

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

NAICS APPEAL OF:

Appledore Marine Engineering, Inc.,

Appellant

Solicitation No. N6258311R0505

U.S. Department of the Navy

Naval Facilities Engineering Command

SBA No. NAICS-5240

Decided: June 2, 2011

APPEARANCES

Thomas C. Dwyer, Esq., and Erin E. Murphy, Esq., Dwyer, Donovan & Pendleton, P.A.  
Portsmouth, New Hampshire, for Appledore Marine Engineering, Inc., Appellant

Chris Henschel, Contracting Officer, Port Hueneme, California, for the U.S. Department  
of the Navy, Naval Facilities Engineering Command

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 designation of North American Industry Classification System (NAICS) code 541330, Engineering Services, with a size standard of \$4.5 million, to the subject procurement was clearly erroneous. *See* 13 C.F.R. § 134.314.

III. Background

A. Introduction

On April 8, 2011, the U.S. Department of the Navy, Naval Facilities Engineering Command (Navy) issued notice N6258311R0505 for “Waterfront Inspection Services at Various CONUS Locations.” The notice invited professional engineering firms to submit statements of their qualifications to perform the required work. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and designated NAICS code 541330, Engineering

Services. NAICS code 541330 ordinarily is associated with a size standard of \$4.5 million, but the notice indicated that the work fit within the exception for Marine Engineering and Naval Architecture, which utilizes a size standard of \$18.5 million.

On April 26, 2011, the Navy amended the notice to state that the Marine Engineering and Naval Architecture exception was not applicable, and lowering the size standard from \$18.5 million to \$4.5 million. Shortly thereafter, the Navy again amended the notice to remove any mention of the words “Marine Engineering and Naval Architecture.”

#### B. Scope of Work

According to the notice, the Navy intends to award one or more indefinite delivery indefinite quantity (IDIQ) contracts. Specific projects will be described in individual task orders. The work under the contract(s) may include: underwater inspections; engineering analyses of waterfront and ocean facility structural, mechanical, and electrical systems and components in comparison to design requirements; waterfront and ocean facility engineering feasibility studies; design of underwater instrument support structures and assemblies; design of termination junction boxes and support structures; design of underwater cable installation; cost estimation for waterfront and ocean facility rehabilitation; underwater geotechnical and above water surveying; and related work associated with waterfront and ocean facility construction and repair.

A “waterfront facility” is defined in the notice as “any structure located on the waterfront, in connection with, or potentially in contact with, water or the marine environment.” The notice further states that a “waterfront facility” may include “piers, wharves, bulkheads, quaywalls, offshore towers, dams, levees, water control structures, instrument support structures, dry docks, moorings, underwater cables, or any similar structure.”

#### C. The Appeal

On May 4, 2011, Appledore Marine Engineering, Inc. (Appellant) filed an appeal with the Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant maintains that the Navy should have utilized the \$18.5 million size standard, as originally stated in the notice, because the procurement qualifies for the Marine Engineering and Naval Architecture exception. Appellant acknowledges that “[t]here is no apparent clear definitional parameter as to the exact substance of work to be performed pursuant to the Marine Engineering and Naval Architecture subcategory.” (Appeal at 4) Nevertheless, Appellant argues that the procurement involves Marine Engineering and Naval Architecture because the procurement is in support of maritime activities, and requires specialized personnel trained in underwater diving. In addition, Appellant asserts that the Navy has previously used the Marine Engineering and Naval Architecture exception in other similar acquisitions, and that the Navy has offered no explanation for deviating in this procurement.

#### D. Timeliness

The instant appeal was filed within 10 days after the issuance of the April 26 amendment revising the size standard. Accordingly, under 13 C.F.R. § 134.304(b), the appeal is timely,

provided that notice N6258311R0505 constitutes a “solicitation” within the meaning of SBA regulations. The issue is clouded because notice N6258311R0505 is identified as a presolicitation notice, not a solicitation. Furthermore, the notice requested that interested firms submit qualification statements, rather than a bid or proposal.

The procurement at issue is being conducted under the Brooks Act (40 U.S.C. §§ 1101 *et seq.*) and Federal Acquisition Regulation subpart 36.6 (“Architect-Engineer Services”). OHA has recognized that such procurements operate differently than other procurements. *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4817, at n.5 (2006). In particular, in such acquisitions, the procuring agency does not obtain a formal bid or proposal. Rather, the agency requests qualification statements via the Standard Form 330, and subsequently negotiates price beginning with the most qualified firm. Accordingly, I find that, in this procurement, a request for qualification statements is the functional equivalent of a solicitation.<sup>1</sup> As a result, the appeal is timely.

#### IV. Discussion

SBA's regulations do not require the CO to designate the perfect NAICS code. Rather, the CO selects the NAICS code which best describes the principal purpose of the services being procured, in light of the industry definition in the *NAICS Manual*,<sup>2</sup> the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b); *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003). To successfully challenge a NAICS code designation, the Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove that the CO's NAICS code designation is based upon a clear error of fact or law. 13 C.F.R. § 134.314; *Durodyne* at 4. OHA will not reverse a NAICS code designation “merely because OHA would have selected a different code.” *NAICS Appeal of Eagle Home Medical Corp.*, SBA No. NAICS-5099, at 3 (2009).

Here, the NAICS code designated by the CO, 541330, Engineering Services, is clearly an appropriate choice for the acquisition. The code 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

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<sup>1</sup> In *NAICS Appeal of McKissack & McKissack*, SBA No. NAICS-5154 (2010), OHA dismissed a NAICS appeal pertaining to a request for architect-engineer qualification statements. *McKissack*, however, involved two other independent grounds for dismissal, and therefore is distinguishable from the instant case.

<sup>2</sup> EXECUTIVE OFFICE OF THE RESIDENT OFFICE OF MANAGEMENT AND BUDGET NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM-UNITED STATES (2007), available at <http://www.census.gov/eos/www/naics/> (hereinafter *NAICS Manual*).

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*, at 733. As discussed above, the procurement at issue is limited to professional engineering firms, and the statement of work confirms that the Navy is seeking a range of engineering services. A principal duty of the contractor will be to inspect and assess waterfront facilities, and the definition in the NAICS manual specifically includes “inspection and evaluation of engineering projects.”

Appellant does not challenge the assigned NAICS code, but argues that the procurement fits within the exception for Marine Engineering and Naval Architecture. Accordingly, the sole issue presented in this appeal is whether the required services are more in the nature of “marine engineering” or “naval architecture,” as distinguished from civil engineering generally.

The terms “marine engineering” and “naval architecture” are not defined in the NAICS Manual or in SBA regulation. Further, OHA has not defined these terms in prior cases. However, “marine engineering” is commonly understood to mean:

The design, construction, installation, operation, and maintenance of main power plants, as well as the associated auxiliary machinery and equipment, for the propulsion of ships.

MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS, SIXTH EDITION, 1283 (2003). A “naval architect” is “[a]n individual who designs ships and makes alterations in them,” and “naval architecture” is defined as:

The study of the physical characteristics and the design and construction of buoyant structures, such as ships, boats, barges, submarines, and floats, which operate in water; includes the construction and operation of the power plant and other mechanical equipment of these structures.

*Id.* at 1403.

Thus, both “marine engineering” and “naval architecture” relate to the design, construction, and operation of ships, and the systems and equipment onboard those ships. The terms do not include engineering efforts pertaining to structures on land or on the waterfront. The fact that such services may support maritime activity, or relate to structures that are in contact with water, does not establish that the work involves “marine engineering” or “naval architecture.”

OHA's prior cases support this interpretation. While OHA has endorsed the use of the Marine Engineering and Naval Architecture exception in a handful of cases, each involved procurements for the design and construction of ships, or the systems of ships. *SIC Appeal*

*of Applied Technical Systems, Inc.*, SBA No. SIC-2717 (1987) (procurement to “identify, document and validate ship systems,” and to resolve discrepancies between operating manuals); *SIC Appeals of George G. Sharp, Inc. and Giannotti & Associates of Texas, Inc.*, SBA No. SIC-2749 (1987) (procurement for ship “design, overhaul, modification, maintenance, repair, improvement and regulatory certification”); *SIC Appeals of CASDE Corp. and George G. Sharp, Inc.*, SBA No. SIC-3503 (1991) (procurement for “ship design, construction and service life management support services”). OHA has not applied the Marine Engineering and Naval Architecture exception to procurements that did not directly entail any work on ships.<sup>3</sup>

Appellant also argues that the Navy has previously used the Marine Engineering and Naval Architecture exception in other similar acquisitions. Even if so, however, it is well-settled that “OHA is not required to follow NAICS code designations related to procurements that are not before this office for consideration.” *NAICS Appeal of SD Titan Resources/SM&MM*, SBA No. NAICS-5187, at 5 (2011).

Accordingly, Appellant has failed to meet its burden of establishing clear error in the CO's NAICS code designation. Rather, the tasks required by this procurement fall squarely within the NAICS code 541330, Engineering Services. The proper size standard for this procurement is therefore \$4.5 million.

#### V. Conclusion

For the above reasons, the instant appeal is DENIED, and the CO's NAICS code designation is AFFIRMED.

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

KENNETH M. HYDE  
Administrative Judge

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<sup>3</sup> . Appellant asserts that a dry dock may be considered a type of “marine vessel,” and that this procurement therefore does involve engineering of marine vessels. Appeal at 9-10. Dry docks, however, are only one of at least a dozen types of “waterfront facilities” included in this procurement. Thus, even if I were to agree that a dry dock is a “marine vessel,” the appeal would still be denied because Appellant has not established that the procurement predominantly entails engineering of marine vessels. *E.g.*, *NAICS Appeal of ALON, Inc.*, SBA No. NAICS-5148 (2010) (denying appeal where only 8,000 of 76,000 estimated labor hours related to the NAICS code advocated the appellant).