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Comptroller General
of the United States

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Decision

Matter of: Shimmick Construction Company, Inc.

File: B-420072.3

Date: March 17, 2022

Giovanni Ruscitti, Esq., Berg Hill Greenleaf & Ruscitti LLP, for the protester.
Casey McKinnon, Esq., and Michael H. Payne, Esq., Cohen Seglias Pallas Greenhall & Furman PC, for Michels Corporation, the intervenor.
Amanda R. Fuller, Esq., Alexandria P. Tramel, Esq., Maryann Blouin, Esq., and Jeremy Weber, Esq., Department of the Army, for the agency.
Christopher An, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the scope of the agency's corrective action is dismissed as untimely where the protester waited to file its protest until after the completion of the corrective action.

DECISION

Shimmick Construction Company, Inc. of Oakland, California, protests the award of a contract to Michels Corporation of Brownsville, Wisconsin, under invitation for bids (IFB) No. W9123821B0010, issued by the Department of the Army, United States Army Corps of Engineers for the construction of a reinforced concrete ogee weir and other various drainage improvements. The protester argues that the agency, as part of its implementation of corrective action, improperly solicited and considered additional information from Michels to assess whether Michels met the IFB's definitive responsibility criteria.

We dismiss the protest.

BACKGROUND

On May 27, 2021, the agency issued the IFB seeking bids for the construction of a reinforced concrete ogee weir across the Success Lake spillway in Porterville, California. The IFB sought various other drainage improvement projects to include the

construction of trench drains, flood proofing, and the relocation of existing wells and storage tanks. IFB at 1.

In order to be found responsible and therefore eligible for award, the IFB required bidders to establish that they meet two definitive responsibility criteria.¹ The first of the definitive responsibility criteria inquired as to whether the bidder had previously constructed projects using the IFB's specified excavation method. *Id.* at 13. The second focused on the bidder's experience with using strict temperature control methods during concrete placement. *Id.*

Accordingly, the IFB instructed bidders to: (1) affirm that they met each of the two criteria; (2) provide relevant project information; and (3) identify a point of contact that would allow the agency to verify the information provided by the bidder if the agency chose to do so. IFB at 13-14. Specifically, the IFB stated as follows:

In order to be found 'responsible', the offeror must respond to all questions with 'yes' and provide name of the firm performing the specific work, location of the project, client, total cost, percentage complete, and a contact person and phone number for each project. The Government reserve[s] the right to verify the accuracy of the project data submitted with the point of contact provided.

Id. at 13.

As it relates to the protest, the second of the two definitively responsibility criteria stated as follows:

2. Has your firm, or a firm on your proposed team, constructed spillway projects or similar projects using 1-1/2 inch to 3 inch coarse aggregate mass concrete under strict temperature control methods for controlling the concrete placement temperature in hot and cold Weather so the temperature of the concrete when deposited in the forms shall not exceed the project specified temperature, similar to those required on this project, to the tolerances required for this project and completed after 1 January 2010?

Id. at 13-14.

¹ Definitive responsibility criteria are specific and objective standards established by an agency for use in a particular procurement to measure a bidder's ability to perform the contract. Federal Acquisition Regulation (FAR) 9.104-2. These special standards of responsibility limit the class of bidders to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance. *M&M Welding & Fabricators, Inc.*, B-271750, July 24, 1996, 96-2 CPD ¶ 37 at 2.

On July 16, 2021, the agency received 5 bids, with Michels being the lowest bidder. The agency, however, found Michels non-responsible, concluding that Michels failed to satisfy the second of the two definitive responsibility criteria mentioned above. In reaching this conclusion, the agency found that Michels's bid did not include sufficient information to establish that it possessed the experience required by the second definitive responsibility criterion.

Having found Michels non-responsible, on August 6, the agency made award to the second low bidder, Shimmick. Michels then protested the agency's award decision with our Office on August 16. In its protest, Michels challenged the agency's finding that it had not adequately demonstrated that it met the second definitive responsibility criterion. Michels argued that the solicitation's criteria simply asked bidders to reply "yes" or "no" to whether they possessed the relevant performance experience and to provide the name of the firm performing the specific work, location of the project, client, total cost, percentage complete, and a contact person and phone number for each project. Having answered yes to both questions and provided the relevant information, Michels argued the agency had no basis to conclude that it did not meet either of the definitive responsibility criteria.

On October 29, the GAO attorney responsible for the protest conducted an outcome prediction alternative dispute resolution (ADR) conference with the parties. During the conference, the GAO attorney advised the parties that our Office would likely sustain the protest filed by Michels.

That same day, the agency advised our Office and the parties that it was taking corrective action in response to Michels's protest. The agency represented that the corrective action would include requesting additional information from Michels to evaluate whether it met the definitive responsibility criteria outlined in the IFB. Specifically, the agency informed our Office and the parties as follows:

The Agency will request additional information from Michels Corporation to determine whether they satisfy the definitive standards of responsibility contained in the Tule Solicitation. In the case that Michels Corporation's additional information allows for an affirmative determination of responsibility, the Agency will terminate for the convenience Contract No. W91238-21-C-0022 and reaward to Michels Corporation.

Notice of Corrective Action at 1, B-420072, Oct. 29, 2021.

Because the agency's corrective action rendered the protest academic, we dismissed the protest on November 3. In our decision we noted that the agency had represented that it was going to "request additional information from [Michels], and if this information allows for an affirmative determination of responsibility, then the agency will award the contract to [Michels]." B-420072, Nov. 3, 2021 (unpublished decision).

On December 10, following the implementation of its corrective action, the agency advised Shimmick that it was terminating its contract and making award to Michels. After learning of the agency's revised award decision, Shimmick filed this protest on December 20.

DISCUSSION

The protester challenges the agency's corrective action principally arguing that it was improper for the agency to consider any additional information from Michels in reassessing whether Michel's met the IFB's definitive responsibility criteria. According to Shimmick, because the agency had previously made award to Shimmick, the agency was precluded "from considering the post-award submissions made by Michels pursuant to the [agency's notice of corrective action]." Protest at 12. Shimmick also argues that "not only was it improper for the Corps to consider the additional information it received from Michels . . . after the award had been made to Shimmick, but the record shows that the Corps had a reasonable basis for finding Michels to be nonresponsible." Protest at 13.

In further support of its protest, Shimmick contends that the consideration of additional information as outlined in the agency's notice of corrective action is tantamount to a modification of Michels' bid, which is prohibited by FAR provision 52.214-7 because the modification occurred after bid opening. Protest at 14. In this context, Shimmick argues that by allowing Michels to submit additional information after award, "the Corps created an unequal playing ground for all of the other offerors, as none of them were also afforded such a courtesy." *Id.* at 14.

Michels, the intervenor, argues that our Office should dismiss the protest as untimely. According to Michels, at its core, the protest is a challenge to the scope of the agency's corrective action, namely the agency's decision to obtain and consider additional information from Michels for the purpose of making its responsibility determination. Michels argues Shimmick should have challenged the scope of the agency's proposed corrective action within 10 days of October 29, when the agency expressly announced its clear intention to take such action. Intervenor's Req. for Dismissal at 3. We agree.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. *WK Eng'g. Int'l, Inc.*, B-414932, Oct. 13, 2017, 2017 CPD ¶ 316 at 6. Under these rules, a protest based on alleged solicitation improprieties that are apparent prior to the deadline for submitting proposals must be filed before that deadline. 4 C.F.R. § 21.2(a)(1). A protest allegation challenging the ground rules that the agency has announced for performing corrective action is analogous to a challenge to the terms of the solicitation and must be filed before any new closing date for submitting revised bids or proposals. *Veterans Evaluation Servs., Inc. et al.*, B-412940.26 *et al.*, Jan. 5, 2017, 2017 CPD ¶ 17 at 11; *Domain Name Alliance Registry*, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7. Where, as here, the contemplated corrective action does not anticipate the establishment of a new closing date, however, a challenge to the scope of

the agency's announced corrective action must be raised within 10 days of when the scope of the agency's intended action was known or should have been known. 4 C.F.R. §21.2(a)(1).

The record reflects that on October 29, the agency made it clear to Shimmick that it would obtain and consider additional information from Michels for the purpose of reassessing whether Michels met the IFB's definitive responsibility criteria. As noted above, the agency's notice of corrective action, which was provided to Shimmick's counsel, explicitly stated that it would "request additional information from Michels Corporation to determine whether they satisfy the definitive standards of responsibility contained in the [] solicitation". Notice of Corrective Action at 1, B-420072, Oct. 29, 2021. The notice also states that "in the case that Michels Corporation's additional information allows for an affirmative determination of responsibility, the Agency will terminate for the convenience [the contract awarded to Shimmick] and reaward to Michels Corporation." *Id.*

In support of its view that the protest should be considered timely, Shimmick argues that the filing of any protest before the agency made award to Michels would have been premature. According to Shimmick, the agency's notice of corrective action "[did] not definitive[ly] state that it [would] take an action adverse to Shimmick," thus there was "no need to file a protest at that time." Resp. to Intervenor's Req. for Dismissal at 3-4.

These arguments are based on a fundamental misunderstanding of our timeliness rules. As stated above, an objection to the scope of an agency's corrective action is analogous to a challenge to the terms of the solicitation and must be filed within the time limitations set forth in 4 C.F.R. § 21.2(a)(1). *Veterans Evaluation Servs., Inc., supra*; *Domain Name Alliance Registry, supra*. Thus, if Shimmick thought the agency's proposed corrective action, as stated, constituted a violation of applicable law and regulation, it could not wait to protest the impropriety until after the agency implemented its planned course of action, and made award to Michels. See e.g., *McKean Def. Grp.-Info. Tech., LLC*, B-401702.2, Jan. 11, 2010, 2010 CPD ¶ 257 at 3 n.3 (explaining that protest filed before award was not premature where protester objected to agency's decision that the corrective action would include discussions); *ActionNet, Inc.*, B-416557.4, Feb. 27, 2019, 2019 CPD ¶ 97 at 4 n.7 (explaining that protest filed before award was not premature where protester challenged the scope of agency's corrective action concerning terms for quotation revisions).

Given the clear expression of the agency's intentions, there was no doubt about the process the agency planned to use for purposes of reassessing Michels's responsibility, and that this process included obtaining additional information from Michels to assist the agency in making its responsibility determination. To the extent Shimmick thought this process was contrary to law or regulation, or fundamentally unfair, as it now appears to argue, it was incumbent on Shimmick to raise these concerns about the agency's

intended course of action within 10 days of October 29. Having failed to do so, the protest allegations are now untimely.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel