

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

NAICS APPEAL OF:

Lost Creek Holdings, LLC d/b/a
ALL-STAR Health Solutions,

Appellant,

Solicitation No. W912F20R0003
Arkansas Army National Guard

SBA No. NAICS-6050

Decided: April 1, 2020

APPEARANCES

Corey L. Tomlinson, Esq., Robison, Curphey & O'Connell, for Lost Creek Holdings,
LLC d/b/a All-STAR Health Solutions

Edward Porter, Contracting Officer, National Guard Bureau, United States Property &
Fiscal Office, Camp Joseph T. Robinson, Arkansas

Lawrence B. Caplin, CEO, for Dentrust Dental Arkansas, P.C.

DECISION

I. Introduction and Jurisdiction

On March 4, 2020, the United States Property and Fiscal Office for the Arkansas Army National Guard issued Solicitation No. W912JF20R0003 requesting Dental Services. The Contracting Officer (CO) set aside the procurement entirely for small business, and designated North American Industry Classification System (NAICS) code 621498, All Other Outpatient Care Centers, with a corresponding \$22 million annual receipts size standard, as the appropriate code.

On March 12, 2020, Lost Creek Holdings, LLC, d/b/a All-STAR Health Solutions (Appellant) filed the instant appeal challenging the NAICS code designation. Appellant asserts that the correct NAICS code for this procurement is 621210, Offices of Dentists, with a corresponding \$8 million annual receipts size standard. For the reasons discussed *infra*, I GRANT the appeal.

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 solicitation, 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 Performance Work Statement

The Performance Work Statement (PWS) states:

The requirement is for the Arkansas Army National Guard (AR-ARNG) Medical Command (MEDCOM). MEDCOM provides medical readiness services to the AR-ARNG and is located on Camp Joseph T. Robinson in North Little Rock, Arkansas. The requirement is to provide dental exams and dental treatments at Camp Joseph T. Robinson in North Little Rock, Arkansas and mobile dental exams and mobile dental treatments at locations within Arkansas.

PWS, ¶ 1.2.

The Contractor shall provide all personnel, equipment, tools, materials, supervision, and quality control necessary, except as specified in Paragraph 3.0 as Government Furnished, to perform Dental Services, as defined in this PWS.

PWS, ¶ 1.1.

In addressing the special qualifications of the personnel an offeror is required to provide, the PWS specifies Doctors of Dental Surgery, Registered Dental Assistants, and Dental Event Managers. (PWS, ¶¶ 1.4.7.1, 1.4.7.2, 1.4.7.3.) The PWS calls for the performance of Dental Examinations at MEDCOM during the Arkansas National Guard Inactive Duty Training periods (PWS, ¶ 5.1), and the performance of Mobile Dental Examinations throughout the state in conjunction with the Periodic Health Assessments (PHAs) of National Guard troops. (PWS ¶ 5.2). The PWS also calls for Dental Treatments at MEDCOM (PWS, ¶ 5.3), Mobile Dental Treatments at other locations (PWS, ¶ 5.4), and Continuation of Care (post-operative follow-up on all treatments, including root canal and extractions) (PWS, ¶ 5.5).

According to the PWS, offerors must have “working knowledge of Army Regulations 40-501, Standards of Medical Fitness, and 40-35, Dental Readiness & Community Oral Health Protection, and perform comprehensive oral evaluations, digital bitewings, and digital panoramic radiographs.” (PWS, ¶ 5.6.) Offerors must comply with all Arkansas corporate and dental licensing requirements under the Arkansas Dental Practice Act, provide proof they are registered and authorized to provide dental services in Arkansas and be approved by the Arkansas State Dental Board. (PWS, ¶ 5.6.3.) All required employees must be authorized and licensed by the Arkansas Board of Dental Examiners. (*Id.*)

The PWS sets standards for the conduct of dental examinations, including current state of oral health, caries risk assessment, periodontal assessment, and oral cancer screening. (PWS, ¶¶ 5.6.5, 5.6.5.2, 5.6.5.3, 5.6.5.5.) The PWS also sets standards for the performance of dental services generally. (PWS, ¶ 5.7.) A list of the dental procedures authorized under the contract (e.g., fillings, crowns, root canals), and those not authorized (e.g., bridges) are identified. (PWS, Appendix A.)

B. The Appeal

On March 12, 2020, Appellant filed the instant appeal. Appellant argues that the correct NAICS code for this procurement is 621210, Offices of Dentists, with a corresponding \$8 million annual receipts size standard. Appellant points to the PWS, which describes the scope of work as providing dental examinations and dental treatments at Camp Joseph T. Robinson and mobile examinations and treatments at other locations within Arkansas. The Contractor must provide all personnel, equipment and tools to perform dental services. (Appeal at 1, citing PWS, ¶¶ 1.1, 1.2.)

Appellant asserts that all healthcare personnel required for this procurement are exclusively dental services personnel. (*Id.*, citing PWS, ¶¶ 1.4.7 through 1.4.7.3.) Appellant maintains this solicitation is exclusively for dental services. (*Id.*) No health practitioners with degrees other than dental degrees are required. (*Id.*) Appellant emphasizes that NAICS code 621498 covers clinics of health practitioners with different degrees from more than one industry i.e., Doctors of Medicine and Doctors of Dental Medicine, practicing within the same establishment, while this solicitation requires only dental personnel. (*Id.*, at 2.) Therefore, the CO failed to select the NAICS code which best describes the principal purpose of the service being acquired and failed to give primary consideration to the industry descriptions in the NAICS Manual. (*Id.*) Where 100% of contract value will be for dental services, the appropriate designation is 621210. (*Id.*, citing FAR 19.103.)

Appellant asserts that Arkansas National Guard exclusively used NAICS code 621210 for its dental solicitations from 2004 through 2012. (*Id.*) Only in 2013 did it begin using NAICS code 621498. (*Id.*) Appellant maintains it is well known that Dentrust Dental International, Inc. (Dentrust) is a large business unable to perform small business set-aside contracts designated under NAICS code 621210. (*Id.*) Appellant contends that Dentrust has been requesting National Guard COs to use NAICS code 621498. (*Id.*) Appellant believes this NAICS code designation has been made to specifically give advantage to a single contractor. (*Id.*) Appellant proffers spreadsheets, which seek to show the history of AR-ARNG's other procurements for dental services. (*Id.*, at 2-3.)

Appellant then cites to a number of OHA cases, without further argument or discussion: *NAICS Appeal of American West Laundry, Inc.*, SBA No. NAICS-5842 (2017); *NAICS Appeal of Escience & Technology Solutions, Inc.*, SBA No. NAICS-5586 (2014); *NAICS Appeal of SAC Cleaners, Inc.*, SBA No. NAICS-5468 (2013); *NAICS Appeal of Phoenix Environmental Design, Inc.*, SBA No. NAICS-5212 (2011); *NAICS Appeal of First American Systems and Services, LLC*, SBA No. NAICS-5119 (2010); and *NAICS Appeal of Panacea Consulting, Inc.*, SBA No. NAICS-4582 (2003). A review of them establishes that they

are all cases where OHA found that the CO's NAICS code designation did not reflect the requirements of the solicitation, and therefore granted the NAICS code appeal.

C. The CO's Response

On March 25, 2020, the CO responded to the appeal. In his response, the CO asserts that NAICS code 621210 covers services performed in their own dental offices, while NAICS code 621468 covers outpatient care services and freestanding ambulatory care centers. (Response, at 1.) The dental examinations are to be performed as part of the overall PHAs of National Guard troops in Arkansas. (*Id.*) PHAs are full physical examinations, performed by military medical doctors. (*Id.*) However, certain services, such as dental, are contracted. (*Id.*)

Furthermore, the CO notes that a prior solicitation for dental services had been designated under NAICS code 621498 without being questioned. (*Id.* at 2.) The CO concludes by vigorously asserting that his decisions are meant to treat all potential offerors fairly and to maximize competition. (*Id.*) Conversely, the CO asserts that Appellant's proposed code would restrict competition. (*Id.*)

D. Dentrust's Response

On March 30, 2020, Dentrust Dental Arkansas, P.C. (DDA) filed a Response to the appeal. DDA asserts that a previous Arkansas Army National Guard procurement for the same services was designated under NAICS code 621498 upon the advice of SBA. (DDA Response, at 1.) DDA submits a copy of an email documenting consultations with SBA over this NAICS code designation. (*Id.*, at 1, 3.)

DDA further asserts that this procurement will require more specialized personnel, such as Oral Surgeons, Periodontists and Endodontists. (*Id.*) These disciplines require from two to six years of additional education, and separate licensure requirements from ordinary dentists. (*Id.*) Accordingly, a procurement requiring their services should not be classified under Offices of Dentists, but under NAICS 621498, which cover multiple disciplines. (*Id.*) Further, the solicitation requires mobile dental examinations and dental treatments at various locations, while NAICS code 621210 covers services performed in dental offices. (*Id.*, at 2.) These services include the requirement to provide all logistics, equipment, shipping and travel associated with setting up mobile facilities at designated armories throughout the state. (*Id.*) This procurement requires transportation of equipment, x-ray units, mobile healthcare practices, internet and supplies for complete setup and breakdown upon conclusion of the examinations. (*Id.*, at 3.) NAICS code 621210 contemplates sending a patient to a dentist's office for treatment, it does not include providing mobile services. (*Id.*) Further, DDA asserts the logistics involved with providing the services at various locations represent more than 50% of contract value. (*Id.*) DDA concludes by asserting that similar procurements for dental services for the National Guard in several states have received the NAICS code 621498 designation and documents this with copies of solicitations. (*Id.*, at 4.)

E. Appellant's Reply

On March 31, 2020,¹ Appellant filed a Motion to Reply to DDA's Response, together with the Reply. Appellant maintains that all the personnel required for this contract are dental, and that this contract is properly designated under NAICS code 621210. (Reply, at 2.) Appellant contends it is a mischaracterization of NAICS 621210 to assert it covers a single field of dentistry. (*Id.*, at 3.) Further, it is a mischaracterization to consider all the logistical support services required to carry the mobile dentistry operations in making a NAICS code designation, because they would apply to services performed in dental offices as well. Similarly, the location of the services to be performed is irrelevant to the designation. (*Id.*, at 4, citing *NAICS Appeal of Med-National, Inc.*, SBA No. NAICS-4762 (2006).) Appellant maintains that NAICS code 621498 is not appropriate, because this procurement does not cover “[C]enters or clinics of health practitioners with different degrees from more than one industry practicing within the same establishment.” This solicitation seeks only dental services. (*Id.*, at 5.) Appellant argues that OHA precedent supports a designation of NAICS code 621210 for a procurement for dental services. (*Id.*, at 5-8, citing *NAICS Appeal of Dentrust Optimized Care Solutions*, SBA No. NAICS-5761 (2016).)

F. NAICS Manual² Descriptions

The CO's designated NAICS Code 621498, All Other Outpatient Care Centers, comprises:

[E]stablishments 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.

Illustrative Examples:

- Outpatient biofeedback centers and clinics
- Outpatient pain therapy centers and clinics
- Outpatient community health centers and clinics
- Outpatient sleep disorder centers and clinics

NAICS Manual, at 529.

¹ Appellant's Motion and Reply were filed after the close of business on March 30, 2020. Therefore, they are counted as filed on the next business day. 13 C.F.R. § 134.204(b)(2).

² Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2017)*, available at <http://www.census.gov>.

Under Cross-References:

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.

Appellant's preferred code, NAICS Code, 621210, Offices of Dentists, comprises:

[E]stablishments 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.

Id., at 524.

Corresponding Index Entries included under this code are Dental Surgeons' offices (e.g., centers, clinics) and Dentists' Offices (e.g., centers, clinics). *Id.*, at 732.

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 3 (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 13 (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 purchased. 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

I grant Appellant's Motion for Leave to Reply. It was filed very shortly after DDA's Response, and responds to arguments not previously raised in the record.

Having examined the PWS, the descriptions in the *NAICS Manual*, and Appellant's appeal, I find the CO committed clear error in designating NAICS code 621498 for the instant procurement.

As a preliminary note, Appellant's arguments that procurements for the same or similar services were designated under NAICS code 621210 and other solicitations have recently been improperly designated under NAICS code 621498, the CO's argument that recent procurements for dental services have been designated under NAICS code 61498 without objection, and Dentrust's argument that similar procurements have received NAICS code 621498 designation, are all irrelevant, because those procurements are not before OHA for consideration and will not be considered in this analysis. See *NAICS Appeal of Curtin Maritime, Corp.*, SBA No. NAICS-5947 (2018); *NAICS Appeal of U.S. Small Business Administration*, SBA No. NAICS-5899 (2018); *NAICS Appeal of Arrowhead Contracting, Inc.*, SBA No. NAICS-5725 (2016).

The PWS here seeks to procure dental examinations and dental treatments for soldiers of the Arkansas National Guard. Section II.A, *supra*. The personnel required are Doctors of Dental Surgery, Registered Dental Assistants and Dental Event Managers. *Id.* These personnel must meet the standards of the Arkansas State Dental Board and Board of Dental Examiners. *Id.* The PWS identifies the dental services to be performed, and those that are excluded. *Id.* The services required are all dental services, such as oral examinations, caries and periodontal examinations, fillings, crowns and root canals. *Id.*

However, the CO's NAICS code designation is for outpatient care, covering health care generally, and including clinics with both Doctors of Medicine and Doctors of Dentistry. Section II.F, *supra*.

OHA has addressed this issue before. In *NAICS Appeal of Med-National, Inc.*, SBA No. NAICS-4762 (2006) (*Med-National*), a CO had designated a procurement for dental services under NAICS code 622110, General Medical and Surgical Hospitals. *Med-National*, at 1. OHA held that the designated code was clearly not appropriate, because the procurement was not for a hospital, or the services necessary to run a hospital, or treatment for a wide variety of medical conditions. *Id.*, at 4. Rather, dental services were the sole subject of the procurement, and so OHA held NAICS code 621210 was the appropriate code. *Id.* Further, OHA held the location where the services to be performed was irrelevant in making a NAICS code designation. *Id.* It is the character of the services themselves, not the location of their performance, which is decisive in making a NAICS code designation. (*Id.*)

In *NAICS Appeal of Dentrust Optimized Care Solutions*, SBA No. NAICS-5761 (2016) (*Dentrust*), a CO had designated a procurement for dental services under NAICS code 621210, and the Appellant sought NAICS code 621498, arguing that the contractor would have to provide services in information technology, surgery, and evaluation of records to perform the contract, and so a code limited to the single field of dentistry was inadequate to classify the procurement. *Dentrust*, at 1-3. OHA held that the services required were dental services, which fell squarely within NAICS code 621210. *Id.*, at 6. The *NAICS Manual* provides that health practitioners from the same industry engaged in the practice of their profession are classified

under that profession, specifically identifying NAICS code 621210. *Id.* at 7. The fact that ancillary services were required did not justify classifying the procurement based upon those ancillary services, even if those services were necessary to the procurement. *Id.*, at 6-7, citing *NAICS Appeal of Noble Supply & Logistics*, SBA No. NAICS-5748, at 7 (2016). Accordingly, OHA upheld the designation of NAICS code 621210.

I find the CO's arguments in favor of his designation of NAICS code 621498 unpersuasive. The fact that dental services being performed are part of an overall physical examination does not alter the principal purpose of this procurement, which is only dental services. Section II.A, *supra*. As the CO noted, most of the physical examination will be performed by military medical doctors, while the dental services portion of the PHA are contracted, as is the case under this procurement. Section II.C, *supra*. This supports the 621210 designation. Also, the mere fact that the services are being performed outside of the dentists' physical offices does not alter the fact that they are exclusively dental services and can be provided in the facilities of others, consistent with the 621210 designation. The *NAICS Manual* description of code 621210 specifically states that the practitioners covered by that code can perform their services "in the facilities of others."

Similarly, I find DDA's arguments unpersuasive. Again, the location of the services is irrelevant. The fact that they are being performed in various locations is not germane, rather it is the character of the services themselves which is dispositive. *Med-National*, at 4. Here, the services to be performed are dental services, which supports the 621210 designation. DDA's mere assertion that the logistical requirements of delivering the services at various locations constitute a majority of the contract value is unsupported by anything in the record. As noted in *Dentrust*, the fact that ancillary services are required does not support classifying the procurement based upon those ancillary services, even if those services were necessary to the procurement. *Dentrust* at 6-7. Even the cost of those ancillary services is irrelevant, it is the principal purpose of the procurement which governs. *NAICS Appeal of Supplycore, Inc.*, SBA No. NAICS-5866, at 10 (2017). Further, DDA's reliance upon the recommendations of SBA officials in the field is misplaced. Guidance given by SBA officials on NAICS code designations is not binding on OHA and cannot sustain a NAICS code designation. *NAICS Appeal of JBS International, Inc.*, SBA No. NAICS-5021, at 7 (2008).

In line with the clear language of the PWS and established OHA precedent, I hold the appropriate code for this procurement is 621210, Offices of Dentists. The services sought are exclusively dental services and fit squarely within the code. Further, the *NAICS Manual* specifically provides that clinics of health practitioners all from the dental industry should be classified under NAICS code 621210. The fact that more specialized dental practitioners are required by the solicitation does not support a different designation. NAICS code 621210 specifically covers specialized dentistry and dental surgery. There is nothing in the PWS to support a designation for Outpatient Care Centers providing generalized or specialized outpatient care. In fact, the PWS only identifies the special qualifications of the personnel as Doctors of Dental Surgery, Registered Dental Assistants, and Dental Event Managers. Section II.A, *supra*. As noted above, the procured services all fall squarely within the category of dental services, provided by Office of Dentists. The fact that the services will be performed at remote locations does not alter the designation, because it is the character of the services itself that

determines the NAICS code designation (and the *NAICS Manual* description of code 621210 provides that services may be provided in the facilities of others). Here, those services are dental services.

Accordingly, I find that Appellant has met its burden of establishing a clear error of fact or law in the CO's NAICS code designation and that the CO's designation of NAICS code 621498 is incorrect. The correct NAICS code for this procurement is 621210, Offices of Dentists.

IV. Conclusion

For the above reasons, the appeal is GRANTED. The CO clearly erred in assigning NAICS Code 621498 to this procurement. The appropriate NAICS Code is 621210, Offices of Dentists, with a corresponding \$8 million annual receipts size standard.

Consequently, because OHA is issuing this decision before the bid proposals are due, the CO MUST amend the RFP to change the NAICS code from 621498 to 621210. FAR § 19.303(c)(8); 13 C.F.R. § 134.318(b); *see e.g., NAICS Appeal of Noble Supply & Logistics*, SBA No. NAICS-5886 (2018).

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

CHRISTOPHER HOLLEMAN
Administrative Judge