

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

NAICS APPEAL OF:

Arrowhead Contracting, Inc.,

Appellant,

Solicitation No. W9126G-16-R-0004
U.S. Army corps of Engineers
Fort Worth District
Fort Worth, Texas

SBA No. NAICS-5725

Decided: March 24, 2016

APPEARANCES

Steven F. Engley, Vice President, Arrowhead Contracting, Inc.

Katherine S. Talbot, Esq., Trial Counsel, U.S. Army Corps of Engineers

DECISION

I. Introduction and Jurisdiction

On February 26, 2016, the U.S. Army Corps of Engineers, Fort Worth District (USACE), issued Solicitation No. W9126G-16-R-0004 (RFP) seeking contractors to provide Design-Build and Design-Bid-Build Repair and Alterations (RA) services at Land Ports of Entry (LPOE).¹ The RFP contemplates award of a target of four Indefinite Delivery Indefinite Quantity Multiple Award Task Order Contracts (MATOC). The Contracting Officer (CO) set the procurement entirely aside for small business and designated North American Industry Classification System (NAICS) code 238990, All Other Specialty Trade Contractors, with a corresponding \$15 million annual receipts size standard, as the appropriate code for the procurement. RFP at 1. Offers are due March 28, 2016.

¹ Land Port of Entry, also known as a border station, is the facility that provides controlled entry into or departure from the United States for persons and materials. It houses the U.S. Customs and Border Protection, and other Federal Inspection Agencies responsible for the enforcement of federal laws pertaining to such activities. The Land Port of Entry consists of the land, the buildings, and the on-site roadways and parking lots that the Port of Entry occupies. http://wbdg.org/design/land_port.php.

On March 2, 2016, Arrowhead Contracting, Inc. (Appellant) filed the instant appeal. Appellant argues the appropriate NAICS code is 236220, Commercial and Institutional Building Construction, with a corresponding \$36.5 million annual receipts size standard.

The 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). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFP

This RFP is to establish a target of four MATOCs to provide Repair and Alterations (RA) services at LPOEs to support the Department of Homeland Security's LPOE RA program. The geographical region is primarily Washington, Idaho, and Montana, but may support other Southwestern Division military, civil works, and International Interagency Section projects. The estimated duration for each contract will be a base period of 12 months with up to four 12-month option periods. RFP at 1. Task orders will be issued as firm fixed price. The estimated maximum task order limitation is \$5 million, with a minimum task order limitation of \$2,000.00. RFP § 21 00 ¶ 1.1.3.

The construction services required include a wide variety of multidisciplinary services required for preparation of, but not limited to, renovation, repairs, preventive maintenance, environmental abatement, and erosion control, earthwork and operations construction activities; restoration of roads, parking lots, bridges, fences, gates, equipment and fixtures, as applicable under these task orders. The contracts are not only intended to execute design-build construction and design-bid-build, but to provide a timely response to remediation of facilities, e.g., maintenance, repair, asbestos and lead-based paint abatement, and minor construction situations relating to, but not limited to, civil, mechanical, plumbing, structural, electrical, heating, ventilation and air conditioning (HVAC), instrumentation, anti-terrorism and force protection. *Id.* ¶ 1.1.2.

USACE will evaluate offers using Two-Phase Design-Build selection procedures. In Phase 1, offerors shall submit specified performance capability proposals, demonstrating their capability to successfully execute the required work. The Government will evaluate the qualifications in accordance with the RFP criteria to select the most highly qualified offerors to compete in Phase 2. RFP § 21 00 ¶ 1.1.4.1.

In their Phase 1 proposal, offerors must submit at least three recent examples of relevant repair, alteration or construction experience. RFP § 22 10 ¶ 6.1.1. Recent means completed, or currently in progress with at least 75% construction completed, within the past seven years. *Id.* ¶ 6.1.2. Projects will be considered relevant to this procurement if they are the same or similar in complexity, in type, scope, and magnitude. *Id.* ¶ 6.1. It is considered a strength to provide at least

two examples of repair, alteration, or construction of a facility involving these trades: architectural, mechanical, electrical, plumbing (MEP), structural or civil with a construction value of at least \$200,000 and a minimum of one example of repair, alteration, or construction of a facility involving two of more of these trades: architectural, MEP, structural or civil with a construction value of at least \$500,000. *Id.* ¶ 6.2.1.

Offerors must submit their organization and technical approach. RFP § 22 10 ¶ 7.1. Offerors must identify their key personnel and their technical competencies, roles, and responsibilities. *Id.* ¶ 7.1.2. Key personnel include: a Project Manager, Construction Superintendent, Design Team, Civil Engineer, Mechanical Engineer, Structural Engineer, Architectural Engineer and Electrical Engineer. *Id.* Project Managers must have a minimum of 10 years' experience managing construction projects or five years combined with a bachelor's degree in engineering or construction management. *Id.* Construction Superintendents must have at least 10 years' experience on construction projects. *Id.* The Design Lead must have a minimum of five years' experience combined with a bachelor's degree in engineering. *Id.* The remaining key personnel will have at least two years' experience combined with a bachelor's degree in the appropriate field. *Id.*

The three Evaluation Factors for Phase 1 are, in order of greatest importance: Experience, Organization and Technical Approach, and Past Performance. *Id.* at 4.0.

Phase 2 centers on a Seed Task Order, as described below.

Provide the Customs and Border Protection (CBP) . . . with construction support to repair and revise the domestic water systems at the CBP LPOE locations identified below. This work will involve separating and handling domestic and fire protection systems individually to protect the integrity of the domestic water system for potable use. This work will entail re-routing the domestic water piping away from, and around, the fire protection cistern. The ultimate goal is to achieve domestic water quality that will meet both primary and secondary drinking water regulations. Some LPOEs may also require inspection of and adjustment or replacement of water treatment systems; construction of new wells; and freeze-proofing existing supply systems.

Construction shall add or incorporate the necessary water treatment equipment to produce high quality water that is clear in vision, does not smell of any pungent odor and has a pleasant taste. All water treatment, handling and storage designs must achieve water test results that pass both primary and secondary drinking water regulations, for all domestic water used in the facilities. Water treatment system performance, confirmed by water quality testing results, and must be clearly defined in the design specifications as a condition of acceptance of the Construction Contractor's work.

The requirement is to treat the entire domestic system at each LPOE. The water at each location shall be treated at the source and not at the point of use (i.e. simply treated at the break room sinks). The goal is to provide full confidence in

the use of the source water as a whole by the LPOE Officers, Port Directors and all the visitors in all aspects of each facility, including the public restrooms.

RFP § 21 00 ¶ 1.1.8. Four locations are listed. *Id.*

Phase 2 consists of the Technical Proposal relating to the Seed Task Order (Design-Build Approach and Summary Schedule), and also Price. RFP at 5-9 and 65. The most important Evaluation Factor is the offeror's Design-Build Approach. RFP § 22 20 ¶ 3.0. The proposal must clearly define the proposed scope and quality levels that the construction team is offering to the Government in enough detail for the Government and the offeror to mutually understand whether or not the proposal meets or exceeds the minimum solicitation requirements. This factor only applies to the Seed Task Order. *Id.* ¶ 4.1.1.

An offeror must discuss, by discipline, the demolition and construction for the subject project, to include site preparation, demolition, provision and installation of plumbing, treatment and other applicable systems, testing and commissioning. Discussions shall also address maintenance considerations, operability and durability, as applicable by discipline. The offeror must discuss its approach for coordination amongst trades, including the coordination of excavation, irrigation, landscaping, masonry, and paving trades. The offeror must discuss its approach for adjustment or replacement of water treatment systems, and the construction of new wells if necessary. The offeror must also discuss its approach for freeze-proofing of existing systems. *Id.* ¶ 4.1.2.1.

The next most important Evaluation Factor in Phase 2 is the Summary Schedule. *Id.* ¶ 3.0. Price is significantly less important than the Technical Proposal. *Id.* ¶ 3.0.

B. The Appeal

Appellant proposes NAICS code 236220, Commercial and Institutional Building Construction, as the most appropriate for this solicitation.

Appellant asserts that the USACE's NAICS code 238990 does not include firms providing design-build services, and also specifically excludes: foundation, structure and building exterior contractors, building equipment contractors, building finishing contractors, and site preparation contractors, all of which are clearly implied requirements of the contract. Appeal at 2. Further, the services defined within NAICS code 238990 are more in the nature of landscaping and typically take place in residential or light commercial settings. The function and purpose of LPOEs typically include administrative offices, meeting rooms, employee housing, baggage and vehicle inspection areas, warehouse storage, and interrogation and detention rooms. These facilities should be considered commercial and industrial buildings. Only NAICS code 236220 covers the performance of design-build work at commercial and industrial buildings and related structures. *Id.*

Appellant points to two upcoming and one ongoing procurement currently listed in the Federal Business Opportunities database. These procurements require design-build and design-

bid-build work identical in nature to the scope of the work required here, and each case, USACE designated the procurement under NAICS code 236220. Appeal at 3.

C. The U.S. Army Corps of Engineers' Response

On March 18, 2016, the USACE responded to the appeal. USACE argues NAICS code 238990 is the correct code, and OHA should deny the appeal. USACE maintains NAICS code 238990 covers “minor construction work such as repairs, cleaning, and the construction of items such as billboards, swimming pools, fences, and paving of driveways and parking lots”. USACE Response at 2, citing *NAICS Appeal of Fortis Networks, Inc.*, SBA No. NAICS-5713 (2015) (*Fortis Networks*). Appellant's proposed code covers the construction of major buildings, office buildings, airports, arenas, hospitals, barracks, and schools. *Id.* at 3. USACE asserts this project is not for the construction of commercial and industrial buildings, but rather for repair and alteration of LPOEs. The services required are renovation, repairs, preventive maintenance, environmental abatement, and erosion control, restoration of roads, parking lots, bridges, fences and fixtures. Response at 3. This will involve minor design build work, limited to minor work required by the listed types of projects, renovations, repairs and maintenance. The anticipated Seed Task Order is for repair of domestic water systems at Land Ports of Entry. This is not the major construction work required by NAICS code 236220, but minor construction work such as repairs. *Id.* at 3, citing *Fortis Networks*.

USACE argues this case is similar to *Fortis Networks*, where the solicitation at issue required specialty trade construction services with minimal design requirements for new minor construction, facility repair, rehabilitation and alterations. *Id.* This solicitation similarly calls for minor construction, facility repair, rehabilitation and alterations. There were some design requirements, although minimal. *Fortis Networks* held that the appropriate code was 238990, and USACE argues that should be the holding here.

USACE characterizes as “misplaced” Appellant's argument that because the facilities requiring work are commercial and industrial buildings, the current NAICS code is inappropriate. The type of building to be serviced is not a factor; the issue is the type of work required. Here, the work required is not the major construction required by Appellant's proposed code. Response at 4.

USACE notes Appellant's two presolicitation notices with NAICS code 236220 are not solicitations; however, both state the scope of work will include new construction. The present solicitation does not contemplate new construction, and thus justifies a different code.

D. *NAICS Manual*² Descriptions

The NAICS code designated by the CO, 238990, All Other Specialty Trade Contractors, comprises:

establishments primarily engaged in specialized trades (except foundation, structure, and building exterior contractors; building equipment contractors; building finishing contractors; and site preparation contractors). The specialty trade work performed includes new work, additions, alterations, maintenance, and repairs.

NAICS Manual at 220. The *NAICS Manual* goes on to include the following illustrative examples of activities included under include this NAICS code. Such activities include:

- Billboard erection
- Outdoor swimming pool construction
- Cleaning building interiors during and immediately after construction
- Paver, brick (e.g., driveway, patio, sidewalk), installation
- Crane rental with operator
- Paving, residential and commercial driveway and parking lot
- Driveway paving or sealing
- Sandblasting building exteriors
- Fence installation
- Scaffold erecting and dismantling
- Interlocking brick and block installation
- Steeplejack work
- Manufactured (mobile) home, set up and tie-down

Id.

The NAICS code advanced by Appellant, 236220, Commercial and Institutional Building Construction, comprises:

establishments primarily responsible for the construction (including new work, additions, alterations, maintenance, and repairs) of commercial and institutional buildings and related structures, such as stadiums, grain elevators, and indoor swimming facilities. This industry includes establishments responsible for the on-site assembly of modular or prefabricated commercial and institutional buildings. Included in this industry are commercial and institutional building general contractors, commercial and institutional building for-sale builders, commercial and institutional building design-build firms, and commercial and institutional building project construction management firms.

² 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 197-98. The *NAICS Manual* goes on to include the following illustrative examples of activities included under include this NAICS code. Such activities include:

- Airport building construction
- Office building construction
- Arena construction
- Parking garage construction
- Barrack construction
- Prison construction
- Farm building construction
- Radio and television broadcast studio construction
- Fire station construction
- Religious building (e.g., church, synagogue, mosque, temple) construction
- Grain elevator construction
- Restaurant construction
- Hospital construction
- School building construction
- Hotel construction
- Shopping mall construction
- Indoor swimming facility construction
- Warehouse construction (e.g., commercial, industrial, manufacturing, private)

NAICS Manual at 198. This NAICS code cross references Subsector 238, Specialty Trade Contractors, and explains that this Subsector includes “specialized construction work on commercial and institutional buildings, generally on a subcontract basis.” *Id.*

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

I find Appellant has not persuasively demonstrated the CO erred in designating NAICS code 238990. The appeal is therefore denied.

The difference between the designated NAICS code and the code advocated by Appellant is significant. NAICS code 238990, which the CO chose, covers minor construction work such as repairs, cleaning, and the construction of items such as billboards, swimming pools, fences, and paving of driveways and parking lots. Work under Subsector 238, Specialty Trade Contractors, moreover, includes specialized construction work suitable for subcontracting. By contrast, Appellant's preferred code, 236220, covers the construction of major buildings, offices buildings, airports, arenas, hospitals, barracks, and schools.

Here, USACE seeks a contractor to perform repair and alterations for the LPOEs which control the traffic entering and departing the United States at the land border crossings. The contract calls for repairs and preventive maintenance. It also calls for environmental abatement and erosion control services. The contractor will be tasked with the restoration of roads, bridges, parking lots fences and gates. The contractor must perform maintenance and repair on the LPOEs. The work will also include asbestos and lead-based paint abatement, and minor construction dealing with the MEP and HVAC systems of the LPOEs. None of these tasks will involve the construction of new facilities; rather, the contractor is being called upon to perform maintenance, repair and alterations on existing LPOE facilities.

The Seed Task Order does not call for the construction of a building. Rather, it calls for the repair and renovation of the water systems at certain LPOEs. This will involve separating the fire protection systems from the systems providing potable water. The construction will add the necessary water treatment equipment to produce high quality drinking water, with no odor and a pleasant taste. While this work is vital for the operation of the LPOEs, it is not building construction.

NAICS code 238990, the CO's designated code, explicitly covers alterations, maintenance, and repairs, required by this solicitation. It also covers the paving of parking lots and driveways, and fence installation, also called for here.

Appellant's argument that NAICS code 238990 covers services more in the nature of landscaping is misplaced. OHA has held that NAICS code 238990 covers procurements that require repairs, alterations and rehabilitation of buildings. *NAICS Appeal of Fortis Networks, Inc.*, SBA No. NAICS-5713 (2016) (*Fortis Networks*). *Fortis Networks* also held the code covers asbestos abatement, MEP work, structural repairs, paving, fencing and HVAC work. *Id.* Further, the code covers the engineering and design work necessary to plan for these alterations, repairs and other work required. *Id.* *Fortis Networks* considered a procurement very similar to that in the instant case, in that it called for maintenance, repair and alterations to buildings and concluded that the CO's designation of NAICS code 238990 was appropriate.

Appellant points to certain services specifically excluded from NAICS code 238990: foundation, structure and building exterior contractors, building equipment contractors, building

finishing contractors, and site preparation contractors, and asserts that they are implied requirements of this contract. However, with the exception of site preparation, these services are not mentioned in the solicitation, and while they might be implied for a procurement calling for the construction of buildings, they are not implied in the kind of repair and alteration work required here. While site preparation is excluded from NAICS code 238990, as noted above, the CO's NAICS code designation need not be perfect, but must best describe the principal purpose of the product or service being acquired. *Evanhoe & Assoc., supra*.

By contrast, Appellant's requested code, 236220, covers the construction of commercial and institutional buildings. While the code does include alterations, maintenance and repair of existing commercial and industrial buildings, it refers to the buildings themselves, and this procurement will also include work on the roadways, parking lots, fences and gates, environmental abatement and erosion control. The Seed Task Order applies to the water systems, not the buildings. While the buildings at the LPOEs could be considered commercial and industrial buildings, Appellant is incorrect that only code 236220 covers the performance of design-build work at these buildings. The description for code 238990 includes additions, alterations, repairs and maintenance, and does not in any way exclude commercial and industrial buildings from the structures upon which this work will be performed. I cannot find that it was clear error for the CO to designate NAICS code 238990, which covers all of this work, rather than NAICS code 236220, which arguably applies to the alterations of the buildings, but not to the other work required here.

Appellant points to other procurements which it alleges have similar requirements, and were designated under NAICS code 236220. However, those procurements are not before us, and they are not probative of the correct designation for this procurement. *See NAICS Appeal of Ferris Optical*, SBA No. NAICS-5285 (2011).

The solicitation does state that task orders will be both design-bid-build, where design and construction are sequential and contracted for separately, and design-build, which combine design and construction in one contract with one contractor. FAR 36.102. The key employees here will include engineers, a design team, and a Construction Superintendent. The contractor must therefore be ready to prepare a design for any project required by a task order, and to actually undertake the construction required by any task order. This does not exclude the 238990 designation, because, as noted above, OHA held in *Fortis Networks* that NAICS code 238990 may cover a procurement which includes the engineering and design work necessary to plan the projects required by a solicitation. This permits the Government to issue one solicitation authorizing task orders which will cover both the design and the construction of the projects required. The fact that engineering and design services as well as construction are required by the solicitation thus does not exclude the designation of a construction NAICS code.

I conclude that the instant solicitation requires the contractor to perform maintenance, renovations, repair, and alterations on LPOEs. In addition, the contractor will be required to perform environmental abatement, erosion control, paving and work on fences and gates. The contractor must be prepared both to design the projects required and to actually perform the work required. The Seed Task Order requires not the construction of a building, but the renovation of LPOE's water systems. The solicitation does not require the construction of new commercial and

industrial buildings. The work required then is very similar to that OHA reviewed in *Fortis Networks*, and concluded was covered by NAICS code 238990, which covers smaller construction projects. Accordingly, I conclude that the CO acted appropriately in designating NAICS code 238990, All Other Specialty Trade Contractors, as the appropriate NAICS code for this procurement, and Appellant has failed to meet its burden of establishing clear error in the designation.

IV. Conclusion

For the above reasons, the appeal is DENIED. The CO reasonably selected NAICS code 238990, All Other Specialty Contractors, with a corresponding \$15 million annual receipts size standard. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge