

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

NAICS APPEAL OF:

B&B Medical Services, Inc.,

Appellant,

Solicitation No. VA255-14-R-1728

U.S. Department of Veterans Affairs
Network Contracting Office
Leavenworth, KS

SBA No. NAICS-5597

Decided: September 17, 2014

APPEARANCES

Richard L. Moorhouse, Esq., Ryan C. Bradel, Esq., Greenberg Traurig LLP, McLean, VA, for B&B Medical Services, Inc.

Arnold Payne, Contracting Officer, U.S. Department of Veteran Affairs, for the Agency

DECISION

I. Introduction and Jurisdiction

On August 20, 2014, the U.S. Department of Veterans Affairs (VA) issued Solicitation No. VA255-14-R-1728 (RFP) seeking a contractor to provide Home Oxygen Services and Ventilation to veteran beneficiaries. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 621610, Home Health Care Services, with a corresponding \$14 million annual receipts size standard.

On August 28, 2014, B&B Medical Services, Inc. (Appellant) filed an appeal challenging the CO's use of NAICS code 621610. Appellant asserts the VA erred in choosing NAICS code 621610, and argues that the appropriate code for the solicitation at issue is 532291, Home Health Equipment Rental, with a corresponding \$30 million annual receipts size standard. For the reasons discussed *infra*, the appeal is DENIED.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA)

decides NAICS code appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellants filed the instant appeal within ten calendar days after issuance of the RFP, so the appeal is timely. Federal Acquisition Regulation (FAR) 19.303(c); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFP

The RFP provides that the contractor will have to setup, install, and manage Home Oxygen Services for VA beneficiaries. The services will be performed at the home of individual beneficiaries, and the equipment needs may vary as determined by a physician. RFP, at 14. A Certified Trained Technician (CTT), Certified Respiratory Therapist (CRT), or Registered Respiratory Therapist (RRT) must perform any initial setup for services, and provide any repair or maintenance issue. If the beneficiary requires a ventilator, a CRT or RRT must perform the initial setup and home visits must occur monthly. Additionally, a licensed Respiratory Therapist must be available 24 hours a day, 7 days a week. *Id.* at 15-16. For oxygen services beneficiaries, a CTT, CRT, or RRT will conduct monthly calls to follow up, and quarterly home visits shall be performed.

The RFP requires the contractor to provide the beneficiary with complete equipment education, and any follow-up education as needed. *Id.* at 16. During the initial set up, the contractor will be responsible for ensuring the beneficiary's home has the proper electrical system capable of supporting the equipment, and of notifying the Contracting Officer's Representative about any required changes to the beneficiary's home needed to support the equipment. The contractor will be responsible for providing an alternative oxygen system if appropriate. *Id.* at 18. The contractor must perform an equipment compliance evaluation at least annually.

The RFP requires the contractor must have emergency services available 24 hours a day, 7 days a week in the event of equipment malfunction or when a beneficiary's home may be threatened by a natural disaster. Once the beneficiary no longer qualifies for the services, the contractor will be responsible for picking up the equipment. The CTT, CRT, or RRT provided by the contractor must have at least two years of experience in the successful administration of home oxygen and ventilator services.

Lastly, the RFP price schedule contains 17 Contract Line Item Numbers (CLINs) which correspond to the seven locations in which services are sought. Each CLIN is for oxygen and ventilator services equipment and initial setup of equipment, ancillary equipment such as diverse cylinder refills, cannulas, and different monthly fees associated with the equipment.

B. Appeal

Appellant asserts the subject procurement primarily involves providing oxygen and ventilation equipment to veteran beneficiaries on a rental basis. Appellant adds that beyond

providing the equipment, the awardee will have to train the patients on the use of the equipment as well as perform monthly follow-ups to ensure the equipment is working correctly. However, Appellant argues these services are ancillary as the solicitation's "pricing structure" relies on the types of equipment to be provided. Appeal, at 2.

Appellant adds that in the past, OHA has considered a NAICS appeal for similar services, and concluded that these types of services "should properly be procured under NAICS 532291." *Id.* at 3; citing *NAICS Appeal of Eagle Home Medical Corp.*, SBA No. NAICS-5099 (2009).

Appellant argues the NAICS Manual definition for code 621610 are for services that "might entail the use of some medical equipment, which the definition acknowledges; however, the core of NAICS 621610 is the provision of skilled nursing care." *Id.* at 4.

Appellant maintains the rental of oxygen equipment, as identified in NAICS code 532291, pertains to the solicitation's primary function and any other services to be provided by the contractor are incidental. According to the Appellant, "these services are not primarily directed at patient care but rather at ensuring proper and beneficial use of the oxygen equipment provided to the patients." *Id.* at 5. Further, Appellant asserts the solicitation's pricing schedule is based on the equipment provided, with every piece containing a monthly fee rate. Appellant argues the solicitation only calls for CRTs while the NAICS code chosen by the CO calls for skilled nursing services. Highlighting the fact that nursing services do not have their own CLIN within the solicitation's pricing structure, Appellant surmises that nursing services are not the solicitation's primary purpose. *Id.* at 6.

Lastly, Appellant states that six other VA solicitations for similar home oxygen rental services have been assigned NAICS code 532291. Appellant concludes the instant solicitation is an outlier that should be reconciled with the VA's systematic use of NAICS code 532291 for similar services.

C. CO's Response

On September 11, 2014, the CO filed his response to the appeal. The CO states Appellant erred in arguing the solicitation's primary purpose is for home medical equipment installation.

The CO argues the solicitation's required use of a CRT or RRT "is a necessary requirement for the administration of physician prescribed oxygen for patients served under the contract." Response, at 1. The CO adds that the services provided by the CRT or RRT are important and vital services that may require additional visits to a beneficiary's home depending on numerous factors; adding that the home visits amount to more than just an equipment check. In arguing for the chosen NAICS code, the CO maintains that contrary to Appellant's claim, the solicitation does not solely focus on the equipment to be provided. The CO asserts that "the central and primary focus of the services is to provide for an effective home oxygen services program to the ambulatory patients." *Id.* at 2.

Further, the CO states he conducted market research in preparing the RFP, and found

industries that provide these types of services at issue here are found under NAICS code 621610. According to the CO, code 621610 contemplates home respiratory services, which include supplying the equipment, personnel, and prescribed medications required to provide the services. The CO states that concerns certified to be small under NAICS code 621610 list their capabilities as able to provide home oxygen needs, equipment and supplies. Lastly, the CO maintains past solicitations seeking similar services have been awarded under code 621610, further showing the proper code was utilized for this solicitation. *Id.* at 3.

F. NAICS Manual¹ Descriptions

The NAICS code designated by the CO, 621610, Home Health Care Services, comprises:

[E]stablishments primarily engaged in providing skilled nursing services in the home, along with a range of the following: personal care services; homemaker and companion services; physical therapy; medical social services; medications; medical equipment and supplies; counseling; 24-hour home care; occupation and vocational therapy; dietary and nutritional services; speech therapy; audiology; and high-tech care, such as intravenous therapy.

Illustrative Examples:

Home health care agencies
Visiting nurse associations
In-home hospice care services

NAICS MANUAL, at 844.

The NAICS Manual description of Appellant's recommended NAICS code, 532291, Home Health Equipment Rental, provides that:

This industry comprises establishments primarily engaged in renting home-type health and invalid equipment, such as wheel chairs, hospital bed, oxygen tanks, walkers, and crutches.

NAICS MANUAL, at 730.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must demonstrate that the CO's NAICS code designation is based on a clear error of fact or law. *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at

¹ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2012)*, available at <http://www.census.gov>.

4 (2003); 13 C.F.R. § 134.314. SBA regulations do not require the CO to select the perfect NAICS code. Rather, the CO must designate the NAICS code that best describes the principal purpose of the product or service being acquired in light of the industry description in the *NAICS Manual*, the description in the solicitation, and the relative weight of each element in the solicitation. *Durodyne*, SBA No. NAICS-4536, at 4; 13 C.F.R. § 121.402(b).

B. Analysis

After reviewing the *NAICS Manual* and the regulation at 13 C.F.R. § 121.201, I find the Appellant has not met its burden of establishing that the NAICS code chosen by the CO is erroneous and does not best describe the solicitation's primary purpose.

Here, the RFP requires the contractor provide oxygen and ventilator equipment at the home of a VA beneficiary, as directed by the VA. The contractor is required to complete the initial setup, and follow up periodically with the beneficiary in either a monthly, quarterly, or annual basis. In order to perform these services, the contractor, as stated by the RFP, must utilize a licensed CTT, CRT, or RRT. These individuals are further tasked with providing education on equipment use, equipment maintenance, and safety inspections. The services required here are not merely the dropping off of equipment and some brief instruction on its operation. The recipient's home must be evaluated to ensure its electrical system can support the equipment. The contractor must provide licensed Respiratory Therapists and conduct regular visits to ensure that the equipment is working properly and used correctly. An RRT must be available 24 hours a day, seven days a week for emergencies. The services in question go beyond those required merely to provide rental equipment. The RFP requires that the contractor provide personnel with some professional training and skill in respiratory therapy. The contractor personnel here will be providing their skilled services to the individual recipients of oxygen.

A review of the description for NAICS code 621610 reveals that it covers provision of skilled health care services in the home, including those dealing with medical equipment and supplies. Here, the RFP calls for health care services provided at home to individual recipients, dealing with medical equipment and supplies, and thus it falls squarely within the category of Home Health Care Services covered by NAICS code 621610. Whereas NAICS code 532291 specifically allows for equipment rental, NAICS code 621610 allows for medical equipment and supplies and home health services, thus fitting within the range of services sought by the solicitation. Accordingly, I find that the CO's designation of NAICS code 621610 appropriate for this procurement.

Appellant argues in previous cases OHA has considered NAICS appeals regarding solicitations for home oxygen equipment and services, and has found NAICS code 532291 was the correct code. *NAICS Appeal of Eagle Home Medical Corporation*, SBA No. NAICS-5099 (2009) and *NAICS Appeal of Medical Comfort Systems, Inc., et al.*, SBA No. NAICS-5106 (2010). In these cases, OHA was considering this code in light of the CO's designation of NAICS code 339112, Surgical and Medical Instrument Manufacturing. OHA determined that the services component of the procurement precluded a NAICS code designation that was only applicable to equipment. Those appellants could meet their burden of establishing clear error in the CO's NAICS code designation, because there was no services component to the NAICS code

designation for those procurements, whereas services are included in NAICS code 532291. Here, however, the CO's NAICS code designation of code 621610 includes precisely the type of services required for this procurement, namely the provision of skilled home health care services dealing with medical equipment. Appellant thus cannot establish that there is clear error in this designation.

IV. Conclusion

For the above reasons, the instant appeal is DENIED. The correct NAICS code designation for this procurement is 621610, Home Health Care Services, with a corresponding \$14 million annual receipts size standard. However, because this decision is rendered after the deadline for receipt of proposals, the decision does not apply to the pending RFP, but may apply to future solicitations for the same supplies or services. 13 C.F.R. § 134.318(b) and FAR 19.303(c)(5). This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge