

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

NAICS APPEAL OF:

Oak Grove Technologies, LLC,

Appellant,

RFP No. H92239-19-R-0002

U.S. Army Special Operations Command
Fort Bragg, North Carolina

SBA No. NAICS-5998

Decided: April 15, 2019

APPEARANCES

Craig A. Holman, Esq., Arnold & Porter Kaye Scholer LLP, Washington, D.C., for Appellant

Gail C. Williams, Contracting Officer, U.S. Army Special Operations Command, Fort Bragg, North Carolina

Matthew T. Schoonover, Esq., Shane J. McCall, Esq., Robert D. Kampen, Esq., Koprince Law LLC, Lawrence, Kansas, for Lukos-VATC JV III LLC

DECISION

I. Introduction and Jurisdiction

On March 13, 2019, the U. S. Army Special Operations Command (Army) issued Request for Proposals (RFP) No. H92239-19-R-0002 for Army Special Operations Forces (ARSOF) Training Support. The RFP contemplates award of a single Indefinite Delivery / Indefinite Quantity contract, with firm-fixed-price task orders to be issued against it. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Business Concerns, and assigned North American Industry Classification System (NAICS) code 611519, Other Technical and Trade Schools, with a corresponding size standard of \$15 million average annual receipts.

On March 22, 2019, Oak Grove Technologies, LLC (Appellant) filed the instant appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant asserts that the CO clearly erred in selecting NAICS code 611519, and that the correct NAICS code for this procurement is 541330, Engineering Services, with the Military and

Aerospace Equipment and Military Weapons (MAE&MW) exception. For the reasons discussed *infra*, the appeal is denied.

OHA decides appeals of NAICS code designations 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

On March 13, 2019, the Army issued the instant RFP under NAICS code 611519. On March 29, 2019, in response to industry questions, the Army issued Amendment 1, which made certain revisions to the RFP and extended the deadline for receipt of proposals until April 17, 2019.

The RFP's Performance Work Statement (PWS) states that the purpose of the procurement “is to provide role player and direct support to field and situational training exercises in all ARSOF courses.” (PWS § 1.2.)¹ This contract supports the United States Army John F. Kennedy Special Warfare Center and School (USAJFKSWCS). (*Id.* § 1.4.)

According to the PWS, the contractor will provide in-role instruction during training events by subject matter experts who have operational experience coupled with years of instructor experience to effectively teach in role. (*Id.* § 1.3.1.) The contractor will also provide basic role player support to training events that require role players who understand the scenario, are capable of reacting to a wide variety of responses from students, and can then adjust appropriately depending on the desired outcome of the learning event. (*Id.* § 1.3.2.) To augment instructors during training, the contractor will provide Observer/Controller (O/C) subject matter experts. (*Id.* § 1.3.3.)

Further, the contractor will provide support for Range 37 and Camp Mackall. The Exercise Support Cell will provide direct support to training through numerous activities, such as general maintenance and repairs, building of training aids, and basic industrial skills to include carpentry, wood working, and metal working. (*Id.* § 1.3.4.) Finally, the contractor will provide management for all contract personnel. (*Id.* § 1.3.5.)

¹ All citations to the PWS are to the version included with Amendment 1.

Technical Exhibit 7 provides estimated workload hours based on historical data:

Full-Time Support

Labor Category	Est. Hours
Training Management Office Supervisor (1)	1,880
Pineland Area Managers (2)	3,760
Pineland Lane Managers (12)	22,560
Exercise Support Cell Manager (1)	1,880
Exercise Support Cell Team, Camp Mackall (14)	26,320
Exercise Support Cell Team, Range 37 (10)	18,800
Logistics Specialist (1)	1,880
Weapons Specialist, Range 37 (1)	1,880

Course Support

Labor Category	Est. Hours
Guerilla Chiefs	20,664
Role Players - OPFOR/Guerilla/HN	405,436
Role Players - Cultural	74,106
Role Players - Ambassador	432
Log Runners / Drivers	3,312
Point Sitters	4,896
Outstation Communication Support	6,480
Site Managers	6,944
Observer / Controllers	51,912
Role Players - Interpreters	2,112

(*Id.*, Tech. Exh. 7.) The PWS outlines the required qualifications for role players and other contractor personnel. Guerilla-Chief (G-Chief) role players must be ex-Special Forces Non-Commissioned Officers (NCOs) of Sergeant First Class or higher, Warrant or Commissioned Officers who are subject matter experts on all aspects of unconventional warfare (UW). (*Id.* § 1.6.15.)

Opposition Force (OPFOR), Guerrilla, and Host Nation/Partner Nation (HN/PN) role players shall be capable of traveling up to two kilometers cross-country with a 30-pound rucksack, and may be required to simulate combat in a training environment using blank ammunition, simunitions, paintball, and pyrotechnics and, at times, may be required to “die in place” or be captured after a simulated firefight and be searched. (*Id.* § 1.6.16.7.)

Ambassador role players must be filled by a former U.S. Ambassador, Deputy Ambassador, Chief of Mission, Deputy Chief of Mission, Charge d'Affaires, senior level Foreign Service Officer, or senior level Career Diplomat who are subject matter experts on all aspects of the State Department mission in foreign countries. (*Id.* § 1.6.16.3.) Interpreter role players must

be fluent in both English and a target language and able to accurately interpret short passages or phrases at a time. (*Id.* § 1.6.16.5.)

O/C personnel in support of the Special Forces Qualification Course must be ex-Special Forces NCOs of Sergeant First Class or higher, Warrant or Commissioned Officers who are subject matter experts on all aspects of UW. (*Id.* § 1.6.16.4.) Some O/Cs in support of the Special Forces Qualification Course must have additional Advanced Special Operations Techniques (ASOT) Level III Qualifications and at least four years of experience as an ASOT Level III. (*Id.* § 1.6.16.4.1.) O/Cs in support of the Civil Affairs Qualification Course must be ex-Civil Affairs NCOs of Sergeant First Class or higher, or Commissioned Officers who are subject matter experts on all aspects of Civil Affairs (CA). (*Id.* § 1.6.16.4.)

Outstation Communications Support personnel must be able to communicate using Special Forces communications techniques and base station equipment suites. (*Id.* § 1.6.16.1.) Re-Supply (Log Runner) personnel must be trained to handle hazardous materials; must lift repetitive loads in loading, unloading and short carrying operations; and must be able to operate 15-passenger vans, two- and four-wheel drive trucks, and cargo vans on and off-road under all weather conditions. (*Id.* § 1.6.16.2.)

Technical Exhibit 8 of the RFP contains 11 “Enclosures” outlining training exercises, required contractor personnel, and tentative schedules. According to the Enclosures, role players and other contract personnel will participate in: ARSOF Assessment and Selection exercises; 18A Military Occupational Specialty (MOS) Training, Practical Exercises (PEs), and Field Training Exercises (FTXs); Small Unit Tactics (SUT); 18B and 18C MOS FTXs; the Robin Sage Mission Rehearsal Exercise and Culmination Exercise (CULEX); the CA Sluss-Tiller CULEX Phases 1, 2, and 3; Psychological Operations (PSYOPS) Advanced Individual Training (AIT); PSYOPS Inter Agency Planning Exercise; PSYOPS CULEX; Survival, Evasion, Resistance, and Escape (SERE) Urban Evasion Lane; and CA AIT Module H Engagements, Negotiations, and Assessments. (RFP, Tech. Exh. 8, Encl. 1-11.)

B. Appeal

On March 22, 2019, Appellant filed the instant appeal. Appellant contends that NAICS code 611519 “does not accurately reflect” the work. (Appeal at 1.) Instead, Appellant urges, NAICS code 541330, Engineering Services, with the MAE&MW exception, is the most appropriate NAICS code. Appellant asserts that the Army has used NAICS code 541330 with the MAE&MW exception for years for this work. (*Id.* at 3-4.)

Appellant highlights that the vast majority of estimated personnel hours relate to opposition force role players. (*Id.* at 5.) Further, the Army, not the contractor, creates the training scenarios and designs the roles. (*Id.*) Several positions require particular military experience and expertise, such as G-Chief, O/C, Program Manager, Weapons Specialist, Logistics Specialist, and Exercise Support Cell Manager. (*Id.* at 6.) In addition, the contractor must maintain and have proficiency in a range of non-standard or foreign weapons and be capable of handling ammunition and pyrotechnics, employing small arms and pyrotechnics, and performing light infantry tactics. (*Id.* at 6-7.) Because this procurement involves military and aerospace

equipment and military weapons, NAICS code 541330 with the MAE&MW exception should apply. (*Id.* at 8.)

In contrast, Appellant contends, NAICS code 611519 is for schools “primarily engaged in offering job or career vocational or technical courses” with curriculums that “are highly structured and specialized and lead to job-specific certification.” (*Id.* at 10, quoting *NAICS Manual*² at 517.) NAICS code 611519 is typically used for physical schools and Job Corps Centers. (*Id.* at 10-11, citing *NAICS Appeal of Global Sols. Network, Inc.*, SBA No. NAICS-4478 (2002) and *NAICS Appeal of CHP Int'l, Inc.*, SBA No. NAICS-5367 (2012).) Appellant points to USASpending.gov for the proposition that Federal spending under NAICS code 611519 is largely for Job Corps Centers, manufacturer training, and small contracts for discrete training programs. (*Id.* at 11.)

Further, in the subject RFP, it is the Army, not the contractor, that manages and operates the school, and designs the curriculum. (*Id.* at 11-12.) The Army also provides much of the required office space and equipment, including exercise communications equipment, computers, and tents. (*Id.*) The Army, not the contractor, grades and passes the students. (*Id.*) These facts support the conclusion that “[w]hat the Army seeks to procure by the procurement is role players and related facilities support.” (*Id.* at 13.)

Appellant observes that in *NAICS Appeal of Katmai Simulations & Training*, SBA No. NAICS-5445 (2013) OHA found that a contract for role player support services for law enforcement training was properly classified under NAICS code 561320, Temporary Help Services, rather than a NAICS code in subsector 611. Similarly, in *NAICS Appeal of CWU, Inc.*, SBA No. NAICS-5226 (2011), OHA found that NAICS code 561320 applied to an Army role player contract. (*Id.* at 12-13.)

In support of its contention that NAICS code 541330 with the MAE&MW exception applies, Appellant notes this code applies to contracts for engineering support, including support on simulation projects, citing *NAICS Appeal of Millennium Eng'g & Integration Co.*, SBA No. NAICS-5309 (2011). (*Id.* at 13-14.) In addition, Appellant maintains, other solicitations classified under NAICS code 541330 with the MAE&MW exception have a similar scope of work to the instant RFP. (*Id.* at 14-15.) Appellant reiterates that the RFP “lists several positions and tasks that require working in combat-simulating roles and working with weapons.” (*Id.* at 15.)

Alternatively, Appellant contends that other NAICS codes would be more appropriate for this RFP than NAICS code 611519. NAICS code 711310, Promoters of Performing Arts, Sports, and Similar Events with Facilities, could apply here because the RFP calls for “live role play actors, facility/set support, and related logistics and supervision support.” (*Id.* at 16.) Appellant emphasizes that the RFP estimates 405,436 labor hours for “Role Players - OPFOR/Guerilla/HN” and another 74,106 labor hours for “Role Players - Cultural.” (*Id.* at 16-17.)

² Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2017)*, available at <http://www.census.gov>.

In a footnote, Appellant identifies two other possible NAICS codes. First, NAICS code 561210, Facilities Support Services, may apply because the RFP seeks “a broad range of facility support services in addition to role player support.” (*Id.* at 18, fn.8.) Second, Appellant suggests that NAICS code 561320, Temporary Help Services, is also appropriate. (*Id.*)

C. CO's Response

On April 5, 2019, the CO responded to the appeal. The CO states that she selected NAICS code 611519 because the *NAICS Manual* includes “specialized military training” as an example of work under this NAICS code, and the instant RFP calls for the contractor “to provide exercise management, role player, subject matter expertise, and training support for assessment, selection, and training support for field and situational training exercises.” (CO's Response at 4.) The CO explains that the predecessor contract included other customers in addition to ARSOF, and was classified under NAICS code 541330 due to the broad scope of that procurement, which included live, virtual and constructive training, services, training requirements analysis, prototyping, advanced concept exploration, rapid prototype development, and operation and maintenance functions. (*Id.* at 5.) The CO contrasts that contract with the instant RFP, which is a more narrowly-scoped effort. (*Id.* at 6.)

The CO also asserts that NAICS code 541330 is not appropriate for the instant RFP because only a small percentage of the work is for general maintenance and repairs. Nor is NAICS code 711310 appropriate, because the role-players here are not performers with scripts, but will provide interactive training events, give feedback, and function as subject matter experts. (*Id.* at 7.)

The CO also highlights that NAICS code designations made in other, allegedly similar procurements carry little weight in a NAICS code appeal, citing *NAICS Appeal of ACE Consulting Services, LLC*, SBA No. NAICS-5574 (2014). (*Id.* at 6.)

D. LV JV's Response

On April 8, 2019, Lukos-VATC JV III LLC (LV JV), a potential offeror, responded to the appeal. LV JV maintains that the CO's selection of NAICS code 611519 is correct because the RFP is for “specialized military training” as set out in the *NAICS Manual* under NAICS code 611519. (LV JV Response at 5.) The RFP clearly calls for highly-specialized military training, and the personnel requirements likewise demonstrate that the principal nature of the procurement is specialized military training. (*Id.* at 7-8.)

Contrary to Appellant's focus on the use of NAICS code 611519 for Job Corps Centers, LV JV points out that Job Corps Centers work is an exception under NAICS code 611519, and that NAICS code 611519 is not limited to Job Corps Centers. (*Id.* at 10, citing 13 C.F.R. § 121.201, fn.16.) Instead, NAICS code 611519 by its own terms covers the specialized military training service sought here. (*Id.* at 10.)

As for Appellant's recommendation of NAICS code 541330, LV JV observes that this RFP includes no labor hours for engineers. (*Id.* at 13.) Further, the NAICS code assigned to a

predecessor contract has no bearing on this RFP. (*Id.*) Appellant's suggestion that other NAICS codes could apply is meritless, because Appellant first must establish that the CO's assigned NAICS code is improper for the RFP. (*Id.* at 5.)

E. Reply

On April 11, 2019, three days after the close of record, Appellant moved to reply to the Responses and submitted its proposed Reply. A Reply is warranted, Appellant argues, to address errors in the Responses. (Motion at 1-2.)

Under applicable regulations governing NAICS code appeals, a reply to a response is generally not permitted unless OHA so directs. 13 C.F.R. § 134.309(d). No such direction occurred here. Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Accordingly, Appellant's motion to reply to the Responses is DENIED, and the proposed Reply is EXCLUDED from the record. *NAICS Appeal of T3 TigerTech*, SBA No. NAICS-5674, at 2, fn.2 (2015); *NAICS Appeal of Allserv, Inc.*, SBA No. NAICS-5629, at 7 (2014).

F. NAICS Manual

The NAICS code chosen by the CO and supported by LV JV, 611519, Other Technical and Trade Schools, covers:

establishments primarily engaged in offering job or career vocational or technical courses (except cosmetology and barber training, aviation and flight training, and apprenticeship training). The curriculums offered by these schools are highly structured and specialized and lead to job-specific certification.

NAICS Manual at 517. The *NAICS Manual* provides the following illustrative examples of such establishments: “[b]artending schools”; “[m]odeling schools”; “[b]roadcasting schools”; “[r]eal estate schools”; “[c]omputer repair training”; “[t]ruck driving schools”; “[g]raphic arts schools”; and “[s]pecialized military training (except flight instruction, academies, and basic training).” *Id.* Under NAICS code 611519, “[s]pecialized military training (except flight instruction, academies, and basic training)” appears as an illustrative example for the first time in the 2017 edition of the *NAICS Manual*. *Cf.*, 2012 *NAICS Manual* at 823-24.

The NAICS code Appellant advocates, 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. NAICS code 541330 normally corresponds with a size standard of \$15 million average annual receipts, although there are three exceptions which instead utilize a size standard of \$38.5 million. 13 C.F.R. § 121.201. Appellant asserts that the MAE&MW exception applies here.

Appellant's first alternative NAICS code is 711310, Promoters of Performing Arts, Sports, and Similar Events with Facilities. This industry covers:

establishments primarily engaged in (1) organizing, promoting, and/or managing live performing arts productions, sports events, and similar events, such as state fairs, county fairs, agricultural fairs, concerts, and festivals, held in facilities that they manage and operate and/or (2) managing and providing the staff to operate arenas, stadiums, theaters, or other related facilities for rent to other promoters.

NAICS Manual at 547.

Appellant's second alternative NAICS code, 561210, Facilities Support Services, covers:

establishments primarily engaged in providing operating staff to perform a combination of support services within a client's facilities. Establishments in this industry typically provide a combination of services, such as janitorial, maintenance, trash disposal, guard and security, mail routing, reception, laundry, and related services to support operations within facilities. These establishments provide operating staff to carry out these support activities, but are not involved with or responsible for the core business or activities of the client. Establishments providing facilities (except computer and/or data processing) operation support services and establishments providing private jail services or operating correctional facilities (i.e., jails) on a contract or fee basis are included in this industry.

NAICS Manual at 490. For NAICS code 561210, a footnote in the Size Standards Table states:

(a) If one or more activities of Facilities Support Services as defined in paragraph (b) (below in this footnote) can be identified with a specific industry and that industry accounts for 50% or more of the value of an entire procurement, then the proper classification of the procurement is that of the specific industry, not Facilities Support Services.

(b) "Facilities Support Services" requires the performance of three or more separate activities in the areas of services or specialty trade contractors industries. If services are performed, these service activities must each be in a separate NAICS industry. If the procurement requires the use of specialty trade contractors (plumbing, painting, plastering, carpentry, etc.), all such specialty trade contractors activities are considered a single activity and classified as "Building and Property Specialty Trade Services." Since "Building and Property Specialty

Trade Services” is only one activity, two additional activities of separate NAICS industries are required for a procurement to be classified as “Facilities Support Services.”

13 C.F.R. § 121.201, fn.12.

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

Having reviewed the RFP, the descriptions in the *NAICS Manual*, OHA's prior decisions, and the arguments of the parties, I find that Appellant has not met its burden of proving that the CO clearly erred in selecting NAICS code 611519 for this procurement. As a result, this appeal must be denied.

According to the *NAICS Manual*, NAICS code 611519 is appropriate for “job or career vocational or technical courses” with curriculums that are “highly structured and specialized and lead to job-specific certification.” Section II.F, *supra*. Moreover, under the 2017 edition of the *NAICS Manual*, NAICS code 611519 specifically includes “[s]pecialized military training (except flight instruction, academies, and basic training).” *Id.*

The instant RFP falls squarely within the description of NAICS code 611519. The RFP calls for role players and other support personnel to help USAJFKSWCS train special operations students to become members of the Army's elite Special Forces. Section II.A, *supra*. This is highly-structured and specialized training that will be conducted on a secure military base or training ranges using military training methods, including guerrilla warfare simulations and battlefield immersion experiences. *Id.* The specialized military character of this training is unmistakable. Indeed, in its appeal, Appellant itself highlights the quintessentially military character of the training being provided. Section II.B, *supra*. Further, the training here is not basic training. It includes complex field and situational training exercises, occurs well after basic training, and leads successful students to careers in specific Military Occupational Specialties in

the Special Forces. Section II.A, *supra*. Accordingly, NAICS code 611519 is proper for the instant RFP.

Appellant correctly observes that in *NAICS Appeal of Katmai Simulations & Training*, SBA No. NAICS-5445 (2013) and *NAICS Appeal of CWU, Inc.*, SBA No. NAICS-5226 (2011), OHA found contracts for role player support services for Army warfighter training and for law enforcement training were appropriately classified under NAICS code 561320, Temporary Help Services. These decisions, however, were based on earlier editions of the *NAICS Manual*, and thus preceded the inclusion of “[s]pecialized military training” in the *NAICS Manual's* description for NAICS code 611519, which first occurred in the 2017 edition. Section II.F, *supra*. I therefore do not find these decisions dispositive here. Appellant's further argument that an exception to the NAICS code 611519 size standard is used for Job Corps Centers does not detract from the fact that the *NAICS Manual* now specifically enumerates “[s]pecialized military training” amongst the lines of work covered.

Appellant also argues the NAICS code should be the same as for the predecessor contract. As both the CO and LV JV point out, however, NAICS code designations made in other, allegedly similar procurements carry little weight in a NAICS code appeal. *E.g.*, *NAICS Appeal of ACE Consulting Servs., LLC*, SBA No. NAICS-5574, at 4 (2014). The CO correctly determined the NAICS code for this RFP based on the work it contains, rather than on the NAICS code used for a previous, more broadly-scoped contract.

Because Appellant has not demonstrated that the CO erred in selecting 611519 for the RFP, it is not necessary to consider Appellant's alternative NAICS codes 541330, 711310, 561210, or 561320. *E.g.*, *NAICS Appeal of 1st American Sys. and Servs., LLC*, SBA No. NAICS-5119, at 4 (2010) (“If OHA finds the contracting officer committed clear error or the contracting officer's designation was unquestionably erroneous, only then will OHA select a different code.”).

IV. Conclusion

Appellant has not demonstrated the CO clearly erred in assigning NAICS code 611519 to this RFP. Therefore, the appeal is DENIED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge