

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

NAICS APPEAL OF:

1st American Systems and Services, LLC

SBA No. NAICS-5119

Appellant

Decided: March 31, 2010

Solicitation No. N00189-10-R-Z001

Department of the Navy

Philadelphia, PC

APPEARANCES

Alpa Shah, President, for Appellant.

Leanne Hanger, Contracting Officer, for the U.S. Department of the Navy, Fleet and Industrial Supply Center Norfolk Contracting Department, Philadelphia Office.

Manny Pena, President & CEO, H.I.M. On Call.

I. Introduction and Jurisdiction

On February 4, 2010, the U.S. Department of the Navy, Fleet and Industrial Supply Center Norfolk Contracting Department, Philadelphia Office issued Solicitation No. N00189-10-R-Z001 (RFP) to acquire Medical Coding, Auditing, and Training Services at various Naval Medical Treatment Facilities.

The Contracting Officer (CO) set the procurement totally aside for small business. In the original RFP, the CO designated North American Industry Classification System (NAICS) code 518210, Data Processing, Hosting, and Related Services, with a corresponding size standard of \$25 million in average annual receipts. On March 12, 2010, the CO issued Amendment 0003 to the RFP in which she changed the NAICS designation to 541611, Administrative Management and General Management Consulting Services, with a \$7 million average annual receipts size standard. On March 16, 2010, the CO issued Amendment 0004 to the RFP in which she changed the NAICS designation back to the original code—518210.

On March 22, 2010, 1st American Systems and Services, LLC (Appellant) filed the instant NAICS code appeal with the Small Business Administration's (SBA) Office of Hearings and Appeals (OHA). Appellant argues the appropriate NAICS code for the contract line items in the RFP is 541611, the NAICS code assigned by the CO in Amendment 0003.

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. Appellant filed its appeal within ten days of the issuance of Amendment 004. 13 C.F.R. § 134.304(a)(3). Accordingly, this appeal is properly before OHA for decision. For the reasons discussed below, Appellant's appeal is granted.

II. Issue

Is the CO's designation of NAICS code 3518210, Data Processing, Hosting, and Related Services, to the instant RFP for Medical Coding, Auditing, and Training Services based upon a clear error of fact or law? *See* 13 C.F.R. § 134.314.

III. Background

A. Facts

1. The RFP provides the procurement is a total small business set-aside. The CO originally designated NAICS code 518210, Data Processing, Hosting, and Related Services, with a size standard of \$25 million.
2. Among the questions submitted to the CO regarding the RFP was an inquiry concerning the applicability of NAICS code 518210, wherein a prospective offeror alleged that NAICS code 518210 was only appropriate when the contractor's primary task is installing and maintaining computer systems.
3. On March 12, 2010, in response to the inquiry outlined in Fact 2, the CO issued Amendment 0003 to the RFP, which, among other things, changed the NAICS code designation from 518210 to 541611, Administrative Management and General Management Consulting Services, with a size standard of \$7 million.
4. On March 16, 2010, the CO issued Amendment 0004 to change the NAICS code back to 518210. The CO offered no explanation for this change. The CO established that proposals are due on April 2, 2010.
5. The RFP contains a Schedule of Supplies and Scope of Work.
 - a. The Schedule of Supplies and Services provides approximately nine contract line items (CLINs) for each of the base year and four option years. The highest-quantity items required are outpatient medical record coding, inpatient medical record coding, and medical auditing services for various locations.
 - b. Consistent with the CLINs, the Scope of Work provides: "The contractor shall provide inpatient and outpatient medical record coding services, medical record audit services, and training services to Military Treatment Facilities (MTF) worldwide." Generally, the Scope of Work explains the contractor must provide certified professionals to apply coding classification standards and guidelines to medical record documentation, to audit government-coded encounters and report coding accuracy rates, and to train government personnel to improve documentation and properly apply codes. The Scope of Work section also provides:

“The purpose of the contract is to provide a comprehensive package of coding services that will enhance the overall coding function, assist MTFs in improving the accuracy and completeness of coding, and aid in maximizing workload capture through appropriate medical documentation and coding at MTFs throughout Navy Medicine.”

B. Appeal Petition

On March 22, 2010, Appellant filed its NAICS code appeal with OHA. Appellant argues the CO’s March 16, 2010, designation of NAICS code 518210, Data Processing, Hosting, and Related Services, is clearly erroneous because the services required by the Scope of Work do not fall within the description of NAICS code 518210—i.e., “[t]he scope of work for this solicitation is not to provide hosting or data processing services.” Appellant asserts that NACIS code 541611, Administrative Management and General Management Consulting Services, is the correct code for this RFP because it appropriately reflects the Scope of Work, which is to provide Medical Coding, Auditing, and Training Services.

Appellant points out that Amendment 0003 provides that “remote services as described in this [performance work statement] DOES NOT mean the contractor will obtain access to the Government’s AIS or be required to interface with any Government AIS.”¹ (Amendment 0003, Changes to the Solicitation ¶ 5.) Appellant contends that because the contractor will not have access to or interface with government automated information systems, a NAICS code relating to data processing and hosting cannot be appropriate. Appellant requests that the NAICS code be changed back to 541611 and that the date to respond to the solicitation be extended.

C. CO Response

On March 29, 2010, the CO filed a response to the appeal petition. The CO argues that the appeal should be denied because her designation of NAICS code 518210 was not clearly erroneous. She emphasizes that a CO’s designation should only be overturned if it is unquestionably erroneous and not simply because OHA would have chosen a different code. She also notes that a CO is not required to designate the perfect NAICS code, but rather one that describes the principal purpose of the procurement.

The CO sets forth the critical elements of the Performance Work Statement, noting that coding services and audit services are the primary requirements of the solicitation. The CO also sets forth the definition of NAICS code 518210, which includes data processing. The CO asserts that she selected NAICS code 518210 because the majority of the solicitation is for data processing services. “The majority of the services procured in the instant solicitation comprise automated data processing and data entry functions. The medical coding and data processing functions of the solicitation comprise over 51% of the total dollar value of the instant Solicitation.” Accordingly, given the relative weight of the coding services in relation to the remainder of the services requested under the RFP, and taking into account the description of

¹ I note that Appellant left the word “remote” out of this quote from the RFP. I do not consider this to be an intentional misleading of OHA.

services set forth in the definition of NAICS code 518210, the CO concluded that 518210 was the most appropriate code for this procurement.

Finally, the CO argues NAICS code 541611, which includes general business operating assistance with administrative management functions, does not appropriately define the tasks required by the RFP. The CO asserts the RFP does not require the types of services that comprise this code—*e.g.*, organizational planning, financial planning and budgeting, marketing objectives and/or information systems planning. Instead, the solicitation clearly seeks data processing services, and NAICS code 541611 does not adequately encompass the requirements of the RFP. Furthermore, the CO claims, Appellant has failed to offer any justification for its conclusion that NAICS code 541611 should be utilized here. The CO concludes that when compared, NAICS code 518210 fits the solicitation better than NAICS code 541611, and her designation must be affirmed because it is not clearly erroneous.

D. H.I.M. ON CALL Response

On March 30, 2010, OHA received a filing from H.I.M. ON CALL, Inc., presumably a company interested in submitting a proposal in response to the RFP. H.I.M. On Call argues that the RFP is not a data processing contract, but obviously an administrative services contract and that NAICS code 541611 should apply. H.I.M. ON CALL offers two examples of other RFPs that were issued by the Army under NAICS code 541611 and urges OHA to strike the CO's designation of NAICS code 518210 to this RFP in favor of NAICS code 541611.

IV. Discussion

A. Standard of Review

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

as 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's contracting officer designates the NAICS code that best describes the principal purpose of the product being

² U.S. Census Bureau, Ask Dr. NAICS, 1. What is NAICS and how is it used?, <http://www.census.gov/epcd/www/drnaics.htm#q1> (last revised May 19, 2009).

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 that the contracting officer's NAICS code designation is based on a clear error of fact or law. 13 C.F.R. § 134.314. 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 Prods. of Cal., Inc., 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 will OHA select a different code.

B. Merits of the Appeal

1. NAICS Code Definitions

The requirements for 518210, Data Processing, Hosting, and Related Services, as stated in the NAICS Manual, are as follows:

This industry comprises establishments primarily engaged in providing infrastructure for hosting or data processing services. These establishments may provide specialized hosting activities, such as web hosting, streaming services or application hosting; provide application service provisioning; or may provide general time-share mainframe facilities to clients. Data processing establishments provide complete processing and specialized reports from data supplied by clients or provide automated data processing and data entry services.

NAICS code 518210 has a \$25 million size standard. 13 C.F.R. § 121.201.

The requirements for 541611, Administrative Management and General Management Consulting Services, as stated in the NAICS Manual, are as follows:

This U.S. industry comprises establishments primarily engaged in providing operating advice and assistance to businesses and other organizations on administrative management issues, such as financial planning and budgeting, equity and asset management, records management, office planning, strategic and organizational planning, site selection, new business startup, and business process improvement. This industry also includes establishments of general management consultants that provide a full range of administrative; human resource; marketing; process, physical distribution, and logistics; or other management

³ EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (2007), *available at* <http://www.census.gov/eos/www/naics/> (hereinafter NAICS Manual).

consulting services to clients.

NAICS code 541611 has a \$7 million size standard. 13 C.F.R. § 121.201.

2. Analysis

As stated in the RFP, “[t]he purpose of the contract is to provide a comprehensive package of coding services that will enhance the overall coding function, assist MTFs in improving the accuracy and completeness of coding, and aid in maximizing workload capture through appropriate medical documentation and coding at MTFs throughout Navy Medicine.” The primary function the contractor must perform is to provide certified professionals to perform medical coding services and to audit government records and coding practices. (Fact 5.)

Contrary to the CO’s assertions, I do not find that the coding of medical records is an automatic data processing task. Instead, coding of tasks or records is an administrative task that can be accomplished without computers. Of course, coding of data may be recorded on automatic data processing equipment for reporting or statistical purposes, but that is not an essential part of the coding function. The conclusion that coding is an administrative task not requiring the use of computers is also consistent with Appellant’s observation that the contractor would not have remote access to government AIS and may not be guaranteed access to the Navy’s automatic data processing equipment at all.⁴

Moreover, NAICS code 518210 pertains to businesses that provide infrastructure for the hosting of data processing or web based services. *NAICS Appeal of Info. Ventures, Inc.*, SBA No. NAICS-4767 at 9 (2006); *see also NAICS Appeal of Info. Ventures, Inc.*, SBA No. NAICS-4815 (2006). Even the language in the *NAICS Manual* regarding code 518210 that addresses data processing indicates that *complete processing* is required for this code to apply. This requirement, consistent with the first sentence of the NAICS code definition (“This industry comprises establishments primarily engaged in providing infrastructure for hosting or data processing services.”), means the concern accomplishing the data processing must accomplish it using contractor infrastructure/equipment for code 518210 to apply. Accordingly, because coding is an administrative task that does not necessarily require the use of computers, and because the RFP does not require the provision of data processing infrastructure or complete data processing, I hold that NAICS code 518210 is not applicable to the RFP.

Appellant has proffered NAICS code 541611, Administrative Management and General Management Consulting Services, a code that addresses operating advice and assistance to businesses and other organizations on administrative management issues. Although this NAICS code is not perfect, it does address assistance to the Navy in encoding its medical records, which is patently records management. Because this is the principal purpose of the RFP, I cannot say

⁴ Amendment 0003 provides, in answer to questions 49-50, that the government will not provide remote access to its AIS, and the contractor’s equipment will not be connected to any government AIS unless it is within a .mil domain with government furnished equipment and a common access card.

that NAICS code 541611 does not apply to the RFP, as is the case with NAICS code 518210. I also note that no other code in the *NAICS Manual* fits the RFP better than NAICS code 541611.

Finally, I find it significant that the CO determined in Amendment 0003 that 541611 was the appropriate NAICS code for the RFP, then in Amendment 0004, changed the NAICS code back to 518210 without any explanation as to why she did so. (Facts 2-4.) In Amendment 0003, the CO noted that NAICS code 541611 “better identifies the services, specifically ‘records management.’” (Amendment 0003, ¶ 1.) In Amendment 0004, the CO changed the NAICS code back to 518210 without any comment. I find this to be an admission on the part of the CO that NAICS code 541611 is in fact the appropriate NAICS code for this solicitation.

In consideration of the foregoing, I hold the CO committed clear error in designating NAICS code 518210 for the RFP. In addition, I hold a more appropriate NAICS code for this procurement is NAICS code 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of \$7 million in average annual receipts.

V. Conclusion

Upon consideration of the RFP, the Appeal Petition, and the CO’s Response, I REVERSE the CO’s NAICS code designation set forth in RFP Amendment 0004 and thus GRANT the appeal. The correct size standard for the RFP is \$7 million.

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

THOMAS B. PENDER
Administrative Judge