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# Decision

**Matter of:** Superior Waste Management, LLC

**File:** B-421022; B-421022.2

**Date:** December 15, 2022

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Douglas P. Hibshman, Esq., and Nicholas Solosky, Esq., Fox Rothschild LLP, for the protester.  
Benjamin Hogan, Esq., Andrew J. Smith, Esq., and Abraham Young, Esq., Department of the Army, for the agency.  
Michael P. Price, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Agency reasonably accepted intervening bidder's late bid, where agency failed to implement reasonable procedures to ensure the timely receipt of bids and where consideration of the late bid did not otherwise compromise the integrity of the procurement process.
  2. Protester is not an interested party to challenge the agency's evaluation of the awardee where the protester has otherwise failed to raise protest grounds challenging the agency's evaluation of an intervening bidder.
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## DECISION

Superior Waste Management, LLC (SWM), a small business of Dunn, North Carolina, protests the award of a contract to Nisou Enterprises, of Wichita, Kansas, under invitation for bids (IFB) No. W911RX22B0003, issued by the Department of the Army for refuse and recycling services at Fort Riley, Kansas. The protester argues that the agency's evaluation of the awardee's bid was unreasonable, and that the agency improperly accepted and considered an intervening bidder's late bid.

We deny the protest in part and dismiss in part.

## BACKGROUND

The Army issued the IFB on March 1, 2022, under the procedures of Federal Acquisition Regulation (FAR) part 14, seeking bids for refuse and recycling services, as

well as construction and demolition landfill services on Fort Riley. Agency Report (AR), Tab 03a, IFB at 1, 41. The IFB provided that award would be made to the responsible bidder who represented the best value to the government, considering only price and price related factors. AR, Tab 03c, IFB, amend. 2 (IFB) at 17.<sup>1</sup> The IFB established a deadline for receipt of bids at 12:00 p.m. Central Time on April 27, with a bid opening scheduled to occur at 1:00 p.m. that same day. *Id* at 15. Bids were required to be delivered, either by mail or hand-carried, to the Mission and Installation Contracting Command (MICC) building on Fort Riley.<sup>2</sup> *Id*. The IFB advised bidders that late bids would be handled in accordance with FAR provision 52.214-7. *Id*.

The Army had three bids in its possession by the noon deadline for receipt of bids on April 27. Contracting Officer's Statement (COS) at 2. The agency conducted bid opening as scheduled, announced SWM as the apparent low bidder, and prepared a bid abstract with each of the three bidders' proposed contract line item number (CLIN) pricing. *Id*. After further review of the bids, the contracting officer requested clarifications from the protester and Nisou regarding discrepancies in pricing in their bids. *Id*. Following receipt of clarifications, the contracting officer revised the bid abstract, and informed the protester that Nisou was in fact the apparent low bidder in a May 19 email, which also contained the awardee's CLIN pricing. Protest, exh. B-1 and B-2; COS at 2-3. On May 27, the protester filed an agency-level protest with the contracting officer, arguing that the agency's price evaluation of the awardee was flawed, and that the awardee was not a responsible bidder to perform the contract. COS at 4; AR, Tab 10a, Agency-Level Protest Decision at 1.

The Army continued to evaluate bids during the pendency of the agency-level protest, with the source selection evaluation board and source selection advisory council convening in May and August, respectively. COS at 4. On August 23, the agency informed the protester that it was denying the agency-level protest. AR, Tab 10a, Agency-Level Protest Decision at 1. The agency decision stated that the Army concluded that the protester was not an interested party to the protest, because there was a fourth, lower-priced, intervening bidder, Cal Vet Integrated Consulting Services-Avartara (CVICS), which would have been in line for award even if the protest grounds against the awardee were sustained. *Id* at 3; COS at 5.

The Army announced award to Nisou on August 31, and SWM subsequently filed this protest with our Office on September 1. COS at 5.

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<sup>1</sup> All references to the IFB in the decision from this point forward are to the IFB as amended on April 8, 2022.

<sup>2</sup> The solicitation identified the address of the MICC building as 1792 12<sup>th</sup> Street, Fort Riley, KS 66442. IFB at 1, 15.

## DISCUSSION

SWM challenges the Army's conduct of the procurement, in particular arguing that the agency's acceptance of the CVICS bid violated the FAR and the IFB. Further, the protester challenges the agency's evaluation of Nisou's pricing, arguing that its bid contained unbalanced pricing. See Protest at 4-11. The Army maintains that its acceptance of the CVICS bid was proper and that the protester is not an interested party to pursue its protest grounds with respect to the evaluation of Nisou's bid.<sup>3</sup> See Memorandum of Law (MOL) at 6-7, 9-14.

We have considered all of SWM's arguments, and, for the reasons explained below, find no basis to sustain the challenges to the acceptance of CVICS's bid. Because the protester has failed to further challenge the agency's evaluation of CVICS's pricing, we find it is not an interested party to pursue its remaining protest grounds.<sup>4</sup>

### Agency Acceptance of the CVICS Bid

SWM argues that the Army's receipt and consideration of the CVICS bid was improper. Specifically, the protester maintains that the bid was "late" as defined by the IFB and the FAR, and accordingly should not have been considered by the agency. Comments at 10-12.

Bidders are responsible for submitting bids so as to reach the government office designated in the IFB by the time specified in the IFB. FAR 14.304(a). Part 14 of the FAR further prescribes the regulations governing late bids, including the conditions that must be met in order for a contracting officer to properly consider a late bid. To this end, the FAR states:

Any bid, modification, or withdrawal of a bid received at the Government office designated in the IFB after the exact time specified for receipt of bids is "late" and will not be considered unless it is received before award

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<sup>3</sup> The agency filed a request for dismissal with our Office on September 15 arguing in part that the protester was not an interested party because of the existence of an intervening bid. Req. for Dismissal at 1, 4-5. In part, because the request for dismissal lacked information and record evidence regarding the intervening bid, we denied the request on September 23. Notice of Request for Dismissal Decision at 1.

<sup>4</sup> Our Office attempted alternative dispute resolution (ADR) for this matter on November 17. Following ADR, the protester indicated it would not withdraw its protest, and requested our Office proceed with a written decision in this matter. Request for Written Decision at 1. To the extent the protester's request raised additional legal arguments or attempted to develop existing protest issues, we find that this amounts to an unwarranted piecemeal presentation or development of protest issues and therefore we will not consider these arguments. *The Logistics Company, Inc.*, B-419932.3, May 26, 2022, 2022 CPD ¶ 133 at 3-4 n.2.

is made, the contracting officer determines that accepting the late bid would not unduly delay the acquisition; and—

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There is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids and was under the Government's control prior to the time set for receipt of bids.

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Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the bid wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

FAR 14.304(b)(1), (c). Under the governing language in the FAR, it is the contracting officer, in the first instance, who should make the determination whether a late bid should be accepted and our Office will not substitute its judgment in this regard, but will review the reasonableness of the agency's determination. *J.L. Malone & Associates*, B-290282, July 2, 2002, 2002 CPD ¶ 116 at 4-5. Our Office has found an agency's acceptance of a late bid reasonable where the agency provided package intake evidence to show the bid was received at the agency installation and was under agency control before the time set for receipt of bids, and the other conditions required to satisfy the late bid rule exception were otherwise met. *Athena Construction Group, Inc.*, B-413406, B-413406.2, Oct. 21, 2016, 2016 CPD ¶ 297 at 5.

The Army, through the contracting officer's statement, recounted the following details relating to the receipt and consideration of the CVICS bid. The mail facility at Fort Riley is a hybrid, dual purpose facility, meaning that it is both a United States Post Office (USPO) and an Army mail facility. COS at 3. Accordingly, the facility was staffed and operated by both USPO personnel and Army personnel. *Id.* The contracting officer explains that due to COVID protocols in place in April 2022, packages addressed to the MICC building would not be delivered further than the Army mail facility. *Id.* Instead, the facility would receive packages and notify the contracting office that a package had arrived and needed to be picked up. *Id.* Someone with a mail handler card then had to retrieve the mail from the mail facility and deliver it to the MICC building. *Id.* Because much of the contracting office was teleworking at that time, the contracting officer states that mail pickup by MICC employees was sporadic.

On April 27, at 8:16 a.m., prior to the noon deadline established for receipt of bids, the mail facility at Fort Riley printed a delivery receipt documenting packages received that morning. *Id.*; AR, Tab 06f, Post Office Firm Delivery Receipt. The delivery receipt included a tracking number that matched a package sent by CVICS. See AR, Tab 06c, CVICS Bid Package Outer Envelope; Tab 06f, Post Office Firm Delivery Receipt. The inner envelope of that package contained the CVICS bid, which was properly addressed to the address identified in the IFB for the MICC building. COS at 3; AR, Tab 06d,

CVICS Bid Package Inner Envelope. The delivery receipt was then initialed by an Army civilian employee who, according to the agency, works in the hybrid facility and handles official Army mail. COS at 3 n.2, 4; AR, Tab 06f, Post Office Firm Delivery Receipt. After receiving the CVICS bid and identifying the intended recipient (MICC), the mail facility attempted to call MICC staff, to inform them that they had a package for pickup. COS at 3. The call was unsuccessful, and no message was left, however, the attempted call was documented as a “first delivery attempt” on Postal Service (PS) Form 3849.<sup>5</sup> *Id*; AR, Tab 06g, PS Form 3849. The agency states that the bid package was then secured in a vault at the facility. COS at 3. The package remained in the vault until May 12, when it was signed for and picked up by a member of the MICC staff. *Id*; see AR, Tab 06g, PS Form 3849 (showing the MICC employee’s signature and address at the MICC building).

After the bid was received by the MICC staff member and delivered to the contracting officer, the contracting officer investigated the circumstances surrounding the bid’s receipt. COS at 4. He concluded that though the bid was not received at the MICC building by the date and time specified in the IFB, the bid was otherwise received at the government installation and available for pickup by the MICC office, and under government control prior to the established deadline.<sup>6</sup> *Id*. Further, the contracting officer determined that considering the bid would not unduly delay the acquisition. *Id*. Lastly, because award had not yet been made at the time the MICC office obtained the bid, the contracting officer determined that it would be appropriate to consider the bid, and proceeded to evaluate it in accordance with the terms of the IFB. *Id*. An amended bid abstract was prepared on May 26, and included the pricing of the CVICS bid. *Id*; AR, Tab 08a, Revised Bid Abstract.

SWM argues that the Army improperly accepted CVICS’s bid. Specifically, the protester alleges that the exception to the late bid rule at FAR provision 52.214-7 does not apply in this instance, because there is insufficient evidence to demonstrate that the bid was received at the government installation and under government control prior to the time set for receipt of bids in the IFB. Comments at 13; Supp. Comments at 10. The protester contends the evidence actually suggests that the CVICS bid was not received by the agency until after the deadline for receipt of bids, and, in any event, the receipt was only made by the USPO, and not the agency. Comments at 13; Supp. Comments at 10-11. In support of its argument, the protester relies on our decision in *Brian X. Scott* in which our Office found that receipt of a bid or proposal at a mailroom or other receiving area does not constitute receipt at the location specified in the solicitation, provided the agency has established reasonable procedures to ensure that mailed bids

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<sup>5</sup> The agency explains that PS Form 3849 is a notice form the post office uses to notify a customer when a mail delivery was attempted. COS at 3.

<sup>6</sup> In a May 16 email responding to an inquiry from CVICS regarding the status of the CVICS bid, an Army contract specialist informed CVICS that “[d]ue to the error of our office and not receiving the package timely it will be included with the other bids.” AR, Tab 06h, Agency Email to CVICS at 1.

or proposals are routed from the mailroom to the location designated in a solicitation for receipt. *Brian X. Scott*, B-410195, Nov. 7, 2014, 2014 CPD ¶ 335 at 4.

The Army maintains that it properly accepted the CVICS bid because, even though it was late, it satisfied the exception to the late bid rule established in the IFB and FAR. MOL at 11; Supp. MOL at 11. Specifically, the agency contends that the contracting officer reasonably determined the CVICS bid to be on the Fort Riley installation and under the Army's control prior to the time set for receipt of bids in the IFB. MOL at 11. Further, the Army argues that in any event, unlike the agency in the *Brian X. Scott* decision, the Army did not have reasonable procedures in place for ensuring the timely receipt of bids on base due to the COVID-19 pandemic. Supp. MOL at 11. As noted above, the agency explains that due to much of the contracting office teleworking at the time, mail pickup by the MICC staff was sporadic and this is why the attempted delivery of CVICS's bid on April 27 was unsuccessful. Therefore, due to the lack of procedures in place on the agency's part, acceptance and consideration of the CVICS bid was proper. Supp. MOL at 10-11.

Here, we find no basis to disturb the contracting officer's conclusion that the exception to the late bid rule was met. As explained above, a late bid may be considered if (1) it is received before award is made, (2) the contracting officer determines that accepting the late bid would not unduly delay the acquisition, and (3) there is acceptable evidence to establish that it was received at the government installation designated for receipt of bids and was under the government's control prior to the time set for receipt of bids. FAR 14.304(b)(1), (c).

SWM effectively concedes that the first two prongs of the late bid rule exception were met. Comments at 13 (“[w]hile the first two elements of the exception [at FAR section 14.304] may apply . . .”). The protester's concession is supported by the record and the agency's determination. First, the Army did not award the contract until August 31, and the CVICS bid was received by MICC personnel on May 12. Second, the agency did not convene its source selection evaluation board until May 29, therefore, the contracting officer's conclusion that consideration of the CVICS bid after it was turned over to MICC personnel on May 12 would not unduly delay the acquisition was reasonable.

With respect to the third prong of the late bid rule, SWM contends that United States Postal Service electronic tracking data that was included in the record contradicts the Army's representation that the bid was received at the mail facility at 8:16 a.m. on April 27. In this regard, the protester notes that while the electronic tracking data shows that the package “arrived at” the USPO at 8:11 a.m., it also shows that the package was not “delivered” until 3:21 p.m. that day. Thus, the protester contends that the record does not support the agency's position that the bid was under agency control prior to the deadline for receipt of bids.

With respect to the discrepancy between the “delivered” and “arrived at” times from the electronic tracking data, the contracting officer explains that the 3:21 p.m. delivery time

is not accurate. Because no mail was being delivered beyond the main installation post office, there was no delivery to individual buildings beyond the main hybrid facility, including the MICC building. COS at 3-4. As noted above, individual installation offices had to come to the mail facility to retrieve packages and this was not done for CVICS's bid until May 12. In addition, the contracting officer explains that the individual shown as having received the package in the electronic tracking data was the same Army civilian employee who initialed the delivery receipt showing receipt of the CVICS bid at 8:16 a.m. The agency thus maintains that the delivery receipt demonstrates that the bid was received at the mail facility and available for pickup by the MICC office by 8:16 a.m. *Id.*

The protester has not offered any meaningful rebuttal to this explanation by the contracting officer, or the physical evidence showing receipt of the CVICS package at the Fort Riley installation by an Army employee. Absent such rebuttal, we find reasonable the contracting officer's conclusion that the CVICS bid was at the government installation prior to the time set for receipt of bids in the IFB.

Similarly, we find reasonable the contracting officer's determination that the CVICS bid was under government control prior to the time set for receipt of bids in the IFB. As stated above, the delivery receipt shows that the bid package was first received at 8:11 a.m. and then signed for by an Army employee at 8:16 a.m. While the installation's mail facility's attempt to contact the MICC office to pick up the bid was unsuccessful due to most of the contracting office employees teleworking, the agency notes that the bid was available for pickup prior to the deadline for receipt of bids. Following receipt of the bid by Army personnel, the contracting officer has also represented that the bid was secured by the Army in a vault until it was turned over to MICC personnel some 15 days later. The protester alleges that there is not sufficient evidence to demonstrate government control of the CVICS bid, specifically arguing that the agency's statement that the Fort Riley post office was a dual purpose facility operated by both USPO and Army personnel is "self-serving" and does not constitute sufficient evidence in this regard.<sup>7</sup> Supp. Comments at 10. This argument, however, ignores evidence showing receipt of the bid by an Army employee at 8:16 a.m. As explained above, the protester has not meaningfully challenged the agency's evidence to this end, or otherwise alleged that it was not an Army employee who received and secured the CVICS bid.<sup>8</sup>

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<sup>7</sup> The protester repeatedly criticizes agency statements in the agency report as "self-serving," however, the protester offers no other meaningful rebuttal to the statements.

<sup>8</sup> To the extent the protester further argues that a finding by our Office of government control in this instance would mean that any bid dropped in any USPO mailbox around the world would amount to government control "as soon as provided to the US Post Office," this argument is flawed. Supp. Comments at 12. Our decision is not based on the fact that the bid was merely received at a USPO facility. Rather, it is based on a record showing that the bid had been received by Army personnel at the Army

Further, the Army had reasonable concerns about the lack of adequate agency procedures to ensure the timely receipt of bids at the MICC office. As noted above, the contracting officer explains that the COVID-19 pandemic had disrupted the normal mail delivery procedures on Fort Riley. COS at 3-4. Because mail was not being delivered beyond the main base facility, it was incumbent on individual offices to coordinate mail pick-up with the main facility. *Id.* Here, the contracting officer has explained that a majority of the MICC staff have been teleworking as a result of COVID-19 protocols, and mail pick-up has been sporadic. COS at 3. There was a reasonable, documented attempt to reach the MICC building on the day bids were due, but despite the availability of the bid for pick-up, MICC personnel did not attempt to retrieve the mail for approximately 15 days.<sup>9</sup>

We find that the unique set of facts here demonstrate that the agency failed to implement any sort of procedures to ensure the timely receipt of bids in this procurement, and that this failure played a paramount role in the CVICS bid not being timely received at the MICC office. CVICS otherwise fulfilled its responsibility to timely provide a mailed bid in accordance with the IFB's instructions, and it was the agency's own lack of procedures to timely retrieve mail while COVID protocols were in place that led to the bid arriving at the MICC building after the deadline established in the IFB.<sup>10</sup>

In sum, we find the contracting officer reasonably determined that the CVICS bid had been received at the government installation and under government control prior to noon on April 27.<sup>11</sup> Moreover, the record also reflects that the contracting officer

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installation designated for receipt of bids and was under the control of Army personnel prior to the time set for receipt of bids.

<sup>9</sup> The protester questions the contracting officer's explanation that the mail facility called the MICC office and contends that there is no evidence in the record that this call occurred. Supp. Comments at 12. However, the record includes a document showing an attempted delivery by the mail facility on April 27 and the contracting officer has explained that this attempt was a phone call to the MICC office that went unanswered. Based on our review of the record, we have no reason to doubt the contracting officer's explanation, and the protester has not provided one beyond an unsupported insinuation that the contracting officer was not being forthcoming in his explanation.

<sup>10</sup> The protester itself even states that the agency "inexplicably has not developed reasonable procedures to deliver mail almost three years into the pandemic, especially mail as important as bids." Supp. Comments at 11.

<sup>11</sup> Our conclusion is also consistent with the principle our Office explained in *Weeks Marine*, B-292758, Oct. 16, 2003, 2003 CPD ¶ 183. There, we stated that in various instances, our Office has found late bids acceptable, notwithstanding the fact that regulations may not have provided for acceptance of the bid, and that a strict application of the late bid regulations is not appropriate in every case. *Id.* at 4-5. Our conclusions in these decisions stem from the "the principle that the late bid rules should not be used to reject a bid where doing so would contravene the intent and spirit of the competitive



reasonably attributed the cause for the delay in actual receipt of the bid at the MICC office as being due to the agency's failure to implement reasonable procedures for the timely delivery of bids to the requisite office designated for receipt of bids. As such, this protest ground is denied.

#### Responsiveness of the CVICS Bid

SWM also challenges the responsiveness of the CVICS bid. The protester argues that the agency's price analysis indicated, in multiple locations, that the CVICS bid was nonresponsive. Therefore, according to the protester, the agency should not have further considered the CVICS bid. Comments at 15.

The Army responds by stating that the finding of nonresponsiveness was made in error. Specifically, the agency argues that it initially found CVICS's bid to be nonresponsive because it did not include an attachment addressing pre-award information, specifically past performance information. Supp. MOL at 3; AR, Tab 14a, Price Analysis at 2. The agency contends that the attachment containing past performance information was to be submitted as part of a responsibility review and, consistent with FAR section 9.104-6(b)(1), the agency was able to review the federal award performance and integrity information system (FAPIIS) to find the relevant past performance information for CVICS. Supp. MOL at 7-8; AR, Tab 14a, Price Analysis at 2. Accordingly, the agency maintains that because it found the past performance information it needed to make a responsibility determination for CVICS in FAPIIS, it properly found that CVICS's bid was otherwise responsive to the solicitation. Supp. MOL at 7-8.

A bid is responsive as submitted when it offers to perform without exception the exact thing called for in the solicitation and acceptance of the bid will bind the contractor to perform in accordance with all of the IFB's material terms and conditions. *D.B.I. Waste Systems, Inc.*, B-285049, July 10, 2000, 2000 CPD ¶ 117 at 4.

Here, we find that the agency properly found that CVICS's bid was responsive to the solicitation. The IFB clearly indicated that the requirement to submit past performance information as part of the attachment was part of the responsibility determination. While CVICS did not submit the attachment, the agency's review of FAPIIS to find relevant past performance information was consistent with the FAR provision addressing review

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system" and that "[t]he purpose of the rules governing the consideration of late bids is to insure for the Government the benefits of the maximum legitimate competition, not to give one bidder a wholly unmerited advantage over another by over-technical application of the rules." *Id.* at 5. This reasoning is based on the idea that a bidder "should not suffer if the bid is untimely because the government failed in its own responsibility, so long as acceptance of the bid would not cast doubt on the integrity of the bidding process." *Id.* To this end, our Office has applied this principle where, as here, an agency's failure to establish procedures for the timely receipt of bids is the paramount cause of a bid's untimely receipt. *Id.*

of past performance information as part of a responsibility determination. FAR 9.104-6(b)(1). Though two charts in the price analysis indicated that the CVICS bid was nonresponsive, the agency has reasonably explained that this was a clerical error made after an initial review of CVICS's bid and prior to the agency finding the past performance information on FAPIIS. This explanation is consistent with the contemporaneous price analysis. See AR, Tab 14a, Price Analysis at 2. Moreover, there is nothing in the record to suggest that the CVICS bid did not offer to perform the exact thing called for in the solicitation. Accordingly, this protest ground is also denied.

#### Agency Evaluation of Nisou's Bid

Finally, SWM challenges the Army's evaluation of Nisou's bid. Specifically, the protester alleges that the agency's unbalanced pricing evaluation of the awardee was flawed in multiple respects, and that the agency's finding of responsibility with respect to Nisou was also flawed, because the awardee lacks the experience to show that it is capable of performing the work contemplated by the solicitation.<sup>12</sup> Protest at 4-6; Comments at 3-12. The Army argues that SWM is not an interested party to raise these challenges because CVICS was an otherwise acceptable, intervening lower-priced bidder and therefore the protester would not be next in line for award even if the challenges to the evaluation of Nisou's bid were sustained. MOL at 6-7; Supp. MOL at 4.

Our regulations provide that only interested parties may pursue protests with our Office. 4 C.F.R. § 21.1(a). An interested party is defined as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 4 C.F.R. § 21.0(a)(1). When there is an intervening bidder who would otherwise be next in line for award even if challenges to the awardee were sustained, our Office has found that a protester is generally only an interested party if it also challenges the evaluation of the intervening bid, in addition to the awardee's bid. *Al-Tahouna Al-Ahliyah General Trading & Contracting Company, WLL et al.*, B-412769 *et al.*, May 9, 2016, 2016 CPD ¶ 127 at 8-9.

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<sup>12</sup> The protester also initially challenged the agency's acceptance of Nisou's bid, alleging that the bid was improperly received because it was not submitted in a "sealed" package, in accordance with the IFB and FAR part 14. Protest at 8-9. However, the agency report addressed this matter and the protester failed to meaningfully respond in its comments. We therefore dismiss this protest ground as abandoned. *AeroSage, LLC*, B-414640, B-414640.3, July 27, 2017, 2017 CPD ¶ 233 at 3 n.4.

Here, as explained above, we have found no basis to disturb the contracting officer's decision to accept and consider the CVICS bid. Therefore, there is an otherwise acceptable, lower-priced bidder who would be in line for award even if the protest challenges relating to the evaluation of Nisou's bid were sustained. Accordingly, we conclude SWM is not an interested party to pursue these remaining protest grounds.

The protest is denied in part and dismissed in part.

Edda Emmanuelli Perez  
General Counsel