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United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: Caddell Construction Company, Inc.

File: B-298949.2

Date: June 15, 2007

James F. Archibald, III, Esq., Bradley Arant Rose & White LLP, for the protester.
Scott M. Heimberg, Esq., Mark J. Groff, Esq., Andrea T. Vavonese, Esq., and Lauren R. Bates, Esq., Akin Gump Strauss Hauer & Feld LLP, for American International Contractors (Special Projects), Inc., an intervenor.
Dennis J. Gallagher, Esq., Department of State, for the agency.
Linda C. Glass, Esq., Glenn G. Wolcott, 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 contractors must have 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 solicitation issuance date. Where the agency's determination that an awardee has met this requirement is inconsistent with the ordinary meaning of the words of the statute, has the effect of "reading out" portions of the statute, and is inconsistent with the statute's legislative history, the awardee is not eligible for award, and the protest is sustained.

DECISION

Caddell Construction Company, Inc. protests the Department of State's (DOS) decision to reaffirm its earlier award of a contract to American International Contractors (Special Projects), Inc. (AICI-SP), after a review of AICI-SP's eligibility to perform this work, conducted in response to our decision in Caddell Constr. Co., Inc., B-298949, Jan. 10, 2007, 2007 CPD ¶ 24. In that decision, we sustained Caddell's protest of an award to AICI-SP under request for proposals (RFP) No. SALMEC-06-R-0009, issued by DOS's Overseas Buildings Operations division, for the design and construction of a new U.S. embassy compound in Djibouti, in eastern Africa. The solicitation was subject to the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended, (hereinafter, the "Diplomatic 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.[1]

As discussed in greater detail below, DOS sought additional information from AICI-SP, after our earlier decision, in an effort to determine whether the company could properly be viewed as eligible for award of this contract given the restrictions of the Diplomatic Security Act; with this information DOS again concluded that AICI-SP is eligible here. Caddell argues that AICI-SP cannot qualify as a "United States person" or "qualified United States joint venture person" as those terms are defined by the Dipomatic Security Act, and, with respect to one provision of the statute, we agree.

We sustain the protest.

BACKGROUND

On October 27, 2005, the agency posted a "Sources Sought Notice" on the Federal Business Opportunities (FedBizOpps) website, announcing its planned fiscal year 2006 Standard Embassy Design projects. The notice invited interested firms to file prequalification submissions, and advised that potential offerors for the various construction projects "are limited to United States person bidders." The prequalification submission package contained a total of nine separate certifications so that offerors could establish their eligibility to construct a U.S. Embassy by addressing their compliance with each of the restrictions established in the Diplomatic Security Act.

In December 2005, AICI-SP submitted a prequalification package, stating in its cover letter that AICI-SP was established in November 2005 (i.e., 35 days earlier) to perform classified contracts for DOS and was wholly owned by American International Contractors, Inc. (AICI). AICI-SP's prequalification submission indicated--in response to certification question No. 8 concerning joint venture status--that it was not seeking qualification on the basis of either a formal or *de facto* joint venture. Consistent with this statement, AICI-SP did not provide any of the information required from joint venture offerors--such as identifying the "U.S. person participant" in the joint venture, or identifying "all co-venturers."

In January 2006, the agency evaluated AICI-SP's submission with regard to the requirements concerning a "United States person" and "qualified United States joint venture persons." In reviewing AICI-SP's submission, the agency concluded that,

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[1] Specifically, the Diplomatic Security Act provides that: "where adequate competition exists, only United States persons and qualified United States joint venture persons may . . . bid on a diplomatic construction or design project which has an estimated total project value exceeding $10,000,000." 22 U.S.C. § 4852(a).

because of AICI-SP's recent incorporation, it did not qualify as a "United States person" in its own right.[2] Nonetheless--and directly contrary to AICI-SP's representation that it was not part of either a formal or a *de facto* joint venture--the agency concluded that AICI-SP was a *de facto* joint venture and should be considered eligible as a United States person.

After receiving the prequalification submissions, proposals were received from six prequalified firms, including Caddell and AICI-SP. After a technical and price evaluation, only the proposals of Caddell and AICI-SP were included in the competitive range. After evaluation of revised proposals, both offerors were determined to be technically qualified, and award was made to AICI-SP with a final evaluated price of $74,988,000, compared to Caddell's evaluated price of $90,115,000.

Caddell protested to our Office arguing that the agency unreasonably determined that AICI-SP was a "United States person" or a "qualified United States joint venture person" within the meaning of the Diplomatic Security Act and, accordingly, that it was improper to award the contract to AICI-SP.

We sustained Caddell's earlier protest because the contemporaneous documentation supporting the agency's summary conclusion that AICI-SP was eligible to participate in the procurement on the basis of a *de facto* joint venture provided no explanation as to how the agency could reach this conclusion in light of AICI-SP's expressly contrary representation. We were therefore unable to conclude that the agency's determination regarding AICI-SP's eligibility for award was reasonable.

Our decision sustaining the earlier protest was limited to the express terms of AICI-SP's submission; we did not reach the underlying issue of the agency's interpretation of the requirements of the Diplomatic Security Act. We recommended that the agency review the qualification submission of AICI-SP, specifically consider and address AICI-SP's representation that it was not part of a formal or *de facto* joint venture, and fully document its review and analysis regarding this matter. We noted that in the event the agency concluded that additional information was required, it should seek such information in a manner consistent with applicable procedural requirements. We further noted that in the event the agency determined that AICI-SP was ineligible for award, it should terminate the contract with AICI-SP and make a new award consistent with the solicitation provisions and applicable law and regulation.

In response to our decision and recommendation, the agency, by letter dated January 22, 2007, requested that AICI-SP clarify its intentions by submitting a new

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[2] Among other things, the Diplomatic Security Act defines "United States person" as a "person" that has been incorporated or legally organized in the United States for more than 5 years before the issuance date of the solicitation. 22 U.S.C. § 4852(c)(2).

statement of qualifications and, if a *de facto* joint venture was intended, provide a statement from AICI guaranteeing AICI-SP's performance. In response, AICI-SP provided the agency with a revised Statement of Qualification indicating that it was a *de facto* joint venturer with AICI, and a guarantee letter from AICI. After a review of the revised statement, the agency confirmed the original award. Caddell filed this protest on March 8.

DISCUSSION

The Diplomatic Security Act, Pub. L. No. 99-399, 100 Stat. 853 (1986), was enacted in response to terrorist and state-sponsored attacks upon United States citizens and embassies in the early and mid-1980s. After the passage of similar bills by the House and the Senate, a conference committee was appointed to negotiate a final version of the bill. The conferees explained in the Joint Explanatory Statement that the Act was intended "to provide enhanced diplomatic security and combat international terrorism." H.R. Rep. No. 99-783, at 53 (1986) (Conf. Rep.). Among other things, the Diplomatic Security Act established several statutory qualification requirements for construction firms seeking to build a U.S. embassy.

Of relevance here, the Diplomatic 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 in excess of $10 million; this provision is now codified at 22 U.S.C. § 4852(a)(1). The 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 (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).

The current protest challenges both the agency's decision to allow AICI-SP to submit a revised prequalification statement, and its conclusion that the company meets the requirements of the Act. Caddell argues that even if AICI-SP is considered a *de facto* joint venture offeror with AICI, AICI-SP cannot reasonably be viewed as meeting the Act's requirement that only a United States person can construct a project of this magnitude. As discussed below, Caddell specifically contends that AICI-SP cannot meet the requirements of subparagraphs C, D, and E of the statutory provision set forth above.[3]

The 5-Year Incorporation Requirement

With respect to subparagraph C of the statute--requiring that an entity seeking contracts for diplomatic construction projects over $10 million be incorporated, or legally organized, for more than 5 years before the RFP--Caddell argues that AICI-SP cannot possibly meet this requirement. As mentioned above, AICI-SP was created approximately 35 days before the date it submitted its prequalification package.

In answering this contention, the agency first explains that AICI-SP has clarified any ambiguity about whether the company was offering to perform as a *de facto* joint venture with its parent entity, AICI. In addition, DOS explains that, given the clear indication of commitment from AICI-SP and AICI, it decided that AICI-SP could meet this requirement through its joint venture partner and parent company. In this regard, the agency explains that it has relied on the concept of *de facto* joint ventures for diplomatic construction projects since the 1980s as several major

[3] We do not agree with Caddell's argument that the agency improperly engaged in discussions by requesting, and allowing, AICI-SP to submit revised prequalification materials. The prequalification materials at issue here were submitted prior to proposals, and were used to determine eligibility to participate in the competition. As such, these materials are more analogous to matters of responsibility, than to questions of the proposal's acceptability--as Caddell argues. We have specifically held that an agency properly may obtain information from a contractor regarding its responsibility at any time until award is made. Dock Express Contractors, Inc., B-227685.3, Jan. 13, 1988, 88-1 CPD ¶ 23 at 6.

American firms have adopted a business practice of relying on wholly-owned subsidiaries to perform international projects, and using such subsidiaries to perform classified construction projects. In addition, the agency notes that this practice is consistent with its regulations. Agency Report (AR) at 8. Under this approach, the affiliated firm is treated as a guarantor, not an offeror. Id.

The DOS regulations implementing the requirements of the Diplomatic Security Act are consistent with the agency's decision on this matter. Specifically, the regulations provide that, for submissions by a joint venture, the joint venture must have at least one firm or organization that meets all the requirements of a "United States person." 48 C.F.R. § 652.236-72. Since AICI-SP (having only been incorporated for 35 days prior to its prequalification submission) could not meet the requirement, the agency looked to the incorporation date of AICI (i.e., 1974), which clearly meets the incorporation requirements in the statutory definition of a "United States person."

Caddell argues that there is nothing in the statute that allows a bidder existing less than 5 years to utilize a parent company's longer period of incorporation through a *de facto* joint venture to meet this requirement. In addition, Caddell points out that in a previous case before our Office, the agency refused to allow a bidder to rely upon the incorporation status of its affiliates through a *de facto* joint venture to meet the requirement that the entity be organized for at least 5 years before the issuance of the current solicitation; Caddell also points out that our Office agreed with the agency's interpretation of this requirement. See Wallace O'Connor, Inc., B-227834, Aug. 19, 1987, 87-2 CPD ¶ 181.

Our Office asked the agency to explain why its position has changed since the time of the Wallace decision. The agency pointed out that the current regulation did not exist 20 years ago, and that the Wallace case arose within the first year after passage of the Diplomatic Security Act. Supplemental (Supp.) AR at 5-7. In addition, the agency explained that the regulation reasonably accommodates the special steps corporate entities must take to meet other requirements, such as the need to treat construction details as classified for security purposes. Id. at 6-7. Thus, the agency's practices and procedures concerning this issue have evolved since the Wallace decision was issued in 1987. For these reasons, the agency argues it was reasonable for it to promulgate regulations to allow an offeror that relies on a *de facto* joint venture with a parent or affiliate to be considered a "qualified United States joint venture person," provided the joint venture has at least one firm or organization that itself meets all the requirements of a "United States person" listed in the statute. Despite Caddell's arguments to the contrary, we think the current regulation does not contradict the statute, and there is no dispute that AICI's incorporation date meets the requirement.

Experience with Projects of Similar Complexity and Value

Turning next to subparagraph D of the statute--requiring 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)(C)--Caddell argues that neither AICI-SP, nor AICI, can meet the similar complexity and value requirement. As before, Caddell notes that AICI-SP is a new entity that has performed no projects whatsoever, and Caddell argues that the agency has reached too far into AICI's past to find a project to meet this requirement of the statute.

As a preliminary matter, now that the agency has received a clear statement from AICI-SP and AICI that they should be construed as *de facto* joint venturers--together with the performance guarantee received from AICI--we think there was nothing unreasonable or improper about the agency's decision to look to AICI to meet this experience requirement. That said, the project the agency relied upon to decide that AICI meets this requirement presents its own controversy.

Specifically, DOS found AICI-SP eligible based on AICI's construction of the United States Embassy in Amman, Jordan. This embassy was built between 1987 and 1992 at a cost of approximately $38.7 million. AR, Tab 3, AICI's Certification at 11. The agency determined that the value of the Amman project as adjusted for inflation was $55 million and thus within the $50-$60 million estimate the government originally prepared for the current Djibouti project, and which the government was relying on during the prequalification process.[4] Therefore, DOS concluded that AICI-SP, through its parent, satisfied the similar experience requirement of the Diplomatic Security Act with a project that was completed 15 years ago, and had a value, adjusted for inflation, that was lower than AICI-SP's price for the Djibouti project by more than $20 million.

Caddell responds that the embassy project relied upon here was too far in the past to be taken as a reasonable indication that AICI meets the statutory requirement for performing projects of similar complexity. In addition, Caddell argues that there is no provision in the statute, or the DOS regulations, that anticipates adjusting the contract price of prior projects for inflation to determine whether the project can be viewed as one of similar complexity.

To decide whether it was reasonable for the agency to conclude that AICI's experience constructing the U.S. embassy in Amman meets the similar complexity and value requirements of the Diplomatic Security Act, we look first to the express words of the statute--which contain no indication of any time limit on the experience

[4] The agency's current government estimate for the Djibouti construction project is approximately $81 million. AR at 17.

requirements--and then to the implementing regulations. The regulations define "value" for the purpose of interpreting this section as the "total contract price of the project." 48 C.F.R. § 652.236-72(d)(4). The regulations are silent, however, on the question of how much time can pass before a project becomes too dated for reasonable consideration.

In our view, prior experience building an embassy is clearly relevant to the question of whether an offeror has experience of similar complexity--the questions for our Office are whether the project value here was appropriately viewed as similar, and whether the information about this project is simply too stale to provide any meaningful insight into AICI's capabilities.

On the question of similar value, we know of no statute or regulation that was violated by the agency's decision to adjust for inflation the price of the earlier project to determine its approximate current value. In fact, the approach of calculating such an adjustment for the purposes of determining a current value for the earlier project seems to fall within the reasonable exercise of the agency's discretion. See, e.g., OMNI Gov't Servs., LP, B-297420.2 et al., Mar. 22, 2006, 2006 CPD ¶ 56 at 3 n.4 (adjusting a prior contract price for inflation in order to compare it with a currently proposed price was a reasonable exercise of agency discretion). While, as noted above, DOS's implementing regulations define "value" as the contract price of the project (AICI-SP's price is approximately $75 million), the agency looked instead to a previous government estimate of the value of this project (which was $50-$60 million). It was this early government estimate that the agency used as the benchmark for comparison with the adjusted value of the 1992 Amman project ($55 million). Nonetheless, since the qualification decision here was being made prior to the time proposed prices were received, we are not prepared to find that the agency abused its discretion when it decided that AICI's 1992 Amman project met the similar value portion of the statute.

On the question of whether the project was too old to be considered, we recognize that neither the statute, nor the agency's regulations, address this issue, leaving considerable discretion to the agency. On the other hand, we think the agency's decision to qualify AICI-SP based on a single project from a decade and a half ago clearly reaches toward the outer limits of a reasonable exercise of discretion. That said, however, given the absence of any language in the statute limiting the time period during which an offeror must have performed similar work, we will not conclude--on this record--that the agency unreasonably decided that AICI met the statute's requirement of performing a construction project of similar complexity.

The Business Volume Requirement

Turning next to subparagraph E of the statute--requiring 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 DOS has adopted an unreasonable interpretation of the statute in order to conclude that AICI had the requisite business volume to qualify as an offeror for this project. On this ground, and for the reasons set forth below, we agree.

The record here shows that certification No. 5 of the prequalification submission required vendors to list their gross receipts for at least 3 years within the 5-year period beginning with 2000 and extending through 2004. AR, Tab 1, Statement of Qualifications, at 5. In its initial submission in December of 2005 (and prior to providing additional information after our Office sustained Caddell's earlier protest), AICI-SP submitted the following information about its parent company's business volume:

Jan.--Sept. 2005	[**deleted**] million
2004	[**deleted**] million
2003	[**deleted**] million
2002	[**deleted**] million
2001	[**deleted**] million
2000	[no entry]

Leaving aside for now the issue of allowing AICI to provide 2005 information--contrary to the solicitation's instructions calling for information for the years 2000-2004--DOS decided then (and has reaffirmed its decision now[5]) that the statute allows the agency to aggregate 3 years of business volume and compare the total to the project at issue. Specifically, DOS determined that AICI-SP satisfied the "United States person" business volume requirement through the experience of AICI, its corporate parent, by adding together AICI's business volume for years 2003 through 2005 (i.e., [**deleted**] million + [**deleted**] million + [**deleted**] million), and comparing the resulting total of [**deleted**] million to the amount of the government's early price estimate for this project ($50-$60 million).

[5] When the agency sought revised prequalification submissions from AICI-SP, all of the numbers above remained the same except for a revised number for 2005 receipts. Instead of providing AICI's 2005 business receipts from January to September, AICI-SP provided its parent company's receipts for the entire year. Hence, DOS's second determination that AICI-SP meets the business volume requirements of the Diplomatic Security Act relies upon a figure of [**deleted**] million in AICI business receipts for 2005. AR, Tab 4, AICI-SP Prequalification Submission, at 6.

Caddell argues that the agency's approach of adding together 3 years of a company's business receipts is not what the statute intended. In fact, Caddell contends that the DOS interpretation of the statute effectively reads out the term "3 years" because, under the agency's interpretation, if only 1 year of business receipts provided sufficient business volume, and the remaining 2 years did not, the agency could still add together the 3 years of business receipts and conclude that the offeror met the requirement in 3 of the 5 years. In answer, the agency argues that our Office should reject Caddell's contentions and defer to its interpretation, as it is the agency charged with interpreting this statute.

In matters concerning the interpretation of a statute, the first question is whether the statutory language provides an unambiguous expression of the intent of Congress. If it does, the matter ends there, for the unambiguous intent of Congress must be given effect. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). It is a fundamental canon of statutory construction that words, unless otherwise defined by the statute, will be interpreted consistent with their ordinary, contemporary, common meaning. State of California v. Montrose Chem. Corp., 104 F.3d 1507, 1519 (9th Cir. 1997); GAO, Principles of Federal Appropriations Law, vol. 1, at 2-89 (3d ed. 2004); see Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 301 (1989).

Here, the statute contemplates a significant restriction on an offeror's eligibility to compete for this type of contract. Specifically, the statute seeks a showing that an entity 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). We think the ordinary and common meaning of these words 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. That said, given the arguments raised by Caddell and State, we necessarily recognize an element of ambiguity in this provision.

When a statute is silent or ambiguous with respect to the specific issue, deference to the interpretation of an administering agency is dependent on the circumstances. Chevron, 467 U.S. at 843-45; see also United States v. Mead Corp., 533 U.S. 218, 227-38 (2001). Where 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").[6] Mead, 533 U.S. at 227-31; Chevron, 467 U.S. at 843-44.

[6] The absence of authority for an agency to use formal administrative procedures to interpret laws does not alone bar this level of deference. Mead, 533 U.S. at 231 n.13 (citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251

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However, where the agency position reflects only an informal interpretation, "Chevron deference" is not warranted. In these cases, deference to an agency's interpretation is not mandatory, but rather the weight to be accorded an agency's judgment will depend on its relative expertise, the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, though lacking power to control. Mead, 533 U.S. at 227-31; Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

In our view, DOS's interpretation of this statute is not entitled to "Chevron deference," as the interpretation arose in the normal course of a procurement, and is not the result of either a rulemaking or an adjudication. See, e.g., Intertribal Bison Cooperative, B-288658, Nov. 30, 2001, 2001 CPD ¶ 195 at 4. In fact, while the agency suggests it has used this interpretation before, it has given our Office no examples. In any event, it has not promulgated this interpretation as part of its extensive implementing regulations. Nor, as discussed below, do we think the agency's interpretation of this statute has the persuasive weight deserving of deference. Our review leads us to conclude that Caddell is correct in its argument that the agency's interpretation has the effect of rendering meaningless the statute's requirement for receipts at this level for 3 years within the previous 5-year period. We also think the legislative history of the Diplomatic Security Act does not support the agency's interpretation. We address both conclusions in more detail below.

As mentioned above, Caddell makes the point that the agency's interpretation of aggregating 3-years worth 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. For example, if AICI had receipts of $75 million in 2005 and $0 in each of the other years, under the agency's interpretation, AICI's receipts would establish AICI-SP's eligibility. We think this result is not consistent with the commonly understood meaning of the words of this statute.

With respect to legislative history, we note that reference to the legislative history of a statute is an appropriate additional tool of analysis "with the recognition that only the most extraordinary showing of contrary intentions from such analysis would justify a limitation on the 'plain meaning' of the statutory language." Garcia v. United States, 469 U.S. 70, 75 (1984); see Chevron, 467 U.S. at 859-62. Here, the legislative history of this provision shows that the Committee Reports from both houses of Congress--the Committee on Foreign Affairs in the House, and the Committee on Foreign Relations in the Senate--used almost identical language to describe these

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(1995), for the example that the deliberative conclusions of the Comptroller of the Currency as to the meaning of banking laws are deserving of this higher level of deference due to the Comptroller's specific authority to enforce such laws).

provisions, and, in fact, used identical language to tie together the previously-discussed provision requiring experience with projects of similar complexity and value, and the business volume requirements. Specifically, the Senate Committee on Foreign Relations advised:

> -- The firm must have performed services similar to the complexity, cost, and construction-type to that of [the][7] project open for bid.
>
> -- The firm must have achieved a total business volume in 3 of the previous 5 years at least equal to the value of the project being bid. The previous two requirements will help ensure that a firm is technically capable to carry out a given project.

S. Rpt. No. 99-304, at 15 (1986); see also H. Rpt. No. 99-494, at 17 (1986) (emphasis added; the underlined language is identical in both reports). Given these concerns, it is troubling that the agency's interpretation of the business volume requirement will result in the eligibility of an offeror who has not, in any of the previous 5 years before this solicitation was issued, performed a project of this magnitude. In fact, the AICI receipts aggregated by the agency ([**deleted**] million + [**deleted**] million + [**deleted**] million, for the first determination of eligibility; [**deleted**] million + [**deleted**] million + [**deleted**] million, for the second) do not even approach a steady volume of one-third of the value of the project here.

Moreover, the narrative description of this provision provided by both Committees, and quoted above, provides additional words not included in the statute even though the wording of the bill, on this issue, as reported by both Committees, is identical to the wording that was enacted into law.[8] While the statute (and both bills as reported) refers to business volume "in 3 years of the 5-year period," 22 U.S.C. 4852(c)(2)(E), both committees describe the provision as looking to the business volume "in 3 of the previous 5 years." Id. (Emphasis added.) We think the description of this provision in the two Committee Reports strongly supports a conclusion that Congress intended that a qualified entity have receipts equal to the size of the project in each of 3 years within the previous 5-year period. As a result, we think the agency's interpretation of this provision--looking to an entity's highest cumulative 3-year business volume within the previous 5-year period--conflicts with the narrative guidance provided by the agency's committees of jurisdiction. In short,

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[7] The Senate Report omits the word "the," which we have added for clarity. The missing article does not change the meaning of the quote, and is apparently a typographical error.

[8] Compare Pub. L. No. 99-399 § 402(c)(2)(E), 100 Stat. 853, 865 (1986) with H.R. 4151, 99th Cong. § 402(c)(2)(E) (as reported to the House, Mar. 12, 1986) and with H.R. 4151, 99th Cong. § 402(c)(2)(E) (as reported to the Senate, May 20, 1986).

we find that DOS's interpretation of this statute is inconsistent with its ordinarily understood meaning, and with the legislative concerns that led to the statute's enactment.[9]

RECOMMENDATION

Since, in accordance with the Diplomatic Security Act, only a United States person or qualified United States joint venture person may bid on a diplomatic construction project and, as discussed above, AICI-SP apparently does not qualify, we recommend that the award to AICI-SP for the construction of the embassy in Djibouti be terminated. As the record indicates that Caddell was the only other offeror eligible for award, we find that, absent a decision to reopen the competitive range, or to recompete this contract, the award should be made to Caddell, if otherwise appropriate. Finally, we 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) (2007). 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 protest is sustained.

Gary L. Kepplinger
General Counsel

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[9] The record here also shows that the agency abandoned the express terms of its own solicitation. As previously stated, the solicitation specifically required that vendors list their gross receipts for the years 2000-2004--the calendar years immediately preceding issuance of the solicitation, as required by the statute and implementing regulations. Nonetheless, the awardee provided receipts for the years 2001-2005. AICI-SP was thus allowed to provide more recent information than allowed under the solicitation, and other offerors might have been able to establish their eligibility had they been allowed to deviate from the time period identified by the agency's request for information. Moreover, if the agency had limited its consideration to the information the solicitation specifically sought, AICI's shortfall in meeting the statute's business volume requirement becomes even more striking--even applying DOS's cumulative approach to meeting those requirements. In this regard, the awardee's business volume was reported as [**deleted**] million for 2004, [**deleted**] million for 2003, [**deleted**] million for 2002--its three highest volume years. Aggregating these numbers does not approach either of the government's estimates for this project, or the $74,988,000 evaluated price for AICI-SP's proposal on which the award was based.