

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

NAICS APPEAL OF:

Ascendant Program Services, LLC,

Appellant,

Solicitation No. HQ003417R0028

U.S. Department of Defense

Washington Headquarters Services

SBA No. NAICS-5832

Decided: May 25, 2017

APPEARANCES

Jonathan T. Williams, Esq., Julia Di Vito, Esq., PilieroMazza PLLC, Washington, D.C.,  
for Appellant

James L. Mayer, Esq., James L. Mayer, P.A., Marriottsville, Maryland, for KJMK  
Management, Inc. d/b/a RealStreet Staffing

Corey V. Forshee, Contracting Officer, U.S. Department of Defense, Washington  
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DECISION

I. Introduction and Jurisdiction

On April 18, 2017, the U.S. Department of Defense, Washington Headquarters Services (WHS) issued Request for Proposals (RFP) No. HQ003417R0028 seeking a contractor “to provide a wide range of analytical and planning, design, and construction management support services to assist the [WHS], Facilities Services Directorate (FSD) in the accomplishment of its missions.” (RFP, Exh. 1 - Performance Work Statement (PWS) § 1.) The RFP contemplates the award of a single Indefinite Delivery/Indefinite Quantity contract with a one-year base period and four one-year options. (*Id.* § 1.5.)

The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with an associated size standard of \$36.5 million average annual receipts. Offers are due June 6, 2017. (RFP, Amendment 0002.)

On April 28, 2017, Ascendant Program Services, LLC (Appellant) appealed the NAICS designation to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant maintains that the CO erred in selecting NAICS code 236220, and that the proper code is 541611, Administrative Management and General Management Consulting Services, with a corresponding \$15 million size standard. For the reasons discussed *infra*, the appeal is denied.

OHA decides NAICS code appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed this appeal within ten calendar days after issuance of the RFP, so the appeal is timely. 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

The PWS states that “[t]he scope of services may include multidisciplinary technical and managerial assistance as related to all elements of facility planning, program and project execution, project oversight, and building and utility operations, while maintaining a broad focus on technical requirements, technical quality, feasibility, constructability, operational effectiveness, and risk management.” (PWS § 1.4.) More specifically, the contractor will perform “program management support for identifying requirements, scheduling, estimating and planning for construction, alterations, and repair projects.” (*Id.*) Other anticipated services may include “program development, technology and or construction programs/activities strategic planning, systems design, and integration, integrated logistics support, acquisition, life cycle management, space allocation, construction management, building commissioning, and contract documentation.” (*Id.*)

The PWS outlines tasks to be performed by the contractor and groups them into five categories: (i) Contract Management; (ii) Project Planning, Development, Programming and Project Portfolio Management Services; (iii) Project Design; (iv) Construction Management; and (v) Other Support Activities. (*Id.* §§ 5.2-5.6.) Tasks under Contract Management include managing and directing the day-to-day efforts of the Construction Management Technical Support Services organization and personnel, providing oversight of contract administration, and providing organizational development and program oversight. (*Id.* § 5.2.1.b.) Tasks under Project Planning, Development, Programming and Project Portfolio Management Services include reviewing customer work requests, validating requirements, developing requirements packages, preparing cost estimates, preparing and reviewing procurement packages, and performing program management roles. (*Id.* § 5.3.1.) Project Design tasks include developing scope of work and cost estimates, evaluating proposals for architect and engineering services, tracking and maintaining the submittal review process, and supporting management of awarded design and study contracts. (*Id.* § 5.4.1.) Tasks under Construction Management include oversight of contractors performing repair and construction projects, developing performance work statement and solicitation packages, managing awarded construction projects, evaluating site surveys, managing and tracking project deliverables, monitoring and reviewing project financial data and contractor payment invoicing, preparing status reports, and preparing and

delivering project close-out and transition packages. (*Id.* § 5.5.1.) Tasks under Other Support Activities include assistance with strategic planning, budgeting, tracking program metrics, conducting assessments and analyses using government furnished applications, developing and integrating risk management plans and strategies, and preparing program management reviews and audits. (*Id.* § 5.6.1.)

The RFP contains Contract Line Item Numbers (CLINs) corresponding to the following labor categories: Contract Manager, Project Engineer Entry, Estimator, Scheduler, Quality Assurance Inspector, Commissioning Specialist, and four levels of Project Manager. (RFP § B, at 2-20.) It also provides minimum and maximum estimates of the number of Contractor Full-Time Equivalents (CFTEs) annually for each of these positions. (*Id.*, Exh. 2.) The estimated minimum quantity of Project Manager personnel is 19 CFTEs out of a total of 35, and the estimated maximum quantity of Project Manager personnel is 49 CFTEs out of 70. The position descriptions for the Project Manager positions state that these personnel will perform contract oversight; oversee the work of others; research, develop, establish, maintain, and interpret processes, procedures, policies, and guidelines; evaluate and make recommendations for improvement; and conduct project planning, facility engineering, scheduling, estimating, requirements gathering, organizational assessment, preparing draft of statements of work, and document management. (*Id.*, Exh. 3 at 2-6.)

The labor categories also have education and experience requirements. Most positions require a Bachelor of Science degree in engineering, architecture, or construction management. In many instances, construction-related experience may substitute for this education. (*Id.* at 1-10; PWS § 5.1.)

The PWS states that “the contractor shall provide all personnel, equipment, tools, materials, supervision, and non-personal services necessary to perform [the required] technical support services [except for] those items specified as Government furnished property and services.” (PWS §§ 1.1.) According to the PWS, WHS will provide workspace “to include desk space, telephone, computer, and other items necessary to maintain an office environment for each contract employee.” (*Id.* § 3.2.)

The RFP states that WHS will evaluate proposals based on three evaluation factors: Technical, Past Performance, and Price. (RFP § M-4.) The Technical factor is comprised of five equally-weighted subfactors: (1) Quality Control Plan; (2) Human Capital Management; (3) Flexibility & Innovation; (4) Transition Plan; and (5) Key Personnel. (*Id.*)

## B. The Appeal

On April 28, 2017, Appellant filed this appeal. Appellant explains that, although it qualifies as a small business under both NAICS code 236220 and NAICS code 541611, the use of NAICS code 236220 disadvantages Appellant because Appellant will be obliged to compete with firms substantially larger than itself. (Appeal at 2.)

Appellant argues that the CO erred in selecting NAICS code 236220. The primary purpose of the RFP is not to acquire commercial and institutional building construction,

Appellant maintains, but rather to acquire technical and managerial assistance services. As evidence for this conclusion, Appellant observes that WHS seeks “technical and managerial assistance as related to all elements of facility planning, program and project execution, project oversight, and building and utility operations, while maintaining a broad focus on technical requirements, technical quality, feasibility, constructability, operational effectiveness, and risk management.” (*Id.* at 8, quoting PWS § 1.4.) None of the tasks described in the RFP requires actual construction work. Nor do the evaluation criteria involve developing an approach to the construction of buildings or structures. Because the RFP “does not contemplate that the contractor will perform any actual construction work,” NAICS code 236220 does not apply. (*Id.* at 9, citing *NAICS Appeal of Pueblo Elec., Inc.*, SBA No. NAICS-4860 (2007).)

Appellant highlights that the RFP “lacks the hallmarks of Federal construction contracts.” (*Id.* at 10.) Notably, it does not require “performance bonds, payment bonds, or any other type of surety bond requirement necessary for a Federal construction contract.” (*Id.*) It also lacks standard Federal Acquisition Regulation (FAR) clauses typical of construction procurements, such as 52.211-12 (Liquidated Damages — Construction), 52.236-2 (Differing Site Conditions), 52.236-3 (Site Investigation and Conditions Affecting the Work), 52.236-15 (Schedules for Construction Contracts), 52.243-4 (Changes), 52.246-12 (Inspection of Construction), and 52.246-21 (Warranty of Construction). One FAR clause that is incorporated, though, is 52.222-41 (Service Contract Labor Standards), which does not apply to construction contracts. (*Id.*, citing FAR 22.1003-3(a).)

Appellant advocates NAICS code 541611 because the RFP's primary purpose is to acquire technical and managerial assistance services. Appellant maintains that 70% of the CFTEs are Project Managers, who “will provide oversight, project planning, scheduling, gathering requirements, and document management services.” (*Id.* at 12-13, citing RFP Exh. 3 at 2-5.) Because the bulk of the contract value is associated with technical and managerial assistance services, the correct NAICS code is 541611. (*Id.* at 13, citing 13 C.F.R. § 121.402(b)(2).)

Appellant also observes that WHS assigned NAICS code 541611 to a predecessor contract for similar work. “While not dispositive, WHS's use of NAICS code 541611 on the predecessor, nearly identical contract further confirms that NAICS code 541611, not NAICS code 236220, is the best fit for the instant procurement.” (*Id.* at 14.)

### C. RealStreet's Response

On May 12, 2017, KJMK Management, Inc. d/b/a RealStreet Staffing (RealStreet) intervened and responded to the appeal. RealStreet agrees with Appellant that NAICS code 236220 is clearly erroneous for this procurement, and adopts and incorporates Appellant's arguments to that effect. (RealStreet Response at 4.) RealStreet contends that “in addition to NAICS code 541611 . . . , there are other NAICS code designations namely NAICS code 541990, All Other Professional, Scientific, and Technical Services, and NAICS code 561990, All Other Support Services, which may also be applicable.” (*Id.* at 5.) RealStreet then discusses the *NAICS Manual* definition of NAICS code 541990 and asserts that the PWS and Exhibit 3 to

the RFP “describe primarily professional and technical positions and tasks.” (*Id.* at 5-6.) RealStreet does not offer any rationale for selecting NAICS code 561990.

#### D. CO's Response

On May 12, 2017, the CO responded to the appeal. NAICS code 236220 is the appropriate code, the CO maintains, because it “covers the majority of services required under the solicitation and . . . increases the potential pool of small business vendors eligible to compete for this procurement.” (CO's Response at 1.) Therefore, OHA should deny the appeal.

The CO explains that he considered conducting this procurement through the U.S. General Services Administration (GSA) Federal Supply Schedules under Special Item Number (SIN) 871-7 — Construction Management and Engineering Consulting Services. According to the CO, a GSA official commented that SIN 871-7 is associated with NAICS code 236220 because that code offers “the broadest usage.” (*Id.* at 2.) In addition, the responsible Procurement Center Representative recommended NAICS code 236220 on the grounds that it would enhance small business participation. (*Id.* at 5.) The CO also represents that, during a question and answer session, “members of industry raised the concern that NAICS code 541611 did not provide enough flexibility to ensure small business participation would be fully-capable of performing the tasks required in the performance work statement.” (*Id.* at 2.)

The CO states that he considered NAICS code 541611 but “determined that NAICS code 236220 more directly supported the requirements being requested.” (*Id.*) Although NAICS code 541611 was assigned to prior contracts for similar services, the CO highlights that the instant RFP requires personnel to have more construction-related experience than those previous contracts. For instance, the Contract Manager position now “requires 20 years of construction-related engineering or architecture work experience with a bachelor degree in construction management, architecture, or engineering”, and the required work experience is “specifically attainable within a construction management industry.” (*Id.* at 2-3.) The three highest Project Manager positions require similar education and experience. Estimators and Schedulers must have five years of dedicated construction cost-estimating or scheduling experience or the educational equivalent, and Quality Assurance Inspectors must have five years of experience as construction managers or foremen. The experience necessary for these positions “is obtainable within a construction management firm or an industry which comprises of building management under NAICS code 236220 and is not obtainable under . . . NAICS code 541611.” (*Id.* at 4.) The CO estimates that 67 CFTEs require experience or specialized licenses in a construction management industry, while only three CFTEs “could be recruited from a ‘general consulting firm’.” (*Id.*)

The CO asserts that three of the five task areas in the PWS—Project Planning, Development, Programming and Project Portfolio Management Services; Project Design; and Construction Management—are comprised of “construction management services, design management of future construction, and planning of future construction projects.” (*Id.* at 5.) As part of Project Planning, Development, Programming and Project Portfolio Management Services, the contractor “must establish the basis of construction development to meet cost and program development of a future construction project.” (*Id.*) Such tasks include “site visits and

investigations, development of project documents, project development, code compliance and constructability reviews, development of a proposed project schedule, responses to [solicitation] questions, development of [] performance work statements for studies and projects, development of plan and track integrated master schedules, management of construction quality management program, [and] evaluation and monitoring of a contractor's quality control procedures.” (*Id.*) “These tasks,” the CO continues, “require an understanding of the processes of actual building construction to develop [] project schedules and understand constructability as it relates to good design to plan and monitor the building of high-performance construction”. (*Id.*)

Tasks under Project Design include:

the development of technical requirements for [Architecture and Engineering (AE)] services, conducting site evaluations and field surveys, drafting cost-estimates and AE schedules, conducting design technical reviews from initial concepts to design documents, participating in risk analysis walk through and value engineering, conducting document design meetings, utilizing [] software tools to develop supportive documents for use by government contractors, supporting as-built documents, and providing engineering support and analysis of projects.

(*Id.* at 6.) According to the CO, these tasks “require an understanding of design quality as a method of assessing the quality of buildings in the three main areas of functionality, building quality, and impact.” (*Id.*)

Construction Management tasks include:

oversight of construction contractors, monitoring other government contractors to ensure compliance with procedures and specifications, analyzing submittals, coordinating responses to RFIs, reviewing progress payments, analyzing requests for equitable adjustments, managing awarded construction projects, providing daily inspection reports, evaluating site surveys, scheduling pre-construction meetings, managing and tracking project deliverables and contractor submittals, validating contractor's submittal register and logs to ensure code compliance, developing a plan and track[ing] milestone project schedules, developing construction schedules and analyzing the critical path method and primavera P6, analyzing contractor submitted schedules, performing daily inspections of construction activities, tracking defective work/ omissions/ and non-compliant work for corrections, managing change orders, assisting in obtaining permits, reviewing scope changes, technical support for constructor claims and default actions, and preparing project close-out and transition packages.

(*Id.* at 6-7.) “These construction management tasks require on-site management practices and inspections for actual building construction and are directly related to the services described in NAICS code 236220”. (*Id.* at 7.)

The CO then addresses Appellant's argument that it will be at a competitive disadvantage if larger businesses are eligible to compete for the subject procurement. Using the smaller size standard associated with Appellant's recommended NAICS code, small business competition would decrease by 14%, the CO contends. (*Id.*)

#### E. NAICS Manual<sup>1</sup> Descriptions

The NAICS code designated by the CO, 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.

*NAICS Manual* at 197-98. The *NAICS Manual* goes on to provide the following examples of activities included under this NAICS code:

- 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

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<sup>1</sup> Executive Office of the President, Office of Management and Budget (OMB), *North American Industry Classification System-United States (2012)*, available at <http://www.census.gov>. SBA has proposed to adopt the 2017 edition of the *NAICS Manual* effective October 1, 2017. 82 Fed. Reg. 18,253 (Apr. 18, 2017). At present, the 2012 edition remains in effect and thus is applicable here.

Warehouse construction (*e.g.*, commercial, industrial, manufacturing, private)

*Id.* at 198. Index entries that refer to NAICS code 236220 include “[c] onstruction management, commercial and institutional building”. *Id.* at 1145. The *NAICS Manual*'s description of “Sector 23 — Construction” as a whole states that “[c]onstruction managers that provide oversight and scheduling only (*i.e.*, agency) as well as construction managers that are responsible for the entire project (*i.e.*, at risk) are included [in Sector 23] as general contractor type establishments.” *Id.* at 191.

The NAICS code advocated by Appellant, 541611, Administrative Management and General Management Consulting Services, covers:

establishments primarily engaged in providing operating advice and assistance to businesses and other organizations on administrative management issues, such as financial planning and budgeting, equity and asset management, records management, office planning, strategic and organizational planning, site selection, new business startup, and business process improvement. This industry also includes establishments of general management consultants that provide a full range of administrative; human resource; marketing; process, physical distribution, and logistics; or other management consulting services to clients.

*Illustrative Examples:*

Administrative management consulting services

Site selection consulting services

Financial management (except investment advice) consulting services

Strategic planning consulting services

General management consulting services

*Id.* at 756-57.

NAICS code 541990, All Other Professional, Scientific, and Technical Services, proposed by RealStreet, covers:

establishments primarily engaged in the provision of professional, scientific, or technical services (except legal services; accounting, tax preparation, bookkeeping, and related services; architectural, engineering, and related services; specialized design services; computer systems design and related services; management, scientific, and technical consulting services; scientific research and development services; advertising, public relations and related services; market research and public opinion polling; photographic services; translation and interpretation services; and veterinary services).

*Id.* at 773. Illustrative examples of work covered by this code include appraisal (except real estate) services, marine surveyor services, arbitration and conciliation services (except by an attorney or paralegal offices), patent broker services, pipeline or power line inspection services,



consumer credit counseling services, weather forecasting services, handwriting analysis services, and commodity inspector services. *Id.*

The second NAICS code proposed by RealStreet, 561990, All Other Support Services, covers:

establishments primarily engaged in providing day-to-day business and other organizational support services (except office administrative services, facilities support services, employment services, business support services, travel arrangement and reservation services, security and investigation services, services to buildings and other structures, packaging and labeling services, and convention and trade show organizing services).

*Id.* at 805. Illustrative examples of work covered by this code include bartering services; flagging (*i.e.*, traffic control) services; bottle exchanges; cloth cutting, bolting, or winding for the trade; traffic control services; inventory taking services; contract meter reading services; lumber grading services; and diving services on a contract or other 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

Appellant has not met its burden of proving that the CO's NAICS code designation is clearly erroneous. As a result, this appeal must be denied.

Appellant's principal argument is that NAICS code 236220 is improper for this RFP because the contractor will not perform construction. The *NAICS Manual* makes clear, however, that NAICS code 236220 encompasses not only the construction of buildings and structures, but also “construction management”. Section II.E, *supra*. Indeed, the index entry for “[c]onstruction management, commercial and institutional building” refers specifically to NAICS code 236220. *Id.* Further, according to the *NAICS Manual*, “[c]onstruction managers that provide

oversight and scheduling only (*i.e.*, agency) as well as construction managers that are responsible for the entire project (*i.e.*, at risk) are included [in Sector 23 — Construction] as general contractor type establishments.” *Id.*

Here, as the CO emphasizes in his response to the appeal, most of the work called for in this RFP can reasonably be construed as agency-type construction management pertaining to oversight and scheduling. The PWS states that the contractor will provide “assistance as related to all elements of facility planning, program and project execution, project oversight, and building and utility operations,” to include “identifying requirements, scheduling, estimating and planning for construction, alterations, and repair projects.” Section II.A, *supra*. Project Managers account for a large majority of the required CFTEs, and these personnel are responsible for overseeing and supporting the planning, design, and performance of construction projects, efforts that fall squarely within the *NAICS Manual*'s description of “construction management”. *Id.* The fact that the RFP requires Project Managers and other personnel to have extensive construction-related backgrounds further bolsters the CO's choice of NAICS code 236220, as OHA has recognized that “the requirement for construction experience supports the selection of a construction NAICS code.” *NAICS Appeal of DIAL Gen. Eng'g*, SBA No. NAICS-5375, at 6 (2012). I therefore agree with the CO that NAICS code 236220 is appropriate here because it includes the construction management support efforts that comprise the majority of this procurement.

Appellant argues that the absence of standard FAR clauses for construction contracts demonstrates that WHS does not anticipate acquiring actual construction through this procurement. Under the FAR, though, such clauses are required for contracts to construct, alter, or repair buildings, structures, or other real property, and for dismantling, demolition, or removal of improvements. FAR 36.500. Appellant has not persuasively demonstrated that such FAR clauses are required for agency-type construction management procurements, where the contractor will not directly perform the underlying construction and is not “at risk” for delivering the project on time or on budget. Accordingly, the omission of standard FAR construction provisions from the instant RFP does not establish that NAICS code 236220 is improper.

Appellant also argues that the NAICS code it recommends, 541611, was assigned to a predecessor procurement for similar requirements. However, this predecessor procurement is not before OHA, and OHA attaches little weight to the NAICS codes assigned to other procurements that were not appealed to OHA. *NAICS Appeal of Arrowhead Contracting, Inc.*, SBA No. NAICS-5725, at 8 (2016).

Because Appellant has not established that NAICS code 236220 is clearly erroneous for this RFP, it is unnecessary to consider the NAICS codes Appellant and RealStreet advocate, or any other alternate code. OHA has long held that “OHA will not assign a different NAICS code to a procurement unless the CO's choice of NAICS code is shown to be clearly erroneous.” *NAICS Appeal of Dentrust Optimized Care Solutions*, SBA No. NAICS-5761, at 7 (2016) (quoting *NAICS Appeal of Pac. Shipyards Int'l, LLC*, SBA No. NAICS-5464, at 7 (2013)); *see also NAICS Appeal of Nat'l Elec. Coil*, SBA No. NAICS-5666, at 8 (2015); *NAICS Appeal of Env't. Int'l Ltd.*, SBA No. NAICS-5628, at 7 (2014).

IV. Conclusion

For the above reasons, the appeal is DENIED. The CO appropriately selected NAICS code 236220, Commercial and Institutional Building Construction, for this procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge