

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

NAICS APPEAL OF:

The U.S. Small Business Administration,

Appellant,

Solicitation Nos. FA8517-13-R-30810,
FA8517-13-R-30037

U.S. Department of the Air Force
Robins Air Force Base, Georgia

SBA No. NAICS-5526

Decided: January 8, 2014

APPEARANCES

Laura M. Foster, Esq., U.S. Small Business Administration, Washington, D.C., for
Appellant

Bradley S. Adams, Esq., Ryan C. Springer, Esq., Dorothy D. Woodard, Contracting
Officer, U.S. Department of the Air Force, Robins Air Force Base, Georgia

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John Karaus, Vice President, Boneal, Inc., Means, Kentucky

DECISION

I. Introduction and Jurisdiction

On October 18, 2013, the U.S. Department of the Air Force (Air Force) issued Request for Proposals (RFP) No. FA8517-13-R-30810 and RFP No. FA8517-13-R-30037 for the Third Party Logistics (3PL) Follow-On Service Acquisition. The Contracting Officer (CO) set aside RFP No. FA8517-13-R-30810 entirely for small businesses, and RFP No. FA8517-13-R-30037 entirely for 8(a) Business Development (BD) program participants. The RFPs otherwise were substantively identical. The solicitations stated that the Air Force planned to award a total of seven indefinite delivery/indefinite quantity (ID/IQ) contracts from the two procurements. Offerors were instructed to submit a proposal for either, but not both, of the RFPs.

Both RFPs were structured as procurements of “commercial items” under Federal Acquisition Regulation (FAR) part 12. (RFPs at 3.) The solicitations were assigned North American Industry Classification System (NAICS) code 541330, Engineering Services. NAICS code 541330 ordinarily is associated with a size standard of \$14 million, but the RFPs indicated that the work fit within the exception for Military and Aerospace Equipment and Military Weapons (MAE&MW), which utilizes a size standard of \$35.5 million.

On November 19, 2013, the U.S. Small Business Administration (Appellant) filed the instant appeal. Appellant asserts that the RFPs should have been assigned a manufacturing or supplies NAICS code, rather than a services NAICS code. For the reasons discussed *infra*, the appeal is granted.

The SBA Office of Hearings and Appeals (OHA) decides NAICS code 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 before initial offers were due, so the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1) and 134.304(b). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFPs

According to the RFPs, the contractors will “source, acquire, and deliver a broad range of support equipment”, as specified in individual delivery orders. (RFPs, Attachment A, § 1.0.) The contractors “shall be required to maintain a flexible and cost-effective means of providing the items, which is responsive to the fluctuating needs of [Air Force] customers and compatible with the socioeconomic goals of the [Air Force].” (*Id.*)

The RFPs provided a list of thousands of items of equipment that might be ordered during contract performance. (*Id.* § 4.1.) The contractors will be responsible for selecting appropriate vendors to fulfill the orders, and for ensuring that the vendors achieve quality and timeliness standards. (*Id.* at 4.4.) The RFPs explained that, although certain vendors have already been determined qualified by the Air Force, “[a]t times, there will be requirements for items with no current qualified vendor.” (*Id.*) In that situation, the contractors will complete a Technical Support Request (TSR) to qualify a new vendor. (*Id.*) In addition, “[t]here is the potential for some items under this contract to be obsolete.” (*Id.* § 4.5.) To address such issues, the contractors will submit a TSR including a “technical approach recommendation and supporting documentation/rationale for resolving obsolescence.” (*Id.*)

The contractors will “provid[e] Electronic Data Exchange (EDE) for order management.” (*Id.* § 1.0.) The EDE will give Air Force officials access to real-time information concerning orders. (*Id.* § 4.2.)

The RFPs identified five “critical success factors” for the procurements. (*Id.* § 2.0.) First, each contractor will have no more than 40 discrepancies annually in EDE information. Second, small businesses will comprise at least 30% of selected vendors. Third, items delivered will have no more than 5% deficiency rate. Fourth, all orders will be delivered on time. Fifth, each

contractor will quote a fixed price or submit a TSR upon request. The contracts will include two two-year “performance incentive option” periods that may be exercised if the contractor achieves these performance objectives. (RFPs at 14-16.) Timeliness of deliveries is the most heavily-weighted objective for purposes of the options, accounting for 40% of the performance incentive determination. (*Id.* at 15.) The RFPs explained that “having the ordered part in the field at the expected time” is of paramount importance to the Air Force. (*Id.*, Attachment A, § 4.3.)

The RFPs stated that offerors' proposals will be evaluated under two equally-weighted factors: Past Performance and Price. (RFPs at 43.) Proposals were due December 2, 2013.

B. The Appeal

On November 19, 2013, Appellant filed the instant appeal. Appellant maintains that the CO incorrectly selected a services NAICS code for the RFPs because “the primary purpose of these contracts is to allow the Air Force to procure a wide range of products.” (Appeal at 3.) Therefore, “a supplies NAICS code would more accurately describe the primary purpose of the instant solicitation.” (*Id.*) Appellant states that because the procurements anticipate the acquisition of “diverse products”, Appellant is not in a position to recommend a particular supplies or manufacturing NAICS code. (*Id.*)

C. Air Force's Response

On December 2, 2013, the Air Force responded to the appeal. The Air Force maintains that NAICS code 541330, with the MAE&MW exception, is correct for the RFPs.

The Air Force explains that the 3PL Follow-On Acquisition program “was designed to replace thousands of individual contracting actions for low dollar value, low demand support equipment items with [a] strategic supply chain management approach.” (Air Force Response at 2.) The Air Force contends that it is not merely buying supplies, but rather is seeking contractors to perform “supply chain management services.” (*Id.* at 7-8.) According to the Air Force, “[s]ervices required under the 3PL program include performing market research, qualifying vendors, providing information on those vendors to the [Air Force], performing or obtaining research and engineering services to solve parts obsolescence and vanishing vendor issues, recommending viable alternative parts for obsolescent parts, and sourcing, pricing, and delivering [equipment] as requested.” (*Id.* at 2.)

The Air Force argues that many of the tasks expected of the contractors are those of an engineering services contract. The Air Force asserts that if an item is requested that has no qualified vendor, the contractors will be responsible for completing a TSR in order to qualify a new vendor. (*Id.* at 4.) The contractors also will need to provide the Air Force with a proposed technical approach to resolve any issue regarding reconditioned or surplus items, which will then be evaluated by Government engineers before any action is taken. (*Id.* at 5-6) Additional tasks required of contractors include advising and providing recommendations to Air Force engineers on drawing package updates, and addressing any defective items. The Air Force further states that the PWS requires the contractor to complete any “first article testing, proof loading certification, and configuration management” prior to delivery. (*Id.* at 6.) “Therefore, while at

first glance it may seem the contractor is bidding on a supply, the contractor is actually proposing on providing supply chain management with a heavy dose of engineering services.” (*Id.* at 8.)

The Air Force acknowledges that equipment accounts for a large majority of the dollar value of the procurements, but argues that this “is not conclusive as to the true nature of the effort.” (*Id.* at 8.) According to the Air Force, “the primary purpose of the proposed 3PL follow-on solicitations is to provide a service and not simply deliver items.” (*Id.* at 16). The Air Force asserts that the instant case is analogous to *NAICS Appeal of Ferris Optical*, SBA No. NAICS-5285 (2011), where OHA refused to change a services NAICS code to a supply code, even though supplies comprised the greater part of the value of the contract.

D. CO's Statement

Accompanying its response, the Air Force provided a statement from the CO. The CO defends her choice of NAICS code 541330, with the MAE&MW exception.

The CO maintains that engineering services are essential in order for the contracts to be successfully performed. (CO's Statement, at 1.) Specifically, “[i]herent in sourcing support equipment, much of which has been fielded in excess of 20 years ago, are engineering efforts necessary to address market research, parts obsolescence, vendor qualification, data adequacy, and original equipment manufacturer (OEM) quality requirements.” (*Id.* at 2.) The CO states the 3PL program has proven to be a flexible and cost-effective means of acquiring a broad range of support equipment. According to the CO, in order to satisfy the orders issued under the predecessor 3PL contracts, “thousands of individual supply contracts within multiple NAICS codes” would have been required. (*Id.*)

Attached to her statement, the CO provides a breakdown of the 3PL procurement by dollar value. (*Id.* at Attachment 1.) The CO estimates that equipment collectively accounts for 75% of the 3PL procurements, and services 25%. However, if equipment is subdivided to numerous NAICS supply codes, and services are grouped together under a single NAICS code, services then represent “the preponderance of dollars as opposed to any one supply NAICS code.” (*Id.* at 4.) The CO adds that approximately 93.2% of the items to be sourced are “military peculiar (non-commercial)”. (*Id.* at 3.)

The CO asserts that 3PL contractors will perform engineering services, such as interpreting technical data packages, validating vendors' ability to provide items, and identifying items that no longer conform to Air Force requirements. (*Id.* at 6.) In analyzing and evaluating the adequacy of drawings, the CO maintains that contractors will access and download drawings from the Joint Engineering Data Management Information and Control System repository. Some data may be incomplete or illegible, so engineering services may be needed. (*Id.*) Furthermore, the EDE must be “designed, developed, and maintained through the use of a software engineer.” (*Id.* at 7.) The CO asserts that engineering advice also is needed when making recommendations on obsolete items. (*Id.*) The CO concludes that 3PL contractors will be “performing functions that were previously accomplished by Government engineering and technical personnel”, so NAICS code 541330 is proper. (*Id.* at 8.)

E. ATAP Response

On December 2, 2013, ATAP, Inc. (ATAP), an incumbent 3PL contractor, responded to the appeal. ATAP asserts that the predecessor 3PL contracts were awarded under NAICS code 423830, Industrial Machinery and Equipment Merchant Wholesalers. (ATAP Response at 1.) Nevertheless, ATAP agrees with the CO that NAICS code 541330 is most appropriate for the instant procurements.

ATAP states that the wide range of equipment contemplated “cannot fit within any supply NAICS code,” so the procurements may not be assigned a supply NAICS code as there is no single code that properly fits the requirements. (*Id.* at 2.) ATAP further maintains that the RFPs require the contractors to provide engineering services in performance of the contracts. According to ATAP, the required engineering services “include provision of advice, preparation of designs in the form of technical data/drawing formation or correction, provision of technical services in reviewing data packages, inspection and evaluation of technical data with reports and technical advice provided back to government engineers, technical evaluations of new manufacturing sources of supply, and related services including, but not limited to, first article qualification testing, provision of proof load testing criteria, occasional oversight of proof load testing, base material obsolescence support in proposing available substitutions, and reviewing the processes required by the manufacturer to properly execute the technical requirements and provide reporting documentation back to the government.” (*Id.*)

ATAP references instances during performance of the predecessor contract where engineering services were needed in order to fulfill an Air Force order. (*Id.* at 5-8.) ATAP concludes that procurements at issue require the use of engineering services, and thus the CO's use of NAICS code 541330 is proper.

F. Boneal's Response

On December 2, 2013, Boneal, Inc. (Boneal), an incumbent contractor, responded to the appeal. Boneal supports the choice of NAICS code 541330 with the MAE&MW exception.

Boneal states that Appellant's argument that a supply code should be utilized is a “narrow assessment” that fails to “account for the preponderance of effort required to acquire and deliver individual supply items and only focuses on the result of the services rendered.” (Boneal Response, at 1.) Boneal argues that a variety of services need to be performed in order to complete a proper delivery. Boneal contends that tasks such as evaluation of technical data and providing an EDE that meets the RFPs' requirements, involve the use of engineering services. (*Id.* at 2.) As one of the incumbent contractors, Boneal states that the work solicited requires engineering services, in particular “the requirements to identify and source assets for [Air Force] weapon systems that meet the technical requirements of the original specifications for aircraft with an average fleet age that exceeds 20 years.” (*Id.* at 3.) Boneal further states that the delivery of items requested may depend on locating new sources, updating specifications and qualifying the new items for use. Lastly, Boneal asserts that the use of TSRs requires the contractor to provide to the Government the technical approach it will attempt in order to deliver the item

requested.

Boneal states that it has processed 3,940 orders under the predecessor 3PL procurement, resulting in 7,808 items delivered to the Air Force. To accomplish these deliveries, Boneal has prepared and submitted 354 TSRs to the Air Force. (*Id.*)

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 show 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).

B. NAICS Manual¹ Description

The NAICS code selected by the CO, 541330, Engineering Services, “comprises establishments 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.” *NAICS Manual* 746. The MAE&MW exception is defined neither in the *NAICS Manual* nor in SBA regulations. OHA has recognized, however, that “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).

C. Analysis

Having reviewed the RFPs, the descriptions in the *NAICS Manual*, and the arguments of the parties, I agree with Appellant that the CO clearly erred in selecting NAICS code 541330 for the instant procurements. The main problem with the CO's choice is that engineering services apparently represent only a limited portion of the overall procurements. The CO herself estimates that equipment will constitute 75% of the dollar value of these procurements, with only 25% devoted to services. *See* Section II.D, *supra*. Further, the CO asserts that the instant RFPs replace “thousands of individual supply contracts”, thereby suggesting that the Air Force is primarily

¹ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States* (2012), available at <http://www.census.gov>.

acquiring equipment. *Id.*

Even among the 25% portion of the RFPs that the CO estimates will pertain to services, it is not evident that engineering work is particularly significant. The RFPs do indicate that engineering services may be necessary “[a]t times” to qualify new vendors, and that “[t]here is the potential” for engineering to be required to address obsolete items. *See* Section II.A, *supra*. Based on the RFPs, though, it appears that engineering services are contemplated only sporadically, and are not routinely expected in the performance of these contracts. The RFPs did not request information about offerors' engineering capabilities or engineering personnel, and gave no weight to these matters in the evaluation criteria. *Id.* This suggests that the Air Force did not consider engineering services a particular focus of the acquisitions. Similarly, in its response to the appeal, the Air Force characterized the RFPs as seeking “supply chain management services”, rather than engineering services. *See* Section II.C, *supra*. Many of the “supply chain management” functions identified by the Air Force — such as conducting market research, delivering equipment, or developing an EDE — cannot reasonably be construed as “engineering”, as they do not involve the application of physical laws and principles of engineering. *Id.* Furthermore, the comments from ATAP and Boneal seemingly indicate that the predecessor 3PL contracts were not assigned an engineering NAICS code (or even a services NAICS code), and that only a small portion of orders under the predecessor contracts have involved engineering work. *See* Sections II.E and II.F, *supra*.

It is also worth noting that the Air Force structured the instant RFPs as “commercial items” acquisitions under FAR part 12. According to FAR 2.101, it is possible for services to be considered commercial items if they are “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.” Nevertheless, the Air Force offers no explanation of how the engineering services in question here could qualify as “commercial items” under this definition. Thus, the use of FAR part 12 authority again suggests that the Air Force did not view these acquisitions as predominantly seeking engineering services.

In short, although engineering services are not totally irrelevant to these acquisitions, such services appear to represent a minor aspect of the overall RFPs. OHA has explained that the mere fact that a procurement calls for incidental or ancillary services “does not justify classifying the procurement based upon the ancillary services,” even if those ancillary services are ““necessary to the procurement.” *NAICS Appeal of Dial General Eng'g*, SBA No. NAICS-5375, at 7 (2012). Accordingly, I agree with Appellant that the CO clearly erred in selecting NAICS code 541330, because the primary purpose of these procurements is not engineering services.

The Air Force's reliance on *NAICS Appeal of Ferris Optical*, SBA No. NAICS-5285 (2011) to justify the choice of NAICS code 541330 is misplaced. In *Ferris*, OHA found that a solicitation called for “extensive services in the provision of eyeglasses,” and therefore was properly classified under a services NAICS code (446130, Optical Goods Stores), rather than the corresponding supplies NAICS code (339115, Ophthalmic Goods Manufacturing). *Ferris*, SBA No. NAICS-5285, at 9. In reaching this decision, OHA distinguished *NAICS Appeal of Rochester Optical Manufacturing Co.*, SBA No. NAICS-4577 (2003), which had applied the supplies

NAICS code 339115, because “the Judge [in *Rochester*] had a formal statement from the [procuring agency] that the supplies to be provided represented 71% of the contract value.” *Id.* If anything, then, the instant case appears more analogous to *Rochester* than *Ferris*, given that equipment will constitute a similarly high share (75%) of the dollar value of these procurements. Furthermore, in *Ferris*, the services sought fit squarely within the NAICS code selected by the CO. Conversely, as discussed above, the services here do not appear to be predominantly ““engineering” in nature.

Because Appellant has demonstrated that the CO erred in assigning NAICS code 541330, I must consider which NAICS code best describes the principal purpose of the acquisitions. 13 C.F.R. § 121.402(b). I agree with Appellant that the primary purpose of these procurements is to allow the Air Force to acquire a wide range of equipment. As a result, a manufacturing NAICS code is required.² It is, however, clear that there is no single NAICS code which encompasses all of the equipment the Air Force plans to acquire. The CO's analysis indicates that the majority of contract cost, 75%, will go towards equipment, and of that percentage, the single largest share is categorized under NAICS code 334419, Other Electronic Component Manufacturing. SBA regulations stipulate that “[a] procurement is usually classified according to the component 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 Delphi Research, Inc.*, SBA No. NAICS-5377 (2012). Furthermore, NAICS code 334419 has the same size standard (500 employees) as many of the codes identified in the CO's analysis. I conclude, therefore, that NAICS code 334419 best captures the principal purpose of these acquisitions, and as such, is the correct NAICS code for these RFPs.

IV. Conclusion

For the above reasons, the appeal is GRANTED. The appropriate NAICS code for these RFPs is 334419, Other Electronic Component Manufacturing, with a corresponding size standard of 500 employees. Because this decision is rendered after the deadline for receipt of proposals, the decision does not apply to the pending RFPs, but may apply to future solicitations for the same supplies or services. 13 C.F.R. § 134.318(b) and FAR 19.303(c)(5).

KENNETH M. HYDE
Administrative Judge

² According to 13 C.F.R. § 121.402(b), “Acquisitions for supplies must be classified under the appropriate manufacturing NAICS code, not under a Wholesale Trade or Retail Trade NAICS code.” *See also NAICS Appeal of Phoenix Environmental Design, Inc.*, SBA No. NAICS-5212 (2011) (wholesale trade NAICS codes may not be used for procurements of supplies).