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# Decision

**Matter of:** Grant Thornton, LLC

**File:** B-416733

**Date:** November 29, 2018

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Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest challenging a solicitation's requirements for quoting labor categories from vendors' Federal Supply Schedule (FSS) contracts is sustained where the agency does not reasonably justify solicitation provisions that restrict the circumstances under which a vendor's FSS contract may be considered within the scope of the solicitation's requirements.

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## DECISION

Grant Thornton, LLC, of Alexandria, Virginia, challenges the terms of request for quotations (RFQ) No. HQ003418R0198, which was issued by the Department of Defense (DOD), Washington Headquarters Services, for auditing support services. The protester argues that the solicitation, which was issued under the Federal Supply Schedule (FSS) provisions of Federal Acquisition Regulation (FAR) subpart 8.4, is unduly restrictive of competition because it requires vendors to quote labor categories from their FSS contracts that "align precisely" with the minimum years of experience in the RFQ.

We sustain the protest.

## BACKGROUND

DOD issued the RFQ on August 8, 2018, seeking quotations to provide audit support services for the Office of the Undersecretary of Defense (Comptroller). Agency Report (AR), Tab 1, RFQ, at 1, 30; Performance Work Statement (PWS) at 152.<sup>1</sup> The RFQ was issued under the FSS provisions of FAR subpart 8.4, and anticipates the establishment of up to four blanket purchase agreements (BPAs) with base periods of 1 year and four 1-year options. AR, Tab 3, RFQ amend. 2, at 239, 253. The estimated combined value of the BPAs is \$240 million. Id. at 239.

The RFQ requires vendors to quote labor categories from their Professional Services Schedule or Schedule 70 FSS contracts for each labor category in the PWS. Id. at 239, 248. The solicitation's price evaluation factor requires vendors to quote labor categories that "align precisely" with the PWS labor categories, as follows:

The PWS labor categories are defined in Attachment 1.3. In accordance with applicable case law, the pricelist description of the corresponding FSS labor category must enumerate the qualifications and responsibilities contained in the definition of the PWS labor category. See AllWorld Language Consultants, Inc., B-411481.3, Jan. 6, 2016, 2016 CPD ¶ 12 at 4; see also American Systems Consulting, Inc., B-294644, Dec. 13, 2004, 2004 CPD ¶ 247. The pricelist description of the vendor's quoted FSS labor category must align precisely with the requirements of the corresponding PWS-defined labor category. See AllWorld, B-411481.3 at 6.

For example, the PWS-defined labor category of Systems Analyst IV requires 12 years of experience and a Master's degree. To fill the services of the Systems Analyst IV, a vendor may *not* quote [an] FSS labor category that provides for only 10 years of experience and a Master's degree. The vendor may not quote such labor category for the Systems Analyst IV even if the FSS pricelist description uses wording such [as] "minimum of 10 years," "10+ years," "at least 10 years," etc. The minimum number of years of experience listed in the FSS pricelist description must be no less than the minimum number of years listed in the Attachment 1.3 definition of the PWS labor category.

Id. at 248.

The contracting officer explains that he viewed our Office's decisions in AllWorld Language Consultants and American Systems Consulting to require an evaluation of vendor's quoted FSS labor categories in the manner set forth in the solicitation provisions above. Contracting Officer's Statement at 4-5. The purpose of the RFQ

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<sup>1</sup> Citations to documents refer to the page numbers added by the agency in its report.

provisions, therefore, was to advise vendors of how the agency would evaluate quotations.

A prospective vendor submitted a question regarding these provisions, requesting that the agency remove the RFQ's requirement for "precise alignment" as it relates to the number of years set forth in a labor category. The question and the agency's response were addressed in RFQ amendment No. 1:

[Question 28] While we understand that [the] government may require certain experience/education requirements for the BPA PWS [labor categories (LCATs)], a more typical approach would be to allow offerors to align proposed BPA PWS LCATs to their most appropriate [General Services Administration (GSA)] Schedule LCATs that may require fewer years of experience, as long as they agree to provide personnel that meet the qualifications of BPA PWS LCATs. This is feasible because the GSA Schedule LCATs usually state [] the years of experience as a minimum, allowing for this flexibility and resulting in more competitive offers with the Government receiving personnel with the requirements from the BPA it deems necessary per the BPA PWS during actual task order performance. Would the government consider eliminating the restrictive instruction language requiring "precise alignment" with GSA LCATs, consistent with FAR requirements to maximize competition?

[Response 28 ] No; see the referenced GAO cases contained within Attachment 1, page 10, Factor 3.

RFP amend. 1, Questions and Responses, at 214.

Grant Thornton filed an agency-level protest on August 23, which the agency denied later that day. AR, Tab 5, Agency-Level Protest, at 317; Tab 6, Denial of Agency-Level Protest, at 319. The protester filed this protest with our Office the following day, prior to the time for receipt of quotations.

## DISCUSSION

Grant Thornton argues that the solicitation's requirement that a vendor's quoted FSS contract labor categories "align precisely" with the RFQ's labor categories, with respect to the number of years of experience, is unduly restrictive of competition. The protester contends that where the labor category in the solicitation states a requirement for a minimum number of years of experience, a labor category on a vendor's FSS contract that identifies a "minimum" of a lesser number of years of experience does not mean the vendor cannot quote employees with higher years of experience, and should be

considered within the scope of the solicitation. For the reasons set forth below, we agree with the protester and sustain the protest.<sup>2</sup>

The FSS program, which is directed and managed by GSA, provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services. FAR § 8.402(a). Under the FSS program, GSA awards firms indefinite-delivery, indefinite-quantity contracts to provide supplies and services at stated prices for given periods of time. Id. Orders placed or BPAs established using the FSS program satisfy the requirement for full and open competition under the Competition in Contracting Act of 1984. 10 U.S.C. § 2302(2)(C); FAR § 6.102(d)(3). In FSS buys, as in other procurements, an agency has the discretion to determine its needs and the best method to accommodate them. Veterans Healthcare Supply Solutions, Inc., B-409888, Sept. 5, 2014, 2014 CPD ¶ 269 at 3. Where a protester challenges a solicitation provision as unduly restrictive of competition, the agency must establish that the provision is reasonably necessary to meet the agency's needs. See Diversity Marketing & Commc'ns, LLC, B-412196.2, Mar. 9, 2016, 2016 CPD ¶ 84 at 4. We examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. HealthDataInsights, Inc.; CGI Fed. Inc., B-409409 et al., Apr. 23, 2014, 2014 CPD ¶ 134 at 8.

Non-FSS products and services may not be purchased using FSS procedures; instead their purchase requires compliance with applicable procurement laws and regulations, including those requiring the use of competitive procedures. See FAR § 8.402(f); OMNIPLEX World Servs. Corp., B-291105, Nov. 6, 2002, 2002 CPD ¶ 199 at 4-5. 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 FSS contract. See American Sec. Programs, Inc., B-402069, B-402069.2, Jan. 15, 2010, 2010 CPD ¶ 2 at 3.

The RFQ cites two decisions by our Office in support of the provisions challenged by the protester, American Systems Consulting, and AllWorld Language Consultants. RFQ amend. 2 at 248. Both of these decisions involved post-award challenges to an agency's issuance of an FSS task order; our Office sustained both protests because the orders were not within the scope of the awardee's FSS contract. In American Systems Consulting, the RFQ required vendors to quote FSS contract labor categories that "most nearly equat[ed]" to the solicitation's labor categories. American Sys. Consulting, supra, at 2. We agreed with the protester that the awardee's quoted labor categories on its FSS contract were not within the scope of the solicitation. For example, a labor category from the awardee's FSS contract that was quoted for the solicitation's user support manager position did not include all of the tasks required by the solicitation. Id. at 4-5. We also rejected the procuring agency's argument that the agency may take into consideration the qualifications of individuals proposed for a specific position, even

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<sup>2</sup> Grant Thornton also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest on grounds other than those identified herein.

where a vendor's FSS labor category does not encompass those qualifications. Id. at 5. Instead, we explained, agencies must assess "whether [the required] services are actually included in the vendor's FSS contract as reasonably interpreted." Id.

In AllWorld Language Consultants, we sustained the protest because the awardee's quoted FSS contract labor categories did not include a number of the qualifications required by the RFQ's labor categories. AllWorld Language Consultants, supra, at 4-6. For example, the RFQ required vendors to quote labor categories that were within the scope of the PWS requirement to provide translation services, including translating conversations between English and local languages at locations involving "harsh desert environments" and "heightened state[s] of threat," and also to "function as an integral member of a team of highly trained professionals responsible for the safety and security of U.S. military and civilian personnel." Id. at 3. The record showed that the single labor category quoted by the awardee addressed only translation of documents and other source media at the "Contractor site." Id. at 4. We concluded that the awardee's quoted labor category did not encompass the PWS requirements and was therefore not within the scope of the RFQ. Id. at 4-5.

GSA, the procuring agency in AllWorld Language Consultants, argued that a labor category in an FSS contract did not need to "align precisely" with the requirements of a given solicitation, provided the vendor commits to provide personnel who satisfy the requirements set forth in the solicitation's labor categories. Id. at 3-4. We disagreed with GSA's view, concluding that where a quoted FSS contract labor category does not "align precisely" with the solicitation requirements, the vendor may not alter the terms of its FSS contract by proposing to comply with PWS requirements that are not within the scope of that contract. Id. at 6. Instead, the terms of a vendor's FSS contract dictate whether the agency may place an order with that vendor. Id.

DOD argues that the solicitation here is not unduly restrictive because, consistent with American Systems Consulting, and AllWorld Language Consultants, the RFQ appropriately precludes the vendor from proposing to use a labor category in an FSS contract that states individuals have "at least" or "a minimum" of a certain number of years of experience (e.g., 10 years) for a solicitation requirement for a greater number of years (e.g., 12 years). Based on our review of the relevant statutes and regulations, decisions by our Office, the views of GSA, and the record, we conclude that the agency has not justified the inclusion of the challenged solicitation provision, and that the RFQ's provisions are therefore unduly restrictive of competition. The protester does not challenge any of the solicitation's labor category requirements with regard to the types of skills, capabilities, or education required, or the number of years of experience required. Therefore, for purposes of this decision, we assume that the protester's arguments address only the solicitation requirement for years of experience to "align precisely," and that all labor categories discussed otherwise meet the non-experience requirements, e.g., skills, capabilities, or education.

Grant Thornton argues that where a solicitation's labor category requires, for example, a minimum of 12 years of experience performing a service, vendors should be able to

quote a labor category on their FSS contract that encompasses performance of that service by personnel with “a minimum” of 10 years of experience. See Protest at 9-11; Protester’s Comments, Oct. 3, 2018, at 7-8. In this regard, the protester contends that providing personnel during performance with 12 years of experience is inherently within the scope of a labor category that specifies “a minimum of 10 years of experience.” See Protester’s Comments on GSA Response, Nov. 6, 2018, at 2-3.

Grant Thornton argues that the disputed solicitation term unfairly requires vendors to “guess” at agency requirements regarding experience when establishing the labor categories on their FSS contracts. See Protester’s Comments, Oct. 3, 2018, at 7. In this regard, the protester contends that a requirement for a vendor’s FSS contract labor category to “align precisely” with the experience requirements in a solicitation’s labor categories would require the vendor to have labor categories that encompass the same skills, capabilities, or education, but with multiple years of experience, for example, labor categories specifying 4, 6, 8, 10, 12, etc., years of experience for the same services. See id.

DOD primarily argues that our decisions in American Systems Consulting, and AllWorld Language Consultants mandate that FSS contract labor categories “align precisely” with the PWS labor categories with respect to years of experience. Memorandum of Law (MOL) at 8-13. The agency acknowledges that labor category requirements in solicitations do not always “parrot” FSS contract labor categories, and that agencies must exercise judgement in assessing whether a quoted FSS contract labor category is within the scope of a solicitation requirement. Id. at 19. In this regard, the agency states that an “agency can focus on whether the FSS labor category substantively enumerates a particular PWS attribute, even if the FSS wording or level of detail varies from the PWS requirements.”<sup>3</sup> Id.

DOD contends, however, that there can be no judgement exercised with regard to years of experience, as this concerns an objective, inflexible requirement. See id. at 12-13. In this regard, the agency argues that years of experience identified in an FSS schedule contract are as much a material element of the scope of a labor category as the stated skills, capabilities, or education. Agency Comments on GSA Response, Nov. 6, 2018, at 1-5, 15-18. For this reason, the agency argues that there is no difference between an FSS contract labor category which states that a vendor provides personnel with “10 years of experience” as compared to a labor category that states that a vendor provides personnel with “10+ years,” “at least 10 years,” or “a minimum of 10 years” of experience. Id. at 15-18. In the agency’s view, therefore, an FSS task order or BPA that requires personnel with 12 years of experience may only be issued to a vendor that has an FSS contract labor category that specifies 12 or more years of experience. See id.

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<sup>3</sup> The agency also states that “nothing in the solicitation states that the agency will perform a literalistic check of labor category matching that rigidly focuses on phrasing instead of substance.” MOL at 19.

Our Office requested the views of GSA, which administers the FSS program. In response to questions from our Office, GSA agreed with Grant Thornton's position and stated that the solicitation requirement does not provide vendors a fair opportunity to reasonably align their FSS contract labor categories to the PWS-defined categories. GSA Response to GAO Questions, Oct. 31, 2018, at 4. GSA acknowledges that the stated number of years of experience in a vendor's FSS contract labor category is material for purposes of assessing whether the labor category is within the scope of a solicitation requirement. Id. at 2. In GSA's view, however, a labor category that states that a vendor can provide personnel with "10+ years," "a minimum of 10 years," or "at least 10 years" of experience effectively sets the minimum number of years that an individual must possess to be provided under that labor category. Id. at 3. GSA states that the terms of such a schedule contract do not prohibit a vendor from providing personnel with more years of experience. Id. For this reason, GSA supports the protester's contention that an FSS contract labor category that specifies personnel with a "minimum of 10 years of experience" would be within the scope of a solicitation requiring 12 years of experience. Id. at 3-4.

As discussed above, our Office's decisions explain that agencies may issue FSS task orders to or establish BPAs with a vendor only where the services required are within the scope of the labor category on the vendor's FSS contract. American Sys. Consulting, supra, at 5; AllWorld Language Consultants, supra, at 6; see also Tarheel Specialties, Inc., B-298197, B-298197.2, July 17, 2006, 2006 CPD ¶ 140 at 8-9; US Investigations Servs., Professional Servs. Div., Inc., B-410454.2, Jan. 15, 2015, 2015 CPD ¶ 44 at 5-6. Consistent with these decisions, we have explained that an agency may not issue an order to or establish a BPA with a vendor based on a schedule that is not within the scope of the RFQ based on the vendor's promise to meet the solicitation requirement during performance. American Sys. Consulting, supra, at 5; AllWorld Language Consultants, supra, at 5-6. Our decisions, however, have not specifically addressed how years of experience must be assessed in determining whether a labor category in a vendor's FSS contract is within the scope of a solicitation requirement.

Contrary to DOD's view, nothing within our decisions in American Systems Consulting or AllWorld Language Consultants state that years of experience as set forth in the labor categories of a vendor's FSS contract must be viewed as a hard cap for purposes of assessing whether the labor category is within the scope of a solicitation. As discussed above, both of those decisions addressed post-award challenges to the issuance of orders where the awardee's quotation included FSS contract labor categories that were, on their faces, clearly not within the scope of the solicitation requirements. In American Systems Consulting, the awardee's quoted labor category did not "include at least 2 years of help desk experience, as is required for the user support manager position." American Sys. Consulting, Inc., supra, at 5. This conclusion, however, was based on the fact that the awardee's quoted labor category did not address "the services required" for that position at all. Id. Our decision turned on the fact that the skills and capabilities in the awardee's quoted labor categories were

not within the scope of the solicitation--i.e., the labor categories did not “align”--rather than the number of years of experience set forth in the labor category. See id. at 5-7.

Grant Thornton and GSA argue that an FSS contract with a labor category that states that the vendor may provide personnel with “a minimum of 10 years of experience,” “10+ years of experience,” or “at least 10 years of experience,” is within the scope of a requirement for 12 years of experience. We agree. The terms of such a labor category provide a price for personnel with a stated minimum level of experience; but nothing prohibits the vendor--expressly or implicitly--from providing personnel with more than that level of experience. We do not find that any of our prior decisions, or the statutes and regulations that apply to the FSS, are inconsistent with this understanding, and therefore sustain the protest.<sup>4</sup>

## CONCLUSION AND RECOMMENDATION

In sum, we conclude that DOD’s view that our decisions in American Systems Consulting and AllWorld Language Consultants mandate the inclusion of the provisions in the price evaluation factor challenged by the protester regarding the minimum years of experience set forth in a vendor’s FSS contract is not supported by those decisions. We also note that the agency has not provided any other justification for the inclusion of these provisions. In the absence of a valid justification, we therefore conclude that the solicitation’s requirement that the minimum number of years of experience set forth in the labor categories of a vendor’s FSS contract must “align precisely” with the minimum number of years in the solicitation is unduly restrictive of competition.

We recommend that DOD amend the solicitation to remove the unduly restrictive provisions and provide vendors an opportunity to submit revised quotations. We also recommend that the agency reimburse the protester’s reasonable costs associated with filing and pursuing its protest, including attorneys’ fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester’s certified claims for costs, detailing the time

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<sup>4</sup> DOD also argues that Grant Thornton’s and GSA’s position regarding a labor category in an FSS contract stating a “minimum” number of years of experience could, in an extreme case, mean that a solicitation labor category requiring a “minimum of 12 years of experience” could be satisfied with an FSS contract labor category stating that proposed personnel have “a minimum of 1 year of experience.” See MOL at 13. We recognize the agency’s concern regarding this potential scenario. We note, however, that regardless of the terms included in a solicitation, agencies are obligated to assess whether quoted FSS contract labor categories are within the scope of a solicitation. American Sec. Programs, Inc., supra, at 3; American Sys. Consulting, supra, at 5. Our decision here does not address all scenarios which might cause an agency to reasonably question whether an FSS contract labor category is within the scope of a solicitation requirement. Rather, we conclude that the agency has not justified the inclusion of the challenged solicitation provisions here.



expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Thomas H. Armstrong  
General Counsel