

# Government Contracts Blog

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## GAO Rejects "Aggregate" Valuation Method for Determining Qualification Under the Omnibus Diplomatic Security and Antiterrorism Act

In *Caddell Constr. Co., Inc.*, B-401596, et al, Sept. 21, 2009, the GAO sustained a protest against the pre-qualification of a vendor on the grounds that the Department of State's (DOS) determination that the vendor satisfied the qualification requirements of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Security Act) was unreasonable. The GAO recommended that the DOS withdraw the pre-qualification, concluding that the vendor did not have the necessary experience required by the Security Act. This recommendation rejected the DOS's method of aggregating dollar values to determine an offeror's qualification under the statute.

### Background

The case centers around a Sources Sought Notice posted by the DOS for the design and construction of its 2009 Standard Embassy Design projects, which included new diplomatic compounds in Burundi, Senegal and Mexico (the 2009 Projects). These projects were subject to the Security Act, which provides that only "United States persons" and "qualified United States joint venture persons" were eligible to compete. The posting advised firms that pre-qualified for any of the 2008 Standard Embassy Design projects could also pre-qualify for the 2009 Projects by submitting a letter of interest and demonstrating that no changes had occurred in the vendor's pre-qualification status. Framaco International, Inc. (Framaco) submitted a letter of interest indicating that it had already been pre-qualified for a 2008 project in Belgrade. Shortly thereafter, both Framaco and Caddell Construction Company, Inc. (Caddell) were notified that they had been pre-qualified for the 2009 Projects. Caddell protested the pre-qualification of Framaco as a "United States person," arguing that Framaco failed several of the statute's requirements.

### The Experience Requirement

The Security Act defines a "United States person," in relevant part, as an entity that "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." The GAO sustained Caddell's protest

on the grounds that there was no reasonable basis on which DOS could have concluded that Framaco's experience satisfied this requirement. The GAO found that Framaco's previous contracts were of relatively low dollar values compared to the estimated dollar values of the 2009 Projects, which ranged in value from \$85 to \$150 million. Framaco's largest project to date had been valued at only \$41.7 million, less than one-third of the most expensive of the 2009 Projects. The DOS contended, however, that an offeror should be permitted to satisfy the experience requirement by identifying a number of projects it has performed, that, when aggregated, matched or exceeded the estimated value of the upcoming project. Under this theory, Framaco demonstrated it had performed several projects with a combined value of \$122 million. Since this fell within the range of values of the 2009 Projects, DOS concluded Framaco satisfied the experience requirement.

The GAO disagreed. In short, the GAO rejected the DOS's aggregate valuation method for determining qualification. It concluded the language of the statute "anticipates that an offeror has completed at least one construction project of similar complexity, size, and value as [the 2009 Projects]." The GAO sustained Caddell's protest on the grounds that Framaco failed to satisfy this requirement.

#### The Annual Business Volume Requirement

In addition to the experience requirement, the Security Act also requires that "United States persons" 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 date" of the project. Caddell argued that the DOS improperly pre-qualified Framaco by *aggregating* 3 of its previous 5 years of annual business volume. Caddell pointed to its sustained protest in 2007 where the GAO had found that a company needed to demonstrate a business volume equal or greater than the value in each of 3 years without aggregation to meet the requirement. *Caddell Constr. Comp., Inc.*, B-298949.2, June 15, 2007. The DOS acknowledged the 2007 case but argued that its interpretation of the statute was supported by the Court of Federal Claims in *Grunley Walsh Int'l, LLC v. U.S.*, 78 Fed. Cl. 35 (2007), a decision that came down only 2 months after the GAO's 2007 decision, which permitted aggregation in any 3 of the 5 previous years. Nonetheless, the GAO expressed its view that the DOS's interpretation of the requirement runs contrary to the "ordinary and common meaning of the words" in the statute. While declining technically to reach a determination regarding the split between the GAO and Court of Federal Claims, the GAO did state that it still believes that the correct application is to show that an offeror's total business volume was equal to, or greater than, the projects at issue in each of 3 of the 5 previous years.

Thus, when deciding on the proper venue, future protesters would be wise to consider these differing interpretations by the GAO and the Court of Federal Claims.

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