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INSPECTOR GENERAL

U.S. Department of Defense

NOVEMBER 12, 2021



(U) Audit of the U.S. Army Corps of Engineers Border Infrastructure Contract

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(U) Results in Brief

(U) Audit of the U.S. Army Corps of Engineers Border Infrastructure Contract

November 12, 2021

(U) Objective

(U) The objective of this audit was to determine whether the U.S. Army Corps of Engineers (USACE) solicited and awarded contract W912PL-20-C-0004 to design and build border infrastructure in accordance with Federal procurement laws and regulations. The audit included a review of the integrity of the procurement process and of whether there was inappropriate influence associated with contracting decisions.

(U) Background

(U) The Chairman of the U.S. House of Representatives Committee on Homeland Security sent a letter to the DoD Office of Inspector General (DoD OIG), seeking a review of the \$400 million contract USACE awarded to Fisher Sand and Gravel Company (Fisher Sand and Gravel) to design and build border infrastructure in Yuma County, Arizona. The letter requested a review of the award to ensure that the bid met the solicitation standards and that USACE made the award in accordance with Federal procurement laws and regulations.¹

(U) U.S. Customs and Border Protection requested USACE's services to assist with the execution of its border infrastructure program. USACE's mission is to deliver vital public and military engineering services; partnering in peace and war to strengthen

¹ (U) A solicitation is used in negotiated acquisitions to communicate Government requirements to prospective contractors.

(U) Background (cont'd)

(U) our Nation's security, energize the economy, and reduce risks from disasters. USACE's contracting office provides comprehensive contracting and acquisition solutions in times of peace, war, and disaster for USACE and its national and global partners. USACE accepted the request to support the border infrastructure.

(U) USACE established three prequalified sources lists to assist with the execution of U.S. Customs and Border Protection's border infrastructure program.² USACE posted an announcement to create Prequalified Sources List 3 for horizontal construction contracts for southwestern border security and immigration enforcement improvements.³ USACE determined that five companies, including Fisher Sand and Gravel, met all of the evaluation criteria standards of acceptability based upon the comparison and placed them on Prequalified Sources List 3.

(U) USACE solicited and awarded contract W912PL-20-C-0004 (Yuma 3 Project) using Prequalified Sources List 3. The Yuma 3 Project was for the construction of approximately 31 miles of 30-foot high new primary and secondary bollard walls, including gates, roads, drainage improvements, demolition, and disposal, and fiber optic cables near Yuma, Arizona. The solicitation stated that the selection for award was determined using the Lowest Price Technically Acceptable (LPTA) procedures in accordance with the Federal Acquisition Regulation.⁴ The companies were required to submit both a non-price element proposal and a price proposal. The non-price element proposal included an executive summary, past performance, a small business participation plan, and commitment letters.

² (U) A prequalified sources list is a list of contractors predetermined to be qualified to perform a specific construction contract.

³ (U) Defense Federal Acquisition Regulation Supplement 236.272, "Prequalification of Sources."

⁴ (U) Federal Acquisition Regulation Part 15, "Contracting by Negotiation," Subpart 15.101-2, "Lowest Price Technically Acceptable Source Selection Process," states that the solicitation must specify that award will be made based on the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors.



(U) Results in Brief

(U) Audit of the U.S. Army Corps of Engineers Border Infrastructure Contract

(U) Finding

(U) USACE contracting officials properly awarded contract W912PL-20-C-0004 (Yuma 3 Project) to Fisher Sand and Gravel. Specifically, USACE contracting officials solicited and awarded the Yuma 3 Project contract to design and build border infrastructure in accordance with Federal procurement laws and regulations. We reviewed Fisher Sand and Gravel's proposal, compared it to the solicitation, and agreed with USACE's assessment that it was the LPTA and was properly awarded the contract.

(U) Additionally, USACE officials testified that there was no undue influence, and none of the information and documents reviewed by the DoD OIG provided evidence that there was undue influence from the White House or Members of Congress that affected the award of the Yuma 3 Project contract to Fisher Sand and Gravel. However, as a condition for us to interview certain USACE employees, the White House Counsel's Office insisted that DoD Office of General Counsel attorneys attend in order to instruct witnesses on whether to answer our questions. For 6 of the 13 USACE witnesses, the DoD Office of General Counsel attorney instructed them not to answer our specific questions about

(U) communications between the White House and senior USACE officials, including not only the substance of the communications but the fact that those communications occurred. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these interviewee assertions. In this report, we recount the interviewees' assertions that any White House communications did not unduly influence the procurement and the specific questions that they were prohibited from answering. In addition, the USACE employees who solicited and awarded the Yuma 3 Project contract answered all the under oath questions and testified that they were not influenced by the White House, Members of Congress, or senior USACE officials during the solicitation and award of the Yuma 3 Project contract. Although the DoD OGC attorneys, on behalf of the White House Counsel's Office, would not allow 6 of the key USACE officials to answer our questions about White House communications regarding the contract, we were able to review the e-mails of all 13 key USACE employees. We did not find any evidence in these e-mails of undue influence on the USACE employees that awarded the Yuma 3 Project contract in these key officials' e-mails.



**INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
4800 MARK CENTER DRIVE
ALEXANDRIA, VIRGINIA 22350-1500**

November 12, 2021

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR ACQUISITION
AND SUSTAINMENT
COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS
AUDITOR GENERAL, DEPARTMENT OF THE ARMY

SUBJECT: (U) Audit of the U.S. Army Corps of Engineers Border Infrastructure Contract
(Report No. DODIG-2022-034)

(U) This final report provides the results of the DoD Office of Inspector General's audit of the U.S. Army Corps of Engineers Border Infrastructure Contract. We considered management's comments on a discussion draft copy of this report when preparing this final report. We did not make any recommendations; therefore, no additional comments are required to the final report.

(U) We appreciate the cooperation and assistance we received during the audit. If you have any questions, please contact me at [REDACTED]

A handwritten signature in black ink, reading "Theresa S. Hull", is positioned above the printed name.

Theresa S. Hull
Assistant Inspector General for Audit
Acquisition, Contracting, and Sustainment

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(U) Acronyms and Abbreviations

(U) Introduction

(U) Objective

(U) The objective of this audit was to determine whether the U.S. Army Corps of Engineers (USACE) solicited and awarded contract W912PL-20-C-0004 to design and build border infrastructure in accordance with Federal procurement laws and regulations. The audit included a review of the integrity of the procurement process and of whether there was inappropriate influence associated with contracting decisions. See Appendix A for a discussion of the scope and methodology and prior audit coverage related to the audit objective.

(U) Background

(U) Representative Bennie Thompson, Chairman of the U.S. House of Representatives Committee on Homeland Security, sent a letter to the DoD Office of Inspector General (DoD OIG), seeking a review of the \$400 million contract USACE awarded to Fisher Sand and Gravel Company (Fisher Sand and Gravel) to design and build border infrastructure in Yuma County, Arizona. Fisher Sand and Gravel is a family of businesses, headquartered in Dickinson, North Dakota, that encompass all aspects of the aggregate production and heavy civil construction industries. For example, Fisher Sand and Gravel mines aggregate materials; sells various aggregate products; and provides concrete, asphalt, drilling, blasting, and paving services. See Appendix B for a copy of the congressional request from Representative Thompson. See Appendix C for a chronology of key events related to the USACE and Fisher Sand and Gravel border wall activities.

(U) Representative Thompson asserted that Fisher Sand and Gravel had not been awarded previous construction contracts because its proposals reportedly did not meet the operational requirements of U.S. Customs and Border Protection (CBP). See Appendix D for a discussion of Fisher Sand and Gravel's proposals. Additionally, Representative Thompson asserted that Fisher Sand and Gravel's prototype came in late and over budget. See Appendix E for a discussion of Fisher Sand and Gravel's prototype. Finally, Representative Thompson asserted that President Donald Trump repeatedly urged USACE to award construction contracts to Fisher Sand and Gravel, which raised concerns about the possibility of inappropriate influence on USACE's contracting decision. See Appendix F for a discussion of USACE's communication with President Trump, White House officials, and Members of Congress.

(U) Representative Thompson requested a review of the award to ensure that the bid met the solicitation standards and that USACE made the award in accordance with Federal procurement laws and regulations.⁵

(U) Requirements for Barriers Along the Southwest Border

(U) The Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) of 1996, as amended, requires the Secretary of Homeland Security to take necessary actions to install physical barriers and roads in the vicinity of the border to deter illegal crossings in areas of high illegal entry.⁶ The Secure Fence Act of 2006 amended the IIRIRA to require the Department of Homeland Security (DHS) to construct at least two layers of reinforced fencing, as well as roads, lighting, cameras, and sensors, on certain segments of the southwest border in California, Arizona, New Mexico, and Texas.⁷ The Secure Fence Act of 2006 also required that the DHS achieve and maintain operational control over U.S. borders through surveillance activities and physical infrastructure enhancements to prevent unlawful entry by foreign nationals and facilitate CBP access to the borders. The Consolidated Appropriations Act, 2008, amended the IIRIRA's border fencing section and replaced it with requirements for the DHS to construct at least 700 miles of reinforced fencing where it would be most practical and effective, and to install additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.⁸

(U) Presidential Executive Order 13767

(U) On January 25, 2017, President Trump issued Executive Order 13767 on border security and immigration enforcement improvements.⁹ The Executive Order was to deploy all lawful means to secure the U.S. southern border and prevent further illegal immigration in the United States. The Executive Order required the immediate construction of a physical wall to secure the southern border of the United States. Additionally, the Executive Order required the Secretary of Homeland Security to:

- (U) immediately plan, design, and construct a physical wall along the southern border, using the appropriate materials and technology that most effectively achieve complete operational control of the southern border;

⁵ (U) A solicitation is used in negotiated acquisitions to communicate government requirements to prospective contractors.

⁶ (U) Public Law 104-208, Division C, "Illegal Immigration Reform and Immigration Responsibility Act," Section 102, "Improvement of Barriers at Border."

⁷ (U) Public Law 109-367, "Secure Fence Act of 2006."

⁸ (U) Public Law 110-161, "Consolidated Appropriations Act," Section 564, "Improvement of Barriers at Border."

⁹ (U) Presidential Executive Order 13767, "Border Security and Immigration Enforcement Improvements," January 25, 2017.

- (U) identify and allocate all sources of Federal funds for the planning, designing, and constructing of a physical wall along the southern border;
- (U) project and develop long-term funding requirements for the wall; and
- (U) produce a comprehensive study of the security of the southern border.

(U) U.S. Army Corps of Engineers Border Infrastructure Acquisition Plan

(U) CBP requested USACE's services to assist with the execution of its border infrastructure program. USACE's mission is to deliver vital public and military engineering services; partnering in peace and war to strengthen national security, energize the economy, and reduce risks from disasters. USACE's contracting office provides comprehensive contracting and acquisition solutions in times of peace, war, and disaster for USACE and its national and global partners. USACE accepted the request to support the border infrastructure program.

(U) On May 24, 2017, USACE contracting officials issued an acquisition plan for prequalification of sources for horizontal construction contracts. The border infrastructure program includes a mix of border fence, wall, patrol roads, access roads, lights, gates, drainage improvements, levee walls, and other miscellaneous improvements, repairs, and alterations. USACE anticipated that the requirements would be both design-build and design-bid-build projects. The Federal Acquisition Regulation (FAR) defines design-build as combining design and construction in a single contract with one contractor, and design-bid-build as the traditional delivery method where design and construction are sequential and contracted for separately with two contracts and two contractors.¹⁰ The border infrastructure program was estimated at \$11 billion for U.S. southern border infrastructure construction between 2017 and 2022.

(U) The border infrastructure program had three distinct phases that included an immediate strategy for FY 2017, a near-term strategy for FYs 2018 and 2019, and a long-term strategy for FY 2019 and beyond. The immediate strategy for FY 2017 included the use of an existing DHS-funded multiple award task order contract (MATOC) to address initial construction requirements. The MATOC is an indefinite-delivery indefinite-quantity construction vehicle based on a general statement of work further defined with each individual task order. Indefinite-delivery indefinite-quantity contracts provide for an indefinite-quantity of supplies or services during a fixed period. USACE contracting officials awarded a contract to multiple construction companies in order to maximize competition and expedite the award process. USACE stated that the available MATOC contract

¹⁰ (U) FAR Part 36, "Construction and Architect-Engineering Contracts," Section 36.102, "Definitions."

(U) ceiling was limited. The available contracting ceiling was approximately \$100 million and would be mostly depleted by early FY 2018. The contract awards for the MATOC would not be sufficient to meet the projected near-term FY 2018 program needs.

(U) Due to the limited contract ceiling on the MATOC, coupled with the urgency of the near term construction projects, USACE developed multiple prequalified sources lists to meet the demand. A prequalified sources list is a list of contractors predetermined to be qualified to perform a specific construction contract. When a prequalified sources list is used, responding companies are limited to those with proven competence and capability to perform in the required manner. USACE stated that the prequalified sources list was necessary to address the FYs 2018 and 2019 urgent priorities in the DHS-designated high-risk areas. According to USACE's border infrastructure acquisition plan, the high-risk areas lack physical barriers to prevent unauthorized entry along stretches of the U.S. southwest border. See Table 1 for the near-term design-build projects and Appendix G for a picture of the Border Wall Sectors.

(U) Table 1. Near-Term Design-Build Projects

(U) Number	Project Title	Location	Mileage
(U) 1	San Diego Sector Secondary Concrete Wall	San Diego Sector	14
(U) 2	Rio Grande Valley Project FY 2018-A	Falcon Dam to Rio Grande City, Texas	16
(U) 3	Rio Grande Valley Project FY 2018-B	Rio Grande City to Los Ebanos, Texas	16
(U) 4	San Diego Sector Replacement of Primary Fencing	San Diego Sector	14
(U) 5	El Paso Sector Replacement of Primary Fencing	El Paso, Texas	20
(U) 6	Rio Grande Valley Project FY 2018-C	East Weslaco Station, Texas	8
(U) 7	Rio Grande Valley Project FY 2018-D	West and Central McAllen, Texas	11
(U) 8	Rio Grande Valley Project FY 2018-E	West Weslaco Station, Texas	12 (U)

(U) Source: USACE.

(U) USACE estimated each project to be more than \$100 million, representing approximately \$1.8 billion of the total \$11 billion. The intent of the prequalified sources list was to meet the near-term construction requirements until a new

(U) MATOC or other long-term strategy was completed, which takes at least 6 months to solicit and award a MATOC. USACE took approximately 10 months to establish the Western MATOC and approximately 15 months to establish the Eastern MATOC.

(U) USACE's long-term strategy was to develop a solution to satisfy additional contracts for the border infrastructure program between FYs 2019 and 2024. USACE anticipated the long-term strategy to cost approximately \$9 billion of the \$11 billion; however, the total cost of the long term strategy was dependent on the number of near-term projects awarded under the prequalified sources list. If all eight projects were not awarded under the prequalified sources list, any remaining projects would be included as part of the long term strategy. USACE established the Eastern and Western MATOCs in July 2018 to assist with the long-term strategy.

(U) Presidential Memorandum on Securing the U.S. Southern Border

(U) On April 4, 2018, President Trump issued a memorandum to the Secretary of Defense, the U.S. Attorney General, and the Secretary of Homeland Security on securing the U.S. southern border.¹¹ President Trump directed the Secretary of Defense to support the DHS in securing the southern border and taking necessary actions against drugs, criminal activity, and foreign nationals who illegally enter the United States. The Secretary of Defense was to request use of National Guard personnel to assist in fulfilling this mission. Additionally, the Secretary of Defense and Secretary of Homeland Security were required to determine what other resources and actions were necessary to protect the U.S. southern border.

(U) National Emergency Declared at the Southern U.S. Border

(U) On February 15, 2019, President Trump issued a proclamation declaring a national emergency on the southern border of the United States.¹² He stated that the situation at the southern border presents a border security and humanitarian crisis that threatens national security interests and constitutes a national emergency. President Trump provided additional construction authority to the DoD to support the U.S. Government's response to the emergency at the southern border.

¹¹ (U) Presidential Memorandum for the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security, "Securing the Southern Border of the United States," April 4, 2018.

¹² (U) Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States, February 15, 2019.

(U) On February 25, 2019, the Executive Secretary of the DHS requested that the DoD assist the DHS in its efforts to secure the southern border. Specifically, the DHS requested that the DoD assist with the replacement of approximately 218 miles of existing vehicle barriers or dilapidated pedestrian fencing with new pedestrian fencing, construction of roads, and installation of lighting in the El Centro Sector, Yuma Sector, Tucson Sector, and El Paso Sector project areas. See Table 2 for the Southern Border Project Areas.

(U) Table 2. Southern Border Project Areas

(U) Number	Project Area	Miles
(U) 1	El Centro 1 Project	15
(U) 2	Yuma Sector	42
	Yuma 1 Project	5
	Yuma 2 Project	6
	Yuma 3 Project	31
(U) 3	Tucson Sector	91
	Tucson 1 Project	38
	Tucson 2 Project	5
	Tucson 3 Project	20
	Tucson 4 Project	26
	Tucson 5 Project	2
(U) 4	El Paso Sector	70
	El Paso 1 Project	46
	El Paso 2 Project	24
(U) Total		218 (U)

(U) Source: USACE.

(U) On March 1, 2019, the Acting Secretary of Defense directed an evaluation of the DHS's request for assistance. He required the Secretary of the Army and USACE's Chief of Engineers and Commanding General to provide two preliminary cost estimates for the DHS-requested border fencing construction projects covering 218 miles using bollard heights of 18 and 30 feet. On March 21, 2019, the Assistant Secretary of Defense (Homeland Defense and Global Security) issued

(U) an action memorandum addressing the DHS's request and presented different priority options. On March 25, 2019, the Acting Secretary of Defense approved up to \$1 billion of support for the Yuma 1 and 2 Projects and El Paso 1 Project that included 57 miles of 18 foot bollard pedestrian fencing, constructing and improving roads, and installing lighting. The Acting Secretary of Defense stated that USACE will be the construction agent and will take all necessary actions to undertake construction in FY 2019. Additionally, the Acting Secretary of Defense stated that USACE should undertake construction as quickly as possible, consistent with applicable laws, in light of the urgent and compelling nature of the crisis at the southern border, as described by President Trump, the Secretary of Homeland Security, and other DHS officials. On April 9, 2019, the Acting Secretary of Defense issued a memorandum to the Acting Secretary of Homeland Security approving the construction of pedestrian fencing for the Yuma Sector Project 1 and El Paso 1 Project, with 30-foot steel bollard with anti-climb plate, and the Yuma 2 Project, with 18 foot steel bollard with anti-climb plate.

(U) On August 16, 2019, the DHS submitted an assistance request for additional miles of border barrier construction under the Yuma 3, 4, and 5 Projects. On August 26, 2019, the Secretary of Defense approved the assistance for the Yuma 4 and 5 Projects and the Tucson 4 Project, which was previously requested.

(U) Secretary of Defense Memorandum on Military Construction at the U.S. Southern Border

(U) On September 3, 2019, the Secretary of Defense issued a memorandum for the Acting Under Secretary of Defense (Comptroller)/Chief Financial Officer, DoD, related to military construction necessary to support the use of the Armed Forces in addressing the national emergency at the southern border. The Secretary of Defense determined that 11 military construction projects for border barrier construction, with an estimated total cost of \$3.6 billion, were necessary to support the use of the Armed Forces in connection with the national emergency. The Secretary of Defense approved and directed that \$3.6 billion in unobligated military construction funds be made available for the 11 military construction projects. See Table 3 for a list of the 11 projects that were included in the El Centro Sector, Yuma Sector, Laredo Sector, El Paso Sector, and San Diego project areas.

(U) Table 3. Projects Located in the El Centro, Yuma, Laredo, El Paso, and San Diego Areas

(U) Number	Project Area	Miles
(U) 1	El Centro Sector	13
	El Centro 5 Project	1
	El Centro 9 Project	12
(U) 2	Yuma Sector	65
	Yuma 2 Project	2
	Yuma 3 Project	31
	Yuma 6 Project	1
	Yuma 10/27 Project	31
(U) 3	Laredo 7 Project	52
(U) 4	El Paso Sector	29.5
	El Paso 2 Project	23.5
	El Paso 8 Project	6
(U) 5	San Diego	4.5
	San Diego 4 Project	1.5
	San Diego 11 Project	3
(U) Total		164 (U)

(U) Source: The DoD.

(U) USACE Solicitation and Award Process for Contract W912PL-20-C-0004 (Yuma 3 Project)

(U) On October 9, 2019, USACE contracting officials issued a notice of intent to solicit a design-build requirement for the Yuma 3 Project to five contractors that were on Prequalified Sources List 3, including Fisher Sand and Gravel. The Yuma 3 Project was for the replacement of 31 miles of vehicle barriers with new pedestrian fencing along the U.S. border near Yuma, Arizona. The Yuma 3 Project began approximately 0.4 miles east of the Barry M. Goldwater Range and continued for 31 miles east along the international border at the southern perimeter of the Cabeza Prieta National Wildlife Refuge in Yuma County, Arizona. See Appendix H for a picture of Yuma Area Projects and the Yuma 3 Project.

(U) On October 23, 2019, USACE contracting officials issued a solicitation for the construction of approximately 31 miles of 30-foot high new primary and secondary bollard walls, including gates, roads, drainage improvements, demolition, and

(U) disposal, and fiber optic cables near Yuma, Arizona (Yuma 3 Project). Selection for award was determined using the Lowest Price Technically Acceptable (LPTA) procedures in accordance with the FAR and DoD Source Selection Procedures.¹³ On December 2, 2019, USACE awarded firm-fixed-price contract W912PL-20-C-0004, valued at \$400 million, to Fisher Sand and Gravel. A firm-fixed-price contract does not allow for a price adjustment.

(U) Review of Internal Controls

(U) DoD Instruction 5010.40 requires DoD organizations to implement a comprehensive system of internal controls that provides reasonable assurance that programs are operating as intended and to evaluate the effectiveness of the controls.¹⁴ We identified that internal controls relevant to the audit objective were effective.

¹³ (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.101-2, "Lowest Price Technically Acceptable Source Selection Process," and Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics memorandum, "DoD Source Selection Procedures," April 1, 2016.

¹⁴ (U) DoD Instruction 5010.40, "Managers' Internal Control Program Procedures," May 30, 2013.

(U) Finding

(U) USACE Properly Awarded the Yuma 3 Project to Fisher Sand and Gravel

(U) USACE contracting officials properly awarded contract W912PL-20-C-0004 (Yuma 3 Project) to Fisher Sand and Gravel. Specifically, USACE contracting officials solicited and awarded the Yuma 3 Project contract to design and build border infrastructure in accordance with Federal procurement laws and regulations. We reviewed Fisher Sand and Gravel's proposal, compared it to the solicitation, and agreed with USACE's assessment that it was the LPTA and was properly awarded the contract.

(U) Additionally, USACE officials testified that there was no undue influence, and none of the information and documents reviewed by the DoD OIG provided evidence that there was undue influence from the White House or Members of Congress that affected the award of the Yuma 3 Project contract to Fisher Sand and Gravel. However, as a condition for us to interview certain USACE employees, the White House Counsel's Office insisted that DoD Office of General Counsel (OGC) attorneys attend in order to instruct witnesses on whether to answer our questions. For 6 of the 13 USACE witnesses, the DoD OGC attorney instructed them not to answer our specific questions about communications between the White House and senior USACE officials, including not only the substance of the communications but the fact that those communications occurred. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these interviewee assertions. In this report, we recount the interviewees' assertions that any White House communications did not unduly influence the procurement and the specific questions that they were prohibited from answering. In addition, the USACE employees who solicited and awarded the Yuma 3 Project contract answered all the under oath questions and testified that they were not influenced by the White House, Members of Congress, or senior USACE officials during the solicitation and award of the Yuma 3 Project contract. Although the DoD OGC attorneys, on behalf of the White House Counsel's Office, would not allow 6 of the key USACE officials to answer our questions about White House communications regarding the contract, we were able to review the e-mails of all 13 key USACE employees. We did not find any evidence in these e-mails of undue influence on the USACE employees that awarded the Yuma 3 Project contract in these key officials' e-mails.

(U) USACE Properly Solicited and Awarded Contract W912PL-20-C-0004 (Yuma 3 Project)

(U) USACE contracting officials properly awarded contract W912PL-20-C-0004 (Yuma 3 Project) to Fisher Sand and Gravel. Specifically, USACE contracting officials solicited and awarded the Yuma 3 Project contract to design and build border infrastructure in accordance with Federal procurement laws and regulations. Representative Thompson requested a review of the award to ensure that the bid met the solicitation standards and that USACE made the award in accordance with Federal procurement law and regulations. USACE contracting officials posted an announcement to create Prequalified Sources List 3 for horizontal construction contracts in support of the border infrastructure program along the U.S.-Mexico border in accordance with the Defense Federal Acquisition Regulation Supplement (DFARS).¹⁵ DFARS states that prequalification procedures may be used when necessary to ensure timely and efficient performance of critical construction projects. Additionally, DFARS states that the head of the contracting activity must: (1) authorize the use of prequalification by determining that a construction project is of an urgency or complexity that requires prequalification, and (2) approve the prequalification procedures.

USACE contracting officials properly awarded contract W912PL-20-C-0004 (Yuma 3 Project) to Fisher Sand and Gravel. Specifically, USACE contracting officials solicited and awarded the Yuma 3 Project contract to design and build border infrastructure in accordance with Federal procurement laws and regulations.

(U) Prequalified Sources List 3

(U) The Acting Secretary of Defense stated that USACE should undertake construction as quickly as possible in light of the urgent and compelling nature of the crisis at the southern border, as described by President Trump, the Secretary of Homeland Security, and other DHS officials. A USACE senior contracting official issued an acquisition plan approving the use of prequalification of sources for horizontal construction contracts in order to satisfy the requirements of the Presidential National Emergency Declaration, dated February 15, 2019. The solicitation required the contractors to meet the following eight rating criteria to be considered qualified for Prequalified Sources List 3.

1. (U) Have a single bonding capability of at least \$1.5 billion and an aggregate bonding capability of at least \$5 billion.

¹⁵ (U) DFARS 236.272, "Prequalification of Sources."

2. (U) Have the capability to perform at least three \$500 million construction contracts concurrently.
3. (U) Have completed a horizontal construction contract in the contiguous United States with a contract price of \$150 million or more within the last 5 years. Companies should include the performance rating, if it was rated.
4. (U) Demonstrate a satisfactory or above past performance record.
5. (U) Use an accounting system that can support Fixed-Price Economic Price Adjustment and Fixed-Price Incentive Firm Target contracts.
6. (U) Have the ability to successfully comply with the provisions of FAR 52.219-8, "Utilization of Small Business Concerns."
7. (U) Provide acceptable responses on implementation approach for construction of the planned type of border infrastructure in remote construction sites in the southwestern United States adjacent to the international border with Mexico.
8. (U) Certify that all responses to the prequalification of sources questionnaire are accurate and complete.

(U) On May 22, 2019, Fisher Sand and Gravel submitted a response to the eight questions, along with additional information that explained its accounting system, bonding capability, past performance, and the sequence of design-build construction schedule assuming a 365 day period of performance. Fisher Sand and Gravel's proposal met the eight solicitation rating criteria, and USACE placed the company on Prequalified Sources List 3. We reviewed Fisher Sand and Gravel's proposal and agreed with USACE's assessment that it met the solicitation requirements for all eight rating criteria. For example, we reviewed Fisher Sand and Gravel's proposal and found that it demonstrated the completion of a horizontal construction contract of \$150 million or more within the last 5 years. Additionally we found that the proposal demonstrated a satisfactory past performance record and provided an acceptable response on implementation approach for the planned construction of border infrastructure.

(U) Yuma 3 Project Award

(U) Selection for the Yuma 3 Project award was determined using the LPTA procedures in accordance with the FAR.¹⁶ For LPTA procedures, the FAR states that the solicitation must specify that award will be made based on the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors. DFARS requires contracting officers to follow the principles and procedures in the DoD Source Selection Procedures when conducting negotiated,

¹⁶ (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.101-2, "Lowest Price Technically Acceptable Source Selection Process."

(U) competitive acquisitions.¹⁷ The DoD Source Selection Procedures expand the LPTA procedures.¹⁸ Specifically, the DoD Source Selection Procedures require the evaluation of past performance within the LPTA process. Past performance should be evaluated to determine whether the offeror's present or past performance was relevant. Past performance should be rated on an acceptable or unacceptable basis. An acceptable past performance rating occurs when the Government had a reasonable expectation that the offeror would successfully perform the required effort based on the past performance record, and an unacceptable past performance rating occurs when the Government did not have a reasonable expectation that the offeror would be able to successfully perform the required effort. The FAR also requires that a small business subcontracting plan be included for any solicitations with subcontracting opportunities that are not small business set asides.¹⁹ Additionally, the DoD Source Selection Procedures state that the Source Selection Authority (SSA) must select the source whose proposal offers the lowest evaluated price and for which all non-price factors are rated as acceptable in accordance with established criteria.²⁰ The SSA is the individual designated to make the best value decision and is responsible for proper and efficient conduct of the source selection process in accordance with all applicable laws and regulations.

(U) On October 23, 2019, USACE contracting officials issued a solicitation to the contractors on Prequalified Sources List 3 for the construction of approximately 31 miles of 30-foot high new primary and secondary bollard walls, including gates, roads, drainage improvements, demolition, and disposal, and fiber optic cables near Yuma, Arizona (Yuma 3 Project). The solicitation stated that the selection for award was determined using the LPTA procedures. The companies were required to submit both a non-price element proposal and a price proposal. The non-price element proposal included an executive summary, past performance, a small business participation plan, and commitment letters.

(U) Evaluation of Price and Non-Price Elements

(U) The solicitation established evaluation criteria for each non-price element. The non-price element proposal included an executive summary, past performance, a small business participation plan, and commitment letters. USACE evaluated the quality of the companies' past performance. To review past performance for projects of similar size, scope, and complexity, USACE used, at a minimum, Contractor Performance Assessment Reporting System (CPARS) performance

¹⁷ (U) DFARS 215.3, "Source Selection."

¹⁸ (U) Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics memorandum, "DoD Source Selection Procedures," April 1, 2016.

¹⁹ (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.304, "Evaluation factors and significant subfactors."

²⁰ (U) Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics memorandum, "DoD Source Selection Procedures," April 1, 2016.

(U) records, the Past Performance Information Retrieval System (PPIRS), the Federal Awardee Performance and Integrity Information System (FAPIIS), and the System for Award Management. USACE assigned a rating of acceptable or unacceptable for past performance. USACE could issue an acceptable rating when the company was determined to have an unknown or neutral past performance in accordance with the FAR.²¹ The FAR states that an offeror may not be evaluated favorably or unfavorably on past performance when an offeror does not have a record of relevant past performance or past performance information is not available. The company will be determined to have unknown or neutral past performance when a company does not have a relevant record of past performance or the record is so sparse that no meaningful past performance rating can be reasonably assigned.

(U) In addition, USACE evaluated the proposed participation of U.S. small businesses in the performance of the contract. USACE assigned a rating of acceptable or unacceptable for small business participation. USACE assigned an acceptable rating when the proposal met the solicitation requirements or an unacceptable rating when a company's proposal did not demonstrate an adequate approach and understanding of the small business objectives, or did not meet or exceeds the overall requirement of 15 percent of the total contract value awarded to small businesses. A rating of unacceptable assigned to any non-price element may render the entire proposal unacceptable.

(U) Each company's price proposal and subcontracting plan included a contract line item number (CLIN) schedule, a copy of the company's bid guarantee or bid bond, and the acknowledgement of any amendments. CLINs are part of defense contracts that break the contract down by the items procured, including labor hours of services, funding for travel, and quantity of products. CLINs help identify the supplies or services to be acquired as separately identified line items on a contract that provides for accounting traceability. USACE stated that the proposed prices would not be rated or scored, but would be evaluated for fairness and reasonableness. USACE analyzed the prices to determine whether the companies reflected a clear understanding of the requirements.

(U) On November 13, 2019, Fisher Sand and Gravel submitted a non-price element proposal and a price proposal to USACE for the solicitation. Fisher Sand and Gravel's non-price element proposal included an executive summary, past performance, a small business participation plan, commitment letters, and a price proposal. On November 15, 2019, the Source Selection Evaluation Board (SSEB) completed its evaluations. The SSEB consists of a

²¹ (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.305, "Proposal Evaluation."

(U) SSEB Chairperson and SSEB members. The SSEB Chairperson is responsible for the overall management of the SSEB and establishes a functional evaluation team to support the source selection evaluation. The SSEB Chairperson ensures that the SSEB members possess the appropriate skills and training to perform the evaluation, follow the evaluation criteria, and apply the ratings consistently. The SSEB members must conduct a comprehensive review and evaluation of proposals based solely on the evaluation criteria outlined in the solicitation.

(U) The SSEB independently reviewed each proposal and evaluated the proposal against the evaluation factors outlined in the solicitation. The SSEB members received copies of the source selection plan and the contractor's proposals. According to the SSEB Chairperson, the SSEB members were in a locked-down room, isolated, and not permitted to contact anyone. Each member independently reviewed the proposals and took notes for the three proposals. After the initial independent evaluation, a consensus discussion occurred for each company, and USACE rated each non-price element. The SSEB rated two companies, including Fisher Sand and Gravel, as acceptable and one company as unacceptable. However, the SSA disagreed with the SSEB's unacceptable rating for the one company and overturned the decision. Therefore, all of the companies were rated as acceptable.

~~(U)~~ The SSEB rated Fisher Sand and Gravel's past performance as acceptable. A search of CPARS performance records, PPIRS, and FAPIIS did not return any past performance evaluations. According to the System for Award Management, Fisher Sand and Gravel had an activation date in the system in July 2019, and an initial registration date of February 2002. However, the SSEB considered other relevant past performance from Fisher Sand and Gravel. Fisher Sand and Gravel's proposal included [REDACTED] past performance questionnaires. The past performance questionnaires were for relevant projects of similar size and complexity to the work requested in the solicitation. Fisher Sand and Gravel received [REDACTED] ratings from the [REDACTED] customers on the past performance questionnaires. The SSEB considered Fisher Sand and Gravel's past performance acceptable because [REDACTED]
[REDACTED] and received an overall rating of [REDACTED] from the customers. The SSEB determined that Fisher Sand and Gravel would successfully perform the required effort and rated Fisher Sand and Gravel acceptable for past performance.

~~(U)~~ In addition, the SSEB found that the proposal met the solicitation requirement and rated Fisher Sand and Gravel's small business participation plan as acceptable. Fisher Sand and Gravel provided a completed small business participation plan indicating the plan to subcontract [REDACTED] percent of the work to small businesses, which exceeded the minimum solicitation goal of 15 percent.

~~(U)~~ Fisher Sand and Gravel received [REDACTED] commitment letters from small businesses. The scope of small business work varied to include [REDACTED]
[REDACTED]

(U) Fisher Sand and Gravel submitted the lowest price. On November 16, 2019, a USACE cost and price analyst completed an analysis on the proposed price to determine whether the prices were fair and reasonable. USACE performed a price analysis to verify that the price offered by the LPTA company was determined to be fair and reasonable based on the FAR.²² The FAR states that the contracting officer is responsible for evaluating the reasonableness of the offered prices. USACE conducted the price analysis that compared the price proposals to the independent cost estimate and the proposals from the other companies. The FAR states that the comparison of proposed prices with the independent government cost estimate and the comparison of proposed prices received in response to the solicitation are appropriate techniques to determine whether a proposed price is fair and reasonable.²³ USACE contracting officials determined that Fisher Sand and Gravel's price proposal was fair and reasonable.

(U) On November 25, 2019, the SSA determined that Fisher Sand and Gravel represented the best overall value to the Government because it was the LPTA offeror at \$400 million. On December 2, 2019, USACE awarded firm-fixed-price contract W912PL-20-C-0004, valued at \$400 million, to Fisher Sand and Gravel for the replacement of 31 miles of primary pedestrian and vehicle fence in Yuma County, Arizona. We reviewed Fisher Sand and Gravel's proposal, compared it to the solicitation, and agreed with USACE's assessment that it was the LPTA and was properly awarded the contract. We reviewed the non-price elements of the proposal and found that the proposal met the acceptable standard for all elements. Additionally, we compared the price proposals and found that Fisher Sand and Gravel was the LPTA offeror.

(U) Influence on the Solicitation and Award of Contract W912PL-20-C-0004 (Yuma 3 Project)

(U) USACE officials testified that there was no undue influence, and none of the information and documents reviewed by the DoD OIG provided evidence that there was undue influence from the White House or Members of Congress that affected the award of the Yuma 3 Project contract to Fisher Sand and Gravel. Several articles in the national media discussed the potential influence

²² (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.404-1, "Proposal Analysis Techniques."

²³ (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.404-1, "Proposal Analysis Techniques."

(U) from President Trump, senior White House officials, and Members of Congress. Representative Thompson asserted that President Trump repeatedly urged USACE to award construction contracts to Fisher Sand and Gravel. The FAR states that improper influence is any influence that induces a Government employee to act regarding a Government contract on any basis other than the merits of the matter.²⁴ However,

USACE officials testified that there was no undue influence, and none of the information and documents reviewed by the DoD OIG provided evidence that there was undue influence from the White House or Members of Congress that affected the award of the Yuma 3 Project contract to Fisher Sand and Gravel.

as a condition for us to interview certain USACE employees, the White House Counsel's Office insisted that DoD OGC attorneys attend in order to instruct witnesses on whether to answer our questions. For 6 of the 13 USACE witnesses, the DoD OGC attorney instructed them not to answer our specific questions about communications between the White House and senior USACE officials, including not only the substance of the communications but the fact that those communications occurred. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these interviewee assertions. In this report, we recount the interviewees' assertions that any White House communications did not unduly influence the procurement and the specific questions that they were prohibited from answering. In addition, the USACE employees who solicited and awarded the Yuma 3 Project contract answered all of the under oath questions and testified that they were not influenced by the White House, Members of Congress, or senior USACE officials during the solicitation and award of the Yuma 3 Project contract. Although the DoD OGC attorneys, on behalf of the White House Counsel's Office, would not allow 6 of the key USACE officials to answer our questions about White House communications regarding the contract, we were able to review the e-mails of all 13 key USACE employees. We did not find any evidence of undue influence on the USACE employees that awarded the Yuma 3 Project contract in these key officials' e-mails. See Appendix F for additional information on USACE communication with President Trump, White House officials, and Members of Congress.

(U) Representative Thompson cited a May 23, 2019 *Washington Post* article in his letter, which alleged that administration officials claimed that President Trump repeatedly brought up Fisher Sand and Gravel after hearing about the company in early 2019. The article stated that President Trump aggressively pushed Fisher Sand and Gravel to DHS leaders and Lieutenant General Todd Semonite,

²⁴ (U) FAR Part 3, "Improper Business Practices and Personal Conflicts of Interest," Subpart 3.401, "Definitions."

(U) USACE Chief of Engineers and Commanding General (Retired) in phone calls, White House meetings, and conversations aboard Air Force One during the past several months.²⁵ As the Chief of Engineers, Lieutenant General Semonite advised the Secretary of the Army and other principal officials on matters related to general, combat, and geospatial engineering; construction; real property; public infrastructure; and natural resources science and management. As the USACE Commanding General, he was responsible for more than 32,000 civilian employees and 700 military personnel who provide project management, construction support, and science and engineering expertise in more than 110 countries.

(U) According to the article, on May 23, 2019, President Trump requested that Lieutenant General Semonite attend a meeting at the White House to discuss the border barrier. According to an administration official cited in the article, President Trump immediately brought up Fisher Sand and Gravel. The article continued by stating that President Trump repeatedly told advisers that Fisher Sand and Gravel should be the company and that he has remained focused on the cost and progress of the wall.

(~~CUI~~) On May 21, 2019, in preparation for the May 23, 2019 meeting, the Special Assistant to the President e-mailed Lieutenant General Semonite [REDACTED]

[REDACTED] According to the e-mail, [REDACTED]
[REDACTED]

[REDACTED] On May 22, 2019, Lieutenant General Semonite responded that he would [REDACTED]

[REDACTED] and stated that the last few weeks has been “very successful” because USACE awarded \$1.5 billion in contracts in 6 days. Additionally, Lieutenant General Semonite stated that there were good discussions with Fisher Sand and Gravel officials and the company continued to be on the prequalified list for upcoming work.

(U) Additionally, the article stated that Mr. Jared Kushner, Senior Advisor to the President of the United States, had joined in the campaign for Fisher Sand and Gravel, along with Senator Kevin Cramer, U.S. Senator for North Dakota. In the article, Senator Cramer stated that the Trump administration had shown a great deal of interest in Fisher Sand and Gravel. “He always brings them up,” Senator Cramer stated, noting that he spoke with President Trump about Fisher Sand and Gravel twice, once in February and again on May 23, 2019. Each time, President Trump stated that he wanted Fisher Sand and Gravel to build some of the barrier.

²⁵ (U) *The Washington Post*, “He Always Brings Them Up: Trump Tries To Steer Border Wall Deal To North Dakota Firm,” May 23, 2019.

(U) The article also stated that President Trump's repeated attempts to influence USACE contracting decisions show the degree to which he was willing to insert himself into what was normally a staid legal and regulatory process designed to protect the U.S. Government from accusations of favoritism. According to the article, President Trump's personal intervention risked the perception of improper influence on decades-old procurement rules that required Government agencies to seek competitive bids, free of political interference. Representative Thompson asserted that these actions raised concerns about the possibility of inappropriate influence on USACE's contracting decision.

(U) To address the allegations in Representative Thompson's letter and the statements made in the articles, we held under oath interviews with 13 key USACE employees and reviewed their e-mails for any evidence of undue influence in the contracting process for the Yuma 3 Project award.

(U) Influence by the White House Administration

(U) We interviewed six senior USACE officials regarding their involvement with the Yuma 3 Project solicitation and award and interactions with President Trump and White House officials to assess whether there was any undue influence. However, the DoD OGC attorney asserted "presidential communications privilege" based on White House Counsel's guidance for communications between the White House and senior USACE officials and instructed several witnesses not to answer our specific questions about these communications, including not only the substance of the communications but the fact that those communications occurred. The DoD OGC attorney stated:

(U) Presidential communications privilege extends to conversations between the President and representatives of the DoD, anyone on the White House staff and the DoD, and any communications internal to the DoD concerning information received from the White House or staff.

(U) As a result, USACE officials did not provide information in the under oath interviews related to communications with the White House for us to use to determine whether the White House administration exerted any inappropriate influence that affected the integrity of the procurement process.

(U) When we requested an interview with Lieutenant General Semonite, the DoD OGC attorney advised us that Lieutenant General Semonite would not answer questions related to any communications with President Trump, members of the President's staff, or other White House officials. The DoD OGC attorney instructed senior USACE officials not to disclose information that would be covered by presidential communications privilege. The DoD OGC attorney

(U) stated that the President controls access to presidential communications within the Executive branch, and that as a general matter, the White House did not view the requirements of the Inspector General Act to overcome the President's constitutional authority to control presidential communications.

(U) As a result, Lieutenant General Semonite was instructed by the DoD OGC attorney not to answer any questions about communications between the President or White House officials and USACE officials regarding the solicitation and award of the Yuma 3 Project and Fisher Sand and Gravel. According to the DoD OGC attorney, the White House makes the final approval before any presidential communications could be disclosed to the DoD OIG.

(U) We informed the DoD OGC attorney that we understood the concept of presidential communications privilege, but the release of any information potentially protected by the presidential communications privilege to the DoD OIG would not waive the privilege. The DoD OIG is part of the Executive branch and therefore distinct from other entities outside the Executive branch that may seek such privileged information. We also cited the Inspector General Act of 1978, as well as DoD issuances, regarding the DoD OIG's authority to review matters related to DoD operations, such as the solicitation and award of the Yuma 3 Project contract. Furthermore, we informed the DoD OGC attorney that we routinely receive and maintain information provided by DoD Components, including information identified as proprietary, classified, or privileged, and that we safeguard and do not further disclose any information in DoD OIG files and reports that is asserted to be privileged, including information potentially protected by the presidential communications privilege.

(U) Despite our authorities and our assurances to safeguard the information, the DoD OGC attorney maintained that the DoD OGC did not control the privilege. The attorney further stated that the USACE officials were instructed based on guidance from the White House Counsel not to disclose to the DoD OIG any communications between the White House and USACE officials related to the solicitation and award of the Yuma 3 Project contract and Fisher Sand and Gravel. We disagreed with the DoD OGC's opinion on the presidential communications privilege with respect to our review. However, we agreed to allow an attorney from the DoD OGC to be present during our interview of Lieutenant General Semonite for the sole purpose of asserting the presidential communications privilege. The DoD OGC attorney instructed the witness to not respond to questions that would elicit information about meetings or communications with the President or his staff.

(U) In addition to the Lieutenant General Semonite interview, the DoD OGC attorney insisted that the arrangement apply to our interviews of other senior USACE officials, including Mr. David Cooper, USACE Chief Counsel; Mr. Lloyd Caldwell, USACE Director of Military Programs; Brigadier General Glenn Goddard, USACE Deputy Director of Military Programs and National Program Manager for the Southwest Border Barrier; Ms. Jill Stiglich, USACE Director of Contracting; and Mr. Denver Heath, USACE Senior Contracting official. At the beginning of these six interviews, the DoD OGC attorney made the following statement.

(U) I am here for the express purpose of serving as agency counsel and asserting the Presidential Communications Privilege. That privilege extends to communications between the President of the United States and representatives of the Department of Defense. It also extends to communications between the White House staff and members of the Department of Defense. The communications also involves internal communications inside the Department of Defense with respect to White House communications. The very dates and existence of meetings with White House personnel comes within this privilege. There may be other privilege information discussed today such as the deliberative process privilege. Those privileges will not be asserted today but are expressly reserved. This matter may be still involved in litigation and we are very mindful of that fact, and we have to protect the Department of Defense's equities with respect to a litigation. Should there be an inadvertent disclosure today of presidential communications material, we would ask to be consulted on that before any transcript of this proceeding is used outside the Department of Defense.

(U) In each of these interviews, the DoD OGC attorney instructed the witnesses not to answer our questions related to communications between USACE officials and White House officials about the solicitation and award of the Yuma 3 Project and Fisher Sand and Gravel, or instructed the witnesses to answer only to the extent that their answers would not include information about White House communications. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these assertions. See Appendix I for the questions related to communications between USACE officials and White House officials that the DoD OGC attorney instructed witnesses not to answer.

(U) We also reviewed 988 e-mails between Fisher Sand and Gravel and USACE about border wall procurements to determine whether there was any evidence of inappropriate influence for the solicitation and award of the Yuma 3 Project. Based on the review, we did not find any evidence of inappropriate influence between Fisher Sand and Gravel and USACE that affected the solicitation and award of the Yuma 3 Project. Additionally, we requested that the

(U) Defense Information Systems Agency provide the Defense Enterprise E-mail Personal Storage Table files that included sent, received, and deleted e-mails from July 1, 2018, through December 31, 2019 for 13 key USACE employees. See Appendix A for a list of the 13 key USACE employees. We reviewed 34,151 e-mails to determine whether there was any evidence of inappropriate influence for the solicitation and award of the Yuma 3 Project. We did not find any evidence in these e-mails of inappropriate influence by the White House administration, Members of Congress, or senior USACE officials that affected the solicitation or award of the Yuma 3 Project.

(U) In addition, we requested that USACE provide Personal Storage Table files that included sent, received, and deleted e-mails from July 1, 2018, through December 31, 2019 for 13 key USACE employees. We did not find any evidence in these e-mails of inappropriate influence by the White House administration, Members of Congress, or senior USACE officials that affected the solicitation or award of the Yuma 3 Project. See Appendix A for a discussion of the e-mail review for key USACE employees.

(~~CUI~~) We could not definitively determine the full extent or nature of interactions that White House officials had, or may have had, with senior USACE officials regarding the solicitation and award of the Yuma 3 Project and Fisher Sand and Gravel. During our interview with Lieutenant General Semonite, he stated that he did not recall receiving requests from the White House about Fisher Sand and Gravel. As stated previously, a DoD OGC attorney instructed him not to answer any questions about communications with the President or White House officials regarding the solicitation and award. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these assertions. However, we identified several interactions between March 7, 2019, and May 23, 2019, [REDACTED]

For example, according to an e-mail about a May 1, 2019 telephone conversation, Lieutenant General Semonite wrote that he [REDACTED]

[REDACTED] According to Lieutenant General Semonite, he had two meetings with [REDACTED]

(~~CUI~~) Lieutenant General Semonite stated that he did not recall receiving any information from the White House specifically related to Fisher Sand and Gravel. However, we identified a May 6, 2019 e-mail [REDACTED] [REDACTED] provide a promotional video of Fisher Sand and Gravel to Lieutenant General Semonite, which he received the

(~~CUI~~) same day. Lieutenant General Semonite stated that any communications with [REDACTED] did not influence the solicitation and award of the Yuma 3 Project contract to Fisher Sand and Gravel. According to Lieutenant General Semonite, he, “went out of his way to assure that there was absolutely no pressure on anybody.” According to Lieutenant General Semonite, the direction he provided USACE staff was that it was important to “do it right” and maintain integrity. Mr. Cooper stated that Lieutenant General Semonite’s direction was that USACE staff should not be influenced or swayed by politicians or anyone else and should award contracts based on merit. Brigadier General Goddard and Ms. Stiglich both stated that Lieutenant General Semonite did not discuss pressure from the White House to award contracts to Fisher Sand and Gravel during his meetings with senior USACE personnel. Mr. Cooper, Brigadier General Goddard, Ms. Stiglich, and Mr. Heath all stated under oath that there was no influence by the White House for the solicitation and award of the Yuma 3 Project contract to Fisher Sand and Gravel. As stated previously, a DoD OGC attorney instructed six key USACE employees not to answer any questions about communications with the President or White House officials regarding the solicitation and award. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these assertions. Additionally, the contracting officer, SSA, SSEB Chairperson, and two SSEB technical members all stated under oath that they did not have any communications with President Trump or any White House administration staff about border wall infrastructure and the use of Fisher Sand and Gravel. They did not feel any outside influence when they made their decisions on the solicitation and award of the Yuma 3 Project contract.

(U) Influence by Members of Congress

(U) We identified communications between Senator Cramer and Senator John Hoeven, U.S. Senators for North Dakota, with senior USACE officials on the border wall solicitations and Fisher Sand and Gravel. Lieutenant General Semonite stated that Senator Cramer was a “very strong advocate” for Fisher Sand and Gravel. He stated that Senator Cramer always brought up Fisher Sand and Gravel during their meetings. According to Lieutenant General Semonite, Senator Cramer wanted the taxpayers to get the best value, and the Senator was convinced that Fisher Sand and Gravel was the cheapest and the fastest company. Lieutenant General Semonite stated that USACE goes through an “unbelievable bureaucratic process” to make sure that the contracting process is done right. Lieutenant General Semonite stated that he believed that Senator Cramer was convinced that Fisher Sand and Gravel was better than the contractors that were awarded previous border wall contracts.

(U) According to Lieutenant General Semonite, Senator Cramer did not ask USACE to award a contract to Fisher Sand and Gravel but strongly encouraged USACE to consider Fisher Sand and Gravel for its innovative construction process. As stated previously, a DoD OGC attorney instructed him not to answer any questions about communications with the President or White House officials regarding the solicitation and award. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these assertions.

(U) During the interview with Lieutenant General Semonite, he stated that he was not against innovation but the contractor's methodology had to meet the solicitation and originally, Fisher Sand and Gravel's approach did not meet the parameters for building the wall. For example, Lieutenant General Semonite stated that there was a requirement to build the wall no more than 3 feet from the border and that it had to be built from the United States side of the border because the company was not allowed to enter Mexico to build the wall. Fisher Sand and Gravel's original process was to build the wall from both sides of the border. However, the border wall could not be built from Mexico. Fisher Sand and Gravel proposed to move the entire wall back 30 feet from the border. Lieutenant General Semonite stated that while the process was innovative, it did not meet the requirements of being 3 feet from the border. Fisher Sand and Gravel had since modified that process, but at the time, it did not meet CBP standards. Ultimately, Lieutenant General Semonite stated that Senator Cramer did not influence the solicitation and award of the Yuma 3 Project contract and that he did not feel pressured to use Fisher Sand and Gravel after leaving meetings with Senator Cramer. As stated previously, a DoD OGC attorney instructed him not to answer any questions about communications with the President or White House officials regarding the solicitation and award. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these assertions.

(U) Mr. Cooper, Mr. Caldwell, and Brigadier General Goddard confirmed Lieutenant General Semonite's statements that Senator Cramer advocated for Fisher Sand and Gravel. Additionally, Brigadier General Goddard stated that Senator Cramer did not ask USACE to award the contract to Fisher Sand and Gravel. Brigadier General Goddard, Ms. Stiglich, and Mr. Heath stated that Senator Cramer did not have any influence on the source selection decision. As stated previously, a DoD OGC attorney instructed six key USACE employees not to answer any questions about communications with the President or White House officials regarding the solicitation and award. Because we were unable to ask followup questions or further explore matters relating to any White House communications,

(U) we are unable to substantiate or refute these assertions. Additionally, the contracting officer, SSA, SSEB Chairperson, and two SSEB technical members all stated under oath that they did not have any communications with Senator Cramer or his staff, or any other Members of Congress about border wall infrastructure and the use of Fisher Sand and Gravel and did not feel any outside influence when they made their decisions on the solicitation and award of the Yuma 3 Project contract. We also reviewed key employee e-mails and did not find any evidence of communication between the contracting officer, SSA, SSEB Chairperson, and two SSEB technical members with any Members of Congress.

(U) According to e-mails, Senator Hoeven had telephone conversations with Lieutenant General Semonite and Brigadier General Mike Hoskin, USACE Director of Contracting (Retired), in which he expressed support for Fisher Sand and Gravel. Additionally, Senator Hoeven's staff requested specific border wall information from USACE. According to Lieutenant General Semonite, he talked to Senator Hoeven a couple of times about a civil works project in Fargo, North Dakota and Senator Hoeven had a cursory comment about using Fisher Sand and Gravel. Mr. Cooper, Mr. Caldwell, Brigadier General Goddard, Ms. Stiglich, and Mr. Heath stated that they did not have any communication with Senator Hoeven. As stated previously, a DoD OGC attorney instructed them not to answer any questions about communications with the President or White House officials regarding the solicitation and award. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these assertions.

(U) Influence by Senior USACE Officials

(U) The information we received showed that the USACE personnel who evaluated the solicitation information and awarded the Yuma 3 Project contract were not influenced regarding their decision by USACE leaders who communicated with the White House and Members of Congress. Lieutenant General Semonite stated that he briefed his senior staff on his meetings with Senator Cramer. He stated that Senator Cramer wanted USACE to think about using Fisher Sand and Gravel. However, according to Lieutenant General Semonite, his direction to USACE personnel was always to do what was right. Additionally, Lieutenant General Semonite discussed that he held programmatic updates with senior USACE officials. He stated that the programmatic updates occurred three times a week and discussed the aspects of the approximately 15 different contracts, including contractor names. In all of those discussions, Lieutenant General Semonite stated that he continued to provide instructions that he did not care who won the contracts and that it was important that USACE made sure that the decisions made were above reproach because border wall construction was a contentious issue

(U) with a lot of litigation. As stated previously, a DoD OGC attorney instructed him not to answer any questions about communications with the President or White House officials regarding the solicitation and award. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these assertions.

(U) We interviewed other USACE officials who attended the weekly meetings with Lieutenant General Semonite. Mr. Cooper, Mr. Caldwell, Brigadier General Goddard, Ms. Stiglich, and Mr. Heath all stated that they participated in USACE internal weekly meetings. Mr. Cooper, Mr. Caldwell, Brigadier General Goddard, and Mr. Heath stated that Lieutenant General Semonite directed senior USACE officials to be fair and objective, and follow the regulations in conducting source selections. Ms. Stiglich stated that Lieutenant General Semonite discussed general expectations, upcoming meetings, and anything that would affect the schedule for the border wall. Mr. Cooper, Mr. Caldwell, Brigadier General Goddard, and Ms. Stiglich all stated under oath that senior USACE officials did not influence USACE staff to award the Yuma 3 Project contract to Fisher Sand and Gravel. As stated previously, a DoD OGC attorney instructed them not to answer any questions about communications with the President or White House officials regarding the solicitation and award. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these assertions.

(U) Mr. David Wethington, USACE Future Directions Branch Chief and a congressional liaison responsible for communicating with committee and member staff about the USACE Civil Works Program, also occasionally participated in USACE internal weekly meetings. Specifically, he stated that he attended the weekly meeting approximately six times between April and August 2019, and that Fisher Sand and Gravel was referenced maybe once or twice during those meetings. He stated that Fisher Sand and Gravel was discussed when the company had been determined qualified and placed on one of the prequalification lists. Mr. Wethington stated that it was common knowledge from information reported by the media that Senator Cramer was pressuring USACE to use Fisher Sand and Gravel. However, he also noted that, other than Lieutenant General Semonite acknowledging Senator Cramer's public statements and instructing everyone to follow the law and not to listen to the media, there was no discussion of outside pressure. Mr. Wethington stated that he did not believe that any pressure from Senator Cramer or his office impacted the prequalified sources list or the contract award.

(U) Lieutenant General Semonite; Mr. Cooper; Mr. Caldwell; Brigadier General Goddard; Ms. Stiglich; Mr. Heath; Mr. Richard Jenkins, USACE Acquisitions Support Division Chief; and Mr. Wethington all stated under oath that they had no involvement in the solicitation and award of the Yuma 3 Project contract. Lieutenant General Semonite stated that he did not know who was assigned or who approved the specific individuals who sit on the different source selection boards. He stated that he did not see any results of the contract documentation or who won border wall contracts because he was busy building billion dollar items and did not get involved in that level of dialogue. As stated previously, a DoD OGC attorney instructed 6 of the 13 key USACE employees not to answer any questions about communications with the President or White House officials regarding the solicitation and award. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these assertions. We interviewed the personnel involved in the evaluation of the solicitation information and award of the Yuma 3 Project, including the contracting officer, the SSA, and the SSEB Chairperson and technical members. The contracting officer, SSA, SSEB Chairperson, and two SSEB technical members all stated under oath that they did not have any communications with USACE leadership about border wall infrastructure and Fisher Sand and Gravel. Additionally, they stated that they did not feel any outside influence when they made their decisions on the solicitation and award of the Yuma 3 Project contract. According to a member of the SSEB, the selection process was one of the most discreet selections in which he had been involved. The SSA would not allow any information to “get out” even when there were multiple staff meetings. These witnesses also told us under oath that nothing influenced the integrity of the procurement process or the award of the Yuma 3 Project contract.

(U) Conclusion

(U) Based on the information provided in under oath interviews and the e-mails and contract documentation reviewed, we determined that USACE contracting officials solicited and awarded the Yuma 3 Project contract to design and build border infrastructure in accordance with Federal procurement laws and regulations. In addition, the contracting officer, SSA, SSEB Chairperson, and technical members for the Yuma 3 Project contract testified that they were not influenced by the White House, Members of Congress, or senior USACE officials during the solicitation and award of the Yuma 3 Project contract. We also reviewed the e-mails of 13 key USACE employees and determined that there was no evidence of undue influence on the USACE employees who awarded the Yuma 3 Project contract in these key officials’ e-mails.

(U) Appendix A

(U) Scope and Methodology

(U) We conducted this performance audit from December 2019 through November 2021 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

(U) To determine whether USACE solicited and awarded the Yuma 3 Project to design and build border infrastructure in accordance with Federal procurement laws and regulations and whether any alleged influence affected the integrity of the procurement process, we interviewed officials from the Office of the Under Secretary of Defense for Acquisition and Sustainment, USACE Headquarters, USACE Los Angeles District-Task Force Barrier, USACE Fort Worth District, and Fisher Sand and Gravel. Specifically, we obtained and reviewed contract documentation from USACE and Fisher Sand and Gravel; conducted 13 under oath witness interviews; reviewed e-mails of 13 key USACE employees and e-mail correspondence between USACE and Fisher Sand and Gravel; reviewed media articles; and reviewed Federal laws and DoD regulations, and guidance.

(U) The White House Counsel's Office, the U.S. Senate Committee on Armed Services, Senator Cramer, Senator Hoeven, the DoD Office of General Counsel, and Fisher Sand and Gravel reviewed and commented on relevant portions of the discussion draft report, and any comments provided were considered in preparing the final report.

(U) USACE Site Visits and Documentation

(U) We conducted a site visit to USACE Headquarters, Washington D.C., and USACE Los Angeles District-Task Force Barrier, Phoenix, Arizona. We obtained and reviewed documentation from USACE for border infrastructure projects. Specifically, we reviewed solicitations and amendments, contractor proposals, source selection documentation, and contract awards for:

- (U) Prequalified Sources Lists 1, 2, and 3;
- (U) the Eastern and Western MATOCs and task orders W9126G-19-F-0249 (Rio Grande Valley 6 Project), W9126G-19-F-6147 (Rio Grande Valley 8 Project), W9126G-19-F-6154 (Rio Grande Valley 9 Project), W9126G-19-F-6152 (Rio Grande Valley 10 Project), W912PL-20-F-0010

(U) (Yuma 6 Project), W50UW8-20-F-0002 (El Paso 2 Segment 2 Project), W50UW8-20-F-0003 (El Paso 2 Segment 3 Project), and W912PL-20-F-0006 (San Diego 4 Project); and

- (U) contracts W9126G-19-C-0011 (FY 2018 California Project), W912PL-19-C-0013 (Yuma 1 and 2 Projects), W912PL-19-C-0014 (Yuma 1 and El Centro 1 Projects), W912PL-19-C-0015 (Tucson 1, 2, and 3 Projects), W912PP-19-C-0018 (El Paso 1 Project), W912PL-20-C-0002 (Yuma 2 and Yuma 10/27 Projects), and W912PL-20-C-0004 (Yuma 3 Project).

(U) We reviewed prior contract documentation to determine a timeline of events for previous Fisher Sand and Gravel proposals. Additionally, we reviewed contract documentation for the Yuma 3 Project to determine whether USACE solicited and awarded the Yuma 3 Project to design and build border infrastructure in accordance with Federal procurement laws and regulations and whether any alleged influence affected the integrity of the procurement process. We also reviewed USACE acquisition plans, market research reports, and protest files related to the Yuma 1 and 2 Projects and El Paso 1 Project.

(U) Under Oath Witness Interviews

(U) We conducted 13 under oath witness interviews of senior USACE personnel involved with the border wall infrastructure program and contracting process. Specifically, we interviewed the following individuals to identify their roles and responsibilities for the solicitation and award of the Yuma 3 Project.

- (U) Lieutenant General Semonite, USACE Chief of Engineers and Commanding General (Retired)
- (U) Mr. David Cooper, USACE Chief of Counsel
- (U) Mr. Lloyd Caldwell, USACE Director of Military Programs
- (U) Brigadier General Glenn Goddard, USACE Deputy Director of Military Programs and National Program Manager for the Southwest Border Barrier
- (U) Ms. Jill Stiglich, USACE Director of Contracting
- (U) Mr. Denver Heath, USACE Senior Contracting Official
- (U) Mr. David Wethington, USACE Future Directions Branch Chief
- (U) Mr. Richard Jenkins, USACE Acquisitions Support Division Chief, USACE Directorate of Contracting

(U) We also asked questions related to the potential inappropriate influence by the White House administration, Members of Congress, and senior USACE officials for the solicitation and award of the Yuma 3 Project. Based on White House Counsel's guidance, the DoD OGC attorney invoked presidential communications privilege

(U) during our interviews of Lieutenant General Semonite, Mr. Cooper, Mr. Caldwell, Brigadier General Goddard, Ms. Stiglich, and Mr. Heath for questions related to the influence of President Trump, Mr. Kushner, and the White House administration. As stated previously, a DoD OGC attorney instructed six key USACE employees not to answer any questions about communications with the President or White House officials regarding the solicitation and award. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these assertions. However, the USACE employees who solicited and awarded the Yuma 3 Project contract answered all of the under oath questions and testified that they were not influenced by the White House, Members of Congress, or senior USACE officials during the solicitation and award of the Yuma 3 Project contract. Additionally, we reviewed the e-mails of 13 key USACE employees and determined that there was no evidence of undue influence on the USACE employees who awarded the Yuma 3 Project contract in these key employees' e-mails.

(U) We also conducted under oath witness interviews at USACE Los Angeles District-Task Force Barrier, Phoenix, Arizona. Specifically, we interviewed the following individuals to identify their roles and responsibilities and the source selection evaluation process for the solicitation and award of the Yuma 3 Project.

- (U) The contracting officer
- (U) The SSA
- (U) The SSEB Chairperson
- (U) Two SSEB technical members

(U) Additionally, we asked questions related to the potential inappropriate influence by the White House administration, Members of Congress, and senior USACE officials for the solicitation and award of the Yuma 3 Project.

(U) USACE Key Employee E-mail Review

(U) We requested e-mails for the following 13 key USACE employees.

- (U) Lieutenant General Semonite, USACE Chief of Engineers and Commanding General (Retired)
- (U) Mr. David Cooper, USACE Chief of Counsel
- (U) Mr. Lloyd Caldwell, USACE Director of Military Programs
- (U) Brigadier General Glenn Goddard, USACE Deputy Director of Military Programs and National Program Manager for the Southwest Border Barrier
- (U) Ms. Jill Stiglich, USACE Director of Contracting

- (U) Mr. Denver Heath, USACE Senior Contracting Official
- (U) Mr. David Wethington, USACE Future Directions Branch Chief
- (U) Mr. Richard Jenkins, USACE Acquisitions Support Division Chief, USACE Directorate of Contracting
- (U) The contracting officer
- (U) The SSA
- (U) The SSEB Chairperson
- (U) Two SSEB technical members for the Yuma 3 Project

(U) The key USACE employees had two e-mail addresses, including a Defense Enterprise E-mail Personal Storage Table file and USACE Personal Storage Table file. We requested that the Defense Information Systems Agency provide the Defense Enterprise E-mail Personal Storage Table files that included sent, received, and deleted e-mails from July 1, 2018, through December 31, 2019 for the 13 key USACE employees. One key employee did not have Defense Enterprise E-mail Personal Storage Table files. We reviewed 34,151 e-mails to determine whether there was any evidence of inappropriate influence for the solicitation and award of the Yuma 3 Project.

(U) We also requested that USACE provide Personal Storage Table files that included sent, received, and deleted e-mails for the same 13 key USACE employees. The 13 key USACE employees had 461,736 unique e-mails from July 1, 2018, through December 31, 2019. Of the 461,736 e-mails, USACE officials searched for 13 keywords—"potus," "omb," "the president," "white house," "wh," "oval office," "mulvaney," "kushner," "westerhout," "the administration," "trump," "eop.gov," and "whitehouse.gov"—to identify 43,433 e-mails with potential presidential communications privilege. After 4 months, USACE provided 418,303 e-mails (more than 141 gigabytes) to the DoD OIG and retained the remaining 43,433 e-mails for review by the DoD OGC and the White House Counsel.

(U) For the 418,303 e-mails, we loaded 1,244 e-mails into Microsoft Outlook and loaded the remaining 417,059 e-mails into the Defense Criminal Investigative Service's Digital Media Examination Network (DMEN). DMEN separated the 417,059 e-mails into 626,757 individual e-mails, attachments, and calendar items. Using DMEN, we searched the 626,757 e-mails, attachments, and calendar items using the original 13 keywords and an additional 27 keywords—"Fisher," "Fischer," "FSG," "0004," "border wall," "semonite," "sen," "senator," "cramer," "kramer," "yuma 3," "yuma project 3," "yuma 03," "yuma project 03," "Hoskin," "Gatz," "Hoeven," "Shanahan," "Brzozowiec," "advocat," "influen," "pressur," "investigation," "0006," "North Dakota," "capitol hill," and "SASC"—to identify any

(U) influence for the solicitation and award of the Yuma 3 Project. We reviewed 171,179 e-mails, attachments, and calendar items in DMEN and 1,244 e-mails in Microsoft Outlook to determine whether there was any evidence of inappropriate influence for the solicitation and award of the Yuma 3 Project.

(U) We did receive all the requested e-mails, including all e-mails that were withheld for potential presidential communications privilege. However, we experienced substantial delays in receiving the requested e-mails from the DoD OGC that significantly impacted the timeliness of issuing the report. The DoD OGC disclosed this delay in access in its April 1, 2020 through September 30, 2020 Semiannual Report to the Congress. USACE provided the remaining 43,433 e-mails to the DoD OGC to review for presidential communications privilege. Over 7 months, the DoD OGC and the White House Counsel reviewed most of the 6,125 e-mails for Lieutenant General Semonite for presidential communications privilege. Following the change in the White House administration, the DoD OGC requested the DoD OGC to reconsider the invocation on presidential communication privilege. Over the next 2 months, the new White House administration authorized the DoD OGC to release the remaining 43,433 e-mails, and USACE provided the original 43,433 e-mails to the DoD OGC for review. USACE also provided an additional 396 e-mails that were too large for its system to process. We loaded the remaining 43,829 e-mails into DMEN. DMEN separated the 43,829 e-mails into 128,837 individual e-mails, attachments, and calendar items. We reviewed 128,837 e-mails, attachments, and calendar items in DMEN to determine whether there was any evidence of inappropriate influence for the solicitation and award of the Yuma 3 Project.

(U) Fisher Sand and Gravel Site Visit and Documentation

(U) We conducted a site visit to Fisher Sand and Gravel, Tempe, Arizona, and Stinger Bridge and Iron, Coolidge, Arizona. Stinger Bridge and Iron, which is commonly owned by the same company as Fisher Sand and Gravel, fabricates the bollard panels for the border wall. Additionally, Stinger Bridge and Iron has a research and development area that included the excavators, forms used to install concrete and bollard border walls, and several different types of prototype border walls. Fisher Sand and Gravel held demonstration days at the research and development area located at Stinger Bridge and Iron.

(U) We obtained and reviewed documentation from Fisher Sand and Gravel for border infrastructure projects. We reviewed prototype documentation, including the prototype proposal and contract award, to determine a timeline of events for the Fisher Sand and Gravel prototype project. We reviewed proposals for:

- (U) Prequalified Sources Lists 2 and 3;

- (U) the Eastern and Western MATOCs and task orders W9126G-19-F-0249 (Rio Grande Valley 6 Project), W9126G-19-F-6147 (Rio Grande Valley 8 Project), W9126G-19-F-6154 (Rio Grande Valley 9 Project), W9126G-19-F-6152 (Rio Grande Valley 10 Project), W912PL-20-F-0010 (Yuma 6 Project), W50UW8-20-F-0002 (El Paso 2 Segment 2 Project), W50UW8-20-F-0003 (El Paso 2 Segment 3 Project), and W912PL-20-F-0006 (San Diego 4 Project); and
- (U) W9126G-19-C-0011 (FY 2018 California Project), W912PL-19-C-0013 (Yuma 1 and 2 Projects), W912PL-19-C-0014 (Yuma 1 and El Centro 1 Projects), W912PL-19-C-0015 (Tucson 1, 2, and 3 Projects), W912PP-19-C-0018 (El Paso 1 Project), W912PL-20-C-0002 (Yuma 2 and Yuma 10/27 Projects), and W912PL-20-C-0004 (Yuma 3 Project).

(U) We also reviewed the Fisher Sand and Gravel protest files for the Eastern MATOC, the Yuma 1 and 2 Projects, and the El Paso 1 Project. We compared Fisher Sand and Gravel's proposal for Prequalified Sources List 3 to the USACE solicitation rating criteria. Additionally, we compared Fisher Sand and Gravel's proposal for the Yuma 3 Project to the USACE solicitation rating criteria.

(U) We also reviewed correspondence for border wall procurements, including information for the unsolicited proposals submitted to the White House and USACE, and e-mail correspondence with USACE. We reviewed e-mail correspondence between Fisher Sand and Gravel and USACE about border wall procurements to determine whether there was any evidence of inappropriate influence for the solicitation and award of the Yuma 3 Project. Specifically, we reviewed 988 e-mails provided by Fisher Sand and Gravel. Based on the review, we did not find any evidence of inappropriate influence between Fisher Sand and Gravel and USACE for the solicitation and award of the Yuma 3 Project.

(U) Fisher Sand and Gravel did not provide any e-mails between Fisher Sand and Gravel and the White House or Congress. However, a Fisher Sand and Gravel official explained that Fisher Sand and Gravel has generally corresponded with the White House and Congress regarding its border wall capabilities and the frustrations it had with the USACE procurement process. Specifically, Fisher Sand and Gravel was frustrated with:

- (U) the format and structure of USACE procurements,
- (U) the slow progress being made by USACE and its contractors on building the wall, and
- (U) not receiving contracts under prior USACE procurements.

(U) The Fisher Sand and Gravel official explained that Fisher Sand and Gravel did not receive any information from the White House or Congress regarding any pending procurements conducted by USACE for which Fisher Sand and Gravel submitted a proposal. Specifically, Fisher Sand and Gravel did not correspond with the White House or Congress regarding USACE's procurement process for the Yuma 3 Project that formed the basis of the contract award to Fisher Sand and Gravel.

(U) Federal Laws and DoD Regulations, and Guidance

(U) We reviewed the following Federal laws and DoD regulations, and guidance for border wall infrastructure projects and contract solicitation, source selection, and award.

- (U) Section 3553, title 31, United States Code, "Review of Protests; Effect on Contracts Pending Decision"
- (U) Public Law 104-208, "Illegal Immigration Reform and Immigration Responsibility Act," Section 102, "Improvement of Barriers at Border"
- (U) Public Law 109-367, "Secure Fence Act of 2006"
- (U) Public Law 110-161, "Consolidated Appropriations Act," Section 564, "Improvement of Barriers at Border"
- (U) FAR 6.302-2, "Unusual and Compelling Urgency"
- (U) FAR Part 15, "Contracting by Negotiation"
- (U) FAR Part 36, "Construction and Architect-Engineering Contracts"
- (U) DFARS 215-3 Source Selection, "Source Selection Procedures"
- (U) DFARS 217.7404-1, "Authorization"
- (U) DFARS 236.272, "Prequalification of Sources"
- (U) Presidential Executive Order 13767, "Border Security and Immigration Enforcement Improvements," January 25, 2017
- (U) Presidential Memorandum for the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security, "Securing the Southern Border of the United States," April 4, 2018
- (U) Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States, February 15, 2019
- (U) Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics Memorandum, "DoD Source Selection Procedures," April 1, 2016

(U) Use of Computer-Processed Data

(U) We used computer-processed data from Encase, Veritas eDiscovery Platform, and Microsoft Outlook. We requested that USACE provide Personal Storage Table files that included sent, received, and deleted e-mails for 13 key USACE employees. The 13 key USACE employees had 461,736 unique e-mails from July 1, 2018, through December 31, 2019. USACE used Encase and Veritas eDiscovery Platform to capture and provide the e-mails. Encase is the system that takes a snapshot of the universe of e-mails by date and individual. The e-mails are then added to the Veritas eDiscovery Platform. The Veritas eDiscovery Platform is a single source for eDiscovery and allows users to map data to locate documents. The Veritas eDiscovery Platform exported the Personal Storage Table files that included e-mails and attachments for 13 key USACE employees. We interviewed USACE officials that processed the e-mails and reviewed Encase and Veritas eDiscover Platform manuals to identify that system controls were in place to verify the accuracy and completeness of the e-mails.

(U) USACE provided 1,244 e-mails for Lieutenant General Semonite. Additionally, we obtained 34,151 e-mails from the Defense Enterprise E-mail Personal Storage Table files. We reviewed all 35,395 e-mails in Microsoft Outlook to determine whether there was any evidence of inappropriate influence for the solicitation and award of the Yuma 3 Project.

(U) USACE provided an additional 417,059 e-mails to the DoD OIG and retained the remaining 43,433 e-mails for review by the DoD OGC and the White House administration. We loaded the 417,059 e-mails into DMEN. DMEN separated the 417,059 e-mails into 626,757 individual e-mails, attachments, and calendar items. A Special Agent for the Defense Criminal Investigative Service stated that he took forensic images of the Personal Storage Table files provided by USACE and uploaded them into the DMEN Access Data Summation module that splits the files into separate items, such as e-mails, attachments, and calendar items. The DMEN Access Data Summation module also allowed for filtering on numerous data elements, reviewing, and exporting of each item. Using DMEN, we searched the 626,757 e-mails, attachments, and calendar items using keywords to identify 171,179 e-mails, attachments, and calendar items relevant to the audit. We reviewed all 171,179 e-mails, attachments, and calendar items relevant to the audit to determine whether there was any evidence of inappropriate influence for the solicitation and award of the Yuma 3 Project.

(U) USACE then provided the remaining 43,433 e-mails to the DoD OIG for review. USACE also provided an additional 396 e-mails that were too large for its system to process. We loaded the remaining 43,829 e-mails into DMEN. DMEN separated

(U) the 43,829 e-mails into 128,837 individual e-mails, attachments, and calendar items. We reviewed 128,837 e-mails, attachments, and calendar items in DMEN to determine whether there was any evidence of inappropriate influence for the solicitation and award of the Yuma 3 Project. We determined that the data were sufficiently reliable for the purposes of this report.

(U) Use of Technical Assistance

(U) We used technical assistance from the DoD OIG Contract Planning Group, DoD OIG Research and Engineering Evaluations Component, and DoD OIG Administrative Investigations Component to perform this audit. Specifically, a Contract Specialist from the DoD OIG Contract Planning Group assisted with determining whether the solicitation and award of contract was in accordance with Federal procurement laws and regulations. A Civil and Industrial Engineer from the DoD OIG Research and Engineering Evaluations Component assisted with determining whether Fisher Sand and Gravel's technical proposal met the requirements of the Yuma 3 Project. Additionally, a Senior Investigator from the DoD OIG Administrative Investigations Component assisted with conducting the under oath witness interviews and obtaining e-mails.

(U) Prior Audit Coverage

(U) During the last 5 years, the Government Accountability Office (GAO), DoD OIG, and DHS OIG issued six reports discussing border wall activities. Unrestricted GAO reports can be accessed at <http://www.gao.gov>. Unrestricted DoD OIG reports can be accessed at <https://www.dodig.mil/reports.html/>. Unrestricted DHS OIG reports can be accessed at <http://www.oig.dhs.gov>.

(U) GAO

(U) Report No. GAO-21-372, "Schedule Considerations Drove Army Corps of Engineers' Approaches to Awarding Construction Contracts through 2020," June 2021

(U) The GAO determined that USACE awarded \$4.3 billion in noncompetitive contracts and started work before agreeing to terms. The GAO stated that the Government risked paying higher costs by focusing on expediency in contracting. USACE had not developed plans to examine its overall acquisition approach and identify lessons learned. Without doing so, USACE could miss opportunities to strengthen its contracting strategies in future border support efforts. The GAO recommended that USACE should assess the approaches used to build the border barriers and, as appropriate, reassess its acquisition strategy going forward.

(U) Report No. GAO-21-356, "Actions Are Needed to Address the Cost and Readiness Implications of Continued DoD Support to U.S. Customs and Border Protection," February 2021

(U) The GAO determined that the DoD did not conduct complete cost estimates or a timely readiness analysis, and is limited in its ability to evaluate the effect of supporting the DHS on its budget and readiness rebuilding efforts. Additionally, the GAO found that the DoD has not provided Congress with timely information on the full costs of supporting the DHS. Also, the GAO found that the DoD's internal tracking of obligations excludes potentially significant costs of border support activities, and the cost of benefits retroactively provide to members of the National Guard.

(U) Report No. GAO-18-614, "CBP Is Evaluating Designs and Locations for Border Barriers but Is Proceeding Without Key Information," July 30, 2018

(U) The GAO determined that CBP and U.S. Border Patrol developed a methodology for prioritizing future barrier deployments along the entire southwest border, which included input from Border Patrol officials, data on illegal entry traffic, and analysis of operational and engineering feasibility for each potential location. However, the strategy did not include analysis of the costs associated with deploying barriers in each location or segment, which can vary depending on topography, land ownership, and other factors. Without assessing costs, consistent with leading practices for capital decision making, CBP does not have complete information for prioritizing locations to use its resources in the most cost-effective manner. The GAO also found that for the San Diego secondary barrier segment, CBP's plans have not yet been documented, which could hinder the DHS's ability to monitor progress for the segment.

(U) DoD OIG

(U) Report No. DODIG-2020-115, "Evaluation of the United States Military Support of Department of Homeland Security Southern Border Security Operations Under Title 10 Authority," August 14, 2020

(U) The DoD OIG determined that the use of DoD title 10 personnel to support DHS southern border security operations was authorized by Federal laws and consistent with DoD policies. Additionally, the evaluation found that between October 24, 2018 and December 31, 2019, DoD title 10 personnel supporting DHS southern border security operations complied with applicable Federal laws and DoD policies. The evaluation also found that the DoD provided adequate Standing Rules for the Use of Force training to DoD title 10 personnel

(U) supporting DHS southern border security operations related to the potential contact between civilians or migrants. Finally, the evaluation found that between October 2018 and December 2019, the Army, Air Force, and Marine Corps obligated \$144.3 million of the respective Service's Operations and Maintenance funds on a non-reimbursable basis for DoD title 10 support to DHS southern border security operations, in accordance with Federal laws and DoD policies.

(U) DHS OIG

(U) Report No. OIG-20-52, "CBP Has Not Demonstrated Acquisition Capabilities Needed to Secure the Southern Border," July 14, 2020

(U) The DHS OIG found that the CBP has not demonstrated the acquisition capabilities needed to execute the Analyze/Select Phase of the Wall Acquisition Program effectively. Specifically, CBP did not conduct an Analysis of Alternatives to assess and select the most effective appropriate, and affordable solutions to obtain operational control of the southern border as directed, but instead relied on prior outdated border solutions to identify materiel alternatives for meeting its mission requirements. Additionally, CBP did not use a sound, well-documented methodology to identify and prioritize investments in areas along the border that would best benefit from physical barriers. The Department also did not complete the required plan to execute the strategy to obtain and maintain control of the southern border, as required by its Comprehensive Southern Border Security Study and Strategy. Without an Analysis of Alternatives, a documented and reliable prioritization process, or a plan the likelihood that CBP will be able to obtain and maintain complete operational control of the southern border with mission effective, appropriate, and affordable solutions is diminished.

(U) Report No. OIG-17-70-SR, "Special Report: Lessons Learned from Prior Reports on CBP's Secure Border Initiative and Acquisitions Related to Security our Border," June 12, 2017

(U) The DHS OIG cited previous reports that found that CBP did not have defined and validated operational requirements resulting in unachievable performance. CBP also lacked a proper acquisition workforce that resulted in missteps, waste, and delays. In addition, CBP did not have robust business processes and information systems needed to enable program offices to move forward expeditiously on the tasks of managing to program objectives. The report stated that most of the DHS's major acquisition programs continue

(U) to cost more than expected, take longer to deploy than planned, or deliver less capability than promised. Although the DHS's acquisition policy includes best practices, the DHS sometimes approves moving forward with major acquisition programs without appropriate oversight.

(U) Appendix B

(U) Congressional Request from Representative Thompson

BENNIE G. THOMPSON, MISSISSIPPI
CHAIRMAN



MIKE ROGERS, ALABAMA
RANKING MEMBER

One Hundred Sixteenth Congress
Committee on Homeland Security
U.S. House of Representatives
Washington, DC 20515

December 4, 2019

Glenn A. Fine
Principal Deputy Inspector General
Department of Defense
4800 Mark Center Drive
Alexandria, VA 22350

Dear Mr. Fine:

I write seeking a review of the \$400 million contract the U.S. Army Corps of Engineers (USACE) awarded to Fisher Sand and Gravel Co. on December 2, 2019, to design and build border infrastructure in Yuma County, Arizona.¹

Since President Trump ordered the immediate construction of a “wall” along the southern border in January 2017, USACE has awarded multiple construction contracts valued at more than an estimated \$2.5 billion—mostly for the replacement of existing fencing along the U.S.-Mexico border. Fisher Sand and Gravel Co. had not been awarded a construction contract prior to December 2, as its proposals reportedly did not meet the operational requirements of U.S. Customs and Border Protection and its prototype project came in late and over budget.²

Nevertheless, President Trump has personally repeatedly urged USACE to award construction contracts to Fisher Sand and Gravel Co.³ Jared Kushner, whom President Trump recently named as the White House lead for border construction projects, has also reportedly supported the company’s selection.⁴ Moreover, Department of Homeland Security officials—including acting Secretary Chad Wolf—toured a private border barrier being constructed by Fisher Sand and Gravel Co. just over a week before USACE awarded the \$400 million construction contract.⁵

¹ U.S. Department of Defense: *Contracts for Dec. 2, 2019*

(<https://www.defense.gov/Newsroom/Contracts/Contract/Article/2030017/source/GovDelivery/>).

² Nick Miroff and Josh Dawsey, ‘He always brings them up’: Trump tries to steer border wall deal to North Dakota firm, *The Washington Post* (May 23, 2019) https://www.washingtonpost.com/immigration/he-always-brings-them-up-trump-tries-to-steer-border-wall-deal-to-north-dakota-firm/2019/05/23/92d3858c-7b30-11e9-8bb7-0fc796ef2ec0_story.html.

³ Ibid.

⁴ Ibid and Josh Dawsey and Nick Miroff, *Jared Kushner’s new assignment: Overseeing the construction of Trump’s border wall*, *The Washington Post* (November 25, 2019) https://www.washingtonpost.com/politics/jared-kushners-new-assignment-overseeing-the-construction-of-trumps-border-wall/2019/11/25/b175cad4-0d63-11ea-a49f-9066f51640f6_story.html.

⁵ Nick Miroff, *Right-wing group continues to build private border wall. It lacks permits, but not official praise*, *The Washington Post* (November 22, 2019) https://www.washingtonpost.com/immigration/right-wing-group-continues-to-build-private-border-wall-it-lacks-permits-but-not-official-praise/2019/11/22/b4281676-0c71-11ea-8397-a955cd542d00_story.html.

(U) Congressional Request from Representative Thompson (cont'd)

These actions raise concerns about the possibility of inappropriate influence on USACE's contracting decision. Therefore, I am requesting that you review the award of this contract to ensure that the bid submitted by Fisher Sand and Gravel Co. met the solicitation standards and that USACE made the award in accordance with federal procurement law and regulations.

Thank you for your prompt attention to this matter. If you have any questions or require additional information, please contact Alison Northrop, Oversight Director, at (202) 226-2616.

Sincerely,



Bennie G. Thompson
Chairman

(U) Appendix C

(U) USACE and Fisher Sand and Gravel Border Wall Chronology of Key Events

(U) Table 4 lists the chronology of key events related to Fisher Sand and Gravel border wall involvement.

(U) Table 4. Chronology of Key Events Related to Fisher Sand and Gravel Border Wall Involvement

(CUI) Date	Event
(U) January 25, 2017	Executive Order 13767 required the Secretary of Homeland Security to obtain complete operational control of the southern border.
(U) March 17 – August 31, 2017	CBP issued solicitations for border wall prototypes. Fisher Sand and Gravel, whose headquarters is in Dickinson, North Dakota, submitted a proposal for a concrete prototype and was awarded a \$365,000 contract to build a border wall prototype.
(U) October 7 – October 13, 2017	Fisher Sand and Gravel built its concrete border wall prototype and was paid \$365,000.
(U) May 24, 2017	USACE issued an acquisition plan of prequalification of sources for horizontal construction contracts.
(U) May 31 – July 31, 2017	USACE posted an announcement to create Prequalified Sources List 1, evaluated the responses, and placed companies on the list. Fisher Sand and Gravel did not apply.
(U) April 4, 2018	President Trump directed the Secretary of Defense to support the Department of Homeland Security in securing the southern border.
(U) July 12 – September 4, 2018	USACE posted an announcement to create Prequalified Sources List 2, Fisher Sand and Gravel applied, and USACE placed it on Prequalified Sources List 2, along with eight other companies.
(U) July 20, 2018 – May 8, 2019	USACE issued a solicitation for the Western MATOC. Fisher Sand and Gravel submitted a proposal, and USACE awarded the company an overall Western MATOC contract, which allows Fisher Sand and Gravel to compete on future task orders for specific border wall projects located in the Western MATOC areas.
(U) July 20, 2018 – October 22, 2019	USACE issued a solicitation for the Eastern MATOC. Fisher Sand and Gravel submitted a proposal, and USACE awarded the company an overall Eastern MATOC contract, which allows Fisher Sand and Gravel to compete on future task orders for specific border wall projects located in the Eastern MATOC areas.
(U) September 6 – December 20, 2018	USACE issued a solicitation for contract W9126G-19-C-0011 (FY 2018 California Project), Fisher Sand and Gravel submitted a proposal, and USACE awarded the contract to a company other than Fisher Sand and Gravel.
(CUI) October 25, 2018	██████████ had a telephone conversation with Lieutenant General Semonite about construction support to CBP on the southwest border. (CUI)

(U) Table 4. Chronology of Key Events Related to Fisher Sand and Gravel Border Wall Involvement (cont'd)

(CUI) Date	Event
(CUI) January 30, 2019	The Secretary of Defense, Deputy Secretary of Defense, Lieutenant General Semonite, and several other senior DoD officials held a telephone conversation with [REDACTED] to discuss construction at the southwest border.
(U) February 15, 2019	President Trump declared a national emergency on the southern border of the United States.
(CUI) March 7, 2019	The Acting Secretary of Defense and Lieutenant General Semonite updated [REDACTED] and Department of Justice officials on the progress of the border barrier construction.
(U) March 13 – April 16, 2019	Fisher Sand and Gravel held demonstration days to show its border wall installation method.
(U) March 28 – April 9, 2019	USACE issued a notice of intent to solicit contract W912PL-19-C-0013 (Yuma 1 and 2 Projects) to four contractors that were selected for Prequalified Sources List 1, which did not include Fisher Sand and Gravel. USACE also issued a notice of intent to solicit contract W912PP-19-C-0018 (El Paso 1 Project) to nine contractors that were on Prequalified Sources List 2, which included Fisher Sand and Gravel. USACE awarded the Yuma 1 and 2 Projects and the El Paso 1 Project to a company other than Fisher Sand and Gravel.
(U) March 29 – August 9, 2019	Fisher Sand and Gravel submitted unsolicited proposals to build a border wall along the U.S.-Mexico border. USACE held a meeting with Fisher Sand and Gravel officials and stated that it cannot accept the unsolicited proposals.
(CUI) April 5, 2019	President Trump participated in a roundtable on immigration and border security where he was briefed by the Secretary of the Homeland Security; CBP Commissioner; U.S. and State Representatives; and Lieutenant General Semonite, USACE Chief of Engineers and Commanding General (Retired). Lieutenant General Semonite stated in an e-mail documenting his closure report for the trip that [REDACTED]
(U) April 12, 2019	Telephone conversation between Senator John Hoeven, North Dakota, and Lieutenant General Semonite to discuss the award of the El Paso 1 Project contract.
(U) April 18 – July 26, 2019	Fisher Sand and Gravel filed a bid protest with the GAO for the award of the El Paso 1 Project. The GAO denied the protest.
(U) April 19 – May 6, 2019	Fisher Sand and Gravel filed a bid protest with the GAO for the award of the Yuma 1 and 2 Projects. USACE took corrective action by terminating the award of the Yuma 1 and 2 Projects and re-competing the projects. The GAO dismissed the protest based on the corrective action.

(CUI)

(U) Table 4. Chronology of Key Events Related to Fisher Sand and Gravel Border Wall Involvement (cont'd)

(CUI) Date	Event
(U) April 19 – June 11, 2019	USACE posted an announcement to create Prequalified Sources List 3, Fisher Sand and Gravel applied, and USACE placed it on Prequalified Sources List 3.
(U) April 25, 2019	Fox News interviewed President Trump. President Trump stated that he was aware of Fisher Sand and Gravel.
(CUI) April 29, 2019	Senator Kevin Cramer, North Dakota, provided a Fisher Sand and Gravel promotional video [REDACTED] provide the video to Lieutenant General Semonite.
(CUI) May 1, 2019	Telephone conversation between [REDACTED] and Lieutenant General Semonite to discuss the status of the border wall [REDACTED]
(U) May 3, 2019	Telephone conversation between Senator John Hoeven, North Dakota, and Brigadier General Mike Hoskin, USACE Director of Contracting (Retired), to discuss future contracting border wall opportunities and Fisher Sand and Gravel.
(U) May 5 – May 15, 2019	USACE issued a solicitation for contract W912PL-19-C-0014 (Yuma 1 and 2 Projects and El Centro 1 Project) under Prequalified Sources List 2, and Fisher Sand and Gravel submitted a proposal. USACE removed the Yuma 2 Project and awarded the Yuma 1 Project and El Centro 1 Project contract to a company other than Fisher Sand and Gravel.
(U) May 6 – May 15, 2019	USACE issued a solicitation for contract W912PL-19-C-0015 (Tucson 1, 2, and 3 Projects) under Prequalified Sources List 2, and Fisher Sand and Gravel submitted a proposal. USACE awarded the Tucson 1, 2, and 3 Projects contract to a company other than Fisher Sand and Gravel.
(U) May 15 – July 16, 2019	Representative Bennie Thompson, Chairman of the U.S. House of Representatives Committee on Homeland Security requested information about the prequalified sources lists and MATOCs used by USACE to award contracts for border barrier construction.
(U) May 21, 2019	Senator Kevin Cramer met with Lieutenant General Semonite to discuss the updates on the border wall construction.
(CUI) May 23, 2019	Meeting between [REDACTED] and Lieutenant General Semonite.
(U) July 11, 2019	Telephone conversation between Senator Hoeven and Lieutenant General Semonite to discuss the updates on the border wall program.
(U) August 2, 2019	Senator Cramer met with Lieutenant General Semonite to get an update from USACE on the border wall construction.

(CUI)

(U) Table 4. Chronology of Key Events Related to Fisher Sand and Gravel Border Wall Involvement (cont'd)

(CUI) Date	Event
(U) August 26, 2019	At the request of Senator Cramer, the USACE Fort Worth District Branch Chief and the USACE Southwestern Division Executive Officer visited the "We Build the Wall Construction Site," where Mr. Tommy Fisher, President and CEO, Fisher Sand and Gravel, met the group to observe the construction of the privately funded border barrier.
(U) August 25, 2019 – January 17, 2020	Fisher Sand and Gravel submitted proposals to compete for the award of seven task orders solicited to the Western MATOC companies. USACE awarded the seven task orders to companies other than Fisher Sand and Gravel.
(U) September 3, 2019	The Secretary of Defense issued a memorandum on the military construction necessary to support the use of the Armed Forces in addressing the national emergency at the southern border.
(CUI) September 11, 2019	The Former Assistant Secretary of Defense for Homeland Defense and Global Security and Lieutenant General Semonite briefed [REDACTED]. The meeting was to discuss a way forward on barrier construction and address any concerns that would impede progress.
(U) September 13 – September 20, 2019	The Chairman of the U.S. House of Representatives Committee on Oversight and Reform requested information about the USACE process and Lieutenant General Semonite's interactions with the White House and others related to the border wall contracting process.
(U) September 18, 2019	President Trump visited a section of the U.S.-Mexico border wall under construction in Otay Mesa, California, along with the Acting Secretary of Homeland Security, Acting CBP Commissioner, and Lieutenant General Semonite.
(U) September 16 – November 6, 2019	USACE issued a solicitation for contract W912PL-20-C-0002 (Yuma 2 and Yuma 10/27 Projects) under Prequalified Sources List 3, and Fisher Sand and Gravel submitted a proposal. USACE awarded the Yuma 2 and Yuma 10/27 Projects contract to a company other than Fisher Sand and Gravel.
(CUI) October 7, 2019	The Former Secretary of Defense briefed [REDACTED] on the progress of the border [REDACTED]. Lieutenant General Semonite attended this meeting.
(U) October 9 – December 2, 2019	USACE issued a solicitation for contract W912PL-20-C-0004 (Yuma 3 Project) under Prequalified Sources List 3, and Fisher Sand and Gravel submitted a proposal. USACE awarded the Yuma 3 Project contract to Fisher Sand and Gravel.
(CUI) October 24, 2019,	The Former Deputy Secretary of Defense briefed [REDACTED] the Acting CBP Commissioner on the progress of the border barrier construction. (CUI)

(U) Table 4. Chronology of Key Events Related to Fisher Sand and Gravel Border Wall Involvement (cont'd)

(CUI) Date	Event
(CUI) November 14, 2019	DoD and USACE meeting with [REDACTED] to discuss the progress of the border barrier construction.
(U) December 4, 2019	Representative Bennie Thompson, Chairman of the U.S. House of Representatives Committee on Homeland Security, sent a letter to the Principal Deputy Inspector General Performing the Duties of the Inspector General, DoD OIG, seeking a review of the Yuma 3 Project contract award to Fisher Sand and Gravel. (CUI)

(U) Source: The DoD OIG.

(U) Appendix D

(U) Fisher Sand and Gravel Proposals

(U) Representative Thompson asserted that Fisher Sand and Gravel had not been awarded previous construction contracts because its proposals reportedly did not meet the operational requirements of CBP. However, USACE determined that 18 previous Fisher Sand and Gravel proposals were at least acceptable in all rating factors and determined that the company was capable of performing the type of border wall construction needed. USACE assigned acceptable ratings when the proposal met the requirements of the solicitation. Specifically, Fisher Sand and Gravel submitted a total of four proposals for Prequalified Sources Lists 2 and 3 and the Eastern and Western MATOCs. USACE found Fisher Sand and Gravel's responses acceptable and placed the company on Prequalified Sources Lists 2 and 3. Fisher Sand and Gravel also submitted proposals for the Eastern and Western MATOCs. For the Eastern MATOC, USACE found Fisher Sand and Gravel's responses at least marginal but did not find that those concerns rose to the level that Fisher Sand and Gravel was incapable of performing the work and determined that the company was capable of performing the type of border wall construction needed.²⁶ As a result, USACE awarded Fisher Sand and Gravel contract W9126G-20-D-0007 for the Eastern MATOC, along with 18 other companies. The contracts allowed the companies to compete on future task orders for specific border wall projects located in the Eastern MATOC areas. USACE also found Fisher Sand and Gravel's responses acceptable for the Western MATOC and awarded it contract W9126G-19-D-0027. The contracts allowed Fisher Sand and Gravel to compete on future task orders for specific border wall projects located in the Western MATOC areas.

(~~CUI~~) Fisher Sand and Gravel submitted 14 additional proposals to USACE for border wall projects that met operational requirements. In some instances, USACE questioned Fisher Sand and Gravel's proposals because the proposals initially deviated from operational requirements. For example, Fisher Sand and Gravel originally proposed to [REDACTED] until USACE officials questioned Fisher Sand and Gravel's proposal. Fisher Sand and Gravel addressed the USACE concern and stated that it would match the operational requirements. As a result, USACE determined that all of Fisher Sand and Gravel's proposals were at least acceptable in all rating factors. However, USACE did not rate Fisher Sand and Gravel as the best-qualified company for 13 of the 14 proposals. For one of the proposals USACE determined that Fisher Sand and Gravel's proposal was the

²⁶ (U) Marginal is defined as the proposal has not demonstrated an adequate approach and understanding of the requirements, and/or risk of unsuccessful performance is high.

(U) LPTA and awarded Fisher Sand and Gravel the Yuma 3 Project contract. For some contracts, despite Fisher Sand and Gravel receiving acceptable ratings, other companies were given higher ratings and determined to be the best value to the Government. Additionally, when Fisher Sand and Gravel received the same ratings as other companies, USACE did not award Fisher Sand and Gravel the contracts because it did not submit the lowest price. USACE stated that the contracts would be awarded based on the LPTA procedures in accordance with the FAR.²⁷ See Table 5 for the determination of contract awards for Fisher Sand and Gravel.

(U) Table 5. Determination of Contract Awards for Fisher Sand and Gravel

(U)	Date	Contract Action	Contract Type	Determination of Contract Award
(U) 1.	December 20, 2018	W9126G-19-C-0011 (FY 2018 California Project)	Prequalified Sources List 2	Not selected best value to the Government
(U) 2.	April 9, 2019	W912PP-19-C-0018 (El Paso 1 Project)	Prequalified Sources List 2	Not selected best value to the Government in Phase I evaluation (Sole-source)
(U) 3.	May 15, 2019	W912PL-19-C-0014 (Yuma 1 and El Centro 1 Projects)	Prequalified Sources List 2	Not selected best value to the Government in Phase I evaluation (Sole-source)
(U) 4.	May 15, 2019	W912PL-19-C-0015 (Tucson 1, 2, and 3 Projects)	Prequalified Sources List 2	Not selected best value to the Government in Phase I evaluation (Sole-source)
(U) 5.	June 26, 2019	W9126G-19-F-0249 (Rio Grande Valley 6 Project)	Eastern MATOC	Not selected best value to the Government
(U) 6.	September 28, 2019	W9126G-19-F-6147 (Rio Grande Valley 8 Project)	Western MATOC	Not selected best value to the Government
(U) 7.	September 29, 2019	W9126G-19-F-6154 (Rio Grande Valley 9 Project)	Western MATOC	Not selected best value to the Government
(U) 8.	September 29, 2019	W9126G-19-F-6152 (Rio Grande Valley 10 Project)	Western MATOC	Not selected best value to the Government

²⁷ (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.101-2, "Lowest Price Technically Acceptable Source Selection Process."

(U) Table 5. Determination of Contract Awards for Fisher Sand and Gravel (cont'd)

(U) Date	Contract Action	Contract Type	Determination of Contract Award
(U) 9. November 6, 2019	W912PL-20-C-0002 (Yuma 2 and Yuma 10/27 Projects)	Prequalified Sources List 3	LPTA-not lowest price
(U) 10. November 20, 2019	W912PL-20-F-0006 (San Diego 4 Project)	Western MATOC	LPTA-not lowest price
(U) 11. December 2, 2019	W912PL-20-C-0004 (Yuma 3 Project)	Prequalified Sources List 3	Awarded the contract
(U) 12. January 10, 2020	W912PL-20-F-0010 (Yuma 6 Project)	Western MATOC	LPTA-not lowest price
(U) 13. January 17, 2020	W50UW8-20-F-0002 (El Paso 2 Segment 2 Project)	Western MATOC	LPTA-not lowest price
(U) 14. January 17, 2020	W50UW8-20-F-0003 (El Paso 2 Segment 3 Project)	Western MATOC	LPTA-not lowest price (U)

(U) Source: USACE.

(U) Establishment of Prequalified Sources List 2

(U) On July 12, 2018, USACE posted a solicitation to create Prequalified Sources List 2 in accordance with DFARS.²⁸ USACE created a prequalified sources list for horizontal construction contracts with a total value of up to approximately \$1.8 billion in support of the DHS program for southwestern border security and immigration enforcement improvements. USACE anticipated that the eight border security infrastructure programs would be advertised to the companies listed on the prequalified sources list over a period of 12 to 18 months. The projects were located in California, Arizona, and Texas.

(U) During the 30-day solicitation period, USACE answered 16 requests for information from contractors. To be considered qualified for Prequalified Sources List 2, companies had to meet the following rating criteria.

1. (U) Have a single bonding capability of at least \$150 million and an aggregate bonding capability of at least \$350 million.²⁹
2. (U) Have the capability to perform at least three \$150 million construction contracts concurrently.
3. (U) Have completed a horizontal construction contract in the contiguous United States with a contract price of \$150 million or more within the last 5 years. Companies should include the performance rating, if it was rated.
4. (U) Demonstrate a satisfactory or above past performance record.

²⁸ (U) DFARS 236.272, "Prequalification of Sources."

²⁹ (U) Bonding capability is the maximum amount of credit a company will provide to a contractor.

5. (U) Use an accounting system that can support Fixed-Price Economic Price Adjustment and Fixed-Price Incentive Firm Target contracts.
6. (U) Have the ability to successfully comply with the provisions of FAR 52.219-8, "Utilization of Small Business Concerns."
7. (U) Provide acceptable responses on implementation approach for construction of the planned type of border infrastructure in remote construction sites in the southwestern United States adjacent to the international border with Mexico.
8. (U) Certify that all responses to the prequalification of sources questionnaire are accurate and complete.

(U) On August 11, 2018, Fisher Sand and Gravel provided a response to the eight questions, along with additional files that explained its accounting system, bonding capability, the sequence of design-build construction schedule assuming a 365-day period of performance, management team, and past performance. On the same day, USACE received responses from 11 additional contractors. Of the 12 responses received, USACE determined that 2 responses were incomplete. On August 13, 2018, the SSEB independently evaluated the 10 remaining responses. On August 15, 2018, the SSEB members performed an initial evaluation to reach a consensus and assigned a rating of acceptable or unacceptable to each factor. If the SSEB found any of the responses unacceptable, the overall rating was considered unacceptable. The SSEB rated 9 of 10 companies as acceptable in accordance with the requirements of the prequalification of sources announcement.

(U) On September 4, 2018, the Source Selection Advisory Council (SSAC) also reviewed the prequalification of sources responses and agreed with the findings of the SSEB. The SSAC convenes for contracts over \$100 million and for any other occasion determined to be in the best interest of the Government. The SSAC consists of a SSAC Chairperson and SSAC members. The SSAC Chairperson appoints the SSAC members and consolidates the advice and recommendations from the SSAC into a written comparative analysis and recommendations for use in making the best value source selection decision. The SSAC members should represent the specific functional areas that may require expertise. The SSAC members review the evaluation results of the SSEB to ensure that the evaluation process follows the evaluation criteria and the ratings are applied appropriately and consistently. Using the SSEB ratings and their own expertise, the SSAC members perform a comparative analysis of the proposals against one another to assess which proposal represents the best value. The SSAC is required to provide written comparative analysis of proposals and award recommendations to the SSA.

(U) The SSA reviewed the source selection evaluation report and compared the results to the evaluation criteria set forth in the announcement. On September 4, 2018, the SSA determined that Fisher Sand and Gravel's responses were acceptable on all evaluation factors and placed the company, along with eight other companies, on Prequalified Sources List 2. On the same day, USACE notified Fisher Sand and Gravel that the evaluation of responses to the prequalification of sources 2 was completed and that it was placed on Prequalified Sources List 2.

(U) USACE used a two-phase process for the project-specific solicitations that were sent to the most highly qualified companies. Phase I of the two-phase selection process started with USACE providing all of the companies on Prequalified Sources List its intent to advertise a border wall construction project. The Phase I notification included a brief summary of the requirements, evaluation criteria for Phase I, general information about the evaluation criteria that were used for the Phase II solicitation, and a request for each company to provide USACE with a positive or negative statement of interest on the project. In competitive acquisitions, Phase I was used to identify highly qualified contractors that would compete in the Phase II solicitation. In noncompetitive acquisitions, Phase I was used to identify the best-qualified contractor to receive a noncompetitive sole-source contract based on urgent and compelling requirements. Sole-source is the award of a contract after soliciting and negotiating with only one source.

(U) In competitive acquisitions, USACE provided project-specific solicitations to the most highly qualified companies that showed interest during Phase I. The selection of the most highly qualified companies was based on the Best Value Trade-Off (BVTO) procedures.³⁰ The FAR states that a tradeoff process is appropriate when it may be in the Government's best interest to consider award to other than the lowest priced offeror or to other than the highest technically rated offeror. When using a tradeoff process, all evaluation factors and significant subfactors must be clearly stated in the solicitation, and the solicitation must state whether all evaluation factors other than cost or prices, when combined, are significantly more important than cost or price, approximately equal to cost or price, or significantly less important than cost or price.

(U) USACE Solicitations for the Eastern and Western MATOCs

(U) On July 20, 2018, USACE issued two solicitations, known as the Eastern and Western MATOCs, seeking proposals for border wall projects. The Eastern MATOC was for the design-build, design-bid-build horizontal construction task orders for the

³⁰ (U) FAR Part 15, "Contracting by Negotiation," Subpart 101-1, "Tradeoff Process."

(U) Rio Grande Valley, Laredo, Del Rio, Big Bend, and El Paso border patrol sectors, and the Western MATOC was for the design-build, design-bid-build horizontal construction task orders for San Diego, El Centro, Yuma, and Tucson border patrol sectors.

(U) Factors for Phase I of the Eastern and Western MATOCs

(U) USACE evaluated the Eastern and Western MATOCs solicitations under a two-phase design-build process. In Phase I, interested companies submitted performance capability proposals that demonstrated their ability to execute the design-build or the design-bid-build construction project successfully. The SSEB evaluated the proposals and identified strengths, weaknesses, and deficiencies for the experience, organization and management team, and past performance factors.

(U) For the experience factor, USACE reviewed the proposals to identify at least 4, but no more than 10, examples of recent, relevant construction, design, or design-build projects. USACE also reviewed the proposals to identify the design and construction companies, their technical competencies, roles and responsibilities, and any previous teaming experiences for the organization and management team factor. USACE assigned ratings of outstanding, good, acceptable, marginal, or unacceptable for the experience and organization and management team factors. See Table 6 for the definitions of the experience and organization and management team rating criteria.

(U) Table 6. Experience and Organization and Management Team Rating Criteria for the Eastern and Western MATOCs

(U) Rating Adjectives	Description
(U) Outstanding	Proposal indicates an exceptional approach and understanding of the requirements and contains multiple strengths, and risk of unsuccessful performance is low.
(U) 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.
(U) Acceptable	Proposal meets requirements and indicates an adequate approach and understanding of the requirements, and risk of unsuccessful performance is no worse than moderate.
(U) Marginal	Proposal has not demonstrated an adequate approach and understanding of the requirements, and/or risk of unsuccessful performance is high.
(U) Unacceptable	Proposal does not meet requirements of the solicitation, and thus, contains one or more deficiencies, and/or risk of unsuccessful performance is unacceptable. Proposal is unawardable.

(U)

(U) Source: USACE.

(U) USACE evaluated past performance to determine whether the company had recent and relevant horizontal construction projects or had completed relevant horizontal construction projects within the past 6 years. For past performance, USACE assigned ratings of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown (neutral) confidence. See Table 7 for the description of past performance rating criteria.

(U) Table 7. Past Performance Rating Criteria for the Eastern and Western MATOCs

(U) Rating	Description
(U) Substantial Confidence	Based on relevant or recent performance record, USACE has a high expectation that the company will successfully perform the required effort.
(U) Satisfactory Confidence	Based on relevant or recent performance record, USACE has a reasonable expectation that the company will successfully perform the required effort.
(U) Limited Confidence	Based on relevant or recent performance record, USACE has a low expectation that the company will successfully perform the required effort.
(U) No Confidence	Based on relevant or recent performance record, USACE has no expectation that the company will successfully perform the required effort.
(U) Unknown (Neutral) Confidence	No recent or relevant performance record is available or the company's performance record is so sparse that no meaningful confidence assessment rating can be reasonably assigned.

(U)

(U) Source: USACE.

(U) The solicitations further defined relevant past performance. See Table 8 for the description of relevant past performance.

(U) Table 8. Relevant Past Performance Descriptions for the Eastern and Western MATOCs

(U) Rating	Description
(U) Very Relevant	Present/past performance effort involved essentially the same scope and magnitude of effort and complexities this solicitation requires.
(U) Relevant	Present/past performance effort involved similar scope and magnitude of effort and complexities this solicitation requires.
(U) Somewhat Relevant	Present/past performance effort involved some of the scope and magnitude of effort and complexities this solicitation requires.
(U) Not Relevant	Present/past performance effort involved little or none of the scope and magnitude of effort and complexities this solicitation requires.

(U)

(U) Source: USACE.

(U) The three evaluation factors were listed in descending order of importance, with experience being the most important factor. For example, factor 1 was more important than factor 2, and factor 2 was more important than factor 3.

(U) Phase I Evaluation for the Eastern MATOC

(U) For the Eastern MATOC Phase I, USACE received proposals from 41 companies (32 small businesses and 9 large businesses).³¹ On September 10, 2018, Fisher Sand and Gravel submitted its Phase I proposal. On December 11, 2018, the SSEB concluded its independent evaluation and reached a consensus for the proposals. Fisher Sand and Gravel received a rating of outstanding for the experience and organization and management team factors, and a rating of satisfactory confidence and relevant for the past performance factor. The SSEB concluded that Fisher Sand and Gravel's proposal indicated an exceptional approach and understanding of the requirements, contained multiple strengths and no weaknesses, and offered a low risk of unsuccessful performance. Based on Fisher Sand and Gravel's recent and relevant performance record, the SSEB had reasonable expectations that the company would successfully perform the required effort. After the SSEB evaluation of the proposals, the SSA conducted an initial pre-award Phase I review and determined that 14 companies were not among the most highly rated and would not participate in Phase II. The SSEB came to a consensus rating for the remaining 27 proposals (9 large businesses and 18 small businesses), including Fisher Sand and Gravel's proposal. The SSEB determined that these proposals were technically acceptable.

(U) Phase I Evaluation for the Western MATOC

(U) For the Western MATOC Phase I, USACE received proposals from 38 companies (29 small businesses and 9 large companies). On September 10, 2018, Fisher Sand and Gravel submitted its Phase I proposal. On October 29, 2018, the SSEB concluded its independent evaluation and reached a consensus for the proposals. Fisher Sand and Gravel received a rating of outstanding for experience and organization and management team factors, and substantial confidence for the past performance factor. The SSEB concluded that Fisher Sand and Gravel's proposal indicated an exceptional approach and understanding of the requirements, contained multiple strengths, and offered a low risk of unsuccessful performance. Based on Fisher Sand and Gravel's recent and relevant performance record, the SSEB had high expectations that the company would successfully perform the required effort. On January 30, 2019, the SSA agreed with the SSEB ratings and

³¹ (U) USACE received proposals from 42 companies, but 1 company withdrew its proposal before the SSEB review and evaluation.

(U) invited 14 companies, including Fisher Sand and Gravel, to submit a proposal for Phase II. On February 25, 2019, Fisher Sand and Gravel submitted a proposal for Phase II.

(U) Phase II Evaluation of the Eastern MATOC

(U) On December 20, 2018, USACE issued a solicitation for the Eastern MATOC Phase II, which was for the base MATOC awards, as well as two seed projects. The two seed projects were the Rio Grande Valley 6 Project for border infrastructure to the unrestricted companies and the Rio Grande Valley Roads Project design-build construction of roads for the small businesses. Phase II required the selected companies to each submit price and technical proposals that included three factors: (1) summary schedule, (2) technical approach, and (3) small business participation. The three technical factors were listed in descending order of importance, with summary schedule being the most important factor. See Table 9 for the descriptions of the technical factors.

(U) Table 9. Technical Factor Descriptions for the Eastern MATOC

(U) Factors	Description
(U) 1. Summary Schedule	A task-oriented summary schedule with milestones for the integrated design and construction, as well as the proposed contract duration.
(U) 2. Technical Approach	A narrative that demonstrates the companies' technical approach to the design and construction of the project. The narrative should demonstrate an understanding of issues that may affect the design and construction efforts and a plan to address each issue.
(U) 3. Small Business Participation	Companies must complete and submit the Small Business Participation Proposal, and propose the level of participation of small businesses. (U)

(U) Source: USACE.

(U) The technical factors, when combined, were approximately equal to the price factor, meaning that the award may not necessarily be made to the lowest price offered. USACE assigned ratings of outstanding, good, acceptable, marginal, or unacceptable for the summary schedule, technical approach, and small business participation factors. See previous Table 6 for the definitions of outstanding, good, acceptable, marginal, or unacceptable.

(U) USACE received Phase II proposals for the Eastern MATOC from 6 large businesses and 12 small businesses.³² On February 8, 2019, Fisher Sand and Gravel submitted a price and technical proposal for Phase II. On February 9, 2019, the SSEB started reviewing the proposals and on June 17, 2019, the SSEB completed its review. The SSEB evaluated the Phase II proposals and identified the strengths, weaknesses, and deficiencies for each evaluation factor. The SSEB rated the Fisher Sand and Gravel proposal summary schedule factor as unacceptable, the technical approach factor as outstanding, and the small business participation factor as acceptable. The SSEB determined that Fisher Sand and Gravel's proposal did not meet requirements of the solicitation and that the risk of unsuccessful performance was unacceptably high. Specifically, the SSEB identified three deficiencies with Fisher Sand and Gravel's proposed summary schedule. The first deficiency was that Fisher Sand and Gravel [REDACTED]

[REDACTED] The second and third deficiencies were that Fisher Sand and Gravel [REDACTED]

[REDACTED] Both would violate the solicitation, which states that offerors should assume that the Government will exercise the option 180 days after the notice to proceed and work is not to proceed until the Government gives the notice to proceed. In addition, the SSEB rated proposals from four small businesses as unacceptable.

(U) On June 18, 2019, the SSAC completed a review of the SSEB's findings and determined that the evaluation criteria and ratings were applied appropriately and consistently. In addition, the SSAC reviewed the price proposals submitted by the companies and conducted a BVTO analysis. The SSAC stated that Fisher Sand and Gravel and one other business had an unacceptable rating because their proposals had deficiencies, which made them unawardable. The SSAC recommended that Fisher Sand and Gravel be eliminated from the Eastern MATOC competition. The SSAC made three additional recommendations to the SSA. The first recommendation was for the 13 companies (5 large companies and 8 small companies) that should be considered for award of the Eastern MATOC contracts. In addition, the SSAC recommended the companies that represented the best value to the Government and should be considered for the award of task orders for the Rio Grande Valley 6 Project and Rio Grande Valley Roads Project.

(U) On June 22, 2019, the SSA performed an independent review and analysis of the proposals received for the Phase II of the Eastern MATOC. Based on the review and analysis, the SSA agreed with the findings and recommendations of

³² (U) One additional small business submitted a proposal, but USACE determined that it was ineligible because its Phase I proposal did not meet requirements.

(U) the SSEB and SSAC. On June 26, 2019, USACE awarded five large businesses and eight small businesses Eastern MATOC contracts. Fisher Sand and Gravel was not included in this group. On the same day, USACE awarded the task orders W9126G-19-F-0249 (Rio Grande Valley 6 Project) and W9126G-19-F-0250 (Rio Grande Valley Roads Project) to contractors other than Fisher Sand and Gravel.

(U) Protests of Phase II of the Eastern MATOC

(U) On June 26, 2019, the USACE contracting officer notified Fisher Sand and Gravel that it was eliminated from the competition for the Eastern MATOC, and provided a debriefing letter. The debrief included Fisher Sand and Gravel's technical factor ratings, including two deficiencies on the summary schedule factor. On July 8, 2019, Fisher Sand and Gravel submitted a protest to the GAO related to the elimination of Fisher Sand and Gravel's Phase II proposal from the competition for the Eastern MATOC and Rio Grande Valley 6 Project. Fisher Sand and Gravel officials claimed that USACE's evaluation of Phase II was unreasonable, flawed, deficient, and inconsistent with the solicitation.

(U) Specifically, Fisher Sand and Gravel officials stated that the two schedule items, which USACE determined to be deficiencies and cause for Fisher Sand and Gravel's elimination from the Eastern MATOC, would not significantly affect the project duration. Fisher Sand and Gravel requested a reevaluation of the proposals and that it be added to the Eastern MATOC and awarded the Rio Grande Valley 6 Project task order. In addition to the Fisher Sand and Gravel protest, three small businesses submitted protests to the GAO for the Phase II evaluation of the Eastern MATOC. On July 9, 2019, USACE agreed to take corrective action and reevaluate the proposals. As a result, on July 18, 2019, the GAO dismissed Fisher Sand and Gravel's protest.

(U) Phase II Reevaluation and Award of Eastern MATOC

~~(U)~~ On August 16, 2019, the SSEB completed its reevaluation of all the Phase II proposals for the Eastern MATOC. The SSEB determined that no factor rating change was warranted for Fisher Sand and Gravel's proposal and that the summary schedule factor remained unacceptable. The SSEB changed Fisher Sand and Gravel's summary schedule factors from a significant strength to an uncertainty because [REDACTED]

[REDACTED] Additionally, the SSEB upgraded the summary schedule rating for one large business and three small businesses. Specifically, the SSEB upgraded the one large business from good to outstanding, two of the small businesses from unacceptable to good, and one of the small businesses from unacceptable to outstanding. On October 18, 2019, the SSAC reviewed the SSEB's revised findings

(~~CUH~~) and updated the analysis. The SSAC agreed with the SSEB's reevaluation of not changing any ratings for Fisher Sand and Gravel. In addition, the SSAC agreed with the decision to upgrade the unacceptable ratings for three of the small businesses and the one large business. The SSAC agreed not to upgrade the remaining small business with an unacceptable rating. The SSAC recommended the award of the Eastern MATOC contracts for the four businesses with upgraded ratings.

(U) On October 21, 2019, the SSA performed an independent review and analysis of the Eastern MATOC proposals and reevaluation. The SSA agreed with the SSAC's recommendation of four additional MATOC awards, but did not agree with analysis of Fisher Sand and Gravel's proposal or the additional small business with an unacceptable rating. The SSA determined that the deficiencies identified in Fisher Sand and Gravel's summary schedule factor were more appropriately characterized as significant weaknesses and upgraded the summary schedule rating from unacceptable to marginal. The SSEB and SSAC determined that instances of shortened Government review durations within Fisher Sand and Gravel's proposal constituted a deficiency because the solicitation specified a review period of at least 21 days. However, the SSA determined that while he has concerns about Fisher Sand and Gravel's schedule due to the several instances of shortened review periods, he did not find that those concerns rose to the level that Fisher Sand and Gravel was incapable of performing the work. Therefore, he did not find the risk of unsuccessful performance to be at the unacceptable level. The SSA also upgraded the small business with an unacceptable rating to marginal. The SSA determined that Fisher Sand and Gravel did not present the best value to the Government for task order W9126G-19-F-0249 (Rio Grande Valley 6 Project), but stated that Fisher Sand and Gravel was capable of performing the type of border wall construction needed. As a result, the SSA added Fisher Sand and Gravel to the list of companies for the Eastern MATOC, as well as the small business. On October 22, 2019, USACE awarded Fisher Sand and Gravel contract W9126G-20-D-0007 for the Eastern MATOC. USACE also awarded five additional contracts to five other contractors for the Eastern MATOC. In total, USACE awarded 19 companies a contract for the Eastern MATOC. The contracts allowed the companies to compete on future task orders for specific border wall projects located in the Eastern MATOC areas.

(U) Phase II Response for the Western MATOC

(U) Phase II required the selected companies to each submit a proposal that included three factors: (1) execution plan, (2) schedule, and (3) small business participation. The three evaluation factors were listed in descending order of importance, with the execution plan being the most important factor. USACE assigned ratings of acceptable or unacceptable for the three factors.

(U) For the execution plan factor, USACE assigned an acceptable rating if the company described each major requirement, stated that each major requirement would be met, and demonstrated how each requirement would be achieved. See Table 10 for the major requirement descriptions for the execution plan factor.

(U) Table 10. Major Requirements Descriptions for the Execution Plan Factor of the Western MATOC

(U) Major Requirements	Description
(U) 1. Project Start-up/Mobilization	The company shall identify the activities that will take place immediately after contract award.
(U) 2. Quality Control	The company shall provide an abbreviated summary of their Quality Control Plan. The summary shall include methods of inspection, how deficiencies will be tracked and resolved, and quality control tracking control procedures.
(U) 3. Staffing of the Field Offices	The company shall provide the staff positions, by job title, that will be located at the field office and a planned timeframe to establish the office.
(U) 4. Sub-Contractors	The company shall describe a plan to obtain, coordinate, and manage sub-contractors. The company shall identify aspects of work to be self-performed and those aspects performed by the subcontractors.
(U) 5. Labor Force	The company shall describe how it intends to establish and maintain the necessary labor force, both skilled and non-skilled, in a remote area.
(U) 6. Logistics	The company shall provide a short summary of how it intends to acquire and transport the necessary materials to complete the project within the 365-day period of performance.
(U) 7. Security	The company shall provide a summary on how it will provide security during the construction of the project as well as the CBP Protection Vetting Requirements for the labor force.
(U) 8. Risk Mitigation	The company shall describe how it intends to mitigate the schedule risk associated with this project.
(U) 9. Bonding	The company will provide the Government with the company's maximum, single project, bonding capacity. (U)

(U) Source: USACE.

(U) USACE also assigned an acceptable rating if the company provided a summary schedule, in sufficient detail, that described how it would perform the required work within the allotted time for the schedule factor. Additionally, USACE assigned an acceptable rating when the small business participation plan identified the category of the small business the company intended to use to meet or exceed the overall goals of 25 percent of the total contract value awarded to small businesses.

(U) Phase II Evaluation and Award of Western MATOC

(U) USACE received Phase II proposals from 11 of the 14 companies. On February 25, 2019, Fisher Sand and Gravel submitted its Phase II proposal. On February 26, 2019, the SSEB started reviewing the proposals and completed its review on February 27, 2019. The SSEB rated the 11 companies as acceptable for the three evaluation factors and recommended that all 11 companies be awarded the Western MATOC. On February 28, 2019, the SSA agreed with the SSEB's ratings for each company. On March 11, 2019, one of the small businesses that was not selected to proceed into Phase II protested the decision, and USACE took corrective action to allow the small business to submit a Phase II proposal. On March 25, 2019, the SSEB evaluated the small business's Phase II proposal and rated the company as acceptable. On May 8, 2019, USACE awarded 12 companies, including Fisher Sand and Gravel, a contract for the Western MATOC. USACE awarded Fisher Sand and Gravel contract W9126G-19-D-0027. The contract allowed Fisher Sand and Gravel to compete on future task orders for specific border wall projects located in the Western MATOC areas.

(U) Between August 25, 2019, and January 17, 2020, Fisher Sand and Gravel submitted proposals to compete for the award of seven task orders solicited to the Western MATOC companies. See Table 11 for a list of the Western MATOC task orders.

(U) Table 11. Western MATOC Task Orders

(U) Number	Task Order Number	Location	Miles
(U) 1	W9126G-19-F-6147	Rio Grande Valley 8	21
(U) 2	W9126G-19-F-6154	Rio Grande Valley 9	22
(U) 3	W9126G-19-F-6152	Rio Grande Valley 10	21.6
(U) 4	W912PL-20-F-0010	Yuma 6 Project	3.5
(U) 5	W50UW8-20-F-0002	El Paso 2, Segments 2 Project	12
(U) 6	W50UW8-20-F-0003	El Paso 2, Segments 3 Project	13
(U) 7	W912PL-20-F-0006	San Diego 4 Project	3.5

(U)

(U) Source: USACE.

(U) USACE stated that the selection would be based on the BVTO or LPTA procedures in accordance with the FAR.³³ USACE informed Fisher Sand and Gravel that its proposals were technically acceptable for these seven task orders; however, USACE did not rate Fisher Sand and Gravel as the best-qualified company, and the company was not awarded the contracts. Additionally, when Fisher Sand and Gravel received the same acceptable ratings as other companies, USACE did not award Fisher Sand and Gravel the contracts because it did not submit the lowest price.

(U) On May 2, 2020, USACE issued Fisher Sand and Gravel task order W50UW8-20-F0027 under contract W9126G-19-D-0027 to build 20 miles of border wall, at a cost of \$218 million, for the El Paso 5 Project. Additionally, on May 6, 2020, USACE issued Fisher Sand and Gravel task order W50UW8-20-F0022 under contract W9126G-19-D-0027 to build 42.1 miles of primary border wall, at a cost of \$1.3 billion, for portions of the Tucson Project. USACE modified task order W50UW8-20-F0022 under contract W9126G-19-D-0027 on September 10, 2020, to build an additional 2 miles, at a cost of \$49.8 million.

(U) USACE Solicitation and Award Process for Contract W9126G-19-C-0011 (FY 2018 California Project)

(U) On September 6, 2018, USACE notified companies on Prequalified Sources List 2, which included Fisher Sand and Gravel, of a solicitation for the FY 2018 California Project design-build border wall construction. The notice required a one-page technical approach narrative from companies that wanted to be considered for the project. On September 7, 2018, USACE issued the solicitation for contract W9126G-19-C-0011 (FY 2018 California Project). The FY 2018 California Project was for design-build of approximately 29 miles in the San Diego, El Centro, and Yuma sectors.

(U) Evaluation of Phase I Responses for Contract W9126G-19-C-0011 (FY 2018 California Project)

(U) On October 6, 2018, USACE provided a notice of intent to advertise the FY 2018 California Project to the nine contractors that were on Prequalified Sources List 2, which included Fisher Sand and Gravel. The notice of intent required the companies to submit an implementation approach narrative and past performance for Phase I of the two-phase evaluation. On October 7, 2018, five companies, including Fisher Sand and Gravel, responded with positive interest for the FY 2018 California Project and submitted the required information. USACE considered the

³³ (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.101-1, "Tradeoff Process," and Subpart 15.101-2, "Lowest Price Technically Acceptable Source Selection Process."

(U) five companies as highly qualified based on the competitive qualifications, and selected all five companies to submit Phase II proposals. On October 30, 2018, Fisher Sand and Gravel submitted its price proposal. On November 20, 2018, Fisher Sand and Gravel submitted its technical proposal for Phase II.

(U) Evaluation of Phase II Responses for Contract W9126G-19-C-0011 (FY 2018 California Project)

(U) Phase II of the FY 2018 California Project solicitation used the BVTO procedures in accordance with the FAR.³⁴ Phase II required the five companies to each submit a non-price technical proposal and a price proposal. Evaluation of the non-price technical proposals consisted of four factors: (1) technical approach, (2) schedule, (3) small business participation, and (4) small business subcontracting plans. The four non-price factors were listed in descending order of importance, with technical approach being the most important factor. See Table 12 for a description of the non-price factors for the FY 2018 California Project.

(U) Table 12. Non-Price Factors for the FY 2018 California Project

(U) Factors	Description
(U) 1. Technical Approach	A narrative that demonstrates the company's ability to successfully accomplish the scope of work and completing it within the contractual period of performance. The narrative should include the approach and methodology for the design-build process, including the timeline for critical activities, key team members and experience, and a detailed discussion of the construction approach.
(U) 2. Schedule	A schedule that demonstrates the company's ability to accomplish the work within the required performance period, starting upon receipt of notice to proceed. The schedule must include, at a minimum, major design activities, major construction activities by construction elements, and interim and final acceptance in a logical sequence.
(U) 3. Small Business Participation	Companies must complete and submit the Small Business Participation Plan form, and will be evaluated on the level of proposed participation of U.S. small businesses.
(U) 4. Small Business Subcontracting Plan	A subcontracting plan meeting the requirements of FAR 52.219-9 and DFARS 252.219-7003.

(U)

(U) Source: USACE.

³⁴ (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.101-1, "Tradeoff Process."

(U) USACE assigned ratings of outstanding, good, acceptable, marginal, or unacceptable for the technical approach and small business participation factors. USACE used the same definitions in the Eastern and Western MATOCs for outstanding, good, acceptable, marginal, or unacceptable. See previous Table 6 for the definitions of outstanding, good, acceptable, marginal, or unacceptable.

(U) USACE assigned ratings of acceptable or unacceptable for schedule and small business subcontracting factors. USACE assigned an acceptable rating when the proposal clearly met the minimum requirements of the solicitation or an unacceptable rating when the proposal clearly did not meet the minimum requirements of the solicitation or did not include a small business subcontracting plan. The non-price evaluation factors were more important than the price factor. The award was made based on the best overall proposal that was determined to be the most beneficial to the Government, with consideration given to price and the four non-price evaluation factors.

(U) On December 9, 2018, the SSEB concluded its independent evaluations and reached a consensus for the FY 2018 California Project. On December 12, 2018, the SSAC determined that the SSEB appropriately and consistently applied the evaluation criteria to the proposals and agreed with the final ratings. See Table 13 for the USACE ratings of the evaluated factors for the FY 2018 California Project.

(U) Table 13. Evaluated Factor Ratings for the FY 2018 California Project

(U) Factors	Fisher Sand and Gravel	Company 2	Company 3	Company 4	Company 5
(U) 1. Technical Approach	Acceptable	Good	Good	Good	Outstanding
(U) 2. Schedule	Acceptable	Acceptable	Acceptable	Acceptable	Acceptable
(U) 3. Small Business Participation	Acceptable	Acceptable	Acceptable	Acceptable	Acceptable
(U) 4. Small Business Sub-Contracting Plan	Acceptable	Acceptable	Acceptable	Acceptable	Acceptable

(U)

(U) Source: USACE.

(U) Award for Contract W9126G-19-C-0011 (FY 2018 California Project)

(U) On December 15, 2018, the SSA compared the proposals and performed an independent review and analysis of the technical evaluation and other factors pertaining to the proposals. The SSA agreed with the SSEB's ratings for each company. In addition, the SSA held price discussions with all five companies,

(U) including method of execution, acknowledgment of scope understanding, and statements affirming that each company had confidence to complete the work at the proposed price. The SSA determined that SLSCO, Ltd. provided the best overall value to the Government because SLSCO, Ltd. received the second highest technical rating but submitted the lowest price. The company with the highest technical rating submitted a price that was substantially higher than the price proposed by SLSCO, Ltd. The SSA did not believe that the technical benefits outweighed the increased cost. On December 17, 2018, the contracting officer determined that the price proposed by SLSCO, Ltd. was fair and reasonable. On December 20, 2018, USACE awarded firm-fixed-price contract W9126G-19-C-0011, valued at \$287.3 million, to SLSCO, Ltd.

(U) On December 20, 2018, the USACE contracting officer notified Fisher Sand and Gravel that its proposal did not present the best value to the Government and that Fisher Sand and Gravel would not be awarded the FY 2018 California Project. USACE provided Fisher Sand and Gravel a summary of USACE's evaluation of its proposal. On December 21, 2018, Fisher Sand and Gravel requested a debriefing for the FY 2018 California Project.

(U) Fisher Sand and Gravel's Debriefing for Contract W9126G-19-C-0011 (FY 2018 California Project)

(U) According to Fisher Sand and Gravel officials, USACE held a telephonic debriefing with Fisher Sand and Gravel on January 17, 2019, for the FY 2018 California Project. USACE explained that Fisher Sand and Gravel had the lowest acceptable score and that the winning contractor received a higher rating. According to Fisher Sand and Gravel officials, USACE stated that even if Fisher Sand and Gravel had the lowest price, USACE would not have selected Fisher Sand and Gravel for the project because SLSCO, Ltd. had a higher rating.

(U) USACE Solicitation and Award Process for Contracts W912PL-19-C-0013 (Yuma 1 and 2 Projects) and W912PP-19-C-0018 (El Paso 1 Project)

(U) On March 28, 2019, USACE issued a notice of intent to solicit the Yuma 1 and 2 Projects to four contractors that were selected for Prequalified Sources List 1, which did not include Fisher Sand and Gravel because Fisher Sand and Gravel did not submit a response for Prequalified Sources List 1. The Yuma 1 and 2 Projects were for the design-build of approximately 11 miles of primary bollard fencing, construction of roads, and lighting along the U.S. border near Yuma, Arizona.

(U) The Yuma 1 Project began approximately 1 mile southeast of the Andrade Port of Entry and continued along the Colorado River for approximately 5 miles in Yuma County. The Yuma 2 Project involved the replacement of two segments of primary pedestrian fencing in the Yuma sector for a total of approximately 6 miles. This included approximately 2 miles of fencing along the Colorado River and the replacement of primary pedestrian fencing approximately 17 miles east of the San Luis Port of Entry, continuing east for approximately 4 miles.

(U) On the same day, USACE issued a notice of intent to solicit the El Paso 1 Project to nine contractors that were on Prequalified Sources List 2, including Fisher Sand and Gravel. The El Paso 1 Project was for the design-build of approximately 46 miles of primary bollard fence replacement including gates, drainage, roads, power distribution, demolition, and disposal. The El Paso 1 Project began approximately 17.5 miles west of the Columbus Port of Entry and continued east in noncontiguous segments to approximately 35 miles east of the Columbus Port of Entry within the Luna and Dona Ana Counties, New Mexico.

(U) On March 30, 2019, USACE sent an e-mail to Fisher Sand and Gravel officials that reminded them that Fisher Sand and Gravel was included only in Prequalified Source List 2 and could participate only in the solicitation for the El Paso 1 Project. The notice of intent served as the advertisement notice and Phase I selection under a two-phase design-build acquisition process in accordance with DFARS.³⁵

(U) On April 2, 2019, USACE received three responses out of the four prequalified companies that were interested in participating in Phase I for the Yuma 1 and 2 Projects and six responses out of the nine prequalified companies, including Fisher Sand and Gravel, that were interested in participating in Phase I for the El Paso 1 Project. USACE conducted the Phase I evaluation for both contracts by considering responses to 10 questions.

1. (U) List all current border infrastructure barrier projects your company is working on or has worked on in the past 5 years. NOTE: USACE intends to verify past performance available so your company must ensure that projects are described with enough information that USACE can identify the projects to verify the past performance.
2. (U) Does your company 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 company will achieve this.
3. (U) Does your company have the ability to start panel emplacement within 45 days of contract award? If yes, please explain how your company will achieve this.

³⁵ (U) DFARS 236.272, "Prequalification of Sources."

4. (U) The solicitation for the Yuma 1 and 2 Projects included the question, “Does your company have the ability to bond up to \$500 million for a single project and \$1 billion aggregate? And if not, what is your max bonding capacity? Please submit a Letter of Commitment substantiating this.” The solicitation for the El Paso 1 Project increased the ability to bond up to 1 billion for a single project and \$4 billion aggregate.
5. (U) Would your company be capable of completing 50 percent of the fence placement within 9 months of contract award? If yes, please explain how your company will achieve this.
6. (U) Would your company be capable of completing 100 percent of the fence placement within 18 months of contract award? If yes, please explain how your company will achieve this.
7. (U) Identify major subcontractors such as the designer and key subcontractors performing significant work such as design or significant percentages of work.
8. (U) How do you anticipate handling site security for the project?
9. (U) USACE 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 U.S. International Boundary and Water Commission, to ensure timely project completion?
10. (U) What is your plan for fabrication and storage?

(U) USACE selected the most advantageous technical approach that met its mission needs. Responses were limited to 10 single-space typed pages of no less than 10-point font, not including the bonding letter and the CLIN structure. USACE asked whether the companies had any questions regarding the CLIN structure and stated that the companies should not provide any pricing information. USACE noted that all responses must meet CBP’s Tactical Infrastructure Design Standard, dated March 2019, and that these projects used a standard 18-foot steel bollard design. The Phase I evaluation determined which contractor would receive the sole-source letter contract in Phase II.

(U) Evaluation of Phase I Responses for Contracts W912PL-19-C-0013 (Yuma 1 and 2 Projects) and W912PP-19-C-0018 (El Paso 1 Project)

(U) USACE evaluated the 10 solicitation questions for reasonableness, logic, and risk. The USACE evaluation treated each of the 10 questions as a separate rating factor and listed them in descending order of importance. USACE evaluated the most important factor (question 1), past performance, to determine whether the company had recent and relevant border fencing projects or had completed relevant border fencing projects within the past 5 years. For past performance, USACE assigned ratings of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown (neutral) confidence. USACE used the same definitions in the Eastern and Western MATOCs. See previous Table 7 for the definitions of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown (neutral) confidence. The solicitation for the El Paso 1 Project further defined relevant performance. USACE used the same definitions in the Eastern and Western MATOCs for relevant performance. See previous Table 8 for the description of relevant performance.

(U) For both contracts, USACE assigned ratings of outstanding, good, acceptable, marginal, or unacceptable for the subcontracting, utility coordination, and fabrication factors. USACE used the same definitions in the Eastern and Western MATOCs for outstanding, good, acceptable, marginal, or unacceptable. See previous Table 6 for the definitions of outstanding, good, acceptable, marginal, or unacceptable.

(U) Additionally, for both contracts, USACE assigned ratings of acceptable or unacceptable for the scoping of site visit, ability to install panels in 45 days, bonding capacity, 50 percent panel placement in 9 months, 100 percent panel placement in 18 months, and security evaluation factors. USACE assigned an acceptable rating when the proposal clearly met the minimum requirements of the solicitation or an unacceptable rating when the proposal clearly did not meet the minimum requirements of the solicitation.

(U) On April 3, 2019, the SSEB concluded its independent Phase I evaluation and reached a consensus for the Yuma 1 and 2 Projects and the El Paso 1 Project. USACE rated each company's response for each of the 10 factors. See Table 14 for USACE ratings of the evaluation factors for the Yuma 1 and 2 Projects and Table 15 for USACE ratings of the evaluation factors for contract the El Paso 1 Project.

(U) Table 14. Evaluation Factors Ratings for the Yuma 1 and 2 Projects

(U) Factors	Company 1	Company 2	Company 3
(U) 1. Past Performance	Substantial Confidence	Substantial Confidence	Unknown Confidence (Neutral)
(U) 2. Scoping Site Visits	Acceptable	Acceptable	Acceptable
(U) 3. Ability to Install Panels in 45 Days	Acceptable	Acceptable	Acceptable
(U) 4. Bonding Capacity	Acceptable	Acceptable	Acceptable
(U) 5. 50 Percent Panel Placement in 9 Months	Acceptable	Acceptable	Acceptable
(U) 6. 100 Percent Panel Placement in 18 Months	Acceptable	Acceptable	Acceptable
(U) 7. Subcontracting	Good	Good	Acceptable
(U) 8. Security	Acceptable	Acceptable	Acceptable
(U) 9. Utility Coordination	Outstanding	Good	Acceptable
(U) 10. Fabrication	Outstanding	Outstanding	Acceptable

(U)

(U) Source: USACE.

(U) Table 15. Evaluation Factors Ratings for the El Paso 1 Project

(U) Factors	Fisher Sand and Gravel	Company 2	Company 3	Company 4	Company 5	Company 6
(U) 1. Past Performance	Limited Confidence	Substantial Confidence	Substantial Confidence	Unknown Confidence (Neutral)	Satisfactory Confidence	Limited Confidence
(U) 2. Scoping Site Visits	Acceptable	Acceptable	Acceptable	Acceptable	Acceptable	Acceptable
(U) 3. Ability to Install Panels in 45 Days	Acceptable	Acceptable	Acceptable	Acceptable	Acceptable	Acceptable
(U) 4. Bonding Capacity	Acceptable	Acceptable	Acceptable	Acceptable	Unacceptable	Acceptable
(U) 5. 50 Percent Panel Placement in 9 Months	Acceptable	Acceptable	Acceptable	Acceptable	Acceptable	Acceptable
(U) 6. 100 Percent Panel Placement in 18 Months	Acceptable	Acceptable	Acceptable	Acceptable	Acceptable	Acceptable
(U) 7. Subcontracting	Acceptable	Good	Good	Acceptable	Acceptable	Acceptable
(U) 8. Security	Acceptable	Acceptable	Acceptable	Acceptable	Acceptable	Acceptable
(U) 9. Utility Coordination	Acceptable	Outstanding	Outstanding	Acceptable	Acceptable	Acceptable
(U) 10. Fabrication	Good	Outstanding	Outstanding	Acceptable	Acceptable	Good

(U)

(U) Source: USACE.

(U) Phase II for Contracts W912PL-19-C-0013 (Yuma 1 and 2 Projects) and W912PP-19-C-0018 (El Paso 1 Project)

(U) For Phase II of the Yuma 1 and 2 Projects and the El Paso 1 Project, USACE selected the most highly qualified single company to continue into the Phase II portion of the acquisition. On April 5, 2019, USACE selected Barnard Construction Company Incorporated as the most highly qualified company and intended to enter further Phase II discussions for the Yuma 1 and 2 Projects. USACE determined that Barnard Construction Company Incorporated had recent and current performance that was relevant. USACE stated that Barnard Construction Company Incorporated demonstrated the ability to perform on wall contracts by successfully completing the replacement of 20 miles of fence in Santa Teresa, New Mexico. The Chief of Construction for the Santa Teresa project rated Barnard Construction Company Incorporated as outstanding and recommended the company for future wall projects.

(U) Additionally, on April 5, 2019, USACE selected SLSCO, Ltd. and intended to enter further Phase II discussions for the El Paso 1 Project. USACE stated that SLSCO, Ltd. had recent and current performance that was relevant. USACE rated SLSCO, Ltd. and another company as the most highly qualified companies. However, USACE considered the prior commitments of the other company an increased risk of possible unsuccessful performance on this contract. SLSCO, Ltd. indicated in its response that it secured a separate subcontractor's team to mitigate the risk to the Government.

(U) USACE Approval and Award of Contracts W912PL-19-C-0013 (Yuma 1 and 2 Projects) and W912PP-19-C-0018 (El Paso 1 Project)

(U) On April 5, 2019, USACE requested a justification and approval for other than full and open competition based on the FAR to award letter contracts for the Yuma 1 and 2 Projects and El Paso 1 Project.³⁶ The FAR states that when an agency's need for the supplies or services is of such an unusual and compelling urgency, the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals. USACE stated that President Trump determined that a national emergency existed at the southern border of the United States and required the ability to award a sole-source contract to a responsible contractor that could begin work immediately.³⁷ USACE stated that it would be unable to undertake construction

³⁶ (U) FAR 6.302-2, "Unusual and Compelling Urgency."

³⁷ (U) Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States, February 15, 2019.

(U) in FY 2019 and would not meet the 18-month delivery schedule without the expedited solicitation methods. A traditional design-build project acquired under full and open competition could take more than 9 to 12 months to award based upon historical averages for contracts of this dollar amount, and limiting the number of sources would save 8 to 11 months. According to USACE, it was critical for construction to begin as soon as possible to ensure complete operational control of the southern border in response to the national emergency. Additionally, funding for both projects expired on September 30, 2019.

(U) On April 5, 2019, USACE also approved the issuance of an undefinitized contract action (UCA), in the form of a letter contract, for the design-build construction in Yuma 1 and 2 Projects and El Paso 1 Project in New Mexico and Texas in accordance with DFARS.³⁸ A UCA is any contract action for which the contract terms, specifications, or price are not agreed upon before performance is begun under the action. DFARS requires the contracting officer to obtain approval from the head of the contracting activity before entering into a UCA. The request for approval must fully explain the need to begin performance before definitization, including the adverse impact on agency requirements resulting from delays in beginning performance. UCAs may be used when the negotiation of a final contract is not possible in time to meet the Government's requirements and the Government's interest demands that the contractor be given a binding commitment so that contract performance can begin immediately. USACE stated that the approval was necessary in order to satisfy the requirements of the Presidential National Emergency Declaration, dated February 15, 2019, and the urgent and compelling directive received from the Acting Secretary of Defense, dated March 25, 2019. Additionally, USACE stated that the unusual and compelling urgency warranted the use of the UCA. On April 8, 2019, USACE approved the justification and approval for other than full and open competition. As a result, on April 9, 2019, USACE awarded a sole-source UCA with a not-to-exceed value of \$187 million, to Barnard Construction Company Incorporated for contract W912PL-19-C-0013 (Yuma 1 and 2 Projects) and a UCA with a not-to-exceed value of \$800 million, to SLSCO, Ltd. for contract W912PP-19-C-0018 (El Paso 1 Project).

(U) Fisher Sand and Gravel's Debriefing for Contract W912PP-19-C-0018 (El Paso 1 Project)

(U) On April 11, 2019, Fisher Sand and Gravel requested a debriefing from the USACE contracting officer when it learned that it was not selected for the El Paso 1 Project. Fisher Sand and Gravel requested that the debriefing include:

- (U) evaluation of the significant weaknesses or deficiencies in its proposal,

³⁸ (U) DFARS 217.7404-1, "Authorization."

- (U) the overall evaluated cost or price and technical rating of the successful company and Fisher Sand and Gravel's past performance information,
- (U) the overall ranking of all companies, and
- (U) a summary of the rationale for award.

(U) In addition, Fisher Sand and Gravel requested responses to relevant questions about the selection procedures, applicable regulations, and whether other applicable authorities were followed. Fisher Sand and Gravel requested that the post-award debriefing occur within 3 days following notice of the contract award and 5 days after receipt of its request.

(U) On April 12, 2019, the USACE contracting officer and staff held a teleconference with Fisher Sand and Gravel. Based on this call, Fisher Sand and Gravel's understanding was that the pool of prequalified applicants for the solicitation of the Yuma 1 and 2 Projects was taken from Prequalified Sources List 1 issued in 2017, and the pool of prequalified applicants for the solicitation of the El Paso 1 Project was taken from Prequalified Sources List 2 issued in 2018.

(U) GAO Protests and Legal Challenges for Contracts W912PL-19-C-0013 (Yuma 1 and 2 Projects) and W912PP-19-C-0018 (El Paso 1 Project)

(U) On April 18, 2019, Fisher Sand and Gravel filed a bid protest with the GAO for the sole-source award of the El Paso 1 Project to SLSCO, Ltd. Fisher Sand and Gravel challenged the terms of the solicitation and stated that USACE did not consistently evaluate the proposals based on the solicitation's evaluation criteria. On April 24, 2019, USACE advised the GAO that it had requested the contractor to continue executing the border wall construction contract based on urgent and compelling circumstances. The United States Code states that a contract may not be awarded in any procurement after the Federal agency has received notice of a protest and while the protest is pending except when the head of the procuring activity authorized the contract award based on urgent and compelling circumstances, which significantly affects U.S. interests.³⁹

(U) On April 29, 2019, USACE requested that the GAO dismiss the protest of the El Paso 1 Project because Fisher Sand and Gravel's protest was untimely and lacked legal and factual support. On May 16, 2019, Fisher Sand and Gravel challenged USACE's request for the contractor to continue executing the border wall construction contract based on urgent and compelling circumstances with

³⁹ (U) Section 3553, title 31, United States Code, "Review of Protests; Effect on Contracts Pending Decision."

(U) the U.S. Court of Federal Claims. On May 21, 2019, the U.S. Court of Federal Claims denied Fisher Sand and Gravel's request for an injunction and dismissed the challenge. On July 26, 2019, the GAO denied Fisher Sand and Gravel's protest of the El Paso 1 Project because Fisher Sand and Gravel's arguments did not provide a basis to sustain the protest. Specifically, the GAO determined that the challenge to the evaluation of the proposal was denied because the evaluation was reasonable and consistent with the terms of the solicitation. Additionally, Fisher Sand and Gravel could not challenge the evaluation because Fisher Sand and Gravel was not the next company in line for the award. Finally, the GAO determined that Fisher Sand and Gravel did not challenge the terms of the solicitation and USACE's evaluation of proposals against the solicitation in a timely manner. On September 20, 2019, USACE unilaterally definitized the UCA, resulting in the award of a firm-fixed-price contract W912PP-19-C-0018, valued at \$739 million to SLSCO, Ltd. Definitization means the agreement on, or determination of, contract terms, specifications, and price, which converts the UCA into a definitive firm-fixed-price contract. On April 3, 2020, USACE modified contract W912PP-19-C-0018 to add 2.4 miles of border wall, at a cost of \$61.4 million, for the El Paso B, Segment 6 Project, increasing the total contract price to more than \$800 million.

(U) Protest of Contract W912PL-19-C-0013 (Yuma 1 and 2 Projects)

(U) On April 19, 2019, Fisher Sand and Gravel filed a bid protest with the GAO for the award of contract W912PL-19-C-0013 (Yuma 1 and 2 Projects) stating that the solicitation was improperly limited to companies on Prequalified Sources List 1. On April 24, 2019, USACE requested that the GAO dismiss the protest on the Yuma 1 and 2 Projects, stating that Fisher Sand and Gravel was not an interested party to challenge the award of the contract, had not competed for the award, and had not made the challenge in a timely manner. However, on May 1, 2019, USACE stated that it would take corrective action on the Yuma 1 and 2 Projects contract by terminating it for the convenience of the Government because the solicitation was incorrectly limited to Prequalified Sources List 1, which did not identify projects in Arizona. USACE stated that it would re-compete the contract. On May 4, 2019, USACE terminated the Yuma 1 and 2 Projects contract for convenience of the Government. USACE negotiated settlement costs of \$244,106 for the Yuma 1 and 2 Projects contract. As a result, on May 6, 2019, the GAO dismissed Fisher Sand and Gravel's protest for the Yuma 1 and 2 Projects based on USACE's notice of corrective action. The Yuma 1 Project was resolicited under contract W912PL-19-C-0014, which was combined with the El Centro 1 Project, and the Yuma 2 Project was resolicited under contract W912PL-20-C-0002, which was combined with the Yuma 10/27 Project.

(U) Establishment of Prequalified Sources List 3

(U) On April 19, 2019, USACE posted a solicitation to create Prequalified Sources List 3 in accordance with DFARS for horizontal construction contracts with a total value of up to approximately \$8 billion in support of the border infrastructure program along the U.S. Mexico border.⁴⁰ USACE had similar requirements as Prequalified Sources Lists 2. During the 30 day solicitation period, USACE answered 14 requests for information from contractors. To be considered qualified for Prequalified Sources List 3, companies had to meet eight rating criteria.

(U) On May 22, 2019, Fisher Sand and Gravel submitted a response to the eight questions, along with additional files that explained its accounting system, bonding capability, the sequence of design-build construction schedule assuming a 365-day period of performance, and past performance. On the same day, USACE received responses from six additional contractors.

(U) Before evaluating the contractor responses, the SSEB members received briefings from the USACE contracting officer and office of counsel. The contracting officer and office of counsel briefed the SSEB members on conflicts of interest, nondisclosures, protection and handling of source selection information, and rules of conduct. After the SSEB members were made aware of the contractors that responded, each SSEB member stated that they did not have a conflict of interest with any of the contractors. The SSEB members signed a nondisclosure statement before responses were distributed.

(U) On May 23, 2019, the SSEB independently evaluated the seven responses and assigned a rating of acceptable or unacceptable to each factor. All criteria were of equal importance, and failure to meet the acceptability standard of one or more criteria resulted in exclusion from Prequalified Sources List 3. The SSEB rated five of the seven companies as acceptable in accordance with the requirement of the prequalification of sources announcement.

(U) On June 4, 2019, the SSAC also reviewed the prequalification of sources responses and agreed with the findings of the SSEB that five of the seven companies were acceptable. Based on the findings of the SSEB and the SSAC, the SSA compared the proposals to the evaluation criteria. On June 6, 2019, the SSA determined that five companies met all of the evaluation criteria standards of acceptability and demonstrated adequate capability and experience for inclusion on Prequalified Sources List 3.

⁴⁰ (U) DFARS 236.272, "Prequalification of Sources."

(U) On June 11, 2019, USACE notified five companies, including Fisher Sand and Gravel, that the evaluation of responses to the prequalification of sources 3 was completed. USACE found Fisher Sand and Gravel's responses acceptable for each of the eight criteria and placed the company on Prequalified Sources List 3, along with four other companies. USACE followed the same two-phase process for projects solicited under Prequalified Sources Lists 1 and 2. USACE stated that the selection would be based on the BVT0 or LPTA procedures in accordance with the FAR.⁴¹

(U) USACE Solicitation and Award Process for Contract W912PL-19-C-0014 (Yuma 1 and El Centro 1 Projects)

(U) USACE resolicited the Yuma 1 Project that was terminated for convenience under contract W912PL-19-C-0013. Specifically, on May 5, 2019, USACE issued a solicitation for the Yuma 1 and 2 Projects and El Centro 1 Project to the nine contractors that were on Prequalified Sources List 2, including Fisher Sand and Gravel. On May 8, 2019, USACE received Phase I proposals, in response to the request for proposal for the Yuma 1 and 2 Projects and the El Centro 1 Project, from five companies, including Fisher Sand and Gravel. On May 9, 2019, USACE's Military Programs Directorate issued a directive that removed the Yuma 2 Project from the solicitation. The Yuma 1 Project and El Centro 1 Project were for the design-build of approximately 20 miles of pedestrian bollard fencing, construction of roads, and lighting along the U.S. border near Yuma, Arizona, and El Centro, California. The El Centro 1 Project began approximately 10 miles west of the Calexico Port of Entry and continued west 15.25 miles in Imperial County.

(U) Evaluation of Phase I Responses for Contract W912PL-19-C-0014 (Yuma 1 and El Centro 1 Projects)

(U) USACE used a two-phase procurement process, with Phase I competed between members of Prequalified Sources List 2 and proposals evaluated to determine the most highly qualified company to enter negotiations with for Phase II, which would result in a sole-source UCA award. Phase I evaluation used six rating factors to evaluate the proposals and listed them in descending order of importance, with factor 1 being the most important factor. Factors 1 through 4 were technical factors, factor 5 was past performance, and factor 6 was bonding capacity. See Table 16 for a description of each rating factor for the Yuma 1 and El Centro 1 Projects.

⁴¹ (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.101-1, "Tradeoff Process," and Subpart 15.101-2, "Lowest Price Technically Acceptable Source Selection Process."

(U) Table 16. Rating Factors for the Yuma 1 and El Centro 1 Projects

(U) Factors	Description
(U) 1. Recent and Relevant Experience	Examples of construction projects that best illustrate the experience of the contractor on recent and relevant projects. "Relevant" projects are projects of similar scope, and "recent" projects are projects that are at least 70 percent complete as of the solicitation closing date or projects that had been completed within 12 years of the solicitation closing date.
(U) 2. Capacity for Concurrent Scoping of Multiple Site Visits	Whether the company had the capacity to support several concurrent scoping site visits at multiple remote sites within 48 hours of notification of a date and time from the Government.
(U) 3. Ability to Mobilize, Geotechnical Exploration, and Design Activities	Whether the company had the ability to mobilize upon award to begin survey, geotechnical exploration, and other design-related activities that would enable the company to start construction within 45 days of contract award.
(U) 4. Major Subcontractors	Identify major subcontractors, including the designer and key subcontractors performing significant features of work.
(U) 5. Past Performance	Past performance (Contractor Performance Assessment Reports and Past Performance Information Retrieval System Reports) for projects submitted under factor 1.
(U) 6. Bonding Capacity	Demonstrate ability to bond up to \$305 million for a single project and \$1 billion aggregate, and submit a Bonding Letter from the Surety.

(U)

(U) Source: USACE.

(U) USACE assigned ratings of outstanding, good, acceptable, marginal, or unacceptable for factors 1 through 4. USACE used the same definitions in the Eastern and Western MATOCs for outstanding, good, acceptable, marginal, or unacceptable. See previous Table 6 for the definitions of outstanding, good, acceptable, marginal, or unacceptable.

(U) For the past performance factor, USACE assigned confidence assessment ratings that are the probability of successful performance in meeting the contract requirements. The confidence assessment ratings were based on the recency and relevancy of each project submitted as well as the quality of performance. USACE used the same definitions in the Eastern and Western MATOCs. See previous Table 7 for the definitions of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown (neutral) confidence and previous Table 8 for the description of relevant performance. USACE assigned an acceptable or unacceptable rating for the bonding capacity factor, with a rating of unacceptable resulting in an unacceptable rating for the entire proposal.

(U) On May 9, 2019, the SSEB concluded its independent evaluation and reached a consensus for rating the proposals for Yuma 1 Project and El Centro 1 Project. USACE rated each company's proposal for each of the six factors. See Table 17 for USACE ratings of the evaluation factors for Yuma 1 and El Centro 1 Projects.

(U) Table 17. Evaluation Factor Ratings for the Yuma 1 and El Centro 1 Projects

(U) Factors	Fisher Sand and Gravel	Company 2	Company 3	Company 4	Company 5
(U) 1. Recent and Relevant Experience	Good	Outstanding	Good	Outstanding	Outstanding
(U) 2. Capacity for Concurrent Scoping of Multiple Sites	Good	Good	Acceptable	Good	Acceptable
(U) 3. Ability to Mobilize, Geotechnical Exploration, and Design Activities	Good	Outstanding	Good	Outstanding	Good
(U) 4. Major Subcontractors	Good	Outstanding	Good	Outstanding	Good
(U) 5. Past Performance	Satisfactory	Substantial	Satisfactory	Satisfactory	Satisfactory
(U) 6. Bonding Capacity	Acceptable	Acceptable	Acceptable	Unknown	Acceptable (U)

(U) Source: USACE.

(U) On May 11, 2019, the SSA performed an analysis of the Yuma 1 and El Centro 1 Project proposals and assigned final ratings that did not agree with all ratings of the SSEB. The SSA changed two ratings. The SSA changed rating factor 3, which was the ability to mobilize, geotechnical exploration, and design activities, from good to outstanding for Fisher Sand and Gravel. The source selection decision document did not detail the reasoning for the Fisher Sand and Gravel change because it discussed only the winning company, company 2, in detail. The SSA also changed rating factor 2, which was the capacity for concurrent scoping of multiple sites, from good to outstanding for company 2 because the SSA identified a significant strength that company 2 had with a designer and management team locally available to respond within short notice to perform scoping efforts within 48 hours' notice. The SSA determined that BFBC, LLC, a subsidiary of Barnard Construction Company Incorporated, was the most qualified company with a plan that appeared to be reasonable and logical. As a result, USACE selected BFBC, LLC as the most highly qualified company and intended to enter further Phase II discussions for the Yuma 1 and El Centro 1 Projects.

(U) USACE Approvals and Award for Contract W912PL-19-C-0014 (Yuma 1 and El Centro 1 Projects)

(U) On May 11, 2019, USACE requested approval for a justification and approval for other than full and open competition based on the FAR to award a UCA, in the form of a letter contract, for the Yuma 1 and El Centro 1 Projects.⁴² USACE stated that President Trump determined that a national emergency existed at the southern border of the United States and required the ability to award a sole-source contract to a responsible contractor that could begin work immediately.⁴³ According to USACE, it was critical for construction to begin as soon as possible to ensure complete operational control of the southern border in response to the national emergency. On May 14, 2019, the Assistant Secretary of the Army approved the justification and approval.

(U) Additionally, on May 11, 2019, USACE approved the issuance of a UCA, in the form of a letter contract, for the design-build construction for the Yuma 1 and El Centro 1 Projects in accordance with DFARS.⁴⁴ USACE stated that the approval was necessary to satisfy the requirements of the Presidential National Emergency Declaration, dated February 15, 2019, and the urgent and compelling directive received from the Acting Secretary of Defense, dated May 3, 2019. USACE also stated that the unusual and compelling urgency warranted the use of a letter contract. As a result, on May 15, 2019, USACE awarded a sole-source UCA with a not-to-exceed value of \$141.8 million to BFBC, LLC for the Yuma 1 and El Centro 1 Projects. On September 10, 2019, the contracting officer approved the post-negotiation memorandum, which documented the negotiations between USACE and BFBC, LLC. On September 12, 2019, USACE definitized the UCA, resulting in an award of a firm-fixed-price contract W912PL-19-C-0014, valued at \$440 million, to BFBC, LLC. On March 24, 2020, USACE modified contract W912PL-19-C-0014 for an additional 10.4 miles of border wall, at a cost of \$173 million, for portions of the Yuma barrier wall. USACE again modified contract W912PL-19-C-0014 on April 11, 2020, for an additional 17.2 miles, at a cost of \$569 million, increasing the total contract price to \$1.2 billion. On January 19, 2021, USACE again modified contract W912PL-19-C-0014 for an additional .46 miles, at a cost of \$4.6 million, increasing the total contract price to \$1.26 billion.

⁴² (U) FAR 6.302-2, "Unusual and Compelling Urgency."

⁴³ (U) Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States, February 15, 2019.

⁴⁴ (U) DFARS 217.7404-1, "Authorization."

(U) Fisher Sand and Gravel's Debriefing for Contract W912PL-19-C-0014 (Yuma 1 and El Centro 1 Projects)

(U) On May 15, 2019, the USACE contracting officer notified Fisher Sand and Gravel that it was not awarded the contract for the Yuma 1 and El Centro 1 Projects. On the following day, Fisher Sand and Gravel officials requested a debriefing from the USACE contracting officer on why its proposal was not selected for contract award. Fisher Sand and Gravel requested that the debriefing include:

- (U) evaluation of the significant weaknesses or deficiencies in its proposal;
- (U) the overall evaluated cost or price and technical rating of the successful company and of Fisher Sand and Gravel, and its past performance information;
- (U) the overall ranking of all companies;
- (U) a summary of the rationale for award; and
- (U) whether the procurement method used for this solicitation would be used for future border wall projects.

(~~CUI~~) On May 18, 2019, the USACE contracting officer provided Fisher Sand and Gravel a debriefing letter related to its proposal for the Yuma 1 and El Centro 1 Projects. In the letter, USACE explained that the SSEB evaluated the proposal and provided a written evaluation to the SSA, who performed an independent analysis. USACE provided the SSA's final ratings for Fisher Sand and Gravel and the contract awardee, BFBC, LLC. In addition, USACE detailed the strengths and weaknesses of Fisher Sand and Gravel's proposal. The letter identified the following weaknesses in Fisher Sand and Gravel's proposal.

- (~~CUI~~) [REDACTED]
- (~~CUI~~) [REDACTED]
- (~~CUI~~) [REDACTED]
- (~~CUI~~) [REDACTED]

(U) USACE concluded by stating that the rationale for the selection of the most qualified company was based on the SSA analysis, which determined that it was in the Government's best interest to select BFBC, LLC.

(U) USACE Solicitation and Award Process for Contract W912PL-19-C-0015 (Tucson 1, 2, and 3 Projects)

(U) On May 6, 2019, USACE issued a solicitation for the Tucson 1, 2, and 3 Projects to the nine contractors that were on Prequalified Sources List 2, which included Fisher Sand and Gravel. On May 9, 2019, USACE received Phase I proposals, in response to the solicitation for the Tucson 1, 2, and 3 Projects, from four companies, including Fisher Sand and Gravel. The Tucson 1, 2, and 3 Projects were for the design-build of approximately 63 miles of pedestrian bollard fencing, construction of roads, and lighting along the U.S. border in Arizona. The Tucson 1 Project included two segments. The first segment began approximately 2 miles west of the Lukeville Port of Entry and continued west approximately 30 miles. The second segment began approximately 3 miles east of the Lukeville Port of Entry and continued east approximately 8 miles in Pima County, Arizona. The Tucson 2 Project began approximately 2 miles west of the Lukeville Port of Entry and continued approximately 3 miles east of the port. The Tucson 3 Project included three segments, which began approximately 18 miles west of the Naco Port of Entry and continued approximately 25 miles east of the Douglas Port of Entry for approximately 20 miles of nonadjacent border in Cochise County, Arizona.

(U) Evaluation of Phase I Responses for Contract W912PL-19-C-0015 (Tucson 1, 2, and 3 Project)

(U) USACE used a two-phase procurement process, with Phase I competed between members of Prequalified Sources List 2 and proposals evaluated, to determine the most highly qualified company to enter negotiations with for Phase II, which would result in a sole-source UCA award. Phase I evaluation used six rating factors to evaluate the proposals and listed them in descending order of importance, with factor 1 being the most important factor. Factors 1 through 4 were technical factors: (1) recent and relevant experience; (2) capacity for concurrent scoping of multiple site visits; (3) ability to mobilize, geotechnical exploration, and design activities; and (4) major subcontractors. Factor 5 was past performance, and factor 6 was bonding capacity. USACE used the same rating factors as the Yuma 1 and El Centro 1 Projects; however, USACE increased the bonding capacity to \$1.3 billion for a single project and \$5 billion aggregate. See previous Table 15 for the descriptions of the rating factors.

(U) USACE assigned ratings of outstanding, good, acceptable, marginal, or unacceptable for factors 1 through 4. USACE used the same definitions in the Eastern and Western MATOCs for outstanding, good, acceptable, marginal, or unacceptable. See previous Table 6 for the definitions of outstanding, good, acceptable, marginal, or unacceptable. For the past performance factor,

(U) USACE assigned confidence assessment ratings that are the probability of successful performance in meeting the contract requirements. The confidence assessment ratings were based on the recency and relevancy of each project submitted as well as the quality of performance. See previous Table 7 for the definitions of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown (neutral) confidence and previous Table 8 for the description of relevant performance. USACE assigned an acceptable or unacceptable rating for the bonding capacity factor, with a rating of unacceptable resulting in an unacceptable rating for the entire proposal. In addition to the six rated factors, companies were required to submit a balance sheet, income statement, and a completed financial standing questionnaire. Companies were also required to submit a completed corporate, partnership, joint venture certificate, and joint venture agreement.

(U) The SSEB reached a consensus for rating the proposals for the Tucson 1, 2, and 3 Projects. The SSEB rated each company's proposal for each of the six factors. See Table 18 for SSEB ratings of the evaluation factors for the Tucson 1, 2, and 3 Projects.

(U) Table 18. Evaluation Factor Ratings for the Tucson 1, 2, and 3 Projects

(U) Factors	Fisher Sand and Gravel	Company 2	Company 3	Company 4
(U) 1. Recent and Relevant Experience	Good	Outstanding	Outstanding	Outstanding
(U) 2. Capacity for Concurrent Scoping of Multiple Site Visits	Good	Good	Good	Good
(U) 3. Ability to Mobilize, Geotechnical Exploration, and Design Activities	Good	Outstanding	Outstanding	Outstanding
(U) 4. Major Subcontractors	Good	Outstanding	Acceptable	Outstanding
(U) 5. Past Performance	Satisfactory Confidence	Substantial Confidence	Satisfactory Confidence	Substantial Confidence
(U) 6. Bonding Capacity	Acceptable	Acceptable	Unknown	Acceptable (U)

(U) Source: USACE.

(U) On May 11, 2019, the SSA performed an analysis of the proposals for the Tucson 1, 2, and 3 Projects and did not agree with all ratings of the SSEB. The SSA changed five ratings. The SSA changed the factor 3 rating, which was the ability to mobilize, geotechnical exploration, and design activities, from good to outstanding for Fisher Sand and Gravel. The evaluation document did not detail the reasoning for the Fisher Sand and Gravel change because it discussed only the top two companies,

(U) company 2 and 4, in detail. The SSA also changed the factor 4 rating on major subcontractors for company 3 from acceptable to outstanding. The SSA changed the factor 2 rating, which was the capacity for concurrent scoping of multiple site visits, from good to outstanding for company 2 because the SSA identified a significant strength that company 2 had with a designer and management team locally available to respond within short notice to perform scoping efforts within 48 hours' notice. While the SSA agreed with the factor 3 rating of outstanding for company 2, the SSA and SSEB noted a concern about the availability of resources, specifically the subcontractor, for company 2 to complete the project in the timeframe required, due to current and future project commitments. Based on the risk identified in factor 3 and quality of all past performance ratings for company 2, the SSA changed the factor 5 rating of substantial confidence to satisfactory confidence. In addition, the SSA changed the factor 2 rating, which was the capacity for concurrent scoping of multiple site visits, from good to outstanding for company 4. Based on the updated ratings, the SSA determined that Southwest Valley Constructors was the most highly qualified company with an excellent execution plan that included logical detail. As a result, USACE selected Southwest Valley Constructors as the most highly qualified company and intended to enter Phase II negotiations for the Tucson 1, 2, and 3 Projects.

(U) Award for Contract W912PL-19-C-0015 (Tucson 1, 2, and 3 Projects)

(U) On May 15, 2019, USACE awarded a sole-source UCA with a not-to-exceed value of \$646 million to Southwest Valley Constructors for the Tucson 1, 2, and 3 Projects. USACE stated that the approval for the UCA was received in order to satisfy the requirements of the Presidential National Emergency Declaration, dated February 15, 2019, and in compliance with FAR.⁴⁵ On August 30, 2019, USACE definitized the UCA, resulting in an award of a firm-fixed-price contract W912PL-19-C-0015, valued at \$1.3 billion, to Southwest Valley Constructors. On March 23, 2020, USACE modified contract W912PL-19-C-0015 to add 31.6 miles of border wall, at a cost of \$524 million, increasing the total contract price to \$1.8 billion.

(U) Fisher Sand and Gravel's Debriefing for Contract W912PL-19-C-0015 (Tucson 1, 2, and 3 Projects)

(U) On May 15, 2019, the USACE contracting officer notified Fisher Sand and Gravel that it was not awarded the contract for the Tucson 1, 2, and 3 Projects. On the following day, Fisher Sand and Gravel officials requested a debriefing from the

⁴⁵ (U) FAR 6.302-2, "Unusual and Compelling Urgency."

(U) USACE contracting officer on why its proposal for the Tucson 1, 2, and 3 Projects was not selected for contract award. Fisher Sand and Gravel requested that the debriefing include:

- (U) evaluation of the significant weaknesses or deficiencies in its proposal;
- (U) the overall evaluated cost or price and technical rating of the successful company and of Fisher Sand and Gravel, and its past performance information;
- (U) the overall ranking of all companies;
- (U) a summary of the rationale for award; and
- (U) whether the procurement method used for this solicitation would be used for future border wall projects.

(U) On May 18, 2019, the USACE contracting officer provided Fisher Sand and Gravel a debriefing letter related to its proposal for the Tucson 1, 2, and 3 Projects. In the letter, USACE explained that the SSEB evaluated the proposal and provided a written evaluation to the SSA, who performed an independent analysis. USACE provided the SSA's final ratings for Fisher Sand and Gravel and the contract awardee, Southwest Valley Constructors, which received an outstanding rating on all technical factors. In addition, USACE detailed the strengths of Fisher Sand and Gravel's proposal, and did not note any weaknesses. USACE concluded by stating that the rationale for the selection of the most qualified company was based on the SSA analysis, which determined that it was in the Government's best interest to select Southwest Valley Constructors.

(U) USACE Solicitation and Award Process for Contract W912PL-20-C-0002 (Yuma 2 and Yuma 10/27 Projects)

(U) USACE resolicited the Yuma 2 Project that was terminated under contract W912PL-19-C-0013. Specifically, on September 16, 2019, USACE issued an intent to advertise a design-build requirement for the Yuma 2 and Yuma 10/27 Projects to five contractors that were on Prequalified Sources List 3, including Fisher Sand and Gravel. The Yuma 2 Project was for the replacement of 2.3 miles of primary barrier, and the Yuma 10/27 Project was for the construction of 31 miles of secondary security barrier. Both of these projects are along the southern boundary of the Barry M. Goldwater Range.

(U) The Prequalified Sources List 3 Phase I consisted of a notice of intent. Between September 17, 2019, and September 20, 2019, USACE received responses from all five companies that were interested in competing in Phase II. Specifically, Fisher Sand and Gravel officials responded that it was interested

(U) in participating in the solicitation for the Yuma 2 and Yuma 10/27 Projects. On September 27, 2019, USACE issued a solicitation for the Yuma 2 and Yuma 10/27 Projects to the five interested contractors identified during Phase I. This solicitation was a competitive acquisition for the award of a firm-fixed-price design-build contract. Selection for award was determined using the LPTA procedures in accordance with the FAR.⁴⁶

(U) Evaluation of Responses for Contract W912PL-20-C-0002 (Yuma 2 and Yuma 10/27 Projects)

(U) The solicitation established evaluation criteria for each non-price element. USACE evaluated the quality of the companies' past performance. Past performance was reviewed using, at a minimum, CPARS performance records, PPIRS, and FAPIIS for projects of similar size, scope, and complexity. USACE assigned a rating of acceptable or unacceptable for past performance. USACE could issue an acceptable rating when the company was determined to have an unknown or neutral past performance in accordance with the FAR.⁴⁷

(U) USACE evaluated the proposed participation of U.S. small businesses in the performance of the contract. USACE assigned a rating of acceptable or unacceptable for small business participation. USACE assigned an acceptable rating when the proposal met the solicitation requirements or an unacceptable rating when a company's proposal did not demonstrate an adequate approach and understanding of the small business objectives, or did not meet or exceeds the overall requirement of 15 percent of the total contract value awarded to small businesses. A rating of unacceptable assigned to any non-price element may render the entire proposal unacceptable. The company's price proposal and subcontracting plan included a CLIN structure schedule, a copy of the company's bid guarantee or bid bond, and the acknowledgement of any amendments. USACE officials stated that the proposed prices would be evaluated for fairness and reasonableness. Four companies responded to the solicitation. On October 18, 2019, Fisher Sand and Gravel submitted a non-price element proposal and a price proposal to USACE for Phase II of the solicitation.

~~(U)~~ On October 23, 2019, the SSEB completed its evaluations. The members independently reviewed each proposal and evaluated the proposal against the evaluation factors outlined in the solicitation. After the initial independent evaluation, a consensus discussion occurred for each company, and USACE rated each non-price element. The SSEB rated the past performance of four companies,

⁴⁶ (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.101-2, "Lowest Price Technically Acceptable Source Selection Process."

⁴⁷ (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.305, "Proposal Evaluation."

(~~CUI~~) including Fisher Sand and Gravel, as acceptable. A search of CPARS performance records, PPIRS, and FAPIIS did not return any past performance evaluations for Fisher Sand and Gravel. Therefore, the SSEB considered other relevant past performance from Fisher Sand and Gravel. Fisher Sand and Gravel's proposal included [REDACTED] past performance questionnaires. The past performance questionnaires were for relevant projects of similar size and complexity to the work requested in the solicitation, whereas previous contracts required border wall specific experience. Fisher Sand and Gravel received [REDACTED] ratings from the [REDACTED] customers on the past performance questionnaires. USACE considered Fisher Sand and Gravel's past performance acceptable because the [REDACTED] projects submitted [REDACTED] and received the highest overall ratings from the customers. The SSEB noted in its review that [REDACTED] [REDACTED] but no past performance evaluations were provided or found related to this project. The SSEB determined that Fisher Sand and Gravel would successfully perform the required effort and therefore rated Fisher Sand and Gravel as acceptable for past performance.

(~~CUI~~) In addition, the SSEB found that the proposal met the solicitation requirement and rated Fisher Sand and Gravel's small business participation plan as acceptable. Fisher Sand and Gravel provided a completed small business participation plan indicating the plan to subcontract [REDACTED] percent of the work to small businesses, which exceeded the minimum solicitation goal of 15 percent. In its proposal, Fisher Sand and Gravel provided [REDACTED] commitment letters from small businesses. The scope of small business work varied to include [REDACTED] [REDACTED]

(U) On October 23, 2019, a USACE price analyst completed an analysis on the proposed price to determine whether the prices were fair and reasonable. USACE performed a price analysis to verify that the price offered by the LPTA company was determined to be fair and reasonable based on the FAR.⁴⁸ USACE determined that BFBC, LLC's price was fair and reasonable and that BFBC, LLC was the LPTA company. On November 6, 2019, USACE awarded firm-fixed-price contract W912PL-20-C-0002, valued at nearly \$260.5 million, to BFBC, LLC, for the replacement of 2.3 miles of primary barrier (Yuma 2 Project) and the construction of 31 miles of secondary security barrier (Yuma 10/27 Project).

⁴⁸ (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.404-1, "Proposal Analysis Techniques."

(U) USACE Solicitation and Award Process for Contract W912PL-20-C-0004 (Yuma 3 Project)

(U) On October 9, 2019, USACE issued a notice of intent to solicit a design-build requirement for the Yuma 3 Project to five contractors that were on Prequalified Sources List 3, which included Fisher Sand and Gravel. The Prequalified Sources List 3 Phase I consisted of a notice of intent. USACE received responses from four companies that were interested in participating in Phase II. Specifically, on October 16, 2019, Fisher Sand and Gravel responded that it was interested in participating in the Yuma 3 solicitation. On October 22, 2019, USACE issued a solicitation for the Yuma 3 Project to the four interested contractors that were identified during Phase I. On October 23, 2019, the fifth contractor rescinded its previous Phase I response and requested a solicitation from USACE. USACE confirmed that all five contractors on Prequalified Sources List 3 received the solicitation.

(U) On October 23, 2019, USACE issued a solicitation for the construction of approximately 31 miles of 30-foot high new primary and secondary bollard walls, including gates, roads, drainage improvements, demolition, and disposal, and fiber optic cables near Yuma, Arizona (Yuma 3 Project). Selection for award was determined using the LPTA procedures in accordance with the FAR and DoD Source Selection Procedures.⁴⁹

(U) According to the SSA, an SSAC was not required for LPTA procedures. The SSA stated that the purpose of an SSAC is to combine the technical evaluation and the price evaluation to conduct an analysis for the SSA. In a best value determination, there are subjective discussions and decisions. It is a great benefit for the SSA to have this analysis but in an LPTA, there is no analysis to be conducted. According to the SSA, the contractor either passed or did not and the lowest priced contractor is selected. The USACE Senior Contracting official also stated:

(U) And it should be noted, the type of procurement that was utilized for that contract, which Fisher was awarded, was the LPTA methodology. So I think it's important for you to understand that methodology because it's a very objective process. It's not really subjective. Meaning, there are minimum criteria that are established to all the contractors in the pool. They either meet those criteria or they don't. And then once the determination is made that they meet the criteria, then at that point, you look at whoever submitted the lowest price, and that's who's awarded the contract.

⁴⁹ (U) FAR Part 15, "Contracting by Negotiation," Subpart 15.101-2, "Lowest Price Technically Acceptable Source Selection Process," and Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics memorandum, "DoD Source Selection Procedures," April 1, 2016.

(U) The companies were required to submit both a non-price element proposal and a price proposal. The non-price element proposal included an executive summary, past performance, a small business participation plan, and commitment letters. The non-price element proposal could not include any dollar amounts from the price proposal. On October 28, 2019, USACE conducted a site visit for the Yuma 3 Project. All-five interested Prequalified Sources List 3 contractors were present at the site visit, including Fisher Sand and Gravel officials. The site visit allowed potential companies to inspect the site before submitting proposals.

(U) Evaluation of Responses for Contract W912PL-20-C-0004 (Yuma 3 Project)

(U) The solicitation established evaluation criteria for each non-price element. USACE evaluated the quality of the companies' past performance. USACE assigned a rating of acceptable or unacceptable for past performance. In addition, USACE evaluated the proposed participation of U.S. small businesses in the performance of the contract. USACE assigned a rating of acceptable or unacceptable for small business participation. The company's price proposal and subcontracting plan included a CLIN structure schedule, a copy of the company's bid guarantee or bid bond, and the acknowledgement of any amendments. USACE stated that the proposed prices would not be rated or scored, but would be evaluated for fairness and reasonableness. USACE analyzed the prices to determine whether the companies reflected a clear understanding of the requirements.

(U) Three companies responded to the solicitation, including Fisher Sand and Gravel. Specifically, on November 13, 2019, Fisher Sand and Gravel submitted a non-price element proposal and a price proposal to USACE for Phase II of the solicitation. USACE did not receive a response from the other two companies that received the solicitation. On November 15, 2019, the SSEB completed its evaluations. The SSEB independently reviewed each proposal and evaluated the proposal against the evaluation factors outlined in the solicitation. The SSEB rated two companies, including Fisher Sand and Gravel, as acceptable and one company as unacceptable.

(U) Fisher Sand and Gravel submitted the lowest price. On November 16, 2019, a USACE cost and price analyst completed an analysis on the proposed price to determine whether the prices were fair and reasonable. USACE determined that Fisher Sand and Gravel's price proposal was fair and reasonable. On November 25, 2019, the SSA disagreed with the SSEB's rating of

(U) unacceptable for the small business participation plan of company 3 and changed the rating to acceptable because the solicitation did not require companies to submit commitment letters from small businesses. With this change, all three companies were determined to be technically acceptable by the SSA. Additionally, the SSA determined that Fisher Sand and Gravel represented the best overall value to the Government because it was the LPTA offeror. On December 2, 2019, USACE awarded firm-fixed-price contract W912PL-20-C-0004, valued at \$400 million, to Fisher Sand and Gravel for the replacement of 31 miles of primary pedestrian and vehicle fence with border wall bollard fence in Yuma County, Arizona. On April 15, 2020, USACE modified contract W912PL-20-C-0004 to add 800 feet of border wall bollard fence, at a cost of \$7.6 million, to connect the eastern portion of the Yuma 3 Project to the Tucson 1, 2, and 3 Projects.

(U) Appendix E

(U) Fisher Sand and Gravel's Border Wall Prototype

(U) In his letter to the DoD OIG, Representative Thompson asserted that Fisher Sand and Gravel's prototype came in late and over budget. On March 17, 2017, CBP issued two solicitations for the design and construction of wall prototypes. The two solicitations were to acquire multiple conceptual wall designs with the intent to construct multiple prototypes. One solicitation was for a concrete wall design, and the other solicitation was for a design built with other materials. On June 12, 2017, Fisher Sand and Gravel submitted a proposal for the concrete wall design but did not submit a proposal for the other material wall design. The proposed concrete wall design included a [REDACTED]

[REDACTED] According to Fisher Sand and Gravel, the concrete wall was not climbable without assistance, could not be tunneled under without going deeper than 6 feet, and could easily withstand a physical breach attempt for more than 4 hours.

(U) CBP awarded eight task orders to six companies with a total value of more than \$3 million to design and construct eight barrier prototypes. On August 31, 2017, CBP awarded four task orders for prototypes constructed from reinforced concrete. Specifically, CBP awarded a firm-fixed-price task order, with a total value of \$365,000, to Fisher Sand and Gravel to build a concrete wall prototype. On September 7, 2017, CBP awarded four other task orders for prototypes constructed from other materials. The selected companies constructed the prototypes in Otay Mesa, California, from September to October 2017. According to Fisher Sand and Gravel officials, the companies were required to complete construction by October 25, 2017.

(U) According to Fisher Sand and Gravel officials, on September 26, 2017, CBP provided Fisher Sand and Gravel the notice to proceed. On October 7, 2017, Fisher Sand and Gravel began construction of the concrete border wall prototype and completed construction on October 13, 2017, 12 days ahead of the contractual due date. Fisher Sand and Gravel's concrete border wall prototype was tan and had a gradual slope to make climbing difficult. Fisher Sand and Gravel was paid the fixed contracted amount of \$365,000 for the concrete border wall prototype. See Figure 1 for a picture of the concrete border wall prototype made by Fisher Sand and Gravel.



(U) On October 26, 2017, the construction phase ended, and CBP tested and evaluated the prototypes. In February 2018, CBP issued a report describing the prototype test results. According to a CBP spokesperson, CBP reported that every wall prototype was vulnerable to at least one breaching technique. The prototypes were not and cannot be designed to be indestructible but were instead meant to help create barriers that would impede or deny efforts to scale, breach, or dig under such a barrier, giving agents time to respond. The CBP spokesperson added that no single prototype met the intended result.

(U) Appendix F

(U) USACE Communication With President Trump, White House Officials, and Members of Congress

(~~CUI~~) Representative Thompson asserted that President Trump repeatedly urged USACE to award construction contracts to Fisher Sand and Gravel, which raised concerns about the possibility of inappropriate influence on USACE's contracting decision. Several articles in the national media discussed the potential influence from President Trump, senior White House officials, and Members of Congress. According to a May 23, 2019 *Washington Post* article, administration officials claimed that President Trump repeatedly brought up Fisher Sand and Gravel after hearing about the company in early 2019. Additionally, the article stated that Mr. Kushner had joined in the campaign for Fisher Sand and Gravel, along with Senator Cramer. During the audit, we identified the following USACE documentation that discussed communications with or involved communications with [REDACTED] and Members of Congress.

(~~CUI~~) USACE Telephone Conversation With [REDACTED]

(~~CUI~~) According to an e-mail from Lieutenant General Semonite to the Secretary of Defense, on October 25, 2018, [REDACTED] telephone conversation with Lieutenant General Semonite about construction support to CBP on the southwest border. The e-mail did not include that Fisher Sand and Gravel was discussed.

(~~CUI~~) According to e-mails between the Director of the Office of the Chief of Engineers and Lieutenant General Semonite on January 30, 2019, the Secretary of Defense, Deputy Secretary of Defense, Lieutenant General Semonite, and several other senior DoD officials held a telephone conversation [REDACTED] [REDACTED] discuss construction at the southwest border. The e-mail did not include that Fisher Sand and Gravel was discussed.

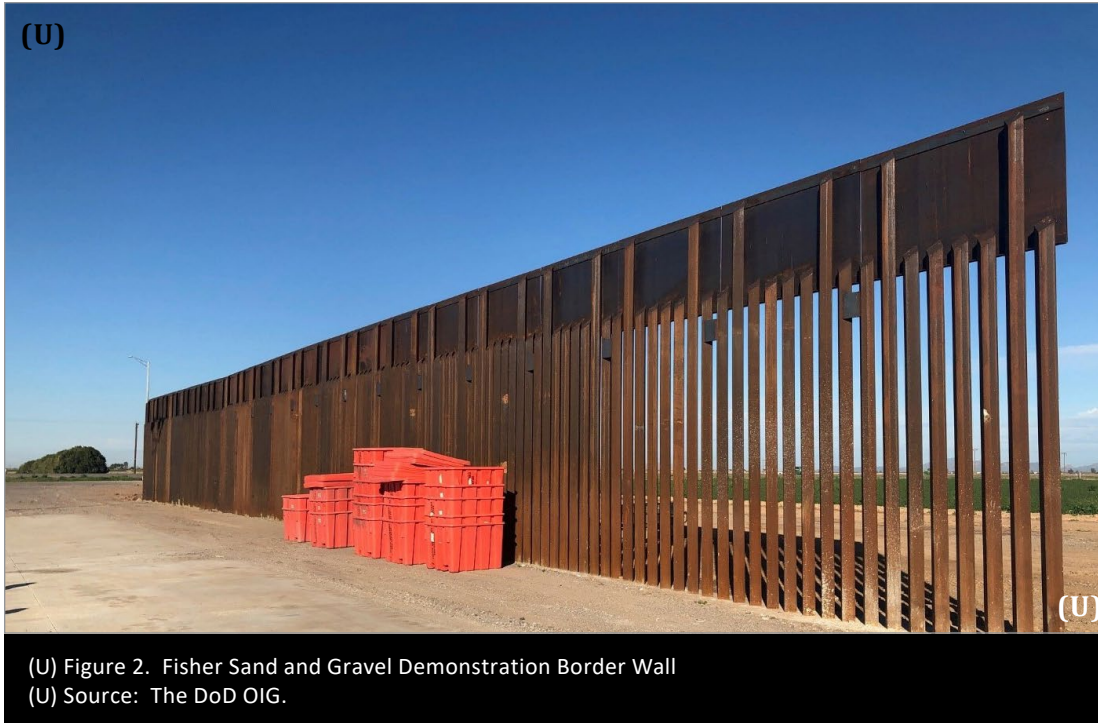
(U) DoD and USACE Meeting at the White House

(~~CUI~~) According to an e-mail from Lieutenant General Semonite to the Secretary of Defense, on March 7, 2019, the Acting Secretary of Defense and Lieutenant General Semonite updated [REDACTED]
[REDACTED]
[REDACTED] Department of Justice officials on the progress of the border barrier construction. In the e-mail, Lieutenant General Semonite stated that [REDACTED]
[REDACTED]

(U) [REDACTED] Lieutenant General Semonite stated that he outlined that projects are best value and that USACE expected the contractor to submit a proposal. USACE would analyze the contractor's methods in accordance with the FAR and use any best practices.

(U) Senator Cramer and USACE Officials Attend Demonstration Days at Fisher Sand and Gravel

(U) Fisher Sand and Gravel held two demonstrations to show its border wall installation method. On March 13, 2019, Fisher Sand and Gravel held its first demonstration day to show its border wall installation method to a small audience. On April 16, 2019, Fisher Sand and Gravel held its second demonstration day with a larger audience that included Senator Cramer, DHS officials, and three mid-level technical experts from USACE. Fisher Sand and Gravel held the demonstration days to show officials that its border wall installation methods were faster than the installation methods used by competitors. According to Fisher Sand and Gravel officials, the concrete prototype may have been ineffective in terms of material, but the technique used to install it had proven to be effective for erecting trench-based wall structures. The Fisher Sand and Gravel officials explained that the construction methods used to construct the border wall prototype were used to complete a highway bridge project months ahead of schedule. Other companies used cranes to install the barrier panels, but Fisher Sand and Gravel used custom-made attachments on its excavator to install the border wall panels, eliminating the need for cranes. According to Fisher Sand and Gravel officials, traditional installation methods involve the use of cranes to install 8 feet of wall panel at a time. Fisher Sand and Gravel's excavators installed 192 feet of barrier in 2 hours during the demonstration. In total between the two demonstrations, Fisher Sand and Gravel installed 192 feet of bollard fence and paved 56 feet of roller-compacted concrete for a high-speed access road. See Figure 2 for a picture of the border wall installed during the demonstrations.



(U) Unsolicited Proposal to the White House and USACE

(~~CUI~~) According to a March 29, 2019 e-mail, Senator Cramer's staff sent the Assistant Secretary of Defense (Legislative Affairs) unsolicited Fisher Sand and Gravel proposals to build a steel or concrete wall on the entire southern border. The unsolicited proposals included [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] Additionally, Senator Cramer's staff provided an unsolicited proposal from Fisher Sand and Gravel for a concrete border wall. The concrete border wall proposal included [REDACTED]

[REDACTED]
[REDACTED]

(~~CUI~~) According to a March 29, 2019 e-mail from Major General Scott Spellmon, Deputy Commanding General for Civil and Emergency Operations, to Lieutenant General Semonite; President Trump, U.S. Senators and Representatives, the Acting Secretary of the Department of the Interior, and Major General Spellmon, visited Lake Okeechobee and the Herbert Hoover Dike the same day. According to Major General Spellmon, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] In the e-mail,

(~~CUH~~) Major General Spellmon stated that he [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(~~CUH~~) On April 1, 2019, Fisher Sand and Gravel submitted an updated unsolicited proposal to CBP officials to build [REDACTED]
[REDACTED]

[REDACTED] Fisher Sand and Gravel officials stated that a patent was pending on the custom-made attachments for its excavators to install the border wall panels, which allowed Fisher Sand and Gravel to install the border wall panels more efficiently than traditional construction methods that involved the use of cranes to place each 8-foot panel individually. On April 2, 2019, Mr. Tommy Fisher, President and CEO of Fisher Sand and Gravel, forwarded the unsolicited proposals to the White House.

(U) On April 3, 2019, Senator Cramer's staff sent an e-mail with the updated Fisher Sand and Gravel proposal to the Assistant Secretary of Defense (Legislative Affairs). On April 4, 2019, the Former Chief of Staff for the Office of the Secretary of Defense forwarded the unsolicited proposal to Lieutenant General Semonite and Brigadier General Goddard.

(U) On April 4, 2019, Lieutenant General Semonite responded to the Former Chief of Staff for the Office of the Secretary of Defense. Lieutenant General Semonite stated that USACE would continue to collect and assess these submissions and that Brigadier General Goddard had provided the USACE general analysis of the Fisher Sand and Gravel proposals to the Office of the Secretary of Defense. He stated that Fisher Sand and Gravel was on the prequalified list and confirmed that the source selection official and process would do due diligence to analyze and assess Fisher Sand and Gravel's proposals in accordance with the FAR and USACE established acquisition process. Lieutenant General Semonite stated that he mandated that USACE pay particular attention to all procedures on the acquisition to ensure that USACE could award the contract without protest delay.

(U) On May 2, 2019, Brigadier General Hoskin stated in an e-mail to Lieutenant General Semonite that he spoke with Mr. Fisher to discuss his concept of meeting the needs of CBP for the border wall. Brigadier General Hoskin stated that Mr. Fisher was going to provide unsolicited proposal information that was sent to CBP. Brigadier General Hoskin stated that he would not discuss the current protest because it was currently in litigation. He further stated that fairness was important to USACE and that it strives to be fair to its industry counterparts. Additionally, according to the e-mail, Brigadier General Hoskin did not promise Mr. Fisher anything other than being fair with the contracting process.

(~~EUH~~) On May 3, 2019, Lieutenant General Semonite responded to Brigadier General Hoskin's e-mail. Lieutenant General Semonite stated that he [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] If the Leader of the "We Build the Wall" project wanted to talk about Fisher Sand and Gravel, Lieutenant General Semonite advised Brigadier General Hoskin to stay out of those discussions because of existing protests, litigation, and upcoming contracts.

(U) On the same day, Fisher Sand and Gravel forwarded its unsolicited proposal to USACE. On May 16, 2019, Fisher Sand and Gravel received a letter from Mr. Caldwell stating that USACE could not accept the proposal because:

- (U) USACE did not have funding to support the proposal;
- (U) USACE did not have authorization for the sectors in the proposal, requirements for real estate accessibility must be worked through, and some technical aspects of the proposal departed from current CBP criteria; and
- (U) USACE cannot legally accept an unsolicited proposal that closely resembles a pending competitive acquisition requirement.

(U) Mr. Caldwell was responsible for the execution of the USACE worldwide program for engineering, construction, real estate, and environmental activities in support of the Army, the Air Force, other DoD and Federal agencies, and foreign nations. USACE offered to meet with Fisher Sand and Gravel officials and encouraged them to continue to submit bids in response to solicitations for the border wall.

(U) On June 20, 2019, a Fisher Sand and Gravel official forwarded a YouTube video regarding Fisher Sand and Gravel's Sunland Park border fence project to Mr. Caldwell, who responded on July 5, 2019, to acknowledge receipt and establish a meeting with Fisher Sand and Gravel. He stated that the meeting would permit them to have an informed discussion on the breadth of business opportunities with the USACE, challenges and practices generally involved with Federal contracting, and the factors impacting decisions for the border barrier program. Mr. Caldwell invited Fisher Sand and Gravel to present any corporate information at the meeting.

(U) On August 9, 2019, Mr. Caldwell, Brigadier General Goddard, and the USACE Deputy Chief of the Interagency and International Services Division held a meeting with Mr. Fisher and other Fisher Sand and Gravel officials. The meeting

(U) was a followup to the USACE response to the unsolicited proposal from Fisher Sand and Gravel to construct a barrier to secure the entire southern border. According to USACE, attendees explained the rationale for why USACE could not accept the unsolicited proposal from Fisher Sand and Gravel. Mr. Fisher talked at length about his commitment to help along the border and discussed his success on other projects. USACE told Mr. Fisher that he should ensure that future proposals are submitted in compliance with the solicitations and encouraged him to seek work on other non-border barrier projects.

(U) USACE Communication With Senator John Hoeven

(U) On March 29, 2019, staff from the Office of Senator Hoeven e-mailed a USACE contracting officer and requested the rationale for the short turnaround on the W912PL-19-C-0013 (Yuma 1 and 2 Projects) solicitation. The staff inquired as to whether this solicitation selected the contractor for the award or created a list of companies to compete for future border wall projects. Senator Hoeven's staff also requested information on the process moving forward for this solicitation. In addition, Senator Hoeven's staff asked whether this solicitation replaced the Western MATOC because it was protested on March 11, 2019, or if the Western MATOC is still ongoing. On April 11, 2019, Senator Hoeven's staff requested additional information from USACE on the rationale for the award of contract W912PP-19-C-0018 (El Paso 1 Project); the amount of wall completed; the timetable for 2020 to get 450 miles completed; and status updates on several contracts, including the FY 2018 California Project and the Eastern and Western MATOCs. According to an April 11, 2019 e-mail from Senator Hoeven's staff to USACE, Lieutenant General Semonite was coming to North Dakota the next week to discuss flood protection, and Senator Hoeven asked for the previously requested information so that he could show that USACE was appropriately handling the mission of building the wall.

(U) According to an April 11, 2019 e-mail between Senator Hoeven's staff and USACE officials, Senator Hoeven's staff had a telephone conversation on the same day with USACE officials. According to an e-mail from Senator Hoeven's staff to USACE, Senator Hoeven stated that Fisher Sand and Gravel had discussed border wall solicitations and shared questions provided by the USACE contracting officer during a Phase I evaluation. The USACE official informed Senator Hoeven's staff by e-mail that bidders were asked a series of questions, and a decision was made

(U) for the El Paso 1 Project contract based on the responses received. The questions were meant to help USACE officials determine whether a bidder understood and could perform the work, and determine whether the bidder had performed similar work of sufficient quality. The contracting officer would make the decision in the best interest of the Government. In this selection, price was not a factor, but there were some concerns with the cost and technical approach in Fisher Sand and Gravel's proposal. Fisher Sand and Gravel's cost proposal did not include real estate acquisition costs, which in some cases are substantial, and its technical proposal did not appear to be feasible in certain areas where construction was close to the Mexican border because it had to be on both sides to construct the wall.

(U) According to an e-mail, on April 12, 2019, Mr. Cooper advised Lieutenant General Semonite on his upcoming conversation with Senator Hoeven. Lieutenant General Semonite stated that he would not share any information with Senator Hoeven because he did not know the criteria of the solicitation process and assumed that all of it was acquisition sensitive. Mr. Cooper advised Lieutenant General Semonite that he needed to be careful in any conversations with Senator Hoeven. On that same day, Senator Hoeven held a telephone conversation with Lieutenant General Semonite to discuss the flood protection and border wall topics before Lieutenant General Semonite's visit to North Dakota. On April 16, 2019, Senator Hoeven met with Lieutenant General Semonite for the region's flood protection project. Senator Hoeven's official press release did not include any border wall information.

(U) A May 3, 2019 e-mail from Brigadier General Hoskin to Lieutenant General Semonite stated that Senator Hoeven had a telephone conversation with Brigadier General Hoskin. According to the e-mail, Senator Hoeven expressed his support for Fisher Sand and Gravel, and Brigadier General Hoskin explained the contracting rules for the border wall acquisition process. Brigadier General Hoskin also informed Senator Hoeven that he had spoken with Mr. Fisher. Brigadier General Hoskin informed Senator Hoeven that USACE was preparing numerous contracting options for future border wall construction projects.

(U) Additionally, an e-mail from the USACE Chief of Staff to the USACE leadership stated that on July 11, 2019, Senator Hoeven had a telephone conversation with Lieutenant General Semonite. The e-mail stated that Senator Hoeven inquired why Fisher Sand and Gravel had not been awarded any border wall contracts. Lieutenant General Semonite provided USACE contracting procedures and stated

(U) that USACE was in the process of scheduling a briefing with Fisher Sand and Gravel to discuss the unsolicited proposals. Senator Hoeven's staff requested notification that the meeting occurred along with a summary of the discussion.

(U) On July 15, 2019, Lieutenant General Semonite sent an e-mail requiring his staff to provide a detailed border wall update and an additional briefing to Senator Hoeven's staff, following a meeting the staff had with Fisher Sand and Gravel. Fisher Sand and Gravel had not received any of the border wall awards but had submitted an unsolicited border wall proposal. At that time, USACE was trying to schedule a briefing with Fisher Sand and Gravel to discuss the earlier unsuccessful proposals, as it did with other unsuccessful companies, and the unsolicited proposal. On July 17, 2019, Lieutenant General Semonite informed his staff by e-mail that he did not intend to engage Senator Hoeven at this time but that USACE needed to provide him what he wanted. According to Lieutenant General Semonite, Senator Hoeven pushed hard for project-level data on the southwest border program in the telephone conversation, but USACE needed to keep the information at a high level because of concerns on how the information would be used.

(U) Roundtable on Immigration and Border Security

(U) On April 5, 2019, President Trump participated in a roundtable on immigration and border security at a U.S. Border Patrol station in Calexico, California. The Secretary of Homeland Security, CBP Commissioner, U.S. and State Representatives, and Lieutenant General Semonite briefed President Trump on the southern border efforts. At this meeting, Lieutenant General Semonite provided the progress on the border wall. According to the White House briefing statement, Lieutenant General Semonite stated that more than 82 miles of border wall had been completed to date and that another 97 miles would be completed by the end of 2019. He also anticipated completing another 277 miles of border wall by the end of December 2020. In addition, Lieutenant General Semonite stated that there were many different complexities, including Federal land and private land acquisitions, but he was committed to building the border wall. According to Lieutenant General Semonite, the meeting also included several briefings from CBP officials. He stated that Fisher Sand and Gravel was not discussed.

(~~CUI~~) However, Lieutenant General Semonite stated in an e-mail to the Secretary of Defense documenting his closure report for the Calexico, California trip that

[REDACTED]

(CUI) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Lieutenant General Semonite stated in the e-mail that it seemed that everyone understood that Fisher Sand and Gravel's unsolicited proposal "was no silver bullet."

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]



(U) Fox News Interviewed President Trump

(U) On April 25, 2019, a Fox News Host interviewed President Trump on several topics. Specifically, the host asked President Trump about a contractor that said it could build the whole wall for less money than other companies and complete it by 2020. President Trump responded that he was aware of Fisher Sand and Gravel. President Trump stated that Fisher Sand and Gravel comes from North Dakota and was strongly recommended by Senator Cramer. He further stated that the company had been bidding but so far had not been selected, even though he thought that Fisher Sand and Gravel would have been selected. President Trump stated that a lot of wall had been renovated, new wall was built, and different contractors would be building in different areas in the next 2 or 3 weeks.

(U) Fisher Sand and Gravel Promotional Video Provided to USACE

(CUI) According to an e-mail, on April 29, 2019, Senator Cramer provided a Fisher Sand and Gravel promotional video by e-mail to [REDACTED]
[REDACTED] Senator Cramer stated that the video was a good illustration of Fisher Sand and Gravel's process and work product. The Senator also stated that he told President Trump that he would send the video for his review and

(~~CUH~~) that he was concerned by some of the messages that he was hearing about Fisher Sand and Gravel's qualifications in the request for proposal process. Additionally, Senator Cramer stated that Fisher Sand and Gravel's product exceeded all of the specifications, while its price was \$2 million per mile less than the closest competitor's price. Senator Cramer also forwarded the video to [REDACTED]. On May 6, 2019, [REDACTED] provide the video to Lieutenant General Semonite on his behalf.

(~~CUH~~) On May 8, 2019, Lieutenant General Semonite forwarded the message to Brigadier General Hoskin and asked him [REDACTED]. [REDACTED] Brigadier General Hoskin stated in his response to [REDACTED]. He stated that USACE has to follow the FAR and Title 10, United States Code, and focus on being as fair as possible with contractors. Additionally, Brigadier General Hoskin stated in the e-mail that proposals are received and evaluated along with past performance. Each proposal goes through an extensive evaluation process set forth in the request for proposal to ensure that the contractors met the qualification standards, and proposals that were not considered one of the most highly rated in accordance with the FAR 36.303⁵⁰ were eliminated from the competition based on their proposal.

(~~CUH~~) USACE Telephone Conversation With [REDACTED]

(~~CUH~~) According to a May 1, 2019 e-mail from the Executive Officer to the Commanding General of USACE, to Lieutenant General Semonite; [REDACTED] had a telephone conversation with Lieutenant General Semonite about the status of the border wall. According to the e-mail, [REDACTED]

⁵⁰ (U) FAR Part 36, "Construction and Architect-Engineer Contracts," Subpart 36.303, "Procedures."

(U) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(U) House Homeland Security Committee Request for Border Wall Documentation

(U) On May 15, 2019, Representative Thompson, Chairman of the U.S. House of Representatives Committee on Homeland Security, requested information from Lieutenant General Semonite about the process that USACE used to award contracts for border barrier construction. Representative Thompson's letter stated that Federal regulation allowed USACE's head of contracting activity to limit awards to a prequalified sources list of vendors in rare circumstances, "to ensure timely and efficient performance of critical construction projects." The letter further stated:

(U) Two such prequalified sources lists have been created since January 2017, President Trump ordered the immediate construction of a wall along the southern border, and USACE has drawn from these lists when awarding border barrier construction contracts. An additional solicitation for a prequalified sources list was issued on April 19, 2019 even though USACE officials told my staff that future border barrier awards would be made using one of two MATOCs.

(U) The Chairman requested that USACE provide the following information and documents no later than May 29, 2019.

- (U) A description of any outreach that has been conducted informing or encouraging companies to respond to the prequalified sources list solicitations.
- (U) The number of companies that submitted documents in response to each solicitation.
- (U) A copy of the completed prequalified sources list questionnaire and any supporting documents from each company.
- (U) The titles of all members of each SSEB, SSAC, and any other entity that reviewed company submissions. Additionally, identify each individual and describe the nature of his or her involvement and if any White House or Office of Management and Budget official participate in the review process.
- (U) The names and numbers of all firms placed on each prequalified sources list.
- (U) For each solicitation, a copy of the head of contracting activity's written determination that was "of an urgency or complexity" that required prequalification.

- (U) A status update on the two MATOCs and a description of how the MATOCs will be used with the prequalified sources lists.
- (U) A list of all contracts USACE has awarded in association with the wall that President Trump ordered on January 25, 2017. For each contract, include a project description, contract type, location, contractor name and number, contract amount, contract number, funding source, and acquisition vehicle used.

(U) On May 28, 2019, the USACE Deputy Director of Contracting responded to the Chairman of the U.S. House of Representatives Committee on Homeland Security. He stated that it was necessary for USACE to research and coordinate the issues because of the complexity of the issues. USACE would provide a final reply by the third week of June.

(U) On June 20, 2019, Lieutenant General Semonite responded to the Chairman of the U.S. House of Representatives Committee on Homeland Security. Lieutenant General Semonite provided information for the prequalified sources lists and MATOCs managed by USACE. He also stated in the letter that USACE provided the requested information for Prequalified Sources List 1 and 2 but that Prequalified Sources List 3 was an ongoing procurement. USACE would provide a separate response for Prequalified Sources List 3. On July 16, 2019, Ms. Stiglich provided the requested information on Prequalified Sources List 3.

(U) USACE Communication With Senator Kevin Cramer

(U) According to a May 16, 2019 e-mail, Senator Cramer's staff requested that USACE officials provide the bids for the award of the Yuma 1 and El Centro 1 Projects to BFBC, LLC and the criteria for how USACE determined recent and relevant experience. Members of Senator Cramer's staff stated that it was their understanding that only one contractor made it past the first round and that the bid process did not include any consideration of price.

(U) On May 21, 2019, Senator Cramer and his staff met with Lieutenant General Semonite; Major General Spellmon; Mr. Heath; and a member of the USACE Future Directions Branch to discuss the recent updates on the border wall construction, permanent flooding relief for Fargo and Minot, North Dakota, and Select Energy Services' application for increased volumes of water for fracking. This meeting originated from a meeting between Senator Cramer and the Assistant Secretary of the Army (Civil Works). According to the USACE memorandum for record, Senator Cramer started the border wall discussion by listing his concerns on the contracting process, the number of miles actually built, and the length of time involved with the procurement process. Mr. Heath explained that the planning process began in FY 2017. The short-term plan was to use the prequalified

(U) sources list, and the long-term plan was to use the Eastern and Western MATOCs. He explained that some of the prequalified sources list criteria included the demonstrated horizontal construction upwards of \$100 million within the last 5 years and the ability to execute multiple contracts. Senator Cramer asked how many bidders were on the contract. Mr. Heath stated that he did not know the number but fewer contractors would be able to apply as project size increased because the construction contracts required full bonding. He also clarified that the prequalified sources list was not a contract but a preferred list used for short-term funding requirements. Mr. Heath stated that urgency and risk were the two main drivers that formed the process. He then discussed the difference between the Phase I process, which he explained as the qualifications-based competition, and the Phase II process, which included the sole-source approval process. Mr. Heath stated that USACE would shift to the MATOC for the long-term strategy. The Western MATOC included \$5 billion of full competition work. He stated that Fisher Sand and Gravel was on the Western MATOC and could compete for future work on the Western MATOC. Mr. Heath told Senator Cramer that he could not comment on the Eastern MATOC because it was under evaluation.

(U) According to the USACE memorandum for record, Senator Cramer indicated that the convoluted process was worse than he originally thought. While he appreciated reducing the risk to the taxpayer and operating with urgency, Senator Cramer expressed concerns with the sole-source method and a potential limit to competition. Additionally, he expressed concerns that price was not part of the equation and that he needed to know how he should explain to the taxpayer that cost was not important. Mr. Heath indicated that USACE had cost control and evaluation measures, including historical cost data, certified estimates, and compliance of the contractor's accounting systems. Senator Cramer voiced support for free-market principles and stated that in the future, he would be requesting detailed cost data to break out the contractor's costs. Senator Cramer pressed USACE to streamline its processes to ensure that USACE no longer inhibit projects from being competed, the southern border from being secure, or energy needs from being met. See Figure 4 for a picture of the May 21, 2019 meeting between Senator Cramer and leaders of USACE.



(U) According to a May 22, 2019 e-mail to Lieutenant General Semonite, the Former Chief of Staff for the Office of the Secretary of Defense stated that he had a call earlier that day with [REDACTED]

He stated that the meeting would probably be deferred to the Deputy Secretary of Defense's office because the Acting Secretary of Defense was out of the country the next week but would need the help of the DoD General Counsel given the ongoing border wall work.

(U) Lieutenant General Semonite responded on the same day and stated that USACE would support the efforts. He stated that he previously spent 90 minutes with Senator Cramer to discuss the contracting processes and actions to date that involved Fisher Sand and Gravel. He also stated that he had found it best to have his warranted contracting leader in attendance, who was informed on what can be discussed and what cannot be discussed because the information was acquisition sensitive. Lieutenant General Semonite stated that he was willing to provide the contracting expert and could run the session to cover contracts already awarded, contracts under protest, and future contract opportunities. He stated that there was active litigation and that individuals needed to be cautious and guarded in what they discussed. Additionally, USACE had given Fisher Sand and Gravel a multi-page print out of a back brief that outlined Fisher Sand and Gravel's progress in the contracting process. Lieutenant General Semonite stated that there was merit in Brigadier General Goddard attending the meeting rather

(U) than himself because he was the USACE Commanding General and could benefit in plausible deniability in future testimony or litigation; however, he would defer to counsel's advice.

(U) According to a May 23, 2019 e-mail, a reporter requested that Senator Cramer address questions on the May 21, 2019 meeting with USACE. Specifically, the reporter asked why Senator Cramer requested the meeting and what specifics he discussed related to Fisher Sand and Gravel with Lieutenant General Semonite. Senator Cramer responded:

(U) I have never advocated for Fisher Industries, but I have always advocated for a process that would build a high quality wall on time, under budget. I am supportive of my constituents and of all North Dakota companies succeeding, but in my conversations with President Trump, Acting Secretary Shanahan, Lieutenant General Semonite, and other members of the President's administration, Fisher Industries has been brought up to me; not the other way around. If another company is able to build the wall more efficiently than Fisher, I would support them too.

(U) On May 23, 2019, Senator Cramer's staff also requested by e-mail information on the FY 2018 California Project, which was awarded to SLSCO, Ltd. on December 20, 2018. Additionally, Senator Cramer's staff requested Prequalified Sources Lists 1 and 2. On June 6, 2019, Mr. Wethington provided a written response from Mr. Heath to Senator Cramer's staff. Mr. Heath provided information regarding Prequalified Sources Lists 1 and 2, the Yuma 1 and El Centro 1 Projects, and the FY 2018 California Project. He stated that USACE placed four companies on Prequalified Sources List 1 and nine companies on Prequalified Sources List 2. He stated that USACE conducted the Yuma 1 and El Centro 1 Projects in accordance with the two-phase design-build selection procedures. USACE issued a competitive Phase I design-build request for proposal to nine companies on Prequalified Sources List 2. USACE conducted its Phase I evaluation and selected the most highly qualified single firm. USACE entered into sole-source negotiations with the most highly qualified single firm and awarded a UCA, which would be definitized as a firm-fixed-price contract.

(U) Mr. Heath added by e-mail that the FY 2018 California Project was also conducted in accordance with the two-phase design-build selection procedures. USACE issued a competitive Phase I design-build request for proposal to the nine companies on Prequalified Sources List 2. Five of the nine companies submitted proposals in response. USACE entered discussions with all five contractors. USACE conducted a price analysis, and a firm-fixed-price contract was awarded.

(U) According to a June 21, 2019 e-mail, Senator Cramer's staff had additional questions on the use of the FAR and requested the solicitations, as well as the final cost per mile negotiated in Phase II for the Yuma 1 and El Centro 1 Projects and the FY 2018 California Project. Additionally, Senator Cramer's staff requested to see the reasoning behind the contracting decisions. Mr. Wethington responded by e-mail that he would identify what further information USACE could provide to help answer the questions. Senator Cramer e-mailed Mr. Wethington and stated that he hoped he could get the necessary information because President Trump requested him to "get in the weeds with Lieutenant General Semonite."

(U) On July 9, 2019, Mr. Wethington e-mailed a response to Senator Cramer's staff that addressed the contracting officer's discretion to determine whether the selection procedure was appropriate when considered against the traditional procedures. Additionally, Mr. Wethington provided the solicitation documents and stated that a cost per mile was not negotiated in Phase II of the contracts. On July 24, 2019, Senator Cramer's staff again requested the bids and any bidder debriefings by e-mail. Additionally, Senator Cramer's staff requested the breakdown of current funds expended on the Rio Grande Valley 2 and 3 Projects and what had been constructed. According to an August 1, 2019 e-mail, Mr. Wethington stated that personnel were gathering the summary of current funds expended and what had been constructed on the Rio Grande Valley 2 and 3 Projects. However, information related to bids, Government estimates, and debriefing information was source selection sensitive, and USACE may be unable to share the information. Senator Cramer responded that it was an inadequate response and requested a meeting with Lieutenant General Semonite.

(U) On August 2, 2019, Senator Cramer and his staff again met with Lieutenant General Semonite; Mr. Cooper; Mr. James Dalton, USACE Director of Civil Works (Retired); Ms. Stiglich; and a member of the USACE Future Directions Branch to get an update from USACE on the border wall construction. Lieutenant General Semonite provided about 2,000 to 3,000 documents. According to Mr. Wethington, USACE previously provided these documents to Senator Cramer and his office electronically on June 6, 2019, and July 9, 2019. Some of documents were redacted, and Senator Cramer was frustrated that he could not receive full access to all of the proprietary documents.

(U) According to the USACE memorandum for record, Senator Cramer received an update on wall construction and the bidding process, as well as several documents and the answers to questions requested from USACE. Senator Cramer expressed frustration with how long it took USACE to compile information and comply with requests. Ms. Stiglich stated that the information was competition-sensitive and

(U) proprietary, and that release of the information could harm the competitiveness of future awards. Mr. Cooper stated that the information could be provided if requested by a committee or subcommittee acting through its chairperson. A committee chairperson's letter would allow for the exchange of more specific information, with proper caveats and restricted review under the oversight of the committee or subcommittee. Senator Cramer stated that he would request a formal committee chairperson's letter because he was unsatisfied with the redacted summary responses from USACE.

(U) According to the USACE memorandum for record, Senator Cramer asked whether Lieutenant General Semonite had been to the "We Build the Wall" project. The "We Build the Wall" project focused on building border walls on the southern border of the United States using privately raised funds. Lieutenant General Semonite offered to go personally or send a representative from USACE to visit the "We Build the Wall" project with Senator Cramer. According to Lieutenant General Semonite, he later declined because he did not want to provide any favoritism to a contractor. He did eventually send representatives to see the "We Build the Wall" construction site. As stated previously, a DoD OGC attorney instructed him not to answer any questions about communications with the President or White House officials regarding the solicitation and award. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these assertions.

(U) On August 2, 2019, Senator Cramer sent a letter to the Principal Deputy Inspector General Performing the Duties of the Inspector General requesting the DoD OIG review USACE's possible leaks to the press concerning his conversations and personal information from meetings conducted with USACE. On November 20, 2019, the DoD OIG replied to Senator Cramer informing him that the DoD OIG provided the allegations and information regarding the leaks to the Department of the Army to conduct an evaluation. The DoD OIG closed the case after the Department of the Army completed an inquiry into this matter. The investigating officer found no evidence to indicate an unauthorized disclosure of official Army records or correspondence related to Senator Cramer's requests regarding the southwest border construction.

(U) On August 21, 2019, Senator Cramer sent a letter to USACE requesting unredacted bids and bidder debriefings for the Yuma 1 and El Centro 1 Projects, FY 2018 California Project, and the Rio Grande Valley 2 and 3 Projects. He requested that USACE provide the information by August 28, 2019. Senator Cramer stated that he would work with the Chairman of the U.S. Senate Committee on Armed Services to review the contract-sensitive information.

(U) On August 26, 2019, Senator Cramer met with the USACE Deputy Commander for the Southwest Division and a USACE Fort Worth District Branch Chief, in El Paso, Texas. During this trip, these individuals, along with the USACE Southwestern Division Executive Officer, met with CBP personnel and Senator Cramer at the Anapra project site, the location of a FY 2015 authorized project that was completed in the fall of 2017. At the request of Senator Cramer, the USACE Fort Worth District Branch Chief and the USACE Southwestern Division Executive Officer then visited the “We Build the Wall” construction site, where Mr. Fisher met the group to observe the construction of the privately funded border barrier.

(U) On August 28, 2019, Ms. Stiglich responded to Senator Cramer’s August 21, 2019 letter and stated that USACE could not release privileged contractor proposal and source selection information unless USACE received a formal request for the information from the chairperson of a congressional committee acting in his or her official capacity. Officials acting on behalf of the Chairman of the U.S. Senate Committee on Armed Services forwarded Senator Cramer’s August 21, 2019 letter to Lieutenant General Semonite. The letter requested unredacted proposals and unsuccessful offeror debriefing materials regarding contracts for the southwest border improvements. On September 18, 2019, the Principal Deputy, Legislative Liaison for the Office of the Chief of Legislative Liaison, Department of the Army, provided the requested border wall documentation on the Yuma 1 and El Centro 1 Projects, FY 2018 California Project, and the Rio Grande Valley 2 and 3 Projects to the Chairman of the U.S. Senate Committee on Armed Services. Specifically, USACE provided bid bonds, debriefings, proposals, and small business participation plan evaluations. On September 24, 2019, the Committee staff had additional questions and requested additional documentation on the Yuma 1 and El Centro 1 Projects, FY 2018 California Project, and Rio Grande Valley 3 Project.

(U) According to an October 4, 2019 e-mail, Senator Cramer’s staff requested additional information on the Tucson 1, 2, and 3 Projects. The members of Senator Cramer’s staff stated that they would work with the committee to get the solicitation but requested an explanation of the contracting process and final negotiated price for the Tucson 1, 2, and 3 Projects. On October 9, 2019, USACE provided the requested information to Senator Cramer’s staff on the Tucson 1, 2, and 3 Projects.

(U) On December 18, 2019, Senator Cramer concluded his review of the USACE’s procurement process, which focused on the construction of physical barriers along the southern border, and presented his findings to President Trump. Senator Cramer wrote to President Trump on December 6, 2019, that over the past 5 months, he had spent many hours with officials from USACE, the DHS, the Army, and the U.S. Senate Committee on Armed Services discussing the border wall

(U) procurement process and reviewing procurement documents. As a result of this investigation, he compiled findings and recommendations for President Trump's review. The letter included four key findings.

- (U) USACE's procurement process fails to foster competition, particularly when it comes to price and schedule.
- (U) USACE set up a procurement process that disfavors new entrants and innovators.
- (U) The DHS abdicated authority for the border wall to USACE, creating a situation in which those who patrol the wall have little say in its speed and manner of construction.
- (U) USACE failed to meet the most basic standards of good faith cooperation in satisfying the Senator's requests for information.

(U) Senator Cramer included detailed examples of his findings and recommendations for how to improve the process.

(U) DoD and USACE Meeting at the White House

~~(CUI)~~ According to briefing notes, on September 11, 2019, the Former Assistant Secretary of Defense for Homeland Defense and Global Security and Lieutenant General Semonite briefed [REDACTED]

[REDACTED] and the Acting CBP Commissioner. The meeting was to discuss a way forward on barrier construction and address any concerns that would impede progress. The briefing notes did not include that Fisher Sand and Gravel was discussed.

(U) House Oversight and Reform Committee Request for Border Wall Documentation

(U) On September 13, 2019, the Chairman of the U.S. House of Representatives Committee on Oversight and Reform requested information about the process that USACE used for the construction of a wall along the southern border, including reported efforts by Trump Administration officials and others relating to Fisher Sand and Gravel. On June 20, 2019, Committee staff received a briefing from USACE contracting personnel. The USACE contracting personnel indicated that Lieutenant General Semonite was involved in several interactions with the White House and others related to the border wall contracting process and that he could provide additional information to the Committee on those interactions. According to the Chairman's request, media reports described additional interactions and raised concerns that USACE was being pressured to bypass

(U) regular contracting processes in order to complete wall construction more quickly. The Committee requested that Lieutenant General Semonite brief Committee staff by September 20, 2019.

(U) On September 20, 2019, the Principal Deputy, Legislative Liaison for the Office of the Chief of Legislative Liaison, Department of the Army, responded to the Chairman of the Committee on Oversight and Reform. He stated that representatives from USACE met with Committee staff and responded to questions concerning the contracting process for construction of a wall along the southern border. According to a USACE memorandum, USACE would continue to assist the Committee in understanding the contracting process, and the content and details of any communications with the President of the United States or his staff were confidential.

(U) President Trump Visits the Border Wall

(U) On September 18, 2019, President Trump visited a section of the U.S.-Mexico border wall under construction in Otay Mesa, California. The Acting Secretary of Homeland Security, the Acting CBP Commissioner, and Lieutenant General Semonite joined President Trump. According to Lieutenant General Semonite, the President received a general briefing and was given an opportunity to see the progress on the wall. According to a PBS News Hour article, Lieutenant General Semonite presented that more than 66 miles of border wall had been completed and another 251 miles were under contract. Additionally, he presented that another 163 miles would be on contracts in the next 90 days and the remaining area was mainly private land. According to Lieutenant General Semonite, Fisher Sand and Gravel was not discussed. See Figure 5 for a picture of the September 18, 2019 visit to the Border Wall.



(U) DoD and USACE Meeting at the White House

(~~CUI~~) According to the briefing notes, on October 7, 2019, the Former Secretary of Defense briefed [REDACTED]

[REDACTED] and the Acting CBP Commissioner on the progress of the border barrier construction. Lieutenant General Semonite attended this meeting. The briefing notes did not include that Fisher Sand and Gravel was discussed.

(~~CUI~~) According to the briefing notes, on October 24, 2019, the Former Deputy Secretary of Defense briefed [REDACTED]

[REDACTED] and the Acting CBP Commissioner on the progress of the border barrier construction. Lieutenant General Semonite attended this meeting. The briefing notes did not include that Fisher Sand and Gravel was discussed.

(~~CUI~~) According to the briefing notes, on November 14, 2019, the former Assistant Secretary of Defense (Homeland Defense and Global Security) briefed [REDACTED]

[REDACTED] the Acting CBP Commissioner, and Department of Justice officials on the progress of the border barrier construction [REDACTED] Lieutenant General Semonite attended this meeting. The briefing notes did not include that Fisher Sand and Gravel was discussed.

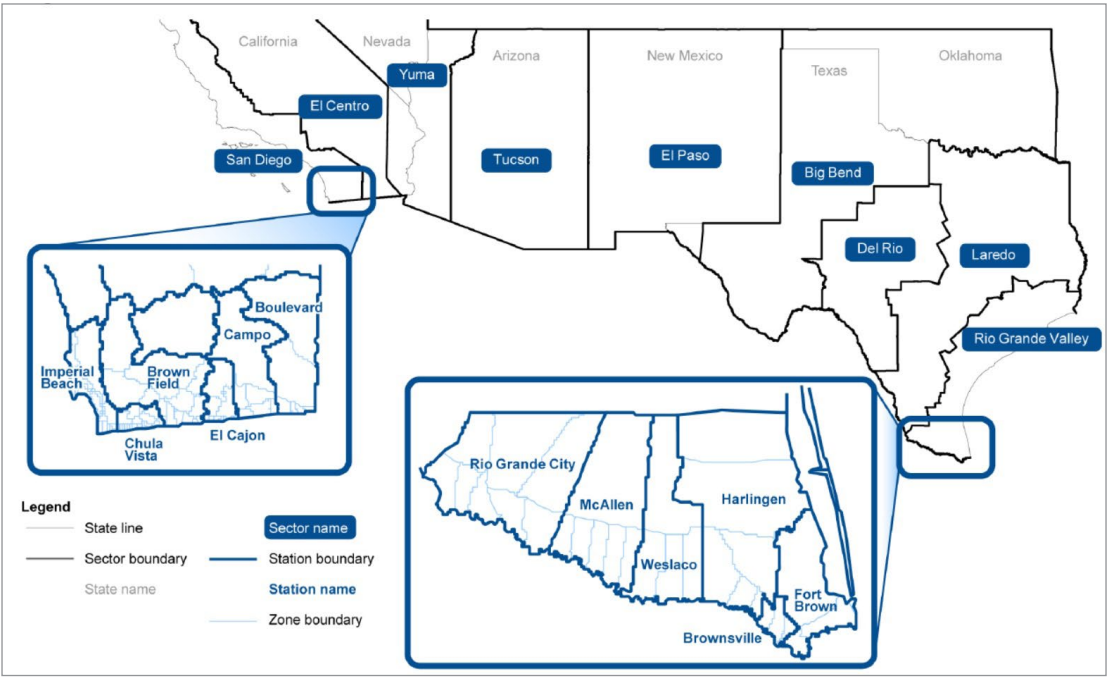
(U) Appendix G

(U) Border Wall Sectors

(U) The Border Wall Sectors include the San Diego, El Centro, Yuma, Tucson, El Paso, Big Bend, Del Rio, Laredo, and Rio Grande Valley Sectors. Specific border wall projects included the FY 2018 California Project, El Paso 1 Project, El Centro 1 Project, and Tucson 1, 2, and 3 Projects. The FY 2018 California Project was for design-build of approximately 29 miles in the San Diego, El Centro, and Yuma sectors. The El Paso 1 Project began approximately 17.5 miles west of the Columbus Port of Entry and continued east in noncontiguous segments to approximately 35 miles east of the Columbus Port of Entry within the Luna and Dona Ana Counties, New Mexico. The El Centro 1 Project began approximately 10 miles west of the Calexico Port of Entry and continued west 15.25 miles in Imperial County.

(U) The Tucson 1, 2, and 3 Projects were for the design-build of approximately 63 miles of pedestrian bollard fencing, construction of roads, and lighting along the U.S. border in Arizona. The Tucson 1 Project included two segments. The first segment began approximately 2 miles west of the Lukeville Port of Entry and continued west approximately 30 miles. The second segment began approximately 3 miles east of the Lukeville Port of Entry and continued east approximately 8 miles in Pima County, Arizona. The Tucson 2 Project began approximately 2 miles west of the Lukeville Port of Entry and continued approximately 3 miles east of the port. The Tucson 3 Project included three segments, which began approximately 18 miles west of the Naco Port of Entry and continued approximately 25 miles east of the Douglas Port of Entry for approximately 20 miles of nonadjacent border in Cochise County, Arizona. See Figure 6 for a picture of the Border Wall Sectors.

(U) Figure 6. Border Wall Sectors



(U) Source: The GAO.

(U) Appendix H

(U) Yuma Area Projects

(U) The Yuma Area Projects include the segments for the Yuma 1, 2, 3 and 6 Projects. The Yuma 1 and 2 Projects were for the design-build of approximately 11 miles of primary bollard fencing, construction of roads, and lighting along the U.S. border near Yuma, Arizona. The Yuma 1 Project began approximately 1 mile southeast of the Andrade Port of Entry and continued along the Colorado River for approximately 5 miles in Yuma County. The Yuma 2 Project involved the replacement of two segments of primary pedestrian fencing in Yuma Sector for a total of approximately 6 miles. This included approximately 2 miles of fencing along the Colorado River and the replacement of primary pedestrian fencing approximately 17 miles east of the San Luis Port of Entry continuing east for approximately 4 miles. The Yuma 3 Project was for the replacement of 31 miles of vehicle barriers with new pedestrian fencing along the U.S. border near Yuma, Arizona. The Yuma 3 Project began approximately 0.4 miles east of the Barry M. Goldwater Range and continued for 31 miles east along the international border at the southern perimeter of the Cabeza Prieta National Wildlife Refuge in Yuma County, Arizona. The Yuma 6 Project was approximately 3.5 miles. The Yuma 6 Project began approximately 1.2 miles east of the Colorado River, continued to 1.3 miles west of Colorado River, and included a 1-mile primary barrier replacement and a 2.5-mile secondary barrier replacement. See Figure 7 for a picture of Yuma Area Projects and Figure 8 for a picture of the Yuma 3 Project.

Yuma Area FY19 Projects

Map Created by: Jessie.d.petth@usace.army.mil
Date of Production: 20200129

SOUTH PACIFIC BORDER DISTRICT

Fort Yuma

FY 19 Sec. 2808 Primary - Yuma 6 (182)

FY 19 Sec. 284 Primary - Yuma 1

FY 19 Sec. 2808 Secondary - Yuma 6 (182)

FY 19 Sec. 2808 Primary - Yuma 2

FY 19 Sec. 2808 Secondary - Yuma 1077

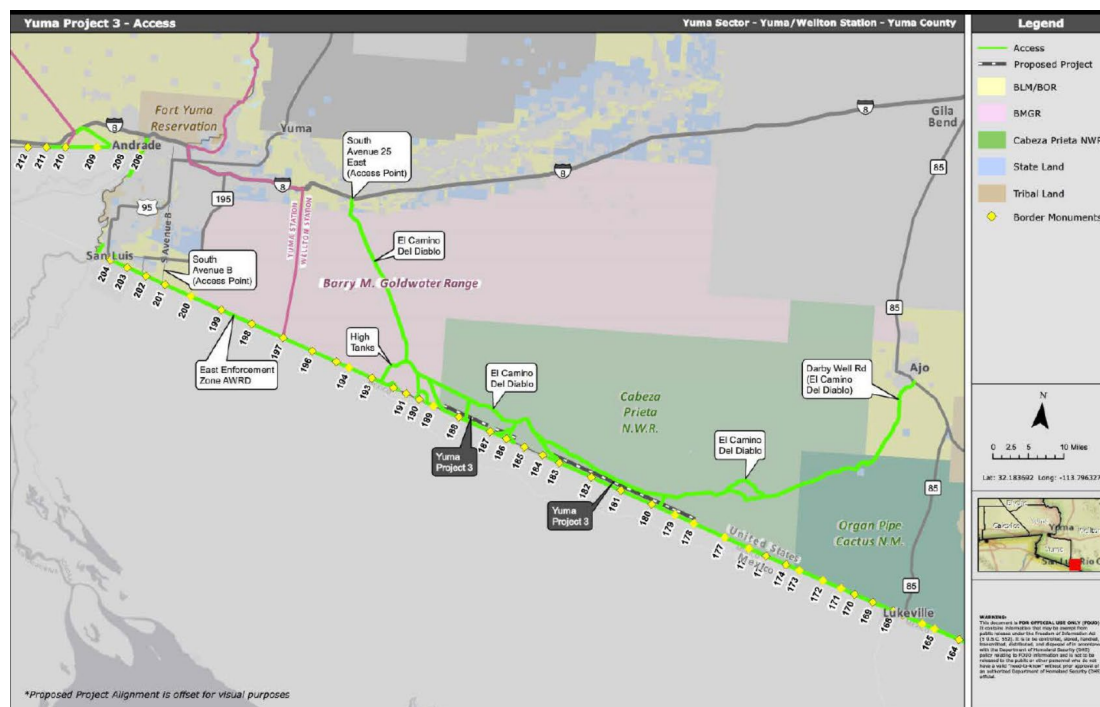
FY 19 Sec. 2808 Secondary - Yuma D

FY 19 Sec. 284 Primary - Tucson 1

0 3.13 6.25 12.5 18.75 25 Miles

Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS,

(U) Figure 8. Yuma 3 Project



~~CUH~~

(U) Appendix I

(U) Presidential Communication Questions Not Answered

(U) According to a DoD OGC attorney, the White House had final approval before any presidential communications could be disclosed to the DoD OIG. As a result, Lieutenant General Semonite was instructed by a DoD OGC attorney based on White House Counsel's guidance not to answer any questions about communications between the President or White House officials and senior USACE officials regarding the solicitation and award of the Yuma 3 Project and Fisher Sand and Gravel. The DoD OGC attorney also insisted that the arrangement apply to our interviews of other senior USACE officials, including Mr. Cooper, Mr. Caldwell, Brigadier General Goddard, Ms. Stiglich, and Mr. Heath. In each of these interviews, the DoD OGC attorney instructed the witnesses not to answer our questions related to communications between USACE officials and White House officials about the solicitation and award of the Yuma 3 Project and Fisher Sand and Gravel, or instructed the witnesses to answer only to the extent that their answers would not include specific information about White House communications. As stated previously, a DoD OGC attorney instructed them not to answer any questions about communications with the President or White House officials regarding the solicitation and award. Because we were unable to ask followup questions or further explore matters relating to any White House communications, we are unable to substantiate or refute these assertions. See the following questions related to communications between USACE officials and White House officials that the DoD OGC attorney instructed at least one witness not to answer.

1. (U) What discussions or communications did you have with President Trump or anyone from the White House administration about border wall infrastructure?
2. (U) What border wall topics were discussed as part of these discussions with President Trump?
3. (U) Were any of those (White House) discussions specifically related to Fisher Sand and Gravel?
4. (U) Were there other USACE officials that have met or participated as part of discussions or communications with President Trump or anyone from the White House administration?
5. (U) Did those individuals receive any information (from the White House) specifically related to Fisher Sand and Gravel?

6. (U) Did they discuss any information that was provided in discussions with White House administration officials related to Fisher Sand and Gravel to any other government officials or other members of USACE?
7. (U) Which White House officials participated in the discussions or the communications related to the border wall?
8. (U) At the April 5, 2019, roundtable meeting with President Trump, were you asked or directed by President Trump, White House staff or any other government officials to award border wall infrastructure contracts to Fisher Sand and Gravel? Additionally, were other USACE officials asked or directed by President Trump, White House staff, or any other government officials to award border wall infrastructure contracts to Fisher Sand and Gravel?
9. (U) On September 18, 2019, a meeting was held in Otay Mesa, California. During this meeting, were you asked or directed by President Trump, White House staff, or any other government officials to award border wall infrastructure contracts to Fisher Sand and Gravel?
10. (U) What communications did you or any other USACE officials have with Mr. Kushner about border wall infrastructure? What border wall topics were discussed as part of these discussions or communications? Were any of those discussions specifically related to Fisher Sand and Gravel? Did you provide any information related to Fisher Sand and Gravel that was obtained from the discussions or communications with Mr. Kushner to anyone else in USACE? Did you direct any USACE personnel to provide any information related to Fisher Sand and Gravel that was obtained from the discussions or communications with Mr. Kushner to anyone else in USACE?
11. (U) According to Lieutenant General Semonite, he had meetings with White House officials regarding border wall work. He also stated that he back briefed the senior leaders on these meetings. What exactly did he tell you regarding the meetings with White House officials?
12. (U) Can you discuss whether or not Fisher Sand and Gravel was discussed in any of those (White House) meetings?
13. (U) Did you participate in any meetings or see any correspondence that specifically discussed pressure from President Trump or White House officials regarding Fisher Sand and Gravel?
14. (U) Did any communications with the White House influence the source selection of Fisher Sand and Gravel for contract W912PL-20-C-0004?

15. (U) Did you attend any of the meetings or participate in discussions with White House officials related to border wall infrastructure? If so, what was discussed specifically related to Fisher Sand and Gravel, and who attended these meetings from USACE, the White House, and Congress? Are you aware of what was discussed in these meetings when USACE officials met with White House officials on border wall infrastructure?
16. (U) Did you participate in any meetings or see any correspondence that specifically discussed pressure or attempts by President Trump or White House officials to influence the use of Fisher Sand and Gravel for border wall infrastructure contracts? What did Lieutenant General Semonite tell you regarding the meetings with White House officials?

(U) Acronyms and Abbreviations

(U) BVTO	Best Value Trade-Off
(U) CBP	U.S. Customs and Border Protection
(U) CLIN	Contract Line Item Number
(U) CPARS	Contractor Performance Assessment Reporting System
(U) DFARS	Defense Federal Acquisition Regulation Supplement
(U) DHS	Department of Homeland Security
(U) DMEN	Digital Media Examination Network
(U) FAPIIS	Federal Awardee Performance and Integrity Information System
(U) FAR	Federal Acquisition Regulation
(U) GAO	Government Accountability Office
(U) IIRIRA	Illegal Immigration Reform and Immigration Responsibility Act
(U) LPTA	Lowest Price Technically Acceptable
(U) MATOC	Multiple Award Task Order Contract
(U) PPIRS	Past Performance Information Retrieval System
(U) SSA	Source Selection Authority
(U) SSAC	Source Selection Advisory Council
(U) SSEB	Source Selection Evaluation Board
(U) UCA	Undefinitized Contract Action
(U) USACE	U.S. Army Corps of Engineers

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