

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

NAICS APPEAL OF:

Nelson Engineering Co.

Appellant

Solicitation No. W912QR-10-R-0085
United States Army
Louisville, KY

SBA No. NAICS-5166

Decided: November 17, 2010

APPEARANCE

Blain L. Nelson, President, for Nelson Engineering Co., Appellant.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether North American Industry Classification System (NAICS) code 561210, Facilities Support Services, is an appropriate code for this procurement for professional services.

III. Background

A. Introduction

On October 18, 2010, the Contracting Officer (CO) for the U.S. Army posted Solicitation No. W912QR-10-R-0085 (RFP) to the Federal Business Opportunities website (<https://www.fbo.gov>) in anticipation of awarding an indefinite delivery/indefinite quantity (ID/IQ) contract for a variety of professional services. The CO set the procurement aside for small business and designated NAICS code 561210, Facilities Support Services, with a corresponding size standard of \$35.5 million in average annual receipts.

On October 26, 2010, Nelson Engineering Co. (Appellant) filed an appeal, asserting that the appropriate NAICS code for this procurement is 541330, Engineering Services, with a corresponding size standard of \$4.5 million in average annual receipts.

B. The Statement of Work

The statement of work indicates the RFP seeks professional services for program management support, master planning, real estate planning, project management support, program management support assistance, environmental management support, modular design support, building information management support, quality assurance, facility planning, construction planning, database management support and support for the Assistant Chief of Staff of Installation Management, Army Reserve Division in their work on various military programs and regional support commands within the United States and Puerto Rico.

The RFP further indicates that some skills and services that may be required include but are not limited to: knowledge of Army Reserve regulations and policies, master planning for real property management support or Army Reserve project development, analysis of engineering and base operations functions, program and project management support, preparation of real estate profiles, completion of environmental impact analyses, operation in a computer-aided design and drafting (CADD) environment, evaluation of construction cost estimating using parametric cost estimating system, learning additional design and cost estimating software, testing prototypes and beta versions of Army Reserve test plans, analysis of space utilization by Army Reserve units, engineer technical support, facility database analysis/correlation support, monitoring of facility reduction program, IT support for data management, performance of condition analysis evaluations of existing Army Reserve centers, quality assurance of construction activity, review of contract drawings and specifications, construction planning support, and preparation of constructing cost estimates.

The RFP requires that for each task order issued under the ID/IQ contract, proposed personnel must be experienced and trained for the type of work to be performed. The RFP anticipates that one individual will be required to perform the work required by each task order and specifies that the person selected must be an experienced professional with excellent verbal and written communication skills comfortable in dealing with individuals at all levels. For some task orders, knowledge of the workings of the Army Reserve will be necessary. The first task order to be issued under the ID/IQ contract is also included. It seeks an interior design professional to perform furniture inspection management services.

Offerors are expected to price services from various types of professionals at different levels, including: program and project managers, real estate planning specialists, master planners, strategic planners, environmental engineers and scientists, biologists, military master planners, general planners, civil engineers, architects, landscape architects, quality control managers, cost estimators, CADD technicians, geographic information systems specialists, technical writers, engineering technicians, economists, budget analysts, computer programmers and systems analysts, real estate technicians, and archaeologists.

C. The Appeal

Appellant contends the NAICS code designated by the CO unfairly favors the incumbent contractor and does not accurately represent the requirements of the RFP. Appellant claims the work required by the RFP, which includes master planning, engineering, and program and project management support services, is inconsistent with the services encompassed by NAICS code 561210, which include physical maintenance and security services. Appellant emphasizes that a note to NAICS code 561210 indicates that if one or more facilities support service activities fall within a specific industry, and that industry makes up more than 50% of the value of the procurement, the proper classification of the procurement is that of the specific industry, not facilities support services. 13 C.F.R. §§ 121.201 n.12(a). Appellant argues NAICS code 541330, which includes all types of engineering services, more accurately represents the work required by the RFP.

The CO did not submit a response to the appeal petition.

IV. Discussion

A. Threshold Questions

Appellant filed the instant appeal within ten days after the solicitation was posted. Thus, the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1); 134.304(a)(3).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the CO's NAICS code designation is based on 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). The correct NAICS code is that which best describes the principal purpose of the services being procured, in light of the industry description in the *NAICS Manual*,¹ the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b); *Durodyne*, SBA No. NAICS-4536, at 4.

B. NAICS Manual Definitions

The *NAICS Manual* description of the NAICS code designated by the CO, 561210, Facilities Support Services, provides that this industry comprises:

[E]stablishments primarily engaged in providing operating staff to perform a combination of support services within a client's facilities. Establishments in this industry typically provide a combination of services, such as janitorial; maintenance; trash disposal; guard and security; mail routing; reception; laundry; and related services to support operations within facilities. These establishments provide operating staff to carry out these support activities; but, are not involved with or responsible for the core business or activities of the client. Establishments

¹ 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*).

providing facilities (except computer and/or data processing) operation support services and establishments operating correctional facilities (i.e., jails) on a contract or fee basis are included in this industry.

NAICS Manual, at 767-68.

The footnote accompanying the size standard for NAICS code 561210 published in the Code of Federal Regulations provides:

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

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

13 C.F.R. §§ 121.201 n.12

The *NAICS Manual* provides in regard to NAICS Industry Sector 54—Professional, Scientific, and Technical Services:

The Professional, Scientific, and Technical Services sector comprises establishments that specialize in performing professional, scientific, and technical activities for others. These activities require a high degree of expertise and training. The establishments in this sector specialize according to expertise and provide these services to clients in a variety of industries and, in some cases, to households. Activities performed include: legal advice and representation; accounting, bookkeeping, and payroll services; architectural, engineering, and specialized design services; computer services; consulting services; research services; advertising services; photographic services; translation and interpretation services; veterinary services; and other professional, scientific, and technical services.

NAICS Manual, at 727.

The *NAICS Manual* description of Appellant’s requested NAICS code, 541330, Engineering Services, provides that this industry comprises:

[E]stablishments 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.

Illustrative examples include Civil engineering service; environmental engineering services; and Engineers' offices.

NAICS Manual, at 733.

C. Analysis

It is clear from even a cursory review of this RFP that the professional services required by the RFP are not encompassed by NAICS code 561210. Even the title and contract line items, which indicate the contract is for *professional* services, belie the applicability of the code for facilities support services. The facilities support services code, as Appellant points out, is to be applied to contracts for physical maintenance services, such as trash disposal, mail routing, and laundry. OHA has held that 561210 is reserved for industries that typically provide a combination of services such as janitorial, trash disposal, and laundry. *NAICS Appeal of Phoenix Scientific Corp.*, SBA No. NAICS-4416 (2000). That is to say, this code covers custodial services not central to a procuring agency's mission. *NAICS Appeal of JBS Int'l, Inc.*, SBA No. NAICS-5021 (2008). This is supported by the code's definition, which indicates the staff who provide these services are not involved with the client's core activities.

Contrary to this description, the instant RFP calls for professional services that have little to do with the physical maintenance of facilities. The required services must be performed by experienced professionals, and many of the services must be provided by professionals in fields that require advanced degrees. It is true that the procurement requires services in at least three separate industries, as required by 13 C.F.R. §§ 121.201 n.12(b), but those services are not of the type that could be considered facilities support services. Here, the RFP requires the services of administrative professionals, planning professionals, real estate professionals, scientists, architects, computer professionals, technicians, financial and economic professionals, and engineering professionals, among others. NAICS code 561210 is not an appropriate designation for a procurement requiring such professional services. *NAICS Appeal of EnergX, LLC*, SBA No. NAICS-4952 (2008). Indeed, it is questionable whether any of the services required here are those of specialty trade contractors, as opposed to professionals, whose absence alone would also disqualify the instant RFP from designation under NAICS code 561210. *NAICS Appeal of Global Solutions Network, Inc.*, SBA No. NAICS-4478 (2002).

Because the CO failed to respond to the appeal, I do not have before me the rationale for the designation of NAICS code 561210 for this procurement. Whatever the CO's reasoning, I find it was clear error to assign NAICS code 561210 to this procurement for professional services.

Instead, it is clear that the procurement belongs under NAICS Industry Sector 54—Professional, Scientific, and Technical Services. Appellant argues that NAICS code 541330,

Engineering Services, is the best code for this procurement because engineering services make up the majority of the work required by the RFP. The fact that not all the services required here are engineering services does not exclude Engineering Services from consideration as the appropriate NAICS code for the instant RFP.

NAICS Code 541330 describes an industry where the establishments provide engineering services, including providing advice, feasibility studies, preparing preliminary and final plans, inspection and evaluation of engineering projects, and related services. . . . [E]ngineers do not work in a vacuum. When engineers or scientists require the support of technically experienced non-engineers or engineers working in other competencies to prepare plans and assess program performance, it cannot be said a contracting officer is incorrect to assign an engineering NAICS code 541330 to the support competencies required for the success of the engineering effort. . . . The *NAICS Manual* does not limit the reach of NAICS code 541330 to pure engineering services. Rather, the definition includes provision of advice, feasibility studies, preparation of all kinds of plans, inspection and evaluation of engineering projects, and *related services*.

NAICS Appeal of Inklings Media Co., SBA No. NAICS-5054, at 12-13 (2009).

Although this procurement covers a wide array of professional services, of the twenty-two skills and services listed in the statement of work, I find nine can be said to fall within the description of engineering services (the ability to perform an environmental impact analysis, CADD skills, parametric cost estimating system skills, testing of prototypes, engineer technical support skills, quality assurance of construction activities, review of contract drawings and specifications, construction planning support skills, and the ability to prepare construction cost estimates). These services constitute the heart of the procurement, and the other services are largely in support of the engineers' efforts. While no one NAICS code covers all the services required by the instant RFP, a NAICS code need not be a perfect fit for a solicitation, in order to be the most appropriate NAICS code. *NAICS Appeal of Computer Cite*, SBA No. NAICS-5010 (2008). Accordingly, I find that the appropriate NAICS code for this procurement is 541330, Engineering Services, with a corresponding size standard of \$4.5 million in average annual receipts

V. Conclusion

For the above reasons, the instant appeal is GRANTED. The appropriate NAICS code for this procurement is 541330, Engineering Services, with a corresponding size standard of \$4.5 million in average annual receipts. Accordingly, because this decision is being issued before the close of the solicitation, the CO MUST amend the RFP to change the NAICS code designation from 561210 to 541330. FAR § 19.303(c)(5); *Matter of Eagle Home Med. Corp.*, Comp. Gen. B-402387, March 29, 2010, *available at* <http://www.gao.gov/decisions/bidpro/402387.pdf>.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN
Administrative Judge