

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

NAICS APPEAL OF:

ACE Consulting Services, LLC,

Appellant,

Solicitation No. HSTS05-14-R-OOPM002
Department of Homeland Security
Transportation Security Administration
Arlington, VA

SBA No. NAICS-5574

Decided: July 7, 2014

APPEARANCES

Kim Holland, CEO, ACE Consulting Services, LLC, Alexandria, Virginia, for Appellant

Michelle F. Kantor, Esq., McDonald Hopkins LLC, Chicago, Illinois, for Kairos
Consulting Worldwide LLC

Guy Galloway, Contracting Officer, Department of Homeland Security, Transportation
Security Administration, Arlington, Virginia

AMENDED DECISION¹

I. Jurisdiction

This appeal is decided 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 its appeal within ten days after issuance of the solicitation, so the appeal is timely. 13 C.F.R. § 134.304(b).

II. Issue

Whether the Contracting Officer's designation of North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, is based on a clear error of fact or law.

¹ I am issuing this amended decision to correct a typographical error. The decision initially misstated the size standard for NAICS code 611430 as \$7 million instead of \$10 million.

III. Background

A. The Solicitation

On June 10, 2014, the Department of Homeland Security (DHS), Transportation Security Administration (TSA), Office of Security Operations (OSO), in Arlington, Virginia, issued Solicitation No. HSTS05-14-R-OOPM002 (RFP) for Lean Six Sigma (LSS) training services. The RFP contemplates awarding a single one-year Indefinite Delivery Indefinite Quantity (IDIQ) contract and task order with four one-year option periods. The Contracting Officer (CO) set the procurement aside for participants in the Small Business Administration (SBA) 8(a) Business Development (BD) program, and designated NAICS code 541611, Administrative Management and General Management Consulting Services, with a corresponding \$14 million annual receipts size standard.

TSA is seeking “to acquire LSS training services needed to the help [its] LSS Program Office meet the demands of the growing TSA LSS Program.” RFP § C.1. To this end, TSA is seeking a contractor to provide TSA with “Phase I LSS classroom training” and “Phase 2 field training to LSS students as needed.” *Id.* The contractor would also “mentor LSS students to the completion of their LSS certification requirements” and provide “direct support to the growing TSA LSS program via student life cycle management, student enrollment, student certification, and project monitoring and trafficking analysis.” *Id.* In addition, the contractor would “provide consulting for TSA as needed.” *Id.* These consulting services include “LSS consulting support for the development of a Strategic Planning process assuring OSO is aligned with Agency and Departmental strategic goals” and “[c]onsulting support for developing, tracking, and reporting LSS program and project measures.” *Id.*

The RFP contains a table for pricing structure in which prices are broken down by Contract Line Item Numbers (CLINs). These CLINs are 0001-00007, 0008A and 0008B, and their respective descriptions are as follows: Contract Support, Program Support, Consulting Support, Field Training Support, [Green Belt] Course, [Black Belt] Course, [Executive Project Sponsor] Course, [Other Direct Costs (ODC)] Travel, and ODC Supplies. *Id.* § B.2.

TSA would evaluate proposals based on four factors—Personnel Qualifications, Technical and Management Approach, Past Performance, and Price—and make an award based on the best value to the Government. Of the non-price factors, Personnel Qualifications is the most important. Technical and Management Approach is the second most important, and Past Performance is the least important. *Id.* § M.3. In considering Personnel Qualifications, TSA “will give greater consideration to the staff with the most experience and expertise in applying Lean Six Sigma. . . .” *Id.* § M.2.

B. The Appeal

On June 20, 2014, ACE Consulting Services, LLC (Appellant) appealed the CO's designation of NAICS code 541611 to the SBA Office of Hearings and Appeals (OHA). Appellant contends NAICS code 541611 is not applicable to this procurement. Instead,

Appellant argues, the proper NAICS code is 611430, Professional and Management Development Training, with a corresponding \$10 million annual receipts size standard.

Appellant asserts NAICS code 541611 is erroneous because TSA has designated NAICS code 611430 on similar procurements for LSS training services and consulting. Moreover, because the procurement is set aside for 8(a) BD participants, an increased size standard of \$14 million puts smaller 8(a) firms who also meet the \$10 million size standard at a distinct disadvantage.

C. Intervenor's Response

On June 20, 2014, Kairos Consulting Worldwide, LLC (Kairos) intervened, supporting Appellant's position. Kairos asserts the RFP does not include in its scope of services any of the illustrative examples of consulting services enumerated in the NAICS MANUAL,² such as administrative management consulting services, site selection consulting, records management consulting, business start-up consulting, financial consulting (except investment advice), or medical office management consulting services. Kairos goes on to assert the RFP covers most, if not all, of the NAICS MANUAL's corresponding index entries for NAICS code 611430, such as management development training, professional development training, and quality assurance training. Kairos points out the RFP's many references to training services, such as the requirements for the contractor to provide Phase 1 LSS classroom training and Phase 2 field training. Kairos argues the RFP requires the contractor to provide an array of courses and seminars for management and professional development, and thus this RFP should be designated under a training NAICS code.

D. C O's Response

On July 2, 2014, the CO responded to the appeal, defending his use of NAICS code 541611. The CO explains that the LSS program has evolved over time, so although it was appropriate to designate NAICS Code 611430 to earlier LSS procurements, that is no longer the case. He went on to explain that, for the instant procurement, “[t]raining requirements are not planned to be a significant portion of the task orders placed under the IDIQ for the first year (no more than 10% of the work effort will be for training.)”

The CO explained that he assumed SBA accepted NAICS code 541611 because he did not receive a response to the DHS Form 700-22, which he sent to SBA on January 2, 2014 and again on January 17, 2014. The form requested authorization from SBA to conduct an 8(a) competitive acquisition.

Further, the CO represents that TSA has received 31 responses from certified 8(a) companies under NAICS code 541611, many of which are also eligible under NAICS code 611430.

² Executive Office of the President, Office of Management and Budget, North American Industry Classification System-United States (2012), available at <http://www.census.gov> (NAICS MANUAL).

IV. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the NAICS code designation assigned to the solicitation is based on 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). OHA's review is deferential, and OHA will not modify the CO's designated code unless OHA has a definite and firm conviction that a mistake has been committed. *NAICS Appeal of Energx, LLC*, SBA No. NAICS-4952 (2008). The correct NAICS code is that which best describes the principal purpose of the services being procured, 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); *Durodyne*, SBA No. NAICS-4536, at 4.

B. NAICS Code Descriptions

The NAICS code selected by the CO, 541611, Administrative Management and General Management Consulting Services, covers:

[E]stablishments 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.

Illustrative examples of work covered by this code include administrative management consulting services, site selection consulting services, financial management (except investment advice) services, strategic planning consulting services, and general management consulting services. NAICS MANUAL, at 757.

The NAICS code Appellant and Kairos propose, 611430, Professional and Management Development Training, covers:

[E]stablishments primarily engaged in offering an array of short duration courses and seminars for management and professional development. Training for career development may be provided directly to individuals or through employers' training programs; and courses may be customized or modified to meet the special needs of customers. Instruction may be provided in diverse settings, such as the establishment's or client's training facilities, educational institutions, the

workplace, or the home, and through diverse means, such as correspondence, television, the Internet, or other electronic and distance- learning methods. The training provided by these establishments may include the use of simulators and simulation methods.

NAICS MANUAL, at 821.

The NAICS MANUAL does not offer illustrative examples for NAICS code 611430. However, it cross references other NAICS codes, and specifically provides that establishments primarily engaged in “[a]dvising clients on human resource and training issues without providing the training [] are classified [under NAICS Code] 541612, Human Resources Consulting Services. *Id.*

C. Analysis

Most of Appellant's argument refers to other procurements that Appellant alleges are similar to this one. This line of reasoning is unpersuasive, however, because the decision in a NAICS code appeal must be based upon the requirements in the solicitation at issue, not other procurements. The regulation used to require that previous government procurement classification for the same or similar services be considered in making a NAICS code determination (13 C.F.R. § 121.402(b)), but the regulation no longer includes that requirement.⁷⁶ Fed. Reg. 5680, 5683 (February 2, 2011). Appellant's citations to other allegedly similar procurements therefore carry no weight. *NAICS Appeal of Dellew Corp.*, SBA No. NAICS- 5358, at 6 (2012).

Nevertheless, having considered the descriptions in the NAICS MANUAL and the work contemplated by the RFP, I find the primary purpose of the procurement is to acquire LSS training and mentoring services. Several factors lead to this conclusion. First, the opening paragraph of the Performance Work Statement states that its purpose is to “acquire LSS training services needed to help the LSS Program Office meet the demands of the growing TSA LSS Program.” Section III.A., *supra*. Second, four of the nine CLINs call for training services, while only one calls for consulting services. *Id.* Third, the evaluation criteria establish that the expertise of the contractor's personnel in applying LSS is of the utmost importance to TSA. *Id.*

The CO's statement that training services will be a very small part of the contract is unpersuasive for two reasons. First, it conflicts with the factors enumerated in the paragraph above. Second, it is the solicitation itself, not post-hoc statements from the CO, that determines the primary purpose of the procurement. *NAICS Appeal of King Aerospace, Inc.*, SBA No. NAICS-5159, at 6 (2010) (“The actual text of the solicitation must govern my decision, not ... speculative predications, however well informed, of what work will be required.”) Thus, because the acquisition of training services—and not consulting services—is the procurement's primary purpose, I agree with Appellant that it was clear error to designate NAICS code 541611.

As the NAICS MANUAL demonstrates, NAICS code 541611 pertains to consulting services such as giving advice on operations and management issues. The illustrative examples for NAICS code 541611 confirm that this code covers various consulting services and does not

contemplate training services are part of this NAICS code. Indeed, the description and examples in the NAICS MANUAL make no mention of conducting management training.

Accordingly, I find that the most appropriate NAICS code for this procurement is 611430, Professional and Management Development Training, with a corresponding \$10 million annual receipts size standard.

V. Conclusion

For the above reasons, I GRANT the instant appeal, REVERSE the CO's NAICS code designation, and designate NAICS code 611430, Professional and Management Development Training, with a corresponding \$10 million annual receipts size standard, as the appropriate NAICS code for this procurement.

Accordingly, because this decision is being issued before the close of the solicitation, the CO MUST amend the solicitation to change the NAICS code designation from 541611 to 611430. FAR § 19.303(c)(5); 13 C.F.R. § 134.318(b); *Matter of Eagle Home Med. Corp.*, Comp. Gen. B-402387, March 29, 2010, *available at* <http://www.gao.gov/decisions/bidpro/402387.pdf>.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge