United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Project Enhancement Corporation, Appellant, Appealed From Size Determination No. 2-2014-93	SBA No. SIZ-5604 Decided: October 6, 2014

APPEARANCES

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Steven J. Koprince, Esq., Amanda M. Wilwert, Esq., Petefish, Immel, Heeb & Hird, LLP, Lawrence, Kansas, for Link Technologies, Inc.

DECISION[1]

I. Introduction and Jurisdiction

On July 22, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2014-93 finding that Project Enhancement Corporation (Appellant) is not a small business for the subject procurement. Appellant contends that the size determination is clearly erroneous and should be reversed. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

SBA's Office of Hearings and Appeals (OHA) decides size determination 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 fifteen days of receiving the size determination, so the appeal is timely.13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

[1] This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205(f), OHA afforded the parties an opportunity to request redactions to the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

II. Background

A. Solicitation, Protest, and Size Determination

On July 26, 2013, the U.S. Department of Energy, National Nuclear Security Administration (NNSA) issued Request for Quotations (RFQ) No. DE-SOL-0005606, seeking security support services for the NNSA Office of Health, Safety and Security (HSS). According to the RFQ, NNSA planned to award a single task order, which would be competed among firms holding Technical, Engineering, and Programmatic Support Services (TEPS) Blanket Purchase Agreements (BPAs). The TEPS BPAs were established through the U.S. General Services Administration (GSA) Federal Supply Schedules (FSS or GSA Schedules) under any of three Schedules: Schedule 871 - Professional Engineering Services (PES); Schedule 874 - Mission Oriented Business Integrated Solutions; or Schedule 899 - Environmental Services.

The Contracting Officer (CO) set aside the procurement entirely for small businesses, and required that offerors recertify size. (RFQ at 1.) The CO did not, however, designate one specific North American Industry Classification System (NAICS) code or size standard. Rather, the RFQ stated that offerors could choose to submit their quotations under "the most appropriate GSA Schedule and NAICS code," and identified a NAICS code for each of the three underlying GSA Schedules: Schedule 871 received NAICS code 541330, Engineering Services; Schedule 874 received NAICS code 541611, Administrative Management and General Management Consulting Services; and Schedule 899 received NAICS code 541620, Environmental Consulting Services. (*Id*. at 2.) All three NAICS codes ordinarily have a $14 million size standard. NAICS code 541330, though, has three exceptions, including an exception for Military and Aerospace Equipment and Military Weapons (MAE&MW). Each of the three exceptions to NAICS code 541330 has a size standard of $35.5 million in average annual receipts.

Quotations were due August 19, 2013. On May 1, 2014, the CO announced that Appellant had been selected for award. Four days later, Link Technologies, Inc. (Link), an unsuccessful offeror, protested Appellant's size. Link asserted, *inter alia*,[2] that the applicable size standard was $14 million and that Appellant's revenues substantially exceed this amount. (Protest at 1.) The CO forwarded Link's protest to the Area Office for review.

On July 22, 2014, the Area Office issued Size Determination No. 2-2014-93, concluding that Appellant is not an eligible small business. The Area Office found that the size standard assigned to the RFQ was unclear. Utilizing the authority of 13 C.F.R. § 121.402(e), the Area Office determined that the appropriate size standard was $14 million and that the MAE&MW exception to NAICS code 541330 did not apply.

[2] Link also contended that Appellant is affiliated with Centro de la Comunidad (Centro) through common management. The Area Office found no merit to this allegation, and the issue is not disputed on appeal.

The Area Office explained that, although the *NAICS Manual* [3] does not specify which services fall under the MAE&MW exception, OHA has interpreted the bounds of this exception in its case law. The application of the exception depends on whether the engineering services being procured are "military in nature." (Size Determination at 4, quoting *SIC Appeal of Giordano Assocs., Inc*., SBA No. SIC-2502 (1986).) Further, "the MAE&MW special size standard applies to procurements that involve professional engineering services with a military or aerospace application." (*Id*. citing *NAICS Appeal of CSMI, LLC*, SBA No. NAICS-5433 (2012) and *NAICS Appeal of Davis-Page Mgmt. Sys., LLC*, SBA No. NAICS-5055 (2009).)

With regard to the instant procurement, the Area Office found that the RFQ's Performance Work Statement (PWS) calls for the contractor to perform administrative and technical services in support of HSS. Specifically, the PWS requires technical and support services in personnel security, site vulnerability analysis and risk assessment, security policy review, development and implementation, nuclear facility design requirements evaluation, nuclear facility safety program review, quality assurance policy development and implementation, safety performance analysis, environmental protection policy review, development and implementation, radiological protection program development and management, worker safety and health program evaluation, accident investigations, and general administrative and technical support. (*Id*. at 5.) Because the engineering services being procured do not reference any military or aerospace application, the MAE&MW exception does not apply. Accordingly, the proper size standard is $14 million.

The Area Office then calculated Appellant's size. Appellant self-certified for the instant procurement at the time of its initial offer in 2013, so the Area Office considered Appellant's receipts for fiscal years 2012, 2011, and 2010. The Area Office noted that the receipts of Appellant and its acknowledged affiliates exceed $14 million, as do the receipts of Appellant alone. Therefore, Appellant is not an eligible small business for the instant procurement. (*Id*. at 8.)

B. Appeal

On August 1, 2014, Appellant filed this appeal[4] and moved to admit new evidence. Appellant argues that the Area Office erred in finding that the size standard was unclear. In Appellant's view, the size standard was clearly $35.5 million because the RFQ was issued under the TEPS BPAs. Appellant argues that its TEPS BPA "expressly designated the MAE&MW exception . . . with a size standard of $35.5 million, as applying to all [PES Schedule] task orders." (Appeal at 2.)

To support this argument, Appellant observes that the BPA stated:

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[3] Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2012)*, available at http://www.census.gov.

[4] Concurrently with its size appeal, Appellant also filed an appeal of the NAICS code selected by the Area Office. Because the two appeals pertained to same procurement and raised similar issues, OHA consolidated the appeals on August 25, 2014.

> For the PES Schedule, the NAICS Code is the following:
>
> NAICS 541330/Engineering Services = the small business standard is using the below exception:
>
> For Military and Aerospace Equipment and Military Weapons = the small business size standard is $35.5 million.

(*Id*. at 7, citing BPA § 1.6.) In addition, the RFQ indicated that the procurement would be "subject to the holders['] GSA Federal Supply Schedule contract, the TEPS BPA, and to the provisions and terms contained within the RFQ." (Appeal at 6, quoting RFQ at 2.) Further, the terms of the BPA apply to all orders issued under it. (*Id*., citing BPA at 7.) Under these circumstances, Appellant argues, the Area Office erred in attempting to "clarify" the size standard, because the RFQ and BPA already made plain that the MAE&MW exception, and the corresponding size standard of $35.5 million, would apply to this order. (*Id*. at 9-11.)

Appellant argues that the actions of the procuring agency likewise demonstrate an intent to invoke the MAE&MW exception. First, NNSA was well aware that Appellant self-certified as small only under a $35.5 million size standard, not under a $14 million size standard. Therefore, had NNSA intended for a $14 million size standard to apply, NNSA "certainly would have summarily rejected [[Appellant's] proposal as nonresponsive." (*Id*. at 11.) Second, Appellant claims that NNSA previously used the MAE&MW exception on 19 other task orders issued under the TEPS BPAs. (*Id*.) Third, Appellant contends, competing offerors also understood that the MAE&MW exception applied, because none lodged a pre-proposal NAICS code appeal.

Turning to the PWS, Appellant next argues that the MAE&MW exception applies because the majority of services in the PWS involve professional engineering services with a specialized nuclear weapons-related application. Appellant argues the PWS calls for services necessary to support "HSS['s] mission related to safeguards and security; nuclear safety and environmental safety and health as well as general and cross-cutting support to HSS." (*Id*. at 14, quoting PWS at 1.) The contractor will "provid[e] technical and administrative assistance to include . . . support of the management of . . . nuclear material control and accountability. . . ." (*Id*. at 15, quoting PWS at 8.) In addition, the contractor will "[a]ssist in the development and maintaining of policy and requirements for the analysis and design of nuclear facilities." (*Id*.) Appellant maintains that the contractor will be directly involved in the inventory and control nuclear weapons-grade materials because it will track and report on the Material Control and Accountability program's performance at nuclear facilities. (*Id*. at 16.)

Further supporting the MAE&MW exception, Appellant argues, is the fact that twelve of the RFQ's required labor categories call for specialized qualifications and experience relating to nuclear weapons, facilities, and weapons-grade materials. (*Id*. at 16-17.) Appellant highlights four positions— the Senior Protective Forces Specialist, Senior Physical Security Systems Specialist, Criticality Specialist, and Nuclear Explosives Safety Specialist— and describes their duties. Appellant concludes that the procurement "require[[s] services beyond simply the generic engineering and design or evaluation tasks encompassed within the base NAICS Code 541440 designation." (*Id*. at 16.)

Appellant requests that OHA conduct a hearing on this matter pursuant to 13 C.F.R. § 134.311, and offers to make its employees available to testify. (*Id*. at 18.)

With its appeal, Appellant moved to introduce new evidence into the record. Specifically, Appellant seeks to admit a declaration from its President/CEO, and excerpts from the HSS and NNSA websites. Appellant argues there is good cause to admit this evidence because the proffered exhibits do not enlarge the issues and bring clarity to the two principal issues on appeal: whether the size standard was clear and whether the services in the instant procurement fall within the MAE&MW exception. Appellant asserts that it could not have offered this information to the Area Office during the size review, because Appellant was unaware of the grounds for appeal until it received the size determination. *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383 (2012).

C. Link's Response

On August 20, 2014, Link responded to the appeal. Link maintains that the size determination is correct, so OHA should deny the appeal.

Link supports the Area Office's view that the size standard was, at a minimum, unclear. (Response at 2.) In fact, the size standard was not stated anywhere in the RFQ. Moreover, contrary to Appellant's contention that all offerors understood that the MAE&MW exception applied, Link asserts that offerors were confused, prompting one prospective offeror to inquire about the issue in a Question and Answer (Q&A).[5] (*Id*. at 10.)

Link challenges Appellant's argument that the $35.5 million size standard is incorporated by reference under the BPA. In Link's view, the clause Appellant references is conditional—that is, the MAE&MW exception applies only when an order under the BPA actually involves military and aerospace equipment or military weapons. (*Id*. at 11.) Thus, according to Link, the BPA says "nothing more than the underlying size regulation itself: that in a case where a procurement fits within the MAE&MW exception, the $35.5 million size standard applies; when the procurement falls outside that narrow exception, the general $14.0 million size standard necessarily applies." (*Id*.)

Link then takes issue with Appellant's argument that NNSA has applied the MAE&MW exception 19 times under the TEPS BPAs. Link contends this argument is weak, for two reasons. First, none of those orders were reviewed by OHA, and a CO's designation on a purportedly similar procurement has little probative value in determining the appropriate NAICS code for a subsequent procurement. *NAICS Appeal of CHP Int'l, Inc*., SBA No. NAICS-5367 (2012). Second, NNSA has not consistently applied the MAE&MW exception to orders under the BPAs.

[5] Question 16 of the Q&A noted that "NAICS [code] 541330 has three exceptions and [the RFQ] has not defined which if any apply," and asked that NNSA "[p]lease define the size standard for NAICS [code] 541330 so that the Offerors understand the agency's selection of a corresponding size standard." NNSA declined to address the issue, and the response to question 16 simply stated "No."

Link points to Solicitation No. DE-SOL-0005490, released last year, which stated that "[f]or the PES Schedule, the size standard for NAICS code 541330/Engineering Services is $14 million." (*Id*. at 11-12.) Thus, NNSA's practice confirms that either size standard can apply under the TEPS BPAs. (*Id*. at 12.)

Further, Link contends, the services described in the PWS do not fall under the MAE&MW exception. The website materials submitted as new evidence are irrelevant to this inquiry because the appropriate size standard for a procurement is determined only by the solicitation itself. (*Id*. at 16, citing *Size Appeal of Vista Eng'g Tech., LLC*, SBA No. SIZ-5041 (2009).) Link then recites the list of technical and support services discussed by the Area Office in the size determination. Link observes that nowhere in the RFQ are the terms ""military," "aerospace," "weapons," "nuclear weapons," or "nuclear equipment." (*Id*.) The closest similar term is "nuclear facility" when the RFQ states that the contractor will assist in "developing and maintaining DOE policy and requirements for the analysis and design of nuclear facilities" and will support "the startup and restart of nuclear facilities by observing, advising, participating in, or assessing the Operational Readiness Review process." (*Id*., quoting PWS at 12, 15.) Therefore, although some tasks do require work with nuclear facilities, the procurement's principal purpose is the acquisition of administrative and technical support, not military or aerospace equipment or military weapons. (*Id*.)

Link opposes Appellant's motion to supplement the record. The excerpts from the website were publicly available at the time of the size investigation, and the declaration addresses the issue of whether the MAE&MW exception should apply, the principal issue before the Area Office. As a result, Link argues, Appellant could and should have submitted this evidence to the Area Office during the size review process.

D. Reply

On August 22, 2014, Appellant moved to reply to Link's response and renewed its request for a hearing. Appellant argues that good cause exists to allow the reply because the response contains factual inaccuracies. Appellant notes that Link does not oppose the motion to reply, provided that Link may sur-reply. Appellant also notes Link's objection to the request for a hearing. (Reply at 1-2.) Appellant states that Link did not timely oppose Appellant's motion to supplement the record, so OHA should disregard Link's objection and admit the new evidence. (*Id*. at 5.) According to OHA's regulations, a response to a motion is due no later than 15 days after the motion is served. 13 C.F.R. § 134.211(c). Here, Appellant served Link with the motion on Friday, August 1, 2014, so any response was due no later than Monday, August 18, 2014.[6] Link did not object to the motion to admit new evidence until August 20, 2014.

Appellant takes issue with Link's position that the size standard was unclear. In Appellant's view, this argument ignores the BPA, the terms of which were a part of this solicitation. Further, the Q&A does not demonstrate that the size standard was unclear. Rather, Appellant argues, the question sought to clarify the applicability of the PES Schedule and its size

[6] Because the fifteenth day was a Saturday, the filing was due the following business day. 13 C.F.R. § 134.202(d)(ii).

standard. (*Id*. at 5-6.)

Appellant again recites the portions of the BPA pertaining to the $35.5 million size standard. Appellant claims that "[t]he BPA makes clear that the $14 million size standard under NAICS Code 541330 ***does not apply*** for purchases from PES Schedule holders, but rather only the $35.5 million size standard." (*Id*. at 7 (emphasis in original).)

Appellant challenges Link's assertion that NNSA has not consistently utilized the MAE&MW exception for TEPS BPA orders associated with NAICS code 541330. The procurement Link referenced, Appellant explains, was for an order awarded to Appellant under its Environmental Services Schedule, although the order "may have inadvertently indicated that the award was made under NAICS code 541330, instead of 562910." (*Id* at 8, n.2) With regard to orders under the Environmental Services Schedule, the BPA states:

> For the ENV Schedule, the NAICS Codes are the following:
>
> 541620/Environmental Consulting Services $14 million
>
> OR
>
> 562910/Remediation Services - the small business size standard is using the below exception:
>
> For Environmental Remediation Services - the small business size standard is 500 employees.

(*Id*. at 7, quoting BPA at 10.) Thus, Appellant reasons, "Link's reference to DE-SOL-0006490 does not prove that awards could be made under a $14 million size standard associated with NAICS Code 541330. It only proves that [NNSA] made awards consistent with the NAICS Codes and small business size standards expressly set forth in the BPA." (*Id*. at 8.) Appellant further argues that Link should have voiced any objection to the NAICS code designation at the time the solicitation was issued. (*Id*.)

Appellant then addresses Link's arguments that the services called for in the instant RFQ do not fall under the MAE&MW exception. Appellant asserts that Link failed to address the RFQ's labor categories, and reiterates that contractor personnel will support the protection of nuclear material or nuclear weapons. (*Id*. at 9-10.)

Finally, Appellant argues there is a genuine dispute of material fact that cannot be resolved without the taking of testimony and the confrontation of witnesses. That dispute, Appellant argues, is whether the MAE&MW exception applies and whether it was appropriate for NNSA to award the task order to Appellant under the PES Schedule contract. (*Id*. at 10-11.) Further, an oral hearing would provide an opportunity to hear from the CO, who did not respond to the appeal.

E. Link's Sur-Reply

On August 29, 2014, Link moved for leave to sur-reply. Link states that Appellant does not presently oppose the motion, "but reserve[s] its rights under OHA's rules." (Sur-Reply at 2, n.1.)

Link argues that it did timely oppose Appellant's motion to include new evidence. On this point, Link notes that OHA's regulations require a response within 15 days of service of a motion, unless the Judge sets a different deadline. 13 C.F.R. § 134.211(b). In this case, Link argues, OHA set a different deadline in the Notice and Order, which stated that "all" responses to the appeal would be due at OHA by August 20, 2014. Moreover, OHA may refuse to grant a motion even in the absence of any formal opposition by non-moving parties. (*Id*. at 2-3.)

Link reiterates its arguments that the size standard was unclear and that the MAE&MW exception does not apply to the services procured under the RFQ.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc*., SBA No. SIZ-4775, at 11 (2006).

B. Preliminary Matters

1. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc*., SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc*., SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, Appellant has not established good cause to admit the new evidence, because Appellant could have submitted the material to the Area Office during the size investigation.

Link's protest specifically alleged that the appropriate size standard was $14 million, and Appellant made arguments to the Area Office on this point. Thus, the website excerpts, which were publicly available at the time of the size investigation, could have been provided to the Area Office to bolster Appellant's claim that the MAE&MW exception applied to the RFQ. Similarly, although the declaration from Appellant's President/CEO was created after the size determination was issued, the declaration again addresses the issue of whether the MAE&MW exception should apply. In short, then, if Appellant wished to have the declaration and website material considered, Appellant could have submitted them to the Area Office during the course of the size review. OHA has long held that it will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review. *See, e.g., Size Appeal of ISC8, Inc*., SBA No. SIZ-5414, at 4 (2012) (rejecting new evidence because it pertained to a matter that the proponent "knew was at issue before the Area Office"); *Size Appeal of BR Constr., LLC*, SBA No. SIZ-5303, at 7 (2011) (denying motion to admit new exhibit, which "sets forth factual information that could have been communicated to the Area Office"). For these reasons, Appellant's motion to supplement the record is DENIED.

2. Reply and Sur-Reply

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). A reply may be accepted, however, to address factual errors or new issues raised in an opposing party's pleading. *E.g., Size Appeal of iGov Techs., Inc*., SBA No. SIZ-5359, at 9-10 (2012). In this case, both the reply and sur-reply are brief and address purported errors and inconsistencies in the response and the reply. Further, Appellant and Link do not object to each other's filings. Accordingly, the motions to reply and sur-reply are GRANTED, and the reply and sur-reply are ADMITTED into the record. *Size Appeal of Systems Resource Mgmt., Inc*., SBA No. SIZ-4640, at 5 (2004) (admitting unopposed reply).

3. Request for a Hearing

OHA may conduct an oral hearing "upon concluding that there is a genuine dispute as to a material fact that cannot be resolved except by the taking of testimony and the confrontation of witnesses." 13 C.F.R. § 134.222(a)(2). An oral hearing is seldom necessary for size appeals, though, because OHA does not conduct its own investigation into the size of a challenged firm. Rather, OHA's role is to determine "whether the area office committed any clear error of fact or law, based on the contemporaneous record available to the area office." *Size Appeal of DefTec Corp*., SBA No. SIZ-5540, at 7 (2014).

Here, I agree with Link that that an oral hearing is not required to resolve this dispute. The principal issue in the case is the applicability of the MAE&MW exception, which is determined primarily through review of the solicitation. While the CO's views might be given some weight on this issue, the CO has had an opportunity to participate in these proceedings and has opted not to respond. It therefore is unlikely that an oral hearing would yield probative information. Further, although this appeal largely pertains to a size determination, the applicability of the MAE&MW exception is a NAICS issue, and OHA regulations do not allow for oral hearings in NAICS code appeals. 13 C.F.R. § 134.311. Accordingly, Appellant's request for an oral hearing is DENIED.

C. Analysis

As discussed *infra*, this appeal lacks merit. Consequently, the appeal must be denied and the size determination affirmed.

In seeking to overturn the size determination, Appellant maintains that the Area Office erred in concluding that the size standard applicable to the RFQ was unclear. The issue is significant because, under SBA regulations, "[a]n unclear, incomplete or missing NAICS code or size standard in the solicitation may be clarified, completed, or supplied by SBA in connection with a formal size determination." 13 C.F.R. § 121.402(e). Appellant asserts that the Area Office mistakenly found the size standard to be unclear because the underlying TEPS BPA specified that all task orders under the PES Schedule would utilize the MAE&MW exception.

I find Appellant's argument unpersuasive for several reasons. First, the size standard is not enunciated anywhere in the subject RFQ. Rather, the RFQ identified three different possible NAICS codes, with no size standards at all, and permitted offerors to choose "the most appropriate GSA Schedule and NAICS code." Section II.A, *supra*. Thus, the phrasing of the RFQ suggests that NNSA did not view the order as necessarily falling within any particular NAICS code. Second, as Link argues in its response to the appeal, Question 16 of the RFQ's Q&A demonstrates contemporaneous uncertainty as to the applicable NAICS code and size standard. Section II.C, *supra*. Third, while it is true, as Appellant asserts, that the RFQ is subject to the terms of TEPS BPA, the BPA itself is unclear with regard to the issue of NAICS codes and size standards. The BPA states:

> **1.6 North American Industry Classification System (NAICS)/Standard Industry Classification (SIC) Code and Small Business Size Standard**
> Listed below are the NAICS Codes and dollar values and/or number of employees necessary to qualify as a small business for providing Mission Oriented Business Information Services (MOBIS), Professional Engineering Services (PES), or Environmental Services (ENV).
> **For the PES Schedule, the NAICS Code is the following**:
> NAICS 541330/Engineering Services = the small business standard is using the below exception:
> For Military and Aerospace Equipment and Military Weapons = the small business size standard is $35.5 million.
> **For the MOBIS Schedule, the NAICS code is the following**:
> NAICS 541611/ Administrative Management and General Management Consulting Services $14 million
> **For the ENV Schedule, the NAICS codes are the following**:
> 541620/ Environmental Consulting Services $14 million
> OR
> 562910/ Remediation Services = the small business size standard is using the below exception:
> For Environmental Remediation Services = the small business size standard is 500 employees.

(BPA at 9-10.) On its face, then, the BPA does indicate that the $35.5 million size standard will apply to orders for military and aerospace equipment and military weapons under the PES Schedule. What is not clear, though, is whether the $35.5 million size standard applies to *all* procurements issued under the BPA from the PES Schedule, regardless of whether the procurement was for MAE&MW.

The text of the TEPS BPA invites conflicting interpretations. On one hand, it is possible, as Appellant urges, that NNSA intended for the MAE&MW exception to apply to every order issued under the PES Schedule, because there is no mention of the $14 million size standard ordinarily associated with NAICS code 514330. This interpretation is strengthened by the fact that the BPA also does not address the other two exceptions under NAICS code 541330, thereby suggesting that only the MAE&MW exception would potentially be applicable. Similarly, the BPA identifies multiple NAICS codes and size standards for orders under the ENV Schedule, so NNSA likewise could have done so for the PES Schedule if that had been the intent.

On the other hand, it can also be argued that NNSA did not intend for the MAE&MW exception to apply to all PES Schedule orders, because such an approach would defy reason. Indeed, it stretches credulity to argue that NNSA, a civilian agency buying commercial services through the GSA Schedule, intended solely to acquire engineering services related to military weapons and aerospace equipment. Significantly, Appellant points to no other provisions in the BPA restricting the scope of orders in this manner. In addition, the text of the BPA contains irregularities which appear unintended, such as a reference to the obsolete SIC code system, so it is not evident whether the discussion of only selected size standards is intentional or a mere drafting error.

Regardless, the very fact that the TEPS BPA is susceptible to so much interpretation demonstrates the opacity of the size standard for orders issued under the PES Schedule. I therefore agree with the Area Office and Link that the size standard for the RFQ was unclear. As a result, the Area Office did not err in exercising its discretion under 13 C.F.R. § 121.402(e) to specify the NAICS code and size standard.

Appellant next argues that the Area Office erred in determining that the procurement did not fall within the MAE&MW exception. This argument, too, is unpersuasive. Neither the *NAICS Manual* nor the regulation at 13 C.F.R. § 121.201 describe precisely what services are covered by the MAE&MW exception. OHA has thus addressed the applicability of this exception through case law. OHA has held that "the MAE&MW special size standard applies to procurements that involve professional engineering services with a military or aerospace application." *NAICS Appeal of Cape Fox Gov't Servs., LLC*, SBA No. NAICS-5444, at 6 (2013) (quoting *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). In *Cape Fox*, for example, OHA found that the MAE&MW exception was inappropriate because the solicitation "does not seek to procure military weapons, aerospace equipment, or engineering services to support such equipment, and therefore does not qualify for the MAE&MW special size standard." *Cape Fox*, SBA No. NAICS-5444, at 7. Although the MAE&MW exception can apply to engineering or aerospace equipment for civilian agencies, the exception is most commonly applicable to

military contracts. *NAICS Appeal of Millennium Eng'g and Integration Co.*, SBA No. NAICS-5309 (2011).

In this case, I find the Area Office did not err in determining the MAE&MW exception inapplicable. The work the contractor will perform is not connected with weapons or aerospace equipment, nor with the design, engineering, or maintenance of weapons or aerospace equipment. In fact, the PWS does not mention weapons systems or aerospace equipment. Rather, the RFQ seeks to procure administrative and technical services in support of HSS program offices. The PWS states that "[t]asks awarded under this agreement will address mission support, technical assistance and support for safeguards and security[[,] nuclear safety, and environment safety and health as well as general and cross-cutting support to HSS." (PWS at 1.) The RFQ then calls for the contractor to "provide procedures and system support, meeting facilities, assistance in preparation of presentations, editing, graphics, reproduction services, and other administrative support necessary to support the issuance of reports on mission support activities, appraisals, investigations, and analysis conducted in accordance with tasks issued under this agreement." (*Id.*) Clearly, then, the primary purpose of the RFQ is not to acquire professional engineering services with a military or aerospace application. Accordingly, I find the Area Office did not err in determining that the size standard is $14 million for this procurement because the MAE&MW exception does not apply.

Lastly, I also reject Appellant's NAICS code appeal, which Appellant filed concurrently with its size appeal. The two appeals raised many of the same substantive arguments, and as discussed above, I have found that the Area Office properly determined that the MAE&MW exception is not applicable to this RFQ. Moreover, a NAICS code appeal is not the appropriate mechanism to challenge an area office's size determination. Rather, OHA has recognized that, when an area office clarifies a NAICS code or size standard pursuant to 13 C.F.R. § 121.402(e), this action may be contested through a size appeal rather than a NAICS code appeal. *E.g., Size Appeal of Prof'l Project Servs., Inc.*, SBA No. SIZ-5411 (2012). Because the Area Office's determination did not result in any change to the solicitation, a NAICS code appeal at this late juncture is untimely. By regulation, Appellant was required to file any NAICS code appeal within 10 calendar days of issuance of the RFQ. *See* 13 C.F.R. § 134.304(b); 48 C.F.R. § 19.303(c)(1).

IV. Conclusion

For the above reasons, I AFFIRM the size determination and DENY the instant appeal. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge