

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

NAICS APPEAL OF:

Bevilacqua Research Corporation

Appellant

Solicitation No. W912HZ-11-R-0001
U.S. Army Corps of Engineers
Vicksburg, Mississippi

SBA No. NAICS-5243

Decided: June 2, 2011

APPEARANCES

Howell Roger Riggs, Esq., Government Contract Solutions LLC, Huntsville, Alabama, for Appellant.

Brandy M. Ellison, Contracting Officer, Engineer Research and Development Center Contracting Office, for the U.S. Army Corps of Engineers.

DECISION

HYDE, 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 designation of North American Industry Classification System (NAICS) code 541690, Other Scientific and Technical Consulting Services, to the subject solicitation was clearly erroneous. *See* 13 C.F.R. § 134.314.

III. Background

A. Introduction

On May 2, 2011, the U.S. Army Corps of Engineers, Engineer Research and Development Center (EDRC) issued Solicitation No. W912HZ-11-R-0001 (RFP) seeking

business advisory and scientific technical support. The Contracting Officer (CO) set aside the acquisition totally for Historically Underutilized Business Zone (HUBZone) small businesses and designated NAICS code 541690, Other Scientific and Technical Consulting Services, with a corresponding size standard of \$7 million in average annual receipts.

On May 12, 2011, Bevilacqua Research Corporation (Appellant) filed an appeal, asserting that the appropriate NAICS code for this procurement is 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), with a corresponding size standard of 500 employees.

B. Performance Work Statement

The RFP is a “commercial items” acquisition being conducted pursuant to Federal Acquisition Regulation (FAR) Part 12. The Performance Work Statement (PWS) accompanying the RFP describes the services the successful contractor will provide for the Geotechnical and Structures Laboratory (GSL) at ERDC’s Waterways Experiment Station in Vicksburg, Mississippi. The PWS states that “[s]upport services are required in: multiple engineering disciplines, geology, administrative assistant, engineering technician, grammatical and technical editors, computational analyst, physicist, geophysicist, and engineering aid areas.” (RFP 7.) The PWS explains that the contractor will be required to “provide support in performing research, development and evaluation tasks” undertaken by GSL, which may include, among other activities, “fabrication and instrumentation of test articles; coordination and conduct of major field investigations; theoretical studies; laboratory experimental work and computational modeling.” (RFP 8.)

The PWS also provides descriptions of the labor categories required to perform the contract. Professionals, who “will be supporting GSL in its primary research and development missions for both civil and military research” are desired to have skills in “report writing; technical presentations; laboratory or field experiment conduct; data collection, reduction and analysis; or computational modeling.” *Id.* Technicians must support research professionals by “assist[ing] in all phases of testing to include: planning, preparation, testing, and reporting.” *Id.* Desirable skills for the lowest technician position are: “surveying experience; solid mathematics skills; basic computer skills; ability to operate heavy equipment on a limited basis . . . and construction experience.” *Id.* Technical/grammatical editors “are intended to support in the preparation of technical reports, papers and journal articles,” and should have skills in “teaching or reviewing written material and assuring sound grammatical structure, punctuation and format,” as well as “technical skills related to the research being conducted by GSL.” (RFP 9.) Administrative assistants must be capable of general office duties, such as “file management, basic financial budgeting, clerical, property accountability, timekeeping, correspondence, report preparation, receptionist, supply management, travel, forms control, [and] statistical reports.” *Id.* Aides will assist professionals and, at a minimum, must be able to perform “basic clerical duties such as filing, answering phones, typing reports, running errands on station, and general assistance as necessary.” *Id.*

The PWS explains that specific tasks and deliverables will be detailed in task orders issued under the contract. “In general, the contractor shall assist research and development

studies to include modeling, simulation, material selection, testing, data gathering, data analysis, report preparation, report presentation, management effectiveness, and security effectiveness.”
Id.

The sample task order included with the RFP explains that GSL is conducting research and development programs related to the analysis of weapons effects. The sample task order indicates that the contractor must provide the following support: assist in initial test planning; develop test plans to include manpower, tools, and equipment; assist in the construction of model targets; assist in placing and calibration of test instruments; operate construction equipment; collect and organize test data and compile records of test activities; and assist in the preparation of reports and presentations.

C. The Appeal

Appellant asserts the appropriate NAICS code for this procurement is 541712, Research and Development in the Physical, Engineering, and Life Sciences. Appellant is the incumbent contractor, having been awarded the predecessor contract to the solicitation at issue.¹ Without any discussion as to what NAICS code was applied to the solicitation that resulted in Appellant’s current contract, Appellant contends that although EDRC attempted to eliminate all references to research and development in the solicitation at issue, the solicitation describes the same work as Appellant’s contract. Appellant also points out that the sample task order accompanying the instant solicitation is identical to the sample task order issued with the previous solicitation resulting in Appellant’s contract.

Appellant attaches to its appeal petition the declaration of Appellant’s President of Administrative Services, Mr. Stephen Cook. Mr. Cook’s declaration states that Mr. Kenneth Scott, the President of Appellant’s Operations Division, examined the scope of work accompanying the solicitation at issue (W912HZ-11-R-0001) and compared it to the scope of work for Appellant’s current contract (W912HZ-10-D-0001), as well as the task orders issued under Appellant’s contract. Mr. Cook summarizes Mr. Scott’s findings: the scope of work for the *contract preceding Appellant’s current contract* (W912HZ-08-D-0005) is not substantially different from the scope of work for the instant solicitation, but NAICS code 541712² was assigned to that earlier contract; the current solicitation deletes references to research and development tasks to be performed, except to indicate that the contractor will support such efforts; the summary of requirements in Appellant’s contract and in the instant solicitation are nearly identical; the minimum labor category requirements are “somewhat different, but essentially the same”; and EDRC’s mission is the same now as when Appellant was awarded the contract currently in performance. Mr. Cook states that, according to Mr. Scott, Appellant’s

¹ Solicitation No. W912HZ-09-R-0013 resulted in Appellant’s current contract (contract number W912HZ-10-D-0001).

² In fact, Mr. Cook’s declaration indicates that the contract preceding Appellant’s own contract (contract number W912HZ-08-D-0005), was issued under NAICS code 541710. Because there is no such NAICS code, I will assume this is a typographical error, and Mr. Cook intended to indicate that the preceding contract was issued under NAICS code 541712, the code Appellant argues should be applied to the instant procurement.

contract and the current solicitation describe the same work, but the current solicitation has been selectively edited to remove terms that describe any research and development efforts. Mr. Cook also maintains that of the task orders issued under Appellant's contract, 68% were for research and development tasks, and 32% were for other types of tasks.

Appellant cites *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4945 (2008), in support of its arguments. In *Information Ventures*, OHA discussed the same two NAICS codes at issue here and decided that the statement of work required primarily research work, as the CO claimed, as opposed to administrative tasks, as the appellant argued. Here, Appellant argues that, as in *Information Ventures*, the work required by the solicitation at issue constitutes research and development, not merely analysis and advice. Appellant requests that OHA order the CO to change the NAICS code applicable to the procurement from NAICS code 541690 to NAICS code 541712.

D. CO's Response

On May 24, 2011, the CO filed her response to the appeal petition. The CO asserts the previous solicitation, which resulted in award to Appellant of the current contract, was assigned NAICS code 541690, just as the instant solicitation. The CO states that Appellant has successfully provided the support required by its contract and has not previously raised concerns about the propriety of NAICS code 541690. The CO indicates that of the task orders issued under Appellant's contract, "slightly over 50% have been satisfied with non-professional [labor] categories." The CO explains the instant solicitation will establish a new contract to replace Appellant's contract, and NAICS code 541690 was assigned because the intent of the solicitation (as well as the previous solicitation) is to procure support services, not to conduct research and development.

IV. Discussion

Appellant filed the instant appeal within ten days after the CO's designation of the NAICS code. Accordingly, 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, Appellant must prove the CO's NAICS code designation is based upon 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). 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).

SBA regulations do not require the contracting officer to designate the perfect NAICS code. Rather, the CO must designate 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

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*).

description in the solicitation, and the relative weight of each element in the solicitation.
13 C.F.R. § 121.402(b).

The *NAICS Manual* description of the NAICS code selected by the CO, 541690, Other Scientific and Technical Consulting Services, provides that this industry comprises “establishments primarily engaged in providing advice and assistance to businesses and other organizations on scientific and technical issues (except environmental).” *NAICS Manual*, at 746.

The *NAICS Manual* description of Appellant’s requested NAICS code, 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), provides that this 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.” *NAICS Manual*, at 748-49. Further, the notation to NAICS code 541712 in SBA’s regulations provides that: “‘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 n.11(a).

I note at the outset that the appeal petition is confusing. Mr. Cook’s declaration indicates that Mr. Scott compared the statement of work for Appellant’s contract (W912HZ-10-D-0001) with the scope of work for the instant solicitation (W912HZ-11-R-0001). Based upon Mr. Scott’s report, Appellant concludes, without ever mentioning which NAICS code was assigned to its existing contract (W912HZ-10-D-0001), that NAICS code 541712 should be assigned to the instant solicitation because it was purportedly assigned to the contract that preceded Appellant’s contract (W912HZ-08-D-0005). Only upon receipt of the CO’s response did it become clear that the same NAICS code assigned to the instant solicitation, NAICS code 541690, was also assigned to Appellant’s current contract. The CO provided a copy of the solicitation which resulted in Appellant’s contract to verify this fact.

Regardless of the basis for Appellant’s argument, I must still decide whether the CO erred in assigning NAICS code 541690 to the instant procurement. Appellant maintains that the RFP requires primarily research and development services, whereas the CO contends the RFP requires assistance and support services.

Appellant relies upon *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4945 (2008) to support the application of NAICS code 541712 to the solicitation at issue. In *Information Ventures*, OHA determined that the research and development code was appropriate because the CO had separated one vital part of the research process for the contractor to perform, namely the preparation of extensive summaries of existing scientific literature. OHA highlighted that the contractor would not offer advice in performing this function. OHA also noted that the work involved environmental science, a subject that is specifically excluded from NAICS code 541690. *Information Ventures*, at 7-8.

In contrast to the *Information Ventures* case, the RFP here does not designate an important part of the research process to be performed by the contractor. Rather, the PWS describes a broad range of activities the contractor must provide to “support” and “assist” the GSL in its research and development goals. In other words, the successful contractor will be providing assistance to GSL in its performance of scientific and technical research; however, the contractor itself will not be performing independent research and development tasks without the participation or supervision of GSL. The sample task order supports this interpretation of the PWS because it requires the contractor to “assist” in test planning, to “assist” in target construction, to “assist” in instrument calibration, to collect and organize test data, and to “assist” GSL in preparing reports and presentations. The sample task order does not indicate that the contractor will perform these requirements independently, as was the case in *Information Ventures*. Rather, the contractor will act as a consultant assisting GSL in performing these activities, perhaps offering advice and opinions as the project progresses.

The fact that the RFP was issued as a commercial items acquisition also signifies that EDRC is acquiring consulting and assistance services, as opposed to research and development services. The FAR describes a “commercial item” as one “that is of a type customarily used by the general public.” FAR 2.101. Although it is also possible to obtain services through a commercial items procurement, they must be “of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.” *Id.* Thus, the form of this procurement demonstrates that EDRC is seeking support services that are readily available in the commercial marketplace, not specialized expertise generally associated with research and development efforts. Furthermore, the RFP does not contain standard clauses that would be typical of a research and development effort, particularly with regard to the ownership of intellectual property rights. Thus, considering the solicitation as a whole, it does not appear that this procurement is intended as a research and development effort.

I agree with Appellant that personnel in the “Professional” labor category conceivably could perform some research and development work. However, the other labor categories appear to require only assistance and support services, as the CO contends. Technicians must assist GSL in preparation, testing, and reporting. Technical editors must assist in the preparation of grammatically correct and technically sound reports and articles, and administrative assistants and aides are providing purely administrative support to the professionals and GSL. These functions are more like the activities of an assistant or consultant than those of a research specialist. Furthermore, according to the CO, more than 50% of the task orders issued under Appellant’s current contract have been fulfilled through the non-professional labor categories. I thus conclude the CO did not make a clear error in designating NAICS code 541690 to the RFP.

V. Conclusion

The CO's NAICS code designation is not clearly erroneous. Therefore, I AFFIRM the CO's designation of NAICS code 541690, Other Scientific and Technical Consulting Services, to the RFP.

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

KENNETH M. HYDE
Administrative Judge