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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Wallace O'Connor, Inc.

File: B-227834

Date: August 19, 1987

DIGEST

Under the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C.A. § 4852 (West Supp. 1987), a firm is required to be incorporated in the United States for 5 years, in order to bid on the procurement of an embassy office building in a foreign country. Given the 5-year incorporation requirement, the Department of State's refusal to consider affiliates' citizenship history to meet this requirement is not an abuse of discretion.

DECISION

Wallace O'Connor, Inc. (WOI), protests the determination by the Office of Foreign Buildings Operations, Department of State (Department), that the firm did not qualify as an eligible offeror under the terms of solicitation No. GE-1, which was issued for the construction of a new United States embassy office building in Georgetown, Guyana. The solicitation was subject to the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Security Act), 22 U.S.C.A. § 4852 (West Supp. 1987), under which only "United States persons" are eligible to compete for a diplomatic construction project having an estimated total project value, as here, exceeding $5,000,000 and where adequate competition exists. WOI contends that the Department misapplied the Security Act in determining that WOI was not a "United States person" within the meaning of that Act.

We deny the protest.

The procurement was synopsized on May 12, 1986, in the Commerce Business Daily as being subject to section 11 of the Foreign Service Buildings Act, 22 U.S.C. § 302 (Supp. III 1985). Wallace O'Connor International Limited (International), a United Kingdom corporation and a minority stockholder of WOI, submitted a prequalification form to the Department on July 15, 1986. This form indicated that International was wholly owned by a Texas corporation which, in turn, was wholly owned by American citizens.

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The Security Act became effective August 27, 1986. The Security Act defines "United States person," eligible to compete on the construction project at issue, as a "person" which:

> "(A) is incorporated or legally organized under the laws of the United States, including State . . . laws;
>
> "(B) has its principal place of business in the United States;
>
> "(C) has been incorporated or legally organized in the United States-
>
> (i) for more than 5 years before the issuance date of the invitation for bids or request for proposals . . .
>
> "(D) has performed within the United States administrative and technical, professional, or construction services similar in complexity, type of construction, and value to the project being bid . . . ." 22 U.S.C.A. § 4852(c)(2) (West Supp. 1987).

Further, under 22 U.S.C.A. § 4852(c)(3) a "qualified United States joint venture person" means a joint venture in which a United States person or persons owns at least 51 percent of the assets of the joint venture.

When the solicitation was issued on October 15, 1986, the solicitation stated that it was subject to the terms of the Security Act. International requested solicitation plans and specifications which were furnished to the firm by the Department. In November 1986, a pre-proposal conference was held in Georgetown, Guyana, which International representatives attended. Subsequently, the closing date for receipt of initial proposals was extended by the Department to April 28, 1987. According to WOI, a Department representative informed International shortly before the firm intended to submit its proposal that the firm would be excluded from the competition because it was not incorporated in the United States. Further, the Department representative allegedly stated that a proposal would be considered from WOI, a Texas corporation, and that the protester should simply explain the reasons for the change in name of the offering corporation in its proposal. On April 24, 1987, WOI submitted a proposal in lieu of International submitting a proposal. After reviewing proposals, the Department sent the following letter of rejection to WOI on May 26, 1987:

> "We regret to inform you that a careful review of the information you furnished with your proposal for subject project does not demonstrate compliance with the qualification criteria of Section 402 of Public Law 99-399 [the Security Act].
>
> "In particular, your enclosed data does not show performance of work within the United States similar in complexity, type of construction, and value to subject project and that your firm has not been legally incorporated in the United States for more than 5 years."

This protest followed. Six other offerors have submitted proposals that have been determined by the Department to be in the competitive range. In its agency report, the Department concedes that it should not have disqualified WOI for failure to meet the requirement that it have "performed within the United States . . . services similar in complexity, type of construction, and value to the project being bid." See 22 U.S.C.A. § 4852(c)(2)(D) (West Supp. 1987). The Department notes that WOI requested that the agency consider the work experience of affiliated companies and, in fact, the Department has done so for other firms, once the firm satisfies the 5-year citizenship requirement. The Department considers such relationships as "de facto joint ventures." However, the Department insists that disqualification of WOI was still required because the firm is not a United States person since it has not been incorporated in the United States for more than 5 years.

WOI admits that it has not been incorporated in the United States for more than 5 years. In fact, WOI was incorporated in Texas on August 8, 1984. However, WOI argues that the Department erred in restricting its consideration of an offeror's qualifications to those of a single corporation named as the offeror in the proposal. WOI claims it is the successor to several companies which are experienced contractors, having worked on previous United States Embassy projects such as the one in Moscow. WOI maintains that the term "person" within the meaning of the Security Act should not be limited to a single corporation but should encompass WOI and its "predecessors and affiliated corporations." WOI also argues that the legislative history of the Security Act indicates that Congress intended the term "person" to include more than a single corporation.

Finally, WOI notes that the Department, after WOI's exclusion, amended the solicitation as follows:

> "A person or entity may submit data showing the financial and experience qualifications of a U.S.-

> owned parent, either combined with its own qualifications or as supplemental to them. In such an instance, the person or entity which itself meets all of the requirements of [the Security Act] except the United States experience factors . . . can do so if the experience of its legally distinct parent or other affiliated corporation is considered. Such a person or entity will be deemed to be a de facto joint venture and will be required to submit a statement of guarantee signed by the president [and will be severally liable for the full and faithful performance of the work]."

WOI contends that this amendment to the solicitation, which permits an offeror to satisfy the experience requirements of the Security Act with the experience of affiliated corporations, is inconsistent with the Department's position that an offeror cannot satisfy the incorporation requirements of the Security Act with affiliated concerns.

Under the Security Act only "United States persons" may "bid on a diplomatic construction project" (22 U.S.C.A. § 4852(a)(1) (West Supp. 1987)). The Security Act requires as a condition of eligibility that a "United States person," meaning a single entity, have been incorporated for more than 5 years before the issuance date of the solicitation (22 U.S.C.A. § 4852(c)(2)(C)(i) (West Supp. 1987)). The legislative history indicates that Congress intended, as a prerequisite to bidding, that the firm bidding be incorporated for 5 years, that is, be in business for that length of time. Based on the Security Act's language and its legislative history, we cannot conclude that the Department abused its discretion by deciding that the history of predecessor and affiliated concerns would not be considered in meeting the Security Act's citizenship requirement.

Furthermore, we do not think that the Department's consideration of the work experience of affiliated concerns of other offerors to satisfy the Security Act's requirement that offerors have performed similar work in the United States is inconsistent with this interpretation. Under the terms of the solicitation, the consideration of affiliates experience is permitted only where the company initially meets the statutory 5-year incorporation requirement.

WOI also claims it proposal and protest costs, arguing that it was wrongfully induced to bid by the Department. Our review of the record indicates that during the pre-bid stage the Department advised International that it would be excluded from the competition since it was not registered in the United States. The protester states that, as a result

of further discussion with the Department, it was advised that it could submit a proposal as a United States registered firm if the offer was submitted in WOI's name, and the change in name was explained. Apparently the 5-year citizenship requirement was not discussed. In our view, the Department was merely trying to help WOI qualify as an offeror. In the absence of any evidence that the Department was aware of WOI's ineligibility, and that it was deliberately inducing WOI to submit an ineligible offer, award of costs would not be appropriate.

The protest and claim for costs are denied.

for James F. Hinchman
Harry R. Van Cleve
General Counsel