

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

NAICS APPEAL OF:

Inklings Media Company

Appellant

Solicitation No. HQ0147-09-R-0001

Missile Defense Agency

MDA/DACM

Redstone Arsenal, Alabama

SBA No. NAICS-5054

Decided: July 28, 2009

APPEARANCES

Charles L. Belitz, President, Inklings Media Company, *pro se*, for Appellant.

Robbie Phifer, Contracting Officer, for the Missile Defense Agency.

I. Introduction and Jurisdiction

On June 17, 2009, the Missile Defense Agency, MDA/DACM, at Redstone Arsenal, Alabama, issued Solicitation No. HQ0147-09-R-0001 for Advisory and Assistance Services (A&AS). The Contracting Officer (CO) set the procurement totally aside for small business, and designated North American Industry Classification System (NAICS) code 541330, Engineering Services (Military and Aerospace Equipment and Military Weapons) for CLINs 0002, 0003, 0004, and 0005. On June 25, 2009, Inklings Media Company (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 those CLINs is 541690, Other Scientific and Technical Consulting Services.

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. For the reasons discussed below, Appellant's appeal is denied.

II. Issue

Is the CO's designation of NAICS code 541330 Engineering Services (Military and Aerospace Equipment and Military Weapons) to a portion of a procurement for advisory and assistance services based upon a clear error of fact or law? *See* 13 C.F.R. § 134.314.

III. Background

A. Facts

1. On June 17, 2009, the Missile Defense Agency, MDA/DACM, at Redstone Arsenal, Alabama (MDA), issued Solicitation No. HQ0147-09-R-0001 (RFP) for A&AS. MDA contemplates award of Indefinite-Delivery, Indefinite-Quantity (ID/IQ) contract(s) with task orders resulting from this RFP. There are 13 Contract Line Item Numbers (CLINs) on the solicitation, arranged in five Capability Groups. The CO designated the Acquisition Support Capability Group CLINs 0002, 0003, 0004, and 0005 under NAICS code 541330, Engineering Services (Military and Aerospace Equipment and Military Weapons), which has a \$27 Million annual receipts size standard. Proposals are due on August 17, 2009.

2. MDA's mission is to develop and field an integrated, layered, ballistic missile defense system (BMDS) to defend the United States, its deployed forces, allies, and friends against all ranges of enemy ballistic missiles in all phases of flight.

3. MDA is primarily a research and development agency that relies upon the expertise and technical skills of the private sector to design, develop, test, and field a BMDS. MDA has developed a research, development, and test program focusing on missile defense as a single layered defense system.

4. MDA has transferred the A&AS work to an MDA program for enterprise-wide functional management and oversight. MDA established a project office to manage a newly created Missile Defense Agency Engineering and Support Services (MiDAESS) program. Among the objectives of the MiDAESS are: (1) Implement national engineering and support services for the BMDS mission; (2) Enhance the sharing of BMD expertise and knowledge across BMD; (3) Centralize the acquisition of support services manpower in a more effective functional alignment; and (4) Reduce costs.

5. MDA conducted market research to determine the capability of the small business community to provide A&AS support to MDA in a number of functional areas. MDA concluded it could set-aside approximately 38% of its estimated A&AS awards for small business concerns.

6. To further its objectives (Fact 4), MDA consolidated its A&AS requirements into six capability groups: (1) Quality, Safety and Mission Assurance Support; (2) Acquisition Support; (3) Engineering Support; (4) Infrastructure and Deployment Support; (5) Agency Operations Support; and (6) Security and Intelligence Support.

7. The RFP's CLINs applicable to this appeal state:

CLIN 0002

Acquisition Support Capability Group
FFP

Task Orders (TOs) will be issued on a Firm Fixed Price basis for non-personal A&AS services for Acquisition Management (MDA/DA) as defined in the Performance Work Statement (PWS) in Section J.

CLIN 0003

Acquisition Support Capability Group

FFP

Task Orders (TOs) will be issued on a Firm Fixed Price basis for non-personal A&AS services for Readiness Management (MDA/DWL) as defined in the Performance Work Statement (PWS) in Section J.

CLIN 0004

Acquisition Support Capability Group

FFP

Task Orders (TOs) will be issued on a Firm Fixed Price basis for non-personal A&AS services for International Affairs (MDA/DI) as defined in the Performance Work Statement (PWS) in Section J.

CLIN 0005

Acquisition Support Capability Group

FFP

Task Orders (TOs) will be issued on a Firm Fixed Price basis for non-personal A&AS services for Business and Financial Management (MDA/DOB) as defined in the Performance Work Statement (PWS) in Section J.

8. The Performance Work Statement (PWS) describes the five functional areas of the Acquisition Support Capability Group. They are:

2.1 Acquisition (DA)

The Director for Acquisition is the principal advisor to the Director, MDA on all issues relating to acquisition, contracting matters, and small business. The mission of the DA Directorate is to facilitate BMDS and program development and deployment by establishing acquisition and contracting policies and processes, developing direction and guidance for the BMDS and associated programs, assessing program performance, developing an acquisition workforce to support mission needs, and providing support through all phases of the acquisition cycle. The Director for Acquisition has five (5) subordinate organizations: Acquisition Policy, Planning, and Assessment; Program Element Management; Small Business Programs; Operations; and Contracting*. Acquisition activities are executed with a streamlined Headquarters staff and functional matrix personnel geographically distributed and co-located with program offices across the Agency. Specific functional management responsibilities include, but are not limited to:

- a. Providing acquisition authorization, assessment, oversight, and assistance throughout the Agency. Developing policies, plans, processes, procedures, and guidance for MDA acquisitions.
- b. Providing acquisition expertise and support to the Program Directors (PDs)/Program Managers (PMs) and their respective Acquisition Functional Leads for execution of the acquisition function.
- c. Preparing analyses, providing advice, and making recommendations to MDA leadership.
- d. Providing oversight and management of the MDA Small Business Program.
- e. Establishing and maintaining the Acquisition organization and workforce.

*The Acquisition Directorate responsibilities also include oversight and management of Agency contracting efforts. The contracting activities are NOT included in the MiDAESS A&AS requirement.

In addition, DA provides acquisition matrix support to the BMDS Plans, Programs and Integration Directorate (DPB). The DPB Directorate reports to the Deputy Program Manager for the BMDS and supports the DP mission of supervising the execution of the BMDS Program. The Directorate is headquartered at Redstone Arsenal, Alabama[,] and has personnel assigned in the National [C]apitol Region (NCR) and Colorado Springs. The Directorate is responsible for BMDS Baseline Integration, providing the Offices of Primary Responsibility (OPRs) for the Schedule Baseline, developing the BMDS Master Plan (BMP) and the BMDS Integrated Master Schedule (IMS), and maturing the BMDS Program Plan.

2.2 Readiness Management (DWL)

The Director of Readiness Management will utilize multiple Memorandum of Understanding (MOU) agreements to ensure effective communication and coordination between subject matter experts (SMEs) and service representatives. Specific functional responsibilities include, but are not limited to:

- a. Lead MDA efforts to ensure the BMDS meets Warfighters readiness requirements, including associated planning, analysis, and assessment requirements.
- b. Define, track, and report appropriate BMDS level (including programs) readiness metrics.
- c. Resolve problems identified through BMDS and program reporting.

- d. Interface with readiness stakeholders (Services, Joint Staff, COCOMS, and OSD) to ensure appropriate stakeholder concerns are considered in BMDS and program readiness trades.
- e. Identify and communicate BMDS and program readiness lessons learned and best practices across the BMDS, programs, services, and other agency stakeholders.

2.3 International Affairs (DI)

The Director for International Affairs provides executive leadership and strategic direction for all international activities and engagements proposed or conducted by the MDA to ensure the BMDS and associated acquisition program plans and accomplishments are aligned with established policies, strategies, guidance, and objectives. The DI Directorate develops and implements the Agency international strategy to facilitate BMDS development and deployment. International Affairs has a Headquarters staff with functional matrix personnel geographically distributed and co-located with programs across the Agency. It is currently organized into four (4) divisions: 1) Europe and the Americas, 2) Asia-Pacific, 3) Middle East, and 4) Strategy and Integration. These divisions cover all regions, countries, and functions germane to the effective execution of its mission. The Director for International Affairs applies unique expertise to a broad range of international policy and foreign affairs issues for the MDA Director, MDA headquarters staff, and to programs across the Agency. The International Affairs Directorate mission consists of the following activities:

- a. International Strategy Development and Execution
- b. Strategic Communication Planning and Execution; Global BMD Outreach
- c. Regional and Global Policy and Affairs
- d. Armaments Cooperation Planning and Execution (including cooperative R&D, international agreements development and negotiation)
- e. Security Assistance Planning and Execution (e.g., Foreign Military Sales)
- f. Multinational BMD Conference Planning and Execution
- g. Arms Control Implementation Planning and Development
- h. Internal Strategic Planning and Execution Supporting International Affairs

2.4 Business and Financial Management (DOB)

The Director for Business and Financial Management reports to the Deputy for Agency Operations and provides executive support, along with on-call support to other Agency senior leaders. The Directorate develops, allocates, executes, reviews, and analyzes funding and manpower expenditures and manages other accounting-related matters across the Agency. It validates that Agency and BMDS programs are resourced in an efficient, business-like, timely manner based on relevant and reliable information to support informed decision-making at all levels. The DOB Directorate also manages the implementation of decisions and executive action plans; establishes and manages Agency fiscal procedures; coordinates fiscal and workforce accounting concerns with Agency senior

leadership and external stakeholders, including the Office of Management and Budget (OMB), Office of the Secretary of Defense (OSD), Military Departments, Government Accountability Office (GAO); collaborates in Base Realignment and Closure (BRAC) related planning and execution; and provides specialized financial management support and oversight to Agency Special Access Programs. Support to the Business and Financial Management Directorate is divided into three functional activities:

- Area 4: Accounting Systems
- Area 5: Cost Estimating
- Area 6: Acquisition Business Support

2.5 Legislative Affairs (LA)

The Director for Legislative Affairs serves as the principal advisor for planning, coordinating, facilitating, and implementing Congressional affairs strategies, policies, and programs for the Agency. The Directorate serves as the single point of contact for Congressional communications, monitors legislation related to the BMD program and potential impacts, and coordinates with MDA and OSD legislative organizations on actions.

9. Following the general descriptions, the PWS continues with more detailed requirements for Acquisition, Readiness Management, International Affairs, Business and Financial Management (including accounting systems and cost estimating detailed requirements) and Legislative Affairs CLINs. Based upon these detailed requirements, a successful contractor must be able to support the engineering (scientific) and program staff (the Systems Program Office), whether through the development of needed schedules and plans, coordination of Warfighter requirements, coordination of strategy with allies based upon mission capabilities, assessing program performance, assessing readiness of the programs, establishing accounting systems capable of tracking costs, establishing cost estimating capable of supporting earned value management a systems, developing a work breakdown structures (WBS), assessing alternatives, and working with the Congress to provide information concerning the programs. Specific requirements by CLIN (or subject matter expertise) include:

a. Acquisition Management (CLIN 002) detailed requirements include the support of acquisition executive tasks such as the development of acquisition policies, plans, processes, procedures, and implementation guidance in support of the MDA and each MDA program. The contractor shall ensure expertise is provided for BMDS development, including program acquisition products, execution of Acquisition Executive tasks associated with development of policies, assessment of program performance, and evaluation of acquisition products developed by the individual program offices. Other detailed requirements include analyzing cost, schedule, and technical performance tradeoffs, providing acquisition and program management expertise and support, international contract planning activities, and technology transfer; support for the development of personnel policy, selection, and training; support for MDA's small business programs; and support for the development and maintenance of the BMDS Master Plan and key schedules.

b. Readiness Management (CLIN 003) detailed requirements include: expertise and

support for planning, defining, analysis and readiness assessments for all programs and components of the BMDS; defining, tracking, assessing, and reporting BMDS readiness. The contractor also must support the Services in defining and executing missile defense system readiness requirements and trades, and must identify and incorporate readiness lessons learned.

c. International Affairs (CLIN 004) detailed requirements include: support for international strategy development and execution, global BMD outreach, conducting political-military assessments to analyze international developments and potential effects of international BMD cooperation, armaments cooperation planning and execution with international organizations, arms control implementation planning and development (including technical analyses of arms control impacts on MDA activities), and internal strategic planning and execution supporting international affairs.

d. Business and Financial Management (CLIN 005) detailed requirements include: support for accounting, internal controls, cost estimating, analysis and development of the cost risk portion of cost estimates, and work on cost models and estimates with engineering, business, and other functional leads in the programs. The contractor also must anticipate program requirements using information gained in program meetings and technical reviews, analyze alternatives to support decision-making, prepare Independent Government Estimates, support the Earned Value Management (EVM) program, research industry EVM System best practices, and meet with industry and government experts on missile defense EVM issues.

e. Legislative Affairs detailed requirements include: monitoring legislative initiatives affecting the BMDS program, preparing testimony, and developing hearing preparation materials.

10. MDA adopted a matrix management approach wherein various functional personnel (contractor and Government employees) with like skills are assigned to directly support each of the program office or executing offices requiring their skills. Functional representatives work closely with the engineering staff to provide acquisition, readiness, cost, program execution, and international affairs expertise. Personnel assigned through matrix management directly facilitate and enable the engineering work by providing advice, preparing studies, and supporting the development, test, and integration of each BMDS element.

11. On June 30, 2009, the CO issued RFP Amendment 0001 informing all interested offerors of the instant NAICS code appeal.

B. Appeal

On June 25, 2009, Appellant filed a NAICS code appeal with OHA. Appellant argues that the appropriate NAICS code for the Acquisition Support Capability Group CLINs 0002, 0003, 0004, and 0005 is 541690, Other Scientific and Technical Consulting Services, which has a \$7 Million annual receipts size standard. Appellant asserts it is adversely affected by the designation of NAICS code 541330 because it allows firms of up to \$27 Million in annual receipts to compete with smaller firms with only \$7 Million in annual receipts.

Appellant asserts the Acquisition Support Capability Group does not require any engineering services; there are no engineers provided for in the labor categories given in the RFP; and the sample task does not include any engineering tasks. Appellant argues the work requires the following non-engineering categories: (1) Analyst; (2) Accountant; (3) Subject Matter Expert; and (4) Program Manager. Thus, business and finance support services dominate the task requirements.

Appellant also argues that MDA is procuring Engineering Support Capability Group services under CLINs 0006, 0007, 0008, and 0009 with their own NAICS code and that this is proof the services being acquired under CLINs 0002, 0003, 0004, and 0005 are not engineering support in nature. In addition, Appellant claims Section M (Evaluation Factors for Award) proves that engineering services are not the predominant services being provided. Appellant asserts that analysis of the MiDAESS Acquisition Support Capability Group Small Business Set-Aside Sample Task and its relative importance in Section M prove that engineering support is not being accomplished, but rather acquisition and finance service tasks predominate.

C. CO's Response to the Appeal

On July 9, 2009, the CO responded to the appeal. The CO challenges Appellant's right to submit a NAICS appeal for this RFP. Specifically, the CO asserts Appellant lacks the ability to understand and perform the work required by the RFP. The CO also requests OHA to refer this appeal to SBA's Inspector General for investigation.

The CO contends she selected the NAICS code that best describes the principal purpose of the services being required by the RFP. The CO notes the MDA is a research and development organization and that the services relevant to CLINs 0002 through 0005 (Acquisition Support) are essential to the ability of MDA's engineers to plan, define, create a system design, build, test and verify, assess, and field the BMDS. Expanding further, the CO notes that the Acquisition Support Capability Group under the RFP is for the procurement of acquisition support services, readiness management, international affairs, accounting, cost estimating, acquisition businesses support and legislative affairs and that "the common characteristic of these services is that they all are in support of the program elements whose primary focus is design, engineering and test of the BMDS." (Reply at 5)

Further amplifying her argument, the CO explains that MDA's matrix management approach means the personnel providing the services acquired by the RFP (functional personnel) are assigned in direct support to the various program offices or executing organizations in need of their skills. Once assigned, functional personnel work closely with the engineering staff to provide acquisition, readiness, cost program execution, and international affairs expertise. In turn, the skills of the functional personnel facilitate and enable the engineering work by providing advice, preparing studies, and supporting the development, test and integration of each BMDS element.

The CO summarizes her position by contending that an objective reading of the entire PWS shows that the services being procured under the Acquisition Support Capability Group are in direct support of the BMDS engineering efforts. Thus, the purpose of the Acquisition Support

Capability Group services is consistent with the industry description for NAICS code 541330, a fact Appellant overlooked by concentrating on the title of the NAICS code in lieu of considering the industry description and NAICS definition.

The CO also presented her reasons why Appellant's proposed NAICS code 541690 is inappropriate.

IV. Analysis

A. Timeliness

Appellant filed the instant appeal within ten days after the MDA 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.¹

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 that best describes the principal purpose of the product being acquired in light of the industry description in the *NAICS Manual*,² 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."

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

² 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*).

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 it "with the definite and firm conviction" that the lower court's *key findings* were mistaken. *Id.* at 243.

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 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 a different code.

C. Standing to Appeal

The CO maintains Appellant is not an interested party because it lacks the capacity to understand or perform the work required by the RFP. The applicable regulation, 13 C.F.R. § 121.402(e), provides:

Any offeror or other interested party adversely affected by an NAICS code designation or size standard designation may appeal the designations to OHA under part 134 of this chapter.

Therefore, I conclude that Appellant's ability to understand or perform the work is not relevant to its standing to appeal the designated NAICS code.

Appellant also alleges it is adversely affected because the CO designated a NAICS code that permits larger businesses to perform the work required by the RFP than would have been the case if the CO had designated the NAICS code it advocated (\$27 million vs. \$7 million). This allegation of prejudice by Appellant is sufficient to meet the requirements of 13 C.F.R. § 121.402(e). Accordingly, Appellant is an interested party and there is no need to refer the matter to SBA's Inspector General.

D. Merits of the Appeal

1. NAICS code definitions

NAICS code 541330, Engineering Services, is for establishments primarily engaged in:

applying physical laws and principles of engineering in the design, development, and utilization of machines, materials, instruments, structures, processes, and systems. The assignments undertaken by these establishments may involve any of the following activities: provision of advice, preparation of feasibility studies, preparation of preliminary and final plans and designs, provision of technical services during the construction or installation phase, inspection and evaluation of engineering projects, and related services.

Illustrative Examples:

Civil engineering services
Environmental engineering services
Construction engineering services
Mechanical engineering services
Engineers' offices

NAICS Manual. The SBA's size standards regulation breaks out a special segment of NAICS code 541330 for Military and Aerospace Equipment and Military Weapons. 13 C.F.R. § 121.201.

Appellant advocates NAICS code 541690, Other Scientific and Technical Consulting Services which is for "establishments primarily engaged in providing advice and assistance to businesses and other organizations on scientific and technical issues (except environmental)."

Illustrative Examples:

Agricultural consulting services
Motion picture consulting services
Biological consulting services
Physics consulting services
Chemical consulting services
Radio consulting services
Economic consulting services
Safety consulting services
Energy consulting services
Security consulting services

NAICS Manual.

2. Analysis

The Missile Defense Agency is charged with fielding a Ballistic Missile Defense Shield to protect the United States, its deployed forces and allies and friends (Fact 2). I take notice that there is considerable debate as to whether this mission can be accomplished and that the MDA's unique mission is universally recognized as so great a technological challenge that it not only requires state of the art engineering and science but edge of the art engineering and science.

One of the detailed and primary requirements stated in the PWS is for assessment of program performance (Fact 9 - PWS paragraph 3.1.1). This detailed requirement, among others, presupposes substantive expertise with the Ballistic Missile Defense Shield work.

NAICS Code 541330 describes an industry where the establishments provide engineering services, including providing advice, feasibility studies, preparing preliminary and final plans, inspection and evaluation of engineering projects, and related services. As described in the PWS (Facts 8 and 9) the work required by the RFP will permit MDA engineers to communicate the requirements of the Ballistic Missile Defense System the MDA is charged with researching and developing (Facts 2 - 4, and 10) to the contractors who must design and produce the anti-ballistic missile shield. The contractor must also be able to expertly assess program performance and evaluate the programs developed by the program offices (Fact 9). These are not simple tasks. Instead, these tasks are consistent with the stated definition of NAICS code 541330, which specifically anticipates evaluation of engineering projects.

The CO argues that Appellant does not understand the procurement represented by the RFP. The CO is correct. As credibly explained by the CO, work required for the acquisition and development of the BMDS is performed by teams of engineers supplemented by functional personnel, *e.g.*, accountants, contracting officers, subject matter experts, and program managers matrixed to a program office. This means engineers, accountants, contracting officers, and other skilled personnel work together to manage a program and produce acquisitions that can successfully describe the BMDS the Government's contractors must produce.

Creating and managing acquisitions capable of buying Ballistic Missile Defense Shield components is necessarily a challenging and sophisticated undertaking. In performing such an undertaking, and as the CO suggests, it is virtually impossible to separate the work performed by the engineers and scientists from those supporting them, for either the entire team succeeds or it fails. Therefore, under such conditions as face MDA in developing the Ballistic Missile Defense System, it is not possible to separate those supporting the engineers from the engineers and thus it is appropriate to assign a NAICS code like 541330 to the effort as best describing the work required by the RFP.

While noting the work required by the PWS includes competency categories for such competencies as analyst, subject matter expert, and program manager, Appellant seemingly fails to comprehend that these competencies are often performed by engineers and if not, are engineering support tasks. Regardless, as explained by the CO, it is apparent the PWS provides these tasks will be performed by subject matter experts in close collaboration with engineers. The descriptions for the Acquisition Support Capability Group competencies provided in the

PWS (Facts 9 and 10) emphasize the engineering centric or synergistic nature of the competencies required by the PWS. Ultimately, these competencies will require understanding of the complex weapons systems, knowledge of technical issues, and the ability to manage the complex weapons systems underlying the BMDS.

Finally, engineers do not work in a vacuum. When engineers or scientists require the support of technically experienced non-engineers or engineers working in other competencies to prepare plans and assess program performance, it cannot be said a contracting officer is incorrect to assign an engineering NAICS code 541330 to the support competencies required for the success of the engineering effort.

Appellant also seems to misunderstand the definition of NAICS code 541330. The *NAICS Manual* does not limit the reach of NAICS code 541330 to pure engineering services. Rather, the definition includes provision of advice, feasibility studies, preparation of all kinds of plans, inspection and evaluation of engineering projects, and *related services*. In the context of this RFP, as long as the CO has made a credible effort to explain why the services being acquired are related to the engineering effort, then there is no clear error and OHA will not second guess a credible attempt to assign the best NAICS code (*See* Facts 5 and 6).

I have considered Appellant's argument concerning the acquisition of engineering support under CLINs 0006, 0007, 0008, and 0009 to the RFP. I find this argument to be irrelevant, because these tasks are not at issue and plainly involve supplementing MDA's own engineers and scientists with pure engineering or scientific services under a research and development NAICS code (541712).

Appellant's final argument is that a list of sample tasks in Section M proves MDA is not buying engineering services.³ Appellant misses the point. Both the RFP and the CO state CLINs 0002, 0003, 0004, and 0005 are for services needed to support engineering effort (as permitted by NAICS code 541330), not pure engineering services. Further, the sample task in Section M, addresses plans, schedules, program analyses, studies, and identifies tasks mentioned in the NAICS code that are critical to, supportive of, and ancillary to the provision of engineering services. The CO's contention that these services cannot be separated from the pure engineering effort is relevant to this argument and along with the supportive and ancillary nature of the sample tasks, defeats Appellant's argument.

In designating NAICS code 541330, the CO represents this code best describes the principal purpose of the RFP. *See* 13 C.F.R. § 121.402(b). After reviewing the RFP and the PWS, I find the CO's designation of NAICS code 541330 is not clearly erroneous. Therefore, I hold the CO did not commit a clear error of law or fact in designating NAICS code 541330, Engineering Services (Military and Aerospace Equipment and Military Weapons) for this RFP. Accordingly, it is unnecessary to address Appellant's allegation concerning NAICS code 541690.

³ Section M, paragraph 2.2 references sample task orders. The list Appellant refers to is in Section L-13, List of Section L Attachments, L-7.2. The sample task order is ranked below the past performance factor (M-01.2).

V. Conclusion

In consideration of the foregoing, I AFFIRM the CO's NAICS code designation and find the appropriate NAICS code for this procurement is NAICS code 541330, Engineering Services (Military and Aerospace Equipment and Military Weapons) and thus DENY the instant appeal.

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

THOMAS B. PENDER
Administrative Judge