U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Department of Defense--Reconsideration

File: B-416733.2

Date: March 18, 2019

Stephan Piel, Esq., Department of Defense, for the requester.
Alex J. Brittin, Esq., Brittin Law Group, PLLC, for the protester.
Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of a prior decision sustaining a protest concerning an unduly restrictive solicitation provision is denied, where the requester does not show that the prior decision contains errors of fact or law that warrant reversal or modification of the decision.

DECISION

The Department of Defense (DOD), Washington Headquarters Services, requests reconsideration of our decision in Grant Thornton, LLC, B-416733, Nov. 29, 2018, 2018 CPD ¶ 411, sustaining Grant Thornton's protest of the terms of request for quotations (RFQ) No. HQ003418R0198, which was issued by DOD, for auditing support services. The protester argued that the RFQ, which the agency issued pursuant to the Federal Supply Schedule (FSS) provisions of Federal Acquisition Regulation subpart 8.4, was unduly restrictive of competition because it required vendors to quote labor categories that "align[ed] precisely" with the minimum years of experience in the RFQ.

We sustained the protest finding that the solicitation was unduly restrictive of competition because it required vendors' FSS contracts to "align precisely" with the solicitation's minimum number of years of experience for identified labor categories. Specifically, we agreed with Grant Thornton, and input provided by the General Services Administration (GSA) (which our Office invited to participate in the protest pursuant to 4 C.F.R. § 21.3(j)), that a vendor with a FSS labor category to provide personnel with "a minimum of 10 years of experience," "10+ years of experience," or "at least 10 years of experience," was within the scope of the RFQ's requirement for 12 years of experience. In this regard, we concluded that the terms of such a FSS labor

category establishes a price for personnel at a stated minimum level of experience; but nothing prohibits the vendor--expressly or implicitly--from providing personnel with more than that level of experience and thereby meeting the experience requirements of the solicitation. DOD argues that our decision ignored or misapplied our prior decisions requiring precise alignment between a solicitation's labor category requirements and the corresponding FSS contract's requirements.

We deny the request for reconsideration.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a). The repetition of arguments made during our consideration of the original protest and disagreement with our prior decision do not meet this standard. Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4.

DOD raises two primary arguments in requesting reconsideration. First, it argues that our Office ignored, or unreasonably applied, relevant prior decisions, including Tarheel Specialties, Inc., B-298197, B-298197.2, July 17, 2006, 2006 CPD ¶ 140, bearing on the question of whether precise alignment of educational and/or experience requirements between FSS and solicitation labor categories is required. Second, the requester argues, in essence, that our decision will result in a burdensome and unwieldy evaluation process that may not ensure that a selected vendor will in fact provide qualified employees satisfying a solicitation's minimum educational and/or experience requirements. For the reasons that follow, we find that neither argument presents a basis upon which to reconsider our prior decision.[1]

With respect to DOD's argument that our Office failed to address or reasonably consider our prior decision in Tarheel Specialties, we find the agency's arguments to be without merit. As an initial matter, while it is true that our decision did not discuss Tarheel Specialties, the mere fact that our Office did not specifically distinguish a decision cited by a party in the prior protest proceeding, without more, is an insufficient basis on which to grant a request for reconsideration. As we recently reiterated in Access Interpreting, Inc.--Reconsideration, B-413990.2, June 12, 2018, 2018 CPD ¶ 224, a party's dissatisfaction that our Office did not specifically address each asserted argument does not provide a valid basis for reconsideration. Specifically, we explained that:

> While our Office reviews all issues raised by protesters, our decisions may not necessarily address with specificity every issue raised; this practice is consistent with the statutory mandate that our bid protest forum provide for

[1] DOD raises additional collateral arguments. While our decision does not address every argument, we have carefully reviewed all of the additional arguments and find that none provides a basis upon which to reconsider our prior decision.

> "the inexpensive and expeditious resolution of protests." In further keeping with our mandate, our Office does not issue decisions in response to reconsideration requests solely to address a protester's dissatisfaction that a decision does not address each of its protest issues. Thus, we find no basis to grant the request for reconsideration simply because our decision did not specifically address this argument.

Access Interpreting, Inc.--Recon., supra at 4 (internal citations omitted). Although the foregoing decision applied to a protester's prior arguments, we find no compelling basis why such limitations should not apply to any party's arguments made on reconsideration.

In any event, DOD's reliance on Tarheel Specialties is misplaced. The decision did not squarely address whether the educational and experience requirements of a solicitation were reasonably within the scope of a vendor's FSS contract; therefore, it is distinguishable from the case at hand. DOD seizes on select language from our prior decision to support its assertion that "the literal text of Tarheel addresses our issue of whether the FSS labor category description must enumerate the same minimum quantity of a qualification as required of the corresponding [performance work statement] position." Request for Recon. at 19. As the agency, concedes, however, our decision in Tarheel Specialties concerned the failure of a vendor's FSS schedule contract to align with a solicitation's functional requirements--it did not involve a challenge of the requirement for alignment of educational and/or experience requirements. See id. (recognizing that the "facts of Tarheel are also somewhat different than the case at bar"); id. at 20 ("Although the main point from this excerpt pertains to functional matching…") (emphasis in original).

In Tarheel Specialties, the Department of Homeland Security (DHS) sought to place an order under a FSS contract for services for day-to-day support of DHS's National Firearms and Tactical Training Unit (NFTTU) Armory Operations Branch. Our Office concluded that DHS failed to explain how three of the solicitation's labor categories were reasonably within the scope of the awardee's FSS contract. For example, the solicitation included a requirement for a ballistics engineering technician, with responsibilities to include: performing testing and evaluation of firearms and ammunition for adherence to Sporting Arms and Ammunition Institute and military specification standards; conducting market research studies on firearms, ammunition, body armor, and other specialized law enforcement equipment; developing and writing comprehensive test plans and test reports for firearms and/or ammunition testing and evaluation projects conducted at the NFTTU ballistics test laboratory. Tarheel Specialties, Inc., supra, at 6-7.

The agency argued that the above requirements were within the scope of the administrative specialist-level II labor category of the awardee's FSS contract. The stated functional responsibilities of this labor category, however, included general administrative support, such as: preparing final correspondence, reports and other published material; preparing briefing material; establishing and maintaining program

files; performing budget and finance functions; and developing, analyzing, and maintaining administrative operating processes and procedures. Id. at 5. Based on the materially different stated functional requirements (i.e., ballistics expertise vs. general administrative support), we found that the agency's requirement for a ballistics engineering technician with specialized expertise was not within the scope of the labor categories maintained on the awardee's FSS contract. Id. at 7-9. We similarly concluded that the specific functional requirements of the other two labor categories were not reasonably within the scope of the administrative specialist labor category's requirements. Id.

Thus, the primary focus of Tarheel Specialties was that the solicitation's functional requirements were not reasonably encompassed within the scope of the quoted FSS labor category's functional requirements. Nonetheless, as noted above, DOD seizes on a single sentence--taken out of context--as support for its assertion that the decision addressed the question of whether precise alignment of educational and/or experience requirements is required. Specifically, DOD relies on the following language in Tarheel Specialties noting that: "[w]e believe that the relevant inquiry is not solely whether the minimum education required for the FSS contract position satisfies the minimum education level required for the RFP-required positions, but whether there is a match in job function as well." Tarheel Specialties, supra, at 9. DOD's reliance on this single sentence is misplaced.

The foregoing sentence responded to an argument submitted by GSA, which our Office invited to participate in that protest, asserting that the solicitation's three positions, including the ballistics engineering technician, should have been found to be within the scope of the administrative specialist-level II labor category because the educational requirements of the awardee's labor category overlapped with the educational requirements required by the solicitation. As we explained in the decision, however, whether the education or experience requirements overlapped was not controlling where the solicitation's functional requirements were not reasonably within the scope of the awardee's FSS contract. Id. at 9-10. Thus, when read in context, the decision did not address the question of the alignment of educational or experience requirements. Rather, it merely emphasized that an agency's functional requirements must be within the scope of a vendor's FSS contract, notwithstanding other potential similarities in qualifications. As a consequence, we find nothing in Tarheel Specialties that is inconsistent with, or that would otherwise warrant, reconsideration of our decision.[2]

[2] DOD also argues that our Office similarly misapplied our decision in American Sys. Consulting, Inc., B-294644, Dec. 13, 2004, 2004 CPD ¶ 247. As with Tarheel Specialties, DOD argues that this decision provides strong support for the proposition that the quoted FSS labor category must enumerate a minimum level of experience that is no lower than the minimum required by the solicitation's defined position. Request for Recon. at 17. As with Tarheel Specialties, however, DOD misconstrues the import of American Systems' discussion of relevant experience, which was in the context of our conclusion that the functional requirements of the solicitation were not reasonably within

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DOD misconstrues the basis for our concern that an agency needs to demonstrate an alignment between the functional requirements of a solicitation's labor category and the corresponding labor category on a vendor's FSS contract. As we explained in our prior decision, an agency may only place an order for services against a vendor's FSS contract where the services are within the scope of the awardee's contract. In contrast, non-FSS products and services must be purchased in compliance with applicable procurement laws and regulations including those requiring the use of competitive procedures. Grant Thornton, LLC, supra, at 4 (internal citations omitted). Thus, our focus on ensuring a precise alignment between functional requirements is to ensure that a procuring agency is appropriately procuring products or services that are on the vendor's FSS contract. As the representative decisions discussed in our prior decision and herein reflect, we will sustain a protest where an agency's solicitation-specific requirements are not reasonably encompassed within the scope of the vendor's FSS contract.

Here, in contrast, DOD's objections regarding a precise alignment of experience requirements do not present the same concerns. Indeed, as we discussed in our prior decision, there is no question that a vendor could propose personnel with the solicitation's requisite 12 years of experience requirement within the scope of its FSS contract, which includes a labor category requiring a minimum of 10 years of experience. DOD's concern that a vendor may utilize personnel not satisfying the solicitation's minimum experience qualifications therefore does not present a scope question, but, rather, a question of compliance with the solicitation's minimum requirements.

In this regard, DOD's other primary basis for requesting reconsideration is its belief that our decision will preclude procuring agencies from reasonably evaluating and ensuring compliance with solicitation-specific education and experience requirements. Specifically, the agency argues that ensuring a precise alignment of educational and experience requirements between the FSS and solicitation labor categories will ensure that procuring agencies obtain personnel with qualifications satisfying the solicitation's minimum requirements. In contrast, DOD argues that our decision will not necessarily ensure that vendors provide personnel meeting the solicitation's minimum educational or experience requirements where the floor for education level or years of experience of a labor category under a vendor's FSS contract does not equal or exceed the floor established by the agency. For example, in the case here, the agency argues that a

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the scope of the awardee's FSS contract. Specifically, we found that a generic task management labor category on the awardee's FSS contract did not contain any requirement for the type of help desk experience required by the solicitation's labor category description. American Sys. Consulting, Inc., supra, at 4-5. Again, the agency's focus on elements of our decision taken outside of the reasonable context of our prior decision fails to provide an adequate basis to demonstrate error.

vendor might utilize personnel with 11 years of experience, which would be consistent with the floor of the vendor's FSS contract specifying personnel with at least 10 years of experience, but would not meet the solicitation's minimum requirement of at least 12 years of experience. See Request for Recon. at 12-14. We do not find that the agency's concerns provide a viable basis on which to reconsider our prior decision.

DOD's objections are premised on a hypothetical where a vendor fails to comply with a solicitation's material requirements. In this regard, as we found in our prior decision, there can be no argument under the agency's hypothetical that the agency's requirements are within the scope of the vendor's FSS contract. Thus, the only concern raised by the agency's hypothetical is whether the vendor will properly perform the contract once the agency has placed the order. Nothing in our decision, however, stands for the proposition that an agency must relax, waive, or otherwise not enforce a vendor's compliance with its requirements. To the extent the number of years of experience required by the agency may exceed the floor for years of experience under a vendor's FSS contract, the vendor must, nonetheless provide individuals that meet the government's requirements. In this regard, material misrepresentations made by a vendor regarding the qualification of its proposed personnel may provide a basis for excluding the proposal, see Trinity Ship Mgmt., LLC, B-416167, B-416167.2, June 19, 2018, 2018 CPD ¶ 214 at 7, or create a basis for a breach of contract claim or a violation of the civil and criminal provisions of the False Claims Act.

Accordingly, we do not find persuasive DOD's arguments that because a vendor might inadvertently, or even knowingly, fail to comply with material solicitation or contractual requirements, demonstrates that our decision was unreasonable or materially flawed. Indeed, even under DOD's preferred strict alignment standard, its concerns that a vendor may not comply with the solicitation's qualification requirements could occur. Additionally, we do not find persuasive DOD's arguments that our decision will undermine an agency's ability to reasonably evaluate a vendor's compliance with a solicitation's specific educational and experience requirements. As addressed above, nothing in our decision diminishes a vendor's requirement to satisfy a solicitation's material qualification requirements, or would impede a procuring agency from implementing reasonable measures to ensure a vendor's compliance with such material requirements. For example, an agency can request that a vendor affirmatively state its understanding of and requirement to comply with the solicitation's enumerated qualification requirements, or request representative resumes or that the vendor address its approach to staffing the prospective order in accordance with the solicitation's specific qualification requirements. In sum, DOD's concerns with implementation of our decision fail to state a viable basis upon which to reconsider our prior decision.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel