

THE RFQ MISTAKE

By Richard D. Lieberman, Consultant and Retired Attorney

While the use of a Request for Quotation (“RFQ”) for a procurement may not be a true “no-win” situation, it may come close to that for the government contractor. That is particularly true when the contractor misses the delivery date, as in *TTF, LLC*, ASBCA Nos. 58495, 58516, Sept. 3, 2013.

Follow the scenario below, which is abbreviated, but is essentially what TTF faced:

- Agency issues an RFQ for 37 aircraft fuselage fairings.
- TTF submits a responsive quote to the agency, which negotiates the price down slightly
- Agency issues a unilateral Purchase Order (“PO”). The PO states that TTF is not required to sign the PO in order to indicate acceptance. TTF does not sign it.
- Delivery date is 180 days after award
- TTF cannot comply with the delivery date, but sends a letter requesting a 120-day extension due to “vendor delays” The Contracting Officer doesn’t respond to the letter.
- The Contracting Officer sends TTF a letter stating that its failure to deliver means the PO has lapsed, and she is canceling the PO. No termination action is necessary—TTF is out of luck

What’s going on here? The Federal Acquisition Regulation (“FAR”) is driving the result. FAR 2.101 recognizes two types of offers: (1) responses to invitations for bids in sealed bidding are *offers* called bids or sealed bids; (2) responses to requests for proposals in negotiated procurement are *offers* called proposals. However, responses to requests for quotations are not offers but are *quotations* or *quotes*. The FAR describes the legal effect of quotations in FAR 13.004 as follows: A quotation is not an offer and cannot be accepted by the Government to form a binding contract. When the Government issues a Purchase Order in response to a quotation that order is merely an offer by the Government --a contract is established only when the supplier accepts the offer. The supplier may indicate its acceptance of the order, or the supplier may indicate acceptance by furnishing the supplies or services ordered or by proceeding with the work to the point where substantial performance has occurred. Unless the contractor has signed and accepted the purchase order, the Government at any time before acceptance occurs, withdraw, amend, or cancel its offer.

- So when TTF got its order (the Purchase Order), it had two ways to accept it:
- (1) by signing the PO and returning it to the agency as an “acceptance” or,
 - (2) by not signing, but by proceeding with the work (and delivering the supplies)

Do you see the trap? The Agency sent the purchase order with the statement that “the Contractor is not required to sign the PO in order to indicate acceptance,” and didn’t sign it. (Acceptance will only occur later, if the contractor delivers the goods). If the contractor had signed it, there would have been a complete contract at the outset. Of course, if the contractor had accepted it,

the government still could have terminated the contract for default, but *there would have been a contract in place*. The Board held that there was no contract, and the PO had lapsed by its own terms (the non-delivery of the goods). The contractor got no relief at all.

TIPS: Don't fall into the RFQ Trap. If you receive a purchase order, sign it and accept it, and send your signature back to the agency. You will then have a contract. Then you must perform, or have valid reasons for non-performance.