

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

NAICS APPEALS OF:

Downrange Operations and Training LLC,
et al.,

Appellants,

Solicitation No. FA4890-14-R-0024
U.S. Department of the Air Force
Air Combat Command
Newport News, VA

SBA No. NAICS-5647

Decided: March 16, 2015

APPEARANCES

Walter F. Smith, Jr., President, for Downrange Operations and Training LLC

James Kaminsky, for Illimite, LLC

Devon E. Hewitt, Esq., Protorae Law, PLLC, for Oak Grove Technologies, LLC

William A. Shook, Esq., for Cambridge International Systems, Inc.

James A. Robinson, Contracting Officer, for the Department of the Air Force

DECISION

I. Introduction and Jurisdiction

On February 2, 2015, the U.S. Department of the Air Force, Air Combat Command (Air Force), issued Request for Proposals (RFP) No. FA4890-14-R-0024 for training support services. The Contracting Officer (CO) issued the procurement as a small business set-aside and assigned North American Industry Classification System (NAICS) code 541330, Engineering Services, with the special \$38.5 million annual receipts size standard for Military and Aerospace Equipment and Military Weapons (MAE&MW).

On February 9, 2015, Downrange Operations and Training, LLC (Downrange) filed an appeal challenging the CO's choice of NAICS code. Downrange urges the use of either NAICS code 611430, Professional and Management Development Training, or NAICS code 611699, All

Other Miscellaneous Schools and Instruction, both of which have a corresponding \$11 million annual receipts size standard. On February 12, 2015, Illimite, LLC (Illimite) also filed an appeal challenging the CO's chosen NAICS code. Illimite also asserts the correct NAICS code should be 611430, Professional and Management Development Training, or alternatively, NAICS code 541690, Other Scientific and Technical Consulting Services, with a corresponding \$15 million annual receipts size standard. On February 13, 2015, I consolidated the appeals into one. For the reasons discussed *infra*, the appeal is GRANTED.

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. Appellants filed this appeal within ten calendar days after issuance of the RFP. 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 that the Air Force plans to award a multiple award Indefinite Delivery/Indefinite Quantity (ID/IQ) contract using a Lowest Price Technically Acceptable (LPTA) source selection process. Proposals are due on March 19, 2015.

The RFP's Performance Work Statement (PWS) states that the objective of the RFP “is to provide training support services, equipment, material, instruction, and products to improve the capability of U.S. and partner nation agencies' capability and expertise to detect, deter, disrupt, degrade and [sic] national security threats posed by illegal drugs, trafficking, piracy, transnational organized crime, threat finance networks, and any potential nexus among these activities.” PWS at § 1.3. The services provided “are defined as any contracted activity aimed at transferring knowledge, skills, abilities (KSA) with the objective of improving individual or organizational performance or creating a required level of competency.” *Id.* § 2.1. The Contractor may be required to conduct Training Assessments, determining the feasibility of providing training to an intended organization by identifying training needs, and proposing a training approach. *Id.*, at § 2.1.1. The Contractor may be required to develop training recommendations for and/or provide training materials. *Id.*, at 2.1.2. The Contractor may be required to provide instruction, transfer training products, retrain students, document progress, and perform other tasks required to deliver training. *Id.*, at 2.1.3.

The contractor will be responsible for determining the feasibility of providing the necessary training by recognizing the training needs and current capacity and resources, as well as developing training recommendations. The PWS states that the contractor may need to provide training in: (i) Flight Instruction; (ii) Military Skills Training; (iii) End Item Usage/Handling and Maintenance; (iv) Subject Matter Expert; and (v) Other Specified Training. *Id.* § 2.1.4. Among other duties, the contractor will need to provide training products, show its management capability, which includes human resources management and financial management, and train its personnel. *Id.* §§ 2.1.5 - 2.4.

The Contractor will provide Flight Instruction for fixed wing, rotary wing and unmanned aircraft at all levels. The Contractor will provide Military Skills training in areas such as tactical skills, combat swimming/diving, mission planning and other fields. The Contractor will provide End Item Usage/Handling and Maintenance Training at an initial, follow-on or refresher level for commercial platforms, systems, and equipment such as detection systems, boats, vehicles, information systems. The Contractor will provide Subject Matter Experts, personnel with specified experience or technical capabilities to impart knowledge by acting as mentors, translators, linguists, or assisting in policy development or training operation oversight. The Contractor will also provide Other Specified Training in areas such as strategic communications, administrative processes, insurgent threats, security, law enforcement, intelligence analysis and facilities management. *Id.* The Contractor will design, develop, produce, store and distribute training products for the delivery of training. *Id.*, at § 2.1.5. These products will include plans, manuals, specialized software, audio/visual media, handouts/materials, and programs of instruction with elements essential to designing training. *Id.*, at § 2.1.5.2.

B. Downrange's Appeal

On February 9, 2015, Downrange filed its appeal of the NAICS code. Downrange insists that NAICS code 541330 is not the appropriate code, and the solicitation would be more appropriately classified under NAICS codes 611430 or 611699.

Downrange contends the PWS identifies training as the primary performance objective of the solicitation, whereas the NAICS code chosen by the CO does not reference any training services. Downrange Appeal, at 2. Downrange adds that during the Questions and Answers period, the Air Force stated that choosing NAICS code 541330 allows for a higher size standard and better competition, which contradicts the reasoning for NAICS code selection found in federal regulations. *Id.* at 2-3; citing 13 C.F.R. § 121.402(b). Downrange argues the Air Force's chosen NAICS code simply increases the number of potential bidders and does not properly fit the purpose of the solicitation. Downrange concludes the NAICS codes it advocates better fit the procurement at hand because other similar training programs by the Department of the Army use them.

C. Illimite's Appeal

On February 12, 2014, Illimite filed its appeal of the NAICS code. Illimite argues that NAICS code 611430 is the appropriate code for the solicitation's required services.

Illimite explains § 121.402(b) requires the CO to select the code that best describes the purpose of the solicitation. Citing the Questions and Answers period, Illimite argues the CO erroneously selected NAICS code 541330 based on its having a larger size standard. Illimite Appeal, at 2. Illimite adds that the code selected by the CO does not contain any reference to training as dictated by the PWS and the *NAICS Manual*¹ definition of the CO's code does not mention training as a description of services covered. *Id.* Illimite goes on to cite extensively to

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>.

the PWS, and contends that only one labor category in the PWS allows for engineering services. Illimite concludes that the solicitation is unrelated to engineering services as described by the *NAICS Manual*.

Illimite requests that OHA assign NAICS code 611430 as this code “clearly encompasses the component that accounts for the greatest percentage of value of this contract.” *Id.* at 5. Alternatively, Illimite provides that code 541690 would also be more appropriate based on the services sought by the solicitation. *Id.* at 6.

D. Oak Grove's Response

On February 27, 2015, Oak Grove Technologies, LLC (Oak Grove) responded to the appeal. Oak Grove supports the CO's selection of NAICS code 541330 for this RFP.

Oak Grove contends that NAICS code 541330 is proper because the RFP is very broad in scope and “applying a strict quantitative analysis to determining the principal purpose of the Solicitation does not work well here.” Oak Grove's Response, at 3. Oak Grove concedes the RFP requires training services but argues that Appellants fail to recognize the RFP requires other services as well. Oak Grove, citing to other past PWSs selected by the CO as examples of services that may be required, argues the past PWSs require the contractor to engage in engineering services. *Id.* at 4; citing *T/O PWS 0363* at 1. Oak Grove adds that one of the evaluation scenarios listed in the RFP relates to military aircraft flight training, thus supporting the NAICS code chosen by the CO. Additionally, the PWS requires the contractor to provide subject matter experts, described as persons capable of completing complex programs that require detailed analysis, supervision of studies and able to lead surveys to collect and analyze data. *Id.* at 4-5.

Oak Grove cites to the *NAICS Manual* description of the CO's chosen NAICS code in order to highlight that it allows for the “provision of advice” relating to “utilization of machines, materials, instruments, structures, processes, and systems.” *Id.* at 5; citing to *NAICS Manual* at 746. Oak Grove maintains the CO's NAICS code designation establishes the RFP has a military component, thus justifying the MAE&MW exception. According to Oak Grove, any training required by the RFP will be provided by instructors with specialized knowledge of aeronautical and mechanical engineering.

Next, Oak Grove asserts the NAICS codes suggested by Appellants do not provide a better fit for the services sought and Appellants failed to prove that the CO's chosen code is clearly erroneous. Specifically, Oak Grove argues NAICS code 611430 does not consider the RFP's objectives. The index entries for code 611430 contemplates training which does not fall into the flight instruction, military skills training, and training in end item usage and maintenance required by the RFP. *Id.* at 7. Similarly, NAICS code 611699 comprises concerns engaged in providing training that excludes technical and trade instruction, which makes it incompatible with the RFP's requirements. *Id.* Lastly, NAICS code 541690 considers establishments that provide advice and assistance on scientific and technical issues. Although the RFP calls for advice on technical issues, the NAICS code chosen by the CO also covers those services. Thus, the overlapping similar services make it unnecessary to alter the code chosen by the CO.

E. Cambridge's Response

On February 27, 2015, Cambridge International Systems, Inc. (Cambridge) filed a response to the appeal. Cambridge supports the CO's use of NAICS code 541330.

Cambridge argues that because the RFP contemplates issuing task orders arising from this contract, those task orders, according to the PWS, may not always require labor hours and could potentially have a specific type of labor required. Cambridge Response, at 2. Thus, Cambridge contends the PWS sections cited by Appellants do not “establish firm requirements nor are they limited to instruction.” *Id.* at 3. According to Cambridge, the RFP's objective then is to improve the capabilities of the U.S. and its partner nations in eliminating global terrorist threats.

Cambridge maintains the RFP distinguishes the services to be provided by the contractor between training support services and instruction. Under training support services, the contractor could potentially be required to design, provide, and instruct on highly technical military systems. *Id.* at 4; citing PWS § 2.1. However, Cambridge states certain areas of strategic and operations training will likely require varying types of engineers beyond the capabilities of instructors. Cambridge observes the RFP contemplates that each task order issued will ultimately specify the labor category, scope, and personnel requirement sought, thus a broad NAICS code, like the one chosen by the CO, meets the RFP's objective.

Cambridge contends that during the Industry Day for the solicitation at issue, the Contract Scope Summary for Operations and Logistics contained services that did not fall under training. Cambridge surmises that “while instruction is anticipated to be a part of the requirements performed” no evidence is presented proving the CO erred in determining “that engineering type services would predominate in the awarded task orders.” *Id.* at 8.

Cambridge further argues the MAE&MW exception applies here because of the services sought are specifically military in nature as the services will include a “wide range of highly sophisticated military equipment involved in the fight against terrorism which require the use of specially trained engineers capable of understanding and performing to meet the needs of military customers.” *Id.* at 10.

F. CO's Response

On February 27, 2015, the CO responded to the appeals. The CO states that after releasing the sources sought notice for this procurement, which did not have the MAE&MW exception, he received comments from the industry maintaining that the MAE&MW exception applied to this procurement. CO's Response, at 2. The CO notes NAICS code 541690 was not previously used for past solicitation with the same requirements, thus not selected. The CO further maintains that NAICS code 611430 does not suit this procurement because it covers management and professional development training, which does not describe the RFP's principal purpose because “only a fraction of the requirements consisted of management and professional development training.” *Id.* at 4. Utilizing this code would also have removed the RFP as a small

business set-aside as market research determined that there would not be sufficient competition at the ID/IQ and task order level.

Next, the CO contends that NAICS code 541330 is the most appropriate designation as it is based on the RFP's principal purpose and used in similar previous acquisitions. According to the CO, Sector 54, Professional, Scientific, and Technical Services, allows for providing a high degree of expertise and training, thus properly suited for the RFP's requirements. Here, the contractor must rely on personnel with expertise and training of the highest degree, and “not necessarily the ‘instructor’ that would train in a classroom setting.” *Id.* at 6. The CO adds the labor categories that will likely be utilized in performing the RFP's principal purpose are: (i) Subject Matter Expert; (ii) Engineer; (iii) Developer/Designer; (iv) Scientist; (v) Maintainer; (vi) Mechanic; (vii) Assembler; (viii) Analyst; (ix) Tradesman; (x) Pilot; and (xi) Logistician.

The CO argues the PWS requires engineering services, particularly the sections requiring Training Assessment and Training Development. *Id.* at 7; citing PWS §§ 2.1.1 and 2.1.2. Additionally, Military Skills Training, End Item Usage/Handling and Maintenance, and Subject Matter Expert, all part of the PWS's description of services, best fit NAICS code 541330's description for engineering services with the MAE&MW exception. The CO states he “determined that the principal purpose of this requirement is to provide some form of subject matter training, knowledge, and/or experience in disciplines relating to providing advice, preparation of feasibility studies, and preparation of preliminary and final plans for training and engineering principles.” *Id.* at 9. The CO adds that utilizing NAICS code 541330 allows for a small business set-aside where performance will primarily be outside the U.S.

I. NAICS Manual Descriptions

The NAICS code designated by the CO, 541330, Engineering Services, 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.

NAICS Manual at 746. The MAE&MW exception to this NAICS code applies a different size standard than the general code. 13 C.F.R. § 121.201.

NAICS code 611430, Professional and Management Development Training, covers:

[E]stablishments primarily engaged in offering an array of short duration courses and seminars for management and professional development. Training for career development may be provided directly to individuals or through employers' training programs; and courses may be customized or modified to meet the special

needs of customers. Instruction may be provided in diverse settings, such as the establishment's or client's training facilities, educational institutions, the workplace, or the home, and through diverse means, such as correspondence, television, the Internet, or other electronic and distance-learning methods. The training provided by these establishments may include the use of simulators and simulation methods.

NAICS Manual at 821. Index entries which refer to this NAICS code are: management development training; professional development training; and quality assurance training.

NAICS code 611699, All Other Miscellaneous Schools and Instruction, covers:

[E]stablishments primarily engaged in offering instruction (except business, computer, management, technical, trade, fine arts, athletic, language instruction, tutoring, and automobile driving instruction.) Also excluded from this industry are academic schools, colleges, and universities.

NAICS Manual at 828. Illustrative examples include public speaking training, survival training, and speed reading training.

NAICS code 541690, Other Scientific and Technical Consulting Services, covers:

[E]stablishments primarily engaged in providing advice and assistance to businesses and other organizations on scientific and technical issues (except environmental).

NAICS Manual at 760. Illustrative examples include agricultural, motion picture, biological, physics, chemical, radio, economic, safety, energy, and security consulting services.

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. 13 C.F.R. § 121.402(b).

B. Analysis

The CO has designated the MAE&MW exception to NAICS code 541330. OHA's precedent has addressed what procurements may receive this designation:

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. 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).

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). . . .

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. (emphasis supplied).

These services [engineering services for numerous software and hardware products] 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).

NAICS Appeal of QED Systems, LLC, SBA No. NAICS-5573 (2014)

Therefore, the key question in any case where the issue is whether the MAE&MW exception applies is whether the engineering services the Air Force is acquiring here are in support of military weapons or equipment. The answer here is no. The services being acquired here are not even engineering services. They call for training services. There is to be training in flight instruction, military skills, handling of boats, vehicles, language, intelligence analysis and other topics. The services do not support weapons or equipment, but are training personnel to develop knowledge, skills, and abilities in a number of military related fields to better accomplish the mission of dealing with the threats posed by the traffic in illegal drugs and other criminal activity. These services are not covered by the MAE&MW exception.

The fact that NAICS code 541330, with the MAE&MW exception, was used in past procurements for these services is not relevant. The NAICS code designations made in other, allegedly similar procurements carry no weight in a NAICS code appeal. *NAICS Appeal of ACE Consulting Services, LLC*, SBA No. NAICS-5574 (2014). The CO's identification of some engineering services in the PWS does not alter the fact that the overall requirements are for training services which are not engineering in nature and are not in support of weapons or military equipment. The CO admits that the principal purpose of this requirement is subject matter training to provide advice, preparation of feasibility studies. Therefore, it is clear the services sought in this procurement are not in support of military weapons, and therefore are not covered by the MAE&MW exception. Additionally, the CO, in his response, states that the selection of the NAICS code was influenced by the possibility that it would lead to more competition. However, federal regulations state that the selection of a NAICS code must be based on the code “which best describes the principal purpose of the product or service being acquired.” 13 C.F.R. § 121.402(b); *NAICS Appeal of Allserv, Inc.*, SBA No. NAICS-5629 (2014). As OHA has previously stated, “arguments based on the level of competition afforded by particular size standards are meritless, because size standards are not part of the criteria for selecting the NAICS code.” *NAICS Appeal of Circle Solutions, Inc.*, SBA No. NAICS-5181, at 14 (2011); citing *NAICS Appeal of Eagle Design and Management, Inc.*, SBA No. NAICS-4521 (2002). Therefore, the CO's reasoning that the chosen NAICS code improves competition is unpersuasive.

Oak Grove's contention that the RFP requires services other than training and thus can support use of the exception is meritless. The fact that some engineering services are required, or that the training has a military application, is not determinative here, the question is whether this

procurement supports military equipment or weapons. Reliance on language in the *NAICS Manual's* description of the overall code is misplaced, because here the question is whether the special requirements of the exception apply.

Cambridge's contention that the training support services requirement could potentially require work on highly technical military systems is speculative at best. The NAICS code determination cannot be based on such a precarious footing. Similarly, statements made during Industry Day presentation are irrelevant; the NAICS code determination must be based upon a review of the solicitation and the required services to be provided by the contractor. Cambridge's argument that the services sought here are military in nature is not enough to support the designation. Rather, the services must be in support of weapons or military or aerospace equipment. The services here are directed to the support of personnel, because the Contractor will be training individuals, not manufacturing or supporting weapons and equipment. Accordingly, Engineering Services with the MAE&MW exception is not the correct NAICS code.

The next issue is, since the designated code is not correct, which NAICS code is the correct code. NAICS code 541690 is utilized when the contractor will provide consulting services or advice on scientific and technical matters. *NAICS Appeal of R. Christopher Goodwin & Associates, Inc.*, SBA No. NAICS-5393 (2012). Therefore, this NAICS code is not applicable here, because the contractor will not be providing scientific or technical advice. Rather, the contractor will be training personnel in some very practical fields, including flight instruction, military skills, and handling of equipment. These do not fit the definition for NAICS code 541690.

NAICS code 611430 covers training for management and professional development. OHA has found this code appropriate for a series of Lean Six Sigma courses. *NAICS Appeal of ACE Consulting Services, LLC*, SBA No. NAICS-5574 (2014). Information Technology courses with a military application have also been classified under this code. *NAICS Appeal of EScience & Technology Solutions, Inc.*, SBA No. NAICS-5586 (2014). In this procurement, the Contractor will be providing professional training for Air Force personnel in skills related to their duties, such as military training, flight training, crewing watercraft, handling vehicles, and performing intelligence analysis. This is important professional training for the personnel receiving it. These courses are therefore for their professional development. Further, it is clear these will be courses of short duration, and not long courses of the type to lead to a degree. Therefore, the type of training being offered here fits well within the description of NAICS code 611430.

I conclude NAICS code 611430 is a better fit than 611699, All Other Miscellaneous Schools and Instruction, because the description for 611430 specifically covers courses of short duration intended to further the students' professional development. The courses the Contractor will offer here fit that description. NAICS code 611699 is more of a catch-all code, and does not fit the requirements of this solicitation as well.² Accordingly, I conclude that the CO's NAICS

² If the course of instruction here emphasized survival training, I would probably reach a different result. However, survival training was not mentioned in the RFP.

code designation here was clearly erroneous, and that the correct NAICS code is 611430, Professional and Management Development Training, with a corresponding \$11 million annual receipts size standard.

IV. Conclusion

For the above reasons, the instant appeal is GRANTED, and the CO's NAICS code designation is REVERSED. The correct NAICS code for this procurement is NAICS code. 611430, Professional and Management Development Training, with a corresponding \$11 million annual receipts size standard.

Accordingly, because this decision is being issued before the close of the solicitation, the CO MUST amend the solicitation to change the NAICS code designation from 541330 to 611430. FAR § 19.303(c)(5); 13 C.F.R. § 134.318(b); *Matter of Eagle Home Med. Corp.*, Comp. Gen. B-402387, March 29, 2010, *available at* <http://www.gao.gov/decisions/bidpro/402387.pdf>.

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

CHRISTOPHER HOLLEMAN
Administrative Judge