

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

NAICS APPEAL OF:

Sytronics, Inc.

Appellant

Solicitation No. HSCG38-10-R-410009
Department of Homeland Security
U.S. Coast Guard Aviation Logistics Center
Elizabeth City, NC

SBA No. NAICS-5092

Decided: November 23, 2009

APPEARANCES

Charles W. Mahan, Esq., and Richard L. Carr, Jr., Esq., Dunlevey, Mahan & Furry, Dayton, Ohio, for Appellant.

Dorothy J. Pelis, Contracting Officer, for the United States Coast Guard.

I. Introduction and Jurisdiction

On October 28, 2009, the United States Coast Guard (Coast Guard) issued Solicitation No. HSCG38-10-R-410009 (RFP). The Coast Guard's objective was to:

1. Obtain services for the Design, Upgrade, Modification, and Sustainment of the ATF3 Jet Test Cell.
2. Obtain services for the Design, Upgrade, Modification, and Sustainment of the T-700-GE-401 Engine Turboshift Test Cell to included [sic] T-700-701c, and the CT7-9C3

(RFP Statement of Objectives, at 2.) The Contracting Officer (CO) set the procurement totally aside for small business, and designated North American Industry Classification System (NAICS) code 488190, Other Support Activities for Air Transportation, with a corresponding size standard of \$7 million in average annual receipts. On November 5, 2009, Sytronics, Inc. (Appellant) filed the instant NAICS code appeal with the Small Business Administration's (SBA) Office of Hearings and Appeals (OHA). Appellant argues the appropriate NAICS code for the contract line items in the RFP is 334513, Instruments and Related Products Manufacturing for Measuring, Displaying, and Controlling Industrial Process Variables, with a corresponding size standard of 500 employees.

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 488190, Other Support Activities for Air Transportation, to the instant RFP for Design, Upgrade, Modification, and Sustainment of the ATF3 Jet Test Cell and the T-700-GE-401 Engine Turboshaft Test Cell based upon a clear error of fact or law? *See* 13 C.F.R. § 134.314.

III. Background

A. Facts

1. On October 28, 2009, the CO for the Coast Guard issued the RFP for the commercial item design, upgrade, modification and sustainment of the ATF3 Jet Engine Test Cell and the T-700-GE-401 Engine Turboshaft Test Cell located at the Coast Guard's Aviation Logistics Center (ALC) in Elizabeth City, North Carolina. The RFP provides the procurement is a total small business set-aside, and selection will be based upon best value procedures. As noted above, the CO designated NAICS code 488190. Proposals are due on November 30, 2009.

2. The RFP contains a Statement of Objectives that describes the services the Coast Guard seeks. Section 1.0 of the Statement of Objectives, Background, describes the status quo as follows:

The [Coast Guard] operates (1) T-700-GE-401 Engine Turboshaft Test Cell at its facility in Elizabeth City, NC. . . . This Test Cell was designed to operate the General Electric T-700-GE (series) engine through its entire operational range. . . . The T-700-GE-401 Engine Turboshaft Test Cell currently uses a proprietary data reduction program from CMR Technologies Inc to verify engine performance. The throughput of the cell is estimated to be 69 T-700 engines, with variation based on yearly demand.

The [Coast Guard] operates one (1) ATF3-6-4C Jet Engine Test Cell at its facility in Elizabeth City, NC. This Test Cell was designed to operate the Honeywell ATF3-6-4C engine through its entire operational range. . . . The ATF3 Test Cell currently uses a proprietary data reduction program from Honeywell to verify engine performance. The throughput of the cell is estimated to be 36 ATF3 engines, with variation based on yearly demand.

(RFP Statement of Objectives, at 1.)

3. Section 2.0 of the Statement of Objectives, Scope, provides:

This specification defines the minimum requirements for the upgrade of the Automatic Data Acquisition System (ADAS), Data Reduction System, Display and Control System (DADCS) for both Test Cells located in Building 100 at

Coast Guard Aviation Logistics Center, Elizabeth City, NC. The ADAS is used to acquire, display and record all physical parameters required for depot testing of the ATF3 and T-700 engines. This upgrade shall consist of replacement of the existing antiquated computer hardware, software, and equipment as well as replacement of existing sensory sub-systems such as:

- ATF3 System:
 - Neff Data Acquisition System
 - Data General CPU and Printer
 - Data Reduction Computer and Printer
 - Throttle Control System
 - Engine Monitoring Sensor System
 - ☞ Temperature
 - ☞ Pressure (Hydraulic and Pneumatic)
 - ☞ Vibration
 - ☞ Displays/Controls
 - ☞ Video Monitoring/Camera System
 - Repositioning of the control console.
 - Upgrade System Power

- T-700 System:
 - CMR ADAS System
 - Mystic Controller System
 - OPTO 22 Interface System
 - Throttle Control System
 - Air Dynamometer System
 - Engine Mounting
 - Engine Monitoring Sensor System
 - ☞ Temperature
 - ☞ Pressure (Hydraulic and Pneumatic)
 - ☞ Vibration
 - ☞ Displays/Controls
 - ☞ Video Monitoring/Camera System
 - Repositioning of the control console.
 - Replace T700 CPU and Printer Systems
 - Upgrade System Power

The objective is to enable ALC to have a modernized test cell facility to meet OEM Standards and support the United States Coast Guard engines for the next decade. Our goal is to utilize the latest versions of sustainable "Commercial-off-the-shelf" (COTS) technology. Award recipient should project sustainability of selected equipment, hardware, software, and spare parts for a term of at least 5 years from Test Cell Upgrade Acceptance.

(RFP Statement of Objectives, at 2-3.)

4. Section 5.0 of the Statement of Objectives, Requirements, lists the systems that must be updated as part of the upgrade and mandates that:

This Up-grade will require the Test Cell to be capable of testing repaired engines in compliance with the Original Equipment Manufacture's, (OEM), specifications of the engines. The Upgrade shall improve the Test Cell to meet or exceed Industry Standards In-Accordance-With, (IAW); Federal Aviation Administration Advisory Circular AC 43-207, the National Electrical Code (NEC) and federal regulations.

(RFP Statement of Objectives, at 6-7.)

5. Section 5.4 of the Statement of Objectives, Test Cell Capabilities, lists what types of engines the test cells are each required to test and notes: "All software must have the ability to be reprogrammed to accommodate a new engine type in the event the USCG re-engines the HU-25 Falcon. . . . Inter-Service operability is highly desirable with Air Force, Navy, Army, and USMC systems and facilities." (RFP Statement of Objectives, at 8-9.)

B. Appeal Petition

On November 5, 2009, Appellant filed its NAICS code appeal with OHA. Appellant argues the effort identified in the RFP "is more akin to a remanufacture of the structure for the analysis of a repaired aircraft engine than it is to the repair of that engine" (Appeal, at 2). Accordingly, Appellant suggests the proper NAICS code for this procurement is 334513, Instruments and Related Products Manufacturing for Measuring, Displaying, and Controlling Industrial Process Variables, which has a size standard that would render Appellant eligible to compete for award of the procurement.

Even though Appellant admits the Coast Guard does not seek to acquire newly manufactured test cell operating systems, Appellant notes that Footnote 6 to 13 C.F.R. § 121.201 provides:

NAICS Subsectors 333, 334, 335 and 336—For rebuilding machinery or equipment on a factory basis, or equivalent, use the NAICS code for a newly manufactured product. Concerns performing major rebuilding or overhaul activities do not necessarily have to meet the criteria for being a "manufacturer" although the activities may be classified under a manufacturing NAICS code. Ordinary repair services or preservation are not considered rebuilding.

Hence, Appellant asserts the "Up-grade" of the test cells required by the Statement of Objectives should be classified under NAICS code 334513 for the *manufacture* of instruments and related devices for measuring whether repaired engines work.

Appellant also prepared a "Matrix" that it attached to its appeal as Exhibit A. In this Matrix, Appellant listed the tasks required by the Statement of Objectives and identified, by task, whether NAICS code 334513 or 488190 should apply. Appellant concluded the vast majority of the tasks required by the Statement of Objectives fall within NAICS code 334513. Appellant also notes that 85% of the dollars to be expended on this procurement are non-

sustainment in nature, and thus the upgrade effort of the procurement far outweighs the sustainment effort.

C. Coast Guard's Response

On November 13, 2009, the CO responded to the appeal. The CO explained that in researching the NAICS code for the work required by the RFP, it was determined, as is often the case, that no code exactly reflects the requirements of the project at hand. However, the CO chose NAICS code 488190, Other Support Activities for Air Transportation, because it includes various activities, including aircraft maintenance and repair services, aircraft testing services, and inspection services.

The CO also noted that Appellant did not appeal the NAICS code on the original solicitation for the work required by the RFP, for which Appellant was the successful offeror (Solicitation No. HSCG38-09-C-410059). The original contract was not awarded to Appellant because Appellant was found to be other than small based upon the \$7 million size standard.

The CO contends she selected the NAICS code that best describes the principal purpose of the services required by the RFP. The CO asserts that NAICS code 334513 falls under “the NAICS subsector Heading of 334 Computer and Electronic Product *Manufacturing*.” The CO contends the RFP does not require either manufacturing or remanufacturing. Instead, offerors were encouraged to provide their own solutions to upgrade the test cell systems. Hence, NAICS code 334513 does not accurately reflect the work required by the Statement of Objectives.

The CO notes NAICS code 334513 describes the manufacture of computer and electronic end products, specifically instruments and related products manufactured for measuring, displaying, and controlling industrial process variables. No such work is required under the RFP. Hence, the CO contends that NAICS code 488190, while not perfect, more accurately reflects the work required by the RFP. “That is to say: aircraft testing services, inspection services, and maintenance and repair services” (Coast Guard Response, at 2).

The CO also disputes Appellant's arguments concerning Footnote 6 to 13 C.F.R. § 121.201 for NAICS Subsectors 333, 334, 335, and 336. The CO argues this note does not provide amplifying information applicable to the RFP. Instead, the CO contends a clear reading of Footnote 6 provides that contracting officers may use these subsectors if the work involves a “major rebuilding or overhaul.” Thus, although the RFP does require upgrading of the engine test cells, it is certainly not a major rebuild or overhaul and, even if it were, Footnote 6 is discretionary in any event.

Finally, the CO cites a previous OHA NAICS decision, *NAICS Appeal of Ahntech, Inc.*, SBA No. NAICS-4579 (2003), to support the Coast Guard's position. According to the CO, *Ahntech* holds that NAICS code 488190 must be used when a solicitation calls for the maintenance of aircraft, their engines, and associated mission support equipment. The CO explains that an engine test cell is the last step in the aircraft engine repair process—the “final check.” “[T]he final testing of repaired aircraft engines prior to their being certified Ready for Issue (RFI) and reinstalled on aircraft . . . goes to the heart of this solicitation.” (Coast Guard

Response, at 2.) Thus, the CO contends the upgrade of the test cells required by the RFP falls under maintenance of aircraft, their engines, and associated mission support equipment, and NAICS code 488190 is appropriate.

IV. Discussion

A. Timeliness

Appellant filed the instant appeal within ten days after the Coast Guard issued the RFP. 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's 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." *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

¹ U.S. Census Bureau, Ask Dr. NAICS, 1. What is NAICS and how is it used?, <http://www.census.gov/epcd/www/drnaics.htm#q1> (last revised May 19, 2009).

² EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, *NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (2007)*, available at <http://www.census.gov/epcd/naics07/index.html> (hereinafter NAICS Manual).

(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)).

Although 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., Inc., 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 OHA select a different code.

C. Merits of the Appeal

1. NAICS Code Definitions

The requirements for NAICS code 488190, Other Support Activities for Air Transportation, are found in the NAICS Manual, which provides: "This industry comprises establishments primarily engaged in providing specialized services for air transportation (except air traffic control and other airport operations)." After identifying work not included in NAICS code 488190, the NAICS Manual continues to describe work specifically covered by the code, including, among other things, aircraft inspection, maintenance, repair, and testing.

The requirements for NAICS code 334513, Instruments and Related Products Manufacturing for Measuring, Displaying, and Controlling Industrial Process Variables Air Transportation, is also found in the NAICS Manual, which provides:

This U.S. industry comprises establishments primarily engaged in manufacturing instruments and related devices for measuring, displaying, indicating, recording, transmitting, and controlling industrial process variables. These instruments measure, display or control (monitor, analyze, and so forth) industrial process variables, such as temperature, humidity, pressure, vacuum, combustion, flow, level, viscosity, density, acidity, concentration, and rotation.

After identifying work not included in NAICS code 334513, the NAICS Manual continues with a very long list of manufacturing work specifically covered by NAICS code 334513. In general, the list encompasses manufacturing of either (1) equipment that tests and measures chemical or physical properties or (2) controllers for non-aviation processes. There is no mention of engine testing or of any aviation task that should be classified under NAICS code 334513.

2. Analysis

Appellant seeks to introduce Exhibit A into the Record of this appeal. With Exhibit A, Appellant attempts to attribute most of the work required by the Statement of Objectives to NAICS code 334513. First, I note that Appellant makes no attempt to establish a foundation for Exhibit A. Second, Appellant offers no regulatory or logical reason to explain why I should consider Exhibit A. Accordingly, I find it would be an abuse of discretion to consider Exhibit A in deciding this appeal. Furthermore, I should not consider Exhibit A because it is essentially opinion evidence on a matter I must decide, *i.e.*, which NAICS code best describes the principal purpose of the Statement of Objectives. *See* 13 C.F.R. § 121.402(b).

Even though I agree with the CO that there is no NAICS code that perfectly describes the principal purpose of the RFP, I do hold NAICS code 488190 comes close. In addition, I accept most, if not all, of the arguments the CO makes in her Response and find the CO's Response logically and cogently addresses why the choice of NAICS code 488190 is consistent with 13 C.F.R. § 121.402(b). However, in so doing, I want to emphasize that the *Ahntech* decision is not relevant to my holding. Rather, the key to the selection of any NAICS code under 13 C.F.R. § 121.402(b) is whether the work described in the solicitation is consistent with that code.

It is undisputed that the test cells that are the subject of the RFP test the performance of repaired engines to be flown on Coast Guard aircraft (Facts 2 and 5, CO Response). It is also undisputed that the Statement of Objectives is a performance specification that states minimum requirements for the upgrade of the test cells. It requires, among other things, the replacement of antiquated computer hardware, software, and equipment, as well as replacement of existing sensory sub-systems (Fact 3). The Coast Guard's objective is that the upgraded test cells enable its ALC to meet the Original Equipment Manufacturer's (OEM) standards and support the Coast Guard engines for the next decade by utilizing the latest version of sustainable "commercial-of-the-shelf" (COTS) technology (Fact 3). The Statement of Objectives requires the up-grade of the test cell to be in compliance with their original specifications so it will meet or exceed FAA standards (Fact 4).

The primary purpose of the RFP is to give the Coast Guard the ability to utilize upgraded test equipment so it can better complete the cycle of repairing aircraft engines. Once successfully tested on the test cells being modernized, upgraded, and overhauled pursuant to the contract arising from the RFP, the engines can be used as replacement engines for the Coast Guard's fleet of Falcon Jets and helicopters. As such, I find the work required by the RFP fits well into the entire scheme of NAICS code 488190, which includes such tasks as aircraft testing, maintenance, repair, and inspection. These tasks are all part of the functionality of the test cells, and, therefore, it is credible to suggest NAICS code 488190 reflects the primary purpose of the RFP. Hence, I hold the CO committed no error in designating NAICS code 488190.

In holding NAICS code 488190 reflects the primary purpose of the RFP, I specifically reject Appellant's argument that NAICS code 334513 is related to the primary purpose of the RFP. NAICS code 334513 has nothing to do with the maintenance or testing of aircraft or aircraft engines. Instead, NAICS code 334513 addresses the manufacture of various measuring instruments and controls, not the upgrade or even re-manufacture of an engine test cell for a jet

aircraft engine and a turboshaft cell suitable for helicopters or turboprop engines. In short, NAICS code 334513 is not industry-specific, whereas NAICS code 488190 is industry-specific. Thus, it was reasonable for the CO to designate NAICS code 488190 to this RFP.

I have considered Appellant's argument with regard to Footnote 6 to 13 C.F.R. § 121.206. Contrary to the CO's contentions, this RFP does call for a "major overhaul" of the test cells (Fact 3). Accordingly, Appellant argues that, pursuant to Footnote 6, the CO could have applied a NAICS manufacturing code. However, Footnote 6 does not compel the CO to apply a NAICS manufacturing code. Rather, the CO was required to apply a NAICS code that reasonably describes the principal purpose of the product being acquired. As I have already discussed, I find that NAICS Code 488190 is an appropriate code for this RFP because it is industry-specific. I simply do not have a "definite and firm conviction that a mistake has been committed." Thus, the CO did not commit any clear error in designating NAICS code 488190.

In consideration of the foregoing, I find the appropriate NAICS code for this procurement is NAICS code 488190, Other Support Activities for Air Transportation, with a corresponding size standard of \$7 million in average annual receipts. The activities contemplated by the RFP are more akin to the services classified under NAICS code 488190 than those classified under NAICS code 334513.

V. Conclusion

Upon consideration of the RFP, the Appeal Petition, and the CO's Response, I AFFIRM the CO's NAICS code designation 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