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IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

CGI FEDERAL INC.,	
Plaintiff,	**No. 14-355C**
v.	**Judge Mary Ellen Coster Williams**
THE UNITED STATES,	[redacted]
Defendant.	

CGI'S MOTION FOR A
STAY AND INJUNCTION PENDING APPEAL

Of Counsel:

Daniel P. Graham
Christine Reynolds
Gary S. Ward
WILEY REIN LLP

Scott M. McCaleb
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
Tel: (202) 719-3193
Fax: (202) 719-7049
smccaleb@wileyrein.com

Counsel of Record for CGI Federal Inc.

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Pursuant to Rule 62(c) of the Rules of the U.S. Court of Federal Claims ("RCFC"), CGI Federal Inc. ("CGI") respectfully moves the Court to immediately stay its August 21, 2014 judgment and immediately enjoin the United States, its officers, agents, and employees from proceeding with the award or performance of contracts under Request for Quote Nos. RFQ-CMS-2014-Region 1, RFQ-CMS-2014-Region 2, and RFQ-CMS-2014-Region 4 (the "RFQs") issued by the Centers for Medicare and Medicaid Services ("CMS"). An injunction is necessary in order to maintain the *status quo* pending CGI's appeal, which has been filed this day. A proposed Order is attached.

I.
SUMMARY

This Court has previously acknowledged the importance of maintaining the *status quo* pending a decision on the merits of this protest. *See* June 17, 2014 Status Conference, Dkt. No. 42, Tr. 5:5-7 ("Now, the Court is concerned about preserving the *status quo*, of course, until the Court can issue a ruling."). The Court indicated that it was prepared to issue a preliminary injunction unless the Government voluntarily refrained from making contract awards under the RFQs. *Id.* at 6:12-14 ("[W]e would be prepared to issue a temporary injunction, if necessary, until mid-August to enable the Court to act."); *accord id*. at 7:1-13; *id*. at 8:1-4. Although the Court has since ruled against CGI on the merits of this protest, the same factors that counseled in favor of an injunction in June exist today:

- CGI's protest and appeal raise "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation." *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 513 (Fed. Cir. 1990). As the Court acknowledged, the Federal Acquisition Streamlining Act ("FASA"), 41 U.S.C. § 3307(e)(2), contains a "mandate that agencies use clauses 'consistent with standard commercial practice'" for acquisitions of commercial items. Op. at 18. Whether this mandate applies to orders under the Federal Supply Schedule ("FSS") is a question of first impression for the Federal Circuit, and one that fundamentally affects the terms on which the Government purchases approximately $50 billion in commercial items every year. CGI's position that FASA's mandate applies to FSS

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orders finds plain textual support in both FASA and FAR Part 12, and it is consistent with GAO precedent that was never called into doubt before CGI's protest of the RFQs. *See Verizon Wireless*, B-406854, Sept. 17, 2012, 2012 CPD ¶ 260.

- Unless this Motion is granted, CGI and the public will suffer irreparable harm if CMS proceeds with the award or performance of contracts under the flawed RFQs. By contrast, the Government will suffer no harm from the requested relief. The current RAC contracts do not expire until 2016, although there is no active recovery audit work (as distinct from appeal support services) currently being performed. Active recovery audit work, however, can be extended for the duration of any appeal; indeed, CMS has provided CGI with a contract modification (which CGI, but not CMS, has executed), to provide recovery audit services through the rest of 2014. *See* Ex. 3, 3d Rolf Decl. Ex. 1 (proposed Modification 20).

- The public interest favors maintenance of the *status quo* until the Federal Circuit has had an opportunity to decide these serious questions. In enacting FASA, Congress sought to comprehensively reform Government procurement practices by mandating that the Government focus its buying efforts on commercial items acquired only under customary commercial terms. The FSS program represents the largest and most critical subset of the Federal Government's commercial item purchases, and the public interest will be best served by authoritative direction from the Federal Circuit, particularly given the inconsistency in the case law.

II.
STATEMENT OF QUESTION INVOLVED

Whether the Court should enjoin the United States, its officers, agents, and employees from proceeding with the award or performance of contracts under the RFQs pending CGI's appeal of the Court's Judgment and August 15, 2014 Opinion and Order.

III.
STATEMENT OF THE CASE

For purposes of this Motion, CGI relies on the Findings of Fact recited in the Court's August 22, 2014 redacted opinion. Op. 2-12.

IV.
ARGUMENT

A. Standard of Review

RCFC 62(c) authorizes the Court to "suspend, modify, restore, or [enjoin]" an Order or final Judgment that "grants, dissolves, or denies an injunction" while that Order or

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Judgment is on appeal. The Court's application of Rule 62 is "[g]uided by the jurisprudence of the Federal Circuit interpreting Fed. R. App. P. 8(a)." *Acrow Corp. of Am. v. United States*, 97 Fed. Cl. 182, 183 (2011). The Court "'assesses the movant's chances for success on appeal and weighs the equities as they affect the parties and the public.'" *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 513 (Fed. Cir. 1990) (quoting *E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 835 F.2d 277, 278 (Fed. Cir. 1987)). The Court considers four factors: (1) whether the movant has made a strong showing that it is likely to succeed on the merits, or, failing that, whether the movant has demonstrated a substantial case on the merits; (2) whether the movant will be irreparably injured absent an injunction; (3) whether issuance of the injunction will substantially injure the other interested parties; and (4) where the public interest lies. *Acrow,* 97 Fed. Cl. at 184 (citing *Standard Havens*, 897 F.2d at 512). The court need not give each factor equal weight. *Id.*

The requirements of Fed. R. App. P. 8(a) are "fluid" and "allow an injunction where the movant can at least 'demonstrate a substantial case on the merits, provided the other factors militate in movant's favor.'" *Acrow*, 97 Fed. Cl. at 184 (quoting *Standard Havens*, 897 F.2d at 512).[1] "When harm to applicant is great enough, a court will not require 'a strong showing' that applicant is 'likely to succeed on the merits.'" *Standard Havens*, 897 F.2d at 512; *accord Red River Holdings, LLC v. United States*, 91 Fed. Cl. 621, 625 (2010). Instead, "if the other elements are present (*i.e.*, the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation." *Standard Havens*, 897 F.2d at 513. "Consequently, if the equities weigh heavily in favor of maintaining the status quo, the court may grant an injunction under RCFC 62(c)

[1] All emphases in this Motion are added unless otherwise noted.

when the question raised is novel or close, especially when the case will be returned to the trial court should the movant prevail on appeal." *Acrow*, 97 Fed. Cl. at 184.

B. CGI Has Demonstrated a Likelihood of Success on the Merits.

The principal issue presented in this protest and on appeal is unquestionably "serious, substantial, difficult and doubtful," *Standard Havens*, 897 F.2d at 513, as well as "novel or close," *Acrow*, 97 Fed. Cl. at 184. Indeed, the Court here stated that "[t]his case has presented some thorny issues." June 17, 2014 Status Conference, Dkt. No. 42, Tr. 4:1. CGI's protest provided this Court with its first and only opportunity to consider whether FASA's requirement that agencies include in solicitations and contracts "only those contract clauses that are . . . determined to be consistent with standard commercial practice ," 41 U.S.C. § 3307(e)(2)(B) & (D), applies to FSS orders. Prior to CGI's protests challenging the RFQs, the law at GAO had been well-settled that the provisions of FAR Part 12 applied to orders placed under the FSS program, so that an agency could not include in any such solicitation or order a term or condition inconsistent with customary commercial practice without a waiver. *See Verizon Wireless*, B-406854, Sept. 17, 2012, 2012 CPD ¶ 260.

Whether FASA and FAR Part 12 apply to FSS orders is a question of first impression for the Federal Circuit, and is one it will review *de novo*. *Rockies Express Pipeline LLC v. Salazar*, 730 F.3d 1330, 1335-36 (Fed. Cir. 2013). This question has major implications for Federal procurement, as purchases under the FSS program account for "approximately $50 billion a year in spending or 10 percent of overall federal procurement spending." GSA, For Vendors – Getting on Schedule (Aug 23, 2014), http://www.gsa.gov/portal/category/100635. Accordingly, the question raised in CGI's appeal fundamentally affects the terms on which a significant portion of Federal acquisitions are conducted. Given both GAO's and COFC's

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acknowledged struggles with this question and its far-reaching implications, CGI has shown more than a "substantial case on the merits," justifying immediate injunctive relief.

CGI respectfully submits that it is likely to succeed on the merits on appeal for at least four reasons. *First*, this Court recognized that 41 U.S.C. § 3307(e)(2) contains a "mandate that agencies use clauses 'consistent with standard commercial practice'" for acquisitions of commercial items. Op. at 18. The Court further recognized that "RAC services qualify as commercial items." *Id*. at 19. Still further, the Court recognized that the challenged payment terms were inconsistent with customary commercial practice. *Id.* at 9-10. Yet, rather than apply FASA's mandate, the Court focused on "whether FAR Part 12 applies to Schedule buys under FAR Subpart 8.4." *Id.* at 19. The plain language of FASA, however, applies to *all* contracts for commercial items, as does FAR Part 12. 41 U.S.C. § 3307(e)(2)(B)-(D); FAR 12.102(a). There was no exception made for FSS contracts—the largest program for the procurement of commercial items—rather, Congress instructed the FAR Council to establish general waiver standards (which CMS concededly did not follow). *Id.* § 3307(e)(2)(E); FAR 12.302 (establishing a process for obtaining a waiver).

The Government did not dispute that FASA contains a statutory mandate that commercial item contracts contain only standard commercial terms; instead, it adopted the untenable position that an FSS order is not a "contract." Gov't Br. at 24-28, 34. The Court correctly did not endorse this position, given that FAR 2.101's definition of "contract" expressly includes "orders," and the Government conceded that orders are a "contract" in the "the ordinary sense of the word," *id*. at 27 (citing Black's Law Dictionary (9th ed. 2009)). The Court should not have construed FAR Part 12 to exempt the largest category of commercial item procurements from FASA's mandate when such an exemption is textually absent, and there are only five inapposite exemptions in FAR Part 12. FAR 12.102(e).

Second, CGI respectfully submits that the Court mistakenly concluded that "FAR Part 12 itself does not expressly state its provisions apply to FSS buys." Op. at 20. FAR 12.102(a) expressly states that FAR Part 12 applies to any "acquisition of supplies or services that meet[s] the definition of commercial items at 2.101." The regulatory history to this rule makes plain that "the policies in the revised Part 12 are applicable to *all* acquisitions of commercial items above the micro-purchase threshold." Acquisition of Commercial Items, 60 Fed. Reg. 48321, 48231 (Sept. 18, 1995). The two principal regulations on which CGI relies, 12.301(a) and 12.302(c), apply to "contracts for the acquisition of commercial items" and any "solicitation or contract for commercial items," respectively. FAR 2.101's definition of "contract" expressly includes "orders," and the definition of "solicitation" expressly includes requests for "quotations." Again, there is no question that "RAC services qualify as commercial items." Op. at 19. As with FASA itself, these FAR Part 12 provisions make no exception for FSS contracts, or orders placed under them. Thus, these provisions facially raise a substantial question of whether the Court's ruling is correct.

The Court found critical that "[w]hile Part 12 states that contracts for commercial items are also subject to policies and procedures found in other parts of the FAR, it does not mention Subpart 8.4 or the FSS in this acknowledgement." *Id*. at 20. Section 12.102(c) does not single out Subpart 8.4 because it broadly applies to all commercial item acquisitions, save for the five express exceptions. The FAR Council had no further obligation to further enumerate the many contract vehicles the Federal Government uses to acquire commercial items; thus, no application of the *exclusio unius est exclusio alterius* canon should have overcome the plain meaning of 12.102(a) and FASA's purpose. *NTN Bearing Corp. of Am. v. United States*, 368 F.3d 1369, 1373 (Fed. Cir. 2004) (explaining that "the maxim [*expressio unius est exclusio alterius*] is not applied where . . . 'its application would thwart

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the legislative intent made apparent by the entire act."). The Court cannot "judicially admit at the back door that which has been legislatively turned away at the front door." *Laird v. Nelms*, 406 U.S. 797, 802 (1972).

Third, the Court mistakenly focused on whether FAR Subpart 8.4 expressly exempts Part 12 from its application or expressly states that FAR Part 12 applies. Op. at 19-20. FASA and FAR Part 12 already provide that their terms apply to all commercial item procurements (save five inapposite acquisitions). As the Court ruled, Subpart 8.4 itself neither excludes Part 12 from its terms (as it does for Parts 13-15 and 19), nor does it expressly state that Part 12 applies. *Id.* The Court assigned undue weight to that relative silence given the express terms and purpose of FASA and FAR Part 12.

If nothing else, FAR 12.102(c) creates a substantial question whether the Court's parsing of FAR Subpart 8.4 is appropriate. It provides that, "[w]hen a policy in another part of the FAR is inconsistent with a policy in this part, this part 12 shall take precedence for the acquisition of commercial items." FAR 12.102(c). Thus, even if FAR Subpart 8.4 went so far as to state expressly that FSS orders are not subject to FAR Part 12, such a statement would conflict with FAR 12.102(a) and FAR Part 12 would prevail.[2] A different result should not obtain because FAR Subpart 8.4 does not expressly state that it is subject to Part 12 (FASA and Part 12 already say that), or because the references to Part 12 in Subpart 8.4 do not explicitly address the application of Part 12 to Subpart 8.4, which by definition deals only with commercial item acquisitions.

Fourth, the Court should have interpreted and applied FASA and FAR Part 12 to avoid the "anomalous result" that follows from allowing ordering agencies to introduce non-

[2] Similarly, if Subpart 8.4 explicitly stated that FSS RFQs or orders could contain non-customary terms, that would be "inconsistent with a policy in" Part 12 that only customary commercial terms are to be included in solicitations and contracts for commercial items.

standard terms that GSA is statutorily prohibited from including in an FSS contract. Op. at 21. The Court acknowledged that, "[u]nder standard commercial practice in the recovery audit industry, a RAC invoices its commission payment immediately after the payer recoups the improperly paid claim." *Id*. at 9. Neither GAO nor the Government disputed this fact. The Court further acknowledged that "FAR Part 12 does apply to GSA's initial award of a vendor's master schedule contract." Op. at 12. Again, both GAO and the Government conceded this point. AR Tab 44 at 1415; Gov't Br. At 27. Accordingly, there is no dispute that the challenged payment terms could *not* have been included in CGI's FSS contract.

Nonetheless, the Court's decision permits ordering agencies to do exactly that which GSA is statutorily prohibited from doing in entering FSS contract, which alone creates "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation." *Standard Havens*, 897 F.2d at 513. The Court's statement that CGI could have "avoided this anomalous result by listing, as part of its Schedule Contract, 'the terms offered pursuant to its base contract, as well as the pricing, terms, and conditions applicable to each item' as required by FAR 8.402(b)," instead of stating that "payment terms would be 'negotiated at the order level,'" respectfully misses the mark. Op. at 21. Neither FASA nor the FAR places the burden on contractors to anticipate an agency's potential inclusion of countless terms that are inconsistent with customary commercial practice, and the fact that payment terms such as the actual fee percentage are to be negotiated on an order-by-order basis, does not open the door for CMS to violate FASA and the FAR by including terms that are inconsistent with customary commercial practice. Instead, FASA and the FAR place the burden <u>on the Government</u> not to include any such terms in commercial item contracts, absent a waiver.

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Allowing the inclusion of such terms in an order (which are prohibited from the underlying FSS contract) defeats the goal of attracting commercial companies to the Government marketplace by doing business with them only on commercial terms. *See, e.g.*, Hearing on the Federal Acquisition Streamlining Act of 1993, S.1587, Before the Comms. on Armed Servs. & Gov't Affairs, 1994 WL 214456 (Feb. 24, 1994) (statement of John M. Deutch, Under Secretary of Defense) ("The only way the Government can take advantage of the commercial marketplace is to enter into it on commercial terms."); 140 Cong. Rec. S12369-03, S12370 (Aug. 23, 1994) (statement of Sen. Glenn) (recognizing that the Government must "jump into the commercial market like any other large customer [because] [t]herein lies the benefits of competition and our national productive capacity."). Such an absurd result, which undermines FASA's very purpose, must be avoided. *Pitsker v. Office of Personnel Management*, 234 F.3d 1378, 1383-84 (Fed. Cir. 2000).

C. <u>CGI Will Be Irreparably Harmed if an Injunction Does Not Issue.</u>

Absent an injunction pending appeal, CMS will proceed with awards under the RFQs. CMS has stated publicly that it intends to award new contracts before the end of the year. *See* Ex. 1 (Michelle M. Stein, *CMS Moves Ahead With New Recovery Audit Contracts; CGI Lost Protest*, Inside Health Policy (Aug. 21, 2014)) ("CMS previously said the agency hopes the new contracts will be awarded this year."). Before agreeing to stay awards voluntarily through August 15, 2014, CMS informed the Court that it could be ready to award the contracts much earlier—on July 21, 2014. June 17, 2014 Status Conference, Dkt. No. 42, Tr. 5:11. Thus, CMS will likely make awards before the Federal Circuit can issue a decision on CGI's appeal, which usually takes between 9-11 months (although CGI will request expedited consideration). *See* United States Court of Appeals for the Federal Circuit,

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Median Disposition Time for Cases Decided by Merits Panels, available at http://www.cafc.uscourts.gov/images/stories/Statistics/med%20disp%20time%20merits_chart.pdf.

This Court has previously acknowledged the importance of maintaining the *status quo* pending a decision on the merits of this protest. June 17, 2014 Status Conference, Dkt. No. 42, Tr. 5:5-7; *see also id.* at 6:12-14; 7:1-13; 8:1-4. The same reasons that the balance of harms and the public interest weighed in favor of maintaining the *status quo* in June continue to exist today. If CMS is permitted to award contracts under the RFQs before the Federal Circuit can decide CGI's appeal, CGI will be irreparably harmed because it will be "deprived of the opportunity to compete fairly for a contract" that is vital to the company. *FCN, Inc. v. United States*, 115 Fed. Cl. 335, 384 (2014). Beyond depriving CGI of an opportunity to compete, the harms further suffered by CGI fall into three additional categories that courts have recognized as irreparable:

- CGI will [redacted] Ex. 2, 2d Rolf Decl. ¶ 3. This constitutes irreparable harm, especially when coupled with other harms. *See Global Computer Enters., Inc. v. United States*, 88 Fed.Cl. 350, 454 (2009) (recognizing that the loss of skilled employees critical to a company's performance in a specialized field may constitute an irreparable harm).

- CGI will suffer irreparable harm since it has no remedy for its lost profits. *See Overstreet Elec. Co. v. United States*, 47 Fed. Cl. 728, 744 (2000).

- CGI will suffer irreparable harm "in terms of lost experience working with the government." *FCN*, 115 Fed. Cl. at 385

Moreover, without injunctive relief to maintain the *status quo* now, the Court may be unable to provide any meaningful relief later, if it finds that CMS violated the law. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 811-12 (Fed. Cir. 1983) ("[T]he inability of reviewing courts to meaningfully correct the review determination is irreparable injury."). Courts have repeatedly recognized that a stay, which operates just as this injunction pending appeal would, is often necessary to "preserve the *status quo*" in order to ensure meaningful

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review in bid protests. *See, e.g.*, *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705, 710 & n.8 (2006). Even if CGI were eventually to obtain injunctive relief after prevailing on appeal, CGI [redacted]. *See* Ex. 2, 2d Rolf Dec. ¶ 4; *see also Univ. Research Co. v. United* States, 65 Fed. Cl. 500, 513-14 (2005).

D. Any Harm to CMS Would Be Minimal in Comparison to CGI's Harm.

CMS would suffer only minimal (if any) harm from an injunction pending appeal. "[T]he Government may never insist upon offerors conforming to irrational [or illegal] terms"; thus, requiring CMS to comply with FASA and the FAR will not irreparably harm it. *U.S. Foodservice, Inc. v. United States*, 100 Fed. Cl. 659, 686 (2011). Additionally, CMS cannot claim harm to its mission of recovering overpayments for three additional reasons.

First, CMS already has contracts in place with CGI and the other incumbent RAC contractors. *See Cohen Fin. Servs., Inc. v. United States*, 110 Fed. Cl. 267, 289 (2013) ("[T]he Agency can extend the Cohen and Quantum contracts until a new business operations support contract can be awarded. Therefore, the hardship that a preliminary injunction will impose on the FDIC is minimal."). CGI's contract (and those of the other three incumbent RAC contractors) is not scheduled to expire until April 2016. Ex. 2, 2d Rolf Decl. Ex. 1 (Modification 17). CMS previously modified CGI's contract (and the other RAC's contracts) so that they will provide active audit services (as opposed to overseeing recoupments under appeal) through June 1, 2014, and CGI would be willing to extend that period either through modification of its existing contract or through a bridge contract with payment terms identical to its incumbent contract. *Id*. ¶ 8. In fact, CMS has provided CGI with a contract modification (which CGI, but not CMS, has executed), to provide recovery audit services through the rest of 2014. *See* Ex. 3, 3d Rolf Decl. ¶ 2 & Ex. 1 (Modification 20).

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Second, even if there were some delay to CMS's mission, that delay would only benefit CMS. CMS has stated publicly that it can take a pause in RAC operations, which will not cause any harm to CMS. Instead, CMS has trumpeted its ability to refine the RAC program during a "pause." Just recently, for example, CMS stated:

> CMS is in the procurement process for the next round of Recovery Audit Program contracts . . . . In addition, *a pause in operations will allow CMS to continue to refine and improve* the Medicare Recovery Audit Program. Several years ago, CMS made substantial changes to improve the Medicare Recovery Audit program. *CMS will continue to review and refine the process as necessary*.

Id. ¶ 7 & Ex. 2 at 1 (statement from CMS website). That CMS has said that it can take a "pause" to allow it to refine and improve the RAC program cuts sharply against any claim that it would be harmed by any "pause" associated with the time it would take the Federal Circuit to decide the merits of CGI's appeal.

Third, there is currently a moratorium on performing roughly 90% of the effort required by the contract. Specifically, recent legislation includes a moratorium on audits of short stay inpatient claims through March of 2015:

> The Secretary of Health and Human Services shall not conduct patient status reviews . . . on a post-payment review basis through recovery audit contractors . . . for inpatient claims with dates of admission October 1, 2013, through March 31, 2015, unless there is evidence of systematic gaming, fraud, abuse, or delays in the provision of care by a provider . . . .

Protecting Access to Medicare Act, Pub. L. No. 113-93, § 111(b), 128 Stat 1040, 1044 (2014). That is critical because 88% of recoveries come from inpatient hospital audits, most of which are for short stays. AR Tab 22b at 613; AR Tab 20f at 544. Thus, there is a statutory stay already of the vast majority of the work RAC contractors perform until the end of March 2015. A stay of the remaining work unaffected by the moratorium—or permitting

the incumbent contractors to perform that effort while the Court considers this Appeal—will not cause irreparable harm.

At bottom, however, even if there were some unplanned delay, "only in an exceptional case would such delay alone warrant a denial of injunctive relief, or the courts would never grant injunctive relief in bid protests." *FCN*, 115 Fed. Cl. at 385. This is not such an exceptional case—for example, one in which urgently needed supplies or services for the warfighter are at stake, *e.g.*, 28 U.S.C. § 1491(b)(3). The harm to CGI far outweighs any harm to CMS.

E. The Public Interest Counsels in Favor of Maintaining the Status Quo.

The Federal Circuit has emphasized "the importance of ensuring that the public's faith in the integrity of the procurement process is not compromised[.]" *Central Ark. Maint., Inc. v. United States*, 68 F.3d 1338, 1343 (Fed. Cir. 1995). "'The public interest in honest, open, and fair competition in the procurement process is compromised'" where (as here) an agency errs in creating a solicitation that departs from the law and does not foster full and open competition. *CW Gov't Travel, Inc. v. United States*, 110 Fed. Cl. 462, 495 (2013) (quoting *PGBA, LLC v. United States*, 57 Fed.Cl. 655, 663 (2003)). Moreover, it is well-settled that there is a public interest in remedying violations of law. *BINL, Inc. v. United States*, 106 Fed. Cl. 26, 49 (2012). In short, where a facial case has been made that "the federal procurement process is tainted by arbitrary and capricious government action, the public interest is served by restoring integrity to the procurement process." *Wetsel-Oviatt Lumber Co. v. United States*, 43 Fed. Cl. 748, 753 (1999).

In enacting FASA, Congress comprehensively reformed Government procurement practices by mandating that the Government focus its buying efforts on commercial items acquired only under customary commercial terms. *See infra* § IV.B. Because the FSS

program represents such a large and critical subset of the Federal Government's commercial item purchases, the public interest demands authoritative direction from the Federal Circuit on whether FASA's "mandate that agencies use clauses 'consistent with standard commercial practice'" for acquisitions of commercial items applies to FSS orders. Op. at 18 (quoting 41 U.S.C. § 3307(e)(2)(B) & (D)). Given that CGI's position finds plain textual support in FASA and FAR Part 12, and given the conflicting decisions on this question, the public interest counsels in favor maintaining the *status quo* pending final disposition of these important issues.

V.
CONCLUSION

For the foregoing reasons, CGI respectfully requests that the Court enjoin the United States, its officers, agents, and employees from awarding or performing contracts under the challenged RFQs pending CGI's appeal of the Court's judgment and order in this case.

Respectfully submitted,

s/Scott M. McCaleb

Scott M. McCaleb
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
Tel: (202) 719-3193
Fax: (202) 719-7049
smccaleb@wileyrein.com

Counsel of Record for CGI Federal Inc.

Of Counsel:

Daniel P. Graham
Christine Reynolds
Gary S. Ward
WILEY REIN LLP

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