

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

NAICS APPEAL OF:

i2S, Inc.

Appellant

Solicitation No. HHM402-08-R-0236

Office for Counterintelligence

Defense Intelligence Agency

Virginia Contracting Agency

SBA No. NAICS-5004

Decided: September 23, 2008

APPEARANCES

Steven L. Reed, Esq., and Douglas P. Hibshman, Esq., Smith, Currie & Hancock LLP, Washington, D.C., for Appellant.

Esther L. Woods, Contracting Officer, and Max D. Houtz, Major, USAF, Assistant General Counsel, Arlington, Virginia, for Defense Intelligence Agency, Virginia Contracting Activity.

I. Introduction and Jurisdiction

On August 27, 2008, the Office for Counterintelligence, Defense Intelligence Agency (DIA), Virginia Contracting Agency (VACA) issued Request for Proposals No. HHM402-08-R-0236 (RFP) for Contractor Support to the DIA, Office for Counterintelligence (OCI). The Contracting Officer (CO) set the procurement totally aside for small businesses, and designated North American Industry Classification System (NAICS) code 541990, All Other Professional, Scientific, and Technical Services, with a corresponding \$7.0 million annual receipts size standard, as the NAICS code for this procurement. Proposals are due on September 26, 2008.

On September 5, 2008, i2S, Inc., (Appellant) filed a NAICS code appeal with the Small Business Administration's (SBA) Office of Hearings and Appeals (OHA). Appellant argues that the appropriate NAICS code for this solicitation is 541513, Computer Facilities Management Services, with a corresponding \$23 million annual receipts size standard.

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. Accordingly, this appeal is properly before OHA for decision.

II. Issue

Whether the CO's designation of NAICS code 541990 to a solicitation for counterintelligence support services is based upon a clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Facts

1. On September 27, 2007, VACA awarded Contract No. HHM402-07-C-0094 (the 2007 contract) to Appellant for contractor support to assist OCI in accomplishing its mission. The CO for the 2007 contract set-aside the procurement for small businesses and assigned NAICS code, 541513, Computer Facilities Management Services, with a \$23 million dollar size standard, to the procurement.

2. The 2007 contract consisted of a base year and option years. The 2007 contract required Appellant to provide approximately 97 full time equivalents (FTEs). The schedule in the 2007 contract identified the various labor categories for the FTEs, which, in turn, matched efforts described in the 2007 contract's Statement of Objectives (SOO). Among the categories of work identified in the schedule (under Contract Line Items or CLINs) of the 2007 contract were:

- a. Series AA, JIOC Support, for approximately 28,000 hours;
- b. Series AB, Strategic Analysis, for approximately 28,000 hours;
- c. Series AC, Operational Analysis, for approximately 40,000 hours;
- d. Series AD, Instructors, for approximately 6,000 hours;
- e. Series AE, Joint Doctrine, for approximately 3,000 hours;
- f. Series AF, Information Management, for approximately 14,000 hours;
- g. Series AH, Inside Threat Project, for approximately 24,000 hours; and
- h. Series AJ, Other, for approximately 6,100 hours.

3. DIA determined that due to a planned realignment of organizational responsibilities, a change in the required scope, the addition of tasks, and a decrease in funds available to meet its support requirements that it would be inappropriate to exercise any of the 2007 contract's options. Accordingly, on June 18, 2008, the CO informed Appellant it would not be exercising any options under the 2007 contract.

4. On August 27, 2008, VACA issued the RFP, which provides that offers are to be received by 9:00 a.m., on September 26, 2008. The CO set-aside the procurement for small businesses

and assigned NAICS code 541990, All Other Professional, Scientific, and Technical Services, with a \$7.0 million size standard.

5. The RFP includes a Statement of Work (SOW) entitled Contractor Support to the DIA, OCI, and in most respects, the 2008 SOW is identical to the 2007 SOO. However, instead of requiring approximately 97 FTE's, the RFP reduced the scope of work in the base year to 32 FTEs (CLIN 0001). The RFP also permits VACA to order an additional 60 FTEs (CLIN 0003), which are currently unfunded.

6. The RFP provides for no Information Management Effort in CLIN 0001. As explained by the CO, the FTE requirements in the base year for the RFP are as follows:

- a. Combat Command Support, 12 FTEs;
- b. Current and Strategic Counterintelligence Analysis, 3 FTEs;
- c. Operational Counterintelligence Analysis, 9 FTEs;
- d. Co-Author, Joint Doctrine, 3 FTEs; and
- e. Other Counter Intelligence (CI) Professionals, 2 FTEs.

B. Appeal

On September 5, 2008, Appellant filed an appeal and supplemental appeal with OHA. Appellant argues the CO's assignment of NAICS code 541990 to OCI's 2008 RFP constitutes a clear error of law and fact.

Appellant asserts the CO's decision to change the NAICS code from 541513, Computer Facilities Management Services, under the 2007 contract, to the more general NAICS code 541990, All Other Professional, Scientific and Technical Services, for the 2008 RFP, constitutes legal error. As the incumbent contractor, Appellant states over fifty percent of the services it provides under the 2007 contract are comprised of management and technical consulting services and computer systems design and related services; Appellant asserts these services are best described by NAICS code 541513. Additionally, Appellant asserts ninety-five percent of the tasks in the 2007 contract are identical to the tasks required under the RFP. Thus, Appellant argues OCI should maintain the same code assigned to the 2007 contract, NAICS code 541513, because NAICS code 541513 most appropriately describes the services Appellant is currently performing.

Appellant also argues NAICS code 541990 is a generic catch-all that does not adequately describe the counterintelligence, analytical, and management services required under the RFP.

Appellant states the NAICS MANUAL¹ description for NAICS code 541990 fails to describe the services a successful contractor will be required to perform under the 2008 RFP and the NAICS MANUAL description for NAICS code 541990 specifically exempts ““computer systems design and related services”” along with ““management, scientific and technical consulting services”” from its list of services. Appeal, at 12 (quoting NAICS MANUAL). Appellant argues that NAICS code 541513 is a more specific code for the RFP and asserts OHA has traditionally changed the NAICS code designation of a contract when a more accurate code is available.

Moreover, Appellant asserts assignment of NAICS code 541990 to the 2008 RFP prohibits Appellant from competing for award. Where NAICS code 541513 has a size standard of \$23 million annual receipts, NAICS code 541990 has a size standard of only \$7 million and Appellant states it exceeds the \$7 million annual receipts size standard.

Finally, Appellant requests a copy of the classified RFP with all attachments and modifications and a copy of all correspondence between the CO and CO representatives and Appellant. Appellant also requests that OHA expeditiously rule on the appeal before the deadline to submit offers expires.

C. CO Response

On September 19, 2008, the CO responded to the appeal. The CO provided the background behind both the 2007 contract and the RFP, explaining why the RFP was necessary (Fact 3). The CO explained the RFP was very different from the 2007 contract, *i.e.*, 32 verses 97 FTEs and no requirement for information management services outside the option (Facts 5 and 6).

The CO also explained why she chose NAICS code 541990. Specifically, the CO asserted that while no NAICS exactly described the RFP’s requirements, it was her contention that NAICS code 541990 best described the services required by the RFP (Response, at 3). In addition, the CO also detailed her efforts to coordinate the selection of the NAICS code and explained that given the weight of the work required by the RFP, NAICS code 541513 is inappropriate since the contract does not involve management of computer facilities.

The CO avers she committed no clear error in her designation of NAICS code 541990. Moreover, she asserts that she researched her choice and it is in accord with the requirements of the RFP. The CO explained that the greatest percentage of work proposed by the RFP comes from counterintelligence analysts performing consulting functions and she detailed this by tying the tasks in the SOW to the CLINs (Response, at 7-9). Specifically, the CO explained that the consultants will be providing (1) Combatant Command Support; (2) Current and Strategic Counterintelligence Analysis; (3) Operational Counterintelligence Analysis; (4) Co-Author, Joint Doctrine; (5) Support to the Joint Staff (J2X); and (6) Other CI Professionals. According to the

¹ EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (2007), *available at* <http://www.census.gov/pcd/naics07/index.html> (hereinafter NAICS MANUAL).

CO, while no NAICS code specifically deals with these services, it is plain that NAICS code 541513 is incorrect.

The CO also argues that the provision of information support is irrelevant to the purpose of the procurement. She points out, “in this day and age” many people (including contract specialists) use computers to perform their work and this requires them to manage the review of information from databases from various sources through the use of proprietary software and then categorize, organize and consolidate the data they find into various formats. In short, the CO asserts data management is not just a function of information management professionals, but a necessary function for everyone with our reliance on computers, networks, and the internet.

D. Appellant’s Reply

On September 19, 2008, Appellant replied to the CO’s Response. Appellant reiterates its request for an expedited decision. Appellant notes if the decision is issued after the deadline for proposals, September 26, 2008, the decision will not apply to the pending procurement. Appellant also reasserts that if the erroneous NAICS code is allowed to stand, Appellant will be ineligible to submit an offer. Appellant states it has incurred substantial legal fees and costs for which it will have no recourse if the OHA decision is not issued before the deadline for proposals.

IV. Discussion

A. Timeliness

Appellant filed this appeal within ten days after VACA issued the solicitation. Thus, the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1), 134.304(a)(3).

B. Standard of Review

The NAICS was developed not to classify work required by Federal contracts, but rather:

[A]s the standard for use by Federal statistical agencies in classifying business establishments for the collection, analysis, and publication of statistical data related to the business economy of the U.S. NAICS was developed under the auspices of the Office of Management and Budget (OMB), and adopted in 1997 to replace the old Standard Industrial Classification (SIC) system. It was also developed in cooperation with the statistical agencies of Canada and Mexico to establish a 3-country standard that allows for a high level of comparability in business statistics among the three countries. . . .²

Thus, SBA’s regulations do not require a contracting officer to designate the perfect NAICS code. Rather, 13 C.F.R. § 121.402(b) charges the procuring agency contracting officer

² *What is NAICS and how is it used?*, <http://www.census.gov/epcd/www/drnaics.htm#q1>.

with designating the NAICS code which best describes the principal purpose of the product 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. To overcome a contracting officer's designation of a NAICS code, an appellant must establish the contracting officer's NAICS code designation is based on a clear error of fact or law. 13 C.F.R. § 134.314.

The clear error standard is rigorous but not as deferential as review under the arbitrary and capricious standard. See RICHARD S. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 11.2 (4th ed. 2002). For example, Black's Law Dictionary defines clear error as a "trial judge's decision or action that appears to a reviewing court to have been unquestionably erroneous." BLACK'S LAW DICTIONARY 563 (7th ed. 1999). Appellate courts also apply the clear error standard in reviewing a trial court's factual findings. See *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). A reviewing court will not reverse the lower court's finding of fact simply because they would have decided the case differently. *Id.* Instead, the reviewing court will reverse only if, on the basis of the entire evidence, it is left with the "definite and firm conviction that a mistake has been committed." *Id.* (quoting the clearly erroneous standard applied in *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). In *Easley*, the Supreme Court engaged in an extensive review of the lower court's findings, for clear error, and found that the review left them "with the definite and firm conviction" that the lower court's *key findings* were mistaken. *Id.* at 243 (emphasis added).

While NAICS code appeals involve a review of a contracting officer's designation and not a lower court's decision, OHA looks to how the clear error standard has been interpreted in the appellate review setting. Consequently, OHA's review is deferential and OHA will not modify a contracting officer's designated code unless OHA has a "definite and firm conviction that a mistake has been committed." See *Concrete Pipe and Products of Cal. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 623 (1993). OHA will not reverse a contracting officer merely because OHA would have selected a different code. If OHA finds a contracting officer committed clear error or a contracting officer's designation was unquestionably erroneous, only then should OHA select a NAICS code it believes is correct.

C. Analysis

1. Designation of NAICS code

Contracting officers must select the NAICS code that:

[B]est describes the principal purpose of the product or service being acquired. Primary consideration is given to the industry descriptions in the NAICS United States Manual, the product or service description in the solicitation and any attachments to it, 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 purchased.

13 C.F.R. § 121.402(b). While a contracting officer may consider other factors, his/her primary responsibility is to choose the NAICS code that best describes the principle purpose of the

procurement and a contracting officer cannot ignore that principle purpose in favor of other factors.

2. Relevant NAICS Code Definitions

NAICS code 541990, all Other Professional, Scientific, and Technical Services, applies to concerns:

[E]ngaged in the provision of professional, scientific, or technical services (except legal services; accounting, tax preparation, bookkeeping, and related services; architectural, engineering, and related services; specialized design services; computer systems design and related services; management, scientific, and technical consulting services; scientific research and development services; advertising, public relations and related services; market research and public opinion polling; photographic services; translation and interpretation services; and veterinary services).

NAICS MANUAL, at 758-59.

NAICS code 541513, Computer Facilities Management Services, applies to concerns:

[E]ngaged in providing on-site management and operation of clients' computer systems and/or data processing facilities. Establishments providing computer systems or data processing facilities support services are included in this industry.

Id., at 741.

3. The Merits

The *sine quon non* of Appellant's appeal is that the designation of NAICS code 541513, Computer Facilities Management, to the 2007 contract was correct and thus the CO was wrong to assign NAICS code 541990 to the RFP. Appellant is mistaken. The designation of NAICS code 541513 to the 2007 contract was clearly erroneous. Like the RFP, the principle purpose of the 2007 contract was to provide sophisticated counterintelligence support, not to manage the DIA OCI's computer facilities or systems (Fact 2). As awarded, the 2007 contract devoted less than ten percent of its effort to any kind of defined computer tasks (Fact 2). Moreover, unlike the 2007 contract, the current RFP requires no information management support, unless VACA awards an option, *i.e.*, CLIN 0003 (Fact 5).

Even if the designation of the NAICS code in the 2007 contract was not clearly erroneous, I note that neither a contracting officer nor OHA is bound by the NAICS code assigned to a previous solicitation. *See NAICS Appeal of Master Key Resources, LLC*, SBA No. NAICS-4862 (2007); *NAICS Appeal of Eagle Design and Management, Inc.*, SBA No. NAICS-4521 (2002). Given the facts of this appeal, it would be error for me to place any reliance upon any designation made in the 2007 contract.

I also concur with the CO's observations concerning computer usage in the modern age. I note that even judges are computer literate and use databases and the internet, while scientists and engineers must be able to use computers for a wide variety of purposes. Accordingly, having to use a computer to perform work does not turn legal research, scientific research, or other consulting services requiring the use of computers, into computer facilities management.

Though the DIA OCI and its consultants must use computers to efficiently perform counterintelligence services in the modern age, I find the use of the computers is merely a tool for the work required by the SOW. Instead, after analyzing the SOW and the CLINs, it is plain to me that the principle purpose of the RFP is the provision of counterintelligence analysts providing consulting services.

Even though counterintelligence services are not specifically mentioned in NAICS code 541990 or anywhere else in the NAICS MANUAL, counterintelligence services are technical consulting services. As a technical service they are within the scope of NAICS code 541990 because it includes technical services generally. Hence, I cannot say that the CO erred in designating NAICS code 541990. Thus, I shall not designate a different NAICS code.

4. Summary

The SOW establishes VACA intends to award a contract whose principal purpose is to obtain the services of consultants who provide various kinds of counterintelligence services. Thus, the CO's explanation of why NAICS code 541990 was chosen is also consistent with the SOW. Consequently, I hold I cannot find the CO's designation of NAICS code 541990 was the result of clear error. *See* 13 C.F.R. § 134.314.

V. Conclusion

In consideration of the foregoing, I AFFIRM the CO's NAICS code designation of 541990 and DENY the Appeal.

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

THOMAS B. PENDER
Administrative Judge