

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

NAICS APPEAL OF:

Computer Cite

Appellant

Solicitation No. N00421-08-R-0100

Department of the Navy

NAVAIR Contracts

Cherry Point, North Carolina

SBA No. NAICS-4979

Decided: August 8, 2008

APPEARANCES

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

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 Contracting Officer's assignment of North American Industry Classification System (NAICS) code 517110, Wired Telecommunications Carriers, to a procurement for telecommunications operations and maintenance support services is based on a clear error of fact or law.

III. Background

A. The Solicitation

On July 11, 2008, the Department of the Navy, NAVAIR Contracts, at Cherry Point, North Carolina, issued Solicitation No. N00421-08-R-0100. The Contracting Officer (CO) set the procurement totally aside for small businesses and assigned NAICS code 517110, Wired Telecommunications Carriers, with a corresponding small business size standard of 1,500 employees. Proposals are due August 8, 2008.

The Performance Work Statement (PWS) states that this requirement is for Telecommunications Services for the Fleet Readiness Center East, Cherry Point, North Carolina. The contractor will augment the existing government workforce by providing telecommunications operations and maintenance (O&M) support services.

The telecommunications services in the PWS include support for a Nortel Meridian Option 81C digital telephone switch, a Nortel Fiber Remote Intelligent Peripheral Equipment module, and three Nortel Option 11 Private Branch Exchange's telecommunications telephone switches. Telecommunications systems support includes support for the basic system, as well as support for Call Pilot VM, Motorola Zetron Paging system, administrative support services, and other services that include the installation of analog and digital phones, enhanced data cabling, and support for special circuit requirements.

In accordance with PWS, the contractor will provide telecommunication technician support for the equipment mentioned above, and data communication technician support for voice communications systems and related infrastructure. The contractor will also provide telecommunications services to include installation, testing, modification, repair, maintenance, and day-to-day technical support of new and existing telephone systems, voice network equipment, telephone switch room equipment, outside plant, and related cabling and wiring infrastructure.

B. Appeal

On July 21, 2008, Computer Cite (Appellant) filed a NAICS code appeal with the Office of Hearings and Appeals (OHA). Appellant requests the CO change the assigned NAICS code from 517110 to 811213, Communication Equipment Repair and Maintenance, with a corresponding \$6.5 million annual receipts size standard. Appellant asserts this code best describes the principal purpose of the goods and services being purchased by the government.

Appellant argues NAICS code 517110 does not fit the solicitation's scope of work. Appellant states NAICS code 517110 refers to "establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease," such as cable companies, direct broadcast satellite services, internet service providers, and local and long distance wired carriers. Appellant asserts that the majority of solicitations on FedBizOps assigned NAICS code 517110 are requesting the services of companies operating transmission facilities and infrastructure they own or lease, where this solicitation requires O&M of government-owned equipment. Moreover, Appellant states the majority of solicitations for communication equipment and maintenance on FedBizOps are assigned NAICS code 811213.

Appellant asserts that historically Department of Defense activities have used NAICS code 811213 when contracting for telecommunications O&M. Appellant states in RFP FA5215-05-R-0010 the Air Force at Hickam Air Force Base had to change a competitive 8(a) procurement for telecommunications support services with an annual receipts size standard to NAICS code 811213 when a contractor requested the Small Business Administration (SBA) intervene. Appellant also cites *NAICS Appeal of Computer Cite*, SBA No. NAICS-4964 (2008),

wherein OHA determined designating NAICS Code 517110 to a procurement for O&M of the base telecommunications system at Dover Air Force Base constituted clear error.

Additionally, Appellant argues this is a service solicitation which should have an average annual receipts size standard, rather than employee size standard which are generally used for manufacturing contracts.

IV. Discussion

A. Timeliness

Appellant filed its appeal within ten days after the Department of the Navy 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 procuring agency CO must select the NAICS code which best describes the principal purpose of the product being acquired in light of the industry description in the NAICS MANUAL,¹ the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b). Appellant must establish the CO'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). While NAICS code appeals involve a review of a CO'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 CO'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 CO merely because OHA would have selected a better code. If OHA finds the CO committed clear error or the CO's designation was unquestionably erroneous, only then will the OHA judge select the correct code.

C. Analysis

The NAICS code designated by the CO, 517110, wired Telecommunications Carriers, covers:

[E]stablishments primarily engaged in operating 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

¹ 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).

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, at 671-72.

Appellant's requested NAICS code, 811213, Communication Equipment Repair and Maintenance, covers:

[E]stablishments 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, at 884.

It is thus clear that NAICS code 517110 describes an industry where the concerns operate and/or provide access to transmission facilities and infrastructure they own and/or lease for transmissions using wired telecommunications networks. Here, the facilities, equipment and infrastructure are government-owned and the purpose of the contract is the repair and maintenance of those facilities.

This PWS does not require the contractor to provide access to its own telecommunications equipment. Conversely, there is nothing in the *NAICS Manual's* description of NAICS code 517110 that references the maintenance of a telecommunications system owned by another entity. This contract is for the maintenance of an existing government-owned telecommunications system, and thus falls more squarely into NAICS code 811213, covering the maintenance of communications equipment. *See NAICS Appeal of Computer Cite*, SBA No. NAICS-4964 (2008).

V. 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, Communications Equipment Repair and Maintenance, and GRANT the instant appeal.

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

CHRISTOPHER HOLLEMAN
Administrative Judge