



**G A O**

Accountability \* Integrity \* Reliability

**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

**DOCUMENT FOR PUBLIC RELEASE**

The decision issued on the date below was subject to a GAO Protective Order. No party requested redactions; we are therefore releasing the decision in its entirety.

## Decision

**Matter of:** Datamaxx Group, Inc.

**File:** B-400582

**Date:** December 18, 2008

---

Carla D. Craft, Esq., Maynard Cooper & Gale P.C., and Jerome S. Gabig, Jr., Esq., Law Office of Jerome S. Gabig, for the protester.

Peter Jones, Esq., Transportation Security Administration; Kathleen D. Martin, Esq., and David B. Funk, Esq., Department of Homeland Security; and John W. Klein, Esq., and Laura Mann Eyester, Esq., Small Business Administration, for the agencies.

Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

Protest that agency improperly proposes to issue a task order under an indefinite-delivery/indefinite-quantity contract without considering a small business set-aside is dismissed as untimely where the protest was filed after the closing date for submission of proposals under the solicitation for the indefinite-delivery/indefinite-quantity contract, and the solicitation provided clear notice that its scope included the services under the task order.

---

### DECISION

Datamaxx Group, Inc., doing business as Datamaxx Applied Technologies, Inc., of Tallahassee, Florida, a small business, protests the terms of task order request for proposals (Task Order RFP) No. HSTS07-08-R-00024 by the Transportation Security Administration (TSA) for software development services. The Task Order RFP was issued to vendors holding Enterprise Acquisition Gateway for Leading Edge Solutions (EAGLE) multiple award indefinite-delivery/indefinite-quantity (ID/IQ) contracts; Datamaxx does not hold an EAGLE ID/IQ contract. As the incumbent small business software development contractor for these services, Datamaxx essentially challenges their inclusion under request for proposals No. HSHQDC-05-R-00010 (RFP), the EAGLE solicitation, and argues that these services must instead be procured as a stand-alone requirement and set aside for small businesses.

We dismiss the protest.

## BACKGROUND

The services being solicited by TSA are referred to as the Tactical Information Sharing System (TISS) Development and Migration Project. The TISS project allows for real-time reporting and analysis of suspicious events by law enforcement personnel, so that TSA can carry out its responsibility to protect the aviation system, its employees, and the public. Agency Report (AR) at 1. Under a TSA contract awarded on September 15, 2003, Datamaxx has designed and developed the TISS system by customizing commercial software. The contract would have expired on September 15, 2008, but was recently extended for 6 more months. TSA Response to Dismissal Request, Oct. 17, 2008, at 3.

On September 29, 2005, the Department of Homeland Security (DHS) (of which TSA is a component) issued the EAGLE RFP. The RFP provided for DHS to award multiple ID/IQ contracts, and based on those contracts, multiple agencies<sup>1</sup> could issue fixed-price, cost-reimbursement, or time-and-materials labor hour task orders to EAGLE vendors for the “full range of IT [information technology] services, technical and management expertise, and solution-related enabling products”<sup>2</sup> worldwide. RFP at 7. The EAGLE RFP provided for a guaranteed minimum order of \$250 per contractor, and a “maximum cumulative dollar ceiling value of all contracts” of \$45 billion. RFP at 29.

The EAGLE RFP identified five functional categories (FC) as follows:

- FC1 -- Engineering Design, Development, Implementation and Integration
- FC2 -- Operations and Maintenance
- FC3 -- Independent Test, Evaluation, Validation and Verification
- FC4 -- Software Development
- FC5 -- Management Support Services

RFP at 7.

---

<sup>1</sup> The EAGLE RFP provided that orders could be placed by DHS “and its Components, as well as other federal agencies in support of homeland security.” RFP at 16. However, the current ordering guide issued by DHS specifies that only DHS component agencies are authorized to use EAGLE. DHS EAGLE Ordering Guide (Sept. 2008) at 7. Since TSA is a component of DHS, the discrepancy has no impact on our resolution of the protest, and is noted only for sake of clarity.

<sup>2</sup> The RFP noted that “[w]hile the Statement of Work identifies five functional categories, the suite of resulting contracts are intended to satisfy the full range of IT related requirements.” RFP at 7; see also RFP at 29 (in addition to services, contract is “structured to permit purchase of a full-range of electronic and information technology solutions”).

The parties agree that FC4 is the only category relevant here.<sup>3</sup> The scope of FC4 was defined in the EAGLE RFP as follows:

The Contractor shall provide any and all phases of software design and development including deployment to ensure DHS applications and databases will enable their users to meet their mission goals and objectives. These efforts include the full range of software design, development, implementation and integration, including, but not limited to, concept development, planning, requirements definition and analysis, systems design and development, coding and testing, production, deployment, implementation, integration, and software application maintenance.

RFP at 9.

The due date for initial proposals under the EAGLE solicitation was November 14, 2005. DHS received 402 proposals. Datamaxx did not submit a proposal under the EAGLE RFP, nor did it object to the scope or terms of the RFP before the closing date for submission of proposals. On June 29, 2006, DHS announced awards to 25 large businesses. A short time later, DHS awarded EAGLE contracts to 28 small businesses.<sup>4</sup> Of those, FC4 services are included in the EAGLE contracts of 7 of the small businesses, and 13 of the large businesses. AR, Tab 1, EAGLE Contractor List, Aug. 18, 2008, at 1-2. The EAGLE contracts provide for a base term of 5 years, followed by two 1-year option periods.<sup>5</sup> RFP at 2.

In August 2007, the TSA requested—although not via issuance of a solicitation—that Datamaxx provide a technical proposal and pricing to develop an internet-based interface accessible on personal digital assistant (PDA) devices for submission of suspicious activity reports. Datamaxx responded with a proposal, and understood that this internet-based interface would replace the customized PDA interface that

---

<sup>3</sup> Although the record reflects that TSA also briefly considered placing TISS under EAGLE Functional Category 1, none of the parties has argued that FC1 is relevant to our decision.

<sup>4</sup> DHS explains that the small business awards were made separately because it conducted the EAGLE procurement on separate “tracks” for the unrestricted awards and the small business set-aside awards. Only those vendors that had received a set-aside track award are allowed to compete for task orders that are subsequently deemed suitable for a small business set-aside. DHS Comments at 7-8; EAGLE Contracting Officer’s Statement at 2-3.

<sup>5</sup> However, the RFP stated that task orders could provide for performance to continue up to 24 months after expiration of the underlying contract, either by continuing to use the final year prices or by negotiating new rates. RFP at 13.

Datamaxx had produced under its contract. Declaration of Datamaxx CEO, Oct. 17, 2008, at 3-4. No solicitation for this work was issued, however.

Approximately 8 months later, in April 2008, the TSA issued the first of three task order solicitations related to this dispute. The first task order solicitation was issued to small businesses holding EAGLE contracts, and requested fixed-price task order proposals to perform a scope of work similar to what Datamaxx had been asked to address in August 2007. AR, Tab 5, TISS Solicitation, at 1, 5. TSA did not receive any task order proposals from the EAGLE small businesses. On May 1, the TSA issued a second task order solicitation, this time noting that the competition was being opened to all EAGLE contract-holders. However, all of the resulting task order proposals were found to be unacceptable.

On July 16, the TSA issued a third unrestricted Task Order RFP to all EAGLE contractors<sup>6</sup> soliciting new fixed-price task order proposals. The Task Order RFP explained that the TSA had “reviewed and clarified” the requirements in the earlier solicitations, and that task order proposals would be due on August 7. The statement of work (SOW) for the Task Order RFP provides that “the Contractor shall develop a web based interface and [Microsoft Structured Query Language] backend clustered server environment to replace the current TISS,” including making TISS “accessible by any PC based web browser, as well as mobile Internet accessible devices (Windows mobile & Blackberry) without proprietary software.” AR, Tab 8, Task Order RFP SOW at 1-2.

Datamaxx filed an agency-level protest on August 7, arguing that there were at least five other small businesses capable of performing the scope of work in the July 16 Task Order RFP, and that the requirement should therefore be set aside for small businesses, rather than being placed under the EAGLE contract.<sup>7</sup> TSA denied the agency-level protest in a letter dated September 3. Datamaxx then filed its protest with our Office.

## DISCUSSION

In its agency-level protest, and again before our Office, Datamaxx argues that there are multiple small businesses capable of performing the TISS Development and Migration Project, and therefore TSA must consider soliciting the requirement as a stand-alone small business set-aside, pursuant to Federal Acquisition Regulation (FAR) § 19.502-2, and not as a task order under the EAGLE contract. At each stage

---

<sup>6</sup> TSA explains that it did not set aside the task order solicitation because the agency concluded that none of the small businesses that hold EAGLE contracts are capable of performing this work.

<sup>7</sup> Datamaxx acknowledges that none of the small businesses it identified is an EAGLE contractor.

of its protest, Datamaxx has cited our Office's decision in LBM, Inc., to argue that its protest should be viewed as a timely challenge to the terms of the EAGLE solicitation, that a small business set-aside is required, and that the set-aside must be open to all capable small businesses. Protest at 2 (citing LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 23, recon. denied, Department of the Army--Request for Modification of Recommendation, B-290682.2, Jan. 9, 2003, 2003 CPD ¶ 23).

As an initial matter, all parties agree that this protest is a challenge to the terms of the EAGLE ID/IQ RFP from November 2005. Both TSA and DHS state that this makes the protest untimely. The protester, citing our decision in LBM, Inc., argues that the protest is timely because Datamaxx did not know, and could not have known, that the TISS development work would be acquired under EAGLE.<sup>8</sup>

Specifically, Datamaxx argues that the scope of EAGLE, and of FC4 in particular, is broad and ambiguous, and therefore the protester could not have anticipated that the TISS follow-on software development effort would be solicited as a task order under EAGLE before the closing date for that solicitation. As support for its position, Datamaxx argues that TSA itself did not consider placing the TISS requirement under EAGLE until 2008, as evidenced both by TSA's August 2007 request that Datamaxx submit a proposal and pricing for similar work from Datamaxx, and by TSA planning documents, which suggest that TSA's consideration of EAGLE for the TISS requirement only emerged in 2008. Datamaxx asserts that similar considerations have led our Office to conclude that small businesses were timely in protesting agencies' failures to consider small business set-asides. Protester's Comments at 9-10.

TSA responds that the scope of EAGLE was not vague, and therefore Datamaxx has no basis to claim that it was unable to file a protest against the failure to set aside TISS software development services before the closing date for the EAGLE RFP in November 2005. TSA argues that the specificity of the scope of the EAGLE RFP distinguishes the present situation from LBM, Inc. and other cases cited by Datamaxx.

DHS joins TSA in its defense of this protest, and adds that it made significant efforts to make awards to small businesses under the EAGLE ID/IQ multiple award program, including coordinating the terms of the EAGLE RFP with the SBA and with interested small businesses. DHS argues that the level of small business competition

---

<sup>8</sup> We note that TSA procurements were outside our jurisdiction in November 2005, when the EAGLE solicitation was issued. The EAGLE RFP was issued by DHS, which was (and is) within our jurisdiction. Thus, our Office would have had jurisdiction over a protest that the terms of the EAGLE RFP improperly failed to provide for a set-aside of TISS software development services in November 2005.

for the EAGLE contracts, and the resulting contract awards, demonstrate that the purposes of the Small Business Act have been met.

In response to our Office's request for the SBA's views on this protest, the SBA argues that TSA has not met its obligations under the Small Business Act. More specifically, the SBA argues that the FAR requires an agency to consider the suitability of an upcoming requirement for performance by small businesses first, while conducting acquisition planning.<sup>9</sup> SBA Comments at 4-5 (citing FAR §§ 10.001(a), 19.202-2, 19.502-2, 19.1305). If such planning reveals that the requirement should be set aside for small businesses, the SBA argues that the procuring agency must then select a procurement vehicle consistent with the requirement for a set-aside. SBA Comments at 5. Thus, in situations where the "rule of two" is met, an agency could properly solicit the requirement under an ID/IQ contract only if the requirement is set aside for capable small business contract-holders. *Id.* at 5. The SBA argues that procuring agencies must not be allowed to solicit requirements on an unrestricted basis under existing ID/IQ contracts, simply because no small businesses hold ID/IQ contracts, or because the small business contract-holders are not capable of performing the particular requirement. *Id.* at 6.

Our Office has recognized that where ID/IQ contracts have very broad or vague statements of work, it may place an unreasonable burden upon potential offerors to determine whether particular work will be acquired under a particular ID/IQ contract, and thus whether to protest the terms of the ID/IQ contract. This burden may be particularly problematic for small businesses. *LBM, Inc., supra*, at 5 (also holding that "it is unreasonable to require a small business that believes that one specific acquisition should continue to be set aside for small businesses to identify the possibility . . . that the specific, and relatively small, acquisition it is interested in may ultimately be transferred to the ID/IQ contracts"); *see also Ocuto Blacktop & Paving Co.*, B-284165, Mar. 1, 2000, 2000 CPD ¶ 32 at 5-6 (protest filed at time of task order for landfill capping is timely where solicitations for ID/IQ contracts "do not provide clear notice that the [agency] will use these contracts to procure environmental remediation work at [particular] sites").

Our Bid Protest Regulations contain strict rules for the timely submission of protests. By implication where the solicitation for the ID/IQ contract is not broad and vague, but rather, gives clear notice of the agency's intention to procure particular requirements under an ID/IQ contract, any protest of those terms of the

---

<sup>9</sup> The SBA also argues that this hierarchy is implied by our decision in *International Program Group, Inc.*, because Historically Underutilized Business Zone (HUBZone) set-asides are mandated by statute in certain cases. SBA Comments at 6-7 (citing *International Program Group, Inc.*, B-400278, B-400308, Sept. 19, 2008, 2008 CPD ¶ 172). Nevertheless, this protest does not raise issues under the HUBZone program, and therefore we will not address it.

solicitation must be filed before the solicitation closing date. 4 C.F.R. § 21.2(a)(1) (2008). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

In our view, the terms of the EAGLE solicitation provided clear notice to Datamaxx that software development services, like those at issue here, would be acquired through EAGLE. We also note that the EAGLE solicitation was posted on Fedbizopps.gov, thus providing the public—including Datamaxx—notice of those terms. As such, in order to be timely, any challenge to the terms of the EAGLE solicitation had to be filed by the closing date, November 14, 2005.

Datamaxx also argues that our Office's decisions indicate that it could not have filed a protest that the terms of the EAGLE RFP improperly failed to consider a set-aside for TISS follow-on work in November 2005, because such a protest would have been premature, defensive, and based only on speculation that the TSA would act contrary to law and regulation. Protester's Comments at 11. We disagree. As stated above, the EAGLE RFP provided clear notice that software development services were within its scope, and therefore a timely protest arguing that this requirement should be reserved for small businesses would have been neither premature nor speculative. In our view, resolving disputes like these while the ID/IQ solicitation is open is key to the proper functioning of the procurement system. Alleged solicitation defects must be raised and resolved before the closing time for submission of proposals whenever possible. To hold otherwise would leave the scope of ID/IQ contracts open to challenge long after the establishment of those contracts, and would unduly disrupt and delay ordering processes that were intended to be efficient and expeditious.

The protest is dismissed.

Gary L. Kepplinger  
General Counsel