United States Small Business Administration  
Office of Hearings and Appeals

NAICS APPEAL OF:  
Global Dynamics, LLC,  
Appellant,  
Solicitation No. VA-256-13-Q-0841  
U.S. Department of Veterans Affairs  
Michael E. DeBakey VA Medical Center  
Houston  
SBA No. NAICS-5470  
Decided: May 21, 2013

APPEARANCE

Edward J. Tolchin, Esq., Offit Kurman, PA, Bethesda, Maryland, for Appellant

DECISION

I. Introduction and Jurisdiction

On May 3, 2013, the U.S. Department of Veterans Affairs (VA) issued Request for Quotations (RFQ) No. VA-256-13-Q-0841 seeking a contractor to provide approximately 30 Certified Nurse Assistants (CNAs) at the Michael E. DeBakey VA Medical Center in Houston, Texas. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and initially assigned North American Industry Classification System (NAICS) code 621399, Offices of All Other Miscellaneous Health Practitioners, with a corresponding size standard of $7 million average annual receipts. On May 6, 2013, the CO issued Amendment A00001 to the RFQ, changing the NAICS code to 561320, Temporary Help Services, with an associated size standard of $13.5 million average annual receipts. The CO stated that NAICS code 561320 is the only NAICS code available on the underlying Federal Supply Schedule (FSS).

On May 8, 2013, Global Dynamics, LLC (Appellant) filed this appeal. Appellant asserts that the NAICS code first chosen by the CO, 621399, is correct. For the reasons discussed infra, the appeal is denied.

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 the instant appeal within ten days after issuance of the RFQ, so the appeal is timely. Federal Acquisition Regulation (FAR) 19.303(c); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). Accordingly, this matter is properly before OHA for decision.
II. Background

A. The Solicitation

According to the RFQ, the contractor will provide CNAs for inpatient units during “days, evenings, nights, weekend, and Federal Holidays for the duration of the contract.” (RFQ at 5.) The RFQ states that CNA staff will “be responsible for the more complex personal patient care duties, supporting diagnostic procedures, technical nursing treatments, patient charting, and patient instruction which involve direct work relationships with patients and participation as a member of the nursing care team in direct services to patients.” (Id.) CNAs must comport with various clinical expectations relating to patient care; patient safety; employee safety; physical standards and environmental factors; documentation, reporting and confidentiality; patient instruction; and personal management and growth. (Id. at 6-10.)

The RFQ will result in a firm-fixed-price task order under FSS 621-I, Professional and Allied Healthcare Staffing Services. The only NAICS code assigned to the Schedule is 561320. In Amendment A00002, the CO addressed a question from a prospective offeror as to whether the NAICS code for the RFQ could be changed back to 621399. The CO declined to do so, explaining that task orders under Schedule 621-I may only be assigned NAICS code 561320. (RFQ, Amendment A00002, Q&A number 11.)

The RFQ was announced to Schedule 621-I contract holders through the U.S. General Services Administration (GSA) E-Buy system. Quotations were due May 15, 2013.

B. The Appeal

On May 8, 2013, Appellant filed the instant appeal contending that NAICS code 561320 is inappropriate for the task order. Appellant maintains that the CO properly assigned NAICS code 621399 in the first instance, but erred when she changed it to 561320. (Appeal, at 2.) Appellant argues that the description for NAICS code 621399 provides for “independent health practitioners”, which includes nurses that perform services in Government clinics, hospitals, and medical centers. (Id. at 3.) Conversely, code 561320 refers to services that are temporarily provided, with temporary meaning of “extremely short duration”. (Id.) Appellant asserts that the instant procurement involves a period of performance up to three years, beyond the scope of NAICS code 561320. (Id. at 4.) Lastly, Appellant states that other task orders for health care professionals, issued under the same Schedule, have utilized code 621399. (Id.)

Appellant concludes that the CO is responsible for choosing a NAICS code that best describes the work sought, and that NAICS code 621399 best describes the RFQ's principal purpose, which “is to provide health care personnel at a Government clinic.” (Id.)
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).

B. Analysis

Appellant correctly observes that, under 13 C.F.R. § 121.402(b), a procuring agency ordinarily 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. However, SBA regulations recognize an exception to this general rule for orders placed under the FSS and other long-term contracts. For such procurements, the CO “must assign a NAICS code and size standard to each order under a long term-contract,” and “[t]he NAICS code and size standard assigned to an order must correspond to a NAICS code and size standard assigned to the underlying long-term contract.” 13 C.F.R. § 121.404(g)(3)(iv). Here, NAICS code 561320 is the only NAICS code available on the underlying Schedule 621-I, and the CO assigned that code to this order. See Section II.A, supra. Accordingly, the CO did not err in selecting NAICS code 561320.1

OHA considered an analogous case in Size Appeal of Professional Project Services, Inc., SBA No. SIZ-5411 (2012). In that case, the procuring agency did not designate any NAICS code to a task order solicitation, so an SBA Area Office selected a code in conjunction with a size review. The Area Office found that the NAICS code which best described the work (541690, Other Scientific and Technical Consulting Services) was not present on the underlying Schedule. Three other NAICS codes were available on the Schedule, but none of those codes accurately described the required work. Because the Area Office was required to select among the three NAICS codes available on the Schedule, though, the Area Office chose a code which had the same size standard as NAICS code 541690. On appeal, OHA rejected the challenged firm's contentions that a different code should have been selected.

Likewise, in this case, the CO was required to assign a NAICS code and size standard to the RFQ, and that NAICS code and size standard “must correspond to a NAICS code and size standard assigned to the underlying long-term contract.” 13 C.F.R. § 121.404(g)(3)(iv). The CO asserts, and Appellant does not dispute, that NAICS code 561320 is the only available NAICS

1 Effective January 7, 2013, SBA increased the size standard for NAICS code 561320 from $13.5 million to $25.5 million. See 77 Fed. Reg. 72,691 (Dec. 6, 2012). Nevertheless, it was not necessarily improper to utilize the $13.5 million size standard for this particular order, because the record does not indicate that the new size standard has been incorporated into Schedule 621-I.
code on the Schedule in question. Thus, the CO's choice of NAICS code 561320 is not clearly erroneous.

IV. Conclusion

For the above reasons, the appeal is DENIED. Because this decision is rendered after the deadline for receipt of proposals, the decision does not apply to the pending RFQ, but may apply to future solicitations for the same supplies or services. 13 C.F.R. § 134.318(b) and FAR 19.303(c)(5).

KENNETH M. HYDE
Administrative Judge