

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

NAICS APPEAL OF:

Technica Corporation,

Appellant

Solicitation No. HC1028-10-R-2001
U.S. Department of Defense
Defense Information Systems
Agency/Defense Information Technology
Contracting Organization
Scott Air Force Base, Illinois

SBA No. NAICS-5248

Decided: June 20, 2011

APPEARANCES

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DECISION¹

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 designation of North American Industry Classification System (NAICS) code 541512, Computer Systems Design Services, to the subject solicitation was clearly erroneous. *See* 13 C.F.R. § 134.314.

III. Background

A. Introduction

On April 19, 2011, the U.S. Department of Defense, Defense Information Systems Agency-Defense Information Technology Contracting Organization (DISA-DITCO) issued Solicitation No. HC1028-10-R-2001 (RFP) for global information grid (GIG) services management (GSM) engineering/transition/implementation (ETI). The Contracting Officer (CO) set aside the acquisition entirely for small businesses and designated NAICS code 541512, Computer Systems Design Services, with a corresponding size standard of \$25 million in average annual receipts. The RFP contemplates the award of multiple indefinite delivery/indefinite quantity (ID/IQ) contracts to small business concerns. Specific requirements will be defined in individual task orders.

On April 27, 2011, Technica Corporation (Appellant) filed an appeal, asserting that the appropriate NAICS code for this procurement is 517110, Wired Telecommunications Carriers, with a corresponding size standard of 1500 employees.

B. Performance Work Statement

DISA-DITCO plans three procurements to support the Defense Information System Network (DISN): operations capabilities (GSM-O), engineering, transition, and implementation capabilities (GSM-ETI), and projects and support capabilities (GSM-P&S). The RFP at issue is for the acquisition of GSM-ETI services. The GSM-O and GSM-P&S procurements will be

¹ This decision was initially issued on June 9, 2011, under a protective order to prevent the disclosure of source selection sensitive and confidential information. At that time, I issued an order for redactions directing each party to file a request for redactions if that party desired to have any information redacted from the published decision. OHA received one or more timely requests for redactions and considered those requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

conducted separately. The RFP's Performance Work Statement (PWS) distinguishes the three procurements as follows:

GSM-ETI sources will provide the support necessary to carry out required engineering, transition/implementation, integration; connection approval and IT service management activities, in support of existing and future DISN networking capabilities. GSM-O sources will provide the support necessary to carry out the day-to-day operations and sustainment of GIG networks and related services. GSM-P&S support capabilities will, in part, perform project work in support of DISA and its customers to deliver a selected set of new capabilities.

(RFP 67.) The PWS explains that deliverables provided through GSM-ETI task orders become the property of the Government and will be operated and maintained by GSM-O contractors.

GSM-ETI contractor responsibilities fall under four task areas: (1) management, (2) telecommunications network engineering, (3) service transition and implementation, and (4) information technology infrastructure library (ITIL)-derived technical support. The management task area requires reports and controls, cost management and reporting, and performance-based data analysis. Telecommunications network engineering is comprised of engineering analysis and design, technical research and development, standards development and analysis, modeling and simulation, network security engineering, troubleshooting support, order and request processing, and technical laboratory engineering support. Service transition and implementation requires such services as network system expansion, network facilities changes, deployment and transition of circuits and systems and services, and integration engineering. ITIL-derived technical support includes service design support, service transition support, and problem management support. The PWS contains a list of specific systems GSM-ETI contractors may be tasked to support, such as the Defense Message System (DMS) and the Secret Internet Protocol Router Network (SIPRNet), among others. (RFP 73-84.)

The PWS sets forth a work allocation table to determine when work should be allocated to GSM-ETI contractors, as opposed to GSM-O contractors or GSM-P&S contractors. Specifically, the protocol indicates that the following types of work will be assigned to GSM-ETI contractors: design and implementation of new DISN capabilities; work that will change the backbone bandwidth at the applicable point of DISN presence; and work requesting equipment or capabilities not on the DISA approved products list. (RFP 69-70.)

The RFP includes a labor rate table, which sets forth the various labor categories to be used during performance of the contract. There are 108 labor categories in total, including such diverse positions as managers, communications specialists, hardware/software specialists, network design and systems engineers, functional and logistics analysts, satellite communications system engineers, network installation technicians, information systems security specialists, national defense operations analysts, information engineers, telecommunications electronic engineers, information technology consultants, and configuration management specialists. Offerors may propose their own labor categories, but those categories must be mapped to the labor categories in the RFP. (RFP 15-20.) The RFP describes in detail the responsibilities for each labor category. (RFP 37-66.)

The sample task order accompanying the GSM-ETI RFP asks offerors to develop an approach for completing a representative task. The task involves an upgrade to the bandwidth of four active optical circuit links located in Denver, San Francisco, St. Louis, and Vaihingen, Germany. Specifically, the contractor would: plan and execute the upgrade; transition links at each node of the four circuit links; install a new router in Denver and transition all circuits to the new router; and minimize network downtime and customer disruption. The contractor also would test the completed installation.

C. The Appeal

Appellant maintains that the appropriate NAICS code for this procurement is 517110, Wired Telecommunications Carriers. Appellant asserts the principal purpose of the GSM-ETI solicitation is “to support and ensure the constant operation of the largest telecommunications network in the world,” the DISN. (Appeal Petition 1.) Given this purpose, Appellant argues the CO clearly erred in assigning NAICS code 541512 to the procurement because the code is too narrow to encompass the wide range of services a GSM-ETI contractor will provide.

Appellant contends that NAICS code 541512 is limited to “basic computer procurements” including hardware and software components. Appellant emphasizes that the GSM-ETI acquisition requires support of telecommunications networks, not computer systems. Appellant sets forth a detailed analysis of the labor categories listed in the RFP and concludes that the overwhelming majority (71%) of the required labor hours are directly related to telecommunications and networking functions under NAICS code 517110. Appellant cites a number of decisions in which OHA discusses the applicability of NAICS code 541512.

Appellant analyzes the PWS and sample task order accompanying the RFP and argues the primary requirements of the RFP are not properly classified under NAICS code 541512. Specifically, citing to language in the PWS for support, Appellant contends the GSM-ETI contractors will not be designing computer systems, but will be supporting and ensuring constant operation and sustainment of a global telecommunications network. Appellant highlights that the terms “computer” and “computer design systems” do not appear in the PWS description of the required contract tasks. On the other hand, the PWS repeatedly refers to “networks” and “telecommunications” in describing the work. Appellant concludes that the RFP does not require design of computer systems, but operation, sustainment, and support of a telecommunications network.

Appellant also contends that the RFP's evaluation criteria focus on network operations rather than computer design. Appellant emphasizes that the past performance questionnaire seeks information about offerors' ability to provide “end-to-end telecommunications engineering, installation and operations services worldwide.” (Appeal Petition 14 (quoting RFP att. 8, at 4).) Appellant argues the wide range of support services required by the RFP precludes the application of NAICS code 541512 to the procurement.

Instead, according to Appellant, NAICS code 517110 best describes the principal purpose of the RFP because it encompasses the operation and support of telecommunications networks,

and the GSM-ETI procurement supports the constant operation of the DISN. Appellant relies heavily on *NAICS Appeal of AOC Connect, LLC*, SBA No. NAICS-5165 (2010), where OHA determined that an Air Force procurement for network operations, infrastructure, and support was properly classified under NAICS code 517110. Appellant claims the solicitation at issue in *AOC Connect* is “strikingly similar” to the GSM-ETI solicitation. (Appeal Petition 17.) Appellant provides a detailed comparison of the primary tasks required by each solicitation and concludes that, based on their similarities, the procurements should be similarly classified under NAICS code 517110.

Appellant concludes that the principal purpose of the RFP is to acquire a wide range of services to ensure the constant operation of the world's largest telecommunications network. Appellant requests that, based upon its analysis, OHA reverse the CO's designation of NAICS code 541512 in favor of NAICS code 517110.

D. NES Response

On May 13, 2011, NES Associates, LLC (NES) submitted its opposition to the appeal petition. NES highlights that DISA-DITCO has divided GSM support into three parts: GSM-O, GSM-ETI, and GSM-P&S. NES asserts that the GSM-ETI RFP does not require day-to-day operations and maintenance of the DISN, but systems integration design and engineering, as well as installation of network infrastructure. Accordingly, NES contends the CO properly designated NAICS code 541512 to the procurement, and the appeal should be denied.

NES sets forth the description of NAICS code 541512, which encompasses the integration and installation of computer hardware, software, and communications technologies. Citing language from the RFP, NES explains that GSM-ETI contractors will provide “design and engineering services that integrate computing hardware, software and communications technologies.” (NES Response 5.) NES asserts GSM-ETI contractors will not operate or maintain a telecommunications network, because such functions are covered by the GSM-O solicitation and are excluded from the GSM-ETI procurement. NES also challenges Appellant's reliance on previous OHA cases involving the applicability of NAICS code 541512.

NES disputes Appellant's claim that NAICS code 517110 represents the principal purpose of the GSM-ETI RFP. NES explains that under the NAICS system, the telecommunications sector (517) is divided into four industry groups. Three of those industries—including the industry represented by NAICS code 517110, Wired Telecommunications Carriers—are limited to entities that operate telecommunications facilities and infrastructure. Additionally, NES observes that firms providing expert advice related to integrating communication and computer systems are excluded from the telecommunications sector. NES concludes that NAICS code 517110 cannot apply to the GSM-ETI RFP.

NES next addresses *AOC Connect* and other OHA case decisions indicating that when a contractor is responsible for operating and maintaining a telecommunications network, the work can be classified under NAICS code 517110. NES asserts this application of NAICS code 517110 does not apply here because GSM-ETI contractors will not be operating and maintaining the DISN at all. NES also challenges Appellant's claim that the solicitation in *AOC Connect* is

similar to the GSM-ETI RFP by arguing that it is the GSM-O solicitation, not the GSM-ETI solicitation, that requires sustainment and ongoing operation of a telecommunications network, as did the *AOC Connect* procurement.

NES also contests Appellant's claim that the majority of the labor categories in the PWS are related to the operation of a telecommunications network. Instead, according to NES, none of the work required by the RFP is properly classified under NAICS code 517110, and Appellant's interpretation of NAICS code 517110 is too broad. NES highlights that NAICS code 541512 does encompass "communications," within the context of the systems integration work required by the RFP. NES provides examples from the labor category descriptions to illustrate that the RFP requires integration and design work and does not require the maintenance and operation of a telecommunications network.

NES argues GSM-ETI offerors will not be evaluated on their ability to operate the DISN, but rather on their ability to design, engineer, and install the infrastructure that will subsequently be maintained and operated by the GSM-O contractor. NES asserts that the sample task order supports its interpretation of the PWS because the order contemplates the design and installation of upgraded network components to be transitioned to the Government for operation.

NES insists that that the CO did not err in assigning NAICS code 541512 to the GSM-ETI procurement. However, in the event that OHA disagrees, NES contends that NAICS code 517919, All Other Telecommunications, would be a more appropriate choice than NAICS code 517110, because NAICS code 517919 does not require a firm to operate telecommunications infrastructure but merely to "provide support activities." NES requests that OHA affirm the CO's NAICS code designation and deny the appeal.

E. IPKeys Response

On May 13, 2011, IPKeys Technologies, LLC (IPKeys) filed its response to the appeal petition. IPKeys asserts NAICS code 541512 is the best fit for the GSM-ETI procurement because the RFP requires engineering, implementation, and integration services. Like NES, IPKeys contends that it is the GSM-O contractor that will provide day-to-day operations and sustainment of the DISN. Thus, IPKeys concludes NAICS code 541512 applies to the GSM-ETI RFP, and NAICS code 517110 applies to the GSM-O solicitation.

IPKeys maintains that the typical task order from the contract preceding the GSM-ETI contract is within the capabilities of firms that fall under the \$25 million size standard associated with NAICS code 541512. Finally, IPKeys notes that a change in the NAICS code at this stage in the procurement would be detrimental to businesses that planned to submit offers under NAICS code 541512 because it would substantially alter the field of competition. IPKeys requests that OHA affirm the CO's designation of NAICS code 541512.

F. CO's Response to Appeal Petition and OHA's Order for Clarification

On May 13, 2011, the CO submitted her response to the appeal petition. The CO indicated that DISA-DITCO had decided to add NAICS code 517110 so that "[t]here will be two

NAICS codes for this solicitation.” The CO also explained that she would extend the proposal due date and issue an amendment to the RFP with the updated NAICS code information.

On May 17, 2011, I issued an Order requesting clarification of the CO's response. Specifically, I requested that the DISA-DITCO explain how its decision to add a second NAICS code to the RFP complies with Federal Acquisition Regulation (FAR) 19.303(b), which provides: “If different products or services are required in the same solicitation, the solicitation shall identify the appropriate small business size standard for each product or service.” I also afforded the other parties to these proceedings an opportunity to file comments regarding the CO's decision to add a second NAICS code to the RFP.

G. Appellant's Motion to Expand Scope of Order

On May 18, 2011, Appellant filed a Motion to Expand Scope of Order for Clarification from Procuring Agency. Appellant requested that OHA expand the Order to ask whether DISA-DITCO intends to identify a NAICS code that corresponds to the “item accounting for the greatest percentage of the total contract price,” as contemplated by FAR 19.102(e) and 13 C.F.R. § 121.407. Appellant explained that because the GSM-ETI solicitation does not permit offerors to submit proposals only for certain portions of the work, it is essential that DISA-DITCO explain which NAICS code applies to the greatest percentage of the contract price.

H. CO's Response to Order for Clarification

On May 20, 2011, the CO filed her response to the Order for Clarification.² DISA-DITCO's position is that the services required under the GSM-ETI contract are equally distributed between NAICS codes 541512 and 517110, and neither code represents the majority of the required work. Accordingly, the CO “determined two NAICS were appropriate.”³ (CO Clarification 4.)

The CO explained that many GSM-ETI tasks will overlap with GSM-O tasks, and GSM-ETI contractors may need to perform operation and maintenance activities in the context of integration requirements. This conclusion led the CO to consider adding NAICS code 517110 to the procurement “because this code complemented NAICS code 541512 and the overall intent of the GSM-ETI procurement.” (CO Clarification 5.) To demonstrate the applicability of both NAICS codes to the work required by the GSM-ETI PWS, DISA-DITCO performed a relevancy analysis to each PWS task. DISA-DITCO examined how many full time equivalents (FTE) would perform tasks encompassed by each NAICS code and how relevant (significantly relevant, somewhat relevant, or not relevant) each NAICS code is to the description and intent of each PWS task and all anticipated task orders. This analysis resulted in an overall relevancy score for

² The CO filed her response before OHA ruled on Appellant's motion to expand. However, the CO's response did address Appellant's motion, stating that DISA-DITCO “strongly disagrees” with the notion that a predominant NAICS code and size standard should be assigned. (CO Clarification 9.)

³ As of this date, the RFP has not been amended to formally add the second NAICS code.

each NAICS code. The total score for NAICS code 541512 was [XXXXXXXXXXXX], and the total score for NAICS code 517110 was [XXX]. Because the scores for each code were so close, DISA-DITCO could not declare either code as representing the majority of the GSM-ETI PWS tasks.

The CO therefore requested that OHA approve the addition of NAICS code 517110 to the GSM-ETI procurement. The CO explained that DISA-DITCO “cannot conduct a line by line analysis of the PWS because [DISA-DITCO] does not want to have offerors submitting proposals for only a portion of the work based on their NAICS code.” (CO Clarification 9.) Further, DISA-DITCO “completely supports full and open competition with vendors registered under one or both of the identified NAICS codes to be allowed to submit a proposal.” *Id.* Finally, the CO explains that DISA-DITCO opposes Appellant’s view that the agency must identify a predominant NAICS code pursuant to FAR 19.102(e). Instead, DISA-DITCO claims FAR 19.102(e) does not apply to the procurement because “the services being procured along with the suggested labor categories do not require [DISA-DITCO] to assign one NAICS code to the predominance of work,” which would be “misleading and defeat the intent of the solicitation.” *Id.* The CO concludes that DISA-DITCO will issue the updated solicitation upon receipt of OHA’s final decision in this matter.

I. Cambridge Comments

On May 24, 2011, Cambridge International Systems Inc. (Cambridge) filed its comments. Cambridge contends the CO’s response to OHA’s order shows that NAICS code 541512 captures the principal purpose of the GSM-ETI RFP, and that code should be the exclusive code for the procurement.

Cambridge first alleges that Appellant failed to recognize that GIG-GSM support is separated into three distinct parts, with the operation of the DISN to be performed under the GSM-O solicitation. Cambridge asserts that in the *AOC Connect* case, OHA recognized that whether a contractor is responsible for the operation of a telecommunications network is the most important factor in determining whether work should be classified under NAICS code 517110. Cambridge concludes that because operation and maintenance of the network is the principal purpose of the GSM-O solicitation, not the GSM-ETI solicitation at issue, NAICS code 517110 does not apply to the GSM-ETI RFP. Cambridge also emphasizes that a GSM-ETI contractor will not provide access to telecommunications infrastructure and facilities that the contractor owns or leases.

Cambridge next argues the GSM-ETI PWS requires work encompassed by NAICS code 541512. Cambridge contends that NAICS code 541512 is not limited to basic computer procurements, as Appellant claims, but includes work on systems that integrate hardware, software, and communications technologies. Cambridge goes on to say that NAICS code 541512 also includes planning, designing, installing, and training “of the evolving network of ‘communication technologies’ for which computers are now serving as a core component.” (Cambridge Comments 4.) According to Cambridge, the GSM-ETI procurement requires system design and implementation of enhancements, which fall within NAICS code 541512. Cambridge includes in its comments the questions and answers from the GSM-ETI RFP as support for its

assertion that the GSM-O solicitation requires operation of the network, and the GSM-ETI solicitation requires front-end engineering activities. Cambridge also contends the sample task orders for the GSM-O and GSM-ETI solicitations demonstrate this distinction: GSM-ETI contractors will perform the integration and enhancement of communication technology, whereas GSM-O contractors will operate the infrastructure.

Cambridge challenges Appellant's analysis of the PWS labor categories by arguing that a simple word search of the labor categories containing the word "telecommunications" does not establish that all categories using that word automatically fall within NAICS code 517110. Cambridge contends Appellant's approach is simplistic, failing to address the fact that NAICS code 541512 also includes "communication technologies" and failing to relate the labor categories to the required PWS tasks. Cambridge provides its own extensive analysis of how various labor categories are more appropriately classified under NAICS code 541512.

Finally, Cambridge contends that the CO's relevancy analysis in its response to OHA's order demonstrates that NAICS code 541512 is appropriate for the GSM-ETI solicitation. Cambridge explains that a procurement is generally classified by the component which comprises the greatest percentage of the contract value and emphasizes that DISA-DITCO has now estimated that NAICS code 541512 represents [XXX]% of the work, whereas NAICS code 517110 represents [XXX]% of the work. Cambridge also argues the exclusive assignment of NAICS code 541512 best serves the purposes of the Small Business Act because it would ensure participation by smaller businesses than those which would be eligible under NAICS code 517110. Cambridge asks that OHA affirm the CO's initial designation of NAICS code 541512 as the exclusive NAICS code for the GSM-ETI RFP.

J. IPKeys Comments

On May 24, 2011, IPKeys filed its comments. IPKeys asserts the CO failed to adequately respond to OHA's clarification order because the CO did not explain how the addition of a second NAICS code complies with the FAR and the SBA's regulations. IPKeys contends the CO also failed to make clear which size standard would apply to the GSM-ETI procurement. IPKeys explains that for an agency to set aside a procurement for small businesses, the agency must designate a NAICS code and a corresponding size standard so that offerors know whether they are small for purposes of the procurement. IPKeys dismisses as baseless DISA-DITCO's argument that 13 C.F.R. § 121.407 does not apply to the GSM-ETI solicitation. Instead, IPKeys asserts that in "all or nothing type procurements"—where offerors may not submit proposals for only a portion of the work, but must propose to complete all work—such as the GSM-ETI RFP, 13 C.F.R. § 121.407 requires an agency to determine what NAICS code represents the greatest percentage of contract value.

According to IPKeys, the PWS makes clear that the focus of the RFP is design engineering and systems integration services, so the appropriate NAICS code for the GSM-ETI procurement is NAICS code 541512. IPKeys asserts that NAICS code 517110 does not apply to this procurement because the GSM-ETI contractors will not operate or maintain a telecommunications network. Even assuming NAICS code 517110 does apply to some of the work required by the PWS, IPKeys contends that it is clear that NAICS code 541512 represents

the majority of the work. IPKeys rejects the CO's argument that the difference between the relevancy of each NAICS code is so slight as to preclude choosing one predominant code, noting that the applicable regulations do not prohibit the CO from making close calls and do require that the CO assign a NAICS code and size standard.

IPKeys also claims the addition of NAICS code 517110 would dramatically and unfairly change competition for the GSM-ETI contract, when offerors have been proceeding under the assumption that NAICS code 541512 would be assigned to the RFP. IPKeys requests the OHA reject the CO's assignment of a second NAICS code, deny the appeal, and affirm the assignment of NAICS code 541512.

K. NES Comments

On May 24, 2011, NES filed its comments. NES asserts DISA-DITCO's plan to assign two NAICS codes to the GSM-ETI procurement is contrary to law. NES explains that if two codes are assigned, "small businesses, like NES, with annual receipts of less than \$25 million, would have to compete for this small business set-aside contract against businesses with as many as 1,500 employees and annual receipts substantially greater than \$25 million. In that case, assignment of the 541512 code would be meaningless." (NES Comments 2.) Instead, according to NES, DISA-DITCO must designate a single NAICS code that best describes the principal purpose of the RFP, as required by 13 C.F.R. § 121.402 and FAR 19.102(c). Moreover, NES claims, DISA-DITCO has failed to comply with FAR 19.303(b) because it is attempting to apply two NAICS codes to the same exact work, rather than different NAICS codes to different line items. NES also asserts that, pursuant to 13 C.F.R. § 121.407 and FAR 19.102(e), multiple NAICS codes are only permissible where offerors may bid on only certain items or services, rather than (as offerors must do here) all items or services required by a procurement.

NES also reiterates its argument that NAICS code 541512 best represents the work required by the GSM-ETI RFP because the PWS requires systems integration, engineering, and installation of network infrastructure. NES contends the GSM-ETI PWS does not require day-to-day operation or maintenance of the DISN, so NAICS code 517110 is inapposite. NES emphasizes that the CO's relevancy analysis supports the application of NAICS code 541512, with [XX] FTEs being significantly relevant to NAICS code 541512, as opposed to [XX] FTEs being significantly relevant to NAICS code 517110 (excluding FTEs that are equally relevant to both codes). NES therefore asserts NAICS code 541512 should be assigned to the GSM-ETI solicitation.

L. Appellant's Comments

On May 24, 2011, Appellant filed its comments. Appellant too suggests that the CO's response to OHA's order is insufficient and does not address the applicable size standard. Appellant contends that because offerors must submit prices on all categories, DISA-DITCO must determine which NAICS code and size standard apply to the GSM-ETI procurement pursuant to FAR 19.102(e) and 13 C.F.R. § 121.407. Specifically, DISA-DITCO must decide which NAICS code represents the greatest percentage of the total contract value.

Appellant claims the relevancy analysis provided in the CO's response to OHA's order is conclusory and inadequate to answer this question. Appellant asserts the CO failed to provide any documentation to support DISA-DITCO's analysis; failed to explain how DISA-DITCO determined the number of FTEs associated with each task; failed to explain how DISA-DITCO analyzed the intent of the PWS tasks and anticipated task orders; and failed to illustrate how DISA-DITCO assigned its relevancy scores. Appellant provides examples of tasks DISA-DITCO determined to be significantly relevant to NAICS code 541512 and argues those tasks actually bear little relationship to NAICS code 541512 because they do not deal with computer design, but rather deal with support of a telecommunications network. Appellant provides other examples of tasks DISA-DITCO determined not to be relevant to NAICS code 517110 and argues those tasks specifically cover operation and sustainment of a telecommunications network. Appellant concludes DISA-DITCO's relevancy analysis is arbitrary and contradictory.

Appellant also argues DISA-DITCO failed to monetize the FTEs, which would be required to determine which NAICS code represents the greatest percentage of the total contract price. Appellant asserts that DISA-DITCO gave no consideration to the hourly rates of the FTEs and so could not have determined the total contract price. Appellant submits that DISA-DITCO failed to adequately demonstrate that the GSM-ETI contract work is evenly distributed between NAICS codes 541512 and 517110. Appellant requests that OHA grant its appeal and identify NAICS code 517110 as the appropriate NAICS code for the procurement.

IV. Discussion

Appellant filed the instant appeal within ten days after the CO's designation of the NAICS code. Thus, the appeal is timely. FAR 19.303(c); 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, Appellant must prove the CO's NAICS code designation is based upon 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).

A. CO's Proposed Addition of NAICS code 517110

The process of assigning a NAICS code and size standard to a procurement is outlined in FAR 19.102 and 13 C.F.R. § 121.402. The CO must select a NAICS code that best describes the principal purpose of the item or service being acquired, must identify the size standard employed by that code, and must specify the size standard in the solicitation. FAR 19.102(b); 13 C.F.R. § 121.402(b). An offeror “must not exceed the size standard for the NAICS code specified in the solicitation.” 13 C.F.R. § 121.402(a).

FAR 19.303(b) provides: “If different products or services are required in the same solicitation, the solicitation shall identify the appropriate small business size standard for each product or service.” Because size standards are linked to NAICS codes, the implication of this provision is that, if more than one NAICS code is assigned to a solicitation, the solicitation must specify which NAICS code (and, more importantly, which accompanying size standard) applies to each item or service being acquired. Additionally, “[i]f a solicitation calls for more than one item and allows offers to be submitted on any or all of the items, an offeror must meet the size

standard for each item it offers to furnish.” FAR 19.102(e); 13 C.F.R. § 121.407.

In this case, because the CO proposed to add a second NAICS code to the solicitation, it originally appeared that the CO would assign each NAICS code to different portions of the work required by the GSM-ETI RFP. Instead, in response to OHA's request to clarify how the addition of a NAICS code would comply with FAR 19.303(b), the CO stated that neither NAICS code represents a predominance of the work, so DISA-DITCO plans to apply both codes to the entire procurement.

FAR 19.303(a) requires a procuring agency to “determine the appropriate NAICS code and related small business size standard” for every solicitation above the micro-purchase threshold. If a procurement could be classified under more than one NAICS code, the CO should choose the NAICS code and size standard that represent the greatest percentage of the contract value. FAR 19.102(d); 13 C.F.R. § 121.402(b). Here, DISA-DITCO argues that neither NAICS code 541512 or NAICS code 517110 represents a predominance of the work required by the GSM-ETI solicitation. It is, however, crucial that a prospective offeror know which size standard is applicable to the procurement in order to determine whether it may represent itself as a small business. FAR 19.301-1(a) and 52.219-1. This is particularly true when, as here, the size standards associated with the NAICS codes in question are vastly disparate (\$25 million in average annual receipts versus 1500 employees). Thus, the FAR requires that “[f]or size standard purposes, a product or service shall be classified in only one industry, whose definition best describes the principal nature of the product or service being acquired even though for other purposes it could be classified in more than one.” FAR 19.102(c).

Accordingly, although DISA-DITCO believes that neither NAICS code represents a significant majority of the work, it must still assign a single NAICS code and, more importantly, a single size standard to the procurement so that firms will know whether they are eligible to compete. DISA-DITCO indicates that it “completely supports full and open competition with vendors registered under one or both of the identified NAICS codes to be allowed to submit a proposal.” (CO Clarification 9.) Assigning more than one code to the same work, however, is improper because the regulations require that “[f]or size standard purposes, a product or service shall be classified in only one industry,” and offerors “must not exceed the size standard for the NAICS code specified in the solicitation.” FAR 19.102(c); 13 C.F.R. § 121.402(a).

Furthermore, assigning two NAICS codes with different size standards to the same work effectively renders the code with the smaller size standard meaningless. There would, for instance, be little purpose in assigning NAICS code 541512 in addition to 517110 to the same work, because an offeror that is small under NAICS code 541512 would almost certainly also be small under 517110.

The CO's response fails to demonstrate a valid basis for assigning two NAICS codes to a procurement where each offeror is required to submit an offer on all the required services. Thus, OHA cannot approve the CO's proposed course of action. Because DISA-DITCO is not prepared to assign a separate NAICS code to each service required by the RFP and allow offerors to submit proposals for only certain services, as opposed to all the work required by the GSM-ETI

RFP, the procurement must be classified under the single NAICS code that best describes the required work.

B. NAICS Manual Definitions

SBA regulations do not require the CO to designate the perfect NAICS code. Rather, the CO must designate the NAICS code that best describes the principal purpose of the product or service being acquired in light of the industry description in the *NAICS Manual*,⁴ the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b).

The *NAICS Manual* description of the NAICS code originally designated by the CO, 541512, Computer Systems Design Services, provides that this industry comprises:

establishments primarily engaged in planning and designing computer systems that integrate computer hardware, software, and communication technologies. The hardware and software components of the system may be provided by this establishment or company as part of integrated services or may be provided by third parties or vendors. These establishments often install the system and train and support users of the system.

NAICS Manual, at 740. The illustrative examples include: computer systems integration analysis and design services, local area network computer systems integration design services, information management computer systems integration design services, and network systems integration design services. *Id.*

The NAICS sector into which this code falls, 54—Professional, Scientific, and Technical Services, “comprises establishments that specialize in performing professional, scientific, and technical activities for others. These activities require a high degree of expertise and training.” *NAICS Manual*, at 727. NAICS subsector 541 covers “establishments engaged in processes where human capital is the major input. These establishments make available the knowledge and skills of their employees, often on an assignment basis, where an individual or team is responsible for the delivery of services to the client.” *Id.* NAICS subsector 54151, Computer Systems Design and Related Services, includes:

establishments primarily engaged in providing expertise in the field of information technologies through one or more of the following activities: (1) writing, modifying, testing, and supporting software to meet the needs of a particular customer; (2) planning and designing computer systems that integrate computer hardware, software, and communication technologies; (3) on-site management and operation of clients' computer systems and/or data processing

⁴ 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*).

facilities; and (4) other professional and technical computer-related advice and services.

NAICS Manual, at 739.

The *NAICS Manual* description of Appellant's requested NAICS code, 517110, Wired Telecommunications Carriers, provides that this industry comprises:

establishments 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, at 671. The illustrative examples are wired broadband internet service providers, wired local and long-distance telephone carriers, cable television distribution services, closed circuit television services, wired VoIP service providers, direct-to-home satellite system services, wired telecommunications carriers, satellite television distribution systems, and multichannel multipoint distribution services. *Id.*

The NAICS sector into which this latter code falls, 51—Information, “comprises establishments engaged in the following processes: (a) producing and distributing information and cultural products, (b) providing the means to transmit or distribute these products as well as data or communications, and (c) processing data.” *NAICS Manual*, at 651. NAICS subsector 517, Telecommunications, covers “establishments that provide telecommunications and the services related to that activity The Telecommunications subsector is primarily engaged in operating, and/or providing access to facilities for the transmission of voice, data, text, sound, and video.” *NAICS Manual*, at 670. Telecommunications carriers, such as those described in NAICS code 517110, “operate transmission facilities and infrastructure that they own and/or lease, and provide telecommunications services using those facilities.” *Id.*

C. Analysis

Considering the GSM-ETI solicitation and the GIG-GSM procurements as a whole, I agree with the intervening parties in this appeal (as well as the CO's original designation) that NAICS code 541512 best represents the principal purpose of the services to be acquired. The fact that the GIG-GSM effort has been separated into three solicitations is significant and strongly supports the conclusion that GSM-ETI contractors will not perform operation and maintenance of the DISN. The GSM-ETI RFP itself explains that “GSM-O sources will provide the support necessary to carry out the day-to-day operations and sustainment of GIG networks and related

services.” (RFP 67.) The work allocation table demonstrates that customer requests will be initiated through GSM-O, suggesting that it is GSM-O contractors who will perform day-to-day operation of the network. (RFP 68-69.) Additionally, the PWS is clear that products delivered as a result of GSM-ETI task orders will be operated and maintained by GSM-O contractors.

In contrast, the GSM-ETI contractors will perform primarily design, engineering, installation, systems integration, and other support activities, as described by the RFP: “GSM-ETI sources will provide the support necessary to carry out required engineering, transition/implementation, integration; connection approval and IT service management activities, in support of existing and future DISN networking capabilities.” (RFP 67.) The work allocation table gives as examples the following types of work that would be assigned to GSM-ETI contractors: design and implementation of new DISN capabilities; work that will change the bandwidth of the DISN; and work requesting equipment or capabilities not on the DISA approved products list. (RFP 69.)

Additionally, the descriptions of the four PWS tasks (management, telecommunications network engineering, service transition and implementation, and ITIL-derived technical support) focus on the design, engineering, and implementation of specific DISN capabilities. For instance, telecommunications network engineering requires engineering analysis and design, technical research and development, network security engineering, order and request processing, and technical laboratory engineering. Service transition and implementation requires network system expansion, network facilities changes, deployment and transition of circuits and systems and services, and integration engineering. These required services demonstrate that the primary responsibilities of GSM-ETI contractors will be to design, engineer, integrate, and transition specifically-requested systems and capabilities, not to provide general management and overall sustainment of the entire DISN.

The labor categories that GSM-ETI contractors must provide include hardware/software specialists, network design and systems engineers, satellite communications system engineers, network installation technicians, information systems security specialists, national defense operations analysts, information engineers, telecommunications electronic engineers, information technology consultants, and configuration management specialists. (RFP 17-20.) Given that technology is increasingly interconnected, and considering that this is an ID/IQ contract under which specific requirements will only later be made available, it is reasonable that an RFP requiring primarily computer systems design, engineering, and integration services would request that such diverse personnel be made available.

Appellant argues strenuously that NAICS code 541512 is improper because GSM-ETI contractors will not be designing “basic computer systems,” but instead will be ensuring constant operation and sustainment of a global telecommunications network. As support for this argument, Appellant emphasizes that the terms “computer” and “computer design systems” do not appear in the PWS description of the required contract tasks, whereas “networks” and “telecommunications” appear repeatedly. Appellant also sets forth a list of the labor categories that it asserts are directly related to telecommunications and networking functions and represent 71% of the total required labor hours. It appears, however, that Appellant has primarily focused on labor categories which contain the words “network” or “telecommunications.” A simple word

search cannot suffice to conclude what NAICS code is applicable to a procurement. Instead, one must read and review the solicitation as a whole.

A reading of the entire GSM-ETI solicitation, taken in connection with the overarching GIG-GSM effort, reveals that NAICS code 541512 is appropriately applied to this RFP. The GSM-ETI contractors will be planning, designing, installing, and integrating computers systems and communication technologies. This work is properly classified as professional or technical services, requires a high degree of expertise and training, and offers human capital as the primary service being acquired. Moreover, NAICS code 541512 encompasses some measure of network operation because NAICS subsector 54151 includes “on-site management and operation of clients' computer systems and/or data processing facilities.” *NAICS Manual*, at 739. Thus, although GSM-ETI contractors could be asked to perform some operational activities, as both Appellant and the CO contend, these limited activities may be properly classified under NAICS code 541512 without adding or substituting NAICS code 517110.

Based upon this analysis of the *NAICS Manual* definition, I disagree with Appellant's contention that NAICS code 541512 is limited to “basic computer procurements.” Nor do the cases cited by Appellant support this restrictive interpretation. In *NAICS Appeal of Engineering Services Network, Inc.*, SBA No. NAICS-5064 (2009), OHA noted that “the central task of any procurement under this NAICS code must be computer systems planning and design,” and an acquisition so classified “must be a computer procurement, seeking to procure the design of computer systems, and the hardware and software that make them run.” *Eng'g Servs. Network*, at 6. In *Engineering Services*, OHA rejected the designation of NAICS code 541512 because the primary purpose of the procurement was administrative and consulting services, not computer systems design services. *Id.* at 7. Thus, *Engineering Services* does not stand for the proposition that NAICS code 541512 pertains only to “basic” computer procurements, but rather held that a procurement which includes a modicum of computer services is not necessarily governed by a computer-related NAICS code. Neither the *NAICS Manual* description of NAICS code 541512 nor OHA case law restrict the code to “basic computer procurements.” So long as the primary service required is the design of computer systems that integrate hardware, software, and communication technologies, NAICS code 541512 is applicable. I conclude computer systems and network systems design and integration services are the primary requirement of the GSM-ETI solicitation.

I also find no merit to Appellant's claim that the sample task order supports the application of NAICS code 517110 to this procurement. The sample task order involves an upgrade of circuit link bandwidth. Specifically, the GSM-ETI contractor would plan and execute the upgrade, transition the links, install new routers, and test the completed installation. These tasks do not constitute the provision of access to transmission facilities and infrastructure for the transmission of voice, data, text, sound, and video. Rather, the contractor is upgrading one specific aspect of the telecommunications network. I find these services are more aptly described as integrating and installing computer hardware and communication technologies.

Appellant also claims the RFP's evaluation factors focus on network operations rather than computer design. Appellant emphasizes that the first question on the past performance questionnaire (to be completed by references who have previously contracted with the offeror)

inquires about the offeror's ability to provide “end-to-end telecommunications engineering, installation and operations services worldwide.” (Appeal Petition 14 (quoting RFP att. 8, at 4).)

The RFP provides three evaluation factors: technical/management, past performance, and cost/price. The RFP indicates the evaluation factors are listed “in descending order of importance,” so the technical/management factor is most heavily weighted, and “all evaluation factors other than cost/price, when combined, are significantly more important than cost or price.” (RFP 204-05.) The RFP sets forth generally the rating methodology by which an offeror's proposal will be evaluated. The technical proposal will be examined to determine whether it meets the solicitation requirements and demonstrates an understanding of those requirements, as well as whether it presents any risks, such as schedule disruption or increased costs. An offeror's past performance will be examined for recency, relevancy, and quality. Price will also be considered. (RFP 205-10.) However, contrary to Appellant's claim, the evaluation factors do not focus on network operations rather than computer design. The only basis for this argument is one question on the past performance questionnaire. This one question is insufficient to prove that the overall purpose of the solicitation is network operations instead of computer design, especially when the same questionnaire also requests information about an offeror's experience in “design, service transition and service operations.” As discussed above, the fact that GSM-ETI contractors may be required to perform some operational activities does not support the conclusion that operation of the DISN is the primary purpose of the solicitation or compel the application of NAICS code 517110 to the procurement.

In its comments following the CO's response to OHA's order, Appellant attacks DISA-DITCO's relevancy analysis, claiming it is arbitrary and unsupported. Appellant also complains that DISA-DITCO failed to monetize the labor hours. Although DISA-DITCO did not monetize the labor hours, it did offer a detailed explanation of the process the agency used to conduct its relevancy analysis. I find that the relevancy analysis supports the designation of NAICS code 541512 by showing that the majority of the work is more closely related to that code.

Finally, I disagree with Appellant's contention that the Air Force solicitation at issue in *NAICS Appeal of AOC Connect, LLC*, SBA No. NAICS-5165 (2010) is “strikingly similar” to the GSM-ETI RFP. Appellant provides a detailed comparison of the tasks required by each solicitation and argues the procurements should be similarly classified under NAICS code 517110. The *AOC Connect* case did confirm that contractor ownership of the telecommunications facilities is not always necessary to apply NAICS code 517110. However, I find NAICS code 517110 still does not apply to the GSM-ETI RFP because the primary purpose of the procurement is not operation and maintenance of the DISN, but rather support of the DISN through the design, engineering, and integration of various specific network capabilities.

The *AOC Connect* solicitation called for “a full range of innovative world class IT services and solutions to support the full spectrum of netcentric operations and missions.” *AOC Connect*, at 3. Through the resulting contract, the Air Force could “acquire network infrastructure systems solutions, operations, and maintenance, as well as systems management, configuration management, and NetOps core IT services (e-mail, storage, and directory services).” *Id.* The contractor would, among other services: enable users “to find, access, collaborate, manage, and store information” on the network; manage “wireless

devices/capabilities, personal data assistants (PDAs) and information-intensive data applications such as video teleconferencing;” provide core enterprise services to include “storage management, messaging, transaction management, workflow management, search and discovery, directory services, and server capability for control and management of multiple services;” “generate and manage metadata and metadata environments;” “provide an information assurance architecture that permeates all components and operations and provides for the confidentiality and integrity of the systems;” “provide all tools, installation materials, and test equipment required to perform any product installation and maintenance;” and support all required software. *Id.* at 3-4. I conclude, contrary to Appellant's assertions, the AOC Connect solicitation called for a much broader range of network operations than the GSM-ETI procurement.

The majority of the work required by the solicitation in *AOC Connect* was to ensure constant operation of the network and to manage all network services and systems. Thus, the AOC Connect solicitation required “not merely the development, but also the integration, testing, deployment, and *most importantly, the sustainment* of Air Force infrastructure and network operations The fact that this contractor will install, *operate, and maintain* this system, as well as design it, puts this procurement in the 517110 designation.” *AOC Connect*, at 15 (emphasis added). Simply put, the solicitation in *AOC Connect* focused on overall management and sustainment of a telecommunications network, whereas the GSM-ETI solicitation focuses on the design and integration of certain systems solutions. Accordingly, the *AOC Connect* case does not support application of NAICS code 517110 to the GSM-ETI procurement.

Appellant has not demonstrated that the CO's original NAICS code designation was clearly erroneous. The operation and sustainment of the DISN will be performed by the GSM-O contractors, not the GSM-ETI contractors, who will perform different support functions, including the design, engineering, and integration of computers and communications technologies. Because the GSM-ETI solicitation primarily requires the design and integration of computer systems and computer-based network services, the application of NAICS code 541512 is appropriate.

V. Conclusion

The CO's original designation of NAICS code 541512 was proper, and the assignment of two NAICS codes for the same work is not allowable. Accordingly, this appeal is DENIED. NAICS code 541512 alone applies to the GSM-ETI solicitation. FAR 19.303(c)(5); *Eagle Home Med. Corp.*, B-402387, March 29, 2010, 2010 CPD ¶ 82.

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

KENNETH M. HYDE
Administrative Judge