United States Small Business Administration
Office of Hearings and Appeals

NAICS APPEAL OF:	
DCS Corporation	SBA No. NAICS-4874
Appellant	Decided: November 20, 2007
Solicitation No. W15P7T-08-R-P401 U.S. Army Communications Electronics Life Cycle Management Command Ft. Monmouth, New Jersey	

APPEARANCE

John R. Tolle, Esq., Barton, Baker, McMahon & Tolle, LLP, McLean, Virginia, for Appellant.

DECISION

PENDER, Administrative Judge:

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.

II. Issue

Whether the designation of NAICS code 541712 to a contract for Sensor Technology Engineering Support is based on a clear error of fact or law. 13 C.F.R. § 134.314.

III. Background

A. Facts

1. On October 24, 2007, the U.S. Army, Communications Electronics Life Cycle Management Command (Army) at Ft. Monmouth, New Jersey, issued Solicitation No. W15P7T-08-R-P401 (RFP) for Sensor Technology Engineering Support. The Contracting Officer (CO)

set the procurement totally aside for small businesses, and designated North American Industry Classification System (NAICS) code 541712[1], Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), with a corresponding 500 employee size standard, as the NAICS code for this procurement. The CO issued Amendment 0001 to the RFP on November 14, 2007, which, among other things, updated Section L, Labor Category Information and the Pricing Format.[2] Proposals are due on November 26, 2007.

2. The RFP's Performance Work Statement (PWS), Paragraph 1.2, provides:

> The services to be provided by the Contractor include support for research and development, systems engineering, technology demonstrations, modeling and simulation of systems, prototype fabrication (one to several hundred), field testing and data collection, facilities and equipment maintenance, engineering parts and materials, networking, and other technical and administrative support.
>
> The services to be provided by the Contractor, as described in Sections 3, 4 and 5 of this PWS, will require personnel with scientific, engineering, analytical, computer programming, manufacturing, administrative, management, and various other technical skills. The Technology Areas which the Contractor will support include, but may not be limited to, the following:
>
> a. Thermal Imaging
> b. Cooled and Uncooled Focal Plane Arrays
> c. Image and Signal Processing, Image Compression, Image Fusion Boards
> d. Optics (small Adaptive) and Image Intensification
> e. Laser, Fiber Laser, Rangefinders, Designators
> f. Electro-Optic (EO) Measurement and Signature Intelligence (MASINT)
> g. Radio Frequency (RF)/Acoustics
> h. Explosive, Mechanical and Electronic Neutralization of Mines (including LASERs)
> i. Mine Detection
> j. Humanitarian Demining
> k. Unexploded Ordnance (UXO)
> l. Countersurveillance/Deception
> m. Low Cost/Low Observables
> n. Physical Security Equipment (PSE)
> o. Aided/Automatic Target Recognition (ATR)
> p. Sensor Fusion
> q. Display, Helmet Mounted Displays (HMDs)
> r. Unmanned Air/Ground Sensors

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[1] The CO correctly identifies a new NAICS code, effective October 1, 2007. 72 Fed. Reg. 49639 (Aug. 29, 2007).

[2] Any references in this decision to RFP Attachments 006 and 007 are to the material accompanying Amendment 0001.

s. Simulation
t. Future Combat Systems (FCS)
u. Modeling and Simulation
v. Perception Testing
w. Computer-Based Trainers
x. Improvised Explosive Devices (IEDs) Neutralization
y. Improvised Explosive Device Detection
z. Persistent Surveillance System
aa. Advanced Gimbals
bb. Imaging and Non-Imaging Systems for Through Foliage Capabilities
cc. Passive Millimeter Wave Camera (PMC)
dd. Objective Pilotage for Utility and Lift
ee. Brownout/Whiteout, Obstacles Detection and Avoidance System
ff. Ultra-Compact High Definition TV (HDTV) and Ultra-Compact Infrared (UCIR) Imagers
gg. Unmanned and Manned Platforms System Integration
hh. Infrared (IR) Systems and Technology (Corrugated Quantum Well IR Photo Detectors and Arrays, Strained Layer Super lattice)
ii. Hyperspectral
jj. Multispectral
kk. SWIR
ll. Light Detection and Ranging (LIDAR)
mm. Acoustic Detection
nn. Forward/Side Ground Penetrating Radar
oo. Airborne IED/Mine Detection

3. Section M of the RFP, Evaluation Factors, provides that award would be based upon the best value for the government, with appropriate consideration given to three evaluation factors: Technical, Performance Risk, and Price. The Technical factor is significantly more important than Performance Risk, which is slightly more important than Price. The Technical Factor is divided into two subfactors: (a) Sample Tasks - five sample tasks of equal importance; and (b) Management. The Army introduced its technical evaluation approach by explaining that the Sample Tasks are designed to test the offeror's expertise and innovative capabilities to respond to the types of situations "that *may* be encountered in performance of the contract resulting from this solicitation" (emphasis added).

4. Attachment 003 to the RFP details the five Sample Tasks:

SAMPLE TASK #1

TASK TITLE: Modeling and Simulation Support

NVESD develops, executes and validates Electro-Optical/Infrared sensor performance models to quantify and understand the range performance of sensor systems under a variety of operational conditions. To achieve this, NVESD conducts field and laboratory data collections, sensor

measurement/characterization, and human perception experiments to; understand the performance of the sensors in a field environment, understand atmospheric effects, support radiometric or target signature studies, characterize sensors, understand task difficulties, and support the development of training applications.

The offeror shall describe in detail their approach to supporting these activities for a period of one year, and how the results can be used to support model development and validation. The offeror shall also address how their team would support the NVESD EO/IR sensor models to understand the range performance of EO/IR sensor systems, develop input data required, execute, and evaluate the results assuming a one year period of performance.

SAMPLE TASK #2

Task Title: Distributed Virtual Simulation

Night Vision and Electronic Sensors Directorate (NVESD) – Operations Division (OPS) - Network Support Branch (NSB) has a requirement to support all engineering networking aspects of simulation experiments (War Games) involving connections to remote locations (example: Ft. Knox, Ft. Benning, etc.). NVESD serves as the primary base location, where the real-time scene and target rendering experiment is performed, and exercise-participants are located at NVESD and remote locations (example: Ft. Knox, Ft. Benning, etc.). Engineering networking support, including hardware and software support, within the simulation environment at NVESD includes all aspects of networking including 'CLASSIFIED' and 'UNCLASSIFIED' information.

The offeror shall address in detail your approach to providing all support associated with networking (both 'CLASSIFIED' and 'UNCLASSIFIED') support of simulation experiments described above, for a one year period of performance. . . .

SAMPLE TASK # 3

TASK TITLE: Facilities and SAP Support

The US Army Night Vision and Electronic Sensors Directorate (NVESD) has the responsibility to provide operations support, which includes facilities support and Special Access Program support within the 300 area compound of Fort Belvoir. The personnel serviced by NVESD are a mix of Government and Contractor engineers, scientists, and administrative personnel. The buildings comprise approximately 429,000 square feet of laboratory space, 62,000 square feet of administrative space, and 22,000 square feet of storage space.

The offeror shall address in detail their approach to designing, developing and constructing a Sensitive Compartmented Information Facility (SCIF). . . .

SAMPLE TASK # 4

TASK TITLE: Rapid Prototype Shop Support

The US Army Night Vision and Electronic Sensors Directorate (NVESD) has the responsibility to provide rapid prototype shop support to its engineers and scientists. This support includes providing mechanical design and fabrication support, electronics support for the integration of surrogate systems and test set-up, software development, and reaching out to industry and academia that are engaged in research that could be quickly exploited by NVESD for rapid fielding of materials and equipment to the Soldier.

The offeror shall address in detail your approach to establishing and operating a NVESD rapid prototype shop including a description of your ability to reach out to industry and academia that may not be a member of your consortiums and also provide information on personnel, labor, and equipment associated with the task assuming one (1) year period of performance.

SAMPLE TASK #5

TASK TITLE: UAV Designator

NVESD has a requirement for the development, integration and testing of a compact, rugged, efficient laser designator that will fit in a Class I UAV. These light weight compact lasers must assure sufficient operational time on a single set of compact batteries, designate at extended ranges, be rugged, and able to operate over a wide temperature range.

The offeror shall address their approach for providing personnel, labor, facilities and equipment necessary to providing NVESD with support to design, prototype, integrate and test a compact laser designator in a Class I UAV, assuming a three year period of performance. Engineering design support proposed shall address their ability to quickly/rapidly coordination [sic] with senior technical experts from academia, industry, and non-consortium members to address emerging technologies and systems concepts as required. Prototype support proposed shall address the offerors ability to rapidly develop two prototype designators in Class I UAVs, using a common laser designator engine. Integration and test support proposed shall address; fabrication of mounting fixtures and adaptors for flight controls; power plants; electronics; stress analysis of fixtures; electro-magnetic interference (EMI) analysis; and data acquisition systems. The offeror shall also address their ability to produce an initial run of production quality Installation Kits, perform some installations and provide user and installation training.

5. Attachment 006 to the RFP contains labor categories applicable to the RFP. It is relevant to the personnel qualifications and pricing of offers by the labor category (Attachment 007). Basically, Attachment 006 contains a spreadsheet of the educational or certification requirements applicable to each labor category. Following this chart is a numbered narrative by labor category that details the education/experience required for each labor category. For example, the Project Manager must have a "[m]inimum of a BS/MS degree in engineering, computer science, mathematics or the physical sciences." While the first six labor categories do not detail specific expertise requirements, certain categories do require specific experience, *e.g.*:

7. Senior Project Engineer:

Engineer shall be familiar with all aspects of Systems Engineering as well as Project Engineering/Management. Shall have experience with project engineering/management with Configuration Electro-Optical systems and

Must have current knowledge and practical experience in the areas of:

a. Thermal Imaging System Technology
b. Image Intensification System Technology
c. Laser and Laser Rangefinder Technology

Minimum of an MS degree of Engineering, Engineering Technology, Physics, or Physical Science from and accredited college or university. A BS with seven (7) years experience in Program Management (i.e. Logistics, Configuration Management, etc.) aspect of a Project will be considered equivalent.

8. Project Engineer:

Engineer shall be familiar with all aspects of Systems Engineering as well as Project Engineering/Management. Shall have experience with project engineering/management with Configuration Electro-Optical systems and

Must have current knowledge and practical experience in the areas of:

a. Thermal Imaging System Technology
b. Image Intensification System Technology
c. Laser and Laser Rangefinder Technology

Minimum of an MS degree of Engineering, Engineering Technology, Physics, or Physical Science from and accredited college or university. A BS with five (5) years experience in Program Management (i.e. Logistics, Configuration Management, etc.) aspect of a Project will be considered equivalent.

9. Senior Engineer:

Engineer shall be familiar with all aspects of Systems Engineering as well as Project Engineering/Management. Shall have experience with project engineering/management with Configuration Electro-Optical systems and

Must have current knowledge and practical experience in the areas of:

a. Thermal Imaging System Technology
b. Image Intensification System Technology
c. Laser and Laser Rangefinder Technology

There does not appear to be any requirement that any of the labor categories have specific aircraft experience.

6. Attachment 007 to the RFP is a spreadsheet that lists the various labor categories explained in Attachment 006 and estimates a level of effort, by hours and contract year, for each labor category. Relevant hourly estimates for the base year are as follows:[3]

Senior Program Manager	9,600
Program Manager	9,600
Project Manager	9,600
Principle Engineer/Scientist	13,440
Senior Engineer/Scientist	13,440
Engineer/Scientist	36,480
Senior Project Engineer	11,520
Project Engineer	24,960
Senior Engineer	9,600
Senior Software Engineer	7,680
Software Engineer	24,960
Radar Engineer	7,680

While there are other categories with hourly estimates equivalent to or even exceeding some of the engineer or scientist categories shown in the foregoing excerpt to Attachment 007, these categories are not for highly technical or developmental positions, *e.g.*, mechanical technicians, clerical assistants, facility maintenance specialists, laborers, warehouseman, and heavy equipment operators that support the developmental effort of the engineers and scientists.

B. The Appeal

On October 26, 2007, DCS Corporation (Appellant) filed a NAICS code appeal with the Office of Hearings and Appeals (OHA), challenging the CO's NAICS code designation. Appellant asserts that the appropriate designation is NAICS code 541712's exception

[3] Estimates for the out years are comparable.

for Aircraft Parts, and Auxiliary Equipment, and Aircraft Engine Parts, which has a corresponding 1,000 employee size standard.

Appellant argues that the evaluation criteria in Section M are heavily weighted upon the offerors' responses to the five Sample Tasks. Appellant states:

> There was an aviation-related component to much of this work, and even though it cannot easily be quantified, it can be surmised in a much more general fashion that the aviation-related component is significant in the Sample Tasks.

Appeal Petition, at 13. Appellant also asserts that more than half of the Technology Areas that the contractor will support have aviation-related components. Appeal Petition, at 13-14. Appellant then argues that OHA should also find three other NAICS codes (561110, 541330, and 561210) inappropriate for this procurement.

C. Army's Response

On October 30, 2007, the CO filed a July 25, 2007 letter from the "C-E LCMC Solicitation Ombudsman" to Appellant. The Ombudsman stated that "[b]ased upon analysis requirements performed under the existing contracts, the Aircraft platform is no longer predominant to the development work under [the] subject solicitation" and accordingly, NAICS code 541712[4], with a corresponding 500 employee size standard, is the appropriate code for this procurement.

IV. Discussion

A. Timeliness

Appellant filed the instant appeal within 10 days after the Army issued the solicitation. Thus, the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1); 134.304(a)(3).

B. Standard of Review

Appellant has the burden of proving all elements of its appeal. Specifically, it must prove the CO's NAICS code designation is based on a clear error of fact or law. 13 C.F.R. § 134.314. 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*,[5] the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b);

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[4] The Ombudsman referenced NAICS code 541710, the predecessor NAICS code to 541712.

[5] Executive Office of the President, Office of Management and Budget, *North American Industry Classification System--United States, 2007* (*available at* http://www.census.gov/epcd/naics07/index.html).

NAICS Appeal of Durodyne, Inc., SBA No. NAICS-4536, at 4 (2003).

C. Analysis

1. Introduction

As a preliminary matter, I do not have jurisdiction (nor is it an efficient use of judicial resources) to entertain the appropriateness of NAICS codes that were not designated in the instant procurement. Only a NAICS code designation made by a procuring activity contracting officer may be appealed to OHA. 13 C.F.R. § 121.1102. Accordingly, contrary to Appellant's request, I will not rule on the appropriateness of NAICS codes 561110, 541330, and 561210 to the instant procurement for they are not at issue.

2. NAICS code 541712

NAICS code 541712 covers:

> [E]stablishments primarily engaged in conducting research and experimental development (except biotechnology research and experimental development) in the physical, engineering, and life sciences, such as agriculture, electronics, environmental, biology, botany, computers, chemistry, food, fisheries, forests, geology, health, mathematics, medicine, oceanography, pharmacy, physics, veterinary and other allied subjects.

NAICS Manual, *available at* http://www.census.gov/eos/www/naics/htmls/5/541712.htm.

Research and development is defined as "laboratory or other physical research and development. It does not include economic, educational, engineering, operations, systems, or other nonphysical research; or computer programming, data processing, commercial and/or medical laboratory testing." 13 C.F.R. § 121.201, n.11(a).[6]

NAICS code 541712 was previously designated as NAICS code 541710[7], Research and Development in the Physical, Engineering, and Life Sciences. 72 Fed. Reg. 49639 (Aug. 29, 2007). Accordingly, OHA's case precedent addressing NAICS code 541710 is applicable here. In *NAICS Appeal of RhinoCorps, Ltd.*, OHA held that NAICS code 541710 "only covers laboratory or other physical research and development, not non-physical research…." *NAICS Appeal of RhinoCorps, Ltd.*, SBA No. NAICS-4736, at 9 (2005); *see also NAICS Appeal of RhinoCorps, Ltd.*, SBA No. NAICS-4729, at 6 (2005). OHA found NAICS code 541710

[6] The footnote corresponding to NAICS code 541712's predecessor NAICS code, 541710, has been retained in the 2007 amendment to SBA's Small Business Size Regulations. 72 Fed. Reg. 49639, 49646 (Aug. 29, 2007).

[7] Executive Office of the President, Office of Management and Budget, *North American Industry Classification System Manual*, at 745 (2002).

inapplicable to a solicitation requiring writing, modifying, testing, and supporting wargaming and simulation software. *RhinoCorps*, SBA No. NAICS-4736, at 11.

The predecessors of NAICS code 541712 (and thus 541710) under the Standard Industrial Classification (SIC) system were various codes dealing with research and development, including 8731, Commercial Physical and Biological Research. *NAICS Manual* (1997)[8], at 882.

In *SIC Appeal of the Cadmus Group, Inc.*, OHA held that these codes included basic research, defined as the continuing search for new knowledge with only the direction of the researcher himself; applied research, defined as laboratory studies concerning the practical application of new knowledge; and development, which takes applied research out of the laboratory and translates it into production. *SIC Appeal of the Cadmus Group, Inc.*, SBA No. SIC-3315, at 8-9 (1990). [9]

3. The Merits

Based upon the contents of the PWS, the Labor Categories, and the Sample Tasks, it is reasonable that NAICS code 541712 is the proper NAICS code for the RFP. The only issue is whether the size standard applicable to the aircraft exception under NAICS code 541712 should apply.

Appellant argues that NAICS code 541712's except provision for Aircraft Parts, Auxiliary Equipment, and Aircraft Engine Parts, which has a corresponding 1,000 employee size standard, is the more appropriate code. However, Appellant presents no evidence that the contracting officer's designation of NAICS code 541712 (without the aircraft exception) fails to describe the principal purpose of the solicitation. Nor does Appellant present evidence sufficient to establish the procurement applies to aircraft parts and auxiliary equipment.

Instead, Appellant merely "surmis[es]…that the aviation-related component is significant in the Sample Tasks. . . ." However, my examination of the Sample Tasks and PWS reveals no clear evidence that the purpose of this procurement is to procure research and development with aircraft parts, auxiliary equipment, or aircraft engine parts. Instead, with one exception, the Sample Tasks contain requirements that do not require the putative contractor to engage in purely aircraft-related endeavors. Specifically, the contractor is to assist the Army in:

(1) Modeling and Simulation Support for infrared sensors;

(2) Distributed Virtual Simulation (War Games) for sensors;

[8] Executive Office of the President, Office of Management and Budget, *North American Industry Classification System Manual* (1997).

[9] OHA's case precedent decided under the prior SIC system is applicable to NAICS code appeals. *NAICS Appeal of Phoenix Scientific Corporation*, SBA No. NAICS-4416, at 8 (2000).

(3) Facilities Support for the Army Night Vision and Electronic Sensors Directorate (NVESD) at Fort Belvoir by designing, developing, and constructing a Sensitive Compartmented Information Facility;

(4) Rapid Prototype Support - rapidly building prototypes for NVESD designs, including mechanical design and fabrication support, electronics support, testing, software development and interfacing with industry and academia; and

(5) UAV Designator (Unmanned Aerial Vehicle) (an aircraft-related task).

Moreover, the contracting officer provided a letter from the procuring command's Ombudsman that stated the aircraft platform is no longer predominant to the development work under the solicitation. The Ombudsman's statement is also consistent with the terms of the solicitation. For example, in examining the labor category qualifications, I find no requirement for engineering experience in aeronautical engineering, aircraft propulsion, or avionics. Instead, the Project Manager, for instance, is required to have expertise in general engineering, computer science, mathematics, or the physical sciences. (Fact 5.) Further, the required qualifications for the various kinds of engineers consists of experience in: (1) Thermal Imaging System Technology; (2) Image Intensification System Technology; and (3) Laser and Laser Rangefinder Technology. (Fact 5.) None of these fields of expertise apply specifically to aircraft.

In addition, of the forty-one technology areas for services identified in paragraph 1.2 of the PWS, there are only four references to technology areas that patently suggest an exclusive relationship to aviation: (1) Objective Pilotage for Utility and Lift; (2) Unmanned and Manned Platforms Systems Integration; (3) Forward/Side Ground Penetrating Radar; and (4) Airborne IED/Mine Detection. (Fact 2.)

Accordingly, my review of the Labor Qualifications, Sample Tasks, and PWS reveals that the instant procurement calls for the contractor to perform tasks that have a strong relationship to research and experimental development in physical science and engineering disciplines as defined by NAICS code 541712. I also find the primary purpose of the procurement is not to procure research and development related to any of the aircraft exceptions provided in 13 C.F.R. § 121.201 for NAICS Code 541712.

Therefore, the NAICS code selected by the CO is appropriate for this solicitation and I conclude that Appellant has not demonstrated clear error in the contracting officer's designation of NAICS code 541712 and thus a 500 employee size standard.

V. Conclusion

For the above reasons, I AFFIRM the CO's designation, and DENY the instant appeal.

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

THOMAS B. PENDER
Administrative Judge