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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Caddell Construction Company, Inc.

File: B-401596; B-401597; B-401598

Date: September 21, 2009

James F. Archibald, III, Esq., and Jeffrey A. Peters, Esq., Bradley Arant Boult Cummings LLP, for the protester.

Jonathan D. Shaffer, Esq., Mary P. Gregory, Esq., and Andrew J. Foti, Esq., Smith Pachter McWhorter PLC, for Framaco International, Inc, an intervenor.

Dennis J. Gallagher, Esq., Department of State, for the agency.

Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C. § 4852 (2000), established statutory qualification requirements for construction firms seeking to build a U.S. embassy, including a requirement that an entity seeking contracts for diplomatic construction projects over \$10 million must have performed construction services “similar in complexity, type of construction, and value to the project being bid.” Agency’s determination that vendor satisfied this requirement is unreasonable where vendor’s projects were not similar in complexity or value.

DECISION

Caddell Construction Company, Inc, of Montgomery, Alabama, protests the Department of State’s (DOS) decision to pre-qualify Framaco International, Inc. of Rye Brook, New York, for requests for proposals (RFP) Nos. SAQMMA-09-R-0066, SAQMMA-09-R-0067 and SAQMMA-09-R-0068, issued by DOS, Overseas Buildings Operations (OBO), to design and construct new compounds at Bujumbura, Burundi; Dakar, Senegal; and Monterrey, Mexico, respectively. The solicitations were subject to the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended, (Security Act), 22 U.S.C. § 4852 (2000), which provides that only “United States persons” and “qualified United States joint venture persons” are eligible to compete for certain diplomatic construction projects. Caddell contends that Framaco is not a “United States person” within the meaning of the Security Act.

We sustain the protests.

BACKGROUND

Events Related to 2008 Projects

In November 2007, the agency posted a “Sources Sought Notice” on the Federal Business Opportunities (FedBizOpps) website, announcing its planned fiscal year 2008 Standard Embassy Design projects. Framaco was one of the firms to submit a pre-qualification submission to the agency for several of the locations. Framaco’s pre-qualification package was reviewed by the OBO technical evaluation panel, which initially concluded that Framaco was qualified to participate in all six listed embassy projects. Ultimately, however, the agency concluded that Framaco did not qualify as a “United States person” eligible to bid on the 2008 projects because Framaco had not performed construction services similar in value to the projects being bid. Agency Report (AR) Tab 4, Legal Memo, Feb. 25, 2008.

Framaco challenged this conclusion at the agency level to the contracting officer (CO) and eventually to our Office on May 1, 2008. This protest was dismissed when, by letter dated May 5, the agency advised our Office that it had reconsidered its determination and pre-qualified Framaco for the 2008 projects. Framaco participated in the competition for the 2008 projects and was awarded a contract in 2009 to construct the U.S. embassy in Belgrade for a price of \$117,137,704.¹

Events Related to 2009 Projects

On December 17, 2008, the agency posted a “Sources Sought Notice” on the FedBizOpps website, announcing its planned fiscal year 2009 Standard Embassy Design projects. AR, Tab 11, Sources Sought Announcement. The announcement included the following new construction projects and the estimated design-build costs for each:

Bujumbura, Burundi	\$85 - \$105 million
Monterrey, Mexico	\$100 - \$120 million
Dakar, Senegal	\$135 - \$150 million

¹ Caddell protested this award, arguing that Framaco was not qualified to compete for award under the RFP. On June 23, 2009, we dismissed Caddell’s protest as untimely because the agency had posted a list of pre-qualified firms on FedBizOpps when it made its earlier pre-qualification decision, and, because Caddell knew prior to the submission of proposals that the agency had determined that Framaco was qualified. Thus, in our view, to be timely, Caddell needed to challenge the eligibility of Framaco to participate in the 2008 competitions before the submission of proposals.

The announcement advised that firms pre-qualified for any of the 2008 embassy projects could pre-qualify for the 2009 projects by submitting a letter of interest. Offerors were required to specifically identify in their letter of interest any changes in their status (such as changes in structure, size status, facility clearance status, or in the offeror's primary design-build team) since the 2008 pre-qualification, no matter how minor; if no changes had occurred, offerors were also asked to submit a letter to that effect. The announcement further provided that pre-qualification was subject to a successful evaluation of the Security Act mandatory pre-qualification requirements.

Framaco submitted a letter of interest for each of the 2009 projects and stated that it had been pre-qualified for the 2008 Belgrade project and had submitted a proposal for that project (at the time of this letter of interest, however, the contract for the Belgrade embassy construction had not been awarded). AR, Tab 12, Letter of Interest, Feb. 3, 2009. While Framaco indicated that there were no changes in its structure and size status since its 2008 submission, its letter of interest advised that its team now included [DELETED].

On March 23, 2009, offerors, including Caddell and Framaco, were notified that they had been pre-qualified for the 2009 projects. AR, Tab 13, Notice to Successful Offerors, Mar. 23, 2009. On July 2, DOS posted a list of pre-qualified firms, including Caddell and Framaco, on the FedBizOpps website. Caddell and Framaco were listed as eligible for all three projects. Eight days later Caddell protested to our Office.

DISCUSSION

The Security Act was enacted in response to terrorist and state-sponsored attacks upon United States citizens and embassies in the early and mid-1980s. Among other things, the Security Act established several statutory qualification requirements for construction firms seeking to build a U.S. embassy.

Of relevance here, the Security Act requires that, where adequate competition exists, only "United States persons" and qualified joint venture persons may bid on a diplomatic construction or design project with an estimated value of excess of \$10 million. The Security Act defines the term "United States person," as an entity which:

(A) is incorporated or legally organized under the laws of the United States, including State, the District of Columbia, and local 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 [for the project];

* * * * *

(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);

(F)(i) employs United States citizens in at least 80 percent of its principal management positions in the United States,

* * * * *

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

22 U.S.C. § 4852(c)(2).

Caddell challenges the agency's decision to pre-qualify Framaco for all three of the 2009 projects. Caddell argues that Framaco is not a "United States person" in that: (a) Framaco has not achieved a total business volume equal to or greater than the estimated value of any of the projects in 3 of the 5-year period before the issuance date of the proposal; (b) Framaco does not have experience building any projects that are similar in size or complexity to any of the three projects; and (c) Framaco does not have the existing technical and financial resources to perform the projects. Additionally, Caddell argues that the agency's decision to pre-qualify Framaco was based on an incomplete record that did not contain the information needed to determine whether Framaco satisfied the Security Act requirements.

Business Volume Requirement

As set forth above, the business volume portion of the Security Act requires that an entity seeking contracts for diplomatic construction projects over \$10 million must have "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). Caddell argues that the agency improperly pre-qualified Framaco by "aggregating" 3 years of Framaco's annual business volume, rather than requiring that Framaco show that its total business volume was equal to, or greater than, the projects at issue here in each of 3 of the 5 previous years. In this regard,

Caddell points to our decision in Caddell Constr. Co., B-298949.2, June 15, 2007, 2007 CPD ¶ 119, wherein we found unreasonable the agency's decision to aggregate 3 years of business volume to determine that an offeror met the business volume requirement.

For the record, Framaco's pre-qualification for the 2009 embassy construction projects was based on its 2008 pre-qualification submission. In this submission, Framaco identified the following "total business volume" for the previous 5 years:

2007	[DELETED]
2006	[DELETED]
2005	[DELETED]
2004	[DELETED]
2003	[DELETED]

AR, Tab 1, Pre-qualification Submission, at 5.

The agency explains that in reviewing Framaco's pre-qualification statements submitted for the 2008 review, it concluded that Framaco's cumulative business volume for 2004, 2006 and 2007 was approximately [DELETED]. Using this approach, the agency explains that it concluded that Framaco's business volume met the requirements of the Security Act for all three of the 2009 projects, and noted that this approach was sanctioned by the Court of Federal Claims in Grunley Walsh International, LLC v. United States, 78 Fed. Cl. 35 (Aug. 13, 2007). In Grunley, the court concluded that an offeror's business volume under the Security Act could be determined by aggregating a company's receipts in any 3 of the previous 5 years. While the agency recognizes that our Office reached a different conclusion about the meaning of this statute, it urges our Office to follow the court's interpretation.

Then 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 Constr. Co., *supra*, at 10. That said, because we conclude, as explained below, that Framaco is ineligible to participate in these procurements for other reasons, we need not reach this issue in this decision.

Experience with Projects of Similar Complexity and Value

Caddell next argues that Framaco has not built any projects similar in complexity, type of construction, and value to the three 2009 projects which, as identified above, ranged in value from \$85 to \$150 million. As quoted above, subparagraph D of the Security Act requires that an entity seeking contracts for diplomatic construction projects over \$10 million must have performed construction services "similar in complexity, type of construction, and value to the project being bid." 22 U.S.C. § 4852(c)(2)(D). In addition to having no experience with projects of this magnitude,

Caddell maintains that Framaco has no experience whatsoever building embassies or working through the challenges of performing “secure” work.

The agency acknowledges that it initially refused to pre-qualify Framaco for any of its 2008 projects on the basis that Framaco could not identify a single project that approached the value of any of the 2008 projects. After Framaco protested this decision to our Office, the agency elected not to defend its decision, and adopted Framaco’s view that an offeror should be permitted to establish that it has performed similar construction services by identifying a number of projects it has performed, that, in total, match or exceed the estimated value of the upcoming project.

In this regard, in its 2008 submission—which, again, forms the basis for the 2009 pre-qualification decision—Framaco identified the following projects that it contended should be viewed as similar projects. In addition, it noted that it had performed these projects for the agency in a joint venture with two Turkish construction firms.

Name and Location of Project	Value (US\$)
Interim Embassy Renovation (Baghdad)	\$ 41,656,220
500 Man Camp (Kabul)	\$ 14,915,379
Cafeteria-Health Center (Kabul)	\$ 5,305,646
Existing Office Renovation and Annex Construction (Kabul)	\$ 9,994,125
Anti-Ram Perimeter Wall (Mosul and Kirkuk)	\$ 4,463,725
Geotechnical Construction Services for NEC Baghdad, Iraq	\$ 2,715,074
NOX Building Construction (Bamako)	\$ 15,825,748
NOX Building Construction (Accra)	\$ 17,749,994
Cantonment and Facilities (Kabul)	\$ 9,724,420
TOTAL	\$ 122,350,332

AR, Tab 6, Letter from Framaco to the Agency, Mar. 17, 2008.

As a preliminary matter, we note that the agency report contains no documentation of any review associated with pre-qualifying offerors for the 2009 projects. Instead, the agency accepted as qualified any contractor that was pre-qualified for 2008. AR, Tab 3, TEP Pre-qualification for 2008 Projects, Feb. 15, 2008. In our view, the agency’s failure to perform any type of evaluation contradicts both the letter and spirit of the Security Act, as well as the sources-sought announcement published in FedBizOps. At a minimum, the 5-year period of review anticipated by the Security Act, by definition, changes each year. It appears from the record that Framaco submitted only a letter of interest for the 2009 projects. Moreover, while Framaco indicated in its letter that no changes had occurred in Framaco’s or [DELETED] (its partner) structure or size status, Framaco did indicate that it was adding another firm to its team. Thus, we believe that some type of evaluation was necessary to

ensure that even previously qualified offerors remained in compliance with the requirements of the Security Act.²

Turning to the analysis that was performed, we do not think the aggregated list of projects provided by Framaco in its 2008 pre-qualification submission could form the basis for a reasonable conclusion that Framaco has shown the requisite experience performing services “similar in complexity, type of construction and value to the project being bid,” as required by 22 U.S.C. § 4852(c)(2)(D). In our view, 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 2009 embassy construction projects. As shown above, considering simply the value of Framaco’s projects, Framaco did not identify a single completed project that reaches even half the value of the low end of the estimated range for the Bujumbura construction project (i.e., a \$41.7 million project offered to show a comparable value for a project estimated between \$85 and 105 million); moreover, its largest identified project (\$41.7 million) is less than one-third of the estimated value of the Dakar project (\$135 - \$150 million). Since Framaco’s experience consists of contracts of relatively low dollar values compared to the estimated dollar values of the 2009 projects, we see no basis for the agency’s conclusion that Framaco has the requisite experience based on contract values. See Sytronics, Inc., B-297346, Dec. 29, 2005, 2006 CPD ¶ 15; J.A. Farrington Janitorial Serv., B-296875, Oct. 18, 2005, 2005 CPD ¶ 187.

In addition, we think Framaco’s argument that the total value of its list of smaller value projects equals the value of the 2009 embassy construction projects ignores the fact that combining the values of a list of projects does not demonstrate the necessary skills to complete and manage an entire embassy construction project, as anticipated by the Security Act. See, e.g., Marathon Constr. Corp., B-284816, May 22, 2000, 2000 CPD ¶ 94 at 5-6. The identified projects mostly involved office or building construction projects; none of them involved the construction of an embassy (other than an interim renovation for the embassy in Baghdad). In short, we conclude that the agency has not provided a reasonable basis for its decision to pre-qualify Framaco.³

² In addition, we note that Framaco’s 2008 pre-qualification submission included no information about its receipt of an award for one of the 2008 projects earlier this year, in part because the 2009 award decision had not happened.

³ Caddell also argues that Framaco does not qualify as a “United States person” within the meaning of 22 U.S.C. 4852(c)(2)(G) because Framaco allegedly does not have the existing technical and financial resources in the United States to perform the contract. The agency maintains that Framaco’s pre-qualification submission demonstrated that it had the required technical and financial resources. Since we have determined that Framaco did not qualify under the experience requirement, we
(continued...)

RECOMMENDATION

Since in accordance with the Security Act, a potential offeror must show that it has performed construction services “similar in complexity, type of construction, and value” of the project at issue, 22 U.S.C. § 4852 (c)(2)(D), and there is no basis in this record to conclude that Framaco can qualify to build these projects, we recommend that Framaco’s pre-qualification for the 2009 projects be withdrawn.⁴ We also recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys’ fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2009). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Daniel I. Gordon
Acting General Counsel

(...continued)

do not address this issue. We note, however, that there is nothing in the record to suggest the agency’s determination in this regard was not reasonable.

⁴ While we recognize that Framaco may well be capable of constructing an embassy, our decision is based on Framaco’s ability to meet Security Act requirements.