



United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Morris, Inc.

**File:** B-407296

**Date:** November 28, 2012

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Thomas K. Wilka, Esq., and Jennifer L. Larsen, Esq., Hagen, Wilka & Archer, LLP, for the protester.

James H. Roberts, III, Esq., Van Scoyoc Kelly & Roberts PLLC, for Road Builders, Inc., the intervenor.

P. Alex Petty, Esq., Department of the Army, for the agency.

Gary R. Allen, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that an agency improperly allowed awardee to cure its failure to acknowledge a solicitation amendment is denied where the amendment was not material because it did not impose new legal obligations on the bidders.

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### DECISION

Morris, Inc., of Ft. Pierre, South Dakota, protests the award of a contract to Road Builders, Inc., of National City, California, by the Department of the Army, Corps of Engineers, under invitation for bids (IFB) No. W912HY-12-B-0012, for dredging of the Oahe Emergency Spillway Inlet Channel in Pierre, South Dakota. Morris contends that Road Builders' bid was nonresponsive, because the awardee failed to acknowledge a material solicitation amendment.

We deny the protest.

### BACKGROUND

The IFB, issued on June 18, 2012, provided for dredging of the upstream spillway channel at the Oahe Dam and for associated construction services, including re-sloping/re-grading the side slopes of the channel, construction of a breakwater, and placement of rock (rip rap) slope protection. The IFB was amended three times. Bidders were required to acknowledge amendments when submitting a bid. See IFB § 00 21 00 at 3.

The IFB contained contract line items (CLINs) for type A and type B stone rip rap.<sup>1</sup> As issued, the IFB provided that, “[a]ll stone for rip rap shall be durable fractured field boulders or quarried rock as approved by the Contracting Officer’s Representative. The field boulders shall have a minimum of one fractured face.” See IFB § 31 05 23 at 3. Further, stone for both type A and B rip rap was required to “be in pieces approximately rectangular in cross section.” Id. at 4.

As relevant here, amendment 3, issued July 19, 2012, amended the solicitation’s specifications as follows: “Section 31 05 23 Page 3, paragraph 2.1.1, line 3: Change “one fractured face” to “three fractured faces.” IFB, amend. 3, at 2 (emphasis in original).

The agency received 10 bids, including that of Morris and Road Builders, by the bid opening date. Road Builders submitted the apparent low bid of \$2,377,080, but did not acknowledge amendment 3. Morris submitted the second low bid, and acknowledged all three amendments.

The contracting officer determined that amendment 3 was a minor informality or irregularity, and that it was in the best interests of the government to accept Road Builders’ bid under Federal Acquisition Regulation (FAR) § 14.405(d)(2). Agency Report (AR), Tab 8, Determination of Minor Informality or Irregularity in Bid, at 1-2. The contracting officer concluded that the agency would accept Road Builders’ bid provided the bidder acknowledged the amendment, agreed to be bound by it, and did not increase its bid price. Id. at 2. After notification by the contracting officer, Road Builders verified its bid, acknowledged amendment 3, and stated that its pricing was not affected by acknowledging the amendment. AR, Tab 10, Road Builders Letter to Agency, Aug. 9, 2012.

The agency awarded the contract to Road Builders on August 28, and this protest followed.

## DISCUSSION

Morris complains that amendment 3 was material and that Road Builders’ failure to acknowledge the amendment rendered its bid nonresponsive. In this regard, Morris contends that the amendment changed the IFB specifications in a way that has more than a negligible effect on price and quality. Protest at 3-4.

An amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation; that is, for example, where it merely clarifies an existing requirement or is a matter of form. Singleton

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<sup>1</sup> The distinction between type A and type B rip rap is based upon size and weight. See IFB § 31 05 23 at 4.

Enterprises, B-295562, Feb. 25, 2005, 2005 CPD ¶ 42 at 3; Kalex Constr. & Dev., Inc., B-278076.2, Jan. 20, 1998, 98-1 CPD ¶ 25 at 2. A bidder's failure to acknowledge an amendment that is not material may be waived or cured. FAR § 14.405; Overstreet Elec. Co., Inc., B-283830, B-283830.2, Dec. 30, 1999, 2000 CPD ¶ 8 at 7. No precise rule exists to determine whether a change required by an amendment is more than negligible; that determination is based on the facts of each case. K Services, B-238744, June 13, 1990, 90-1 CPD ¶ 556 at 2.

The parties disagree as to whether amendment 3 is material. Morris contends that the requirement for three-faced rip rap affects the quality of performance, noting that "three-faced fractured rip rap 'locks' together much better and is less susceptible to moving, shifting, or falling down the embankment during high and/or fast moving water events compared to one-faced rip rap." See Protester's Comments at 5; see also Protester's Response to GAO's Questions at 1.<sup>2</sup> Morris also contends that the amendment has a significant impact on price, because three-faced rip rap is allegedly more costly than one-faced rip rap. See Protester's Comments at 3.

The agency contends that the change is only a matter of form because the stone was required to be "approximately rectangular in cross section." See IFB § 31 05 23 at 4. The agency argues that to be "rectangular in cross section" means that any fractured rock used, must, by definition, have a minimum of three rectangular faces.<sup>3</sup> Memorandum of Law at 4. The agency also states that the amendment did not change the size, quantity or quality of rock required, because the original general requirement stated that "[a]ll stone for rip rap shall be durable fractured field boulders or quarried rock." IFB § 31 05 23 at 3.

Here, the record supports the agency's position that the requirement that the fractured field stone or quarried rock be "rectangular" necessarily means that the rip rap must have at least three fractured faces. Although the protester continues to disagree with the agency, it does not substantively address the "rectangular in cross section" requirement, but instead refers to the size of the rocks required; noting only that it is difficult to find a large and abundant source for field boulders this size. Protester's Comments at 2.

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<sup>2</sup> We asked the parties to provide more detailed explanations from knowledgeable sources specifically concerning rip rap for the side slopes of the projected spillway entrance channel and dike embankment, with its particular steepness and the projected water velocity. We requested that these sources discuss how the presence of fractured faces affects such things as the size of rock needed, workability and interlocking of the rock assemblage, stability, and design adjustments.

<sup>3</sup> Intervenor contends that the size of type A and type B rip rap necessarily dictates that the rip rap must have at least three fractured faces.

Moreover, the statements from the technical consultants for both parties support the agency's position that the rectangular nature of the rip rap requires at least three fractured faces. The agency's technical consultant, in explaining why "approximately rectangular" in shape rip rap stone was critical, states that

To be an effective armor against water and weave action, rip rap should be interlocked or seated closely together, in such a way as to ensure it doesn't easily move. Flat surfaces are necessary for this proper placement. Round rip rap has the opportunity and tendency to roll out of place, especially when confronted with strong wave action or fast-moving water. . . .

See Agency Response to GAO Questions, Oct. 24, 2012, Declaration of Oahe Dam Project Manager at 2 (emphasis added). The protester's consultants state that

it is widely a known fact that the more fractured faces a rock has the better it is able to lock together. Similarly, rounded rock, or rock that has less fractured faces, is more susceptible to moving around, being washed away, or falling down the slope during changes in water elevations and/or high water velocities.

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[T]he existing rip rap on both sides of the [project] inlet channel has at least three fractured faces . . . [and] has remained stable following decades of reservoir fluctuations.

Protester's Comments, attach. 18, Statement from Two Professional Engineers, Oct. 22, 2012 (emphasis added).

These statements appear to agree that rectangular shaped rip rap has a number of fractured faces, as the agency asserts. The protester does not state otherwise. Accordingly, we find no basis to question the agency's determination that amendment 3 clarified an existing requirement, and did not impose additional legal obligations. In short, amendment 3 was not material, and therefore the agency reasonably allowed Road Builders to acknowledge the amendment after bid opening.

We deny the protest.

Lynn H. Gibson  
General Counsel