AGENCIES MUST TREAT CONTRACTORS FAIRLY WHEN USING RFQs

The Government wants have its cake and eat it too—by conducting competitions under the General Services Administration ("GSA") Multiple Award Schedule contracts using Requests for Quotations ("RFQ"), but not abiding by the rules in the Federal Acquisition Regulation ("FAR"). The Government seems to think that because RFQs are different from other types of solicitations, the FAR rules don't apply. Both the Court of Appeals for the Federal Circuit and the Government Accountability Office ("GAO") have both held that the FAR rules apply.

In *Hanel Storage Systems, L.P.,* B-409030.2, Sept. 15, 2014, 2015 CPD ¶ 88, the GAO considered a procurement by the Department of Veterans Affairs ("VA") for vertical storage units at a VA medical center. VA issued an RFQ pursuant to GSA's Multiple Award Schedule (the Federal Supply Service, or "FSS" program), and the RFQ specified that the extractor system of the storage units [was required] to be "suspended on four corners to allow for uneven loading of pans and access from end of units for service." VA awarded the order to Kardex, but admitted that its extractor system was suspended *centrally* and was *not* suspended on four corners, as required by the RFQ.

How could the VA accept Kardex's proposal when it did not comply with the RFQ requirements? VA said that because quotations are not "offers" per FAR 13.004, the agency can accept them, even if the quotation that does not comply with the RFQ requirements, if the agency finds that the quotation will "otherwise satisfy the agency's needs."

The VA is correct that FAR 13.004 explicitly states that "[a] quotation is not an offer, and consequently cannot be accepted by the Government to form a binding contract." But GAO ruled that this does not give the VA free license to ignore the FAR requirement that contracts be awarded fairly and in a manner that affords vendors an opportunity to compete on an equal basis. GAO said:

> The legal nature of a quotation vis-à-vis "offer" and "acceptance" in the context of an RFQ issued to FSS vendors does not alter the fundamental requirement that the FSS competition be conducted fairly and in a manner that affords vendors an opportunity to compete on an equal basis….[We have] specifically explained that where an agency determines that a nonconforming quotation will satisfy its needs, the agency generally should amend the RFQ and reopen the competition to allow all vendors to compete for its actual requirements on an equal basis… [We have] explained that agencies must treat all vendors equally and afford them an opportunity to compete on an equal basis. Normally an agency does not assure equal competition where it identifies a particular model or requirement in a solicitation but does not impose that requirement on an offeror who deviates from the terms of the solicitation. This is so even when only quotations are requested since it can lead vendors to quote on different bases. In this regard, we have held that clearly stated technical requirements are considered material to the needs of the government, and a quotation that fails to conform to material solicitation requirements in technically unacceptable and cannot form the basis for award. (internal citations omitted).

The important point here is that GAO prohibits agencies from writing a requirement in an RFQ and then ignoring that requirement when making award. The FAR requires that source selections must be made "based on a comparative assessment of proposals against all source selection criteria in the solicitation." FAR 15.308. Agencies cannot ignore what is in the solicitation. And just because it's an FSS procurement that used RFQs instead of a more formal solicitation like a Request for Proposal ("RFP"), the Government is still required to be fair.

CGI Federal Inc. v. United States, 779 F. 3d 1346 (Fed. Cir. 2015) is another example of this strange attitude on the part of the Government that it may ignore the FAR when using RFQs. CGI's long procedural history and prior protests are not important, but at the Federal Circuit, the important question was this: in a procurement using an RFQ under an FSS contract for commercial items under Part 12 of the FAR, may the government use terms that are inconsistent with customary commercial practices, even though the FAR prohibits it? In *CGI,* the Department of Health and Human Services ("HHS") used an RFQ under FSS contracts for services to evaluate Medicare claims. CGI challenged the terms in the RFQ which delayed paying the vendor from the method used in previous contracts of this nature, and the Government *admitted* that the payment terms of the RFQ were *inconsistent* with customary commercial practices.

This is important because The Federal Acquisition Streamlining Act of 1994 ("FASA") reformed procurement by requiring the government to purchase commercial items under commercial terms to the extent practicable. FASA requires that "to the maximum extent practicable [the contract] shall include only those clauses that are…determined to be consistent with standard commercial practice." 41 U.S.C. § 3307(e)(2)(B). FAR part 12 implements this Act, and requires that "contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses" required by law or "determined to be consistent with customary commercial practice". FAR 12.301(a). The FAR precludes the inclusion of "any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practices…unless a waiver is approved in accordance with agency procedures." FAR 12.302(c).

HHS argued that its FSS contract complied with FASA and FAR part 12 *but then went on to assert that the rules on commercial practice did not apply to* ***orders*** issued pursuant to an existing FSS contract. HHS said that FAR subpart 8.4, which governs the FSS program, does not expressly state that FAR Part 12 applies to orders, such as those issued using an RFQ.

The Federal Circuit reasoned otherwise. It concluded that RFQs meet the broad definition of an "acquisition" under FAR 2.101. The court held that RFQs are a solicitation and the resulting order is a "contract" as defined in FAR 2.101. The Court concluded that FAR Part 12 applies to these orders "expressly by its terms."

The Government cannot have its cake and eat it too. It can't use the simplified acquisition procedure, including RFQs, in multiple award schedule/FSS contracts but then jettison the fairness rules in the FAR. The government must evaluate offerors fairly and on the same basis, and comply with the FAR. Doing otherwise is a serious mistake.