

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

NAICS APPEAL OF:

Eagle Home Medical Corporation,

Appellant,

Solicitation No. VA256-12-R-0059

U.S. Department of Veterans Affairs

SBA No. NAICS-5378

Decided: July 18, 2012

APPEARANCES

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, P.L.C., Alexandria, Virginia,  
for Appellant

Barton B. Evans, Esq., U.S. Department of Veterans Affairs, Houston, Texas,  
for the Agency

ORDER DISMISSING APPEAL

I. Background

On May 31, 2012, the U.S. Department of Veterans Affairs (VA) issued Solicitation No. VA256-12-R-0059 (RFP) seeking a contractor to provide home oxygen services for VA beneficiaries. The Contracting Officer (CO) set aside a portion of the procurement for small businesses and designated North American Industry Classification System (NAICS) code 621610, Home Health Care Services, with a corresponding size standard of \$13.5 million in average annual receipts.

On June 14, 2012, Eagle Home Medical Corporation (Appellant) filed a NAICS code appeal of the RFP with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). The appeal was brought 10 business days — but 14 calendar days — after issuance of the RFP. In the appeal, Appellant contends that the appropriate NAICS code for the acquisition should be 532291, Home Health Equipment Rental, with a size standard of \$7 million in average annual receipts.

On June 20, 2012, VA moved to dismiss the appeal as untimely. VA emphasizes that the RFP was issued on May 31, 2012, and there were no subsequent amendments affecting the NAICS code designation. OHA's regulations stipulate that a NAICS code appeal must be brought “within 10 calendar days” after issuance of the solicitation, and the Federal Acquisition

Regulation (FAR) likewise specifies a deadline of 10 calendar days. 13 C.F.R. § 134.304(b); 48 C.F.R. § 19.303(c)(1). OHA strictly enforces the deadlines for initiating appeals. *E.g.*, *NAICS Appeal of Hummingbird Solutions*, SBA No. NAICS-5334 (2012). Accordingly, VA asserts that the instant appeal, which was filed 14 calendar days after issuance of the RFP, is untimely and must be dismissed.

On June 29, 2012, Appellant responded to the motion to dismiss. Appellant concedes that its appeal was not filed within 10 calendar days after issuance of the RFP. Appellant observes, however, that 13 C.F.R. § 121.1103(b)(1) expresses the appeal deadline in business days rather than calendar days, and that its appeal was filed within 10 business days. Appellant argues that 13 C.F.R. § 121.1103(b)(1) previously used calendar days, but SBA revised the regulation to business days effective March 4, 2011. 76 Fed. Reg. 5680, 5683 (Feb. 2, 2011). Appellant further notes that the text of 13 C.F.R. § 134.304(b) also was changed at the same time. The latter regulation previously indicated that a NAICS code appeal must be filed within “10 days,” but was amended to state the deadline as “10 calendar days.” *Id.* at 5685. “Thus for the last 16 months, there has been a clear conflict in the SBA's regulations” between 13 C.F.R. § 121.1103(b)(1) and 13 C.F.R. § 134.304(b). (Response at 3.)

Appellant urges that the regulatory inconsistency should be resolved in Appellant's favor. Appellant highlights that 13 C.F.R. § 134.318(a) incorporates 13 C.F.R. § 121.1103 into OHA's own rules of procedure. Thus, asserts Appellant, although 13 C.F.R. § 134.304(b) pertains specifically to OHA and 13 C.F.R. § 121.1103(b)(1) does not, the regulations are equally binding here by virtue of 13 C.F.R. § 134.318(a). Additionally, Appellant cites 13 C.F.R. § 134.202(a)(2), which indicates that when an “SBA action or determination being appealed states a different time period (or deadline) for filing an appeal petition than does the applicable regulation, the longer time period (or later deadline) governs.” Based on 13 C.F.R. § 134.202(a)(2), Appellant maintains that the more generous deadline in 13 C.F.R. § 121.1103(b)(1) should control over the shorter deadline in 13 C.F.R. § 134.304(b). Appellant also cites various case decisions in which other tribunals have extended filing deadlines based on conflicting guidance or information.

## II. Discussion

Although Appellant raises a number of creative arguments, I nevertheless find that it is appropriate to dismiss the instant appeal as untimely. There are two principal flaws in Appellant's reasoning.

First, a review of the regulatory history suggests that the recent change to 13 C.F.R. § 121.1103(b)(1) was in the nature of a clerical or administrative error. As Appellant acknowledges, 13 C.F.R. § 121.1103(b)(1) previously provided for a deadline of 10 calendar days, consistent with both 13 C.F.R. § 134.304(b) and the FAR. SBA amended 13 C.F.R. § 121.1103(b)(1) in February 2011, but included no discussion of this change in the preamble. 76 Fed. Reg. 5680, 5681 (Feb. 2, 2011). Furthermore, in the proposed rule which led to the new iteration of 13 C.F.R. § 121.1103(b)(1), the deadline was expressed in calendar days. 75 Fed. Reg. 9129, 9135 (Mar. 1, 2010). Thus, the switch to business days in 13 C.F.R. § 121.1103(b)(1) appears to have been inadvertent, not the result of any conscious intent by the

agency to extend the deadline for NAICS code appeals. It is well-settled that, when there is doubt about the meaning of regulatory provisions, it is appropriate to examine the intent of the drafters. *Kearfott Guidance & Navigation Corp. v. Rumsfeld*, 320 F.3d 1369, 1373-74 (Fed. Cir. 2003). Accordingly, the fact that the change to business days in 13 C.F.R. § 121.1103(b)(1) was unexplained, and apparently unintentional, weighs in favor of utilizing the 10 calendar day deadline.

A second problem for Appellant involves its reliance on 13 C.F.R. § 134.202(a)(2). That rule allows for an extension of the deadline for appealing an “SBA action or determination” in the event of misleading guidance from the agency. In the instant case, though, there is no “SBA action or determination” that is being appealed. Rather, Appellant is appealing VA's assignment of a NAICS code to a partial small business set-aside. Thus, 13 C.F.R. § 134.202(a)(2) is not applicable. Further, the inconsistency between 13 C.F.R. § 121.1103(b)(1) and 13 C.F.R. § 134.304(b) was evident on the face of those regulations, yet there is no indication that Appellant attempted to seek clarification before bringing this appeal. Given that Appellant apparently made no effort to resolve the patent inconsistency, I cannot conclude that Appellant relied upon misleading agency guidance.

### III. Conclusion

For the above reasons, VA's motion is GRANTED, and Appellant's NAICS code appeal is DISMISSED as UNTIMELY. This is the final decision of the U.S. Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge