

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

NAICS APPEAL OF:

Salvadorini Consulting, LLC,

Appellant,

RFQ No. 36C26019Q0573

U.S. Department of Veterans Affairs
Network Contracting Office 20
Spokane, Washington

SBA No. NAICS-6020

Decided: August 8, 2019

APPEARANCES

Matthew T. Schoonover, Esq., John M. Mattox II, Esq., Haley E. Claxton, Esq., Gregory P. Weber, Esq., Koprince Law LLC, Lawrence, Kansas, for Salvadorini Consulting LLC

Karen R. Rhodes, Contracting Officer, U.S. Department of Veterans Affairs, Spokane, Washington

DECISION

I. Introduction and Jurisdiction

On July 12, 2019, the U.S. Department of Veterans Affairs (VA), Network Contracting Office 20, in Spokane, Washington, issued Request for Quotations (RFQ) No. 36C26019Q0573 seeking to lease one new mobile Computerized Tomography (CT) scanner. (RFQ at 1.) The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and assigned North American Industry Classification System (NAICS) code 334517, Irradiation Apparatus Manufacturing, with a corresponding size standard of 1,000 employees. (*Id.*) The RFQ stated that a waiver of the non-manufacturer rule would apply to this procurement. (*Id.*)

On July 22, 2019, Salvadorini Consulting, LLC (Appellant) filed the instant appeal. Appellant contends that the CO clearly erred in selecting NAICS code 334517, and that the correct NAICS code for this procurement is 621512, Diagnostic Imaging Centers, with an associated size standard of \$15 million average annual receipts. For the reasons discussed *infra*, the appeal is granted in part.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides NAICS code appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within ten calendar days after issuance of the RFQ, so the appeal is timely. Federal Acquisition Regulation (FAR) 19.303(c)(1); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFQ

The Jonathan M. Wainwright Memorial Veterans Affairs Medical Center will lease a new mobile CT scanner for one base year, with two option years. (RFQ at 5.) Required is a minimum 64-slice mobile CT unit, able to perform CT exams of the head, neck, body and extremities, and able to perform 3D CT angiography. (*Id.* at 6.) The CT unit shall include the most current hardware and software, be capable of performing the highest quality CT scans, and have a minimum table capacity of 400 lbs. (*Id.*) The contractor will provide accessories and positioning devices. (*Id.*)

VA personnel will operate the mobile CT scanner. (*Id.* at 7.) However, the contractor will deliver, set up, and test the unit. (*Id.*) The contractor will pay for a Radiation Physicist to inspect the unit upon delivery and at any time maintenance on it would impact radiation output. (*Id.*) Annual testing is also required. (*Id.*) The contractor must provide full-service maintenance and OEM parts and labor. (*Id.* at 6.)

The semi-trailer that houses the CT scanner must allow wheelchair and service access, and include a lead-shielded operator control room and one other room. (*Id.*) It must have a patient lift with guardrails for wheelchair and stretcher patient access, and non-slip stairs with dual handrails. (*Id.*) The contractor will provide all maintenance and parts on the trailer, including heating, electrical, and air conditioning. (*Id.*)

The contractor will provide five days of training for the two VA employees who will operate the unit. (*Id.* at 7.) Price is the sole evaluation factor. (*Id.* at 47-48.)

Amendment 0001 contained a question regarding the NAICS code. There, a prospective offeror inquired:

NAICS Code change: 334517 is a manufacturing code and there are no SDVOSB companies that manufacture CT systems. 621512 is a Service code which better describes the lease requirement for diagnostic imaging centers primarily engaged in producing images of the patient. In fact, NAICS code 621512 has been used for this type of procurement by the VA in the past. Will the VA change the NAICS code under the Solicitation to 621512?

(RFQ Amendment 0001, at 2.) The CO responded:

The Court of Federal Claims has previously determined that rental and leases are considered a supply for purposes of determining applicability of the [non-manufacturer rule]. *Rotech Healthcare, Inc. v. U.S.*, 118 Fed. Cl. 408 (2014). There is a Non-Manufacturer waiver in place for NAICS 334517, applicable to this acquisition as noted on the SF1449 block 20. Therefore, the Government will not change the NAICS.

(*Id.*)

Quotations are due August 9, 2019. (RFQ Amendment 0002.)

B. The Appeal

On July 22, 2019, Appellant filed the instant appeal. Appellant contends that NAICS code 334517 is improper for this procurement, because the RFQ does not call for the contractor to manufacture the mobile CT scanner.

Appellant highlights that NAICS code 334517 is a manufacturing NAICS code. Specifically, firms in this industry are “primarily engaged in manufacturing irradiation apparatus and tubes for applications, such as medical diagnostic, medical therapeutic, industrial, research and scientific evaluation.” (Appeal at 7, quoting *NAICS Manual*¹ at 275.) In the instant case, the contractor will not manufacture the CT scanner. As a result, “the concept of manufacturing doesn't apply here, as the VA isn't instructing offerors to *build* a CT scanner, but instead to simply lease a scanner to the VA.” (*Id.*, emphasis Appellant's.) Appellant argues that OHA has held that manufacturing NAICS codes are inapplicable to procurements for medical equipment rental. (*Id.*, citing *NAICS Appeals of Medical Comfort Systems, et al.*, SBA No. NAICS-5106 (2010).) Further, Appellant observes, the RFQ requires the contractor “to provide extensive services to ensure the scanner's operability and to train technicians on its use.” (*Id.*, citing RFQ at 6-7.) Appellant concludes that a manufacturing NAICS code does not apply to this RFQ, and the CO's choice of NAICS code 334517 here was “clearly erroneous.” (*Id.*)

Regarding the CO's response to the question in Amendment 0001, Appellant maintains that *Rotech*, cited in the response, is inapposite because *Rotech* addressed the circumstances under which the non-manufacturer rule would apply, and “does not mandate the applicability of any particular NAICS code.” (*Id.* at 7.)

Appellant urges that the CO should instead have selected NAICS code 621512, Diagnostic Imaging Centers. This industry specifically encompasses computer tomography (CT-scan) centers which, in Appellant's view, “squarely describes” the work to be performed under this RFQ. (*Id.* at 6-7.) Appellant also asserts that VA has utilized NAICS code 621512 on two other solicitations for “similar services,” although Appellant acknowledges that such other procurements are not dispositive here. (*Id.* at 8, n.4.)

¹ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System — United States (2017)*, available at <https://www.census.gov/econ/isp/index.php>.

C. CO's Response

On July 30, 2019, the CO responded to the appeal. The CO defends her selection of NAICS code 334517, stating:

The princip[al] purpose of this requirement is to lease a mobile CT scanner, a commercial item/supply. The VA is not seeking sources to furnish diagnostic imaging services using contract employees to provide the scanning of patients to the VA. The CT scanner will be 100% operated by VA employees; the contractor will be providing incidental services to the CT scanner (maintenance and initial training as necessary). As the Contracting Officer, I believe the majority of the of the contract is driven by the supply component, therefore, the preponderance of the requirement is a supply and a manufacturing NAICS should be utilized.

(Response at 1.)

The CO maintains that the NAICS code Appellant recommends, 621512, is unsuitable for this procurement. According to the CO, “[w]e are not looking for a technician to perform [diagnostic imaging] services, but for a company to provide the supply item so VA can perform these services for the veteran patient.” (*Id.* at 2.)

D. NAICS Manual Descriptions

The NAICS code designated by the CO, 334517, Irradiation Apparatus Manufacturing, covers:

establishments primarily engaged in manufacturing irradiation apparatus and tubes for applications, such as medical diagnostic, medical therapeutic, industrial, research and scientific evaluation. Irradiation can take the form of beta-rays, gamma-rays, X-rays, or other ionizing radiation.

NAICS Manual at 275. Industries classified under NAICS code 334517 include “[c]omputerized axial tomography (CT/CAT) scanners manufacturing,” “[i]rradiation apparatus and tubes (e.g., industrial, medical diagnostic, medical therapeutic, research, scientific), manufacturing,” and “[i]rradiation equipment manufacturing.” *Id.* at 716 and 802.

The NAICS code Appellant advocates, 621512, Diagnostic Imaging Centers, covers:

diagnostic imaging centers primarily engaged in producing images of the patient generally on referral from a health practitioner.

NAICS Manual at 530. Industries classified under NAICS code 621512 include “[c]omputer tomography (CT-scan) centers,” “[d]ental X-ray laboratories,” and “[u]ltrasound imaging centers.” *Id.* at 716, 732, and 942.

NAICS code 532490, Other Commercial and Industrial Machinery and Equipment Rental and Leasing, covers:

establishments primarily engaged in renting or leasing nonconsumer-type machinery and equipment (except heavy construction, transportation, mining, and forestry machinery and equipment without operators; and office machinery and equipment). Establishments in this industry rent or lease products, such as manufacturing equipment; metalworking, telecommunications, motion picture, theatrical machinery and equipment, or service industry machinery; institutional (i.e., public building) furniture, such as furniture for schools, theaters, or buildings; or agricultural equipment without operators.

NAICS Manual at 458. Industries classified under NAICS code 532490 include “[m]edical equipment (except home health furniture and equipment) rental or leasing.” *Id.* at 825. The *NAICS Manual* reiterates that establishments primarily engaged in “[r]enting medical equipment (except home health equipment), such as electromedical and electrotherapeutic apparatus[,] are classified in Industry 532490, Other Commercial and Industrial Machinery and Equipment Rental and Leasing.” *Id.* at 456.

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

Having reviewed the RFQ, the descriptions in the *NAICS Manual*, OHA's prior decisions, and the arguments of the parties, I must agree with Appellant that the CO clearly erred in selecting NAICS code 334517.

As Appellant emphasizes in its appeal, NAICS code 334517 falls under NAICS sector 33, Manufacturing. Industries in this sector are broadly engaged in the “transformation of materials, substances, or components into new products.” *NAICS Manual* at 143. In the instant case, however, the contractor will not actually manufacture the mobile CT scanner or any of the components thereof, but instead will merely lease such equipment to VA. Section II.A, *supra*. SBA regulations indicate that the rental of equipment is considered a service, not a manufactured product or supply. 13 C.F.R. § 121.406(b)(4). Similarly, OHA has recognized that rental of medical equipment is properly classified under a services, rather than a manufacturing, NAICS code. *NAICS Appeals of Medical Comfort Systems, et al.*, SBA No. NAICS-5106 (2010). Accordingly, because the instant RFQ calls for the lease of a CT scanner, not the creation of the device or the delivery of supplies, the CO clearly erred in assigning NAICS code 334517.

Having concluded that the CO erred in selecting NAICS code 334517, OHA must assign the NAICS code that best describes the principal purpose of the products or services being acquired. Section III.A, *supra*. In making this decision, OHA will consider, but is not limited to, the NAICS codes recommended by the parties. *E.g.*, *NAICS Appeal of Active Deployment Sys., Inc.*, SBA No. NAICS-5712 (2016) (selecting a code not advocated by any litigant).

Appellant argues that NAICS code 621512, Diagnostic Imaging Centers, best describes the required work. As the CO correctly observes, though, the contractor here is not charged with performing any diagnostic imaging services. Instead, VA's own personnel will perform this work, using equipment leased from the contractor. Section II.A, *supra*. While it is true that the contractor will perform some additional services beyond leasing the equipment to VA, the specific services required are very limited and relate solely to the equipment, *e.g.*, testing, maintenance, and training VA personnel to operate the device. *Id.* These are not patient services. Indeed, based on the RFQ, there is no indication the contractor would ever perform diagnostic imaging on patients. Thus, Appellant's recommendation of NAICS code 621512 clearly fails.

I find that the most appropriate NAICS code for this RFQ is 532490, Other Commercial and Industrial Machinery and Equipment Rental and Leasing. According to the *NAICS Manual*, NAICS code 532490 covers:

establishments primarily engaged in renting or leasing nonconsumer-type machinery and equipment (except heavy construction, transportation, mining, and forestry machinery and equipment without operators; and office machinery and equipment). Establishments in this industry rent or lease products, such as manufacturing equipment; metalworking, telecommunications, motion picture, theatrical machinery and equipment, or service industry machinery; institutional (i.e., public building) furniture, such as furniture for schools, theaters, or buildings; or agricultural equipment without operators.

Section II.D, *supra*. Moreover, this industry specifically includes the exact work called for by the RFQ, “[m]edical equipment (except home health furniture and equipment) rental or leasing.” *Id.* The primary purpose of this procurement is to lease medical equipment that is not intended for home health use. Section II.A, *supra*. Accordingly, NAICS code 532490 covers the majority of

the work to be performed by the contractor on this procurement, and is the most appropriate NAICS code for this RFQ.

IV. Conclusion

Appellant has shown that the CO clearly erred in selecting NAICS code 334517, and the appeal is GRANTED to that extent. The most appropriate NAICS code for this procurement is 532490, Other Commercial and Industrial Machinery and Equipment Rental and Leasing, with a corresponding size standard of \$32.5 million average annual receipts. Accordingly, because this decision is being issued before the deadline for receipt of quotations, the CO MUST amend the RFQ to change the NAICS code designation from 334517 to 532490. FAR 19.303(c)(8); *Eagle Home Med. Corp.*, B-402387, March 29, 2010, 2010 CPD ¶ 82.

KENNETH M. HYDE
Administrative Judge