

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

NAICS APPEAL OF:

Computer Cite

SBA No. NAICS-5010

Appellant

Decided: November 13, 2008

Solicitation No. FA8773-08-R-0193

38th EIG/PKL

Tinker Air Force Base, Oklahoma

APPEARANCES

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

Wilbert W. Edgerton, Esq., Attorney Advisor, for the Air Force

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 September 30, 2008, the Department of the Air Force, 38th EIG/PKL (Air Force) issued Solicitation No. FA8773-08-R-0193 for operation and maintenance of the base telecommunications system at Westover Air Force Base in Massachusetts. The procurement was set aside as an 8(a) competitive procurement and was designated under North American Industry Classification System (NAICS) code 517110, Wired Telecommunications Carriers, with a

corresponding 1,500 employee size standard. Proposals were due November 13, 2008. On November 7, 2008, the Air Force issued Amendment 3, which extended the due date for proposals to December 2, 2008.

B. The Performance Work Statement

The Performance Work Statement (PWS) states that this requirement is to provide telecommunications and networked voice, video and data services to support the mission of the 439 CS/SCX Communications Squadron at Westover Air Force Base, in Massachusetts. The contractor will provide all personnel, equipment, tools, materials, vehicles, and all items and services necessary to perform the Operations and Maintenance (O&M) necessary to ensure the Base Telecommunications System (BTS) is available 24 hours a day, seven days a week. The BTS consists of the base telephone system switch, the outside plant (OSP) and inside plant systems, and all associated equipment. The contractor must operate and maintain all BTS equipment and systems.

The contractor must operate and maintain all equipment and systems in a serviceable condition and this will include the replacement of equipment by the purchasing of commercially available parts, plus testing, inspection and repair.

The contractor may be required to support base mission changes; BTS infrastructure modifications; and other support requirements necessary for the BTS to meet mission requirements. The contractor will be required to install telecommunications wiring in various buildings on base.

The contractor will perform all the O&M of the switching systems, transmission equipment, ancillary equipment, customer premise equipment, and inside and outside cable plant. This includes, but is not limited to, maintenance and update of Telecommunications Management System, databases, data administration, repair verification, service verification, inventory tracking, preventive maintenance inspections, recordkeeping, and maintenance of telephone sets, switches, station wiring, batteries and telecommunications power equipment. The contractor will perform telephone switch maintenance, preventive maintenance inspections, switch power tests, spare conductor tests, and inspect at least five manholes a month. The contractor will respond to emergencies, outages, alerts and exercises, 24 hours a day, 365 days a year. The contractor will provide voice mail operations.

The work orders will at times require the contractor to purchase and install equipment or material, such as telephones, communications equipment, plant equipment and cables. The pricing tables include over 200 line items for purchases, including labor categories which will include tasks such as trenching, locating and installing cable, removing and relocating telephone systems and other work which is not computer related.

C. The Appeal

On October 1, 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, Communications 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 FedBizOpps 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 FedBizOpps are assigned NAICS code 811213.

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

Appellant asserts that historically Air Force bases have used NAICS code 811213 when contracting for telecommunications support requirements.

Appellant asserts a review of FedBizOpps using NAICS code 811213 clearly shows a majority of solicitations for communications equipment and maintenance use this NAICS code designation. The scope of work for this solicitation clearly describes equipment and services that are by their nature and principal purpose communication equipment. The purpose of this procurement is to repair and maintain communication equipment, and NAICS code 811213 is thus the appropriate code.

D. The Agency Response

On October 16, 2008, the Air Force filed a CO's response and a memorandum of law in response to the appeal. The Air Force reviewed the government estimate for the Contract Line Item Numbers (CLINs) and found that CLIN 0004, Purchases, comprise 46% of the contract value; CLIN 0005, Installation Services, comprise 22%; CLIN 0001, Operations and Maintenance, comprise 18%; CLINS 0006 and 0007, Removal and Relocation, comprise 3%. The operation and maintenance CLINs make up only 18% of contract value, while purchase of new equipment and installation services, including construction, amounts to approximately 68% of contract value.

The CO's analysis of the PWS showed that out of 28 key requirements, NAICS code 811213 satisfied only 8, while NAICS code 517110 satisfied all 28. The tasks under NAICS

code 811213 make up approximately 18% of contract value, while tasks under NAICS code 517110 encompass all of the contract value.

The operation of the BTS is the critical element of the solicitation, and following an earlier NAICS code appeal the solicitation was drafted to emphasize operation of the system, rather than merely repair and maintenance. Maintenance, while significant, is not the principal purpose of this contract. The critical task of this solicitation is the operation of the BTS on a 24-hour a day/seven day a week basis to provide the communications system vital to the operations of Westover Air Force Base.

Maintenance does not include the operation of the system. While NAICS code 517110 states that establishments under it own or lease the infrastructure through which they provide service, NAICS code 811213 specifically excludes retailing new equipment, which is 46% of this contract's value. NAICS code 811213 also does not include operations or construction which are significant requirements of this solicitation.

The Air Force concludes by stating while neither NAICS code is a perfect fit, NAICS code 517110 is the most appropriate code.

IV. DISCUSSION

A. Timeliness

Appellant filed its appeal within ten days after issuance of 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*, 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. Construction Laborers Pension Trust*, 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 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,¹ 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.

In previous cases, we have found 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. In cases calling for maintenance and repair of government-owned installation telephone networks, OHA has held that NAICS code 811213 was a more appropriate code. *See NAICS Appeal of Computer Cite*, SBA No. NAICS-4979 (2008).

However, here it is clear that the emphasis of this solicitation is not merely the maintenance of the BTS, but its constant operation. The solicitation is different from those OHA considered earlier, in that it emphasizes the constant operation of the system, and requires the government to purchase parts and equipment from the contractor. The contractor here will not merely maintain the BTS; it will be operating the system and ensuring constant service. In addition, the contractor will be installing new equipment and performing construction work, neither of which is covered by NAICS code 811213.

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>.

Further, the contractor will be acquiring parts and selling them to the government as part of its operation and maintenance of the system, and NAICS code 811213 precludes the sale of equipment. Purchases comprise 46% of contract value, while O&M comprises only 18%. While the BTS is government owned, and thus the contractor will not own or lease the system, the contractor will be operating it as though it was a system it owned or leased, for the benefit of the Air Force. We have held that a NAICS code need not be a perfect fit for the solicitation, in order to find it the most appropriate code. *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4600 (2003). Absent the factor of ownership, NAICS code 517110 covers the operation, as well the maintenance, of BTS.

Thus, I find Appellant has failed to meet its burden of establishing clear error in the CO's designation. NAICS code 517110, Wired Telecommunications Carriers, is the appropriate NAICS code for this procurement.

V. CONCLUSION

In consideration of the foregoing, I AFFIRM the CO's NAICS code designation and find the appropriate NAICS code for this procurement is 517110, Wired Telecommunications Carriers, and DENY the instant appeal.

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

CHRISTOPHER HOLLEMAN
Administrative Judge