

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

NAICS APPEAL OF:

edCount, LLC,

Appellant,

RE:

Solicitation No. ED-ELA-12-R-0034
(REV)
U.S. Department of Education
Contracts & Acquisition Management
Washington, D.C.

SBA No. NAICS-5396

Decided: August 31, 2012

APPEARANCES

Andrew Mohr, Esq., and Laurel Hockey, Esq., Cohen Mohr LLP, Washington, D.C.,
for Appellant

Rand L. Allen, Esq., John R. Prairie, Esq., and W. Barron A. Avery, Esq., Wiley Rein
LLP, Washington, D.C., for Synergy Enterprises, Inc.

Todd E. Davis, Esq., and Jeffrey C. Morhardt, Esq., U.S. Department of Education,
Washington, D.C., for the Agency

DECISION

I. Introduction

On June 12, 2012, the Contracting Officer (CO) for the U. S. Department of Education (ED) in Washington, D.C., posted on FedBizOpps.gov a synopsis for planned Solicitation No. ED-ELA-12-R-0034 (REV) (RFP). The synopsis stated:

This requirement is a SMALL BUSINESS SET ASIDE, pursuant to [Federal Acquisition Regulation (FAR)] Part 6.203 and 19.5. [North American Industry Classification System (NAICS)] Codes of 541720 - Research and Development in the Social Sciences and Humanities and 611710 - Educational Support Services shall be considered.

On June 28, 2012, the CO issued the RFP as a total small business set aside and assigned NAICS code 611710, Educational Support Services. The RFP erroneously stated that the size

standard for NAICS code 611710 is \$14 million in annual receipts. The correct size standard for NAICS code 611710 is \$7 million. 13 C.F.R. § 121.201.

On July 19, 2012, the CO issued Amendment 0002, extending the deadline for offers until July 31, 2012. Amendment 0002 also provided responses to 139 questions from prospective offerors and an amended Performance Work Statement (PWS). In Question 25, a prospective offeror noted that the synopsis had identified two possible NAICS codes, but the RFP utilized just NAICS code 611710. The prospective offeror inquired, “Would the Department consider the 541720 NAICS code for this procurement as indicated earlier in the [synopsis]? If not, can there be two NAICS codes assigned to one opportunity?” The CO responded, “The Department shall be considering both NAICS codes, but will only be awarded under one of the NAICS codes upon contract award. This shall not influence the award of this contract.”

On July 30, 2012, edCount, LLC (Appellant) filed this appeal. Appellant contends that ED is legally required to assign a single NAICS code and size standard to the RFP, and that ED may not postpone the issue until contract award. Appellant further argues that the correct NAICS code for the procurement is 611710, with a size standard of \$7 million in average annual receipts.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (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 the instant appeal within ten days after issuance of Amendment 0002, an amendment that affected the NAICS code, so the appeal is timely. FAR 19.303(c); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Performance Work Statement

The RFP's Performance Work Statement (PWS) explains that the National Clearinghouse for English Language Acquisition and Language Instruction Educational Programs (NCELA) is administered by ED's Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students (OELA). NCELA disseminates information through various mechanisms, chief of which is its dedicated website. ED seeks a contractor to support NCELA operations by performing six categories of tasks: (1) managing the project, (2) maintaining and continually enhancing the NCELA website so it meets the needs of the Department and its stakeholders, (3) facilitating dissemination activities, (4) preparing reports, (5) providing additional services, and (6) accomplishing transfer procedures.

Task 1: Manage the Project

Task 1 is overall project management. It includes annual kick-off and follow-up meetings to review contract goals and objectives, and to prepare the schedule of deliverables, the budget, and the transition and quality control plans. Also under Task 1 are monthly written progress reports, budget reports, meetings, and

ongoing communication between meetings.

Also, the contractor shall apply the Quality Control Plan to each PWS task such that products and services meet requirements and expectations. This includes using feedback such as user satisfaction surveys, conference evaluations, and trend analyses to ensure continuous improvement. The contractor shall report on the implementation of the quality control measures as an item in the written monthly report with mid-year and end-of-year summaries.

The contractor also shall manage and report monthly on fees received for duplication and mailing of informational materials and registration fees charged for NCELA-sponsored events.

Task 2: Maintain and Continually Enhance NCELA Website

Under Task 2, the contractor shall effectuate a smooth transition from the predecessor contractor, and maintain and continuously update/upgrade the NCELA website. The contractor shall maintain a NCELA email list and expand it via sign-up activities at events. Before the kick-off meeting, the contractor shall review the website and submit recommendations for enhancing and upgrading it. Enhancements are to include “real world” examples of language instruction educational programs in operation.

The contractor shall continuously update and enhance the NCELA digital resource library of research and information on the education of English Learners (ELs), so that it is user-friendly and includes archival, current, and new materials in multiple formats.

The contractor shall expand and maintain the Title III State Information System on the NCELA website. This includes reviewing and updating state contact information quarterly, and the Title III State Information System annually. The contractor shall include new and updated data on the ten Local Educational Agencies (LEAs) with the highest numbers of ELs in each state and a subpage on the three rural LEAs with the highest EL numbers in each state.

The contractor shall create and maintain a current database of promising practices from Title III Language Instruction Educational Programs (LIEPs) nationwide. Annually, the contractor shall solicit nominations of LIEP promising practices through a notice on the NCELA website, and help assemble the review panels to judge the submissions. The contractor shall summarize the submissions. Submissions selected shall be edited and featured on the website.

Also, the contractor shall create and maintain a current database of promising practices generated by projects funded by the two Title III Discretionary programs. Annually, the contractor shall solicit nominations of promising practices through the website, help assemble the review panels, and summarize

the submissions. Submissions selected shall be edited and featured on the website.

The contractor shall arrange for up to 10 Technical Assistance (TA) virtual dissemination events (webcasts) on policy and/or practice in Limited English Proficient education or related to ELs. Before each webcast, the contractor shall review and discuss any issues and submit a draft agenda with discussion questions and names of recommended presenters. The contractor shall help OELA plan, promote, budget for, coordinate, and facilitate the events. After the webcast, the contractor shall provide a summary of proceedings and identify policy-related and other issues that ED must address.

The contractor shall assist OELA in expanding and supporting an electronic Community of Practice (CoP) to increase opportunities for professional collaboration and TA and to serve multiple audiences within the EL education community. The current CoP has three sites, and the contractor shall host additional communities. Contractor support shall include providing oversight, guidance, acting as the CoP facilitator, and other duties as determined by OELA. The NCELA website will provide an access link.

Task 3: Facilitate Dissemination Activities

The contractor shall support NCELA's information dissemination function by assisting OELA in conducting meetings and events. There are three two-day meetings with 200-250 participants, and up to 12 TA dissemination events with audiences of 50-100.

For both meetings and events, the contractor shall work with OLEA to set up work plans, meeting budgets, and staffing. The contractor shall promote the meetings and events on the website and through the NCELA email list, and assist OLEA with agenda development, program printing, visual presentations, and video and other transmission technologies. The contractor also shall coordinate conference activities including all communication with hotels, registration of participants, travel arrangements for presenters, meeting rooms, sleeping rooms, speaker honoraria, speaker bios, and cost-reimbursement arrangements, as applicable.

The contractor also shall assist with participant contact information, conference proceedings, and event evaluations. If requested, the contractor shall provide transcriptions of selected conference proceedings, an analysis of major themes from key discussions, and an analysis and summary of participants' evaluations.

Task 4: Prepare Reports

The contractor shall prepare three types of reports. The first is the Biennial Report to Congress summarizing two years of states' annual Title III Consolidated State Performance Report data. ED will provide the data to the contractor.

Second is the Short Turn-around Report of up to seven single-spaced pages, including tables and graphics. The contractor shall gather the information for these reports from NCELA-managed resource databases, research and Technical Assistance (TA) materials produced by ED-funded TA and research centers, and other sources to which NCELA has electronic access.

Third is an annual report for each of two discretionary grant programs. These reports are based on Complete Data Reports provided to the contractor. The contractor shall also post to the website the list of Title III discretionary grant recipients.

Task 5: Provide Additional Services

The contractor shall provide accurate, timely, and easily accessible information to State and Local Educational Agencies through a toll-free phone number and email, and direct other users to the NCELA resource library and other resources. The contractor shall submit for approval an updated plan of its in-house procedures for handling user requests for information.

Task 6: Accomplish Transfer Procedures

Upon expiration of the contract, the contractor shall perform transitional activities if a new contractor is selected. These activities include a plan for transfer and a detailed briefing for the new contractor. The contractor shall pack and ship all materials and documentation, and conduct appropriate close-out. The contractor shall carry out all regular NCELA activities, including website operation, without a break in services during transition.

B. Evaluation Criteria

The RFP indicates that the contract will be awarded to the offeror whose proposal is most advantageous to the Government, price and other factors considered. There are three evaluation factors: Technical Merit, Past Performance, and Price. Technical Merit is significantly more important than Price; Past Performance will be evaluated on a pass/fail basis. Technical Merit consists of four elements, under which proposals may receive a maximum score of 100 points:

- | | | |
|------|--|-----------|
| I. | Organizational Capability and Experience | 30 points |
| II. | Technological Experience | 25 points |
| III. | Soundness of the Technical Work Plan | 25 points |
| IV. | Management Plan | 20 points |

C. The Appeal

On July 30, 2012, Appellant filed this appeal. Appellant complains that the CO's

designation of two possible NAICS codes, with different size standards, and intent to select one of them only upon award constitute clear errors of law. Appellant also contends that NAICS code 611710, with its corresponding size standard of \$7 million, is the correct NAICS code for this procurement because all six tasks support the educational programs of states and school districts. Appellant further asserts that NAICS code 541720 is inapplicable because the procurement involves no research and development.

D. ED's Response to the Appeal

On August 10, 2012, the date of the close of record, ED filed its response to the appeal, including comments from the CO. ED agrees with Appellant that only one NAICS code should have been assigned to the RFP, and also agrees with Appellant that NAICS code 611710 is the correct NAICS code. ED presents a portion of its Independent Government Cost Estimate (IGCE) estimating the distribution of direct labor costs associated with each of the RFP's six tasks, as follows:

Task 1:	Manage the Project	33.6%
Task 2:	Manage Technology	36.3%
Task 3:	Dissemination Activities	12.9%
Task 4:	Prepare Reports	14.9%
Task 5:	Provide Additional Services	1.5%
Task 6:	Transfer Procedures	0.5%

(ED Response at 14.) ED asserts that, although Task 2 is the single largest task, Tasks 1, 3, and 5 collectively outweigh it. These three tasks all require expertise in the area of English language education, expertise essential to successful performance. Thus, reasons ED, the correct NAICS code for this RFP is 611710. ED requests that OHA permit ED to amend the RFP to remove references to NAICS code 541720, and to clearly designate NAICS code 611710 as the correct NAICS code.

E. Synergy's Response to the Appeal

On August 10, 2012, Synergy Enterprises, Inc. (Synergy) filed its response to the appeal. Synergy agrees with Appellant and ED that there should have been only one NAICS code assigned to the RFP. Synergy asserts, however, that NAICS codes 611710 and 541720 are both incorrect for the procurement. Synergy maintains that NAICS code 611710 is not applicable because there are no uniquely educational requirements here. While the overall mission of ED pertains to education, the work required by this particular RFP is to support the clearinghouse and dissemination activities. It does not require uniquely educational skills.

Synergy asserts that the correct NAICS code for this RFP is 511199, All Other Publishers, which has a size standard of 500 employees.

F. Appellant's Reply and Synergy's Opposition

On August 14, 2012, after the close of record, Appellant filed a motion for leave to reply

to Synergy's response, and also filed its proposed reply. In the reply, Appellant asserts that Synergy's contention that Tasks 1, 3, and 5 do not require expertise in education is incorrect. In Appellant's view, these tasks do require educational skills and, further, so does Task 2. Without understanding the subject matter, the contractor cannot properly assess issues, create discussion questions or identify qualified presenters.

Appellant also asserts that Synergy has not shown that ED clearly erred in designating NAICS code 611710 to the RFP, and that OHA therefore should defer to ED's choice of NAICS code. Appellant attacks Synergy's reference to OHA decisions in which NAICS codes other than 611710 were at issue.

Also on August 14, 2012, Synergy filed an opposition to Appellant's motion for leave to reply. Synergy urges that Appellant's reply should be rejected because it was submitted after the close of record.

I find it appropriate to accept Appellant's reply under the circumstances presented here. Synergy is correct that a reply ordinarily is not permitted unless OHA so directs. *E.g.*, *NAICS Appeal of Delphi Research, Inc.*, SBA No. NAICS-5377, at 7 (2012). In the instant case, though, Synergy's response to the appeal advocated, for the first time, a NAICS code that was not previously at issue in the litigation. Thus, Appellant could not earlier have addressed the code recommended by Synergy. Accordingly, for good cause shown, Appellant's motion is GRANTED, and the reply is ADMITTED into the record.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove that 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). 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, the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b). OHA will not reverse a NAICS code designation “merely because OHA would have selected a different code.” *NAICS Appeal of Eagle Home Med. Corp.*, SBA No. NAICS-5099, at 3 (2009).

B. NAICS Manual¹ Descriptions

The NAICS code which both Appellant and ED support, 611710, Educational Support Services, “comprises establishments primarily engaged in providing noninstructional services

¹ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System (2007) (NAICS Manual)*, available at www.census.gov/eos/www/naics/.

that support educational processes or systems.” *NAICS Manual* 810. Index entries which refer to this NAICS code are:

- College selection services
- Educational consultants
- Educational guidance counseling services
- Educational support services
- Educational testing evaluation services
- Educational testing services
- School bus attendant services
- Student exchange programs
- Test development and evaluation services, educational
- Testing services, educational

The NAICS code which Synergy advocates for the instant RFP, 511199, All Other Publishers, “comprises establishments generally known as publishers (except newspaper, magazine, book, directory, database, music, and greeting card publishers). These establishments may publish works in print or electronic form.” *NAICS Manual* 658. Index entries which refer to this NAICS code are:

- Art print (except exclusive Internet publishing) publishers
- Art print publishers and printing combined
- Art publishers (except exclusive Internet publishing)
- Calendar publishers (except exclusive Internet publishing)
- Calendar publishers and printing combined
- Catalog (i.e., mail order, store merchandise) publishers (except exclusive Internet publishing)
- Catalog (i.e., mail order, store merchandise) publishers and printing combined
- Children's coloring book publishers (except exclusive Internet publishing)
- Diary and time scheduler publishers (except exclusive Internet publishing)
- Discount coupon book publishers (except exclusive Internet publishing)
- Discount coupon book publishers and printing combined
- Limited editions art print publishers (except exclusive Internet publishing)
- Pattern and plan (e.g., clothing patterns) publishers (except exclusive Internet publishing)
- Pattern and plan (e.g., clothing patterns) publishers and printing combined
- Postcard publishers (except exclusive Internet publishing)
- Postcard publishers and printing combined
- Poster publishers (except exclusive Internet publishing)
- Poster publishers and printing combined
- Publishers (except exclusive Internet publishing), racing form
- Racetrack program publishers (except Internet)
- Racetrack program publishers and printing combined
- Racing form publishers (except exclusive Internet publishing)
- Racing form publishers and printing combined
- Yearbook (e.g., high school, college, university) publishers (except exclusive Internet publishing)
- Yearbook (e.g., high school, college, university) publishers and printing combined

C. Analysis

All parties, including ED itself, agree that the CO erred by stating that two NAICS codes, with very different size standards, might apply to the instant procurement, and by indicating that ED would determine which of those codes to utilize only at the time of contract award. Such an approach is improper because the FAR requires that a procuring agency designate a single NAICS code and size standard to each solicitation, unless the procurement calls for multiple products or services and the agency specifies which NAICS code and size standard applies to each individual product or service. FAR 19.102(c) and 19.303(b); *NAICS Appeal of Technica Corp.*, SBA No. NAICS-5248 (2011). Postponing until contract award a decision as to the applicable NAICS code is also problematic, as it prevents prospective offerors from determining whether they may represent themselves as small businesses for that procurement. The parties further agree that the second NAICS code referenced by the CO, 541720, is not applicable because the acquisition does not entail research and development. The principal question remaining, therefore, is whether the instant RFP is best characterized by NAICS code 611710, as ED and Appellant advocate, or by NAICS code 511199, as Synergy urges.

Having reviewed the RFP as well as the definitions set forth in the *NAICS Manual* and applicable regulations, I find no clear error in the selection of NAICS code 611710 for this procurement. As is evident from the PWS, the contractor will assist ED in operating the National Clearinghouse for English Language Acquisition (NCELA), which in turn supports state educational programs for limited English proficient learners. The contractor will maintain and enhance the NCELA website and resource library; arrange meetings, conferences, and web-based events; gather information; write reports; and respond to user inquiries. Thus, the contractor is performing “noninstructional services that support educational processes or systems” in accordance with NAICS code 611710.

Synergy insists that NAICS code 611710 is appropriate only if the support services themselves are educational in nature. Synergy highlights that the representative examples for NAICS code 611710 — such as test development and guidance counseling — all are connected with education, and are not routine support services. Synergy also cites *NAICS Appeal of Genome Communications*, SBA No. NAICS-5002 (2008), in which OHA determined that a contract to develop internet-based training called for “educational work,” and therefore could properly be classified under NAICS code 611710.

I agree with Synergy that NAICS code 611710 is appropriate only when the support services have some significant educational nexus. The work involved here, though, does have uniquely educational aspects. The contractor must collect information about English language acquisition, analyze and synthesize that information, and share it with schools and districts to assist them in developing language instruction educational programs. Because the contents of the NCELA must be continuously examined, improved, and communicated in a useful manner, successful performance of the contract requires a subject matter expertise in the areas of limited English proficiency and language acquisition. The contractor thus is not functioning as a mere conduit of information. This conclusion is bolstered by ED's IGCE, prepared in advance of the instant litigation. The IGCE demonstrates that Tasks 1, 3, and 5 together comprise the largest share (roughly 48%) of the procurement, and ED emphasizes that “expertise in the area of ELs

[is] needed in order to successfully perform Tasks 1, 3, and 5.” (ED Response 14.)

Because I am not persuaded that the CO clearly erred in assigning NAICS code 611710 to the RFP, it is unnecessary to consider the alternative code, 511199, advocated by Synergy. *E.g., NAICS Appeal of 1st American Sys. and Svcs., LLC*, SBA No. NAICS-5119, at 5 (2010) (“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.”). I note, however, Synergy's arguments in favor of NAICS code 511199 are not compelling. Synergy maintains that the instant procurement primarily entails the compilation and dissemination of information, activities which may be broadly construed as “publishing.” In support, Synergy references two recent OHA decisions sanctioning the use of NAICS code 511999: *NAICS Appeal of Circle Solutions, Inc.*, SBA No. NAICS-5181 (2011) and *NAICS Appeal of JBS International, Inc.*, SBA No. NAICS-5021 (2008). Both of these cases, however, pertained to procurements in the health care industry for which there is no comparable NAICS code to 611710. Accordingly, *Circle Solutions* and *JBS* are not controlling here, because neither case involved a choice between NAICS code 511199 and a reasonable industry-related NAICS code.

IV. Conclusion

There is no dispute that ED erred by designating two NAICS codes, with different size standards, to the instant RFP. Accordingly, the appeal is GRANTED. The appropriate NAICS code for this procurement is 611710, Educational Support Services, with a corresponding size standard of \$7 million in average annual receipts. Because this decision is being issued before the deadline for receipt of proposals, the CO must amend the RFP to clarify that the NAICS code designation is 611710. 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