

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

NAICS APPEAL OF:

Veterans First Health Care,

Appellant,

Solicitation No. 36C24923R0026

U.S. Department of Veterans Affairs

SBA No. NAICS-6212

Decided: May 10, 2023

APPEARANCES

Sarah C. Reida, Esq., Legal Meets Practical, LLC, Alpharetta, Georgia, for Appellant

Roxie A. Keese, Contracting Officer, U.S. Department of Veterans Affairs,
Murfreesboro, Tennessee

DECISION

I. Introduction and Jurisdiction

On March 30, 2023, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. 36C24923R0026 for home oxygen services. (RFP at 6.) The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses, and assigned North American Industry Classification System (NAICS) code 621610, Home Health Care Services, with a corresponding size standard of \$19 million average annual receipts.

On April 10, 2023, Veterans First Health Care (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 621610, and that the appropriate code for this procurement is 532283, Home Health Equipment Rental, with an associated size standard of \$41 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 timely filed the instant appeal on April 10, 2023.¹ Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFP

According to the RFP's Statement of Work (SOW), VA intends to award “[a] single Indefinite-Delivery Indefinite-Quantity (IDIQ) contract with a one-year base year and four one-year option years.” (RFP § B.3.1.) The contractor will “provide all personnel, equipment, supplies, facilities, transportation, tools, materials, supervision, and other items and non-personal services necessary to provide home oxygen” for VA beneficiaries throughout “the Tennessee Valley Healthcare System (TVHS), the James H. Quillen VA Medical Center (VAMC) and the Memphis VAMC catchment areas.” (*Id.* §§ B.3.1.-B.3.2.) Required services include: “all logistical/administrative functions involved with the day-to-day operation of providing the service to the Veteran and their families, including furnishing warehouse space, surplus supplies, and in-home respiratory therapy visits for patients with ventilators.” (*Id.* § B.3.2.) The contractor will provide the following in-home supplies:

[L]ow decibel concentrator (rental) with two broad categories of flow rates and replacement parts; various cylinder sizes (rental) to provide oxygen . . . and replacement parts; portable oxygen concentrator; refillable oxygen cylinders/concentrator; valve fireproof cannula; procurement/distribution of two types of oxygen and backup/spare parts; nasal cannula to include micro nasal cannula, high flow, pendant, nasal cannula with cushion ear piece, soft pronged nasal cannula/masks to include tracheostomy mask, bi-flow nasal mask, aerosol mask and replacement parts, and any interface, adapter or connection to enhance oxygen delivery/masks, tracheostomy mask, bi-flow nasal mask, aerosol mask and replacement parts, and any interface, adapter or connection to enhance oxygen delivery; and replacement parts; [and] oxygen bleed in connector, portable oxygen systems (used when a Veteran travels)[.]

(*Id.*) The contractor will be responsible for delivering, installing, maintaining, and ensuring proper use of in-home equipment. (*Id.* § B.3.4.) The SOW specifies that required “[s]ervices include delivery, set-up, education, pick-up, cleaning, and preventative maintenance,” which are to be “performed in the Veteran's place of residence or in a nursing home or assisted living facility housing the veteran.” (*Id.* §§ B.3.3 and B.3.4.)

¹ 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 March 30, 2023. Ten calendar days after March 30, 2023 was April 9, 2023. Because April 9, 2023 was a Sunday, the appeal petition was due on the next business day: Monday, April 10, 2023. 13 C.F.R. § 134.202(d)(1)(ii).

Among other responsibilities, the contractor must provide patients written and oral education on proper equipment use, including “[e]lectrical and fire safety precautions,” “[p]racticing regular safety drills,” “[k]eeping a manual resuscitator,” “[f]ire safe cannula,” “[f]all prevention at home,” “Do's/Don't's information,” “[p]roper use of prescribed oxygen administration device(s), regulator(s), flow meter(s), and fire safe valves,” “[p]atient rights and responsibilities,” instruction regarding the need to “check smoke alarm monthly,” and “written materials on the hazards of smoking at initial set up and every 6 months,” as well as “[p]roviding continuing education in use as needed or directed by a VA Certified Respiratory Therapist (CRT) or Registered Respiratory Therapist (RRT).” (*Id.* § B.3.6.2.k.) “Monthly assessment shall be required for all Ventilator Patients by a CRT/RRT. A CRT/RRT is also responsible for quarterly visits to tracheostomy patients with compressors. A CRT/RRT may also be required to perform visits in addition to the above for problems that arise as requested by [VA].” (*Id.* § B.3.6.3.) The CRTs/RRTs will be contractor employees. (*Id.* § B.3.13.) The contractor also is required to document and report to VA any patients who are non-compliant with safety guidelines and/or whose behavior poses a risk of self-harm or harm to others despite warnings and ongoing educational interventions. (*Id.* § B.3.6.3.)

B. Appeal

On April 10, 2023, Appellant filed the instant appeal. According to Appellant, the NAICS code selected by the CO, 621610, is inappropriate for the RFP because “*none of the services [described in the SOW] involve skilled nursing or related health care services.*” (Appeal at 4, emphasis Appellant's.) Rather, in Appellant's view, “[t]he vast majority of these services are either home oxygen equipment rental, or related services necessary to deliver or maintain the equipment.” (*Id.* at 5.) Workload estimates set forth in the RFP reflect that “the bulk of total quantities estimated to be ordered” relate to home oxygen equipment rental. (*Id.*) The RFP thus contemplates that the contractor will primarily furnish “healthcare *equipment* rental,” not healthcare. (*Id.* at 7, emphasis Appellant's.) The work called for under the RFP — “home oxygen equipment rental and incidental products and services” — does not fit within the description of NAICS code 621610 nor its illustrative examples. (*Id.* at 9.)

Appellant maintains that the correct NAICS code for this RFP is 532283, for three reasons. (*Id.* at 8-9.) First, the description of NAICS code 532283 in the *NAICS Manual*² “includes the exact same type of equipment” sought by the RFP, *i.e.*, “oxygen tanks.” (*Id.*) Second, in describing NAICS code 621610, the *NAICS Manual* “specifically directs that products leased or rented for home health care are to be assigned NAICS [c]ode 532283.” (*Id.* at 9.) Lastly, at least nine other recent VA procurements for home oxygen services have been classified under NAICS code 532283, rather than 621610. (*Id.* at 8-10.) Appellant concludes that

² 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 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).

the instant RFP is an outlier that should be reconciled with VA's systematic use of NAICS code 532283 for similar services.

C. CO's Response

On April 26, 2023, the CO responded to the appeal. The CO maintains that NAICS code 621610, Home Health Care Services, is the correct NAICS code for the instant RFP. (CO's Response at 6.) The appeal therefore should be denied.

The CO argues that the scope of this procurement “go[es] far beyond mere rental of equipment” because it also includes “education, emergency response to equipment failures, cleaning, preventative maintenance, [and] initial and monthly safety assessment of the beneficiary's home and environment which also involve maintaining documentation of the assessments in the individual patient file.” (*Id.* at 4.) The CO adds that the RFP requires the use of CRTs and RRTs for monthly assessments for all ventilator patients and for quarterly visits to tracheostomy patients with compressors. (*Id.*) Equipment rental alone “would be of little value to the Government and the veteran patients without the time-intensive efforts of the contractor staff in providing the aforementioned services.” (*Id.*)

Although Appellant identifies certain prior contracts that have utilized NAICS code 532283, the CO maintains that at least 10 other prior VA procurements for home oxygen services have been awarded under NAICS code 621610, further demonstrating that the proper code was utilized for this solicitation. (*Id.*) Moreover, OHA itself has upheld the use of NAICS code 621610 for home oxygen and ventilator services. (*Id.*, citing *NAICS Appeal of B&B Med. Servs., Inc.*, SBA No. NAICS-5597 (2014).)

D. NAICS Manual

The NAICS code chosen by the CO, 621610, Home Health Care Services, covers establishments:

primarily engaged in providing skilled nursing services in the home, along with a range of the following: personal care services; homemaker and companion services; physical therapy; medical social services; medications; medical equipment and supplies; counseling; 24-hour home care; occupation and vocational therapy; dietary and nutritional services; speech therapy; audiology; and high-tech care, such as intravenous therapy.

NAICS Manual at 528. The *NAICS Manual* offers the following illustrative examples of such establishments: “[h]ome health care agencies”; “[h]ome infusion therapy services”; “[v]isiting nurse associations”; and “[i]n-home hospice care services.” *Id.* Index entries which refer to NAICS code 621610 include “[h]ome health agencies,” “[h]ome health care agencies,” “[h]ome care of elderly, medical,” “[h]ome infusion therapy services,” “[h]ome nursing services (except private practices),” “[h]ospice care services, in-home,” “[n]urse associations, visiting,” “[n]ursing agencies, primarily providing home nursing services,” and “[v]isiting nurse associations.” *Id.* at 777, 779, 831, and 944. The *NAICS Manual* states that “[e]stablishments

primarily engaged in renting or leasing products for home health care are classified [under NAICS code] 532283, Home Health Equipment Rental.” *Id.* at 528.

The NAICS code advocated by Appellant, 532283, Home Health Equipment Rental, is comprised of firms:

primarily engaged in renting home-type health and invalid equipment, such as wheelchairs, hospital beds, oxygen tanks, walkers, and crutches.

NAICS Manual at 449. Index entries which refer to NAICS code 532283 include “[c]rutches, invalid, rental,” “[f]urniture, home health, rental,” “[h]ome health furniture and equipment rental,” “[h]ospital bed rental and leasing (i.e., home use),” “[h]ospital equipment rental (i.e., home use),” “[h]ospital furniture and equipment rental (i.e., home use),” “[i]nvalid equipment rental (i.e., home use),” “[o]xygen equipment rental (i.e., home use),” “[w]alker, invalid, rental,” and “[w]heelchair rental.” *Id.* at 712, 757, 777, 779, 790, 837, 945, and 950.

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 the CO that the instant case is highly analogous to OHA's decision in *NAICS Appeal of B&B Medical Services, Inc.*, SBA No. NAICS-5597 (2014). In that decision, OHA found that a procurement for “Home Oxygen Services and Ventilation to veteran beneficiaries” was appropriately classified under NAICS code 621610, Home Health Care Services, rather than under a NAICS code for Home Health Equipment Rental. *B&B*, SBA No. NAICS-5597, at 1-2. OHA reasoned that, in addition to “provid[ing] oxygen and ventilator equipment at the home of a VA beneficiary,” the contractor also was required to perform significant services beyond the delivery of oxygen:

The contractor is required to complete the initial setup [of equipment], and follow up periodically with the beneficiary in either a monthly, quarterly, or annual

basis. In order to perform these services, the contractor, as stated by the RFP, must utilize a licensed [technician], CRT, or RRT. These individuals are further tasked with providing education on equipment use, equipment maintenance, and safety inspections. The services required here are not merely the dropping off of equipment and some brief instruction on its operation. The recipient's home must be evaluated to ensure its electrical system can support the equipment. The contractor must provide licensed Respiratory Therapists and conduct regular visits to ensure that the equipment is working properly and used correctly. An RRT must be available 24 hours a day, seven days a week for emergencies. The services in question go beyond those required merely to provide rental equipment. The RFP requires that the contractor provide personnel with some professional training and skill in respiratory therapy. The contractor personnel here will be providing their skilled services to the individual recipients of oxygen.

Id. at 4. OHA determined that NAICS code 621610 “includes precisely the type of services required for this procurement, namely the provision of skilled home health care services dealing with medical equipment.” *Id.* at 5.

Here, like the procurement at issue in *B&B*, the instant RFP seeks a contractor to provide “all personnel, equipment, supplies, facilities, transportation, tools, materials, supervision, and other items and non-personal services necessary to provide home oxygen” for VA beneficiaries. Section II.A, *supra*. The contractor must complete initial setup of equipment, and regularly follow up with beneficiaries. *Id.* In order to perform these services, the contractor, as stated by the RFP, must utilize licensed CRTs or RRTs, who will be contractor employees. *Id.* The contractor is further tasked with educating beneficiaries on proper equipment use, equipment maintenance, and safety matters. *Id.* As OHA observed in *B&B*, the *NAICS Manual*'s description of NAICS code 621610 encompasses the provision of skilled health care services in the home, along with accompanying “medical equipment and supplies.” Section II.D, *supra*. Accordingly, based on the *NAICS Manual* and OHA's decision in *B&B*, NAICS code 621610 is an appropriate choice for this RFP.

In seeking to overturn the CO's chosen code, Appellant highlights that equipment rental will account for the bulk of contract dollar value. Section II.B, *supra*. Appellant further urges that the NAICS code assigned to the instant RFP should be consistent with those utilized for other VA procurements for similar work. *Id.* I find Appellant's arguments unavailing, for two reasons.

First, as in *B&B*, while it is true that the contractor will provide rental equipment, the RFP nevertheless is clear that the contractor also will perform significant value-added services, such as the delivery, setup, and maintenance of equipment, and educating and monitoring patients. Section II.A, *supra*. The RFP requires the contractor to provide education, after-hour support, preventative maintenance, and follow-up visits. *Id.* Notably, monthly and quarterly follow-up visits must be performed by, or in coordination and consultation with, qualified personnel, such as CRTs and RRTs. *Id.* As in *B&B*, then, the contractor here will perform substantial services beyond the rental of equipment. Indeed, the CO maintains that rental equipment alone “would be of little value to the Government and the veteran patients without the

time-intensive efforts of the contractor staff in providing the aforementioned services.” Section II.C, *supra*. According to the *NAICS Manual*, NAICS code 621610 encompasses home health care services along with associated “medical equipment and supplies.” Section II.D, *supra*. Appellant thus has not established that the CO erred in selecting NAICS code 621610.

Second, although Appellant asserts that VA has utilized NAICS code 532283 for other home oxygen procurements, 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 Millennium Health & Fitness, Inc.*, SBA No. NAICS-6094, at 11 (2021); *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). The other procurements referenced by Appellant, though, were not challenged before OHA, and OHA's decision in *B&B* upheld the use of NAICS code 621610, rather than an equipment rental NAICS code, for a similar procurement. Accordingly, the CO properly determined the NAICS code for this RFP based on the work contained in this RFP, rather than considering the NAICS codes used for other, perhaps differently scoped, procurements.

Because Appellant has not demonstrated that NAICS code 621610 is clearly incorrect for this procurement, OHA need not consider the NAICS code Appellant advocates, or other alternative codes. It is well-settled 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)); *NAICS Appeal of Ascendant Program Servs., LLC*, SBA No. NAICS-5832, at 10 (2017).

IV. Conclusion

Appellant has not demonstrated the CO clearly erred in assigning NAICS code 621610, with a corresponding size standard of \$19 million in average annual receipts, to 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