

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

NAICS APPEAL OF:

Laredo Technical Services, Inc.,

Appellant,

Solicitation No. 36C26123R0027

U.S. Department of Veterans Affairs

SBA No. NAICS-6216

Decided: May 30, 2023

APPEARANCES

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

Gary T. Basile, Contracting Officer, U.S. Department of Veterans Affairs, McClellan, California

DECISION

I. Introduction and Jurisdiction

On May 4, 2023, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. 36C26123R0027, seeking a contractor to “[p]rovide 41.0 Full-Time Equivalent Radiology Technologist[s]” for a one-year base period and two option years. (RFP at 1.) 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 561320, Temporary Help Services, with a corresponding size standard of \$34 million average annual receipts.¹

On May 8, 2023, Laredo Technical Services, 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 561320, and that the

¹ The RFP incorrectly stated that the applicable size standard was \$30 million. (RFP at 1.) However, effective December 19, 2022, SBA increased the size standard for NAICS code 561320 from \$30 million to \$34 million. 87 Fed. Reg. 69,118, 69,150 (Nov. 17, 2022). According to SBA regulations, “the size standard in effect on the date the solicitation is issued” is controlling. 13 C.F.R. § 121.402(a).

appropriate code for this procurement is 621399, Offices of All Other Miscellaneous Health Practitioners, with a corresponding size standard of \$10 million average annual receipts. For the reasons discussed *infra*, the appeal is granted, in part. The appropriate NAICS code for this procurement is 621512, Diagnostic Imaging Centers, with an associated size standard of \$19 million average annual receipts.

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 10 calendar days after issuance of the RFP, so the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1), 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

According to the RFP, the contractor will provide 41 radiology technologists, who are Board certified and “specialized in the following modalities: Interventional Radiology (IR), Computed Tomography (CT), Ultrasound (US), Magnetic Resonance Imaging (MRI), Mammography (M), and General Radiography (GEN).” (RFP at 5, 27, 87.) The technologists will deliver “the full range of radiology imaging care for inpatient and outpatient VA patients.” (*Id.* at 27.) Work will be performed at VA medical facilities in and around Palo Alto, California. (*Id.* at 5, 27.)

The RFP states that “[t]he contractor will be responsible for ensuring that each technologist providing services under this contract is fully trained and completely competent to perform the required services covered by this contract.” (*Id.* at 30.) Furthermore, “the Contractor and all Contractor's technologist(s) shall not be considered VA employees for any purpose.” (*Id.* at 35-36.) The RFP specifies that “[i]t is expressly agreed and understood that this is a non-personal services contract, as defined in [FAR] 37.101, under which the professional services rendered by the Contractor or its health-care providers are rendered in its capacity as an independent contractor.” (*Id.* at 75.)

The RFP indicates that VA intends to award a single fixed-price with economic price adjustment (FP-EPA) contract to the offeror that represents the best value to the Government. (*Id.* at 86, 93.) There are four evaluation factors: (1) Contractor's Technical and Management Approach; (2) Qualification and Quality of Offered Providers; (3) Past Performance; and (4) Price. (*Id.* at 87-88, 96-99.) Proposals are due June 2, 2023. (RFP, Amendment 0002.)

B. Appeal

On May 8, 2023, Appellant filed the instant appeal. Appellant alleges that the CO erred by utilizing an “objective standard,” rather than a “subjective standard,” in selecting the NAICS code for the instant procurement. (Appeal at 4.) More specifically, the CO incorrectly chose a NAICS code that corresponds with “the primary business of offerors.” (*Id.*) Appellant highlights

that, according to SBA regulations, the CO instead should have selected “the single NAICS code ***which best describes the principal purpose of the product or service being acquired.***” (*Id.*, quoting 13 C.F.R. § 121.402(b) (emphasis added by Appellant).)

Appellant maintains that the correct NAICS code for this RFP is 621399, Offices of All Other Miscellaneous Health Practitioners. (*Id.* at 4-5.) Appellant reasons that the instant procurement requires “**100%** radiological technologist services” and “there is no requirement for [VA] to purchase the **suppliers** of the radiological technologist services.” (*Id.* at 4 (emphasis Appellant's).) Furthermore, the instant RFP expressly calls for “non-personal services,” and the technologists will be contractor employees supervised by the contractor. (*Id.* at 6.) NAICS code 561320 is improper “***because the [contractor] (that is, the employer company), and not the VA, is providing direct supervision and oversight.***” (*Id.*, emphasis Appellant's.)

Appellant posits that, if OHA were to uphold the use of an “objective standard” in selecting the NAICS code, then “***all*** federal procurements for ***any*** and ***all*** service related” work could be assigned NAICS code 561320. (*Id.* at 4 (emphasis Appellant's).) Such a result would be untenable because “no Government service-related procurements would ever appear for size standards smaller than \$3[4] million.” (*Id.*)

Appellant allows that “one might argue that NAICS [code] 621512, Diagnostic Imaging Centers, is the best NAICS code designation for this procurement.” (*Id.* at 5.) However, in Appellant's view, NAICS code 621399 is better suited for this RFP because “the procurement is not for radiological centers or laboratories ***off-site without the VA facilities*** (objective standard), but for radiological services ***on-site within the VA facilities*** (subjective standard).” (*Id.*, emphasis Appellant's.)

C. CO's Response

On May 24, 2023, the date of the close of record, the CO responded to the appeal. The CO maintains that NAICS code 561320, Temporary Help Services, is appropriate for the instant RFP. (CO's Response at 1.)

The CO asserts that “[t]his procurement is for non-personal healthcare services where the potential awardee and their contract staff shall not be considered VA employees for any purpose.” (*Id.*) Furthermore, according to the CO, “[t]he potential awardee shall not provide direct supervision of their contract staff onsite.” (*Id.*) Prior to issuance of the RFP, VA “posted a sources sought notice on the System for Award Management (SAM)” identifying “Product Service Code Q522 (Medical — Radiology) and NAICS [code] 561320.” (*Id.*) The same combination of PSC Q522 and NAICS code 561320 also is used on a GSA Schedule contract. (*Id.* at 2.) In addition, the Bureau of Labor Statistics lists NAICS code 561320 as among the industries which employs “Radiologic Technologists and Technicians.” (*Id.*) The CO contends that, based on his review of the *NAICS Manual*, “personnel ‘health care’ services” fall under NAICS code 561320, rather than NAICS code 621399. (*Id.*)

D. Reply

On May 24, 2023, Appellant, without instruction from OHA, replied to the CO's Response. Appellant complains that the Response fails to offer “any substantive argument[s]” based on the *NAICS Manual*, but instead relies improperly upon “extraneous market surveys and/or other procurements by [VA].” (Reply at 1.) Appellant also disputes the CO's claim that the contractor will “not provide direct supervision of their contract staff onsite.” (*Id.*) This contention is contradicted by the RFP, which makes clear that VA will exercise no control over professional aspects of services rendered by the contractor or its staff. (*Id.*, citing RFP at 75.)

Under applicable regulations governing NAICS code appeals, a reply to a response generally is not permitted, unless OHA so directs. 13 C.F.R. § 134.309(d). No such direction occurred here. Furthermore, a proposed reply must be accompanied by a motion explaining why good cause exists to permit a reply. 13 C.F.R. § 134.206(e). Appellant here did not file the requisite motion, and its proposed Reply largely reiterates arguments already raised in the appeal. Accordingly, the proposed Reply is EXCLUDED from the record. *NAICS Appeal of T3 TigerTech*, SBA No. NAICS-5674, at 2, fn.2 (2015); *NAICS Appeal of Allserv, Inc.*, SBA No. NAICS-5629, at 7 (2014).

E. NAICS Manual²

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

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.

NAICS Manual at 488. Examples of businesses in this industry include: “[t]emporary employment services,” “[t]emporary help services,” and “[t]emporary staffing services.” *Id.* at 488 and 921.

The NAICS code advocated by Appellant, 621399, Offices of All Other Miscellaneous Health Practitioners, is comprised of:

establishments of independent health practitioners (except physicians; dentists; chiropractors; optometrists; mental health specialists; physical, occupational, and speech therapists; audiologists; and podiatrists). These practitioners operate private

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).

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

NAICS Manual at 523. Index entries which refer to NAICS code 621399 include:

“[a]cupuncturists' (except MDs or DOs) offices (e.g., centers, clinics),” “[d]ietitians' offices (e.g., centers, clinics),” “[h]erbalists' offices (e.g., centers, clinics),” “[h]ypnotherapists' offices (e.g., centers, clinics),” “[m]idwives' offices (e.g., clinics),” “[n]urse practitioners' offices (e.g., centers, clinics),” and “[p]hysicians' assistants' offices (e.g., centers, clinics).” *Id.* at 636, 720, 775, 783, 817, 831, and 848.

NAICS code 621512, Diagnostic Imaging Centers, encompasses:

establishments known as diagnostic imaging centers primarily engaged in producing images of the patient generally on referral from a health practitioner.

NAICS Manual at 527. Index entries which refer to NAICS code 621512 include: “CAT (computerized axial tomography) scanner centers,” “[c]omputer tomography (CT-SCAN) centers,” “[d]iagnostic imaging centers (medical),” “[l]aboratory testing services, medical radiological or X-ray,” “[m]agnetic resonance imaging (MRI) centers,” “[m]ammogram (i.e., breast imaging) centers,” “[m]edical radiological laboratories,” “MRI (magnetic resonance imaging) centers,” and “[r]adiological laboratory services, medical.” *Id.* at 683, 701, 719, 796, 808-09, 814, 823, and 869.

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 561320 is unsuitable for the instant RFP. The *NAICS Manual* makes clear that NAICS code 561320 applies to establishments engaged in “supplying workers to clients' businesses for limited periods of time.” Section II.E, *supra*. Here, the contractor will provide 41 radiology technologists to VA for a period of up to three years.

Section II.A, *supra*. Accordingly, this contractor is not supplying workers for “limited periods of time.” *NAICS Appeal of Millennium Health & Fitness, Inc.*, SBA No. NAICS-6094, at 11 (2021); *NAICS Appeal of Katmai Simulations & Training*, SBA No. NAICS-5445, at 4 (2013) (NAICS code 561320 was appropriate for “a series of undefined, fluctuating, and temporary assignments,” which were “extremely short duration (typically 2 to 4 hours each), subject to frequent change, and incapable of being predicted more than a month in advance.”) Furthermore, as Appellant observes, it appears that the contractor, rather than the client (VA), will supervise the technologists. Sections II.A and II.B, *supra*. Indeed, the RFP repeatedly states that the resulting contract will be for nonpersonal services as defined in FAR 37.101, and that technologists are not “considered VA employees for any purpose.” *Id.* The CO similarly acknowledges in his Response that the RFP is “for non-personal health services where the potential awardee and their contract staff [will] not be considered VA employees for any purpose.” Section II.C, *supra*. According to the *NAICS Manual's* description of NAICS code 561320, however, such establishments “do not provide direct supervision of their employees at the clients' work sites.” Section II.E, *supra*. The instant RFP, then, neither calls for a contractor to supply temporary workers, nor for the client to supervise those personnel. As a result, the CO clearly erred in selecting NAICS code 561320. *NAICS Appeal of Laredo Tech. Servs., Inc.*, SBA No. NAICS-6186, at 7 (2023).

Because 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 III.A, *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) (selecting a code not advocated by any litigant).

I find that NAICS code 621512, Diagnostic Imaging Centers, is the appropriate code for this RFP. The contractor here is charged with providing professional radiology technologists, who will perform “the full range of radiology imaging care” — such as x-rays, MRIs, ultrasounds, and CAT scans — for VA inpatients and outpatients. Section II.A, *supra*. Such work falls squarely within the *NAICS Manual's* description of NAICS code 621512. Section II.E, *supra*. While Appellant emphasizes that diagnostic imaging will be performed at VA's facilities, rather than at the contractor's facilities, such a distinction is not relevant under the *NAICS Manual*. On the contrary, the *NAICS Manual* provides that NAICS code 621512 applies to “[l]aboratory testing services, medical radiological or X-ray,” and to “[r]adiological laboratory services, medical,” irrespective of who owns the facilities where such services are performed. *Id.* OHA likewise has long held that “[i]t is the character of the services themselves, not the location of their performance, which is decisive in making a NAICS code designation.” *NAICS Appeal of Lost Creek Holdings, LLC d/b/a All-STAR Health Solutions*, SBA No. NAICS-6050, at 6 (2020) (citing *NAICS Appeal of Med-National, Inc.*, SBA No. NAICS-4762 (2006)). Accordingly, NAICS code 621512 is appropriate here because it best describes the nature of the work called for in this RFP.

IV. Conclusion

Appellant has shown that the CO clearly erred in selecting NAICS code 561320, and the appeal is GRANTED to that extent. The most appropriate NAICS code for this procurement is 621512, Diagnostic Imaging Centers, with a corresponding size standard of \$19 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 561320 to 621512. 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