

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

NAICS APPEALS OF:

RLB Contracting, Inc., *et al.*,

Appellants,

Solicitation No. AG-7217-S-14-0007  
U.S. Department of Agriculture  
National Resources Conservation Services  
Alexandria, VA

SBA No. NAICS-5577

Decided: July 18, 2014

APPEARANCES

Michael H. Payne, Esq., Robert G. Ruggieri, Esq., Cohen, Seglias, Pallas, Greenhall & Furman, P.C, Philadelphia, PA, for RLB Contracting, Inc. LLC

S. Leo Arnold, Esq., Ashley, Ashley & Arnold, Dyersburg, TN, For Inland Dredging Co., LLC

Antonio T. Robinson, Esq., U.S. Department of Agriculture, Washington, DC. for USDA

DECISION

I. Introduction and Jurisdiction

On June 4, 2014, the U.S. Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS) issued Solicitation No. AG-7217-S-14-0007 (the RFP) seeking a contractor for the South Lake Lery Shoreline and Marsh Restoration Project (Project) in Plaquemines Parish, LA. The procurement seeks construction activities to include 35,831 linear feet of lake rim embankment, 48,154 linear feet of earth containment dikes, and 3,983,600 cubic yards of marsh creation dredging. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding \$33.5 million annual receipts size standard.

On July 2, 2014, RLB Contracting, Inc. (RLB) filed an appeal challenging the CO's use

of NAICS code 237990. On July 3, 2014, Inland Dredging Company, LLC, (Inland) also filed an appeal challenging the use of NAICS code 237990 by the CO. On July 8, 2014, the appeals were consolidated, and RLB's appeal was reassigned from Judge Kenneth M. Hyde to me. Because both RLB and Inland make similar arguments, I will theretofore refer to them as Appellants.

Appellants assert USDA utilized the correct NAICS code, but that the work fit within the exception for Dredging and Surface Cleanup Activities, which utilizes a corresponding \$25.5 million annual receipts size standard. For the reasons discussed *infra*, the appeal is granted.

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. Appellants filed the instant appeal within ten calendar 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 RFP

The RFP provides a Bid Schedule, for offerors to submit their prices on the various items in the procurement. These items include Excavation, Access; Excavation, Marsh Creation Dredging, 3,983,600 cubic yards of material; Earthfill, Lake Rim Embankment, 35,831 linear feet; Earthfill, Containment Dikes, 48,154 linear feet; Excavation, Degrade Containment Dikes, 23,571 linear feet; and placement of Geotextile, 27,644 square yards. RFP, at 1.

Offerors are instructed to submit information on their past performance. The first type of performance they must document is experience with hydraulic dredging activities for marsh creation, the management of marsh creation fill areas, as well as experience with construction of earthen embankments and containment dikes in a coastal environment, and experience with excavation activities for flotation access in a coastal environment. *Id.* at 44. After past performance, the second factor offerors will be evaluated upon is their Technical Approach. Under this factor, the offerors must submit their “means and methods to complete hydraulic dredging activities for marsh creation.” *Id.* at 48. Additionally, offerors who have previous experience in hydraulic dredging activities will receive a higher rating than those without. The same higher rating will be applied to those subcontractors with past hydraulic dredging experience.

The RFP assigned Construction Specifications numbers to all Bid Schedule Items, with some items sharing the Construction Specifications number. For Construction Specifications numbers 21 and 23, the RFP contains numerous requirements for the expected dredging services. Additionally, an offeror must submit a Dredging Operations Plan that must be approved by the CO before any dredging is commenced. *Id.* at 21-8. Based on Construction Specifications numbers 21 and 23, the following Bid Schedule items will require dredging services in order to complete the desired tasks: (i) Excavation, Access; (ii) Earthfill, Lake Rim Embankment; (iii) Earthfill, Containment Dikes; (iv) Excavation, Marsh Creation Dredging; and (v) Excavation,

## Degrade Containment Dikes.

According to the RFP, offerors will be expected to build approximately 35,831 linear feet of earthen lake rim embankment feature using material excavated from Lake Lery, 48,154 linear feet of containment dikes around marsh creation cells using in-situ material, dredge 3,983,600 cubic yards of borrow material and place material inside marsh creation cells, and restore 513.9 acres of intermediate marsh. *Id.* at SWPPP-5.

### B. RLB's Appeal

RLB asserts that the subject procurement is primarily a dredging project, in that 85% to 90% of the Project's construction activity will require the use of hydraulic or bucket dredges to complete, and must be performed by dredging personnel.

RLB asserts that (1) dredging best describes the principal service sought by this RFP; (2) the RFP describes the primary service sought as dredging; (3) dredging is, by far, the largest component of the Project, and dredging has the highest relative value and importance to the Project when compared to other activities; and (4) the purpose of the Small Business Act is best served by the designation of the exception which will require that 40% of the volume dredged be performed by the dredging equipment of a small business.

RLB asserts the contract requires extensive dredging, via both hydraulic and mechanical methods, of large areas of Lake Lery to create and restore marshes and shoreline protections. Nearly four million cubic yards of material will be dredged. Throughout the RFP, the primary work and services required are described as dredging. Dredging also accounts for the greatest percentage of the contract price. Finally, the smaller sized standard, and its requirement that 40% of the work be performed by small business, will best serve the purposes of the Small Business Act.

### C. Inland's Appeal

Inland asserts the Bid Schedule in the RFP itemizes the items of work. The largest single item is Excavation, Marsh Creation Dredging, 3,983,600 cubic yards. The other items combined are less than 130,000 linear feet of earthfill and excavation, and less than 28,000 square yards of Geotextile. By far the major portion of the work solicited is to be done by dredging.

Inland notes the RFP states that excavation of the shoreline access channel shall be done using a barge-mounted bucket dredge. The items described as earthfill refer to the placement of dredged materials using the dredging equipment to form the desired structures. The cost of Mobilization and Demobilization is attributable to the dredging equipment. Other items of work are ancillary to dredging which dredging contractors are accustomed to performing.

Inland estimates that Marsh Creation Dredging accounts for 65% of the value of the work. Inland further argues that Excavation, Access and Excavation and Degrade Containment Dikes, and the construction of the Lake Rim Embankment and Containment Dikes are to be accomplished by dredging; these items should be considered dredging work as well. This raises

the percentage of the work properly characterized as dredging to 85%. Inland goes on to assert that virtually all of the work is dredging or ancillary to dredging.

Inland argues the very location of the Project establishes that the work can only be performed with marine dredging equipment. The map of the site in the RFP shows the only access is by water. Only marine dredging equipment can be used because it is not possible to perform the work with land-based equipment. The RFP clearly contemplates performance of the Project by dredging, as it advises prospective offerors that the Project lies within a dynamic marine environment, and that access to the site may be impeded by shallow water. The only way to access the site is by marine based equipment, and the only way to perform the work is by dredging.

Inland also points to the RFP's language under Construction Specification 21-Excavation, clearly indicating the principal nature of the work is dredging. These specifications indicate the embankment and containment dikes are to be constructed by using a dredge to properly place the dredged materials in the correct location. Further, the descriptions of the technical approach items are requests for the offeror's approach to dredging work. Inland also points to the Evaluation Factors for Award, which emphasizes experience in dredging activities. The evaluation criteria described in Factor 2: Technical Approach has similar emphasis on dredging activities. Inland further points to the RFP's Past Performance section, which requires that offerors submit information on their experience in dredging, as supporting its argument that this procurement should be designated as a dredging procurement.

#### D. USDA's Response

On July 14, 2014, USDA filed a response to the appeals. USDA asserts the CO properly applied the \$33.5 million size standard to the instant procurement. USDA attaches a statement of the CO and an unsigned statement from the NRSC.

USDA states the purpose of the solicitation is to “re-establish a stable shoreline and provide a stable platform for establishing and supporting coastal wetland planting” and “to establish a typical normal, healthy marsh.” USDA Response, at 2. USDA asserts the CO determined the solicitation mirrored a construction project rather than typical dredging. USDA argues the traditional definition of dredging differs from the solicitation's primary purpose. In the past, according to USDA, dredging is used for marine investigation, channel cleanup and maintenance, without any marsh creation or restoration. USDA acknowledges dredging is a component of the instant procurement, but that the presence of other construction duties establishes construction as the primary function.

USDA provides that when the CO reviewed bid schedules for other dredging projects, primarily those from the Army Corps of Engineers, it usually found 1 or 2 line items, mobilization/demobilization and dredging, and determined they were not similar to the instant procurement's primary purpose. USDA argues the solicitation does not exclusively require hydraulic dredging in the traditional sense, but does require construction contractors able to perform numerous construction duties such as excavation for activities related to earth building. USDA adds the number of skills required by the contractor show the primary purpose of the

solicitation is not dredging.

USDA argues the solicitation seeks construction methods that involve marine based equipment, but that, by itself, does not create the Appellants' assumption that the work is strictly dredging. USDA contends the work will require extensive use of marsh buggy excavators, instead of dredges and requires a substantial technical approach that goes beyond dredging activities, including an offeror's past performance in construction related to earthen embankments and containment dikes. Other components of work will be completed that have no relation to dredging. USDA asserts Appellants are incorrect in assuming a dredge is needed to complete the work, as the solicitation requires offerors to supply a containment dike and lake rim construction plan, which will address the equipment utilized to complete the work.

USDA states the solicitation only requires a hydraulic suction cutterhead dredge for the marsh creation. Additionally, Construction Specification 23, Earthfill, contains no specific equipment restriction, allowing offerors to provide any equipment they deem necessary. The lake rim embankment and containment dikes will be completed by utilizing marsh buggy excavators, and even though a bucket dredge may be used, it "is solely due to the distance the material will need to be placed rather than for traditional dredging purposes." *Id.* at 10. The material utilized for the lake rim embankment and containment dikes is not being dredged in a typical manner but rather the material excavated is to be placed in a manner similar to that of building levees. USDA states dredging activities will require the use of a marsh buggy excavator and thus the solicitation does not require a majority use of dredging equipment.

Next, USDA argues that, contrary to Appellants' assertions, the CO determined that roughly 89% of the solicitation's value is for activities associated with general construction. USDA states the labor expenses connected with dredging activities accounts for only 9.6% of labor costs. USDA asserts that "60.6% of the performance time will be utilized to complete the general construction type activities as compared to 39.4% for the dredging activities." *Id.* at 12. USDA further states that previous NRCS procurements for similar services utilized the same size standard found here. These procurements involved containment dikes, marsh creation, dredging, rock riprap, and water control structures. Thus, USDA concludes the use of the same size standard in previous solicitation shows the CO did not commit clear error in issuing the solicitation under the same size standard previously utilized.

#### E. RLB's Reply

On July 17, 2014, after the close of record, RLB moved to reply to the CO's response. RLB argues there is good cause to admit the reply because the USDA's response is based on clear error of fact. Under applicable regulations governing NAICS code appeals, a reply to a response is not permitted unless OHA so directs. 13 C.F.R. § 134.309(d). No such direction occurred here. Accordingly, RLB's motion is DENIED and the reply is EXCLUDED from the record. *NAICS Appeal of Dayton T. Brown, Inc.*, SBA No. NAICS-5164, at 4 (2010); *NAICS Appeal of Delphi Research, Inc.*, SBA No. NAICS-5377 (2012).

F. *NAICS Manual*<sup>1</sup> Descriptions

The NAICS code designated by the CO, 237990, Other Heavy and Civil Engineering Construction, comprises:

[E]stablishments primarily engaged in heavy and engineering construction projects (excluding highway, street, bridge, and distribution line construction). The work performed may include new work, reconstruction, rehabilitation, and repairs. Specialty trade contractors are included in this group if they are engaged in activities primarily related to engineering construction projects (excluding highway, street, bridge, distribution line, oil and gas structure, and utilities building and structure construction). Construction projects involving water resources (e.g., dredging and land drainage), development of marine facilities, and projects involving open space improvement (e.g., parks and trails) are included in this industry.

Illustrative Examples:

Channel construction

Land drainage contractors

Dam construction

Marine construction

Dock construction

Microtunneling contractors

Dredging (e.g., canal, channel, ditch, waterway)

Nuclear waste disposal site construction

Earth retention system construction

Park ground and recreational open space improvement construction

Flood control project construction

Railroad construction

Golf course construction

Subway construction

Horizontal drilling (e.g., cable, pipeline, sewer installation)

Trenching, underwater

Hydroelectric generating station construction

*NAICS MANUAL*, at 204-05

As noted above, while this NAICS code has a \$33.5 annual receipts size standard, SBA's regulations apply an exception for Dredging and Surface Cleanup Activities to this NAICS code with a corresponding \$25.5 million annual receipts size standard. 13 C.F.R. § 121.201. The regulation further provides that to be considered small for purposes of Government procurement,

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<sup>1</sup> Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2012)*, available at <http://www.census.gov>.

a firm must perform at least 40% of the volume dredged with its own equipment or equipment owned by another small dredging concern. 13 C.F.R. § 121.201, fn. 2.

### 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 demonstrate that the CO's NAICS code designation is based on a clear error of fact or law. *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003); 13 C.F.R. § 134.314. SBA regulations do not require the CO to select 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. *Durodyne*, SBA No. NAICS-4536, at 4; 13 C.F.R. § 121.402(b).

#### B. Analysis

Here, Appellants do not dispute the CO's designation of NAICS code 237990, thus I find it unnecessary to contemplate whether the services sought by the instant procurement are best defined by NAICS code 237990. Accordingly, the question at issue is whether the CO should have designated the smaller size standard under the Dredging and Surface Cleanup Activities exception to NAICS code 237990. After examining the solicitation, the descriptions in the *NAICS Manual*, and arguments of the parties, I conclude Appellants have not met their burden of showing clear error in the CO's failure to use the exception for Dredging and Surface Cleanup Activities for NAICS code 237990, Other Heavy and Civil Engineering Construction, for this procurement.

SBA regulations state the “proper NAICS code” is the one “which best describes the principal purpose of the product or service being acquired.” 13 C.F.R. § 121.402(b). “Primary consideration is given to the industry descriptions in the *NAICS Manual*, the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being purchased. A procurement is usually classified according to the component which accounts for the greatest percentage of contract value.” *Id.*

After reviewing the *NAICS Manual* and the regulation at 13 C.F.R. § 121.201, I found neither describes just what services fall under the Dredging and Surface Cleanup Activities exception. Additionally, OHA has not previously considered this exception. Thus, I hold that in order for this exception to apply, the services procured have to be Dredging or Surface Cleanup Activities in nature. Merely because a solicitation involves dredging work does not justify the use of the exception. In order to determine whether the nature of the work is Dredging or Surface Cleanup Activities, one must look directly to the solicitation in determining whether the exception is applicable.

Here, USDA provided a bid schedule in order to assist offerors in submitting prices for

the various items solicited. These items include Excavation, Access; Excavation, Marsh Creation Dredging, 3,983,600 cubic yards of material; Earthfill, Lake Rim Embankment, 35,831 linear feet; Earthfill, Containment Dikes, 48,154 linear feet; Excavation, Degrade Containment Dikes, 23,571 linear feet; and placement of Geotextile, 27,644 square yards.

In any NAICS appeal, the question must be: what is the Government buying? The title of the Project answers this question; this is the Lake Lery Shoreline Protection and Marsh Creation Project (RFP, p. 3). There is no doubt that the Project entails a great deal of dredging. However, it requires more than that. The Bid Schedule makes clear that, in addition to dredging, the contractor will have to construct Lake Rim embankments and containment dikes that will total over 83,000 feet long. Further there will be the placement of over 27,000 square yards of geotextile, fabric liners which will contain and shape the earth.

The Past Performance requirements for an offeror include not only dredging, but also construction of earthen embankments and containment dikes, and excavation. RFP, p.44. The technical approach requires that offerors provide a narrative describing not merely their prospective dredging, but also their means and methods for placing geotextile, their surveying activities, management of construction, means and methods for construction of earthen embankments, lake rims and containment dikes, and installing staff gauges. RFP, p. 48. The first construction specification calls removal of structures from designated areas. RFP, p. 3-1. The RFP calls for extensive construction surveys and the placing of gauges. RFP, pp. 7-1 - 7-13. There must be common excavation as well as dredging. RFP, pp. 21-1 - 21-11. This includes excavation of the lake rim embankment and of containment dikes, and the creation of marshes. *Id.* The specifications also call for Earthfill, which will be the construction of earthen embankments. RFP, p. 23-1 - 23-6. This process requires an excavation and foundation preparation, followed by placing the earth in horizontal layers. *Id.* Also, the placement of geotextile is required. RFP, p. 95-1 - 95-3. The RFP contains detailed specifications as to how the geotextile is to be placed. *Id.*

Having reviewed the RFP, the descriptions in the *NAICS Manual* and the arguments of the parties, I do not agree with Appellants that the CO clearly erred in failing to select the Dredging and Surface Cleanup Activities exception for NAICS code 237990. It is clear that dredging activities account for a large portion of the services sought. However, the Project requires a substantial amount of other types of work in addition to dredging. The Project seeks not merely to dredge material from the bottom of Lake Lery, but to use this material to construct dikes, embankments and to restore marshes. Further, the contractor must conduct surveys, place gauges, and place geotextiles in the ground. While there is no question the RFP requires a great deal of dredging (nearly four million cubic yards) there is also no question it also calls for many other engineering and construction services. What the Government is buying here is not merely dredging, but a shoreline and marsh restoration project which includes dredging and construction. I conclude that the Dredging exception is not appropriate where a procurement requires so many other services in addition to the dredging. Rather, I conclude that the CO properly designated the more general NAICS code for engineering and construction, because this RFP also calls for construction and other services in addition to dredging that better fit the CO's chosen NAICS code.



IV. Conclusion

For the above reasons, the instant appeal is DENIED. The correct NAICS code designation for this procurement is 237990, Other Heavy and Civil Engineering Construction, with a corresponding \$ 33.5 million annual receipts size standard. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge