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Decision

Matter of: Caddell Construction Company, Inc.

File: B-411005.1, B-411005.2

Date: April 20, 2015

Dirk D. Haire, Esq., and Alexa Santora, Esq., Fox Rothschild LLP, for the protester. J. Randolph MacPherson, Esq., Halloran & Sage LLP, for Pernix Group, Inc.; and Jonathan Shaffer, Esq., and Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, for Framaco International, Inc., the intervenors. John W. Cox, Esq., Department of State, for the agency. Stephanie B. Magnell, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. For purposes of future protests challenging the prequalification of potential offerors for overseas embassy construction projects under the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended (Security Act), our Office is revising the timeliness rule set forth in Caddell Constr. Co., Inc., B-401281, June 23, 2009, 2009 CPD ¶ 130. Although the instant protests are deemed timely, all subsequent protests of prequalification decisions in a two-phase solicitation under the Security Act must be filed within 10 days of when the protester knows or should have known of the basis for the challenge.

2. Protests are sustained where the agency's determination that prequalification applicants have met the requirements of the Security Act is unreasonable and not supported by the record.

DECISION

Caddell Construction Company, Inc., of Montgomery, Alabama, protests the decision by the Department of State (DOS), Bureau of Overseas Building Operations, to prequalify Framaco International, Inc., of Rye Brook, New York, and Pernix Group, Inc., of Lombard, Illinois, as "United States person[s]," as that term is defined in the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended, Pub. L. 99-399 (Security Act), codified at 22 U.S.C. § 4852, under solicitation No. SAQMMA-14-R-0073 (RFP), issued for the construction of a U.S. embassy complex in Maputo, Mozambique.

Specifically, Caddell contends that Framaco did not meet the Security Act's requirements regarding (1) technical and financial resources and (2) historical business volume, and was therefore ineligible to submit a proposal. Caddell also alleges that Pernix did not meet the Security Act's requirements regarding (1) historical business volume and (2) performance of similarly valued construction work. The protester argues that the agency's evaluation of Framaco's and Pernix's proposals was unreasonable and inconsistent with the Security Act and the RFP.

We sustain the protests.

BACKGROUND

As relevant here, the Security Act provides that as long as there is adequate competition, "only United States persons and qualified United States joint venture persons may . . . bid on a diplomatic construction or design project" that requires technical security or is valued at \$10 million or more. 22 U.S.C. § 4852(c)(2). The statute defines a "United States person" as an entity that, inter alia:

(D) has performed within the United States or at a United States diplomatic or consular establishment abroad administrative and technical, professional, or construction services similar in complexity, type of construction, and value to the project being bid;

(E) with respect to a construction project under subsection (a)(1) of this section, has achieved total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before the date specified in subparagraph (C)(i);

* * * * *

(G) has the existing technical and financial resources in the United States to perform the contract.

Id.

On February 3, 2014, DOS issued a notice inviting prequalification applications from potential offerors for construction of a U.S. embassy complex in Mozambique, consisting of an office building, quarters, shops, storage and maintenance, utility, security, and parking facilities, on a fixed-price basis to achieve LEED Silver Certification. Agency Report (AR), Tab 1, Prequalification Notice; Contracting Officer (CO) Statement, Framaco, at 4.¹ The prequalification notice explained that

¹ Caddell's protests of Pernix (B-411005.1) and Framaco (B-411005.2) were not consolidated until after completion of briefing by the parties. Where the agency

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prospective offerors must be “United States Person[s],” as that term is defined under the Security Act:

Firms being considered for award under this acquisition are limited to “*United States Person*” bidders as defined in the [Security] Act. The Offeror must complete and submit as part of its pre-qualification package the pamphlet “Certifications Relevant to Public Law 99-399, Statement of Qualifications for Purpose of Section 402 of [the Security Act].

AR, Tab 1, Prequalification Notice, at 2 (emphasis in original). As to the timeline, the agency stated that in Phase I, “DOS will evaluate the pre-qualification submissions based on the evaluation criteria” in the prequalification notice. Id. at 1. The notice further advised that “[t]hose offerors determined to be pre-qualified in accordance with this notice will be issued a formal Request for Proposal (RFP) for the project and invited to . . . submit technical and pricing proposals in Phase II.” Id. The prequalification notice cautioned firms regarding their Security Act certifications as follows:

This [Security Act prequalification] is a pass/fail evaluated area. Submissions from Offerors who do not receive a pass rating in this area will not be further evaluated. Sufficient information should be provided in the Certifications and attachments thereto to determine eligibility under Public Law 99-399, but the Department reserves the right to consider other information in the prequalification submission or to obtain clarifications or additional information from the Offeror.

Id. at 2.

Phase I prequalification applications were due by March 6, 2014. AR, Tab 1, Prequalification Notice, at 3. The agency received timely submissions from nine firms, including Caddell, Pernix and Framaco. CO Statement, Pernix, at 4; CO Statement, Framaco, at 4.

On March 11, a DOS legal advisor completed his review of the prequalification submissions. AR, Tab 3, U.S. Person Qualification Legal Memorandum. As relevant here, the advisor stated that there is “uncertainty” as to the interpretation of the Security Act’s requirement for business volume as set forth in 22 U.S.C. § 4852(c)(2)(E), which states that a firm’s total business volume must equal or

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report documents are identical in content and tab number, the citation does not distinguish between the two protests. Otherwise, citations to the Pernix and Framaco protests are to filings in B-411005.1 and B-411005.2, respectively.

exceed the value of the project being bid for 3 years in the 5-year period preceding the issuance date of the RFP. Id. In this regard, and as discussed below, the advisor noted that there are “inconsistent decisions” by GAO and the U.S. Court of Federal Claims as to the interpretation of this requirement. Id. at 2. The advisor further noted that although Framaco and Pernix appeared to meet the business volume requirement as interpreted in decisions issued by the court, neither firm met the requirement as interpreted in decisions issued by GAO. Id. at 2-3. Ultimately, however, the DOS legal advisor stated that Framaco and Pernix had “provided certifications in prequalification submission[s] demonstrating that they meet all the eligibility criteria of PL 99-399 [the Security Act] for this project.” Id. at 5.

On April 4, the CO adopted all of the DOS legal advisor’s recommendations, as well as the recommendations of another advisor regarding security clearances for the prequalification applicants. AR, Tab 4, CO Prequalification Memorandum. Based on this advice, the CO qualified eight of the nine original applicants as “United States persons” eligible to participate in Phase II of the solicitation. Id. See also CO Statement, Pernix, at 4; CO Statement, Framaco, at 5.

That same day, DOS published the list of prequalified offerors, which included Caddell, Pernix and Framaco, to the government’s central contracting website, www.fbo.gov. CO Statement, Pernix, at 4; CO Statement, Framaco, at 4; AR, Tab 5, List of Prequalified Offerors. On September 30, the agency gave the Phase II RFP to the prequalified offerors. CO Statement, Pernix, at 4; CO Statement, Framaco, at 4. After several extensions, the due date for Phase II proposals was set for January 13, 2015. AR, Tab 7, RFP amendment A003, at 3. On January 9, Caddell filed the two instant protests challenging the agency’s decision to prequalify Pernix (B-411005.1) and Framaco (B-411005.2).

RENEWED MOTION TO REVISE TIMELINESS RULE FOR PREQUALIFICATION PROTESTS

Before we address the merits of the protest, we first consider an issue that the parties raised in Caddell’s protest concerning the prequalification of Framaco: the timeliness rule for protesting the agency’s prequalification decision under the Security Act. As discussed below, we find that the instant protests are timely filed, but set forth a new rule for such protests in the future.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1). A protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest,

whichever is earlier.² 4 C.F.R. § 21.2(a)(2). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

Throughout their briefings, Framaco, Caddell and the agency have all expressed their disagreement with the timeliness rule in our decision Caddell Constr. Co., Inc., B-401281, June 23, 2009, 2009 CPD ¶ 130. That protest similarly involved a two-phase procurement in which Caddell protested DOS's decision to prequalify Framaco as a United States person under the Security Act. Id. In Caddell, B-401281, we dismissed the protest as untimely because it was filed after award of the Phase II construction contract. Id. We described the protest as comparable to a "challenge to the ground rules for the conduct of the procurement, that is, to the terms of a solicitation." Id. at 2. On the basis of this similarity, we reasoned that 4 C.F.R. § 21.2(a)(1) applied, and thus Caddell was required to protest the agency's Phase I prequalification decision prior to the next closing time for receipt of proposals--in this case, receipt of the Phase II proposals. Id. at 2. Because Caddell failed to do so, the protest was found untimely. Id. at 1. At the parties' request we revisit this decision.

Here, Framaco has requested dismissal of Caddell's protest as untimely. Framaco argues that "Caddell's interpretation and GAO's direction in [Caddell, B-401281, supra], are not consistent with GAO's bid protest regulations that state a protest must be filed within ten days of when a protester knew or should have known the basis of protest," and therefore Caddell's protest, filed nine months after the agency's prequalification decision, should be found untimely. Framaco Req. for Dismissal (Feb. 19, 2015), at 5. Framaco argues that the 10-day rule under 4 C.F.R. § 21.2(a)(2) should govern timeliness, and not 4 C.F.R. § 21.2(a)(1), on the basis that the agency's prequalification notice is not part of the solicitation for construction of the embassy complex and the protester must therefore be diligent in pursuing its protest. Id., citing Orbital Scis. Corp., B-400589, B-400589.2, Dec. 15, 2008, 2008 WL 5790105 (protest dismissed where protester delayed filing by more than five months after learning basis of protest).

The agency similarly urges us to find that 4 C.F.R. § 21.2(a)(2) applies, such that a timely protest must be brought within 10 days of the agency's publication of the list of prequalified firms. Agency Resp. to Framaco Req. for Dismissal (Mar. 9, 2015), at 3-4. The DOS highlights the cost of following 4 C.F.R. § 21.2(a)(1), noting that "if

² Additional provisions of our Bid Protest Regulations concern protests following requested and required debriefings and agency-level protests. 4 C.F.R. §§ 21.2(a)(2), (3).

the GAO sustains Caddell's protest, then Framaco needlessly expended resources preparing a full Phase II proposal. . . ." Id. at 3. Similarly relying on Orbital Sciences, supra, the agency argues that we "should not permit [protesters] to sit on a protest for months while competitors invest in Phase II preparations."³ Id. at 4.

Caddell also urges us to reconsider our holding in Caddell, B-401281, supra. Protester Resp. to Framaco Req. for Dismissal (Mar. 9, 2015), at 9. The protester argues that prequalification decisions under the Security Act are not similar to solicitation amendments and asks us to "find that 4 C.F.R. § 21.2(a)(2) governs protests concerning offerors' Security Act qualifications." Protester Resp. to Framaco Req. for Dismissal, at 9. However, Caddell argues that rather than the 10-day rule, the debriefing exception in 4 C.F.R. § 21.2(a)(2) applies, such that protests would be timely filed within 10 days after a debriefing required under Federal Acquisition Regulation Part 15. Id.

Thus, Caddell, Framaco and the DOS all maintain that 4 C.F.R. § 21.2(a)(1), which establishes the timeliness of protests of solicitation improprieties, should not apply to challenges to an agency's Security Act prequalification decision. Instead, Framaco and the agency believe that we should follow the 10-day rule under 4 C.F.R. § 21.2(a)(2). Caddell contends that the exception in 4 C.F.R. § 21.2(a)(2) should apply, so that protests must be filed no later than 10 days after a debriefing is held. Protester Resp. to Framaco Req. for Dismissal, at 9.

The Security Act expressly limits the firms eligible to compete for diplomatic construction or design projects that exceed \$10 million or involve technical security, such that "only United States persons and qualified United States joint venture persons may bid." 22 U.S.C. § 4852(a). By employing the word "bid," the statute effectively prevents firms that do not satisfy the stated criteria from accessing the construction plans for large or technically complex U.S. diplomatic construction and submitting proposals. Furthermore, for material violations of 22 U.S.C. § 4852(a), the corresponding regulation allows for disqualification, suspension, debarment, and criminal penalties under 18 U.S.C. § 1001. See 48 C.F.R. § 652.236-72.

After again reviewing the Security Act, legislative history, prior decisions by our Office and the Court of Federal Claims, our regulations, and the parties' arguments, we conclude that, in the limited circumstances of Security Act prequalification

³ For example, Caddell cites an industry financial report to challenge Framaco's financial status. Protest, Framaco, at 6. Caddell filed the protest on January 9, 2015, but apparently printed the report a full month prior, on December 9, 2014. Protest, Framaco, exh. C, at 1. Thus, Caddell appears to have been aware of the basis for raising its protest long before the protest was filed, which runs counter to our objective of early resolution of protests.

decisions, our 10-day rule in 4 C.F.R. § 21.2(a)(2) will apply. This means that challenges to an agency's U.S. person determination under the Security Act, whether to qualify or disqualify a firm, must be brought within 10 days of the time that the basis for the protest is known or should have been known. This change to the timeliness requirements of such protests will encourage potential offerors to resolve their disputes "as early as practicable during the solicitation process. . . ." Caddell, B-401281, supra, at 3; see also Supp. DOS Resp. to Framaco Initial Req. for Dismissal (Jan. 29, 2015), at 3 ("Permitting an erroneously pre-qualified firm to bid in Phase II would violate the plain language of the Security Act. Thus, any such challenges should be brought prior to bidding to ensure that only firms meeting the requirements of the Security Act actually compete."). As a result, DOS will be able to resolve challenges to its prequalification decision prior to allowing erroneously-qualified entities to bid on the solicitation. Furthermore, a 10-day rule for protests would mean that protests challenging prequalification decisions could be resolved prior to prospective offerors' incurrence of proposal preparation costs. Following this rule also aligns with the provisions of the Security Act, which requires the agency to make its United States person prequalification determination prior to a prospective offeror's submission of a proposal.⁴ However, in order to avoid prejudice to the protester, who reasonably relied on Caddell, B-401281, we shall apply this timeliness requirement going forward, but not in the current protest.⁵ As noted above, the scope of this portion of the decision extends no more broadly than Department of State two-phase procurements in which the agency has made a prequalification determination under the Security Act.

⁴ Similarly, DOS implementing regulation, 48 C.F.R. § 652.236-72, asks for the "total business volume" of the "prospective bidder/offeror," highlighting that a firm must qualify as a "United States person" before it is allowed to be an actual bidder/offeror. Compare the Foreign Services Buildings Act of 1926, as amended, otherwise known as the Percy Amendment, which states that with evidence of adequate competition, "[e]ligibility for award of contracts under this chapter . . . shall be limited . . . to American-owned bidders. . . ." 22 U.S.C. § 302. In such cases, we have treated after-award protests as timely filed. See Pernix-Serka LP, B-407656, B-407656.2, Jan. 18, 2013, 2013 CPD ¶ 70.

⁵ In an analogous situation, our Office announced in Shinwha Elec., B-291064 et al., Sept. 3, 2002, 2002 CPD ¶ 154, that, although we had previously provided for limited review of agency suspension and debarment decisions, we would not do so in future decisions. Specifically, our decision in Shinwha stated that while we would consider the protester's pending arguments under the standards followed in prior decisions, "[w]ith respect to future cases, our Office will no longer review, even under a limited standard, protests that an agency improperly suspended or debarred a contractor from receiving government contracts." Id. at 4.

CHALLENGES TO FRAMACO'S AND PERNIX'S PREQUALIFICATION

Caddell argues that DOS unreasonably found that Framaco and Pernix met the prequalification requirements of the Security Act. For the reasons discussed below, we find the agency's decision to prequalify Framaco and Pernix as United States persons was unreasonable and not in accordance with the requirements of the Security Act.⁶

In reviewing an agency's prequalification decision under the Security Act, we examine the supporting record to determine whether the decision was rational, consistent with the stated evaluation criteria, consistent with applicable laws and regulations, and adequately documented. Caddell Constr. Co., Inc., B-298949, Jan. 10, 2007, 2007 CPD ¶ 24 at 5. See also Johnson Controls World Servs., Inc., B-289942, B-289942.2, May 24, 2002, 2002 CPD ¶ 88 at 6; AIU N. Am., Inc., B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39 at 7; Matrix Int'l Logistics, Inc., B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89 at 5. Where an agency's selection decision is based on conclusions that appear to be directly contrary to the contemporaneous record, or where the agency's evaluation record provides no explanation regarding the apparent conflict, we cannot conclude that the decision was reasonable. See AIU N. Am., Inc., supra.

Caddell's Challenge to Framaco

Caddell alleges that Framaco does not have the technical or financial resources to satisfy the Security Act's requirements under 22 U.S.C. § 4852(c)(2)(G), and that based on Framaco's prequalification application it was unreasonable for the contracting officer to determine otherwise. Protest, Framaco at 5; Protester's Comments, Framaco, (Feb. 19, 2015), at 8-11. Caddell further alleges that Framaco lacks the business volume required by 22 U.S.C. § 4852(c)(2)(E), *i.e.*, that it does not have annual receipts exceeding the agency's estimated project value of \$160 million in 3 of the previous 5 years. Protest, Framaco, at 7.

⁶ Caddell raises other collateral arguments concerning DOS's prequalification of Framaco and Pernix. Although we do not address each of the protester's arguments, we have reviewed them all and find that none provides a basis to sustain the protest, aside from those specifically identified below. For example, Caddell argues that Pernix lacks the resources to furnish a performance bond and payment bond equal to 100 percent of the awarded contract, as required by the RFP. Protester's Comments, Pernix, at 10, citing RFP § H.4. This protest ground is premature and is dismissed.

Framaco's Technical and Financial Resources

Caddell first argues that Framaco lacks the resources to qualify as a United States person under 22 U.S.C. § 4852(c)(2)(G). Protest, Framaco, at 5. As discussed above, satisfaction of the Security Act requirements, and thus, qualifying as a "United States person" was "a pass/fail evaluated area" for prequalification. AR, Tab 1, Prequalification Notice, at 2. As relevant to this protest, the Security Act defines the term "United States person" as an entity that, *inter alia*, has the existing technical and financial resources in the United States to perform the contract. 22 U.S.C. § 4852(c)(2)(G). The agency's regulations implementing the Security Act define the term "existing . . . financial resources" in 22 U.S.C. § 4852(c)(2)(G) as:

[T]he capability of the prospective bidder/offeror to mobilize adequate staffing and monetary arrangements from within the United States sufficient to perform the contract. Adequate staffing levels may be demonstrated by presenting the resumes of current United States citizens and resident aliens with skills and expertise necessary for the work in which the prospective bidder/offeror is interested or some other indication of available United States citizen or permanent legal resident human resources. Demonstration of adequate financial resources must be issued by entities that are subject to the jurisdiction of United States courts and have agents located within the United States for acceptance of service of process.

48 C.F.R. § 652.236-72.

DOS claims that Framaco demonstrated that it met the financial capability requirement because it submitted a "favorable letter of bonding reference" from the [DELETED] Insurance Company. AR, Framaco, at 7, citing AR, Framaco, Tab 2, Framaco Prequalification Submission, att. 4. Although the proposal was submitted by Framaco, the bonding letter referred to "Framaco-[DELETED]."⁷ *Id.* In this regard, the letter's subject is "Framaco-[DELETED][,] Solicitation: SAQMMA-14-R0073[,] Maputo, Mozambique New Embassy Complex." AR, Framaco, Tab 2, Framaco Prequalification Submission, att. 4. It states:

[DELETED] Insurance Company has provided surety credit to Framaco-[DELETED] for an aggregate uncompleted backlog of USD [DELETED]. [DELETED] will favorably consider providing

⁷ The reference to [DELETED] appears to be to an entity related to the [DELETED], which is a [DELETED] construction firm. See [http://www.\[DELETED\].html](http://www.[DELETED].html).

performance and payment bonds if Framaco-[DELETED] is awarded a satisfactory contract with the U.S. Department of State.

Id. The agency argues that this letter demonstrates that Framaco possesses “monetary arrangements . . . sufficient to perform the contract.” AR, Framaco, at 7, citing 48 C.F.R. § 652.236-72 (implementing the Security Act). DOS supplemented its CO Statement with a second statement in which the CO states that he “relied on Framaco’s self-certification that it was not seeking pre-qualification as a joint venture as well as knowledge that [DELETED] Insurance Company has provided similar bonding letters for Framaco International, Inc. as a single firm to determine that Framaco possessed access to sufficient financial resources to satisfactorily perform if awarded the Maputo contract.” AR, Framaco, Tab 8, CO Declaration (undated).

In its comments on the agency report, Framaco claims that its letter “show[s] a surety credit to Framaco for \$[DELETED] million” and asserts that “[DELETED] will provide performance and payment bonds if Framaco is awarded the contract.” Framaco’s Comments (Feb. 19, 2015), at 11. Caddell responds that the letter does not “state Framaco’s available bonding capacity or single contract bonding capacity” and instead, “[b]ecause the letter concerns Framaco-[DELETED], it is likely that [DELETED] has relied on [DELETED]’s resources to issue the letter to Framaco-[DELETED].” Protester’s Comments, Framaco, at 4.

We do not think the [DELETED] letter regarding Framaco-[DELETED] can form the basis for a reasonable conclusion that Framaco independently possesses financial resources sufficient to perform the contract, as required by 22 U.S.C. § 4852(c)(2)(G). [DELETED]’s letter is directed to the combined Framaco-[DELETED] entity, i.e., a formal or de facto joint venture between Framaco and [DELETED], rather than Framaco, the firm that applied for prequalification. The letter presents the historical value at which [DELETED] bonded a Framaco-[DELETED] venture, but does not support any conclusion that [DELETED] would bond Framaco alone for the \$160 million minimum estimated cost of the Mozambique complex.

Moreover, the CO’s post-hoc declaration is unsupported by the contemporaneous record and does not in any event cite any specific evidence that Framaco possesses--alone--adequate financial resources for the project. To the extent the CO states that he is aware that [DELETED] had at one time provided bonding to Framaco, as a standalone entity, for other projects, the CO did not provide any specific information concerning such bonding letters. AR, Framaco, Tab 8, CO Declaration (undated).

Where an agency’s source selection decision is based on conclusions that appear to be directly contrary to the contemporaneous record, and where the agency’s evaluation record provides no explanation regarding the apparent conflict, we

cannot conclude that the decision was reasonable. Solers, Inc., B-404032.3, B-404032.4, Apr. 6, 2011, 2011 CPD ¶ 83 at 13. Further, we give little weight to post-hoc statements that are inconsistent with the contemporaneous record. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. An agency's evaluation must be sufficiently documented to allow our Office to review the merits of a protest. Apptis, Inc., B-299457 et al., May 23, 2007, 2008 CPD ¶ 49 at 10. Where an agency fails to document or retain its evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for our Office to conclude that the agency had a reasonable basis for its source selection decision. Navistar Def., LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 13.

Here, we do not agree that the CO's alleged knowledge of other bonding decisions by [DELETED], as described in his non-contemporaneous statement, provided a reasonable basis to conclude that [DELETED]'s letter concerning Framaco-[DELETED] demonstrated Framaco's financial resources to perform the contract. Specifically, nothing in the contemporaneous record supports the conclusion that DOS documented Framaco's ability "to mobilize adequate staffing and monetary arrangements from within the United States sufficient to perform the contract," as required to prequalify Framaco under the Security Act. See 48 C.F.R. § 652.236-72.

Additionally, Caddell argues that DOS did not reasonably evaluate Framaco's technical resources, as required by 22 U.S.C. § 4852(c)(2)(G). Framaco's initial prequalification application did not list the number of its U.S.-based employees, as required. AR, Framaco, Tab 2, Framaco Prequalification Submission (Feb. 28, 2015), at 7. See also AR, Framaco, Tab 3, U.S. Person Qualification Legal Memorandum, at 3 (Framaco's "Certification 6(b) [number of permanent, full-time positions in the United States] is blank and this information should be obtained from Framaco."). Acting on the March 11 recommendation of the DOS legal advisor, the CO requested this information from Framaco, which confirmed that it had [DELETED] permanent, full-time U.S.-based employees. Email, CO to Framaco, (Mar. 12, 2015); Framaco Revised Prequalification Submission (Mar. 12, 2015), at 7. The record, however, contains no evidence that, after obtaining the completed certification, the agency evaluated whether Framaco's [DELETED] U.S.-based employees constituted technical resources in the United States sufficient to oversee a \$160 million U.S. embassy construction project in Mozambique.

Thus, we conclude that the contemporaneous record does not show that DOS reasonably evaluated whether Framaco demonstrated "the existing technical and financial resources in the United States to perform the contract," as required by 22 U.S.C. § 4852(c)(2)(G). In sum, on the basis of the record here, we cannot conclude that the agency's decision that Framaco satisfied the requirements of 22 U.S.C. § 4852(c)(2)(G) was reasonable, and we sustain the protest.

Framaco's Total Business Volume

Next, Caddell alleges that Framaco cannot satisfy the Security Act requirement that a prequalification applicant's total business volume equal or exceed the project's value in 3 of the preceding 5 years. Protest, Framaco, at 7; 22 U.S.C. § 4852(c)(2)(E). Specifically, Caddell claims that Framaco's total annual revenue is considerably less than the estimated \$160 million minimum contract value. Protest, Framaco, at 7.

As discussed above, the Security Act defines a "United States person" eligible to bid on an overseas embassy construction project as an entity that "has achieved total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before" the issuance of the solicitation. 22 U.S.C. § 4852(c)(2)(E). DOS regulations define the term "total business volume" in 22 U.S.C. § 4852(c)(2)(E) as "the U.S. dollar value of the gross income or receipts reported by the prospective bidder/offeree on its annual federal income tax returns," and require an offeror to demonstrate "total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before the [issuance] date [for the solicitation]." 48 C.F.R. § 652.236-72 (implementing the Security Act). These regulations define the relevant time as "the 3 to 5-year period immediately preceding the issuance date of this proposal." Id.

The U.S. Court of Federal Claims and our Office have issued decisions with different interpretations of the meaning of "total business volume" as used in 22 U.S.C. § 4852(c)(2)(E). For the reasons discussed below, we find no basis to revise our prior interpretation of the Security Act.

In 2007, our Office considered a protest filed by Caddell challenging the award of an overseas embassy construction contract to American International Contractors (Special Projects), Inc. (AIC). The protester argued that the agency unreasonably found that AIC met the total business volume requirement under the Security Act because the sum of the awardee's 3-highest years of annual revenue equaled the anticipated value of the project. Caddell, B-298949.2, June 15, 2007, 2007 CPD ¶ 119, at 10. DOS argued that we should defer to its approach of summing the 3 years, because it is the entity charged with interpreting the statute. Id.

We approached the question of statutory interpretation by first asking whether the statute is unambiguous when its words, unless otherwise defined, are given "their ordinary, contemporary, common meaning." Id. at 10. We found that "the ordinary and common meaning of [the term "total business volume"] is that eligible offerors will have achieved a business volume equal to or greater than the value of the project in each of 3 years within the 5-year period." Id. However, based on the parties' arguments, we recognized "an element of ambiguity" in the statute. Id. We noted that "[w]here an agency interprets an ambiguous provision of the statute through a process of rulemaking or adjudication, unless the resulting regulation or

ruling is procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute, the courts will defer to this agency interpretation (called “Chevron deference”). Id., citing United States v. Mead Corp., 533 U.S. 218, 227-31; Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44.⁸

We declined to follow the agency’s interpretation, finding that Chevron deference was not warranted because the agency’s interpretation was “not the result of either a rulemaking or an adjudication.” Id. at 11. We also examined the legislative history of the Security Act, in which the Congressional Committee Reports referred to “the business volume ‘in 3 of the previous 5 years,’” and found that “DOS’s interpretation of [the Security Act] is inconsistent with its ordinarily understood meaning, and with the legislative concerns that led to the statute’s enactment.”⁹ Id. at 12-13, citing S. Rep. No. 99-304 (1986); H. Rep. No. 99-494 (1986). We also found that the agency had not “promulgated this interpretation as part of its extensive implementing regulations.” Caddell, B-298949.2, supra, at 11.

We agreed with the protester that aggregating 3 years of business receipts to achieve a total business volume equal to or greater than the value of the project could result in a complete “reading out” of the 3-year requirement. Id. We noted that, in effect, the agency’s interpretation would permit prequalification of an offeror if it demonstrated that it achieved a total business volume equal to value of the anticipated program in one year, but had no business revenue in any other year.¹⁰ Id. We therefore recommended that DOS terminate the contract awarded to AIC. Id.

Following our decision in Caddell, B-298949.2, Grunley Walsh International, LLC filed suit in the Court of Federal Claims, challenging DOS’s rejection of its prequalification application--a decision that the agency explained was required by our Office’s decision in Caddell. The court concluded that an offeror’s business

⁸ In Chevron, the Supreme Court held that agencies were entitled to deference in their statutory interpretations. 467 U.S. at 844, 104 S. Ct. at 2782 (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”).

⁹ As noted in Caddell, B-289949.2, “[t]he conferees explained in the Joint Explanatory Statement that the [Security] Act was intended ‘to provide enhanced diplomatic security and combat international terrorism.’” Caddell, B-289949.2, supra, at 4, citing H.R. Conf. Rep. No. 99-783, at 53 (1986).

¹⁰ For example, a firm could satisfy the Security Act if its annual revenue 5 years prior equaled the anticipated value of the solicited project, even if it had no revenue in the other 4 years.

volume under the Security Act could be determined by aggregating a company's receipts in any 3 of the previous 5 years. Grunley Walsh Int'l, LLC v. United States, 78 Fed. Cl. 35, 41-42. Specifically, the court expressly disagreed with our Office's interpretation of the Security Act as requiring that a prospective offeror demonstrate that it had business receipts equal to the anticipated project value in 3 years of the prior 5-year period. Id. The court concluded that the word "total" in total business volume, indicated that the statute anticipated a cumulative assessment of a prospective offeror's revenue over a 3-year period. Id. Based on this interpretation of the Security Act, the court ruled that DOS unreasonably followed our Office's decision in Caddell, B-298949.2, in rejecting Grunley-Walsh's prequalification application. Id. at 44.

Two years after the court's decision in Grunley Walsh, we had an opportunity to revisit our decision in Caddell, B-298949.2. Caddell, B-401596 et al., Sept. 21, 2009, 2009 CPD ¶ 187. In that protest, the protester challenged DOS's conclusion, following the court's decision in Grunley Walsh, that Framaco met the requirements of the Security Act because the sum of its three highest-revenue amounts over the past 5 years exceeded the relevant project value. Caddell, B-401596, supra, at 10. We declined to reverse our decision in Caddell, B-298949.2, as to our interpretation of the Security Act's total business volume requirement and sustained Caddell's protest.¹¹ Id.

Subsequently, DOS had the opportunity to add to or clarify its language in 48 C.F.R. § 652.236-72, which states that a qualifying offeror must have minimum annual revenue greater than the project value in 3 of the most recent 5 years, and made no changes to this wording. In February 2015, DOS revised 48 C.F.R. § 652.236-72, with regard to firms having business relations with Libya, but did not revise this regulation concerning the evaluation of total business volume. 80 Fed. Reg. 6909-03 (Feb. 9, 2015). Despite the prior litigation regarding whether the 3 years must be evaluated on an individual or cumulative basis, DOS did not revise its regulations for overseas embassy construction to implement a cumulative approach to evaluating a firm's total business volume. Id.

DOS asks our Office to follow the court's decision in Grunley Walsh because of the difficulty of the forum split on this issue. AR, Framaco, at 10. Framaco also argues that we should follow Grunley Walsh. Framaco's Comments at 13. As our Office

¹¹ We stated that "[t]hen and now, we think the ordinary and common meaning of the words in this statute is that eligible offerors will have achieved a business volume equal to or greater than the value of the project in each of 3 years within the 5-year period." Caddell, B-401596 et al., supra, at 5. Because we dismissed the protest for other reasons, however, we concluded that we did not need to resolve the matter in that decision. Id.

has held, we are not bound by decisions of the Court of Federal Claims. See, e.g., Kingdomware Techs.--Recon., B-407232.2, Dec. 13, 2012, 2012 CPD ¶ 351 at 3. Nonetheless, we have carefully reviewed the court's reasoning and our own, and decline to reverse our prior decisions. Specifically, we respectfully disagree with the court that the term "total" necessarily and unambiguously shows that the business volume for an applicant should be added cumulatively for the 3-year period identified in the solicitation.¹² See Grunley Walsh, 78 Fed. Cl. at 39-40. The court's interpretation of "total" as modifying "business volume" effectively inserts the absent term "cumulatively" into the statute and implementing regulation. In contrast, we interpret the term "total" as referring to the business volume for the applicant, as opposed to any particular project. See Caddell, B-298949.2, supra, at 10, 12. We

¹² We also note that the court in Grunley Walsh was concerned that our Office's interpretation of the total business volume requirement could preclude small business offerors from participating in the procurement at issue, because a requirement that total business volume equal the anticipated project value would be inconsistent with the maximum business volume limit established under the small business size code identified for that solicitation. Grunley Walsh, 78 Fed. Cl. at 40. In this regard, the statute provides that "[n]ot less than 10 percent of the amount appropriated pursuant to section 4851 (a) of this title for diplomatic construction or design projects each fiscal year shall be allocated to the extent practicable for contracts with American small business contractors." 22 U.S.C. § 4852(e). As this provision states, however, the 10 percent allocation is not a mandatory requirement, since it applies "to the extent practicable." The legislative history also demonstrates that Congress intended that small business participation be a goal and not a requirement. The conference report states:

Because of the size and nature of capital construction projects associated with [the Security Act], it is unlikely that small business contractors will have the qualifications to bid on such projects. Accordingly, it is the intent of this act that prime contractors on such projects seek subcontracts from appropriately qualified small business contractors to the maximum extent possible. In addition, for those projects associated with this act which are not capital construction projects, but which instead are of a follow-on nature, such as but not limited to physical and technical security improvements, the Department of State is directed that no less than 10 percent of such projects shall be allocated to the extent practicable to American small business contractors.

H.R. Conf. Rep. No. 99-783, at 62 (1986). For these reasons, we respectfully disagree with the court that the Security Act's support for small business participation renders our interpretation of the total business volume inconsistent with the requirements for the Security Act.

think this is consistent with DOS’s implementing regulation, which defines “total business volume” as “the U.S. dollar value of the gross income or receipts reported by the prospective bidder/offeror on its annual federal income tax returns.” 48 C.F.R. § 652.236-72. We view our interpretation as the one most likely to give effect to the concern Congress was addressing when it enacted the Security Act, namely, the need for a qualified contractor that has the resources and capability to perform the work.¹³

We recognize the difficulty of the agency’s position when our Office’s and the court’s interpretations differ. However, for the reasons set forth in Caddell, B-298949.2 and above, as well as the fact that the agency did not change the explanation for the term “total business volume” when it revised the relevant regulation in February 2015, we conclude that our interpretation of the Security Act was correct and apply that interpretation to the instant protests.

Turning to the facts of the protest, Framaco lists the following amounts as its gross receipts:

Year	Gross Receipts
2012	\$(DELETED)
2011	\$(DELETED)
2010	\$(DELETED)
2009	\$(DELETED)
2008	[blank]

AR, Framaco, Tab 2, Framaco Prequalification Submission, at 13.¹⁴

¹³ As to Congress’ intent, we concur with the court that “the legislative history does indicate that Congress created the business volume requirement to help ensure an offeror’s technical capability to perform the project being bid on.” Grunley Walsh, 78 Fed. Cl. at 41. See also Caddell, B-298949.2, supra, at 12, citing H. Rep. No. 99-494, at 17 (1986) (stating that the total business volume requirement is meant to “ensure that a firm is technically capable to carry out a given project.”).

¹⁴ Because the prequalification notice was issued in 2014, according to DOS regulations, Framaco was required to provide gross receipts for 3 of the 5 years between 2009 and 2013. 48 C.F.R. § 652.236-72. Thus, had Framaco completed its prequalification application according to the regulation, it would have read:

Year	Gross Receipts
2013	[blank]
2012	\$(DELETED)
2011	\$(DELETED)
2010	\$(DELETED)

(continued...)

The protester argues that Framaco’s annual revenue fails to equal the \$160 million value of the Mozambique project for 3 of the previous 5 years, as required by the Security Act. Protest, Framaco, at 7. On this basis, the protester argues, DOS’s decision to prequalify Framaco was unreasonable. Protester’s Comments, Framaco, at 11.

DOS “admits that Framaco’s pre-qualification submission falls short” of our Office’s holding in Caddell, B-298949.2, supra, concluding that “the business volume reported [by Framaco] meets the cumulative but not the 3 of 5 years standard.” AR, Framaco, at 9; AR, Tab 3, U.S. Person Qualification Legal Memorandum, at 2 (“In no single year did Framaco achieve business volume of \$160 million, the low-end of the estimated project value for Maputo.”). Thus, we hold that the agency’s decision to prequalify Framaco under the Security Act was inconsistent with the statute and sustain this protest ground.

Caddell’s Challenge to Pernix

Caddell alleges that Pernix does not have the business volume required by 22 U.S.C. § 4852(c)(2)(E), i.e., that its business receipts in 3 of any of the previous 5 years do not approach the agency’s estimated project value (here, \$160 million). Id. Caddell also alleges that Pernix cannot qualify as a United States person under the Security Act because Pernix has not completed projects of similar complexity, type and value, as required by 22 U.S.C. § 4852(c)(2)(D). Protest, Pernix, at 6. For the reasons discussed below, we sustain the protests with regard to Caddell’s challenge to DOS’s evaluation of Pernix’s total business volume, but deny the protest with regard to the requirement regarding completion of projects of similar complexity, type and value.

Pernix’s Total Business Volume

First, Caddell alleges that Pernix cannot satisfy the Security Act requirement that in 3 of the preceding 5 years a potential offeror have a total business volume equal to or greater than the value of the project being bid. Protest, Pernix, at 6-7. Specifically, Caddell claims that Pernix’s public financial statements show annual revenue that fails to achieve the estimated \$160 million minimum contract value. Id., citing Protest, Pernix, exh. E, Pernix Annual Report. The protester argues that DOS’s “decision to prequalify Pernix by aggregating three years of revenue is unreasonable” Protester’s Comments, Pernix, at 8.

(...continued)

2009	\$[DELETED]
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Pernix lists the following amounts as its historical gross receipts:

Year	Gross Receipts
2013	\$(DELETED)
2012	\$(DELETED)
2011	\$(DELETED)
2010	[blank]
2009	\$(DELETED)

AR, Pernix, Tab 2, Pernix Prequalification Submission, at 7.

None of Pernix's annual receipts equals DOS's lower-estimate of the value of the Mozambique project, \$160 million, but the sum of the 3 highest-revenue years easily clears this hurdle. AR, Tab 1, Prequalification Notice, at 1. As discussed above, we read 22 U.S.C. § 4852(c)(2)(E) and the agency's regulation, 48 C.F.R. § 652.236-72, to mean that a prequalification applicant must present "receipts equal to the size of the project in each of 3 years within the previous 5-year period." Caddell, B-298949.2, supra, at 12. Thus, Pernix satisfies this Security Act requirement under the Court of Federal Claims' interpretation, but not our Office's as described in Caddell, B-298949.2. We have reviewed Caddell, B-298949.2, the record before us, and in our discussion above we find no grounds here to deviate from its reasoning.

Pernix notes that a different statute, 22 U.S.C. § 4864, titled "Increased participation of United States contractors in local guard contracts abroad under diplomatic security program," uses language identical to the Security Act in defining a "United States person" as an entity that "has achieved a total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before the date" of the solicitation. Pernix Comments, at 8; 22 U.S.C. § 4864(d)(1)(E) (1998). The 2004 DOS regulation implementing 22 U.S.C. § 4864, 48 C.F.R. § 652.237-73, used language concerning the 3-of-5 year total business volume requirement that was identical to that used in DOS's implementation of the Security Act, 48 C.F.R. § 652.236-72. Compare 48 C.F.R. § 652.236-72 (2004) with 48 C.F.R. § 652.237-73 (2004). However, 48 C.F.R. § 652.237-73 included additional language that 48 C.F.R. § 652.236-72 did not, namely, that "[a]n entity will be deemed to have met this requirement if the total cumulative business volume for the three years presented exceeds the contract price at time of award under this solicitation for the full term for which prices are solicited, including any option periods." 48 C.F.R. § 652.237-73 (2004). This means that, for the purposes of soliciting guard services, the department may compare three years of revenue to multiple contract years.

In contrast, as discussed above, in February 2015, DOS did not chose to revise its drafting of 48 C.F.R. § 652.236-72, with the result that the term "total business

volume” was not changed to “total cumulative business volume,” as in 48 C.F.R. § 652.237-73.

We cannot read the word “cumulative” into the DOS regulation implementing the Security Act’s total business volume requirements, 48 C.F.R. § 652.236-72, on the basis that the DOS included that word in an explanation related to a similarly-worded regulation, 48 C.F.R. § 652.237-73, when “cumulative” was not included either in the original or revised version of the regulation at hand, 48 C.F.R. § 652.236-72. Overall, the preceding history does not convince us to interpret the Security Act’s business volume requirement using the sum of the 3 highest-value years of historical receipts.

DOS “admits that Pernix’s pre-qualification submission falls short” of our Office’s reading of the 3-of-5 year requirement. AR, Pernix, at 8. See also AR, Tab 3, U.S. Person Qualification Legal Memorandum, at 3 (“Pernix’s reported business volume meets the cumulative but not 3 of 5 year standard.”). The agency asks us to follow the Court of Federal Claims’ holding, noting the difficulty of the DOS position in these protests. AR, Pernix, at 10.

Because the agency admits that Pernix does not satisfy the Security Act’s 3-of-5 year requirement, and because we decline to reverse our decision in Caddell, B-298949.2, supra, we hold that the agency’s decision to prequalify Pernix under the Security Act was inconsistent with the Security Act and the agency’s regulations and sustain this protest ground.

Pernix’s Similarly-Valued Projects

Next, Caddell alleges, based on information from USAspending.gov, that the largest contract completed by Pernix to date is valued at \$19.4 million, well below the \$120 million minimum established in the prequalification notice. Protest, Pernix, at 6.

To qualify as a United States person under the Security Act, an entity must have completed projects of similar complexity, type and value as the solicited requirement. 22 U.S.C. § 4852(c)(2)(D). In the instant procurement, the agency defined this as “successful[] complet[ion of] a construction contract or subcontract involving work of the same general type and complexity as the solicited project and having a contract or subcontract value of approximately \$120 million.” AR, Tab 1, Prequalification Notice, at 2 (emphasis removed).

The agency responds that Pernix has satisfied this requirement through its completion of the Baghdad Diplomatic Support Center, valued at \$120,335,028. AR, Pernix, at 7. See also AR, Pernix, Tab 2, Pernix Prequalification Submission, at 5. Pernix highlights that it included this information in its public filing with the Securities and Exchange Commission. Pernix’s Comments at 6, citing Pernix’s Comments, exh. 3, Pernix 2013 10-K (Dec. 31, 2013) (The Pernix-Serka joint

venture “received award notices and modification totaling approximately \$120.3 million on [the Baghdad Diplomatic Support Center] . . .”).

Caddell notes that Pernix completed these projects as the apparent 52 percent lead in a joint venture and argues that Pernix can only claim a pro-rated share of project value. Protester’s Comments, Pernix, at 6. While Caddell correctly notes that the agency report does not indicate that DOS ever considered pro-rating or discounting the projects, and that Pernix did not respond to DOS’s inquiries about the percentage of work performed by Pernix in these joint ventures, Caddell fails to provide any legal support for its implicit argument that 22 U.S.C. § 4852(c)(2)(D) requires that joint venture projects must be credited on a pro-rated basis. Id. at 7. Without legal support for this argument, we have no basis to sustain the protest, and therefore this protest ground is denied.

CONCLUSION AND RECOMMENATION

In sum, we sustain Caddell’s protests regarding the agency’s prequalification of Framaco and Pernix as U.S. persons. Specifically, we find that the agency erred in its determination that Framaco had adequate financial resources to complete a project of this size, when the record was entirely silent as to Framaco’s financial resources. Further, the CO’s personal knowledge concerning Framaco’s resources was neither relevant to this matter nor supported in the contemporaneous record. Finally, we find that the agency erred in its evaluation of Framaco’s and Pernix’s total business volume by adding the three-highest annual revenue amounts and favorably comparing this sum to the estimate of the project cost, when the Security Act requires that a company’s 3 highest-revenue years each meet or exceed such cost. Assuming that the agency’s analysis is as set forth in the record, we recommend that DOS determine that Framaco and Pernix do not qualify as United States persons under the Security Act.

Finally, we recommend that the agency reimburse Caddell its costs associated with filing and pursuing these protests, including reasonable attorneys’ fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester’s certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. Id. at § 21.8(f).

The protests are sustained.

Susan A. Poling
General Counsel