

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

NAICS APPEAL OF:

Ferris Optical,

Appellant,

Solicitation No. VA-248-11-RP-0100  
Department of Veterans Affairs  
VA West Palm Beach  
West Palm Beach, Florida

SBA No. NAICS-5285

Decided: September 15, 2011

APPEARANCES

Stephen A. Sachs, Ferris Optical

Eric Sullivan, Contracting Officer, for the Department of Veterans Affairs

Stella L. Ponton, General Manager, The Eyeglass Shop LLC

DECISION<sup>1</sup>

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 NAICS code 446130, Optical Goods Stores is based on a clear error of fact or law.

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<sup>1</sup> Appellant requested confidential treatment to protect its sensitive business information. *See* 13 C.F.R. § 134.205. On issuance of the original Decision, I ordered Appellant to note which portions it wanted me to consider redacting from the published Decision. I now issue the redacted version of the Decision for public release.

### III. Background

#### A. The Solicitation

On June 29, 2011, the U.S. Department of Veterans Affairs (VA) issued the subject solicitation for prescription eyeglass dispensary services. The Contracting Officer (CO) set the procurement aside for Service-Disabled Veteran-Owned Small Businesses (SDVOSB) and designated North American Industry Classification System (NAICS) code 446130, Optical Goods Stores, with a corresponding \$19 million annual receipts size standard, for this procurement.

On July 5, 2011, the CO issued Amendment 0001, changing the NAICS code to 339115, Ophthalmic Goods Manufacturing, with a corresponding 500 employee size standard.

On August 19, 2011, the CO issued Amendment 0005, changing the NAICS code back to NAICS code 446130.

Offers are due on September 20, 2011.

#### B. The Statement of Work

The Statement of Work (SOW) requires the Contractor to provide on-site eyeglass dispensary services to beneficiaries at the VA Medical Center in West Palm Beach, Florida. The VA will provide the Contractor with 305 square feet of space within the Medical Center for patients to select frames, be evaluated and fitted for eyewear. The space will include multiple patient stations and office equipment space.

The Contractor will provide at least one licensed optician and adequate support personnel. The optician will provide optical services to veterans who are eligible for Government-provided eyewear. The optician shall be able to verify prescription specifications. Historical data indicate that the contractor can expect 40 to 60 planned visits a day, from patients who have been examined by VA eye doctors. There will also be dozens of walk-in visits picking up eyeglasses or getting eyeglasses repaired. Patients will select frames and the Contractor personnel will measure pupil distance, segment height, lenses, or whatever else is required for the specific prescription. The optician may provide retail sales to the general public. The optician may provide information on upgrades to prescriptions, but may not engage in "high-pressure sales tactics". The Contractor is also responsible for calling patients and receiving calls from patients during office hours.

The Contractor will provide prescription lenses available in glass, plastic or polycarbonate. The lenses provided will include single vision, bifocal and trifocal lenses, provided in accordance with the American National Standards for Ophthalmic Lenses-Recommendation ANSI Z80.1. The glass lenses must be strengthened by Food and Drug Administration-approved methods for impact resistance. The Contractor will provide any special lens design required.

The Contractor will provide frames in accordance with American National Standard Requirements for Dress Ophthalmic Frames ANSI Z80.5. All items provided shall be new.

The Contractor will provide at the time of proposal submission a sample kit selection of fifty frames of differing styles including men's, women's and unisex in various color selections to allow for different eye sizes, bridge sizes and temples. The Contractor will also submit new frame samples prior to the exercise of any option years. The Contracting Officer's Technical Representative will approve frame samples in writing prior to contract performance.

The Contractor will provide one eyeglass case at no charge with each pair of eyeglasses furnished. The Contractor will provide the facility with a repair kit of replacement screws and nose pads for each pair of contracted frames. The Contractor will correct errors in filling prescriptions within 48 hours after notification.

The solicitation includes a Quality Assurance Surveillance Plan, and the VA will audit the Contractor's performance. The VA will audit records to ensure that orders are held and ordered in batches for multiple days, that orders were processed timely, that billing data were correct, and will review information from patient questionnaires to review trends, complaints, timeliness, and satisfaction rates.

The solicitation requires offerors to submit proposed prices for a number of different types of eyeglasses and lenses.

The Proposal Evaluation Criteria provide that the VA will evaluate each offeror's business plan for providing the required services and eyeglass products. The VA will review the licenses and experience of offerors to determine their ability to provide the required services and eyeglass products. The VA will evaluate the quality of the sample frames provided, and evaluate each offeror's approach to quality control. The VA will also review each offeror's past performance and price.

### C. The Appeal

On August 22, 2011, Ferris Optical (Appellant) filed a NAICS code appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) from the CO's final NAICS code designation. Appellant asserts that the correct code is NAICS code 339115, Ophthalmic Goods Manufacturing.

Appellant argues that the greater part of the value of the contract is in the provision of the prescription eyeglasses, which Appellant estimates will be [XX]% of the overall contract value, and that the requirements for fitting the eyeglasses will represent only [XX]% of the overall contract value. Appellant asserts it bases its estimates on the cost of labor, and considering the total number of staff required (three personnel) and the solicitation's pricing information to determine the relative value of the supplied eyeglasses.

Appellant also argues that using NAICS code 339115 would subject the greatest portion of the value of the solicitation to set-aside procedures and Limitations on Subcontracting

requirements, best serving the purposes of the Small Business Act. Attaching a voluminous amount of material, including solicitations on which OHA has not adjudicated the NAICS code, Appellant asserts that other solicitations with similar requirements have been designated under NAICS code 339115.

Appellant asserts the solicitation calls for ten line items for the base year and each option year. These items are all supplies related to eyeglass manufacturing, and thus should come under code 339115. Appellant argues that their value of optician services is outweighed by that of the eyeglasses to be procured. Appellant further argues that clauses associated with commercial acquisitions are included in the solicitation.

Appellant further argues that while the Statement of Work discusses the provision of optician services, it also deals extensively with the supplies the contractor must provide. Appellant argues that NAICS code 446130 is not the appropriate code because it concerns retail trade, and covers stores where a customer purchases eyeglasses in a retail setting. Here, the VA is examining eligible patients to have eyeglasses prescribed by VA doctors. While the patients are sent to the Contractor for fitting services, this an added benefit to the provision of the eyeglasses. Appellant asserts that the patients are not entering into an economic relationship to purchase eyeglasses. While patients may upgrade their glasses at their own expense, “high pressure sales tactics” are prohibited. Appellant thus argues that the services required to fit the eyeglasses to the patient are not really a part of the solicitation.

Appellant concludes that while there is a service component to the procurement, the primary purpose is to provide finished manufactured eyeglasses. Without the requirement for the supply of manufactured eyeglasses, the requirement for the services would not exist. Appellant argues that the fitting process is part of the manufacturing process, and so the principal purpose of the solicitation is to manufacture eyeglasses.

#### D. The Contracting Officer's Response

On September 8, 2011, the CO responded to the appeal. The CO maintains that NAICS code 446130, Optical Goods Stores, is the correct NAICS code for this procurement. The CO disputes Appellant's assertion that majority of the value of the procurement relates to prescription eyeglasses. The relative value of supplies to services is difficult to determine due to the fact that different businesses will allocate costs and classify the value of work in different ways. The CO asserts it is not possible to determine the appropriate NAICS code based upon one business's assertion of its relative costs.

The CO further asserts that Appellant fails to address the relative importance of the components of the procurement making up the end item being procured. The solicitation bundles together services and supplies in the price list to enable individual patient billing. The CO asserts that the services in this procurement, including customer interactions and personal service, are of greater importance than the supplies. The VA furnishes healthcare services to veterans, and while supply items are important, they are not more important than the services which furnish the items. The services which involve seeing patients, managing patient visits, and dispensing, fitting, adjusting, and fixing eyeglasses are the primary purpose of the contract.

The CO disputes Appellant's assertion that the use of NAICS code 339115 would subject the greatest portion of the contract to set-aside procedures and best conform to the requirements regarding Limitations on Subcontracting. The CO asserts that while this may be true for Appellant, it cannot speak for other businesses with different business models which may allocate costs in different ways. Appellant's estimated percentage value for services and supplies in the solicitation cannot be considered determinative.

The CO further states that while Appellant had produced copies of other solicitations which with similar requirements carrying the 339115 designation, NAICS code 446130 has historically been used for this requirement at this VA installation.

The CO also asserts that while Appellant mentions the use of commercial items clauses in the solicitation, that services are expressly included in the definition of commercial items at FAR 2.101.

The CO further argues while Appellant asserts that the majority of the items mentioned are for supplies, that the SOW and the Quality Assurance Surveillance Plan indicate that the primary purpose of the solicitation is to provide services. The quantity of text devoted to a particular item is not a reasonable means to determine the primary purpose of a requirement.

The CO also argues a retail sales code is appropriate here because the contractor will be providing all of the functions typically associated with a retail store to veteran patient customers, including the fitting of eyeglasses. The SOW provides that the Contractor may also pursue the opportunity of providing retail sales to the public.

The CO further asserts Appellant's argument that the fitting of eyeglasses is part of the entire eyeglass manufacturing process is without support. The CO further asserts Appellant ignores the critical services related to managing patient visits.

The CO asserts Appellant erred in stating that only three personnel would be required for the contract. The CO asserts that this is the absolute minimum of personnel required, the actual number is likely to be higher, and the current incumbent has five full-time personnel. There will also be off-site employees, creating, grinding and shipping lenses, and performing administrative tasks. However, VA is not setting a number of personnel, but rather defining the requirements to be met and seeking proposals for meeting those requirements.

The CO further attaches a copy of an August 12, 2011 letter from the Department of Labor (DOL). After reviewing the solicitation, DOL determined that this procurement is not primarily for supplies, but is primarily for services and utilizes service employees to a substantial degree. DOL thus concluded that this solicitation is subject to the Service Contract Act.

The CO concludes by stating that this is not a solicitation for the manufacture of eyeglasses, but for the dispensing of eyeglasses to veterans, the principal purpose of which is to see patients, manage patient visits, dispense, fit, adjust, and fix eyeglasses.

### E. The Eyeglass Shop Response

On September 5, 2011, The Eyeglass Shop, LLC (TES) filed a response to the appeal. TES supports the CO's designation. TES asserts the principal purpose of this procurement is to furnish eyeglasses to veterans who require them and are eligible for assistance. The Contractor is to provide on-site eyeglass dispensary services to beneficiaries. NAICS code 339115 does not call for the manufacture of eyeglasses in a retail setting, which this procurement calls for.

TES further argues that under Florida law the final responsibility for verifying the accuracy of the prescription lenses dispensed and the fit of the eyewear is that of an optician, and not an ophthalmic manufacturer. Fla. Stat. §§ 484.001, 481.002.

TES also states that NAICS code 446130 is appropriate because it is a retail code, and the optical goods store located within the West Palm Beach VA Medical Center required by this procurement may also be open to the public as well as to VA patients and thus fit the definition of retail stores.

### IV. Discussion

Appellant filed its appeal within ten days after issuance of Amendment 0005 to the solicitation, which redesignated NAICS code 446130 as the appropriate NAICS code for this procurement. 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.

The correct NAICS code is that which best describes the principal purpose of the goods or services being procured, in light of the industry description in the *NAICS Manual*,<sup>2</sup> 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, NAICS code 446130, Optical Goods Stores, covers:

[E]stablishments primarily engaged in one or more of the following: (1) retailing and fitting prescription eyeglasses and contact lenses; (2) retailing prescription eyeglasses in combination with the grinding of lenses to order on the premises; and (3) selling nonprescription eyeglasses.

Cross-References. Establishments primarily engaged in—

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<sup>2</sup> Executive Office of the President, Office of Management and Budget, *North American Industry Classification System (2007)*, available at [www.census.gov/eos/www/naics/](http://www.census.gov/eos/www/naics/) (*NAICS Manual*).

Grinding lenses without retailing lenses—are classified in U.S. Industry 339115, Ophthalmic Goods Manufacturing;

The private or group practice of optometry, even though glasses and contact lenses are sold at these establishments — are classified in Industry 621320, Offices of Optometrists; and

Retailing eyeglasses and contact lenses via mail-order—are classified in U.S. Industry 454113, Mail-Order Houses.

*NAICS Manual*, at 578.

Appellant's requested NAICS code, 339115, Ophthalmic Goods Manufacturing, covers:

[E]stablishments primarily engaged in manufacturing ophthalmic goods. Examples of products made by these establishments are prescription eyeglasses (except manufactured in a retail setting), contact lenses, sunglasses, eyeglass frames, and reading glasses made to standard powers, and protective eyewear.

Cross-References. Establishments primarily engaged in—

Manufacturing molded glass lens blanks—are classified in U.S. Industry 327212, Other Pressed and Blown Glass and Glassware Manufacturing;

Manufacturing molded plastics lens blanks—are classified in U.S. Industry 326199, All Other Plastics Product Manufacturing; and

Retailing and grinding prescription eyeglasses—are classified in Industry 446130, Optical Goods Stores.

*NAICS Manual*, at 495.

A review of the SOW establishes that the purpose of this procurement is to provide eyeglass dispensary services to eligible veterans at the VA Medical Center in West Palm Beach, Florida. The SOW calls for much more from the Contractor than merely the delivery of manufactured eyeglasses. The Contractor is to provide at least one optician, who will work out of a space provided by the VA at the Medical Center. The Contractor will schedule patient visits and perform the essential services of dispensing, fitting, adjusting and repairing the eyeglasses provided to the patients. The Contractor must correct errors in the eyeglasses provided within 48 hours. The space provided by the VA for the Contractor's operations may also be open to the public for the purchase of eyeglasses in a retail setting.

In other words, the solicitation requires the Contractor to operate an optical goods store, performing all of the functions typically associated with such an establishment. The eligible veterans and members of the public will come in with their prescriptions, and receive

prescription eyeglasses which the Contractor will fit to their individual specifications. The veterans' eyeglasses will be paid for under this procurement, while members of the public will pay the Contractor directly. Thus, the services required here are in essence those of retailing and fitting prescription eyeglasses to the eligible veterans, precisely the services covered in the *NAICS Manual's* description of code 446130.

Conversely, the *NAICS Manual* provides that NAICS code 339115 covers the manufacture of ophthalmic goods themselves, and nothing else. Nothing in the description of NAICS code 339115 covers the services of fitting eyeglasses to individual patients and correcting errors in initial orders. Nor does the description of code 339115 cover the tasks of running the eyeglass shop, scheduling patients, and providing ophthalmic products to the patient's order. The *NAICS Manual* descriptions specifically excludes the retailing of prescription eyeglasses from the description of 339115, stating that this is covered by code 446130, and the description for code 446130 states that grinding lenses without retailing them is covered by code 339115.

Appellant's arguments to the contrary are all meritless. Appellant's estimates of the relative values of services and eyeglasses are mere assertions, unsupported by the solicitation. Appellant's assertion that only three personnel will be needed to perform the contract is also an unsupported assertion. Appellant's estimates are, as CO pointed out, based only upon its own business model, and are not binding on the VA or any other offeror. The VA is not mandating a particular workforce for the Contractor here, beyond the requirement that there be at least one optician. Rather, the VA is defining a requirement and seeks proposals to meet them.

Appellant's argument that NAICS code 339115 would best serve the purposes of the Small Business Act is a mere unsupported assertion. Appellant does not explain why this code would do so, and such an assertion cannot overcome the fact that this SOW calls for the services provided under code 446130.

Appellant's assertion that the solicitation calls for ten line items which are all supplies ignores the fact that for each of the line items, for which offerors must submit prices, the services provided by the Contractor required to deliver the eyeglasses to the patient are necessarily included in the price. Therefore, Appellant's argument that these line items are only for products is without foundation. Further, Appellant's argument that there are commercial items clauses through the solicitation is inapposite. As the CO noted, the definition of commercial items includes services. FAR 2.101.

Appellant's submission of other unreviewed solicitations for similar procurements classified under NAICS code 339115 is also without merit. NAICS classifications in other procurements are not of great probative value. *NAICS Appeal of Eagle Design and Management, Inc.*, SBA No. NAICS-4521, at 5-6 (2002); *aff'd sub nom. Eagle Design and Management, Inc. v. United States*, 57 Fed. Cl. 271 (2002)). This is also true of the CO's attempt to rely on this VA's installation's historical use of code 446130. The decision in a NAICS code appeal must be based upon the requirements of the solicitation at issue. Further, the regulation no longer contains a provision directing the use of other solicitations as a source for determining the proper NAICS code. 76 Fed. Reg. 5680, 5683 (Feb. 2, 2011) (removing the third sentence of 13 C.F.R.

§ 121.402(b)). The solicitations Appellant submits cannot overcome the fact that this procurement calls for the provision and fitting of prescription eyeglasses, precisely the goods and services covered by NAICS code 446130.

Appellant's argument that the dispensing, fitting, adjusting, and fixing of eyeglasses required by the SOW is merely an added benefit to the provision of eyeglasses, and that this procurement is thus an ophthalmic goods procurement, is simply contradicted by the SOW. The services to be provided here are a primary and vital part of the solicitation. Were this a procurement for the VA to purchase frames, lenses, etc. for a VA optical goods store, without seeking the services of dispensing, fitting, adjusting, and fixing eyeglasses, then 339115 would be the appropriate code. But this procurement requires extensive services in the provision of eyeglasses, and thus the appropriate code is 446130.

It is true that this Office has previously ruled that a solicitation for providing eyeglasses to veterans was properly classified under NAICS code 339115. *NAICS Appeal of Rochester Optical Manufacturing Co.*, SBA No. NAICS-4577 (2003). There, however, it cannot be certain that the solicitation had exactly the same requirements as here, and there the Judge had a formal statement from the CO that the supplies to be provided represented 71% of the contract value. Nevertheless, *Rochester* fails to adequately consider the service component for delivering eyeglasses, and failed to fully consider the description of NAICS code 446130 and compare it to the solicitation requirements. Further, in *NAICS Appeal of Opti-Serve Lens Laboratory*, SBA No. NAICS-4687 (2005), OHA found that a similar procurement which included the provision of optical examinations was primarily a services procurement, and properly classified under NAICS code 621320, Offices of Optometrists. I must conclude that *Rochester* is not applicable here, as the SOW in this case clearly requires extensive services in the provision of the eyeglasses, and thus is more properly categorized under NAICS code 446130.

I thus conclude that the Appellant has failed to meet its burden of establishing that the CO's NAICS code designation was based on clear error of fact or law. I therefore deny the appeal, and hold the appropriate NAICS code for this procurement is 446130, Optical Goods Stores, with a corresponding \$19 million annual receipts size standard.

#### V. Conclusion

For the foregoing reasons, the instant appeal is DENIED, and the CO's designated NAICS code 446130, Optical Goods Stores, is AFFIRMED.

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

CHRISTOPHER HOLLEMAN  
Administrative Judge