

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

NAICS APPEAL OF:

Pacific Shipyards International, LLC,

Appellant,

Solicitation No. N68836-13-R-0017

U.S. Department of the Navy

Navy Supply Systems Command

SBA No. NAICS-5464

Decided: May 8, 2013

APPEARANCES

Robert E. Korroch, Esq., William A. Wozniak, Esq., Williams Mullen PC, Newport News, Virginia, for Appellant

Philip E. Adams, Esq., Office of the General Counsel, U.S. Department of the Navy, Jacksonville, Florida

Lisa B. Smith, Senior Contracts Administrator, C-Port Marine Services LLC, Anchorage, Alaska

J. William Eshelman, Esq., Butzel Long Tighe Patton PLLC. Washington, D.C., for Metson Offshore, Inc.

DECISION¹

I. Introduction and Jurisdiction

On April 19, 2013, the U.S. Department of the Navy (Navy) issued Request for Proposals (RFP) No. N68836-13-R-0017, seeking a contractor to provide maintenance, operations and logistics support services at Joint Base Pearl Harbor Hickam (JBPHH), Hawaii. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 488310, Port and Harbor Operations,

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded counsel an opportunity to request redaction of sensitive information from the published decision. OHA received one request for redactions and considered that request in redacting the decision. OHA now publishes a redacted version of the decision for public release.

with an associated size standard of \$35.5 million average annual receipts.

On April 29, 2013, Pacific Shipyards International, LLC (Appellant) filed this appeal. Appellant asserts that the correct NAICS code for the procurement is 336611, Ship Building and Repairing, with a size standard of 1,000 employees. For the reasons discussed *infra*, the appeal is denied.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (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. Appellant filed the instant appeal within ten days after issuance of the RFP, so the appeal is timely. Federal Acquisition Regulation (FAR) 19.303(c); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Solicitation

The RFP included a Performance Work Statement (PWS) describing contractual requirements. According to the PWS, “[t]he goal of this contract is to have a logistics and maintenance program that ensures timely and effective vessel maintenance, logistic support, maintenance, vessel operation, dock master services, asset inventory and oil spill response capabilities.” (PWS § C1.1.2.) Work is divided into 16 “major functional areas”:

- C1.2.1.1 Maintenance services, maintenance, repair, and modifications to vessels, support equipment, and Government-furnished Equipment (GFE).
- C1.2.1.2 Transportation of vessels and support equipment.
- C1.2.1.3 Operation of vessels and support equipment.
- C1.2.1.4 Maintain control and accountability for all Government-furnished equipment and facilities that are in the custody of the contractor.
- C1.2.1.5 The Government reserves the right to substitute, add or subtract the number of vessels and Government-furnished equipment supporting the Government missions in accordance with (IAW) the Changes Clause.
- C1.2.1.6 Utilize a Government-approved maintenance and inventory tracking system for purchasing, maintenance data input, history, property control, inventory control, and financial tracking.
- C1.2.1.7 Dock Master Services for the maintenance of brows and platforms.
- C1.2.1.8 Facility Response Team Services (FRT), operation of oil spill equipment, containment, recovery, communications equipment and perform the task of Facility Response Team for Hazardous Materials and Oil Spill Response.
- C1.2.1.9 Management of all hazardous waste generated, to include disposal.
- C1.2.1.10 Development and implementation of a Safety Program.
- C1.2.1.11 Development and implementation of a Quality Control Program.
- C1.2.1.12 Development and implementation of a marine fuel and POL (Petroleum, oil and lubricants) management program.
- C1.2.1.13 Management of consumable vessel spare parts and material inventories.
- C1.2.1.14 Establishment and maintenance of inventory stocking levels.

C1.2.1.15 Maintain control of vessel configurations.

C1.2.1.16 The use of the Government-provided Maintenance Facility located in building 3 at JBPHH on Ford Island.

(*Id.* § C1.2.1.)

The PWS explains that the contractor is responsible for opening and closing barrier gates, as well as the removal of trash from the waters of the Pearl Harbor. (*Id.* §§ C6.3 and C6.4.7.) The contractor is also responsible for responding to oil spills, and transporting vessels in support of port operations. (*Id.* §§ C6.5.1 and C7.1.) As part of port operations support, the contractor will maintain port service equipment, and keep inventory of such equipment. (*Id.* § C8.0.) The contractor will provide maintenance of boats and ships, including necessary alterations, refurbishment and preventive measures. (*Id.* §§ C10.1 and C10.1.2.4.)

The PWS indicates that some “depot level maintenance” may be needed. (*Id.* §§ C1.2.1 and C12.5.) Depot level maintenance is defined as “[r]epair requiring the overhaul [or] upgrading [] of parts, assemblies, or subassemblies, and the testing and reclamation of rebuilding equipment as necessary, regardless of the source of funds for the maintenance or repair or the location at which the maintenance or repair is performed.” (RFP at 52.) Depot level maintenance “may require the use of outside resources, such as shipyards.” (PWS at § C12.5.) Examples of depot level maintenance include abrasive blasting, spray coatings, industrial welding, hull repairs, and fabrication. (*Id.* at § C10.1.1.) Depot level maintenance must be coordinated in advance with the Navy, and is subject to a ceiling of \$1,500,000. (*Id.* at § C12.5.)

The RFP will result in a firm-fixed-price contract, with a one year base period and four one-year options. (RFP at 60.)

B. The Appeal

On April 29, 2013, Appellant filed the instant appeal contending that NAICS code 488310 is unsuitable for the RFP. Appellant acknowledges that certain aspects of the RFP — such as the requirements for port security and a facility response team — can reasonably be characterized as “port operations.” (Appeal at 3.) Nevertheless, Appellant maintains, this procurement does not predominantly involve port operations. Rather, the RFP is heavily weighted with requirements pertaining to vessel repair and maintenance, activities which are commonly performed in a shipyard. Thus, in Appellant's view, the “more appropriate” NAICS code is 336611. (*Id.* at 2.)

Appellant states that the RFP “does not lend itself to an analysis whether support activities for port operations or shipyard activities account for the greatest percentage of contract value.” (*Id.* at 8.) However, it is clear that a significant portion of the contract is devoted to services commonly performed in shipyards, such as ship repair, alteration, refurbishment, and de-scaling. (*Id.* at 7.) The scope of the RFP includes depot level maintenance, which the RFP indicates may require the use of shipyards. (*Id.* at 3.) Further, the RFP requires that some key personnel have shipyard experience. (*Id.* at 8-9.)

Appellant asserts that the selection of NAICS code 488310 restricts competition, because Appellant and other small shipyards cannot qualify as small businesses under a \$35.5 million size standard. (*Id.* at 7.) Appellant also predicts that firms which are eligible under the \$35.5 million size standard may be incapable of successfully performing the contract. (*Id.* at 8.) Appellant urges OHA to conclude that NAICS code 336611 is correct for this solicitation.

C. Navy's Response

On May 2, 2013, the Navy responded to the appeal. The Navy contends that the NAICS code selected by the CO is correct and should be affirmed.

The Navy emphasizes that the RFP calls for a wide range of services, including vessel maintenance, vessel operation, equipment operation, vessel repair, vessel modifications, dock master services, assert inventory management, and oil spill response. (Navy Response at 3-4.) In addition, the contractor will be responsible for removing trash from the harbor, conducting underwater cleaning and inspections, and operating barrier gates for vessel traffic. (*Id.* at 4-5.) According to the Navy, these activities “are in direct support of 'water transportation' i.e., vessels that are entering, docking, or departing the port in Pearl Harbor.” (*Id.* at 4.) The NAICS code selected by the CO is therefore appropriate, because the code falls under NAICS subsector 488, Support Activities for Transportation. (*Id.* at 4.) The Navy asserts that NAICS code 488310 has been used for many other similar procurements, including a predecessor contract for similar services at Pearl Harbor. (*Id.* at 1-2.)

The Navy insists that the NAICS code advocated by Appellant is improper for the RFP. NAICS code 336611 is predominantly used for shipbuilding, and this RFP does not contemplate any shipbuilding or manufacturing. (*Id.* at 6) Further, although the RFP does call for depot level maintenance in “situations in which the Navy's provided facilities will not be sufficient or adequate to accommodate work that is required under the contract,” the Navy's Independent Government Cost Estimate (IGCE) indicates that this work constitutes no more than [XX]% of the total value of the contract. “[T]he remaining functional aspects of the contract do not involve any shipyard work or expertise whatsoever.” (*Id.* at 6.) The Navy also observes that not all ship repair or ship maintenance is conducted in a shipyard. According to the *NAICS Manual*, ship maintenance and repair not done in a shipyard is within the scope of NAICS subsector 488. (*Id.* at 6-7.)

The Navy also takes issue with Appellant's contentions that NAICS code 488310 restricts competition, and that firms which are eligible under NAICS code 488310 will be unable to perform the contract. The Navy maintains that NAICS code 488310 has been used for several other Navy procurements without incident. (*Id.* at 7-8.) “In all locations where the code has been used, the Navy's performance requirements and objectives were met.” (*Id.* at 8.)

The Navy attaches a sworn affidavit from the CO discussing the RFP, the IGCE, and the Navy's use of NAICS code 488310 on other procurements.

D. C-Port's Response

On May 3, 2013, C-Port Marine Services, LLC (C-Port), a prospective offeror, filed a response to the appeal. C-Port supports the Navy's choice of NAICS code 488310 for the procurement. (C-Port Response, at 1.) According to C-Port, this NAICS code allows for ample competition and supports small businesses. (*Id.*) Further, C-Port maintains that NAICS code 488310 more closely reflects the work required by the PWS, because the contract will not be predominantly performed in shipyards. (*Id.*)

E. Metson's Response

On May 6, 2013, Metson Offshore, Inc. (Metson), the incumbent on the predecessor contract, filed a response to the appeal. Metson opposes the appeal, and agrees with the CO's assignment of NAICS code 488310. (Metson Response, at 1.) Metson argues the Navy's prior experience with similar contracts, particularly in Pearl Harbor, and its past use of NAICS code 488310, establishes that no “clear error” exists on the part of the CO. (*Id.* at 2.) Metson asserts that Appellant misconstrues the solicitation by suggesting that depot level maintenance is a primary purpose of the procurement. In Metson's view, the RFP clearly contemplates that depot level maintenance will be performed only as needed. (*Id.* at 3.) Metson argues the solicitation requires ““ordinary maintenance”, which falls within the scope of NAICS code 488310. (*Id.* at 4.)

F. Navy's Supplemental Response

On May 6, 2013, the Navy filed a supplemental response to the appeal. The Navy asserts that the instant RFP is a procurement of services within the meaning of FAR 37.101. (Supplemental Response, at 1.) The Navy also points to *NAICS Appeal of King Aerospace, Inc.*, SBA No. NAICS-5159 (2010), to establish that, even if some portion of the procurement may be considered manufacturing, a manufacturing NAICS code is not necessarily appropriate. (*Id.*) The Navy argues that, just as in *King Aerospace*, the solicitation here is predominantly for support services, not manufacturing. (*Id.*) Because the depot level maintenance is a small percentage of the solicitation's work requirements, the Navy argues that the correct NAICS code is 488310, not 336611, a manufacturing NAICS code.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must show that the CO's NAICS code designation is based upon 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). SBA regulations do not require the CO to designate the perfect NAICS code. Rather, the CO must designate the NAICS code that best describes the principal purpose of the product or service being acquired in light of the industry description in the NAICS Manual, the description in the solicitation, and the relative weight of each element in the

solicitation. 13 C.F.R. § 121.402(b). OHA will not reverse a NAICS code designation “merely because OHA would have selected a different code.” *NAICS Appeal of Eagle Home Med. Corp.*, SBA No. NAICS-5099, at 3 (2009).

B. NAICS Manual² Descriptions

The NAICS code selected by the CO, 488310, Port and Harbor Operations, “comprises establishments primarily engaged in operating ports, harbors (including docking and pier facilities), or canals.” *NAICS Manual* 644. Index entries which refer to this NAICS code include:

Harbor maintenance services (except dredging)

Harbor operation

Port facility operation

Seaway operation

The NAICS code which Appellant advocates for the RFP, 336611, Ship Building and Repairing, “comprises establishments primarily engaged in operating a shipyard. Shipyards are fixed facilities with dry docks and fabrication equipment capable of building a ship, defined as watercraft typically suitable or intended for other than personal or recreational use. Activities of shipyards include the construction of ships, their repair, conversion and alteration, the production of prefabricated ship and barge sections, and specialized services, such as ship scaling.” *NAICS Manual* 477.

C. Analysis

I find no error in the CO's selection of NAICS code 488310, Port and Harbor Operations, for the instant procurement. According to the RFP, the contractor will perform a wide range of services that generally support port operations in Pearl Harbor. These services include vessel operation, logistic support, removal of trash from the harbor, responding to oil spills, and dock master services. *See* Section II.A, *supra*. Thus, NAICS code 488310 is suitable for this RFP. Appellant itself recognizes that the RFP, to a large extent, calls for port operations activities. (Appeal at 3, 8.)

In seeking to overturn the CO's chosen code, Appellant contends that a significant portion of the contract is devoted to “depot level maintenance,” commonly performed in shipyards. It is true that, under SBA regulations and OHA case law, a procurement which predominantly calls for the rebuilding of equipment on a factory basis — in effect calling for depot level maintenance — is properly classified under a manufacturing NAICS code. 13 C.F.R. § 121.201 n.6; *NAICS*

² Executive Office of the President, Office of Management and Budget, *North American Industry Classification System* (2012) (*NAICS Manual*), available at www.census.gov/eos/www/naics/.

Appeal of King Aerospace, Inc., SBA No. NAICS-5159 (2010). In the instant case, though, although the scope of the RFP includes depot level maintenance, such work constitutes a relatively small portion of the total procurement. As the Navy emphasizes, the IGCE states that depot level maintenance will account for no more than [XX]% of the total acquisition. See Sections II.C and II.F, *supra*. Similarly, the RFP places little emphasis on depot maintenance, not even listing it among the “major functional areas” addressed by the procurement. The RFP contemplates that, in addition to depot level maintenance, the contractor will also perform regular repairs and maintenance. However, SBA regulations make clear that “[o]rdinary repair services or preservation are not considered rebuilding.” 13 C.F.R. § 121.201 n.6. In short, then, this procurement does not predominantly call for depot level maintenance, such that assignment of a manufacturing NAICS code would be appropriate.³

Appellant also asserts that NAICS code 488310 restricts competition and increases the risk of unsuccessful contract performance. These contentions are meritless. Appellant offers no evidence to support these allegations, and, even if they were shown to be valid, OHA has held that such considerations “are not part of the criteria for selecting the NAICS code.” *NAICS Appeal of Circle Solutions, Inc.*, SBA No. NAICS-5181, at 14 (2011). Instead, by regulation, the CO must designate the NAICS code that best describes the principal purpose of the product or service being acquired. 13 C.F.R. § 121.402(b); FAR 19.102.

IV. Conclusion

OHA will not assign a different NAICS code to a procurement unless the CO's choice of NAICS code is shown to be clearly erroneous. *E.g.*, *NAICS Appeal of Katmai Simulations & Training*, SBA No. NAICS-5445, at 6 (2013). Here, the record establishes that the work sought is support for port and harbor operations, with a small percentage to include shipyard activities. As a result, the proper NAICS code for this procurement is 488310, Port and Harbor Operations, with an associated size standard of \$35.5 million average annual receipts. For these reasons, the appeal is DENIED. This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge

³ The Navy correctly observes that *King Aerospace* is analogous to the instant case. In *King Aerospace*, OHA found that the procurement at issue primarily involved routine aircraft maintenance and repair services, and was therefore properly classified under NAICS code 488190, Other Support Activities for Air Transportation, and not NAICS code 336411, Aircraft Manufacturing. *King Aerospace*, SBA No. NAICS-5159, at 6. OHA denied the appeal and affirmed the procuring agency's selection of NAICS code 488190.