

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

NAICS APPEAL OF:

King Aerospace, Inc.

Appellant

Solicitation No. FA8106-10-R-0013  
Department of the Air Force  
Tinker Air Force Base, Oklahoma

SBA No. NAICS-5159

Decided: October 13, 2010

APPEARANCES

J. Alex Ward, Esq., Eric R. Haren, Esq., Damien C. Specht, Esq., Jenner & Block LLP,  
for Appellant King Aerospace, Inc.

DECISION<sup>1</sup>

HOLLEMAN, Administrative Judge:

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 appropriate North American Industry Classification System (NAICS) code  
for this procurement for aircraft maintenance is 488190, Other Support Activities for Air  
Transportation, or 336411, Aircraft Manufacturing.

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<sup>1</sup> The Assistant Administrator for Hearings and Appeals (AA/OHA) originally assigned  
this appeal to Judge Thomas B. Pender. Judge Pender left the SBA on September 24, 2010. The  
AA/OHA then reassigned this appeal to me.

### III. Background

#### A. Introduction

On September 3, 2010, the Department of the Air Force, Tinker Air Force Base, Oklahoma (Air Force) issued the subject solicitation for Contractor Logistics Support (CLS) for E-9 aircraft assigned to Tyndall Air Force Base. The Contracting Officer (CO) set the contract totally aside for small business and designated NAICS code 488190, Other Support Activities for Air Transportation, with a corresponding \$7 million annual receipts size standard, as the applicable code for this procurement.

On September 10, 2010, King Aerospace, Inc. (Appellant) filed an appeal, asserting that the appropriate NAICS code for this procurement is 336411, Aircraft Manufacturing, with a corresponding 1,500 employee size standard.

#### B. The Performance Work Statement (PWS)

The scope of effort for this solicitation includes logistics management, supplies, and services for CLS for the E-9 aircraft, related spares, support equipment, and technical data. CLS includes all design, maintenance, installation and test of modifications, engineering services, organizational and depot level maintenance and repaint, supply support, engineering/technical data, transportation of parts and components, and launch and recovery of the aircraft. Solicitation, at 3.

The Contract Line Item Numbers (CLINs) identified on this contract include Transition, Base Operations, Contractor Operated and Maintained Base Supply Operation, Recurring Engineering and Technical Services, Flying Hour, Depot Level Maintenance (designated as an “Information Only CLIN – Do Not Price), Engine Hot Section Inspection/Engine Overhaul, Propeller Overhaul, Landing Gear Overhaul, Strip and Paint, Modification Development and Installation, and Data (also designated as an “Information Only CLIN – Do Not Price). Solicitation, at 3-9.

The contractor is to maintain the E-9 fleet to meet a Mission Capable rate of not less than 80%, a Weapon System Reliability rate of not less than 90%, and a Non Mission Capable Supply rate of not greater than 5%. PWS, at 1. The contractor will support normal flight operations Monday through Friday from 0600 to 1800 hours. PWS, at 2. The contractor will provide the aircraft’s maintenance personnel with the tools, data, and supplies needed to perform maintenance for missions away from the base. *Id.* The contractor will provide training for pilot and crew on cockpit procedures and ground servicing. *Id.*

The contractor will provide all maintenance for the E-9 aircraft fleet, including organizational maintenance. PWS, at 3. The contractor will perform all preflight and postflight inspections. *Id.* The contractor will develop a maintenance plan and maintain the maintenance software and the mission systems software. PWS, at 4, 6. The contractor will provide and maintain the life support equipment for each aircraft and maintain a corrosion control program for the aircraft and equipment. PWS, at 4. The contractor will maintain all the relevant

maintenance records. PWS, at 5. The contractor will maintain a technical library. PWS, at 8. The contractor will repair and maintain the parts and equipment used with the aircraft. PWS, at 5. The contractor will match all repaired and replaced items to the existing color and texture of the aircraft to maintain aircraft appearance. PWS, at 6. The contractor will maintain and operate supply support services for the aircraft, including all petroleum, oil, and lubricants needed, with the exception of aircraft fuel. PWS, at 10.

The PWS includes a service summary that lists the performance objectives the contractor must achieve. PWS, at 13-14. Depot level maintenance is not included in this summary. Depot level maintenance is included in a section designating “As Needed Requirements,” which requires the contractor to provide all required depot level maintenance when directed for the aircraft, mission systems, engine, propeller, and landing gear. PWS, at 23-25.

### C. The Appeal

Appellant is the incumbent contractor for E-9 aircraft maintenance. Appellant discusses at length its long experience with the contract and alleges it has maintained an excellent level of performance.<sup>2</sup> Appellant also submits a Declaration of Keith W. Snyder, its Program Manager. Mr. Snyder asserts the maintenance program for the aircraft has two seasons, hurricane and depot maintenance. During the hurricane season, frequent maintenance is necessary on the aircraft, but they must be in constant readiness. During the depot maintenance period, the contractor performs extensive maintenance, overhaul, rebuilding, and upgrade work to return the aircraft to “like new” condition. Mr. Snyder declares that 60% to 70% of Appellant’s work under the existing contract is this type of depot maintenance work.

Appellant argues that this contract requires much more than simple maintenance. Rather, the contract requires the contractor to overhaul and repair the engines and other parts of the aircraft and to perform major structural repairs and depot level maintenance. Appellant emphasizes that outside of the hurricane season the aircraft undergo extensive maintenance, repair, and overhaul in preparation for their next period of service. Appellant discusses the extensive repairs performed under the current contract and argues that this supports a conclusion that the current contract calls for depot-level maintenance as its primary purpose

Appellant argues that, under the size regulations and OHA’s case law, a procurement that requires depot level maintenance is properly classified under a manufacturing NAICS code, rather than a services NAICS code. Accordingly, Appellant argues that this procurement must be classified under a manufacturing NAICS code. Appellant argues that previous contracts for CLS for E-9 Aircraft were classified under manufacturing NAICS codes, which supports a manufacturing NAICS code for this procurement. Consequently, Appellant contends NAICS code 336411, Aircraft Manufacturing, is the appropriate code for this procurement, which requires depot level maintenance. Conversely, the 488190 code assigned by the CO cannot include the extensive overhaul maintenance required by the solicitation.

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<sup>2</sup> Appellant’s experience and performance record are, however, irrelevant to the question of the appropriate NAICS code for this procurement.

#### D. The CO's Response to the Appeal

On September 27, 2010, the CO for the Air Force responded to the appeal. The CO states the Federal Acquisition Regulation (FAR) defines service contracts as those where the contractor must perform an identifiable task rather than furnish an end item of supply. FAR 37.101. Further, FAR categorizes contracts requiring repair as service contracts, as opposed to those requiring remanufacturing, which are supply contracts. FAR 22.1003-6. Here, the CO asserts that Appellant's characterization of the contract is incorrect. The maintenance required in this contract does not meet the definition of manufacturing as outlined in the FAR. Annual maintenance is not depot work. The mere fact that some overhaul that may meet the definition of manufacture is included in the effort does not change the fact that the procurement's primary purpose is services: to provide all support actions required for operating the aircraft.

The CO asserts that depot level maintenance is expected to decrease under this contract from the existing contract because two primary mission systems have been upgraded and the major items driving repair have been replaced or eliminated. The CO further asserts that 57% of the effort under the current contract is services. The CO relies on the descriptions in the *NAICS Manual*<sup>3</sup> to support its contention that this is a services procurement.

The CO further asserts that depot level maintenance must be performed at a Federal Aviation Regulation Part 145 repair station, and the Appellant's Tyndall AFB facility is not such a station. The CO also asserts that the Air Force obtained a Wage and Hour Letter from the Department of Labor (DOL), classifying a similar procurement for C-21 aircraft as a services contract.

#### E. Appellant's Reply

On September 28, 2010, Appellant requested leave to reply to the CO's Response. On September 29, 2010, I granted the request. On October 1, 2010, Appellant filed its Reply.

Appellant asserts the CO's arguments are inapposite. Appellant argues the DOL letter the CO relies upon is irrelevant here, as OHA has ruled that DOL's labor standards are irrelevant in making NAICS code determinations. Similarly, Appellant asserts the CO's citations to FAR are inapposite in a NAICS code case.

Appellant also asserts the CO is factually incorrect in describing this contract as a services contract. The solicitation frequently refers to depot level maintenance, and Appellant refers to a further affidavit from Mr. Snyder to dispute the CO's contention that a preponderance of the work under this contract is services. Mr. Snyder maintains that the contractor must perform depot level maintenance on the aircraft each year and will have to perform more each year as the aircraft age. Mr. Snyder also asserts that it is not necessary to send aircraft to a Part 145 station to perform depot level maintenance, but any Federal Aviation Administration

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<sup>3</sup> 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*).

certified Airframe and Powerplant mechanic can perform this work.

Appellant asserts what the CO submitted is not evidence, but argument of counsel, and its submission of Mr. Snyder's affidavits is evidence which stands unchallenged.

On October 4, 2010, the CO moved for leave to file a surreply. On October 5, 2010, I denied that motion.

#### IV. Discussion

Appellant filed the instant appeal within 10 days after issuance of 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 CO's NAICS code designation 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 correct NAICS code is that which best describes the principal purpose of the services being procured, in light of the industry description in the *NAICS Manual*, 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.

The *NAICS Manual* description of the NAICS code designated by the CO, 488190, Other Support Activities for Air Transportation, provides that this industry comprises:

[E]stablishments primarily engaged in providing specialized services for air transportation (except air traffic control and other airport operations).

Illustrative Examples: Aircraft maintenance and repair services (except factory conversions, overhauls, rebuilding) . . .

Cross-References. Establishments primarily engaged in . . . [p]roviding factory conversion, overhaul, and rebuilding of aircraft—are classified in Industry 33641, Aerospace Product and Parts Manufacturing . . . .

*NAICS Manual*, at 638.

The *NAICS Manual* description of Appellant's requested NAICS code, 336411, Aircraft Manufacturing, provides that this industry comprises:

[E]stablishments primarily engaged in one or more of the following: (1) manufacturing or assembling complete aircraft; (2) developing and making aircraft prototypes; (3) aircraft conversion (i.e., major modifications to systems); and (4) complete aircraft overhaul and rebuilding (i.e., periodic restoration of aircraft to original design specifications).

Cross-References. . . . Establishments primarily engaged in the repair of aircraft

(except overhauling, conversion, and rebuilding) are classified in Industry 488190, Other Support Activities for Air Transportation . . .

*NAICS Manual*, at 475-76.

Appellant is correct that under the size regulations and OHA case law, a procurement that calls for the rebuilding of equipment on a factory basis, in effect calling for depot maintenance, must be classified under a manufacturing NAICS code. 13 C.F.R. § 121.201 n.6; *NAICS Appeal of Phoenix Scientific Corp.*, SBA No. NAICS-4416 (2000). The central question here, then, is whether this procurement calls for that type of work.

The parties have presented affidavits from personnel who have worked on the predecessor contract, letters from DOL concerning similar contracts, and citations from the FAR. However, all of these are beside the point. The most important piece of evidence here, as discussed above, is the solicitation itself. It is the solicitation that determines the principal purpose of the procurement, not declarations from employees of interested parties or letters from other agencies concerning other procurements. The actual text of the solicitation must govern my decision, not Mr. Snyder's speculative predications, however well informed, of what work will be required.

Here, it is clear that Appellant has mischaracterized the solicitation. Although there are references to depot level maintenance in the solicitation, it is clearly stated that depot maintenance will be performed "as needed." There are over ten CLINs listed, and only one is Depot Maintenance. Further, that CLIN is one of only two designated "Information Only- Do Not Price."

The solicitation calls for the contractor to support normal flight operations. The contractor will provide pre- and post- flight inspections, develop maintenance plans, maintain the maintenance software and technical library, provide and maintain life support equipment, and maintain a corrosion control program for each aircraft. The contractor will maintain supply support services and repair and maintain the parts and equipment used with the aircraft.

In sum, the whole PWS emphasizes maintenance and repair of the E-9 aircraft. While Appellant stresses the appearance of the phrase depot maintenance in the PWS, the references to ordinary maintenance are much more frequent. Therefore, I find that that this solicitation seeks regular maintenance services for the E-9 aircraft. The *NAICS Manual's* description of 488190 specifically includes aircraft maintenance and repair services. Conversely, the references to depot level maintenance in the PWS are not only far fewer, but also contemplate that such services will not be major part of the procurement.

Accordingly, I find that Appellant has failed to meet its burden of establishing that the CO's NAICS code designation is in error. This procurement is for aircraft maintenance and is thus properly classified under NAICS code 488190. I must therefore deny this appeal.

V. Conclusion

For the above reasons, the instant appeal is DENIED, and the CO's NAICS code designation is AFFIRMED. The correct NAICS code designation for this procurement is 488190, Other Support Activities for Air Transportation.

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

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CHRISTOPHER HOLLEMAN  
Administrative Judge