

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

NAICS APPEAL OF:

Information Ventures, Inc.,

Appellant,

Solicitation No. N01DA-14-4423

U.S. Department of Health and Human
Services
National Institutes of Health

SBA No. NAICS-5544

Decided: April 2, 2014

APPEARANCES

Bruce H. Kleinstein, President, Information Ventures, Inc., Philadelphia, Pennsylvania

Kenneth E. Goodling, Contracting Officer, U.S. Department of Health and Human
Services, National Institutes of Health, Bethesda, Maryland

DECISION

I. Introduction and Jurisdiction

On February 28, 2014, the U.S. Department of Health and Human Services, National Institutes of Health (NIH) issued Request for Proposals (RFP) No. N01DA-14-4423 for the “NIH Pain Consortium Centers of Excellence in Pain Education Coordination Center.” The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), with a corresponding size standard of 500 employees.

On March 10, 2014, Information Ventures, Inc. (Appellant) filed the instant appeal. Appellant asserts that the correct NAICS code for the procurement is 541611, Administrative Management and General Management Consulting Services, with a size standard of \$14 million average annual receipts. For the reasons discussed *infra*, the appeal is granted.

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 calendar 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 explains that, in 2012, NIH designated 12 health professional schools as Centers of Excellence in Pain Education (CoEPEs) to “advance the assessment, diagnosis, and safe treatment of pain.” (RFP § C.1.a.I.) The CoEPEs “develop pain management training and educational resources for medical, dental, nursing, and pharmacy students,” and “act[] as hubs for the development, evaluation, and distribution of pain management curriculum resources for medical, dental, nursing and pharmacy schools to enhance and improve how health care professionals are taught about pain and its treatment.” (*Id.*) The 12 CoEPEs are: the University of Washington, Seattle; the Johns Hopkins University, Baltimore; the University of Pennsylvania Perelman School of Medicine, Philadelphia; Southern Illinois University, Edwardsville; the University of Rochester, New York; the University of New Mexico, Albuquerque; the Harvard School of Dental Medicine, Boston; the University of Alabama at Birmingham; the Thomas Jefferson University School of Medicine, Philadelphia; the University of California, San Francisco; the University of Maryland, Baltimore; and the University of Pittsburgh.

The instant procurement will establish a “Coordination Center,” that will be operated by a contractor, to work in conjunction with NIH and the CoEPEs. (*Id.* § B.1.) Specifically, the contractor will “maintain and facilitate conversations and collaborations” between NIH and the CoEPEs through an interactive online communications portal and via other means. (*Id.*) The contractor will use content submitted by the CoEPEs to “create online interactive case-based teaching scenarios” that will be published on an NIH website and used in teaching students in various professional schools (*e.g.*, nursing, dental, medical and pharmacy schools) about how to diagnose and properly treat pain. (*Id.*) The contractor will “review content from the CoEPEs for each case, proofread and correct content, and program content into interactive cases,” and will “design, program, maintain, and update” portions of NIH website. (*Id.*)

The RFP divides the required services into seven task areas. (*Id.* § C.1.a.II.) Under Task 1, the contractor will prepare and submit monthly progress reports. Under Task 2, the contractor will “maintain, host and manage an interactive online communication portal” to be used by NIH, the contractor, and the CoEPEs. (*Id.*) Under Task 3, the contractor will “coordinate the process by which CoEPEs submit their materials” to NIH, and facilitate NIH's evaluation. (*Id.*) The contractor will “use the materials submitted by the CoEPEs” to create online interactive pain treatment scenarios with graphics and embedded videos. (*Id.*) The contractor will “proofread, edit, and program” the scenarios, and ““suggest ways to improve the cases, when applicable.”” (*Id.*) In addition, the contractor will “program, format and code” portions of the NIH website. (*Id.*) Under Tasks 4 and 5, the contractor will “plan and host teleconferences,” organize meetings and symposia, and prepare written summaries. (*Id.*) Under Task 6, the contractor will post videos through a special YouTube channel. Under Task 7, the contractor will, upon request from NIH, obtain additional content for case studies.

According to the RFP, NIH will evaluate proposals based on three factors: Technical, Cost, and Past Performance. (*Id.* § M.1.) The Technical factor consists of five subfactors: Understanding the Project; Technical Approach; Management Plan; Personnel; and Facilities. (*Id.* § M.4.) For the Personnel subfactor, the RFP indicates that “proposed personnel will be evaluated for ability to coordinate complex projects” and that “a demonstrated ability to create or facilitate the creation of online teaching modules will be evaluated, as well as their familiarity with the education of health care providers and with the field of pain treatment.” (*Id.*) For the Past Performance factor, NIH “will focus on the past performance of the offeror as it relates to all acquisition requirements, such as the offeror's record of performing according to specifications, including standards of good workmanship; the offeror's record of controlling and forecasting costs; the offeror's adherence to contract schedules, including the administrative aspects of performance; the offeror's reputation for reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the offeror's business-like concern for the interest of the customer.” (*Id.* § M.6.)

The RFP states that NIH plans to award a single cost-plus-fixed-fee contract. (*Id.* at § B.2.) The contract will have a base period of one year, and four one-year options. (*Id.*) Proposals are due April 15, 2014.

B. The Appeal

On March 10, 2014, Appellant filed its appeal of the NAICS code. Appellant contends that NAICS code 541712 is improper because the instant RFP does not call for research and development. In Appellant's view, the correct NAICS code is 541611, Administrative Management and General Management Consulting Services.

Appellant discusses the seven tasks described in the RFP, concludes that none of these tasks pertains to research and development. (Appeal at 8.) Conversely, with the exception of Task 3 — which contains some work properly viewed as information technology, such as developing a website — all of the tasks fit squarely within NAICS code 541611. Appellant emphasizes that the contractor will facilitate communications between NIH and the CoEPEs; manage the process by which CoEPEs submit information and materials; coordinate and facilitate NIH reviews; disseminate information; organize and attend meetings and teleconferences; prepare written summaries; and post videos. (*Id.* at 8-10.) Thus, Appellant reasons, the RFP primarily calls for the contractor to assist and advise NIH on administrative and managerial issues. “It is clear then that the tasks in the [RFP] closely correspond to the tasks the NAICS Manual characterizes as covered by NAICS code 541611.” (*Id.* at 10.)

Appellant observes that offerors will not be evaluated on their scientific or medical credentials, but rather on their “qualifications related to performing administrative and consulting functions in overseeing contract performance.” (*Id.*) In addition, Appellant asserts, NIH has previously procured all of the subject services under NAICS code 541611. (*Id.* at 5.) Appellant contends that these factors further demonstrate that this procurement should have been assigned NAICS code 541611, not NAICS code 541712.

C. CO's Response

On March 20, 2014, the CO responded to the appeal. The CO defends his choice of NAICS code 541712 for this RFP.

The CO notes that, according to OHA precedent, “the development of a new or improved product is the predicate of a research and development contract.” (Response at 1, quoting *NAICS Appeal of Evanhoe & Assocs., LLC*, SBA No. NAICS-5505, at 11 (2013).) In this case, the CO asserts, “the primary purpose of the subject contract is to find a contractor to produce a new product for [NIH].” (*Id.*) Specifically, “[t]he Contractor will use materials researched and submitted by the CoEPEs to develop the online case scenarios,” and also ““will develop a website” to provide access to this information. (*Id.* at 2.) The CO emphasizes that neither the case scenarios nor the website currently exist. “Therefore, the Contractor will be responsible for the R&D creation of the two predominant products in the contract.” (*Id.*)

The CO maintains that Appellant's arguments focus largely on Tasks 1, 2, 4, 5, and 6 of the RFP. The CO acknowledges that “several tasks enumerated in the [RFP] could fall under the 541611 NAICS code,” but contends that such work is ancillary to the primary purpose of the contract, “the development and creation [of] the case-based scenarios and the website to host them.” (*Id.* at 3.)

The CO also argues that Appellant is not harmed by the choice of NAICS code 541712, because Appellant is eligible to compete under the 500-employee size standard associated with this NAICS code. Conversely, changing to NAICS code 541611, which has a much smaller size standard than NAICS code 541712, potentially restricts the pool of competition, and therefore “sets an undesirable precedent.” (*Id.*)

D. NAICS Manual¹ Descriptions

The NAICS code designated by the CO, 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), covers:

establishments primarily engaged in conducting research and experimental development (except biotechnology research and experimental development) in the physical, engineering, and life sciences, such as agriculture, electronics, environmental, biology, botany, computers, chemistry, food, fisheries, forests, geology, health, mathematics, medicine, oceanography, pharmacy, physics, veterinary and other allied subjects.

NAICS Manual at 763. Further, NAICS industry group 5417, Scientific Research and Development Services, covers:

¹ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2012)*, available at <http://www.census.gov>.

establishments engaged in conducting original investigation undertaken on a systematic basis to gain new knowledge (research) and/or the application of research findings or other scientific knowledge for the creation of new or significantly improved products or processes (experimental development).

Id. at 761.

For NAICS code 541712, a footnote in the Size Standards table states that:

“Research and Development” means laboratory or other physical research and development. It does not include economic, educational, engineering, operations, systems, or other nonphysical research; or computer programming, data processing, commercial and/or medical laboratory testing.

13 C.F.R. § 121.201, n.11(a).

The NAICS code Appellant advocates, 541611, Administrative Management and General Management Consulting Services, covers:

establishments 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 756-57.

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 demonstrate that the CO's NAICS code designation is based on a clear error of fact or law. *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003); 13 C.F.R. § 134.314. SBA regulations do not require the CO to select 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. *Durodyne*, SBA No. NAICS-4536, at 4; 13 C.F.R. § 121.402(b).

B. Analysis

Having examined the RFP, the descriptions in the *NAICS Manual*, OHA's prior decisions, and the arguments of the parties, I must agree with Appellant that the instant procurement does not call for research and development. As a result, the CO clearly erred in assigning NAICS code 541712.

According to the RFP, the contractor will serve as a “Coordination Center,” facilitating interactions between the CoEPEs and NIH, and overseeing the manner in which information is conveyed to, and reviewed by, NIH. *See* Section II.A, *supra*. The RFP does not indicate that the contractor will conduct research into pain treatment, or that the contractor will participate directly in any research conducted by the CoEPEs and/or by NIH. Significantly, the RFP does not call for the contractor to perform any laboratory or experimental work. *Id.* Nor does the RFP require the contractor to have expertise in the treatment of pain, or to provide personnel with medical or scientific backgrounds. *Id.* Instead, the RFP's evaluation criteria emphasize much more general qualifications, such as the “ability to coordinate complex projects.” *Id.* Thus, the contractor appears to have little, if any, substantive role in any research. The mere fact that the contractor will provide assistance to a research organization is not sufficient to justify classifying the procurement as research and development. *E.g.*, *NAICS Appeal of Bevilacqua Research Corp.*, SBA No. NAICS-5243 (2011) (administrative support to Corps of Engineers research and development center was properly not classified as research and development).

The CO acknowledges that, of the seven tasks identified in the RFP, only Tasks 3 and 7 potentially involve research and development. *See* Section II.C, *supra*. The CO asserts, however, that these tasks do contain research and development because the contractor will create interactive scenarios to teach students how to diagnose and properly treat pain, and because the contractor will create a website to disseminate this information. *Id.*

I find the CO's argument unpersuasive. As noted in Section II.D above, SBA regulations for NAICS code 541712 restrict “research and development” to mean only “laboratory or other physical research and development,” and expressly exclude “computer programming” as well as “nonphysical research.” 13 C.F.R. § 121.201 n.11(a). In this case, the contractor will not participate directly in any laboratory or experimental work. The development of a new website is “computer programming” and therefore does not constitute research and development under 13 C.F.R. § 121.201 n.11(a). Similarly, although it is true that the contractor will be asked to create interactive scenarios, the RFP makes clear that the CoEPEs will develop the content of those scenarios, and the contractor will then “use the materials submitted by the CoEPEs” to produce interactive versions with graphics and embedded videos. *See* Section II.A, *supra*. Thus, in creating the scenarios, the contractor essentially will perform information technology functions, which are excluded from “research and development” under NAICS code 541712. Contrary to the CO's contentions, then, the development of interactive scenarios and the website are not research and development within the meaning of 13 C.F.R. § 121.201 n.11(a).

The CO also argues that Appellant is not harmed by the choice of NAICS code 541712, but this argument too is meritless. OHA has “consistently held that a concern which is small under the size standard challenged in a NAICS code appeal has standing to file an appeal

advocating a lower size standard, because it is adversely affected by having to compete with larger firms.” *NAICS Appeal of SAC Cleaners, Inc.*, SBA No. NAICS-5468, at 6 (2013); *NAICS Appeal of SVL Analytical, Inc.*, SBA No. NAICS-4721, at 5 (2005). In this case, although Appellant qualifies as a small business under both NAICS code 541712 and NAICS code 541611, Appellant asserts that use of NAICS code 541712 disadvantages Appellant because Appellant will be obliged to compete with firms substantially larger than itself. (Appeal at 3.) Accordingly, Appellant has standing to challenge the selection of NAICS code 541712. The CO also maintains that changing to a NAICS code with a smaller size standard would be undesirable because it may restrict the field of competition. OHA has explained, however, that “[a]rguments based on the level of competition afforded by particular size standards . . . are not part of the criteria for selecting the NAICS code.” *NAICS Appeal of Circle Solutions, Inc.*, SBA No. NAICS-5181, at 14 (2011). It is therefore not relevant to determine which NAICS code would maximize competition.

Because Appellant has demonstrated that the CO erred in assigning NAICS code 541712, I must consider which NAICS code best describes the principal purpose of the acquisition. 13 C.F.R. § 121.402(b). I agree with Appellant that NAICS code 541611 is most appropriate here. In prior cases, OHA has affirmed the use of NAICS code 541611 in situations where a contractor will “assist[] with the administration and management” of an important program. *NAICS Appeal of CHP International, Inc.*, SBA No. NAICS-5367, at 5 (2012); *NAICS Appeal of ALON, Inc.*, SBA No. NAICS-5148 (2010). The instant contractor will perform precisely such work, acting as the “Coordination Center,” assisting with administrative matters, and managing communications and interactions between NIH and the CoEPEs. It is worth noting that the CO himself concedes that “several tasks enumerated in the [RFP] could fall under the 541611 NAICS code.” (Response at 3.) Further, the CO does not dispute Appellant's assertion that NIH has previously used NAICS code 541611 for similar procurements.

IV. Conclusion

For the above reasons, the instant appeal is GRANTED. The appropriate NAICS code for this procurement is 541611, Administrative Management and General Management Consulting Services, with a size standard of \$14 million average annual receipts. Accordingly, because this decision is being issued before the close of the solicitation, the CO MUST amend the RFP to change the NAICS code designation from 541712 to 541611. 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