

In the United States Court of Federal Claims

No. 11-73C

(Filed May 17, 2011)

NOT FOR PUBLICATION

B&B MEDICAL SERVICES, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

EAGLE HOME MEDICAL CORP.,

Defendant-Intervenor.

ORDER

Before the Court is plaintiff’s Motion for Leave to Use Demonstrative Exhibits at the May 18, 2011 Oral Argument, filed May 12, 2011. In it, plaintiff requests permission to use six demonstrative exhibits during oral argument -- (1) a table comparing the contract line items (“CLINs”) from the original solicitation and the resolicitation; (2) a table comparing the CLINs from the solicitation at issue here and the solicitation at issue in *Rotech Healthcare Inc. v. United States*, 71 Fed. Cl. 393 (2006); (3) a photograph showing the rental oxygen concentrator items from CLIN A0001; (4) a photograph showing a one-month supply of the items from CLIN A0001; (5) a photograph showing a one-year supply of items from CLIN A0001; and (6) an actual, inert rental concentrator called for under CLIN A0001. Defendant and intervenor do not object to proposed exhibits 1 and 2, but do object to exhibits 3, 4, 5, and 6 on the grounds that they are not relevant and are not part of the administrative record. For the reasons that follow, plaintiff’s motion is **GRANTED-IN-PART** and **DENIED-IN-PART**.

Generally, demonstrative exhibits will be allowed if relevant, authentic, and in accord with Rule 403 of the Federal Rules of Evidence. See *Tritek Techs., Inc. v. United States*, 67 Fed. Cl. 727, 729 (2005); Kenneth S. Broun, *McCormick on Evidence* §§ 212, 214-215. Defendant

and intervenor do not object to proposed exhibits 1 and 2. Therefore, plaintiff will be allowed to use those tables at the hearing.

For proposed demonstrative exhibits 3, 4, and 5, photographs are most commonly admitted as demonstrative evidence when they are used for illustrative, not substantive purposes. Broun, *supra*, § 215. Defendant and intervenor do not argue that the photographs are not accurate depictions of what plaintiff claims, nor do they argue the prejudicial value of the photographs would outweigh their probative value. This just leaves relevance. The Court finds the photographs relevant to illustrate the items being referenced in CLIN A0001 and plaintiff is allowed to use these photographs at the hearing. Indeed, the Court questions why defendant and intervenor would object to the relevance of the photographs -- even in an administrative record case such as this -- when the exclusion of them would leave only the Court without a visual sense of the items involved in the solicitation. Quite obviously, the contracting officer (who seeks to obtain them) and the offerors (who seek to provide them) are familiar with these items, so why keep the Court in the dark?

Turning to proposed demonstrative exhibit 6, the Court does not see any benefit of having an actual rental concentrator in the courtroom during the hearing. Plaintiff, as detailed above, will be allowed to use photographs that depict a rental concentrator, so the Court will know what one is and looks like. There is no added benefit of having one present in the courtroom, particularly in light of the potential difficulties in transporting one and passing through security. Therefore, plaintiff will not be allowed to use the actual rental concentrator during the hearing.

IT IS SO ORDERED.

s/ Victor J. Wolski

VICTOR J. WOLSKI

Judge