

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

NAICS APPEAL OF:

Computer Cite

SBA No. NAICS-4964

Appellant

Decided: June 10, 2008

Solicitation No. FA8773-08-R-0136

U.S. Department of the Air Force

Tinker Air Force Base, Oklahoma

APPEARANCE

Cammy C. Ticknor, President, Computer Cite, San Ramon, California, *pro se*, for Appellant.

I. Introduction and Jurisdiction

On May 12, 2008, the U.S. Department of the Air Force (Air Force) issued the subject Request for Proposals No. FA8773-08-R-0136 (RFP) for operations and maintenance of the Base Telecommunications System at Dover Air Force Base (AFB). The Contracting Officer (CO) set the procurement totally aside for 8(a) small businesses, and designated North American Industry Classification System (NAICS) code 517110, Wired Telecommunications Carriers, with a corresponding 1,500 employee size standard, as the NAICS code for this procurement. Proposals are due on June 12, 2008.

On May 21, 2008, Computer Cite (Appellant) filed a NAICS code appeal with the Small Business Administration's (SBA) Office of Hearings and Appeals (OHA). Appellant argues that the appropriate NAICS code for this solicitation is 811213, Communication Equipment Repair and Maintenance, with a corresponding \$6.5 million annual receipts size standard.

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. Accordingly, this appeal is properly before OHA for decision. For the reasons discussed below, Appellant's appeal is granted.

II. Issue

Whether the CO's designation of NAICS code 517110 to a solicitation for the operations and maintenance of a Base Telecommunications System was based upon a clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Facts

1. On May 12, 2008, the Air Force issued the RFP as a total competitive 8(a) small business set-aside. The Air Force stated that it would be using Federal Acquisition Regulation (FAR) Part 12, Acquisition of Commercial Items, in this solicitation for the described supplies or services. The RFP's Synopsis describes the work as follows:

The 38th Engineering Installation Group/PKL, Contracting Division, has a requirement for non-personal services for operation and maintenance of the Base Telecommunications Systems (BTS) at DOVER AFB DE. . . . Contractor shall perform operation and maintenance on the switching system(s), transmission equipment, ancillary equipment, customer premise equipment (CPE), and the inside and outside cable plant as well as execute work orders.

2. The RFP's Contract Line Item Number (CLIN) 0001 states:

Monthly Maintenance, Base Name
FFP¹

Services non-personal: The contractor shall furnish all labor, tools, parts and incidentals necessary to provide monthly maintenance for the Base Telecommunication System (BTS) in accordance with (IAW) contract terms and conditions.

FOB: Destination

CLIN 0001AA states:

Monthly Maintenance, Base Name, BTS
FFP

Monthly maintenance for the Base Telecommunication System (BTS) in accordance with (IAW) contract terms and conditions for Dover AFB.

FOB: Destination

CLIN 0001AB states:

Monthly Maintenance, Base Name, BTS
FFP

Monthly maintenance for the Base Telecommunication System (BTS) in accordance with (IAW) contract terms and conditions for the Hospital at Dover AFB .

FOB: Destination

¹ FFP indicates a Firm Fixed Price line item.

CLIN 0001AC states:

Monthly Maintenance, Base Name, BTS

FFP

Monthly maintenance for the Base Telecommunication System (BTS) in accordance with (IAW) contract terms and conditions for the Command Post.

FOB: Destination

CLIN 0003AA states:

Cable Marking and Locating

FFP

The Contractor shall conduct cable marking and locating services IAW the terms and conditions of the contract. See also PWS Section 1.3.

FOB: Destination

Others CLINs addressed the contractor providing labor and tools for the removal and installation of communications equipment in accordance with various referenced documents. In addition, there were CLINs for the option years.

3. The RFP contains a Performance Work Statement (PWS) for the operation and maintenance of Dover AFB's Telecommunications System. The PWS contains the following provisions:

a. Paragraph 1.1, Scope of Work, which states:

Contractor shall provide all personnel, equipment, tools, materials, vehicles, supervision and other items and services necessary to provide highly reliable telecommunications and networked voice, video and data services, unless specified in this contract as Government Furnished Property (GFP) to support the mission of 436 Communication Squadron (CS) at Dover Air Force Base, DE. Contractor shall perform monthly Operations and Maintenance (O&M) services and other services required to ensure the Base Telecommunications System (BTS) is available 24 hours per day, 7 days per week. The BTS consists of the base telephone system switch, the outside plant (OSP) and inside plant systems, and all associated equipment described in Appendix 5.2. Contractor must operate and maintain all BTS equipment and systems in accordance with (IAW) publications in Appendix 5.6.

b. Paragraph 1.3, Monthly Maintenance, provides:

Overall responsibility to properly maintain and operate the BTS shall rest with Contractor as described by the maintenance support plan (see 1.3.12.1) and be performed IAW the commercial manufacturer's recommended procedures. Monthly Maintenance is all actions taken by Contractor to maintain equipment and systems in a serviceable condition or to restore it to a serviceable condition to

include inspection, periodic testing, adjustment, and repair. The effort includes the replacement of defective circuit packs and Customer Premise Equipment (CPE), and preventive maintenance IAW applicable publications and other routine work to optimize the life expectancy of the equipment and cable systems. Work orders will be accomplished IAW 1.4 to include relocates and removals. Monthly Maintenance efforts shall not be postponed or otherwise delayed to accomplish work orders.

c. Paragraph 1.3.1, Perform Telephone Switch System Maintenance, states:

Contractor shall operate and maintain the switching system(s) identified in Appendix 5.2 IAW Original Equipment Manufacturer (OEM) procedures. Acceptable standard performance level shall be measured by a determination of the total systems availability (up time) and reliability rating during any given month. A period of five minutes down time shall not be exceeded during any one month period. All equipment or services completed by Contractor shall automatically become part of the monthly maintenance services.

d. Paragraph 1.3.2, Perform Inside and OSP Maintenance, states the “Contractor shall maintain inside and OSP cable and equipment as identified in Appendix 5.2 and IAW applicable documents listed in Appendix 5.6 of this PWS.”

e. Paragraph 1.3.4.1, Contractor Availability, states:

Contractor shall respond in case of emergencies, outages, alerts and exercises, twenty four hours a day, 365 days a year. If contacted, Contractor or required personnel should report for duty and provide services as necessary until the emergency, alert, or exercise is completed.

4. On May 30, 2008, the CO issued RFP Amendment 0001 informing all interested offerors of the instant NAICS code appeal.

IV. Appeal

On May 21, 2008, Appellant filed the instant appeal. Appellant argues NAICS code 517110 is inappropriate because the scope of work requires companies to operate and maintain Government-owned equipment, and NAICS code 517110 describes establishments that own or lease transmission facilities. Next, Appellant argues that a revenue-based size standard is more appropriate than an employee-based size standard because the principal purpose of the work is a service, not manufacturing. Appellant asserts NAICS code 811213 is the best code for the procurement because it encompasses establishments primarily engaged in repairing communications equipment, and here the Air Force is seeking contractors to repair and maintain a “telecommunications and networked voice, video and data services to support the communication system at Dover AFB.” Appellant also asserts other Air Force bases have used NAICS code 811213 when contracting for telecommunications support services.

V. Discussion

A. Timeliness

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

B. Standard of Review

The NAICS was developed not to classify work required by Federal contracts, but rather:

[A]s the standard for use by Federal statistical agencies in classifying business establishments for the collection, analysis, and publication of statistical data related to the business economy of the U.S. NAICS was developed under the auspices of the Office of Management and Budget (OMB), and adopted in 1997 to replace the old Standard Industrial Classification (SIC) system. It was also developed in cooperation with the statistical agencies of Canada and Mexico to establish a 3-country standard that allows for a high level of comparability in business statistics among the three countries.²

Thus, SBA's regulations do not require the contracting officer to designate the perfect NAICS code. Rather, 13 C.F.R. § 121.402(b) states the procuring agency contracting officer designates the NAICS code that best describes the principal purpose of the product being acquired in light of the industry description in the *NAICS Manual*,³ the description in the solicitation, and the relative weight of each element in the solicitation. To overcome a contracting officer's designation of a NAICS code, Appellant must establish the contracting officer's NAICS code designation is based on a clear error of fact or law. 13 C.F.R. § 134.314.

The clear error standard is rigorous but not as deferential as review under the arbitrary and capricious standard. See RICHARD S. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 11.2 (4th ed. 2002). For example, Black's Law Dictionary defines clear error as a "trial judge's decision or action that appears to a reviewing court to have been unquestionably erroneous." BLACK'S LAW DICTIONARY 563 (7th ed. 1999). Appellate courts also apply the clear error standard in reviewing a trial court's factual findings. See *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). A reviewing court will not reverse the lower court's finding of fact simply because it would have decided the case differently. *Id.* Instead, the reviewing court will reverse only if, on the basis of the entire evidence, it is left with the "definite and firm conviction that a mistake has been committed." *Id.* (quoting the clearly erroneous standard applied in *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). In *Easley*, the Court engaged in an extensive review of the

² Question No. 1, available at <http://www.census.gov/epcd/www/drnaics.htm#q1>.

³ Executive Office of the President, Office of Management and Budget, *NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM--UNITED STATES, 2007*, available at <http://www.census.gov/epcd/naics07/index.html> (hereinafter *NAICS Manual*).

lower court's findings, for clear error, and found that the review left it "with the definite and firm conviction" that the lower court's *key findings* were mistaken. *Id.* at 243.

While NAICS code appeals involve a review of a contracting officer's designation and not a lower court's decision, OHA looks to how the clear error standard has been interpreted in the appellate review setting. Consequently, OHA's review is deferential and OHA will not modify the contracting officer's designated code unless OHA has a "definite and firm conviction that a mistake has been committed." *See Concrete Pipe and Products of Cal. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 623 (1993). OHA will not reverse the contracting officer merely because OHA would have selected a different code. If OHA finds the contracting officer committed clear error or the contracting officer's designation was unquestionably erroneous, only then should the OHA Judge select the correct code.

C. Analysis

1. NAICS code definitions

NAICS code 517110, Wired Telecommunications Carriers, is for establishments primarily engaged in:

[O]perating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."

NAICS Manual, available at <http://www.census.gov/eos/www/naics/htmls/5/517110.htm>.

Appellant advocates NAICS code 811213, Communication Equipment Repair and Maintenance, which is for "establishments primarily engaged in repairing and maintaining communications equipment without retailing new communication equipment, such as telephones, fax machines, communications transmission equipment, and two-way radios." *NAICS Manual*, available at <http://www.census.gov/eos/www/naics/htmls/8/811213.htm>.

2. The Merits

The RFP is for the operation and maintenance of the Government-owned telecommunications system at Dover AFB (Fact 1). The CLINs, among other requirements, require offerors to price the maintenance and operation of the Government-owned equipment at Dover AFB (Fact 2). In addition, the PWS describes regular and episodic maintenance the successful offeror is to perform on Dover AFB's Government-owned communications

equipment (Fact 3). The PWS also contains lists of Government-furnished communications and communications-related computer equipment the successful offeror will be required to maintain. Therefore, I find the principal purpose of the procurement is for the maintenance and operation of Dover AFB's telecommunications equipment.

In designating NAICS code 517110, the CO is representing that this code best describes the principal purpose of the RFP. *See* 13 C.F.R. § 121.402(b). After reviewing the RFP's CLINs and the PWS, however, I do not find the industry description of NAICS code 517110 best describes the principal purpose of the RFP.

Specifically, NAICS Code 517110 describes an industry where the establishments "operat[e] and/or provid[e] access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks." There is no reference or inference in the *NAICS Manual's* description of NAICS code 517110 to the maintenance of a system owned by another entity. Nor is there any requirement in the RFP that the successful offeror will provide access to communications facilities owned or leased by that offeror. Rather, the contract arising out of this RFP applies to the maintenance and operation of Government-owned telecommunications equipment. Accordingly, I hold that the designation of NAICS Code 517110 constitutes clear error.

Appellant's suggested NAICS code of 811213, Communication Equipment Repair and Maintenance, applies specifically to establishments engaged in "repairing and maintaining communications equipment without retailing new communications equipment. . . ." I find this description is consistent with the principal purpose of the RFP, to maintain and operate communications equipment, and therefore find NAICS code 811213 is the most appropriate code for the RFP.

VI. Conclusion

In consideration of the foregoing, I REVERSE the CO's NAICS code designation and find the appropriate NAICS code for this procurement is 811213, Communication Equipment Repair and Maintenance, and GRANT the instant appeal.

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

THOMAS B. PENDER
Administrative Judge