

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

NAICS APPEAL OF:

Dentrust Optimized Care Solutions,

Appellant,

Solicitation No. W912QG-16-R-0002

U.S. Department of the Army  
United States Property & Fiscal Office for  
South Carolina

SBA No. NAICS-5761

Decided: July 13, 2016

APPEARANCES

Theodore P. Watson, Esq., Nicole L. Carter, Esq., Meghan F. Leemon, Esq., Watson & Associates, LLC, Aurora, Colorado, for Appellant

James O. Robinson, \***I** Contracting Officer, United States Property & Fiscal Office for South Carolina, Columbia, South Carolina

Corey L. Tomlinson, Esq., Gressley, Kaplin & Parker LLP, Toledo, Ohio, for Lost Creek Holdings, LLC d/b/a All-STAR Health Solutions

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DECISION

I. Introduction and Jurisdiction

On June 16, 2016, the U.S. Department of the Army (Army), United States Property and Fiscal Office for South Carolina, issued Request for Proposals (RFP) No. W912QG-16-R-0002 seeking a contractor to provide “commercial Dental Services consisting of dental examinations and dental treatments” for soldiers in the South Carolina Army National Guard (SCARNG). (RFP, Performance Work Statement (PWS) § 1.1.) The RFP was issued as a procurement of commercial items pursuant to Federal Acquisition Regulation (FAR) part 12. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 621210, Offices of Dentists, with a

corresponding size standard of \$7.5 million in average annual receipts. Proposals were due July 20, 2016, but the CO stayed the proposal deadline pending the outcome of this appeal. (RFP, Amendment 0002.)

On June 27, 2016, Dentrust Optimized Care Solutions (Appellant) filed the instant appeal. Appellant contends that the CO clearly erred in selecting NAICS code 621210. Instead, Appellant asserts, the CO should have assigned NAICS code 621498, All Other Outpatient Care Centers, with a size standard of \$20.5 million in annual receipts. For the reasons discussed *infra*, the appeal is denied.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides appeals of NAICS codes under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant timely filed the instant appeal on June 27, 2016.<sup>1</sup> Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. The RFP

The RFP states that the contractor will provide 23 event days per year at McEntire Joint National Guard Base (JNGB) in Eastover, South Carolina, and up to 14 event days per year at SCARNG armories or facilities throughout the state of South Carolina. (PWS §§ 1.4.1, 1.4.2, 5.1, and 5.2.) The 23 event days held at McEntire JNGB will consist of “providing bitewings, radiographs, panographs and dental treatments in a mobile or static environment.” (*Id.* § 1.4.1.) For the up to 14 event days held elsewhere, in addition to the dental services rendered at McEntire JNGB, the contractor also must enter dental exam information into the Army's Dental Classification System (DENCLASS) and perform “all other necessary events to support the dental services provided to the SCARNG soldiers.” (*Id.* §§ 1.4.2 and 5.2.) During each of the event days, the contractor is expected to service 50 soldiers hourly. (*Id.* §§ 5.1 and 5.2.)

The RFP explains that the Army has four classifications of dental readiness ranging from “Worldwide Deployable with no further treatment required” (Class 1) to “Non-deployable with no examination documented within the past 12 months” (Class 4). (*Id.* § 1.2.) One of the procurement's objectives is to upgrade SCARNG soldiers who are currently in dental Class 3 status to Class 2. (*Id.* §§ 1.2 and 1.3.)

The RFP requires the contractor to “provide all personnel, equipment, tools, materials, supervision, and quality control necessary” to perform the contract, except for any resources specifically identified as being government furnished. (*Id.* § 1.1.) According to the PWS, “[t]he Government will not provide any property, materials, equipment or support services during the performance of the 14 event day or 23 event day periods.” (*Id.* § 3.1.) However, “[a]ll utilities in

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<sup>1</sup> Ordinarily, a NAICS code appeal must be filed within 10 calendar days after issuance of the solicitation. FAR 19.303(c)(1); 13 C.F.R. §§ 121.1103(b)(1) and 134.304(b). In this case, 10 calendar days after June 16, 2016 was June 26, 2016. However, because June 26, 2016 was a Sunday, the appeal was due the next business day: June 27, 2016. 13 C.F.R. § 134.202(d)(1)(ii).

the facility will be available for the contractor's use in the performance of this contract.” (*Id.* § 3.2.)

### B. *NAICS Manual*<sup>2</sup> Descriptions

The NAICS code selected by the CO, 621210, Offices of Dentists:

comprises establishments of health practitioners having the degree of D.M.D. (Doctor of Dental Medicine), D.D.S. (Doctor of Dental Surgery), or D.D.Sc. (Doctor of Dental Science) primarily engaged in the independent practice of general or specialized dentistry or dental 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. They can provide either comprehensive preventive, cosmetic, or emergency care, or specialize in a single field of dentistry.

*NAICS Manual*, at 833.

The NAICS code advocated by Appellant, 621498, All Other Outpatient Care Centers:

comprises establishments with medical staff primarily engaged in providing general or specialized outpatient care (except family planning centers, outpatient mental health and substance abuse centers, HMO medical centers, kidney dialysis centers, and freestanding ambulatory surgical and emergency centers). Centers or clinics of health practitioners with different degrees from more than one industry practicing within the same establishment (*i.e.*, Doctor of Medicine and Doctor of Dental Medicine) are included in this industry.

*Id.* at 841-42.

The *NAICS Manual* provides illustrative examples of establishments included in NAICS code 621498. The examples are outpatient biofeedback centers and clinics, outpatient pain therapy centers and clinics, outpatient community health centers and clinics, and outpatient sleep disorder centers and clinics. *Id.* at 842.

The description of NAICS code 621498 also cross references other NAICS codes. It states: “Centers and clinics of health practitioners from the same industry primarily engaged in the independent practice of their profession are classified in Industry 62111, Offices of Physicians; Industry 621210, Offices of Dentists; and Industry Group 6213, Offices of Other Health Practitioners.” *Id.*

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<sup>2</sup> Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2012)*, available at <http://www.census.gov>.

### C. Appeal

Appellant contends that the CO erred in selecting NAICS code 621210 because “[s]ervices under NAICS code 621210 are limited to a ‘single field of dentistry’ in an established facility where the Government furnishes adequate work space, equipment, supplies, and materials as needed to accomplish the work.” (Appeal at 7, citing *NAICS Manual*.) The instant RFP, however, requires the contractor to provide the workspace and all equipment and supplies. The services called for under the RFP, moreover, are not limited to a single field of dentistry. They include information technology, surgery, pre-treatment evaluation of records in military systems, and uploading data in military databases. These services are therefore broader and “wholly inconsistent with the operation of a private dental office or a dentist working in a government facility under a professional services contract.” (*Id.*) Appellant notes further that the contractor is required to “insure processing 50 soldiers per hour” and to provide services at multiple locations throughout South Carolina. (*Id.* at 9, citing PWS §§ 5.1 and 5.2.) Accordingly, the RFP “requires that the contractor possess multiple sets of mobile equipment, mobile offices, technology systems, etc.” (*Id.*) Given the broader nature of these services and the fact that the contractor must provide “virtually all resources”, the CO should have assigned NAICS code 621498. (*Id.* at 8.)

Appellant explains that prior to filing this NAICS appeal, it attempted to persuade the CO to change the NAICS code. The CO responded that one of the reasons he determined NAICS code 621210 best represents the requirements was a similar solicitation issued five years earlier. This reasoning, Appellant contends, is faulty because “the codes assigned to other procurements are entitled to little weight, particularly if those other procurements were not themselves the subject of a NAICS code appeal to OHA.” (*Id.* at 10, quoting *NAICS Appeal of DCS Corp.*, SBA No. NAICS-5703, at 5 (2016).)

Appellant attached six exhibits to its appeal: (1) the RFP; (2) Appellant's letter requesting that the CO change the NAICS code; (3) the CO's response to Appellant's request; (4) recent procurements using NAICS code 621210; (5) a picture of a mobile office environment; and (6) an email from 2012.

### D. CO's Response

On July 5, 2016, the CO responded to the appeal. The CO states that he selected NAICS code 621210 for this RFP because the principal purpose of the procurement is to obtain dental examinations and dental treatments. (CO's Response at 1-2.) The fact that such services may be performed in a mobile dental office or with the contractor's equipment is irrelevant. “Regardless of the setting, regardless of using whoever's equipment, the examinations and treatments are the principal purpose of the solicitation.” (*Id.* at 2.)

### E. All-STAR's Response

On July 8, 2016, Lost Creek Holdings, LLC d/b/a All-STAR Health Solutions (All-STAR) responded to the appeal. All-STAR supports the CO's choice of NAICS code 621210 and urges OHA to deny or dismiss the appeal.

All-STAR maintains that Appellant mischaracterizes NAICS code 621210 as applying only to practitioners engaged in a single field of dentistry. Appellant is incorrect, All-STAR asserts, and OHA has previously recognized that NAICS code 621210 “includes all types of dentistry”. (All-STAR Response at 4-5, quoting *NAICS Appeal of Med-National, Inc.*, SBA No. NAICS-4762, at 4 (2006).) Appellant's suggestion that NAICS code 621210 is unsuitable for this procurement because the contractor will perform other tasks in addition to dentistry is equally meritless. All-STAR maintains that these additional tasks are “secondary supportive activities that are necessarily attendant to the primary purpose of the Solicitation.” (*Id.* at 4.)

All-STAR also questions whether Appellant has standing to bring the instant appeal. According to All-STAR, Appellant does not qualify as a small business under NAICS code 621210 or under NAICS code 621498. (*Id.* at 5-6.)

#### F. DHMS's Response

On July 11, 2016, Dental Health Management Solutions (DHMS) responded to the appeal. DHMS contends that the appeal has no merit and should be denied.

DHMS objects to the documents Appellant attached to the appeal petition, particularly attachments (2) and (6). OHA should give no weight to these documents, DHMS argues, because the documents are conclusory, self-serving, and do not shed light on which NAICS code is appropriate for this procurement. (DHMS Response at 2-3.)

DHMS argues that Appellant has failed to prove any error in the CO's choice of NAICS code. Appellant incorrectly construes NAICS code 621210 as applying only to practitioners in a single field of dentistry. Rather, NAICS code 621210 “contemplates either comprehensive or specialized dental services” and thus includes providers engaged in “comprehensive preventative, cosmetic, or emergency care or those which specialize in a single field of dentistry and not just a single field.” (*Id.* at 3 (emphasis in original).) Further, Appellant improperly focuses on the “means and methods of delivery”, such as whether dental services will be provided in a mobile environment. (*Id.* at 4.) Such issues are immaterial to determining the principal purpose of the procurement, DHMS maintains.

#### G. Appellant's Motion s to Reply

On July 11, 2016, the date of the close of record, Appellant moved to reply to the CO's and All-STAR's responses, and attached copies of its proposed replies. Appellant argues that there is good cause to permit a reply because the CO's and All-STAR's responses contain inaccuracies. Appellant also requests leave to respond to All-STAR's allegation that Appellant lacks standing to bring this appeal.

I agree that Appellant should have an opportunity to address the question of standing, which was raised for the first time in All-STAR's response. However, Appellant has not shown good cause to reply more broadly to the CO's and All-STAR's responses. Under applicable regulations governing NAICS code appeals, a reply to a response is not permitted unless OHA so

directs. 13 C.F.R. § 134.309(d). No such direction occurred here. Accordingly, Appellant's replies are ADMITTED as they pertain to the issue of standing, but are otherwise EXCLUDED from the record. *NAICS Appeal of T3 TigerTech*, SBA No. NAICS-5674, at 2 (2015); *NAICS Appeal of Allserv, Inc.*, SBA No. NAICS-5629, at 7 (2014).

With regard to the issue of standing, Appellant asserts that All-STAR's allegation is premised on the notion that Appellant is affiliated with other concerns. Appellant, though, does not concede such affiliation, and it is not clear that Appellant would exceed the \$20.5 million size standard even if Appellant were affiliated with these concerns. (Reply to All-STAR's Response, at 6-7.) Further, OHA cannot properly decide questions of affiliation which have not first been raised in the context of a size determination. (*Id.* at 7-8.) I agree with Appellant that All-STAR has not shown that Appellant lacks standing to appeal. Accordingly, All-STAR's request to dismiss the appeal for lack of standing is DENIED.

### III. Discussion

#### A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must show that the CO's NAICS code designation is based upon 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). SBA regulations do not require the CO to select the perfect NAICS code. *NAICS Appeal of Evanhoe & Assocs., LLC*, SBA No. NAICS-5505, at 14 (2013). Rather, the CO must assign the NAICS code that best describes the principal purpose of the product or service being acquired in light of the industry descriptions in the *NAICS Manual*, the description in the solicitation, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being acquired. FAR 19.303(a)(2); 13 C.F.R. § 121.402(b). OHA will not reverse a NAICS code designation “merely because OHA would have selected a different code.” *NAICS Appeal of Eagle Home Med. Corp.*, SBA No. NAICS-5099, at 3 (2009).

#### B. Analysis

Appellant has not met its burden of proving that the CO's NAICS code designation is clearly erroneous. As a result, this appeal must be denied.

As the CO and interveners emphasize in their responses to the appeal, the instant RFP calls for the contractor to provide dental exams and dental treatments to SCARNG soldiers. Section II.A, *supra*. Such services fall squarely within NAICS code 621210, Offices of Dentists. Section II.B, *supra*. Indeed, the *NAICS Manual* specifically states that “Centers and clinics of health practitioners from the same industry primarily engaged in the independent practice of their profession are classified in Industry 62111, Offices of Physicians; Industry 621210, Offices of Dentists; and Industry Group 6213, Offices of Other Health Practitioners.” *Id.* Further, OHA considered a substantially similar situation in *NAICS Appeal of Med-National, Inc.*, SBA No. NAICS-4762 (2006), and determined that NAICS code 621210 was the appropriate code. In *Med-National*, the solicitation stated that the contractor would “supply dental assistants, dental

hygienists, dentists, and dental laboratory technicians to staff various facilities offering dental services to active duty military personnel and other eligible beneficiaries,” and that the contractor would provide these dental services “at Department of Defense or U.S. Coast Guard dental treatment facilities, medical treatment facilities, branch dental clinics or other dental activities within eleven designated states.” *Med-National*, SBA No. NAICS-4762, at 1-2. OHA concluded that NAICS code 621210 best described the principal purpose of that solicitation because “the services sought are all dental services, and the great majority of services will be those of dentists and their assistants.” *Id.* at 4. Similarly, in the instant case, NAICS code 621210 is the correct NAICS code for this procurement based on the work described in the RFP, the industry descriptions in the *NAICS Manual*, and OHA case precedent.

Contrary to Appellant's suggestions, the fact that the instant RFP requires additional services such as inputting dental exam information into DENCLASS does not establish that a different NAICS code should apply. Such services are ancillary to the practice of dentistry, and it is settled law that “the mere fact that a procurement calls for incidental or ancillary services does not justify classifying the procurement based upon the ancillary services, even if those ancillary services are necessary to the procurement.” *NAICS Appeal of Noble Supply & Logistics*, SBA No. NAICS-5748, at 7 (2016) (internal citations and quotations omitted).

Appellant's contention that NAICS code 621210 is incorrect because the contractor must supply its own mobile equipment or mobile offices is likewise unavailing. The *NAICS Manual* makes clear that NAICS code 621210 encompasses dental practitioners that either “operate private or group practices in their own offices (*e.g.*, centers, clinics) or in the facilities of others.” Section II.B, *supra*. Thus, the location where dental services are performed does not affect whether NAICS code 621210 is applicable. OHA reached this same conclusion in *Med-National*, explaining that “[i]t is not location where the services will be performed that is determinative of a procurement's NAICS code designation, but the character of the services themselves.” *Med-National*, SBA No. NAICS-4762, at 3.

Because Appellant has not established that NAICS code 621210 is improper for this RFP, it is unnecessary to consider the NAICS code Appellant advocates or any other alternate code or size standard. OHA has long held that “OHA will not assign a different NAICS code to a procurement unless the CO's choice of NAICS code is shown to be clearly erroneous.” *NAICS Appeal of Pac. Shipyards Int'l, LLC*, SBA No. NAICS-5464, at 7 (2013); *see also NAICS Appeal of Nat'l Elec. Coil*, SBA No. NAICS-5666, at 8 (2015); *NAICS Appeal of Env't. Int'l Ltd.*, SBA No. NAICS-5628, at 7 (2014).

#### IV. Conclusion

For the above reasons, the appeal is DENIED. The CO correctly selected NAICS code 621210, Offices of Dentists, for this procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge