

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

NAICS APPEAL OF:

InGenesis, Inc.,

Appellant

Solicitation No. W81K04-11-R-0018
U.S. Army Medical Command
Center for Health Care Contracting

SBA No. NAICS-5296

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 621111, Offices of Physicians (Except Mental Health Specialists), to a procurement for physician 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-0018 (RFP) for physician 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 621111, Offices of Physicians (Except Mental

Health Specialists), with a corresponding \$10 million annual receipts size standard, to the procurement.

The Performance Work Statement (PWS) requires the contractor to provide physician services in support of military treatment facilities. Required personnel include registered medical doctors and doctors of osteopathy. (RFP 25.) The specific specialties, locations, and quantities required will be obtained through task orders. Enclosure 5 lists the typical physician specialties that will be required. Twenty-five specialties are listed, including psychiatry. (RFP 47-48.)

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 26.) Physicians must provide services in conjunction with other health care providers, such as other physicians and support personnel. Physicians “shall perform all procedures and duties that are normal to the scope of that provider's particular specialty.” (RFP 25.)

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 621111 does not accurately encompass the principal purpose of the services being acquired. Appellant first contends that the code cannot apply because it excludes psychiatrists and the RFP specifically requires the contractor to provide psychiatrists. In fact, Appellant explains that a joint venture in which it is a partner is currently performing the work required by the RFP, and 73% of the physicians it has provided are psychiatrists.

Appellant next 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 indicates that of the physicians provided under the current

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/](http://www.census.gov/eos/www/naics/) (hereinafter *NAICS Manual*).

contract, 19% perform only inpatient services at military treatment facilities, and another 60% perform both inpatient and outpatient services. 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 physicians, including psychiatrists, at hospitals and medical centers. Accordingly, Appellant requests that OHA change the NAICS code assigned to the procurement to 622110.

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 621111 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 seeking through this solicitation. Instead, the Army is seeking various physicians to augment staff in military hospitals. The CO contends NAICS code 621111 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 also disagrees with Appellant's assessment that psychiatrists are a significant component of the RFP requirements. The CO contends psychiatrists make up only a small portion of the overall requirements. The CO estimates that only 19% to 24% of services required by each military treatment facility are psychiatrist services. The CO thus claims that 76% to 81% of the total RFP requirements are the services of medical doctors and doctors of osteopathy engaged in general or specialized medicine or surgery. The CO concludes that 621111 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, 621111, Offices of Physicians (Except Mental Health Specialists):

comprises establishments of health practitioners having the degree of M.D. (Doctor of Medicine) or D.O. (Doctor of Osteopathy) primarily engaged in the

independent practice of general or specialized medicine (except psychiatry or psychoanalysis) or surgery. 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 812. NAICS code 621111 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 physicians 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 621111 cannot apply to the RFP because the RFP requires a significant amount of psychiatric services, which are specifically excluded by NAICS code 621111. Appellant claims that of the physicians provided under the predecessor contract, 73% were psychiatrists. The CO, on the other hand, contends psychiatric services will make up only a small portion of the services to be provided under the RFP: approximately 19% to 24% of the total labor requirements. According to the CO, the majority of services to be provided are those of general medical doctors, doctors of osteopathy, and surgeons.

The CO is not required to designate a perfect NAICS code. *See* 13 C.F.R. § 121.402(b); *NAICS Appeal of Technica Corp.*, SBA No. NAICS-5248, at 13 (2011). In a recent case, OHA approved the procuring agency's assignment of an administrative services NAICS code to a solicitation even though the PWS required additional work that was not encompassed by that NAICS code. OHA noted: “It is clear that the great breadth of services required here means that no one designation can be a perfect fit.” *NAICS Appeal of AllSource Global Mgmt., LLC*, NAICS-5292, at 7 (2011). OHA emphasized that the proper NAICS code “best describes the principal purpose” of the procurement. *Id.* (citing *NAICS Appeal of Computer Cite*, SBA No.

NAICS-5010 (2008)).

Here, Appellant claims a majority of the services required by the RFP will be psychiatric services, whereas the CO contends psychiatric services represent only a small portion of the services to be provided. Because the contracts resulting from the RFP will be IDIQ contracts, it is not yet possible to determine precisely the percentage of psychiatric services that will ultimately be acquired. Nonetheless, a fair reading of the solicitation, upon which my decision must be based, supports the CO's assertion that psychiatric services are not the majority of services to be acquired. The RFP lists twenty-five physician specialties that may be required. (RFP 47-48.) Although this list is not comprehensive, psychiatry is the only mental health specialty on the list. Thus, it would be difficult to conclude that psychiatry or mental health specialties represent the principal purpose of the RFP. Instead, the list includes many varied physician specialties,² which supports the conclusion that the principal purpose of the procurement is to acquire specialized physician services generally, not to acquire psychiatric services specifically. Thus, even though the PWS does require some psychiatric services, I find the NAICS code assigned by the CO, which covers "health practitioners having the degree of M.D." properly captures the principal purpose of the RFP.

Appellant's next contention is that the ambulatory care subsector, under which NAICS code 621111 falls, does not encompass inpatient services, and the Army is acquiring a significant amount of inpatient physician 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 doctors 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 "health practitioners having the degree of M.D.," *NAICS Manual*, at 812, to work in its hospitals. Moreover, as the CO points out, health practitioners encompassed by NAICS code 621111 may operate at their own offices or "in the facilities of others, such as hospitals." *Id.*

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 NAICS code proposed by Appellant in this matter), and OHA granted

² The other twenty-four specialties on the list are: general and family medicine, neurosurgeon, emergency medicine, allergy and immunology, endocrinology, gastroenterology, ophthalmology, orthopedics, otolaryngology, hematology and oncology, radiology, general surgery, internal medicine, neurology, pulmonary disease, pediatrics, anesthesiology, obstetrics and gynecology, psychiatry, plastic surgery, urology, dermatology, preventive medicine, and occupational medicine.

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 doctors, not the services necessary to operate an entire military treatment facility. These physicians will be performing their services in the Army's facility, as contemplated by the description of NAICS code 621111. Although psychiatrists' services will be required, they are only one of twenty-five categories of physician required by this solicitation. The character of the physician services being provided is better encompassed by NAICS code 621111 than NAICS code 622110. Accordingly, because the Army is procuring the services of individual physicians who specialize in many types of medicine, I find the CO's designation of NAICS code 621111 was not clearly erroneous.

V. Conclusion

For the foregoing reasons, the instant appeal is DENIED, and the CO's designated NAICS code 621111, Offices of Physicians (Except Mental Health Specialists), is AFFIRMED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge