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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: B&B Medical Services, Inc.; Rotech Healthcare, Inc.

File: B-404241; B-404241.2

Date: January 19, 2011

Richard L. Moorhouse, Esq., Greenberg Traurig LLP, and Kyle R. Jefcoat, Esq., Latham & Watkins LLP for the protesters.

Stephen F. Butera, Esq., Department of Veterans Affairs, and Sam Q. Le, Esq., Small Business Administration, for the agencies.

Cherie J. Owen, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Statutory non-manufacturer rule does not apply to procurements set aside for Historically Underutilized Business Zone small business concerns.

DECISION

B&B Medical Services, Inc., of Oklahoma City, Oklahoma, and Rotech Healthcare, Inc., of Orlando, Florida, protest the terms of request for proposals (RFP) No. VA-244-10-RP-0221 issued by the Department of Veterans Affairs (VA) for home oxygen equipment rental and services. Specifically, the protesters challenge the VA's decision not to apply a statutory non-manufacturer rule to the solicitation, and the agency's decision to set aside this procurement for Historically Underutilized Business Zone (HUBZone) small businesses. B&B also asserts that the agency must evaluate non-manufacturers using a 500-employee size standard.

We deny the protests.

BACKGROUND

The RFP, issued on September 28, 2010, as a HUBZone small business set-aside, contemplates the award of a firm fixed-price requirements contract to provide home oxygen equipment rental and services to VA beneficiaries within defined geographic areas. RFP at 1, 68. The agency first began attempting to fulfill this requirement under RFP VA-244-09-RP-0252, issued on August 19, 2009, as a small business set-aside. The agency initially assigned North American Industry Classification

System (NAICS¹) code 532291, Home Health Equipment Rental, which has a corresponding size standard of \$7 million, to that 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 a 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). In that case, which involved two other solicitations issued by the VA for home oxygen equipment rental, the court held that the solicitations at issue were for the procurement of supplies and, thus, the non-manufacturing rule set forth in the Small Business Act, 15 U.S.C. § 637(a)(17), required the VA to consider whether the offerers were manufacturers of the items to be delivered.⁴ Rotech Healthcare, Inc., 71 Fed. Cl. at 430. The VA interpreted this decision as requiring the VA to evaluate non-manufacturers of supplies using a 500-employee size standard (such as with NAICS code 339112)

¹ The NAICS code scheme is used by the federal government to identify and classify specific categories of business activity that represent 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

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, SBA No. NAICS-5099, Dec. 11, 2009, 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, SBA No. NAICS-5099, Dec. 11, 2009, at 4.

⁴ The Small Business Act’s non-manufacturer rule provides that the offer of a non-manufacturer small business concern under an 8(a) or 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 Small Business Administration (SBA). 15 U.S.C. § 637(a)(17); see also 13 C.F.R. § 121.406; FAR § 19.001.

instead of the \$7 million size standard set forth in NAICS code 532291.⁵ Accordingly, on November 16, 2009, the VA amended the solicitation to establish NAICS code 339112 as applicable to the solicitation. Id.

Eagle Home Medical Corp., a potential offeror, filed an appeal with 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, 2009, OHA granted Eagle's NAICS code appeal and reversed the contracting officer's decision to assign NAICS code 339112 to this procurement. After receiving OHA's decision, the VA initially declined to comply with OHA's determination that the solicitation should be amended to change the NAICS code.

Eagle then filed a protest with our Office, arguing that the agency had violated the Small Business Act and its implementing regulations by failing to comply with OHA's final decision resolving the NAICS code appeal. GAO sustained the protest, noting that OHA was presented with substantial evidence in the form of analysis and a study that was not provided to the court in Rotech that showed that the primary purpose of the procurement was to provide home oxygen services in support of the home oxygen equipment, which OHA took into account in determining the appropriate NAICS code for the solicitation. Eagle Home Med. Corp., B-402387, Mar. 29, 2010, 2010 CPD ¶ 82 at 5-6. Because OHA has been granted the authority to make binding NAICS code determinations, our Office determined that the VA was required to comply with OHA's decision regarding the appropriate NAICS code for the procurement. Id. at 6. We also found Rotech distinguishable because the court was presented with a different issue--the applicability of a statutory non-manufacturer rule. Id. at 5-6.

To comply with our Office's decision in Eagle Home Med. Corp., *supra*, the VA issued the RFP here. The parties do not contend that the requirements in the RFP have changed from the prior solicitation that was the subject of the NAICS code appeal to OHA. However, the RFP now follows OHA's decision and designates NAICS code 532291, Home Health Equipment Rental, with a size standard of \$7 million in annual receipts, for this procurement. RFP at 1. In addition, the new RFP limits the competition to HUBZone small businesses. (The prior solicitation was set aside for small businesses.) Id. at 1, 61. The new RFP also contains FAR clause 52.212-1, "Instruction to Officers--Commercial Items." Id. at 61.

⁵ The Rotech court expressly declined to review the VA's NAICS code selection, recognizing that the court lacked jurisdiction to review NAICS code selections that had not first been presented to the SBA's Office of Hearing and Appeals (OHA) for consideration. Rotech Healthcare, Inc., 71 Fed. Cl. at 408; *see also* 13 C.F.R. § 121.402(c) (vesting OHA with the authority to review agency NAICS code selections).

Subsequent to the agency's issuance of the RFP, B&B and Rotech contacted the agency and inquired whether the non-manufacturer rule applies to this procurement. B&B Protest, attach. A; Rotech Protest, attach. A. In response, the agency stated that the non-manufacturer rule does not apply to this procurement because the solicitation is primarily for services and not supplies. The agency stated that, because the non-manufacturer rule does not apply, the VA intends to apply the \$7 million size standard mandated by OHA's decision, rather than a 500-employee size standard applicable to non-manufacturers of supplies. B&B Protest, attach. A; Rotech Protest, attach. B.

B&B is a HUBZone concern that meets the 500-employee size standard, but not the \$7 million size standard. B&B Agency Report, Tab 5, Size Determination, at 2, 6. Rotech is a large business concern. Both firms protested the terms of the solicitation here.

DISCUSSION

B&B and Rotech protest the agency's failure to apply the non-manufacturer rule to this procurement. The protesters contend that the Rotech decision issued by the Court of Federal Claims determined that the statutory non-manufacturer rule applied to "virtually identical" solicitations for home oxygen equipment rental and services, and thus the VA must follow that decision here. Rotech Protest at 8; B&B Protest at 3. B&B further asserts that application of the non-manufacturer rule requires the agency to adopt a 500-employee standard for non-manufacturers such as itself. B&B Protest at 3. In addition, both protesters contend that, if the non-manufacturer rule is properly applied, there are not two or more HUBZone or small businesses that are eligible to compete for the contract; thus, the procurement should not be set aside for HUBZone or small business concerns. B&B Protest at 4; Rotech Protest at 10-11.

The agency contends that this solicitation differs from the solicitation considered by the Rotech court, that the non-manufacturer rule does not apply because the procurement here primarily involves services, and that the agency is properly following OHA's directive to use a \$7 million size standard in this solicitation. Further, the agency contends that its market research was reasonable and shows that the agency expects to receive offers from two or more HUBZone small businesses at a fair and reasonable price. Rotech Agency Report at 2-5; B&B Agency Report at 3-5.

The SBA also submitted comments on these issues. The SBA emphasizes that it, not the GAO, has jurisdiction to determine the applicable size standard for procurements. SBA Comments on B&B Protest, Nov. 22, 2010, at 3. The SBA further contends that this protest is merely B&B's attempt to circumvent OHA's prior determination that the size standard for this procurement is \$7 million, and that B&B and Rotech are other-than-small for purposes of this procurement. Id.; B&B Agency

Report, Tab 5, SBA Size Determination. The SBA also contends that the Rotech decision is not relevant to this protest because the facts of this case are distinguishable in many respects. SBA Supplemental Comments on B&B Protest, Dec. 7, 2010, at 3-5. The SBA states that the Rotech decision analyzed different, much older home oxygen solicitations without the benefit of the additional analysis presented to OHA. Id. at 3. The SBA further notes that the statutory non-manufacturer rule interpreted by the Rotech court in a solicitation set-aside for small businesses is inapplicable to procurements set aside for HUBZone businesses like the one here. Id. at 2.

We agree with the agencies.

Non-Manufacturer Rule

The protesters assert that the agency's decision not to apply the statutory non-manufacturer rule to this solicitation is inconsistent with the decision of the Court of Federal Claims in Rotech Healthcare, Inc. v. United States, *supra*. The statutory non-manufacturer rule is set forth in 15 U.S.C. § 637(a)(17)(A) and states as follows:

An otherwise responsible business concern that is in compliance with the requirements of subparagraph (B)⁶ shall not be denied the opportunity to submit and have considered its offer for any procurement contract for the supply of a product to be let pursuant to this subsection or subsection (a) of section 644 of this title solely because such concern is other than the actual manufacturer or processor of the product to be supplied under the contract.

15 U.S.C. § 637(a)(17)(A) (2006). Thus, by the plain language of the statute, the statutory non-manufacturer rule applies only to “contracts . . . let pursuant to” § 637(a) or § 644(a) of title 15. Id.

Section 637(a) provides the authority for agencies to conduct section 8(a) sole source procurements and section 8(a) competitive procurement set-asides. 15 U.S.C. § 637(a)(16) (providing for sole source awards to section 8(a) companies); 15 U.S.C. § 637(a)(1)(D) (providing for set-asides for section 8(a) companies in competitive procurements). Section 644(a) provides the authority for general small business

⁶ Subparagraph (B) requires offerors to be primarily engaged in the wholesale or retail trade, be a small business concern under the NAICS code stated in the solicitation, be a regular dealer, and represent that it will supply the product of a domestic small business manufacturer unless a waiver is obtained. As the SBA and VA point out, neither protester is a small business concern under the NAICS code stated in the solicitation here.

set-asides, which do not include HUBZone set-asides. See Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93 at 3-4 (recognizing 15 U.S.C. § 657a, not § 644(a), as the statutory provision authorizing contracts to be set aside for HUBZone business concerns); Mission Critical Solutions v. United States, No. 09-864C at 12 (Fed. Cl. Mar. 2, 2010) (same); 67 Fed. Reg. 3826, 3831 (January 28, 2002) (setting forth SBA's long-standing view that the statutory non-manufacturer rule applies only in connection with a section 8(a) or small business set aside contract, not in connection with a HUBZone procurement); 69 Fed. Reg. 29411, 29415 (May 24, 2004) (same).

Thus, the statutory non-manufacturer rule applies only to section 8(a) procurements and competitive procurements set aside for small business concerns, generally.⁷ The procurement at issue here is a HUBZone set-aside issued pursuant to § 31(b) of the Small Business Act (15 U.S.C. § 657a). Since the contract here is not awarded pursuant to 15 U.S.C. § 637(a) or 15 U.S.C. § 644(a), it is not covered by the statutory non-manufacturer rule. Because the statutory non-manufacturer rule does not apply to this solicitation, the Court of Federal Claims decision in Rotech Healthcare Inc., 71 Fed. Cl. 393 (2006) is inapplicable; that case involved solicitations that were set aside for small business. Accordingly, we deny this aspect of the protests.

500-Employee Size Standard

B&B contends that the agency is required to evaluate non-manufacturers using a 500-employee size standard and not the \$7 million standard required by the designated NAICS code for this solicitation. B&B Protest at 2-3. It argues that the 500-employee standard flows from the statutory non-manufacturer rule and implementing regulations, as well as a provision in the solicitation. *Id.* Specifically, B&B cites to FAR clause 52.212-1(a), which is included in the solicitation. That provision provides:

(a) North American Industry Classification System (NAICS) code and small business size standard. The NAICS code and small business size standard for this acquisition appear in Block 10 of the solicitation cover sheet (SF 1449). However, the small business size standard for a

⁷ Like the statute, the FAR defines the “nonmanufacturer rule” as being limited to section 8(a) or small business contracts generally:

Nonmanufacturer rule means contractor under a small business set-aside or 8(a) contract shall be a small business under the applicable size standard and shall provide either its own product or that of another domestic small business manufacturing or processing concern.

FAR § 19.001.

concern which submits an offer in its own name, but which proposes to furnish an item which it did not itself manufacture, is 500 employees.

RFP at 61. The protester asserts that the last sentence requires the agency to apply a 500-employee size standard to non-manufacturers such as B&B, even where it designates a different NAICS code with a different size standard. B&B Protest at 3. These arguments do not provide a basis to sustain the protest.

Neither the statutory non-manufacturer rule set forth in 15 U.S.C. § 637(a)(17)(A), nor the regulatory non-manufacturer rule set forth at FAR § 19.001, provide any reference to a 500-employee standard. Rather, the size standards are established in other regulations applicable to nonmanufacturers, which make clear that the 500-employee standard does not apply to contracts for services. FAR § 19.102(f); see also § 19.1303(d); (requirement that HUBZone non-manufacturers provide end items produced by HUBZone nonmanufacturer rule not applicable to service contracts). Whether a contract is one for services or supplies is determined by the “principal nature” of the procurement. See FAR § 19.102(c).

Here, OHA selected a NAICS code that reflects its view that this is a contract for services, and it expressly declined to adopt a NAICS code that would implement a 500-employee standard applicable to a supply contract. In making this determination, OHA considered the solicitation requirements, as well as substantial evidence in the form of analysis and a study, that showed that the primary purpose of the procurement here was to provide home oxygen services in support of the home oxygen requirement. As we stated in our prior decision, the VA was required to comply with the decision of OHA, which is binding on the parties. Eagle Home Med. Corp., supra, at 6; see also 13 C.F.R. § 121.403; FAR § 19.303(c)(5). To the extent that the protester now argues that the solicitation permits the application of a different size standard than the one established by OHA and requests that GAO enforce one standard over the other, we decline to do so.⁸ The SBA, not GAO, is vested with the exclusive authority to establish and approve small business size standards. 15 U.S.C. § 632(a)(2); 4 C.F.R. § 21.5(b)(1) (2011).

Set-Aside Challenge

The protesters contend that the procurement should not be set aside for HUBZone or small business contractors. Their challenge to the HUBZone set-aside is premised on the protesters’ belief that there were no HUBZone or small business offerors

⁸ Furthermore, to the extent that B&B asserts that the solicitation provision is ambiguous, the agency eliminated the ambiguity when it clarified, in response to the protester’s inquiry, that the 500-employee standard would not be implemented in this procurement because the procurement was considered to be a contract for services and not supplies. See B&B Protest, attach. A.

capable of complying with the nonmanufacturer rule. Because we find that the non-manufacturer rule does not apply to this procurement, we need not address the protesters' arguments that no HUBZone or small businesses manufacturers are available. However, we note that the record contains sufficient evidence that the agency conducted market research and concluded that four HUBZone small business firms could be expected to submit offers under the NAICS code size standard set forth in the solicitation.

The protest is denied.

Lynn H. Gibson
General Counsel