

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

NAICS APPEAL OF:

MicroTechnologies, LLC,

Appellant,

Solicitation No. SAQMMA13R0297

U.S. Department of State

Arlington, Virginia

SBA No. NAICS-5489

Decided: August 1, 2013

APPEARANCES

Aaron Drabkin, Esq., General Counsel, MicroTechnologies, LLC, Vienna, Virginia

Robert B. Wissman, Contracting Officer, U.S. Department of State, Arlington, Virginia

DECISION

I. Introduction and Jurisdiction

On July 11, 2013, the U.S. Department of State (DoS) issued Request for Proposals (RFP) No. SAQMMA13R0297 for video teleconferencing (VTC) solutions. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541519, Other Computer Related Services. NAICS code 541519 ordinarily is associated with a size standard of \$25.5 million, but the RFP indicated that the work fit within the exception for Information Technology Value Added Resellers, which utilizes a size standard of 150 employees.

On July 19, 2013, MicroTechnologies, LLC (Appellant) filed this appeal. Appellant asserts that the correct NAICS code for the procurement is 517110, Wired Telecommunications Carriers, with a size standard of 1,500 employees. For the reasons discussed *infra*, the appeal is denied.

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 the RFP, so the appeal is timely. Federal Acquisition Regulation (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 RFP

The RFP's Statement of Work (SOW) indicates that the contractor will be responsible for delivering fully functional and integrated VTC systems, so that “[t]he end user should be able to walk into the room and immediately begin to use the product.” (SOW at 5.) The contractor will perform “acquisition, engineering, design, installation, integration, user/admin training, and remedial routine/on-call and preventive maintenance services” of the VTC systems. (*Id.* at 3.) Specific locations and requirements will be defined in individual task orders issued after award of the base contract.

The contractor will provide “core equipment” — described as “all equipment necessary to conduct VTC operations” — including cameras, microphones, speakers, and codecs. (*Id.* at 15-16.) Further, the contractor will furnish other peripheral/ancillary equipment that “does not directly connect to the DoS VTC infrastructure”, such as monitors, projectors, electronic white boards, control interfaces, and other accessories necessary to achieve fully functional, integrated VTC solutions. (*Id.* at 16.) Unless the contractor is the manufacturer of the equipment, “the contractor must be an authorized reseller, authorized service partner, or authorized dealer to sell, configure, and consult with the manufacturer.” (*Id.* at 12.)

According to the SOW, the contractor is not charged with providing computer equipment. Rather, “computers will be provided by DoS for connection to the integrated room builds.” (*Id.* at 3.)

The RFP states that DoS plans to award multiple indefinite delivery/indefinite quantity contracts. (RFP at 27.) Task orders may be fixed price, labor hour, or time and materials. (*Id.* at 4.) Each contract will have a base period of one year, and four one-year options. (*Id.* at 9.)

Proposals were originally due on August 1, 2013. On July 24, 2013, the CO extended the proposal deadline to August 12, 2013.

B. The Appeal

Appellant maintains that the CO incorrectly chose NAICS code 541519, Other Computer Related Services, for the RFP. Appellant asserts that, based on the descriptions in the *NAICS Manual*,¹ NAICS code 541519 is appropriate for procurements of computer-related services, but “is not a NAICS code that includes video teleconferencing within its stated definition.” (Appeal at 2.) Because the instant RFP involves video teleconferencing and “clearly states that computers are not within the scope of the contract,” the CO erred in assigning NAICS code 541519. (*Id.*)

Appellant contends that the best NAICS code for the procurement is 517110, Wired

¹ 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/.

Telecommunications Carriers. Appellant observes that the definition of NAICS code 517110 includes “wired (cable) audio and video programming distribution,” which, in Appellant's view, corresponds closely to the requirements of this RFP. (*Id.* at 3, quoting *NAICS Manual*.) Appellant emphasizes that the contractor will provide equipment to accept or transmit signals across wired connections. Thus, Appellant reasons, NAICS code 517110 is the most appropriate code for the RFP. Appellant requests that OHA grant the appeal and direct the CO to revise the NAICS code selection.

C. CO's Response

On July 29, 2013, the CO responded to the appeal. The CO recites SBA's definition “Information Technology Value Added Resellers,” as found at 13 C.F.R. § 121.201 n.18, and the definition of “information technology” in FAR 2.101. The CO observes that the FAR defines information technology broadly to include a wide variety of equipment and disciplines, not just computers. (CO Response at 2.) The CO reiterates that the instant RFP requires the contractor to provide both VTC equipment and value-added services such as “engineering, design, installation, integration, user/admin training, and remedial routine/on-call and preventative maintenance services.” (*Id.*) The CO rejects Appellant's contention that the solicitation is for wired audio and video programming distribution. The CO argues the solicitation requires “simple IT end points and their design and installation, not transmission facilities or networks.” (*Id.*)

The CO defends the selection of NAICS code 541519, Other Computer Related Services, with the exception for Information Technology Value Added Resellers. The CO maintains that the RFP is properly categorized as information technology. The CO notes that digital and video cameras and microphones allow input of information, whereas monitors and projectors allow output. The CO further asserts that “videoconferencing requires computers to operate,” and that NAICS code 541519 is proper. (*Id.* at 3.)

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 Manual Descriptions

The NAICS code selected by the CO, 541519, Other Computer Related Services,

“comprises establishments primarily engaged in providing computer related services (except custom programming, systems integration design, and facilities management services).” *NAICS Manual* 754-55. SBA includes Information Technology Value Added Resellers within the scope of NAICS code 541519. According to SBA regulations:

An Information Technology Value Added Reseller provides a total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant services. Significant value added services consist of, but are not limited to, configuration consulting and design, systems integration, installation of multi-vendor computer equipment, customization of hardware or software, training, product technical support, maintenance, and end user support. For purposes of Government procurement, an information technology procurement classified under this industry category must consist of at least 15% and not more than 50% of value added services as measured by the total price less the cost of information technology hardware, computer software, and profit. If the contract consists of less than 15% of value added services, then it must be classified under a NAICS manufacturing industry. If the contract consists of more than 50% of value added services, then it must be classified under the NAICS industry that best describes the predominate service of the procurement.

13 C.F.R. § 121.201, n.18.

The NAICS code which Appellant advocates for the RFP, 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 679. 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.*

C. Analysis

I find no error in the CO's choice of NAICS code 541519, with the Information

Technology Value Added Resellers (ITVAR) exception, for the instant procurement. According to the RFP, the contractor will provide complete, integrated video teleconferencing solutions, including both value-added services — such as design, installation, and training — and substantial quantities of video teleconferencing equipment produced by various manufacturers. Section II.A, *supra*. As the CO correctly observes, video teleconferencing can be considered a type of “information technology” within the meaning of FAR 2.101. Thus, the instant RFP falls squarely within the ITVAR definition, because the contractor will be “provid[ing] a total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant services.” 13 C.F.R. § 121.201, n.18. The ITVAR regulation also instructs that value-added services must constitute at least 15% and no more than 50% of the total acquisition. *Id.* Appellant, though, does not allege, and has not attempted to demonstrate, that the RFP does not comply with these thresholds.

Appellant asserts that the ITVAR exception is appropriate only when the contractor is reselling computer equipment. According to Appellant, the instant procurement involves video teleconferencing, not computers, and therefore does not qualify for the ITVAR exception. This argument has no merit. The text of the ITVAR exception and its regulatory history indicate that the exception applies to purveyors of information technology equipment in general. *E.g.*, 67 Fed. Reg. 48,419, 48,421 (July 24, 2002) (explaining that the role of an information technology value added reseller is “to assist and provide supporting services to an agency in the acquisition of information technology equipment”). Thus, the ITVAR exception does not require that the contractor resell computers as opposed to other types of information technology. Further, the instant RFP makes clear that “computers will be provided by DoS for connection to the integrated room builds,” and the CO likewise emphasizes that ““videoconferencing requires computers to operate.” Sections II.A and II.C, *supra*. Thus, even if the ITVAR exception could be applied only to computer acquisitions, the instant procurement evidently does contemplate significant use of computers in developing complete video teleconferencing solutions.

Because Appellant has not demonstrated that the CO erred in assigning NAICS code 541519 and the ITVAR exception to this RFP, OHA need not consider the alternative code Appellant advocates. *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 517110 appears less appropriate for the instant procurement than the code selected by the CO. In prior decisions, OHA has explained that NAICS code 517110 typically involves the management and operation of networks or telecommunications facilities. *See, e.g., NAICS Appeal of AOC Connect, LLC*, SBA No. NAICS-5165, at 15 (2010) (“The fact that this contractor will install, operate, and maintain this [networking] system, as well as design it, puts this procurement in the 517110 designation.”). Here, the contractor will deliver fully functional VTC systems to DoS, but thereafter has little role in operating those systems. Thus, NAICS code 517110 appears inapplicable.

IV. Conclusion

For the above reasons, the appeal is DENIED. The proper NAICS code for this procurement is 541519, Other Computer Related Services, with the exception for Information

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

KENNETH M. HYDE
Administrative Judge