

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

NAICS APPEAL OF:

Active Deployment Systems, Inc.,

Appellant,

Solicitation No. W9124E-16-R-0001  
Department of the Army  
Mission and Installation Contracting  
Command  
Fort Bragg, North Carolina

SBA No. NAICS-5712

Decided: February 4, 2016

APPEARANCES

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq.,  
Koprince Law LLC, Lawrence, Kansas, for Appellant

Rebecca Fentzke, Contracting Officer, MICC-Fort Bragg, North Carolina, for the Army

DECISION<sup>1</sup>

I. Jurisdiction

This appeal is decided 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 its appeal within ten days after issuance of the solicitation, so the appeal is timely. 13 C.F.R. § 134.304(b).

II. Issue

Whether the Contracting Officer's designation of North American Industry Classification System (NAICS) code 561210, Facilities Support Services, is based on a clear error of fact or law.

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<sup>1</sup> I originally issued this Decision under a Protective Order and ordered the parties to file any requests for redactions. OHA received one or more timely requests for redactions and I considered them in issuing this redacted version of the Decision for public release.

### III. Background

#### A. The Solicitation

On December 18, 2015, the Department of the Army, Mission and Installation Contracting Command, at Fort Bragg, North Carolina (Army), issued Solicitation No. W9124E-16-R-0001 (RFP) for Rotational Life Support Services for the Joint Readiness Training Center. The Contracting Officer set the procurement aside for small businesses, and designated it under NAICS code 561210, Facilities Support Services, with a corresponding \$38.5 million annual receipts size standard.

On December 29, 2015, the Army issued Amendment 0001, informing the public of the filing of the instant NAICS code appeal and extending the deadline for offers from January 19, 2016 to February 1, 2016. On January 7, 2016, the Army issued Amendment 0002, revising the Performance Work Statement, revising the Addendum to 52.212-1, and updating the Government Responses to Industry Questions. On January 21, 2016, the Army issued Amendment 0003, extending indefinitely the due date for offers.

#### B. Performance Work Statement (PWS)<sup>2</sup>

The Joint Readiness Training Center (JRTC), Fort Polk, Louisiana, conducts training exercises, known as rotations, for Joint Task Forces. The rotations occur about 10 times per year and range from 500 to 10,000 personnel. PWS § 1.2. The Government anticipates a single award ID/IQ contract. PWS § 1.6.19. There is a 30-day phase-in, an 11-month base year, and four option years during which the Army will issue task orders specifying exact quantities of each item needed. PWS § 1.5. The contractor will perform:

the following services IAW this PWS and task orders: Set-up, operation, maintenance, servicing, repair, and tear down of all Contractor and/or Government furnished components at the site; fueling operations of all applicable components with Government furnished JP-8 fuel; collecting, and disposing of all grey water generated by hand wash stations; providing fresh water services utilizing government-furnished potable water to government and Contractor-furnished hand wash and hygiene facilities; and providing and maintaining storage/dispensing points with government-furnished potable water.

PWS § 1.3.1. Further, the services and support required by this PWS will be provided during the execution of training that replicates an actual conflict area. PWS § 1.3.2. Rotational Training Exercise is a 24/7 operation and requires services to be performed 24/7 including weekends and holidays. PWS § 1.6.4.

The contractor will provide “life support services in the form of personnel, equipment, supplies, facilities, transportation, tools, materials, and supervision to resource operational support to JRTC”. PWS § 1.4. The contractor shall furnish all labor, materials, equipment and services, other than water and fuel, required to execute the Rotational Life Support contract

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<sup>2</sup> All citations are to Amendment 0002 of the RFP

“which includes performing all work incidental to the set-up, operations and removal of life support structures and services” per the task orders. PWS § 5.0.

The contractor shall ensure all components at the sites are in place and operating at the specified capacities/capabilities a minimum of 48 hours in advance of the date listed on the task order for occupancy by the Advance Party. PWS § 1.6.15.1. The two key personnel are the Contract Manager and the Site Manager. The Contract Manager or alternate must be available 24/7 during task order periods. PWS § 1.6.11.1.1. The Site Manager must address all service requests within two hours of notification, and the contractor must coordinate service and maintenance responses from specialized subcontractors. PWS § 1.6.11.1.2.

The Government will furnish bulk potable drinking water, bulk water for hygiene, and JP-8 fuel; however, the contractor must transport these items. PWS § 3. The contractor provides all expendable materials. PWS § 4.2. Equipment and services to be provided include:

Tents (various sizes).

The contractor shall provide, place, and maintain tents and also equip the tents with heating/cooling and electrical equipment. All tents shall be clear span metal frame structures that when erected provide a minimum wind load capability of 80 mph. PWS §§ 4.3.1, 4.3.2. “All tents shall be Industry Standard Festival/Event tents that provide the occupant with a weatherproof structure.” PWS § 5.1.1. Tents shall have solid white roof and wall panels and pedestrian openings at all four sides and be made of fire retardant material. PWS § 5.1.1.

Tent, type A is for Sleep, Dining Facility (DFAC), and Maintenance. PWS § 4.3.1. These are 9,000 sq. ft., except for Maintenance tents which are 3,000 sq. ft. PWS § 4.3.1. Additional specifications are based on use; for example, door openings for Maintenance tents are 12-15 ft. high to accommodate entry of trucks, helicopters, or other military equipment. PWS § 5.1.1. Tent sidewalls shall be solidly attached to the tent floor so occupants cannot raise walls. PWS § 5.1.1. All Type A Sleep and DFAC tents shall have “real” doors, a framed entry access that can be closed and withstand heavy soldier traffic. PWS § 5.1.1. Tent, type B is for Sleep, Tactical Operations Command (TOC), Dining, and Admin. PWS § 5.1.2. These are smaller than Tent, type A, 1,200 sq. ft., with different openings. PWS § 4.3.2.

The contractor shall provide, place and maintain electric Environmental Control Units (ECUs) to provide forced air cooling or heating in tents. The contractor will determine ECU size based on the required interior temperature stated on each task order. ECUs shall be placed six feet away from tents and conditioned air introduced into tents by overhead, suspended poly ductwork. The contractor shall provide and connect power to the units. The contractor shall monitor air temperatures inside all tents every 6 hours. Temperature readings shall be logged and the logs forwarded daily to the COR. PWS § 5.1.1.2.

The contractor shall provide, place and maintain lighting and ground fault protected receptacles in all tents. PWS § 5.1.1. Lighting is by floodlight fixtures designed for exterior use with individual on/off switches. PWS § 5.1.1.1.1. The power distribution system, receptacles, and lighting fixtures shall be securely attached to tent poles. Electrical requirements vary by

usage of tent. Type A Sleep and Dining tents require 16 quadruplex receptacle units, each rated at 60 amps total (15 amps at each receptacle), and 6,000 watts of lighting. PWS § 5.1.1.1.2. Maintenance tents require four quadruplex receptacles and 6,000 watts of lighting. PWS § 5.1.1.1.3. Admin tents require eight quadruplex receptacles, four as dedicated circuits for electrical equipment, and 3,000 watts of lighting. PWS § 5.1.2.1.1. TOC tents require 16 quadruplex receptacles, eight dedicated, and 3,000 watts of lighting. PWS § 5.1.2.1.2. All Sleep and Dining tents require continuous lit red “EXIT” lights with battery backup. PWS §§ 5.1.1.1, 5.1.2.1. Electricians must be certified by State of Louisiana and trained in the specific equipment, and fuel handlers shall complete the Fort Polk Environmental Compliance Officer Certification Course. PWS § 1.6.8.

#### Tent Flooring.

The contractor shall provide, place and maintain flooring in all tents. Flooring shall be interlocking high strength plastic or rubber panels or wood flooring with 5/8” to 3/4” thick plywood placed on wood stringers or metal frames. Flooring shall provide continuous coverage of the ground inside the tent from sidewall to sidewall and be of sufficient strength to support the function of the tent. Ramps shall be installed at all doorway openings. The average flooring height is 6 in. on unimproved ground and 4 in. on prepared hard surfaces. Dining tents shall have a minimum of one layer of plastic floor panels placed as the wearing/traffic surface. Flooring in Maintenance tents shall be capable of supporting heavy tracked armor vehicles weighing 80 tons. Maintenance and DFAC tents shall have improved flooring, and other tents shall have unimproved flooring. PWS § 5.1.4.

#### Environmental Control Units (ECUs).

The contractor shall determine and provide equipment with size/capabilities (8 to 25 tons) to meet the Government's stated temperature parameters. ECUs must include power generation, fuel storage, and all distribution duct work. The Government will provide JP-8 to fuel generators. The contractor must fuel ECUs as needed to ensure 24 hour operation. PWS § 5.1.6.

#### Generators.

The contractor shall provide, install, and maintain generators 24/7 to supply power to facilities per task order. PWS § 5.1.7.1. The Government will provide fuel. Down time for maintenance is limited to two hours, but communication facilities requiring uninterrupted operation will require generators that can be serviced while in operation. The contractor shall determine and provide equipment with size/capabilities (35-400 Kva) to meet the Government's stated parameters. The contractor must verify the electrical peak load requirements for the structure and install appropriate equipment to meet that load. PWS § 5.1.7.1. The contractor must determine the most efficient method for the overall power generation at each site and provide all necessary equipment for an efficient and safe power grid. PWS § 5.1.7.2.

Light Tower Units.

The contractor shall provide, place and maintain (to include fueling) light tower units at locations per task order. The light tower units must be self-contained 6KW generator type on wheels, with four 1,000 watt metal halide light fixtures mounted. The engine shall run on JP-8 fuel. The contractor shall service light towers to include adjusting beams, starting units prior to sundown each day, and shutting them off after sunrise. PWS § 5.1.13.

Hygiene Units.

Hygiene Units are self-contained, fully operational shower and lavatory areas to include lighting, GFI receptacles, enclosed shower stalls, hot and cold running water with sufficient pressure to supply all showers and lavatories if running at the same time, and heat, cooling, and exhaust ventilation. Each Hygiene Unit has 10-20 shower heads and lavatory points. Shower structures shall include common dressing areas with benches and wall mounted hooks or bars for hanging clothing. The contractor shall provide and install all fresh water supply equipment and grey water collection equipment to include storage tanks, pumps, connecting pipes, hoses, etc., and ensure that all structures, water supply and collection equipment are protected from freezing. Fresh water supply and grey water collection vessels must have a minimum capacity of 3,000 gallons each. Government will remove grey water. All electrical components shall meet NEC requirements for wet and outdoor/mobile locations. Water heaters must have a minimum capacity of 250 gallons per 20 shower heads and lavatories, and shall be of quick recovery design. PWS § 5.1.8.

Handwash Units.

The contractor shall furnish and place self-contained hand wash stations per task order. The contractor shall maintain the clean water at no less than 25% full capacity at all times and removal of grey water from the units. The contractor shall ensure continuously supplied liquid soap and paper towels. The contractor must ensure all hand wash units are maintained in operable and sanitary condition at all times and are operational during freezing weather. The contractor shall repair or replace defective units and perform complete pressure washing quarterly. PWS § 5.1.9.

Refrigerators (Cold Storage Units).

The contractor shall provide, place, and maintain refrigerators with at least 900 cubic feet of cold storage capability at 0° F. PWS § 5.1.10.

Cots, Tables, and Chairs.

The contractor shall provide heavy duty tubular metal cots with canvas or synthetic material capable of supporting 325 pounds. PWS § 5.1.5. The contractor shall furnish and set up 6-8 ft. long folding tables and metal folding chairs per the task order. PWS §§ 5.1.18, 5.1.19.

Trash Cans.

The contractor shall place 50 gallon trashcans with lids adjacent to hand wash stations and in tents in specified numbers. The contractor does not provide trash bags for trash cans or empty trash cans. PWS § 5.1.11.

Fire Extinguishers.

The contractor will provide all tents, generators, fuel tanks and light towers with the proper fire extinguishers for chemical fires. The contractor must maintain them in charged and ready condition. PWS § 5.1.12.

Potable Containers.

The contractor shall conduct daily testing at pickup and delivery and daily testing at all potable water points. The contractor must be familiar with all hot zones and live fire ranges in the operational area. PWS § 5.1.15.

Transport Bulk Potable Drinking Water.

The contractor shall provide, place and maintain potable water storage tanks of not less than 1,200 gallons for drinking water. The contractor must transport Government furnished water from a designated fill point to the storage tanks, ensuring the water level does not go below half the total capacity of the tank at any time. The storage tanks shall be fiberglass or high strength plastic and shall be equipped with lockable supply inlets and a manifold of four to six individual dispensing valves. All potable water storage tanks shall be covered with a shade canopy. The contractor shall test the water at each tank at each refill to ensure the Potable Water standards are being met. Test results shall be logged and submitted to the COR daily. The contractor shall take appropriate actions to ensure the supply of water from the tanks through the dispensing manifolds is not disrupted during freezing weather. PWS § 5.1.14.

Transport Bulk Water for Hygiene.

The contractor shall provide transport of Government furnished bulk potable water from a designated fill point to each site to provide fresh water to hygiene facilities. The contractor shall develop a refill schedule that ensures water is available during surge periods of use at each site. The contractor shall test the water at each storage tank at each refill to ensure standards are being met. Test results shall be logged and submitted daily. PWS § 5.1.16.

Transport JP-8 Fuel.

The contractor shall receive Government furnished JP-8 fuel from the Fort Polk Bulk Fuel Site at either North Fort Polk or South Fort Polk and transport it to sites. The contractor shall provide and add a fuel additive to the JP-8 fuel to make it compatible with diesel engines. contractor must develop refueling schedules that ensure all components receiving fuel are kept at sufficient fuel levels to prevent shutdowns. PWS § 5.1.17.

The contractor shall have full responsibility for the maintenance and repair of all contractor furnished equipment, structures and components. Any equipment failures must be repaired or replaced within two hours after receiving a report of such unless extenuating circumstances exist. PWS § 5.1.20.

#### C. Performance Objectives and Performance Requirements Summary (PRS)

Technical Exhibits 2 and 3 together set out six Performance Objectives, with corresponding Performance Standards, Maximum Allowable Deviations, and Maximum Percentages of Contract. The first, “Quality of Service”, requires all services to be delivered IAW the PWS. The Maximum Allowable Deviation is two defects per rotation (zero defects for critical timelines), for a maximum 15% of the Contract.

The second Performance Objective, “Timeliness of Support”, requires all timelines to be met 100% of the time. The Maximum Allowable Deviation is zero defects per rotation, for a maximum 25% of the Contract. The third, “Quality of Equipment”, requires all equipment to be fully operational at all times. The Maximum Allowable Deviation is two defects per rotation, for a maximum 25% of the Contract.

Performance Objective 4, “Maintenance Support”, requires the Contractor to ensure all equipment receives proper maintenance and corrective response IAW the PWS. The Maximum Allowable Deviation is two defects per rotation, for a maximum 10% of the Contract. The fifth Performance Objective, “Water Quality Control”, requires all water delivery, storage, and hauling is performed IAW the PWS. The Maximum Allowable Deviation is zero defects per rotation, for a maximum 15% of the Contract. The sixth, “Responsiveness of Onsite and Corporate Personnel”, requires the Contractor to ensure its staff is sufficient in terms of size, experience and capability to accomplish task order requirements. The Maximum Allowable Deviation is two defects per rotation, for a maximum 10% of the Contract.

#### D. Evaluation Criteria

Proposals are evaluated using three evaluation factors: Technical Capability, Past Performance, and Price. RFP at 87-88. Award is to the offeror whose proposal is deemed technically acceptable (technical capability and past performance) and offers the lowest price. RFP at 87. The Government will evaluate the offeror's technical proposal to determine whether it satisfies the minimum for successful contract performance. To be considered for award, a proposal must receive “Acceptable” ratings in both non-price factors. RFP at 87.

Factor I. The Technical Capability evaluation assesses the offeror's capability to satisfy the requirements. There are two elements, each rated “Acceptable” if the offer clearly meets the RFP's minimum requirements, or “Unacceptable” if not. RFP at 88. An “Acceptable” rating in Element 1, Staffing Approach, requires the staffing matrix to identify the staffing by labor category and quantity, and crosswalk personnel identified to accomplish each task of the PWS. RFP at 88. An “Acceptable” rating in Element 2, Management Approach, requires (a) an organizational chart clearly identifying the management structure of key personnel, lines of

communication, and the roles and responsibilities for key personnel; (b) a showing of how the offeror will attain and sustain sufficient personnel, equipment, materials, and supplies to perform, and a sustainable method for repairing and replacing unserviceable equipment; and (c) a phase-in plan showing the offeror will be fully staffed and ensure all personnel, life support equipment, materials, and supplies are available at the end of phase-in. RFP at 88-89.

Factor II. The Past Performance evaluation assesses the offeror's ability to successfully perform as required. RFP at 89. It considers up to three recent and relevant past performances provided by the offeror as well as information from relevant databases. RFP at 89-90. The offeror's past performance must be at least satisfactory in four areas: Business Relations, Quality of Service, Schedule, and Customer Satisfaction. RFP at 90. Past Performance is rated either "Acceptable" or "Unacceptable". *Id.*

Factor III. Price is not rated, but evaluated for reasonableness. RFP at 90-91.

The Price Matrix lists the required items in specified quantities for pricing purposes. Amendment 0002, Attachment 1.

#### E. The Independent Government Cost Estimate and Methodology

The Army filed its Independent Government Cost Estimate (IGCE) and a May 8, 2015 Memorandum setting out the methodology used to arrive at the IGCE. The Memorandum states:

Labor cost is included in the rental price and is derived as a percentage of the cost of the rented item. It is the customer's expert opinion, based on experience that the labor rates range from [xxx] - [xxx]% of the overall estimated rental cost for the equipment. The customer used an average rate of [xxx]% to develop the labor rate within the material cost for the IGCE.

May 8, 2015 Memorandum, ¶ 5.g. It further states:

IGCE provide cost estimate from a rental perspective and represent an all inclusive cost to the item rented. IGCE represent a fair estimate of the cost for the Life Support Contract.

*Id.* ¶ 6. The IGCE itself states, "Rental cost include delivery, set up, service, repair, tear down and pick up at conclusion of rotation."

The IGCE spreadsheets show "Base Year Cost (Estimated) for ten 21-day Plus One Week Rotations" for "Contractor" and "IGCE". Under "Contractor", the Total Value of Tent Rentals<sup>3</sup> is \$[xxx] ([xxx]% of the entire contract) and All Other Rental Totals is \$[xxx] ([xxx]% of the entire contract). Labor costs are not broken out.

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<sup>3</sup> All citations are to Amendment 0002 of the RFP.



Under “IGCE” the total Estimate is \$[xxx]. Tent Rental is \$[xxx] and after subtracting [xxx]% for Labor, it is \$[xxx] ([xxx]% of the total Estimate). Other Rental is \$[xxx] and after subtracting [xxx]% for Labor, and then subtracting the three bulk transportation items (\$[xxx], about [xxx]% of the total Estimate), Other Rental is \$[xxx] ([xxx]% of total Estimate).

#### F. The Appeal

On December 28, 2015, Active Deployment Systems, Inc. (Appellant) appealed the Army's designated NAICS code 561210 to the SBA Office of Hearings and Appeals (OHA). Appellant contends NAICS code 561210 is not applicable to this procurement. Instead, Appellant argues, the proper code is either NAICS code 532310, General Rental Centers, or NAICS code 532299, All Other Consumer Goods Rentals, both of which have a corresponding \$7.5 million annual receipts size standard.

Appellant presents three bases for its contention that NAICS code 561210 is erroneous. First, Appellant argues the principal purpose of this procurement is the provision of goods — rental of tents and the various life support structures that go with them. NAICS code 561210 applies to the provision of services, not goods. Appeal at 1-2. The contractor-furnished items listed in the solicitation are all goods, and none are services. The tasks described in the PWS are not tasks, but specifications for equipment. Appeal at 4-5. Appellant argues the only services sought are transport of fuel and water. Appeal at 5.

Appellant asserts the solicitation makes few staffing related requirements, only that it be sufficient in size, experience and capability to meet the solicitation's needs. Appeal at 8. The PWS identifies only two key personnel, a contract manager and a site manager. The Price Matrix enumerates all the items the Army seeks to rent, but it does not include a calculation for staff. Appeal at 8. Appellant asserts there are few instructions relating to staff, and so it is not an important part of the procurement. Appeal at 5. Appellant points out the solicitation refers to the set-up and break-down services as “incidental”, implying this means the solicitation classifies these as minor items for the procurement. Appeal at 8.

Appellant also points to the Performance Requirements Summary, where Quality of Equipment accounts for 25% of the contract, tied for largest among the six objectives. Appeal at 9. Further, Appellant argues the other objectives show that equipment rental is the primary purpose of the procurement, e.g., Timeliness emphasizes the importance of on-schedule set-up of the equipment. *Id.* Appellant maintains the strong Timeliness factor shows the Army's main concern is that the components be ready before the military personnel arrive. Appellant asserts “It is not seeking staff to provide services. In fact, it wants the staff to be entirely gone by the time the soldiers arrive.” *Id.* The Army is seeking not services, but a habitation for military personnel while they train, in other words, goods. Appeal at 8.

Second, Appellant argues the services being procured here are core activities of the Army, the housing of its personnel. Therefore, NAICS code 561210, which excludes the client's core business functions, is inappropriate. Appeal at 10.

Third, Appellant argues that one activity, tent rental, exceeds 50% of the value of the procurement, and so NAICS code 561210, which requires a combination of support services none of which accounts for 50% of the work, is not appropriate. Appeal at 11. Appellant asserts tent rental has historically accounted for over 50% of this procurement. *Id.* Appellant's own calculations are that tent rental accounts for [xxx]% of the estimated \$[xxx] million total, and other rentals [xxx]%. Appeal at 12.

Appellant argues the rental NAICS codes, 532210, General Rental Centers, or 532299, All Other Consumer Rental Goods, would be appropriate codes. They both cover the rental of goods. Further, the NAICS code description for 532210<sup>4</sup> specifically includes certain types of tents. Appeal at 13-15.

#### G. The Army's Response

On January 12, 2015, the Army responded to the appeal. The Army moves to dismiss the appeal for two reasons. First, the Army argues Appellant does not have standing to appeal, because Appellant is not registered in the System for Award Management (SAM) under either NAICS code 532310 or 532299. The Army asserts OHA would be rendering an advisory opinion here, and for Appellant to argue in favor of two NAICS codes under which it is not registered is speculative. Army Response at 2. Second, the Army argues Appellant has not been adversely affected by the NAICS code designation. The Army had previously issued a FedBid solicitation under NAICS code 561210 for a bridge contract until the subject solicitation could be awarded. On January 4, 2016, Appellant emailed the Army indicating interest in the FedBid procurement, without questioning the NAICS code designation. Appellant's email [xxxxxxx] {xxxxxxxxxxxx xxxxxxxxxxxxxxxxxx}, thus showing that it recognized the services nature of the procurement. Army Response at 3.

Addressing the merits, the Army asserts that through its acquisition planning, NAICS code 561210 was selected as the appropriate code for the procurement. This was the code used for the previous acquisitions, and the Market Research Report found similar requirements were similarly categorized. Further, a Sources Sought/Request for Information was issued, and none of the eight responders commented the NAICS code was inappropriate. Army Response at 4.

The Army further argues the rental NAICS codes Appellant advocates cannot meet the breadth and scope of this contract, as equipment rental is only one aspect of the procurement. These codes describe the rental of consumer goods, and describe rental of “party equipment and supplies”, where the Army seeks to procure tents, flooring, cots, environmental control units, generators, hygiene units, hand wash units, refrigerators, and other items that would not be appropriate for a party setting or for consumer rental. Army Response at 5-6. Also, Appellant's rentals NAICS codes are for shorter periods of time, not 37 days as for a rotation.

The Army also asserts the PWS also requires much more than the mere rental of equipment. The contractor here is responsible for furnishing all the labor, materials, equipment, and services incidental to the set-up, operations, and break-down of life support structures and

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<sup>4</sup> Appellant probably meant NAICS code 532299.

services at Fort Polk and other locations. The contractor is responsible for set-up and break-down of the tents and all the other equipment to be provided. There is a requirement for ongoing services relating to heating and cooling of the tents and their electrical lighting requirements. The contractor must monitor the temperature within the tents, and conduct structural checks to ensure a tent can withstand an up to 80 mph wind. Army Response at 6-7.

The contractor also must provide vehicles to pick up, transport and distribute potable water and fuel. Army Response at 7. The contractor must conduct daily testing at pickup and delivery of the water. The contractor must also conduct regular checks to ensure that hot and cold water is running at all times with sufficient pressure, and to ensure the outlets are operational. *Id.* The contract requires a licensed electrician. Fuel handlers must complete an Environmental Compliance Officer Certification Course. *Id.*

The Army argues the services required by this procurement support a 561210 designation. The Army points to *NAICS Appeal of B&B Medical Services, Inc.*, SBA No. NAICS-5597 (2014), where a procurement was classified as being for Home Health Care Services, rather than for Home Health Equipment Rental, when it required the provision of significant services to the patients beyond the mere delivery of oxygen. The Army argues this is a similar case, where the services required by the PWS support a services designation. *Id.* at 8.

The Army further maintains it seeks an operating staff to perform a combination of support services within its facilities, including maintenance, and this supports the designation. The Army takes exception to Appellant's "manipulation" of the word "incidental" in the solicitation's description of the services as incidental to the set-up, operation, and removal of life support structures at Fort Polk. The Army asserts the word here means not minor, but rather something that happens as a consequence of something else. *Id.* at 10 (quoting PWS § 1.0). The services here are not inconsequential, but vital.

The Army asserts the Evaluation Criteria make clear that staffing (therefore services) is an important component of the procurement. The Evaluation Criteria require each offeror to identify the staffing proposed in each category, quantity of personnel for each category, and the PWS task for which the labor category is proposed. *Id.* at 11 (quoting RFP at 8-9). Were this a supplies procurement, the Government would not be evaluating the offeror's staffing approach or management structure. Army Response at 12. Also, contrary to Appellant's assertion, the Performance Requirements Summary analysis actually supports the Army's contention that services are being procured, since only one objective, worth 25%, speaks to equipment. The Army also takes issue with Appellant's assertion that the Army wants contractor staff "entirely gone" when the trainees arrive, pointing to items where continuous maintenance is required.

In response to Appellant's second argument, the Army maintains that while the contract will require services, these services are not the core activities of the Army. Housing troops is not a core activity of the Army. Many private entities serve that function, and some troops live off-post. *Id.* at 15.

In response to Appellant's third argument, the Army asserts tent rental here does not exceed half the value of the procurement. The Army points to the Independent Government Cost

Estimate (IGCE), which was prepared on December 11, 2014, to demonstrate that the only [xxx]% of the value of the procurement is attributable to tent rental. Further, the other rentals account for only [xxx]% of the value of the procurement.

#### H. Appellant's Reply

On January 15, 2016, Appellant filed a Motion to Reply to Appellant's Response, together with the Reply.

First, Appellant asserts it has standing to appeal because it is adversely affected by the Army's designation. Appellant is small not only under this code, but under the codes it advocates here, which have smaller size standards. Appellant is adversely affected by having to compete against much larger businesses. Reply at 1-2. Appellant asserts its SAM profile is irrelevant. There is no requirement a contractor be registered in a NAICS code in SAM in order to bid on or be awarded a contract designated with that NAICS code. The regulations merely require registration in SAM prior to award. Reply at 3 (quoting FAR 4.1102). Appellant points to a GAO decision holding that failure to list the applicable NAICS code in an online profile is an insignificant omission. *S4, Inc.*, B-299817, 2007 CPD ¶ 164 (Comp. Gen. Aug. 23, 2007). Appellant also points to an OHA decision holding a concern's failure to list in an online profile the NAICS code for which it submits an offer is irrelevant. *Size Appeal of IPKeys Techs., LLC*, SBA No. SIZ-5353 (2012).

Appellant argues the bridge contract is similarly irrelevant. Nothing about a different solicitation should have any bearing on the Army's designation here. While Appellant intends to compete for this contract in any event, the fact that the Army's NAICS code designation will force Appellant to compete with larger firms gives it standing here. Reply at 6-7. Likewise, Appellant asserts the fact it did not challenge the NAICS code in the Sources Sought notice proves nothing, because there is no mechanism for doing so. Reply at 14-15.

Appellant renews its substantive arguments that its proposed rental NAICS codes better describe the work. The fact that labor is required to put an end product together does not transform the product into a service rather than a thing. While consumer items are included among the items rented under the rental NAICS codes, so are more substantial items, such as the tents required here. Reply at 9-10. The fact that there are services involved here does not make the NAICS code designation proper. The services are not a significant part of the work required. Merely including maintenance and repair in a solicitation does not bring procurement under NAICS 561210. Further, Appellant argues the Army misreads *B&B Medical Services*. That procurement was about actual life support, the machines that keep people alive, and services required a high level of training, far above the maintenance and repair services required here. Reply at 11-12.

Appellant argues that a NAICS code decision should not be based on evaluation criteria, and the Army conflates Performance Objectives here with services. Reply at 12. These objectives are not priced services, but benchmarks to measure contractor performance. Reply at 13. Further, the RFP's Evaluation Criteria, under Management Approach, refers to the offeror's plan for personnel, equipment, materials, and supplies required to perform the procurement,

establishing the Army's main concern here “is to acquire things, not staff.” Reply at 13. Also, the phase-in plan shows the Army's four areas of focus: personnel, life support equipment, materials, and supplies, only one of which speaks to services. Reply at 14. Appellant's conclusion is: “The Army wants stuff.” *Id.*

Appellant asserts the Army's denial that housing is its core function because some housing is private is irrelevant, because this housing was not solicited under NAICS code 561210. The Army's statement that the contractor must test the tents for resistance to wind is not supported by the PWS, which merely directs the tents must have this capacity, not that the contractor test them. Reply at 16.

Appellant maintains the Army is not seeking only equipment, but that it is primarily seeking equipment. Appellant asserts the Army misunderstood its argument regarding the Performance Requirements Summary. Reply at 17.

### I. Appellant's Supplement to its Appeal

On January 25, 2016, Appellant moved to file a Supplement to its Appeal and filed its Supplement. Appellant's counsel received the unredacted IGCE and other documents under a Protective Order on January 20, 2016. Appellant seeks to reply to the Army's arguments based upon the IGCE. Appellant maintains the IGCE supports its argument that the instant RFP is not for a services contract, but a procurement of goods.

Appellant asserts the IGCE demonstrates that what the Army seeks to acquire here is almost entirely rental goods. Appellant argues that in a services solicitation, the IGCE ordinarily reflects the type of services the agency seeks, and when OHA seeks to determine the type of services sought, it will look to the amount specified for each contract line item number in the solicitation. *NAICS Appeal of RhinoCorps, Ltd.*, SBA No. NAICS-4736 (2005).

Appellant asserts that here, the line items of the IGCE demonstrate the Army seeks goods, not services. Only three out of twenty-three items, transporting drinking water, hygiene water and fuel, can be described as services. Appellant argues that when an IGCE does not include significant line items for services, the government is not seeking to award a services contract. Supplement at 3.

Appellant also argues the [xxx] vendors the Army contacted for the IGCE are in the rental business, [xx], and this supports its argument the solicitation is for tent rentals. Appellant also maintains the IGCE essentially ignores labor, accounting for only two contractor employees, a project manager and a supervisor for a total of [xxx]% of the total estimate. The failure to separately identify labor indicates this is not a services contract.

Appellant maintains the Army admits that labor is, at most, [xxx]% of the contract. Appellant asserts the Army's claim that labor is [xxx]% of contract cost is a *post hoc* rationalization. Appellant claims documents submitted with the IGCE must have been prepared

after the filing of the appeal, because they include Appellant's estimated cost figures. Thus, these documents should be accorded less weight than the IGCE itself. Supplement at 4.

Appellant argues the Army's calculations, which deduct [xxx]% for labor from the value of the rental items, make its estimate appear inflated, but if Appellant were to deduct the cost of labor from its estimate, the difference is not so stark. Appellant argues the IGCE does not account for [xxx]% of its costs as labor, the Army did so *post hoc* so that the rental goods would have less value. The IGCE reflects the cost of setting up and taking down the tents which is built into the price of renting the tents. In addition, the [xxx]% figure means that [xxx]% of the cost of the contract is the value of the rental goods. Supplement at 5-6.

Further, the IGCE only lists one type of service, the transportation of water and fuel. The PWS does not list the type of activities that usually support a 561210 designation, such as plumbing, painting, and carpentry. Supplement at 6.

#### J. The Army's Response to Appellant's Supplement

On January 26, 2016, the Army opposed the admission of Appellant's Supplement into the record, which was closed, and also provided a substantive response to the Supplement. The Army takes issue with Appellant's assertion that the IGCE ignores labor and attempts to claim *post hoc* that [xxx]% of the value of the contract is labor. The Army points out that it included in its submission its May 8, 2015 memorandum explaining the IGCE methodology.

The Army argues the IGCE clearly shows the percentage of the contract allocated for services is [xxx]%, and [xxx]% for tents. Many other services are required for this procurement. The Army points to NAICS code 238220, Plumbing, Heating and Air Conditioning Contractors, and 221121, Electric Bulk Power Transmission and Control, as covering services required here. The procurement requires a substantial amount of other work besides tent rental. Army Response at 4.

The Army further argues that while a procurement is usually classified according to the component which accounts for the greatest percentage of contract value, the appropriate code is that which best describes the principal purpose of the procurement. In a multi-faceted procurement such as this, where the breadth and scope of the requirement is much greater than tent rental, to simply designate the procurement as being for the rental of tents would be inadequate.

### IV. Discussion

#### A. Motions

On January 12, 2015, the day on which the record closed in this appeal, the Army filed a motion to dismiss the appeal and also its substantive response to the appeal. The Army's substantive response included protected material that was not served upon Appellant or its attorney. On January 15, 2015, Appellant responded to the Army's motion to dismiss, moved to reply to the Army's response, and filed its proposed reply. On January 25, 2016, after its counsel

had reviewed the Army's protected material under the terms of a protective order, Appellant moved to file a supplement to its appeal petition, and also filed its proposed supplement. On January 26, 2016, the Army responded substantively to Appellant's proposed supplement. The Army opposes the filing of both Appellant's proposed reply and its proposed supplement.

Ordinarily, pleadings must be filed with OHA no later than the close of record. 13 C.F.R. § 134.309(b). Further, a reply to a response is not permitted unless the Judge orders it. 13 C.F.R. § 134.309(d). Here, however, the Army moved to dismiss the appeal on the day the record closed, so Appellant had no choice but to respond to the motion to dismiss after close of record. *See* 13 C.F.R. § 134.211(c). As for the substantive portion of Appellant's Reply and Supplement, I note the Army's filing of critical factual information on the day the record closed, without presenting that critical information to Appellant's counsel through a protective order or otherwise, prevented counsel from addressing, or even seeing, that critical information until well after close of record.

Accordingly, I ADMIT into the record Appellant's Reply and its Supplement, as well as the Army's Response to Appellant's Supplement.

The Army's argument that Appellant lacks standing to appeal is meritless. There is no requirement that a concern's SAM registry include the NAICS code(s) for which it advocates. Any person adversely affected by a NAICS code designation may appeal it to OHA. 13 C.F.R. § 134.302(b). Further, OHA has held that a concern which is small for the designated NAICS code has standing to appeal advocating a NAICS code with a smaller size standard because it is adversely affected by having to compete with larger firms. *NAICS Appeal of SAC Cleaners, Inc.*, SBA No. NAICS-5468, at 6 (2013). Appellant's January 4, 2016, correspondence with the Army concerning the FedBid procurement is irrelevant to the NAICS code selection on the instant RFP. No rule requires a contractor to contest the NAICS code in any or every other procurement for which it seeks to compete, or in any "Sources Sought" notice.

Accordingly, I DENY the Army's Motion to Dismiss.

#### B. NAICS Code Descriptions

The Army's NAICS code is classified under NAICS Subsector 561, Administrative and Support Services. The NAICS code selected by the Army, 561210, Facilities Support Services, covers:

[E]stablishments primarily engaged in providing operating staff to perform a combination of support services within a client's facilities. Establishments in this industry typically provide a combination of services, such as janitorial, maintenance, trash disposal, guard and security, mail routing, reception, laundry, and related services to support operations within facilities. These establishments provide operating staff to carry out these support activities; but are not involved with or responsible for the core business or activities of the client. Establishments providing facilities (except computer and/or data processing) operation support services and establishments providing private jail services or operating

correctional facilities (i.e., jails) on a contract or fee basis are included in this industry.

*NAICS Manual* at 782. The *NAICS Manual* does not offer illustrative examples for NAICS code 561210. The NAICS website, however, provides the following Corresponding Index Entries:

Base facilities operation support services;  
Correctional facility operation on a contract or fee basis;  
Facilities (except computer operation) support services;  
Government base facilities operation support services;  
Jail operation on a contract or fee basis;  
Jails, privately operated

Regarding Facilities Support Services, the size regulation provides additional information in Footnote 12. This information is as follows:

NAICS code 561210—Facilities Support Services: (a) If one or more activities of Facilities Support Services as defined in paragraph (b) (below in this footnote) can be identified with a specific industry and that industry accounts for 50% or more of the value of an entire procurement, then the proper classification of the procurement is that of the specific industry, not Facilities Support Services. (b) “Facilities Support Services” requires the performance of three or more separate activities in the areas of services or specialty trade contractors industries. If services are performed, these service activities must each be in a separate NAICS industry. If the procurement requires the use of specialty trade contractors (plumbing, painting, plastering, carpentry, etc.), all such specialty trade contractors activities are considered a single activity and classified as “Building and Property Specialty Trade Services.” Since “Building and Property Specialty Trade Services” is only one activity, two additional activities of separate NAICS industries are required for a procurement to be classified as “Facilities Support Services.”

13 C.F.R. § 121.201, n.12.

The first NAICS code Appellant proposes, 532310, General Rental Centers, covers:

[E]stablishments primarily engaged in renting a range of consumer, commercial, and industrial equipment. Establishments in this industry typically operate from conveniently located facilities where they maintain inventories of goods and equipment that they rent for short periods of time. The type of equipment that establishments in this industry provide often includes, but is not limited to: audio visual equipment, contractors' and builders' tools and equipment, home repair tools, lawn and garden equipment, moving equipment and supplies, and party and banquet equipment and supplies.



*NAICS Manual* at 732. The *NAICS Manual* does not offer illustrative examples for NAICS code 532310. The NAICS website, however, provides the following Corresponding Index Entries:

General rental centers;  
Home and garden equipment rental centers;  
Rent-all centers.

Appellant's alternate NAICS code is in Industry Group 5322, Consumer Goods Rental. The *NAICS Manual* describes establishments in this Industry Group as “primarily engaged in renting personal and household-type goods.” *NAICS Manual* at 728.

Appellant's alternate NAICS code, 532299, All Other Consumer Goods Rental, covers:

[E]stablishments primarily engaged in renting consumer goods and products (except consumer electronics and appliances; formal wear and costumes; prerecorded video tapes and discs for home electronic equipment; home health furniture and equipment; and recreational goods). Included in this industry are furniture rental centers and party rental supply centers.

*NAICS Manual* at 731. The *NAICS Manual* does not offer illustrative examples for NAICS code 532299. The NAICS website, however, provides the following Corresponding Index Entries:

Carpet and rug, residential, rental;	Piano rental;
Furniture (i.e., residential) rental centers;	Rug and carpet rental;
Furniture, residential, rental or leasing;	Silverware rental;
Musical instrument rental;	Table and banquet accessory rental;
Party (i.e., banquet) equipment rental;	Tableware rental;
Party rental supply centers;	Tent, party, rental.

### C. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the NAICS code designation assigned to the solicitation is based on 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). OHA's review is deferential, and OHA will not modify the procuring agency's designated NAICS code unless OHA has a definite and firm conviction that a mistake has been committed. *NAICS Appeal of EnergX, LLC*, SBA No. NAICS-4952, at 8-9 (2008). The correct NAICS code is that which best describes the principal purpose of the services being procured, in light of the industry description in the *NAICS Manual*,<sup>5</sup> the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b); *Durodyne*, SBA No. NAICS-4536, at 4.

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<sup>5</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>

#### D. Analysis

A review of the RFP and the Army's IGCE leads to the conclusion that the overwhelming value of this procurement is in the rental of the equipment the Army seeks to procure. The Army seeks to rent a very large amount of equipment: tents, tent floors, cots, ECUs, generators, hygiene units, handwash units, refrigerators, light towers, lighting receptacles, trash cans and fire extinguishers. The only line items which can be classified as services are the transportation of fuel, drinking water and hygiene water, and the two key employees of the contract. These make up a small proportion of the contract.

The RFP does call for the contractor to provide extensive services along with the equipment. The contractor must erect and take down the tents and other equipment, and maintain them while they are in use. The contractor must test the temperature of the air, and the quality of the water. The contractor must set up the lighting and other electrical equipment, using licensed electricians. However, none of these services are listed as separate items on the IGCE. The IGCE estimates that the cost of the service obtained with the equipment rented represents [xxx]% of the cost of each item of equipment. The IGCE further estimates that, after deducting the [xxx]% cost of included services for each of items rented, the cost of the tent rental is [xxx]% of the contract, and the cost of the rental for the other equipment is [xxx]%.

The size regulation requires that the work in a procurement designated under NAICS code 561210 include services from three different NAICS codes, and no one code may account for 50% or more of the value of the procurement. 13 C.F.R. § 121.201, n.12. If any single NAICS code does, the proper classification for the procurement is that code, not 561210. *Id.* Here, however, the rental of all equipment including tents, minus the cost of the services (labor), accounts for about [xxx]% of the value of the contract. There is not a separate NAICS code for the rental of tents. Given the descriptions in the *NAICS Manual*, it is difficult to find a way to distinguish the rental of tents from that of the other equipment required by the solicitation. The value of the equipment to be rented here is the greater portion of this procurement.

The question remains, which rental NAICS code is the appropriate NAICS code for this procurement. Appellant argues for General Rental Centers or All Other Consumer Goods Rentals. However, the types of equipment these establishments rent are more in the nature of consumer items. The tents included in the code are described as “party tents” under All Other Consumer Goods. Another NAICS code, 532292, Recreational Goods Rental, covers “camping tents”, but the tents required by this procurement are far larger and more elaborate than the recreational camping tents. The tents here are large, 9,000 sq. ft., 3,000 sq. ft., and 1,200 sq. ft., and the Maintenance tents require flooring sufficient to support 80-ton vehicles. These are not party or recreational camping tents. Further, the PWS requires the contractor to provide other equipment that is not of the consumer goods type. The procurement requires large (eight tons or more) ECUs, a variety of large generators, hygiene units which must have 10-20 lavatories and shower heads each, 900 cubic foot refrigerators, and large light towers. These are not consumer items, nor are they the type of item handled by a General Rental Center. The equipment here is meant to provide large numbers of military personnel with temporary living facilities while they train.

After reviewing the *NAICS Manual*, I conclude that the most appropriate code for this procurement is 532490, Other Commercial and Industrial Machinery and Equipment Rental and Leasing, which covers:

[e]stablishments primarily engaged in renting or leasing nonconsumer-type machinery and equipment (except heavy construction, transportation, mining, and forestry machinery and equipment without operators; and office machinery and equipment). Establishments in this industry rent or lease products, such as manufacturing equipment; metalworking, telecommunications, motion picture, theatrical machinery and equipment, or service industry machinery; institutional (i.e., public building) furniture, such as furniture for schools, theaters, or buildings; or agricultural equipment without operators.

*NAICS Manual* at 735. NAICS code 532490 has a corresponding \$32.5 million annual receipts size standard.

This NAICS code is for the rental of “nonconsumer-type” equipment. This is exactly the type of equipment the Army requires. These tents, ECUs, generators, refrigerators, light towers and hygiene units are large, nonconsumer items and they constitute the bulk of the value of this procurement. While this is not the NAICS code advocated by Appellant, after reviewing the solicitation and the *NAICS Manual*, I conclude that it is the most appropriate code for this procurement. *NAICS Appeal of SD Titan Resources/SM&MM*, SBA No. NAICS-5187 (2011).

The Army's arguments that it used NAICS code 561210 throughout its acquisition planning, that previous procurements were designated under it, that the Market Research Report used similar codes, and that none of the responders to the Sources Sought notice questioned the code are all not relevant here. The issue is whether the code chosen accurately describes what the Government seeks to procure. *Size Appeal of Heritage Health Solutions, Inc.*, SBA No. SIZ-5650 (2015). Likewise, recommendations the Contracting Officer received from other officials carry no weight here. *NAICS Appeal of JBS Int'l, Inc.*, SBA No. NAICS-5021 (2008). Similarly, opinions expressed by potential vendors have no weight, especially here, where the responses were conclusory and included no analysis. The issue is whether, in the light of the industry description and the requirements of the solicitation, this NAICS code best describes the principal purpose of the services being acquired. *NAICS Appeal of The Tolliver Group, Inc.*, SBA No. NAICS-5705 (2016); 13 C.F.R. § 121.402(b).

The Army's argument that there is a breadth of services required by this procurement, is accurate. However, these services, by the Army's own estimate, comprise only [xxx]% of the value of the rented equipment, plus the transportation of fuel and water and the key employees, totaling about [xxx]% of the value of the procurement. The regulatory requirement that no one NAICS code account for more than 50% of the value of a Facilities Support Services procurement cannot be overcome by the actual values the Army itself provided in the IGCE. The Army's reliance upon *NAICS Appeal of B&B Medical Services, Inc.*, SBA No. NAICS-5597 (2014) is misplaced, because the Facilities Support Services code was not at issue in that case.

The Army maintains the Evaluation Criteria make clear that staffing is an important element of this procurement, and that it seeks an operating staff to perform support services at Fort Polk. However, the Army's own documentation establishes that this need for services does not represent the majority of the value of the procurement, while the rental of equipment does. Further, a rental NAICS code is a services code, because the Subsector is categorized as Subsector 532 — Rental and Leasing Services(emphasis supplied). *NAICS Manual*, at 725. The evaluation of the services portion of the procurement is thus consistent with rental services NAICS code designation. The regulatory requirement is clear, a procurement where 50% or more of the value is identified with one NAICS code designation cannot support a Facilities Support Services designation. Here, the great majority of the value of the procurement is the equipment rental.

Accordingly, I conclude that Appellant has established clear error in the Army's designation of NAICS code 561210, Facilities Support Services, as the appropriate code for this procurement. After reviewing the solicitation, I conclude that that the appropriate code is 532490, Other Commercial and Industrial Machinery and Equipment Rental and Leasing, with a corresponding \$32.5 million annual receipts size standard.

#### V. Conclusion

For the above reasons, I GRANT the appeal and the Army's NAICS code designation is REVERSED. NAICS code 532490, Other Commercial and Industrial Machinery and Equipment Rental and Leasing, with a corresponding \$32.5 million annual receipts size standard, is the appropriate NAICS code for the requirements of the solicitation.

Accordingly, because this decision is issued before the close of the solicitation, the Army MUST amend the solicitation to change the NAICS code designation from 561210 to 532490. FAR § 19.303(c)(5); 13 C.F.R. § 134.318(b); *Matter of Eagle Home Med. Corp.*, Comp. Gen. B-402387, March 29, 2010, *available at* <http://www.gao.gov/decisions/bidpro/402387.pdf>.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge