

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

NAICS APPEAL OF:

Millennium Health & Fitness, Inc.,

Appellant,

Solicitation No. 75P00120R00111

Department of Health and Human Services

SBA No. NAICS-6094

Decided: April 20, 2021

APPEARANCES

Scott A. MacGriff, Esq., Dickinson Wright, PLLC, Washington, D.C., for Appellant

Sandra L. Kpadeh, Contracting Officer, Program Support Center, Acquisition Management Services, U.S. Department of Health and Human Services, Bethesda, Maryland

DECISION

I. Introduction and Jurisdiction

On March 12, 2021, the U.S. Department of Health and Human Services (HHS) issued Request for Proposals (RFP) No. 75P00120R00111 for “Wellness and Fitness Staffing.” The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 713940, Fitness and Recreational Sports Centers, with a corresponding size standard of \$8 million average annual receipts.

On March 22, 2021, Millennium Health & Fitness, Inc. (Appellant) filed the instant appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant maintains that the CO clearly erred in selecting NAICS code 713940, and that the appropriate code for this procurement is either 541611, Administrative Management and General Management Consulting Services, with an associated size standard of \$16.5 million average annual receipts, or 561320, Temporary Help Services, with an associated size standard of \$30 million average annual receipts. For the reasons discussed *infra*, the appeal is denied.

OHA decides appeals of NAICS code designations 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 RFP, so the appeal is timely. 13 C.F.R. §§

121.1103(b)(1) and 134.304(b); Federal Acquisition Regulation (FAR) 19.103(a)(1). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFP

The CO issued the RFP on March 12, 2021. On April 2, 2021, the CO issued Amendment 4 to the RFP, which included a “Revised Solicitation-0001”; responses to questions from prospective offerors; and updated versions of the Performance Work Statement (PWS), labor category definitions, and pricing template.¹ The revised PWS describes the procurement as being for “Wellness and Health Promotion Support Services.” (Revised PWS, at 1.)

According to the revised PWS, the contractor will “provide wellness and health promotion support services for approximately 28 to 30 Wellness and Health Promotion programs, which includes managing the daily operations of 9 Fitness Centers” at designated Service Provision Sites (SPS). (*Id.* at 2.) An SPS site “may include a worksite wellness location where wellness and health promotion services are offered (e.g. wellness staff or group exercise classes) or a fully operational fitness center.” (*Id.*) The contractor will “operate [Wellness/Fitness (W/F)] centers and programs according to the needs of each SPS.” (*Id.* at 3.) Further, contractor will deliver “direct care, services, and education” in both “individualized and group settings.” (*Id.* at 2.)

The revised PWS states that the contractor will be required to perform the following services:

- Provide a [W/F] Coordinator who will be responsible for managing the daily operations of the fitness centers in accordance with [the RFP]
- Maintain other support staff who are properly oriented/trained/security cleared
- Maintain [a] readily available sub pool to meet fluctuating workload demands
- Fulfill vacant positions timely including submission of accurate and complete security clearance paperwork in accordance with [the RFP].
- Schedule group fitness classes to meet customer demands and avoid cancellations
- Deliver the labor hour support services identified in the work plan

(*Id.* at 3.) Services available at the W/F Centers include: wellness and pre-participation screenings; fitness assessments and individualized exercise programs; group exercise and

¹ Unless otherwise indicated, citations in this decision are to the version of the RFP as revised by Amendment 4.

specialty classes; muscular/strength and cardiovascular training; health promotion; health education seminars; motivational challenges; wellness fairs; and walk/run events. (*Id.* at 4.)

According to the revised PWS, the contractor will be responsible for conducting physical fitness programs that adhere to the guidelines of the American College of Sports Medicine; maintaining gym equipment; leading group exercise and specialty classes; and performing other related services to promote health and fitness “consistent with agency goals and the needs and interests of individual employees.” (*Id.* at 4-6.) Contractor staff must be certified and qualified to teach any classes they instruct, and must be capable of meeting the physical requirements of the work. (*Id.* at 5, 12.)

The contractor will be required to submit various reports to HHS, including a “[W/F] Center Client Report,” in approved format. (*Id.* at 8.) Furthermore, all contractor staff must complete suitable background investigations. (*Id.* at 36.)

HHS will provide “oversight and technical direction to the Contractor to assure services are delivered, following parameters agreed on between [HHS] and its customer agencies.” (*Id.* at 3.) In addition to its own needs, HHS provides occupational health services to other Federal agencies through inter-agency agreements (IAAs). (*Id.* at 1.) HHS may request that the contractor “create, review, or edit health campaign materials, implementation plans, standard operating procedures, program materials, policies, outreach initiatives, health fair plans, and related resources” prior to the implementation of such programs. (*Id.* at 6.)

An attachment to the revised RFP described the required labor categories to be filled by contractor staff, including: W/F Coordinators and Assistant Coordinators, W/F Specialists, Personal Trainers, Exercise Physiologists, Health Promotion Coordinators, Fitness Center Clerks, Group Exercise Instructors, Specialty Class Instructors, MindBody Class Instructors, Massage Therapists, Health Education Specialists, and Registered Dietitians. (Revised RFP, Attach. J.2.) The description of the “W/F Coordinator” labor category states, in part:

Must plan, develop, coordinate and implement all activities of the W/F center or program, which may include managing daily operations, opening and closing, ordering and restocking cleaning/office supplies, scheduling wellness programs and classes, and preparing reports. Oversees designated wellness/fitness program(s), ensuring that all services under the agreements have been delivered and reported to [HHS].

(*Id.* at 1.) According to the revised RFP's attached “Security Clearance and Badging Information,” the contractor must submit a complete badging package for each new hire. (Revised RFP Attach. J.7, at 1.) The security adjudication process may take up to 60 days. (*Id.* at 2.)

The revised RFP indicates that HHS contemplates the award of a single indefinite-delivery / indefinite-quantity (ID/IQ) contract. (Revised RFP at 3.) Specific work will be defined in task orders issued after award of the base contract. (*Id.* at 8.) Orders will be priced on a time-

and-materials or labor hour basis. (*Id.* at 3.) The period of performance for the contract is July 1, 2021 to June 30, 2026, assuming all options are exercised. (*Id.* at 8.)

Proposals are due April 22, 2021. (RFP, Amendment 3.)

B. Appeal

On March 22, 2021, Appellant filed the instant appeal. Appellant asserts that the CO erred by “merely carrying over” the NAICS code assigned to a prior contract, and by not assigning the NAICS code that properly corresponds to the work described in the RFP. (Appeal at 4.) In Appellant's view, the CO's selected code, 713940, “contemplates the operation and management of fitness facilities” but the contractor here will not perform such work. (*Id.*) Rather, Appellant maintains, the RFP merely calls for the contractor to provide “qualified staffing.” (*Id.* at 5.) The “correct” NAICS code for this procurement therefore is 541611. (*Id.* at 2.)

Appellant explains that it has been the incumbent on two predecessor contracts for similar work. In 2010, HHS issued solicitation number 10-233-SOL-00265 PSC28383 (“the 2010 solicitation”) under NAICS code 541611. (*Id.* at 2-3.) Appellant recounts that, pursuant to this contract, Appellant was responsible for providing “staffing and scheduling services,” setting up membership accounts, and collecting proceeds on behalf of HHS. (*Id.* at 3.) The contract was terminated in 2013. (*Id.*)

Appellant then also was the successful offeror for solicitation number 13-233-SOL-00070 (“the 2013 solicitation”). (*Id.*) Appellant asserts that the latter contract was largely a “continuation of the prior contract,” except with an important change to the Performance Work Statement. Specifically, the 2013 solicitation's Performance Work Statement was divided into two task orders. Task Order 1 called for the contractor to provide “staffing and scheduling” and Task Order 2 “was a zero dollar task order that allowed [Appellant] to collect membership dues to provide to [HHS] management of the facilities.” (*Id.*) The structure of the contract is significant, Appellant continues, because:

This meant that [Appellant] “owned” the management staff, that is, the [W/F] Coordinator, and [HHS] provided under Task Order 1 additional staffing if needed and group exercise classes. In order to do this, [HHS] had to change the NAICS code and put the contract under NAICS code 713940 — Fitness Center Management, even though Task 1 did not include any oversight or management by [Appellant]. Critically, [HHS] Program/Account/Operations Managers provided oversight and management.

(*Id.*)

Appellant asserts that the instant RFP differs from the 2013 solicitation because HHS will “maintain[] management of the facilities, and the contractor is simply to provide qualified staffing.” (*Id.* at 4.) As a result, the instant RFP is more analogous to the 2010 solicitation, which utilized NAICS code 541611. (*Id.* at 5.)

Appellant contends that NAICS code 713940 is not suitable for the instant RFP because it contemplates both the operation and management of fitness facilities. (*Id.* at 4.) However, the PWS here does not require the contractor to “negotiate or manage the IAA's, negotiate contracts for supplies, negotiate contracts for building leases or utilities, or, negotiate or manage the services of staff that fall outside the scope of the PWS.” (*Id.* at 4-5.) Rather, HHS will retain operation and management duties, and will “directly manage[.]” all contractor staff supplied under the contract. (*Id.*) The contractor will not have oversight of the work and will be “required to submit forward looking schedules and operational timetables to [HHS] for approval.” (*Id.* at 5.) Appellant maintains that the contractor's role is only to provide qualified staffing. (*Id.*)

Appellant argues that 541611 is the best NAICS code for this procurement because it covers “a full range of administrative, human resource, [and] . . . logistics” services. (*Id.*, quoting *NAICS Manual*² at 472.) NAICS code 541611 also was assigned to the 2010 solicitation, which, like the instant RFP, did not require the contractor to perform managerial services. For example, the instant RFP requires the contractor to confer with “[HHS] management and agency person[nel] to advise on helping [HHS] to fulfill its requirement under” IAAs, and to work with “individual agencies to achieve agency specific goals and outcomes.” (*Id.*)

In the alternative, Appellant proposes that NAICS code 561320, Temporary Help Services, also covers the work in the RFP. (*Id.*) Appellant explains that this code applies when a contractor is “primarily engaged in supplying workers to clients' businesses for limited periods of time to supplement the working force of the client. The individuals provided are employees of the temporary help services establishment.” (*Id.*, quoting *NAICS Manual* at 492.) Appellant asserts that the instant RFP does not require the contractor to directly supervise employees at the client work site. Moreover, none of the labor categories in the RFP are for “management or supervisory personnel” and, instead, are exclusively for “wellness and fitness staffing support.” (*Id.*)

Lastly, Appellant declares that it will be harmed if NAICS code 713940 applies to the RFP, because Appellant exceeds the size standard for that code. (*Id.* at 5-6.) Appellant will, however, be eligible to compete for award under either NAICS code 541611 or NAICS code 561320. (*Id.*) Accompanying its appeal, Appellant submitted copies of the instant RFP and the 2013 solicitation.

C. CO's Response

On April 7, 2021, the CO responded to the appeal. The CO defends her choice of NAICS code 713940, and argues that Appellant has shown no error of fact or law in that designation. (CO's Response at 1.) Furthermore, on April 2, 2021, the CO issued Amendment 4 to the RFP, which revised the PWS and the labor category definitions and made various other changes to the solicitation. (*Id.* at 2, citing Amendment 4.) Under the amended RFP, it is even clearer that 713940 is the proper NAICS code.

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>.

The CO explains that the RFP, as amended, seeks a contractor to provide “wellness and health promotion support services for approximately 28 to 30 wellness and health promotion programs, which includes managing the daily operations of 9 fitness centers.” (*Id.*, quoting revised PWS at 2-3.) The contractor must provide W/F Coordinators who will be “responsible for managing the daily operations of the fitness centers” in accordance with the revised RFP. (*Id.*, quoting Amendment 4.) Specifically, a W/F Coordinator must:

plan, develop, coordinate and implement all activities of the [W/F] Centers or program, which may include opening and closing the [W/F] Centers, ordering and restocking cleaning and office supplies, scheduling wellness programs and classes, and preparing reports.

(*Id.*) HHS will provide “oversight and technical direction” to the contractor to ensure that services are rendered in accordance with the RFP. (*Id.*)

Based on the revisions to the RFP, the CO insists that OHA should uphold the designation of NAICS code 713940 for the procurement. (*Id.* at 3.) Appellant's contention that NAICS code 713940 is improper because the RFP does not require the contractor to operate or manage fitness facilities is plainly incorrect. (*Id.*) Rather, the revised RFP makes clear that the contractor, through its W/F Coordinators, is responsible for managing the daily operations of 9 fitness centers in addition to the 28-30 wellness and health promotion programs. (*Id.* at 3-4.) Appellant's assertion that contractor staff are to be directly managed by HHS also is inaccurate. HHS will provide general guidance and technical direction to the contractor, but is not permitted to supervise, direct, or otherwise control the actions of a contractor's employees. (*Id.* at 4.)

The CO rejects Appellant's contention that HHS will manage and operate the fitness facilities merely because the contractor lacks “authority to manage, negotiate, amend, or oversee” the IAAs between HHS and other federal agencies. (*Id.*) Such IAAs are inherently governmental activities and thus are reserved exclusively for government personnel, not contractors. (*Id.*)

Because Appellant has not shown that NAICS code 713940 is improper, OHA need not, and should not, consider alternative NAICS codes. (*Id.*, citing *NAICS Appeal of MicroTechnologies, LLC*, SBA No. NAICS-5489, at 5 (2013).) In any event, though, the alternative NAICS codes Appellant recommends are not suitable for this RFP. (*Id.* at 5-6.) NAICS code 541611 is not appropriate because HHS does not seek a contractor to provide consulting services. Further, HHS itself already “performs the necessary budgeting, financial planning, and strategic and organizational planning” for this effort. (*Id.* at 5.) Appellant's second alternative NAICS code, 561320, Temporary Help Services, is inconsistent with the RFP's requirement that the contractor provide “regular, steady state staff who must be security cleared.” (*Id.* at 6.) Given that HHS incurs a significant cost per security clearance, it is not “feasible or cost effective” to utilize temporary workers to fulfill these requirements. (*Id.*) The CO reiterates that the assigned NAICS code, 713940, best describes the work called for in the RFP. (*Id.*)

D. Supplemental Appeal

On April 7, 2021, Appellant moved to supplement its appeal so as to address RFP Amendment 4. Appellant asserts that HHS revised the PWS and labor categories in an effort to correct the defective NAICS code selection. (Supp. Appeal at 1.) Nevertheless, the revised RFP “is nothing but subterfuge” because the underlying work remains unchanged. (*Id.*)

According to Appellant, the CO attempted to amend the RFP to align with the NAICS code by “selectively changing the description of the work”; however, the revised RFP “fails to include information necessary and required for actually bidding on the work, much less successfully performing the contract.” (*Id.*) The revised PWS replaces “Fitness Staffing” with “Health Promotion Services,” and states that the primary role of the contractor “is to facilitate the wellness and health promotion support” as specified in the revised PWS. (*Id.* at 2, citing Revised PWS, at 1.) The role of HHS is changed from stating that the agency “manages” the wellness and health promotion programs and centers to “maintains” these same programs and centers. (*Id.* citing Revised PWS, at 2.) The revised RFP omits “center management” and “management of day to day operations” from the responsibilities of HHS. (*Id.*) The contractor will now be responsible for “managing the daily operation of 9 Fitness Centers.” (*Id.*) The revised PWS no longer states that HHS will be responsible for “providing nationwide staffing and oversight of” W/F programs and centers; instead, HHS will provide “oversight and technical direction to the Contractor to assure services are delivered.” (*Id.*)

Notwithstanding these changes, Appellant contends that HHS's “attempt to distance itself from its management role falls flat.” (*Id.*) HHS has not designated management-level personnel in the revised labor categories, and has not provided copies of IAAs “that would permit a Contractor to know what services are required at each Federal agency customer site.” (*Id.* at 3.) Appellant argues that under the revised PWS, HHS even increased its own management role in some functions, including telework, although HHS attempts to avoid characterizing itself as a manager. (*Id.*) Thus, HHS will continue to manage the work covered by the RFP. (*Id.* at 4, citing Revised Labor Categories.) Despite the CO's contention that HHS lacks authority to supervise, direct, or control contractor staff, the RFP does not support this claim. (*Id.* at 5.) Instead, Appellant asserts, HHS maintains daily management control over contractor personnel in several important respects, including: authority over reassignments, approval of telework arrangements, authority over contractor staff working between facilities, control of overtime requests, and the right to remove contractor staff under certain circumstances. (*Id.*)

Appellant complains that the revised PWS attempts to change the responsibilities of the contractor. (*Id.* at 3.) For example, the contractor now is required to “[p]rovide a [W/F] Coordinator who will be responsible for managing the daily operations of the fitness centers,” and to “[d]eliver the labor hour support services identified in the work plan.” (*Id.* at 3-4, citing revised PWS.) In Appellant's view, the revised PWS's requirement for the contractor to provide W/F Coordinators does not comport with the revised labor categories of the RFP. (*Id.* at 4.) The description for the “W/F Coordinator” labor category is flawed because it merely indicates that responsibilities “may include” management activities, and thus are conditional in nature rather than mandatory. (*Id.* at 4.) Appellant protests that the revised PWS does not expressly add or require management activities on the part of the contractor. (*Id.*)

Appellant asserts that NAICS code 713940 remains improper for the revised RFP “because [the revised RFP] does not provide information by which the supposed new management criteria may be bid.” (*Id.* at 5.) The RFP lacks several documents and pieces of information that would be necessary for proper bidding, including information regarding agency policies, procedures, and protocols; equipment inventory information; requirements for office and cleaning supplies; badging requirements; Preventive Task Force screening policies; and training materials and manuals. (*Id.* at 5-6.) Absent this information, the revised RFP is “nothing more than an ill-conceived, last minute, inadequate effort to avoid an adverse ruling in this appeal.” (*Id.* at 6.)

Appellant concludes that NAICS code 713940 contemplates the “operation and management of fitness facilities,” yet the revised RFP reserves the management responsibilities to HHS, instead of the contractor. (*Id.*) The revised RFP still requires the contractor to “provide qualified staffing” to HHS to fulfill its obligations under various IAAs. (*Id.*) Appellant avers that the revised PWS attempts to bind the contractor to manage those IAAs without providing the necessary information. Contractor staff ultimately are still managed by HHS and the contractor is required to submit schedules and timetables to HHS for approval. (*Id.*)

Appellant concludes that NAICS code 541611, or alternatively, NAICS code 561320, best describes the work required by the RFP. (*Id.* at 6-7.)

E. NAICS Manual

The NAICS code chosen by the CO, 713940, Fitness and Recreational Sports Centers, covers:

establishments primarily engaged in operating fitness and recreational sports facilities featuring exercise and other active physical fitness conditioning or recreational sports activities, such as swimming, skating, or racquet sports.

NAICS Manual at 554. Examples of businesses in this industry include: “[p]hysical fitness centers,” “[g]ymnasiums,” “[a]erobic dance or exercise centers,” “[s]wimming or wave pools,” and “[h]andball, racquetball, or tennis club facilities.” (*Id.*) Index entries which refer to NAICS code 713940 include “[a]thletic club facilities, physical fitness,” “[e]xercise centers,” “[f]itness centers,” “[g]yms, physical fitness,” “[h]ealth club facilities, physical fitness,” “[p]hysical fitness centers,” “[p]hysical fitness facilities,” “[r]ecreational sports club facilities,” and “[w]eight training centers.” (*Id.* at 668, 751, 760, 782, 786, 857, and 954.)

The first NAICS code advocated by Appellant, 541611, Administrative Management and General Management Consulting Services, is comprised of:

establishments primarily engaged in providing operating advice and assistance to businesses and other organizations on administrative management issues, such as financial planning and budgeting, equity and asset management, records management, office planning, strategic and organizational planning, site selection,

new business start-up, and business process improvement. This industry also includes establishments of general management consultants that provide a full range of administrative, human resource, marketing, process, physical distribution, logistics, or other management consulting services to clients.

NAICS Manual at 472. Index entries which refer to NAICS code 541611 include consulting related to a variety of fields, such as “[b]usiness management consulting services,” “[b]usiness start-up consulting services,” “[f]inancial management consulting (except investment advice) services,” “[m]edical office management consulting services or consultants,” “[r]eorganizational consulting services,” “[r]ecords management consulting services,” “[s]ite location consulting services,” and “[s]trategic planning consulting services.” (*Id.* at 691, 758, 825, 881, 884, and 917.)

NAICS code 541611 is one of several codes within NAICS sector 54, Professional, Scientific, and Technical Services. The *NAICS Manual* contains the following description of the sector as a whole:

The Professional, Scientific, and Technical Services sector comprises establishments that specialize in performing professional, scientific, and technical activities for others. These activities require a high degree of expertise and training. The establishments in this sector specialize according to expertise and provide these services to clients in a variety of industries and, in some cases, to households. Activities performed include legal advice and representation; accounting, bookkeeping, and payroll services; architectural, engineering, and specialized design services; computer services; consulting services; research services; advertising services; photographic services; translation and interpretation services; veterinary services; and other professional, scientific, and technical services.

This sector excludes establishments primarily engaged in providing a range of day-to-day office administrative services, such as financial planning, billing and recordkeeping, personnel supply, and physical distribution and logistics. These establishments are classified in Sector 56, Administrative and Support and Waste Management and Remediation Services.

(*Id.* at 461.)

The alternative NAICS code Appellant advocates, 561320, Temporary Help Services, which is comprised of:

establishments primarily engaged in supplying workers to clients' businesses for limited periods of time to supplement the working force of the client. The individuals provided are employees of the temporary help services establishment. However, these establishments do not provide direct supervision of their employees at the clients' work sites.

(*Id.* at 492.) Index entries which refer to NAICS code 561320 include “[t]emporary staffing services,” “[c]ontract staffing services,” “[h]elp supply services,” “[o]ffice help supply services” and “[o]utplacement services.” (*Id.* at 719, 788, 842, and 846.)

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. 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 shown that the CO erred in selecting NAICS code 713940 for the instant RFP. Therefore, this appeal must be denied.

A review of the RFP, particularly as revised by Amendment 4, establishes that NAICS code 713940 is an appropriate choice for this procurement. The *NAICS Manual* makes clear that NAICS code 713940 applies when a contractor is engaged in “operating fitness and recreational sports facilities featuring exercise and other active physical fitness conditioning or recreational sports activities, such as swimming, skating, or racquet sports.” See Section II.E, *supra*. Further, according to the *NAICS Manual*, NAICS code 713940 expressly includes fitness centers, athletic clubs, and gymnasiums. *Id.* Here, the revised RFP specifies that the contractor will operate nine fitness centers, and will provide services in support of “28 to 30 Wellness and Health Promotion programs.” Section II.A, *supra*. Activities offered at the fitness centers will include: fitness assessments and individualized exercise programs; group exercise and specialty classes; muscular/strength and cardiovascular training; health promotion; health education seminars; motivational challenges; wellness fairs; and walk/run events. *Id.* The contractor will provide W/F Coordinators who will be “responsible for managing the daily operations of the fitness centers,” and the other required labor categories — such as fitness instructors, dieticians, and massage therapists — likewise directly relate to health and wellness. *Id.* Accordingly, the work contemplated by the revised RFP fits squarely within the *NAICS Manual's* description of NAICS code 713940.

In contending that NAICS code 713940 is incorrect for this RFP, Appellant maintains that NAICS code 713940 requires that the contractor both operate and manage fitness facilities,

but in Appellant's view, it is HHS, rather than the contractor, that will manage the facilities here. Sections II.B and II.D, *supra*. This argument fails because the RFP, as revised by Amendment 4, specifically states that the contractor will not only staff and operate the fitness centers, but also, through the W/F Coordinators, will “manag[e] the daily operations of the fitness centers.” Section II.A, *supra*. HHS will provide “oversight and technical direction to the Contractor,” not itself manage the centers. *Id.* Furthermore, contrary to the premise of Appellant's arguments, the *NAICS Manual's* definition of NAICS code 713940 makes no mention of any required managerial responsibilities. Section II.E, *supra*. Rather, the *NAICS Manual* provides that NAICS code 713940 is appropriate when a contractor is engaged in “operating fitness and recreational sports facilities.” *Id.*

Appellant also argues that HHS will be obliged to manage the fitness centers because the RFP does not provide sufficient information to enable the contractor to do so. Section II.D, *supra*. Again, there is no indication in the *NAICS Manual* that a contractor must carry out all managerial responsibilities in order for NAICS code 713940 to apply. Section II.E, *supra*. But in any event, Appellant overlooks that the instant RFP contemplates the award of an ID/IQ contract, with specific services to be defined in task orders issued after award of the base contract. Section II.A, *supra*. Even supposing, then, that the instant RFP lacks enough information to enable the contractor to manage the fitness centers, this would not establish that HHS itself must manage the centers, as additional information could simply be provided to the contractor later in individual orders.

Appellant also urges the NAICS code assigned here should be the same as was utilized for a predecessor contract, specifically the 2010 solicitation. Section II.B, *supra*. The 2010 solicitation, though, is not before OHA, and it is well-settled law that NAICS code designations made in other, purportedly similar procurements carry little weight in a NAICS code appeal, unless those prior procurements were appealed to OHA. *E.g.*, *NAICS Appeal of Oak Grove Techs., LLC*, SBA No. NAICS-5998, at 9 (2019); *NAICS Appeal of ACE Consulting Servs., LLC*, SBA No. NAICS-5574, at 4 (2014). Accordingly, the CO properly determined the NAICS code for this RFP based on the work contained in this solicitation, rather than relying on the NAICS code used for any previous, and perhaps differently scoped, procurement.

Because Appellant has not demonstrated that NAICS code 713940 is incorrect for this procurement, OHA need not consider the NAICS codes Appellant advocates, or other alternative codes. OHA has repeatedly 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 Taurean General Servs., Inc.*, SBA No. NAICS-6092, at 6 (2021) (quoting *NAICS Appeal of Dentrust Optimized Care Solutions*, SBA No. NAICS-5761, at 7 (2016)); *see also NAICS Appeal of Ascendant Program Servs., LLC*, SBA No. NAICS-5832, at 10 (2017). It is worth noting, however, that neither of the NAICS codes Appellant recommends appear suitable for the instant procurement. OHA has explained that NAICS code 541611 “is an expansive code, covering a broad range of consulting and administrative support services.” *NAICS Appeal of Integrity Consulting Eng'g and Sec. Solutions, LLC*, SBA No. NAICS-5941, at 8 (2018). The RFP here, though, does not indicate that the contractor will provide any “consulting” or “advice” to HHS, nor does the contract primarily involve administrative support, such as financial planning and budgeting, records management, or office planning. Section II.A, *supra*.

Appellant's alternative suggestion, NAICS code 561320, is appropriate when a contractor will provide "personnel for limited periods of time to supplement the work force of the client." *NAICS Appeal of CWU, Inc.* SBA No. NAICS-5226, at 4 (2011). The instant RFP will utilize regular, security-cleared contract staff, not temporary workers, and the contractor will staff and operate the fitness centers, not merely serve to "supplement" HHS's own workforce. Section II.A, *supra*.

IV. Conclusion

Appellant has not demonstrated the CO clearly erred in selecting NAICS code 713940 for this RFP. The appeal therefore is DENIED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d); FAR 19.103(a)(7).

KENNETH M. HYDE
Administrative Judge