

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

NAICS APPEALS OF:

Heritage Health Solutions, Inc.,

Appellant,

Solicitation No. VA255-15-Q-0419
U.S. Department of Veterans Affairs
Network Contracting Office
Leavenworth, KS

SBA No. NAICS-5650

Decided: March 25, 2015

APPEARANCES

John R. Prairie, Esq.m Wiley Rein LLP, Washington, D.C., for Appellant

William Webb, Contracting Officer, Leavenworth, KS, for the Dept. of Veterans Affairs.

DECISION

I. Introduction and Jurisdiction

On February 27, 2015, the U.S. Department of Veterans Affairs (VA), issued Request for Proposals (RFP)No. VA255-15-Q-0419 for non-personal pharmacy benefits management services. The Contracting Officer (CO) issued the procurement as a small business set-aside and assigned North American Industry Classification System (NAICS) code 621399, Office for all Other Miscellaneous Health Practitioners, with a corresponding \$ 7.5 million annual receipts size standard.

On March 4, 2015, Heritage Health Solutions, Inc. (Appellant) filed an appeal challenging the CO's choice of NAICS code. Appellant recommends the use of NAICS code 446110, Pharmacies and Drug Stores, with a corresponding \$27.5 million annual receipts size standard, or NAICS code 424210, Drugs and Druggists' Sundries Merchant Wholesalers, with a corresponding 100 employee size standard. For the reasons discussed *infra*, the appeal is GRANTED.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides NAICS code appeals under the Small Business Act of 1958, 15 U.S.C. § 631*et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed this appeal within ten calendar days after issuance of the RFP, and within ten days after the subsequent change of the NAICS code and size

standard, so the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFP

The RFP states the VA plans to award a firm-fixed price, multiple award Indefinite Delivery/Indefinite Quantity (ID/IQ) base contract, with four one-year options at the CO's discretion. Proposals are due on March 30, 2015.

The RFP states the pharmacy benefit management services will be provided at the Harry S. Truman Memorial Medical Center (HTMC) and its outlying Community Based Outpatient Clinics (CBOC) and Home Based Primary Care (MBPC) patients. The RFP's Performance Work Statement (PWS) provides that the contractor must also fill and dispense prescriptions and counsel patients on all controlled and non-controlled prescriptions. PWS, Section B, at § 1.1.

The Contractor will have the responsibility of ensuring that all Federal, State, and/or local licenses and certifications that apply to the provision of pharmacy services are verified when the pharmacy is added to the network. The Contractor is required to have “a minimum of two licensed pharmacies accepting its plan in each of the seven CBOC locations and within the designated zip code areas.” *Id.* at § 4.1.1. Additionally, the PWS requires the Contractor to have at least two licensed pharmacies located in all service areas. The PWS provides that if a new CBOC is opened, the CO will provide the Contractor with notice in order for the Contractor to submit a list of proposed pharmacies for that area. *Id.* at § 4.15. Further, the Contractor must provide a list of pharmacies that are accessible, geographically, to HTMC and all the CBOCs. The Contractor must have a pharmacist present to provide counseling to ensure appropriate and optimal outcomes from drug therapy and “to answer any drug-related questions a patient may have after the prescription is filled.” *Id.* at § 4.18.

B. Appeal

On March 4, 2015, Appellant filed its appeal of the NAICS code. Appellant argues that NAICS codes 446110 or 424210 are more suitable codes for the solicitation's required services.

Appellant argues the VA is seeking a Contractor to provide pharmacy benefit management services. Appellant maintains the SOW requires the contractor to “provide urgent pharmacy management services to eligible veteran beneficiaries.” Appeal at 2; citing RFP § B.4.1.1, at 11. Further services to be provided by the Contractor include filling prescriptions, dispensing prescriptions, and providing patients with counseling regarding controlled and non-controlled prescriptions. The Contractor will be responsible for filling and dispensing medications from prescriptions written by VA health providers.

According to Appellant, the NAICS code chosen by the CO does not illustrate the services sought by the RFP. The CO's NAICS code describes services provided by independent health practitioners such as acupuncturists, dental hygienists, dietitians or registered nurses.

Conversely, the RFP seeks pharmacy prescription services, specifically a contractor that provides access to a network of pharmacies. *Id.* at 4. Appellant theorizes the CO may have chosen NAICS code 621399 due to the RFP's use of the CBOCs. Appellant argues the RFP does not require the Contractor to operate the CBOCs, just to provide a network of pharmacies to fill prescriptions for eligible individuals that are assigned to a certain CBOC. *Id.*

Appellant further argues NAICS codes 446110 or 424210 would be more appropriate based on the RFP's requirements. Appellant argues NAICS code 446110 fits best because the main requirements of the RFP are to provide access to pharmacies and drug stores. Appellant contends that in the past, the VA has designated NAICS code 446110 for procurements that call for the provision of pharmacy prescriptions. In the alternative, NAICS code 424210 also fits the RFP's requirements as it covers establishments that provide prescription drugs.

C. CO's Response

On March 11, 2015, the CO responded to the appeal. He argues that NAICS codes 446110 and 424210 cannot be used by him in any Government solicitation. He states that this is because codes in Sector 42, Wholesale Trade, and Sector 44, Retail Trade shall not be used when contracting for the acquisition of supplies. The applicable manufacturing NAICS code shall be used to classify supply acquisitions. 13 C.F.R § 121.402(b)(2).

D. NAICS Manual¹ Descriptions

The NAICS code designated by the CO, 621399, Office for all Other Miscellaneous Health Practitioners, covers:

[E]stablishments 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 837. Illustrative examples include acupuncturists, hypnotherapists, dental hygienists, inhalation or respiratory therapists, denturists, midwives, dietitians, naturopaths, homeopaths and registered or licensed practical nurses' offices.

NAICS code 446110, Pharmacies and Drug Stores, covers:

[E]stablishments known as pharmacies and drug stores engaged in retailing prescription or nonprescription drugs and medicines.

NAICS Manual at 577. Index entries which refer to this NAICS code are: apothecaries, drug stores, institutional pharmacies, on site, and pharmacies.

¹ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2012)*. available at <http://www.census.gov>.

NAICS code 424210, Drugs and Druggists' Sundries Merchant Wholesalers, covers:

[E]stablishments primarily engaged in the merchant wholesale distribution of biological and medical products; botanical drugs and herbs; and pharmaceutical products intended for internal and external consumption in such forms as ampules, tablets, capsules, vials, ointments, powders, solutions, and suspensions.

NAICS Manual at 533. Illustrative examples include antibiotics, endocrine substances, in-vitro and in-vivo diagnostics, botanicals, vaccines, cosmetics, vitamins, and blood derivatives merchant wholesalers.

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 demonstrate that the CO's NAICS code designation is based on a clear error of fact or law. *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003); 13 C.F.R. § 134.314. A procuring agency must designate the NAICS code which 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, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b); *NAICS Appeal of Global Dynamics, LLC*, SBA No. NAICS-5470 (2013).

B. Analysis

Having examined the RFP, the descriptions in the *NAICS Manual*, and Appellant's arguments, I must agree with Appellant that the solicitation at issue does not call for services that fit the description of NAICS code 621399. Therefore, the designated NAICS code is clearly erroneous.

In the instant case, the CO chose NAICS code 621399, which describes services provided by the offices of numerous health practitioners. However, it is significant that pharmacy services are not included in the description or illustrative examples of code 621399. As OHA has noted previously, "NAICS code 621399 falls under the ambulatory health care services subsector, 621. Regarding this subsector, the *NAICS Manual* provides: 'Industries in the Ambulatory Health Care Services subsector provide health care services directly or indirectly to ambulatory patients and do not usually provide inpatient services. Health practitioners in this subsector provide outpatient services, with the facilities and equipment not usually being the most significant part of the production process.'" *NAICS Appeal of InGenesis, Inc.*, SBA No. NAICS-5295 (2011); citing *NAICS Manual* at 831.

Here, the RFP clearly seeks to acquire pharmacy services. Specifically, the Contractor will be responsible for operating pharmacies near HTMC and any outlying CBOCs. The

Contractor's primary duties will be to fill and dispense prescriptions written by VA health personnel. *Supra*, Section II. A.

In contrast to the code chosen by the CO, NAICS code 446110 describes pharmacies, and not “independent health practitioners.” *NAICS Manual* at 837. Pharmacies retail prescription drugs, but they do more than simply provide the drugs to patients. They provide pharmacy services of the kind described in the PWS. They fill prescriptions, and provide counseling to patients to ensure optimal outcomes from drug therapy. They counsel patients on the name, dosage and use of medication, special directions and precautions, common side effects, techniques for self-monitoring, action to take if a dosage is missed, and what a patient can expect from a medication. PWS at § 4.18. As Appellant points out, the RFP itself requires the Contractor to have a network of pharmacies readily available in the services areas specified by the RFP. Thus, this solicitation requires the Contractor both to provide the prescription drugs required, and to perform the services involved in properly filling the prescriptions and counseling the patients.

It is thus clear that the work sought by this solicitation fits squarely within the *NAICS Manual* description for NAICS code 446110. Conversely, NAICS code 621399 does not cover it. The VA is not seeking a Contractor that operates private or group practices or to perform outpatient services. The VA simply seeks a Contractor to provide the drugs and services typical of a pharmacy.

The CO's response to the appeal does not support his designation. He appears to describe this procurement as the acquisition of supplies, which would require a manufacturing NAICS code designation, and preclude a retail trade designation. 13 C.F.R. § 121.402(b)(2), *see also* 13 C.F.R. § 121.201 (notation to Sector 42). However, this procurement is not for the acquisition of supplies. Rather it calls for pharmacy services. The Contractor here will not merely deliver drugs to the VA. Rather, it will fill prescriptions for veterans written by VA personnel and provide counseling to the patients. Thus, this is a services procurement, not a supplies procurement. The CO's own designation undercuts his argument, because NAICS code 621399 is also a services designation. The issue in this case is just what services are required by the solicitation. The solicitation clearly calls for pharmacy services, in the providing of prescriptions and counseling, not outpatient health care services, as described by the designated NAICS code.

I therefore conclude that in this procurement, the VA is seeking to acquire pharmacy services, which are covered by NAICS code 446110. Accordingly, I find the CO's designation of NAICS code 621399 was clearly erroneous.

IV. Conclusion

For the above reasons, the instant appeal is GRANTED. The appropriate NAICS code for this procurement is 446110, Pharmacies and Drug Stores, with a corresponding \$27.5 million annual receipts size standard.

Accordingly, because this decision is being issued before the close of the solicitation, the CO MUST amend the solicitation to change the NAICS code designation from 621399 to

446110. FAR § 19.303(c)(5); 13 C.F.R. § 134.318(b); *Matter of Eagle Home Med Corp.*, Comp. Gen. B-402387, March 29, 2010, *available at* <http://www.gao.gov/decisions/bidpro/402387.pdf>.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge