

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

NAICS APPEAL OF:

Cape Fox Government Services, LLC,

Appellant,

Solicitation No. HSCG44-13-R-ILMS
Department of Homeland Security
United States Coast Guard
Portsmouth, Virginia

SBA No. NAICS-5444

Decided: February 4, 2013

APPEARANCE

William K. Walker, Esq., Walker Reausaw, Washington, D.C., for Appellant

DECISION

I. Introduction and Jurisdiction

On January 10, 2013, the Department of Homeland Security, United States Coast Guard (Coast Guard) Command Control and Communication Engineering Center (C3CEN) issued Solicitation HSCG44-13-R-ILMS (RFP) seeking a contractor to provide installation and logistics management services for Command Control Communications Computers Information Technology (C4IT) systems supported at C3CEN. The Contracting Officer (CO) set the procurement totally aside for 8(a)-certified small businesses and 8(a) joint-ventures, and designated North American Industry Classification System (NAICS) code 541330, Engineering Services, with a corresponding \$14 million annual receipts size standard.

NAICS code 531330 provides an exception to the \$14 million size standard for Military and Aerospace Equipment and Military Weapons (MAE&MW). The size standard associated with the MAE&MW exception is \$35.5 million. The CO found the exception did not apply, and so did not designate the larger size standard to the instant procurement.

On January 24, 2013, Cape Fox Government Services, LLC (Appellant) filed this appeal. Appellant contends the \$35.5 million MAE&MW exception applies. For the reasons discussed *infra*, the appeal is denied.

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 the ten-day period following the issuance of the RFP,¹ 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 Solicitation

The RFP contemplates the award of multiple Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts. “The base contract schedule consists of a single line item representing the total maximum value² of the [ID/IQ].” RFP § B.1. “Each Task Order (TO) request shall be issued as a separate request for proposals ... and shall identify the requirement as either a firm fixed price (FFP) or a time and materials (T&M) task order.” *Id.* § B.4.A.

The RFP states, “The contractor shall perform work as set forth in general terms in the attached [Statement of Work (SOW)]. Detailed support services to be performed shall be identified in each individual Task Order (TO) issued against the primary ID/IQ Contract(s) awarded.” *Id.* § B.²

The SOW states:

The purpose of this acquisition is to acquire non-personal Installation and Logistic Management Services (ILMS) for the U.S. Coast Guard wide Command, Control, Communication Computer and Information Technology (C4IT) system installation and logistics management. Required support services shall include, but not be limited to, the following:

- a. C4IT system documentation support;
- b. C4IT system installation and de-installation of equipment;
- c. C4IT system Time Compliance Technical Order (TCTO) support;
- d. C4IT system field support; and
- e. C4IT System Management and Engineering Facilities (SMEF) support.

SOW § 1.1. The SOW also makes clear that “[t]he contractor shall provide all labor, material, supplies, test equipment, tools, and any other items required to satisfactorily perform support services. Services are to be performed aboard U.S. Coast Guard (USCG) vessels/cutters at USCG shore facilities and potentially USCG units located [in and outside the continental United States].” *Id.*

¹ The RFP was issued on January 10, 2012. Because the tenth succeeding calendar day was Sunday, January 20, 2013, and the following day was a Federal Holiday, the last day to file an appeal was Tuesday, January 22, 2013.

² “The minimum and maximum values of this IDIQ contract are \$50,000.00 and \$295,000,000.00, respectively.” RFP § B.4.B.

The RFP provides labor categories for performance of the subject contract. RFP, Attachment 6. Of 47 full time equivalents, the RFP specifically calls for 11 engineering professionals.³ *Id.*

The RFP explains that contractors will be evaluated for award based on four factors: (1) Technical Knowledge/Capability and Approach; (2) Management Approach/Strategy and Capability; (3) Past Performance; and (4) Price. *Id.* § E.7.

B. The Appeal

On January 22, 2013, Appellant filed the instant appeal. Appellant does not dispute the designated NAICS code. Rather, Appellant asserts the CO should have applied the special MAE&MW size standard exception for NAICS code 541330.

Appellant argues the MAE&MW exception should apply because the SOW describes services for military systems and equipment. To support this argument, Appellant highlights the following sections of the SOW, arguing they “constitute the most common and most significant aspects of the procurement”:

- 5.2.1.3 Systems Engineering and Design Support
- 5.3 Design and Documentation Services
- 5.4 Installation/De-Installation of Equipment
 - 5.4.1.6 Hot/Welding Services
- 5.6.3 Technical Assistance and Fields Engineering
- 5.8 Systems Management and Engineering Facilities

³ The breakdown of these engineers is as follows: 1 Systems Engineer, 1 Senior Engineer, 1 Engineer, 1 Test Engineer, 1 Communications/Networking Engineer, and 6 Engineering Technicians.

Appeal at 6.

Appellant then points out that the Coast Guard designated the MAE&MW exception to the predecessor contract, and argues the SOW for the predecessor procurement is similar to the SOW for the instant procurement. To support this argument, Appellant cites the following sections of the predecessor procurement's SOW:

- 3.1.1.1 Systems Engineering and Design Support
- 3.1.1.2.2 Installation/De-installation
- 3.1.1.3 Technical Assistance and Field Engineering

Appellant also argues this procurement is similar in size, scope, and complexity to two procurements issued by the Navy under the MAE&MW exception. One is a “Task Order RFI under the Navy Seaport-e contract for potential support of USCG C4IT systems.” The other is a “Production, Installation, and In-(PII) Service Support Contract” that “anticipates task orders associated with providing C4IT support for USCG vessel & aviation platforms/systems.” Appeal at 6-7.

Appellant argues the Coast Guard did not designate the MAE&MW exception because it relied on a faulty definition of “military.” Appellant explains that potential offerors questioned the Coast Guard about the applicability of the exception to the instant procurement, and the CO responded:

Military and Aviation systems/equipment is termed in this definition as “Department of Defense” (i.e., DoD - meaning Army, Navy, Air Force, or Marine). While it is realized the definition of 'Military' may be expanded to include the U.S. Coast Guard [(USCG)], it requires the design, development, production, etc., of aircraft. Within the parameters of the USCG, fabrication of the field of aviation systems/equipment services does not meet the requirements of definition of design, development and production on the same basis as the remainder of DoD. Rather, the USCG is on a search and rescue basis. Accordingly, the meaning of Military and Aviation systems/equipment is not termed with the same meaning as this procurement.

Id. at 5 (quoting Q&A 61). Appellant argues this response is contrary to 10 U.S.C. § 1 (“The term “armed forces” means the Army, Navy, Air Force, Marine Corps, and Coast Guard.”), 14 U.S.C. § 1 (“The Coast Guard . . . shall be a military service and a branch of the armed forces or the United States at all times. The Coast Guard shall be a service in the Department of Homeland

Security, except when operating as a service in the Navy.”), and 14 U.S.C. § 3(b)(“Upon the declaration of war if Congress so directs in the declaration or when the President directs, the Coast Guard shall operate as a service in the Navy.”) The Coast Guard's website confirms that the Coast Guard is “a military service”; thus, “Guardians on active duty and in the Reserve are subject to the Uniform Code of Military Justice and receive the same pay and allowances as members of the same pay grades in the other four armed services.” Moreover, argues Appellant, no authority states the term “military” is restricted only to agencies technically within the Department of Defense.

Appellant then quotes OHA's decision in *NAICS Appeal of CSMI, LLC*, SBA No. NAICS-5433 (2012) in which OHA summarized its case law surrounding the MAE&MW exception. According to Appellant, “These cases stand for the proposition that the application of the MAE&MW exception is determined by a functional analysis [of] the nature of the military application of the system in question and [is] in no way limited to exclusively Department of Defense agencies.” Appeal at 9. Appellant argues that C4IT is functionally a military system, so the MAE&MW exception applies to the instant procurement.

III. Discussion

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,⁴ 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, 541330, 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 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.

Illustrative Examples:

- Civil engineering services
- Environmental engineering services
- Construction engineering services
- Mechanical engineering services
- Engineers' offices

⁴ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States* (2012), available at <http://www.census.gov>.

NAICS MANUAL, at 733. In this case, because Appellant does not dispute the CO's designation of NAICS code 541330, it is unnecessary to consider whether the services sought by the instant procurement are best described by NAICS code 541330. Rather, the issue presented is whether the CO should have designated the larger size standard under the MAE&MW exception to NAICS code 541330.

Unlike the services that under NAICS code 541330, the NAICS Manual does not describe what services fall under the MAE&MW exception. However, as Appellant points out, OHA has addressed the applicability of the size standard exception in its case law. *E.g.*, *SIC Appeal of Giordano Assocs., Inc.*, SBA No. SIC-2502 (1986) (holding the application of the exception depends on whether the engineering services being procured are “military in nature”); *SIC Appeal of New Tech., Inc.*, SBA No. SIC-2505 (1986) (affirming the CO's designation of the exception because the procurement was for weapons testing and evaluation and called for engineers and engineering-related professionals); *SIC Appeal of Jack Faucett Assocs.*, SBA No. SIC-2782 (1987) (reversing the CO's designation of the exception because the solicitation contained no reference to aerospace equipment or military weapons).⁵

More recently, upon reviewing these previous cases, OHA concluded, “the MAE&MW special size standard applies to procurements that involve professional engineering services with a military or aerospace application.” *NAICS Appeal of CSMI, LLC*, SBA No. NAICS-5433, at 8 (2012); *see also NAICS Appeal of Davis-Page Mgmt. Sys., LLC*, SBA No. NAICS-5055, at 5 (2009) (holding that for the MAE&MW designation to be appropriate, the procurement must involve professional engineering services with a military application). OHA has also determined that the use of the special size standard is not limited to Department of Defense procurements. *NAICS Appeal of Millennium Eng'g and Integration Co.* SBA No. NAICS-5309, at 10-11 (2011) (holding that civilian agencies such as NASA may utilize the special size standard.). Thus, contrary to the CO's response to potential offerors, whether the Coast Guard is within the Department of Defense is not determinative of whether the MAE&MW exception applies.

Correspondingly, and contrary to Appellant's argument, even assuming the Coast Guard were in fact a part of the military, such status would not be dispositive of whether the MAE&MW exception applies to the instant procurement. Military agencies procure a host of services and supplies, the majority of which do not fall within engineering services, let alone the MAE&MW exception. Thus, Appellant's argument that the Coast Guard is in fact a military service is not determinative of whether the MAE&MW exception applies to the instant procurement.

In this case, I find the Coast Guard did not err in designating the \$14 million size standard and finding the MAE&MW exception does not apply. The Coast Guard seeks a contractor for its agency-wide C4IT system to perform installation and logistics management

⁵ “Where appropriate, OHA's case precedent decided under the prior Standard Industrial Classification (SIC) code system will apply to NAICS code appeals.” *NAICS Appeal of CSMI, LLC*, SBA No. NAICS-5433, at 7 n.3 (2012)

services aboard Coast Guard vessels/cutters. The contractor will provide system documentation support, install and remove equipment, and provide field and system management and engineering facilities support. Thus, I conclude that this RFP does not seek to procure military weapons, aerospace equipment, or engineering services to support such equipment, and therefore does not qualify for the MAE&MW special size standard. The work the contractor will perform is largely not connected with weapons or weapons systems, nor with the design, engineering, or maintenance of weapons. Significantly, the SOW does not mention weapons systems or aerospace equipment. Thus, Appellant has not demonstrated that C4IT is functionally a military weapons system.

Appellant's argument that the MAE&MW exception should apply to this procurement, because it applied to other procurements, is unpersuasive. The NAICS code designations for the predecessor procurement and those issued by the Navy have never been, and are not now, before OHA. In any event, OHA has held that "NAICS code designations for other procurements are not of great probative weight." *Davis-Paige*, SBA No. NAICS-5055, at 5 (2009).

Accordingly, I find Appellant has failed to meet its burden of establishing clear error in the CO's designation of the \$14 million size standard.

IV. Conclusion

For the above reasons, the instant appeal is DENIED, and the CO's NAICS code designation and size standard is AFFIRMED. The correct NAICS code designation for this procurement is 541330, Engineering Services, with a corresponding \$14 million annual receipts size standard. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge