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## Decision

**Matter of:** CCE Specialties, LLC

**File:** B-413998

**Date:** January 18, 2017

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Thomas M. Brownell, Esq., and Gregory R. Hallmark, Esq., Holland & Knight LLP, for the protester.

William K. Walker, Esq., Walker Reausaw, for Olgoonik Diversified Services, LLC, an intervenor.

John W. Cox, Esq., Department of State, for the agency.

Young H. Cho, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest challenging agency's prequalification of the awardee for overseas embassy construction projects under the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended (Security Act), is denied where the record shows that the awardee's submissions satisfied the requirements of the prequalification notice.

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### DECISION

CCE Specialties, LLC (CCE), of King George, Virginia, challenges the award of a contract to Olgoonik Diversified Services, LLC (ODS), of Anchorage, Alaska, under request for proposals (RFP) No. RFP-SAQMMA-16-R-0261, issued by the Department of State for construction services relating to security upgrades for the U.S. Embassy compound in Baghdad, Iraq. The protester challenges the agency's decision to prequalify ODS to participate in the procurement.

We deny the protest.

### BACKGROUND

On March 22, 2016, the agency issued a notice soliciting prequalification submissions from contractors for design-build construction services for the Baghdad embassy compound security upgrades project in Baghdad, Iraq. See Agency Report (AR), Tab 1, Prequalification Notice. The prequalification notice explained that the project would be solicited in two phases. Id. at 1-2. Phase I was the

announcement of solicitation of prequalification submission. Id. at 2. Offerors determined to be prequalified would be issued a formal request for proposals (RFP) for the project and would be invited to participate in a site visit and submit technical and pricing proposals in phase II. Id.

The prequalification notice advised that prospective offerors must be “United States Person[s],” as that term is defined under the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended (Security Act), and were required to complete and submit as part of the offeror’s prequalification package a completed certification pamphlet.<sup>1</sup> Id.

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 is valued at \$10 million or more or involves technical security. 22 U.S.C. § 4852(a)(2). The statute defines a “United States person” as an entity that, inter alia, (1) has been incorporated or legally organized in the United States for more than five years before the issuance date of the request for proposals with respect to a construction project that exceeds \$10 million, and for more than two years before the issuance date of the request for proposals with respect to a construction or design project which involves physical or technical security; and (2) 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. See 22 U.S.C. §§ 4852(c)(2)(C) and (D).

Certification question #3 pertained to the Security Act’s formation requirements stated above. See Protester’s Comments and Supplemental (Supp.) Protest, attach. A, Certification Pamphlet at 3. The certification pamphlet also provided relevant definitions applicable to this certification question. Id. As relevant here, “issuance date” was defined as “The Department expects that the issuance date of the Phase II solicitation will be in March 2016-February 2017.” Id. (underscore in original). The prequalification submissions were due on April 12, 2016. AR, Tab 1, Prequalification Notice at 3.

The prequalification notice stated that the project’s estimated construction cost was between \$12 to \$17 million, but also specifically advised the following:

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<sup>1</sup> This pamphlet is titled “Certifications Relevant to Public Law 99-300, Statement of Qualifications for Purpose of Section 402 of The Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Public Law 99-399).” See Protester’s Comments and Supplemental (Supp.) Protest, attach. A.

NOTE: To demonstrate performance of similar construction work for Omnibus Diplomatic Security and Antiterrorism Act of 1986 purposes, the offeror needs to provide information demonstrating that it has successfully completed in the United States or at a U.S. diplomatic or consular mission 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 at least **\$9 million**. See Section 4 below.

AR, Tab 1, Prequalification Notice at 1 (emphasis in original). See also id. at 2 (repeating the requirement).

As relevant here, section 4 of the prequalification notice informed offerors that use of “the experience or financial resources of any other legally dependent organization or individual, including parent companies, subsidiaries, or other related firms,” was permitted but that an offeror “must do so by way of a joint venture,” which included formal joint ventures (where the arrangement among the co-venturers has been reduced to writing) and de facto joint ventures (“where no formal agreement has been reached, but the offering entity relies upon the experience of a related U.S. person firm that guarantees performance”).<sup>2</sup> Id. at 3.

Nine offerors, including CCE and ODS, submitted timely prequalification submissions. AR, Tab 3, Prequalification Review Memorandum (Memo.), May 3, 2016 Memo. to Contracting Officer (CO) at 1.

ODS certified that it was incorporated on March 25, 2011. AR, Tab 2, ODS Prequalification Submission at 3. ODS also provided information about three contracts, one of which was performed by ODS and the other two were performed by “affiliated, sister divisional” companies, O.E.S., Inc., and Olgoonik Specialty Contractors, LLC (OSC). Id. at 5; see also id., attach. 2, Certification #4. As relevant here, the contract performed by O.E.S. was an indefinite-delivery, indefinite-quantity (IDIQ) contract with a \$150 million ceiling for forced-entry/ballistic-resistant (FE/BR) projects at multiple facilities worldwide under which \$74 million in task orders were performed ranging from \$78,000 to \$7,400,000 in value. Id. at 16-19.

The prequalification submissions were reviewed by the agency’s legal counsel to determine whether the firms seeking prequalification satisfied the eligibility requirements of the Security Act. See AR, CO’s Statement of Facts (COS) at 4; see

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<sup>2</sup> In this regard, the prequalification notice also stated that “[i]f a [j]oint [v]enture (JV) is formed, the company having 51 percent or greater interest in the JV must be the one completing the pamphlet. This is a pass/fail evaluated area.” AR, Tab 1, Prequalification Notice at 2-3.

also AR, Tab 3, Prequalification Review Memo., May 3, 2016 Memo. to CO. The agency counsel stated in the prequalification review memorandum that because the project was a diplomatic construction project involving technical security, the two-year formation requirement (rather than the five year) was applicable. Id. at 1-2. Because ODS was incorporated in 2011, the agency found that ODS had been incorporated in the United States for at least two years. Id. at 9. The agency also found that

ODS relies on the performance of a worldwide FE/BR IDQ (sic) contract by an affiliated firm O.E.S., Inc., which performed task orders at various U.S. diplomatic and consular missions totaling over \$74 million. While no individual task order reached the \$9 million threshold, O.E.S. certainly performed construction services very similar in type and complexity and greatly exceeding in value the Baghdad Security Upgrade project. In these unique circumstances, under which O.E.S. was performing multiple task orders at different locations under the same standards set by FE/BR IDQ contract, the requirement for performance of construction services having a contract value similar to or exceeding the value of the contract being solicited is clearly met.

Id. The agency concluded that

ODS meets the prequalification criteria if it can rely on the construction services performed by its affiliate O.E.S., whom it identifies as a de facto joint venture partner. As stated in the Important Note on page 1 of the Prequalification Certifications, the U.S. person co-venturer will be required to sign a guarantee making the U.S. person individually responsible for performance of any contract awarded. The contracting officer should confirm that ODS and O.E.S. understand this requirement and that O.E.S. is prepared to furnish the required guarantee if ODS is in line for award.

Id. at 10.

On May 5, the CO contacted a representative of the firms and requested confirmation that ODS and O.E.S. understood the requirement and that O.E.S. was prepared to furnish the required guarantee if ODS was determined to be in line for award. AR, Tab 4, ODS Prequalification Clarification. The representative confirmed that ODS and O.E.S. understood the requirement and O.E.S. was prepared to furnish the required guarantee if ODS were in line for award. Id.

The phase II RFP was issued on June 5 to the prequalified potential offerors, including CCE and ODS. AR, COS at 5. Proposals were due on September 22. Four firms, including CCE and ODS, submitted timely proposals. Id. On October 3,

CCE was notified that ODS received the award.<sup>3</sup> Id. This protest was filed following a debriefing.

## DISCUSSION

The protester raises a number of arguments claiming that the agency improperly allowed ODS to prequalify without satisfying the requirements of the Security Act or the solicitation. Although we do not specifically address all of CCE's challenges, we have fully considered all of them and find that they afford no basis on which to sustain the protest.<sup>4</sup>

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 the applicable laws and regulations, and adequately documented. Caddell Constr. Co., Inc., B-411005, B-411005.2, Apr. 20, 2015, 2015 CPD ¶ 132 at 8.

CCE first argues that because the project is valued at over \$10 million, the five year formation requirement should apply. Further, because ODS was incorporated on March 25, 2011 and the prequalification notice was issued on March 22, 2016, CCE's formation fails to satisfy this requirement. See Protest at 6; Protester's Comments and Supp. Protest at 1-2. We disagree.

The plain language of the statute and prequalification notice do not support the protester's argument that the applicable "issuance date" for purposes of this certification should be the date the prequalification notice was issued. In this regard, the statute refers to the date to measure the qualification of a U.S. person as the issuance of the request for proposals, rather than the request for prequalification submissions. See 22 U.S.C. § 4852(c)(2)(C). Further, the

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<sup>3</sup> CCE was not aware prior to this date that ODS was a prequalified offeror.

<sup>4</sup> For example, citing to 13 C.F.R. § 121.103(h), How Does SBA Determine Affiliation, CCE argues that ODS cannot rely upon the experience of O.E.S. because there is no written joint venture agreement, as required by that regulation. See Protester's Comments and Supplemental (Supp.) Protest at 7-9. The cited portions of that provision expressly provide that the requirements that ODS and O.E.S. allegedly failed to meet, including that the joint venture agreement be in writing, were required only "[f]or purposes of this provision and in order to facilitate tracking of the number of contract awards made to a joint venture." 13 C.F.R. § 121.103(h). Thus, CCE's reliance on 13 C.F.R. § 121.103(h) without acknowledging and addressing its expressly limited purpose, fails to provide a legally sufficient argument as required by our Bid Protest Regulations. 4 C.F.R. §§ 21.1(c)(4) and 21.1(f). Accordingly, this protest ground is dismissed.

prequalification notice provided a projected “issuance date” of the request for proposals for purposes of this certification as sometime between March 2016 and February 2017. See Protester’s Comments and Supp. Protest, attach A, Prequalification Pamphlet at 3. Because the prequalification submission due date was April 12, 2016, no phase II RFP could have been issued prior to that date. See AR, Tab 1, Prequalification Notice at 3. Because ODS was incorporated on March 25, 2011, it would have been incorporated for more than five years before the issuance date of any request for proposals that could have been issued here.<sup>5</sup> Accordingly, we find the protester’s argument to be without merit.

CCE next argues that the agency improperly allowed ODS to rely upon the experience of an affiliate that performed a number of small projects, among which no single one approached the \$9 million threshold in value. Protester’s Comments at 6. In this regard, the protester contends that “[t]he regulation<sup>6</sup> and the certification pamphlet both clearly required that the offeror demonstrate completion of a ‘project’ having a value in excess of \$9 million.” Id. We disagree.

The prequalification notice stated that “to demonstrate performance of similar construction work for **[Security Act] purposes**,” the offeror needed to provide information demonstrating that it has successfully completed in the United States or at a U.S. diplomatic or consular mission “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 at least **\$9 million**.” (bold underscore in original; bold italics added). See AR, Tab 1, Prequalification Notice at 1, 2. Here, the affiliate’s contract was an IDIQ contract with a ceiling value of \$150,000,000, with task orders ranging from \$78,000 to \$7,400,000, and for which the total value of completed task orders was more than \$74 million dollars.<sup>7</sup> See AR, Tab 2, ODS Prequalification Submission at 16-19. While it is undisputed that no individual task order satisfied the \$9 million threshold, we do not find that the agency’s acceptance of ODS’s affiliate’s contract to be contrary to the terms of the prequalification notice,

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<sup>5</sup> During the development of the protest, we requested that the agency explain why the two year formation requirement applied to this project, when the project was valued in excess of \$10 million. Because we find that ODS would have been incorporated for more than five years before the issuance date for any request for proposals that could have been issued here, we need not reach the issue of whether the two-year or five-year formation requirement applies to this project.

<sup>6</sup> While the protester does not specifically identify the regulation to which it is referring, the agency’s regulations implementing the requirements of the Security Act are found in 48 C.F.R. § 652.236-72, Statement of Qualifications for the Omnibus Diplomatic Security and Antiterrorism Act.

<sup>7</sup> It is undisputed that that the work performed under these task orders was of a similar type and complexity as the solicited project.

which did not require that the offeror demonstrate completion of a single project having a value in excess of \$9 million.<sup>8</sup> Accordingly, this protest ground is denied.

CCE finally argues that ODS's prequalification submission package failed to comply with the requirement in the prequalification notice that "[i]f a Joint Venture (JV) is formed, the company having 51 percent or greater interest in the JV must be the one completing the pamphlet." See Protester's Comments and Supp. Protest at 10-11. In this regard, the protester points out that ODS indicated that it was a de facto joint venture relying on the experiences of its affiliates O.E.S. and OSC, and stated that it was also relying on its parent OD for financial support. Nonetheless, the certification was completed by an individual, "who identifies himself only as 'President, Olgoonik Development Operations,' . . . never as president or other authorized officer of ODS, O.E.S., or OSC." See *id.* at 10-11; Supp. Comments at 2. On this record, we find no basis to sustain the protest.

Here, the record shows that the person who signed the certificate is the president of ODS and the president of OD, which is the parent of all three entities (ODS, O.E.S., and OSC). Accordingly, we do not find the agency's acceptance of the certification by this individual, as the president of OD, the parent of all the entities participating in the de facto joint venture among ODS, O.E.S., and OSC, to be unreasonable or inconsistent with the prequalification notice. Accordingly, this protest ground is denied.

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<sup>8</sup> In this regard, we disagree with the protester that our decision in Caddell Constr. Co., Inc., B-401596 et al., Sept. 21, 2009, 2009 CPD ¶ 187 supports its argument that the agency improperly allowed the "accumulation of small task orders to meet the statutory requirement that the offeror demonstrate completion of a project of similar size." See Protester's Comments and Supp. Protest at 6-7. In Caddell, we stated that "the Security Act's experience requirements anticipate a demonstration that an offeror has completed at least one construction **project** of similar complexity, size, and value" as the solicited project, and found that the agency could not reasonably conclude that the awardee had the requisite experience based on the aggregated value of a list of projects provided by the awardee. See Caddell Constr. Co., Inc., B-401596 et al., Sept. 21, 2009, 2009 CPD ¶ 187 at 7 (emphasis added). Unlike the circumstance in Caddell, the presolicitation notice here did not require that offerors possess experience with "projects" of similar complexity, size, and value as the solicited project, which had an estimated value between \$12 to \$17 million. Instead, the presolicitation notice emphasized that to demonstrate performance of similar construction work for **Security Act purposes**, the offeror was required to provide information demonstrating that it has successfully completed "***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 at least **\$9 million.**" See AR, Tab 1, Prequalification Notice at 1, 2 (bold underscore in original; bold italics added).

The protest is denied.

Susan A. Poling  
General Counsel