

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

SIZE APPEAL OF:

U.S. Department of State and Precise
Systems, Inc.,

Appellants,

Appealed From
Size Determination Nos. 2-2014-118, -119

SBA No. SIZ-5627

Decided: December 23, 2014

APPEARANCES

Kathleen D. Martin, Attorney Advisor, Patrick J. Murphy, Contracting Officer, for the
Department of State

Kevin P. Mullen and Charles L. Capito, Jenner & Block LLP, Washington, D.C., for
Precise Systems, Inc.

Sam Q. Le, Attorney Advisor, for the U.S. Small Business Administration

DECISION¹

I. Introduction and Jurisdiction

On September 18, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination Nos. 2-2014-118 and 119, finding that Precise Systems, Inc. (Precise) is not an eligible small² business for U.S. Department of State (DoS) Solicitation No. SAQMMA13R0044.

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

² Precise's eligibility as a Service-Disabled Veteran-Owned Small Business (SDVOSB) was also challenged. The Area Office size determination was limited to Precise's size. Precise's SDVOSB eligibility was decided by the Office of Government Contracting in a separate determination and affirmed by the Office of Hearings and Appeals in a separate appeal, *Matter of Precise Systems, Inc.*, SBA No. VET-243 (2014).

On October 2, 2014, DoS appealed the Area Office size determination to the SBA Office of Hearings and Appeals (OHA). On October 3, 2014, Precise filed an appeal to OHA. On October 7, 2014, OHA consolidated the appeals and requested SBA comments. For the reasons discussed below, the appeal is granted, and the size determination is remanded for a new size determination consistent with this decision.

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. Appellants filed appeals within fifteen days of receiving the size determination, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On November 22, 2013, the DoS issued Request for Proposals (RFP) No. SAQMMA13R0044, for aviation program support services. The statement of work (SOW) requires the contractor to serve as an interface between the Bureau of International Narcotics and Law Enforcement Affairs, Office of Aviation (INL/A) and contractors performing specialized services and to provide support services for the INL/A Program Management Office. INL/A conducts operational missions, such as, eradication and interdiction of drugs, aerial transportation of personnel and cargo, search and rescue, medical evacuation, test flight maintenance, aerial reconnaissance, and aircraft recovery. The Contracting Officer (CO) set aside the procurement entirely for SDVO SBCs.

On an Industry Day event on May 22, 2013, the CO informed all potential offerors the applicable North American Industry Classification System (NAICS) code was 541330, Engineering Services, with the special size standard for Military and Aerospace Equipment and Military Weapons (MAE&MW) of \$35.5 million annual receipts. The notice and synopsis of the solicitation on FedBizOpps identified NAICS code 541330 as the applicable code, but did not indicate a size standard. The CO's December 18, 2013 questions and answers informed offerors that the \$35.5 million size standard applied. On December 27, 2013, the CO again identified and confirmed the \$35.5 million size standard in response to another question explicitly requesting confirmation that the \$35.5 million size standard applied. On January 8, 2014, the CO answered a follow-up question reaffirming the NAICS code.

Offers were due on January 16, 2014. Fifteen offerors submitted proposals. Twelve of the fifteen offerors used the \$35.5 million annual receipts size standard in certifying their size.

Precise submitted a timely proposal on January 16, 2014, self-certifying as an SDVO SBC. On July 9, 2014, the CO announced that Precise was the apparent awardee. On July 14, 2014, the CO received a timely protest from AMPS, LLC (AMPS), an unsuccessful offeror. AMPS asserted that the applicable size standard for this procurement is \$14 million in annual receipts. AMPS further asserted Precise is other than small for this size standard. On July 15, 2014, another unsuccessful offeror, Downrange Operations and Training, LLC (Downrange),

filed a timely size protest arguing Precise is affiliated with various businesses, shares common officers with these businesses, is unduly reliant upon FCI Federal in violation of the ostensible subcontractor rule, and exceeds the \$35.5 million size standard. The Area Office consolidated the protests.

B. Size Determination

On September 18, 2014, the Area Office issued Size Determination Nos. 2-2014-118 and 119, finding that Precise is not an eligible small business for DoS Solicitation No. SAQMMA13R0044. The Area Office noted the solicitation was set aside for SDVO SBC, but a NAICS code and corresponding size standard was not assigned to the solicitation. The Area Office indicated during the Industry Day event held on May 22, 2013, and in the pre-proposal questions and answers, published on December 18, 2013, the CO identified NAICS Code 541330 for Military and Aerospace Equipment and Military Weapons (MAE&MW) with the special size standard of \$35.5 million in annual receipts. The CO reaffirmed the size standard of \$35.5 million in annual receipts in subsequent questions and answers. The NAICS code and applicable size standard were not incorporated into the three amendments issued.

The Area Office considered the different legal theories underlying the size protests of Downrange and AMPS. The evidence in the record did not support Downrange's allegations of affiliation based on common ownership or common management with FCI Federal, Tower Group, Inc., Sherier Capital LLC, Asset Capital Corp., Inc., or Tower Group International Ltd. Moreover, contrary to Downrange's allegations, the Area Office indicated there is no affiliation with FCI Federal under the ostensible subcontractor rule because Precise has never partnered with FCI Federal for any procurement and FCI Federal is not a proposed subcontractor for the instant procurement. The Area Office indicated Precise acknowledged its affiliation with XXXXXXXXXXXXXXXXXXXX and Precise is not affiliated with any other alleged affiliates.

The Area Office noted that, in response to AMPS protest allegations that the size standard should be \$14 million in annual receipts, Precise argued AMPS was attempting to file an untimely NAICS code appeal. Precise stated DoS identified the size standard on numerous occasions, including in response to the questions from prospective offerors, and Precise asserted that \$35.5 million annual receipts is the applicable size standard.

The Area Office found the solicitation and amendments did not identify a NAICS code and corresponding size standard. The Area Office stated the CO identified NAICS code 541330 and \$35.5 million annual receipts as the size standards in the materials distributed on Industry Day and in questions and answers, but the Area Office found these to be merely suggestive because the NAICS code and size standard were not incorporated in the solicitation or amendments.

Citing the authority in 13 C.F.R. § 121.402(d), the Area Office clarified the NAICS code and size standard applicable to the procurement. The Area Office first considered whether NAICS code 541330 is the appropriate code for this procurement. The Area Office found the solicitation's statement of work (SOW) does not support the use of NAICS code 541330. The SOW identified seeking program support services as the primary objective of the instant

procurement. Accordingly, the Area Office determined that the appropriate NAICS code for the procurement was 541611, Administrative Management and General Management Consulting Services, with a corresponding \$14 million annual receipts size standard.

The Area Office then examined the annual receipts of Precise and its acknowledged affiliate, XXXXXXXXXXXXXXXXXXXX, and concluded that they exceeded the \$14 million size standard. Accordingly, the Area Office determined Precise was other than small.

C. DoS Appeal

On October 2, 2014, DoS appealed the Area Office's size determination to OHA. DoS maintains that it identified NAICS code 541330, exception 1, Engineering Services for MAE&MW with a corresponding \$35.5 million annual receipts size standard.

DoS asserts that to determine the appropriate NAICS code the CO worked closely with DoS's INL/A. The solicitation identified a set of services geared toward accomplishing the aviation mission. The CO considered the fact that the solicitation involved professional engineering services with a military or aerospace application. DoS argues, to successfully carry out the procurement, the principal requirement of the contractor will be its expertise and experience overseeing the technical and logistical demands of the INL/A air fleet, not its ability to provide back office support. DoS argues that NAICS code 541611 is not appropriate because it addresses fiscal and general administrative functions, and focuses on planning and budgeting, equity and asset management, records management, office planning, strategic and organizational planning, site selection, new business startup, and business process improvement. The Program Support Office (PSO) contractor is charged with advising DoS on aircraft performance capabilities and design. DoS maintains the RFP requires a contractor with aviation operations, maintenance and logistics expertise. DoS asserts the PSO contractor therefore must possess a skill set far beyond basic and general management and administration.

DoS asserts it sought and received SBA's concurrence for its acquisition strategy and NAICS code 541330, with a \$35.5 million size standard. DoS points to an email from a Supervisor Procurement Center Representative approving the designation.

DoS maintains that it informed all potential officers at an Industry Day event on May 22, 2013, the applicable NAICS code was 541330 with the \$35.5 million size standard.

The notice and synopsis of the solicitation on FedBizOpps identifies the NAICS code 541330 as the applicable code. DoS made clear in its set of questions and answers of December 18, 2013 that the \$35.5 million size standard applied. On December 27, 2013, the CO identified and confirmed for the third time the \$35.5 million size standard in response to another question. On January 8, 2014, the CO answered a follow-up question reaffirming the code.

DoS maintains the Area Office should have dismissed AMPS's challenge to the NAICS code exception as untimely. DoS asserts that its intent to solicit this requirement under the MAE&MW size standard was clear, given DoS's Industry Day comments and answers to questions. None of the offerors challenged the designated code and size standard prior to

proposal submissions. DoS further maintains that there was no confusion among the offerors because 12 of 15 proposals identified NAICS code 541330 with the MAE&MW size standard as the applicable size standard, and certified to that size standard.

DoS argues the Area Office's reliance on 13 C.F.R. § 121.402(d) places form over function, ignores SBA's timelines requirements, and overlooks important policies supporting those timeliness requirements. The omission of the code and size standard from the solicitation did not obviate DoS's intent or indicate a lack of clarity. The preponderance of the evidence clearly demonstrates DoS's intent, there was no need for the Area Office to step in and designate an entirely different and inappropriate NAICS code.

DoS asserts any NAICS code challenge should have been filed long ago. DoS states the Area Office should have dismissed AMPS's size protest as an untimely NAICS code appeal. Moreover, DoS argues the Area Office was in error for not dismissing the appeal as a moot post-award NAICS code challenge.

Further, DoS argues the solicitation is primarily for engineering services. In order to manage the aviation program, the PSO contractor must have the expertise to evaluate each aircraft's capabilities, limitations, and support requirements. Thus, the services required here are professional engineering services with an aerospace application, and meet the test for applying the MAE&MW size standard.

DoS further asserts the Area Office erred in relying upon the initial task order to determine the appropriate code. The task order contemplated the basic startup of the PSO, and is not indicative of the solicitation's requirements. Administrative functions are required initially, but they are not the purpose of the contract. The independent government estimate estimated 79% of the hours are considered to be aviation related. The principal purpose of the RFP was to obtain a PSO with the requisite aviation engineering experience to manage the contract.

D. Precise Appeal

On October 3, 2014, Precise appealed the Area Office's size determination finding Precise to be an ineligible small business for Solicitation No. SAQMMA-13-R-0044. Precise explains, like other offerors, Precise “expended time, money, and effort to prepare and submit a proposal to the State Department, reasonably relying on the Agency's consistent, unambiguous, and unchallenged identification of NAICS code 541330, Engineering Services, and a \$35.5 million size standard for services for military or aerospace equipment.” Precise Appeal at 1 (emphasis in original). Precise argues the Area Office's decision to select a new NAICS code after award is arbitrary and should be reversed.

Precise argues that the NAICS code was not challenged during the solicitation process. Precise asserts AMPS protest after award should have been dismissed as an untimely challenge to the size standard. Appeal at 7 (citing 13 C.F.R §§ 121.1004 & 134.304). Precise argues late consideration of this threshold issue disrupts the procurement and threatens the viability of the contract. Precise states when an “offeror has ‘ample notice of the applicable NAICS code and size standard,’ its failure to diligently pursue an appeal ‘renders th[e] appeal untimely.’” Precise

Appeal at 8 (citing *NAICS Appeal of Validata Chemical Servs., Inc.*, SBA No. NAICS- 5449 at 4 (2013)).

Moreover, Precise states even AMPS's untimely challenge to the size standard did not question the NAICS code. Precise asserts the Area Office erred in *sua sponte* deciding the procurement should have applied a different NAICS code. Precise notes 13 C.F.R. § 121.402(e) permits the Area Office to clarify, complete, or supply a NAICS code, but only if the NAICS code assigned by the procuring agency is “unclear, incomplete, or missing.” Precise Appeal at 9. Precise asserts DoS's decision to use NAICS code 541330 with the \$35.5 million size standard was clear, complete, and apparent. Precise cites the official solicitation notice on www.fbo.gov, the bidder's conference slides, and the questions and answers, which provided written identification of NAICS code 541330 and the MAE&MW exception as applicable to the procurement. Precise cites to *NAICS Appeal of Validata Chemical Services, Inc.*, SBA No. NAICS-5449 (2013), and *Size Appeal of FDR, Inc.*, SBA No. SIZ-4781 (2006).

Precise argues the Area Office NAICS code selection is based on a superficial examination of the solicitation and Precise's task order price proposal. Precise states if the Area Office had examined the PWS, which includes the solicitation's actual requirements, or consulted with the CO, the Area Office would have reached a different result than it did relying on aspirational elements in the solicitation, a government estimate, and Precise's proposed price for the solicitation's initial task order.

E. SBA Comments³

The SBA Office of General Counsel maintains that the size determination was not in error. SBA maintains that because the solicitation did not designate a size standard, that Area Office properly designated one under 13 C.F.R. § 121.402(e). SBA maintains that this designation was timely because it was conducted as part of the size determination. These designations are typically conducted many months after offers were due.

SBA maintains that every solicitation must contain a NAICS code designation and size standard, and must include them in the solicitation. This requirement applies throughout SBA's programs. SBA recently revised contracting assistance regulations to require a NAICS code assigned for every set-aside task order. 13 C.F.R. § 125.2(e)(2)(ii), (e)(3)(ii), (e)(6)(iv). Eligibility for an SDVO SBC contract, such as the instant procurement, hinges on whether the offeror is small for the NAICS code assigned to the contract. 13 C.F.R. § 125.11(a). Other SBA programs have similar requirements. 13 C.F.R. §§ 124.501(h), 126.601(d)(e), 127.504(a)(1). The NAICS code also sets the applicability of the nonmanufacturer rule to the contract. 13 C.F.R. § 121.406(b)(3).

SBA asserts designating the code avoids confusion. SBA points to *Size Appeal of Dawson Technical, LLC*, SBA No. SIZ-5476 (2013), where OHA held that a CO did not

³ On October 7, 2014, I requested SBA [to] file comments. On October 27, 2019, SBA requested additional time to file comments and submitted comments. SBA's request for additional time is granted and I considered SBA's comments in rendering this decision.

incorporate into a solicitation a change in the size standard, even though the change was mentioned in instructions and questions and answers which were not part of an amendment to the solicitation. OHA noted that a revision to a size standard may be accomplished only through a formal solicitation amendment, citing 13 C.F.R. § 121.402(a). SBA also points to *Size Appeal of Metters Industries, Inc.*, SBA No. SIZ-5456 (2013), which held that a set of questions and answers had not been incorporated into a task order request for quotations.

SBA argues that the authority relied upon to support the argument that questions and answers are changes to the solicitation are inapposite, because they both concerned changes in the solicitation terms not required by regulation. *HP Enterprises Services v. U.S.* 104 Fed. Cl. 230, 239 (2012) and *Public Communication Services, Inc.*, B-400058, July 18, 2008, 2006 CPD ¶ 154 at 10.

Finally, SBA asserts the Area Office reasonably rejected application of the MAE&MW size standard. SBA reasserts its ability to clarify, complete or supply NAICS code or size standard where it is incomplete, unclear or missing in the solicitation. 13 C.F.R. § 121.402(e). This authority remains even where a contracting officer identifies a code in communications with an offeror. *NAICS Appeal of King's Thrones, LLC*, SBA No. NAICS-4845 (2007), *Size Appeal of FDR, Inc.*, SBA No. SIZ-4781 (2006).

SBA maintains that the solicitation itself does not identify any military weapons or aerospace equipment to be supported by engineering services under this contract. Rather, the SOW lists objectives consistent with the Area Office's reading of this as a management contract. The key personnel lists no engineers, and the minimum qualifications document does not list any positions for which an engineering degree is required.

III. Analysis

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 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. Analysis

SBA's Office of General Counsel correctly maintains that the regulations required the CO to select the single NAICS code and corresponding size standard that best describes the principal purpose of the product or service being acquired, and to include the designation in the solicitation. 13 C.F.R. § 121.402(b). It is this size standard which determines whether an offeror is small for the contract in question. 13 C.F.R. § 121.402(a).

SBA's Office of General Counsel is also correct that designating the NAICS code in the contract avoids confusion. Had the DoS CO designated NAICS code 541330, MAE&MW exception in the solicitation, there would have been no case here. However, because the CO did not, we must address the issue of whether the Area Office properly designated a new NAICS code under 13 C.F.R. § 121.402(e), which gives SBA the authority to clarify, complete, or supply an unclear, incomplete or missing NAICS code designation.

Here, while DoS did not designate the NAICS code in the solicitation, it is clear what code and size standard DoS sought to use. The Industry Day comments and the questions and answers made clear that NAICS code 541330, with the MAE&MW exception, was the code and size standard DoS sought to use. Nearly all of the offerors certified to that code and size standard. The Area Office itself refers to this as "State's NAICS code selection." Size Determination at 8. It is therefore clear that the Area Office recognized that the DoS CO sought to designate 541330, exception 1, as the NAICS code and size standard for this procurement. I therefore find that the record establishes by a preponderance of the evidence that the CO meant to designate NAICS code 541330, exception 1, as the code to be included in the RFP, but mistakenly failed to do so. In such circumstances, that code and size standard should be accepted as the NAICS code designation and size standard for this procurement. *Size Appeal of FDR Inc.*, SBA No. SIZ-4781 (2006).

SBA's argument that the Industry Day comments and questions and answers (all of which were mentioned in the size determination, and thus part of the record before the Area Office) were not formal amendments to the solicitation, and thus could be ignored, misses the significance of the *FDR* precedent. I should note that there is precedent to the effect that questions and answers can modify a solicitation. *HP Enterprises Services v. U.S.* 104 Fed. Cl. 230, 239 (2012) and *Public Communication Services, Inc.*, B-400058, July 18, 2008, 2006 CPD ¶ 154 at 10. SBA's argument that these cases do not apply here because they did not deal with provisions required by regulation is without foundation. SBA does not explain why the fact that the provision is required by regulation means that questions and answers could not be used to vary the information contained within it. However, I do not find that DoS formally modified the solicitation. Rather, I find that, given the information before the Area Office, it was clear by a preponderance of the evidence that DoS selected NAICS code 541330, with the MAE&MW size standard, as the applicable code for the procurement. Accordingly, it could not be said that the NAICS code designation was unclear, incomplete, or missing.

This should have ended the Area Office inquiry as to the applicable size standard. The provision at 13 C.F.R. § 121.402(e) is meant to handle cases where there is genuine confusion about the designation of the NAICS code and size standard. Here, while there was administrative error in preparing the solicitation, there was not a lack of clarity as to what code and size standard DoS had intended to designate. No offeror filed a NAICS code appeal in response to the solicitation. Yet, the Area Office determined Precise's size under a NAICS code and size standard to which it did not certify. This was an arbitrary action and thus constituted a clear error of law. The regulation is not a license for the Area Office to seize upon an error by the CO to substitute its own judgment for that of the CO as to the appropriate code and size standard. Here, the Area Office should have applied the \$33.5 million annual receipts MAE&MW size standard

to make its size determination. I herewith decide that I must remand this case to the Area Office, so that it may do just that.

IV. Conclusion

For the above reasons, the appeal is GRANTED. The Area Office clearly erred in its selection of a NAICS code and size standard. I VACATE the instant size determination and REMAND this matter to the Area Office for a new size determination applying the \$35.5 million annual receipts size standard applicable to NAICS code 541330, MAE&MW exception, consistent with this decision.

CHRISTOPHER HOLLEMAN
Administrative Judge