



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Eagle Home Medical Corporation

File: B-402387

Date: March 29, 2010

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, PLC, for the protester.
Stephen F. Butera, Esq., Department of Veterans Affairs, and Sam Q. Lee, Esq., Small Business Administration, for the agencies.
Paula A. Williams, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency failed to comply with the final decision of the Small Business Administration's Office of Hearings and Appeals (OHA), in which the OHA reversed the North American Industry Classification System (NAICS) code assigned by the contracting officer and the contracting officer did not amend the solicitation to reflect the NAICS code that the OHA had determined was appropriate for this procurement, as required by applicable regulations.

DECISION

Eagle Home Medical Corporation (Eagle) of Roanoke Rapids, North Carolina, protests the Department of Veterans Affairs' (VA) decision not to comply with a ruling by the Small Business Administration's (SBA) Office of Hearings and Appeals (OHA) designating North American Industry Classification System (NAICS)¹ code 532291, Home Health Equipment Rental, for request for proposals (RFP) No. VA-244-09-RP-0252 issued by the VA for home oxygen equipment rental and services.

We sustain the protest.

¹ The NAICS code scheme is used by the federal government to identify and classify specific categories of business activity that represents the lines of business a firm conducts. See Federal Acquisition Regulation (FAR) § 19.102; Rochester Optical Mfg Co., B-292247; B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 2 n.2

BACKGROUND

The RFP, issued on August 19, 2009, as a small business set-aside, contemplates the award of a fixed-price, indefinite-quantity contract to provide home oxygen equipment rental and services to VA beneficiaries within defined geographic areas. As initially issued, the RFP assigned NAICS code 532291, Home Health Equipment Rental, which has a corresponding size standard of \$7 million, to this procurement.² The contracting officer subsequently determined that the NAICS code needed to be changed to NAICS code 339112, Surgical and Medical Instrument Manufacturing, with a size standard of 500 employees,³ based upon the decision by the United States Court of Federal Claims in Rotech Healthcare, Inc. v. United States, 71 Fed. Cl. 393 (2006), appeal dismissed, No. 2006-5121 (Fed. Cir. 2006). Contracting Officer's Statement at 1. On November 16, amendment 4 to the solicitation was issued to establish NAICS code 339112 as applicable to the solicitation. RFP amend. 4 at 1. The RFP was later amended to extend the due date for receipt of proposals to December 23. RFP amend. 7 at 1.

On November 27, Eagle filed an appeal with the OHA, arguing that the contracting officer's designation of NAICS code 339112, Surgical and Medical Instrument Manufacturing, was unreasonable because this NAICS code does not best describe the principal purpose of the procurement. By decision dated December 11, the OHA granted Eagle's NAICS code appeal and reversed the contracting officer's decision to assign NAICS code 339112 to this procurement.

As a threshold matter, the OHA determined that Rotech "is not relevant to this decision" because the court decided a different issue (whether the non-manufacturing rule applied to the procurement and not whether NAICS code 339112 was designated in error) and the court's decision was limited to the facts of the case before it. OHA Decision at 5. In deciding the merits, the OHA noted that the purpose of the NAICS code designation was to identify the NAICS code "that best describes the principal purpose" of the procurement. See 13 C.F.R. § 121.402(b)

² NAICS code 532291, Home Health Care Rental, is defined as follows: "This U.S. industry comprises establishments primarily engaged in renting home-type health and invalid equipment, such as wheel chairs, hospital beds, oxygen tanks, walkers, and crutches." OHA Decision at 4-5.

³ NAICS code 339112, Surgical and Medical Instrument Manufacturing, is defined as follows: "This U.S. industry comprises establishments 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." OHA Decision at 4.

(2009); FAR § 19.102(b)(1). The OHA then determined, with regard to the procurement here, that

[t]he RFP requires the successful contractor, at the VA's direction, to install oxygen equipment (whether provided by the VA or the contractor) in the homes of VA beneficiaries. The contractor must use licensed [respiratory therapists] to set up the equipment and train beneficiaries In addition, the contractor must maintain the equipment, conduct safety inspections, and make safety assessments required in the contract. . . . The RFP's requirements mean the contractor must deliver both supplies and services. . . . I find the principal purpose of the RFP is to provide home oxygen services to the VA's beneficiaries, not to provide equipment to them. . . . [I]t is the services required by the [statement of work] that give the various oxygen devices (including supporting equipment) value for VA beneficiaries. That is, the equipment would be virtually useless to the beneficiaries without the accompanying services. Thus, the services form the principal purpose of the RFP.

* * * * *

The NAICS code [339112, Surgical and Medical Instrument Manufacturing,] has nothing to do with the provision of Home Oxygen Equipment Rental and Services for the VA as described in the RFP. Instead NAICS code 339112 is about the Manufacture of Medical, Surgical, Ophthalmic, and Veterinary Instruments and Apparatus. Moreover, the [solicitation] references none of the devices identified in the NAICS Manual, except for cannulas. Even if there was some congruency between the devices required by the RFP and those encompassed by NAICS code 339112, NAICS code 339112 would, at best, still only touch upon part of what the RFP requires and not its principal purpose, which is to provide home oxygen to VA beneficiaries in a professional and safe manner.

OHA Decision at 5. The OHA concluded that NAICS code 532291 "covers all services necessary to make the home health care equipment functional" and determined that the appropriate code for this procurement is NAICS code 532291, Home Health Equipment Rental. *Id.* at 6.

The OHA's decision was received by the VA prior to the extended due date for receipt of proposals. The VA disagreed with the OHA's decision and decided not to

amend the solicitation. This protest followed. The SBA has submitted its views regarding the protest to our Office and the parties.

DISCUSSION

Eagle and the SBA contend that the VA violated the Small Business Act and its implementing regulations when the agency decided to ignore the OHA's final decision, which determined that NAICS code 532291, Home Health Equipment Rental, is the proper code for this procurement. We agree.⁴

The Small Business Act, as amended, vests the authority to establish and approve small business size standards exclusively with the SBA. 15 U.S.C. § 632(a)(2) (2006). Under the Act's implementing regulations, once the SBA has defined or approved size standards for small businesses, federal agencies generally are bound to follow the SBA's determinations. 13 C.F.R. § 121.403; see also FAR § 19.102. The regulations state that the contracting officer should assign the NAICS code which "best describes the principal purpose of the product or service being acquired." 13 C.F.R. § 121.402(b). However, NAICS code designations made by authorized contracting officers may be appealed to the OHA and any formal NAICS code designations made by the OHA are binding on the parties. 13 C.F.R. §§ 121.402(c), 121.403, 121.1102; FAR § 19.303(a), (c). In this regard, the SBA regulations governing a NAICS code appeal provide that the OHA's decision is final and becomes effective on issuance. 13 C.F.R. § 134.316(b). Furthermore,

If [the] OHA's decision is received by the contracting officer before the date offers are due, the solicitation must be amended if the contracting officer's designation of the NAICS code is reversed.

Id. § 121.1103(b)(5); see also FAR § 19.303(c)(5).

As noted above, the OHA decision reversing the contracting officer's NAICS code determination was received by the VA prior to the due date for receipt of proposals, but the VA decided not to amend the RFP to modify the NAICS code. The VA contends that its decision not to amend the solicitation is governed by Rotech Healthcare, Inc. v. United States, supra, a decision of the United States Court of Federal Claims discussing these types of home oxygen procurements. The VA states that the OHA decision impermissibly disregarded the applicability of the Rotech

⁴ Although our Office does not have jurisdiction to determine the appropriate NAICS code for this procurement, 4 C.F.R. § 21.5(b)(1); 13 C.F.R. § 121.1102, we do have jurisdiction to review the protest challenge here, which is whether the agency violated procurement laws and regulations in failing to follow the OHA's decision determining the NAICS code applicable to this RFP.

decision in which the Court found two solicitations for home oxygen and related services to be procurements primarily for supplies; thus, the agency insists, the home oxygen procurement here should be solicited under a NAICS code for supplies and not the NAICS code identified by the OHA.

In our view, the situation here is distinguishable from Rotech. The Rotech decision was limited to the question of whether the proposed awards would violate the statutory non-manufacturer rule set forth in the Small Business Act.⁵ The court in Rotech did not address the issue of what NAICS code should apply to these types of procurements. In fact, the court specifically noted that the protester did not challenge the NAICS codes assigned to the procurements, and it noted the protester's argument that NAICS code determinations were "irrelevant" to the issue before the court. Rotech Healthcare, Inc. v. United States, *supra*, at 29, 31, 35, 57. In considering whether the non-manufacturer rule applied to the two solicitations at issue, the court recognized that the procurements for home oxygen involved both supplies and services, and the court concluded that the non-manufacturer rule applies to mixed contracts and not just to contracts solely for supplies. *Id.* at 53. The court expressed its view that the solicitations before the court involved primarily supplies, based in part on the agency's failure to provide any evidence or argument demonstrating the importance of the services aspect of the solicitations. *Id.* at 61. The court noted, also, that the SBA had not previously addressed in its decisions the issue of the applicability of the current non-manufacturing rule to these types of procurement. *Id.* at 49. Furthermore, the applicability of the non-manufacturing rule to the protested solicitations had not been presented to the OHA.

In this case, a timely NAICS code appeal was filed with the OHA, and the OHA determined that the NAICS code that "best describes" this particular procurement was NAICS code 532291, Home Health Equipment Rental. OHA Decision at 5-6; 13 C.F.R. § 121.402(b). The OHA based its determination on reviewing the solicitation requirements in light of the NAICS code descriptions in the NAICS code manual. OHA Decision at 4-5. The OHA was also presented with substantial evidence in the form of analysis and a study (which was not provided to the court in Rotech) that showed that the primary purpose of the procurement here was to

⁵ The Act's non-manufacturer rule provides that the offer of a non-manufacturer small business concern under a small business set-aside for "any procurement contract for the supply of a product" can be considered, provided, among other things, that the small business concern represents that it will supply the product of a domestic small business manufacturer or processor, or a waiver of this requirement is granted by the SBA. 15 U.S.C. § 637(a)(17); *see also* 13 C.F.R. § 121.406.

provide home oxygen services in support of the home oxygen equipment.⁶ Id. at 3, 5. We find that the VA was required to comply with the decision of the OHA, which has been granted the authority to make binding NAICS code determinations. Moreover, given that the Rotech court was not presented with the issue of reviewing the NAICS code and did not reach that issue in its decision, we find the VA's decision to rely on Rotech as controlling, while ignoring the decision of the OHA, to be unreasonable.

In summary, we find on this record that the OHA decision has conclusively resolved the NAICS code appeal filed by Eagle and the OHA's decision which is applicable to this procurement, indicates that the solicitation should be amended consistent with its determination. As noted above, the VA has not advanced any countervailing reasons for why not amending the solicitation would be appropriate, other than its belief that the Rotech decision is controlling. We therefore conclude that the VA should have amended the solicitation when it received the OHA decision reversing the contracting officer's designation of NAICS code 339112 as the proper code for this procurement, inasmuch as the OHA decision is binding upon the agency. See 13 C.F.R. § 121.403; § 121.1102.

We recommend that the VA amend the RFP in a manner consistent with the OHA decision that NAICS code 532291, Home Health Equipment Rental, with a size standard of \$7 million, is applicable to this procurement. We also recommend that Eagle be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
Acting General Counsel

⁶ The OHA also considered the Rotech decision, but found it inapplicable inasmuch as the court was not addressing the NAICS code issue and the decision was limited to the facts before that court.