broad discretion to choose whether to renew or exercise a contract option.
- Including a “best efforts” or an “availability of funds” clause may limit government discretion to exercise an option, dependent on the unique circumstance.

Federal contract options grant the government a unilateral right to purchase additional supplies or services without further competition. Amid shifting budgets, limitations on expenditures, and the presence of new, cheaper alternatives to existing requirements, a government agency may have various reasons not to exercise an option. Often, government agencies maintain broad discretion in rendering this decision. See FAR § 52.217-8; *MicroTechnologies, LLC v. U.S.*, ASBCA No. 62394, 20-1 BCA ¶ 37632 (2020); *Kurkjian v. Sec’y of the Army*, No. 2020-2201, 2021 WL 3520624 (Fed. Cir. Aug. 11, 2021). This GT Advisory explores contract terms that may limit a government agency’s discretion to exercise (or not exercise) a contract option.

A contractor may have a viable claim if additional terms limit the government’s discretion to exercise an option. *Kurkjian*, 2021 WL 3520624, at *5. Even so, absent a specific contractual restriction, such as a

“best efforts” clause,¹ limiting the government’s discretion, the government may choose not to exercise an option, as long as it acts in good faith. *Id.*

By including specific terms in the contract, the government may expressly commit to exercising every option year unless certain conditions are met. For example, the government might agree to use its best efforts to obtain funds for each renewal of an option (*Marquardt Co. v. United States*, 101 Fed. Cl. 265, 270-71 (2011)), or elect not to renew an order at the end of any base or option period only if adequate funds have not been made available to the government in an amount sufficient to continue to render payment to the contractor. See *Englewood Terrace Ltd. P’ship. v. U.S.*, No. 03-2209C, at *13 (Fed. Cl. Aug. 10, 2004). When these terms are a condition of acceptance under the contract, the government’s repudiation to exercise the option years may breach the contract, along with its duty of good faith and fair dealing. See *Metcalf Const. Co., Inc. v. United States*, 742 F.3d 984, 994 (Fed. Cir. 2014).

Contractors can seek redress through the claims process when the government fails to satisfy a best efforts or availability of funds² provision in deciding not to exercise an option. In *Marquardt Co.*, the court focused on a contract provision requiring the government to “use its best efforts to seek funds from [the procuring agency]” and use best efforts to obtain funding to meet its payment obligations. 101 Fed. Cl. at 272-73. Although the court ultimately determined that the contractual dispute was unresolvable without more information, the court treated the “best efforts” dispute as an actionable claim for breach of contract. *Id.* Similarly, in *Northrop Grumman Computing Systems v. United States*, the court identified a “best efforts” provision as a limitation to the government’s usual discretion in exercising an option. 93 Fed. Cl. 144, 150-51 (2010). While the court again declined to resolve the contractual dispute, citing a lack of information, its analysis suggests that, if the agency failed to employ its “best efforts” to obtain funding to continue a contract, the agency would have breached the contract. *Id.*; see also *Merlin Int’l, Inc. v. Dep’t Homeland Sec.*, CBCA 1012, 2570 11-2 BCA ¶ 34869 (2011) (“an option may be restricted by agreed-upon contract provisions,” such as a best efforts clause).

Besides a “best efforts” provision, an availability of appropriations clause may provide contractors with a remedy against government breach of contract. In *Greenlee Cnty. v. U.S.*, the court held that, if sufficient appropriations were available and the government refused to exercise a renewal option, then “the government would be breaching a money-mandating duty.” 487 F.3d 871, 877 (Fed. Cir. 2007). In other words, the existence of the availability of an appropriations clause effectively limited the government’s discretion to choose whether to renew a contract and compelled the government’s payment “in satisfaction of certain conditions.” *Id.*

Ultimately, if a contractor can incorporate other payment terms or renewal provisions into the contract, then the government’s discretion to exercise an option may be more limited than usual.

Key Takeaways

While government contractors generally maintain broad discretion to choose whether to exercise an option, cases such as *Northrop* and *Marquardt Co.* are reminders that the government’s discretion is not unfettered. Courts mainly agree that “disputes as to the application of ‘best efforts’ clauses” present factually specific issues. 93 Fed. Cl. at 151 n. 7. The contracting agency may face limitations in deciding whether to exercise options when these contractual clauses, such as when the government fails to employ

¹ A “best efforts” clause typically requires a party to a contract to do only that which is reasonable under the circumstances in light of the party’s capabilities.

² “No legal liability on the part of the Government for any payment may arise until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.” FAR § 52.232-18.

its best efforts to seek funding or when appropriated funds are no longer available, are added to the contract.

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