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**Comptroller General
of the United States**

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

Decision

Matter of: MadahCom, Inc.--Reconsideration

File: B-297261.2

Date: November 21, 2005

Joel Singer, Esq., Sidley Austin Brown & Wood LLP, for the protester. Christina Sklarew, Esq., and Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that a solicitation improperly restricts competition to multiple-award task-order contract holders, and that the task orders will exceed the scope of the underlying contracts, is timely under section 21.2(a)(1) of GAO's Bid Protest Regulations where filed before the closing date for receipt of task-order proposals. Dismissal of protest as untimely under section 21.2(a)(2) because it was not filed within 10 days of when the protester knew that the procurement would be restricted to task-order contract holders therefore is reversed.

DECISION

MadahCom, Inc. asks that we reconsider our October 6, 2005 dismissal, as untimely, of its protest of the decision of the Department of the Army, U.S. Army Corps of Engineers (USACE), Europe District, to procure custom emergency mass notification systems (MNS) for facilitating emergency notifications at various locations in Germany under request for proposals (RFPs) issued under multiple-award task order contracts Nos. W912GB-04-D-0024-0028, 0032--0035.

We grant the request for reconsideration.

The RFPs were issued on September 7 and 8, 2005 to firms holding one of the existing task-order contracts. According to the president of MadahCom, on September 7 he spoke to a contracting official at USACE Europe and was told that a prior solicitation for MNSs would not be implemented until 2006, while a "couple of small local projects" would be done this year using the existing task-order contracts. On that day, MadahCom also contacted a contracting official at USACE Europe by e-mail, in which MadahCom acknowledged that the task-order contracts would be the contracting vehicle for currently available funds. The following day,

MadahCom's president directed one of the firm's sales managers to contact certain task-order contract holders to attempt to understand what the task-order contract was, how it was issued, and what its scope was. The sales manager expressed interest in working as a subcontractor to one of the contract holders and attempted to obtain a copy of the task order in order to prepare a proposal prior to a bidders conference that had been scheduled for September 14. On September 13, MadahCom learned that it would not be permitted to participate in the bidders conference.

In its protest filed with our Office on September 20, MadahCom argued (as relevant here) that the agency's decision to procure the MNSs by issuing task orders for sophisticated electronic systems under the multiple-award contracts for construction services was improper as the task orders will exceed the scope of the underlying contracts. We dismissed this aspect of the protest as untimely under our Bid Protest Regulations, which require a protest based on other than alleged improprieties in a solicitation to be filed not later than 10 calendar days after the protester knew or should have known of the basis for protest. 4 C.F.R. § 21.2(a)(2) (2005). We reasoned that not later than September 8, MadahCom knew or should have known of its basis of protest--that it was not eligible to compete as a prime contractor for any of the referenced requirements--yet it did not file its protest in our Office until September 20.

In requesting reconsideration, MadahCom argues that we applied the wrong timeliness standard, since the basis of protest was that the RFP was defective in limiting the competition to the multiple-award contract holders because the proposed task orders were outside the scope of those contracts--a solicitation impropriety. As protests of this type are required to be filed prior to the time set for receipt of initial proposals, 4 C.F.R. § 21.2(a)(1), and since that date in this case was September 21, MadahCom contends that its September 20 protest should be deemed timely.

Under our Regulations, to obtain reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made of information not previously considered. 4 C.F.R. § 21.14(a).

On reconsideration, we are persuaded that the appropriate rule to apply in these circumstances is the solicitation-impropriety rule at 4 C.F.R. § 21.2(a)(1). We have applied the solicitation-impropriety rule in similar situations. We have held, for example, that a protest that a competitive task order solicitation issued to multiple firms holding umbrella contracts is beyond the scope of the umbrella contracts must, pursuant to 4 C.F.R. § 21.2(a)(1), be filed before the time set for proposal receipt. United Information Sys., Inc., B-282895, B-282896, June 22, 1999, 99-1 CPD ¶ 115 at 3. Similarly, we have stated that a small (but not disadvantaged) business challenge to a small disadvantaged business set-aside--a protest by a company being excluded from a competition--must be filed before responses to the restricted solicitation are

due, not within 10 days after the excluded firm learns of the limitation. Star Brite Constr. Co., Inc., B-241741, Feb. 1, 1991, 91-1 CPD ¶ 105 at 2. Where we have held that a beyond-the-scope protest in the context of award to multiple-award contract holders had to be filed within 10 days of when the protester knew or should have known of the basis for protest, application of this rule was based on our conclusion that the particular impropriety alleged had not been apparent from the solicitation (because, for example, the scope of work when the umbrella contracts were awarded was too broad and vague to allow offerors to anticipate a scope-related impropriety that might arise later). LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157 at 5-7.

In sum, since the crux of MadahCom's protest concerned the terms of that solicitation, it had to be filed before proposals under the solicitation in issue were due. Based on the chronology of the events outlined above, we conclude that MadahCom's protest was timely filed.

We are reopening our file and requesting an agency report from USACE, and we intend to address the merits of MadahCom's protest in a separately decision.

The request for reconsideration is granted.

Anthony H. Gamboa
General Counsel