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Decision

Matter of: Ashland Sales and Service Company/Macon Garment Inc., a Joint Venture

File: B-400466

Date: October 23, 2008

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.
Jared P. Weissberger, Esq., Defense Supply Center Philadelphia, for the agency.
Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that set-aside for Historically Underutilized Business Zone concerns should have been withdrawn because prices received were unreasonably high is denied where the contracting officer properly relied on multiple relevant factors to determine that the awardee's price was reasonable.

DECISION

Ashland Sales and Service Company/Macon Garment Inc., a Joint Venture, (AM-JV) protests the decision of the Defense Logistics Agency, Defense Supply Center Philadelphia (DSCP), to award a contract to Zachac Apparel, LLC under solicitation No. SPM1C1-07-R-0209, a Historically Underutilized Business Zone (HUBZone) set-aside for men's long-sleeved Air Force shirts.

We deny the protest.

In coordination with the Small Business Administration, DSCP determined that this requirement should be set aside for competition among small business concerns. Rather than fulfill the requirement through a single procurement, DSCP set aside 75 percent of the requirement for small businesses under solicitation No. SPM1C1-07-R-0190, and set aside 25 percent of the requirement for HUBZone small businesses under the solicitation challenged here.¹ Under the first solicitation, AM-JV submitted

¹ Both solicitations provided for a best value source selection procedure under which all evaluation factors other than price, when combined, were significantly more important than price. HUBZone Solicitation at 65.

an offer to supply the required shirts for \$13.08 per unit. After evaluation, DSCP determined that AM-JV's offer represented the best value under the small business set-aside and made the award to AM-JV.

Under the HUBZone set-aside solicitation, DSCP received submissions from five offerors. (AM-JV is not a HUBZone small business and did not submit an offer under the solicitation.) DSCP then established a competitive range of three offers, including Zabcac's, and conducted discussions concerning both technical and price issues. After discussions, Zabcac submitted a revised offer to supply the required shirts for \$17.09 per unit. DSCP determined that Zabcac's offer represented the best value under the HUBZone solicitation, and awarded Zabcac the contract. AM-JV then filed a protest with our Office, challenging the award to Zabcac as unreasonably priced in violation of Federal Acquisition Regulation (FAR) § 19.1305.² AM-JV requests that our Office recommend that the award to Zabcac be cancelled and the HUBZone set-aside be withdrawn.

FAR § 19.1305 states that in order to set aside an acquisition for HUBZone small businesses the contracting officer must have a reasonable expectation that offers will be received from two or more HUBZone small businesses and that award will be made at a fair market price. If the contracting officer sets the acquisition aside but receives no acceptable offers, the HUBZone set-aside must be withdrawn. FAR § 19.1305(d). The determination of price reasonableness in a set-aside is a matter within the discretion of the contracting officer and will not be disturbed unless it is unreasonable. A. Hirsh, Inc., B-271829, July 26, 1996, 96-2 CPD ¶ 55 at 2.

In view of the congressional policy favoring small businesses, our Office has stated that contracts may be awarded under small business set-aside procedures to small business firms at premium prices, so long as those prices are not unreasonable. Vitronics, Inc., B-237249, Jan. 16, 1990, 90-1 CPD ¶ 57 at 2. In this regard, we have noted that a small business concern's price is not unreasonable merely because it is higher than the price of an ineligible large business, since there is a range over and above the price submitted by the large business that may be considered reasonable in a set-aside situation. Hardcore DuPont Composites, L.L.C., B-278371, Jan. 20, 1998, 98-1 CPD ¶ 28 at 3. The determination of whether a particular small business price premium is unreasonable depends upon the circumstances of each case. Id. With regard to the set-aside challenged here, we think our statements concerning the

² The protester also asserts that the agency failed to properly publicize the award notice, which prevented AM-JV from filing a protest within 10 days of award. AM-JV argues that this action in effect violated the statutory stay provisions of the Competition in Contracting Act of 1984 (CICA). Issues regarding whether an agency is complying with the CICA stay requirements are not subject to review by our Office. Systalex Corp., B-400109, July 17, 2008, 2008 CPD ¶ 148 at 6; Grot Inc., B-276979, Aug. 14, 1997, 97-2 CPD ¶ 50 at 3 n.1.

congressional policy favoring small businesses apply equally in the context of a HUBZone small business set-aside.

AM-JV asserts that under the circumstances presented in this case, Zabcac's price was unreasonable. AM-JV specifically emphasizes that Zabcac's price was over 30 percent higher than that offered by AM-JV (itself a small business), that the item being produced is a mass production item that does not require research or development, and that there are no special reasons why production in a HUBZone should be any more expensive than production in AM-JV's facilities. AM-JV also points to previous decisions by our Office in which we have upheld a contracting officer's decision to cancel a set-aside when the small business' price was less than 30 percent higher than that of an ineligible business. American Imaging Servs., B-238969, B-238971, July 19, 1990, 90-2 CPD ¶ 51 at 2 (26 percent higher); Flagg Integrated Sys. Tech., B-214153, Aug. 24, 1984, 84-1 CPD ¶ 221 at 1 (24 percent higher).

We note, however, that our Office also has upheld a contracting officer's decision to proceed with a set-aside where the small business' price has been as much as 51 percent higher than that of an ineligible large business. Browning-Ferris Indus., B-209234, Mar. 29, 1983, 83-1 CPD ¶ 323 at 2 (51 percent higher); Canadian Commercial Corp., B-196111, May 29, 1980, 80-1 CPD ¶ 369 at 3 (31 percent higher). When taken together, we believe that our decisions reflect the broad discretion granted the contracting officer in this area and in fact counter the notion that there is any set price differential at which that discretion ends, as long as the contracting officer's conclusion is supported by other relevant factors. See A. Hirsh, Inc., Supra, at 2 (in making a determination of price reasonableness, the contracting officer may consider pricing history, government estimates, current market conditions, or other relevant factors revealed by the bidding).

Here, the record indicates that the contracting officer conducted a thorough price analysis of Zabcac's offer. This price analysis explicitly made a comparison between Zabcac's price and the price offered by AM-JV on the small business set-aside, and noted the 30.7 percent price differential. Agency Report, Tab 5, at 6. The price analysis also considered that there was adequate price competition in the HUBZone set-aside solicitation in the form of offers from five different HUBZone firms, three of which were included in the competitive range; during discussions, all three firms were advised to review their proposed prices. Id. at 4, 6-7. Ultimately, the contracting officer determined that Zabcac's price was fair and reasonable based on adequate price competition, and discounted the price differential between Zabcac and AM-JV as a product of the three times greater quantity under the small business set-aside solicitation. Id. at 7.

Based on our review of the record, we cannot conclude that the contracting officer's conclusion was unreasonable. That all offers received in response to the HUBZone set-aside solicitation were higher in price than the offer submitted by the protester

on the prior solicitation can reasonably be interpreted (as the contracting officer did) to indicate that the difference in volume between the two solicitations had a material impact on price. In light of that factor, we find the contracting officer's decision to discount the differential between solicitations in determining reasonable price, relying on the price competition achieved on the particular solicitation at issue, to be unobjectionable.

The protest is denied.

Gary L. Kepplinger
General Counsel