

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

NAICS APPEAL OF:

QED Systems, LLC,

Appellant,

Solicitation No. W56KGU-14-R-0002

U.S. Department of the Army

Contracting Command

Aberdeen Proving Ground, MD

SBA No. NAICS-5573

Decided: July 1, 2014

APPEARANCES

Bruce H. Kleinstein, President, Information Ventures, Inc., Philadelphia, Pennsylvania

Kenneth E. Goodling, Contracting Officer, U.S. Department of Health and Human Services, National Institutes of Health, Bethesda, Maryland

DECISION

I. Introduction and Jurisdiction

On June 4, 2014, the U.S. Department of the Army (Army) issued Solicitation No. W56KGU-14-R-0002 seeking a contractor to provide certain research, development, engineering and business support of C4ISR systems and systems integration programs. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541330, Engineering Services, with a corresponding \$14 million annual receipts size standard.

On June 13, 2014, QED Systems, LLC (Appellant) filed the instant appeal. Appellant asserts that the Army utilized the correct NAICS code, but that the work fit within the exception for Military and Aerospace Equipment and Military Weapons (MAE&MW), which utilizes a of corresponding \$35.5 million annual receipts size standard. For the reasons discussed *infra*, the appeal is denied.

The U.S. Small Business Administration (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 within ten calendar 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 RFP

The RFP states the solicitation will be for Engineering, Software Architectures, System Engineering, Business Operations Support to Command, Power and Integration (CP&I) Directorate. RFP § A.1. The Performance Work Statement (PWS) requires the contractor to provide “expertise required to develop and maintain the infrastructure critical to the implementation of Best of Breed war fighting capabilities such as engineering, systems engineering, technology integration and insertion, installation, testing, logistical, tactical soldier support for both legacy data and application as well as emerging battlefield operating environments, business operations, safety, and material/equipment acquisition to support the Directorate mission.” *Id.* § C.1.

The PWS's contractor requirements are broken down into the following categories: (i) Operation Maintenance & Information Assurance Support; (ii) Mobile Power and Environmental Control Units; (iii) Enterprise Mobile Platforms; (iv) Tactical Mobile Platforms; (v) Technology Insertion and Systems Integration; (vi) Systems Engineering; (vii) Testing, Integration and Certification; (viii) Joint Experimentation and Pilots; (ix) Logistics Support; (x) Transportation Support; (xi) Installation/Integration Support; (xii) C4ISR Prototype and Installation Support; (xiii) Quality Assurance Support; (xiv) Fabrication/Integration Process Control Support; (xv) Engineering and Design Support; (xvi) Administrative and Business Operations Support; (xvii) Stakeholders Collaboration; and (xviii) Project/Program Management. *Id.* § C.2.

All categories require the contractor to perform engineering services and analysis, with other software and system integration duties. Further contractor responsibilities include the operation, administration, and maintenance of networks and systems, which includes Information Assurance support to the engineering systems and C4ISR systems integration programs. *Id.* The instant procurement will require the contractor to migrate previous systems utilized by the Army into new common operating environments and cloud computing environments, as well as update training materials to integrate with emerging technologies.

The PWS requires the contractor to provide analysis, research and development, and support for tactical mobile platforms that will serve as an investigation into its functionality in a disadvantaged tactical environment. *Id.* § C.2.4. Other interface support required by the contractor will assist soldiers to connect with developers for a variety of functions. *Id.* § C.2.5. Additionally, the solicitation's list of key personnel requires that 7 out of the 8 positions be filled with individuals with an engineering background. *Id.* § C.1.14.

B. The Appeal

On June 13, 2014, Appellant filed its appeal of the NAICS code. Appellant contends that

NAICS code 541330 is the proper NAICS code but that the Army failed to assign the MAE&MW exception.

Appellant argues the solicitation is seeking engineering services for military equipment, thus the MAE&MW exception should be applied. Appellant contends the majority of services sought are of an engineering nature, and the limited activities that are administrative help support engineering services. Appeal at 2. Additionally, Appellant states all key personnel identified by the solicitation require an engineering background, further establishing the solicitation as one of engineering services.

Next, Appellant argues the engineering services sought are in support of military equipment and that the solicitation contains a list of military equipment that will be supported by the engineering services requested in the solicitation. *Id.* at 3. Appellant cites to numerous OHA decisions in support of its argument that the engineering services in question are military in nature. Particularly, Appellant states that *NAICS Appeal of Millennium Engineering and Integration Co.*, SBA No. NAICS-5309 (2011) is analogous to the situation here. Appellant notes that the description of the work to be done and the labor categories in *Millennium Engineering and Integration Co* “compares consistently to the nature of the work in this [s]olicitation and is clearly characterized as ‘Engineering Services.’” *Id.* at 7. Appellant concludes that, similar to past OHA decisions with comparable type of work and labor categories, the engineering services sought by the solicitation are in direct support of military equipment development and transition.

C. CO's Response

On June 27, 2014, the CO filed a response to the appeal. The CO contends that after evaluating whether the MAE&MW exception should be applied, the CO determined the services sought were for engineering services without a military application.

The CO states the services required of the contractor involve daily maintenance of the C4ISR systems among additional engineering services for other operating systems, including enhancement, analysis and research and development of mobile power units and mobile software platforms utilized by military personnel. The CO concludes that “the PWS does not reflect work that links Military and Aerospace Equipment and Military Weapons Systems.” Response, at 5.

D. *NAICS Manual*¹ Descriptions

The description of the NAICS code designated by the CO, 541330, Engineering Services, provides that this industry 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

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>.

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 746. Index entries that direct the reader to this NAICS code include “[E]ngineering consulting services.” Id. at 1112. The MAE&MW exception to this NAICS code applies a different size standard than the general code. 13 C.F.R. § 121.201.

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 demonstrate that 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. SBA regulations do not require the CO to select 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. *Durodyne*, SBA No. NAICS-4536, at 4; 13 C.F.R. § 121.402(b).

B. Analysis

Here, Appellant does not dispute the CO's designation of NAICS code 541330, thus I find it unnecessary to contemplate whether the services sought by the instant procurement are best defined by NAICS code 541330. Accordingly, the question at issue is whether the CO should have designated the larger size standard under the MAE&MW exception to NAICS code 541330.

Neither the *NAICS Manual*, nor the regulation at 13 C.F.R. § 121.201 describe just what services fall under the MAE&MW exception. OHA has thus addressed the applicability of this size standard in our cases. Initially, OHA held the key question is whether the engineering services being procured are military in nature. Therefore, OHA upheld the designation of the MAE&MW exception for a procurement for automatic test equipment for Navy aircraft weapons systems. *SIC Appeal of Giordano Assocs., Inc.*, SBA No. SIC-2502.² OHA upheld designation of the exception where the procurement was for weapons testing and evaluation. *SIC Appeal of New Tech., Inc.*, SBA No. SIC-2505 (1986). Where the procurement contained no reference to aerospace equipment or military weapons, OHA reversed the designation of the size standard. *SIC Appeal of Jack Faucett Assoc.*, SBA No. SIC-2782 (1987).

² 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 Phoenix Scientific Corp.*, SBA No. NAICS-4416 (2000).

Subsequently, OHA elaborated the test and held that in order for the MAE&MW exception to apply, the procurement must “involve professional engineering services with a military or aerospace application.” *NAICS Appeal of CSMI, LLC*, SBA No. NAICS-5433, at 8 (2012); *NAICS Appeal of Davis-Page Mgmt. Sys., LLC*, SBA No. NAICS-5055, at 5 (2009). The size standard is not solely applicable to contracts for the Department of Defense, but can also apply to engineering or civilian aerospace equipment for agencies such as NASA or the Coast Guard. *NAICS Appeal of Millennium Engineering and Integration Co.*, SBA No. NAICS-5309 (2011).

Nevertheless, merely because a procurement is for the military, does not justify use of the MAE&MW exception. Military agencies procure a host of services and supplies, most of which are not engineering services. A procurement for Installation and Logistics Management services did not qualify for the MAE&MW exception. *NAICS Appeal of Cape Fox Government Services, LLC*, SBA No. NAICS-5444 (2013). A procurement for passive security measures to protect military personnel and equipment also did not qualify for the MAE&MW exception. *NAICS Appeal of CSMI, LLC*, SBA No. NAICS-5433 (2012). A procurement supporting the development of the Ballistic Defense Missile Shield did qualify for the exception. *NAICS Appeal of Inklings Media Co.*, SBA No. NAICS-5054 (2009).

Appellant attempts to argue that the situation found here is similar to *Millennium Engineering and Integration Co.* Appellant contends the solicitation at issue in *Millennium* required the same type of engineering services and engineering background for key personnel that are found here. Nevertheless, it appears Appellant fails to notice that in *Millennium*, the issue was whether a civilian agency could utilize the MAE&MW exception. Additionally, the procurement in *Millennium* involved engineering services for aerospace equipment, services specifically described as covered by the exception. In contrast, the solicitation here does not clearly state that the engineering services are for military or aerospace equipment even though the type of engineering services in *Millennium* share some similarities with the procurement at issue here. While different solicitations may procure similar engineering services, the key issue in a case where the question is the applicability of the MAE&MW exception is whether those services are in support of military or aerospace weapons or equipment.

Here, the Army seeks engineering services for numerous software and hardware products to support the CP&I Directorate. The contractor will be responsible for maintaining the infrastructure for several communications software applications, as well as other activities, including but not limited to, analysis and equipment acquisition to support the CP&I Directorate's mission. The contractor will perform duties such as the operation, administration, and maintenance of networks and systems, which includes Information Assurance support to the engineering systems and C4ISR systems integration programs and migrating past systems with cloud computing and other new technologies. The procurement emphasizes software, and barely speaks of weaponry. The platforms it refers to a number of times are for mobile devices, not weapons systems.

These services do not qualify for the MAE&MW exception. The solicitation describes in detail the large number of responsibilities and duties the contractor will be responsible for, but

fails to describe any military weapons or aerospace equipment that will be supported by the engineering services. The C4ISR Prototype and Installation Support requirement states the contractor may be required to provide engineering services to “tactical wheeled vehicle systems” but falls short of stipulating it will be a mandatory requirement or a key part of the contractor's duties. I must conclude that the work to be performed by the contractor is not connected to “weapons or weapon systems, nor with the design, engineering or maintenance of weapons.” *NAICS Appeal of CSMI, LLC*, SBA No. NAICS-5433, at 8 (2012).

It appears the contractor will largely be responsible for engineering services relating to software and other Army programs that do not have a military equipment application to them. I therefore conclude that the solicitation is for engineering services supporting the CP&I Directorate that does not provide for the use of military or aerospace weapons or equipment. Accordingly, Appellant has failed to meet its burden to establish error in the CO's decision to not assign the MAE&MW exception to the instant solicitation.

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. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge