

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

NAICS APPEAL OF:

Dial General Engineering,

Appellant,

Solicitation No. VA786-12-R-0109
Department of Veterans Affairs
National Cemetery Administration
Stafford, Virginia

SBA No. NAICS-5375

Decided: July 10, 2012

APPEARANCES

Jonathan T. Williams, Esq., Peter B. Ford, Esq., PilieroMazza PLLC, Washington, DC
for Appellant DIAL General Engineering

Mary A. Moss, Contracting Officer, for the Department of Veterans Affairs

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 561730, Landscaping Services, to a procurement to Raise, Realign, and Reset Upright Marble Headstones, Flat Markers and Private Headstones onto a new marker grid support system at a National Cemetery, is based on a clear error of fact or law.

III. Background

A. The Solicitation

On June 4, 2012, the Department of Veterans Affairs, National Cemetery Administration (VA) issued Solicitation No. VA786-12-R-0109 (Solicitation) to Raise, Realign, and Reset Upright Marble Headstones, Flat Markers and Private Headstones onto a new marker grid support system at the San Francisco National Cemetery, San Francisco, California. The

Contracting Officer (CO) set the procurement totally aside for Service-Disabled Veteran-Owned Small Business Concerns and designated North American Industry Classification System (NAICS) code 561730, Landscaping Services, with a corresponding \$7 million annual receipts size standard as the appropriate NAICS code for this procurement. The Solicitation set a due date for offers of June 28, 2012, at 2:30 pm.¹

[*SH Note*--The following seven paragraphs are quotations from various parts of the solicitation even though there are no quotation marks or citations in the OHA's decision.]

The National Cemetery Administration honors veterans with a final resting place and lasting memorials that commemorate their service to our Nation. National cemeteries are national shrines. The standards of maintenance, appearance and operational procedures performed by the Contractor at this cemetery shall reflect this nation's concern for those interred there. For this reason, the Contractor's strict adherence to the specifications shall be required and shall be essential. This solicitation seeks a Contractor to raise, realign, and reset upright marble headstones, flat markers and private headstones onto a new marker grid support system at the San Francisco National Cemetery, San Francisco, California.

The Contractor shall provide all personnel, management, supplies, transportation, equipment and supervision necessary to perform and complete all work to construct a Marker Grid Support System that includes, but not limited to: clearing and grubbing vegetation, excavation and backfill, marker identification tagging, existing concrete demolition and disposal, marker handling, concrete foundation, concrete pre-cast marker support block, marker re-installation with leveling sand, marker cleaning, turf and restoration work. The contract performance period is 365 days from the date of contract award.

One of the most important considerations in erecting or emplacing a headstone or marker is that of precision in alignment. Much of the beauty that exists or should exist in a national cemetery is the direct result of perfectly aligned headstones and markers. It only takes one headstone or marker out of alignment to spoil the appearance of an entire row, and thereby, the appearance of the entire section. The appearance of the finished work shall be gravesite section(s) that shall be contoured grass landscape, with headstones set in a concrete footing system and the headstones aligned with each other in the vertical, horizontal, lateral and diagonal directions within the tolerances specified in the Solicitation.

The Contractor shall preserve and protect all structures, equipment, and vegetation (such as trees, shrubs, and grass) on or adjacent to the work site, which shall not be removed and which does not unreasonably interfere with the work required under this contract. The Contractor shall only remove trees when specifically authorized to do so, and shall avoid damaging vegetation that will remain in place.

The Contractor shall lay out the work and shall be responsible for all measurements in

¹ On June 21, 2012, the CO issued Amendment No. 2, stating "The hour and date specified in the solicitation for receipt of offers is delayed until further notice pending on the appeal."

connection with the layout(emphasis in the Solicitation). Where burial section grid monumentation exists, it shall be utilized for all headstone row layout work, and Contractor shall coordinate all associated field layout dimensions with COR prior to start of work. The Contractor shall furnish, at Contractor's own expense, all stakes, templates, platforms, equipment, tools, materials, and labor required to layout any part of the work. The Contractor shall be responsible for executing the work to the lines and grades needed to accomplish the work and to ensure that grave markers are correctly and accurately located on their associated gravesites.

The Contractor shall provide a competent and experienced Contractor Superintendent for not less than two (2) hours a day whenever work is being performed - other than trash and debris pick-up. In the absence of the Superintendent, the Contractor shall appoint a crew foreman or an employee who shall be responsible to insure that the work is being accomplished in an expeditious manner, is performed in accordance with the contract specifications and that the work shall progress without undue delay. The Contractor Superintendent shall have not less than three years experience as a direct supervisor of a commercial service operation that included surveying, soil excavation, site construction in industrial, commercial or public sites.

The Contractor will retain a registered professional land surveyor or registered civil engineer for layout control of work and to restore any grave section corner monuments that may be disturbed as a result of the Contractor's performance of the contract work.

The Solicitation includes the following Contract Line Item Numbers (CLINs):

CLIN	Description	Est. Qty.
0001	R&R Upright Headstones: Raise, Lower, Realign, Reset & Backfill Standard Upright Marble Headstones onto a new marker grid support system — Cemetery Sections as listed below under “Upright Burial Section Data”.	8,648
0002	R&R Flat Markers: Raise, Lower, Realign, Reset & Backfill Standard Flat Marker Marble Headstones onto marker grid support system — Cemetery Sections as listed below under “Flat Marker Burial Section Data”.	1,585
0003	R&R Private Headstones: Raise, Lower, Realign, Reset & Backfill Private Headstones onto a new marker grid support system — Cemetery Sections as listed below under “Private Headstones section Data”.	293
0004	Clean Upright Headstones: Clean Standard Upright Marble Headstones — Cemetery Sections as listed below under “Upright Burial Section Data”.	8,648
0005	Clean Flat Markers: Clean Standard Flat Marker Marble Headstones — Cemetery Sections as listed below under “Flat Marker Burial Section Data”.	1,585

0006	Clean Private Headstones: Cemetery Sections as listed below under “Private Headstones section Data”.	293
0007	Turf Renovation: Renovate & Replace Existing Cemetery Turf With New Sod — All Cemetery sections/areas as shown (Shaded) on cemetery site plan takeoff drawing and burial section list.	343,000 sq. ft.

B. The Appeal

On June 14, 2012, DIAL General Engineering (Appellant) filed the instant appeal. Appellant asserts the appropriate NAICS code is 238110, Poured Concrete Foundation and Structure Contractors, with a corresponding \$14 million annual receipts size standard.

Appellant argues the Solicitation is for a construction project, the principal purpose of which is to build a Marker Grid Support System (MGSS). Any landscaping-type services are ancillary to the construction of the MGSS. Appellant asserts the contract will entail surveying, demolishing and disposing of existing concrete, pouring new concrete foundations for the grid support block, and installing concrete pre-cast marker support blocks. Appellant asserts these services are covered in CLINs 0001 - 0003. The ancillary services of cleaning the headstones and replacing turf are covered by CLINs 0004 - 0007. Appellant points out that the precision created by the new support system is critical to the beauty called for in the Solicitation.

Appellant asserts that this is Phase 2 of a project to perform this work at the San Francisco National Cemetery. Appellant asserts it was the contractor for Phase 1, performed in a different area of the cemetery. Appellant asserts that VA has used other NAICS codes for this type of procurement, such as 821110, Cemeteries and Crematories, which has a corresponding \$19 million size standard.

Appellant argues that the principal purpose of this contract is the construction of a concrete foundation support system. Appellant asserts CLINs 0001 - 0003 are for construction work, to construct a new concrete support system and to raise, realign and reset the grave markers. Appellant asserts the MGSS is a concrete berm installed to perfect alignment of headstones and flat markers in the cemetery. The Contractor must demolish or dispose of existing concrete, pour a concrete foundation of the grid support block, and install the concrete pre-cast marker support block. Solicitation, at 8. Appellant argues that this is construction work, not landscaping work.

Appellant also asserts this work represents the great majority of the anticipated contract value. Based upon Appellant's own estimates, CLINS 0001 - 0003 will represent nearly 87% of contract value. Appellant points to the fact the Solicitation requires key personnel with construction experience as evidence that a construction NAICS code is appropriate. Further, Appellant argues that contract's one-year performance period is more appropriate for a construction contract, than for a landscaping contract, which would normally include option

years.

Appellant asserts that the contract includes clauses which reflect a construction project, including FAR 52.243-4, the changes clause for construction contracts, FAR 52.236-21, Specifications and Drawing for Construction, and VAAR § 852.236-91, deeming the bidder to represent that it is a construction contractor. Appellant further argues that the inclusion of site maps and drawings as attachments which are, in effect, construction specifications.

Appellant thus argues this Solicitation is for a construction contract, and requires a construction NAICS code.

C. The Contracting Officer's Response

On July 3, 2012, the CO filed a Response to the appeal. The CO asserts that she chose NAICS code 561730 with the advice of counsel because landscaping contracts can contain some construction work. The CO asserts that while CLIN 0001 contains construction, it also covers traditional cemetery service work and cannot be totally assigned to construction. The CO argues that digging and filling trenches, laying gravel and soil work are all part of traditional cemetery service work. The CO further asserts that while in this case a concrete system is being used to stabilize the headstones, there is a competing system using a foam based substance and prefabricated blocks. The CO asserts the main requirement here is to raise and realign the headstones and markers.

The CO further argues that the key personnel do not dictate the NAICS code. The requirement is for personnel with the knowledge and experience necessary to complete the work called for in the solicitation. The CO asserts the limited period of time is not a justification for a construction NAICS code, because almost all contracts are for limited periods. The CO also asserts that many contracts have both construction and services FAR clauses incorporated into them, because contracting offices have the discretion to incorporate whatever clauses are necessary to convey the requirement to potential bidders. The CO further asserts that inclusion of a site map and drawings does not necessarily mean this is a construction contract.

The CO alleges that Appellant is the incumbent on Phase I of this project, but now exceeds the size standard for NAICS code 561730, and seeks a higher size standard. The CO argues that it is the contracting officer who has the authority to determine which NAICS code is appropriate for the contract. The CO further requests that if the appeal is granted, NAICS code 561730 be retained to allow the VA's traditional bidders to compete.

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*,² 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 selected by the CO, 561730, Landscaping Services, covers:

- (1) [E]stablishments primarily engaged in providing landscape care and maintenance services and/or installing trees, shrubs, plants, lawns, or gardens and
- (2) establishments primarily engaged in providing these services along with the design of landscape plans and/or the construction (i.e., installation) of walkways, retaining walls, decks, fences, ponds, and similar structures.

NAICS Manual, at 785-86.

Illustrative examples of work covered by this code include Arborist services, Cemetery plot care services, Fertilizing lawns, Garden maintenance, Landscape care and maintenance, Landscape contractors (except construction), and Lawn care services. *NAICS Manual*, online.

The NAICS code Appellant proposes, 238110, Poured Concrete Foundation and Structure Contractors, covers:

[E]stablishments primarily engaged in pouring and finishing concrete foundations and structural elements. This industry also includes establishments performing grout and shotcrete work. The work performed may include new work, additions, alterations, maintenance, and repairs.

NAICS Manual, at 183.

Illustrative examples of work covered by this code include Concrete pouring and finishing, Concrete work (except paving), Footing and foundation concrete contractors, and Foundation, building, poured concrete contractors. *NAICS Manual*, at 183, and online.

A review of the Solicitation convinces me that Appellant is correct, and that 238110 is the correct NAICS code here. NAICS code 561730 covers landscaping services. These services cover the care of lawns, gardens, trees, shrubbery, and other plants. In essence, establishments

² 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*).

under 561730 are caring for various forms of plant life and vegetation.³

However, this procurement does not call for the design of landscape plans, the maintenance of landscaping, planting vegetation, or continuing maintenance of the vegetation around cemetery plots. While this Solicitation does require some clearing and grubbing of vegetation and replacement of turf, these activities are not the heart of this procurement. Indeed, the Solicitation explicitly forbids the moving of trees and existing plantings. The Contractor here is to excavate and backfill around the grave markers, demolish and dispose of the existing concrete berm that holds the markers in place, and pour the concrete foundation for and construct a new berm and re-install the markers. The markers are to be raised and realigned from their current positions.

CLIN 0001 requires the construction of a MGSS to raise and realign 8,648 upright headstones. CLIN 0002 requires a MGSS to raise and realign 1,585 flat grave marker headstones, and CLIN 0003 requires the same work for 293 private headstones. It is clear that this work is primarily construction work. While there will be some landscaping type work involved, the major part of the work will be constructing the concrete berm upon which the headstones will be raised and realigned. This is clearly the major part of the work. The work in cleaning the headstones (CLINs 0004 - 0006) and renovating turf (CLIN 0007) clearly is not as labor intensive, nor requires as much materials and equipment.

The Solicitation, far from calling for new plantings, requires the Contractor to leave existing trees, shrubbery and other plantings alone unless authorized, meaning that there is an existing landscape plan which is not to be disturbed. The Solicitation emphasizes the Contractor's obligation to ensure the grave makers are all correctly located, and properly aligned. These are not concerns regarding landscaping and the maintenance of vegetation. Rather, these are concerns regarding the construction of the berm and the alignment of the grave markers placed into it, and thus establishes that the instant Solicitation is for a construction contract, using poured concrete to create a foundation for the markers.

While there are ancillary services to the construction, the fact that they are necessary to the procurement does not justify classifying the procurement based upon the ancillary services. *NAICS Appeal of EnergX, LLC*, SBA No. NAICS-4952, at 11 (2008), citing *NAICS Appeal of Spherix, Inc.*, SBA No. NAICS-4626, at 5 (2004).

The CO's own response actually confirms that this is a construction contract. The CO admits that a concrete system is to be installed. Appellant has submitted information on its own estimates that the great majority of the work here will be construction work under CLINS 0001 to 0003, and the CO does not contest this submission. I find this persuasive that the heart of this contract will be construction work. The inclusion of cemetery plot care services under this code clearly covers the care of the vegetation around cemetery plots, to ensure a visually pleasing aspect to the plots.

³ Services such as the designing of landscaping plans, gardening, planting and continuing maintenance of the landscape are part of Landscaping Services. *See NAICS Appeal of Brian Scott*, SBA No. NAICS-5150, at 4 (2010).

The CO refers to another type of system, using foam, to stabilize headstones. Nevertheless, the Solicitation does not mention the use of that system, but specifies that concrete shall be used for this procurement. Accordingly, this procurement requires concrete construction in order to raise and realign the headstones and markers.

The CO states that the key personnel's qualifications are required to complete the work called for in the Solicitation. The Solicitation requires that the Contractor Superintendent have construction experience. While it is true that the key personnel requirements alone do not dictate the NAICS code, they are part of the Solicitation, and the requirement for construction experience supports the selection of a construction NAICS code.

The CO admits that she chose the clauses necessary to convey the requirement to potential bidders. As Appellant points out, the Solicitation includes FAR clause 52.243-4, the changes clause in construction contracts. Solicitation at 84-85. FAR requires the use of this clause in contracts for dismantling, demolition or removal of improvements, and construction. FAR 43.205(d). Similarly, the Solicitation includes FAR clause 52.236-21 "Specifications and Drawings for Construction". Solicitation, at 83-84. FAR requires the use of this clause when a construction or demolition contract is contemplated. FAR 36.521. The Solicitation also includes VAAR clause 852.236-91. Solicitation, at 88-89. This clause provides that the signing of a bid is a representation that the bidder is a construction contractor. VAAR 852.236-91(a)(1). This clause is to be inserted into construction contracts. VAAR 836.579. It is thus clear that the CO has chosen to include, as necessary to convey the requirements of this contract, clauses meant only for construction contracts. The inclusion of these clauses in the contract thus supports the designation of the construction NAICS code.

While the CO is correct that she has the authority to determine the NAICS code designation for this procurement, this Office has appellate jurisdiction over that determination. 13 C.F.R. § 134.102(k); FAR 19.303(c). The CO's assertion that Appellant is merely seeking a larger size standard is inapposite. NAICS code appellants are usually seeking a different size standard from the one selected; the issue to be decided is whether the NAICS code designated by the CO is appropriate. Nor do I see any way of assigning two NAICS codes to this procurement, as the CO requests. In any event, the CO's concern that bidders will be excluded by the 238110 NAICS code is misplaced. Under the larger size standard, any bidder who would have been eligible under NAICS code 561730 will remain eligible under NAICS code 238110.

V. Conclusion

For the above reasons, I GRANT the instant appeal, REVERSE the CO's NAICS code designation, and designate NAICS code 238110, Poured Concrete Foundation and Structure Contractors, with a corresponding \$14 million annual receipts size standard, as the appropriate NAICS code for this procurement.

Accordingly, because this decision is being issued before the close of the solicitation, the CO MUST amend the solicitation to change the NAICS code designation from 561730 to 238110. FAR § 19.303(c)(5); 13 C.F.R. § 134.318(b); *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. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge