

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

NAICS APPEAL OF:

Delphi Research, Inc.,

Appellant,

Solicitation No. NND12374119R
National Aeronautics and Space
Administration
Dryden Flight Research Center
Edwards, California

SBA No. NAICS-5377

Decided: July 10, 2012

APPEARANCES

Robert E. Gustafson, Senior Vice President, and Daniel J. Perez, Contracts Specialist
Delphi Research, Inc., San Diego, California, for Appellant

Richard W. Amos, President, COLSA Corporation, Huntsville, Alabama

Robert Medina, Contracting Officer, National Aeronautics and Space Administration,
Dryden Flight Research Center, Edwards, California

DECISION

I. Introduction

On May 15, 2012, the National Aeronautics and Space Administration (NASA) issued Solicitation No. NND12374119R (RFP) seeking a contractor to perform research facilities and engineering support services (RF&ESS) at the Dryden Flight Research Center (DFRC). The Contracting Officer (CO) set aside the procurement entirely for small businesses and designated North American Industry Classification System (NAICS) code 541712, Research and Development in Physical, Engineering, and Life Sciences (except Biotechnology). NAICS code 541712 ordinarily is associated with a size standard of 500 employees, but the RFP indicated that the work fit within the exception for aircraft research and development, which utilizes a size standard of 1,500 employees.

On May 24, 2012, Delphi Research, Inc. (Appellant) filed this appeal. Appellant contends that the designated code is clearly erroneous, and that the CO should instead have selected NAICS code 541513, Computer Facilities Management Services, with a corresponding size

standard of \$25.5 million in average annual receipts. For the reasons discussed *infra*, the appeal is granted.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides NAICS appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Appellant filed the instant appeal within ten days after issuance of the RFP, so the appeal is timely. Federal Acquisition Regulation (FAR) 19.303(c); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Performance Work Statement

Section C. 1 of the RFP indicates that the contractor will perform “operations and engineering support” at the DFRC in accordance with the Performance Work Statement (PWS) and Work Breakdown Structure (WBS). The PWS states that “[c] ontractor support is required for mission operations, Western Aeronautical Test Range (WATR) Engineering, simulation support, and center-wide information technology (IT) services and support.” (PWS § 1.2.) The contractor's responsibilities include “development, engineering, operation, maintenance, documentation, training, customer outreach, change management, configuration control, troubleshooting and related functions.” (*Id.*)

The PWS explains that DFRC's WATR supports aerospace flight research, technology integration, space exploration concepts, airborne remote sensing and science missions, and range operations of the International Space Station. (*Id.* § 1.1.1.) To support the WATR, the contractor “designs, integrates, validates, verifies, operates and maintains” a variety of WATR systems: telemetry, time space position information, video, radio frequency and ground voice communication, data distribution and archival, real-time data processing/monitoring, range safety ground, and post-flight. (*Id.*) These systems are considered crucial to mission success and safety.

DFRC's Simulation Engineering Group “supports flight research ... by providing aerospace simulation, hardware in-the-loop (HIL) testing, and remotely augmented vehicle computer systems to the research staff.” (*Id.* § 1.1.2.) The PWS states that “[t]he contractor shall support these areas by providing systems engineering, systems administration, and [c]omputer aided design and modeling (CAD/CAM) [s]upport.” (*Id.*)

The PWS divides the specific contractual requirements into three categories: mission support services, operations and maintenance, and systems engineering. (*Id.* §§ 4.1-4.3.) Mission support services include configuring and operating computer systems, production control, scheduling and tracking mission assets, capturing data in support of flight research, range data recording systems operations and maintenance, range communication systems operations and maintenance, and video systems support. (*Id.* § 4.1.) Operations and maintenance encompasses information technology (IT) support services, system administration, applications and programming support, IT security support, help desk, conference room scheduling, multimedia services, security control center operations and maintenance, and communications service and

security support. (*Id.* § 4.2.) Systems engineering includes troubleshooting problems, proposing solutions, and replacing, modifying, or significantly upgrading existing systems. (*Id.* § 4.3.)

The RFP includes a table summarizing the number and type of contractor personnel employed on a predecessor contract for similar services at DFRC. (RFP, Attachment J-B.) According to the table, the predecessor contract had 20 systems administrators, 14 electrical technicians, 14 field service engineers, 10 computer operators, 9 managers, 8 cable technicians, 6 photographers, 5 software engineers, 4 web developers, 4 production control clerks, 3 computer programmers, 3 systems engineers, 3 database administrators, and 3 illustrators. In addition, there were 24 personnel among 18 other labor categories pertaining to IT, engineering, and administrative support.

B. Evaluation Criteria

According to the RFP, NASA will evaluate proposals based on three factors: Mission Suitability, Cost or Price, and Relevant Experience and Past Performance. (RFP § M.2.) The Mission Suitability factor consists of four subfactors: Management Approach, Technical Approach, Safety and Health, and Phase-In/Phase-Out. Under the Phase-In/Phase-Out subfactor, the RFP states that NASA will consider offerors' "procedures, methods and techniques to assure the continuity of quality operations and engineering support during transition between contractors." (*Id.* § M.3.1.) For the Relevant Experience and Past Performance factor, RFP instructs offerors to "describe any quality award or certifications received over the last 5 years that indicate the Offeror possesses a high-quality process for performing operations and developmental and sustaining engineering." (*Id.* § L.16.D.7.)

C. NASA's Memorandum for the Record

On March 8, 2012, NASA posted a draft solicitation for comment on the Federal Business Opportunities website. The draft solicitation indicated that the CO planned to designate NAICS code 541712. On April 2, 2012, Appellant submitted comments to NASA questioning this choice.

On April 19, 2012, the CO prepared a memorandum for the record justifying the application of NAICS code 541712. The memorandum emphasized that "a product or service shall be classified in only one industry, whose definition best describes the principal nature of the product or service being acquired even though for other purposes it could be classified in more than one." (Memorandum at 1 (citing FAR 19.102(c)).) The memorandum further stated that, "When acquiring a product or service that could be classified in two or more industries with different size standards contracting officers shall apply the size standard for the industry accounting for the greatest percentage of the contract price." (*Id.* (citing FAR 19.102(d)).)

The memorandum recognized that RF&ESS is a "multi-faceted" procurement that involves "a variety of functions," including work which may be best described as information technology, engineering and telecommunications. (*Id.* at 2, 4.) The memorandum stated, however, that "the PWS and WBS include numerous functions that are characterized as physical research and development.

The memorandum identified instances where the incumbent contractor has purportedly performed physical research and development, and asserted that “[i]t is fully anticipated that the contract resulting from the subject solicitation will include very similar types of physical research and development efforts.” (*Id.* at 4.) The memorandum explained that such research and development efforts will include:

- Developing a virtual control room to support monitoring of missions from remote locations
- Developing modifications to WATR telemetry systems to support new telemetry frequency bands and new modulation techniques that will be used on research vehicles
- Researching the integration of ... developed technologies into research aircraft and WATR ground support systems
- Researching and developing integrating Federal Aviation Administration data sources into a Traffic Collision Avoidance System (TCAS) function to help ensure safety for flight research missions.

(*Id.*) The CO also listed thirteen “other likely research and development activities.” (*Id.* at 4-5.)

Regarding the relative dollar values of each industry, the memorandum referenced the incumbent contractor's monthly expenditure reports from over the preceding twelve months. The CO then prepared a table showing the percentage breakdown of work into twelve NAICS codes. According to the table, NAICS code 541712 comprised the single largest value (20%) of the incumbent contract.¹

Finally, the memorandum emphasized that DFRC is primarily an aeronautical research center. Therefore, although “engineering, operations, IT, telecommunications, and other industry characterizations are integral to the RF&ESS effort,” the memorandum concluded that NAICS code 541712 would be most appropriate, due to DFRC's core research mission. (*Id.* at 7).

D. The Appeal

Appellant contends that the CO erred in assigning NAICS code 541712 to the RFP, and that the appropriate NAICS code for this procurement is 541513, Computer Facilities Management Services. According to Appellant, NAICS code 541513 best describes the principal purpose of the services being procured, in light of the industry definitions in the NAICS

¹ The other 11 NAICS codes were 517919, All Other Communications (comprising 13% of the current contract); 518210, Data Processing, Hosting and Related Services (11%); 541330, Engineering Services (5%); 541430, Graphic Design Services (2%); 541511, Custom Computer Programming Services (12%); 541512, Computer Systems Design Services (2%); 541513, Computer Facilities Management Services (15%); 541519, Other Computer Related Services, (4%); 541922, Commercial Photography (11%); 561210, Facilities Support Services (2%); and 561422, Telemarketing Bureaus and Other Contact Centers (2%).

MANUAL,² the description in the solicitation, and the relative weight of each element in the solicitation.

Appellant argues that NAICS code 541712 is not the appropriate code, as it is intended for original research and experimental development activities. Appellant finds support for this argument in the definition of NAICS code 541712 and the clarifying language in 13 C.F.R. § 121.201. The NAICS MANUAL states that code 541712:

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 748-49. Appellant emphasizes that, under SBA regulations, “‘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).

Appellant next argues that OHA precedent confirms that NAICS code 541712 is intended for primary research and development activities. According to Appellant, OHA held in *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4953 (2008) and similar cases that NAICS code 541712 is appropriate only when the contractor would independently conduct research and development, or perform work that is an integral part of the such efforts. (Appeal at 6-7.)

Appellant goes on to argue that the instant RFP does not call for any physical, independent, or original research and development. Rather, Appellant asserts that the RFP primarily seeks a contractor to perform “operations and sustaining engineering support.” (Appeal at 7 (quoting RFP at 1).) Appellant notes further that the contractor will assist in “ensuring seamless IT service delivery to DFRC personnel and projects.” (*Id.* (quoting PWS § 1.2).) Required contractor functions include “effective configuration control and operational procedures,” as well as an “effective maintenance and repair program that assures equipment availability” (*Id.* quoting PWS § 2.2.). Appellant recites the functional and specific systems requirements from the PWS, which in Appellant's view, show the contract is for operations and systems maintenance and engineering support. Appellant argues that the mere fact the contract will be performed at DFRC does not mean the contractor will conduct research and development.

Next, Appellant addresses NASA's contention that the selected NAICS code was “based on the existence of research and development (R&D) aspects in the PWS ... and contributions

² Executive Office of the President, Office of Management and Budget, *North American Industry Classifications System* (2007), available at [http:// www.census.gov/eos/www/naics/](http://www.census.gov/eos/www/naics/) (hereinafter, NAICS Manual).

made by RF&ESS to the overall research and development mission of the Dryden Flight Research Center.” Appellant argues this assertion is undermined by the absence of any indication in the RFP or PWS that the contractor will be involved in the actual research process. In Appellant's view, NASA cannot argue RF&ESS is an “essential element” of the research process, as the instant procurement seeks facilities, maintenance, and engineering support services. *Cf. NAICS Appeal of Info. Ventures, Inc.*, SBA No. NAICS-4945, at 7 (2008) (finding preparatory research to be a “vital first step” and “essential segment” of the research process).

Next, Appellant argues that many of the engineering, operations, and systems requirements identified throughout the PWS are, by definition, excluded from NAICS code 541712. Therefore, argues Appellant, the NAICS code selected by the CO is incorrect, as it is not appropriate for most of the operations, data processing, and systems requirements listed in the PWS, as well as the engineering activities listed as functional and system-specific PWS requirements.

Appellant then evaluates DFRC's staffing on the predecessor RF&ESS contract. According to Appellant, the labor categories with the greatest number of personnel include System Administrator, Electrical Technician, Field Service Engineer, and Computer Operator. (Appeal at 9 (referencing RFP, Attachment J-B).) Appellant argues that insofar as the predecessor contract is probative of the instant RFP, these labor categories indicate the procurement does not involve original research and experimental development, as NAICS code 541712 contemplates.

Appellant argues that NAICS code 541513 is the correct code for the instant acquisition. The code pertains to “establishments primarily engaged in providing on-site management and operation of clients' computer systems and/or data processing facilities,” and includes “[e]stablishments providing computer systems or data processing facilities support services.” NAICS MANUAL 741. Appellant argues that large portions of the RFP—particularly PWS Sections 3.2 ““Operations, Maintenance, and Repair Requirements,” 4.1 “Mission Support Services,” and 4.2 “Operations and Maintenance”—are best characterized by NAICS code 541513.

Lastly, Appellant asserts that it would be adversely affected by the use of NAICS code 541712. Appellant explains that it has approximately 30 employees, and that it and other similarly sized businesses cannot effectively compete with much larger businesses under a size standard of 1,500 employees.

E. CO's Response

On June 5, 2012, the CO submitted a response to the appeal. The CO maintains that the NAICS code selection is appropriate and that the appeal should be denied.

The CO takes issue with Appellant's contention that the contractor will not be conducting any original research and development. (Reply at 3 (referencing (Appeal at 9)).) The CO argues that the April 19 memorandum does in fact identify multiple research and development efforts associated with the predecessor contract, with similar work expected under the instant RFP. The

CO argues those efforts fall clearly under NAICS code 541712.

The CO then addresses Appellant's argument that research and development must be novel to come within the purview of NAICS code 541712. Rather, argues the CO, the NAICS Manual indicates that "research and development" may include "the creation of new or significantly improved products or processes (experimental development)." NAICS MANUAL 747. Thus, the CO reasons that "efforts that significantly improve products or processes are also inclu[ded] in the definition" of research and development. (Reply at 3.)

Next, the CO counters Appellant's argument that NAICS code 541513 is the appropriate code. The CO asserts that this code "is applicable to a portion of the subject procurement," but maintains that it describes approximately 15% of the overall effort. (*Id.*) According to the CO, NAICS code 541712 constituted approximately 20% of the predecessor contract, and the CO predicts that this percentage may increase to 25% for the instant RFP, as an upcoming contract for computer services will cause the relative share of IT-related codes to decline.

F. COLSA's Response

On June 5, 2012, COLSA Corporation (COLSA), a prospective offeror, filed a response to the appeal petition. COLSA contends that there is no perfect NAICS code, but "the preponderance of the work is research and development." (COLSA Response at 1.)

COLSA points out that the RF&ESS contract will support the Mission Information and Test Systems Directorate at DFRC, which COLSA argues is "a research and development activity." (*Id.*) Appellant also argues the contractor must "provide advanced research and development support" when acquiring and processing mission data in support of flight research systems. (*Id.* at 2.)

G. Appellant's Reply

On June 15, 2012, after the close of record, Appellant moved to reply to the CO's response. Appellant argues there is good cause to admit the reply because the CO's response is based on flawed reasoning and mischaracterizations. Under applicable regulations governing NAICS code appeals, a reply to a response is not permitted unless OHA so directs. 13 C.F.R. § 134.309(d). No such direction occurred here. Accordingly, Appellant's motion is DENIED and the reply is EXCLUDED from the record. *NAICS Appeal of Dayton T. Brown, Inc.*, SBA No. NAICS-5164, at 4 (2010).

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant 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; *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003). SBA regulations do not require the CO to designate the perfect

NAICS code. Rather, the CO must designate the NAICS code that best describes the principal purpose of the product or service being acquired 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); FAR 19.102(d).

B. NAICS Manual Definitions

The NAICS Manual description of the NAICS code designated by the CO, 541712, Research and Development in the Physical, Engineering, and Life Sciences (Except Biotechnology), provides that this industry comprises “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 748-49. Index entries that direct the reader to this NAICS code include “[g]uided missile and space vehicle engine research and development” and “[g]uided missile and space vehicle parts (except engines) research and development.” *Id.* at 1154. SBA's regulation expounds upon this definition, stating 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). The “aircraft” exception for NAICS code 541712 utilizes the same definitions, but authorizes a larger size standard than the general code. 13 C.F.R. § 121.201.

The NAICS Manual description of Appellant's recommended NAICS code, 541513, Computer Facilities Management Services, provides that: “This U.S. industry comprises establishments primarily engaged in providing on-site management and operation of clients' computer systems and/or data processing facilities.” NAICS MANUAL 741.

C. Analysis

Having reviewed the RF&ESS RFP—including the PWS, the WBS, the labor categories, and the estimated labor hours—as well as the definitions set forth in the NAICS Manual and applicable regulations, I find that the CO clearly erred in classifying this acquisition under NAICS code 541712.

OHA has recognized 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 Dayton T. Brown, Inc.*, SBA No. NAICS-5164, at 5-6 (2010) (emphasis in original). The procurement here, though, does not call for the contractor to create new processes or products, and thus cannot properly be characterized as research and development. Rather, the RFP reflects that the predominant contract tasks are operating and maintaining computer equipment, capturing data, and providing technical support for existing systems. *See* Section II.A, *supra*. This is confirmed by the labor categories identified in the solicitation, which consist overwhelmingly of engineers, technicians, and computer specialists. *Id.* Notably, there are no scientists or research specialists among the labor categories.

It is true, as NASA asserts, that the PWS indicates that the RF&ESS contractor may be called upon to implement modifications to NASA systems. Such work, however, is better characterized as “engineering” rather than “research and development,” because it involves systems already in existence, rather than the creation of new processes or products. *NAICS Appeal of DCX-Chol Enters., Inc.*, SBA No. NAICS-5140, at 6 (2010) (recognizing that the design and development of original prototypes is a “quintessential research and development (R&D) function”); *NAICS Appeal of Dynamac Corp.*, SBA No. NAICS-5025, at 8 (2009) (“[w]hile many of [the] tasks [identified in the solicitation] require scientific experience/expertise, they do not require the development of a new or improved product, which is the predicate of a research and development contract.”). In short, then, the principal services required by the RF&ESS RFP are engineering, operations, and computer support services, not research and development. It is noteworthy in this regard that SBA regulation expressly excludes “engineering, operations, systems, or other nonphysical research,” and “computer programming” and “data processing,” from the definition of “research and development.” 13 C.F.R. § 121.201, n.11(a). Such restrictions on the scope of “research and development” are further indication that NAICS code 541712 is inappropriate for the instant RFP. *NAICS Appeal of Advanced Sys. Tech., Inc.*, SBA No. NAICS-4774, at 20 (2006) (“[The] exclusion of operations research, systems research, and other nonphysical research, as well as computer programming and data processing, excludes the work required under this solicitation from being classified as research and development.”).

NASA defends the use of NAICS code 541712 by emphasizing that the contractor would perform a range of support services at the DFRC, an aeronautical research facility. Nevertheless, although there is no dispute that DFRC's mission is aeronautical research, the mission of the procuring agency has little relevance in determining the applicable NAICS code for an acquisition. Rather, pursuant to 13 C.F.R. § 121.402(b), the appropriate NAICS code is that which “best describes the principal purpose of the product or service being acquired.” Accordingly, OHA has repeatedly held that contracts to “support” or “assist” a research organization cannot automatically be deemed as “research and development.” Only if the contractor will directly perform work that is an integral part of the research and development is such a code appropriate. *NAICS Appeal of Bevilacqua Research Corp.*, SBA No. NAICS-5243, at 6 (2011) (finding NAICS code 541712 inappropriate because the contractor would “not be performing independent research and development tasks without the participation or supervision” of the procuring agency); *NAICS Appeal of Info. Ventures, Inc.*, SBA No. NAICS-4953, at 7 (2008) (when a contractor would “not be conducting physical research of any kind” nor “performing any of the preparatory work for the research, of the type to be an integral part of research,” it was clear error to designate NAICS code 541712 to the procurement).

Similarly, the RF&ESS RFP does not delegate an important part of the research process for the contractor to perform independently. In fact, the RFP does not clearly assign any research function to the contractor. Rather, the PWS describes a broad range of activities the contractor must perform to “support” and “assist” DFRC in its research and development goals. In other words, the successful contractor will provide assistance to NASA in its performance of scientific and technical research; however, the contractor will not directly or independently perform research and development tasks.

NASA also relies heavily on an analysis of the predecessor contract, which divides the predecessor contract among twelve NAICS codes, and concludes that NAICS code 541712 constitutes the single largest portion (20%).³ This analysis, however, is unpersuasive for several reasons. It is unclear why the agency subdivided the procurement in this manner, or how the agency went about assigning NAICS codes to individual elements. It is unclear, for example, whether work deemed to be “research and development” involved the creation of new processes or products, consistent with OHA precedent. Further, several of the twelve identified codes pertain to information technology, and there is no clear rationale for separating such work into multiple codes. Had these codes been grouped together, they would collectively far surpass the percentage of effort purportedly devoted to research and development. *See*, footnote 1, *supra*.

Because Appellant has shown that the CO erred in assigning NAICS code 541712, I must consider the NAICS code advocated by Appellant, 541513, Computer Facilities Management Services. I agree with Appellant that this code best captures the principal nature of the procurement. As discussed above, NAICS code 541513 applies to the on-site management and operation of computer systems and/or data processing facilities. Such services plainly represent a large portion of the instant procurement, particularly the “mission support services” and “operations and maintenance” portions of the PWS. *See* Section II. A, *supra*. Further, NASA's own analysis suggests that NAICS code 541513, and other related information technology work, were, collectively, by far the largest portion of the predecessor contract. The multiple information technology efforts can reasonably be grouped under NAICS code 541513, and thus constitute the bulk of the anticipated work. While there is no single NAICS code that applies to the full range of services being acquired under this contract, applicable regulations instruct that the CO should select the code “which accounts for the greatest percentage of contract value.” 13 C.F.R. § 121.402(b); *see also* FAR 19.102(d); *NAICS Appeal of Nelson Eng'g Co.*, SBA No. NAICS-5166 (2010) (recognizing that “no one NAICS code covers all the services required by the instant RFP” and selecting the code which represents a plurality of the work.).

IV. Conclusion

For the above reasons, the instant appeal is GRANTED. The appropriate NAICS code for this procurement is 541513, Computer Facilities Management Services, with a corresponding size standard of \$25.5 million in average annual receipts. Accordingly, because this decision is being issued before the close of the solicitation, the CO must amend the RFP to change the NAICS code designation from 541712 to 541513. FAR 19.303(c)(5); *Eagle Home Med. Corp.*, B-402387, March 29, 2010, 2010 CPD ¶ 82. This is the final decision of the Small Business Administration. *See* 13 C.F.R § 134.316(d).

KENNETH M. HYDE
Administrative Judge

³ The analysis does not indicate which NAICS code was assigned to the predecessor procurement as a whole.