

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

NAICS APPEAL OF:

Information Ventures, Inc.

Appellant

Solicitation No. NIHES2008017
National Institute of Environmental
Health Services
National Institutes of Health
Research Triangle Park, NC

SBA No. NAICS-4953

Decided: May 15, 2008

APPEARANCES

Bruce H. Kleinstein, President, for Appellant Information Ventures, Inc.

Donald A. Gula, Contracting Officer, National Institute of Environmental Health Services

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the appropriate NAICS code for a procurement for NTP Technical Reports Preparation Support Service is 541712, Research and Development in the Physical, Engineering and Life Sciences (except Biotechnology), 541990, All Other Professional, Scientific and Technical Services, or 511130, Book Publishers.

III. Background

A. The Solicitation

On April 22, 2008, the National Institute of Environmental Health Sciences of the National Institutes of Health (NIH) issued the subject solicitation for administrative and scientific support for technical report preparation support services for the National Toxicology Program (NTP). The Contracting Officer (CO) set the procurement totally aside for small businesses, and designated North American Industry Classification System (NAICS) code 541712, Research and Development in the Physical, Engineering and Life Sciences (except Biotechnology), with a corresponding 500 employee size standard, as the NAICS code for this procurement. Offers are due June 5, 2008.

B. The Performance Work Statement (PWS)

The NTP is an interagency program within the U. S. Department of Health and Human Services headquartered at the National Institute of Environmental Health Services. The NTP organizes and conducts a comprehensive research and testing program focused on determining potential human health hazards of exposures to chemical, biological or physical substances or mixtures of substances in order to carry out its mission to evaluate environmental substances of public health concern.

The contractor will serve as a resource for the preparation of Public Health Service Technical Reports describing NTP studies of the toxicology and carcinogenicity of selected chemicals. These reports will be government-produced, peer-reviewed, book-style documents describing in full detail NTP studies. Two principal types of reports will be produced. The first will be book-length monographs that provide an overview of the literature and the results of long-term NTP studies on a particular substance or set of chemicals. The second will be short reports which will describe a variety of short-term toxicity studies in rodents. The contractor will work in consultation with NTP scientists and contractors to provide technical writing, copy editing, proofreading, word processing, desktop publishing, graphics, data formatting, and recordkeeping services.

The subject matters of the reports include general toxicity, animal physiology, histologic and clinical pathology, chemistry, genetics, and statistics, and may on occasion include pharmacology, molecular biology, immunotoxicity, developmental and reproductive toxicology, or other related disciplines. The contractor will provide review draft reports for each draft stage and will also prepare desktop publishing files for use by the Government.

Approximately 12 long reports and 12 short reports will be presented for review and completed each year; the contractor should expect to commence preparation of approximately two reports per month and to deliver approximately two drafts per week. The contractor will archive all materials received, maintain a log of all materials received and delivered, and submit a biweekly status report.

The PWS specifies the format the reports will follow, the page layouts, and headers and footers to be used. Reports are to be prepared with suitable software with the capability to incorporate the entire report, including all headings, text, tables, line art images, and photomicrographs, into a single file. The contractor will be able to produce hard copies, Word files, and Portable Document Format (PDF) and/or hypertext markup language (HTML) files of the entire report. On occasion the contractor may be asked to prepare graphical displays of data (e.g. line plots or bar graphs) or chemical structures and metabolism pathways. These should be prepared as transportable files. For all graphics the contractor will use programs that capture the required information in a file format without loss of quality of the image. During the report preparation process the contractor must be able to extract portions or entire sections of the report and send them as electronic files to NTP staff for review.

Each report will begin with a preliminary draft. NTP will provide the contractor with the data. The contractor will then prepare a Preliminary Draft Technical Report from the materials available. The Preliminary Draft will contain a Materials and Methods section detailing the protocols, materials, and history of the laboratory studies and the data analysis methods and criteria; all appendixes for which data are available; and a draft Results section containing a summary of the key results of the studies. The NTP scientist for the report will provide a rough draft of an Introduction section and a list of all references cited. The contractor will edit the Introduction, verify citations, and prepare a first draft of an abstract summarizing the study and the key results. The contractor will deliver a PDF file of the Preliminary Draft to the NTP Project Officer within eight weeks after commencing report preparation.

After the preliminary draft is completed, the contractor will prepare three successive drafts, all progressively including more recommendations and comments of various reviewers, and will then prepare the Final Master Report. The Final Master Report will be delivered in two forms: 1) A Web-optimized HTML file, and 2) Double-sided printed reports perfect bound in a cover jacket (front, back, and spine). A template for the cover jacket will be provided by the government. Approximately thirty copies will be prepared for each final report.

For the performance of the project, the Government anticipates the participation of a principal investigator, senior science writers, technical writers/copy editors, document preparation specialists and clerical staff. The principal investigator should have several years of direct experience managing a document production group and be thoroughly familiar with all aspects of office management for such a group. The senior science writers should possess an advanced degree in the biological sciences and be thoroughly familiar with the conduct of long-term animal studies and have demonstrated working experience in scientific document preparation. The technical writers/editors should possess degrees in the sciences or languages and have demonstrated abilities to edit and prepare technical documents. The document preparation specialists and other staff should be experienced in the use of the document preparation system proposed for this project and also with acquisition, capture, formatting, and transfer of large data sets and graphics from and to a variety of platforms, and with translating and transferring text and data files between a variety of formats.

C. The Appeal

On, April 28, 2008, Information Ventures, Inc. (Appellant), filed the instant NAICS code appeal with the Office of Hearings and Appeals (OHA), challenging the CO's NAICS code designation. Appellant asserts that the appropriate designation is NAICS code 541990, All Other Professional, Scientific and Technical Services, with a corresponding \$6.5 million annual receipts size standard.

Appellant argues this contract does not require the contractor to engage in research and development in the physical, engineering or life sciences. The solicitation does not call for significant scientific expertise. Rather, the principal work is assisting NTP staff by providing a number of professional, scientific or technical report support preparation services, such as the assembly and physical preparation of reports. Appellant argues this is established by two sample tasks the solicitation. In one exercise, offerors are required to download a PDF document from the Internet, extract two plots of body weights, and place them on a chart. In another exercise, offerors are required to download a PDF document from the Internet and extract several columns of data and realign them into a different format.

Appellant thus argues that the work here does not rise to level of research work, but rather is more consistent with the 541990 code, which covers a number of professional and technical services, of the type called for in this solicitation.

D. The CO's Response

On May 9, 2008, the CO submitted a response to the appeal. First, the CO asserts Appellant lacks standing to bring this appeal. The CO argues Appellant has failed to establish that NAICS code 541712 represents a larger size standard than NAICS code 541990, and does not establish that NAICS code 541712 necessarily includes significantly larger small businesses.

Second, the CO asserts he determined NAICS code 541712 was inclusive of the services sought in this procurement, as well as the level of expertise required. While this code does not perfectly reflect the nature of the work performed, no other NAICS code was better suited. The CO further asserts he obtained the concurrence of NIH's Small Business Specialist and the SBA Procurement Center Representative to the NAICS code designation prior to the release of the pre-solicitation notice.

Third, the CO argues Appellant does not establish that it would qualify under NAICS code 541990, and therefore is requesting an advisory opinion from OHA.

Fourth, the CO concedes that while the contractor here will not be conducting laboratory or other physical research, the work that will be conducted under this contract is a necessary and essential prerequisite for the reporting of NTP toxicology studies. These studies are laboratory work that does constitute physical research. Without the publishing which this solicitation will procure the data from these studies will not be compiled and reported, and the studies will be rendered useless. The CO argues that publishing the results of the studies is as much an integral

part of the research process as the preparatory work found to be properly classified under NAICS code 541712 in *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4945 (2008).

Fifth, the CO argues that NAICS code 541990 is not an appropriate designation. This procurement requires significant scientific expertise in laboratory or other physical research, and thorough familiarity with the conduct of long-term animal studies. NAICS code 541990 specifically does not include scientific research and development services. Further, the list of scientific services NAICS code 541990 does cover does not include any services similar to the type of work required by the instant solicitation.

Sixth, the CO asserts OHA should consider that NIH's regulations define Research and Development differently than does the *NAICS Manual*,¹ citing 42 C.F.R. Part 52h. NIH does not limit its definition to physical research and development. NIH errs on the side of obtaining the most qualified experts available. A research and development procurement is intended to acquire new or fuller knowledge and understanding in areas of biomedical or behavioral research, and to use this knowledge and understanding to develop useful materials, devices, systems, or methods. 42 C.F.R. § 52h.2(t).

IV. Discussion

A. Threshold Issues

Appellant filed the instant appeal within 10 days after NIH issued the solicitation. Thus, the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1); 134.304(a)(3).

The CO's argument Appellant lacks standing is meritless. OHA has consistently accorded standing to appellants that would qualify as small under either the code assigned or the code advocated. *SIC Appeal of America House*, SBA No. SIC-3659 (1992).² The instant appeal does not involve an unrestricted procurement (*NAICS Appeal of Integrated Laboratory Systems, Inc.*, SBA No. NAICS-4733 (2005)) and Appellant is not other than small under both NAICS codes (*NAICS Appeal of Spendida Property Systems, LLC*, SBA No. NAICS-4576 (2003)). The instant appeal does not present the kind of facts which have resulted in dismissals for lack of standing. Accordingly, Appellant has standing here, and thus its appeal is not a request for an advisory opinion.

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove 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.

¹ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System Manual* (2007).

² Where appropriate, the case precedent of this Office, decided under the prior SIC system, will apply to NAICS code appeals. *NAICS Appeal of Phoenix Scientific Corporation*, SBA No. NAICS-4416, at 8 (2000).

§ 134.314. The correct NAICS code is that which best describes the principal purpose of the services being procured, in light of the industry description in the *NAICS Manual*, the description in the solicitation, and the relative weight of each element in the solicitation. *Durodyne*, SBA No. NAICS-4536, at 4; 13 C.F.R. § 121.402(b).

Accordingly, the NIH regulations the CO cites in his Response are inapposite to any NAICS appeal, and the fact that the SBA Procurement Center Representative concurred in the CO's NAICS code designation is in no way controlling here, and cannot bind this Office in its review of the instant appeal. *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4600 (2003).

C. The Merits

The NAICS code designated by the CO, 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), covers:

[E]stablishments primarily engaged in conducting research and experimental development (except biotechnology research and experimental development) in the physical, engineering, and life sciences, such as agriculture, electronics, environmental, biology, botany, computers, chemistry, food, fisheries, forests, geology, health, mathematics, medicine, oceanography, pharmacy, physics, veterinary and other allied subjects.

NAICS Manual, at 748-49.

The size standard regulations include the following additional criteria:

“Research and Development” means laboratory or other physical research and development. It does not include economic, educational, engineering, operations, systems, or other nonphysical research; or computer programming, data processing, commercial and/or medical laboratory testing.

13 C.F.R. § 121.201, fn. 11(a) (emphasis added).

Appellant's requested NAICS code, 541990, All Other Professional, Scientific and Technical Services, covers:

[E]stablishments primarily engaged in the provision of professional, scientific, or technical services (except legal services; accounting, tax preparation, bookkeeping, and related services; architectural, engineering, and related services; specialized design services; computer systems design and related services; management, scientific, and technical consulting services; scientific research and development services; advertising, public relations and related services; market research and public opinion polling; photographic services; translation and interpretation services; and veterinary services)

Illustrative Examples:

Appraisal (except real estate) services
Marine surveyor (i.e., appraiser) services
Arbitration and conciliation services (except by lawyer, attorney, or paralegal offices)
Patent broker services (i.e., patent marketing services)
Commodity inspector services
Pipeline or power line inspection (i.e., visual) services
Consumer credit counseling services
Weather forecasting services
Handwriting analysis services

NAICS Manual, at 758 (emphasis added).

After reviewing the solicitation, it is difficult to conclude that the National Institute of Environmental Health Sciences seeks to procure laboratory or other research services here. The contractor will not be conducting physical research of any kind. Neither will the contractor be performing any of the preparatory work for research, of the type found to be an integral part of research in *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4945 (2008). Rather, the work here will be performed after the research is completed. This contract requirement is for the reporting on research which has already been performed. It cannot be considered part of the research itself. I must conclude that it was clear error for the CO to designate NAICS code 541712 for this procurement.

Conversely, Appellant's preferred NAICS code is also inapplicable here. The contractor will not be providing any professional advice or performing any professional services here. Rather, this procurement calls for the production of reports, some book-length, some somewhat shorter.

The PWS requires the production of "peer-reviewed, book-style documents describing in full detail NTP studies" and short reports on toxicity studies in rodents. The PWS further requires the contractor to take NTP data and prepare a report. The report will then go through an extensive process of editing, drafting, and revisions before reaching its final stage. Once completed, the contractor must produce the report in a bound form, with text, tables, and illustrations in a particular format, and a cover jacket with front, back and spine, as well as in electronic form. The main thrust of the effort expended here is not to perform research, nor is it merely to compile data. Rather, it is to write, edit, and physically produce reports of book-length and shorter on research already performed. Thus, it is clear that what the contractor is being asked to do is to compile and publish research in book form. Publishing is covered by NAICS code 511130, Book Publishers. Publishing includes the writing, editing and other processes which are required to create a book. *NAICS Manual*, at 653. The book publishing NAICS code is described as including:

[E]stablishments known as book publishers. Establishments in this industry carry out design, editing, and marketing activities necessary for producing and

distributing books. These establishments may publish books in print, electronic, or audio form.

NAICS Manual, at 656.

It is clear this procurement requires the contractor to write, edit, and print book length studies for NIH. In essence, the Government is seeking someone to write and publish the results of its studies. The Book Publishing NAICS code best describes the principal purpose of the solicitation. While this NAICS code was neither designated by the CO nor advocated by the Appellant, OHA will use its discretion to designate the best NAICS code for solicitation, once OHA has determined clear error in the CO's designation. *SIC Appeal of Jack Faucett Associates*, SBA No. SIC-4282 (1997); *SIC Appeal of M. P. Environmental Services, Inc.*, SBA No. SIC-3950 (1994).

Accordingly, I find that the CO erred in designating 541712, Research and Development in the Physical, Engineering and Life Sciences, as the NAICS code for this procurement. I GRANT this appeal and designate NAICS code 511130, Book Publishers, with a corresponding 500 employee size standard, as the appropriate NAICS code for this procurement.

V. Conclusion

For the above reasons, I OVERTURN the CO's NAICS code designation, GRANT the instant appeal, and designate NAICS code 511130, Book Publishers, with a corresponding 500 employee size standard, as the appropriate NAICS code for this procurement.

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

CHRISTOPHER HOLLEMAN
Administrative Judge