

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

NAICS APPEAL OF:

CWU, Inc.,

Appellant

Solicitation No. W91LE51069C213
U. S. Department of the Army
Fort Wainwright, AK

SBA No. NAICS-5226

Decided: April 13, 2011

APPEARANCE

Charles L. Jenkins, President, for Appellant CWU, Inc.

DECISION

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 designation of North American Industry Classification System (NAICS) code 561210, Facilities Support Services, for a solicitation for role players for warfighter training was based upon a clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. The Solicitation

On March 30, 2011, the Department of the Army, Fort Wainwright, AK, issued Solicitation No. W91LE51069C21 (solicitation) for roleplayers for warfighter training. The Contracting Officer (CO) set the procurement totally aside for the 8(a) Business Development program and designated NAICS code 561210, Facilities Support Services, with a corresponding \$35.5 million annual receipts size standard, as the NAICS code for the solicitation. Offers are due April 14, 2011.

B. Performance Work Statement

This procurement is for six role players (five male and one female) to provide realistic

training to soldiers during a two-week Platoon Situational Training Exercise at Government-owned facilities on Fort Greely, AK. The contractor also will provide a separate individual to coordinate events and for logistical coordination between the unit and the role players.

The role players must be demographically experienced individuals to support training in order to prepare for future unit readiness. They must have moderate experience in cultural, linguistic (Pashto/Arabic), tactical, and behavioral characteristics of modern Afghan tribes people. All role players will arrive with proper Afghan attire and be generally fit in order to complete eight hours of intermittent activity.

The role players will also participate in the After Action Review process.

C. The Appeal

On April 4, 2011, CWU, Inc. (Appellant), filed the instant NAICS code appeal with the Small Business Administration (SBA) Office of Hearings and Appeals (OHA), challenging the CO's NAICS code designation. Appellant asserts the appropriate NAICS code designation is 561320, Temporary Help Services, with a corresponding \$13.5 annual receipts size standard.

Appellant asserts that the work to be performed here properly falls under NAICS code 561320, Temporary Help Services. This code covers concerns providing workers for limited periods of time to supplement the client's work force, and is therefore the more appropriate code for this procurement. Appellant further asserts that it is performing this type of work in other federal government contracts under NAICS code 561320.

On April 12, 2011, I held a telephone conference with Appellant's president and the CO. During the conference, the CO stressed the urgency of the procurement. For this reason, I am issuing this decision on an expedited basis.

During the conference, the CO stated the procurement is for a combination of services, not just strict role-playing. He explained that the role-players will be performing varied tasks, and will be responding to different scenarios as they develop.

IV. Discussion

A. Timeliness and Standard of Review

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

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. 13 C.F.R. § 134.314; *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003). 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*,¹ the description in the solicitation, and the relative weight of each element in the solicitation.

B. The Regulatory Framework

The NAICS code designated by the CO, 561210, Facilities Support Services, covers:

[E]stablishments primarily engaged in providing operating staff to perform a combination of support services within a client's facilities. Establishments in this industry typically provide a combination of services, such as janitorial, maintenance, trash disposal, guard and security, mail routing, reception, laundry, and related services to support operations within facilities. These establishments provide operating staff to carry out these support activities; but are not involved with or responsible for the core business or activities of the client. Establishments providing facilities (except computer and/or data processing) operation support services and establishments providing private jail services or operating correctional facilities (i.e., jails) on a contract or fee basis are included in this industry.

NAICS Manual, at 767-68.

SBA's size regulations further define this NAICS code:

(a) If one or more activities of Facilities Support Services as defined in paragraph (b) (below in this footnote) can be identified with a specific industry and that industry accounts for 50% or more of the value of an entire procurement, then the proper classification of the procurement is that of the specific industry, not Facilities Support Services.

(b) "Facilities Support Services" requires the performance of three or more separate activities in the areas of services or specialty trade contractors industries. If services are performed, these service activities must each be in a separate NAICS industry. If the procurement requires the use of specialty trade contractors (plumbing, painting, plastering, carpentry, etc.) all such specialty trade contractors activities are considered a single activity and classified as "Building and Property Specialty Trade Services." Since "Building and Property Specialty Trade Services" is only one activity, two additional activities of separate NAICS industries are required for a procurement to be classified as "Facilities Support Services."

13 C.F.R. § 121.201, fn. 12.

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>.

Appellant's requested NAICS code, 561320, Temporary Help Services, covers:

[E]stablishments primarily engaged in supplying workers to clients' businesses for limited periods of time to supplement the working force of the client. The individuals provided are employees of the temporary help service establishment. However, these establishments do not provide direct supervision of their employees at the clients' work sites.

Illustrative Examples:

Help supply services
Model supply services
Temporary employment or temporary staffing services
Labor (except farm) contractors (i.e., personnel suppliers)
Manpower pools

NAICS Manual, at 770-71.

C. The Merits

The CO's designated NAICS code, 561210, covers establishments which provide a combination of support services, but are not involved with the core business of the client. The description in the *NAICS Manual* mentions services such as janitorial, maintenance, security, and trash disposal as examples of services covered by the code. The procurement must cover at least three activities to be classified under the code, but, if any one activity accounts for 50% or more of the value of the procurement, the proper classification of the solicitation is for that industry, not 561210.

The CO's designation of NAICS code 561210, Facilities Support Services, to a solicitation seeking personnel to assist in Army training was based upon a clear error of fact or law. The services here are not support services, but are the core of the Army's business, training soldiers for war. This service is central to the Army's mission. Thus, the services are not support services and should not be classified under this code.

Further, the services are not the type of custodial services the *NAICS Manual* gives as examples of services covered by the NAICS code 561210. In addition, the solicitation does not call for the performance of work in three or more separate activities or specialty trade contractors industries, which the regulation requires for a procurement designated under NAICS code 561210. The regulation defines specialty trade contractors as construction trades such as plumbing, painting, plastering, carpentry, etc. The instant solicitation does not require three different types of work, nor does it include any specialty trade contractor work. There is work in only one field, that of providing training to Army personnel. The brief Performance Work Statement here simply does not support a 561210 designation.

Further, OHA has rejected this code as the appropriate NAICS code for the establishment of Federal Information Centers for the National Institutes of Health, where those centers were central to NIH's mission, and the procurement did not require custodial services. *NAICS Appeal of JBS International, Inc.*, SBA No. NAICS-5021 (2008). OHA has also found this code inappropriate for a procurement for Job Corps Training Centers because the purpose was education and training, not ancillary support services for the facility. *NAICS Appeal of Global Solutions Network, Inc.*, SBA No. NAICS-4478 (2002).

Conversely, while the CO has asserted that the personnel furnished here must perform a number of functions, the Performance Work Statement does not reflect that, nor does it call for a number of different tasks which could be classified under different NAICS codes. Further, while the personnel provided here may have different scenarios they must deal with, this would all come under the training services they are providing to the Army, and would not justify a different NAICS code designation for each scenario. Accordingly, I conclude that the CO's designation of NAICS code 561210 for this procurement was clear error.

The NAICS code advocated by Appellant, 561320, does appear to be applicable this procurement. This code covers the provision of personnel for limited periods of time to supplement the work force of the client. That is what this solicitation calls for. The Army is seeking to supplement its work force at Fort Greely with personnel who can play the role of Afghans to train Army personnel arriving at the Fort. While the NAICS code states that these establishments do not provide direct supervision of the employees at the work sites, the solicitation does not call for the contractor to supervise its personnel, but rather to provide a liaison for coordination of events. The CO's statement in the teleconference made clear that the Army will be providing the scenarios that the contractor's personnel must participate in, and thus be supervising the personnel.

Accordingly, I conclude that the appropriate NAICS code for this solicitation is 561320, Temporary Help Services, with a corresponding \$13.5 million annual receipts size standard.

V. Conclusion

For the above reasons, I GRANT the appeal and the CO's NAICS code designation is REVERSED. NAICS code 561320, Temporary Help Services, with a corresponding \$13.5 million annual receipts size standard, is the appropriate NAICS code for the requirements of the solicitation.

Accordingly, because this decision is being issued before the close of the solicitation, the CO MUST amend the solicitation to change the NAICS code designation from 561210 to 561320. FAR § 19.303(c)(5); 13 C.F.R. § 134.318(b); *Matter of Eagle Home Med. Corp.*, Comp. Gen. B-402387, March 29, 2010, available at <http://www.gao.gov/decisions/bidpro/402387.pdf>.

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

CHRISTOPHER HOLLEMAN
Administrative Judge