

Troubling Language In GAO Ruling On Translator Contract

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In a Federal Supply Schedule procurement conducted under Federal Acquisition Regulation Subpart 8.4, all items quoted and ordered by the agency are required to be available on the vendor's schedule contract as a precondition to its receiving the order. This means, in the case of a task order for services, that all of the solicited labor categories must be on the successful vendor's FSS contract.

The U.S. Government Accountability Office has issued several opinions addressing what it means for U.S. General Services Administration schedule services to be "on" a vendor's FSS contract. In US Investigation Services, Professional Services Division, B-410454.2, Jan. 15, 2015, 2016 CPD ¶ 44, the GAO articulated the test as whether the duties, responsibilities, and qualifications for the types of employees solicited by the agency are encompassed within the FSS labor category description. In that case, the GAO sustained a protest alleging that the services offered by the awardee were not available on its GSA schedule contract where "none of the responsibilities or activities described in [the awardee's FSS] labor category description [was] germane to the work required under the RFQ."



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More recently, in AllWorld Language Consultants Inc., B-411481.3, Jan. 6, 2016, 2016 CPD ¶ 12, the GAO articulated what could be interpreted as a more restrictive standard for determining whether services are available on a vendor's FSS contract. Specifically, AllWorld includes language that arguably could be interpreted to suggest that a vendor's FSS labor category description must recite all capabilities and qualifications identified in the solicitation and statement of work for an FSS procurement.

AllWorld involved a solicitation issued by the GSA, on behalf of the Air Force, for an FSS task order to procure linguistic support services in southwest Asia. The solicitation required linguists to provide both oral and written translation services. The statement of work provided that the proposed linguists may be required to live and work in harsh desert environments, including living and working in temporary facilities such as tents; serve during a level of heightened state of threat; function effectively and efficiently during extended periods of high pressure and stress, while maintaining a professional functional demeanor at the scenes of crimes, many of which may be the result of violent and repugnant acts; function as an integral member of a team of highly trained personnel; and operate government-owned vehicles.

The awardee's technical quotation offered to meet all of the solicitation requirements using a single FSS labor category. The awardee's FSS description of that labor category, however, did not include certain of the qualifications required by the statement of work. In particular, it did not include oral translation

services of any type. It also contemplated that all work would be performed at the contractor's facility, with no provision for the performance of services in remote locations.

The protester argued that the awardee's quotation was technically unacceptable because the quoted labor category, as described on the awardee's FSS contract, did not meet the requirements of the solicitation and the statement of work. The GSA responded that "no contractor's FSS labor categories align precisely with the requirements of any particular PWS," and explained that it therefore looked to the awardee's technical quotation to determine what duties the proposed linguists would perform.

The GAO rejected the GSA's argument and sustained the protest. The GAO found that the labor category description included in the awardee's FSS contract, on its face, did not include many of the qualifications required by the solicitation. GAO held that the awardee could not, through its technical quotation, propose additional capabilities that were required by the solicitation but missing from the awardee's FSS labor category description.

Given the significant disparity between the awardee's FSS labor category description and the solicitation requirements, the GAO had little choice but to sustain the protest. However, GAO's opinion includes the following broad language (in bold) that is likely to be troubling to agencies and contractors alike:

We note as well that GSA's underlying premise – that [the awardee] could identify a labor category under its FSS contract that did not meet **all of the requirements** of the PWS, but could somehow enhance or alter the narrative description and qualifications of that labor category through the technical portion of its quotation – reflects a fundamental misunderstanding of the nature of FSS contracting. The labor categories identified and described in each firm's underlying FSS contract are **fixed, discrete, specific labor category descriptions** that are contractually binding and not subject to alteration, just as the technical specifications for products available under a firm's FSS contract are fixed, discrete specific, contractually binding, and not subject to alteration.

To the extent a quoted labor category description under a firm's FSS contract does not, in the words of GSA, **'align precisely' with the requirements of a given solicitation**, the firm may not properly alter the underlying labor category description through the terms of its quotation. Rather, where a firm's quoted labor category description does not **align with the requirements of the solicitation**, it means that the quoted labor category does not meet the requirements of the solicitation, and therefore cannot serve as the basis for issuing a task order to the firm.

The holding of AllWorld is unremarkable given the significant disparity between the awardee's quoted FSS labor category description and the requirements of the solicitation. Oral translation services to be provided in a war zone-type environment clearly are not within the scope of a labor category limited to written translation services to be provided at a contractor's facility. However, there is a perceived risk that the AllWorld decision, and specifically the above quoted language, could be interpreted more broadly to mean that an offeror's FSS labor category description must include each and every capability described in the solicitation and the statement of work.

Whether interpreted broadly or narrowly, the AllWorld decision has several important implications for GSA schedule contractors.

First, in light of decisions such as AllWorld, contractors should confirm that their FSS labor category descriptions are sufficiently broad to capture all requirements for the types of FSS procurements in which they typically participate. A contractor can accomplish this objective by comparing its FSS labor

category descriptions to a representative sample of recent solicitations or task orders. If those solicitations and task orders include requirements that are not in the contractor's FSS labor category description, it may be advantageous for the contractor to broaden its FSS labor category description to include those requirements. It is impossible to anticipate every requirement that may be included in a new solicitation, but this exercise may help a contractor to identify recurring requirements or capabilities that should be included in its FSS contract in order to increase the likelihood of being eligible for future FSS task orders.

Prior to AllWorld, some contractors took the opposite approach, watering down their labor category descriptions to one or two sentences with a very general statement of capabilities. This practice brings with it significant risk, particularly in light of the potential to interpret AllWorld as requiring a contractor's FSS labor category description to include, "on its face," a detailed recitation of all capabilities and qualifications necessary to perform the statement of work. This approach also creates a risk that the GSA will not have sufficient information to evaluate an offeror's proposal for an FSS contract, and to make a price reasonableness determination, in the first instance.

Second, contractors should propose an FSS labor category that is appropriate for the work described in the solicitation and the statement of work. The GAO's decision in AllWorld suggests that the awardee's FSS contract included additional labor categories that potentially could have met the solicitation requirements. The awardee, however, proposed a labor category that clearly did not meet the requirements of the solicitation. The GAO suggested that this approach provided the awardee with a "significant competitive advantage" because the labor categories that potentially met the solicitation requirements were more expensive than the proposed labor category. However, given that the awardee's quotation agreed to meet all of the solicitation requirements, the awardee potentially could have achieved the same competitive advantage by offering a higher discount on one of its more expensive FSS labor categories that complied with all of the solicitation requirements.

Third, contractors should understand the potential bid protest implications of cases such as AllWorld. FSS price lists and labor category descriptions are publicly available on the GSA Advantage! website. Thus, a disappointed offeror can validate whether the awardee's FSS contract includes labor categories that align with the requirements of the solicitation and statement of work. If the awardee's FSS contract does not include any such labor categories, there may be a valid basis for protest. If the awardee's FSS contract includes labor categories that are consistent with the solicitation requirements, but those labor categories are far more expensive than the award value would seem to suggest, there may be a basis to allege that the awardee either did not propose those compliant FSS labor categories or that it proposed those FSS labor categories at a price that was unrealistically low (if the solicitation requires a price realism analysis).

Fourth, GSA schedule contractors should understand the incentives that decisions such as AllWorld create for agencies and anticipate how agencies will respond. Insisting on precise alignment between FSS labor category descriptions and solicitation requirements may incentivize agencies to water down statements of work for FSS procurements to avoid including specific requirements that are not expressly listed in many contractors' FSS labor category descriptions. Thus, contractors should be on the lookout for vague solicitation requirements and, to the extent possible, attempt to obtain more specific information through the question and answer process. Likewise, contractors should anticipate the possibility that agencies will attempt to impose more specific, and potentially more stringent, requirements after award. Such requirements may be outside the scope of the contractor's FSS contract or, at minimum, may constitute a change for which the contractor is entitled to additional compensation.

Alternatively, to the extent an agency requires a solicitation with very specific labor category qualifications, it may choose to procure its requirements outside the FSS program. I have witnessed this trend in my own practice, particularly in the context of corrective action taken in response to several GAO protests that included allegations similar to those raised in AllWorld. None of the prospective offerors' FSS contracts in those cases included service descriptions that expressly covered each and every requirement of the solicitation. Rather than risking a sustained protest, the agencies chose to abandon the FSS program and procure their requirements on an open-market basis.

Decisions like AllWorld have the potential to push agencies away from the FSS program. Thus, contractors who are accustomed to selling to the Government solely through their FSS contracts may wish to familiarize themselves with some of the important differences between FSS procurements and procurements conducted on an open market basis. These include, without limitation, different procedures, different terms and conditions, different pricing strategies, and the flexibility to offer different products and services beyond those included on the contractor's FSS contract.

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DISCLOSURE: Sheppard Mullin Richter & Hampton LLP represented the protester in US Investigation Services, Professional Services Division.

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