

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

NAICS APPEAL OF:

InGenesis, Inc.,

Appellant,

Solicitation No. W81K04-11-R-0021
U.S. Army Medical Command
Center for Health Care Contracting
Fort Sam Houston, Texas

SBA No. NAICS-5295

Decided: October 24, 2011

APPEARANCES

Edward J. Tolchin, Esq., Fettmann, Tolchin & Majors PC, Fairfax, Virginia, for Appellant

Johnie F. Johnson, Contracting Officer, Fort Sam Houston, Texas, for the U.S. Army Medical Command

DECISION

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the Contracting Officer's designation of North American Industry Classification System (NAICS) code 621399, Offices of All Other Miscellaneous Health Professionals, to a procurement for nursing services is based on a clear error of fact or law.

III. Background

A. The Solicitation

On September 15, 2011, the U.S. Army Medical Command, Center for Health Care Contracting (Army) issued Solicitation No. W81K04-11-R-0021 (RFP) for nursing services. A maximum of five multiple award indefinite delivery indefinite quantity (IDIQ) contracts are to be awarded as a result of the solicitation. The Contracting Officer (CO) set the procurement aside

for small businesses and designated NAICS code 621399, Offices of All Other Miscellaneous Health Professionals, with a corresponding \$7 million annual receipts size standard, to the procurement.

The Performance Work Statement (PWS) requires the contractor to provide personal and non-personal nursing services in support of military treatment facilities. Required personnel include registered nurses, licensed practical/vocational nurses, medical assistants, and nurse assistants. (RFP 27.) The specific specialties, locations, and quantities required will be obtained through task orders. The PWS explains that the military health care system provides health care services to beneficiaries at medical treatment facilities located on or near military installations. Military treatment facilities include clinics, hospitals, and medical centers:

Clinics are outpatient facilities offering primary care or simple specialty care (routine exams, tests, treatments). The Clinic may be a stand-alone site or a satellite of a larger Clinic, Hospital, or Medical Center. Army Community Hospitals (ACH) offer more complex, resource-intensive secondary care (e.g. inpatient care, surgery under anesthesia) and primary care at outpatient clinics inside and outside the hospital. Army Medical Centers (MEDCENs) offer tertiary (sophisticated diagnosis/treatment of any ailment), secondary, and primary care, hospital services, preventive services, blood bank, and other services.

(RFP 29.) Under the contract, nurses must provide services in conjunction with other health care providers, such as physicians and support personnel. Nurses must “perform all procedures and duties that are normal to the scope of that provider's particular specialty.” (RFP 28.)

B. The Appeal

On September 26, 2011, InGenesis, Inc. (Appellant) filed a NAICS code appeal with the Office of Hearings and Appeals (OHA). Appellant contends the NAICS code 621399 does not accurately encompass the principal purpose of the services being acquired. Appellant explains that the CO's code is classified under the ambulatory health care subsector, and the *NAICS Manual*¹ indicates that providers of such services do not usually provide inpatient services. According to Appellant, inpatient services are a critical component of the services required by the RFP, particularly in military hospitals and medical centers, as described by the PWS. Appellant also indicates that a joint venture in which it is a partner is currently performing the work required by the RFP, and more than 80% of the nurses it has provided perform only inpatient services at military treatment facilities. Appellant claims NAICS code 622110, General Medical and Surgical Hospitals (with a corresponding \$34.5 million annual receipts size standard) is a better fit for the solicitation because it includes both inpatient and outpatient services of all health care providers at hospitals and medical centers. Accordingly, Appellant requests that OHA change the NAICS code assigned to the procurement to 622110.

¹ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System* (2007), available at <http://www.census.gov/eos/www/naics/> (hereinafter *NAICS Manual*).

C. The Contracting Officer's Response

On October 6, 2011, the CO responded to the appeal. The CO explains that the Army did extensive research to support the application of NAICS code 621399 to the subject procurement. The Army attaches its determination and findings to its response and notes that the findings were reviewed by the Army's small business programs office. The CO claims that NAICS code 622110 does not apply to the procurement because it encompasses licensed general medical and surgical hospitals, which are not what the Army is acquiring through this solicitation. Instead, the Army is seeking various nurses to augment staff in military hospitals. The CO contends NAICS code 621399 is the proper code because it encompasses not only ambulatory care services, but also practitioners “who operate private or group practices in their own offices (e.g., centers, clinics) or *in the facilities of others*,” such as hospitals or medical centers. (CO Response 2.) The CO explains that the Army opted to use this code because it captures “not only the character of the services, but their location as well.” *Id.* The CO concludes that 621399 more accurately encompasses the requirements of the RFP and requests that OHA deny the appeal.

IV. Discussion

Appellant filed its appeal within ten days after issuance of the solicitation. Thus, the appeal is timely. 13 C.F.R. § 134.304(b). Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the NAICS code designation assigned to the solicitation is based on a clear error of fact or law. 13 C.F.R. § 134.314; *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003). The correct NAICS code is that which best describes the principal purpose of the services being procured, 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. 13 C.F.R. § 121.402(b); *Durodyne*, SBA No. NAICS-4536, at 4.

The NAICS code designated by the CO, 621399, Offices of All Other Miscellaneous Health Professionals, “comprises establishments of independent health practitioners (except physicians; dentists; chiropractors; optometrists; mental health specialists; physical, occupational, and speech therapists; audiologists; and podiatrists). These practitioners operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.” *NAICS Manual*, at 816. NAICS code 621399 falls under the ambulatory health care services subsector, 621. Regarding this subsector, the *NAICS Manual* provides: “Industries in the Ambulatory Health Care Services subsector provide health care services directly or indirectly to ambulatory patients and do not usually provide inpatient services. Health practitioners in this subsector provide outpatient services, with the facilities and equipment not usually being the most significant part of the production process.” *NAICS Manual*, at 811.

The NAICS code Appellant proposes, NAICS code 622110, General Medical and Surgical Hospitals:

comprises establishments known and licensed as general medical and surgical hospitals primarily engaged in providing diagnostic and medical treatment (both surgical and nonsurgical) to inpatients with any of a wide variety of medical conditions. These establishments maintain inpatient beds and provide patients with food services that meet their nutritional requirements. These hospitals have an organized staff of physicians and other medical staff to provide patient care services. These establishments usually provide other services, such as outpatient services, anatomical pathology services, diagnostic X-ray services, clinical laboratory services, operating room services for a variety of procedures, and pharmacy services.

NAICS Manual, at 826-27.

The PWS requires the contractor to provide nurses to perform services in conjunction with other health care personnel at Army clinics, hospitals, and medical centers. Appellant's primary contention is that NAICS code 621399 cannot apply to the RFP because the ambulatory care subsector, under which this code falls, does not encompass inpatient services, and the Army is acquiring primarily inpatient nursing services.

However, the NAICS code Appellant proposes, 622110, encompasses entire hospitals and the wide variety of services offered in hospitals. In contrast, the CO explains, and the PWS quite clearly reflects, that the Army is procuring the services of individual nurses with particular specialties to augment the staff of military treatment facilities. The Army is not acquiring whole establishments that have an existing "organized staff of physicians and other medical staff." *NAICS Manual*, at 826.

Although services classified in the ambulatory health care services subsector "do not usually provide inpatient services," *NAICS Manual*, at 811, the Army is certainly acquiring "independent health practitioners," *NAICS Manual*, at 816, to work in its hospitals. Moreover, as the CO points out, health practitioners encompassed by NAICS code 621399 may operate at their own offices or "in the facilities of others, such as hospitals." *Id.* Additionally, the CO is not required to designate a perfect NAICS code. Instead, the CO must assign the NAICS code that best describes the principal purpose of the service being acquired. *See, e.g., NAICS Appeal of Technica Corp.*, SBA No. NAICS-5248, at 13 (2011).

OHA has previously determined that "[i]t is not the location where the services will be performed that is determinative of a procurement's NAICS code designation, but the character of the services themselves." *NAICS Appeal of Med-Nat'l, Inc.*, SBA No. NAICS-4762, at 5 (2006). In *Med-National*, the U.S. Navy sought to award multiple IDIQ contracts for dentists and various dental support personnel to perform services at government treatment facilities. The CO assigned NAICS code 622110, the code proposed by Appellant in this matter, and OHA granted an appeal to change the code to 621210, Offices of Dentists, because the government was "not seeking to procure a hospital, or the services necessary to run a hospital," but was seeking "limited and defined" services. *Id.* at 4.

In *Med-National*, OHA noted that the dental services being acquired would rarely be

provided on an inpatient basis. However, a reading of the whole decision indicates that factor was not determinative. Rather, OHA reversed the CO's NAICS code designation primarily because the services being procured were all dental services, and the NAICS code 621210 encompassed those engaged in the practice of dentistry. *Id.* at 5.

Similarly, in this case the Army is acquiring the services of individual nurses, not the services necessary to operate an entire military treatment facility. These nurses will perform their services in the Army's facilities, as contemplated by the description of NAICS code 621399. The character of the nursing services being provided is better encompassed by NAICS code 621399 than NAICS code 622110. Accordingly, I find the CO's designation of NAICS code 621399 was not clearly erroneous.

V. Conclusion

For the foregoing reasons, the instant appeal is DENIED, and the CO's designated NAICS code 621399, Offices of All Other Miscellaneous Health Professionals, is AFFIRMED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge