

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

NAICS APPEAL OF:

BLB Resources, Inc.,

Appellant,

Solicitation No. DU204SB-17-R-0003  
U.S Department of Housing and Urban  
Development  
Atlanta, Georgia

SBA No. NAICS-5855

Decided: September 25, 2017

APPEARANCES

David S. Cohen, Esq., Laurel Hockey, Esq., Cohen Mohr LLP, Washington, D.C., for Appellant

F. Marie Myers, Contracting Officer, U.S. Department of Housing and Urban Development, Atlanta, Georgia

DECISION

I. Introduction and Jurisdiction

On August 22, 2017, the U.S. Department of Housing and Urban Development (HUD) issued Request for Proposals (RFP) No. DU204SB-17-R-0003 for Asset Management services. The RFP contemplates the award of a single indefinite-delivery/indefinite-quantity contract. (RFP, § B.1.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 531210, Offices of Real Estate Agents and Brokers, with a corresponding size standard of \$7.5 million average annual receipts. (*Id.* § B.2.) Proposals are due September 26, 2017. (RFP, Amendment 000003.)

On August 30, 2017, BLB Resources, Inc. (Appellant) filed the instant appeal. Appellant contends that the CO erred in selecting NAICS code 531210, and that the correct NAICS code is 541611, Administrative Management and General Management Consulting Services, with an associated size standard of \$15 million average annual receipts. For the reasons discussed *infra*, the appeal is granted.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides appeals of NAICS code designations 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) and 134.304(b). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. The RFP

The RFP's Performance Work Statement (PWS) states that HUD seeks a contractor “to provide Asset Management services for HUD's Real Estate Owned [(REO)] properties.” (PWS, § 1.1.) The required services include “marketing and sales, inspection services, data updates, customer service, reports, and training.” (*Id.*) The contractor, also referred to as the “Asset Manager,” is responsible for analyzing market and property conditions, and developing a marketing strategy for the pricing and disposition of HUD-owned properties. (*Id.* § 1.4.) According to the PWS, “[t]he Contractor is required to utilize the services of local real estate professionals, whose primary place of business is within reasonable proximity to the listed property, including the use of small and small disadvantaged businesses, to list properties for sale.” (*Id.* § 1.3.19.) The contractor must “ensure listing brokers are vetted and registered, perform required inspections, and that properties are advertised on industry standard listing sites.” (*Id.*) The PWS states that “[t]he Contractor shall provide a Contract Manager, Project Manager, and Quality Control Manager/Third Party Quality Control Vendor who shall be responsible for the performance of work.” (*Id.* § 4.5.)

The PWS divides the required services into eight specific tasks: (1) Transition In; (2) Marketing and Sales; (3) Inspections; (4) Data Updates; (5) Customer Service; (6) Required Reports; (7) Training; and (8) Transition Out. (*Id.* §§ 1.4 and 5.) Under Marketing and Sales, the contractor will “list, market, select the best offer, execute sale documents, oversee the closing process, and ensure that sale proceeds are delivered to HUD in [ ] no more than one (1) business day.” (*Id.* § 5.2.) “The Contractor shall properly exercise its authority to sell properties in a manner that is consistent with the requirements of the PWS, achieves the greatest net return to the government, and minimizes holding time.” (*Id.*) In addition, the contractor must develop a Comprehensive Marketing Plan explaining how the contractor will market properties, advertise to potential customers, conduct buyer seminars, perform “Real Estate Broker Outreach Activities” and “Lender Outreach Activities,” and continuously analyze market conditions. (*Id.* § 5.2.2.)

Under the Inspections task, the contractor will perform various property inspections, or ensure that such inspections are performed by the listing broker. (*Id.* § 5.3.) Under Data Updates, the contractor will promptly update HUD's P260 case management system with records of actions taken for marketing and sales. (*Id.* § 5.4.) Under the Customer Service task, the contractor shall promote HUD's objectives with the public and customers, maintain a satisfactory response time to inquiries, have a toll-free phone number, and notify HUD of any request for information from an elected official. (*Id.* § 5.5.) For Training, on a monthly basis, the contractor shall provide: (i) training on benefits of purchasing a HUD home; (ii) real estate broker training on sales of HUD homes; (iii) buyer select closing entities training; (iv) training on FHA appraisers; and (v) broker/agent training. (*Id.* § 5.7.)

The RFP states that HUD will award the contract to the offeror with the lowest-price technically-acceptable proposal. (RFP § M.1.)

### B. Appeal

Appellant contends that the CO erred in selecting NAICS code 531210 for the RFP. According to Appellant, the solicitation calls for the contractor to perform administrative management services. Therefore, NAICS code 541611 is the appropriate code for the instant procurement. (Appeal at 2.)

Appellant states that it has standing to bring this appeal because, although Appellant is not a small business under the \$7.5 million size standard associated with NAICS code 531210, Appellant is a small business and therefore could compete for the procurement if NAICS code 541611, with its corresponding \$15 million size standard, were assigned to the RFP. (*Id.* at 3.)

Appellant maintains that the PWS prevents the prime contractor from acting as an agent or broker, thus contradicting the CO's chosen NAICS code. In Appellant's view, HUD requires an asset manager to oversee the disposition of HUD's inventory of single-family houses. The asset manager will be in charge of “updating HUD's central information management systems; maintaining a fully staffed office within the [Homeownership Center]; providing customer service; preparing and implementing a quality control plan, marketing plan, and contingency plan; managing real estate agents and brokers; ordering appraisals and inspections; determining property insurability; and advertising.” (*Id.* at 9.) Thus, the RFP seeks administrative management services associated with the disposition of HUD properties. Due to a conflict of interest provision found in the RFP, the prime contractor is prevented from assigning listings to itself as the listing broker, representing a buyer, receiving any portion of the brokers' sales commission, or receiving any other form of payment, income, revenue, compensation, or anything else of value from a broker who procures a buyer for a HUD-owned property. (*Id.*) The asset manager will be able to use real estate agents and brokers as subcontractors to sell properties, but it is HUD that will pay the associated commissions. “As such, the Solicitation is not actually seeking the services of real estate agents and brokers, but rather, Asset Managers that can manage these real estate professionals.” (*Id.* at 10.)

NAICS code 531210 covers businesses that act as real estate agents or brokers. However, the RFP does not require the prime contractor to be licensed as a real estate agent or broker, nor is this part of the evaluation criteria. In addition, the key personnel positions require the prime contractor “to provide personnel with *management* experience, not licensed brokers or agents.” (*Id.*, emphasis Appellant's.) The RFP also requires that listing brokers have their primary office within 30 miles of any assigned property. Since a listing broker may have only one primary office, this geographical restriction, along with the conflict of interest prohibition, demonstrates that the prime contractor cannot serve as a listing agent or broker. Thus, the CO clearly erred in choosing NAICS code 531210. (*Id.*)

Next, Appellant contends the RFP's primary purpose is administrative management and general consulting services. Appellant explains that the contractor will manage the entire

disposition process and record this information in HUD's information management systems. The contractor must “keep track of work order notifications on HUD properties (repairs, inspections, defective paint stabilizations, remediation), and scan and upload all hard copy documents.” (*Id.*) Additionally, the contractor must maintain a fully-staffed office, while real estate agents and brokers perform a large portion of their work outside of the office. Customer service is also a duty of the Asset Manager, and the RFP describes customers as including potential buyers, real estate brokers, contractors, and HUD employees and contractors. (*Id.* at 11.)

Appellant notes that a procurement typically is assigned the NAICS code that accounts for the greatest percentage of contract value. (*Id.*, citing 13 C.F.R. § 121.402(b)(2) and *NAICS Appeal of Active Deployment Systems, Inc.*, SBA No. NAICS-5712 (2016).) Here, Appellant argues, real estate agent and broker services do not account for the largest percentage of contract value. Further, the Asset Manager is paid a “Marketing Fee” for its services, which excludes listing broker commissions. (*Id.* at 12.) Thus, “the Marketing Fee paid to the contractor under the Asset Manager contracts [is] based on the performance of asset management services, not broker or real estate agent activities.” (*Id.*)

Appellant highlights that OHA has previously found NAICS code 541611 to encompass a wide variety of administrative and management services, including the administrative functions of supporting government programs and marketing. (*Id.* at 13, citing *NAICS Appeal of ALON, Inc.*, SBA No. NAICS-5148 (2010) and *NAICS Appeal of The Tolliver Group, Inc.*, SBA No. NAICS-5705 (2016).) Similar to past OHA decisions involving NAICS code 541611, the services sought here reflect a “broad range of administrative management assistance to support HUD in operating its single-family real estate-owned property program.” (*Id.* at 14.)

Appellant asserts that “[e]quity and asset management is undisputedly the principal purpose of this procurement.” (*Id.* at 15.) Specifically, “[t]he Asset Manager is tasked with managing a sizeable inventory of HUD assets, *i.e.*, single family homes, from the time the properties are acquired by HUD until they are sold.” (*Id.*) The RFP repeatedly describes the services being sought as asset management services. Moreover, “a review of the specific contract tasks confirms this fact as well.” (*Id.* at 16.) Beyond equity and asset management, the RFP calls for the Asset Manager to perform other administrative management services that fall under NAICS code 541611, such as records management; office planning; new business startup; strategic and organizational planning; and the overall management of the marketing and sales process. (*Id.* at 17-18.) Due to the assortment of tasks that fall under administrative management for which the Asset Manager is responsible, Appellant concludes that NAICS code 541611 is the most appropriate code for the RFP.

### C. CO's Response

On September 15, 2017, the CO responded to the appeal. The CO explains that “[t]his requirement is to obtain Asset Management Services” in support of HUD's REO division. (Response, at ¶ 2.) Specifically, the contractor “will be required to analyze market and property conditions and develop marketing strategies for the pricing and disposition of REO properties.” (*Id.*) The contractor's tasks include “listing, marketing, selecting the best offer, executing sales documents, overseeing the closing process, and ensuring that sales proceeds are properly

accounted for and delivered to HUD in a timely manner.” (*Id.*) “The contractor must ensure that properties are accurately and competitively valued; sales achieve the highest net return; holding times are minimized; and sales create owner-occupant opportunities.” (*Id.*)

The CO defends her choice of NAICS code 531210 for the RFP. According to the CO, “[t]he preponderance of cost under this solicitation and resulting contracts, will be associated with Professional Real Estate Brokerage Services, and the ancillary supporting services are administrative in nature.” (*Id.* ¶ 4.)

The CO states that, except for solicitation R-ATL-2006, HUD has utilized NAICS code 531210 for its asset management services contracts. R-ATL-2006 was issued under NAICS code 541611 “because the entire [NAICS] Sector 53 [Real Estate and Rental and Leasing] was under review by SBA to reestablish the Small Business size standards.” (*Id.*) That review is now complete, so HUD has returned to NAICS code 531210 for the instant procurement.

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

The NAICS code selected by the CO, 531210, Offices of Real Estate Agents and Brokers, comprises:

establishments primarily engaged in acting as agents and/or brokers in one or more of the following: (1) selling real estate for others; (2) buying real estate for others; and (3) renting real estate for others.

*NAICS Manual* at 722.

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

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.

*Id.* at 756-57.

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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.

The *NAICS Manual*'s index entry for “[r]eal estate asset management services (except property management)” indicates that such services fall under NAICS code 531390, Other Activities Related to Real Estate. *Id.* at 1361. NAICS code 531390:

comprises establishments primarily engaged in performing real estate related services (except lessors of real estate, offices of real estate agents and brokers, real estate property managers, and offices of real estate appraisers).

*Id.* at 724-25.

### 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. 48 C.F.R. § 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 agree with Appellant that the CO erred in selecting NAICS code 531210, Offices of Real Estate Agents and Brokers, for this RFP. As Appellant observes, the RFP repeatedly describes the required work as real estate asset management services, not as the services of real estate agents and brokers. *See, e.g.*, RFP § B.2 (“The selected Offeror(s) will serve as the Asset Manager (AM) contractor(s) in accordance with the Performance Work Statement (PWS) for the geographic areas identified above.”). Moreover, the bulk of the tasks outlined in the PWS are in the nature of real estate asset management services, such as overseeing the marketing and sale of real estate; managing property inspectors, appraisers, and listing brokers; and performing records management. Section II.A, *supra*. While the CO does assert, in her response to the appeal, that professional real estate brokerage services constitute the largest portion of contract value, she offers no data, or explanation, to support this conclusion. Section II.C, *supra*.

Because Appellant has established that the CO erred in selecting NAICS code 531210, OHA must assign the NAICS code that best describes the principal purpose of the products or services being acquired. Section III.A, *supra*. In making this decision, OHA will consider, but is not limited to, the NAICS codes recommended by the parties. *E.g.*, *NAICS Appeal of Active*

*Deployment Sys., Inc.*, SBA No. NAICS-5712 (2016) (selecting a code not advocated by any litigant).

Here, according to the *NAICS Manual*, “[r]eal estate asset management services (except property management)” fall under NAICS code 531390, Other Activities Related to Real Estate. Section II.D, *supra*. Further, NAICS code 531390 applies broadly to “establishments primarily engaged in performing real estate related services,” other than certain activities that are more specifically discussed elsewhere in NAICS Sector 53. *Id.* Accordingly, because this RFP primarily calls for real estate asset management services, the appropriate NAICS code for this RFP is 531390.

Appellant advocates NAICS code 541611, Administrative Management and General Management Consulting Services. It is true that the definition of NAICS code 541611 includes “equity and asset management,” among other functions. *Id.* Appellant, though, offers no rationale for selecting NAICS code 541611 over NAICS code 531390, and, as noted above, the latter code specifically encompasses “[r]eal estate asset management services” as well as other “real estate related services.” *Id.* Accordingly, Appellant has not persuasively demonstrated that NAICS code 541611 is suitable for this procurement.

#### IV. Conclusion

For the above reasons, the appeal is GRANTED. The CO clearly erred in assigning NAICS code 531210 to this RFP. The correct NAICS code designation for the procurement is 531390, Other Activities Related to Real Estate, with a corresponding \$7.5 million size standard. Accordingly, because this decision is being issued before the close of the solicitation, the CO MUST amend the RFP to change the NAICS code designation from 531210 to 531390. 48 C.F.R. § 19.303(c)(8); 13 C.F.R. § 134.318(b); *Eagle Home Med. Corp.*, B-402387, March 29, 2010, 2010 CPD ¶ 82. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge