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**Comptroller General
of the United States**

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

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Decision

Matter of: Hawkeye Glove Manufacturing, Inc.

File: B-299237

Date: March 6, 2007

Marc Lamer, Esq., Kostos and Lamer, PC, for the protester.
Vera Meza, Esq., and Srikanti Dixit, Esq., U.S. Army Materiel Command, for the agency.

Peter D. Verchinski, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest by small business that agency improperly awarded small business set-aside contract to unreasonably high-priced offeror is denied where set-aside price was lower than government estimate and within range of small business prices received.

DECISION

Hawkeye Glove Manufacturing, Inc., a small business, protests the Department of the Army's award of a contract to Hatch Worldwide Imports under request for proposals (RFP) No. W911QY-06-R-0004, for combat gloves. Hawkeye alleges that the award was improper because the awardee's price was unreasonably high.

We deny the protest.

The RFP, issued on February 22, 2006, contemplated the award of two contracts: 50 percent of the requirement would be set aside for award to a small business, while the other 50 percent would be awarded on an unrestricted basis. Each awardee would receive an indefinite-delivery/indefinite-quantity contract with a guaranteed minimum of 60,000 pairs of gloves, and a maximum of 250,000 pairs. The awards were made on a "best value" basis using five evaluation criteria: technical, management, past performance, price, and subcontracting plan. The technical criteria combined were significantly more important than price.

Under the small business set-aside portion of the requirement, the agency received eight proposals, including Hawkeye's and Hatch's. The agency subsequently decided not to include Hawkeye's proposal in the competitive range because the firm's product demonstration sample was found to contain numerous weaknesses and

deficiencies. Two proposals were included in the competitive range, and the agency ultimately made award to Hatch based on its lower price--\$8,832,500 (\$35.33 each for 250,000 pairs). Under the unrestricted portion of the requirement, the agency received four proposals, including one from Hawkeye, offering different gloves from those it proposed under the set-aside. The agency determined that Hawkeye's proposal provided the best value to the government, and thus made award to Hawkeye for the unrestricted portion of the requirement at a price of \$5,975,000 (\$23.90 each).

After learning of the award to Hatch, Hawkeye filed an agency-level protest, asserting that the award for the small business set-aside portion was improper because Hatch's price, which was approximately 48 percent higher than Hawkeye's contract price, was unreasonably high. The agency dismissed Hawkeye's protest on the grounds that it was untimely and that Hawkeye was not an interested party to challenge the small business set-aside award. Hawkeye then filed this protest with our Office. Hawkeye essentially contends that the contract awarded to Hatch was not awarded at a fair market price, that the set-aside thus should be withdrawn, and that the agency should purchase the full requirement under Hawkeye's contract.

As a preliminary matter, the agency asserts--as the contracting officer found in dismissing Hawkeye's agency-level protest--that Hawkeye is not an interested party to protest the award to Hatch because Hawkeye's proposal was properly eliminated from the small business competition, and there was another firm in the competitive range; that firm, not Hawkeye, would be in line for award if Hawkeye's protest were sustained. In this regard, a party will not be deemed to have the necessary economic interest to maintain a protest if it would not be in line for award if its protest were sustained. See 4 C.F.R. § 21.0(a) (2006); Eagle Mktg. Group, B-242527, May 13, 1991, 91-1 CPD ¶ 459 at 2.

This argument is without merit. While the agency found Hawkeye's set-aside proposal unacceptable, Hawkeye has challenged the reasonableness of Hatch's price, not the rejection of its own proposal. Since the only other offeror in the competitive range proposed a price higher than Hatch's, a finding by our Office that Hatch's price was unreasonable would also necessarily mean that this offeror's price was unreasonable. Since both proposals in the competitive range thus would be unacceptable due to unreasonable pricing if we sustained the protest, there is no intervening small business offeror that would be in line for award. Reopening the small business set-aside competition or recompeting the requirement would be appropriate remedies under these circumstances. Since Hawkeye thus could be in a position to submit a revised proposal or participate in the recompetition, it has a sufficient economic interest to qualify as an interested party eligible to maintain a protest challenging the award to Hatch. See Wilcox Indus. Corp., B-281437 et al., June 30, 1999, 99-2 CPD ¶ 3 at 5.

The agency also argues--as the contracting officer also concluded--that the protest is untimely, since Hawkeye learned that its proposal was excluded from the competitive range under the small business set-aside portion on August 22, but did not file its protest until it learned of the award. See 4 C.F.R. § 21.2(a)(2) (2006) (protests must be filed no later than 10 days after the basis for protest is known or should have been known). This argument is without merit. Hawkeye is not protesting its exclusion from the competitive range; rather, as stated above, Hawkeye maintains that the award to Hatch was improper because Hatch's price was unreasonably high. Hawkeye did not possess the information necessary to raise this argument until it learned both that Hatch had received the award, and Hatch's price. Since Hawkeye filed its agency-level protest within 10 days of learning this information, and then filed its protest with our Office within 10 days of learning that its agency-level protest was dismissed, the protest is timely.

Turning to the merits, in view of the congressional policy favoring small businesses, contracts may be awarded under small business set-aside procedures at premium prices, so long as those prices are not unreasonable. Hardcore DuPont Composites, LLC, B-278371, Jan. 20, 1998, 98-1 CPD 28 at 3.¹ The contracting officer has discretion to determine price reasonableness, and we will not disturb such a determination unless it is unreasonable. A. Hirsh, Inc., B-271829, July 26, 1996, 96-2 CPD ¶ 55 at 2. In making such a determination, the contracting officer may consider such factors as the government estimate, the procurement history for the solicited supplies, the current market climate, or the "courtesy bid" of an ineligible non-small business. See Federal Acquisition Regulation (FAR) §§ 19.202-6, 15.404-1(b); Stitzel Co., B-251560, Apr. 13, 1993, 93-1 CPD ¶ 315 at 2. The determination of whether a small business price premium is unreasonable depends on the circumstances of each case. Olsen Envtl. Servs., Inc., B-241475, Feb. 6, 1991, 91-1 CPD ¶ 126 at 2-3.

There is no basis for objecting to the agency's finding that Hatch's price was reasonable. The record shows that the Army's determination was based on the independent government estimate (IGE), which projected a price of \$60 for a pair (\$15,000,000 for 250,000 pairs) of size medium combat gloves. AR, Tab 12. The agency also cited the pricing of the 8 small business set-aside proposals received, which ranged from \$3,290,000 to \$19,301,750, Agency Report (AR), Tab 13, 21, for an average price of \$10,115,859. Although all but two of these proposals were eliminated from the competitive range, there is no indication--or argument by Hawkeye--that the proposals' elimination was somehow related to their prices. In any case, given that Hatch's price was well below the IGE, the agency reasonably

¹ We note that we have equated the concept of price reasonableness with "fair market price" in the context of a small business set-aside. See American Imaging Servs., B-238969, B-238971, July 19, 1990, 90-2 CPD ¶ 51 at 2.

determined that Hatch's proposed price was reasonable. See Sletager, Inc., B-240789.6, Oct. 11, 1991, 91-2 CPD ¶ 328 at 2.

The protester also argues that the agency improperly failed to consider Hawkeye's price under the unrestricted competition in assessing the reasonableness of Hatch's price. However, there is no requirement that agencies take a price submitted outside of a small business set-aside competition--or any other particular factors--into account in its reasonableness determination. See FAR § 19.202-6. In any case, there is a range above the price an agency may receive under an unrestricted procurement that may be considered reasonable in a set-aside situation, Browning-Ferris Indus., B-209234, Mar. 29, 1983, 83-1 CPD ¶ 323 at 2-3; CDI Marine Co., B-188905, Nov. 15, 1977, 77-2 CPD ¶ 367 at 2-3, and we have found a price premium of as much as 51 percent to be reasonable. See Browning-Ferris Indus., supra. Therefore, the fact that Hatch's price was 48 percent higher than the protester's would not mandate a finding that the price was unreasonable.

The protest is denied.

Gary L. Kepplinger
General Counsel