

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

NAICS APPEAL OF:

Dayton T. Brown, Inc.

Appellant

Solicitation No. W58RGZ-10-R-0143  
Department of the Army  
AMCOM Contracting Center  
Redstone Arsenal, Alabama

SBA No. NAICS-5164

Decided: November 8, 2010

APPEARANCES

Michael A. Gordon, Esq., Fran Baskin, Esq., Washington, D.C., for Appellant.

Lillie M. Stanford, Contracting Officer, for the Department of the Army.

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 appropriate North American Industry Classification System (NAICS) code for a procurement for an Airworthiness Verification Program is 541380, Testing Laboratories, or 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology).

III. Background

A. The Solicitation

On September 15, 2010, the Contracting Officer (CO) for the Department of the Army, AMCOM Contracting Center, at Redstone Arsenal, Alabama (Army), posted on FedBizOpps Solicitation No. W58RGZ-10-R-0143 for an Airworthiness Verification Program of Aircraft Components. The CO set the procurement aside for small businesses, and designated it under

North American Industry Classification System (NAICS) code 541380, Testing Laboratories, which has a corresponding \$12 million annual receipts size standard. Offers are due on November 10, 2010.

B. The Performance Work Statement (PWS)

This solicitation is for the Army's Airworthiness Verification Program (AVP) for certain aircraft parts considered to be Critical Safety Items (CSIs). The AVP will replace the Conformance Inspection Program (CIP). The program will consist of a limited dimensional and metallurgical examination of CSIs through destructive and non-destructive testing to determine compliance with the Technical Data Packages as defined in the inspection plan.

The Contractor will perform Airworthiness Verification on Government-furnished CSIs to determine whether they were manufactured in a consistent manner, and that they conform to the applicable drawing and process specifications. The Government will provide for each part a Technical Data Package with applicable drawings, parts list, and manufacturing specifications; and a Technical Direction Order with the Inspection Plan and any special instructions. The Contractor will use industry standard measurement equipment and instrumentation, and industry standard non-destructive and destructive inspection methods as specified in the inspection plan.

Required work includes: (1) Receipt Inspection to visually identify obvious shipping damage and labeling issues; (2) Visual Inspection to verify presence and adhesion of paints, primers, lockwires, thread-locking substances, grease, other nonmetallic assembly substance or subcomponent, and required markings; (3) Dimensional Inspection (non-destructive), but only as specifically requested for parts likely to change dimensions on disassembly; (4) Non-destructive Tests including magnetic particle, dye, fluorescent penetrant, radiographic, and ultrasonic tests; (5) Functional Testing, usually limited to proof loading, push out forces, weight, and breakaway torque measurements; and (6) Material, including quantitative evaluation of base metal chemistry, semi-quantitative chemical analysis of metallic platings or wear surface coatings, thickness verification, hardness and/or electrical conductivity, microstructural elements such as grain size and type, grain flow, and retained austenite, and visual or microscopic examination of shot peen surfaces.

The Contractor will record measurements. In the event of discrepancies or nonconformances, the Contractor is to submit a "Flash Report", providing information on test results. The Flash Report will inform the Army of non-conforming technical characteristics, conflicts between the inspection plan and the technical data supplied, or the need for additional data for clarification. The Flash Report will also inform the Army when an inspection cannot be completed without destroying a nonconforming feature. In that case, the Contractor will request direction on how to proceed.

The Contractor shall provide a final report which will include a description of inspection methodology and equipment used. The final report will document the results of the inspected features, and include photographs of the parts as received, a list of all test equipment and identification of nonconformances. The nonconformances, critical characteristics, and suspect features and anomalies shall be identified in a table at the front of the report.

### C. The Appeal

On September 27, 2010, Dayton T. Brown, Inc. (Appellant), filed the instant appeal. Appellant asserts the appropriate NAICS code for this procurement is 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), with a corresponding 500 employee size standard. Appellant is the incumbent on the prior contract, the CIP, which was designated under NAICS code 541712.

Appellant asserts that NAICS code 541712 is most appropriate because it includes “engineering research and development laboratories and services” while NAICS code 541830 does not include “engineering” anywhere in its definition. Appellant asserts the “acceptance testing” work required in this procurement is highly specialized engineering work not normally performed by laboratories within the size standard for NAICS code 541380.

The solicitation requires engineering research to develop the test set-up, and engineering expertise to evaluate processes and nonconformities. Engineering analysis is needed to properly disassemble parts properly without destroying or altering critical features resulting in testing errors. Engineer involvement is needed for metallurgical testing and the lack of it on-site would result in delays. Simple knowledge of inspection technologies is inadequate. Engineering expertise in the related manufacturing processes of the particular item is needed for delivery timeliness.

Appellant noted the “sample task” requires engineering expertise in heat treatment, nondestructive testing, surface treatments, metal forming technologies, and most notably stress corrosion testing. Further, identification of nonconformances requires metallurgical and state-of-the-art equipment that small testing labs within the \$12 million size standard would not have, necessitating much subcontracting.

Appellant attaches the Declaration of Reyes Cortés, the Program Manager for CIP. Mr. Cortés states, based on the number of engineering labor hours used in the CIP contract and his evaluation of the engineering requirements in this procurement, that 30% of the labor hours in this procurement would be engineering work.

Also in support of its argument, Appellant cites *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4945 (2008) in which OHA upheld the agency’s designation of NAICS code 541712 where the required work was not research, but constituted a vital and integral step in order to facilitate research.

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

On October 8, 2010, the CO responded to the appeal. The CO asserts Appellant misstates the principle purpose of the PWS, suggesting that the Army is procuring engineering services. The CO attaches the statement of Patricia K. McCann, an engineer who was the CO’s Representative on the old CIP and who authored the PWS for the AVP. Ms. McCann stated that the AVP is not highly specialized engineering work or research but is largely straightforward

mechanical, chemical, physical, and nondestructive tests that follow standard industry processes.

Ms. McCann also stated that the instant procurement (AVP) is different from the old CIP. The AVP calls for only a limited dimensional and metallurgical examination of the CSIs using standard test processes identified in the Inspection Plan; in contrast, the old CIP required the Contractor to develop its own test procedures and then to execute those procedures. Here, no new processes or techniques being developed, so no research and development is needed, and any required engineering would be performed by the Army.

The CO also asserts that *Information Ventures* is inapplicable because the procurement there did require research.

On October 12, 2010, Appellant filed a Request for Leave to file a reply, and the proposed reply. On October 14, 2010, the CO filed an Opposition to Appellant's Request for Leave. On October 15, 2010, Appellant filed a reply to the CO's Opposition.

#### IV. Discussion

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

Appellant's Request for Leave to file a Reply to the CO's Response is DENIED. Under the regulations governing NAICS code appeals, a reply to a response is not permitted unless the Judge so directs. 13 C.F.R. § 134.309(d). I did not direct this reply to be filed. Accordingly, Appellant's Reply is EXCLUDED from the record.

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. *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003); 13 C.F.R. § 134.314. 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*<sup>1</sup>, the description in the solicitation, and the relative weight of each element in the solicitation. *Durodyne*, SBA No. NAICS-4536, at 4; 13 C.F.R. § 121.402(b).

The NAICS code designated by the CO, 541380, Testing Laboratories, covers:

[E]stablishments primarily engaged in performing physical, chemical, and other analytical testing services, such as acoustics or vibration testing, assaying, biological testing (except medical and veterinary), calibration testing, electrical and electronic testing, geotechnical testing, mechanical testing, nondestructive testing, or thermal testing. The testing may occur in a laboratory or onsite.

*NAICS Manual*, at 736.

---

<sup>1</sup> Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2007)*, available at <http://www.census.gov/naics>.

Among the “Corresponding Index Entries” listed on the NAICS Website for NAICS code 541380 are: Metallurgical testing laboratories or services, Non-destructive testing laboratories or services, and Radiographic testing laboratories or services.

Appellant’s requested NAICS code, 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*, at 748-49. Among the Cross-References, the *NAICS Manual* states:

Providing physical, chemical, or other analytical testing services (except medical or veterinary) - are classified in Industry 541380, Testing Laboratories [.]

*Id.* at 749. The small business size regulations include a footnote for NAICS code 541712. The footnote provides:

‘Research and Development’ means laboratory or other physical research and development. It does not include economic, educational, *engineering*, operations, systems, or other nonphysical research; or computer programming, data processing, commercial and/or medical laboratory testing.

13 C.F.R. § 121.201, fn. 11(a) (emphasis added).

Appellant’s entire argument depends upon its characterization of the principal work involved in this procurement as engineering. Because this characterization fails, so too must Appellant’s argument.

The instant PWS calls for the Contractor to perform an extensive series of tests on certain aircraft parts. The design process for the parts in question here is completed. There is nothing in the PWS calling for the design or development of aircrafts parts, or looking towards design and development as an ultimate object of a process which includes this procurement. Rather, the parts in question here have already been designed, manufactured and delivered to the Army. The object of this procurement is not to design new aircraft parts, but rather to ensure that those parts already manufactured and delivered are fit for use and pose no safety hazard. There is no question of further design modifications on these parts, as that process is complete.

Therefore, this procurement does not call for experimental development, as the NAICS code designation for 541712 requires. There is no further development necessary on the items to be tested. OHA has held that procurements classified under NAICS code 541712 must be for research and development, and thus must look to creating new processes or products. *NAICS*

*Appeal of Dynamac Corporation*, SBA No. NAICS-5025, at 8 (2009). This solicitation does not envision creating new processes or products, and thus does not meet the criteria for classification under 541712.

Conversely, NAICS code 541380 covers analytical testing services. This is precisely the type of work called for in this PWS. The Contractor must test the aircraft parts provided to the Army. The many tests required are enumerated above. Accordingly, I conclude the CO properly classified this procurement under NAICS code 541380.

This conclusion is consistent with OHA precedent on this matter, which has found that procurements for testing and analysis, and no more, are properly designated under NAICS code 541380. *NAICS Appeal of SVL Analytical, Inc.*, SBA No. NAICS-4721 (2005) (analyzing soil and other environmental samples). This is also consistent with the cases under the predecessor Standard Industrial Classification (SIC) code 8734, Testing Laboratories, which covered procurements for testing and analysis.<sup>2</sup> *SIC Appeal of Apex Environmental, Inc.*, SBA No. SIC-3851 (1993); *SIC Appeal of Sitek Research Laboratories, et al.*, SBA No. SIC-3228 (1989).

Appellant's reliance upon *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4945 (2008) is misplaced. The procurement in that case was categorized as research and development because it was part of a research and development process. There is no such process here. As noted above, there is no further development contemplated on the items which the Contractor will test.

Accordingly, I find that the Appellant has failed to meet its burden of establishing clear error in the CO's NAICS code designation, and that the appropriate NAICS code for this procurement is 541380, Testing Laboratories, with a corresponding \$12 million annual receipts size standard.

#### 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 541380, Testing Laboratories.

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

---

CHRISTOPHER HOLLEMAN  
Administrative Judge

---

<sup>2</sup> 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).