

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

NAICS APPEAL OF:

Rotech Healthcare, Inc.

Appellant

**Solicitation No. VA259-14-R-0107
U.S. Department of Veterans Affairs
Network Contracting Office
Salt Lake City, UT**

SBA No. NAICS-5550

Decided: April 15, 2014

ORDER DISMISSING APPEAL¹

I. Background

On March 31, 2014, the U.S. Department of Veterans Affairs (VA) issued Solicitation No. VA259-14-R-0107 seeking a contractor to provide home oxygen services to VA beneficiaries. The Statement of Work (SOW) states that this procurement is for home oxygen services to be provided to VA beneficiaries in a number of states. The contractor shall provide services to individual VA beneficiaries, which include oxygen prescription, equipment and supplies. The contractor will be responsible for furnishing, installing, and servicing the oxygen equipment to dispense oxygen and supplies ordered under the contract.

The Contracting Officer (CO) set the procurement aside for small business and assigned to it NAICS code 532291, Home Health Equipment Rental, with a corresponding \$30 million annual receipts size standard. Proposals are due on April 25, 2014.

On April 7, 2014, Rotech Healthcare, Inc. (Appellant) filed its appeal of the CO's NAICS code designation. Appellant asserts the correct NAICS code is 339112, Surgical and Medical Instrument Manufacturing, with a corresponding size standard of 500 employees.

II. Discussion

Appellant filed the instant appeal within 10 days after the VA issued the solicitation. Thus, the appeal is timely. 13 C.F.R. § 134.304(b)

¹ 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.

SBA regulations provide that only a party adversely affected by a NAICS code designation may bring a NAICS code appeal. 13 C.F.R. §§ 121.402(e), and 134.302(b). In order to have standing to bring a NAICS code appeal, the aggrieved party "must show that it is a potential bidder or offeror on a small business set-aside." *NAICS Appeal of J.D. Broco, LLC*, SBA NAICS-5389, at 3 (2012); citing *SIC Appeal of Advanced Tech., Inc.*, SBA SIC-2647, at 4 (1987). OHA has consistently held that "a firm which is other than small under both the NAICS code designated in the solicitation and the NAICS code it seeks on appeal has no standing to file a NAICS code appeal." *NAICS Appeal of American Systems Corporation*, SBA NAICS-5060 (2009); *NAICS Appeal of Spendida Property Systems, LLC*, SBA No. NAICS-4576 (2003).

Here, Appellant readily discloses that it is not a small business concern under both the assigned NAICS code and the code it maintains is the correct code. In fact, Appellant admits that its goal in arguing for changing the NAICS code is to then have the VA reissue the solicitation as a full and open procurement in order for Appellant to properly compete for the procurement. Appeal, at 2. This line of speculative reasoning has been rejected by OHA previously, stating that "such conjecture as a basis for finding that a party has been 'adversely affected' by NAICS code designation" is not sufficient to establish standing. *J.D. Broco, LLC*, SBA NAICS-5389, at 3 (2012); citing *NAICS Appeal of Integrated Lab. Sys., Inc.*, SBA NAICS-4735, at 2 (2005). Accordingly, I find Appellant has no standing to file this NAICS appeal, and thus, I must dismiss the appeal.

III. Conclusion

In consideration of the foregoing, I find Appellant has no standing to bring the instant appeal and, therefore, I must DISMISS the instant appeal.

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



CHRISTOPHER HOLLEMAN
Administrative Judge

CERTIFICATE OF SERVICE

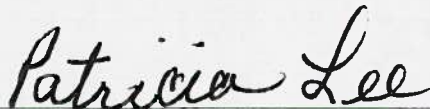
I hereby certify that, on April 15, 2014, I served the foregoing by email upon the following:

Kyle R. Jefcoat
Latham & Watkins LLP
Counsel for Rotech Healthcare, Inc.
Washington, DC
Email: kyle.jefcoat@lw.com

Ricky Robins, Contracting Officer
U.S. Department of Veterans Affairs
Network Contracting Office
Salt Lake City, UT
Email: ricky.robins@va.gov

John W. Klein, Esq.
Assoc. General Counsel for Procurement Law
Office of General Counsel
U.S. Small Business Administration
409 Third Street, SW, Fifth Floor
Washington, DC 20416
Email: OPLService@sba.gov

Russell L. Emery
Attorney
Department of Veterans Affairs
Office of Regional Counsel
155 Van Gordon Street, Suite 551
Denver, CO 80225
Ph: 303-914-5817
Fax: 303-914-5849
Email: russell.emery@va.gov



Patricia Lee
Office of Hearings and Appeals