

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

NAICS APPEAL OF:

SD Titan Resources/SM&MM,

Appellant,

Solicitation No. W912DR-1-B-0003

U.S. Army Corps of Engineers

Baltimore, Maryland

SBA No. NAICS-5187

Decided: January 26, 2011

APPEARANCES

Wayne T. Lawrence, Partner, Dallas, Texas, For SD Titan Resources/SM&MM,  
Appellant

Donna Leketa, Contracting Officer, Baltimore, Maryland, For the U.S. Army Corps of  
Engineers

Brendan Krause, Contracts Administrator, Malvern, Pennsylvania, for Vanguard Modular  
Building Systems, LLC

Damon T. Pross, President, Bel Air, Maryland, for Modular Genius, Inc.

DECISION

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 the Contracting Officer's designation of North American Industry Classification System (NAICS) code 321992, Prefabricated Wood Building Manufacturing, to the subject solicitation was clearly erroneous. *See* 13 C.F.R. § 134.314.

III. Background

A. Introduction

On December 29, 2010, the U.S. Army Corps of Engineers in Baltimore, Maryland

(Corps), issued Solicitation No. W912DR-1-B-0003 (IFB) for leased modular facilities. The Contracting Officer (CO) set the contract totally aside for small business and designated NAICS code 321992, Prefabricated Wood Building Manufacturing, with a corresponding size standard of 500 employees, as the applicable code for this procurement.

On January 7, 2011, SD Titan Resources/SM&MM (Appellant) filed an appeal, asserting that the appropriate NAICS code for this procurement is 531120, Lessors of Nonresidential Buildings (except Miniwarehouses), with a corresponding size standard of \$7 million in average annual receipts.

### B. Scope of Work

The scope of work included in the IFB provides that the base year of the contract includes the installation and one year lease for 82,800 square feet of classrooms, meeting rooms, and office space. There are three options, each consisting of an additional year's lease, and a fourth option, consisting of removal of the facility at the end of the lease. (IFB § C ¶ 1.b.)

Offerors must include floor plans in their proposals to accommodate the required spaces identified in the IFB, and the base year leased modular facilities must correspond to those floor plans. The scope of work provides:

The contractor shall furnish all plant, labor, materials, and equipment to perform all work necessary to design, construct, transport, erect, maintain the building and equipment, and remove the facilities identified herein. Additional building requirements include, but are not limited to, lighting, power distribution, heating and air-conditioning systems, water and sanitary systems, wood steps/decks/ramps, and fire sprinkler and alarm system. The contractor shall be responsible for providing facilities meeting the requirements listed herein.

(IFB § C ¶ 1.f.) The scope of work indicates that the contractor is responsible for the removal of the modular facility upon completion of the lease. (IFB § C ¶ 1.g, 1.j.) The contractor is also responsible for the design of the modular facility. (IFB § C ¶ 2.a.) The contractor is not responsible for grading and stabilizing the site, but is responsible for providing a sidewalk and driveway, any foundation necessary, and communication lines. Water and sewer lines will be provided within proximity of the modular facility, but connection of the lines is the responsibility of the contractor. (IFB § C ¶ 2.b.) The scope of work includes architectural, structural, mechanical, modular, electrical, and communications specifications with which the contractor must comply. (IFB § C ¶ 2.c-h.) The modular specifications do not indicate that the facilities must be constructed of wood. The only time wood is mentioned is in the requirement that the contractor provide treated wood decks, ramps, and steps for the facility. (IFB § C ¶ 2.f.)

### C. The Appeal

Appellant asserts the NAICS code assigned to a particular procurement should reflect the most prevalent aspect of the project and claims leasing is the primary activity required by the IFB because the Corps plans to lease a modular building from the successful offeror.

Accordingly, Appellant argues the government should use a leasing code for the IFB. Appellant contends the use of a manufacturing code for this procurement would only be appropriate if the Corps were purchasing the modular building. Appellant indicates, without providing any evidence thereof, that “a recent project at Paxt River Naval Station” sought modular facilities and assigned a leasing NAICS code. On these bases, Appellant proposes that NAICS code 531120, Lessors of Nonresidential Buildings (except Miniwarehouses), is the most appropriate code for the instant procurement.

#### D. Vanguard's Response

On January 19, 2011, Vanguard Modular Building Systems, LLC (Vanguard), a potential offeror on the instant IFB, filed a response to the appeal. Vanguard disagrees with Appellant and asserts the CO designated the appropriate NAICS code for this IFB. Vanguard asserts the project requires three separate types of work: a manufacturing component, a construction component, and a lease component. Thus, Vanguard suggests this is a hybrid procurement that is most properly classified under the NAICS code chosen by the CO—321992, Prefabricated Wood Building Manufacturing—because the services required go beyond the scope of the leasing NAICS code proposed by Appellant. Vanguard explains that the manufacturing NAICS codes comprise the transformation of materials into new products and include the assembling of component parts.

Vanguard explains that the successful offeror will manufacture the modular building, ship the unit to the project site, assemble the building at the project site, and perform construction activities such as connecting electrical and plumbing services to the building. Vanguard acknowledges that NAICS code 321992 excepts construction activities, but contends any construction services are merely ancillary. Because the contractor will manufacture the components of a new product at a location separate from the project site, Vanguard contends the project is properly classified under NAICS code 321992, a manufacturing NAICS code. Vanguard further contends that even though the successful contractor would also oversee the lease of the building and dismantle and remove the building at the end of the lease, the primary contract task is the assembly of the modular building because it is the basis for all the other subsequent contract tasks. Vanguard requests that OHA deny the instant appeal.

#### E. Appellant's Reply

On January 20, 2011, Appellant filed a reply asserting that Vanguard's argument conflicts with past precedent. Appellant references General Services Administration (GSA) Solicitation No. 9MD2192, which seeks a contractor to provide buildings for lease, in support of its argument that the IFB at issue should be conducted under a leasing code, not a manufacturing code.<sup>1</sup> Appellant also filed a second reply on the same date, in which it references (without

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<sup>1</sup> A reply may generally only be filed with permission of the administrative judge. 13 C.F.R. § 134.206(e). I note Appellant did not request permission to file its reply. Nonetheless, I admit it to the record as support for the contention in Appellant's original appeal petition that other recent similar procurements have used leasing NAICS codes.

citation) Federal Acquisition Regulation (FAR) § 19.502-2(c), which provides that “any concern proposing to furnish a product that it did not itself manufacture must furnish the product of a small business manufacturer.” Appellant argues that not all firms submitting offers for this procurement are manufacturing the product being acquired.<sup>2</sup>

#### F. CO's Response

On January 20, 2011, the CO filed her response to the appeal. The CO explains that the contractor must supply a large number of custom manufactured modular units and install the units to create a single training facility, which the Corps will lease. The CO also notes that the IFB requires additional services, such as the installation of sidewalks and driveways, the connection of utility lines, the installation of a fire suppression system, and the eventual removal of the temporary modular units.

The CO acknowledges that the IFB calls for multiple products and services, and cites FAR § 19.102(d), which provides that a CO should apply the NAICS code that encompasses the industry accounting for the greatest percentage of the contract price. The CO asserts that an independent government estimate determined that approximately 60% of the contract price would cover the furnishing and installing of the customized modular units, the connection of utility lines, the installation of communication lines, and the removal of the temporary facility. The remaining 40% of the contract would cover the base year lease and the three option year leases. Accordingly, the CO reasons the manufacture of the custom modular units represents a greater percentage of the contract value than the lease, especially the base year lease alone.

The CO also argues the leasing code proposed by Appellant is inappropriate for the IFB because it is comprised of industries that lease real estate. The CO contends the Corps will not lease real estate pursuant to this contract, and the funding for the project allows expenditures for supply items, not for the leasing of real property. The CO also disputes Appellant's other arguments, contending Appellant improperly ignores the IFB's requirement of custom-made modular units and instead focuses only on the leasing aspect of the procurement. Finally, the CO emphasizes that the designation of a reasonable NAICS code is a matter within the CO's discretion. The CO contends that simply because another agency used a leasing NAICS code on a procurement for the lease of modular facilities does not require the Corps to do so. The CO explains that many factors influence a CO's NAICS code decision, and all procurements have different requirements.<sup>3</sup>

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<sup>2</sup> Again, Appellant failed to seek permission to file this reply. Because the reply is very brief and does not raise any new issues, I will admit it to the record.

<sup>3</sup> The CO also moves to dismiss the appeal because it did not contain the CO's correct contact information. The CO argues the appeal should be dismissed for failing to comply with 13 C.F.R. § 134.305(a), which requires this information. The appeal petition did include contact information for the CO listed on the IFB, and dismissal would be too harsh a sanction for such an offense. Accordingly, the CO's motion is denied.

### G. Modular Genius, Inc.'s Response

On January 20, 2011, Modular Genius, Inc. (Modular Genius) filed a response to the appeal petition. Modular Genius supports Appellant's position and agrees that the CO should have designated NAICS code 531120 for this procurement. Modular Genius contends the most prevalent aspect of the project is the lease of the modular building and emphasizes that there would be adequate small business participation if the NAICS code is changed. Modular Genius requests that OHA grant the appeal and change the NAICS code.

#### IV. Discussion

Appellant filed the instant appeal within ten days after issuance of the solicitation. 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*,<sup>4</sup> 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.

The *NAICS Manual* description of the NAICS code designated by the CO, 321992, Prefabricated Wood Building Manufacturing, provides that this industry comprises “establishments primarily engaged in manufacturing prefabricated wood buildings and wood sections and panels for prefabricated wood buildings.” *NAICS Manual*, at 279.

The *NAICS Manual* description of Appellant's requested NAICS code, 531120, Lessors of Nonresidential Buildings (except Miniwarehouses), provides that this industry comprises:

establishments primarily engaged in acting as lessors of buildings (except miniwarehouses and self-storage units) that are not used as residences or dwellings. Included in this industry are: (1) owner-lessors of nonresidential buildings; (2) establishments renting real estate and then acting as lessors in subleasing it to others; and (3) establishments providing full service office space, whether on a lease or service contract basis. The establishments in this industry may manage the property themselves or have another establishment manage it for them.

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<sup>4</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*).

*NAICS Manual*, at 710.

The CO must assign the NAICS code that “best describes the principal purpose of the product or service being acquired.” 13 C.F.R. § 121.402(b). Upon consideration of the IFB, the *NAICS Manual*, and the positions of the parties, I conclude the CO's designation of NAICS code 321992 was clearly erroneous. I also conclude NAICS code 531120, proposed by Appellant, is inappropriate for the instant procurement. Instead, I find NAICS code 236220, Commercial and Institutional Building Construction, with a corresponding \$33.5 million annual receipts size standard, best describes the principal purpose of the IFB.

The *NAICS Manual* description of NAICS code 236220, Commercial and Institutional Building Construction, provides that this industry comprises:

This industry comprises establishments primarily responsible for the construction (including new work, additions, alterations, maintenance, and repairs) of commercial and institutional buildings and related structures, such as stadiums, grain elevators, and indoor swimming facilities. This industry includes establishments responsible for the on-site assembly of modular or prefabricated commercial and institutional buildings. Included in this industry are commercial and institutional building general contractors, commercial and institutional building operative builders, commercial and institutional building design-build firms, and commercial and institutional building project construction management firms.

*NAICS Manual*, at 175.

I find the principal purpose of the procurement at issue is to construct customized modular space. The contractor must design and build the custom modular units, connect utility (including water and sewer) lines and communications lines, provide any foundation necessary, and provide sidewalks and driveways. The solicitation thus requires a great deal more than merely the delivery of the sections and panels of prefabricated buildings. Rather, it requires extensive construction services, and the *NAICS Manual* description of code 236220 specifically provides that the industry “includes establishments responsible for the on-site assembly of modular or prefabricated commercial and institutional buildings.” It is precisely this type of on-site assembly that is required by this solicitation. Therefore, I do not agree with Vanguard that the construction services required by the IFB are ancillary to the provision of the modular facility.

I also disagree with Appellant's contention that leasing is the primary component of the procurement. The solicitation requires the contractor to construct the buildings before leasing them to the Corps. Thus, I find the leasing component of the IFB is ancillary to the construction of the modular facility. Further, the NAICS code proposed by Appellant relates primarily to the lease of real estate and existing buildings. Here, the Corps is not attempting to lease real estate or existing buildings. The Corps seeks a very specific, temporary space and already owns the real estate upon which it will be constructed. Accordingly, Appellant's preferred NAICS code 531120 is not applicable to this procurement.

I find the CO's designation to be erroneous because nowhere does the solicitation require that the modular facility be constructed from wood. The only things that must be specifically constructed from wood are the decks, ramps, and steps for the facility. NAICS code 321992 encompasses only the manufacturing of prefabricated wood buildings. If there is no requirement that the facility must be composed of wood, this NAICS code cannot apply. Moreover, not only does the solicitation not require wood, it also does not require manufacturing. The contractor will design and construct the modular facility, but it is not clear that the contractor is required to manufacture the building components.

Finally, Appellant argues that because other agencies have used leasing NAICS codes on similar procurements, a precedent has been set and I should reverse the CO's NAICS code designation for this procurement. OHA is not required to follow NAICS code designations related to procurements that are not before this office for consideration. *NAICS Appeal of Eagle Design & Management, Inc.*, SBA No. NAICS-4521, at 5-6 at (2002). Second, I agree with the CO that every solicitation is different and each must be considered individually. *Id.* Upon consideration of the specific procurement at issue, I find Appellant's proposed NAICS code to be inappropriate, and I find the CO's NAICS code designation was based upon clear error. Instead, I conclude NAICS code 236220 best fits the requirements of the IFB.

#### V. Conclusion

The CO's NAICS code designation was based upon clear error of fact or law, and the code proposed by Appellant does not describe the primary purpose of the procurement at issue. NAICS code 236220, Commercial and Institutional Building Construction, with a corresponding \$33.5 million annual receipts size standard, best describes the primary purpose of the IFB. Consequently, because this decision is being issued before the close of the solicitation, the CO MUST amend the RFP to change the NAICS code from to 321992 to 236220. 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