

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

NAICS APPEAL OF:

Environment International Ltd.,

Appellant,

Solicitation No. DE-SOL-0006102

U.S. Department of Energy

SBA No. NAICS-5628

Decided: December 22, 2014

APPEARANCES

Brent Finley, Esq., Environment International Ltd., Seattle, Washington.

Karen L. Manos, Esq., Sarah B. Gleich, Esq., Gibson, Dunn & Crutcher LLP,
Washington, D.C., for Industrial Economics, Inc.

Diana Lane, Principal, Stratus Consulting Inc., Boulder, Colorado.

Matthew R. Carpenter, Contracting Officer, Brady L. Jones, III, Esq., EM Consolidated
Business Center, U.S. Department of Energy, Cincinnati, Ohio.

DECISION

I. Introduction and Jurisdiction

On November 20, 2014, the U.S. Department of Energy (DOE), Environmental Management Consolidated Business Center, issued Request for Proposals (RFP) No. DE-SOL-0006102 for “Los Alamos National Laboratory (LANL) Natural Resource Damage Assessment (NRDA) Support Services”. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 562910, Remediation Services. (RFP §§ K.1 and L.19.) NAICS code 562910 ordinarily is associated with a size standard of \$20.5 million average annual receipts, but the RFP indicated that the work fit within the exception for Environmental Remediation Services, which utilizes a size standard of 500 employees.

On November 28, 2014, Environment International Ltd. (Appellant) filed this appeal. Appellant asserts that the correct NAICS code for the procurement is 541620, Environmental Consulting Services, with a size standard of \$14 million average annual receipts. 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 RFP

The RFP explains that, in 2008, a Trustee Council was created “to pursue a NRDA based on releases of hazardous substances from LANL.” (RFP § C.1.1.) The Trustee Council consists of DOE, the state of New Mexico, and other governmental and tribal entities. (*Id.*) For the instant procurement, the contractor will “assist the Trustee Council with undertaking an NRDA”, utilizing work already completed for the Trustee Council, and “work[ing] closely with the Trustee Council in all phases of the scope of work.” (*Id.* § C.2.)

The RFP divides the required services into four task areas. (*Id.* § B.1.) For Task 1, the contractor will conduct NRDA activities. For Task 2, the contractor will prepare a Restoration and Compensation Determination Plan, a Report of Assessment, and a Restoration Plan/Environmental Assessment. For Task 3, the contractor will compile an administrative record of information used in preparing the NRDA and other plans and analyses. For Task 4, the contractor will perform administrative support functions for the Trustee Council, facilitate Trustee Council meetings, and maintain the Trustee Council Website. The RFP includes a Performance Work Statement (PWS) detailing the four task areas. (*Id.* § C.2.)

The RFP states that DOE will select the proposal that represents the best value to the agency, with non-price factors significantly more important than price. (*Id.* § M.3.) There are four non-price factors: (1) Technical Approach to Sample Task; (2) Key Personnel, Management Approach, Organization and Staffing; (3) Relevant Experience; and (4) Relevant Past Performance. (*Id.* § M.4.)

The RFP indicates that DOE plans to award a single indefinite-delivery indefinite-quantity contract, with firm-fixed-price and time-and-materials task orders. (*Id.* §§ B.1 and L.3.) The contract will have a five-year term, with a guaranteed minimum of \$50,000 and a ceiling of \$24,000,000. (*Id.* §§ B.2 and B.3.) Proposals were due January 5, 2015, but DOE suspended the deadline pending OHA's decision on the NAICS code appeal. (*Id.*, Amendment 001.)

B. The Appeal

On November 28, 2014, Appellant filed this appeal. Appellant contends that NAICS code 562910 is improper and that the correct NAICS code is 541620. Although Appellant would qualify as a small business under either code, Appellant is harmed by the choice of NAICS code 562910 because Appellant is “forced to compete with businesses that would not otherwise be

considered small”, specifically Industrial Economics, Inc. (IEc) and Stratus Consulting Inc. (Stratus). (Appeal at 2.)

Appellant maintains that NAICS code 562910 covers “physical, on-site removal and treatment of contaminated materials.” (*Id.* at 3.) The instant RFP, however, does not call for such work, but rather focuses on “assessment and planning and process support.” (*Id.* at 2-3.) In addition, the term “remediation” is not used anywhere in the PWS. Appellant contends that “[t]here are no on-site remediation activities that are requested under this solicitation.” (*Id.* at 3)

Appellant argues that the requested services are “routinely procured under NAICS code 541620.” (*Id.* at 4.) Therefore, NAICS code 541620 is most suitable for this RFP.

C. IEc's Response

On December 16, 2014, IEc responded to the appeal. IEc supports the CO's choice of NAICS code 562910 and urges OHA to deny the appeal.

IEc observes that SBA regulations provide criteria for classifying a procurement as Environmental Remediation Services. (IEc Response at 5, citing 13 C.F.R. § 121.201 n.14(b).) According to the regulation, to be considered Environmental Remediation Services, the procurement must directly support the restoration of a contaminated environment, but need not involve actual remediation work. (*Id.* at 5-6.) Thus, “the fact that the contractor will not be required to actually perform the remediation services under this solicitation **does not** exclude these activities from classification under this size standard.” (*Id.* at 6, emphasis in original.)

IEc argues that SBA regulations also require that a procurement classified as Environmental Remediation Services be comprised of activities in at least three separate NAICS codes, none of which accounts for a majority of the value of the entire procurement. The instant RFP meets this requirement, IEc reasons, because the RFP calls for work under four different NAICS codes: 541620; 541330, Engineering Services; 541519, Other Computer Related Services; and 561110, Office Administrative Services. According to IEc, “Tasks 1 and 2 are split between NAICS codes 541620 and 541330; Task 3 is comprised of NAICS code 561110; and Task 4 is split between NAICS code 541519 and 561110.” (*Id.* at 6-7.)

IEc maintains that the NAICS code recommended by Appellant, 541620, is not appropriate for this RFP because it does not represent 50% or more of the contract value. In IEc's view, “[a]lthough code 541620 describes a *portion* of the work to be performed under this solicitation, code 541620 does not encompass at least half of the work to be performed. Specifically, the administrative and computer services required under Tasks 3 and 4 are not covered by code 541620.” (*Id.* at 7, emphasis in original.)

IEc also challenges Appellant's contention that other similar procurements are routinely classified under NAICS code 541620. IEc asserts that DOE previously used NAICS code 562910 for a procurement in an earlier phase of the LANL assessment process. IEc concludes that the instant appeal should be denied as it is merely “a transparent attempt to unduly restrict

competition by excluding otherwise eligible small businesses with demonstrated experience in performing the requested work.” (*Id.* at 1.)

D. Stratus's Response

On December 16, 2014, Stratus responded to the appeal. Stratus agrees with Appellant that NAICS code 541620 is most suitable for this RFP.

Stratus argues that the term “remediation” refers to environmental cleanup or other methods used to remove or contain contaminants. Accordingly, “the general purpose of the NRDA activities called for in the solicitation is *not* to provide environmental remediation services.” (Stratus Response at 3 (emphasis in original).) Instead, the contractor will collect and analyze data to identify and quantify injuries to site resources. (*Id.* at 3-4.) This work, according to Stratus, is best classified as Environmental Consulting Services under NAICS code 541620. Furthermore, Stratus asserts, “[i]t is clear from the [PWS] that 50% or more of the value of the procurement could be classified as Environmental Consulting Services.” (*Id.* at 4.)

E. DOE's Response

On December 16, 2014, DOE responded to the appeal. DOE defends the choice of NAICS code 562910 for the RFP.

DOE argues that, pursuant to 13 C.F.R. § 121.201 n.14(b), this RFP is properly classified as Environmental Remediation Services. (DOE Response at 4-5.) The general purpose of the procurement is to support the restoration of a contaminated environment, and the successful contractor must have expertise in environmental remediation such as “soil remediation, waste water treatment, and hazardous material removal in order to effectively quantify injuries to natural resources.” (*Id.* at 4.) Furthermore, the procurement consists of activities occurring in at least three separate NAICS codes, including 541330, 541620, and 562910. (*Id.* at 5.) DOE states that no single NAICS code accounts for more than 50% of the work. (*Id.*)

DOE rejects the notion that the RFP would be better classified under NAICS code 541620. DOE asserts that, prior to the issuance of the RFP, the CO conducted a review of possible NAICS codes in December 2013. The CO determined that NAICS code 541620 was not appropriate because the procurement would require more than advice and assistance on environmental issues, such as field testing to obtain additional data. (*Id.* at 1, 4.) “Although there is a need for advice and assistance on environmental issues, this NAICS code [541620] does not consider the NRDA implementation and remediation portion of the acquisition. The advice and assistance on environmental issues is merely a component of the whole requirement.” (*Id.* at 5.)

F. NAICS Manual¹ Descriptions

The NAICS code selected by the CO, 562910, Remediation Services, comprises:

establishments primarily engaged in one or more of the following: (1) remediation and cleanup of contaminated buildings, mine sites, soil, or ground water; (2) integrated mine reclamation activities, including demolition, soil remediation, waste water treatment, hazardous material removal, contouring land, and revegetation; and (3) asbestos, lead paint, and other toxic material abatement.

NAICS Manual 812.

For Environmental Remediation Services under NAICS code 562910, a footnote in the Size Standards table states that:

For purposes of classifying a Government procurement as Environmental Remediation Services, the general purpose of the procurement must be to restore or directly support the restoration of a contaminated environment (such as, preliminary assessment, site inspection, testing, remedial investigation, feasibility studies, remedial design, remediation services, containment, removal of contaminated materials, storage of contaminated materials or security and site closeouts), although the general purpose of the procurement need not necessarily include remedial actions. Also, the procurement must be composed of activities in three or more separate industries with separate NAICS codes or, in some instances (e.g., engineering), smaller sub-components of NAICS codes with separate, distinct size standards. These activities may include, but are not limited to, separate activities in industries such as: Heavy Construction; Specialty Trade Contractors; Engineering Services; Architectural Services; Management Consulting Services; Hazardous and Other Waste Collection; Remediation Services, Testing Laboratories; and Research and Development in the Physical, Engineering and Life Sciences. If any activity in the procurement can be identified with a separate NAICS code, or component of a code with a separate distinct size standard, and that industry accounts for 50 percent or more of the value of the entire procurement, then the proper size standard is the one for that particular industry, and not the Environmental Remediation Service size standard.

13 C.F.R. § 121.201, n.14(b).

¹ 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/.

The NAICS code which Appellant advocates for the RFP, 541620, Environmental Consulting Services, comprises:

establishments primarily engaged in providing advice and assistance to businesses and other organizations on environmental issues, such as control of environmental contamination from pollutants, toxic substances, and hazardous materials. These establishments identify problems (e.g., inspect buildings for hazardous materials), measure and evaluate risks, and recommend solutions. They employ a multidisciplined staff of scientists, engineers, and other technicians with expertise in areas, such as air and water quality, asbestos contamination, remediation, and environmental law. Establishments providing sanitation or site remediation consulting services are included in this industry.

NAICS Manual 760.

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 select the perfect NAICS code. *NAICS Appeal of Evanhoe & Assocs., LLC*, SBA No. NAICS-5505, at 14 (2013). Rather, the CO must assign the NAICS code that best describes the principal purpose of the product or service being acquired in light of the industry descriptions in the *NAICS Manual*, the description in the solicitation, and the function of the goods or services being acquired. 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. Analysis

I find no merit to this appeal. Appellant's principal argument is that the RFP cannot be considered Environmental Remediation Services because the RFP does not call for the “physical, on-site removal and treatment of contaminated materials.” *See* Section II.B, *supra*. As DOE and IEc correctly observe in their responses, however, 13 C.F.R. § 121.201 n.14(b) provides that a procurement classified as Environmental Remediation Services “need not necessarily include remedial actions.” *See* Section II.F, *supra*. Instead, the “general purpose” of the procurement must be to “directly support the restoration of a contaminated environment.” *Id.* In addition, the examples of Environmental Remediation Services identified in the regulation - such as preliminary assessments, feasibility studies, and remedial design - are analogous to the NRDA activities called for here. Thus, contrary to the premise of the appeal, the mere fact that the RFP does not contemplate on-site remediation does not establish that the Environmental Remediation Services NAICS code was improper. Rather, that code is suitable for the RFP because the procurement will directly support the restoration of a contaminated environment. *Cf.*, *NAICS*

Appeal of Prudent Technologies, Inc., SBA No. NAICS-4710 (2005) (procurement for litigation preparation did not directly support restoration of a contaminated site).

SBA regulation also requires that a procurement classified as Environmental Remediation Services include work associated with at least three NAICS codes, none of which represents a majority of the work. Appellant is silent on this question, but DOE and IEC point to several NAICS codes that apply to various aspects of the RFP. *See* Sections II.C and II.E, *supra*. Furthermore, both DOE and IEC contend that, while the RFP does include some work that may be best classified under NAICS code 541620, that code does not account for a majority of the contract. This argument draws support from the fact that NAICS code 541620 apparently pertains only to two of the four RFP task areas. Thus, Appellant has not established that the CO clearly erred in selecting NAICS code 562910. Because Appellant has not demonstrated that the CO's choice was erroneous, it is unnecessary to consider the alternative NAICS code Appellant advocates, or other alternative codes. *E.g.*, *NAICS Appeal of Pacific Shipyards International, LLC*, SBA No. NAICS-5464, at 7 (2013) (“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.”); *NAICS Appeal of Katmai Simulations & Training*, SBA No. NAICS-5445, at 6 (2013).

Lastly, Appellant claims that NAICS code 541620 is often utilized for similar procurements. Appellant, though, does not identify any purportedly similar procurements with NAICS code 541620, and OHA gives little weight in any event to the codes assigned to other procurements. *E.g.*, *NAICS Appeal of R. Christopher Goodwin & Assocs., Inc.*, SBA No. NAICS-5393, at 5 (2012) (recognizing that “because each acquisition presents unique facts and circumstances, the NAICS codes assigned to other procurements have little probative value in assessing the appropriate NAICS code.”). Nor does Appellant cite any case in which OHA has affirmed the use of NAICS code 541620 for a procurement similar to the instant RFP.

IV. Conclusion

For the above reasons, the appeal is DENIED. The CO appropriately selected NAICS code 562910, Environmental Remediation Services, with an associated size standard of 500 employees, for this procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge