

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

NAICS APPEAL OF:

K-Mar Industries, Inc.

Appellant

Solicitation No. FA4890-08-R-0004  
Department of the Air Force  
Headquarters Air Combat Command  
Langley Air Force Base, Virginia

SBA No. NAICS-4946

Decided: April 21, 2008

APPEARANCES

Kenneth R. Lee, President, K-Mar Industries, Inc., D'Iberville, Mississippi, for Appellant.

Keith D. Friot, Captain, U.S. Air Force, Contracting Officer, Department of the Air Force, Headquarters Air Combat Command, Acquisition Management and Integration Center, Langley Air Force Base, Virginia.

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. Accordingly, this appeal is properly before the Small Business Administration's (SBA) Office of Hearings and Appeals (OHA) for decision.

II. Issue

Whether the Contracting Officer's assignment of North American Industry Classification System (NAICS) code 541990, All Other Professional, Scientific and Technical Services, to a procurement for weather forecasting and meteorological equipment maintenance services is based on a clear error of fact or law.

### III. Background

On March 19, 2008, the Department of the Air Force, Headquarters Air Combat Command (ACC), at Langley Air Force Base, Virginia issued Solicitation No. FA4890-08-R-0004 (solicitation). The Contracting Officer (CO) set the solicitation totally aside for small businesses and assigned NAICS code 541990, All Other Professional, Scientific and Technical Services, with a corresponding small business size standard of \$6.5 million average annual revenues. Proposals are due April 23, 2008.<sup>1</sup>

#### A. Appeal

On March 20, 2008, K-Mar Industries, Inc. (Appellant) filed a NAICS code appeal with OHA. Appellant states the solicitation bundles two existing contracts into one. Appellant alleges it is the incumbent contractor on the Weather and Radar Equipment contract which is under SIC code<sup>2</sup> 7699, with a size standard of \$6.5 million average annual revenues, and 3D Research Corporation is the incumbent on the Weather Observation Services contract which is under NAICS code 541990, also with a \$6.5 million size standard.

Appellant argues these two existing contracts are vastly different and consolidating the two contracts creates a single contract unsuitable for award to a small business under the selected NAICS code, 541990. Appellant doubts two or more small businesses, operating under NAICS code 541990, are capable of performing the bundled solicitation. Appellant does not oppose the bundling, but appeals the selected NAICS code for the bundled contract.

Appellant argues the proper NAICS code for the solicitation is 517919, All Other Telecommunications, with a size standard of \$23 million. Appellant states the solicitation requires services to be performed at 14 separate sites. Appellant asserts: Weather Observation and Forecasting Services are performed at 9 sites; Weather Observation and Forecasting Services and Radar Maintenance and Repair functions overlap and are performed concurrently at 6 sites; and Weather Equipment and Radar Maintenance and Repair functions are performed at 11 sites. Appellant states NAICS code 517919 includes Radar Station Operations. Moreover, Appellant argues ACC has previously used NAICS code 517919 for similar services.

Appellant requests OHA to change the NAICS code assigned to the solicitation to 517919, All Other Telecommunications, or, in the alternative, direct ACC to unbundle the requirements and issue two separate stand alone solicitations.

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<sup>1</sup> Proposals were originally due on April 18, 2008, but Amendment 3, issued on April 14, 2008, extended the deadline for proposals until April 23, 2008.

<sup>2</sup> Effective October 1, 2000, NAICS replaced the Standard Industrial Classification (SIC) system as the basis for the SBA's small business size standards. *See* 65 Fed. Reg. 30836, 30840 (May 15, 2000) (amending 13 C.F.R. § 121.101).

## B. CO Response

On April 1, 2008, the CO filed a response contending that 541990 is the appropriate NAICS code for the solicitation. The CO states the services required by the solicitation were previously performed under two separate contracts. The CO conveys the services were consolidated for the solicitation, in accordance with DFAR 207.170-3(a)(3).

The CO asserts market research was conducted for the solicitation. On November 5, 2007, ACC issued a Sources Sought Notice requesting a response from capable small businesses under NAICS code 541990. The CO states five small businesses responded. The CO asserts the Government Program Managers for each of the service contracts being consolidated in the solicitation evaluated the small businesses' capability statements submitted and determined all five small businesses to be fully capable of performing successfully. The CO states none of the respondents to the Sources Sought Notice opposed consolidating the contracts or the NAICS code assigned to the solicitation and the CO claims several responses noted potential cost savings due to the consolidation. Additionally, the CO states two more companies certified as small businesses under NAICS code 541990 have expressed their intent to submit proposals.

The CO acknowledges that Appellant and 3DRC are performing the two current contracts that are bundled in the solicitation. The CO states Appellant is performing a contract under NAICS code 811219, Other Electronic and Precision Equipment Repair and Maintenance, which is valued at \$8.5 million, where 3DRC's contract is valued at \$12.7 million. The CO argues the larger contract performed by 3DRC under NAICS code 541990 supports the use of NAICS code 541990 on the consolidated contract. Moreover, the CO asserts the use of Appellant's recommended NAICS code, 517910, has been researched and determined inappropriate for this solicitation.

## IV. Discussion

### A. Timeliness

Appellant filed its appeal within 10 days after ACC 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 procuring agency CO must select the NAICS code which best describes the principal purpose of the product being acquired in light of the industry description in the *NAICS Manual*,<sup>3</sup> the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b). Appellant must establish the CO's NAICS code designation is based on a clear error of fact or law. 13 C.F.R. § 134.314.

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<sup>3</sup> 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> (hereinafter *NAICS MANUAL*).

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 it 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 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 CO'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 the CO'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 the CO merely because OHA would have selected a better code. If OHA finds the CO committed clear error or the CO's designation was unquestionably erroneous, only then should the OHA Judge select the correct code.

### C. Analysis

NAICS code 541990, All Other Professional, Scientific, and Technical Services applies to concerns offering professional, scientific, or technical services. Immediately underneath the definition in the *NAICS Manual* are several illustrative examples, including: "Weather forecasting services."

NAICS code 517919 applies to concerns engaged in providing specialized telecommunication services, such as satellite tracking, communications telemetry, and radar station operation. There is no mention or reference under NAICS code 517919 in the *NAICS Manual* to the provision of weather forecasting services.

Based upon the *NAICS Manual* and the CO's response, I hold there is no clear error in the CO's selection of NAICS code 541990, All Other Professional, Scientific and Technical Services. Rather, I find the CO's NAICS code designation was researched and based on sound reasoning. Appellant's argument that small businesses will be incapable of performing the bundled solicitation under NAICS code 541990 was refuted by the CO's response and Appellant's argument that NAICS code 517910 is more appropriate based on its previous use for similar services is unpersuasive. Moreover, Appellant's arguments fail to establish the CO committed clear error.

V. Conclusion

For the above reasons, I AFFIRM the CO's NAICS code designation of 541990 and DENY the Appeal.

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

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THOMAS B. PENDER  
Administrative Judge