

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

NAICS APPEAL OF:

Global Precision Systems, LLC,

Appellant,

Solicitation No. FA4497MXCONSUMABLES
Department of the Air Force
Air Mobility Command
Dover AFB, Delaware

SBA No. NAICS-5681

Decided: September 22, 2015

APPEARANCE

William K. Walker, Esq., Walker Reausaw, Washington, D.C., for Appellant

DECISION

I. Introduction and Jurisdiction

On July 14, 2015, the U.S. Department of the Air Force. Air Mobility Command, Dover AFB, Delaware, issued Solicitation No. FA4497MXCONSUMABLES for commercial items in support of the 436th Maintenance Squadron (436 MXS). The Contracting Officer (CO) set the procurement 100% aside for small business, and designated North American Industry Classification System (NAICS) code 423840. Industrial Supplies, Merchant Wholesalers, with a corresponding 100 employee size standard, as the appropriate code for the procurement. On August 11, 2015, the CO issued Amendment 1 to the Solicitation, changing the NAICS code designation to 332510, Hardware Manufacturing, with a corresponding 500 employee size standard.

On August 21, 2015. Global Precision Systems. LLC (Appellant), filed the instant NAICS code appeal, arguing that the appropriate NAICS code is 423840.

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 this appeal within ten calendar days after issuance of the RFP. 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The PWS

The Contractor will provide all labor, equipment, tools, transportation and materials necessary to provide the 436 MXS with the maintenance consumables required by the contract. The PWS identifies a long list of items helpful in performing maintenance functions, such as protective gloves, protective booties, bristle discs, paint brushes, coveralls, syringes, sanding discs, drills, drill bits, and flashlights.

The Contractor will provide a distribution mechanism, together with a method of control which will track monthly usage rates, current quantities, identify users and identify personnel with access to the consumables. Currently the Air Force is using a vending machine solution, with seven vending machines at various locations on the base served by 436 MXS.

B. The Appeal

Appellant argues this is a services contract. It requires the Contractor to “provide all labor” necessary to provide 436 MXS with maintenance consumables. The Contractor is required to “distribute” the consumables and maintain stock levels and maintain the vending machines. The Contractor must create and maintain records, perform surveys and make monthly usage reports to the CO. The PWS includes repeated instructions on the requirements of Contractor personnel to follow base security instructions, and the handling of employee badges.

The solicitation has no requirement that the Contractor manufacture any of the hundreds of items required by the PWS. The Contractor purchases products manufactured by others, maintains inventory, maintains records, and regularly visits the site. These are services. Appellant relies on *NAICS Appeal of Ferris Optical*, SBA No. NAICS-5285 (2011). Appellant argues that in *Ferris*, a contract to provide eyeglasses included the services involved in providing the eyeglasses, and the contract in question was not merely for products, but for services as well. Appellant argues this is also the case here. The Contractor will have to perform services to deliver the consumables to be purchased here. The Contractor will have to maintain the items in its inventory, deliver them to the facility, place them in vending machines, replace them at frequent intervals, with complete records, and meet the base security requirements for its personnel. Further, the Contractor is not required to manufacture anything. Appellant maintains this is not merely a contract for goods, but for services as well, and therefore should not have a hardware NAICS code, but a wholesaler's NAICS code.

C. NAICS Manual¹ Descriptions

The NAICS code designated by the CO. 332510. Hardware Manufacturing:

[C]omprises establishments primarily engaged in manufacturing metal hardware, such as metal hinges, metal handles, keys, and locks (except coin-operated, time locks).

NAICS Manual, at 376-77.

The NAICS code urged by Appellant, 123840, Industrial Supplies Merchant Wholesalers:

[C]omprises establishments primarily engaged in the merchant wholesale distribution of supplies for machinery and equipment generally used in manufacturing, oil well, and warehousing activities.

Illustrative Examples:

Industrial containers merchant wholesalers
Refractory materials (e.g., brick, blocks, shapes) merchant wholesalers
Industrial diamonds merchant wholesalers
Welding supplies (except welding gases) merchant wholesalers
Printing inks merchant wholesalers

NAICS Manual, at 525.

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. 13 C.F.R. § 121.402(b).

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

B. Analysis

The key regulation for this case is 13 C.F.R. § 121.402(b)(2), which provides:

Acquisitions for supplies must be classified under the appropriate manufacturing or supply NAICS code, not under a Wholesale Trade or Retail Trade NAICS code.

Appellant here seeks to apply a Wholesale trade NAICS code to this procurement, something the regulation expressly prohibits. Further, there is no significant services component to the procurement. The Contractor will have to keep track of the items delivered, their usage, and see that its personnel comply with base security policy. This is minimal administrative work, of the type that any Contractor providing goods would have to perform. The real heart of this procurement is the consumable items used in maintenance. This is thus a contract for supplies, and thus must be categorized under a manufacturing or supply code, as the CO here has done.

Appellant's reliance upon *Ferris* is misplaced. The contract in *Ferris* called not merely for the provision of eyeglasses, but for the services of a trained optician who would verily prescribe, aid in the selection of frames, and properly fit the eyeglasses. The contract thus called for significant professional services as well as the provision of the eyeglasses themselves. The instant contract calls for nothing like this level of professional services, and so *Ferris* is inapposite.

The CO's designation, while not perfect, covers hardware items, and most of the items listed in the PWS are of a type that would be categorized as hardware. Accordingly, I find that Appellant has failed to meet its burden of establishing that the CO's NAICS code designation was based upon an error of fact or law. I must deny the appeal and affirm the NAICS code designation.

IV. Conclusion

For the above reasons, the instant appeal is DENIED. The correct NAICS code designation for this procurement is 332510, Hardware Manufacturing, with a corresponding 500 employee size standard. However, because this decision is rendered after the deadline for receipt of proposals, the decision does not apply to the pending RFP, but may apply to future solicitations for the same supplies or services. 13 C.F.R. § 134.318(b) and FAR 10.303(c)(5). This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge