

**United States Small Business Administration
Office of Hearings and Appeals**

NAICS APPEALS OF:

Medical Comfort Systems, Inc.
Eagle Home Medical Corporation
Greene Respiratory Services, Inc.
American Medical Equipment Company

Appellants

Solicitation No. VA-249-10-RP-0041
Department of Veterans Affairs
ASC-VISN 9
Murfreesboro, TN

SBA No. NAICS-5106

Decided: January 5, 2010

APPEARANCES

Joe S. White, President, for Appellant Medical Comfort Systems, Inc.

Stephen J. Russell, CFO, for Appellant Greene Respiratory Services, Inc.

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, PLC, for Appellant Eagle Home Medical Corporation.

Sandra R. Hoskin, President/CEO, for Appellant American Medical Equipment Company.

Tammy L. Kennedy, Esq., Regional Counsel, Phillip Gillihan, Esq., for the Department of Veterans Affairs.

DECISION

I. JURISDICTION

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. ISSUE

Whether the Contracting Officer's designation of North American Industry Classification System (NAICS) code 339112, to a solicitation to provide home health care oxygen was based upon a clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. BACKGROUND

A. The Solicitation

On November 23, 2009, the Department of Veterans Affairs (VA), in Murfreesboro, Tennessee, issued Solicitation No. VA-249-10-RP-0041 as a Request for Proposals (RFP) for home health care oxygen. The Contracting Officer (CO) set the procurement entirely aside for small business and designated NAICS code 339112, Surgical and Medical Instrument Manufacturing, with a corresponding 500 employee size standard, as the applicable NAICS code. Offers originally were due on December 24, 2009.

On December 2, 2009, the CO issued Amendment 0001 to the solicitation notifying all interested offerors of the pendency of the instant appeal. On December 11, 2009, the CO issued Amendment 0002 extending the offer due date to January 25, 2010.

Under the “Description of Supplies/Services” the RFP states:

Services: The contractor shall furnish all rental, delivery, supplies, oxygen and service of oxygen equipment and ventilators, including delivery and service of government owned CPAP/BiPAPs equipment (if needed) and VA owned ventilators to beneficiaries served by VISN 9 VA medical centers in accordance with the specifications.

The contractor shall provide all supplies, materials, equipment, labor, supervision, and transportation for oxygen delivery systems. The VA shall provide or purchase all supplies for the ventilators, CPAP/BiPaps. If the contractor is required to provide supplies for vent patients, this shall be handled by separate purchase order. In addition the contractor shall provide patient education, safety management, and infection control; shall develop mechanisms and methods to register complaints; shall issue Patient Rights and Responsibilities; and shall provide pertinent documentation of performing all tasks as identified herein. All work shall be performed in accordance with guidelines established by Federal, State and local ordinances. The Contractor shall maintain an equipment inventory level to ensure that the specified equipment and services are always readily available.

RFP, at 14.

Under “Statement of Work” the RFP states:

1. The contractor shall provide rental, delivery and service of oxygen equipment, CPAP, BIPAP, Ventilators, supplies and oxygen to patients served by the VISN 9 medical centers. Services are required 24 hours a day, seven days a week, including holidays. The primary service areas covered by this contract include all counties specified by Attachment A. The contractor shall provide all services and equipment as specified by the Contracting Officer or his/her technical representative (COTR) in accordance with a Home Oxygen prescription (SF Form 513) for each authorized patient. Any change of prescription from the

patient's physician shall be furnished to the contractor in the same manner as the original.

VA owned equipment may be utilized in some instances when preferred. Such equipment shall be delivered and serviced in accordance with these contract specifications, but shall be reimbursed in accordance with applicable line items stated in the list of prices/cost schedule.

2. The installation of all machines and equipment by the contractor shall be performed by a competent professional familiar with the nature of the equipment involved and fully qualified under the laws of the State, in which the services are being rendered. Installation shall be consistent with local Fire and Safety Codes in the respective area of the State and shall conform to NFPA 99/101 (Life Safety Codes) NFPA (Oxygen Cylinder Requirements). The contractor shall provide a safety/emergency checklist (may be included in the Initial Set-up/Periodic Maintenance Form) to be completed, then signed by the veteran or his/her caregiver and retained in the beneficiary account folder. The contractor shall ensure that all equipment is checked at manufacturer recommended intervals. A contractor staff member shall conduct a check of the concentrator using a certified oxygen analyzer that is calibrated according to the manufacturer standards. Maintenance on equipment shall be done by a manufacturer's specifications. It shall include compressor inlet pre-filter changes and compressor inlet bacteria filter changes according tot [sic] the manufacturer recommendations. The alarm battery shall be tested at each maintenance check, changed as indicated but at least annually. Contractor shall be responsible for tracking and documenting maintenance of equipment in accordance with manufacturer specifications and providing these records for review upon request. Contractor shall furnish parts and labor for routine maintenance. All preventive maintenance for government owned equipment shall be in accordance with manufacturers' specifications.

RFP, at 22.

The RFP requires the contractor have to provide fully licensed Registered Respiratory Therapists and Certified Respiratory Therapists. Further, the drivers who deliver and recover the equipment must be qualified to perform maintenance. RFP, at 18. The Respiratory Therapists will perform the set-up and delivery of devices, review plans of service to implement plans of care, and visit ventilator patients monthly. RFP, at 21, 29, 34.

The RFP requires the contractor to perform initial set-up of equipment for new patients the day they are discharged from the hospital, and provide instructions to the patients. The contractor will provide emergency service, 24 hours a day, seven days a week. All issuing and follow-up care of home oxygen and patient services will provided in accordance with the applicable Joint Commission for the Accreditation of Hospital Organization (Joint Commission) standards. Each branch office and distribution point must be accredited and meet the Joint Commission standards. The incumbent contract will continue to provide services during a transition period. There are standards for the contractor's delivery of the equipment, and safety requirements. There are extensive specifications the equipment and oxygen provided by the contractor must meet. RFP, at 23-37.

B. The Appeals

1. Medical Comfort Systems, Inc.

On November 27, 2009, Medical Comfort Systems, Inc. (MCS) filed a NAICS code appeal. MCS asserts that this contract is incorrectly classified under NAICS code 339112 but did not request a particular NAICS code. MCS asserts that a NAICS code for sales, rental, and service of home health care equipment would be appropriate for this solicitation.

MCS further asserts that the solicitation requires each branch office of the awardee to meet Joint Commission standards; thus, no manufacturer could meet the requirements, because the Joint Commission only accredits health care organizations, not manufacturers. MCS also asserts that the evaluation factors would eliminate a manufacturer, because they require an offeror have Joint Commission accreditation and have past performance in this area.

2. Eagle Home Medical Corporation

On December 1, 2009, Eagle Home Medical Corporation (Eagle) also filed a NAICS code appeal. Eagle asserts that the appropriate NAICS code is 532291, Home Health Equipment Rental, with a corresponding \$7 million annual receipts size standard.

Eagle asserts that NAICS code 339112 replaced Standard Industrial Classification (SIC) code 3841, Surgical and Medical Instruments and Apparatus. Eagle points out that in the long list of items whose manufacturers were covered by SIC code 3841, only one item is listed among the deliverables in this RFP.¹

Eagle asserts this RFP requires the awardee to provide home oxygen services on a rental basis; refills of oxygen tanks placed in a beneficiary's home, and home visits to monitor equipment and assess the well-being of recipients of home oxygen services. Eagle asserts the NAICS Manual description describes code 532291 as covering the rental of home medical equipment, including oxygen tanks. Appellant asserts therefore the appropriate NAICS code for these services is 532291.

Eagle asserts the CO's designation is a deviation from the VA's previous practice and refers to a recent similar procurement which used the 532291 designation.

3. Greene Respiratory Services, Inc.

On December 1, 2009, Greene Respiratory Services, Inc. (Greene), filed a NAICS code appeal. Greene also asserts that NAICS code 532291 is the appropriate NAICS code. Greene asserts the RFP calls for equipment rental, clinical and patient education along with the provision of supplies. Further, the awardee must have trained professionals make safety and clinical assessment visits. Greene also asserts no manufacturer may meet the standard of Joint Commission accreditation set by the RFP.

¹ This item is cannulas, which are tubes inserted into the body.

4. American Medical Equipment Company

On December 7, 2009, American Medical Equipment Company (AMEC) filed its NAICS code appeal, also requesting NAICS code 532291, asserting that this code more accurately reflects the nature of this contract.

On December 10, 2009, I issued an order consolidating these four appeals.

C. The VA's Response to the Appeal

On December 10, 2009, the VA responded to the appeal. The VA asserts that this solicitation is identical to the solicitation considered by the Court of Federal Claims in *Rotech Healthcare, Inc. v. United States*, 71 Fed.Cl. 393 (2006) (*Rotech*). The VA asserts that under *Rotech*, the nonmanufacturer rule must apply regardless of the underlying NAICS code. The nonmanufacturer rule does not apply to solicitations assigned an underlying service NAICS code. Therefore, the CO assigned a supply code to this solicitation in order to assure the applicability of the nonmanufacturer rule consistent with the holding in *Rotech* that this type of solicitation was a supply contract.

The VA argues that the title or language describing the NAICS code is not controlling, rather the legal nature of the contract is controlling here. The VA further argues that this Office is bound by *Rotech's* holding that an identical procurement is a supply contract. The VA asserts that *Rotech* makes no distinction between items procured on a rental basis and items purchased outright, and thus the nonmanufacturer rule applies to both types of procurements. The VA argues that *Rotech* holds that this type of solicitation is a solicitation for manufactured products, and thus the only appropriate NAICS code is a manufacturing NAICS code. The VA concludes by asserting that this Office is bound by *Rotech* and the court's ruling to sustain his NAICS code determination.

D. Eagle's Supplementary Pleading

On December 17, 2009, Eagle filed a supplementary pleading. Eagle asserts that the *Rotech* decision is limited to the facts in that case. *Rotech* dealt with similar procurements to one under consideration here. The plaintiff there alleged the proposed awards violated the nonmanufacturer rule. The *Rotech* plaintiff did not challenge the procurements' NAICS code designation, nor did the court offer any opinion on the proper NAICS code designation. The court did conclude that the contracts before it were supply contracts, not service contracts, and that therefore the nonmanufacturer rule applied. The court found that the services portion of the contracts before it were small in relation to the supply portion.

Conversely, Eagle asserts the value of the services portion of this procurement far exceeds that of the supply portion. Eagle relies upon its own estimates and a VA-commissioned Booz Allen Hamilton Study (the BAH Study) of Home Oxygen contracts to state the most of the value of this procurement is in services, not supplies.

E. The VA's Reply

On December 23, 2009, after the close of record, the VA filed a motion to reopen the record

for the purpose of responding to Eagle's supplementary pleading. The VA's pleading restates its position that this solicitation is indistinguishable from that considered in *Rotech*, and thus *Rotech* requires that this RFP be classified under a manufacturing NAICS code. VA further asserts its interpretation of its own requirements is entitled to deference from OHA.

IV. DISCUSSION

A. Preliminary Matters

Appellants MCS, Eagle, and Greene filed their appeals within 10 days after the VA issued the solicitation. Thus, their appeals are timely. 13 C.F.R. §§ 121.1103(b)(1); 134.304(a)(3). Appellant AMEC filed its appeal more than 10 days after issuance of the solicitation. AMEC's appeal is thus untimely and is therefore DISMISSED. 13 C.F.R. § 134.304(b).

Appellant Eagle submits new evidence here, the BAH Study. Because the study is relevant to the issues in this case and does not enlarge the issues on appeal, the BAH Study is ADMITTED into the record.

The CO's motion to reopen the record is GRANTED, and CO's December 23rd pleading is ADMITTED into the record.

Appellants have the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the NAICS code designation assigned to the solicitation is based on a clear error of fact or law. 13 C.F.R. § 134.314; *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003). The NAICS code designation should be based on the code that best describes the principal purpose of the services being procured, in light of the industry description in the *NAICS Manual*,² the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b); *Durodyne*, SBA No. NAICS-4536, at 4.

Nevertheless, while the Appellants have the burden of proof, the CO's designation is not entitled to deference from OHA. Rather, it is OHA which is designated by regulation as the adjudicator of NAICS code appeals. FAR § 19.303(c)(5); 13 C.F.R. §§ 121.1102, 134.102(k). Thus, OHA's NAICS code appeal decisions are final agency decisions which are themselves entitled to deference because of SBA's "quasi-technical administrative expertise and ... familiarity with the situation acquired by long experience with the intricacies inherent in a comprehensive regulatory scheme." *Eagle Design and Management, Inc. v. United States*, 57 Fed.Cl. 271, at 273 (2002) (internal citations omitted).

B. The Merits of the Appeal

1. Rotech

The VA here relies upon *Rotech* to support the CO's NAICS code designation. The *Rotech* court however, specifically held that the case before it was not an untimely NAICS code appeal,

² Executive Office of the President, Office of Management and Budget, North American Industry Classification System-United States (2007), available at <http://www.census.gov>.

and was not a challenge to that procurement's NAICS code designations. *Rotech*, at 409. Rather, *Rotech* is a decision dealing with the nonmanufacturer rule, holding that the rule applied to the procurement in that case.

Further, *Rotech* is a decision by a trial level court limited to the facts before it. The holding in *Rotech* is based upon the Claims Court's analysis of the solicitation before it, and cannot be binding upon the analysis of another solicitation, especially when the issue at hand is a different one. In *Rotech*, the question was whether the nonmanufacturer rule applied to the contracts at issue. Here, the question is the appropriate NAICS code for this procurement.

Contrary to the VA's argument, *Rotech* does not control the result here. *Rotech* is a decision by a trial level court limited to the facts in the case before it. I conclude with my colleague in another, recent NAICS code appeal, that *Rotech* cannot dictate the NAICS code for any other RFP, and is not relevant to this decision. See *NAICS Appeal of Eagle Home Medical Corporation*, SBA No. NAICS-5099, at 5 (2009).

2. The Appropriate NAICS Code

The NAICS code designated by the CO, 339112, Surgical and Medical Instrument Manufacturing, covers:

[E]stablishments primarily engaged in manufacturing medical, surgical, ophthalmic, and veterinary instruments and apparatus (except electrotherapeutic, electromedical and irradiation apparatus). Examples of products made by these establishments are syringes, hypodermic needles, anesthesia apparatus, blood transfusion equipment, catheters, surgical clamps, and medical thermometers.

NAICS Manual at 494.

Appellants' requested NAICS code, 532291, Home Health Equipment Rental, covers:

[E]stablishments primarily engaged in renting home-type health and invalid equipment, such as wheel chairs, hospital beds, oxygen tanks, walkers, and crutches.

NAICS Manual at 719.

An examination of the RFP establishes that this procurement requires the contractor to provide home oxygen services for VA patients. The contractor will be providing the oxygen, the tanks and the equipment necessary for the patients to receive the respiratory therapy. However, the contractor must also transport and deliver the oxygen and equipment. The contractor must install the equipment and set it up. Once installed, the contractor is responsible for periodic checks on the equipment and maintenance in accordance with manufacturer's specifications. The contractor must train and educate the patients in the use of the equipment, and develop a system to register complaints. The contractor must provide services 24 hours a day, seven days a week. The RFP includes standards the contractor's service must meet. Further, the RFP refers frequently to the services to be provided by the contractor, as well as the equipment to be delivered.

Further, the RFP requires the contractor to provide the services of licensed Respiratory Therapists. These therapists will perform important professional services in ensuring the proper installation and functioning of the equipment provided, and educating the patients in the equipment's proper use. A contract which requires such a substantial amount of professional services is more properly classified as a services contract, rather than a supply contract.

Thus, it is clear that services are a very large part of this procurement. Indeed, the VA patients who will be served by this contract could not adequately receive the benefit of the oxygen and equipment without the services of the professional Respiratory Therapists and the delivery, installation, training, and maintenance the contractor will provide here.³

This conclusion that the instant RFP is primarily a services procurement is supported by the BAH Study Eagle submitted. The BAH Study confirms that it is likely, depending on the location and practices of the VA medical center issuing this type of procurement, that this type of procurement could be weighted more toward services than supplies. BAH Study, at 5-6. Further, the BAH Study states that labor costs are typically the most significant cost driver in any function or activity, which supports the notion that service requirements can cost more than equipment. BAH Study, at 5. In addition, the BAH Study indicates that, consistent with Eagle's argument, VA's overall oxygen equipment costs are much less than its costs for repair of equipment, service visits, delivery of systems, etc. BAH Study, at 25. *See NAICS Appeal of Eagle Home Medical Corporation*, SBA No. NAICS-5099, at 5 (2009).

In addition, I find that the concerns raised by MCS and Greene concerning Joint Commission accreditation are well-founded. The RFP requires the contractor to have Joint Commission accreditation. However, the Joint Commission oversees hospitals and providers of health care services, not manufacturers. *See* http://en.wikipedia.org/wiki/Joint_Commission. Consequently, no manufacturer of equipment could meet the RFP's requirement of Joint Commission accreditation.

The 339112 code is a manufacturing code, and it covers manufacturing of medical equipment. However, this procurement clearly includes the provision of extensive services. The contractor will not simply drop off equipment, but will perform extensive services. Indeed, without services required by this RFP, the patients could not safely and effectively operate the equipment provided. Conversely, code 532291 specifically covers the rental of home oxygen tanks, and thus appears to cover this RFP, which is for the delivery of home oxygen to VA patients.

In addition, NAICS code 339112 replaced SIC code 3841, Surgical and Medical Instruments and Apparatus. Executive Office of the President, Office of Management and Budget, North American Industry Classification System-United States (1997), at 962. SIC code 3841 had an extensive list of medical equipment whose manufacture was covered by the code. As Eagle has noted, only one of the items in this procurement, cannulas, is on that list. Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at

³ This finding that this procurement is primarily for services further underscores the conclusion that *Rotech* is inapposite here. The *Rotech* court concluded that the services portions of the procurements before it were slight. *Rotech*, at 428-9. Here, we must reach a different factual conclusion, which cannot be controlled by the factual conclusion from another case, dealing with a different solicitation.

250. The fact that the equipment this RFP seeks to procure is not included in the list of equipment covered by this NAICS code further undercuts the CO's designation.

I conclude that the instant RFP is not merely for manufactured medical equipment, but for the delivery of home oxygen services to VA patients. The contractor will not merely drop off oxygen and equipment, but will install it, train the patient in its use, and provide maintenance and emergency services. Accordingly, I conclude that Appellants have met their burden of establishing clear error in the CO's designation of NAICS code 339112 for this solicitation. The appropriate NAICS code for this procurement is 532291, Home Health Equipment Rental, with a corresponding \$7 million annual receipts size standard.

V. CONCLUSION

For the reasons stated above, I REVERSE the CO's NAICS code designation and thus GRANT the appeal. The correct NAICS code for the RFP is NAICS code 532291, Home Health Equipment Rental, which has an annual receipts size standard is \$7 million.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN
Administrative Judge