

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

Decision

Matter of: CES Industries, Inc.

File: B-401427

Date: September 1, 2009

Mitchell B. Nesenoff for the protester.
Rebecca L. Tranthem, Esq., Department of Veterans Affairs, for the agency.
Paula A. Williams, Esq., and Ralph O. White, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly failed to make sole-source award to a service-disabled veteran-owned small business concern and impermissibly competed the acquisition on an unrestricted basis is dismissed where the protest was filed after award.
2. Protest alleging bias against protester and favoritism toward awardee is denied where record fails to support the protester's allegations.

DECISION

CES Industries, Inc. (CES) of Farmingdale, New York, protests the award of a contract by the Department of Veterans Affairs (VA) to Arjo Huntleigh, Inc. (Arjo) of Addison, Illinois, under request for quotations (RFQ) No. VA-248-09-RQ-0322, for a contractor to provide and install commercially-available safe patient handling device monitoring systems.¹ CES, which has a teaming agreement with a service-disabled veteran, essentially asserts that the VA improperly conducted the procurement on an unrestricted basis rather than make award to CES as a service-disabled veteran-owned small business (SDVOSB) concern.

¹ The purpose of the automated tracking system is to systematically record the frequency, date, and start/stop time for each actual use of three types of patient handling equipment—ceiling mounted patient lifts, floor based patient lifts, and air assisted lateral transfer devices. RFQ at 8.

We dismiss the protest in part and deny it in part.²

In February 2009, as part of the market research for this acquisition, the contracting officer searched the Central Contractor Registration and the Veterans Business databases to identify potential contractors capable of meeting the agency's requirements. The agency located only one firm that potentially was able to meet its requirements.

On February 18, the VA published a presolicitation notice announcing its intent to award a sole-source contract to Arjo and identified the applicable North American Industry Classification System (NAICS) code as 423450 with a size standard of 100 employees. Among other things, the presolicitation notice stated that interested firms could identify their interest and capability to meet the requirements which the agency would consider in order to determine whether to conduct a competitive procurement. Agency Report (AR) exh. 7B, Presolicitation Notice. CES submitted a response to the presolicitation notice and the VA's technical personnel subsequently determined that CES did not have the technology to meet the agency's requirements. CES was notified of the agency's findings and the agency's intent to proceed with the procurement on a sole-source basis. Protest exh. 5, VA's email to CES (Mar. 17, 2009).

Despite its March 17 message advising it would proceed on a sole-source basis, the agency conducted additional market research, revised its requirements, and issued the instant solicitation on an unrestricted basis. Contracting Officer's Statement at 1-2. The VA's solicitation contemplated award of a fixed-price contract to the offeror whose offer was determined to be most advantageous to the government, price and other factors considered. The nonprice factors were identified as quality, delivery time and past performance and, when combined, were significantly more important than price.³ RFQ at 34, 36.

² CES proceeded with its protest *pro se*, and therefore did not have an attorney who could obtain access to nonpublic information pursuant to the terms of a protective order. Accordingly, our discussion of some aspects of the procurement is necessarily general in nature in order to avoid reference to nonpublic information. Our conclusions, however, are based on our review of the entire record, including nonpublic information.

³ Although the solicitation identified itself as an "RFQ," the solicitation and the agency's procurement record contemplated an evaluation and source selection similar to those used in negotiated procurements. For the sake of consistency, our decision adopts the terminology "proposal" as used by the solicitation and the agency record.

The VA received proposals from CES and Arjo by the solicitation due date. Following oral presentations by each firm, the agency evaluators' consensus rating of CES's proposal was unsatisfactory under the nonprice factors. AR exh. 4B, Consensus Evaluation Document. Award was made to Arjo, whose proposal was determined to be most advantageous to the government. Id. exh. 7C, Notice of Award.

CES then filed an agency-level protest of the award determination claiming that the agency's decisions to proceed on an unrestricted basis and make award to Arjo were improper. Specifically, the protester alleged that as an SDVOSB concern the agency was statutorily required to award the contract to CES on a sole-source basis. In addition, CES contested the award to Arjo on the grounds that Arjo's tracking system does not meet the agency's needs. CES also questioned the awardee's ability to manufacture and install a location or radio-based telemetry tracking system without infringing on CES's patent, and complained that Arjo "may" be a foreign-owned firm in contravention of applicable laws and regulations. AR exh. 1B, Protester's Agency-Level Protest (Apr. 20, 2009).

Following denial of its agency-level protest, CES filed this protest with our Office. The overarching theme of CES's protest is that the VA failed to use its statutory authority to make sole-source awards to SDVOSB concerns. However, this challenge contained in both the agency-level protest and the protest to our Office is untimely; it relates to the terms of the competition that were known to the protester as early as March 17, when it received the agency's email stating that the VA would proceed with the procurement on a sole-source basis.

More specifically, prior to the issuance of the solicitation on an unrestricted basis, CES sought a sole-source award as an SDVOSB concern and the VA refused to make such award. Protester's Comments at 2-3. Given that this acquisition was competed on an unrestricted basis, the protester was on notice when it submitted its offer that it would not receive the award on a sole-source basis, or be competing for this award under an SDVOSB set-aside. As a result, the protester's post-award challenge is untimely and will not be considered. 4 C.F.R. § 21.2(a)(1), (a)(2) (2009); Raith Eng'g and Mfg. Co., W.L.L., B-298333.3, Jan. 9, 2007, 2007 CPD ¶ 9 at 2.

CES next argues that the competition was not conducted on a fair and open basis because of favoritism towards Arjo. The protester suggests that favoritism is evident from the agency's own statements that it conducted pilot testing and evaluation of Arjo's equipment monitoring system prior to the issuance of the February 18 presolicitation notice. Protest exh. 9, VA's Letter to CES, at 2 (May 18, 2009).

It is well-settled that government officials are presumed to act in good faith and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Triton Marine Constr. Corp., B-250856, Feb. 23, 1993, 93-1 CPD ¶ 171 at 6. Where a protester alleges bias, it not only must provide credible evidence clearly demonstrating a bias against the protester or for the awardee, but

also must demonstrate that this bias translated into action that unfairly affected the protester's competitive position. Advanced Sci., Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52 at 17.

Our review of the record shows no support for any alleged improper consideration of Arjo's equipment. Specifically, the agency evaluators rated CES's equipment unsatisfactory because it failed to meet the solicitation requirements (CES's sensor devices did not work on all lifting devices or air assisted lateral transfer devices), and the protester has not shown that the actions it complains of, *i.e.*, pilot testing of Arjo's equipment, prejudiced the protester's competitive position. In other words, since CES has not challenged any of the specific areas in which the VA found its equipment was unsatisfactory, there is no evidence that but for the agency's actions, CES would have had a substantial chance of receiving the award. See NV Servs., B-284119.2, Feb. 25, 2000, 2000 CPD ¶ 64 at 18; Advanced Sci., Inc., *supra*, at 17.

Regarding CES's assertion that it has reason to believe that Arjo is a foreign company because of information the protester obtained from Arjo's website, we have no basis to question the agency's evaluation. Even if Arjo is a foreign-owned company--and CES correctly asserts that Arjo's website shows that the company is headquartered in Sweden--our review of the entire record, including Arjo's proposal, reveals that Arjo took no exception to the solicitation's place of manufacture provisions. Thus, Arjo has represented that it will comply with the restrictions in the solicitation; should it later fail to comply with its representations, the matter will raise an issue of contract administration for the VA, up to and including a possible referral to the Department of Justice. Similarly, the protester's allegations of a possible patent infringement in performance of this contract provide no basis to challenge the award to Arjo. The exclusive remedy for a patent holder who claims patent infringement by the government or by a government contractor who acts with the authorization or consent of the government is a suit against the government in the United States Court of Federal Claims. Council for Adult & Experiential Learning, B-299798.2, Aug. 28, 2007, 2007 CPD ¶ 151 at 8. Thus, we will not consider this issue.

The protest is dismissed in part and denied in part.

Daniel I. Gordon
Acting General Counsel