

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

NAICS APPEAL OF:

EnergX, LLC

Appellant

Solicitation No. DE-RP05-080R23286
U.S. Department of Energy
Transuranic Waste Processing Center
Oak Ridge, Tennessee

SBA No. NAICS-4952

Decided: May 14, 2008

APPEARANCES

Kenneth B. Weckstein, Esq. and Pamela A. Reynolds, Esq., Brown Rudnick Berlack
Israels LLP, Washington, D.C., for Appellant.

Kristopher D. Muse, Esq., Office of Chief Counsel, Oak Ridge, Tennessee, for the U.S.
Department of Energy.

Joseph P. Hornyak, Esq. and Megan M. Mocho, Esq., Holland & Knight LLP,
Washington, D.C., for Gonzales-Stoller Services, LLC.

Michael H. Evans, President and Chief Executive Officer, for GEM Technologies, Inc.

I. Introduction and Jurisdiction

On April 2, 2008, the Department of Energy (DOE) issued the subject Request for
Proposals No. DE-RP05-080R23286 (RFP) for waste management activities at the Oak Ridge
Transuranic Waste Processing Center (TWPC). The Contracting Officer (CO) set the
procurement totally aside for small businesses, and designated North American Industry
Classification System (NAICS) code 562211, Hazardous Waste Treatment and Disposal, with a
corresponding \$11.5 million annual receipts size standard, as the NAICS code for this
procurement. Proposals are due on June 2, 2008.

On April 14, 2008, EnergX, LLC (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 561210, Facilities Support Services, with a
corresponding \$32.5 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 562211 to a solicitation for waste management activities was based upon a clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Facts

1. The CO provided a cover letter to the RFP that states, in part:

The U.S. Department of Energy (DOE), Oak Ridge Office (ORO) has a requirement for waste management activities at the Transuranic Waste Processing Center (TWPC). The wastes to be managed include contact-handled (CH) and remote handled (RH) transuranic (TRU) waste currently in storage, or to be generated by ongoing activities, on the Oak Ridge Reservation and/or other DOE Sites. Additionally, the requirement involves the process and disposal of low-level radioactive waste (LLW), mixed low-level radioactive waste (MLLW), and hazardous or industrial waste resulting from CH and RF-TRU waste processing. The primary waste streams to be managed include: (1) RH and CH transuranic containerized debris and soil wastes, (2) RH sludge and associated supernate [this refers to liquid forming on the top of solid precipitates during a chemical reaction], and (3) LLW and MLLW resulting from the processing of TRU waste. The requirement also involves project management and support in the areas of facilities operations and maintenance, environment, safety, health and quality (ESH&Q), project support, and engineering.

2. The RFP states the contractor must furnish all "personnel, facilities, equipment, material, supplies, and services (except as may be expressly set forth in this contract as furnished by the Government) and otherwise do all things necessary for, or incident to," performing the work required under the Performance Work Statement (PWS). RFP, ¶ B.1.
3. The PWS contains an introduction explaining the essential elements of the procurement, to wit:

The mission of the Department of Energy (DOE) Environmental Management (EM) Program in Oak Ridge is to conduct cleanup programs to correct the legacies remaining from more than 50 years of energy research and weapons production. The program also includes an aggressive effort to manage currently-generated wastes. The management of the Reservation's approximately 3,500 cubic meters (m³) of remaining remote handled (RH), and contact-handled (CH) transuranic (TRU) waste debris and soils and RH sludge and supernate waste is one of the essential elements of this mission and is the *objective of this contract*.

The wastes to be managed include CH and RH-TRU waste currently in storage, or to be generated by ongoing activities, on the Oak Ridge Reservation (specifically Oak Ridge National Laboratory (ORNL)) or other DOE sites. Additionally, the Contractor will process and dispose of low-level radioactive waste (LLW), mixed low-level radioactive waste (MLLW), and hazardous or industrial waste resulting from CH and RH-TRU waste processing. The primary waste streams managed include:

- RH and CH transuranic containerized debris and soils wastes
- RH sludge and associated supernate
- LLW and MLLW resulting from the processing of TRU waste

...

In addition, the Contractor will need to manage any industrial or hazardous waste generated by the project.

These wastes must be processed and packaged for compliant disposal in offsite radioactive waste repositories – Waste Isolation Pilot Plant (WIPP) for TRU wastes and the Nevada Test Site (NTS) or other DOE site for LLW and MLLW. In addition, the Contractor may choose to use other treatment and disposal facilities for LLW/MLLW treatment or disposal, and hazardous or industrial waste disposal, as necessary, including the use of commercial facilities. . . .

(emphasis added).

4. The PWS contains requirements for disposal of the various types of waste. For example, the waste disposal requirements for MLLW are:

1. Prepare waste profiles as required and obtain NTS or other disposal site approval.
2. Obtain final waste form certification from NTS or other utilized disposal sites.
3. Prepare all required procedures, work plans, waste shipping forecasts, etc. for processing MLLW.
4. Process and treat the waste as required to meet disposal site WAC and RCRA Land Disposal Requirements (LDR) as applicable.
5. Procure MLLW disposal site approved disposal containers for the waste.
6. Coordinate with the treatment and/or disposal sites and be the Shipper of Record for all waste being shipped to treatment and/or disposal sites.

7. Prepare the waste for transport to the treatment and/or disposal facility.
8. Provide interim storage for waste ready-for-disposal until shipping can be arranged by the Contractor.
9. Load and transport MLLW for treatment and/or disposal.
10. Dispose of the waste.
11. Prepare exemption requests for use of commercial disposal facilities, if commercial treatment and/or disposal options are being considered.

PWS, ¶ C.1.1.5.

5. PWS Paragraph C.1.2.1, Facilities Operations and Maintenance, states the contractor shall:

1. Maintain in proper working condition all facilities including processing and storage buildings, roads, lighting, fencing, and grounds required at the TWPC.
2. Maintain (including preventative maintenance) the buildings at the MVST when under the control of the Contractor.
3. Provide inventory controls for facilities equipment.
4. Provide radiological controls including surveys, postings, dosimetry, source controls, and bioassay.
5. Support audits, tours, and information requests from DOE and regulatory agencies.
6. Maintain office space for site operations including DOE personnel, and other DOE contractors (e.g. CCP).
7. Procure all equipment, systems, consumables, and services not provided by DOE or CCP.
8. Maintain and administer the site-wide DOE Personal Property Management System.
9. Implement and administer the site-wide cyber security program in accordance with the Under Secretary of Energy Program Cyber Security Plan (PCSP).

6. PWS Paragraph C.1.2.2, Environment, Safety, Health and Quality (ESH&Q), in pertinent part, states:

The Contractor's ESH&Q program shall be operated as an integral, but visible, part of how the Contractor conducts business. The Contractor shall implement and maintain an ISM System to accomplish all work as required by DEAR 970.5223-1, "Integration of Environment, Safety and Health into Work Planning and Execution." DOE will review this system on an annual basis. The Contractor shall adopt the existing DOE approved ISM System or submit for DOE's approval another ISM System within 60 days of contract award. The Contractor shall establish and maintain an effective quality assurance program in compliance with 10 CFR 830 Subpart A and DOE O 414.1C, Quality Assurance, or its latest version. The Contractor shall implement and maintain a Contractor Assurance System as required by DOE O 226.1 or its latest version.

The Contractor shall obtain and maintain all required environmental permits and comply with all regulatory requirements for the operation. . . .

7. PWS Paragraph C.1.2.3, Project Support, in pertinent part, states, "The Contractor shall develop and maintain a project management system and integrated Contractor and Federal baseline plan in accordance with DOE O 413.3A and Section H clause, Project Management Systems and Reporting Requirements. . . ."

8. PWS Paragraph C.1.2.4, Engineering, states, "The Contractor shall provide all engineering support required to perform this PWS. Engineering activities may include, but are not limited to engineering management, waste disposition engineering, facility engineering, system engineering, and project engineering."

IV. Appeal

On April 14, 2008, Appellant filed the instant appeal. Appellant argues the CO committed a clear error of law and fact in designating NAICS code 562211, Hazardous Waste Treatment and Disposal. Appellant asserts that only 30.9 percent of the estimated value of the contract is spent on hazardous waste treatment or disposal and thus NAICS code 562211 does not best describe the principal purpose of the RFP. Instead, Appellant maintains the RFP requires the contractor to provide a combination of support services, justifying NAICS code 561210, Facilities Support Services. Appellant is also the contractor under the current TWPC management contract (Contract No. DE-AC05-98OR22516), which Appellant argues is "virtually identical" to the instant contract and appropriately classified as a facilities support services contract.¹

Appellant asserts the RFP requires the contractor to perform a wide range of services, each of which qualify under separate NAICS codes and account for less than fifty percent of the

¹ The contract is classified under Standard Industrial Classification (SIC) code 8744, Facilities Management, which has been converted to NAICS code 561210, Facilities Support Services.

contract value. These services include environmental and soil remediation, hazardous waste treatment and disposal, environmental consulting services, engineering services, office administrative services, building and property specialty trade services, specialized trucking, computer services, and other scientific and technical consulting. Because the contractor would provide operating staff to perform a variety of support services within DOE's facilities, Appellant advocates a facilities support services code.

Finally, Appellant contends a hazardous waste treatment and disposal code is inappropriate because "additional services are provided for waste characterization and security at the TWPC Facility under separate prime contracts." Appeal, at 9. The PWS, however, requires only that the contractor interface with these separate prime contractors.

V. DOE Response

On April 30, 2008, DOE filed a Response in support of the CO's NAICS code designation. DOE argues that the principal purpose of the RFP is to treat and prepare for disposal various types of waste that have been and will be generated at the Oak Ridge Reservation. Specifically, the contractor is expected to process, on an annual basis, a minimum of 400 m³ of contact handled (CH) transuranic (TRU) solid waste, 200 m³ of remote handled (RH) TRU solid waste, and 450 m³ of RH sludge. Response, at 3 (citing PWS, at C-3).

DOE asserts it "took a 'global' view of the work scope and determined that the numerous tasks listed in the RFP PWS were in support of the contractor's principal goal, i.e., successfully receiving, treating and processing various types of waste ... in preparation for disposal." Response, at 10.

DOE argues that even if it applied Appellant's "more compartmentalized approach" to designating a NAICS code, i.e., determining the percentage of project resource time associated with each NAICS code activity, Hazardous Waste Treatment and Disposal still accounts for more than fifty percent of the value of the procurement.

DOE argues Appellant improperly characterized certain job functions in an attempt to reduce the percentage of work attributed to hazardous waste treatment and disposal. For example, DOE disputes Appellant's separation of waste processing resulting from environmental remediation activities from waste processing resulting from facility operations at Oak Ridge National Laboratory. McMillan Affidavit, ¶ 11. DOE argues Appellant inappropriately separated the processing of these waste populations into two different NAICS code -- 562211 (Hazardous Waste Treatment and Disposal) and 569210 (Remediation Services) -- when both fall under the umbrella of hazardous waste treatment and disposal.

DOE also asserts Appellant improperly characterized certain job functions as Environmental Consulting Services resulting in an inaccurate distribution of cost to this industry. Response, at 14. For example, Radiological Control Technicians (RCTs) are incorrectly included in the calculation of estimated costs attributed to environmental consulting services when RCTs support the safe treatment and disposal of hazardous waste.

DOE maintains that if environmental remediation activities are included in the hazardous waste processing and disposal functions, and activities in direct support of waste processing are included (such as the RCT activities), the total budget for the activities in hazardous waste processing and disposal is approximately 53.5 percent. McMillan Affidavit, ¶ 28. Fundamentally, however, DOE argues:

[A]ll of the functions that [Appellant] has indicated as support functions are performed in support of the waste disposition mission of the project. All project management and administration activities, engineering and maintenance, consulting services, health and safety support, quality assurance, project controls, information technology, and construction related activities are in direct support of the mission of the facility as a hazardous waste processing facility. As such, it can be concluded, in reality, that near 100% of the activities conducted at the TWPC are in support of the overall purpose and mission at the TWPC. Therefore, it does not appear appropriate to separate the work into multiple NAICS code categories.

McMillan Affidavit, ¶ 29.

VI. Intervenor Responses

On April 30, 2008, Intervenor Gonzales-Stoller Services, LLC (GSS) filed a response supporting the CO's NAICS code designation. GSS argues Appellant adopts a flawed methodology in treating each ancillary task in the PWS as a segregable item deserving its own NAICS code classification. GSS asserts such line by line segregation of incidental activities could be done on any statement of work to justify a larger umbrella facilities support services NAICS code, in contravention of the Small Business Act.

GSS maintains that the thrust of the procurement is for hazardous waste treatment and disposal. The fact that accomplishing this principal goal involves other incidental tasks, such as complying with environmental regulations, does not justify classifying the procurement under these ancillary codes. Further, GSS argues that OHA is not bound by the NAICS code assigned to the incumbent solicitation.

On April 30, 2008, Intervenor GEM Technologies, Inc. (Gem) filed a response in support of Appellant's appeal. Gem generally concurs with Appellant that the scope of work requires companies capable of providing multi-disciplined services for the operation and maintenance of a nuclear facility, necessitating a facilities support services NAICS code.

VII. Discussion

A. Timeliness

Appellant filed the instant appeal within ten days after DOE 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 the contracting officer to designate the perfect NAICS code. Rather, 13 C.F.R. § 121.402(b) states the procuring agency contracting officer designates the NAICS code which best describes the principal purpose of the product being acquired in light of the industry description in the *NAICS Manual*,³ 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, 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 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 the contracting officer's designated code unless OHA has a "definite and firm conviction

² Question No. 1, *available at* <http://www.census.gov/epcd/www/drnaics.htm#q1>.

³ 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*).

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 contracting officer merely because OHA would have selected a different code. If OHA finds the contracting officer committed clear error or the contracting officer’s designation was unquestionably erroneous, only then should the OHA Judge select the correct code.

C. Analysis

1. NAICS code definitions

NAICS code 562211, Hazardous Waste Treatment and Disposal, is for “establishments primarily engaged in (1) operating treatment and/or disposal facilities for hazardous waste or (2) the combined activity of collecting and/or hauling of hazardous waste materials within a local area and operating treatment or disposal facilities for hazardous waste.” *NAICS Manual*, available at <http://www.census.gov/eos/www/naics/htmls/5/562211.htm>.

Appellant advocates NAICS code 561210, Facilities Support Services, which is for establishments primarily engaged in:

[P]roviding operating staff to perform a combination of support services within a client’s facilities. Establishments in this industry typically provide a combination of services, such as janitorial, maintenance, trash disposal, guard and security, mail routing, reception, laundry, and related services to support operations within facilities. These establishments provide operating staff to carry out these support activities; but are not involved with or responsible for the core business or activities of the client. Establishments providing facilities (except computer and/or data processing) operation support services and establishments providing private jail services or operating correctional facilities (i.e., jails) on a contract or fee basis are included in this industry.

NAICS Manual, available at <http://www.census.gov/eos/www/naics/htmls/5/561210.htm>. In addition, footnote 12(a) of 13 C.F.R. § 121.201 provides:

If one or more activities of Facilities Support Services as defined in paragraph (b) (below in this footnote) can be identified with a specific industry and that industry accounts for 50% or more of the value of the entire procurement, then the proper classification of the procurement is that of the specific industry, not Facilities Support Services.

Further, in order to utilize a facilities support services code, there must be “the performance of three or more separate activities in the areas of services or specialty trade contractors industries. If services are performed, these service activities must each be in a separate NAICS industry.” 13 C.F.R. § 121.201, n.12(b).

2. The Merits

The issue on appeal is whether the CO's designation of NAICS code 562211, Hazardous Waste Treatment and Disposal, is clearly erroneous. 13 C.F.R. § 134.314.

The Principal Purpose of the Procurement

The Introduction to the PWS explains that management of various kinds of TRU radioactive waste is the objective of the contract (Fact 3). The PWS also contains specific disposal requirements for the various categories of waste (Fact 4). After explaining how the contractor is to dispose of the TRU waste, the PWS specifies how the contractor is to manage, operate, and maintain the facilities associated with the processing of the TRU waste (Fact 5). Next the PWS establishes Environment, Safety, Health, and Quality requirements, including complying with all relevant regulations and obtaining all required permits for the operation of the TRU waste disposal program (Fact 6). Then the PWS requires the contractor to provide the project support and engineering support necessary to perform the PWS (Facts 7 and 8). Finally, the PWS identifies the entities with which the contractor will interface (RFP, ¶ C.1.2.6).

The DOE provided an Affidavit from William G. McMillan, DOE's Project Director at the TWPC, that explained the logic behind the CO's designation of NAICS code 562211. Specifically, Mr. McMillan explained that the overall purpose of the contract was to operate the TWPC to process TRU waste for disposition in New Mexico or Nevada. McMillan Affidavit, ¶ 4. Therefore, DOE chose the NAICS code that most closely fit the purpose of the facility, i.e., treating and disposing hazardous waste. *Id.* Moreover, while DOE understood the contractor's responsibilities would include a variety of tasks (e.g., environmental, safety, health and quality compliance, engineering and maintenance, project controls, computer support, and administrative support), all of these tasks were directly associated with the objective of the contract, processing TRU waste for disposal. *Id.* Mr. McMillan stated:

[A]ll of the functions that [Appellant] has indicated as support functions are performed in support of the waste disposition mission of the project. All project management and administration activities, engineering and maintenance, consulting services, health and safety support, quality assurance, project controls, information technology, and construction related activities are in direct support of the mission of the facility as a hazardous waste processing facility. As such, it can be concluded, in reality, that near 100% of the activities conducted at the TWPC are in support of the overall purpose and mission at the TWPC. Therefore, it does not appear appropriate to separate the work into multiple NAICS code categories.

McMillan Affidavit, ¶ 29.

Based upon the PWS and Mr. McMillan's supporting Affidavit, I find the principal purpose of the RFP is treating and disposing of hazardous waste. I also find the tasks Appellant argues support a facilities support services NAICS code, such as environmental consulting services, engineering services, and office administrative services, are ancillary to, and in support

of, the disposal of the TRU waste. That is, radioactive waste disposal requires an integrated effort on the part of a contractor, who must necessarily hire engineers, environmental consultants, office support staff, safety experts, computer support, and program management personnel to treat and dispose of the TRU waste. The fact that these ancillary services are necessary to the procurement does not justify classifying the procurement based on these services. *See NAICS Appeal of Spherix, Inc.*, SBA No. NAICS-4626 (2004). Accordingly, because the principal purpose of the RFP is to treat and dispose of hazardous waste, I cannot find error in the CO's designation of NAICS code 562211.

Alternatively, the DOE applied Appellant's methodology of segregating the tasks and nonetheless found the majority of the work fell into the category of hazardous waste treatment and disposal. Mr. McMillan explained that a portion of the contractor's efforts involved with engineering, maintenance, environmental consulting, safety, health, and quality compliance, computer support, and administrative support must necessarily be attributed to the primary purpose of processing and disposing hazardous waste and not estimated in a stand alone manner. Further, if environmental remediation activities, and other activities in direct support of waste processing, are included in the hazardous waste processing and disposal functions, hazardous waste processing and disposal accounts for approximately 53.5 percent of the work required for the contract. McMillan Affidavit, ¶ 28.

I find Mr. McMillan's calculations are reasonable. Thus, even applying Appellant's methodology, I would find that the amount of work required by the contract to perform TRU waste treatment and disposal is greater than fifty percent of the work likely to be performed on the contract. Thus, a facilities support services code is inappropriate. 13 C.F.R. § 121.201, n.12(a).

I note that I have considered Appellant's argument that because DOE used a facilities support services code on the predecessor contract, DOE should continue to use that code. I find, however, Appellant's argument unpersuasive in view of the PWS and Mr. McMillan's Affidavit. In addition, OHA is not 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).

Summary

The PWS establishes DOE intends to award a contract whose principal purpose is to treat, remove, and dispose of hazardous waste (Facts 2, 3, 4, 5, 6, 7, and 8). Mr. McMillan's explanation of why NAICS code 562211 was chosen is also consistent with the PWS. Further, the separate services Appellant alleges justify an alternative NAICS code are ancillary to the primary purpose of the contract and constitute less than fifty percent of the value of the contract. Consequently, I hold I cannot find the CO's designation of NAICS code 562211 was the result of clear error.

VIII. Conclusion

In consideration of the foregoing, I AFFIRM the CO's NAICS code designation of 562211 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