

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

NAICS APPEAL OF:

Laredo Technical Services, Inc.,

Appellant,

Solicitation No. 36C25023Q0150

U.S. Department of Veterans Affairs

SBA No. NAICS-6238

Decided: August 17, 2023

APPEARANCES

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

Brandi Holland, Contracting Officer, U.S. Department of Veterans Affairs, Columbus,
Ohio

Tim Coven, President, InSync Consulting Services, LLC, Roseville, California

David A. Meek II, Esq., Losey PLLC, Orlando, Florida, for Ghost RX Inc.

Christopher R. Clarke, Esq., Office of General Counsel, U.S. Small Business
Administration, Washington, D.C.

DECISION

I. Introduction and Jurisdiction

On July 6, 2023, the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) received the above-captioned appeal from Laredo Technical Services, Inc. (Appellant). The appeal challenges the North American Industry Classification System (NAICS) code assigned to Request for Quotations (RFQ) No. 36C25023Q0150. Pursuant to the RFQ, the procuring agency, the U.S. Department of Veterans Affairs (VA), intends to award a task order under an existing Multiple Award Contract (MAC), the U.S. General Services Administration (GSA) Federal Supply Schedule (FSS) 621 I. (RFQ at 85.)

In its appeal, Appellant maintains that the Contracting Officer (CO) clearly erred in assigning NAICS code 561320, Temporary Help Services, to the RFQ. Appellant contends that the appropriate NAICS code for this order is 621399, Offices of All Other Miscellaneous Health Practitioners. 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 10 calendar days after issuance of the RFQ, 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 RFQ

On June 26, 2023, VA issued RFQ No. 36C25023Q0150, seeking a contractor to provide “Registered Nurse [s]taffing [s]ervices” for a one-year base period and up to four option years. (RFQ at 1, 6-8.) The CO set aside the task order entirely for Service-Disabled Veteran-Owned Small Businesses, and assigned NAICS code 561320, Temporary Help Services, with a corresponding size standard of \$34 million average annual receipts.

According to the RFQ, the contractor will provide a total of 40 full-time equivalent (FTE) registered nurses (RNs) to staff various departments at the Indianapolis VA Medical Center. (*Id.* at 9.) More specifically, the contractor will provide: 10 FTEs for “Critical Care (Intensive Care Unit/Stepdown/Emergency Department)”; 18 FTEs for “Acute Care (Med-Surg/General RN/etc.)”; and 12 FTEs for “Perioperative (Operating Room, Same Day Surgery, Post Anesthesia Care Unit).” (*Id.*)

The RFQ stipulates that contractor personnel “shall not be considered VA employees for any purpose.” (*Id.* at 18.) However, “[t]he service to be performed by the contractor will be under the direction of the Associate Director Patient Care Services/Nurse Executive of the VA Medical Center.” (*Id.* at 34.) The RFQ indicates that “VA management will determine the schedule tour of duties for each individual areas based on the needs of the facility.” (*Id.* at 20.) Furthermore, all RNs are “subject to the professional direction of the VA Nurse Manager or designee during the workweek,” and “[o]n evenings, nights, holidays and weekends, the RN[s] report[] through the Charge Nurse to the Nursing Supervisor.” (*Id.* at 25.)

The RFP states that VA intends to award a single fixed-price task order to the offeror that represents the best value to the Government. (*Id.* at 85-86.) There are three evaluation factors: (1) Price; (2) Past Performance; and (3) Technical. (*Id.* at 93.) Quotations originally were due July 12, 2023, but the CO stayed the deadline pursuant to 13 C.F.R. § 121.1103(c)(1)(i). (RFQ, Amendment 0003.)

B. Appeal

On July 6, 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 task order. (Appeal at 4.) More specifically, the CO incorrectly chose a NAICS code that corresponds with “*the primary business of [the] offerors.*” (*Id.*, emphasis Appellant's.) 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.* at 5, quoting 13 C.F.R. § 121.402(b) (emphasis added by Appellant).)

Appellant maintains that the correct NAICS code for this task order is 621399, Offices of All Other Miscellaneous Health Practitioners, because the work described in the RFQ is “**100% nursing services.**” (*Id.* at 4-5, emphasis Appellant's.) Appellant allows that if “the VA were, in fact, supervising the contractor personnel . . . then a case *might* be made for NAICS Code 561320.” (*Id.* at 6, emphasis Appellant's.) In Appellant's view, however, such is not the case here, because “the contractor is still responsible for the supervision of the contractor employees.” (*Id.*) Appellant observes that, under the RFQ, the RNs will “not be considered VA employees for any purpose.” (*Id.*, quoting RFQ at 18.)

Appellant acknowledges that the NAICS code 561320 is the only NAICS code available on the underlying Schedule 621 I MAC. (*Id.* at 2, 5.) Appellant therefore anticipates that the CO may oppose the appeal on the grounds that “‘her hands are tied’ and that she was just ‘flowing down’ NAICS code 561320, Temporary Help Services, because this NAICS code was the umbrella NAICS code for the original award of the GSA eBuy (GSA 621 I MAC contract).” (*Id.* at 5.) Appellant urges that OHA should reject such reasoning, based on recent revisions to 13 C.F.R. § 121.402(c)(2)(i). As revised, that rule now provides that “*[i]f the NAICS code corresponding to the principal purpose of the order is not contained in the underlying [MAC], the [CO] may not use the [[MAC] to issue that order.*” (*Id.*, quoting 13 C.F.R. § 121.402(c)(2)(i) (emphasis added by Appellant).)

Appellant concludes that NAICS code 621399 is best suited for this RFQ because it “provides an explicit description and alignment with the performance of work objectives outlined in the solicitation.” (*Id.* at 6.)

C. InSync's Response

On July 14, 2023, InSync Consulting Services, LLC (InSync), a prospective offeror, intervened and responded to the appeal. InSync complains that this and other similar appeals filed by Appellant “are having a severe impact on the ability of the [VA] to acquire the services necessary to properly staff the VA Medical Centers and facilities to provide services to our Veterans.” (InSync's Response at 8.) InSync further contends that Appellant lacks any “legitimate reason” to bring its appeals. (*Id.*) InSync urges that OHA should deny, or summarily dismiss, the appeal. (*Id.* at 10.)

D. Ghost's Response

On July 21, 2023, Ghost RX Inc. (Ghost), a prospective offeror, intervened and responded to the appeal. (Ghost Response at 1.) Ghost disputes the notion that NAICS code 561320 is inappropriate because the contractor remains responsible for the supervision of the contractor employees. (*Id.* at 3.) Instead, Ghost asserts, provisions in the RFQ make clear that contractor employees will be “under the direction and supervision of VA employees and staff.” (*Id.*)

Next, Ghost rejects Appellant's argument that NAICS code 621399, Offices of All Other Miscellaneous Health Practitioners, is the appropriate code. Ghost observes that this code covers “‘independent health practitioners' that 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.’” (*Id.*, at 3, quoting *NAICS Manual* at 523.) Ghost contends that it would be difficult to locate “a group practice of nurses large enough and mobile enough to meet the requirements of the [RFQ]” and asserts a “healthcare-focused temporary staffing company” is better suited for the RFQ. (*Id.*)

Ghost notes the temporary nature of the RFQ and Appellant's acknowledgement of the 1-year duration of the contract. (*Id.* at 4.) Although VA has the option to “extend beyond the one year term” of the task order, “it has no obligation to work with the selected contractor after that one year.” (*Id.*)

E. CO's Response

On July 21, 2023, the CO responded to the instant appeal. The CO maintains that the RFQ was properly issued under the GSA Schedule 621 I, a MAC. (CO Response at 2.) Furthermore, referencing SBA regulations and the FAR, the CO asserts that “it is not legally allowable for a [CO] to prescribe a NAICS code that is not contained in the underlying FSS contract.” (*Id.*, citing 13 C.F.R. §§ 121.402(c)(2)(i) and 121.404(g)(3)(iv); FAR 19.102(b)(3)(i).)

The CO also notes the distinction between NAICS code 561320, which covers “employees of the temporary help services establishment,” and NAICS 621399, which covers independent practitioners that “operate private or group practices in their own offices s (e.g., centers, clinics) or in the facilities of others.” (*Id.* at 3.)

F. SBA's Comments

Because the issues raised by Appellant involved interpretation of SBA regulations at § 121.402(c)(2)(i) and FAR 19.102, OHA requested that SBA address whether the recent revisions to § 121.402(c)(2)(i) would permit OHA to determine, in the context of a NAICS appeal, whether a task order solicitation must be cancelled.

On August 3, 2023, SBA filed comments in response to OHA's request. SBA highlights that the provision in question states “**[i]f the NAICS code corresponding to the principal purpose of the order is not contained in the underlying Multiple Award Contract, the contracting officer may not use the Multiple Award Contract to issue that order.**” (SBA Comments at 1-2, quoting 13 C.F.R. § 121.402(c)(2)(i), emphasis added by SBA.) SBA therefore “agrees [with Appellant] that a MAC should not be utilized if it does not contain the proper NAICS that should be assigned to the task order.” (*Id.* at 1.) SBA maintains “[t]his is an intended outcome of the SBA's rulemaking” and reasons that a “significant number of contracts and contracting dollars [are] awarded using task orders and that often th[e] NAICS assigned to task orders . . . did not describe the goods or services that the government was buying.” (*Id.* at 2, citing 85 Fed. Reg. 66,146, 66,180 (Oct. 16, 2020).)

In the preamble to the 2020 revisions, SBA stated that ““this rule makes only minor revisions to the existing regulations to ensure that the NAICS codes assigned to specific procurement actions, and the corresponding size standards, are an accurate reflection of the contracts and orders being awarded and performed””. (*Id.* at 3, quoting 85 Fed. Reg. 66,150, emphasis added by SBA.) SBA deduces “SBA's rulemaking clearly laid out the problems that can and have occurred when NAICS assigned to task orders are based on the NAICS assigned to underlying contract rather than assigned based on the goods and services being procured by the individual task order contract.” (*Id.*)

SBA asserts that “it is better to not use the [MAC] than to use [an] inappropriate NAICS.” (*Id.*) In the preamble accompanying the proposed rule, SBA explained:

There will still be anomalies where a procuring agency seeks to award an order whose principal purpose is different than the assigned NAICS code for the MAC until the Federal Acquisition Regulation (FAR) and the FPDS is amended to include multiple NAICS codes at the contract level. SBA does not believe that the order should be assigned a NAICS code that does not properly reflect its principal purpose. SBA believes that the better approach would be to fulfill such requirement through a different contracting vehicle.

(*Id.* at 3, citing 84 Fed. Reg. 60,846, 60,848 (Nov. 8, 2019).) SBA deduces from its rulemaking that “the accuracy of the NAICS assigned to a contract or task order is and should be more important than the NAICS [code on the] underlying [MAC].” (*Id.* at 3.) SBA concludes that “[i]f an Agency has the need for goods or services, and the proper NAICS to describe those needs is not on the underlying [MAC], th[e]n the Agency should not use that [MAC] to procure those goods or services.” (*Id.*)

G. Ghost's Reply to SBA's Comments

On August 11, 2023, Ghost replied to SBA's Comments. Ghost emphasizes that “[OHA] cannot overturn the [CO's] NAICS code designation unless [Appellant] gives [] OHA a ‘definite and firm conviction that a mistake has been committed.’” (Ghost Reply at 2, citing *Concrete Pipe and Products of Cal, Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 623 (1993).) Appellant here has failed to show any error in the assigned NAICS code. (*Id.* at 3.) Specifically, Ghost reiterates that the RFQ does not contemplate that the contractor will provide “onsite supervision of the contractor's employees,” contrary to the premise of the appeal. (*Id.*) Instead, the RFQ is clear that contractor RNs are subject to “the direction and oversight of the VA and its staff.” (*Id.*) Lastly, Ghost maintains that “a healthcare-focused temporary staffing company” is likely the only type of company that can meet the requirements of the RFQ. (*Id.*)

H. CO's Reply to SBA's Comments

On August 11, 2023, the CO filed a reply to SBA's comments. The CO asserts that the RFQ is a “direct result of the COVID pandemic causing staffing shortages at facilit[ies] [and] [i]t is designed to supplement VA clinicians until direct hire candidates can be brought on board to offset the staffing shortfall that VA facilities continue to contend with 3 years after the start of

the pandemic.” (CO's Reply at 1.) Accordingly, the RFQ is “not intended to be a permanent solution” and the contractor personnel are “expected to supplement the existing workforce of the VA facility, not serve as a replacement.” (*Id.*)

Citing provisions in the RFQ, the CO highlights that the RNs are “not classified as VA personnel” and are “directly supervised by VA staff while on site.” (*Id.* at 1-3.) NAICS code 561320 also “is notably different than VA's approach to contract vehicles that are intended to be long-term care solutions where hiring is not traditionally possible or economically feasible,” whereas NAICS code 621399 is intended for “long-term and/or permanent contracted solution[s]” (*Id.* at 3.)

I. NAICS Manual¹

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. Corresponding index entries which refer to NAICS code 561320 include “[c]ontract staffing services” and “[p]ersonnel (e.g., industrial, office, health care, legal, construction) suppliers.” *Id.* at 705 and 845.

NAICS code 561320 falls within NAICS industry group 5613, Employment Services, which broadly encompasses:

establishments primarily engaged in one of the following: (1) listing employment vacancies and referring or placing applicants for employment; (2) providing executive search, recruitment, and placement services; (3) supplying workers to clients' businesses for limited periods of time to supplement the working force of the client; or (4) providing human resources and human resource management services to client businesses and households. *NAICS Manual* at 487.

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

¹ 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).

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 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.

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

Appellant has not carried its burden of proving that NAICS code 561320 is clearly incorrect for the instant RFQ. This appeal must therefore be denied.

A review of the record confirms that NAICS code 561320 is an appropriate choice for this procurement. The *NAICS Manual* makes clear that NAICS code 561320 applies to establishments that are “primarily engaged in supplying workers to clients' businesses for limited periods of time to supplement the working force of the client.” Section II.I, *supra*. Furthermore, although the “individuals provided are employees of the temporary help services establishment,” such establishments “do not provide direct supervision of their employees at the clients' work sites.” *Id.* Temporary workers provided under NAICS code 561320 may include health care personnel, and NAICS code 561320 expressly covers “[p]ersonnel (e.g., health care) suppliers.” *Id.*

In the instant case, the contractor will provide 40 Registered Nurses (RNs) to staff various departments at the Indianapolis VA Medical Center. Section II.A, *supra*. As Ghost and the CO observe, these nurses will be contractor (not VA) employees, yet work will be performed at VA's facilities, and VA (not the contractor) will supervise the nurses. *Id.* The RFQ thus states that the contractor will be “under the direction of the Associate Director Patient Care Services/Nurse Executive of the VA Medical Center,” and that the RNs are “subject to the professional direction of the VA Nurse Manager or designee during the work week.” *Id.* VA will define the specific duties and the work schedules of the RNs. *Id.* Additionally, although Appellant maintains that the contractor will supervise the nurses, Appellant overlooks that the RFQ does not call for the contractor to provide any of its own managerial personnel. *Id.* As a result, Appellant fails to identify any plausible mechanism whereby the contractor might manage the RNs. Section II.B, *supra*. Accordingly, based on the RFQ, the CO could reasonably select NAICS code 561320, as the contractor will supply temporary health care personnel to its client (VA), and those personnel will perform work at VA facilities and under VA supervision, while remaining employees of the contractor.

OHA's decision in *NAICS Appeal of Laredo Technical Services, Inc.*, SBA No. NAICS-6216 (2023) does not require a contrary result. In that case, OHA determined that NAICS code 561320 was inappropriate for a procurement because that procurement “neither call[ed] for a contractor to supply temporary workers, nor for the client to supervise those personnel.” *Laredo Tech. Servs.*, SBA No. NAICS-6216, at 6. Conversely, as discussed above, the RFQ here makes clear that the contractor will provide personnel who will operate under the supervision of the client (VA). Section II.A, *supra*. Indeed, Appellant itself acknowledges in its appeal that if “the VA were, in fact, supervising the contractor personnel . . . then a case *might* be made for NAICS Code 561320.” Section II.B, *supra*. Furthermore, the *NAICS Manual* states that temporary assignments under NAICS code 561320 need not necessarily be of extremely short duration; rather, NAICS code 561320 encompasses situations where temporary workers are provided for “limited periods of time to supplement the working force of the client.” Section II.I, *supra*. Here, both the CO and Ghost emphasize the “limited” nature of this RFQ, explaining that VA commits to utilizing the RNs only for a one-year period, and that the RNs are intended only to supplement, not replace, VA's own workforce. Sections II.G and II.H, *supra*.

Because Appellant has not demonstrated that NAICS code 561320 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 Millennium Health & Fitness, Inc.*, SBA No. NAICS-6094, at 11 (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).

In its appeal, Appellant argues that, although SBA regulations and the FAR require a contracting officer to assign a task order the same NAICS code associated with the underlying MAC, recent revisions to 13 C.F.R. § 121.402(c)(2)(i) nevertheless mandate cancellation of a task order if OHA determines that the NAICS code associated with the MAC is not appropriate for that task order. Section II.B, *supra*. I find it unnecessary to decide that issue here, since as

discussed above, NAICS code 561320 is a reasonable choice for the instant RFQ. It is worth noting, however, that the regulatory revisions Appellant relies upon were introduced in October 2020, and SBA's commentary in the *Federal Register* accompanying those regulatory revisions does not indicate whether SBA intended the revisions to apply to MACs already in existence at the time of the revisions, or only to MACs newly awarded after the revisions became effective. 85 Fed. Reg. 66,146, 66,150 (Oct. 16, 2020). Similarly, SBA is silent on this question in its comments on the instant appeal. Section II.F, *supra*. In the preamble accompanying the final rule, however, SBA did comment that the revisions would have no “retroactive” effect, and that SBA believed the revisions to § 121.402(c)(2)(i) represented “only minor revisions to the existing regulations.” 85 Fed. Reg. at 66,150 and 66,170. Contrary to Appellant's suggestions, then, it is not clear the revisions to § 121.402(c)(2)(i) would apply in the instant case, because the underlying Schedule 621 I was awarded well before the revisions to § 121.402(c)(2)(i) became effective.

III. Conclusion

Appellant has not demonstrated the CO clearly erred in assigning NAICS code 561320, Temporary Help Services, with a corresponding size standard of \$34 million average annual receipts, to this RFQ. 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