

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

NAICS APPEAL OF:

Prime Physicians,

Appellant,

Solicitation No. HT001523R0003

Defense Health Agency

SBA No. NAICS-6185

Decided: January 18, 2023

APPEARANCES

Dr. Chakri Pureti, CEO, Prime Physicians, Sioux City, Iowa

Raul J. Garcia, Contracting Officer, Defense Health Agency, Joint Base San Antonio,
Fort Sam Houston, Texas

DECISION¹

I. Introduction and Jurisdiction

On November 16, 2022, the U.S. Department of Defense, Defense Health Agency (DHA) issued Request for Proposals (RFP) No. HT001523R0003, seeking contractors to provide “professional medical (i.e., clinical) and medical support services to either supplement existing medical staffs or provide full operational services on-site or off-site in support of mission requirements within federal hospitals, clinics, and dental facilities.” (RFP, Performance Work Statement (PWS) at 1.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 622110, General Medical and Surgical Hospitals, with a corresponding size standard of \$47 million average annual receipts.

On November 28, 2022, Prime Physicians (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 622110, and that the appropriate

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA afforded DHA an opportunity to file a request for redactions if desired. OHA now issues this redacted decision for public release.

NAICS code for this procurement is 621111, Offices of Physicians (except Mental Health Specialists), with a corresponding size standard of \$16 million average annual receipts.² For the reasons discussed *infra*, the appeal is granted.

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 timely filed the instant appeal on November 28, 2022.³ Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFP

On November 16, 2022, DHA issued RFP Nos. HT001523R0003 and HT001523R0004 for the “Medical Q-Coded Support and Services — Next Generation (MQS2-NG)” procurement.⁴ RFP No. HT001523R0003 is restricted to small businesses whereas RFP No. HT001523R0004 is not, but the two RFPs otherwise are substantively identical. (RFP No. HT001523R0003, at 65-66.) DHA instructed prospective offerors to “select the MQS2-NG acquisition solicitation (e.g., HT001523R0003 or HT001523R0004) for which they would like to compete and submit an offer in response to that solicitation number only.” (*Id.* at 66.)

RFP No. HT001523R0003 (hereafter, “the RFP”) states that DHA intends to award multiple indefinite-delivery, indefinite-quantity (ID/IQ) contracts for “personal and non-personal services.” (*Id.* at 3.) Specific work will be defined in task orders issued after award of the base contracts. (*Id.* at 3, 32.) The RFP is structured as a procurement of “commercial items” pursuant to Federal Acquisition Regulation (FAR) part 12. (*Id.* at 1.)

The RFP includes twelve Contract Line Item Numbers (CLINs): Physician Services — Personal; Physician Services — Nonpersonal; Dental Services — Personal; Dental Services — Nonpersonal; Ancillary Services — Personal; Ancillary Services — Nonpersonal; Nursing Services — Personal; Nursing Services — Nonpersonal; Medical Support Services — Type I; Medical Support Services — Type II; Other Direct Costs; and Post Award Conference. (*Id.* at 3-13.) According to the RFP's PWS, the contractors will:

² Effective December 19, 2022, SBA increased the size standard associated with NAICS code 621111 from \$14 million to \$16 million. *See* 87 Fed. Reg. 69,118, 69,126 (Nov. 17, 2022).

³ Ordinarily, a NAICS code appeal must be filed within 10 calendar days after issuance of the solicitation. 13 C.F.R. §§ 121.1103(b)(1) and 134.304(b); Federal Acquisition Regulation (FAR) 19.103(a)(1). Here, the RFP was issued on November 16, 2022. Ten calendar days after November 16, 2022 was November 26, 2022. Because November 26, 2022 was a Saturday, the appeal petition was due on the next business day: Monday, November 28, 2022. 13 C.F.R. § 134.202(d)(1)(ii).

⁴ The RFP originally was published on November 15, 2022. On November 16, 2022, the RFP was reissued to correct an administrative error, and the initial posting was deleted. (E-mail from J. Terra (Nov. 29, 2022).)

recruit, qualify, place, manage and maintain contract workers to support routine staffing, temporary increases in workload, new mission support, reorganization support, short-term and part-time requirements, and workload fluctuations in the following labor segments to meet all schedule, cost and performance requirements and standards outlined in individual Task Orders (TOs). The services include credentialed (privileged and non-privileged) and non-credentialed contract workers in various labor categories [] grouped in the following five labor segments []:

1.3.1. Physician Services ([Product Service Codes] Q501-Q502; Q504-Q527): Services provided by primary and specialty care physicians who deliver routine, preventive, and specialty care services to patients.

1.3.2. Dental Services (Q503): Services provided by contract workers who deliver dental care including, but not limited to, general dentists and dental specialists, dental hygienists, dental assistants and dental lab technicians.

1.3.3. Ancillary Services (Q201 or Q301): Services provided by contract workers who deliver patient treatment or assist in the provision of patient treatment including, but not limited to, audiologists, clinical laboratory personnel, dietitians, occupational therapists, pharmacists, physical therapists, podiatrists, radiology support, respiratory therapists, speech pathologists, and clinical support staff such as medical assistants.

1.3.4. Nursing Services (Q401-Q403): Services provided by contract workers including, but not limited to, registered and/or licensed nursing personnel including all types of registered and advanced practice nurses as well as practical and vocational nurses. Technicians and assistants working in nursing services are considered in the Ancillary Services labor segment.

1.3.5. Medical Support Services: Services provided by contract workers include, but not limited to, certified, specialized/technical and administrative/clerical labor categories as listed in Table 1.

(PWS at 2.) In addition to labor, a contractor also may supply, “when necessary, tools and materials” as indicated in individual orders. (*Id.* at 1.) The overall objective of the MQS2-NG procurement is:

to acquire professional medical (i.e., clinical) and medical support services to either supplement existing medical staffs or provide full operational services on-site or off-site in support of mission requirements within federal hospitals, clinics, and dental facilities.

(*Id.*)

The PWS explains that task orders will be grouped into two categories. In a Type I configuration, the contractor will provide “qualified contract workers . . . to supplement existing civilian, military or other contract personnel onsite.” (*Id.* at 3, 33, 37.) A Type I order, “[b]y its very nature,” is performed on-site at Government facilities, such as “Department of Defense (DoD) and other federal agency hospitals, clinics, dental facilities, and health activities, including, but not limited to, satellite locations and patient centered medical homes.” (*Id.* at 1, 33.) In a Type II configuration, the contractor will “provide[] full service operational support when civilian, military, or other contract personnel are not available to perform the same or similar services for that performance location.” (*Id.* at 4, 33.) A Type II order may “either be on-site or off-site,” as specified in the order. (*Id.*)

The RFP states that DHA plans to award “up to ten (10)” contracts. (RFP at 92.) To evaluate proposals, DHA will utilize a “three-step evaluation process” whereby proposals will be assessed for Proposal Responsiveness (Step 1), Technical Capability (Step 2), and Past Performance (Step 3). (*Id.* at 93-96.) Proposals are due March 31, 2023. (RFP, Amendment 0005, at 1.)

B. Appeal

On November 28, 2022, Appellant filed the instant appeal. Appellant contends that the RFP merely seeks contractors to “provide labor staffing services in various labor categories for military treatment facilities,” including physician services, dental services, nursing services, and medical support services. (Appeal at 2.) The RFP requires that such personnel must have education, training, licensure, experience, and expertise appropriate for their respective positions. (*Id.*)

According to Appellant, the NAICS code selected by the CO, 622110, is not appropriate for the RFP because it is used in situations “where [h]ospitals serve as contractors.” (*Id.*) Hospitals operating under this NAICS code “provide direct care to patients in their own setting and do NOT provide labor services to any other clients outside of their internal needs.” (*Id.* at 3, emphasis Appellant's.) Here, the RFP does not seek contractors that are, themselves, hospitals. (*Id.* at 2-3.) Rather, the RFP contemplates that contractors will furnish medical personnel to perform services in Government facilities. (*Id.* at 3.) Appellant highlights that “[t]here is not even a single Hospital [among] the 37 incumbent contractors on the [predecessor procurement] awarded in 2017.” (*Id.* at 2, emphasis Appellant's.)

Appellant maintains that the duties required by this RFP are commonly performed by staffing agencies, coding and transcription agencies, or medical offices, such as physicians, dentists, or physical therapists. (*Id.* at 3.) In accordance with FAR 19.102, the “end item” being procured under the RFP “is a physician or dentist or nurse or ancillary health or medical support person” provided by a contractor. (*Id.* at 4.) Furthermore, the “greatest percentage of the contract value” will be associated with the “physicians labor category,” which supports the choice of NAICS code 621111, Offices of Physicians (except Mental Health Specialists). (*Id.*)

In the alternative, if DHA has determined that another of the five labor categories identified in the RFP will contribute a greater percentage of contract value, DHA should have

selected the NAICS code corresponding with such work. Appellant identifies several other possible NAICS codes, including 621112 Offices of Physicians, Mental Health Specialists; 621210, Offices of Dentists; 621399, Offices of All Other Miscellaneous Health Practitioners; or 621999, All Other Miscellaneous Ambulatory Health Care Services. (*Id.* at 4 and Appx. A.) In Appellant's view, whichever NAICS code is selected “should not be a broad categorization that is unfair to small businesses or an unfit representation of the needs of the MQS2-NG contract.” (*Id.* at 4.)

C. CO's Response

On December 14, 2022, the CO responded to the appeal. The CO maintains that 622110, General Medical and Surgical Hospitals, is suitable for the instant RFP, and that Appellant has not shown that the CO's selection is clearly erroneous. (CO's Response at 1-2.)

The CO, first, disputes Appellant's claim that the principal purpose of the procurement is to obtain the services of “health [practitioners] having the degree of M.D. . . . primarily engaged in the [independent] practice of general or specialized medicine . . . or surgery,” as contemplated by NAICS code 621111. (*Id.* at 2.) Rather, according to the CO, DHA seeks “nearly all services necessary to operate an entire military treatment facility.” (*Id.* at 1-2, citing *NAICS Appeal of InGenesis, Inc.*, SBA No. NAICS-5296 (2011).) MQS2-NG contractors will furnish “qualified contract workers that supplement current staff, or provide full services, in Department of Defense (DoD) and other federal agency hospitals, clinics, dental facilities, and health activities, including, but not limited to, satellite locations and patient centered medical homes.” (*Id.* at 2-3, quoting PWS at 1.) Furthermore, for Type II orders, contractors may be responsible for the “performance of the entire scope of operations, subject only to Government surveillance.” (*Id.* at 3, citing PWS at 33.) The CO asserts that the RFP:

even contemplates ordering an *entire clinic*, contracting for all contractor services — including an organized staff of physicians and other medical and administrative staff to provide support across the entire spectrum of patient care services — necessary to operate a Military Health System (MHS) facility on a turn-key basis.

(*Id.* at 1, emphasis CO's.) The “broad scope of services” required by this RFP exceeds the scope of the predecessor MQS procurement, which also was assigned NAICS code 622110. (*Id.* at 1-2.)

Next, the CO emphasizes that the selection of NAICS code need not be “perfect” but instead merely be the code that “best describes the principal purpose of the product or service being acquired.” (*Id.* at 2, citing *InGenesis* and 13 C.F.R. § 121.402(b).) OHA caselaw instructs that “[it] is not the location where the services will be performed that is determinative of a procurement's NAICS code designation, but the character of the services themselves.” (*Id.* at 2, quoting *NAICS Appeal of Med-National, Inc.*, SBA No. NAICS-4762, at 3 (2006).)

In the instant case, the CO selected NAICS code 622110 because this code is “most likely to be successful in obtaining these services from small businesses,” as DHA already has 30 small businesses that are currently performing work under NAICS code 622110 for the predecessor

MQS contracts. (*Id.* at 3.) If DHA were to select a different NAICS code, this could potentially limit the ability of incumbent small businesses to compete for the RFP. (*Id.* at 4.)

Accompanying his Response, the CO attached a “MQS2-NG Market Research Report,” dated May 26, 2021, and a Determination & Findings (D&F) for the predecessor procurement, dated July 19, 2016. (*Id.*, Exhs. 1-2.)

D. Market Research Report

[REDACTED]

E. NAICS Manual⁵

The NAICS code chosen by the CO, 622110, General Medical and Surgical Hospitals, comprises:

establishments known and licensed as general medical and surgical hospitals primarily engaged in providing diagnostic and medical treatment (both surgical and nonsurgical) to inpatients with any of a wide variety of medical conditions. These establishments maintain inpatient beds and provide patients with food services that meet their nutritional requirements. These hospitals have an organized staff of physicians and other medical staff to provide patient care services. These establishments usually provide other services, such as outpatient services, anatomical pathology services, diagnostic X-ray services, clinical laboratory services, operating room services for a variety of procedures, and pharmacy services.

NAICS Manual at 530. Index entries which refer to NAICS code 622110 include “[c]hildren's hospitals, general,” “[h]ospitals, general medical and surgical,” “[h]ospitals, general pediatric,” “[m]icro-hospitals,” and “[o]steopathic hospitals.” *Id.* at 688, 780, 817, and 836.

The NAICS code advocated by Appellant, 621111, Offices of Physicians (except Mental Health Specialists), is comprised of:

establishments of health practitioners having the degree of M.D. (Doctor of Medicine) or D.O. (Doctor of Osteopathic Medicine) primarily engaged in the independent practice of general or specialized medicine (except psychiatry or psychoanalysis) or surgery. These practitioners operate private or group practices

⁵ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2022)*, available at <http://www.census.gov>. SBA has instructed that, for purposes of SBA programs, the 2022 edition of the *NAICS Manual* is to be utilized effective October 1, 2022, “the beginning of the new fiscal year following the effective date of the OMB's release of the NAICS 2022 revision.” See 87 Fed. Reg. 59,240 (Sept. 29, 2022).

in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.

NAICS Manual at 520. Index entries which refer to NAICS code 621111 include “[c]ardiologists' offices (e.g., centers, clinics),” “[d]ermatologists' offices (e.g., centers, clinics),” “[f]orensic pathologists' offices,” “[g]ynecologists' offices (e.g., centers, clinics),” “[h]ealth screening services in physicians' offices,” “[i]nternists' offices (e.g., centers, clinics),” “MDs' (medical doctors, except mental health) offices (e.g., centers, clinics),” “[p]hysicians' (except mental health) offices (e.g., centers, clinics),” “[r]adiologists' offices (e.g., centers, clinics),” “[s]urgeons' (except dental) offices (e.g., centers, clinics),” and “[s]urgical pathologists' offices (e.g., centers, clinics).” *Id.* at 681, 718, 752, 770, 774, 789, 812, 848, 869, 913, and 914.

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 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 acquired. 13 C.F.R. § 121.402(b); FAR 19.102(b)(1). 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 agree with Appellant that NAICS code 622110, General Medical and Surgical Hospitals, is plainly unsuitable for the instant RFP. The *NAICS Manual* makes clear that NAICS code 622110 applies to licensed establishments that are “primarily engaged in providing diagnostic and medical treatment (both surgical and nonsurgical) to inpatients with any of a wide variety of medical conditions.” Section II.E, *supra*. The *NAICS Manual* further states that such establishments “maintain inpatient beds and provide patients with food services that meet their nutritional requirements,” and that they often “provide other services, such as outpatient services, anatomical pathology services, diagnostic X-ray services, clinical laboratory services, operating room services for a variety of procedures, and pharmacy services.” *Id.* Examples of establishments in this industry include children's hospitals and general medical and surgical hospitals. *Id.*

Here, the instant RFP does not seek contractors that are, themselves, licensed hospitals. Section II.A, *supra*. Nor does the RFP contemplate that MQS2-NG contractors will perform the full range of work associated with operating a hospital, such as “maintain[ing] inpatient beds” or

“provid[ing] patients with food services.” Sections II.A and II.E, *supra*. Instead, the principal purpose of this RFP is to acquire medical staffing services. Specifically, MQS2-NG contractors will “recruit, qualify, place, manage and maintain” physicians and other medical professionals, in order to “support routine staffing, temporary increases in workload, new mission support, reorganization support, short-term and part-time requirements, and workload fluctuations.” Section II.A, *supra*. DHA's Market Research Report further confirms that the MQS2-NG procurement is for “health care staffing services,” along with associated “value added services” performed by “medical staffing and recruiting services,” such as “market trend analysis, determining demand patterns and developing resource prioritizations to adjust staffing.” Section II.D, *supra*.

OHA's decision in *NAICS Appeal of Med-National, Inc.*, SBA No. NAICS-4762 (2006) is instructive here. In *Med-National*, OHA determined that NAICS code 622110 was clearly inappropriate for a solicitation, because the procuring agency was “not seeking to procure a hospital, or the services necessary to run a hospital.” *Med-National*, SBA No. NAICS-4762, at 3. Rather, the agency was “seeking the services of dentists, their assistants, laboratory technicians and hygienists to provide dental services to military personnel.” *Id.* Specifically, the agency planned to award “multiple indefinite delivery indefinite quantity contracts for dental personnel to staff various facilities on the East Coast.” *Id.* at 1. OHA granted the appeal and changed the assigned NAICS code from 622110 to 621210, Offices of Dentists. *Id.* at 4.

Similarly, in *NAICS Appeal of InGenesis, Inc.*, SBA No. NAICS-5295 (2011), OHA rejected the contention that NAICS code 622110 would be proper for a procurement of “personal and non-personal nursing services in support of military treatment facilities.” *InGenesis*, SBA No. NAICS-5295, at 1. OHA reiterated that NAICS code 622110 “encompasses entire hospitals and the wide variety of services offered in hospitals.” *Id.* at 3. NAICS code 622110 thus was improper for the solicitation in question, because the procuring agency was “acquiring the services of individual nurses, not the services necessary to operate an entire military treatment facility.” *Id.* at 4.

In the instant case, although DHA seeks a greater range of medical personnel than in *Med-National* or *InGenesis*, there is no indication that DHA intends to procure the services of one or more entire hospitals. Section II.A, *supra*. Rather, DHA seeks medical staffing services, whereby contractors will “recruit, qualify, place, manage and maintain” physicians, nurses, dentists, and other medical personnel. Sections II.A and II.D, *supra*. According to the RFP, such personnel typically will perform their work on-site at Government facilities, such as “federal hospitals, clinics, and dental facilities.” Section II.A, *supra*.

In response to the appeal, the CO urges that NAICS code 622110 should be utilized because this same NAICS code was assigned to the predecessor MQS contracts. Section II.C, *supra*. That earlier procurement, however, 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.” *NAICS Appeal of Potomac Valor Healthcare 2, LLC*, SBA No. NAICS-6172, at 12 (2022); *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

fact that DHA may previously have assigned NAICS code 622110 to the predecessor procurement, or to other procurements, is not relevant here. Likewise, the CO's policy-based arguments, such as preferring a NAICS code that will maximize competition, are misplaced, because such considerations “are not part of the criteria for selecting a NAICS code.” *Potomac Valor*, SBA No. NAICS-6172, at 12; *NAICS Appeal of Pacific Shipyards Int'l, LLC*, SBA No. NAICS-5464, at 6 (2013); *NAICS Appeal of Circle Solutions, Inc.*, SBA No. NAICS-5181, at 12 (2011). Instead, the CO must select the NAICS code that best describes the principal purpose of the instant procurement. Section III.A, *supra*.

Because Appellant has demonstrated that the CO erred in selecting NAICS code 622110, OHA must assign the NAICS code that best describes the principal purpose of the products or services being acquired. In making this decision, OHA considers, 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).

Here, I agree with Appellant that NAICS code 621111 best describes the principal purpose of this procurement. The RFP plainly calls for medical staffing services, and the personnel in question will remain contractor employees. Section II.A, *supra*. As a result, a NAICS code such as 561311, Employment Placement Agencies, is not suitable for this RFP, because such a code does not apply when personnel referred or placed “will be contractor employees, not [Government] employees.” *NAICS Appeal of Laredo Tech. Servs., Inc.*, SBA No. NAICS-6173, at 5-6 (2022).

NAICS code 621111, on the other hand, applies to establishments that are “primarily engaged in the independent practice of general or specialized medicine (except psychiatry or psychoanalysis) or surgery.” Section II.E, *supra*. DHA's Market Research Report indicates that the bulk of contract dollar value will be associated the “Physicians” labor category. Section II.D, *supra*. Specifically, according to data from the predecessor MQS procurement, the two largest categories for annual spend were “General Medical” physicians and “Specialists” physicians. *Id.* Both general practitioners and specialists fall under the NAICS code 621111, which encompasses family physicians and internists as well as specialists such as cardiologists and dermatologists. Section II.E, *supra*. Based on historical data, then, physicians will comprise a majority of MQS2-NG contract dollar value. Furthermore, it is immaterial that work under the MQS2-NG contracts may be performed on-site at Government facilities. Section II.A, *supra*. Pursuant to the *NAICS Manual*, NAICS code 621111 is appropriate irrespective of whether services are performed “in [the physician's] own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.” Section II.E, *supra*.

Accordingly, I must find that NAICS code 621111 “best describes the principal purpose of the acquisition.” This NAICS code corresponds with the bulk of contract dollar value. Although this NAICS code does not perfectly encompass all of the services sought by this RFP, such as dental services or nursing services, I find that this NAICS code nevertheless best describes the principal purpose of the procurement as a whole. Applicable regulations stipulate that, when a procurement calls for qualitatively different types of products or services, the appropriate NAICS code is the one which represents “the greatest percentage of contract value.” 13 C.F.R. § 121.402(b)(2); *see also* FAR 19.102(b).

IV. Conclusion

For the above reasons, the appeal is GRANTED. The CO clearly erred in assigning NAICS code 622110 to this RFP. The correct NAICS code designation for the procurement is 621111, Offices of Physicians (except Mental Health Specialists), with an associated size standard of \$16 million average annual receipts. Accordingly, because this decision is being issued before the close of the solicitation, the CO MUST amend the RFP to change the NAICS code designation from 622110 to 621111. 13 C.F.R. § 134.318(b); FAR 19.103(a)(7); *Eagle Home Med. Corp.*, B-402387, March 29, 2010, 2010 CPD ¶ 82. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge