

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

NAICS APPEAL OF:

eScience & Technology Solutions, Inc.,

Appellant,

Solicitation No. W91249-14-R-0010

U.S. Department of the Army

SBA No. NAICS-5586

Decided: August 26, 2014

APPEARANCES

Antonio R. Franco, Esq., Kathryn V. Flood, Esq., Peter B. Ford, Esq., PilieroMazza PLLC, Washington, D.C., for eScience & Technology Solutions, Inc.

R. Jonathan Charleston, Esq., Jose A. Coker, Esq., The Charleston Group, Fayetteville, North Carolina, for RLM Communications, Inc.

Justin A. Speering, Contracting Officer, U.S. Department of the Army, Fort Gordon, Georgia.

DECISION¹

I. Introduction and Jurisdiction

On May 29, 2014, the U.S. Department of the Army, Mission and Installation Contracting Command (Army) at Fort Gordon, Georgia, issued Request for Proposals (RFP) No. W91249-14-R-0010 for “Information Assurance (IA) Computer (Cyber) Network Defense Resident and Mobile Training and Support.” The procurement is set aside entirely for 8(a) Business Development (BD) participants. The Contracting Officer (CO) initially assigned North

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to request redactions to the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

American Industry Classification System (NAICS) code 611430, Professional and Management Development Training, with a corresponding size standard of \$10 million average annual receipts. On May 30, 2014, the CO amended the RFP, changing the NAICS code to 541519, Other Computer Related Services, with a size standard of \$25.5 million average annual receipts.

On June 6, 2014, eScience & Technology Solutions, Inc. (Appellant) filed the instant appeal. Appellant asserts that the NAICS code originally assigned to the procurement, 611430, is correct. 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 this appeal within ten calendar days after issuance of the RFP, and within ten days after the subsequent change of the NAICS code and size standard, 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 states that the Army plans to award a firm-fixed-price contract to the offeror with the lowest-priced technically-acceptable proposal. The contract will have a base period of one year, and one one-year option. Proposals originally were due on June 18, 2014, but the CO indefinitely extended the deadline for receipt of proposals after the NAICS code appeal was filed. The RFP is structured as a procurement of commercial items under FAR part 12.

The RFP's Performance Work Statement (PWS) states that the Army "requires contractor support for Information Assurance (IA) and Network Defense (ND) courseware development and instruction for the Cyber-Electro-Magnetic Activities (CEMA) Division at the Cyber Leader College (CLC)" located at Fort Gordon, Georgia. (PWS at § 1.0.) The objective of the procurement "is to provide high-quality management and instructors for curriculum development and instruction of training courses." (*Id.* at § 2.1.) The contractor will "maintain current curriculum and develop new curriculum," and must have the "knowledge and expertise to instruct, educate, and train various tools, systems, and concepts to defend, monitor, detect, analyze, audit, and mitigate threats to DoD and US Army networks and traffic." (*Id.*) The contractor will be expected to "conduct training courses for the Army's IA workforce" at eight sites in the continental United States. (*Id.*) Training also will be conducted via Mobile Training Teams (MTT). (*Id.*) The PWS states that the contractor "shall provide instruction and support services in a classroom, simulated and/or MTT environment" and will "provide and maintain state-of-the-art subject matter experts (SMEs), computer network defense - service provider instructors, and a trained workforce capable of providing training support services in IA, ND, and other IT security." (*Id.* §§ 2.2 and 2.3.) In addition, "[c]ontractor support for IA database and administration is also required." (*Id.* § 2.1.)

The PWS stipulates that the contractor:

shall provide technical analysis and administration; develop course material and syllabus; [provide] software package/images used to perform labs or practical exams; conduct classroom and lab instruction, and maintenance; develop and grade homework assignments, tests, and labs; provide blended training solutions, labs, assessment or self study products; and provid[e] all subject texts and textbooks for the requisite course; develop and employ advanced distributed learning; [and] coordinat[e] off site training and [video teleconference] lecturers for the courses. . . .

(*Id.* at § 2.3.)

With regard to the workforce necessary to perform the contract, the PWS states:

The government anticipates the requirements within this PWS will require ten (10) IA Instructor/Writers, twelve (12) Senior IA Instructor/Writers, four (4) Senior IA Mobile Instructor/Writers, one (1) Database/Web Administrator, one (1) Coordinator, one (1) Mid-Level Network Engineer and one (1) Security Assistant.

(*Id.* at § 5.8.) According to the PWS, the IA Instructor/Writers, Senior IA Instructor/Writers, and Senior IA Mobile Instructor/Writers will “[p]erform classroom instruction and maintain instructor certification”; install, operate, and maintain classroom equipment; “[s]tand, bend and stoop for long periods of time, while delivering and assisting students with training materials”; administer and grade tests and exams; revise, update, and develop courseware and materials; and collect, maintain, and analyze student feedback. (*Id.* at §§ 5.1 - 5.3.) To be considered qualified, IA Instructor/Writers must “[p]ossess advanced presentation speaking skills (e.g. tailoring content and delivery for different audiences, presenting confidently to large or small groups, and using more creative approaches to presenting).” (*Id.* at § 6.1(g).)

The RFP contains 15 Contract Line Item Numbers (CLINs) for each year of contract performance. (RFP at 5-11.) CLINs 0001 to 0011 cover the various labor categories and services discussed in the PWS, specifically: IA Instructor/Writers (CLIN 0001); Senior IA Instructor/Writers (CLIN 0002); Database Engineer (CLIN 0003); Program Manager (CLIN 0004); Senior IA Mobile Instructor/Writers (CLIN 0005); Coordinator (CLIN 0006); Mid-Level Network Engineer (CLIN 0007); Security Assistant (CLIN 0008); Master Courseware Developer Service (CLIN 0009); Helpdesk Support (CLIN 0010); and Visiting Subject Matter Expert (CLIN 0011). (*Id.*) The remaining four CLINs cover Travel (CLIN 0012); Textbooks (CLIN 0013); Program Certifications/Vouchers (CLIN 0014); and Contract Manpower Reporting (CLIN 0015). (*Id.*)

B. The Appeal

On June 6, 2014, Appellant filed its appeal of the NAICS code. Appellant insists that NAICS code 541519 is improper and that the correct NAICS code is 611430. Although

Appellant qualifies as a small business under either code, Appellant asserts that it would be placed at a “great competitive disadvantage” if it were required to compete with larger firms under NAICS code 541519. (Appeal at 2.)

Appellant quotes extensively from the PWS and concludes that the principal purpose of the procurement is education services, specifically “the training and course instruction of Army personnel on IA and ND.” (*Id.* at 7.) Conversely, Appellant argues, “[a]ny ‘computer related services’ to be performed are merely ancillary to the educational services that are to be provided.” (*Id.* at 2.) Appellant maintains that, among the various NAICS codes in the education sector, NAICS code 611430 is the most appropriate because the RFP calls for professional and management development training. (*Id.* at 13.) Appellant notes that the instruction here will enable students to fulfill training and certification requirements imposed by the Army and by DoD. (*Id.* at 14.)

Appellant emphasizes that a solicitation ordinarily is classified under the NAICS code which represents the largest percentage of contract value. (*Id.* at 6.) In this case, Appellant asserts, CLINs 0001, 0002, 0005, and 0011 relate purely to educational tasks and, according to Appellant's estimates, constitute more than 60% of contract value. (*Id.* at 9-10.) Appellant allows that CLINs 0008 and 0010 are not educational in nature and “arguably do encompass computer-related services”; however, these tasks together are less than 4% of contract value. Accordingly, education services are not only the focus of the PWS, but also “dominate the anticipated value of the work to be performed.” (*Id.* at 15.)

Turning to the workforce requirements of the contract, Appellant observes that IA Instructor/Writers, Senior IA Instructor/Writers, and Senior IA Mobile Instructor/Writers represent more than 75% of required contract personnel, as stated in § 5.8 of the PWS. (*Id.* at 11.) Further, the RFP contemplates that these personnel will have presentation skills and backgrounds in IA course instruction, but does not require expertise in providing computer-related services. Thus, Appellant reasons, the RFP's personnel requirements bolster the conclusion that the procurement calls primarily for training and instruction rather than computer services. (*Id.*)

Appellant also argues that, since 2007, the Army has procured IA and ND training and support services on seven occasions, five of which were solicited under NAICS code 611430. (*Id.* at 12.) In Appellant's view, “[t]he fact that the Army has a history of procuring the services required by the [RFP] under training/instruction classification codes further supports a determination that the principal purpose of the [RFP] is training and course instruction, not computer-related services.” (*Id.*)

C. CO's Response

On June 24, 2014, the CO responded to the appeal. The CO states that the instant RFP is a “merger” of two prior acquisitions: (1) an IA Training Support contract which “consisted primarily of instructors” and used NAICS code 611430; and (2) an IA Management Technical Training contract which “used NAICS [code] 541519 and included a network engineer and helpdesk type support.” (CO's Response at 2.) Thus, “[t]he current combined effort consists of

personnel who perform database, web, and server administration, network engineering, and helpdesk support in addition to instructing.” (*Id.*) The CO notes that instructors are required to maintain laboratories as well as the software, servers, and/or systems within those laboratories. (*Id.*) Further, personnel performing the contract will possess high levels of computer-related expertise and training. (*Id.* at 3.) The CO states that NAICS code 541519 was selected for this RFP “because the duties extended well beyond ‘Professional and Management Development Training’ (NAICS [code] 611430) and extended into ‘Other Computer Related Services’ (NAICS [code] 541519).” (*Id.* at 2-3.)

The CO explains that, due to an administrative error, the RFP was inadvertently released under NAICS code 611430. (*Id.* at 1.) An amendment was issued shortly thereafter to correct this mistake. (*Id.*)

The CO also notes that, on March 18, 2014, SBA's Georgia District Office accepted the instant procurement for competition in the 8(a) BD program. The District Office did not object to the CO's choice of NAICS code 541519, and further directed that the code “should not be changed without prior coordination” with that office. (*Id.* at 2.)

D. RLM's Response

On July 10, 2014, RLM Communications, Inc. (RLM) responded to the appeal. RLM supports the CO's selection of NAICS code 541519 for this RFP.

RLM contends that NAICS code 541519 is proper because the RFP requires “[n]ot merely educational services” but also “computer related services including database, web and server administration, network engineering, and helpdesk support.” (RLM Response at 5.) Appellant itself admits that NAICS code 541519 is suitable for some of the activities described in the RFP. (*Id.*) Further, the subject matter of the instruction pertains to computers, such as the attack and defense of networks, information systems security, and intrusion detection. (*Id.*) In RLM's view, “[t]he aforementioned clearly demonstrates the [RFP's] primary purpose to acquire professional, scientific and technical services.” (*Id.*)

RLM asserts that Appellant failed to prove that the CO's chosen code is clearly erroneous. (*Id.* at 5-6.) Nor has Appellant shown that it is harmed by the selection of NAICS code 541519, as Appellant acknowledges that it is eligible to compete under either NAICS code 541519 or NAICS code 611430. (*Id.* at 6-7.) RLM alleges that the instant appeal is a “bad faith effort” to restrict competition and to exclude RLM from participation. (*Id.* at 7.)

E. OHA's Request for Clarification

On July 22, 2014, OHA reopened the record and requested additional information from the CO. Specifically, OHA asked the CO to clarify whether instruction represents a majority of the planned effort by dollar value or by hours, and the expected division of work between instruction and the other, non-educational activities referenced in the CO's response. In addition, OHA inquired whether the contractor will provide additional staff beyond the personnel

identified in § 5.8 of the PWS, and whether the various IA Instructor/Writer personnel would be devoted primarily to instruction.

F. CO's Supplemental Response

On August 1, 2014, the CO responded to OHA's questions. The CO reported that, based on the Independent Government Cost Estimate and other information, the expected division of work is as follows:

Instruction hours total:	49,920
Instructor hours used for instructing:	29,952 (60%)
Instructor hours used for researching and developing courses:	19,968 (40%)
Non-Instruction hours total: (9,600 + 19,968)	29,568
Total hours for instruction and non-instruction: (29,952 + 19,968 + 9,600)	59,520
Total percentage of hours instructing	(50%) (.503)
Total percentage of hours for other than instructing	(50%) (.496)

(CO's Supp. Response at 1.) With regard to OHA's questions about workforce requirements, the CO stated that § 5.8 of the PWS is “a workload estimate only” and that the contractor may be required to provide additional staff - specifically, a Master Courseware Developer, Helpdesk Support and Visitor Subject Matter Experts - “as needed.” (*Id.* at 2.) The CO asserted that “[t]he Instructor/Writers (PWS 5.8) spend an average of 60% of their time instructing and 40% of their time doing research and course development.” (*Id.*)

G. Appellant's Reply

On August 18, 2014, Appellant replied to the CO's Supplemental Response. Appellant contends that the CO's own data confirms that NAICS code 611430 is correct for this RFP.

Appellant argues that the CO concedes that instruction “represents a majority (50.3%) of the work called for under the [RFP],” whereas non-instruction is only 49.6%. (Appellant's Reply at 1.) Moreover, the CO's breakdown is misleading because the estimated 29,568 non-instructional hours includes 19,968 hours that the CO described as “Instructor hours used for researching and developing courses.” (*Id.* at 1-2.) Such activities should be considered educational in nature. As a result, “[b]y correcting the [CO's] miscalculation, the expected division of work actually equates to 49,920 instruction hours and only 9,600 non-instruction hours,” so that education services comprise the “overwhelming majority (84%) of the effort.” (*Id.* at 2.)

Appellant disputes the notion that “Instructor hours used for researching and developing courses” are not educational. Appellant insists that “it is clear that such services are educational” such that “the Instructor/Writers will be spending 100% of their time performing work best categorized under an educational services NAICS code.” (*Id.* at 3.) Further, even if researching and developing courses were not educational services, the CO offers no justification for classifying such work as “Other Computer Related Services” under NAICS code 541519. (*Id.*)

H. RLM's Reply

On August 18, 2014, RLM replied to the CO's Supplemental Response. RLM maintains that “[t]he [CO] cannot ascertain the relative values with any degree of precision,” and reiterates its view that NAICS code 541519 is correct for the RFP. (RLM Reply at 1.)

I. NAICS Manual² Descriptions

The NAICS code designated by the CO, 541519, Other Computer Related Services, covers:

establishments primarily engaged in providing computer related services (except custom programming, systems integration design, and facilities management services). Establishments providing computer disaster recovery services or software installation services are included in this industry.

NAICS Manual at 754-55. Index entries which refer to this NAICS code are computer disaster recovery services and software installation services, computer.

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

establishments 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. Index entries which refer to this NAICS code are: management development training; professional development training; and quality assurance training.

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

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>.

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. 13 C.F.R. § 121.402(b).

B. Analysis

Having reviewed the record and the arguments of the parties, I must agree with Appellant that the CO erred in selecting NAICS code 541519 for this RFP. As Appellant correctly argues, the text of the RFP strongly suggests that education services - not computer services - are the principal purpose of the contract. The RFP contains lengthy discussion of instructional activities, and indicates that the objective of the procurement “is to provide high-quality management and instructors for curriculum development and instruction of training courses.” See Section II.A, *supra*. According to the PWS, the three “IA Instructor/Writer” labor categories together comprise 26 out of the total expected workforce of 30 employees. *Id.* In addition, in response to OHA's request for clarification, the CO acknowledged that educational services constitute a majority (50.3%) of the anticipated hours. Section II.F, *supra*. By regulation, a procurement ordinarily is classified under the NAICS code which constitutes the greatest percentage of contract value. FAR 19.102(d) and 13 C.F.R. § 121.402(b). Thus, based on the RFP and the data provided by the CO, it appears that an educational services NAICS code is appropriate for this RFP, because such services are the primary purpose of the procurement and represent a majority of the effort.

Appellant also persuasively argues that the RFP may, in fact, be more heavily skewed towards education services than the CO's metrics would indicate. Based on the data provided in the CO's supplemental response, the CO apparently distinguished between the delivery of instruction and the development of curriculum, and considered the latter tasks “non-instructional.” See Section II.F, *supra*. This distinction appears flawed, however, as time spent researching and developing curriculum logically constitutes education services. Indeed, the *NAICS Manual* description of NAICS code 611430 contemplates that curriculum development may occur as part of the educational services, stating that “courses may be customized or modified to meet the special needs of customers.” Similarly, the education sector of the *NAICS Manual* includes educational institutions such as colleges, universities, and training centers, which plainly develop curriculum in conjunction with providing instruction in a variety of subjects. OHA likewise has found that NAICS code 611430 is appropriate for educational services, without differentiating between the delivery of instruction and the development of curriculum. *NAICS Appeal of ACE Consulting Services, LLC*, SBA No. NAICS-5574 (2014). In addition, as Appellant points out, NAICS code 541519 makes no reference to curriculum development, and the illustrative examples for this code provided in the *NAICS Manual* (computer disaster recovery services and software installation services) bear no resemblance at all to curriculum development. I therefore conclude that curriculum development constitutes educational services within the meaning of the *NAICS Manual*. When curriculum development is added to the other instructional tasks, rather than to the non-instructional tasks, educational services constitute an extremely large percentage of the effort. See Section II.G, *supra*.

RLM argues that Appellant is not harmed by the choice of NAICS code 541519, but this argument has no merit. 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 541519 and NAICS code 611430, Appellant asserts that use of NAICS code 541519 disadvantages Appellant because Appellant will be obliged to compete with firms substantially larger than itself. *See* Section II.B, *supra*. Accordingly, Appellant has standing to challenge the selection of NAICS code 541519.

The CO also argues that OHA should not disturb the assigned NAICS code because the code has already been reviewed, and tacitly approved, by SBA's Georgia District Office when it accepted the instant procurement for competition in the 8(a) BD program. SBA regulations, though, expressly permit private parties to bring NAICS code appeals on competitive 8(a) procurements. 13 C.F.R. § 121.1103(a)(1). I therefore cannot conclude that review by an SBA District Office insulates a procurement from any subsequent NAICS code appeal. Similarly, OHA has held that opinions or guidance provided by other SBA officials are not binding on OHA in a NAICS code proceeding. *E.g. NAICS Appeal of JBS International, Inc.*, SBA No. NAICS-5021, at 8 (2008). Thus, the fact that the Georgia District Office did not object to the CO's choice of NAICS code does not affect the analysis as to whether NAICS code 541519 is appropriate for this procurement.³

RLM and the CO also suggest that NAICS code 541519 is appropriate because the subject matter of the instruction is computer related. This argument too is meritless. The “Educational Services” sector of the *NAICS Manual* includes many different types of specialty schools and instruction (*e.g.*, fine arts schools, flight training, and driving schools), all of which are classified as educational services rather than under a sector corresponding to the subject matter of the instruction.

Lastly, although no other parties have intervened in this litigation, and no other NAICS code besides 541519 and 611430 has been advocated by the parties, I have considered whether any alternate NAICS code might be more appropriate for this RFP and find none. While the instant RFP arguably could fall under NAICS code 611420, Computer Training, instead of NAICS code 611430, Professional and Management Development Training, the issue is immaterial because NAICS codes 611420 and 611430 have the same size standard.

³ It is worth noting that the District Office's standard of review is different than that which OHA must apply in a NAICS code appeal. Under 13 C.F.R. § 124.503(b)(1), a District Office will accept the CO's choice of NAICS code “as long as it is reasonable, even if though other NAICS codes may also be reasonable.” OHA's review, on the other hand, considers whether the CO selected “the single NAICS code which best describes the principal purpose of the product or service being acquired.” 13 C.F.R. § 121.402(b).

IV. Conclusion

For the above reasons, the instant appeal is GRANTED. The appropriate NAICS code for this procurement is 611430, Professional and Management Development Training, with a size standard of \$10 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 541519 to 611430. FAR 19.303(c)(5); 13 C.F.R. § 134.318(b); *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