

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

NAICS APPEAL OF:

Caduceus Healthcare, Inc.,

Appellant,

Solicitation No. HSBP1017R0029
U.S. Dept. of Homeland Security
U.S. Customs & Border Protection
National Recruitment & Hiring Team
Indianapolis, Indiana

SBA No. NAICS-5847

Decided: August 4, 2017

APPEARANCES

Steven J. Koprince, Esq., Candace M. Shields, Esq., Koprince Law LLC, Lawrence, Kansas, for Appellant

Joseph M. Barbato, Esq., Office of the Assistant Chief Counsel, Indianapolis, Indiana, for U.S. Customs and Border Protection

DECISION

I. Introduction and Jurisdiction

On July 7, 2017, the U.S. Department of Homeland Security, U.S. Customs and Border Protection (CBP) issued Request for Proposals (RFP) No. HSBP1017R0029 for “expert market research, data analytics, recruitment, and advertising” services. (RFP, at 1.) The procurement is unrestricted. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code, 541612, Human Resources Consulting Services, with a corresponding \$15 million annual receipts size standard, for the instant procurement. (*Id.*)

On July 17, 2017, Caduceus Healthcare, Inc. (Appellant) filed the above-captioned appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant asserts NAICS code 561311, Employment Placement Agencies, with a corresponding \$27.5 million annual receipts size standard, “best describes the principal purpose of the [s]olicitation.” (Appeal, at 1.) Appellant, which is small under NAICS code 561311, argues the CO's erroneous designation of NAICS code 541612 prevents it from “avail[ing] itself of a small business designation in competing for the award.” (*Id.*, at 1-2.)

On July 18, 2017, the CO issued Amendment 0002 to the solicitation, staying the solicitation and suspending the deadline for submission of proposals “for the duration of the appeal process.” (Amendment 0002, at 1; *see* 13 C.F.R. § 121.1103(c).) However, on July 21, 2017, the CO issued Amendment 0004 to the solicitation, lifting the suspension of the deadline for submissions of proposals and reestablishing the original deadline of August 8, 2017. (Amendment 0004, at 1.)

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 (10) calendar days after issuance of the solicitation, so the appeal is timely. Federal Acquisition Regulation (FAR) 19.303(c)(1); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b), 134.202(d). Accordingly, the matter is properly before OHA for decision.

II. Background

A. The Solicitation

The solicitation's Statement of Objectives (SOO) states CBP “seek[s] the services and expertise of industry to assist with its recruiting and hiring mission to protect America's borders,” particularly in hiring 5,000 Border Patrol Agents (BPAs) pursuant to Executive Order 13,767, Border Security and Immigration Enforcement Improvements (January 25, 2017). (SOO, at 1.) The SOO states the Executive Order's requirements “[h]ave created the need for CBP to seek the services and expertise of industry to assist with its recruiting and hiring mission.” (*Id.*) The SOO further specifies “CBP needs all requisite recruitment, market research, data analytics, advertising and marketing services to be performed by a contractor with the expertise and capability to execute a recruiting and hiring campaign. . . .” (*Id.*) “Ultimately, the goal is to produce the required number of employees who actually enter on duty. . . .” (*Id.*, at 1-2.) “The contractor will recruit enough highly qualified Frontline candidates to successfully satisfy the Executive Order over the course of the contract.” (*Id.* at 2.) “Ultimately, remuneration to the contractor will be based primarily on the delivery of qualified applicants. . . .” (*Id.*)

The solicitation requires offerors to develop a Performance Work Statement addressing eight objectives and other requirements for CBP's National Recruiting and Hiring acquisition. (Solicitation, at 61-63.) According to the solicitation, source selection will be based on the Highest Technically Rated Offerors with a Fair and Reasonable Price and proposals will be rated using a point-based scoring system. (*Id.*, at 60; *see id.*, at 64-70.)

Objective 1, Recruiting, requires an offeror “to expand the diversity of CBP Frontline applicants by targeting recruitment efforts both locally and nationally” and “to use analytics to drive CBP recruitment with data based evidence.” (*Id.*, at 61.) According to the solicitation's scoring table, an offeror's proposal may receive up to 1700 points for Objective 1. (*Id.*, at 65.)

Objective 2, Coordinate with the CBP Hiring Center on Positing of Vacancy Announcements, requires an offeror to “configure an application intake system,” “prepare new [Job Opportunity Announcements (JOAs)] using CBP approved templates,” and “determine whether applicants meet eligibility requirements based on their application responses.” (*Id.*, at

61-62.) According to the solicitation's scoring table, an offeror's proposal may receive up to 600 points for Objective 2. (*Id.*, at 66.)

Objective 3, Applicant Support/Care, requires an offeror to provide a system to monitor an applicant's progress and provide a summary of the candidate. (*Id.*, at 62.) According to the solicitation's scoring table, an offeror's proposal may receive up to 800 points for Objective 3. (*Id.*, at 66.)

Objective 4, Applicant Intake and Applicant Processing, “[e]ntails managing the full life cycle of the hiring process from job posting to processing new entry-level BPA hires.” (SOO, at 3.) An offeror must “complete all listed steps in entirety to hire [agents].” (Solicitation, at 62.) The contractor must administer the required Entrance Examinations, Medical Examinations, Physical Fitness Tests, Background Investigations, Polygraph Examinations, and Drug Tests, as well as conduct interviews. (SOO, at 3.) According to the solicitation's scoring table, an offeror's proposal may receive up to 5000 points for Objective 4 as described. (Solicitation, at 67.) The solicitation's scoring table also assesses 2500 points under Objective 4 to an offeror for “complet[ing] some or all of the hiring steps without pilfering or poaching [] current CBP vendor employees performing some or all of the current tasks to hire Frontline Line Employees.” (*Id.*, at 67.)

Objective 5, Reporting, requires an offeror to report weekly on processing volume, pass-rates, candidate needs, JOAs, and other information. (*Id.*, at 62.) Objective 5 also requires an offeror to prepare and present annual updates to recruitment reports, and provide a quality control plan. (*Id.*) According to the solicitation's scoring table, an offeror's proposal may receive up to 650 points for Objective 5. (*Id.*, at 67-68.)

Objective 6, Security and Management of Employee Data, requires an offeror to “safeguard all [i)] data that is generated by the contractor on behalf of the CBP, ii) CBP data transmitted by the contractor, and iii) CBP data otherwise stored or processed by the contractor.” (*Id.*, at 63.) Objective 6 also requires an offeror to ensure “all solutions, products, deliverables, and services are aligned and compliant” with CBP's enterprise structure and to provide a Data Management Plan. (*Id.*) According to the solicitation's scoring table, an offeror's proposal may receive up to 4000 points for Objective 6. (*Id.*, at 69.)

Objective 7, System Interfaces, requires an offeror to “interface and integrate with multiple CBP information systems.” (*Id.*, at 63.) According to the solicitation's scoring table, an offeror's proposal may receive up to 1000 points for Objective 7. (*Id.*, at 70.)

Objective 8, Program Management, requires an offeror to “provide senior liaison to work in collaboration with CBP to communicate and resolve issues between CBP and [the] vendor.” (*Id.*, at 63.) According to the solicitation's scoring table, an offeror's proposal may receive up to 200 points for Objective 8. (*Id.*, at 70.)

In addition, the solicitation states that offerors will receive higher ratings for relevant experience in “Leading Edge Talent Acquisition Methodologies,” specifically artificial intelligence, social recruitment, video recruitment, inbound recruitment, branding, and cost-per-

hire. (*Id.*, at 61.) According to the solicitation's scoring table, an offeror's proposal may receive up to 3600 points total for relevant experience in these methodological areas. (*Id.*, at 65.)

B. Appeal

Appellant contends the CO's designation of NAICS code 541612 for the instant procurement is clearly erroneous. (Appeal, at 1, 5.) Appellant argues the primary purpose of the procurement is “assist the CBP with national recruitment and hiring” and “to recruit, refer, and place applicants for employment with the CBP.” (*Id.*, at 3, 5.) According to Appellant, NAICS code 541612 does not best describe these services, nor does the solicitation seek any assistance with human resource and personnel policies, practices, and procedures or any other services described under that NAICS code. (*Id.*, at 6.) To the contrary, in Appellant's view, the solicitation suggests CPB already has such policies, practices, and procedures in place and “has meticulously detailed the offeror's required adherence to them in the hiring process.” (*Id.*) Appellant further argues CPB is not seeking to improve its hiring process through human resource consulting services. (*Id.*)

Appellant asserts NAICS code 561311 best describes the services sought for procurement. (*Id.*, at 7.) Appellant argues that while the solicitation contemplates other services such as reporting, management of employment data, system interfaces, and program management, each is derivative of recruitment, referral, and placement of applicants with CBP. (*Id.*) Appellant also argues the majority of the solicitation's eight objectives are best described by NAICS code 561311. (*Id.*) According to Appellant, Objectives 1 and 2 primarily require listing employment vacancies, as the contractor is asked to determine the appropriate applicant pool to target and coordinate employment postings. (*Id.*, at 8.) Appellant further suggests Objectives 3, 4, 5, and 6 primarily require reference and placement of applicants with CBP. (*Id.*)

Moreover, Appellant argues the solicitation's emphasis on relevant experience in social recruitment, video recruitment, inbound recruitment, branding, cost-per-hire, and artificial intelligence relating to recruitment further demonstrates the primary purpose is recruitment and hiring assistance rather than consulting services. (*Id.*) In addition, Appellant argues the delineation of payments by Contract Line Item Number (CLIN) also suggests payment is “a direct result of the contractor's recruiting and employee placement efforts,” as each CLIN involves “monetary reimbursement for employment placement services.” (*Id.*)

C. CBP's Response

On July 28, 2017, the CO responded to the appeal. The CO maintains designation of NAICS code 541612 was proper, as it best describes the majority of the work required by the procurement. (Response, at 3.) The CO asserts Objective 4, Application Intake and Applicant Processing, represents the majority of work required as it accounts for the majority of the contractor's costs. (*Id.*) Citing the solicitation's scoring table, the CO further asserts the solicitation emphasizes Objective 4's relative importance because a contractor may receive up to 7500 points of a possible 16,450 point-total for Objective 4 alone during evaluation. (*Id.*, at 6.) In the CO's view, Objective 4 is best represented by NAICS code 541612. (*Id.*) In addition, the CO

states that another agency under the U.S. Department of Homeland Security utilized NAICS code 541612 for “a very similar acquisition for recruiting and hiring services.” (*Id.*, at 3.)

The CO argues the each objective outlined in the solicitation is “tied to this procurement's underlying purpose of meeting CBP's human resources requirements” and, taken together, “is human resources consulting, through the provision of advice and assistance respective to human resources policies, practices, and procedures.” (*Id.*, at 4, 7.) The CO asserts Objective 1, Recruiting, is “foundational to helping satisfy CBP's human resources needs” and requires a contractor to determine the appropriate applicant pools, use analytics-based recruitment methods, and communicate effectively through a marketing strategy. (*Id.*, at 4.) According to the CO, this “calls for the contractor to both advise and assist CBP with human resources policies and practices.” (*Id.*)

The CO asserts Objective 2 requires a contractor to prepare announcements, use an application intake system, and determine an applicant's eligibility, but prohibits a contractor to actually post the announcement or hire an applicant. (*Id.*) In CO's view, this prohibition limits the contractor to “assisting CBP with human resources practices and procedures.” (*Id.*)

The CO asserts Objective 3 “meets an essential human resources need by requiring the contractor to implement a tracking system capable of providing an applicant with support throughout the entire hiring process,” including monitoring an applicant's progress and providing applicant “snapshots.” (*Id.*) The CO suggests the contractor, in short, “provides assistance with the human resources practice of applicant tracking” as CBP is “open to contractor recommendations.” (*Id.*, at 5.)

The CO asserts Objective 4 “entails managing each applicant's progression through the entire CBP hiring cycle . . . which currently involves twelve or more discrete steps depending on the position.” (*Id.*) The CO states “[t]he best proposals in this regard are expected to demonstrate the contractor's ability to complete all of the steps set out in the SOO.” (*Id.*) The CO stresses CBP intends to “consult with the contractor on this requirement” as the solicitation notes the CO is open to the contractor's recommendations. (*Id.*) The CO also stresses the contractor shall not make any “final adjudications” regarding an applicant's progression to the next hiring step or an offer of employment, as these are “inherently governmental in nature.” (*Id.*)

The CO asserts Objective 5, which requires the contractor to provide weekly reports, annual recruitment reports, and recruitment return-on-investment reports with costs-benefit analysis, clearly aligns with the human resources consulting services described in NAICS code 541612. (*Id.*) In the CO's view, Objective 5 “fosters [CBP's] evaluation and improvement of its recruitment and hiring process.” (*Id.*)

The CO asserts Objective 6 and Objective 7, while not entirely related to human resources, are “critical components underpinning the contractor's ability to assist with human resources practices and procedures.” (*Id.*, at 5-6.) The CO similarly asserts Objective 8, while not related to human resources service itself, “facilitates the provision of satisfactory advice and assistance regarding human resources policies, practices, and procedures. (*Id.*, at 6.)

The CO also contends NAICS code 561311 is inapplicable to the instant procurement, as the solicitation seeks the “wider-ranging benefit of consultation” rather than “merely to engage an employment agency or registry.” (*Id.*, at 8.) The CO argues the contractor is not responsible for “listing employment vacancies” or “in referring or placing applicants for employment,” as described by NAICS code 561311. (*Id.*) The CO states, to the contrary, listing JOAs and placing applicants through “final adjudications” is reserved to CBP. (*Id.*) The CO further states “placement” may be construed as less than exclusively governmental, but asserts the contractor is still not responsible for placement as the applicant “initiates the hiring process by responding to the JOA . . . effectively ‘placing’ him/herself for employment with CBP.” (*Id.*)

D. NAICS Manual¹ Descriptions

The NAICS code selected by the CO, 541612, Human Resources Consulting Services, comprises:

establishments primarily engaged in providing advice and assistance to businesses and other organizations in one or more of the following areas: (1) human resource and personnel policies, practices, and procedures; (2) employee benefits planning, communication, and administration; (3) compensation systems planning; and (4) wage and salary administration.

NAICS Manual, at 757. Illustrative examples of establishments under NAICS code 541612 include “[b]enefit or compensation consulting services,” “[e]mployee assessment consulting services,” “[p]ersonnel management consulting services,” and “[h]uman resources consulting services.” *Id.*, at 758.

The description for NAICS code 541612 also cross-references other related NAICS codes, including NAICS code 561311. It states “[e]stablishments primarily engaged in . . . [l]isting employment vacancies and in selecting, referring, and placing applicants in employment—are classified in U.S. Industry 561311.” *Id.* The description for NAICS code 541612 also cross-references NAICS codes 611430 and 561312 covering establishments engaged in “professional and management development training” and “executive search, recruitment, and placement services,” respectively. *Id.*

The NAICS code advocated by Appellant, 561311, Employment Placement Agencies, comprises:

establishments primarily engaged in listing employment vacancies and in referring or placing applicants for employment. The individuals referred or placed are not employees of the employment agencies.

¹ Executive Office of the President, Office of Management and Budget (OMB), *North American Industry Classification System-United States (2012)*, available at <http://www.census.gov>. SBA has proposed to adopt the 2017 edition of the *NAICS Manual* effective October 1, 2017. 82 Fed. Reg. 18,253 (Apr. 18, 2017). At present, the 2012 edition remains in effect and thus is applicable here.

Id., at 783. Illustrative examples of establishments under NAICS code 561311 include “[b]abysitting bureaus (i.e., registries),” “[e]mployment registries,” “[c]lustering agencies or bureaus (i.e., motion picture, theatrical, video),” “[m]odel registries,” and “[e]mployment agencies.” *Id.*

The description of NAICS code 561311 also cross-references other related NAICS codes. It states that establishments primarily engaged in “[p]roviding human resources and human resources management services to clients — are classified in Industry 561330, Professional Employer Organizations.” *Id.*, at 783-84. NAICS code 561330 comprises establishments “specialized in performing a wide range of human resource and personnel management duties, such as payroll, payroll tax, benefits administration, workers' compensation, unemployment, and human resources administration.” *Id.*, at 786.

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 select the perfect NAICS code. *NAICS Appeal of Evanhoe & Assocs., LLC*, SBA No. NAICS-5505, at 14 (2013). Rather, the CO must assign the NAICS code that best describes the principal purpose of the product or service being acquired in light of the industry descriptions in the *NAICS Manual*, the description in the solicitation, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being acquired. Federal Acquisition Regulation (FAR) 19.303(a)(2); 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). NAICS code appeals may be filed on unrestricted procurements if the appellant is seeking a change in NAICS code designation that would render it a small business for the subject procurement. 13 C.F.R. § 121.1103(a)(1); *see NAICS Appeal of Milani Construction, LLC*, SBA No. NAICS-5749 (2016).

B. Analysis

Having reviewed the arguments and the record, I find Appellant has demonstrated the CO clearly erred in designating NAICS code 541612 for the instant procurement.

It is clear from the solicitation that CBP is not seeking “advice and assistance [in] ... human resources and personnel policies, practices, and procedures,” but rather seeks performance of the human resources services themselves. *See* Section II.D, *supra*. The solicitation explicitly states, “CBP needs all requisite recruitment, market research, data analytics, advertising and marketing services **to be performed by a contractor** The contractor **will recruit** enough highly qualified frontline candidates. . . .” *See* Section II.A, *supra* (emphasis added). Moreover, the solicitation suggests payment to the contractor is

“based primarily on the delivery of qualified applicants” as “[its] goal is to produce the required number of employees who actually enter on duty” — not to seek advice, assistance, or recommendation on fulfilling CBP's hiring needs. *See id.*

The eight objectives outlined in the solicitation's SOO also clearly indicate the principal purpose of this procurement is to secure human resources services rather than consultation on such services. Objective 4, in particular, states the contractor is responsible for “managing the full lifecycle of the hiring process from job posting to processing new entry-level BPA hires.” *See id.* Taken together with Objectives 1, 2, and 3, this process includes: preparation of new JOAs; targeting recruitment efforts; monitoring applicants' progress; determining applicants' eligibility; and administering entrance exams, medical evaluations, polygraph examinations, drug tests, and interviews. *See id.*

The CO correctly states the final decisions regarding examinations, medical evaluations, polygraph examinations, and other tests rests with CBP. *See* Section II.C, *supra*. However, the CO does not dispute that the examinations, evaluations, polygraph examinations, and other tests themselves are conducted by the contractor. Further, the CO states the Office of Personnel Management rules and regulations prohibit the contractor from posting any JOA, without any citation to such prohibition in its appeal or its solicitation. *See id.* However, even assuming such regulatory prohibition controls, the solicitation clearly states the contractor will prepare new JOAs, coordinate posting with CBP, and determine applicants' eligibility based on their responses. *See* Section II.A, *supra*. In sum, while the contractor may not perform these final tasks for certain objectives, the contractor is performing all preceding tasks rather than advising and assisting CBP with them. This is consistent with the activities of employment agencies, who will prepare listings for employment vacancies and refer applicants, but the final decision on hiring will always be made by the employment agencies' client firms. Here, the contractor will recruit and produce the candidates, but the final hiring decision will be made by CBP.

Similarly, by ensuring its services interface and integrate with CBP's information systems and by protecting CBP's and other's information, the contractor is not providing advice or assistance to CBP on its own systems. *See* Section II.C, *supra*. In these instances, the contractor is performing, not consulting on, the required human resources services.

The relative value placed on each objective also supports the importance of the services described in Objectives 1, 2, 3, and 4. According to the scoring table included in the solicitation, Objectives 1, 2, 3, and 4 account for 8,100 of 13,950 possible points an offeror's proposal can receive, with Objective 4 alone accounting for 5,000 points. *See* Section II.A, *supra*. With the exception of Objective 6, security and data management, none of the remaining objectives account for more than 1000 points. *See id.* Thus, it is clear the human resources services themselves are the principal purpose of the instant procurement.

Also, the additional points allocated in the scoring table suggest the principal purpose is not consulting. The CO asserts the scoring table affords offerors an additional 2,500 points for previously-unidentified technical capabilities under each objective as an incentive for offerors to advise and make recommendations to CBP. *See* Section II.C, *supra*. But, logically, an incentive for advice and recommendations would be unnecessary and meaningless if the principal purpose

was already to provide advice and recommendations. Further, the scoring table affords offerors an additional 2,500 points for “complet[ing] some or all of the hiring steps without pilfering or poaching of current CBP vendor employees . . . ,” suggesting the contractor independently performs the human resources services. *See id.*

Based on the *NAICS Manual* description, NAICS code 541612 describes establishments providing advice or assistance to organizations regarding human resources policies, practices, and procedures, not ones performing human resources services themselves. *See* Section II.D, *supra*. Each of the illustrative examples assigned to NAICS code 541612 describe “consulting services” rather than establishments performing the actual services consulted upon. *See id.* In fact, the description of NAICS code 541612 specifically cross-references NAICS codes covering establishments engaged in related services, specifically “professional and management development training,” “executive search, recruitment, and placement services,” and “[l]isting employment vacancies and in selecting, referring, and placing applicants in employment.” *See id.* Given the principal purpose of the instant procurement is the human resources services and not consulting upon them, it is clear NAICS code 541612 does not best describe the instant procurement.

I therefore reach the conclusion that the contractor here is not aiding CBP in designing human resource policies, benefits or compensation planning. The contractor here is not providing advice and assistance on the CBP's overall personnel systems. Rather, the contractor is actively spearheading the recruitment of new personnel for CBP, and will perform most of the work involved in producing new candidates for hiring by CBP. Thus, it is clear advising and assisting CBP on human resources policies, practices, and procedures is not the principal purpose, and designation of NAICS code 541612 was erroneous.

I agree with Appellant that NAICS code 561311 best describes the procurement's principal purpose of recruitment, referral, and placement of applicants with CBP. *See* Section II.B, *supra*. NAICS code 561311, which is cross-referenced by NAICS code 541612, covers establishments primarily engaged in “listing employment vacancies and in referring or placing applicants for employment” where the applicants are not employees of the establishment. *See id.* For the instant procurement, while the contractor is not responsible for posting the JOAs or offering employment to qualified applicants, the contractor is responsible for preparing the JOA and referring qualified applicants for placement with CBP. These services are clearly described by NAICS code 561311. The contractor is also responsible for targeting recruitment, monitoring applicant progress, evaluating applications, and conducting examinations, evaluations, and other tests, each of which is inherent in referring qualified applicants. Thus, these services are also described by NAICS code 561311. Notably, while NAICS code 561330 on its face describes human resources and management services, it does not better describe the instant procurement. NAICS code 561330 describes establishments engaging in human resource services including payroll, taxes, and employee benefits, and this procurement does not include any of the post-employment services. *See id.* Here, the contractor will undertake the process of recruiting the candidates for CBP, which will make the final hiring decisions. Thus, NAICS code 561311 best describes the instant procurement.

IV. Conclusion

For the above reasons, the appeal is GRANTED. The appropriate NAICS code for the RFQ is 561311, Employment Placement Agencies, with a corresponding \$27.5 million average annual receipts size standard.

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 541612 to 561311. FAR § 19.303(c)(5); 13 C.F.R. § 134.318(b); *see 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 U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge