

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

NAICS APPEAL OF:

Dellew Corporation,

Appellant,

Solicitation No. GS-07P-12-JU-D-0038

General Services Administration  
Public Building Service  
Fort Worth, Texas

SBA No. NAICS-5358

Decided: May 30, 2012

APPEARANCES

Robert Ervin, Dellew Corporation, for Appellant

Stephen Carroll, Contracting Officer, for the General Services Administration

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 561210, Facilities Support Services, to a procurement for operation and maintenance services is based on a clear error of fact or law.

III. Background

A. The Solicitation

On April 27, 2012, the General Services Administration (GSA), Public Building Service, in Fort Worth, Texas, issued Solicitation No. GS-07P-12-JU-D-0038 (RFP) for operation and maintenance services for three buildings. The Contracting Officer (CO) set the procurement

aside for small businesses and designated NAICS code 561210, Facilities Support Services, with a corresponding \$35.5 million annual receipts size standard, as the appropriate code for the procurement.

The Performance Work Statement (PWS) requires the Contractor to provide all management, supervision, labor, materials, supplies, repair parts, tools and equipment for the operation and maintenance of three Federal buildings in Fort Worth, Texas. The work will include the repair of equipment and systems located within the buildings. The three buildings are the Fritz G. Lanham Federal Building, with 670,140.73 square feet, the Fort Worth Federal Courthouse, with 119,274.64 square feet, and the Federal Parking Garage, with 7,980.25 square feet.

The Contractor will be responsible for the electrical systems and equipment; the Heating, Ventilating and Air Conditioning (HVAC) systems and equipment; mechanical, plumbing and energy management control systems and equipment; architectural and structural systems, fixture and equipment; service call desk operations; maintenance of landscape irrigation systems; locks, keys, and keycard systems; water treatment equipment and systems; sewage equipment and systems; storm drainage equipment and systems; reporting elevator problems and service calls; flags and flagpoles; kitchen appliances and equipment; roof and roofing systems; parking, including striping and signage; building directory board; and building signage.

The Contractor will be responsible for routine preventative maintenance. The Contractor must provide transition startup services prior to contract start date to assist the transition. During this period the Contractor must develop a new, updated building operating plan; inspect all equipment and systems; review work order history; and develop an initial deficiency report.

The Contractor must provide staff to ensure services are continued without disruption. The Contractor must operate a service call and administrative support function. The staff must have sufficient skills to immediately respond to a variety of service calls. The Contractor must ensure its employees maintain communications with the Government. Then the Contractor will establish and implement a quality control plan. The Contractor must prepare and submit a building operating plan. The Contractor is responsible for maintaining and updating the inventory of building equipment. The Contractor will submit monthly progress reports, describing the status of work orders, condition of equipment, itemizing work performed, and describing corrective actions taken. The Contractor will maintain a log of all repairs. The Contractor must maintain a comprehensive reference library. The Contractor must tour the major building equipment at set frequencies. The Contractor will tour twice daily for major HVAC, fire alarm system controls panels, and steam system reducing and regulation functions, weekly for other HVAC equipment, bimonthly for battery systems, and monthly for electrical equipment.

The Contractor is responsible for establishing an effective system for scheduling and performing preventive maintenance on all building equipment and systems requiring such a procedure. The Contractor must provide equipment, chemicals and services required to control corrosion, scale, algae and bacterial growth in HVAC systems. The Contractor must replace failed lamps. The Contractor must perform architectural and structural systems maintenance. The Contractor is responsible for furnishing and installing the flags at all buildings.

The Contractor will perform repairs as required. The Contractor will keep all fire protection and safety systems and equipment fully functional at all times. The PWS describes at great length the detailed requirements the Contractor must meet for maintaining the fire safety systems.

### B. The Appeal

On May 9, 2012, Dellew Corporation (Appellant) filed a NAICS code appeal with the Office of Hearings and Appeals (OHA). Appellant contends the NAICS code 561210 is not applicable to this procurement. Appellant requests that OHA change the NAICS code assigned to the procurement to 238220, Plumbing, Heating, and Air Conditioning Contractors, which has a \$14 million annual receipts size standard.

Appellant asserts, based upon its 18 years of experience with similar work, the HVAC Mechanical and Plumbing work on commercial facilities of the size as the Federal buildings in Fort Worth, Texas, accounts for more than 50% of the workload.

Appellant asserts that it is currently performing Building Operations and Maintenance Services at the Social Security Administration building in Baltimore, Maryland. The facility has 1.3 million square feet. On this contract, HVAC Mechanical and Plumbing accounts for 50% of the workload. Appellant did not identify the NAICS code for this contract.

Appellant further argues that similar solicitations have been issued under NAICS code 238220, and so this RFP should also be so classified. Appellant asserts the GSA issued a contract for operations and maintenance on the Federal Building in San Francisco, California, under NAICS code 238220. This facility is 900,000 square feet. The scope of work includes electrical systems and equipment; HVAC, mechanical, plumbing and building automation systems; fire protection and life safety systems and equipment; all control systems; architectural and structural systems; landscape irrigation; window washing; locks and keycard systems. Appellant further asserts it submitted a bid proposal for this contract. Appellant asserts that 50.4% of the items on the equipment list, and thus a majority of the workload, is attributable to HVAC/Plumbing.

Appellant also points to a GSA procurement for Building Operations and Maintenance Services for the Federal buildings in Flint and Saginaw, Michigan, issued under NAICS code 238220. These buildings total 82,000 square feet. This contract includes HVAC systems, chilled water system; electrical systems; heating systems, sanitary systems; fire safety systems. Appellant asserts its analysis of this contract establishes that even on a smaller facility, 55% of the contract cost is attributable to HVAC.

Appellant also points to a Social Security Administration (SSA) procurement for operations and maintenance services at the SSA building in Jamaica, New York. This facility has 900,000 square feet of space, of which 650,000 square feet are occupied. The services are similar in size and scope to those of the instant procurement. Appellant asserts HVAC Mechanical and Plumbing are more than 50% of this work.

Appellant argues that its experience with this type of work and these examples establish that the appropriate NAICS code for this procurement is 238220.

#### B. The Contracting Officer's Response to the Appeal

On May 10, 2012, the CO issued Amendment No. 2 to the solicitation, informing all prospective offerors and other parties of the instant appeal, and suspending the closing date for the solicitation in accordance with 13 C.F.R. § 121.1103(c)(1)(i). On May 24, 2012, the CO responded to the appeal. The CO asserts that NAICS code 561210 best describes this requirement as a whole because the contract requires the contractor to provide a number of support services for the three Federal buildings. The work required includes a variety of services including predictive maintenance (that is, maintenance whose scheduling derives from monitoring the operating condition of the equipment), service call and administrative support, use of the Computerized Maintenance Management System (CMMS), submission of progress reports, maintaining repair logs, tours and building inspections, signage and directories, and safety and environmental management.

The CO asserts contractors associated with NAICS code 561210 provide a combination of support services within facilities in support of maintenance and operation without getting involved in their client's core business. The CO determined that to obtain a highly competent contractor who would provide quality services, GSA would need a contractor whose primary business activity is to provide and manage support services for the operation of facilities similar to the three Federal buildings serviced by this procurement. Conversely, contractors operating under NAICS code 238220 are operating under a Construction NAICS code and would target specialty trade contractors who primarily perform construction subcontracts.

The CO also asserts that NAICS 561210 best describes the contract requirement because specialty trade services such as plumbing, electrical and HVAC maintenance do not account for more than 50% of the contract value. The CO asserts the historical data for this particular contract evidence that the costs are distributed among a number of services which account for the majority of services for this contract. These services include 561622, Locksmith Services; 561790, Other Services to Buildings; and 562910, Remediation Services. Ancillary codes in support of this requirement include 238220; 238210, Electrical Contractors; 541350, Building Inspection Services; and 811310, Commercial and Industrial Machinery and Equipment Repair.

The CO further asserts that Appellant's argument that HVAC/Plumbing services account for more than 50% of the services in the contract for the Social Security Administration building in Baltimore, Maryland, is deficient because this account does not reflect the entire scope of work, work load, nor contract costs, nor does the example specify the NAICS code used on the contract.

Finally, the CO provides examples of a number of procurements for Building Operations and Maintenance which are currently being solicited under NAICS code 561210. These include contracts for the Prettyman Courthouse in Washington, DC, various location under GSA's Richmond, Virginia, field office; various Federal facilities in New Orleans, Louisiana; the

Federal Center in St. Louis, Missouri; and the Robert A. Young Federal Center in St. Louis, Missouri.

#### IV. Discussion

Appellant filed its appeal within ten days after issuance of the solicitation. Thus, the appeal is timely. 13 C.F.R. § 134.304(b). Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the NAICS code designation assigned to the solicitation 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). OHA's review is deferential and OHA will not modify the contracting officer's designated code unless OHA has a definite and firm conviction that a mistake has been committed. *NAICS Appeal of Energx, LLC*, SBA No. NAICS-4952 (2008). 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>1</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 code designated by the CO, 561210, Facilities Support Services, 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 providing facilities (except computer and/or data processing) operation support services and establishments providing private jail services or operating correctional facilities (i.e., jails) on a contract or fee basis are included in this industry.

*NAICS Manual*, at 767-68.

This NAICS code is further described by SBA's size regulations, which identify the requirements for classifying a procurement under this NAICS code:

NAICS code 561210 — Facilities Support Services:

- (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

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<sup>1</sup> Executive Office of the President, Office of Management and Budget, North American Industry Classification System-United States (2007), available at <http://www.census.gov> (*NAICS Manual*).

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, fn. 12.

The NAICS code Appellant proposes, NAICS code 238220, Plumbing, Heating, and Air-Conditioning Contractors, comprises:

[E]stablishments primarily engaged in installing and servicing plumbing, heating, and air-conditioning equipment. Contractors in this industry may provide both parts and labor when performing work. The work performed may include new work, additions, alterations, maintenance, and repairs.

*NAICS Manual*, at 189.

The description includes illustrative examples such as Cooling tower installation, HVAC contractors, Duct work, Fire sprinkler system installation, and Mechanical contractors. *Id.*

The CO's designated NAICS code, 561210, covers establishments which provide a combination of support services, but are not involved with the core business of the client. The description in the *NAICS Manual* mentions services such as janitorial, maintenance, security, and trash disposal as examples of services covered by the code. The procurement must cover at least three activities to be classified under the code, but, if any one activity accounts for 50% or more of the value of the procurement, the proper classification of the solicitation is for that industry, not 561210. Here, the solicitation clearly calls for a large number of different services, not merely HVAC, but also fire safety systems, architectural and structural systems, service call desk operations, landscape irrigation, water treatment, storm drains and sewer systems, locks and keycard systems, flags and flagpoles, kitchen appliances, roofs, parking, signage and the building directory. There are clearly more than three activities covered here.

However, Appellant argues that one activity, HVAC maintenance and repair, accounts for more than 50% of the value of this procurement. In order to support its argument, Appellant points to other procurements which it alleges are similar. However, the decision in a NAICS code appeal must be based upon the requirements in the solicitation at issue, not other procurements. The regulation used to require that previous government procurement classification for the same or similar services be considered in making a NAICS code

determination (13 C.F.R. § 121.402(b)), but the regulation no longer includes that requirement. 76 Fed. Reg. 5680, 5683 (February 2, 2011). Appellant's citations to other procurements for building maintenance do not carry the same weight they would prior to the revision of the regulation. Further, Appellant does not even provide the designated NAICS code for one of the procurements it relies upon. Even if the regulatory provision were still extant, the CO's citation to a number of similar Operations and Maintenance procurements classified under NAICS code 561210 refutes Appellant's evidence.

In order to prevail in a NAICS code appeal, Appellant must rely on the instant solicitation to show that the CO's designation is incorrect and that Appellant's proposed designation is correct. Appellant's citation to other procurements does not meet this standard. Appellant also offers only its own analysis of these procurements, and this is too sketchy to be probative. Appellant's submission does not reflect the entire scope of work for these procurements, nor does it include the work load and contract costs for them.

Further, Appellant simply asserts that its experience with this type of work establish that over 50% of the value of the procurement will be in HVAC. Without more supporting evidence than Appellant offers, this is a mere assertion, and thus cannot establish that the CO's designation was clear error. Appellant's assertion that 50.4% of the items on the equipment list for a similar procurement are HVAC-related does not establish that over 50% of the value of the entire procurement is attributable to HVAC. The proportion of equipment an activity requires does not establish the proportion of contract value. Conversely, the CO asserts that the historical record for this procurement establishes that no one service accounts for the majority of the costs for this contract. While more specificity in the CO's response would have been helpful, Appellant has simply not met its burden of establishing that the majority of the value of this procurement will be in HVAC services.

In addition, Appellant does not take into account the fact that one of the three buildings covered by this procurement is a parking garage, which would presumably have minimal HVAC requirements. Even under Appellant's own analysis, the inclusion of a parking garage in the calculation could easily bring the HVAC portion of the work below 50%. Appellant has not presented enough evidence and argument here to meet its burden of establishing definitely and firmly that the CO's designation is incorrect. Because Appellant has not met its burden, I must affirm the CO's designation. *NAICS Appeal of NVT Technologies, Inc.*, SBA No. NAICS-4570 (2003).

#### V. Conclusion

For the foregoing reasons, the instant appeal is DENIED, and the CO's designated NAICS code 561210, Facilities Support Services, with a corresponding \$35.5 million annual receipts size standard, is AFFIRMED.

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

NAICS-5358

CHRISTOPHER HOLLEMAN  
Administrative Judge