

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

NAICS APPEAL OF:

Inklings Media Company, LLC

Appellant

Solicitation No. W9113M-07-R-0006

Department of the Army

USASMDC/ARSTRAT

Huntsville, Alabama

SBA No. NAICS-4850

Decided: May 16, 2007

APPEARANCE

Charles L. Belitz, President, Inklings Media Company, LLC, Munford, Alabama.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

On April 30, 2007, Inklings Media Company, LLC, (Appellant) filed a North American Industry Classification System (NAICS) Appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant appeals the U.S. Army Space and Missile Defense Command/U.S. Army Forces Strategic Command (USASMDC/ARSTRAT) designation of NAICS code 541710, Research and Development in the Physical, Engineering, and Life Sciences, with an applicable 1,000 employee size standard.¹ Appellant contends that the proper NAICS code for the procurement should be 541330, Engineering Services, with a \$25 million dollar size standard.²

¹ The general size standard for NAICS code 541710 is 500 employees; however, this solicitation falls within a specific exception for Space Vehicles and Guided Missiles, their Propulsion Units, their Propulsion Units Parts, and their Auxiliary Equipment and Parts, which increases the size standard to 1,000 employees.

² The general size standard for NAICS code 541330, Engineering Services, is \$4.5 million. The Engineering Services NAICS code includes an exception for Military and Aerospace Equipment and Military Weapons which increases the size standard to \$25 million.

OHA decides NAICS code appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

II. Issue

Whether the NAICS code designation is based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Facts

1. On April 26, 2007, USASMDC/ARSTRAT issued Solicitation No. W9113M-07-R-0006, a negotiated request for proposal (RFP). The RFP is a total small business set-aside and contemplates issuance of multiple awards: one 8(a) reservation, one Service-Disabled Veteran Owned reservation, two women-owned small business reservations, and three small business reservations. The contract is an Indefinite Delivery/Indefinite Quantity (IDIQ) task order arrangement for Systems Engineering and Technical Assistance (SETA).

2. USASMDC/ARSTRAT designated NAICS code 541710, Research and Development in the Physical, Engineering, and Life Sciences, for the RFP.

3. The RFP anticipates award of ID/IQ task orders. Section B states the contract will be an ID/IQ:

. . . type contract with multiple pricing arrangements available for use in pricing individual task orders. It is anticipated that most task orders will be Fixed Price/Level of Effort (FP/LOE) or Cost-Reimbursable (CR) with cost-reimbursable ODCs. A Cost Plus Fixed Fee CLIN is available for Consultants but may not be utilized on every task order. Most task orders will be solicited, negotiated, and awarded as bilateral orders. In emergency situations or when a bilateral task order cannot otherwise be issued in a timely manner, the government reserves the right to issue unilateral task orders on an undefinitized basis. Any such undefinitized unilateral task order shall be definitized in accordance with DFARS 252.217-7027 (Contract Definitization) utilizing a not to exceed ceiling amount provided by the contractor.

RFP, at 2.

4. The RFP contains a Scope of Work (SOW). The SOW's title is "Systems Engineering and Technical Assistance Contract (SETAC)." However, the introductory paragraph (paragraph 1.1.1) states:

The goal of services hereby obtained is to ensure a timely, energetic, and cost effective *development of technologies for defense against evolving threats*; to coordinate all technology base development to maximize benefits for strategic and theater missile defense and air/space technology programs; and to ensure programs are in regulatory compliance. The USASMDC/ARSTRAT, along with

its myriad of other government agencies and strategic partners, *acts to manage the Army's research and development effort*; to advance the technologies of ballistic missile defense, air and space technology; and to provide a system technology base for a range of future defense applications. These programs, and the associated support, revolve around ten major functions:

1.1.1.1 *Requirements Definition, Integration, and Planning*

1.1.1.2 *Technology Development, System Development, Assessment, and Validation*

1.1.1.3 Threat Estimation/Projections

1.1.1.4 Weapons Lethality and Effects Estimation

1.1.1.5 Modeling, Simulation, and Interfacing

1.1.1.6 Program/Project Analysis, Evaluation, Experimentation, and Support

1.1.1.7 Production and Fielding Support

1.1.1.8 Homeland Defense and Homeland Security

1.1.1.9 Warfighter Support

1.1.1.10 Chemical, Biological, Radiological, and Nuclear

RFP, at 15 (emphases added).

5. RFP Section M, Evaluation Factors for Award, Factor 1, Technical Proposal, Subfactor A: Team/Technical Approach, among other matters, contains the following text:

. . . This subfactor will be used to evaluate the offeror's proposed technical team, the role of each member, and their capability to successfully execute the requirements of the SOW. The efforts of: Providing technical project leadership/supervision to assigned technical staff; *Providing expert engineering and/or scientific solutions to highly complex technical/scientific matters*; Research, studies, system analysis, and technical assessment of weapon system/government program; and ensuring security requirements for the SETAC will also be evaluated. . . .

RFP, at 116 (emphasis added).

6. RFP Section M, Evaluation Factors for Award, contains a clause entitled "Alternative Source Selection Procedure For Highly Complex RDT&E Requirements, 2003-DEV-01." RFP, at 121. (RDT&E is an accepted acronym for Research Development Testing and Evaluation.)

7. Upon receiving Appellant's appeal, the Contracting Officer (CO) wrote a letter, dated May 8, 2007, to OHA addressing the appeal. The CO asserted:

a. She had selected an appropriate NAICS code because the RFP anticipated a research and development contract to “advance ballistic missile defense and air and space technologies”;

b. The ten areas listed in the SOW are for the advancement of physical research and development;

c. The NAICS code selected for this solicitation is 541710, Research and Development in the Physical, Engineering and Life Sciences, the same that applies to current SETA contracts that this RFP is replacing;

d. The NAICS code had been shared with industry for many months, including the issuance of draft solicitations and she has received no comments on the NAICS code;

e. While the proposed effort will include engineering services that may be classified under NAICS code 541330, Engineering Services, the preponderance of support will fall in the more specialized research and development category, which is one of the core missions of the Space and Missile Defense Command; and

f. Failure to pursue the current NAICS code, 541710, may result in change in acquisition strategy and insufficient competition as the suggested NAICS code would not support a small business set-aside.

8. The 2002 NAICS Manual³ (Manual) describes NAICS code 541710, Research and Development in the Physical, Engineering, and Life Sciences, as:

This industry comprises establishments primarily engaged in conducting research and experimental development in the physical, engineering, and life sciences, such as agriculture, electronics, environmental, biology, botany, biotechnology, computers, chemistry, food, fisheries, forests, geology, health, mathematics, medicine, oceanography, pharmacy, physics, veterinary, and other allied subjects.

9. Footnote 11 to 13 C.F.R. § 121.201 applies to NAICS code 541710. The relevant paragraphs state:

(a) “Research and Development” means laboratory or other physical research and development. It does not include economic, educational, engineering, operations, systems, or other nonphysical research; or computer programming, data processing, commercial and/or medical laboratory testing.

³ EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM MANUAL (2002), *available at* <http://www.census.gov/epcd/naics02/>.

...
 (c) “Research and Development” for guided missiles and space vehicles includes evaluations and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft.

10. The Manual describes NAICS code 541330, Engineering Services, as:

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.

IV. Discussion

A. Applicable Law

1. Timeliness

NAICS Appeals must be served within 10 days after the issuance of the initial solicitation. 13 C.F.R. § 134.304(a)(3).

2. Burden of Proof

Appellant must prove the USASMDC/ARSTRAT’s CO based her NAICS code designation in the RFP on a clear error of fact or law. 13 C.F.R. § 134.314. In determining whether there is a clear error of fact or law, OHA reviews the record to determine whether the CO based her NAICS code designation upon a clear error of fact or law.

Black’s Law Dictionary defines clear error as a “decision or action that appears to a reviewing court to have been unquestionably erroneous.” BLACK’S LAW DICTIONARY 563 (7th ed. 1999). OHA applies the clear error standard in reviewing a NAICS determination, similar to an appellate court reviewing a trial court’s factual findings. *See generally Easley v. Cromartie*, 532 U.S. 234, 242 (2001). Review under the clearly erroneous standard is “significantly deferential” requiring a “definite and firm conviction that a mistake has been committed.” *Concrete Pipe & Prods. v. Constr. Laborers Trust*, 508 U.S. 602, 623 (1993). The clear error standard is rigorous. *See* RICHARD S. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 11.2 (4th ed. 2002). Therefore, I will not reverse the NAICS designation simply because I might have selected a different NAICS code. Rather, I will only select a different NAICS code and reverse the CO’s NAICS code designation if I have a definite and firm conviction the CO based her

NAICS code designation upon an erroneous interpretation of applicable regulations or that she based her application of the regulations upon facts not supported by the Record.⁴

3. The Correct NAICS Code

The correct NAICS code is that which best describes the principal purpose of the product or service being procured. 13 C.F.R. § 121.402(b). Factors considered in the selection of the proper NAICS code include: industry descriptions in the Manual, the product or service description in the solicitation, the relative weight of each element in the solicitation, the function of the goods or services, previous procurement classifications of the same or similar products or services, and the classification which would best serve the purposes of the Small Business Act. *Id.*

B. Analysis

1. Introduction

The Record before me, which consists of the Appeal Petition, the RFP, and the CO's May 8, 2007 letter, does not contradict the CO's selection of NAICS code 541710, Research and Development in the Physical, Engineering, and Life Sciences. Rather, the Record generally supports the CO's designation. Hence, I conclude Appellant has not established the CO made a clear error of fact or law in designating NAICS code 541710.

2. Timeliness

Appellant filed the instant appeal within 10 days after USASMDC/ARSTRAT issued the initial solicitation; Appellant's appeal is timely.

3. Appellant's Arguments for NAICS Code 541330, Engineering Services

As explained, Appellant must prove the CO's NAICS code designation was based on clear error. 13 C.F.R. § 134.314. Appellant acknowledges the missions and functions of USASMDC/ARSTRAT include research and development. However, Appellant argues that the preponderance of work required by the contract is engineering services. Appellant relies on the footnote to the NAICS code designated in the contract to support its contention that the designated NAICS code, 541710, specifically excludes engineering research. 13 C.F.R. § 121.201, n. 11(a) ("Research and Development' means laboratory or other physical research and development and not engineering."); Fact 9. Additionally, Appellant states the solicitation does not require laboratory research or other physical research.

⁴ See *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review applied by OHA for size appeals. OHA applies the same standard to both size and NAICS appeals. 13 C.F.R. § 134.314

4. The Principal Purpose of the Contract is Research and Development in the Physical, Engineering, and Life Sciences

The RFP articulates its goal as follows:

The goal of services hereby obtained is to ensure a timely, energetic, and cost effective development of technologies for defense against evolving threats; to coordinate all technology base development to maximize benefits for strategic and theater missile defense and air/space technology programs; and to ensure programs are in regulatory compliance.

RFP, at 15; Fact 4.

The use of the phrase “development of technologies for defense against evolving threats” is probative of a research and development oriented procurement. Specifically, to develop a technology⁵ capable of defending against evolving threats necessarily requires research and development in scientific disciplines, for the threat being defended against is a moving target. Given the uncertain nature of the threats the RFP is designed to counter, it would be counter intuitive for me to find the RFP’s primary purpose is for anything but research and development, unless Appellant were to prove otherwise.

To achieve the goal of the RFP, the SOW requires the contractor to:

... conduct studies, and provide concept system definition and related documentation to support the study results; provide independent analyses, simulations, technological assessments; and perform other related tasks in systems definition, experiments, technology demonstration, system development, production and fielding; homeland defense/homeland security; and warfighter support.

RFP, paragraph 2.1.2, at 16. These tasks are also probative of a research and development contract.

As the SOW states, USASMDC/ARSTRAT, with other agencies and strategic partners, manages Army’s research and development, advances ballistic missile defense and air and space technology, and provides system technology for future defense applications. RFP, at 15. USASMDC/ARSTRAT’s programs are concentrated in ten functions: (1) Requirements Definition, Integration, and Planning; (2) Technology Development, System Development, Assessment, and Validation; (3) Threat Estimation/Projections; (4) Weapons Lethality and Effects Estimation; (5) Modeling, Simulation, and Interfacing; (6) Program/Project Analysis, Evaluation, Experimentation, and Support; (7) Production and Fielding Support; (8) Homeland Defense and Homeland

⁵ Technology is defined as “the science of the application of knowledge to practical purposes.” WEBSTERS’S THIRD NEW INTERNATIONAL DICTIONARY 2348 (1993).

Security; (9) Warfighter Support; and (10) Chemical, Biological, Radiological, and Nuclear. *Id.* The RFP notes USASMDC/ARSTRAT's programs are evolving and that the current focus is researching, evaluating, and proving the effectiveness of components and systems, and supporting production. *Id.*

The SOW is not the only part of the RFP that emphasizes that the purpose of the RFP is for research and development for scientific matters. In addition to the language in the SOW emphasizing research and development, the CO also placed language in Section M, Evaluation Factors for Award, that placed significant emphasis on offerors having experience in providing engineering and scientific solutions to highly complex technical and scientific matters (Fact 5).

Within Section M, the CO also placed a tailored clause entitled "Alternative Source Selection Procedure For Highly Complex RDT&E Requirements" (Fact 6). The CO's use of this clause is highly probative of her contemporaneous understanding that the RFP will involve the purchase of highly complex research and development services.

Although Appellant cites to footnote 11(a) of 13 C.F.R. § 121.201, to support its argument that the designated NAICS code, 541710, excludes engineering research, Appellant overlooks footnote 11(c) of 13 C.F.R. § 121.201 which specifically states that with respect to the designated NAICS code "'Research and Development' for guided missiles and space vehicles includes evaluations and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft." (Fact 9). Hence, since knowledge of missiles and spacecraft is the heart of the RFP, it is fair to say the CO's choice complies with the regulations applicable to NAICS code 541710.

5. The Designated NAICS Code is Proper

Instead of demonstrating the CO's designation of NAICS code 541710 is clearly erroneous, Appellant offers an alternative NAICS code. Appellant's alternative code, NAICS code 541330, Engineering Services, contains a description that may overlap with the description of NAICS code 541710 on occasion. Further, Appellant's suggested NAICS code may be appropriate for some of the services the CO may choose to order under the ID/IQ delivery contract arising from the RFP.

Regardless, the existence of a potential overlap is insufficient to constitute clear error by the CO. Instead, clear error requires that I have no doubt the NAICS code in the solicitation is not the best description of the principal purpose of the product or service being procured. 13 C.F.R. § 121.402(b). As discussed above, I have found that the SOW, Section M, and the definition for NAICS code 541710 support the CO's designation. Thus, based upon my review of the industry descriptions in the Manual, the SOW, Section M, previous procurement classifications (Fact 7.c.), and the CO's reasoned assertion that there might not be a set aside procurement strategy if NAICS code 541330 were chosen (Fact 7.f.), I find the CO's designation of NAICS code 541710 best serves the purposes of the Small Business Act.

C. Decision

On the basis of the foregoing, I hold Appellant has not and cannot meet its burden of establishing a clear error of fact or law in the CO's designation of NAICS code 541710 for this procurement. Appellant's appeal is DENIED.

V. Conclusion

The appropriate NAICS code for this RFP is 541710, Research and Development in the Physical, Engineering, and Life Sciences, with a corresponding 1,000 employee size standard. The CO's designation is AFFIRMED, and the instant appeal is DENIED.

This is the Small Business Administration's final decision. 13 C.F.R. § 134.316(b).

THOMAS B. PENDER
Administrative Judge