

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

NAICS APPEAL OF:

Palladian Partners, Inc.,

Appellant,

Solicitation No. N01DA-14-4423  
U.S. Department of Health and Human  
Services  
National Institutes of Health

SBA No. NAICS-5553

Decided: May 7, 2014

ORDER DISMISSING APPEAL<sup>1</sup>

I. Background

A. RFP

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 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 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

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<sup>1</sup> 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.

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 the 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. (*Id.*)

The RFP states that 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 Contracting Officer (CO) set aside the procurement entirely for small businesses. At the time the RFP was issued, the CO 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.

## B. Prior Proceedings

### 1. IVI Appeal

On March 10, 2014, Information Ventures, Inc. (IVI) appealed the NAICS designation to OHA. IVI argued that the CO clearly erred in selecting NAICS code 541712. According to IVI,

NAICS code 541611, Administrative Management and General Management Consulting Services, best described the work to be performed.

IVI argued that none of the seven task areas described in the RFP pertains to research and development. (IVI 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. IVI emphasized 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, IVI concluded, the RFP primarily calls for the contractor to assist and advise NIH on administrative and managerial issues. (*Id.* at 10.)

IVI observed 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, NIH has previously procured all of the subject services under NAICS code 541611. (*Id.* at 5.) These considerations, IVI contended, further demonstrated that this procurement should have been assigned NAICS code 541611, not NAICS code 541712.

## 2. Notice and Order and Amendment 1

On March 10, 2014, upon receiving IVI's appeal, OHA issued a Notice and Order, stating that “[a]ny response to this appeal must be filed with OHA and served upon all parties or their attorneys (if represented), and be **RECEIVED by OHA no later than March 25, 2014.**” (Notice and Order at 2, emphasis in the original.) The Notice and Order instructed the CO to “[a]mend the solicitation within three business days to notify potentially interested parties of the pendency of this appeal” and to “[a]ttach a copy of this Notice and Order to the amendment.” (*Id.* at 1.)

On March 11, 2014, the CO issued Amendment 1 notifying prospective offerors of IVI's NAICS appeal and attaching the Notice and Order. No potential offerors intervened in IVI's appeal.

## 3. CO's Response

On March 20, 2014, the CO responded to IVI's appeal, defending his choice of NAICS code 541712. The CO observed 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 asserted, “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 emphasized 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 acknowledged that “several tasks enumerated in the [RFP] could fall under the 541611 NAICS code,” but maintained that such work is secondary to the primary purpose of the contract, which in the CO's view, is “the development and creation [of] the case-based scenarios and the website to host them.” (*Id.* at 3.)

#### 4. OHA's Decision and Amendment 3

On April 2, 2014, OHA issued its decision in *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-5544 (2014). In the decision, OHA determined that the CO erred in selecting NAICS code 541712, and that NAICS code 541611, Administrative Management and General Management Consulting Services, was the appropriate code. *Information Ventures*, SBA No. NAICS-5544, at 6-7.

On April 4, 2014, the CO issued Amendment 3 to the RFP, changing the NAICS code from 541712 to 541611. On April 8, 2014, the CO issued Amendment 4 extending the proposal deadline.

#### C. The Instant Appeal

On April 14, 2014, Palladian Partners, Inc. (Appellant) filed the instant appeal with OHA. Appellant does not dispute OHA's conclusion that NAICS code 541712 is improper for this RFP. Rather, Appellant argues that OHA erred in assigning NAICS code 541611. In Appellant's view, the correct code is 519130, Internet Publishing and Broadcasting and Web Search Portals, with a corresponding size standard of 500 employees. Appellant asserts that the appeal is timely because it was filed within 10 days after the issuance of Amendment 3. (Appeal at 2.)

Appellant highlights that the RFP's purpose is “to create a CoEPE Coordination Center.” (*Id.* at 3.) This Coordination Center will create a website that disseminates CoEPE content and facilitates communication among the CoEPEs. (*Id.*) Appellant then emphasizes the portions of the RFP that require IT Security Certification and Accreditation, as well as delivery of source code and object code and an IT Security Plan and IT Risk Assessment. (*Id.* at 4.)

Appellant argues that NAICS code 541611 is inappropriate because it is used for “general consulting services in support of an agency and not more complicated efforts where the contractor will responsible for providing independent services.” (*Id.* at 7, citing *NAICS Appeal of Panacea Consulting, Inc.*, SBA No. NAICS-4582 (2003).) Here, Appellant contends, the RFP calls for more than just consulting services. In fact, its “central goal . . . is to publish CoEPE-generated content and to generate other supporting online materials.” (*Id.* at 8.) Thus, Appellant contends, the RFP seeks the “creation of new processes and resources, and a new web portal to publish content.” (*Id.* at 9.)

Further, NAICS code 519130 best describes the work to be performed because the RFP's seven tasks all relate to the creation of the Coordination Center website or to basic contract administration. Although Tasks 4 and 5 pertain to administrative functions—planning and hosting teleconferences, organizing meetings and symposia, and preparing written summaries—Appellant argues these tasks are minor parts of the overall contract. (*Id.* at 12.)

Next, Appellant argues that procuring activities have selected NAICS code 519130 for similar acquisitions. (*Id.* at 12-13.) Appellant also cites a case in which OHA affirmed an agency's choice of NAICS code 519130. The procurement in that case was for the operation of a National Prevention Information Network website, and Appellant argues that the work to be performed here is “a mirror image” of that procurement. (*Id.* at 14.)

On April 15, 2014, upon receiving Appellant's appeal, OHA issued another Notice and Order establishing a close of record of April 30, 2014. On April 16, 2014, the CO issued Amendment 5 notifying prospective offerors of the instant appeal and attaching the Notice and Order. The CO subsequently issued Amendments 6 and 7, further extending the proposal deadline until May 16, 2014.<sup>2</sup>

#### D. Rho's Response

On April 28, 2014, Rho Federal Systems Division, Inc. (Rho) intervened and responded to the instant appeal. At the outset, Rho acknowledges that it could have responded to the appeal in *Information Ventures* and “take[s] responsibility for [its] own lack of knowledge and inaction” in that appeal. (Rho Response at 1.)

As for the proper NAICS code, Rho maintains that the CO's original designation, NAICS code 541712, best reflects the “intent” of the RFP. (*Id.*) To this end, Rho draws attention to five requirements: (1) the naming of a Principal Investigator and other investigators; (2) proofreading and editing the teaching cases and advising and suggesting ways to improve the cases; (3) facilitating the evaluation of the impact of the training materials; (4) helping to determine the scope of the use of teaching materials; and (5) attending professional meetings and presenting work. (*Id.*)

Rho opines that a successful offeror should possess experience in coordinating large research-related networks, a Principal Investigator who understands pain from a clinical perspective, and support staff with health care experience. Thus, Rho asserts, the Coordination

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<sup>2</sup> I note for the record that Amendments 4, 5, 6, and 7 made no substantive changes to the RFP, and therefore provide no independent grounds for Appellant to pursue a NAICS code appeal. *See* 13 C.F.R. § 134.304(b) (explaining that a NAICS code appeal may be filed within 10 calendar days of an amendment “affecting the NAICS code or size standard”). As a result, the issue presented here is whether Amendment 3—which changed the NAICS code and size standard pursuant to OHA's decision in *Information Ventures*—provides a valid basis for Appellant to bring a new NAICS code appeal.

Center contractor must “go beyond the simple administrative and management tasks that are assumed under the 541611 code.” (*Id.* at 2.)

#### E. Appellant's Motion to Supplement

On April 30, 2014, Appellant moved for leave to supplement its appeal on two grounds. First, Appellant seeks to address the jurisdictional issues raised in Rho's response. Second, Appellant seeks to introduce new evidence.

Appellant argues it has the right to bring this appeal because it is challenging “not only the selection of the NAICS code, but OHA's failure to follow its own procedures in the initial decision.” (Motion at 1.) On this point, Appellant charges that OHA considered only the codes advocated by the CO and by IVI, rather than comprehensively exploring other possible codes that might best describe the work to be performed. (*Id.* at 1-2.) Appellant further suggests that, if OHA finds that Appellant cannot pursue this appeal, OHA should instead reopen the case *sua sponte*. (*Id.* at 2.)

Appellant also seeks to introduce what it describes as new evidence. Specifically, Appellant proffers portions of the CO's response to IVI's appeal.<sup>3</sup> (Motion at 3-4.)

#### II. Discussion

Under the doctrine of *res judicata*, a final judgment on the merits bars further claims by the parties or their privies based on the same cause of action. *See generally Montana v. United States*, 440 U.S. 147, 153 (1979); *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003); Restatement (Second) Judgments § 17 (1982). The related doctrine of issue preclusion, also known as collateral estoppel, prevents re-litigation of the same issues that were decided in a prior case involving the same parties. *Montana*, 440 U.S. at 153; Restatement (Second) Judgments § 27 (1982). Issue preclusion is appropriate when four conditions are met: “(1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) plaintiff had a full and fair opportunity to litigate the issue in the first action.” *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994).

I find that, under the doctrine of issue preclusion, Appellant and Rho are barred from re-litigating issues already decided in *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-5544 (2014). The issue in that case was identical to the one presented here: *i.e.*, which NAICS code is appropriate for RFP No. N01DA-14-4423. This issue was the only matter under

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<sup>3</sup> Because I am dismissing the appeal under the doctrine of issue preclusion and this “evidence” is not probative of whether that doctrine applies, I need not consider it. In any event, the proffered statements do not pertain to disputed factual questions, but instead are mere argument that OHA previously considered, and rejected, in *Information Ventures*. The CO's remarks are not new, nor do they constitute evidence.

review in *Information Ventures*, and OHA decided the question on the merits. Furthermore, through Amendment 1, the CO expressly notified Appellant, Rho, and other prospective offerors that a NAICS appeal was pending at OHA, and that the record would close on March 25, 2014. *See* Section I.B.2, *supra*. OHA's regulations permit interested parties to intervene “at any time until the close of record.” 13 C.F.R. § 134.210(b). Thus, as Rho acknowledges in its response to this appeal, the parties had a full and fair opportunity to intervene in *Information Ventures*, yet failed to do so. I find, therefore, that if Appellant and Rho wished to litigate the issue of what NAICS code should apply to this RFP, they could, and should, have intervened in *Information Ventures*. Because the issue OHA decided in that case is dispositive here, the instant appeal is barred. Indeed, to hold otherwise would potentially create endless cycles of NAICS code litigation, whereby any concern disappointed by an OHA decision could file a new NAICS code appeal, and thereby re-litigate the matter.<sup>4</sup>

Appellant's suggestion that OHA's decision in *Information Ventures* should have specifically addressed every other possible NAICS code is unpersuasive. While it is true that OHA has, in some instances, selected a NAICS code other than those advanced by the parties, OHA typically has done so only after considering the codes actually argued by the litigants. *E.g.*, *NAICS Appeal of CHP International, Inc.*, SBA No. NAICS-5367, at 5-6 (2012) (finding two recommended codes “inapplicable” and selecting a third NAICS code). Thus, in situations such as *Information Ventures*, where OHA agrees that a code advocated by a party is most appropriate, there is no logical reason to proceed with a discussion of other, less appropriate codes. Nor would it be practicable to specifically comment in the text of a decision on every NAICS code theoretically applicable to a procurement.

Lastly, to the extent Appellant or Rho is requesting reconsideration under 13 C.F.R. § 134.227(c), or is requesting that OHA reconsider the matter on its own initiative, the regulations specifically preclude reconsideration of a NAICS code decision. 13 C.F.R. § 134.316(f) (“The decision in a NAICS code appeal may not be reconsidered.”)

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<sup>4</sup> In *Advanced Sys. Tech., Inc. v. United States*, 69 Fed. Cl. 474 (2006), the U.S. Court of Federal Claims found that OHA improperly dismissed a NAICS code appeal, without allowing the plaintiff to express its views on the merits of the code, because the plaintiff received no notice that a competing offeror had filed a NAICS code appeal, and consequently had no opportunity to intervene in the appeal proceedings before OHA. *Advanced Sys. Tech.*, 69 Fed. Cl. at 486 (“How can an entity file a motion to intervene if it does not receive notice of the appeal?”). The instant case, though, is readily distinguishable, since prospective offerors were notified of IVI's appeal through Amendment 1 to the RFP, and chose not to participate.

III. Conclusion

For the above reasons, the instant appeal is DISMISSED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge