

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

NAICS APPEAL OF:

CHP International, Inc.,

Appellant,

Solicitation No. DOL-12-QA-20002
Department of Labor
ETA Office of Contracts Management
Boston, MA

SBA No. NAICS-5367

Decided: June 21, 2012

APPEARANCES

Howard Raik, CHP International, Inc., for Appellant

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 561990, All Other Support Services, to a procurement for outreach and admissions, and career transition services is based on a clear error of fact or law.

III. Background

A. The Solicitation

On May 17, 2012, the Department of Labor (DOL), Employment and Training Administration, Office of Job Corps, in Boston, Massachusetts, issued Solicitation No. DOL-12-QA-20002 (RFP) for outreach and admissions, and career training services in all workforce investment areas in the states of New York and New Jersey, for eligible individuals participating in the Job Corps program. The Contracting Officer (CO) set the procurement aside for small businesses and designated NAICS code 561990, All Other Support Services, with a corresponding \$7 million annual receipts size standard, as the appropriate code for the procurement.

The Statement of Work (SOW) requires the Contractor to provide material, services, and all necessary personnel to operate a Job Corps Outreach/Admissions and Post-Center Career Transition Services program.

The Contractor will be responsible for performing outreach and admissions activities required by the contract, which ensure that the Job Corps program maintains a positive public image, maintains a ready supply of eligible and committed applicants, and works in partnership with individuals, communities, organizations, employers, and state and local workforce development systems.

The Contractor will be expected to recruit and screen sufficient number of applicants to generate sufficient numbers of arrivals to maintain the Job Corps Centers, primarily in New York and New Jersey, while maintaining an average on-board participant strength of 100% of the design capacity.

Regarding the outreach and admissions program, the Contractor must work cooperatively with various individuals and organizations to attract and enroll eligible at-risk youth. The Contractor must also develop and implement effective marketing techniques to educate the public about the program and to ensure that Job Corps is viewed as a positive alternative for youth. The Contractor shall assess, verify, and document applicant eligibility for the Job Corps program.

The Contractor is responsible for providing applicants with accurate information about the Job Corps program, and about specific Job Corps centers. The Contractor shall provide a regular flow of applicants for assignment to centers in accordance with Regional procedures. Lastly, the Contractor shall ensure that assigned applicants are fully prepared for successful center enrollment.

The Contractor's duties under the career transition services are to assist eligible students in entering and maintaining long-term attachment to the labor market or further educational opportunities and training. The Contractor will provide personalized career transition services, access to services that support successful transition and identify and make referral to suitable employment or educational opportunities.

The Contractor will provide direction, management and administrative support to all functions and activities of outreach/admissions and career transition services. The Contractor will establish systems that ensure effective program organization and management, program integrity and accountability, and staff professionalism and development.

B. The Appeal

On May 25, 2012, CHP International, Inc. (Appellant) filed a NAICS code appeal with the Office of Hearings and Appeals (OHA). Appellant contends NAICS code 561990 is not applicable to this procurement. Appellant requests that OHA change the NAICS code assigned to the procurement to 541990, All Other Professional, Scientific, and Technical Services, which has

a \$14 million annual receipts size standard.

Appellant asserts NAICS code 561900 is erroneous because the services required under the procurement at issue are professional and technical in nature, which require professional personnel, with professional level educational background and experience, to deliver them.

Appellant further states a past DOL acquisition seeking Transition Assistance Program Employment Work, posted on May 11, 2012; utilized NAICS code 541611, Administrative Management and General Management Consulting Services. Appellant argues the services sought by this procurement are similar to the services being solicited under the procurement at issue here.

Appellant further argues the procurement at issue requires the staff to be Admissions Counselors or Career Transition Specialists, qualifications which require employees to perform professional, not support services. Appellant points to requirements that the Contractor perform outreach services to attract and enroll eligible at risk youth, and develop and implement effective marketing techniques to educate the public about the program, as being professional services. Appellant further asserts the requirement that the Contractor shall assess, verify and document applicant eligibility for admission, and do the same for applicants for readmission, is also a requirement for professional services. Appellant argues the same for the requirement that the Contractor provide a regular flow of applicants for the centers and ensure the applicants are fully prepared for enrollment.

IV. Discussion

Appellant filed its appeal within ten days after issuance of the solicitation. Thus, the appeal is timely. 13 C.F.R. § 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 NAICS code designation assigned to the solicitation 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). 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. *NAICS Appeal of Energx, LLC*, SBA No. NAICS-4952 (2008). The correct NAICS code is that which best describes the principal purpose of the services being procured, in light of the industry description in the *NAICS Manual*,¹ the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b); *Durodyne*, SBA No. NAICS-4536, at 4.

The NAICS code selected by the CO, 561990, All Other Support Services, covers:

[E]stablishments primarily engaged in providing day-to-day business and other organizational support services (except office administrative services, facilities

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> (*NAICS Manual*).

support services, employment services, business support services, travel arrangement and reservation services, security and investigation services, services to buildings and other structures, packaging and labeling services, and convention and trade show organizing services).

NAICS Manual, at 788-89.

Illustrative examples of work covered by this code include Bartering services, Bottle exchanges, Cloth cutting, bolting, or winding for the trade, Traffic control services, Inventory taking services, Contract meter reading services, Lumber grading services, Diving services on a contract or other basis. *NAICS Manual*, at 789.

The NAICS code Appellant proposes, 541990 covers:

[E]stablishments primarily engaged in the provision of professional, scientific, or technical services (except legal services; accounting, tax preparation, bookkeeping, and related services; architectural, engineering, and related services; specialized design services; computer systems design and related services; management, scientific, and technical consulting services; scientific research and development services; advertising, public relations and related services; market research and public opinion polling; photographic services; translation and interpretation services; and veterinary services).

NAICS Manual, at 758-59.

Illustrative examples of work covered by this code include Appraisal (except real estate) services, Marine surveyor services, Arbitration and conciliation services (except by an attorney or paralegal offices), Patent broker services, Commodity inspector services, Pipeline or power line inspection services, Consumer credit counseling services, Weather forecasting services, Handwriting analysis services. *NAICS Manual*, at 758-59.

In order to support its argument, Appellant points to other procurements which it alleges are similar. However, the decision in a NAICS code appeal must be based upon the requirements in the solicitation at issue, not other procurements. The regulation used to require that previous government procurement classification for the same or similar services be considered in making a NAICS code determination (13 C.F.R. § 121.402(b)), but the regulation no longer includes that requirement. 76 Fed. Reg. 5680, 5683 (February 2, 2011). Appellant's citations to other allegedly similar procurements carry no weight. *NAICS Appeal of Dellew Corp.*, SBA No. NAICS-5358, at 6 (2012).

Having considered the descriptions in the *NAICS Manual* and the work contemplated by the RFP, I agree with Appellant that the selection of NAICS code 561990 was clearly erroneous. NAICS code 561990 provides for organizational support services, but excludes office administrative services and employment services. Furthermore, the illustrative examples for NAICS code 561990 are largely for services requiring manual labor such as bartering, cloth cutting and lumber grading services. NAICS 561990 covers the provision of support services to

businesses which are largely of a manual or clerical nature. They do not appear to require the exercise of any judgment or any professional skill.

Conversely, this procurement calls for direction, management, and administration of programs that would support the outreach, admissions, and career transition services of the Job Corps, which require provision of professional services. The Contractor must recruit and screen the applicants for the position. Further, the Contractor must engage in assisting graduates and former enrollees of the Job Corps with employment after their relationship with the Job Corps finishes. The Contractor must provide career transition services to the students entering the labor market. The Contractor must also market the program to the public. These are professional services, demanding training, education and skills beyond those required by NAICS code 561990. The types of work cited as “examples” under NAICS code 561990 bear no resemblance at all to this procurement. Further, “employment” services are specifically excluded from NAICS code 561990. *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-5037, at 6 (2009) (rejecting proposed use of NAICS code 561990 after finding that the “industries chosen as illustrative examples ... simply have no relation whatever to the tasks required by this solicitation.”)

Nevertheless, Appellant's preferred NAICS code is also inapplicable here. NAICS code 541990 does not cover the type of professional services required by the solicitation. The illustrative examples under this code are narrow specialties, which mostly require a professional license, and deal with some specialized trade or skill. Here, the Contractor will be performing services related to human resources and marketing. The Contractor will be marketing the program to the public, and screening the applicants. A more appropriate code would be 541611, Administrative Management and General Management Consulting Services, which covers:

[E]stablishments 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 consulting services to clients.

NAICS Manual, at 743.

This code covers establishments which offer advice and assistance on human resources and marketing. This solicitation requires the Contractor to perform services in primarily those two fields. The Contractor must market the program, must recruit and screen the applicants for the program, and perform career transition services for the students. These are marketing and human resources functions and they are covered by NAICS code 541611. Further, the Contractor will be assisting with the administration and management of the program, functions covered by NAICS code 541611. While NAICS code 541611 was neither designated by the CO nor advocated by the Appellant, OHA will make use of its discretion to designate the most appropriate NAICS code for a solicitation, once clear error in the CO's designation is

determined. *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4953 (2008).

Accordingly, I find that the most appropriate NAICS code for this procurement is 541611, Administrative Management and General Management Consulting Services, with a corresponding \$14 million annual receipts size standard. 77 Fed. Reg. 7490, 7514 (Feb. 10, 2012).²

V. Conclusion

For the above reasons, I GRANT the instant appeal, REVERSE the CO's NAICS code designation, and designate NAICS code 541611, Administrative Management and General Management Consulting Services, with a corresponding \$14 million annual receipts size standard, as the appropriate NAICS code for this procurement.

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 561990 to 541611. 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

² The Job Corps Center NAICS code, 611519, 13 C.F.R. § 121.201, fn. 16, is not appropriate here this code requires the establishment must perform all the functions for the management and operation of a Job Corps Center, which this solicitation does not require.