

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

NAICS APPEAL OF:

DCS Corporation,

Appellant,

Solicitation No. FA2486-16-R-0065

U.S. Department of the Air Force

Eglin AFB, Florida

SBA No. NAICS-5703

Decided: January 6, 2016

APPEARANCE

John R. Tolle, Esq., Barton, Baker, Thomas & Tolle, LLP, McLean, Virginia, for
Appellant

DECISION

I. Introduction and Jurisdiction

On December 2, 2015, the U.S. Department of the Air Force (Air Force) issued Request for Proposals (RFP) No. FA2486-16-R-0065 for the SEEK EAGLE Modeling, Analysis, and Tools Support 2 (SEMATS 2) procurement. The Contracting Officer (CO) set aside the acquisition entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541712, Research and Development in the 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 procurement fit within the exception for Space Vehicles and Guided Missiles, their Propulsion Units, their Propulsion Units Parts, and their Auxiliary Equipment and Parts (SVGGM exception), which utilizes a 1,000-employee size standard. (RFP at K-4.)

On December 8, 2015, DCS Corporation (Appellant) filed the instant appeal. Appellant agrees that NAICS code 541712 is appropriate for the RFP, but maintains that the CO erred in selecting the SVGGM exception. Instead, Appellant asserts, the exception for Aircraft, with a size standard of 1,500 employees, should apply. 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)(1);

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's Performance Work Statement (PWS) explains that the Air Force SEEK EAGLE Office (AFSEO) is responsible for managing all aircraft stores certification activities. (PWS § 1.1.) The term “aircraft stores” refers to items such as weapons, fuel tanks, and pods carried internally or externally on aircraft. (*Id.*) To support the AFSEO, the contractor will perform “extensive Modeling and Simulation (M&S), analyses, and test (both ground and flight)” involving aircraft stores in order to “assure safety-of-flight for the aircrew, weapon employment acceptability, and air worthiness.” (*Id.*) Specific tasks will be defined in task orders issued after award of the base contract, but “the primary scope of the work is to provide software and data based modeling, M&S, analysis, and tool and/or product development support.” (*Id.* § 1.2.)

The PWS divides the required services into six task areas: (1) software development and sustainment; (2) project management/project planning; (3) compatibility engineering and analysis; (4) ordnance delivery planning and product development; (5) technical data generation and management; and (6) organizational support. (*Id.* §§ 3.1-3.6.) For each of these task areas, the PWS emphasizes that the contractor will assist and support AFSEO's aircraft store certification efforts. The contractor will, for example, “[p]erform analysis to determine if a store can be loaded and maintained while on the aircraft, assess the store functionality, and perform digital and physical fit checks if needed.” (*Id.* § 3.3.1.3.) Similarly, to evaluate store separation, the contractor will “model [] the aircraft-store combination for computer simulation, run computer simulations to analyze store separation characteristics, and modify and document changes to existing analysis software for evaluating store separation characteristics.” (*Id.* § 3.3.6.3.)

The RFP states that the Air Force plans to award a single indefinite-delivery / indefinite-quantity (ID/IQ) contract to the offeror with the proposal representing the best overall value. (RFP, Section M, at 1-2.) There are three evaluation factors: (1) Technical Capability and Risk; (2) Past Performance; and (3) Cost/Price. The Technical Capability and Risk factor is more important than Past Performance, which in turn is more important than Cost/Price. (*Id.*) The Technical Capability and Risk factor consists of four equally-weighted subfactors: (1) Aircraft Stores Compatibility Engineering Analysis and Support; (2) Technical Workforce Management; (3) Organizational Conflict of Interest; and (4) Program Management. (*Id.* at 4-8.) Proposals are due January 11, 2016.

B. The Appeal

Appellant argues that the CO should have selected the Aircraft exception under NAICS code 541712 rather than the SVGGM exception. According to Appellant, the Aircraft exception is appropriate when a procurement is for research and development and “Aircraft are integral to the

services being sought.” (Appeal at 6, citing *NAICS Appeal of Evanhoe & Assocs., LLC*, SBA No. NAICS-5505 (2013).) Conversely, for the SVGGM exception to apply, “the focus is on whether research and development is for Guided Missiles and Space Vehicles.” (*Id.* at 7.)

Appellant highlights that the instant RFP makes no mention of space vehicles or guided missiles. Indeed, the word “guided” appears only occasionally in the PWS, and even then in the context of aircraft. (*Id.* at 9.) The word “aircraft,” on the other hand, is used “approximately 118 times in the PWS.” (*Id.*) Appellant asserts that the AFSEO's mission is “primarily focused on [research and development] covering Aircraft safety and performance flight dynamics in connection with loading, carriage and release of Government furnished stores.” (*Id.*) The RFP requires the contractor to assist the AFSEO by performing “aerodynamic evaluation and testing of Aircraft with regard to stores compatibility.” (*Id.* at 14.) Therefore, Appellant reasons, the procurement involves aircraft, and the Aircraft exception under NAICS code 541712 should be utilized.

Appellant argues that PWS requirements such as “fit and function (loading)”, “structural load engineering (carriage)”, “electromagnetic compatibility/electromagnetic interface engineering (carriage)”, “stability and control engineering (carriage)”, “flutter engineering (carriage)”, “store separation engineering (release)”, “ballistics analysis (release)”, “safe escape analysis (release)”, and “ordnance delivery planning and product development (release)” require the contractor to perform tasks relating to aircrafts' ability to perform a variety of activities given the installation of the stores. (*Id.* at 12-14.) Further, Appellant contends, the RFP does not require the contractor to participate directly in “the development of either Aircraft parts or Aircraft stores, including Guided Missiles.” (*Id.* at 14.)

Lastly, Appellant maintains that the predecessor SEMATS 1 contract used the Aircraft exception for the same or similar products or services.

C. NAICS Manual¹ Descriptions

The NAICS code designated by the CO, 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), encompasses:

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 at 763.

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>.

SBA regulations recognize three exceptions under NAICS code 541712: the Aircraft exception, with a size standard of 1,500 employees; the SVGGM exception, with a size standard of 1,000 employees; and the Aircraft Parts and Auxiliary Equipment, and Aircraft Engine Parts exception (Aircraft Parts exception), with a size standard of 1,000 employees. 13 C.F.R. § 121.201. A footnote in the size standards table states that:

“Research and Development” for guided missiles and space vehicles includes evaluations and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft.

Id. n.11(c).

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 select the perfect NAICS code. *NAICS Appeal of Evanhoe & Assocs., LLC*, SBA No. NAICS-5505, at 14 (2013). Rather, the CO must assign the NAICS code that best describes the principal purpose of the product or service being acquired in light of the industry descriptions in the *NAICS Manual*, the description in the solicitation, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being acquired. FAR 19.303(a)(2); 13 C.F.R. § 121.402(b). OHA will not reverse a NAICS code designation “merely because OHA would have selected a different code.” *NAICS Appeal of Eagle Home Med. Corp.*, SBA No. NAICS-5099, at 3 (2009).

B. Analysis

Appellant has not shown that the CO clearly erred in selecting NAICS code 541712, with the SVGGM exception, for this procurement. Therefore, the appeal must be denied.

As noted above, SBA regulations state that “‘Research and Development’ for guided missiles and space vehicles includes evaluations and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft.” 13 C.F.R. § 121.201 n.11(c). Here, the RFP primarily calls for the contractor to perform Modeling and Simulation (M&S), analyses, and testing in support of the AFSEO. Section II.A, *supra*. In particular, the contractor will assist the AFSEO in assessing aircraft safety and aircraft performance in connection with the loading, carriage, and release of aircraft stores. Further, the term “aircraft stores” is broadly defined to encompass items — such as missiles — carried internally or externally on aircraft. *Id.* The instant procurement therefore can fairly be said to require “evaluations and simulations” involving missiles and similar devices, as well as a “thorough knowledge” of these technologies, as contemplated by 13 C.F.R. § 121.201 n.11(c). Accordingly, the SVGGM exception is not clearly erroneous for this procurement.

Because Appellant has not established that NAICS code 541712, with the SVGGM exception, is improper for this RFP, OHA need not consider any alternate code or size standard. It is settled law that “OHA will not assign a different NAICS code to a procurement unless the CO's choice of NAICS code is shown to be clearly erroneous.” *NAICS Appeal of Pac. Shipyards Int'l, LLC*, SBA No. NAICS-5464, at 7 (2013); *NAICS Appeal of Env't. Int'l Ltd.*, SBA No. NAICS-5628, at 7 (2014); *NAICS Appeal of National Electric Coil*, SBA No. NAICS-5666, at 8 (2015).

Nevertheless, Appellant's contention that the procurement would be better classified under the Aircraft exception is unpersuasive. Appellant maintains that, because SEMATS 2 is a research and development procurement that involves aircraft, the Aircraft exception should apply. As Appellant acknowledges, however, there are three exceptions under NAICS code 541712, all of which pertain to aerospace industries, and two of which relate specifically to aircraft (*i.e.*, Aircraft and Aircraft Parts). *See* Section II.C, *supra*. Contrary to Appellant's claims, then, I cannot conclude that the Aircraft exception is applicable merely because a research and development procurement relates in some manner to aircraft. Such a conclusion would be inconsistent with the separate exception for Aircraft Parts recognized in the regulation.

A review of the regulatory history sheds light on the intended scope of the Aircraft exception. In promulgating the three exceptions, SBA stated that firms engaged in research and development in the aerospace industries should be permitted to utilize the same size standards as manufacturers in those industries. *See* 53 Fed. Reg. 43,422 (Oct. 27, 1988). As a result, SBA has drawn a connection between NAICS code 336411, Aircraft Manufacturing, and the Aircraft exception under NAICS code 541712. 76 Fed. Reg. 14,323, 14,333 (Mar. 16, 2011) (explaining that “the size standard for aircraft related R&D contracts under NAICS 541712 is 1,500 employees, the same as that for Aircraft Manufacturing (NAICS 336411).”). NAICS code 336411 is utilized for establishments that are manufacturing new aircraft, or performing major modifications to existing aircraft. *NAICS Manual* at 472. By analogy, then, it appears that the Aircraft exception under NAICS code 541712 is appropriate when a contractor is performing research and development relating to new aircraft or major aircraft modifications. The instant procurement does not involve such work, so the Aircraft exception is, at best, questionable for this procurement.²

Lastly, Appellant's argument that the Aircraft exception was utilized on the predecessor procurement is unavailing. OHA has repeatedly held that the codes assigned to other procurements are entitled to little weight, particularly if those other procurements were not

² OHA's decision in *NAICS Appeal of Evanhoe & Associates, LLC*, SBA No. NAICS-5505 (2013) does not advance Appellant's case. In *Evanhoe*, OHA concluded that “the work in this procurement will be an initial step in the development of future aircraft. Because it will be laying the essential groundwork for further research and development of aircraft, the Aircraft exception to NAICS code 541712 is appropriate.” *Evanhoe*, SBA No. NAICS-5505, at 18. By contrast, the SEMATS 2 RFP does not call for the contractor to participate in the development of future aircraft. Rather, all of the contractor's duties are designed with one ultimate goal, the completion of the aircraft-store certification.

themselves the subject of a NAICS code appeal to OHA. *E.g., NAICS Appeal of R. Christopher Goodwin & Assocs., Inc.*, SBA No. NAICS-5393, at 5 (2012) (recognizing that “because each acquisition presents unique facts and circumstances, the NAICS codes assigned to other procurements have little probative value in assessing the appropriate NAICS code.”).

IV. Conclusion

For the above reasons, the appeal is DENIED. The CO reasonably selected NAICS code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), with the SVGM exception, for this procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge