

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

NAICS APPEAL OF:

Katmai Simulations & Training,

Appellant,

Solicitation No. HSFLGL-13-B-00003
U.S. Department of Homeland Security
Federal Law Enforcement Training Center

SBA No. NAICS-5445

Decided: February 7, 2013

APPEARANCES

William K. Walker, Esq., Walker Reausaw, Washington, D.C., for Appellant

Erin Wofford, Contracting Officer, U.S. Department of Homeland Security, Federal Law Enforcement Training Center, Glynco, Georgia

DECISION

I. Introduction and Jurisdiction

On January 10, 2013, the U.S. Department of Homeland Security issued Invitation for Bids (IFB) No. HSFLGL-13-B-00003, seeking a contractor to provide roleplayer support services for the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 561320, Temporary Help Services, with an associated size standard of \$25.5 million average annual receipts.¹

On January 22, 2013, Katmai Simulations & Training (Appellant) filed this appeal. Appellant asserts that the correct NAICS code for the procurement is 611710, Educational

¹ The IFB incorrectly stated that the applicable size standard was \$13.5 million. (IFB at § K.1.) However, effective January 7, 2013, the U.S. Small Business Administration (SBA) increased the size standard for NAICS code 561320 from \$13.5 million to \$25.5 million. 77 Fed. Reg. 72,691, 72,694 (Dec. 6, 2012). According to SBA regulations, “the size standard in effect on the date the solicitation is issued” is controlling. 13 C.F.R. § 121.402(a).

Support Services, with a size standard of \$14 million average annual receipts. For the reasons discussed *infra*, the appeal is denied.

SBA's 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 timely filed the instant appeal on January 22, 2013.² Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Solicitation

FLETC provides law enforcement training for Federal officers and agents. In support of this mission, FLETC seeks a contractor to furnish roleplayers who will participate in realistic simulations of law enforcement situations. According to the IFB, the FLETC curriculum utilizes more than 500 training exercises requiring roleplayer support. (IFB § C.1.b.) The IFB explains that:

The contractor shall provide [roleplayer support services]. FLETC requires morning, afternoon, and evening roleplayer support for training exercises. Training exercises are normally for two (2) or four (4) hour blocks ranging from 6:30 a.m. to 6:00 p.m. Training exercises may start before 6:30 a.m. with the possibility of exercises lasting until 12:00 midnight. The length of each exercise is determined by the scenario package(s) specified [by FLETC] in [a] monthly [order]. Exercises are scheduled concurrently with numerous exercises at different locations. A normal training day may utilize in excess of 157 roles to support 26 exercises and multiple scenarios. Many roles are on-going on a concurrent basis.

(*Id.* § C.11.1.a (emphasis in original).)

The contractor is responsible for hiring, training, preparing, and scheduling the roleplayers. (*Id.* § C.11.1.b.) The contractor will not, however, participate in developing the scenarios. (*Id.* § C.11.3.) During the simulations, roleplayers are “under the general and indirect control of [FLETC] instructors.” (*Id.* § C.11.8.) Roleplayers are prohibited from evaluating students' performance, and “shall distance themselves from the Instructor and students during any student critique.” (*Id.*)

The IFB states that FLETC's specific roleplayer requirements will be determined on a

² Ordinarily, a NAICS code appeal must be filed within ten calendar days after issuance of the solicitation. Federal Acquisition Regulation (FAR) 19.303(c); 13 C.F.R. §§ 121.103(b)(1) and 134.304(b); *NAICS Appeal of R. Christopher Goodwin & Associates, Inc.*, SBA No. NAICS-5382 (2012). In this case, the IFB was issued on January 10, 2013. Ten calendar days after January 10, 2013 was January 20, 2013. Because January 20, 2013 was a Sunday, and January 21, 2013 was a Federal holiday, the appeal petition was due on the next business day: Tuesday, January 22, 2013. 13 C.F.R. § 134.202(d).

monthly basis and are subject to frequent change. FLETC will notify the contractor of its anticipated needs in a monthly “Roleplayer Work Order.” (*Id.* § C.11.5.) However, “[d]ue to various daily factors affecting the monthly Roleplayer Work Order, the contractor shall be prepared for the issuance of numerous scheduling revisions resulting in add-ons, cancellations, and changes of roleplayer support requirements.” (*Id.* § C.11.6.)

During contract performance, the contractor must ensure that at least one manager is on-site at FLETC during normal business hours. (*Id.* § C.5.1.b.) The manager must be prepared to meet with FLETC officials with 30 minutes advance notice. (*Id.*)

The solicitation will result in a hybrid contract with firm-fixed-price, indefinite delivery/indefinite quantity, and cost reimbursement line items. (*Id.* § B.) The contract will have a base period of six months, four one-year optional performance periods, and one six-month optional performance period. (*Id.* § F.3.)

B. The Appeal

On January 22, 2013, Appellant filed the instant appeal contending that NAICS code 561320 is improper for the IFB. Appellant asserts that “FLETC role players cannot be classified as *temporary* employees because their employment is not limited to just a short period of time.” (Appeal at 7 (emphasis in original).) Rather, Appellant maintains, roleplayers may be employed by the contractor for years, and provide services to clients on a recurring and frequent basis. Further, due to the specialized nature of roleplayer work, “it is unreasonable to expect that [FLETC] intends for the contractor to carefully select, vet, hire, train, and deploy hundreds of role players, and then cut those folks loose after less than a year even though role player support services are still ongoing and very much in demand.” (*Id.* at 9.) Appellant observes that roleplayers do not perform routine clerical or administrative functions of the type customarily filled by temporary workers. Moreover, because the IFB requires on-site contractor managers, roleplayers are not directly supervised by the client or customer, as is expected for temporary workers.

Appellant acknowledges that “many role player contracts have been coded under ‘Temporary Help Services,’ and legitimately so.” (*Id.* at 15.) Nonetheless, Appellant insists that NAICS code 561320 is not appropriate for every roleplayer procurement. Here, Appellant maintains that NAICS code 611710, Educational Support Services, is the “only valid NAICS code” for the IFB. (*Id.* at 17.) Appellant reasons that the services to be performed are non-instructional in nature, but will be provided to FLETC, an educational organization, for use during instruction. Appellant asserts that roleplayers may be considered “a type of ‘teaching aid’ or ‘prop’ instead of an actual trainer or instructor.” (*Id.* at 18.)

C. CO's Response

On February 1, 2013, the CO responded to the appeal. The CO explains that she assigned NAICS code 561320 because it was “most appropriate due to the temporary nature of the work which is driven by the need for various scenario(s) and roles that are required on a fluctuating basis.” (Response at 2.)

The CO also disagrees with Appellant's arguments raised in the appeal. According to the CO, the NAICS code Appellant recommends, 611710, would be improper for this procurement because the roleplayers are not substantively involved in any FLETC instruction, but instead merely act out scenarios developed exclusively by the Government. Further, the instant contract does not call for the types of work ordinarily associated with NAICS code 611710, such as educational consulting, testing, guidance counseling, student exchange, or testing evaluation services. (*Id.* at 1.) With regard to the contractor's on-site management presence at FLETC, the CO states that the purpose of this requirement is not to supervise the roleplayers, but instead is a "convenience to the government given the large number of scenarios required to be coordinated." (*Id.* at 2.)

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 show 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 Manual³ Descriptions

The NAICS code selected by the CO, 561320, Temporary Help Services, "comprises establishments primarily engaged in supplying workers to clients' businesses for limited periods of time to supplement the working force of the client. The individuals provided are employees of the temporary help service establishment. However, these establishments do not provide direct supervision of their employees at the clients' work sites." *NAICS Manual* 785. Index entries which refer to this NAICS code are:

- Help supply services
- Labor (except farm) contractors (i.e., personnel suppliers)
- Labor (except farm) pools
- Manpower pools
- Model supply services
- Office help supply services

³ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System* (2012) (*NAICS Manual*), available at www.census.gov/eos/www/naics/.

Office supply pools
Personnel (e.g., industrial, office) suppliers
Temporary employment services
Temporary help services
Temporary staffing services

The NAICS code which Appellant advocates for the IFB, 611710, Educational Support Services, “comprises establishments primarily engaged in providing noninstructional services that support educational processes or systems.” *NAICS Manual* 829. 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

C. Analysis

I find no error in the CO's choice of NAICS code 561320, Temporary Help Services, for the instant acquisition. As discussed above, this code covers “establishments primarily engaged in supplying workers to clients' businesses for limited periods of time to supplement the working force of the client.” *NAICS Manual* 785. This is precisely the type of work being undertaken here, as the contractor will provide substantial numbers of role players to participate in short-duration simulations of law enforcement situations. Appellant itself recognizes that OHA has previously upheld the use of NAICS code 561320 for similar procurements. *NAICS Appeal of CWU, Inc.*, SBA No. NAICS-5226 (2011) (procurement seeking individuals to portray Afghans during military training exercises was properly categorized under NAICS code 561320). Further, roleplaying work — particularly when (as here) any script is developed solely by the Government — is highly analogous to modeling, and the *NAICS Manual* instructs that “[e]stablishments primarily engaged in supplying models to clients are classified in Industry 561320, Temporary Help Services.” *NAICS Manual* 873.

In attempting to overturn the CO's designed code, Appellant emphasizes that the roleplayers are long-term employees of the contractor, and perform services for the client (*i.e.*, FLETC) on a recurring basis. Thus, Appellant reasons, the procurement does not involve “temporary” workers for only “limited periods of time.” I see no merit to this argument. Regardless of the workers' employment status with the contractor, the services that those workers will perform for FLETC are inherently temporary in nature. The IFB makes clear that the exercises in question are of extremely short duration (typically 2 to 4 hours each), subject to frequent change, and incapable of being predicted more than a month in advance. *See* Section

II.A, *supra*. Thus, the work is, essentially, a series of undefined, fluctuating, and temporary assignments. Similarly, the fact that the contractor will maintain an on-site management presence at FLETC does not establish that NAICS code 561320 is erroneous. As the CO reasonably explains, the purpose of having contractor managers on-site is not to supervise the roleplayers, but rather to serve as a point of contact for resolving scheduling issues with FLETC. The IFB confirms that, during training exercises, the roleplayers are “under the general and indirect control of [FLETC] instructors,” not the contractor's management. (IFB § C.11.8.) Contrary to Appellant's arguments, then, the roleplayers are in fact under the supervision of FLETC for the duration of their temporary assignments.

Because Appellant has not demonstrated that the CO erred in assigning NAICS code 561320 to the IFB, it is unnecessary to consider the alternative code, 611710, Appellant advocates. *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.”). Nevertheless, NAICS code 611710 appears less suitable for the instant procurement than the code selected by the CO. OHA has recognized that NAICS code 611710 is appropriate when a contractor performs non-instructional services that have “some significant educational nexus.” *NAICS Appeal of edCount, LLC*, SBA No. NAICS-5396, at 9 (2012). Here, the contractor's personnel will merely execute scenarios provided by FLETC, without any substantive involvement in the development or the delivery of the training, and with no expertise in the underlying subject matter. At best, then, the procurement is only tangentially related to education.

IV. Conclusion

For the above reasons, the appeal is DENIED. The proper NAICS code for this procurement is 561320, Temporary Help Services, with an associated size standard of \$25.5 million average annual receipts. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge