

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

NAICS APPEAL OF:

Millennium Engineering and Integration  
Co.

Appellant

Solicitation No. NNK11370724R  
National Aeronautics and Space  
Administration  
Kennedy Space Center, Florida

SBA No. NAICS-5309

Decided: December 12, 2011

APPEARANCES

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DECISION

I. Introduction

On November 1, 2011, the National Aeronautics and Space Administration (NASA) issued Solicitation No. NNK11370724R (RFP) for safety and mission assurance (SMA) support services at Kennedy Space Center (KSC). The Contracting Officer (CO) set aside the procurement entirely for small businesses and designated North American Industry Classification System (NAICS) code 541330, Engineering Services. NAICS code 541330 ordinarily is associated with a size standard of \$4.5 million, 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 \$27 million.

On November 3, 2011, Millennium Engineering and Integration Co. (Appellant) filed this

appeal, asserting that the CO should instead have designated NAICS code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology). Specifically, Appellant maintains that the appropriate code is the exception under NAICS code 541712 for Space Vehicles and Guided Missiles, their Propulsion Units, their Propulsion Unit Parts, and their Auxiliary Equipment and Parts (SVGM), with a corresponding size standard of 1000 employees. 13 C.F.R. § 121.201 n.11(c).

The Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides NAICS 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 days after issuance of the RFP, so the appeal is timely. Federal Acquisition Regulation (FAR) 19.303(c); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). Accordingly, this matter is properly before OHA for decision. For the reasons discussed *infra*, the appeal is denied, and the CO's designation is affirmed.

## II. Background

### A. The RFP

The RFP seeks a contractor to support the KSC SMA Directorate by performing a variety of safety-related engineering tasks, including risk assessments, inspections, investigations, analyses, independent assessment of technical issues, evaluations of work performed by other contractors, and maintenance of applications/databases. NASA defines SMA as:

[1] The technical and management efforts of directing and controlling the safety and mission assurance elements of the project. This [work] includes design, development, review, and verification of practices and procedures and mission success criteria intended to assure that the delivered spacecraft, ground systems, mission operations, and payload(s) meet performance requirements and function for their intended lifetimes. This [work] excludes mission and product assurance efforts directed at partners and subcontractors other than a review/oversight function, and the direct costs of environmental testing.

[2] Refers to the organization, i.e., the offices and people at all NASA Field Installations and Headquarters, who support customers with policy, process, and standards development; oversight and insight; and technology development and transfer, in the disciplines of safety, reliability, maintainability, and quality.

NASA Technical Standard, Safety and Mission Assurance Acronyms, Abbreviations, and Definitions, NASA-STD 8709.22, at 115, *available at* <http://www.hq.nasa.gov/office/codeq/doctree/NS870922.pdf> (approved Dec. 8, 2010, revised Jan. 7, 2011). NASA defines “safety” as “an overall condition that provides sufficient assurance that mishaps will not result from the mission execution or program implementation, or, if they occur, their consequences will be mitigated. This assurance is established by means of the satisfaction of a combination of deterministic criteria and risk-informed criteria.” *Id.* at 114. Alternatively, “safety” may mean “[f]reedom from those conditions that can cause death, injury, occupational illness, damage to or loss of equipment or property, or damage to the environment.” *Id.*

The statement of work set forth in Section C of the RFP indicates that the contractor will provide “mission assurance, engineering, and risk assessment in the disciplines of safety, reliability, and quality” at KSC. (RFP ¶ C. 1.) The contractor must “manage all documentation and data produced in performance of this contract (e.g., assessments, evaluations, reports, presentations, processes, plans, reviews, and statuses).” (RFP ¶ C.4.) The contractor is also responsible for management and administration of all contract activity and must provide management interfaces with KSC officials. (RFP ¶ C.6.)

The statement of work divides the contract tasks into twelve functional areas: (1) integration, (2) safety, reliability, and maintainability, (3) quality program, (4) human factors engineering, (5) SMA enhancements, (6) training development, (7) range safety, (8) independent assessments, (9) metrology, (10) expendable launch vehicle (ELV) payload SMA program, (11) information technology, and (12) miscellaneous studies. (RFP ¶ C.7.1 - .12.) Specific tasks within these functional areas include: interfacing across organizations and disciplines to ensure SMA issues are addressed, developing and drafting SMA policies, conducting or reviewing SMA risk assessments and safety and reliability analyses, providing a wide array of SMA-related recommendations and expertise, assisting in the development of SMA-related documentation, developing quality control tools and strategies, reporting problems and corrective actions, identifying sources of human error, supporting SMA software and database applications, conducting SMA surveys and audits, developing training for SMA personnel, developing range safety requirements, mitigating metrological risks through the development of policies and documentation, assisting in the development of the ELV SMA program through the development of policies and documentation, maintaining web pages in support of SMA operations, and performing other miscellaneous investigations and studies upon request of the KSC SMA Directorate. *Id.*

There are three sample tasks in the RFP. (RFP Attachment L.3.7.3.) The first sample task asks offerors how they would assist KSC officials in developing a response to a request for an opinion on the safety implications of a request from a commercial entity to utilize KSC facilities and infrastructure. *Id.* The second asks offerors to provide an opinion on the SMA issues associated with the reactivation of a payload hazardous processing facility for one test mission. *Id.* The third sample task asks offerors to evaluate and assess a situation in which an engine controller failed during testing, and a rocket with the same type of controller is scheduled to launch in two days. *Id.*

The RFP includes a list of “standard labor categories.” (RFP Attachment L.3.7.1.) Of twenty-nine categories, seventeen are engineers: four safety engineers, two range safety engineers, five independent assessment engineers, one metrology/calibration engineer, one reliability engineer, three quality engineers, and one technical expert with at least fifteen years experience in aerospace engineering. *Id.* Of the remaining labor categories, there are four safety specialists, three information technology personnel, two managers, and three administrative support. *Id.*

The RFP also includes NASA's estimates of hours per labor category during the base year and each option year. (RFP Attachment L.3.7.2.) The estimates indicate that the bulk of the hours

are associated with the engineer labor categories. For example, during the base year, NASA estimated 36,800 hours of labor performed by various types of engineers, of a total of 52,440 estimated hours. *Id.*

### B. The Appeal

Appellant contends the CO erred in assigning the MAE&MW exception to NAICS code 541330. Appellant maintains instead that the appropriate NAICS code for this procurement is the SVGSM exception to NAICS code 541712. Appellant claims the SVGSM exception is appropriate because the majority of the work to be performed under the RFP deals with guided missiles and space vehicles and requires thorough knowledge of missiles and spacecraft. Specifically, Appellant asserts that the majority of programs requiring SMA support from the successful contractor deal with guided missiles and space vehicles, including the space shuttle program, the international space station, the launch services program, and various developmental programs designed to replace the space shuttle program.

Appellant next explains that the RFP is the successor to an existing contract for similar services and that Appellant itself is the incumbent contractor. Appellant concedes that the predecessor contract utilized NAICS code 541330 and the MAE&MW exception, which Appellant now argues are inappropriate for the current RFP. Nevertheless, Appellant argues that, since the predecessor procurement was conducted, NASA has designated the SVGSM exception to NAICS code 541712 for other similar procurements. With its appeal, Appellant submits several statements of work from recent solicitations to support its position.

Appellant asserts that nothing in the NAICS MANUAL description of code 541330 relates ANUAL<sup>1</sup> to missiles or spacecraft and, instead, the code only relates to traditional engineering fields. Appellant also maintains that, according to OHA case precedent, the MAE&MW exception to NAICS code 541330 applies only to “professional engineering services with a military application.” *NAICS Appeal of Davis-Paige Mgmt. Sys., LLC*, SBA No. NAICS-5055, at 5 (2009). Accordingly, Appellant contends that the MAE&MW exception cannot apply to this procurement, because NASA is a civilian agency and is by statute limited to peaceful pursuits. 51 U.S.C. § 20102.

Appellant explains that it made a presentation to NASA officials in August, 2011, to explain to the agency why the SVGSM exception to NAICS code 541712 should apply to the RFP. Subsequently, the Director of the NASA KSC Procurement Office issued a letter rejecting Appellant's recommendation. Appellant attaches a copy of NASA's letter to its appeal petition and offers additional rebuttal arguments. Appellant contends that any advice given to NASA procurement officials by small business specialists is irrelevant to this appeal, and OHA need not defer to the CO's NAICS code designation because OHA is the final arbiter of such matters. *See NAICS Appeal of JBS Int'l, Inc.*, SBA No. NAICS-5021 (2008); *NAICS Appeal of Eagle Design and Mgmt., Inc.*, SBA No. NAICS-4521 (2002).

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<sup>1</sup> Executive Office of the President, Office of Management and Budget, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (2007), *available at* <http://www.census.gov/eos/www/naics/> (hereinafter NAICS MANUAL).

Appellant also offers substantive criticism of NASA's position. Appellant challenges NASA's reliance on *NAICS Appeal of Inklings Media Co.*, SBA No. NAICS-5054 (2009), to support NASA's view that the MAE&MW exception applies to the RFP at issue. Appellant claims that the case does not support NASA's argument because it involved a Department of Defense (DoD) procurement. According to Appellant, under *Davis-Paige*, DoD can use the MAE&MW exception to NAICS code 541330, but NASA cannot. Appellant further maintains that OHA's statement in *Davis-Paige* that the MAE&MW exception can apply only to procurements with a military application was a central holding of the case and cannot be dismissed as mere dicta.

Appellant challenges NASA's contention that the SVGGM exception to NAICS code 541712 applies only to procurements for research and development. Appellant argues that, as in *NAICS Appeal of Inklings Media Co., LLC*, SBA No. NAICS-4850 (2007), the focus of the instant RFP is knowledge of missiles and spacecraft, so the SVGGM exception to NAICS code 541712 is appropriate. Appellant maintains that a recent KSC procurement which purportedly involved "little to no research and development" applied the SVGGM exception due to the expanded definition of research and development in footnote 11(c) of 13 C.F.R. § 121.201. (Appeal Petition 19.) Appellant requests that OHA direct the CO to assign the SVGGM exception to NAICS code 541712 to the RFP.

#### C. Nelson Engineering Response

On November 13, 2011, Nelson Engineering Co. (Nelson Engineering), a potential offeror, filed a response to the appeal petition. Nelson Engineering contends that the CO designated the proper NAICS code to the RFP because the scope of work relates to engineering services, not research and development. Nelson Engineering maintains that the work contemplated by the RFP requires "applying engineering principles to existing systems" and "performing analysis." (Nelson Engineering Response 2.) Nelson Engineering points out that the labor categories to be provided by the contractor relate predominantly to engineering fields. Nelson Engineering also notes that the RFP is procuring the same services as the predecessor contract, and Appellant did not oppose application of the MAE&MW exception to the predecessor procurement.

Nelson Engineering argues that although this is a NASA procurement, there are aspects of the work that could have military applications. Nelson Engineering asserts that NASA KSC and the 45<sup>th</sup> Space Wing of the U.S. Air Force (Air Force) together run the Eastern Range, and the range safety component of the RFP is to be integrated with the Air Force. (Nelson Engineering Response 3.) Further, Nelson Engineering contends that the booster vehicle and launch pad system analyses to be performed under the RFP have potential military application. Nelson Engineering urges OHA to affirm the CO's designation of the MAE&MW exception to NAICS code 541330 to the RFP.

#### D. APT Response

On November 21, 2011, APT Research, Inc. (APT), another potential offeror, filed a response to the appeal petition. APT contends that the NAICS code advocated by Appellant,

541712, “applies when the need is for broad or theoretical application of science.” (APT Response 4.) By contrast, the instant RFP would require “the practical application of safety engineering to explosives and other hazardous items during preparation and execution of launch.” *Id.* APT also claims the work required by the RFP is similar to work performed at national ranges operated by DoD. APT believes that six such national ranges generally apply NAICS code 541330 to this type of work, whereas two national ranges typically apply NAICS code 541712. APT also observes that NAICS code 541712 comprises “experimental development,” which APT contends does not apply to NASA launches.

APT next asserts, based on the labor estimates in the RFP, that engineering constitutes approximately 70% of the labor requirements. APT contends every major section of the statement of work requires engineering services in a variety of fields. APT also argues that the MAE&MW exception applies to the RFP according to the language of the exception itself, which specifically includes “aerospace equipment.” APT emphasizes that this NASA procurement requires work on aeronautical and space systems and is to be performed at KSC, where NASA launches aerospace equipment. In sum, APT states: “The notion that the phrase ‘and aerospace equipment’ cannot be applied to [a NASA procurement] is hard to embrace.” (APT Response 7.) APT also notes that missiles and spacecraft are plainly aerospace equipment.

APT further claims that the MAE&MW exception can apply to procurements related to military, aerospace, *or* weaponry, rather than applying only to procurements that combine all three. APT explains that this interpretation of the exception is reasonable because if all three factors were required, the exception could apply only to a very small group of procurements. APT explains that it currently holds two contracts that apply its broader interpretation of the MAE&MW exception, one that deals with military equipment and another that deals with military weapons. APT contends that the CO likely could have chosen to designate NAICS code 541712 to the RFP, but APT contends NAICS code 541330 is a better fit for a variety of reasons. APT concludes the CO did not err in assigning NAICS code 541330 and urges OHA to deny the appeal.

#### E. Davis Strategic Innovations' Response

On November 21, 2011, Davis Strategic Innovations, Inc. (DSI), APT's potential subcontractor for this procurement, filed a response to the appeal petition. DSI maintains the CO designated the appropriate NAICS code to the RFP. DSI recognizes that NAICS codes 541330 and 541712 could potentially overlap, but maintains that NAICS code 541330 is the proper code for this procurement.

#### F. CO's Response

On November 21, 2011, the CO submitted his response to the appeal petition. The CO maintains that the MAE&MW exception to NAICS code 541330 best describes the principal purpose of the RFP. The CO notes that the RFP seeks the same services as the predecessor contract, which employed the MAE&MW exception. The CO analyzed the total technical effort required by the RFP and determined that the tasks to be performed by technical personnel involve “the provision of advice, the preparation of feasibility studies, and the review of

preliminary and final plans and designs during the construction or installation phase, the inspection and evaluation of engineering projects, and related services.” (CO Response 2.) The CO contends that these services are within the ambit of NAICS code 541330. The CO also analyzed the statement of work and determined that the preponderance of the work required relates to engineering because a large majority of the work requires “some form of subject matter training, knowledge, and/or experience in disciplines relating to safety and engineering principles applied to the review of the design, development, and utilization of machines, materials, and instruments, structures, processes and systems.” *Id.*

The CO challenges Appellant's argument that nothing in the NAICS MANUAL description of NAICS code 541330 relates to missiles and spacecraft. According to the CO, Appellant unreasonably ignores the fact that the MAE&MW exception itself specifically applies to engineering services related to “aerospace equipment.” The CO contends this exception captures the services required by the instant RFP. The CO also disputes Appellant's argument that the SVGSM exception to NAICS code 541712 must apply because the solicitation requires knowledge of aerospace equipment. On the contrary, the CO asserts that he applied the MAE&MW exception to the RFP specifically because it relates to aerospace equipment. According to the CO, “[i]t is obvious that a Safety and Mission Assurance Support Services contract for [NASA] will deal with Aerospace Equipment.” (CO Response 4.) The CO also emphasizes that the RFP requires engineering services, not research and development services.

The CO next questions Appellant's assertion that NASA cannot utilize the MAE&MW exception because it is not a military agency. The CO argues that the MAE&MW exception applies to procurements involving “military *and* aerospace equipment,” and that to uphold Appellant's argument would require words to be read out of the title of the exception itself, contrary to general rules of construction. “If [the MAE&MW] exception were not meant to apply to civilian, as well as military, aerospace equipment, there would be no need for the word ‘aerospace,’ as ‘military aerospace equipment’ would certainly be included under ‘military equipment.’” (CO Response 5.) The CO also challenges Appellant's reliance on the *Davis-Paige* case. The CO maintains that the language upon which Appellant relies is dicta because, in that case, OHA upheld the designation of NAICS code 541712 and did not determine the applicability of the MAE&MW exception. *Davis-Paige*, NAICS-5055.

Moreover, the CO contends OHA precedent actually supports the proposition that the MAE&MW exception applies to NASA procurements. The CO points out that OHA has previously stated that the MAE&MW exception is inapplicable where there is no military *or* aerospace involvement. *SIC Appeal of Advanced Testing Techs., Inc.*, SBA No. SIC-3687 (1992); *SIC Appeal of Jack Faucett Assocs.*, SBA No. SIC-2782 (1987). The CO argues that these cases demonstrate that the MAE&MW exception was meant to apply to NASA engineering projects, and it applies to both military *and* aerospace equipment, as supported by the title of the exception itself.

The CO next contends that Appellant failed to offer any evidence that the services required by the RFP are not engineering services. In fact, the CO submits that the substantial majority of the work required falls under NAICS code 541330. The CO argues the services required in *NAICS Appeal of Inklings Media Co.*, SBA No. NAICS-5054 (2007), are similar to

the services required by the instant RFP, and OHA approved the use of NAICS code 541330 in that case. The CO also notes that although Appellant may be correct that some NASA procurements apply NAICS code 541712, other procurements apply NAICS code 541330, including the predecessor contract. The CO recognizes that some of the work required by the RFP could fall under NAICS code 541712 but emphasizes that potential overlap between NAICS codes does not establish that the CO's selection is erroneous. The CO maintains that the MAE&MW exception to NAICS code 541330 best captures the principal purpose of the RFP, which is to acquire engineering services related to aerospace equipment. The CO asks that OHA deny the appeal.

### 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 prove 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 designate the perfect NAICS code. Rather, the CO must designate the NAICS code that best describes the principal purpose of the product or service being acquired in light of the industry description in the NAICS MANUAL, the description in the solicitation, and the relative weight of each element in the solicitation. 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. NAICS Manual Definitions

The NAICS MANUAL description of the NAICS code designated by the CO, 541330, Engineering Services, provides that this industry comprises:

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 733. Index entries that direct the reader to this NAICS code include “[engineering consulting services.” *Id.* at 1112. The MAE&MW exception to this NAICS code applies a different size standard than the general code. 13 C.F.R. § 121.201.

The NAICS MANUAL description of Appellant's requested NAICS code, 541712, Research and Development in the Physical, Engineering, and Life Sciences (Except Biotechnology), provides that this industry comprises: “experimental development (except



biotechnology research and experimental development) in the physical, engineering, and life sciences, such as agriculture, electronics, environmental, biology, botany, computers, chemistry, food, fisheries, forests, geology, health, mathematics, medicine, oceanography, pharmacy, physics, veterinary and other allied subjects.” NAICS MANUAL, at 748-49. Index entries that direct the reader to this NAICS code include “[g]uided missile and space vehicle engine research and development” and “[g]uided missile and space vehicle parts (except engines) research and development.” *Id.* at 1154. The SVGSM exception to this code applies a different size standard than the general code. 13 C.F.R. § 121.201. A footnote in the regulation explains that: “‘Research and Development’ for guided missiles and space vehicles includes evaluations and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft.” *Id.* at n.11(c).

### C. Analysis

Having reviewed the RFP—including the statement of work, the sample tasks, the labor categories, and the estimated labor hours—and the definitions in the NAICS MANUAL, I find that the CO properly classified this acquisition under NAICS code 541330, Engineering Services. The statement of work reflects that the predominant contract tasks are the performance of highly-technical safety-related analyses, assessments, and investigations, and the provision of safety-related advice and expertise to the KSC SMA Directorate. These services are plainly “engineering” in nature; specifically, the RFP primarily calls for the performance of “safety engineering.”<sup>2</sup> The sample tasks in the RFP similarly ask offerors to prepare technical responses to realistic safety-related scenarios. More than half of the labor categories specified in the RFP are engineers, and those labor categories account for approximately 70% of the total estimated labor hours. Many of the remaining labor categories and hours are associated with safety specialists and support staff that will assist the engineers. Further, although OHA has long recognized that NAICS codes assigned to other procurements have little probative value in determining an appropriate NAICS code, it is notable here that the predecessor procurement for similar services—on which Appellant itself is the incumbent—also was assigned NAICS code 541330.

In its appeal, Appellant does not dispute that NAICS code 541330 is appropriate for this acquisition. Rather, Appellant's primary argument is that, because NASA is a civilian agency, NASA may not utilize the MAE&MW exception to NAICS code 541330.<sup>3</sup> To support its

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<sup>2</sup> The NAICS MANUAL does not explain how “engineering” differs from “research and development.” However, engineering is commonly understood to involve the practical application of science for the design and utilization of structures, machines, and products, whereas research and development entails the discovery or invention of new facts, techniques, or natural laws. MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS at 722, 1790 (6th ed. 2003). “Safety engineering” is a recognized discipline within engineering, and is defined as “[t]he testing and evaluating of equipment and procedures to prevent accidents.” *Id.* at 1845.

<sup>3</sup> . Appellant overlooks the fact that NAICS code 541330 could apply to the acquisition even if the MAE&MW exception does not. *See, e.g., NAICS Appeal of Appledore [cont.]*

position, Appellant relies upon *NAICS Appeal of Davis-Paige Mgmt. Sys., LLC*, SBA No. NAICS-5055 (2009), in which OHA remarked that the MAE&MW exception applies to procurements of “professional engineering services with a military application.” The CO insists that NASA is permitted to use the MAE&MW exception.

In *Davis-Paige*, the Army designated NAICS code 541712, Research and Development in the Physical, Engineering and Life Sciences (except Biotechnology), to a procurement for “project management, research, development, acquisition and sustainment support services.” *Davis-Paige*, NAICS-5055, at 2. Among other tasks, the contractor was required to “conduct laboratory scale and prototype scale experiments,” and to “develop methods and design experiments for ongoing developmental programs.” *Id.* The appellant in *Davis-Paige* claimed that the MAE&MW exception to NAICS code 541330 should apply because much of the work could be characterized as engineering services, rather than research and development. *Id.* at 2-3. OHA determined, however, that the CO did not err in designating NAICS code 541712 because the procurement was focused on research and development, not engineering. *Id.* at 5. In so holding, OHA stated: “[W]e have held that for [the MAE&MW exception] to be appropriate, the procurement must involve professional engineering services with a military application.” *Id.* (citing *SIC Appeal of R.M. Vrendenburg & Co.*, SBA No. SIC-4220 (1996); *SIC Appeal of Giordano Assocs., Inc.*, SBA No. SIC-2502 (1986)).

As discussed *supra*, the procurement at issue in *Davis-Paige* was conducted by the Army (a military agency), and did not pertain to aerospace at all. Thus, in *Davis-Paige*, OHA had no reason to consider whether the MAE&MW exception would apply to a procurement of engineering services involving non-military aerospace equipment. I find, therefore, that *Davis-Paige* does not prohibit use of the MAE&MW exception by civilian agencies. *Davis-Paige* should not be understood as holding that every procurement employing the MAE&MW exception must be military in nature. Rather, the case held that the MAE&MW exception may be used in appropriate circumstances when a procurement is military in nature.<sup>4</sup>

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*Marine Eng'g, Inc.*, SBA No. NAICS-5240 (2011) (upholding procuring agency's decision to utilize NAICS code 541330 without one of the exceptions for that code).

<sup>4</sup> The cases referenced in *Davis-Paige* likewise do not indicate that a military application is required to apply the MAE&MW exception. In *Vrendenburg*, OHA determined the exception did not apply to the procurement at issue because the procurement sought procedural consulting services, not engineering services. *Vrendenburg*, SIC-4220, at 7. The case does not address whether the MAE&MW exception requires a military application. In *Giordano Associates*, there was no dispute that the services being procured were engineering services. The CO designated the general engineering services code, but the appellant argued that because the services would be provided “for military aircraft systems at a military facility,” the MAE&MW exception to the code should be used. *Giordano Assocs.*, SIC-2502, at 4. In deciding the issue, OHA indicated: “the only question is whether the engineering services being procured are principally military in nature.” *Id.* at 5. In concluding that the MAE&MW exception should apply, OHA reasoned that “the essential nature of this procurement is engineering services for military equipment and weapons.” *Id.*

Furthermore, the plain language of the MAE&MW exception indicates that it pertains to “Military and Aerospace Equipment and Military Weapons.” There is no indication that the MAE&MW exception may be used only by military agencies, but not civilian agencies. Indeed, as the CO correctly observes, “[i]f this exception were not meant to apply to civilian, as well as military, aerospace equipment, there would be no need for the word ‘aerospace,’ as ‘military aerospace equipment’ would certainly be included under ‘military equipment.’” (CO Response 5.) In addition, a review of the regulatory history confirms that SBA did not intend to limit the MAE&MW exception exclusively to military applications. Rather, when the exception was promulgated, SBA stated that the exception could be used by NASA. *See* 49 Fed. Reg. 5024, 5026 (Feb. 9, 1984) (indicating that “Engineering Services for Military and Aerospace Equipment and Military Weapons include highly sophisticated projects for the Department of Defense and NASA.”).<sup>5</sup> Accordingly, I find that NASA may apply the MAE&MW exception to an engineering services procurement relating to aerospace equipment.

Appellant has not shown that the CO erred in assigning NAICS code 541330 to the RFP or in utilizing the MAE&MW exception. As a result, it is unnecessary even to consider the alternative code advocated by Appellant. *E.g.*, *NAICS Appeal of 1<sup>st</sup> American Sys. and Svcs., LLC*, SBA No. NAICS-5119, at 5 (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.”). As discussed below, however, Appellant's arguments in favor of its alternative NAICS code, 541712, are not meritorious.

Appellant contends that because “knowledge of missiles and spacecraft is the heart of the RFP,” the CO should have designated the SVGSM exception to NAICS code 541712 to the RFP based upon *Inklings Media*, NAICS-4850. In *Inklings Media*, OHA upheld application of the SVGSM exception to NAICS code 541712.<sup>6</sup> OHA specified that the language used in the solicitation was “probative of a research and development oriented procurement,” and “will involve the purchase of highly complex research and development services.” *Inklings Media*, NAICS-4850, at 7-8. Contrary to Appellant's characterization, then, OHA did not affirm the chosen code merely because “knowledge of missiles and spacecraft is the heart of the RFP.” *Id.* at 8. Accordingly, I reject Appellant's contention that *Inklings Media* requires the application of the SVGSM exception to any procurement dealing with missiles and spacecraft.

Nor does the language of footnote 11(c) in 13 C.F.R. § 121.201 establish that only NAICS code 541712 can apply to procurements dealing with missiles and spacecraft, as Appellant contends. The footnote provides that research and development for missiles and spacecraft “includes evaluations and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft.” 13 C.F.R. § 121.201 n.11(c). Thus, footnote 11(c) appears to contemplate that, in the complex world of missiles and spacecraft, “research and

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<sup>5</sup> SBA's remarks refer to Standard Industrial Classification (SIC) code 8711, a predecessor to NAICS code 541330.

<sup>6</sup> The case discusses NAICS code 541710, the predecessor code to 541712.

development” may be viewed more expansively than in traditional disciplines. The footnote does not, however, require application of the SVGSM exception to NAICS code 541712 to any procurement dealing with missiles and spacecraft.

Appellant's discussion of NAICS codes assigned to other procurements is similarly unavailing. It is well-settled that “NAICS code designations for other procurements are not of great probative weight.” *Davis-Paige*, NAICS-5055, at 5.

#### IV. Conclusion

Upon review of the RFP and the NAICS MANUAL, I find that the services required by the instant procurement were properly classified as engineering services. Appellant has not shown that the CO's designation of the MAE&MW exception to NAICS code 541330 was clearly erroneous. Accordingly, this appeal is DENIED, and the CO's designation is AFFIRMED.

This is the final decision of the Small Business Administration. *See* FAR 19.303(c)(5) and 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge