

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

NAICS APPEAL OF:

Davis-Paige Management Systems, LLC

Appellant

Solicitation No. W911SR-09-R-0031
US Army RDECOM Contracting Center
Edgewood Contracting Division
Aberdeen Proving Ground, Maryland

SBA No. NAICS-5055

Decided: July 22, 2009

APPEARANCES

Charles A. Comaty, Contracting Officer, Department of the Army, US Army Research, Development and Engineering Command Contracting Center, Edgewood Contracting Division Aberdeen Proving Ground, Maryland.

Michael E.P. Davis, President, Davis-Paige Management Systems, LLC, Annandale, Virginia.

Rink C. Wood, Vice-President - Contracts, Chief Financial Officer, Science and Technology Corp., Hampton, Virginia.

DECISION

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the Contracting Officer's designation of North American Industry Classification System (NAICS) code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), to a solicitation to provide project management, research development, acquisition and sustainment support services was based upon a clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. BACKGROUND

A. The Solicitation

On June 24, 2009, the U.S. Army's Research Development and Engineering Command Contracting Center (RDECOM) in Aberdeen Proving Ground, Maryland issued the subject solicitation for project management, research, development, acquisition and sustainment support services. The Contracting Officer (CO) set the procurement entirely aside for small business and designated NAICS code 541712, Research and Development in the Physical, Engineering and Life Sciences (except Biotechnology), with a corresponding 500 employee size standard, as the applicable NAICS code. The purpose of the contract is to service the non-medical needs of the Chemical, Biological, Radiological, Nuclear and Explosives (CBRNE) defense agencies.

The solicitation seeks research and technology support. The contractor will provide subject matter experts to support hazard assessments, vulnerability assessments, and knowledge management. The contractor is to conduct laboratory scale and prototype scale experiments on CBRNE materials, perform studies on CBRNE materials, and conduct literature searches. The contractor is to develop methods and design experiments for ongoing developmental programs, design and perform computer-based studies on the dynamics of CBRNE materials, develop in-house instrumentation, and develop mathematical descriptions that can be validated by full-scale testing. The contractor will prepare and analyze CBRNE materials present in samples of interest and perform synthesis of compounds. The contractor must document its findings in formal reports and maintain laboratories.

The solicitation also seeks program and integration support. The contractor will perform risk analyses, prepare environmental documentation, prepare standard operating procedures, conduct inspections, and initiate special studies, test plans, and reports. The contractor will also conduct studies and make recommendations, organize and conduct workshops, and collect data and prepare responses to information and data requests. The contractor will provide program management support to technical reviews, symposia, and technical meetings. Further, the contractor will prepare risk analysis and environmental documentation, prepare and edit technical reports, and develop and maintain internet and intranet web services.

B. The Appeal

On July 2, 2009, Davis-Page Management Systems, LLC (Appellant) filed the instant appeal from the CO's NAICS code designation. Appellant asserts that this contract requires similar, indeed nearly identical, work to a different procurement, Solicitation No. W911SR-09-R-0023 (0023), which is unrestricted and was assigned NAICS code 541330, Engineering Services, with a corresponding \$27 million annual receipts size standard. Appellant asserts the \$27 million annual receipts size standard is the appropriate size standard for the subject solicitation as well.

Appellant asserts 0023 includes three task areas: acquisition program and engineering support, research and technology support, and program and integration support. Appellant states the instant solicitation includes research and technology support and program and integration support.

Appellant points to the sample tasks included in solicitation 0023 which cover research and technology support, program and integration support, and acquisition program and engineering support. Appellant states, for the instant solicitation, the sample tasks all require program and integration support.

Appellant argues while both solicitations require similar work the CO has assigned two different NAICS codes. Appellant states the instant procurement's 541712 NAICS code covers research and experimental development in the physical, engineering, and life sciences and solicitation's 0023's 541330 NAICS code covers providing advice, preparing feasibility studies, preparing preliminary and final plans and designs, and inspecting and evaluating engineering projects. Appellant asserts NAICS code 541330 also covers chemical engineering services and environmental engineering services which appear in both solicitations..

Appellant argues that most of the effort of this solicitation should be characterized as engineering services, not research and development, and therefore NAICS code 541330 is the appropriate NAICS code for both procurements.

C. Solicitation 0023

RDECOM issued solicitation 0023 on June 24, 2009 as an unrestricted procurement, under NAICS code 541330, with a corresponding \$27 million annual receipts size standard. Solicitation 0023 requires the contractor to provide acquisition program and engineering support, which includes: analyzing mission performance across the Department of Defense; providing input to technology development strategy; and being involved with technology development, and prototype development. Further, solicitation 0023 tasks the contractor with engineering and manufacturing development and production and deployment, as well as research and technology support and program and integration support.

D. STC Response to the Appeal

On July 16, 2009, Science and Technology Corporation (STC) responded to the appeal. STC asserts that solicitation 0023 requires extensive engineering support services which are not included in the instant solicitation. STC argues that the solicitations do not require nearly identical services. STC states the sample tasks for solicitation 0023 are mostly engineering tasks, while the tasks for the instant procurement are largely laboratory and research tasks.

E. The CO's Response to the Appeal

On July 21, 2009, the CO responded to the appeal. The CO asserts that solicitation 0023 and the instant solicitation do not contain identical requirements. The CO states solicitation 0023 requires acquisition program and engineering support, which is not required in the instant solicitation. The CO explains that the sample tasks in solicitation 0023 include engineering tasks and the instant solicitation does not. The majority of the tasks required by solicitation 0023 are engineering tasks. The CO asserts the majority of tasks required by the instant solicitation are research, development and analysis in areas such as chemistry, biology, and toxicology. Therefore, the appropriate NAICS code for this procurement is a research and development NAICS code.

IV. DISCUSSION

A. Preliminary Matters

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

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the NAICS code designation assigned to the solicitation is based on a clear error of fact or law. 13 C.F.R. § 134.314; *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003). The NAICS code designation should be based on the code that best describes the principal purpose of the services being procured, in light of the industry description in the NAICS MANUAL,¹ the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b); *Durodyne*, SBA No. NAICS-4536, at 4.

B. The Merits of the Appeal

The NAICS code designated by the CO, 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), covers:

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

NAICS MANUAL 745, *available at* <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

Appellant's requested NAICS code, 541330, Engineering Services covers:

[E]stablishments 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.

NAICS MANUAL 731, *available at* <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

Despite Appellant's allegations, Engineering Services has a \$4.5 million annual receipts size standard, not a \$27 million size standard. The \$27 million size standard is applicable to two

¹ EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM-UNITED STATES (2007), *available at* <http://www.census.gov>. [hereinafter NAICS MANUAL].

subcodes of 541330, Military and Aerospace Equipment and Military Weapons (MAE&MW); and Contracts and Subcontracts Engineering Services Awarded Under the National Energy Policy Act of 1992. 13 C.F.R. § 121.201. There is nothing in this procurement to indicate it covers services under the 1992 Energy Policy Act, and so Appellant must argue that this procurement should be designated as an MAE&MW procurement.

The special size standard for the MAE&MW segment first appeared in 1984. 44 Fed. Reg. 5024, 5037 (Feb. 9, 1984). The Federal Register articles contain no special discussion of this segment. In OHA's case law, we have held that for this designation to be appropriate, the procurement must involve professional engineering services with a military application. *SIC Appeal of R.M. Vrendenburg & Co.*, SBA No. SIC-4220 (1996); *SIC Appeal of Giordano Associates, Inc.*, SBA No. SIC-2502 (1986).²

Appellant argues that solicitation 0023's designation should control here. However, NAICS code designations for other procurements are not of great probative weight. Appellant's selection of one other contract is obviously not a comprehensive collection of all procurements similar to the instant solicitation, but a selection of one other procurement which has the NAICS code designation Appellant seeks here. Further, this solicitation is a designation made by a contracting officer, exactly the type of designation OHA must review. For OHA to give too great a weight to designations by contracting officers would be to abdicate its regulatory role as a reviewer of contracting officer decisions. *NAICS Appeal of Eagle Design and Management, Inc.*, SBA No. NAICS-4521, at 5-6 (2002).

Moreover, solicitation 0023 is significantly different from the instant solicitation. Solicitation 0023 has significant engineering requirements which are not present in this solicitation. It is therefore not an appropriate comparison for this solicitation.

The instant solicitation requires the contractor provide research and technology support, conduct experiments on CBRNE materials, design further experiments, and develop in-house instrumentation and mathematical descriptions. The contractor must also prepare and analyze CBRNE samples. The contractor must prepare risk analyses and prepare studies and reports. The solicitation thus requires research and experimental development in the sciences, precisely as the industry description for 541712 requires. Conversely, the solicitation does not require engineering services. The studies required appear to deal with the nature of CBRNE materials, rather than engineering topics. This procurement is focused on research about these CBRNE materials, not the engineering of new ones. Therefore the procurement is appropriately classified as a research and development procurement, rather than an engineering one.

Accordingly, I conclude that Appellant has failed to meet its burden of establishing clear error in the CO's designation of NAICS code 541712 to the solicitation.

² Where appropriate, OHA case precedent, decided under the prior Standard Industrial Classification (SIC) code system, will apply to NAICS code appeals. *NAICS Appeal of Phoenix Scientific Corporation*, SBA No. NAICS-4416, at 8 (2000).

V. CONCLUSION

For the above reasons, the instant appeal is DENIED, and the CO's NAICS code designation of 541712, Research and Development in the Physical, Engineering and Life Sciences (except Biotechnology), with a corresponding 500 employee size standard, as the applicable NAICS code for this procurement, is AFFIRMED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge