

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

**FOR PUBLIC RELEASE**

NAICS APPEAL OF:

Milani Construction, LLC

Appellant,

Solicitation No. W912DR-16-B-009  
U.S. Department of the Army  
Army Corps of Engineers  
Baltimore, MD

SBA No. NAICS-5749

Decided: June 9, 2016

APPEARANCES

P. Sean Milani-Nia, Esq., Fox, Rothschild LLP, Washington DC, for Appellant

Michael T. Shields, Esq., Assistant District Counsel, Baltimore District, U.S. Army  
Corps of Engineers, for the Army

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On May 11, 2016, the United States Army Corps of Engineers (Army) issued Solicitation No. W912DR-16-B-0009. The Army seeks a contractor to perform road and infrastructure improvements around the projected National Museum of the United States Army (National Museum) at Fort Belvoir, Virginia. The solicitation is an Invitation for Bid and contemplates the award of a firm-fixed price contract. The procurement is unrestricted. The Contracting Officer

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<sup>1</sup> This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

(CO) designated North American Industry Classification System (NAICS) code 238910, Site Preparation Contractors, with a corresponding \$15 million annual receipts size standard, as the appropriate code for the procurement. On May 26, 2016, the CO issued Amendment No. 0001, extending the due date for offers to June 14, 2016.

On May 23, 2016, Milani Construction, LLC (Appellant) filed the instant NAICS code appeal. Appellant argues that NAICS code 237310, Highway, Street and Bridge Construction, with a corresponding \$36.5 million annual receipts size standard, “best describes the subject work.” (Appeal at 1.) Appellant asserts it is a certified HUBZone business under NAICS code 237310, but not under NAICS code 238910. Appellant argues it would be entitled to a HUBZone preference if the solicitation were designated under NAICS code 237310, but not under NAICS code 238910. For reasons discussed *infra*, the appeal is denied.

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 on the first business day after the expiration of ten calendar days after issuance of the IFB, so the appeal is timely. Federal Acquisition Regulation (FAR) 19.303(c)(1); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b), 134.202(d). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. The Statement of Work

The solicitation requires offerors to submit bids on four items. Item No. 0001 is all costs in connection with roads and infrastructure at the National Museum, to be completed as shown on drawings included in the solicitation. Item No. 0002 is all costs associated with gas line installation. Item No. 0003 is landscaping and tree planting at the north end of the site. Item No. 0004 is constructing bituminous concrete pavement and associated curb and gutter for the service road, service area, and Liberty Drive. (Solicitation, at 3.) Items 0003 and 0004 are listed as optional bid items, but offerors must submit quotes on all items. (*Id.* at 3-4.) The Government will evaluate offers by adding the total price for all options to the total price for the basic requirements, except when it is determined not to be in the Government's interest. (*Id.* at 4.) Evaluation of options will not obligate the Government to exercise the options. (*Id.*)

The solicitation's Statement of Work (SOW) includes the following Project Description:

This project provides site and infrastructure improvements for the proposed National Museum of the U.S. Army on Fort Belvoir in Virginia. These site and infrastructure improvements include selective demolition, mass grading including construction of retaining walls as necessary, installation of a storm water management system, installation of a gas line, installation of physical security measures around the site, construction of service and access roads on the site, stump removal for existing trees on-site to be cut and removed by others, and a new intersection on Fairfax County Parkway including installation of a traffic control system at the new intersection.

a. Intersection at Fairfax County Parkway: A continuous green T-intersection will be constructed to control traffic entering and exiting the museum entrance road. The intersection will include traffic signals to allow left and right turns into the site and vehicles to exit the site.

(SOW, ¶ 1.1.1.)

The SOW requires certain tasks to be completed by certain dates. An extension of Liberty Drive to the Fairfax County Parkway must be completed by December 31, 2016. (*Id.* ¶ 1.4.1(a).) The Service Drive and Service Yard will be graded and constructed by January 31, 2017. (*Id.* ¶ 1.4.1(b).) The bituminous concrete base course, including curbs and gutters must be completed to the entrance to the National Museum's Founder's Hall by July, 2017. (*Id.* ¶ 1.4.1(c).) The contractor will coordinate with Washington Gas to have the main gas line installed and operational by March 1, 2017. (*Id.* ¶ 1.4.1(d).) The contractor will clear those trees designated for removal from the golf course by November 15, 2016. (*Id.* ¶ 1.4.1(e).)

The solicitation includes four volumes of drawings, showing the areas where the work is to be performed. Most of the drawings are of the terrain around the site, showing where grading is to be performed. Only three out of 84 Civil drawings show (C-701.0, C-701.1 and C-701.2) the Liberty Drive and service road construction work. The 50 Civil Transportation drawings show the work on the “punch through” road to the Fairfax County Parkway. There are 43 other drawings. The solicitation includes four volumes of geotechnical reports on the ground upon which the contractor will be performing grading operations, and a one volume report on the site for road construction.

## B. The Appeal

Appellant argues the appropriate NAICS code for this procurement is 237310, Highway, Street, and Bridge Contractors, with a corresponding \$36.5 million annual receipts size standard. (Appeal at 1.) Appellant asserts NAICS code 238910 does not accurately describe the principal purpose of the solicitation. The solicitation is titled “Road and Infrastructure Improvements”. Appellant emphasizes the Solicitation's requirement that the project include improvements to existing roads and infrastructure at Fort Belvoir and the construction of roads and infrastructure around the National Museum. (*Id.* at 2-3.)

Appellant asserts NAICS code 238910 covers contractors who simply perform earth moving and related services to prepare a site for construction. These contractors do not build structures, roads, or other improvements. None of the illustrative examples for this code include the construction of structures, roads or improvements. (*Id.* at 3-4.)

Appellant argues the work required here will include some earth moving and grading, but that is not the solicitation's principal purpose. This work will be incidental to the solicitation's principal purpose, road and infrastructure improvements. (*Id.* at 4.)

Appellant argues NAICS code 237310 best describes the solicitation's principal purpose, because it includes the construction of highways, streets and roads. (*Id.*) This contract requires

signalization, drainage, utility work and construction of a new turn lane on the Fairfax County Parkway. (*Id.*) Further, the solicitation requires grading a golf course to construct a storm water management system, building and paving roads, constructing retaining walls, curbs and gutters, guard booths, and installation of all associated utilities. Installation of utilities is also within the same general NAICS code category 237, Heavy and Civil Engineering Construction. The great majority of this work is tied to the construction of roads and infrastructure improvements, and so NAICS code 237310 is the appropriate code. (*Id.* at 5.)

While the solicitation will require some earth moving and grading, typically contracts to construct and improve roads and infrastructure involve the preparation of the site and the construction upon the site. NAICS code category 237 comprises establishments whose primary activity is the construction of entire engineering projects, and specialty trade contractors, whose primary activity is the production of a specific component for such projects. (*Id.* at 5, citing *NAICS Manual*,<sup>2</sup> at 198-99.) Accordingly, Appellant argues, any site preparation work required here that is incidental to road and infrastructure improvements is a component of a road construction project and should be included in a NAICS code 237310 designation. (*Id.* at 5.)

Finally, Appellant, maintains the Department of Labor Wage Rate Determination for this contract supports a NAICS code 237310 designation for this contract, because it classifies the construction type for this contract as “Highway”. (*Id.* at 6.)

### C. The Army's Response

On June 2, 2016, the Army responded to the appeal. The Army argues NAICS code 238910 is the correct code, and OHA should deny the appeal.

The Army first points out that on June 18, 2015, the Army issued a Sources Sought Announcement for this project. The Announcement identified the project with the same NAICS code (238910) and title (Road and Infrastructure Improvements) as the solicitation would. The Announcement described the work as consisting of a Road and Infrastructure improvement project to support the National Museum by providing access, site preparation and infrastructure for the National Museum. The Announcement stated the work was to include clearing and grubbing, rough grading, cuts and fills, berms, retaining walls, and sediment and erosion control. Further, a new Fairfax County Parkway intersection and traffic improvements, as well as a new entrance road, service road, service area and curbing would be included. In addition, there were to be constructions of a sewer and storm water management infrastructure, and water lines. There were to be security features constructed and demolition of an abandoned golf course. The Announcement required interested firms to demonstrate experience managing similar projects, and experience with the required work. The Army received only one response, from an unqualified contractor. The CO determined there was no reasonable expectation the Army would obtain bids from two responsible small business concerns, and thus decided to issue the solicitation as unrestricted. (Army Response, at 2.)

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<sup>2</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>.

On March 7, 2016, the Army posted a synopsis for the procurement on FedBizOpps. This described the work as constructing infrastructure improvements for the National Museum, including electric service, water and gas distribution, wastewater lines, access roads, traffic improvements, intersection upgrade, storm water drainage, and physical security measures. The synopsis described the work in more detail using the same language in the Sources Sought Announcement. (*Id.* at 3.)

The Army then describes the solicitation. The Army asserts that the solicitation requires as road construction a short segment to be called Liberty Drive, a “punch-through” and an intersection of this segment with the Fairfax Count Parkway, and a short service road. The project drawings show the roadwork and traffic controls, and other project works. (*Id.* at 4.)

The Army includes a Declaration of the Contracting Officer, Gary Faykes. Mr. Faykes declares he based his NAICS code determination on the cost estimate in DD Form 1391, the Contract Drawings and Specifications, and the *NAICS Manual*. These led him to the conclusion that NAICS code 238910 was the appropriate code. He has subsequently reviewed a Current Working Estimate prepared by the Project Engineer, which confirms his conclusion that NAICS code 238910 is the appropriate code. The road work here is approximately XX% of the total work. Most of the work required is site preparation. This includes general site excavation, grading, and demolition. (Faykes Declaration, Army Response, Exhibit 3.)

The Army asserts it relied upon the Department of Defense cost estimates to designate the NAICS code for this procurement. This estimate shows road improvements comprising approximately XX% of total contract cost. The Army submits its current working estimate as Exhibit 4. This shows road work as approximately XX% of contract cost. (Army Response, at 5.)

The Army asserts the purpose of this procurement is to prepare the National Museum site for construction by other contractors. The work involves grading, earth moving, utility work drainage and road work. The majority of the work is not construction of highways, streets and bridges. At most, XX% of the work is related to road construction. Some of that road work includes traffic signal installation, which is classified under NAICS subsector 238, Specialty Trade Contractors. (*Id.* at 7.) The Army asserts the solicitation's specifications describe the work as “site and infrastructure improvements” that include selective demolition, mass grading including construction of retaining walls as necessary, installation of a storm water management system, installation of a gas line and electric and telecom lines, installation of security measures around the site, construction of service and access roads, stump removal and a new intersection. (*Id.*) The Army states that NAICS code 238910 specifically covers demolition and grading, as well as land clearing and earth moving for all types of sites. (*Id.*) Land clearing and earth moving are required as parts of storm water management, installation of gas, electric and telecom lines and road work. (*Id.*) NAICS code 238910 covers cutting new rights of way, trenching, excavation and equipment rental, all called for by this solicitation. (*Id.*)

The Army maintains that under the DD 1391 cost estimate, up to XX% of the project could be considered road work, and under the Current Working Estimate, approximately XX% could be considered road construction. (*Id.*) The remaining work is site preparation work for the construction of the Museum. There is significant pure excavation work, site clearing, soil

stabilization and demolition that falls under 238910. Additional work is the storm, sewer, gas, electric and telecom line construction that involve a significant amount of excavation and grading work falling under 238910. (*Id.* at 8.)

The Army argues NAICS code 238910 fits the purpose of this solicitation precisely, namely, to prepare the National Museum site for construction. (*Id.*) The Army maintains that Improvements is a broad enough term to encompass all the work required under this contract. The statement of work references infrastructure improvements as including demolition, mass grading and construction of retaining walls, all within 238910. (*Id.*)

Further, the Army maintains that it is not accurate to say NAICS code 238910 does not include the construction of structure, roads, or other improvements. The Army maintains a procurement must be classified according to the component which accounts for the greatest percentage of contract value, citing 13 C.F.R. § 121.402(b) & FAR 19.303(a)(2). Here, the Army's estimates indicate that road construction represents a minority of total contract cost, and the greatest percentage of contract value is the work of site preparation. (*Id.*) Conversely, NAICS code 237310 covers only the construction of roads and highways.

The Army maintains that this procurement is not for the entire engineering project, but preparation for the construction of the National Museum on the site. (*Id.*) The solicitation is not for all the construction to build the National Museum. The Army maintains Appellant does not support its assertions that site preparation work is merely incidental to road and infrastructure improvements. The Army maintains the road construction here is incidental to the site preparation work. (*Id.*)

In addressing the Davis Bacon issue, the Army submits the declaration of Helen Busch, a Contract Industrial Relations Specialist. Ms. Busch declares that based upon the project title and the description of project she thought the work was primarily road construction. (Busch Declaration, Army Response, Exhibit 5, at 1.) Now she has reviewed the project specifications and drawing, along with the Army cost estimates. These documents lead her to revise her conclusion, and she now affirms that the majority of the work is grading, drainage, land leveling, demolition, and installation of a storm sewer line. (*Id.* at 2.) Ms. Busch now concludes the procurement is properly classified as Heavy Construction. (*Id.*) The Army thus argues the Davis Bacon Act wage determination in the solicitation has no probative value here. (Army Response, at 9.) Further, the Davis Bacon categories are broader in coverage than individual NAICS codes, and thus are not exactly equivalent to NAICS codes and are not apposite to NAICS code determinations. (*Id.*)

The Army includes with its Response a Cost Estimate, dated May 16, 2016. (Army Response, Exhibit 4.) The estimate lists a Construction Working Estimate (CWE) of \$XXXX for CLIN 0001, \$XXXX for CLIN 0002, \$XXXX for CLIN 0003, and \$XXXX for CLIN 0004, for a total of \$XXXX. (*Id.* at 3.) The CWE breaks down the cost for CLIN 0001 as \$XXXX for site preparation, \$XXXX for site improvements, and \$XXXX for site utilities. (*Id.* at 8.) Site improvements estimates include \$XXXX for the Fairfax County Parkway intersection, but also \$XXXX for landscaping, \$XXXX for site development, and \$XXXX for Environmental Remediation. (*Id.* at 9.) Site development includes the retaining walls, (\$XXXX), the entry road

(\$XXXX), the service road (\$XXXX), rigid paving (\$XXXX) flexible paving on the entry road (\$XXXX) and service road (\$XXXX). (*Id.* at 22-25.)

D. Request to Reply and Protective Order

On June 8, 2016, Appellant filed a motion seeking leave to reply to the Army's response and requesting a protective order. However, a reply to a response is not permitted unless the Judge otherwise directs. 13 C.F.R. § 134.309(d). Further, offers on this procurement are due June 14, 2016, and OHA must issue its decision by that date in order to apply to this procurement. 13 C.F.R. § 134.318(b); FAR 19.303(c)(5). Accordingly, on June 8, 2016, I denied Appellant's motion. However I granted the request for a protective order.

E. NAICS Manual Descriptions

The NAICS code designated by the CO, 238910, Site Preparation Contractors, comprises:

[E]stablishments primarily engaged in site preparation activities, such as excavating and grading, demolition of buildings and other structures, and septic system installation. Earth moving and land clearing for all types of sites (e.g., building, nonbuilding, mining) is included in this industry. Establishments primarily engaged in construction equipment rental with operator (except cranes) are also included.

Illustrative Examples:

Blasting, building demolition  
Foundation digging (i.e., excavation)  
Concrete breaking and cutting for demolition  
Foundation drilling contractors  
Cutting new rights of way  
Grading construction sites  
Demolition, building and structure  
Line slashing or cutting (except maintenance)  
Dewatering contractors  
Septic system contractors  
Dirt moving for construction  
Trenching (except underwater)  
Equipment rental (except crane), construction, with operator  
Underground tank (except hazardous) removal  
Excavating, earthmoving, or land clearing contractors  
Wrecking, building or other structure

*NAICS Manual*, at 219.

The NAICS code advanced by Appellant, 237310, Highway, Street and Bridge Construction, comprises:

[E]stablishments primarily engaged in the construction of highways (including elevated), streets, roads, airport runways, public sidewalks, or bridges. The work performed may include new work, reconstruction, rehabilitation, and repairs. Specialty trade contractors are included in this group if they are engaged in activities primarily related to highway, street, and bridge construction (e.g., installing guardrails on highways).

Illustrative Examples:

Airport runway construction  
Highway line painting  
Causeway construction  
Painting traffic lanes or parking lot lines  
Culverts, highway, road, and street, construction  
Pothole filling, highway, road, street, or bridge  
Elevated highway construction  
Resurfacing, highway, road, street, or bridge  
Guardrail construction  
Sign erection, highway, road, street, or bridge

*NAICS Manual* at 203-04.

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). NAICS code appeals may be filed on unrestricted procurements if the appellant is seeking a change in NAICS code designation which would render it a small business for the subject procurement. 13 C.F.R. § 121.1103(a)(1).

B. Analysis

This solicitation calls for road and infrastructure improvement around the National Museum. The contractor will have to level some existing structures and excavate and grade the



land where construction will take place. Additionally, this solicitation requires some road building, the construction of an intersection on the Fairfax County Parkway, the extension of Liberty Drive, and the construction of other service and access roads, including retaining walls. The contractor must also install a storm water management system, and coordinate with Washington Gas to install the gas line.

The drawings and plans included in the solicitation show most of the work to be done is the grading and landscaping around the site. The Fairfax County Parkway intersection and the service road will not make up the majority of the work. The Government Estimate and its breakdown of the costs of the tasks required by a procurement is a good indicator of the procurement's principal purpose. *NAICS Appeal of Computer Cite*, SBA No. NAICS-5010 (2008); *NAICS Appeal of Rhinocorps, Ltd.*, SBA No. NAICS-4736 (2005). Here, the cost breakdown establishes that the road construction required does not constitute the majority of the work. Most of the costs here go to site preparation and site development. The Army correctly identified the principal costs associated with road construction as CLIN 0004, Service Road and Liberty Drive, (\$XXXX) and the new intersection, a subitem of CLIN 001 (\$XXXX). As the Army notes, these items represent only \$XXXX out of an overall estimate of \$XXXX. A close look at the estimate reveals other items that involve construction on the service and entry road as part of site development, but these total only a little more than \$XXXX, not enough to raise road construction to the primary purpose of the solicitation.

Appellant's preferred code, 237310, covers only road construction, and thus the items that fall under this code make up only about XXXXX of the work required here. While Appellant argues that the site preparation is incidental to the road construction, the information in the Government Estimate supports a finding that, in fact, the road construction is incidental to the grading and site preparation, because the site preparation represents by far the greater value of the work. Appellant makes no argument based upon what proportion of the work should be road construction, rather than site preparation. Appellant merely asserts that road construction is the primary purpose here, without an analysis of the solicitation to show why road construction work should predominate over site preparation work.

The fact that other work is included besides site preparation, such as installing utilities, does not preclude a finding that NAICS code 238910 is the appropriate code. As noted above, the code need not be perfect, but must best describe the solicitation's principal purpose. Here, the principal purpose is grading and preparation of the site, and so, while it includes other work, NAICS code 238910 is appropriate.

Appellant's reliance upon the Wage Determination is misplaced. There is no authority which recognizes Wage Determinations as probative in NAICS code appeals. The two classification systems are different, and have different purposes, and so the Wage Determination carries no weight here.

Conversely, 238910, the designated code, covers landscaping, dirt moving for construction, cutting new rights of way, demolition and land clearing, all tasks required for this procurement. The fact that the *NAICS Manual* specifically includes the cutting of new rights of way establishes that some road work is covered by this code. Most of the work here, according to

the Government Estimate, will involve working on this site to prepare it for the construction of the National Museum, while the road work represents less than XXXX of the required work. Therefore, the work here is included in the activities contemplated by NAICS code 238910. Accordingly, I conclude that Appellant has failed to meet its burden of establishing clear error in the CO's NAICS code designation, and I must deny this appeal.

IV. Conclusion

For the above reasons, the appeal is DENIED. The CO reasonably selected NAICS code 238910, Site Preparation Contractors, with a corresponding \$15 million annual receipts size standard.

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

CHRISTOPHER HOLLEMAN  
Administrative Judge