

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

NAICS APPEAL OF:

DCX-Chol Enterprises, Inc.

Appellant

Solicitation No. BAA-10-02-PKP
Department of the Air Force
Air Force Research Laboratory
Wright-Patterson AFB, Ohio

SBA No. SIZ-5140

Decided: June 14, 2010

APPEARANCES

Richard D. Lieberman, Esq., Gabriel D. Soll, Esq., McCarthy, Sweeney & Harkaway, PC, Washington, D.C., for Appellant.

Margaret L. Bradshaw, Contracting Officer, United States Air Force

DECISION

I. Introduction and Jurisdiction

On May 19, 2010, the U.S. Department of the Air Force, Air Force Research Laboratory, Wright-Patterson AFB, Ohio (Air Force), posted a Broad Agency Announcement (BAA) on FedBizOpps for Soldier Portable Power Management & Distribution. The Contracting Officer (CO) set the procurement totally aside for small businesses, and designated North American Industry Classification System (NAICS) code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), with a corresponding 500 employee size standard, as the NAICS code for this procurement.

On May 21, 2010, DCX-Chol Enterprises, Inc. (Appellant) filed the instant NAICS code appeal with the Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant asserts that the correct NAICS code for this procurement is 334290, Other Communications Equipment Manufacturing, which has a 750 employee size standard.

On May 24, 2010, the CO responded to the appeal. Other than repeating the purpose of the solicitation, the CO made no substantive reply to the Appeal. Appellant replied to the CO's statement. For the reasons more fully explained below, I deny the appeal.¹

¹ 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

Is the CO's designation of NAICS code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), for the design and development of 16 prototype items pursuant to the instant BAA based upon a clear error of fact or law? *See* 13 C.F.R. § 134.314.

III. Background

A. Facts

1. A BAA is a competitive solicitation procedure used to acquire basic and applied research and that part of the development not related to the development of a specific system or hardware procurement. Contracting Officers may utilize a BAA only if they can reasonably anticipate proposals with varying technical/scientific approaches. *See* FAR 35.016.

2. The Air Force described the program in the BAA as follows:

1. **Statement of Objective/Needs:**

a. Power Management. Over the past several years, battlefield airmen have demonstrated an increased energy requirement centered on the standard 72hr dismounted mission. This has dictated the need for improved power management and distribution technology to improve the battlefield airmen electronics suite. The expected benefit of this is reduced weight and complexity while increasing, reliability, functionality and mission effectiveness. AFRL is seeking to address the power management and distribution aspect of this requirement.

Present solutions which allow for power management are bulky, unreliable, and overly complex often requiring the user to maintain a veritable rat's nest of cables to distribute power to multiple devices in both the rucksack and on the soldier worn vest. The objective of this effort is to develop a power management system with improvements in the areas of reliability, ruggedization, usability, efficiency and reduced size and weight. It is desired that the proposed solution enable the battlefield airmen to effectively conduct full power management while carrying the rucksack and a limited power management capability while without a rucksack. Both power management schemes should enable a plug and play architecture which requires minimal user interaction for effective power management and distribution.

The offeror is required to provide a Ruck Power Manager Demonstrator 30 days after contract award which meets the requirements specified below. These requirements have been deemed by AFRL to be consistent with the current technology state. *All demonstrators should be designed to be easily testable upon delivery, and be delivered with sufficient cabling to verify performance.*

(emphasis added).

3. The Air Force described a requirement for a Vest Power Manager and noted that a Power Manager is defined as an electronically controlled system which automatically and safely maintains power to critical soldier-portable devices and facilitates the recharging of batteries in a safe manner from various sources. The Air Force also provided Key Performance Parameters and Required Attributes for both the Ruck and Vest Power Managers.

4. The Air Force acknowledged that its requirements presented manufacturing challenges as follows:

b. Manufacturing Challenges. Upcoming solutions to battlefield airmen power requirements show promising innovation. However, current production of such technology is costly and nonstandard. Manufacturing challenges will be addressed to streamline production and create reliable technology for the warfighter. A demonstration of a Manufacturing Readiness Level (MRL) of 6 with a specific manufacturing maturity plan through MRL 7 must be provided to address production improvements. An analysis of current manufacturing techniques will be completed to identify critical paths in production. A demonstration of an ability to produce the deliverables must also be provided.

In addition to meeting the specifications contained in this solicitation and MIL-SPEC standards MIL-STD-461F (for EMC), MIL-STD-810F (Method 510.4 Procedure I for Sand/Dust), and MIL-STD 810F (Methods 514.5 and 516.5 for ESS - vibration/shock) for the prototype deliverables, the Offeror will also address the manufacturing objectives of streamlining the manufacturing process and reducing the need for highly skilled labor, which will result in lower product cost and improved product consistency. The manufacturing challenges for the Joint Power Manager include reducing the size of power electronics while maintaining performance and safety, preventing failures from internal faults through improved construction materials, development of “plug and play” architecture for joint power managers, and the application of joint connectors and communication protocols. The manufacturing challenges for the Vest Power Manager include eliminating interference between internal electronics, integration of joint connectors, and EMI shielding of connectors and electronic components. Challenges for low profile cabling include ruggedization of power strips and connectors to MILSPECs.

5. The Air Force identified the Deliverable Items and Delivery Schedule as follows:

2. Deliverable Items:

c. Hardware: A Power Management System includes a ruck power manager, vest power manager, vest worn power strip and associated cabling necessary to demonstrate functionality of the system.

d. Other: Contractor acquired property/residual material at completion

3. Schedule:

- a. Overall effort: 18 months
- d. Hardware: *Prototypes* to be delivered as follows:
 - 1 Ruck Power Manager Demonstrator (1 month after award)
 - 5 Gen I Power Management Systems (6 months after award)
 - 10 Gen II Power Management Systems (15 months after award)

(emphasis added).

6. In the Proposal Review section of the BAA, the Evaluation Criteria identifies the technical criteria the Air Force would use during the award process as:

- i. Unique and innovative approach proposed to accomplish the technical objectives. New and creative solutions and/or advances in knowledge, understanding, technology, and the state of the art.
- ii. The offeror's understanding of the scope of the technical effort.
- iii. Soundness of the offeror's technical approach.
- iv. Availability of qualified technical personnel and their experience with the applicable technologies.
- v. Availability, from any source, of necessary research, test, laboratory, or shop facilities.

B. The Appeal

Appellant alleges: (1) 13 C.F.R. § 121.201, Footnote 11, controls the application of NAICS code 541712 designated by the CO; (2) the BAA requires the development and manufacture of the 16 deliverables; and (3) the language in Footnote 11 states that if the contract is for the delivery of manufactured products the appropriate size standard is that of the manufacturing industry. Consequently, the CO should have designated NAICS code 334290, Other Communications Equipment Manufacturing, with a size standard of 750 employees.

IV. Analysis

A. Standard of Review

The NAICS was developed not to classify work required by Federal contracts, but rather:

as 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'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*,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 that the contracting officer's NAICS code designation is based on a clear error of fact or law. 13 C.F.R. § 134.314. 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 Prods. 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 will OHA select a different code.

B. Merits of the Appeal

1. Timeliness

NAICS code appeals must be filed within 10 calendar days after the issuance of the initial solicitation. 13 C.F.R. §§ 121.1103(b)(1), 134.304(a)(3). Appellant filed its appeal within two days of the CO's publishing of the BAA. Thus, Appellant's Appeal is timely.

2. The Principal Purpose of the BAA is Consistent with the Designated NAICS Code

The CO designated NAICS code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology). The definition for this code in the *NAICS Manual* is:

² 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).

³ EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (2007), *available at* <http://www.census.gov/eos/www/naics/> (hereinafter *NAICS Manual*).

This U.S. Industry comprises establishments 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.

The CO chose a BAA as a contract vehicle. By choosing a BAA, the CO affirmed that the Air Force sought to acquire research and development needed to develop a Ruck and Vest Power Management devices (Power Management Systems). What is more, by using a BAA, the Air Force also represented that it expected to receive proposals espousing varying approaches to developing these devices. (Facts 1 - 5).

I find the principal purpose of the BAA is to have the successful offeror design, develop, and manufacture a very limited number of prototypes or demonstrators for testing by the Air Force (Facts 2 and 5). The BAA further requires the successful offeror to design and develop the prototypes in such a way as to overcome significant manufacturing challenges the Air Force perceives blocks successful manufacture of adequate Power Management Devices today (Facts, 2, 3, and 4). Consistent with the purpose of a BAA, the Air Force anticipated that the successful offeror would have to offer a unique and innovative approach to accomplish the BAA's technical objectives while using new and creative solutions and/or advances in knowledge, understanding, technology, and the state of the art (Fact 6). Accordingly, the NAICS code designated by the CO is very nearly an exact match for the principal purpose of the procurement.

I understand that Appellant alleges the requirement for the very limited number of prototypes required by the BAA (16) triggers the operation of Footnote 11 in 13 C.F.R. § 121.201. I disagree. Instead, I hold that design and development of a prototype, followed by the manufacture of a limited number of prototypes is a quintessential research and development (R&D) function. Hence, the BAA is not a manufacturing contract.

In holding that design and development of a prototype is included under NAICS code 541712, I observe that logic requires: (1) a prototype developed after R&D must be tested to confirm it is functional and complies with the stated requirements; (2) the manufacture of a single prototype is usually insufficient, because a prototype can be inadvertently destroyed during testing; (3) confirmation is needed to ensure the prototype can be made to function in more than one instance; and (4) development continues during or after testing. This logic is consistent with the BAA, wherein the Air Force: (1) stated it would be testing the devices it sought to acquire under the BAA (Fact 2) and (2) required the delivery of Generation I and II Power Management Systems six months after award and 15 months after award, respectively (Fact 5). This delivery schedule anticipates further development based upon test results and further research.

The BAA also contains other relevant considerations. First, the Air Force described a future need for many Power Management Systems (Fact 2). This point strongly implies there will be a need for a separate manufacturing procurement provided design and development required by the BAA is successful. Second, the BAA explicitly required the successful offeror be able to develop a successful means of manufacture, rather than to manufacture Power

Management devices (Fact 4). Both of these points militate against identifying the BAA as a manufacturing contract.

While Appellant's Appeal is clear, it ultimately lacks merit because Appellant discounts the BAA's principal purpose, which is research and development, not manufacturing. Consequently, I hold the CO made no error, let alone clear error, in designating NAICS code 541712 for the BAA.

V. Conclusion

Upon consideration of the BAA, the Appeal Petition, and the CO's Response, I AFFIRM the CO's NAICS code designation set forth in BAA and thus DENY the appeal. The correct size standard for the BAA remains 500 employees.

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

THOMAS B. PENDER
Administrative Judge