

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

NAICS APPEAL OF:

Laredo Technical Services, Inc.,

Appellant,

Solicitation No. 36C256-23-Q-0223

U.S. Department of Veterans Affairs

SBA No. NAICS-6186

Decided: January 25, 2023

APPEARANCE

Joseph G. Lukowski, President, Laredo Technical Services, Inc., San Antonio, Texas

DECISION

I. Introduction and Jurisdiction

On January 12, 2023, the Department of Veterans Affairs (VA) issued the subject solicitation for Optometry Provider Services and Ophthalmology Health Technician/Certified Ophthalmic Assistant (COA) services on-site to beneficiaries of the Department of Veterans Affairs (VA) and the Southeast Louisiana Veterans Health Care System (SLVHCS). (Solicitation, at 1.) The Contracting Officer (CO) set the procurement aside for Service-Disabled Veteran Owned Small Business Concerns and designated North American Industry Classification System (NAICS) code 561320, Temporary Help Services, with a corresponding \$34 million annual receipts size standard, as the applicable code.<sup>1</sup> (*Id.*, at 1.) On January 13, 2023, (Appellant) filed the instant NAICS code appeal, arguing that NAICS code 621220, Offices of Optometrists, with a corresponding \$9 million annual receipts size standard, was in fact the appropriate code.<sup>2</sup> For the reasons discussed *infra*, the appeal is GRANTED.

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

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<sup>1</sup> The CO erred in including a \$30 million annual receipts size standard in the Solicitation. SBA raised this standard to \$34 million in 2022. 87 Fed. Reg. 69118, 69125 (Nov. 17, 2022).

<sup>2</sup> Appellant erred in including a \$8 million annual receipts size standard in the appeal. SBA raised this standard to \$9 million in 2022. 87 Fed. Reg. 69118, 69126 (Nov. 17, 2022).

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

On January 12, 2023, VA issued the Solicitation No. 36C256-23-Q-0223. The Solicitation describes the work to be performed as part of this procurement. The Solicitation requires two optometrists to work in Baton Rouge and three ophthalmology health technicians in New Orleans “for the purpose of treating and evaluating all Veteran patient prescriptions by the Optometry or Ophthalmology clinics or other network providers.” (Solicitation, at 8-18.) VA will provide workspace, equipment, and medications for the contractor to perform the work. (*Id.*, at 42.) The Solicitation contained the following provisions pertinent to these proceedings:

#### 4. CONTRACTOR CLINICAL RESPONSIBILITIES

4.1.1. Clinical Personnel Required: The Contractor shall provide Contractor's provider(s) who are competent, qualified per this performance work statement and adequately trained to perform assigned duties.

4.1.2. Contractor will be responsible for provide (sic) an advance work schedule for each on-site staff.

4.2. Standards of Care: The Contractor's personnel's care shall cover the range of Optometry services as would be provided in a state-of-the-art civilian medical treatment facility and the standard of care shall be of a quality, meeting or exceeding currently recognized TJC, VA and national standards as established by:

...

4.4 Direct Patient Care: estimated 100% of the time involved in direct patient care. Per the qualification section of this PWS, the Contractor shall provide the following on-site personnel/staff:

4.4.1 Optometrist requirements:

4.4.1.1 Education and Experience:

4.4.1.1.1 Experience. Min. of one year of experience in Optometry

4.4.1.1.2 Education Educational Requirements. Optometrist shall have completed both a bachelor's program and a Doctor of Optometry (O.D.) program. Advanced Training. In addition to completing O.D. program, Optometrist shall have had the option of going on to receive additional training in a residency program. Licensure

Information: The BLS reports that in order to practice optometry, state licensure is required ([www.bls.gov](http://www.bls.gov)).

4.4.1.1.3 Experience/Education Combination. Equivalent combinations of experience and education are qualifying. All providers are required to have completed an ACOE-approved optometry residency program.

4.4.1.1.4 Must validate evidence of professional and clinical background enough to be deemed equivalent to an approved residency program experience.

4.4.1.2 Certification:

4.4.1.2.1 Optometrist must be certified by The American Board of Optometry. Note: Advance certifications such as Certified Ophthalmic Technician or Certified Medical Ophthalmic Technologist are/is acceptable.

4.4.1.2.2 Optometrist must have a current Basic Life Support (BLS) certification.

4.4.1.2.3 Required to maintain certification through the utilization of organizations such as the American Board of Physician Specialties

4.4.1.3 Knowledge, Skills, and Abilities:

4.4.1.3.1 Must have the ability and credentialing to diagnose and treat eye-related disorders and conditions.

4.4.1.3.2 Provide outpatient care for patients with eye-related disorders, conditions, and any emergent conditions.

4.4.1.3.3 Answer beneficiary questions related to exams, prescriptions any pre-operative/ post-operative questions and care.

4.4.1.3.4 Conduct routine eye examinations, as well as visual field tests.

4.4.1.3.5 Conduct vision tests ordered in a standard vision exam.

4.4.1.3.6 Take detailed medical histories for all patients, including current and past prescription medications.

4.4.1.3.7 Maintain professional customer relations. Meet the needs of customers while supporting VA missions. Consistently communicate and treat customers (veterans, their representatives, visitors, and all VA staff) in a well-mannered, tactful, and respectful manner.

4.4.1.3.8 Provide the customer with accurate information according to established policies and procedures.

4.4.1.3.9 Work closely with COR and staff members regarding administrative issues as early as possible once issues are discovered.

4.4.1.3.10 Must ensure that all clinical privileges are up to date with the National Standards.

4.4.1.3.11 Responsible for maintaining communications and emails on a weekly basis.

4.4.1.3.12 Must comply with current standards for medical record documentation, professional accountability, and administrative responsibilities outlined in this performance work statement.

4.4.1.3.13 Must be accountable for completing chart audits.

4.4.1.3.14 Must possess knowledge of the following: instruments, devices, pharmaceutical agents' procedures with the purpose of investigating, examining, treating, diagnosing, or correcting visual defects or abnormal conditions of the human eye such as but not limited to:

- Keratometer
- Pachymeter
- Microkeratome
- Lasers
- Phoropter
- Ophthalmoscope
- Retinal Camera.
- Snellen Chart
- Tonometer both Applanation and Tonopen
- Retinoscope
- VT 1 Vision Screener
- Slit lamp
- Indirect and Direct Ophthalmometers
- Spectacle lens measurement — automated and manual

4.4.1.3.15 Prescriptions must be entered by a VA licensed optometrist or VA authorized designee. Prescriptions must be electronically linked to a VA clinical exam note, VA electronic order, or VA authorized appointment for use in the performance of this contract.

4.4.1.3.16 Must possess knowledge and clinical experience in order to prescribe lenses, devices containing lenses, prisms, tints, contact lenses, orthoptics, vision training, pharmaceutical agents, low vision aids and other prosthetic devices to correct, relieve, or treat defects or abnormal conditions of the human eye.

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4.4.2 Ophthalmology Health Technician/Certified Ophthalmic Assistant (COA) requirements:

4.4.2.1 Experience and Education:

4.4.2.1.1 Experience. One year of experience in a health care field, such as but not limited to nursing, medical assistant, or health technician. OR

4.4.2.1.2 Education. Two years above high school with a minimum of six semester hours directly related to a health care field or associate degree in a health care related degree. OR

4.4.2.1.3 Experience/Education Combination. Equivalent combinations of experience and education are qualifying.

4.4.2.2 Certification:

4.4.2.2.1 All applicants must be certified as a Certified Ophthalmic Assistant (COA) with the Joint Commission on Allied Health Personnel in Ophthalmology (JCAHPO). The COA certification is JCAHPO's entry-level certification examination for a Health Technician (Ophthalmology).

4.4.2.2.2 Must also have current Basic Life Support (BLS) certification.

4.4.2.3 Knowledge, Skills, and Abilities:

4.4.2.3.1 Ability to perform advanced tonometry and pupil evaluation.

4.4.2.3.2 Ability to perform calculations for selection of intraocular lens.

4.4.2.3.3 Knowledge of clinic based ophthalmic surgical assisting including preparation of the surgical field.

4.4.2.3.4 Knowledge of eye anatomy and physiology.

4.4.2.3.5 Knowledge of medication effects and proper instillation in the eye.

4.4.2.3.6 Knowledge of optics.

4.4.2.3.7 Knowledge of proper cleaning and maintenance of clinic equipment.

4.4.2.4 Clinical Responsibilities:

4.4.2.4.1 The Health Technician (Ophthalmology) shall be able to perform a range of standard, but complex, diagnostic procedures.

4.4.2.4.2 Checks and performs calibration of technical ophthalmology screening instruments

4.4.2.4.3 Obtains patient physical history, to include chief complaint; reason for visit; pertinent signs and symptoms; current medication allergies; past ocular and general medical history both ocular and general; family history both ocular and general; social history; and review of medications and allergies, including current ocular prescription and non-prescription medications.

4.4.2.4.4 Accurately tests visual acuity at distance and near, with and without correction or with and without a pinhole.

4.4.2.4.5 Measures eyeglass prescription using manual or automated lensometer, recording sphere, cylinder, axis, and prism in both plus and minus cylinder.

4.4.2.4.6 Performs pupil evaluation recording pupil size, shape, symmetry, reaction to light and accommodation. Performs swinging flashlight test to detect a relative afferent pupillary defect.

4.4.2.4.7 Performs basic refractometry utilizing an auto refraction or habitual glass prescription in the phoropter.

4.4.2.4.8 Instills eye medications (drops or ointments, including anesthetic, dye, dilating drops, cycloplegic drops, or antibiotics).

4.4.2.4.9 Measures intraocular pressure with standard techniques, including Goldmann applanation tonometry.

4.4.2.4.10 Performs pachymetry to determine corneal thickness and manual keratometry or automated topography to determine corneal curvature.

4.4.2.4.11 Performs intra-ocular lens calculations using an IOL Master or equivalent device.

4.4.2.4.12 Performs automated visual field testing using various perimetry machines.

4.4.2.4.13 Performs external photographs and fundus photography.

4.4.2.4.14 Performs optical coherence tomography (OCT) of the anterior segment, retina, and optic nerve.

4.4.2.4.15 Performs patient screening and triage of potentially urgent ocular conditions.

4.4.2.4.16 Assists during clinic-based ophthalmic surgery, including revision of wounds, biopsies of the eyelid lesions, cultures of conjunctiva, or cornea; reformation of anterior chamber, evacuation of hyphema, repositioning of corneal endothelial grafts, intra-vitreous injections, and laser surgical procedures.

4.4.2.4.17 Educates patients and legal authorized representatives in eye care, including preoperative and postoperative instructions.

4.4.2.4.18 Ensures proper cleaning and disinfection; calibration, maintenance, backup, annual inventory and ordering of instruments, supplies and equipment; obtains quotes as needed; and reports needed repairs to biomedical engineering.

4.4.3 Scope of Care: Contractor's provider(s) (as appropriate and within scope of practice/privileging) shall be responsible for providing clinical care (no retail), including, but not limited to:

4.4.3.1 Clinic and Surgical Care: Contractor provider(s) shall provide clinical Optometry services. Contractor provider(s) shall be present on time for any scheduled clinics as documented by physical presence in the clinic at the scheduled start time.

4.4.3.2 Medications: Contractor provider(s) shall follow all established medication policies and procedures. No sample medications shall be provided to patients.

4.4.3.3 Discharge education: Contractor provider(s) shall provide discharge education and follow up instructions that are coordinated with the next care setting for all patients seen by provider.

4.4.3.4 Mechanisms must be in-place to provide notification of test results for patients receiving care in accordance with VHA Directive 1088, Communicating Test Results to Providers and Patients.

Solicitation, at 32-38.

## B. The Appeal

On January 13, 2023, Appellant filed the instant appeal and asserts the correct designation is 621320, Offices of Optometrists, with a corresponding \$9 million annual receipts size standard. (Appeal, at 6.) Appellant asserts that the CO assigned the NAICS code based on the categories of businesses which would provide the required services. (*Id.*) Appellant argues the code the CO assigned used an objective standard, a code based upon the primary business of

offerors. (*Id.*) Here, the presumed offerors are Temporary Help Services firms and thus, the CO incorrectly selected NAICS Code 561320, Temporary Help Services. (*Id.*)

Appellant argues the regulations require “the subjective standard of the requirement be the sole determinant of the NAICS code, and not the objective standard.” (*Id.*) According to Appellant, the “subject” requirement should drive the NAICS code determination, not the provider of the services. (*Id.*) Citing SBA regulation, Appellant contends the NAICS code must be that “which best describes the principal purpose of the product or service being acquired.” (*Id.*, citing 13 CFR § 121.402 (b).) Appellant maintains that this solicitation's requirement is 100% optometry — i.e., optometrists and certified ophthalmology technicians; and there is no requirement for the Government to purchase the suppliers of optometry services, the staffing agencies themselves, but instead optometry services. (*Id.*, at 6.) Appellant contends that without the legal interpretation of a subjective standard, all federal services procurement could be for Temporary Help Services, or Employment Placement Agencies (NAICS code 561311), since all services provided to the Government on a contract basis are temporary help services provided by employment placement agencies, and no Government services procurement could have a size standard lower than \$34 million. (*Id.*, at 7.)

Appellant further argues the NAICS Manual provides that establishments covered by code 561320 do not provide for direct supervision of their employees at the clients' work sites. (*Id.*, at 7.) Here, the contractor, not the VA, is providing direct supervision and oversight of the personnel performing the services provided. The solicitation makes clear that contractor personnel will not be considered VA employees for any purpose. (*Id.*, at 8, citing Solicitation at 29.)

Lastly, Appellant maintains that even though it could submit an offer under the current NAICS code, it has standing to challenge this code and advocate a lower size standard because it is adversely affected by having to compete with larger firms. (*Id.*, at 9, citing *NAICS Appeal of SAC Cleaners, Inc.*, SBA No. NAICS-5468, at 4 (2013).)

### C. The NAICS Manual<sup>3</sup>

The NAICS code designated by the CO, 561320, Temporary Help Services, covers:

[E]stablishments 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.

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<sup>3</sup> Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States* (2022), available at <http://www.census.gov/naics>. SBA has adopted this version of the *NAICS Manual* effective October 1, 2022. 87 Fed. Reg. 59240 (Sept. 29, 2022).



Illustrative Examples:

Help supply services

Model supply services

Labor (except farm) contractors (i.e., personnel suppliers)

Temporary employment or temporary staffing services

Manpower pools

*NAICS Manual, at 488.*

The NAICS code advocated by the Appellant, 621320, Offices of Optometrists, covers:

[E] stablishments of health practitioners having the degree of O.D. (Doctor of Optometry) primarily engaged in the independent practice of optometry. These practitioners examine, diagnose, treat, and manage diseases and disorders of the visual system, the eye, and associated structures as well as diagnose related systemic conditions. Offices of optometrists prescribe and/or provide eyeglasses, contact lenses, low vision aids, and vision therapy. They 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, and may also provide the same services as opticians, such as selling and fitting prescription eyeglasses and contact lenses.

*NAICS Manual, at 521.*

### 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). A procurement is usually classified according to the component that accounts for the greatest percentage of contract value. (*Id.*) 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 561320 is unsuitable for the instant solicitation. The *NAICS Manual* clearly expresses that NAICS code 561320 applies to establishments engaged “in supplying workers to clients' businesses for limited periods of time to supplement the working force of the client.” Section II.C, *supra*. The *NAICS Manual* further states, however, “these establishments do not provide direct supervision of their employees at the clients' work sites.” *Id.* Accordingly, when NAICS code 561320 applies to a procurement, the referred individuals are temporary personnel, not supervised by that employing agency. Here, the VA is procuring professionals, not to augment its work force for a limited period, but to provide two optometrists and three ophthalmology health technicians in New Orleans, that provide eye and vision health care to veterans. Section II.A, *supra*.

OHA's decision in *NAICS Appeal of CWU, Inc.*, SBA No. NAICS-5226, at 4 (2011) is instructive. In *CWU, Inc.*, OHA found that procurement which primarily called for “role players to provide realistic training to soldiers” and “a separate individual to coordinate events and for logistical coordination,” was best classified under the NAICS code 561320. *CWU, Inc.*, SBA No. NAICS-5226, at 4. OHA observed that the Army sought personnel to play the role of Afghans in training simulations. *Id.* NAICS code 561320 was appropriate because the solicitation called for “personnel for limited periods of time to supplement the work force of the client.” *Id.* Further, the solicitation made clear mention that the Army would provide scenarios that would require contractor's personnel to supervise. *Id.* Conversely, OHA considered this code inappropriate in instances where the solicitation called for “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.” See *NAICS Appeal of Millennium Health & Fitness, Inc.*, SBA No. NAICS-6094, at 11 (2021). Unlike the temporary employees in *CWU, Inc.*, the ophthalmologists and opticians the contractor in the instant case will provide are not “considered VA employees for any purpose”; and the solicitation is cited as a “nonpersonal services contract.” Section II.A, *supra*. The CO did not provide a response to consider otherwise.

I find Appellant has demonstrated that the CO erred in selecting NAICS code 561320, OHA must assign the NAICS code that best describes the principal purpose of the products or services being acquired. Section II.B, *supra*. 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).

I agree with Appellant that NAICS code 621320 best describes the principal purpose of this procurement. Section II.B, *supra*. NAICS code 621320 applies to health practitioners with a doctorate degree in optometry, who “examine, diagnose, treat, and manage diseases and disorders of the visual system, the eye, and associated structures as well as diagnose related systemic conditions” and provide “eyeglasses, contact lenses, low vision aids, and vision therapy.” Section II.C, *supra*. This summarizes the solicitation. The principal purpose of the solicitation is to contract certified optometrists and ophthalmology health technicians. Section II.A, *supra*. In addition to education and experience, these certified individuals are required to have extensive knowledge, skills, and abilities in providing services including, but not limited to,

eye exams, vision test, treating/diagnosing visual defects, and prescribing prescriptions. *Id.* It is clear from the extensive requirements that the greatest percentage of contract value is that of the medical professionals performing the tasks they have been trained for, not merely temporarily supplementing the VA workplace. The contract lays out extensive requirements for the medical tasks the contractor personnel must perform to support eye health of VA's clients. These tasks are included in the services NAICS code 621320 assigns to Offices of Optometrists. Thus, I find NAICS code 621320 appropriately encompasses the services the contractor will perform.

#### IV. Conclusion

Appellant has shown that the CO clearly erred in selecting the NAICS code, and I GRANT the instant appeal. NAICS code 621320, Office of Optometrists, is the most appropriate NAICS code for this procurement with a corresponding \$9 million annual receipts size standard. Accordingly, because this decision is being issued before the close of the solicitation, the CO MUST amend the RFQ to change the NAICS code designation from 561320, Temporary Help Services, with its corresponding \$34 million annual receipts size standard, to NAICS code 621320, Office of Optometrists, with a corresponding \$9 million annual receipts size standard. FAR 19.303(c)(8); *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).

CHRISTOPHER HOLLEMAN  
Administrative Judge