



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American International Contractors
(Special Projects), Inc.

File: B-252859; B-253352

Date: July 29, 1993

Scott M. Heimberg, Esq., and Janet Z. Barsy, Esq., Akin, Gump, Strauss, Hauer & Feld, for the protester.
Barry F. Puschauer, Esq., Department of State, for the agency.

Richard P. Burkard, Esq., and Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency did not abuse its discretion in determining that under the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Security Act), 22 U.S.C. § 4852 (1988), protester did not meet the definition of a "United States person" and therefore was ineligible to submit an offer for the design and construction of U.S. Embassy.

DECISION

American International Contractors (Special Projects), Inc. (AICSPI) protests the determination by the Department of State that the firm did not "prequalify" as an eligible offeror to receive a solicitation package or submit an offer for the design and construction of a new U.S. Embassy in Kuwait City, Kuwait.¹ The procurement is subject to the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Security Act), 22 U.S.C. § 4852 (1988), amended by 22 U.S.C. § 4852(a) (Supp. III 1991), which provides that only "United States persons and qualified United States joint venture persons" are eligible to compete for a

¹The protester filed a second protest objecting to the agency's refusal to prequalify the firm for the construction of a new U.S. Embassy in Singapore. The parties agree that the second protest presents the identical issues raised in the initial protest. Thus, our conclusion regarding the propriety of the agency's determination with respect to the protester's eligibility for the Kuwait project applies equally to the agency's determination concerning the firm's eligibility for the Singapore project.

diplomatic construction project having an estimated total project value, as here, exceeding \$10,000,000 and where adequate competition exists. AICSPI contends that the agency misapplied the Security Act in determining that AICSPI was not a "United States person" within the meaning of that Act.

We deny the protest.

The Security Act defines "United States person," eligible to compete on the construction project at issue, as an entity which:

"(C) has been incorporated or legally organized in the United States . . . 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;

"(E) . . . 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 date of the solicitation] . . . ; and

"(G) has the existing technical and financial resources in the United States to perform the contract. . . ." 22 U.S.C. § 4852(c) (2) (1988).

Further, under 22 U.S.C. § 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.

On November 4, 1992, the Department of State placed a notice in the Commerce Business Daily stating that it sought to prequalify contractors for the project in Kuwait City. In addition to advising potential offerors that the procurement was classified and required appropriate security clearances, the notice stated that "in order to receive the solicitation and be eligible for award of this contract, prospective offerors must be prequalified as either a 'U.S. person' or 'U.S. Joint Venture Person' as defined by [the Security Act]."

The protester and 13 other firms submitted prequalification packages. AICSPI's prequalification application stated that it sought prequalification as a "U.S. person" and that it was not a joint venture. The application stated further

that AICSPI was formerly named Delphcon Builders and that it intended to "draw the financial and other resources" from its parent corporation, American International Contractors, Inc. (AICI).

In January 1993, an agency prequalification evaluation committee reviewed the prequalification packages. The Department of State found that the protester failed to meet three of the statutory criteria which define a "United States person"--specifically, those provisions set forth in subsections (D), (E), and (G) of 22 U.S.C. § 4852(c)(2), which concern (1) past performance of similar projects, (2) total business volume in the preceding 5-year period, and (3) technical and financial resources in the United States, respectively. AICSPI subsequently filed this protest, alleging that it meets these criteria, each of which must be met in order to be considered a "United States person" under the Act.

With respect to subsection (D), which defines a "United States person" as one which "has performed within the United States . . . services similar in complexity, type of construction, and value to the one being bid," the agency found that AICSPI has never been the prime contractor on any project and that the firm is not a "viable, capable, construction concern." The agency further states that AICSPI is the "successor" to Delphcon Builders in name only, noting that AICSPI has only one full-time employee, and that the individual was not an employee of Delphcon. The Department of State argues further that even if all of Delphcon's past experience is imputed to the protester, AICSPI would still not meet the prequalification criteria since that firm's only government project was a post office rehabilitation nearly 10 years ago which did not involve high security.

The protester has not rebutted the agency's specific findings regarding the firm's relevant experience. Rather, it attempts to characterize those findings as "unstated evaluation criteria" not contemplated by the Security Act. For example, it argues that the Security Act does not prohibit an offeror from qualifying as a U.S. person because "it has not been a prime contractor for the U.S. Government or performed classified work for the U.S. Government." While the protester is correct that the Act does not specifically refer to government projects or classified projects, it refers to "services similar in complexity" and "type of construction" to those being bid. In our view, the statute contemplates the type of comparison undertaken by the agency. Moreover, the protester has simply failed to provide any basis for our Office to object to the agency's conclusions regarding AICSPI's lack of experience performing

services similar to those which are to be performed in connection with the project in Kuwait.

Next, the protester contends that it should be able to rely on the experience of its parent corporation, AICI, for purposes of satisfying the prequalification criteria, including the provision discussed above requiring similar work experience. It argues that it is unreasonable for the agency to require that a subsidiary form a joint venture with its parent in order to rely on the experience of its parent. It states that "[t]here is no meaningful difference between allowing a co-venturer subsidiary to rely on the . . . experience of its U.S. parent and allowing AICSPI [to rely] on the business volume of . . . AICI."

We find this argument to be untimely. The prequalification application contains an "important note" explicitly stating that "[o]rganizations that wish to use the experience or financial resources of any other legally dependent organization or individual, including parent companies, subsidiaries, or other related firms, must do so by way of a joint venture." (Emphasis added.) Moreover, the application also states that "an entity whose only construction work experience was performed by its legally distinct subsidiary or parent will not be considered to have construction experience."

Our Bid Protest Regulations provide that protests shall be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1993). Here, AICSPI is arguing that the prequalification application was improper in requiring organizations wishing to use the experience of parent companies to do so by way of a joint venture. AICSPI submitted its application on December 18, 1992. Since AICSPI first raised its challenge to the terms of the application months later in its protest to our Office, that challenge is untimely.

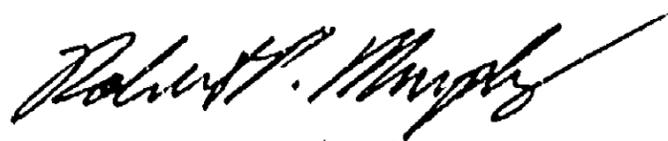
AICSPI also argues that, although it did not seek qualification as a joint venture, AICI and AICSPI "meet all the requirements" of a "de facto joint venture." Thus, according to the protester, in order to treat AICSPI equally to other potential offerors, the agency should have considered the experience of AICI in its prequalification determination of AICSPI. We disagree.

Regardless of how closely AICSPI and AICI may cooperate, they do not constitute a joint venture applicant for purposes of the prequalification application for the simple reason that they did not apply as a joint venture. The prequalification application states that, where a prospective offeror applies as a joint venture, certain

consequences result, so that, in the example given in the application, a prospective offeror might not be acceptable for a project requiring a facility security clearance unless both co-venturers were able to obtain one.² Applying as a joint venture thus entailed a certain additional burden, as well as permitting the consideration of both co-venturers' assets. While other potential offerors sought prequalification as joint ventures (whether formal or de facto), AICSPI chose to apply alone as a United States person; AICSPI and AICI did not apply as a joint venture. Because the only applicant was AICSPI, the agency reasonably limited its consideration to that company's experience and found, as explained above, that AICSPI's experience was inadequate.

For the reasons discussed, we find that the agency did not abuse its discretion in determining that AICSPI's experience did not satisfy the criterion for qualifying as a "United States person" under the Security Act. See Wallace O'Connor, Inc., B-227834, Aug. 19, 1987, 87-2 CPD ¶ 181. Since compliance with every one of the criteria set forth in the Act was required, we need not address the agency's additional bases for concluding that the protester did not meet the Act's requirements.

The protest is denied.


James F. Hinchman
General Counsel

²The application does not distinguish between formal and de facto joint ventures in this regard. Indeed, the only difference between the two kinds, according to the application, is that a formal joint venture involves a written agreement between the co-venturers, while in a de facto arrangement the two entities cooperate in the project without a written agreement.