

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

NAICS APPEAL OF:

Dynamac Corporation

Appellant

Solicitation No. AB133F-09-RP-0001

National Oceanic and Atmospheric
Administration

National Marine Fisheries Service

Western Regional Acquisition Division

SBA No. NAICS-5025

Decided: February 4, 2009

APPEARANCES

Pamela J. Mazza, Esq., Jonathan T. Williams, Esq., and Steven J. Koprince, Esq.,
PilieroMazza PLLC, Washington, D.C., for Appellant.

Susan K. Sherrell, Contracting Officer, National Oceanic and Atmospheric
Administration, National Marine Fisheries Service, Western Regional Acquisition Division.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

On January 7, 2009, the National Oceanic and Atmospheric Administration (NOAA) issued Request for Proposals No. AB133F-09-RP-0001 (RFP) for scientific and technical support for National Marine Fisheries. 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 million annual receipts size standard, as the NAICS code for this procurement. Proposals are due on February 6, 2009.

On January 21, 2009, Dynamac Corporation (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 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), with a corresponding 500 employee 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 scientific and technical support for National Marine Fisheries is based on a clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Facts

1. The RFP describes the contract NOAA proposes to award as follows:

National Marine Fisheries Services (NMFS) Indefinite-Delivery, Indefinite-Quantity (IDIQ) contract for scientific professional services. Purpose is to provide scientific professional support to the NMFS mission of assessing, managing, and promoting the conservation of living marine resources in U.S. waters. Work will be conducted in accordance with the attached Statement of Work (SOW) and the various schedules listed herein, associated with specific task orders issued by a contracting officer of NOAA.

2. The RFP includes a Statement of Work (SOW) at C.3, which provides:

This contract provides services for the following NOAA, NMFS offices: Alaska Fisheries Science Center, Northwest Region, Southwest Region, Southwest Fisheries Science Center and Pacific Islands Fisheries Science Center. . . .The Contractor shall provide technical and analytical support in the disciplines of the physical and biological sciences, (e.g., mathematics, statistics, engineering, computer sciences, physiology, molecular biology, genetics, systematics, oceanography fishery biology, and ecology), as well as support in the services areas of research, scientific illustration, safety and environmental, technical and non-technical writing, scientific editing, and social sciences.

...

C.3.1 TASKS - Tasks will be ordered/issued on individual task orders, and include, but not limited to, the following requirements:

C.3.1.1 Perform literature searches and reviews; compile and catalog background material; and/or prepare summaries and bibliographies for a specified fishery management, resource protection, or habitat conservation project, or a specified scientific research project.

C.3.1.2 Perform data conversions and coding for a specified fishery management, resource protection, or habitat conservation project or a specified scientific research project.

C.3.1.3 Perform data analysis and data reduction for a specified fishery management, resource protection, or habitat conservation project, or a specified scientific research project.

C.3.1.4 Review, analyze, and document management operational procedures, and/or perform feasibility studies for a specified fishery management, resource protection, or habitat conservation project or a specified scientific research project.

C.3.1.5 Prepare engineering drawings and schematics for a specified fishery management, resource protection, or habitat conservation project or a specified scientific research project.

C.3.1.6 Analyze charts, aerial photographs, and maps utilizing photogrammetric and cartographic techniques for a specified fishery management, resource protection, or habitat conservation project, or a specified scientific research project.

C.3.1.7 Conduct molecular, biological or physiological experiments, measurements, analyses, tests or evaluations for a specified fishery management, resource protection, or habitat conservation project or a specified scientific research project.

C.3.1.8 Design, exercise and/or test computer models utilizing stimulation, simulation, emulation, and numerical and statistical analysis techniques for a specified fishery management, resource protection, or habitat conservation project, or a specified scientific research project.

C.3.1.9 Develop computer programs, libraries, and databases for a specified fishery management, resource protection, or habitat conservation project or a specified scientific research project.

C.3.1.10 Prepare specialized scientific illustrations, such as drawings of developmental stages of marine fish species, for a specified fishery management, resource protection, or habitat conservation project, or a specified scientific research project.

C.3.1.11 Conduct environmental safety management and laboratory waste handling (hazardous, biomedical, non-hazardous) for a specified fishery management, resource protection, habitat conservation project, or a specified scientific research project.

C.3.1.12 Provide writing and editorial services for a specified fishery management, resource protection, or habitat conservation project or a specified scientific research project.

C.3.1.13 Surveying (as seagoing and aerial technicians) for fishery, marine mammal, and marine turtle surveys, or oceanographic cruises for a specified fishery management, resource protection, or habitat conservation project or a specified scientific research project.

C.3.1.14 Provide assistance with the organization, preparation and review of documents related to a specified fishery management, resource protection, habitat conservation project, or a specified scientific research project.

C.3.1.15 Provide GIS support through data entry, digitizing data, collecting geo-referenced data and metadata, and display GIS and mapping products, and analyses. Work closely with biologists to create GIS products. All work for this requirement will pertain to projects related to a specified fishery management, resource protection, habitat conservation project, or a specified scientific research project.

C.3.1.16 Provide Observer Program support, including preparing and updating bycatch plans and reports; assisting in the preparation of bycatch summaries; participating in operations pertaining to the training of observers; and maintaining and updating observer field manuals and collection protocols. All work for this requirement will pertain to projects related to a specified fishery management, resource protection, habitat conservation project, or a specified scientific research project. The Contractor will NOT be performing fisheries observation services.

3. NOAA has not anticipated the expenditure of research and development funds for work ordered under this contract. *See infra*, CO Response.

B. Appeal

On January 21, 2009, Appellant filed an appeal with OHA. Appellant argues the CO's assignment of NAICS code 541990 constitutes a clear error of law and fact.

Appellant asserts the principal purpose of the RFP is scientific research services yet the CO's designated NAICS code specifically excludes scientific research from its purview. In support of Appellant's position, Appellant notes: (1) the vast majority of the maximum contract dollars are allocated to scientific research facilities; (2) all sixteen tasks listed in the Scope of Work "contemplate the contractor's performance of that task on 'a specified scientific research project'"; and (3) the labor staffing consists primarily of scientific researchers and research support staff.

Appellant argues NAICS code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), is the appropriate code because it specifically addresses research in the fields of life sciences and fisheries. Although recognizing that prior NAICS code designations are not dispositive, Appellant notes that prior NOAA solicitations for the services in the instant RFP used NAICS code 541712.

C. CO Response

On February 2, 2009, the CO submitted its response in support of NAICS code 541990. The CO noted the work involves assisting various NOAA scientists in laboratory settings, which is consistent with services performed in support of scientific studies as opposed to scientific research and development. The CO maintains that the overwhelming amount of work is in support of scientific work and studies; indeed the personnel listed in Section J include such categories as scientists, veterinarians, biology technicians, scientific divers, and natural resource specialists. The CO argues that NOAA has historically used NAICS code 541990 for similar work at different centers. The CO asserts there is no research and development funding applied to this contract and thus a research and development NAICS code is inappropriate. The CO also argues that Appellant is focused on the fact that the services are to be provided at scientific research facilities, when the issue is what type of work is to be done at those scientific research facilities. The CO argues “[t]he work is in support of scientific studies as opposed to doing pure research and development.” Response, at 3.

IV. Discussion

A. Timeliness

Appellant filed this appeal within ten days after NOAA 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 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 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 MANUAL¹, 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

¹ EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (2007) (hereinafter NAICS MANUAL).

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. 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 (emphasis added).

NAICS code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), applies to concerns:

[E]ngaged 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.

Id. at 748-749 (emphasis added). Moreover, the Scientific Research and Development Services industry group comprises establishments:

[E]ngaged in conducting original investigation undertaken on a systematic basis to gain new knowledge (research) and/or the application of research findings or other scientific knowledge for the creation of new or significantly improved products or processes (experimental development). The industries within this industry group are defined on the basis of the domain of research; that is, on the scientific expertise of the establishment.

Id. at 747.

2. The Merits

Contrary to Appellant's argument, I do not find that NAICS code 541990 excludes scientific support services. Indeed, NAICS code 541990 is for concerns engaged in providing scientific services. NAICS code 541990 only excludes scientific research and development services. Thus, the issue in the appeal is whether the RFP requires both scientific research and development services. If so, the CO's designated NAICS code 541990 would be inappropriate as it specifically excludes scientific research and development services. Conversely, Appellant's suggested NAICS code of 541712's specific inclusion of research and development services may then be a possible NAICS code for the RFP.

The SOW lists 16 different kinds of services NOAA may require successful offerors to perform (Fact 2 above). While many of these tasks require scientific experience/expertise, they do not require the development of a new or improved product, which is the predicate of a research and development contract. Accordingly, I cannot find these tasks describe research and development tasks designed to develop a new or significantly improved product as required under the 5417 NAICS industry group. Nor can I find these tasks require the contractor to provide anything more than scientific support. These tasks include conducting biological experiments, performing data analysis, and preparing engineering drawings and schematics. Thus, as the CO asserts, these tasks are oriented to support NOAA scientists performing a wide variety of scientific missions, some of which may involve research, but very little of which, if any, is related to scientific research dedicated to the development of new or significantly improved products or processes.

As discussed above, I must find clear error to overturn a contracting officer's designation of a NAICS code. In this instance, I cannot find clear error. In holding the CO did not commit clear error, I find it persuasive that:

a. The task orders involve scientific research and support at various NMFS offices, which is consistent with a scientific services NAICS code;

b. The SOW neither provides for the creation of new or significantly improved products or processes (product development) nor describes any products or processes to be developed; and

c. Appellant's suggested NAICS code of 541712 describes research and development services yet no research and development funds are designated for the performance of the contract(s) resulting from the RFP and thus NOAA cannot issue research and development task orders under the contract.

Based upon the foregoing, I hold NAICS code 541990 best describes that work required by the SOW. Additionally, I hold that NAICS code 541712 is inapplicable to this RFP, for NAICS code 541712 applies to "research and development" and not pure research or scientific investigation, which does not involve creating new or significantly improved products or processes. 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