

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

NAICS APPEAL OF:

National Electric Coil,

Appellant,

Solicitation No. W912EF-15-R-0019

U.S. Army Corps of Engineers

Walla Walla District

SBA No. NAICS-5666

Decided: June 23, 2015

APPEARANCES

Rodger E. Shuback, Esq., National Electric Coil, Columbus, Ohio

J. Tyler Moore, Esq., Deputy District Counsel, U.S. Army Corps of Engineers, Walla Walla, Washington

DECISION

I. Introduction and Jurisdiction

On May 14, 2015, the U.S. Army Corps of Engineers (Corps) issued Request for Proposals (RFP) No. W912EF-15-R-0019 for the replacement of the stator core and stator winding in the Dworshak Powerhouse Generating Unit 3, an air-cooled, vertical hydro-electric generator at Dworshak Dam in Clearwater County, Idaho. The RFP states that, to replace the stator core and stator winding, the contractor must disassemble and reassemble Unit 3.

The RFP included an evaluation preference for small businesses, but the Contracting Officer (CO) did not limit competition only to small businesses. The CO assigned North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding size standard of \$36.5 million average annual receipts.

On May 22, 2015, National Electric Coil (Appellant) filed the instant appeal. Appellant maintains that the CO should have assigned NAICS code 333611, Turbine and Turbine Generator Set Unit Manufacturing, with a 1,000-employee size standard. 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 calendar days after issuance of the RFP, so the appeal is timely. Federal Acquisition Regulation (FAR) 19.303(c)(1); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b).

II. Background

A. The RFP

The RFP contemplates award of a firm-fixed-price contract valued between \$10 million and \$25 million. The RFP solicits prices for the following Contract Line Item Numbers (CLINs):

- 0001, Mobilization and Demobilization;
- 0002, Design and Manufacture Stator Lamination Stamping Die;
- 0003, Design, Manufacture, Test, and Deliver Stator Laminations, including Vent Duct Spacers;
- 0004, Furnish Complete Set of Stator Bars, including Factory Testing, Supplies, and Accessories for a Complete New Winding;
- 0005, Furnish for Test and Have Tested 13 Prototype Bars Identical to Bars to be Supplied in CLIN 0004;
- 0006, Furnish Spare Generator Parts;
- 0007, Pre-disassembly Measurements;
- 0008, Generating Unit Disassembly, including Inspections of Components;
- 0009, Provide Surface Air Cooler Assemblies and Associated Piping;
- 0010, Provide Air Shrouds;
- 0011, Special Tools and Scaffolding;
- 0012, On-Site Guide Bearing Inspections and [Resistance Temperature Detector] Replacement;
- 0013, Remove Stator Winding and Stator Core Including cleaning of components and surfaces;
- 0014, Install and Test New Generator Stator Core;
- 0015, Install and Test Stator Winding;
- 0016, Install and Test Machine Condition Monitoring System;
- 0017, Oil Storage System;
- 0018, Refurbish and Factory Test Rotor Field Poles (1 Gen Unit, 56 Poles);
- 0019, Inspect, Clean, and Test Rotor;
- 0020, Generating Unit Alignment and Reassembly;
- 0021, Post-Assembly Measurements, Inspections, and Tests;
- 0022, Perform Model Validation Testing on Generator;
- 0023, Unit Foundation Crack Repair — 444 linear inches;
- 0024, Additional Crack Repair;
- 0025, Unit Foundation Grout Repair — 400 cubic inches; and
- 0026, Additional Grout Repair.

(RFP, at 4-5.)

The RFP states that award will be made to the offeror that represents the best overall value. In determining best value, the Corps will consider four evaluation factors: Technical; Past Performance; Small Business Participation; and Price. (*Id.* at 6.) The Technical factor is more important than Past Performance, which in turn is more important than Small Business Participation. When combined, the non-Price factors are significantly more important than Price. (*Id.*) The Technical factor is comprised of three equally-weighted subfactors: Subfactor A, Technical Work Plan and Capabilities; Subfactor B, Unit Stator Winding Replacement and Commissioning; and Subfactor C, Management, Quality Control and Schedule. (*Id.*)

The RFP incorporated by reference FAR clause 52.219-4, Notice of Price Evaluation Preference for HUBZone¹ Small Business Concerns (Oct 2014). (*Id.* at 47.) The clause pertinently states that:

Offers will be evaluated by adding a factor of 10 percent to the price of all offers, except—

- (i) Offers from HUBZone small business concerns that have not waived the evaluation preference; and
- (ii) Otherwise successful offers from small business concerns.

FAR 52.219-4(b).

B. The Appeal

On May 22, 2015, Appellant filed its appeal of the NAICS code. Appellant contends that NAICS code 237990 is improper and that the correct code is 333611. Appellant also represents that it is a certified HUBZone small business. With its appeal, Appellant attached a certification letter from SBA addressed to Advanced Coil Technology, Inc. (ACT), the general partner of National Electric Coil Co., L.P. (NECC).

Appellant argues that NAICS code 333611, Turbine and Turbine Generator Set Units Manufacturing, best describes the principal purpose of the acquisition because the Corps is seeking to replace Unit 3's stator winding and core. These components, Appellant contends, “are to be upgraded, designed, manufactured, and installed as part of the unit's turbine generator assembly.” (Appeal at 2.) Appellant highlights that Subfactor B emphasizes that offerors will be evaluated on their manufacturing capability and processes for the stator components. (*Id.*)

Appellant argues that the majority of the work is for the upgrade of the electrical and magnetic components of the generator, and the CLINs indicate that “the bulk of the work will involve, again, the design, manufacture, and installation of the stator winding and core.” (*Id.*) Appellant estimates that more than 60% of the final bid price will be comprised of the following five CLINs: 0003, Design, Manufacture, Test, and Deliver Stator Laminations, including Vent Duct Spacers; 0004, Furnish Complete Set of Stator Bars, including Factory Testing, Supplies, and Accessories for a Complete New Winding; 0014, Install and Test New Generator Stator Core; 0015, Install and Test Stator Winding; and 0018, Refurbish and Factory Test Rotor Field

¹ “HUBZone” is an abbreviation of Historically Underutilized Business Zone.

Poles (1 Gen Unit, 56 Poles). This work, Appellant contends, “does not involve the ‘construction’ of a ‘hydroelectric generating station’ under NAICS code 237990, but rather is a solicitation for the manufacture of a turbine generator set which happens to be located within a hydroelectric generating station.” (*Id.*)

The NAICS code designated by the CO, 237990, is erroneous, Appellant argues, because heavy construction and civil engineering construction do not account for the bulk of the work to be performed. Appellant estimates that such work represents only 16% of the value of the contract. (*Id.* at 3.)

On May 27, 2015, in response to an order from OHA, Appellant stated that it qualifies as a small business under the size standard associated with NAICS code 333611, but is not a small business under the size standard assigned to the RFP.

C. The Corps' Response

On June 9, 2015,² the Corps responded to the appeal. The Corps defends the choice of NAICS code 237990 for this procurement, and argues that OHA should deny the appeal or dismiss it for lack of jurisdiction.

OHA should dismiss the appeal, the Corps contends, because it is untimely and Appellant lacks standing. An appeal of a NAICS code designation must be made within 10 calendar days after the issuance of the solicitation. 13 C.F.R. § 134.304(b). Further, an appeal must include a “full and specific statement” as to why the designated NAICS code is erroneous. *Id.* § 134.305(a)(3). The Corps argues that the instant appeal is untimely because Appellant did not allege how it was adversely affected by the NAICS code until May 27, 2015-13 calendar days after the RFP was issued. The initial May 22, 2015 appeal petition was silent on this point. (Response at 1.)

The Corps argues that Appellant is not adversely affected by the NAICS code designation and therefore lacks standing to appeal. Because competition for the procurement is not restricted to small businesses, Appellant must show that it would be eligible for a price or evaluation preference if the agency used a different NAICS code. *NAICS Appeal of Head, Inc.*, SBA No. NAICS-5214 (2011), *recons. dismissed*, SBA No. NAICS-5218 (2011) (PFR). The Corps maintains that the only evidence Appellant puts forth on this point is a conclusory statement that Appellant is large under NAICS code 237990 and small under NAICS code 333611. This statement does not demonstrate adverse effect, the Corps argues, because the instant procurement is unrestricted and Appellant is not precluded from submitting an offer, regardless of which NAICS code is assigned. (Response at 2.)

² OHA received the response at 6:23 PM Eastern Time on June 8, 2015. “Any submission received at OHA after 5 p.m. eastern time is considered filed the next business day.” 13 C.F.R. § 134.204(b)(2).

The Corps then takes issue with Appellant's representation that it is a HUBZone small business. The letter Appellant offered to substantiate this claim indicates that ACT is the certified HUBZone small business, not Appellant. (*Id.* at 3.)

Next, the Corps argues that the CO designated the correct NAICS code. The Corps states that “[t]he principal purpose of this contract requires on site work to disassemble Dworshak Unit 3, incorporate the many accessories and parts to rebuild the stator core, and to reassemble Dworshak Unit 3.” (*Id.*) Further, “[t]he critical elements of this work are of the type typically performed by heavy construction contractors as represented in past [Walla Walla District (District)] projects of a similar nature.” (*Id.*)

The Corps explains that it has previously procured winding and core replacement at 10 generating units under NAICS code 237990. The Corps utilizes this NAICS code for such work because “the unit must be unstacked and then restacked using two 250T powerhouse bridge cranes that will perform numerous onsite critical lifts.” (*Id.* at 4.) The winding's pieces, moreover, “cannot function independently and are not simply attached to the generator. Rather these items require further onsite brazing, welding, and permanent modification, including the concrete demolition and repair, to the generation station to make the winding unit functional.” (*Id.*) The Corps explains that “[t]his type of work necessarily requires trades and crafts of a construction nature, including crane operators, electricians, laborers, machinists, millwrights (Davis-Bacon), ironworkers and welders.” (*Id.*)

NAICS code 237990 is the correct code, moreover, because it specifically includes work that requires specialty trade contractors on construction of hydroelectric generation stations. (*Id.*, citing *NAICS Manual* at 204-05.) By contrast, the code Appellant advocates, 333611, “comprises establishments primarily engaged in manufacturing turbines (except aircraft) and **complete turbine generator set units**, such as steam, hydraulic, gas, and wind.” (*Id.*, citing *NAICS Manual* at 412 (emphasis added by the Corps).) This procurement, the Corps states, is not for a complete generator unit at a plant. Rather, “the manufacturing aspect of this project consists of many smaller parts like copper stator bars that are shipped to the Dworshak Powerhouse. These parts are then integrated into the unit through welding, brazing, and concrete demolition and repair in order to rebuild the stator core of Unit #3 on site.” (*Id.*) The Corps states that when it does replace complete turbine generator units, it designates NAICS code 333611.

Another consideration the Corps cites for why NAICS code 237990 is proper is the fact that hydropower generators are real property. As a result, the Corps requires contractors to have adequate bonding capacity to protect the Corps' interest in the event of default. Because the procurement calls for the alteration of real property, contractors must be familiar with the Corps' on-site safety requirements, quality control, and environmental protection. In addition, the work must be completed in eight months, so contractors must have experience with heavy construction to coordinate the project. (*Id.*)

Finally, the Corps disagrees with Appellant's division of CLINs into turbine manufacturing and heavy construction, and therefore rejects Appellant's estimates of the percentages of work that fall into these two categories. According to the Corps, on-site work that alters real property is heavy construction work, whereas building major and complete generating

units at a contractor's plant is turbine manufacturing. The Corps contends that CLINs 0014 and 0015 are “two of the largest [CLINs]” and “consist of replacing stator bars, stator laminations, and other accessories on site with the type of labor normally associated with heavy construction projects and paid under Davis-Bacon standards.” (*Id.* at 5.) As a result, Appellant erroneously construes them as turbine manufacturing. Instead, CLINs 0014 and 0015 should be counted under NAICS code 237990.

D. Appeal Supplement

On June 9, 2015, the day before the close of record, Appellant moved to supplement its appeal. Because Appellant filed this motion before the close of record and no other party is prejudiced by the supplement, Appellant's motion is GRANTED. *NAICS Appeal of Pinnacle Solutions, Inc.*, SBA No. NAICS-5651, at 5 (2015).

Appellant explains that “‘National Electric Coil’ is a trade name used by both [NECC] and National Electric Coil, Inc. [(NECI)],” and that Appellant intends to submit its bid through NECC. (Appeal Supp., at 1.) Appellant goes on to explain that NECC and NECI “essentially operate as one entity, sharing ownership and management.” (*Id.*) For this reason, SBA determined NECC and NECI are affiliated when NECC applied for HUBZone certification.

After evaluating NECC and NECI as one entity, SBA certified NECC as a HUBZone small business. Because NECC is a limited partnership, SBA addressed the certification letter to the general partner, ACT. Pursuant to FAR 52.219-4, NECC's HUBZone status renders Appellant eligible for a pricing preference on the subject procurement if the NAICS code is changed to 333611, because Appellant would be a small business under that code but not under the code designated by the CO. (*Id.* at 2.)

E. NAICS Manual³ Descriptions

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

establishments 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.

³ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2012)*, available at <http://www.census.gov>.

NAICS Manual at 204. The *NAICS Manual* contains several illustrative examples of activities performed under this NAICS code. One such activity is “hydroelectric generating station construction.” *Id.* at 205, 1246.

The NAICS code Appellant advocates, 333611, Turbine and Turbine Generator Sets Units Manufacturing, covers “establishments primarily engaged in manufacturing turbines (except aircraft); and complete turbine generator set units, such as steam, hydraulic, gas, and wind.” *Id.* at 412. This NAICS code does not provide illustrative examples.

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, 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 acquired. FAR 19.303(a)(2); 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

1. Preliminary Issues

The Corps moves to dismiss the appeal as untimely because, although Appellant submitted its appeal within the ten-day deadline, Appellant did not assert that it had standing to appeal until after the deadline had passed. This argument lacks merit. The applicable regulations do not require an appellant to explain its standing in the initial appeal. *See* FAR 19.303(c)(5); 13 C.F.R. §§ 134.203(a) and 134.305(a). The provision cited by the Corps, 13 C.F.R. § 134.305(a)(3), requires only “[a] full and specific statement as to why the size determination or NAICS code designation is alleged to be in error, together with argument supporting such allegations,” which Appellant met when it argued that NAICS code 237990 is erroneous and should be changed to NAICS code 333611.

The Corps contends additionally that OHA should dismiss the appeal because the procurement is unrestricted, so Appellant is not harmed by the choice of NAICS code. This argument too is meritless. It is true, as the Corps observes, that OHA historically has held that “[w]hen an unrestricted solicitation [contains] price and evaluation preferences for small businesses, an appellant must demonstrate that it will be adversely affected by the NAICS code designation— due to its eligibility for one or more of those preferences—in order to establish

standing to bring a NAICS appeal.” *NAICS Appeal of Head, Inc.*, SBA No. NAICS-5214, at 9 (2011), *recons. dismissed*, SBA No. NAICS-5218 (2011) (PFR). In the instant case, though, Appellant explains that, if Appellant is a small business, Appellant may receive a pricing preference under FAR 52.219-4, because NECC operates in a HUBZone. If Appellant is ineligible for this pricing preference due to its size, Appellant is adversely affected. Appellant, therefore, has standing to pursue this appeal. Further, the Corps' motion fails to address recent amendments to 13 C.F.R. § 121.1103(a)(1), which now states that “[a]n interested party [for a NAICS code appeal] would include a business concern seeking to change the NAICS code designation in order to be considered a small business for the challenged procurement, regardless of whether the procurement is reserved for small businesses or unrestricted.” Here, Appellant asserts that it is not a small business under NAICS code 237990, but is a small business under NAICS code 333611; thus, Appellant seeks to be considered a small business for the instant procurement, and would appear to have standing under 13 C.F.R. § 121.1103(a)(1), notwithstanding that the procurement is unrestricted.

For these reasons, the Corps' motion to dismiss is DENIED.

2. Merits

Turning to the merits of the case, Appellant has not demonstrated that the selection of NAICS code 237990 for this procurement is clearly erroneous. According to the *NAICS Manual*, NAICS code 237990 encompasses “hydroelectric generating station construction,” and work performed under this code “may include new work, reconstruction, rehabilitation, and repairs.” Section II.E, *supra*. This is precisely the type of work contemplated here. The RFP calls for the replacement of a hydro-electric generator's stator core and stator winding. Section II.A, *supra*. To do so, the contractor must disassemble and reassemble the hydro-electric generator. *Id.* Based on the *NAICS Manual* and the RFP, then, I cannot find that the CO erred in choosing NAICS code 237990.

Appellant bases its appeal primarily upon the RFP's CLIN structure, and claims that turbine manufacturing represents over 60% of the overall effort. *See* Section II.B, *supra*. Appellant, however, provides no support for this estimate, nor does Appellant offer detailed calculations of the percentage of work allocable to each CLIN. Appellant's assertion is therefore unconvincing. Further, the Corps reasonably counters that Appellant's characterization of the CLINs is flawed because two CLINs (0014 and 0015), which account for significant portions of the procurement, involve the replacement of stator bars and stator laminations and should be considered hydroelectric generating station construction and repair under NAICS code 237990.

Because Appellant has not demonstrated that the CO's choice of NAICS code was erroneous, it is unnecessary to consider the alternative NAICS code Appellant advocates, or other alternative codes. *E.g.*, *NAICS Appeal of Env't. Int'l Ltd.*, SBA No. NAICS-5628, at 7 (2014); *NAICS Appeal of Pac. Shipyards Int'l, 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.”). Nevertheless, the Corps correctly observes that the NAICS code Appellant advocates, 333611, is questionable for this procurement, because that code applies to the manufacture of entire turbines or “complete turbine generator set units.” Section

II.E, *supra*. The contractor here will not furnish a complete turbine or turbine generator set, so NAICS code 333611 appears inapplicable.

IV. Conclusion

For the above reasons, the appeal is DENIED. The CO appropriately selected NAICS code 237990, Other Heavy and Civil Engineering Construction, with a corresponding size standard of \$36.5 million 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