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Decision

Matter of: Fisher Sand & Gravel Company

File: B-417496

Date: July 26, 2019

Scott R. Sleight, Esq., and Ellie Perka, Esq., Ahlers Cressman & Sleight PLLC, for the protester.

David R. Hazelton, Esq., Kyle R. Jefcoat, Esq., Dean W. Baxtresser, Esq., and Chase A. Chesser, Esq., Latham & Watkins LLP, for SLSCO, Ltd., the intervenor.

Blake M. Hedgecock, Esq., Department of the Army, for the agency.

Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest allegations challenging the terms of a solicitation are dismissed as untimely because they were filed after the time for receipt of proposals.
 2. Challenge to the evaluation of the protester's proposal is denied where the evaluation was reasonable and consistent with the terms of the solicitation.
 3. Supplemental protest arguing that the agency's evaluation of offerors' proposals was inconsistent with the terms of the solicitation is dismissed where it was filed more than 10 days after receiving the documents upon which the argument was based.
 4. Protester is not an interested party to challenge the evaluation of the awardee's qualifications to perform the contract where, even if the argument had merit, an intervening offeror, rather than the protester, would be next in line for award.
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DECISION

Fisher Sand & Gravel Company, of Dickinson, North Dakota, challenges the award of a contract to SLSCO, Ltd. (SLS), of Galveston, Texas, by the Department of the Army, Corps of Engineers (Corps), under solicitation No. W9126G19R9002 (solicitation 9002), for construction along the U.S. border in New Mexico. The protester challenges the terms of the solicitation and also argues that the agency failed to evaluate proposals in a manner consistent with solicitation's evaluation criteria.

We dismiss in part and deny in part the protest.

BACKGROUND

The 9002 Solicitation

The Corps issued the solicitation on March 28, 2019, seeking proposals for phase 1 of a 2-phase competition under the architect-engineer competition provisions of Federal Acquisition Regulation (FAR) subpart 36.6.¹ Agency Report (AR), Tab 3, Solicitation, at 2.² The solicitation anticipated the award of a design-build contract for construction of roads and fences, and installation of lighting along the U.S. border near El Paso, New Mexico. Id. The procurement was limited to firms that had been prequalified by the agency in 2018 to perform construction work in Arizona, and that were listed on the prequalified sources list (PQSL) 2, which included Fisher and SLS.³ Agency Request for Dismissal, Apr. 29, 2019, at 2.

The solicitation stated that the agency would conduct the phase 1 evaluation “by considering information on hand and responses to Enclosure 1 which includes questions and a [contract line item number (CLIN)] Structure.”⁴ Solicitation at 2. The solicitation further stated that after evaluating the proposals, the agency would select “the most highly qualified single firm” for the phase 2 competition, which would involve negotiations with that firm for the purpose of entering into a contract. Id.

¹ Although the solicitation did not state that it was conducted under the procedures of FAR subpart 36.6, it clearly referenced the 2-phase competitive procedures for a design-build contract outlined in that subpart of the FAR. Under the competitive procedures of FAR subpart 36.6, agencies do not issue solicitations and competing firms do not submit proposals or quotations; instead agencies publish synopses of their requirements and invite firms to submit qualification statements. See FAR §§ 36.601-2, 36.602. The record here, however, refers to the agency’s request for information from firms as a solicitation and the responses from those firms as proposals; for the sake of consistency we use those terms in our decision.

² Citations to documents in the agency report are to the page numbers added by the agency.

³ As discussed below, the agency subsequently recognized that solicitation 9002, as well as a related solicitation for border construction, were each limited to firms prequalified for work in locations other than those specified in the respective solicitations.

⁴ Offerors were instructed to not provide pricing, and were instead asked to advise whether they had any questions regarding the CLIN structure. Solicitation at 5.

Enclosure 1 to the solicitation contained the following 10 questions, listed in descending order of importance, which offerors were required to address in their proposals:

Q1 List all current Border Infrastructure Barrier Projects your firm is working on or has worked on in the past five years. NOTE: The Government intends to verify past performance by any and all means available so your firm must ensure that projects are described with enough information that the Government can identify the projects to verify the past performance.

Q2 Does your firm have the capacity to support several concurrent scoping site visits at multiple remote sites within 48 hours of notification? If yes, please explain how your firm will achieve this.

Q3 Does your firm have the ability to start panel emplacement within 45 days [of] contract award? If yes, please explain how your firm will achieve this.

Q4 Does your firm have the ability to bond up to \$1 [billion] for a single project and \$4 [billion] aggregate? And if not, what is your max bonding capacity? Please submit a Letter of Commitment substantiating this.

Q5 Would your firm be capable of completing 50% of the fence placement within 9 months of contract award? If yes, please explain how your firm will achieve this.

Q6 Would your firm be capable of completing 100% of the fence placement within 18 months of contract award? If yes, please explain how your firm will achieve this.

Q7 Identify major subcontractors such as the designer and key subcontractors performing significant work such as design or significant percentages of work.

Q8 How do you anticipate handling site security for the project?

Q9 The government anticipates utility and pipeline relocations will be required. What is your plan for coordinating with these entities, as well as other federal governmental entities such as United States International Boundary and Water Commission [], to ensure timely project completion?

Q10 What is your plan for fabrication and storage?

Id. at 4.

The solicitation did not state how proposals would be evaluated under these 10 questions. Instead, the agency's evaluation methodology was described in the evaluation report prepared by the source selection evaluation board (SSEB). The agency's evaluation treated each question as a factor. The agency evaluated the most important factor, past performance, "to determine if the Offeror has current and relevant border fencing projects or has completed relevant border fencing projects within the past five years."⁵ AR, Tab 7, SSEB Report, at 198. For the subcontracting, utility coordination, and fabrication factors the agency assigned adjectival ratings.⁶ Id. at 200. The remaining factors were evaluated on an acceptable/unacceptable basis. Id.

The Corps received proposals from six firms, including Fisher and SLS, by the due date of April 2. As relevant here, the SSEB assigned the following ratings to the proposals of Fisher, SLS, and a third offeror:

	Fisher	SLS	Offeror 3
Factor 1, Past Performance	Limited Confidence	Substantial Confidence	Substantial Confidence
Factor 2, Scoping Site Visits	Acceptable	Acceptable	Acceptable
Factor 3, Ability to Install Panels In 45 Days	Acceptable	Acceptable	Acceptable
Factor 4, Bonding Capacity	Acceptable	Acceptable	Acceptable
Factor 5, 50% Panel Placement in 9 Months	Acceptable	Acceptable	Acceptable
Factor 6, 100% Panel Placement in 18 Months	Acceptable	Acceptable	Acceptable
Factor 7, Subcontracting	Acceptable	Good	Good
Factor 8, Security	Acceptable	Acceptable	Acceptable
Factor 9, Utility Coordination	Acceptable	Outstanding	Outstanding
Factor 10, Fabrication	Good	Outstanding	Outstanding

AR, Tab 7, SSEB Report, at 202.

The Corps' award decision found that the proposals submitted by SLS and Offeror 3 "were both tied in terms of ratings for the most highly qualified offerors and presented

⁵ For past performance, the agency assigned ratings of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown (neutral) confidence. AR, Tab 7, SSEB Report, at 198.

⁶ For these factors, the agency assigned ratings of outstanding, good, acceptable, marginal, or unacceptable. AR, Tab 7, SSEB Report, at 200.

plans that individually appeared reasonable and logical.” AR, Tab 8, Selection Decision, at 235. The agency concluded that although both offerors received ratings of good under the subcontracting factor, SLS’s proposal reflected less risk. Id. at 237. For this reason, the source selection authority concluded that SLS was the most highly qualified offeror and selected it to proceed to phase 2 of the competition. Id. at 238.

On April 8, the Corps issued a justification and approval (J&A) to award SLS an undefinitized fixed-price design-build contract, with an estimated value of \$800 million and a performance period of 18 months. Contracting Officer’s Statement (COS) at 7; AR, Tab 9, J&A, at 248. The agency awarded the contract to SLS on April 9. COS at 7.

On April 18, Fisher filed the instant protest with our Office challenging the award of the contract under solicitation 9002 to SLS. On April 24, the Corps advised our Office that it had executed an override of the stay of performance under the Competition in Contracting Act of 1984 triggered by the protest to our Office, based on urgent and compelling circumstances. Agency Notice of Override, Apr. 24, 2019, at 1. On May 16, Fisher challenged the Corps’ override of the stay of performance at the U.S. Court of Federal Claims. On May 21, the court denied the protester’s request for an injunction and dismissed the challenge. Fisher Sand & Gravel Co. v. U.S., No. 19-615C (Fed. Cl.), May 29, 2019, at 10.

The 9001 Solicitation

As relevant here, the Corps also issued solicitation No. W9126G19R9001 (solicitation 9001) on March 28, for phase 1 of a 2-phase competition under the provisions of FAR subpart 36.6. This solicitation anticipated the award of a design-build contract for construction of roads, fences and installation of lighting along the U.S. border near Yuma, Arizona. The evaluation factors were identical to those in solicitation 9002. The procurement was limited to firms that had been prequalified by the agency in 2017 to perform construction work in California, Texas, and New Mexico, and that were listed on PQSL 1. See Agency Request for Dismissal (B-417499), Apr. 24, 2019, at 1; Agency Notice of Corrective Action (B-417499), May 1, 2019, at 1. Fisher was not included in PQSL 1 and did not submit a proposal for that competition. Agency Request for Dismissal (B-417499), Apr. 24, 2019, at 1

On April 19, Fisher filed a protest (B-417499) with our Office challenging the award of a contract to Barnard Construction Company under solicitation 9001. The protester argued that solicitation 9001 was improperly limited to firms that were listed in PQSL 1. Protest (B-417499) at 1-2.

The Corps requested that our Office dismiss the protest, arguing that Fisher was not an interested party to challenge the award to Barnard, as it had not competed for the award, and because the challenge to the limitation of the competition under solicitation 9001 to firms listed in PQSL 1 was untimely. Agency Request for Dismissal (B-417499), Apr. 24, 2019, at 2-3. On May 1, 2019, prior to our Office’s ruling on the agency’s request for dismissal, the agency advised that it would take corrective action

by “terminat[ing] for the convenience of the Government the contract that resulted from the Yuma [Arizona] Solicitation [solicitation 9001],” and that it would cancel the solicitation and “re-compete the requirement.” Agency Notice of Corrective Action (B-417499), May 1, 2019, at 1. The agency explained that although the competition was limited to firms that were listed in PQSL 1, “[t]he PQSL 1 notice did not identify projects in Arizona and the Agency erroneously offered the Yuma [Arizona] Solicitation to PQSL 1 contractors.”⁷ Id. Based on the agency’s notice of corrective action, our Office dismissed Fisher’s protest of the 9001 solicitation. Fisher Sand & Gravel Co., B-417499, May 6, 2019, at 1-2 (unpublished decision).

DISCUSSION

Fisher challenges the Corps’ selection of SLS’s proposal to proceed to phase 2 of the competition under solicitation 9002 (which ultimately resulted in the award of a contract to SLS) based on two primary arguments: (1) the agency did not evaluate proposals reasonably or in accordance with the terms of the solicitation, and (2) the agency did not reasonably evaluate SLS’s qualifications to perform the contract. For the reasons discussed below, we find that Fisher’s arguments do not provide a basis to sustain the protest.⁸

In reviewing a protest of an agency’s selection of a contractor for the award of an architect-engineering services contract under FAR subpart 36.6, our Office will not substitute its judgment for that of the agency evaluators. OLBN Architectural Serv., Inc., B-402444.4, B-402444.5, Oct. 4, 2010, 2011 CPD ¶ 55 at 3. Rather, the evaluation of offerors’ qualifications statements is within the discretion of the agency, and our review examines whether the agency’s selection was reasonable and in accordance with the published criteria. AMEL Techs., Inc., B-412611, Apr. 1, 2016, 2016 CPD ¶ 103 at 5. A protester’s disagreement with an agency’s judgment in the assessment of an offeror’s qualifications, without more, does not provide a basis to sustain the protest. James W. Hudson & Assocs., B-243277, July 5, 1991, 91-2 CPD ¶ 29 at 4. Competitive prejudice is also an essential element of a viable protest, and we will sustain a protest only where the protester demonstrates that, but for the agency’s improper actions, it would have had a substantial chance of receiving the award. Earth Resources Tech. Inc., B-416415, B-416415.2, Aug. 31, 2018, 2018 CPD ¶ 312 at 4.

Previously Dismissed Untimely Protest Arguments

Prior to filing the agency report, the Corps requested that our Office dismiss as untimely several arguments raised by Fisher regarding the terms of the solicitation. In this regard, our Bid Protest Regulations provide that a protest based on alleged

⁷ This issue was not raised in Fisher’s protest (B-417499).

⁸ Fisher raises other collateral arguments. Although we do not address every argument raised, we have reviewed them all and find no basis to sustain the protest.

improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals must be filed by that time. 4 C.F.R. § 21.2(a)(1); Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. We provided the protester an opportunity to respond to the agency's request. On May 6, we dismissed the arguments discussed below.

First, Fisher raised several challenges to the terms of the solicitation, including the following: (1) the solicitation did not comply with the requirements of subpart 36.6 because it did not adequately explain the evaluation criteria or basis for selecting a proposal to proceed to phase 2 of the competition; (2) the solicitation was unduly restrictive of competition because the evaluation criteria assigned the most weight to an offeror's performance of border construction projects; and (3) the solicitation's evaluation criteria were unreasonably ranked in order of importance. Protest at 5, 12-15. Although Fisher's challenges to the terms of the solicitation were filed after the time for receipt of proposals, the protester argued that the "lack of information in the solicitation" did not allow the protester to understand the nature of the problems with the solicitation. Protest at 18; see also Protester's Response to Agency's Request for Dismissal, May 6, 2019, at 8-9. We concluded that all of these challenges were untimely because they were apparent on the face of the solicitation.⁹ GAO Notice of Partial Dismissal, May 6, 2019, at 1-2.

Second, Fisher's response to the agency's request for dismissal cited the Corps' decision to take corrective action in connection with Fisher's protest in B-417499, concerning the limitation of the competition under solicitation 9001 for work in Arizona to firms prequalified for work in California, New Mexico, and Texas. The protester argued that the agency's decision to take corrective action showed that the competition under solicitation 9002, which was for work in New Mexico but limited to firms prequalified for

⁹ Fisher also requested that our Office consider these arguments under the exception to the timeliness requirements in our Bid Protest Regulations. Protester's Response to Agency's Request for Dismissal, May 6, 2019, at 12-13. In this regard, our regulations provide that we may consider an untimely protest argument "for good cause shown, or where [our Office] determines that a protest raises issues significant to the procurement system." 4 C.F.R. § 21.2(c). In order to prevent our timeliness rules from becoming meaningless, however, these exceptions are strictly construed and rarely used. Id. The good cause exception is generally limited to compelling reasons beyond the protester's control that prevented it from filing a timely protest. Central Texas College, B-245233.5, Feb. 6, 1992, 92-1 CPD ¶ 151 at 3. The significant issue exception to our timeliness rules is limited to untimely protests that raise issues of widespread interest to the procurement community which we previously have not considered on the merits. Hawker Beechcraft Def. Co., LLC, B-406170, Dec. 22, 2011, 2011 CPD ¶ 285 at 4 n.4. We concluded that the untimely filing of Fisher's protest was not due to compelling reasons beyond the protester's control, and that the challenges to the solicitation's evaluation factors did not reflect significant issues to the procurement system. GAO Notice of Partial Dismissal, May 6, 2019, at 1-2.

work in Arizona, was also improper. Protester's Response to Agency's Request for Dismissal, May 6, 2019, at 1-2. We concluded that this argument was untimely because the protester was aware or should have been aware of the issues regarding PQSLs 1 and 2 prior to the time for receipt of proposals in solicitation 9002, based on questions and answers issued by the agency in connection with both solicitations. GAO Notice of Partial Dismissal, May 6, 2019, at 2.

Technical Evaluation Factors 7, 9 and 10

Fisher next argues that the Corps' evaluation of proposals was unreasonable for two primary reasons: (1) the agency failed to assign higher ratings to the protester's proposal, and (2) the agency's evaluation improperly considered the awardee's past performance in the evaluation of other factors. For the reasons discussed below, we find no merit to the protester's first argument, and conclude that the second argument is untimely.

Fisher contends that the Corps unreasonably assigned its proposal a rating of only acceptable under the subcontracting evaluation factor. Protester's Comments, May 30, 2019, at 8-9. The solicitation required offerors to "[i]dentify major subcontractors such as the designer and key subcontractors performing significant work such as design or significant percentages of work." Solicitation at 4. The Corps assigned Fisher's proposal a strength under the subcontracting factor based on its proposed design lead subcontractor. AR, Tab 7, SSEB Report, at 230. In contrast, the agency assigned SLS's proposal a significant strength based on "a strong array of subcontractors, many of which have previous border wall experience," and a strength based on its proposed designer of record subcontractor, which "has successfully performed on other wall contracts." Id. at 211-12.

Fisher argues that the agency's evaluation failed to assign a strength to its proposal based on the protester's "vertical integration" with its related companies, and its ability to "self-perform" the "critical aspects" of the work without relying on subcontractors. Protest at 7; Protester's Comments, May 30, 2019, at 9. The solicitation, however, did not provide that the agency would give favorable consideration to an offeror's proposal to perform without subcontractors. To the extent the protester contends that the agency should have assigned its proposal strengths based on what the protester contends is an inherently less risky approach of not utilizing subcontractors, the protester's disagreement with the agency's judgment does not provide a basis to sustain the protest. See James W. Hudson & Assocs., supra. Additionally, to the extent Fisher contends that the solicitation should have provided for consideration of risks arising from an offeror's proposal to subcontract certain parts of the work, any such challenge regarding the evaluation criteria after the time for receipt of proposals is untimely. 4 C.F.R. § 21.2(a)(1).

The protester also argues that the agency should have assigned its proposal higher than ratings of acceptable under the subcontracting and utility coordination factors, and higher than a rating of good under the fabrication factor, because the agency did not

assign Fisher's proposal any weaknesses, deficiencies, or uncertainties under these evaluation factors. Protester's Comments, May 30, 2019, at 8-9; AR, Tab 7, SSEB Report, at 230-31. The agency defined ratings of outstanding, acceptable and good in the SSEB report, as follows:

Outstanding: Proposal indicates an exceptional approach and understanding of the requirements and contains multiples strengths, and risk of unsuccessful performance is low.

Good: Proposal indicates a thorough approach and understanding of the requirements and contains at least one strength, and risk of unsuccessful performance is low to moderate.

Acceptable: Proposal meets requirements and indicates an adequate approach and understanding of the requirements, and risk of unsuccessful performance is no worse than moderate.

AR, Tab 7, SSEB Report, at 200.

As an initial matter, an offeror is not entitled to receive the highest possible rating in an evaluation simply because its proposal is not evaluated as having weaknesses. Archer Western Contractors, Ltd., B-403227, B-403227.2, Oct. 1, 2010, 2010 CPD ¶ 262 at 5 n.5. We also note that the record indicates that the agency treated offerors equally in the evaluation under these factors. For example, the agency assigned ratings of acceptable to the protester's proposal under the subcontracting and utility coordination factors based on a single strength and no weaknesses, and a rating of good under the fabrication factor based on a significant strength and no weaknesses. AR, Tab 7, SSEB Report, at 230-31. The agency also assigned SLS's proposal a rating of good under the subcontracting factor based on a single significant strength and no weaknesses, and assigned ratings of outstanding under the utility coordination and fabrication factors based on multiple significant strengths and strengths. Id. at 211-13. On this record, we see no basis to conclude that the agency's evaluation of proposals was unreasonable.

Additionally, even if this protest argument had merit, we see no possibility of prejudice to Fisher. In this regard, SLS's and Offeror 3's proposals received the highest possible ratings of significant confidence under the most important factor, past performance. AR, Tab 7, SSEB Report, at 202. In contrast, Fisher's proposal was assigned a weakness and overall rating of limited confidence for this factor, based on the protester's lack of experience with border construction projects, which the agency found was limited to "one prototype construction out of solid concrete." Id. at 228. None of the protester's arguments provide a basis to conclude that the agency's evaluation of the offerors' proposals under the past performance factor was unreasonable.

SLS and Offeror 3's proposals were each assigned a rating of good for the subcontracting factor, and outstanding for the utility coordination and fabrication factors. Even if the protester's proposal had been assigned the highest possible rating of

outstanding under all three of these factors, this would mean that the protester's proposal would be rated higher than SLS's and Offeror 3's proposals only under the subcontracting factor. These three factors, 7, 9, and 10, were three of the four lowest-weighted evaluation factors. We therefore find no possibility that improved ratings under these factors would affect the protester's competitive standing with regard to SLS or Offeror 3, and no possibility that, but for any error in the evaluation of these factors, the protester would have a reasonable prospect for award.¹⁰ See Earth Resources Tech. Inc., supra.

In addition to these arguments, Fisher's comments on the agency report raised new challenges to the agency's evaluation of SLS's proposal under the subcontracting, utility coordination, and fabrication factors; specifically, Fisher contends that the agency improperly considered the awardee's past performance for border construction contracts in the evaluation under these factors. The intervenor contends that these arguments are untimely because the protester first raised them in its comments on the agency report, more than 10 days after receiving the documents upon which they were based. Intervenor's Request for Dismissal, June 3, 2019, at 1-3. For the reasons discussed below, we agree.

Where a protester initially files a timely protest, and later supplements it with new grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements, since our Regulations do not contemplate the piecemeal presentation or development of protest issues. Vigor Shipyards, Inc., B-409635, June 5, 2014, 2014 CPD ¶ 170 at 5. Additionally, where an initial protest raises general protest allegations and a supplemental protest provides specific "examples" of the alleged general flaws, the supplemental grounds must independently satisfy our timeliness rules. FR Countermeasures, Inc., B-295375, Feb. 10, 2005, 2005 CPD ¶ 52 at 9. Such a staggered presentation of "examples," each of which involves different factual circumstances and requires a separate explanation from the agency, constitutes piecemeal presentation of issues that our timeliness rules do not permit. Id.

As discussed above, Fisher's initial protest raised challenges to the evaluation of its proposal, and also argued that the agency failed to consider what the protester contends was negative information regarding SLS's performance of a contract for

¹⁰ Fisher's initial protest also argued that the Corps' evaluation failed to reasonably consider or favorably evaluate what the protester describes as its "patent-pending bollard fence hanging system" (also described as "patented" in its proposal), or its bonding capacity in excess of the solicitation's minimum requirements. Protest at 7. Although the agency responded to these arguments in its report on the protest, Fisher's comments on the agency report did not address them further. See Memorandum of Law (MOL) at 4-6, 10 n.23. We consider these arguments abandoned and therefore dismiss them. Bid Protest Regulations, 4 C.F.R. § 21.3(i)(3) ("GAO will dismiss any protest allegation or argument where the agency's report responds to the allegation or argument, but the protester's comments fail to address that response.").

border construction in California (we discuss this issue below). Protest at 7-12. The agency filed its documents in response to the protest on May 15, which included the SSEB report and the selection decision, and subsequently filed its agency report on May 20. SLS filed its comments on the agency report on May 30.

In its comments on the agency report, the protester raised new challenges regarding the agency's evaluation of SLS's proposal--that the agency improperly considered offerors' past performance in connection with the evaluation of the subcontracting, utility coordination, and fabrication factors. Protester's Comments, May 30, 2019, at 5-7. In this regard, the protester notes that the agency assigned strengths and significant strengths to the awardee's proposal based on the awardee's or its proposed subcontractors' experience working on border construction projects. Id. at 5-6; see AR, Tab 7, SSEB Report, at 211-213. The protester argues that the solicitation did not provide for the evaluation of past performance in connection with these factors, and that the agency therefore improperly departed from the terms of the solicitation.

Fisher contends that the arguments in its comments were not new or supplemental, because its initial protest broadly challenged the evaluation of proposals. Protester's Response to Intervenor's Request for Dismissal, June 6, 2019, at 3. The protester also explains that its specific arguments concerning the consideration of past performance in connection with other evaluation factors were based on the evaluation documents provided by the agency. Id. at 3-4. We conclude that the new arguments are supplemental protest grounds that were required to independently meet the timeliness rules under our Bid Protest Regulations. In this regard, the protester's comments challenged specific strengths and significant strengths assigned to the awardee's proposal--information first disclosed to the protester in the agency's document production. We find that these arguments are supplemental protest grounds, as they would have required a supplemental response from the agency addressing whether the evaluation improperly considered past performance in connection with other evaluation factors. See FR Countermeasures, Inc., supra.

In addition, the new arguments were not timely filed because they were filed more than 10 days after the protester's receipt of the documents upon which the arguments were based. As noted, the agency provided documents for its report on the protest on May 15, but provided its memorandum of law and contracting officer's statement on May 20. The protester filed its comments on May 30. Although the protester's comments were timely filed based on the May 20 filing of the memorandum of law and contracting officer's statement, the protester's supplemental arguments regarding the consideration of past performance information in other evaluation factors were based on documents filed by the agency on May 15, specifically the SSEB report and award decision. Supplemental protest arguments based on documents filed by the agency on May 15 would have been due on May 28, due to weekends and the May 27 Memorial Day holiday. See 4 C.F.R. § 21.0(d). On this record, we conclude that the protester's arguments regarding the consideration of past performance information in the evaluation of SLS's proposal under the subcontracting, utility coordination, and fabrication factors, are untimely and are dismissed. See Vigor Shipyards, Inc., supra.

SLS's Qualifications to Perform the Contract

Finally, Fisher argues that the Corps failed to reasonably evaluate SLS's proposal based on what the protester contends is information showing that the awardee was unqualified to perform the work based on its performance of another border wall contract. For the reasons discussed below, we conclude that the protester is not an interested party to challenge this issue.

A protester is an interested party to challenge the agency's evaluation of proposals where there is a reasonable possibility that the protester would be next in line for award if its protest were sustained. SRA Int'l, Inc.; NTT Data Servs. Fed. Gov't, Inc., B-413220.4 et al., May 19, 2017, 2017 CPD ¶ 173 at 28; Ridoc Enter., Inc., B-292962.4, July 6, 2004, 2004 CPD ¶ 169 at 9. In this regard, where there is an intervening offeror who would be in line for the award even if the protester's challenges were sustained, the intervening offeror has a greater interest in the procurement than the protester, and we generally consider the protester's interest to be too remote to qualify it as an interested party. See SRA Int'l, Inc.; NTT Data Servs. Fed. Gov't, Inc., supra.

Fisher argues that, based on its analysis of information "currently available," SLS's performance of work for a border wall project in California involved an unsafe alteration of design specifications and unsatisfactory levels of performance. Protest at 10; Protester's Comments, May 30, 2019, at 10. The protester contends that the agency failed to reasonably consider this information in its evaluation of the awardee's proposal.

As discussed above, we find no basis to sustain any of Fisher's arguments concerning the evaluation of proposals. For this reason, we find no basis to question the agency's conclusion that the two highest-rated proposals were submitted by SLS and Offeror 3. See AR, Tab 8, Selection Decision, at 235-37. We therefore need not address the protester's arguments regarding SLS's past performance and experience, as the protester is not an interested party to challenge this matter.¹¹ In this regard, even if the protester were correct that SLS's past performance should have caused it to receive a

¹¹ For the record, the Corps states that it had no information regarding unsafe or unsatisfactory performance of the California project by SLS. MOL at 12-13. In support of the agency's position, the chair of the agency's source selection evaluation board for the instant procurement states that he is "very familiar with SLS's work and performance" under all of its border construction contracts, and is "not aware of any unsafe work performed by SLS or its subcontractors on any current [Army Corps of Engineers] contract." AR, Tab 15, Decl. of SSEB Chair, May 20, 2019, at 256.

lower, or even unacceptable rating, Offeror 3's proposal would remain in line for award ahead of the protester's. See SRA Int'l, Inc.; NTT Data Servs. Fed. Gov't, Inc., supra.

The protest is dismissed in part and denied in part.

Thomas H. Armstrong
General Counsel