

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

NAICS APPEAL OF:

Integrity Consulting Engineering and
Security Solutions, LLC,

Appellant,

Solicitation No. W911QY-18-R-0002
U.S. Department of the Army
Army Contracting Command
Natick, Massachusetts

SBA No. NAICS-5941

Decided: July 23, 2018

APPEARANCES

Katherine B. Burrows, Esq., Stephen P. Ramaley, Esq., Jason Blindauer, Esq., Miles Stockbridge P.C., Baltimore, Maryland, for Integrity Consulting Engineering and Security Solutions, LLC

DECISION

I. Introduction and Jurisdiction

On June 20, 2018, the U.S. Department of the Army, Army Contracting Command (Army) issued Request for Proposals (RFP) No. W911QY-18-R-0002 for acquisition and program management support services for the Joint Program Executive Office for Chemical, Biological, Radiological, and Nuclear Defense (JPEO-CBRND). The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) Code 541330, Engineering Services. NAICS code 541330 ordinarily is associated with a size standard of \$15 million average annual receipts, but the RFP indicated that the work fit within the exception for Military and Aerospace Equipment and Military Weapons (MAE&MW), which utilizes a size standard of \$38.5 million.

On June 26, 2018, Integrity Consulting Engineering and Security Solutions, LLC (Appellant) filed the instant appeal. Appellant maintains that the CO clearly erred in assigning the MAE&MW exception. 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. 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 explains that, during 2012, the Army established the Omnibus Program, Engineering, and Technical Support (OPETS) contracts to provide support services for the JPEO-CBRND. (Performance Work Statement (PWS) § 1.1.) The OPETS contracts were comprised of “six business area domains: (1) Business and Analytical, (2) Engineering and Technical, (3) Information Technology, (4) Logistics, (5) Medical, and (6) Acquisition.” (*Id.*) Contracts for first five of the OPETS business area domains were awarded on a full and open basis, but the sixth business area domain, Acquisition, was restricted small businesses. (*Id.*)

Because the OPETS contracts are nearing expiration, “a need for a new contracting vehicle is imminent.” (*Id.* § 1.2.) The instant procurement is intended as “a follow on effort to [the] OPETS Acquisition Domain” contracts, and is referred to as the Joint Enterprise-OPETS for Acquisition (“JE-OPETS-A”) procurement. (*Id.*) According to the RFP, the JE-OPETS-A contractors will provide “program management support and technical expertise, supporting DOD acquisition programs. . . .” (*Id.*)

The RFP states that the Army intends to award “at least three” indefinite-delivery/indefinite quantity (ID/IQ) contracts for the JE-OPETS-A procurement. (*Id.* § 1.3.) Specific requirements will be defined in task orders issued after award of the base contracts. (*Id.*)

The RFP indicates the JPEO-CBRND organization includes five Joint Project Managers (JPMs) that JE-OPETS-A contractors will support. Each JPM has a different specialty, but they share “similar requirements for acquisition support services.” (*Id.* § 2.1.) The five JPMs are: 1) JPM for Medical Countermeasure Systems, whose role is to provide for research, development, acquisition, fielding, and life cycle management of U.S. Food and Drug Administration-approved medical systems for protection, treatment, and diagnostic capabilities against CBRN threat agents; 2) JPM for Contamination Avoidance, who is responsible for the development, production, integration, testing, and fielding of nuclear, biological, and chemical detection, obscuration, and reconnaissance systems; 3) JPM for Protection, whose role is to develop, field, and sustain CBRN protection and hazard mitigation capabilities for the nation; 4) JPM for Information Systems, who is to “provide the information architecture and applications for shaping the battle space against the chemical and biological threat”; and 5) JPM for Guardian, whose mission is to develop, integrate, deliver and sustain chemical, biological, radiological, nuclear and explosive defense capabilities. (*Id.* §§ 2.1.1-2.1.5.) In addition to supporting the JPMs, the JE-OPETS-A contractors also will support JPEO-CBRND headquarters and offices. (*Id.* § 2.2.)

The RFP states that the acquisition support services to be provided by the JE-OPETS-A contractors “includes all support associated with the life cycle management, administration and

strategic functions involved in successful execution of acquisition programs. . . .” (*Id.* § 5.1.) The RFP identifies nine labor categories that will be provided by the JE-OPETS-A contractors: Acquisition Analyst; Strategic Planner; Relations Manager; Life Cycle Manager; Administrative Assistant; Graphics Artist; Technical Writer; Security Analyst; and Program Analyst. (*Id.*) The RFP describes the responsibilities associated with each labor category as follows:

Acquisition Analyst: The Offeror shall provide management, coordination, operational and technical support to programs within the JPEO-CBRND portfolio. The Offeror shall assist in the management and coordination of daily staff operations, support the Government lead on Integrated Product Teams (IPTs) and provide guidance to senior Government leadership on agency programs. Additionally, the Offeror shall assist in performing all tasks associated with acquisition program management in order to lead the overall program acquisition strategy, including, but not limited to, the following:

- a. Developing and implementing technical and programmatic plans, measures, and progress reports
- b. Monitoring program schedules to ensure proper resources have been allocated and risks are recognized and mitigated
- c. Gaining concurrence, approval, and consensus from stakeholders on various issues
- d. Developing, providing, and presenting program information
- e. Responding to external requests for information
- f. Preparing and reviewing all policy, acquisition and technical documentation
- g. Communicating issues regarding product development, storage, and sustainment
- h. Overseeing fielding

Strategic Planner. The Offeror shall perform strategic planning analysis of department and command-wide policy, assisting in generating and managing measurements of performance and evaluating the effectiveness of management policies and organization, programs and operations, missions and functions, and staffing and workload.

Relations Manager. The Offeror shall establish strategic partnerships, identify opportunities and coordinate events, both within the DoD and with external stakeholders (e.g., Department of Homeland Security (DHS), etc.), to synchronize JPEO-CBRND efforts with ongoing initiatives.

Life Cycle Manager. The Offeror shall serve as a life cycle manager at the staff level, performing operations across the entire organization in order to develop comprehensive support and maintainability requirements. The Offeror shall provide budgetary input (e.g., program affordability, cost-benefit analysis, initial Life Cycle Cost Estimate (LCCE)) to the requirements originator. The Offeror shall provide input to program offices during the development of logistics documentation. Additionally, the Offeror shall develop logistics support and maintainability plans to be implemented across the full life cycle of a program — from systems development to procurement and sustainment — in order to increase efficiencies and reduce the logistical footprint across the organization.

Administrative Assistant. The Offeror shall facilitate efficient office operations and apply traditional and innovative methodologies for team building and strategic planning. The Offeror shall perform all aspects of administrative support for the organization.

Graphics Artist. The Offeror shall design and develop print, electronic and web-based media products targeting a variety of audiences (e.g., senior DoD leadership, bioengineers and related scientific disciplines, pharmaceutical and biotechnology companies, acquisition professionals, regulatory agencies, etc.) to support JPEO-CBRND Enterprise-wide graphics requirements.

Technical Writer. The Offeror shall serve as a technical writer, developing, reviewing, proofreading, and modifying technical chemical, biological, radiological, and nuclear defense documentation, including, but not limited to, briefings, presentations, reports, plans, memorandums, correspondence, journal articles, and information papers.

Security Analyst. The Contractor shall support the JPEO-CBRND HQ Facilities and Security Managers with daily operational tasks for all JPEO-CBRND facilities.

Program Analyst. The offeror shall provide on-going analytical, acquisition and administrative support by managing and coordinating daily staff operations, communications and processes; ensuring the team understands deadlines, assignments and objectives; assisting in the development of program documentation and briefing materials; and tracking the status of action items, program milestones and monthly reports. The offeror shall perform all aspects of program analysis from project proposal to closeout in accordance with established policies and guidelines, including, but not limited to, the following:

- a. Demonstrating knowledge of the DoD 5000 acquisition process and how it relates to product development, production and sustainment

b. Facilitating milestone planning by preparing, reviewing, and updating technical briefing materials, documentation and program schedules; developing and implementing technical and programmatic plans and measures to track program cost, schedule and performance and reporting progress; and tracking program deliverables

c. Gathering, generating, reviewing and assessing data to update Acquisition Status Reports, Joint Quarterly Readiness Reviews, and Joint Life Cycle Management Reports

d. Supporting, coordinating and/or managing the JPEO-CBRND Task Management System (TMS) and Document Staffing System, to include assigning all official and unofficial taskers and document reviews, tracking inputs and responses, and ensuring timely and coordinated responses are submitted in the appropriate format

e. Assisting with Army Knowledge Online (AKO) and JPEO-CBRND Knowledge Center (KC) operation

f. Maintaining a library of program-specific electronic files and acquisition reference materials for multiple programs

g. Serving as a liaison between the JPM office and JPEO-CBRND Headquarters, reporting directly to the product manager and supporting the Government lead on IPTs

h. Providing coordination and staff support at meetings, program reviews, conferences and briefings by producing the agenda and meeting minutes, preparing presentation materials and displays, hosting or participating in the event, and recording and tracking action items, as required by the Government.

(*Id.*)

The RFP states that the Army intends to make its award decisions on a lowest-price technically-acceptable basis, except that “price will not be evaluated at contract award”. (RFP, Attach. 3, at 1.) To be eligible for award, an offeror must achieve a rating of “Acceptable” for each of two non-price evaluation factors: (1) Past Performance and (2) Technical/Management. (*Id.*) The Technical/Management factor consists of four subfactors: (i) Organizational Plan; (ii) Recruitment, Retention and Replacement Competency; (iii) Transition Approach; and (iv) Management of Resources. (*Id.*) Proposals were due July 19, 2018.

B. The Appeal

On June 26, 2018, Appellant filed the instant appeal. Appellant asserts that “NAICS code 541330 may be the proper NAICS code” for this RFP, but that the MAE&MW exception is unsuitable. (Appeal at 3.) Appellant highlights that the ultimate customer for this procurement,

JPEO-CBRND, “does not develop weapons.” (*Id.*) Rather, JPEO-CBRND is responsible for preparing “medical, protective, surveillance, detection, and data analytic technologies and systems—which are NOT weapons systems or aerospace equipment under the MAE&MW exception.” (*Id.* at 7, emphasis Appellant's.) Appellant points to OHA's decision in *NAICS Appeal of CSMI, LLC*, SBA No. NAICS-5433 (2012) to support the notion that “[s]urveillance, detection and protective technologies/equipment, even if developed and used by the military,” do not qualify for the MAE&MW exception. (*Id.* at 7-8.) In Appellant's view, because the JE-OPETS-A contractors will “provide acquisition and program management support services” to JPEO-CBRND and “are not participating in weapons system development”, the CO clearly erred in utilizing the MAE&MW exception. (*Id.* at 6-7.)

OHA received no responses to the appeal from other interested parties.

C. NAICS Manual¹ Descriptions

The NAICS code designated by the CO, 541330, Engineering Services, covers:

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 at 465. Examples of work included under this NAICS code are “[c]ivil engineering services,” “[m]echanical engineering services,” “[e]nvironmental engineering services,” “[e]ngineers' offices,” and “[c]onstruction engineering services.” *Id.*

The MAE&MW exception is a special size standard applied to NAICS code 541330 but the scope of the exception is not defined in the *NAICS Manual* or in SBA regulations. OHA has 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 QED Systems, LLC*, SBA No. NAICS-5573, at 4-5 (2014) (quoting *NAICS Appeal of CSMI, LLC*, SBA No. NAICS-5433, at 7 (2012)).

NAICS code 541611, Administrative Management and General Management Consulting Services, includes:

establishments primarily engaged in providing operating advice and assistance to businesses and other organizations on administrative management issues, such as financial planning and budgeting, equity and asset management, records

¹ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2017)*, available at <http://www.census.gov>.

management, office planning, strategic and organizational planning, site selection, new business start-up, and business process improvement. This industry also includes establishments of general management consultants that provide a full range of administrative, human resource, marketing, process, physical distribution, logistics, or other management consulting services to clients.

NAICS Manual at 472. Examples of work included under this NAICS code are “[a]dministrative management consulting services,” “[f]inancial management (except investment advice) consulting services,” “[s]ite selection consulting services,” “[s]trategic planning consulting services,” and “[g]eneral management consulting services.” *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 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 and 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

The instant case is analogous to OHA's decisions in *NAICS Appeal of The Tolliver Group, Inc.*, SBA No. NAICS-5705 (2016) and *NAICS Appeal of U.S. Small Business Administration*, SBA No. NAICS-5526 (2014). In *Tolliver Group*, the procuring agency assigned NAICS code 541330 and the MAE&MW exception to a procurement for human resource support, financial analysis, and program management and administration. OHA explained that “it is important to remember the [MAE&MW] exception is part of the Engineering Services [NAICS] code, and therefore in order to be designated under this exception, a procurement designated under it must involve professional engineering services with a military or aerospace application, ‘applying physical laws and principles of engineering.’” *Tolliver Group*, SBA No. NAICS-5705, at 10 (quoting *NAICS Manual*). Upon reviewing the requirements described in the solicitation and the definitions in the *NAICS Manual*, OHA found that “the great majority of the work required here is not engineering.” *Id.* Furthermore, none of the labor categories in the solicitation required an engineering degree. *Id.* OHA concluded that “[t]he PWS simply does not support an engineering designation, because it does not require engineering tasks.” *Id.* As a result, it was improper to have assigned NAICS code 541330 and the MAE&MW exception to the procurement.

OHA reached a similar conclusion in the *U.S. Small Business Administration* case. There, the procuring agency assigned NAICS code 541330 and the MAE&MW exception, but OHA found that “although engineering services are not totally irrelevant to these acquisitions, such services appear to represent a minor aspect of the overall RFPs.” *U.S. Small Business Administration*, SBA No. NAICS-5526, at 7. Under OHA case precedent, “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.’” *Id.*, quoting *NAICS Appeal of Dial General Eng'g*, SBA No. NAICS-5375, at 7 (2012). Because “the primary purpose of these procurements is not engineering services,” it was clear error to assign NAICS code 541330 and the MAE&MW exception. *Id.*

In the instant case, Appellant highlights that the ultimate customer for the JE-OPETS-A procurement is not engaged in weapons development. As in *Tolliver Group* and *U.S. Small Business Administration*, though, the more fundamental issue is that the instant RFP does not call for work that can reasonably be construed as engineering. The RFP repeatedly states that the principal purpose of the JE-OPETS-A procurement is to obtain acquisition support services for the JPEO-CBRND. Section II.A, *supra*. Moreover, there is no indication in the RFP that such acquisition support services involve application of the physical laws and principles of engineering. *Id.* Indeed, none of the labor categories described in the RFP are engineers, nor do any of the labor categories require education or expertise in any engineering discipline. *Id.* Furthermore, while the RFP states that JPEO-CBRND previously obtained “Engineering and Technical” support services through the predecessor OPETS contracts, such work is beyond the scope of the instant procurement. This is true because, according to the RFP, the JE-OPETS-A procurement is the successor only to the “Acquisition” portion of the OPETS contracts. *Id.* Accordingly, as in *Tolliver Group* and *U.S. Small Business Administration*, there is no basis here to conclude that the instant procurement primarily calls for engineering services. Since this RFP is not primarily for engineering, the MAE&MW exception also is inappropriate.

Because I agree with Appellant that the CO erred in selecting NAICS code 541330 and the MAE&MW exception, OHA must assign the NAICS code that best describes the principal purpose of the products or services being acquired. Section III.A, *supra*. In making this decision, OHA will consider, but is not limited to, the NAICS codes recommended by the parties. *E.g.*, *NAICS Appeal of Active Deployment Sys., Inc.*, SBA No. NAICS-5712 (2016) (selecting a code not advocated by any litigant).

I find that the most appropriate NAICS code for this procurement is 541611, Administrative Management and General Management Consulting Services. NAICS code 541611 is an expansive code, covering a broad range of consulting and administrative support services. The code includes “establishments primarily engaged in provide operating advice and assistance to businesses and other organizations on administrative management issues,” as well as “general management consultants that provide a full range of administrative, human resource, marketing, process, physical distribution, logistics, or other management consulting services to clients.” Section II.C, *supra*. Moreover, OHA has previously held that “acquisition consulting support” services — such as “prepar[ing] documentation in the acquisition planning phase, assist[ing] in proposal evaluation, and assist[ing] in monitoring performance in the post-award

phase” — fall within NAICS code 541611. *NAICS Appeal of ALON, Inc.*, SBA No. NAICS-5148, at 8 (2010). OHA likewise has applied NAICS code 541611 in situations “where a contractor will ‘assist[] with the administration and management’ of an important program.” *NAICS Appeal of Info. Ventures, Inc.*, SBA No. NAICS-5544, at 7 (2014) (quoting *NAICS Appeal of CHP Int’l, Inc.*, SBA No. NAICS-5367, at 5 (2012)). Thus, NAICS code 541611 best describes the acquisition and program management support services being acquired here.

IV. Conclusion

For the above reasons, the appeal is GRANTED. The CO clearly erred in assigning NAICS code 541330 and the MAE&MW exception to this procurement. The most appropriate NAICS code is 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of \$15 million average annual receipts. Because this decision is rendered after the deadline for receipt of proposals, the decision does not apply to the pending solicitation, but may apply to future solicitations for the same supplies or services. 13 C.F.R. § 134.318(b) and FAR 19.303(c)(8). This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge