

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

NAICS APPEAL OF:

Genome-Communications

Appellant

Solicitation No. VA-241-08-RP-0425

Department of Veterans Affairs

VAMC White River Junction

White River Junction, VT

SBA No. NAICS-5002

Decided: September 18, 2008

APPEARANCES

Eugene J. Koprowski, President, for Appellant Genome-Communications

Stacy A. Sullivan, Contract Specialist, for the Department of Veteran Affairs

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 Internet based educational courses is 611710, Educational Support Services, or 519130, Internet Publishing and Broadcasting and Web Search Portals.

III. Background

A. The Solicitation

On September 4, 2008, The Department of Veterans Affairs (VA) issued the subject solicitation for development of educational material in support of post traumatic stress disorder (PTSD) training. The Contracting Officer (CO) set the procurement totally aside for service-disabled veteran-owned small businesses (SDVO SBCs), and designated North American Industry Classification System (NAICS) code 611710, Educational Support Services, with a corresponding \$6.5 million annual receipts size standard, as the NAICS code for this procurement. Offers are due September 19, 2008.

B. The Performance Work Statement (PWS)

The contractor will create six new courses for a web-based curriculum on PTSD. The contractor must create two high quality professional courses, on Pharmacotherapy for PTSD and Traumatic Brain Injury, which are interactive, engaging and professional. The contractor must also create four standard PowerPoint courses with voice narration on Risk and Resilience Factors, PTSD Assessments, Women's Treatment Issues, and Military Sexual Trauma. Further, the contractor will create a new page in html format for each course, and a new biography page in html format for each course as needed, with a photo of the first instructor and sample text. In addition, the contractor will create a 508 compliant PDF for the continuing education credits brochure. The contractor will deliver the final educational materials in a web-ready format.

The VA will supply the course content in a PowerPoint template, course goals and objective, text and photo for instructor biography, and a Word document of the transcript.

The contractor must be proficient in creating professional educational courses for adult learning, and in creating web-ready courses compatible with VA's website.

C. The Appeal

On, September 11, 2008, Genome-Communications (Appellant), filed the instant NAICS code appeal with the Office of Hearings and Appeals (OHA), challenging the CO's NAICS code designation. Appellant asserts the appropriate NAICS code designation is 516110, Internet Publishing and Broadcasting. This was a NAICS code under an earlier, since superseded version of NAICS.¹ The current NAICS code for Internet Publishing and Broadcasting and Web Search Portals is 519130, with a corresponding 500 employee size standard. I will adjudicate this appeal on the premise that Appellant is urging that 519130 is the appropriate NAICS code.

Appellant argues this contract calls for work not performed by an educational institution, but rather for publishing and internet services. Appellant argues that NAICS code 519130 is

¹ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System Manual* (2002), at 668.

more appropriate because it covers firms engaged in publishing and/or broadcasting content on the Internet. These firms do not provide non-Internet versions of the content they provide, but provide text, audio and video content for the Internet.²

D. The CO's Response

On September 17, 2008, the CO submitted a response to the appeal. The CO asserts this requirement is educational in nature and does not involve publishing. The procurement is to support an educational program and requires an educational consultant company with educational experience to develop a curriculum. While the end product must be in web-ready format, the contractor will not broadcast, host or publish any materials on the Internet. The contractor must be adept at designing educational content, creating educational material, and formatting course materials for web-based education needs. This is an educational task, not an Internet task.

IV. Discussion

A. Timeliness and Standard of Review

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

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. § 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*,³ 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).

B. The Merits

First, it must be noted that there was an error in the CO's NAICS code designation and size standard. Effective August 18, 2008, there was a modification of the revenue-based size standards to adjust for inflation. The appropriate size standard for NAICS code 611710 is now \$7 million in annual receipts. 73 Fed. Reg. 41237, 41250 (July 18, 2008).

² Appellant also asserts that the CO is attempting to use this SDVO SBC set-aside and NAICS code designation to preselect one particular (unnamed) firm. Appellant asks for an investigation. This Office has no jurisdiction to conduct such an investigation, and suggests Appellant contact the VA Inspector General.

³ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System Manual* (2007).

The NAICS code designated by the CO, 611710, covers:

[E]stablishments primarily engaged in providing noninstructional services that support educational processes or systems.

Illustrative examples:

Educational consultants
Educational testing services
Educational guidance counseling services
Student exchange programs
Educational testing evaluation services

NAICS Manual, at 810.

Appellant's requested NAICS code, 519130, covers:

[E]stablishments primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users.

Illustrative Examples:

Internet book publishers
Internet sports sites
Internet entertainment sites
Internet video broadcast sites
Internet game sites
Internet news publishers
Internet periodical publishers
Internet radio stations
Internet search portals
Web search portals
Internet search Web sites

NAICS Manual, at 678.

After reviewing the solicitation, I cannot say that there is clear error in the CO's NAICS code designation. Appellant's requested code covers firms which broadcast their content on the Internet exclusively or operate Web sites. The contractor is not required to do that. This procurement does not require either broadcasting on the Internet or operation of a Web site at all. The contractor will prepare these courses to be Internet-ready, but will not be handling the posting of them or maintaining the web sites where they are available.

Rather, this procurement calls for the creation of six educational courses, to be used by professionals in preparing to treat PTSD. The work is educational work which happens to have an Internet component, but it is not Internet work. The fact that there is an Internet-related component to this solicitation does mean that the procurement must receive an Internet-related NAICS code. The question is whether the primary purpose of the procurement is to publish on the Internet or maintain web sites, or is it to prepare educational materials. *NAICS Appeal of Eagle Design and Management, Inc.*, SBA No. NAICS-4510, at 4, *remanded to SBA No. NAICS-4521; aff'd sub nom. Eagle Design and Management, Inc. v. United States*, 57 Fed. Cl. 271 (2002).

Accordingly, the educational consultant NAICS code the CO designated is a far more suitable code, because the work here is educational work. Appellant has failed to meet its burden of establishing clear error on the part of the CO in designating this NAICS code.

Accordingly, I find that the CO did not err in designating NAICS code 611710, Educational Support Services, as the NAICS code for this procurement.

V. Conclusion

For the above reasons, I AFFIRM the CO's NAICS code designation, DENY the instant appeal, and affirm the designation of NAICS code 611710, Educational Support Services, with a corresponding \$7 million annual receipts 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