

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

NAICS APPEAL OF:

Mission Analytics, LLC,

Appellant,

Solicitation No. 1333ND24QNB770135

U.S. Department of Commerce

SBA No. NAICS-6298

Decided: July 24, 2024

APPEARANCES

Mike Winters, President of Mission Analytics, LLC, Falls Church, Virginia

Adam Powell, Contracting Officer U.S. Department of Commerce, National Institute of Standards and Technology, Gaithersburg, Maryland

DECISION

I. Introduction and Jurisdiction

On May 17, 2024, Mission Analytics, LLC (Appellant) filed the above-captioned appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). The appeal challenges the North American Industry Classification System (NAICS) code designation of the U.S. Department of Commerce, National Institute of Standards and Technology (NIST), Solicitation No. 1333ND24QNB770135 (Solicitation).

In its appeal, Appellant maintains the Contracting Officer (CO) erred in assigning NAICS code 334310, Audio and Video Equipment Manufacturing, with a corresponding 750 employee size standard, to the Solicitation. Appellant contends the appropriate NAICS code is 541519 Other Computer Related Services (Exception), Information Technology Value Added Reseller, with a corresponding 150 employee size standard. Alternatively, if SBA OHA determines that a manufacturing NAICS code is most appropriate, Appellant claims NAICS code 334419 - Other Electronic Component Manufacturing, with a corresponding 750

employee size standard, is appropriate. 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 Solicitation, 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 Solicitation

On May 7, 2024, the NIST issued the subject Request for Quotation (RFQ), totally set aside for small business, and designated NAICS code 334310, Audio and Video Equipment Manufacturing / Television (TV) Sets Manufacturing, with a corresponding 750 employee size standard as the applicable code. The Contracting Officer (CO) stated that simplified acquisition procedures would be utilized and noted that SBA “maintains an active non-manufacturer rule class waiver for the aforementioned NAICS code. . . .” (SAM.Gov Notice ID 1333ND24QNB770135.)

As a background information, the RFQ introduces:

High Performance Computing and Visualization Group (HPCVG), is located in the Applied and Computational Mathematics Division (ACMD) in the Information Technology Laboratory (ITL) of the National Institute of Standards and Technology (NIST). The Group develops novel algorithms and implementations for parallel and distributed computation, as well as innovative techniques for immersive scientific visualization in a variety of local and distributed hardware environments [. . .] all in support of the NIST mission [. . .]

HPCVG owns and operates a CAVE (CAVE Automatic Visualization Environment) for its immersive visualization work at the NIST Gaithersburg, MD site. A CAVE is a real-time hardware system that enables the user to see perspective-based true 3D images. For this to function correctly, the hardware system must be designed with real-time capability that enables viewing of real-time images.

This Immersive Visualization Environment (IVE), along with the software that the Group develops, is on a critical path for all research in the Group. Its role is critical in HPCVG's High Performance Computing work as it serves to speed code development and enable quick checking for errors as well as validation tests. It enables the visualization, measurement on visualizations, and analysis of results.
[. . .]

The CAVE has come to the end of its life as the display system can no longer be maintained. In order to ensure continuity of research efforts and to keep pace with the rapid advancement of technology in this area, it is important that the IVE be upgraded.

(Id.)

Followed by this information, NIST “requires an upgrade to the IVE/CAVE on the NIST Gaithersburg, MD campus with newer display technology [. . .] NIST has identified that a Direct View Light Emitting Diodes (LED) display system would offer a higher resolution and brighter display compared to its existing projection-based visualization system [and] would also be able to support dual view stereoscopic visualization [. . .].” Thus, NIST seeks to acquire a dual-view display system, described in the Specifications. *(Id.)*

B. Quotes and Evaluation Criteria

Offerors are to provide firm-fixed pricing for Contract Line Item Number (CLIN) 0001, covering a Dual-View Capable Direct View LED System in compliance with the Attachment 1 — Specifications, and for CLIN 0002, covering the installation. All proposed equipment is to be new. Used, refurbished, experimental, prototype, or custom items will not be considered. “Gray market” components not authorized for sale in the U.S. by the Quoter are not acceptable. *(Id.)*

The RFQ requires delivery be made within 4 months after receipt of order (ARO). The contractor will install the system at NIST and provide the required demonstration within 4 weeks after delivery. Therefore, delivery, installation and demonstration are to be completed within 5 months ARO. *(Id.)*

For evaluation of Technical Capability, the RFQ requires documentation and product literature, demonstrating that the items and services being quoted conform to the requirements identified in CLIN 0001. The quotation is to clearly document that the proposed delivery lead time complies with the Government's delivery requirements. In the event the offeror is not the Original Equipment Manufacturer (OEM) of the proposed items, the offeror will submit documentation that clearly demonstrates that the offeror is authorized by the OEM to re-sell the proposed items. (*Id.*)

As part of the offeror's technical quotation, the offeror is to “clearly document or provide the minimum computer requirements required to drive the quoted display system.” (*Id.*) In the Statement of Need, NIST intends to obtain said computer system separately (not as part of this solicitation), and to then provide said computer system to the resulting awardee within 6 weeks after award. Therefore, all quotations must clearly document the minimum computer requirements required to drive the quoted display system. (*Id.*)

The Specification of the display system indicates the contractor will provide one immersive visualization system meeting or exceeding the Dual-view capability display with the ability to support two users with unique head tracked stereoscopic view. The Vendor Direct View will be no larger than 1.25mm LED. Further, the system will include One Wall Panel and One Floor Panel. The required Wall system will be a single (one-plane) vertical surface, to be abutted with the floor surface, with a Floor Display System, Structural System, Cabling System, Tracking System, 3D system, Desktop Console System, and Equipment Rack. It also requires power and cooling specification. (Solicitation Amend. 001, at 1-2.)

NIST will supply the Application Software and Computer System but requires the vendor to provide minimum computer requirements required to drive the display as part of its capability narrative, as well as to demonstrate to NIST correct display and tracking of computer by the end of the installation at NIST. (*Id.*, at 3.)

As for the System testing, the contractor is responsible for installing and then demonstrating the entire working system at the NIST installation site. As part of the contractor's demonstration, the following system tests shall be performed by the contractor:

- Stereographically display polygonal models such as the industry standard Utah Teapot and Stanford Bunny.

- Tracking system capable of simultaneously tracking the 6-DOF position of the head of three (3) individual viewers, along with three (3) hand-held controllers, plus at least two (2) other rigid body objects.
- Demonstration of dual-view stereoscopic rendering and display.

(*Id.*)

For Price evaluation purposes, contractors must include a firm fixed price quote, including shipping costs. (*Id.*) The Government intends to award a firm-fixed price purchase order from this solicitation to the responsible quoter whose quotation, conforming to the solicitation, is the lowest price technically acceptable quotation. (*Id.*)

To be considered technically acceptable, a quotation must include a quote for a dual view display system meeting all the Government's requirements in the Specifications, clearly documenting the minimum computer requirements required for the quoted display system and complying with the delivery and installation requirements and all other terms and conditions detailed in this Solicitation. Price will be evaluated for reasonableness. (*Id.*)

May 24, 2024 was the deadline for Quotations.

C. Appeal

On May 17, 2024, Appellant filed the instant appeal, “asserting that the assignment of NAICS 334310 is not [the appropriate code under] IAW FAR 19.102(b).” (Appeal, at 1.) By first describing NAICS code 334310 with examples under this classification, Appellant claims that “[n]either the type of establishment (manufacturer) nor the description of consumer end products bears any resemblance to the requirements of the [Statement of Work (SOW)].” (*Id.*) Here, Appellant claims the supplies specified in the SOW are:

Direct View Light Emitting Diode (LED) 1.25mm pixel Display to create a custom multi-plane Video Wall

Professional Video Wall Controller that supports 240Hz display cycle

Structural Multi-Plane Video Wall Mounting System Cabling System

6-DOF Motion Tracking System to include software

3D Glasses

Desktop Console

Two Desktop Displays — UHD

AV Equipment Rack

Power Distribution System

(Id., at 2.)

Appellant argues that “none of these items even remotely match up with the consumer-level equipment listed under NAICS 334310.” *(Id.)* Appellant takes at issue the SOW required list of services to deliver a functional CAVE, such as:

- System Design that exhibits Dual View Stereoscopic Rendering and Display
- Hardware and Software Integration
- Mechanical Engineering/Analysis (to calculate weight bearing capacity)
- Custom Installation
- Software Testing with Government Computers
- Electrical Load and Thermal Analysis
- Advanced graphical computing tests to demonstrate dual-view stereoscopic rendering and display

(Id., at 3.)

In Appellant's view, the list creates two mismatches with the NAICS description:

1) Equipment is multi-vendor, and likely to be sourced from five or more manufacturers. Thus, no firm “primarily engaged in manufacturing” would be able to provide the products of a multitude of other manufacturers.

2) The required services are significant and describe activities that are in no way manufacturing.

(Id.)

Appellant thus concludes that NAICS 334310, which describes the manufacturing of consumer-level products, is a poor match for the requirements of the RFQ. Appellant explains that SBA had these challenges in mind when it carved out the ITVAR exception to NAICS 541519. Appellant cites to, Small Business Size Standards; Information Technology Value Added Resellers Proposed Rule by the Small Business Administration, 67 Fed. Reg. 48419, (July 24, 2002):

The acquisition of IT equipment has several aspects that lead SBA to believe that it should establish special small business eligibility requirements for IT Value Added Resellers that are similar to those for a service contractor. First, as discussed above, many Federal agencies prefer to go to a single source to obtain IT equipment and supporting services. In doing so, a contractor often provides advisory and other support services. Second, most acquisitions are for numerous IT products that make it unrealistic to expect one manufacturer to produce all of the required items. . . . Third, IT contracts often require the contractor to customize computer hardware or install specialized software to meet an individual user's needs. Although these activities usually do not constitute manufacturing, they are beyond the traditional wholesale-distribution function.

(Id.)

Relying upon the above citation, Appellant asserts SBA created the ITVAR Exception to NAICS code 541519 at Footnote 18, which it maintains is almost a perfect match to the requirements of this solicitation. This NAICS code covers a “total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant value-added services. Significant value-added services consist of, but are not limited to, configuration consulting and design, systems integration, installation of multi-vendor computer equipment,

customization of hardware or software, training, product technical support, maintenance, and end user support.” (*Id.*)

Further, Appellant claims that this RFQ requires services to be between 15% and 50% of the contract value (arguing that 20% is a reasonable factor for this RFQ) so it meets the requirements of the ITVAR exception and the CAVE system that is being solicited clearly meets the definition of IT provided by FAR 2.101. (*Id.*, at 4.)

Appellant relies on the term “information technology” in FAR 2.101 to establish that the ITVAR Exception to NAICS code 541519 provides a far better description than NAICS code 334310 for the principal purpose of the supplies and services required by the instant RFQ. Thus, the ITVAR Exception to NAICS code 541519 should be chosen rather than NAICS code 334310.

As a policy consideration, Appellant also relies on the preamble at 84 Fed. Reg. 65647, 65649 (Nov. 29, 2019), where SBA evaluated whether the size standard for the ITVAR Exception to NAICS code 541519 should be raised to 500 employees and after full deliberation and public comment, it remained at 150 employees because SBA did not believe that a “non-manufacturer with close to 500 employees should be considered small.” (*Id.*) Appellant states the instant procurement describes supplies and services more than likely to be provided by a non-manufacturer. It would therefore be against the public interest to adopt a NAICS code that would allow a non-manufacturer to be considered small under a 500-employee standard. Thus, assignment of NAICS code 334310, or any supplies NAICS code, to this requirement runs counter to the public interest. (*Id.*)

In support of its NAICS code, Appellant submits that SBA fully agreed with this position in the *NAICS Appeal of Microtechnologies, LLC*, SBA No. NAICS-5489 (2013) (*Microtech.*) when OHA found no error in the CO's choice of NAICS code 541519, with ITVAR exception, as indicated:

According to the RFP, the contractor will provide complete, integrated video teleconferencing solutions, including both value-added services — such as design, installation, and training — and substantial quantities of video teleconferencing equipment produced by various manufacturers. Section II.A, *supra*. As the CO correctly observes, video teleconferencing can be considered a type of “information technology” within the meaning of FAR 2.101. Thus, the instant RFP falls squarely within the (ITVAR) definition, because the contractor

will be “provid[ing] a total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant services.” 13 C.F.R. § 121.201, n.18.

(*Id.*, at 5, citing *Microtech*, SBA No. NAICS-5489, at 4.)

Appellant then explains that when NIST previously solicited a similar solution, via RFQ SB1341-13-RP-0102, NIST Reconfigurable Advanced Visualization Environment (RAVE) Upgrade, the solicitation was assigned the ITVAR Exception to NAICS code 541519. NIST should therefore be very familiar with how this NAICS code matches the requirement, described as follows in the solicitation:

For both systems, visual immersion is implemented through 3D stereoscopic display and head tracking. Additional capabilities include a tracked wand for input, audio and a multi-core computer supporting a high-performance graphics card for each projector.

The first environment is located in Gaithersburg, MD and is a three-projector RAVE product purchased from Mechdyne Corporation (www.mechdyne.com) as a series of increments over the years 2000-2003. The configuration is a corner consisting of two walls and a floor, each projecting a 96”Dx96”D’ image.

...

Due to the aging of this equipment, ITL/HPCVG requires the upgrade of the Gaithersburg system to current state-of-the-art hardware.

(*Id.*, at 5, citing RFQ SB1341-13-RP-0102, SOW, at 1.)

Appellant questions how this 2013 requirement for a state-of-the-art CAVE was assigned ITVAR Exception to NAICS code 541519, but the 2024 upgrade to a state-of-the-art CAVE is assigned a different NAICS code. Further, Appellant takes issue with “why NIST is separately resisting inclusion of the NMR. It gives the appearance that the assignment of a supply NAICS and erroneous exclusion of the NMR is designed to favor a firm that is not small under the 150-employee standard and intends to offer the products of a large business manufacturer.” (*Id.*)

Conversely, Appellant cites *NAICS Appeal of KVA Electric, Inc.*, SBA No. NAICS-5030, at 5 (2009):

NAICS code 335314 describes an industry where concerns manufacture switchgear and switchboard apparatus. NAICS code 335314 does not describe an industry where manufacturers expertly install and test vacuum breakers. While it may be true that the greatest cost of the RFQ is the value of the vacuum breakers, cost is not the relevant standard for selecting an appropriate NAICS code. Rather, as provided by 13 C.F.R. § 121.402(b), contracting officers are responsible for selecting the NAICS code that best describes the principal purpose of the product or service being acquired.

The RFQ does not require the successful offeror to supply vacuum breakers on a pallet at the front gate of Fort Lewis for the government to install. Instead, the RFQ requires installation of vacuum breakers by experienced high voltage electricians, in accordance with applicable codes and standards, and testing of the functionality of the installed vacuum breakers. In addition, the successful offeror must provide shop drawings containing wiring diagrams and properly dispose of the old medium voltage breakers. Based upon the RFQ, the principle purpose of the RFQ, as anticipated by 13 C.F.R. § 121.402(b), is that the successful offeror expertly install, test, and document the installation of vacuum breakers (with final shop drawings) while being responsible for the disposal of the old breakers. Hence, it was clear error for the CO to designate NAICS code 335313 to the RFQ.

The definition of NAICS code 238210, Electrical Contractors and Other Wiring Installation Contractors, parallels the text of the RFQ, which requires the successful offeror to install and service electrical wiring and equipment. Moreover, as anticipated in the NAICS MANUAL, the RFQ requires the successful offeror will provide both the parts and labor when performing the work.

(*Id.*, at 5-6.)

Here, Appellant argues this case has two parallels, indicating “[f]irst is that the Agency had assigned 238210, and then changed to less restrictive size 335313, which parallels the agency here going from 541519 ITVAR to 334310. Secondly, 334310 only addresses the supplies, whereas 541519 addresses the supplies but

ADDS the necessary expertise, otherwise known as Value Added Services. Even though the supplies make up the greatest cost, as in NAICS 5030 (sic), the Services are the predominant product and NAICS 541519 ITVAR should prevail.” (*Id.*, at 6.)

Appellant asserts “Direct View LED Video Walls are not expressly listed under any NAICS. But, as any industry pro would agree, the closest match to a listed NAICS product (and the product they serve as a direct substitute for) is LCD (liquid crystal display) Unit Screen. These are included in NAICS 334419 Other Electronic Equipment Manufacturing.” (*Id.*) Further, Appellant reasons “the term Unit Screens directly relates to the way LCD video walls are built from individual panels assembled into a matrix. Similarly LED modules and cabinets are assembled into a display. It would be unreasonable to assert that LCD Video Wall manufacturing is assigned to 334310 when they are clearly assigned to 334419. The same goes for LED Video Wall manufacturing, as it is much more comparable to LCD unit screens than to Television Sets.” (*Id.*)

Appellant claims that if the CO intended to choose a manufacturing NAICS code, 334310 is not the NAICS code that best describes the principal product and purpose of the instant RFQ. Here, Appellant argues in the alternative that if this NAICS Appeal is not successful at designating the ITVAR Exception to NAICS code 541519, NAICS code 334419, Other Electronic Component Manufacturing, with a corresponding 750 employee size standard, is the best description of the items sought. (*Id.*) Appellant explains that Direct View LED Video Walls are not expressly listed under any NAICS code, but the closest match to a product listed under any NAICS code description (and the product they serve as a direct substitute for) is the LCD (liquid crystal display) Unit Screen, which is included in the NAICS code 334419 description. (*Id.*, at 6-7.) Appellant states that: “The term Unit Screens directly relates to the way LCD video walls are built from individual panels assembled into a matrix. Similarly LED modules and cabinets are assembled into a display. It would be unreasonable to assert that LCD Video Wall manufacturing is assigned to 334310 when they are clearly assigned to 334419. The same goes for LED Video Wall manufacturing, as it is much more comparable to LCD unit screens than to Television Sets.” (*Id.*, at 6). Thus, if OHA determines that a manufacturing NAICS is most appropriate, NAICS code 334310 should be replaced with NAICS code 334419. (*Id.*)

Lastly, Appellant asserts “[T]he Agency has a pattern of not applying the [Non-Manufacturer Rule (NMR)], so it would be appropriate for the OHA to not only determine the best NAICS, but to also determine whether any SBA Class

Waiver would apply to the instant RFQ.” (*Id.*) Appellant offers a list of recent RFQs where the NMR is not applied as Appellant argues that it should be. (*Id.*)

On May 23, 2024, the CO issued an amendment notice in SAM.Gov, to pause the due date for receipt of quotes for this RFQ per OHA's Notice and Order, with a copy of OHA's Order. (*Id.*)

D. The CO's Response

On June 4, 2024, the CO filed a substantive response to the instant appeal. The CO first states that “the purpose of this requirement is to upgrade the current projector-based display system to an LED-based system within the existing CAVE. The required system primarily consists of one LED wall and one LED floor display that utilizes large, high-resolution LED panels. It will also include a Motion tracking system and Stereoscopic glasses. The computer system and application software for the CAVE will be procured via a separate procurement as stated within the solicitation. While the contractor will be tasked with installing and demonstrating that its LED-based system meets the specifications contained in the solicitation, NIST anticipates the installation/setup cost would be incidental to the overall requirement.” (CO's Response, at 1.)

The CO asserts that he carefully considered the primary function of the required supplies and services being acquired and determined that NAICS code 334310 best describes the principal purpose of the procurement based on four reasons. First, “initial market research confirmed that potential sources identified predominantly serve and specialize in the Audio and Video Equipment Manufacturing industry.” (*Id.*) The CO adds that protester's website emphasizes Audio and Video Equipment Manufacturing, and installation services and explicitly references NAICS code 334310. (*Id.*)

The CO explains the current CAVE is a projection-based display system, consistent with the commercially accepted definition of “Audio-Visual Equipment.” The CO relies on Law Insider's dictionary defining “Audio-Visual Equipment” as all audio equipment and all visual projection and sound equipment, whether fixed or movable, which is what NIST is procuring here. (*Id.*, at 2.) Further, “the CAVE equipment used at NIST has been described as a whole, integrated, audio-visual experience by its inventors, as published in 1992 [online link], and is still considered a complete audio-visual experience by more modern practitioners of virtual reality, as conveyed in an article published via ScienceDirect [online link] who describe their CAVE equipment as ‘audio-visual

devices.” (*Id.*, citing Context with Immersive Technologies in Sensory Consumer Testing (2019); Section 23.1.1 Audiovisual devices).

Second, the CO recognizes that while the contractor will install its working system and demonstrate that it functions in accordance with the RFQ's specifications, such installation/setup costs are incidental to the overall requirement's cost. Here, the CO asserts that NAICS code 334310 is appropriate, because most of the cost of this requirement is for the LED panels themselves. Moreover, the ITVAR Exception to NAICS code 541519 is not appropriate because that NAICS code requires significant value-added services, i.e., at least 15 percent and not more than 50 percent of value-added services as measured by the total price less the cost of information technology hardware, computer software, and profit. In contrast, the Government's market research found that the value-added services included in this requirement (i.e., installation and setup) would be less than 15% of the total requirement's cost. (*Id.*)

Third, the CO states NIST issued a sources sought notice on January 16, 2024, via SAM.gov. The sources sought notice included the ITVAR Exception to NAICS code 541519 because NIST wanted to canvas the entire marketplace across numerous industries. However, after analyzing responses received to the sources sought notice, “coupled with the fact that virtually all of the requirement's costs related to the LED panels themselves, NIST determined that NAICS Code 541519 is not appropriate for this requirement and that the appropriate NAICS Code is 334310.” (*Id.*) NIST received three (3) responses to its sources sought notice. Two of three respondents were capable of fulfilling the Government's requirement, and those two respondents were small businesses with 334310 as their primary NAICS code. (*Id.*)

Fourth, given the procurement is of Audiovisual Equipment, which is commercially available, and that a predominant aspect of the procurement is television screens (i.e., LED displays/screens), NIST determined that SBA class waiver 334310 — Television Sets Manufacturing; Home Type — applies to this procurement. Therefore, the CO reasserts that this procurement is exempt from the nonmanufacturer rule, and FAR 52.219-33, Nonmanufacturer Rule, was not included in the solicitation. (*Id.*)

In response to Appellant's argument, the CO states NIST is procuring an LED-based display system to replace the existing projector-based system, which aligns best with NAICS Code 334310. Although Appellant asserts that NAICS 334419, Other Electronic Equipment Manufacturing, should be used in the

alternative, the CO affirms that given the primary purpose of this procurement is to purchase an LED display system, i.e., audio and visual equipment, NAICS code 334310 is more appropriate than NAICS 334419, Other Electronic Component Manufacturing. NIST also notes that none of the sources sought responses suggested that NAICS code 334419 be used, nor is it included in any of their SAM profiles. (*Id.*, at 2-3.)

The CO concludes by affirming the assigned NAICS code 334310 accurately reflects the core industry for this solicitation and ensures fair competition among qualified businesses. The CO believes the designation best serves the Government's procurement needs while complying with SBA size regulations. (*Id.*, at 3.)

III. NAICS Manual¹

The CO's designated NAICS code, 334310 Audio and Video Equipment Manufacturing, covers:

[E]stablishments primarily engaged in manufacturing electronic audio and video equipment for home entertainment, motor vehicles, and public address and musical instrument amplification. Examples of products made by these establishments are digital video recorders, televisions, stereo equipment, speaker systems, household-type video cameras, jukeboxes, and amplifiers for musical instruments and public address systems.

NAICS Manual, at 265.

Under the Alphabetic Index, NAICS code, 334310 covers an array of areas, including:

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).

Automobile radio receivers manufacturing
Camcorders manufacturing
Car stereos manufacturing
Clock radios manufacturing
Loudspeakers manufacturing
Microphones (except broadcast and studio equipment) manufacturing
Personal audio and video headsets,
Coin-or card-operated jukebox manufacturing
Compact disc players (e.g., automotive, household-type manufacturing
Digital video disc players manufacturing
DVD (digital video disc) players manufacturing
E-book readers (i.e., dedicated) manufacturing
Home stereo systems manufacturing
Home tape recorders and players (e.g., cartridge, cassette, reel) manufacturing
Home theater audio and video equipment manufacturing
Jukeboxes manufacturing including virtual reality headsets, manufacturing
Portable stereo systems manufacturing
Projection television manufacturing
Public address systems and equipment manufacturing
Radio headphones manufacturing
Radio receiving sets manufacturing
Speaker systems manufacturing
Tape players and recorders, household-type, manufacturing
Television (TV) sets manufacturing
VCR (video cassette recorder) manufacturing
Video cameras, household-type, manufacturing
Video cassette recorders (VCR) manufacturing
Video projectors, household-type, manufacturing

NAICS Code, 541519 Other Computer Related Services, covers:

[E]stablishments primarily engaged in providing computer related services (except custom programming, systems integration design, and facilities management services). Establishments providing computer disaster recovery services or software installation services are included in this industry.

NAICS Manual, at 466.

Appellant's preferred NAICS code is the ITVAR Exception to NAICS code 541519, which the SBA Size Standards Table describes:

[ITVAR] provides a total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant value added services. Significant value added services consist of, but are not limited to, configuration consulting and design, systems integration, installation of multi-vendor computer equipment, customization of hardware or software, training, product technical support, maintenance, and end user support. For purposes of Government procurement, an information technology procurement classified under this exception and 150-employee size standard must consist of at least 15% and not more than 50% of value added services, as measured by the total contract price. In addition, the offeror must comply with the manufacturing performance requirements, or comply with the non-manufacturer rule by supplying the products of small business concerns, unless SBA has issued a class or contract specific waiver of the non-manufacturer rule. If the contract consists of less than 15% of value added services, then it must be classified under a NAICS manufacturing industry. If the contract consists of more than 50% of value added services, then it must be classified under the NAICS industry that best describes the predominate service of the procurement.

13 C.F.R. § 121.201, fn. 18.

Appellant advocates in the alternative, for NAICS code 334419, Other Electronic Component Manufacturing, which covers:

[E]stablishments primarily engaged in manufacturing electronic components (except bare printed circuit boards; semiconductors and related devices; electronic capacitors; electronic resistors; coils, transformers, and other inductors; connectors; and loaded printed circuit boards).

Illustrative Examples:

Crystals and crystal assemblies, electronic, manufacturing
Electron tubes manufacturing
LCD (liquid crystal display) unit screens manufacturing
Microwave components manufacturing

Piezoelectric devices manufacturing
Printed circuit laminates manufacturing
Switches for electronic applications manufacturing
Transducers (except pressure) manufacturing

NAICS Manual, at 267.

IV. 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

Having reviewed the record and the arguments of the parties, I find Appellant has not established that the CO's NAICS code designation is clearly erroneous. I therefore must deny this appeal.

First, it is clear that NIST's RFQ calls for the procurement of one LED display system to replace the existing projector-based system as the principal purpose of the contract. The LED display requires installation and demonstration within 5 months of delivery. The RFQ directs offerors to provide firm-fixed pricing for CLIN 0001, covering Dual-View Capable Direct View LED System, and for CLIN 0002, covering the installation. While NIST will supply the software

and computer system, the contractor must provide minimum computer requirements required to drive the display as part of its capability narrative. Evaluation of price is based on firm fixed price quote, including shipping costs and award will be made to the lowest price technically acceptable quotation. Sections II.A, II.B, *supra*.

The *NAICS Manual* defines NAICS code 334310 as covering “establishments primarily engaged in manufacturing electronic audio and video equipment,” including “televisions.” Section II.E, *supra*. The *NAICS Manual* includes further examples of manufacturing industries covered by the code, such as Projection television manufacturing and Television (TV) manufacturing. Here, NIST is seeking to buy a projector to replace its existing one. This equipment comprises most of the value of the contract.

It is settled law that if the principal purpose of a procurement is the supply of goods, a manufacturing NAICS code should be utilized. *E.g.*, *NAICS Appeal of Noble Supply & Logistics*, SBA No. NAICS-5886 (2018); *NAICS Appeal of U.S. Small Bus. Admin.*, SBA No. NAICS-5526, at 6 (2014). Insofar as the instant RFQ seeks “services”, such as installation and demonstration of the LED display, these appear to be ancillary to, and in support of, the primary goal of the procurement: to purchase a new projector and replace the existing projector-based system. OHA has long held that “the mere fact that a procurement calls for incidental or ancillary services does not justify classifying the procurement based upon the ancillary services even if those services are necessary to the procurement.” *Noble Supply*, SBA No. NAICS-5886, at 9; *U.S. Small Bus. Admin.*, SBA No. NAICS-5526, at 6. Notably, the instant RFQ does not establish that the contractor will perform significant value-added services beyond the installation and demonstration, such as technicians with licenses to perform the demonstration and installation, or maintenance and follow up visits. Certainly, NIST is providing the software and computer system, and does not require other services beyond the ancillary ones.

Accordingly, it seems clear that this procurement is primarily a procurement for manufactured goods, with the services required to install being it merely incidental. As such, a manufacturing NAICS code is called for. NAICS code 334310 covers audio and video equipment, the type of manufactured goods sought here.

Appellant's two main arguments fail for the following reasons. First, Appellant claims the RFQ requires services and installations, estimating to a “20% is a reasonable factor for this RFQ” and falling within 15% and 50% of value of

the contract, consistent with the ITVAR Exception to NAICS code 541519. However, this estimation is merely conclusory without presenting credible evidence or support.² Nowhere in the RFQ does NIST allocate 15% to 50% of the solicitation to services that will fit Appellant's preferred NAICS code and alleged claims. Indeed, the RFQ requests a quote for both, the LED display and the installation and demonstration in support of the primary goal of the procurement. However, this requirement alone does not show or support Appellant's conclusory, estimated percentage.

Next, Appellant's contention that an "LED" display does not exist in the *NAICS Manual*, and therefore, LCD Unit Screen applies, falling under NAICS 334419, Other Electronic Equipment Manufacturing, is farfetched. Appellant fails to demonstrate how LED displays equate to LCD unit screens, but it merely argues that because Direct View LED Video Walls are not expressly listed under any NAICS, OHA should accept the closest match to a product listed in the *NAICS Manual* (and the product they serve as a direct substitute for) is LCD Unit Screen. Certainly, the *NAICS Manual* allocated LCD Unit Screens to NAICS 334419 but did not include LED displays when it could have done so. The simple reading of the *NAICS Manual* is that display panels can serve and fall under projection television manufacturing and television (TV) sets manufacturing, irrespective of whether the panels are LED or not.

Appellant points to OHA's decision in *NAICS Appeal of KVA Elec., Inc.*, SBA No. NAICS-5030 (2009), in support of its argument that, when a procurement calls for installation of manufactured products, a services-based NAICS code may be appropriate. Section II.C, *supra*. In *KVA*, though, OHA found that the solicitation sought the services of "experienced high voltage electricians" who would "expertly install, test, and document the installation" of the manufactured products, "in accordance with applicable codes and standards." *KVA*, SBA No. NAICS-5030, at 5. Conversely, here, there is no indication in the RFQ that installation and demonstration will represent even a significant portion of the

² Notably, Appellant did not offer credible evidence that contradicts the CO's substantive response that any services, including installation, would be incidental and cover less than 15% of the contract value. In its appeal, Appellant merely asserts that the services will amount to more than 15% of the contract value without any supporting documentation. The assertion is mere speculation. Further, Appellant did not object to the CO's response on this issue.

procurement, or that any specialized skills or expertise are necessary to perform such work. Sections II.A, II.B, *supra*. Thus, *KVA* is inapposite here.

Appellant also points to *NAICS Appeal of Microtechnologies, LLC*, SBA No. NAICS-5489 (2013). There, a procurement for video teleconferencing was to include significant services as well as equipment. The contractor was to provide significant design, installation and training services. Again, this case is not apposite here, because the services here are merely ancillary, and do not show or support the 15% proportion of contract value required by the ITVAR Exception.

Because Appellant has not demonstrated that NAICS code 334310 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).

V. Conclusion

For the above reasons, I DENY the instant appeal. The CO appropriately selected NAICS code 334310, Audio and Video Equipment Manufacturing, with a corresponding 750 employee size standard, for the instant procurement.

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).

CHRISTOPHER HOLLEMAN
Administrative Judge