

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

**REDACTED DECISION FOR PUBLIC RELEASE**

NAICS APPEAL OF:

U. S. Small Business Administration,

Appellant,

Solicitation No. 36C255-18-R-0074  
U. S. Department of Veterans Affairs  
Network Contracting Office 15  
Leavenworth, KS

SBA No. NAICS-5899

Decided: April 19, 2018

APPEARANCES

Sam Q. Le, Esq., Office of General Counsel, U.S. Small Business Administration, for the Agency

Jeanette G. Mathena, Contracting Officer, Network Contracting Office, U.S. Department of Veterans Affairs, for the Procuring Agency

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On March 16, 2018, the U.S. Department of Veterans Affairs, Network Contracting Office (NCO) 15 (VA) issued Solicitation No. 36C255-18-R-0074, an unrestricted Request for Proposals (RFP) for an expansion of the parking garage at the Harry S. Truman Veterans' Hospital in Columbia, Missouri. The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 238120, Structural Steel and Precast Concrete,

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<sup>1</sup> OHA initially issued this decision with confidential treatment pursuant to 13 C.F.R. § 134.205, and permitted the parties to recommend redactions in addition to those covering the Independent Government Estimate. OHA did not receive any additional recommended redactions. OHA now publishes a redacted version of the decision for public release.

with a corresponding \$15 million annual receipts size standard. Proposals were originally due on April 6, 2018, but are presently due on April 30, 2018.

On March 22, 2018, the U.S. Small Business Administration (SBA) Office of General Counsel (Appellant) filed the above-captioned appeal on behalf of the SBA Office of Government Contracting, asserting the CO erred in selecting NAICS code 238120 for the subject procurement. Appellant argues that procurement is best described by NAICS code 236220, Commercial and Institutional Building Construction, with a corresponding \$36.5 million annual receipts size standard. For the reasons discussed *infra*, the appeal is GRANTED.

The 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's appeal is timely, as SBA may file a NAICS appeal at any time before offers are due, and they did so within six days of issuance of the RFP. 13 C.F.R. §§ 121.1103(b)(1) and 134.304(b). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. Solicitation

The RFP states VA intends to award a construction contract to expand the parking garage located at the Harry S. Truman VA Medical Center in St. Louis, Missouri. (RFP, at 1.) According to the RFP, “the work includes general construction of a new 694 stall parking garage to be constructed as an expansion of an existing garage, repaving and/or resurfacing of portion of the existing surface parking lot that remains, including alterations, roads, walks, grading, drainage, mechanical and electrical work, utility systems, and necessary removal of existing structures and construction and certain other items as defined in the drawings and specifications.” (*Id.*, at 3.)

The RFP requires that offerors submit at least two examples of “Technical Construction Experience” that involve similar technical requirements to those needed for the underlying project. (*Id.*, at 12). The RFP requires an example of a successful construction project that involved “construction of pre-cast concrete parking garage.” (*Id.*) The requirement also requires an offeror to submit information regarding “[p]re-cast parking garages the prime contractor has completed that are similar to the scope of work of this project.” (*Id.* at 13.) The offeror is to include “a brief description of the construction project scope of work” when submitting these past projects. (*Id.*)

The RFP further details the technical qualifications required of the proposed key staff. The information will be evaluated to determine if “previous construction experience” will meet the requirements of the project. (*Id.*) Offerors are also directed to provide evidence that they have done pre-cast concrete work for parking structures and have at least five years of experience in pre-cast concrete work. (*Id.*, at 14.)

The RFP includes Federal Acquisition Regulation Clause 52.222-6, Construction Wage Rate Requirements, applies to the wages paid to laborers. (*Id.* at 40.) In the Davis Bacon Wage

Rate information section, the RFP lists the type of work as “Building Construction Projects.” (*Id.*, at 83.)

The RFP also includes the construction related clauses “Buy-American for Construction Materials,” FAR 52.225-11, and “Payments Under Fix-Price Construction Contracts,” FAR 852.236-82. (*Id.*, at 56, 73.)

The contract is unrestricted, but the RFP enumerated “Small Business Considerations” as one of the six non-price evaluation factors used to determine technical acceptability. (*Id.*, at 9, 11.) The award selection is to be made based on Lowest Price Technically Acceptable Source Selection Process. Large businesses were instructed to list small businesses in their subcontracting plan, and VA has established subcontracting goals, which are listed in a chart. Small businesses need not submit subcontracting plans. (*Id.*, at 15.) Further, VA stated that it would evaluate offers based on their “service-disabled veteran-owned small business and veteran owned small business status” and use of these businesses as sub-contractors. (*Id.*, at 44.) Prime contractors are “encouraged to assist service-disabled veteran-owned and veteran-owned small business potential subcontractors in obtaining bonding.” (*Id.*)

### B. Appeal

Appellant argues NAICS code 236220, Commercial and Institutional Building Construction, is more appropriate for the underlying solicitation. (Appeal, at 1.) Appellant argues that “the predominance of effort under this proposed contract most closely resembles the description under NAICS code 236220.” Further, that the solicitation includes a significant amount of work which exceeds the coverage of NAICS Code 238120, the RFP's designated code. (*Id.*)

Appellant maintains that NAICS code 238120 covers the use of pre-cast concrete and the assembly of pre-cast concrete only, and is therefore unsuitable for an RFP for the construction of an entire parking garage. Appellant contends that the *NAICS Manual* Cross-Reference Guide “states that codes in subsector 238 are more appropriate for subcontractors that perform specialized work.” (*Id.*, at 5.) Appellant suggests OHA has previously upheld the use of a subsector 238 code in a NAICS Appeal when a solicitation calls for minor construction. (*Id.*, citing *NAICS Appeal of Fortis Networks, Inc.*, SBA No. NAICS-5713 (2016).) Appellant also cites to OHA case law that indicates that NAICS codes in subsector 238 cover minor construction work. (*Id.*, at 3, citing *Fortis Networks*.)

Appellant argues NAICS code 236220 covers the broader scope of the required work and incorporates the inclusion of specialty trades listed under subsection 238. (*Id.*) In Appellant's view, NAICS code 236220 is appropriate where a solicitation requires “extensive construction services.” (*Id.*, at 2, citing *NAICS Appeal of SD Titan Resources/SM&MM*, SBA No. NAICS-5187 (2001).) Appellant notes NAICS Code 236220 comprises establishments that are responsible for the construction of commercial institutional buildings and related structures, including new work, additions, alterations, maintenance and repairs. (*Id.*, citing *NAICS Appeal of Arrowhead Contracting, Inc.*, SBA No. NAICS-5725 (2016).) “Parking Garage Construction” is specifically listed as an illustrative example of work covered by NAICS code 236220. (*Id.*)

According to Appellant, the RFP describes the work required as the construction of a new parking garage as an expansion of an existing garage. Appellant highlights drawings and specifications for the new garage, which includes four parking levels, stairs, striping and signs, doors, plumbing fire protection, and electrical work. (*Id.* at 3.) Appellant suggests the RFP requires significant work outside of NAICS code 238120, such as lighting, color coding at each level, vinyl signage, modified bitumen roofing system, power for the structure, parking counter system, heaters at each landing, and an electrical equipment room. (*Id.*) In Appellant's view, the purpose of the solicitation is to deliver a completed parking garage, not merely minor construction or specialty work with steel and pre-cast concrete. (*Id.*, at 3.)

Appellant further states NAICS code 236220 was used in solicitations for six recent VA parking garage construction projects (including both initial construction and expansions of existing garages). (*Id.*, at 4.) Appellant also argues that the higher size standard of its proposed NAICS code will open the market to more small business participation. (*Id.*, at 5.)

### C. Contracting Officer's Response

On April 6, 2018, the CO filed a response on behalf of VA, the procuring agency. In its response, the CO maintains it selected the NAICS code best describing the subject procurement for “construction of the pre-cast concrete parking garage” and SBA's appeal is “without merit and should be denied.” (CO's Response, at 2.)

The CO asserts the principal purpose of the procurement is to erect a pre-cast parking garage “utilizing structural steel for pier work and grade beams and pre-cast concrete 12-foot double tees, pre-cast beams, walls columns and two stair systems that will all be pre-cast concrete.” (*Id.*, at 3.) The CO characterizes the subject procurement as “an expansion of the initial pre-cast parking construction project,” specifically a second-phase garage “connected directly south of the existing pre-cast parking garage.” (*Id.*, at 1.) The CO suggests “[p]re-cast work represents the prominent part of the work to be completed.” (*Id.*) The CO further suggests “ancillary work,” such as “field applied 3” concrete topping, lighting, parking lot stripping, and signage,” represents only 30% of the subject procurement. (*Id.*, at 2.) The CO asserts SBA “failed to look past the general description of bid items,” and should have concentrated on the evaluation factors' focus on pre-cast concrete experience. (*Id.*, at 4.) The CO stresses “[n]owhere within the solicitation does a general construction background suffice to meet the experience requirements” and any related work “reflects nothing more than minor finish work when compared to the overall focus of the specialized pre-cast concrete work.” (*Id.*)

The CO recounts it completed market research for the subject procurement in April 2016, and based on that research, concluded the procurement should proceed unrestricted, full and open. (*Id.*, at 7.) The CO suggests SBA “required this project be set-aside for 8(a) concerns since SBA had found one potential company that met that qualification” and the VA Form 2268 “Small Business Program and Contract Bundling Review” submitted and approved for that procurement by the Small Business Liaison and the VA Office of Small and Disadvantaged Business Utilization (OSDBU) Representative utilized NAICS code 238120. (*Id.*, at 7, Exh. 2.) The CO states that, after unsuccessful negotiations with the identified 8(a) firm, the “8(a)

procurement was terminated and the VA obtained a release from the 8(a) program” and proceeded with the subject, unrestricted procurement. (*Id.*, at 8.) According to the CO, the Small Business Liaison subsequently advocated for changing the designation to NAICS code 236220, but the CO proceeded to solicit unrestricted, full and open competition based on the VA OSDDBU Representative's concurrence. (*Id.*, at 8.)

The CO asserts the relative value and importance of the pre-cast concrete construction to the overall cost of the project also supports designating NAICS code 238120. According to the CO, FAR 19.303 “clearly states the procurement is classified according to the component which accounts for the greatest percentage of the contract value.” (*Id.*, at 5, citing FAR 19.303.) The CO asserts that the Independent Government Estimate for this procurement projects that pre-cast concrete accounts for approximately [xxx] of the procurement's [xxx] value. (*Id.*, at 5.)

The CO also asserts OHA should disregard SBA's citations to previous VA procurements and OHA cases. The CO suggests OHA's holdings on NAICS code designations for other procurements are unpersuasive, particularly as those procurements are not presently before OHA. (*Id.*, at 5-6, citing *NAICS Appeal of Ferris Optical*, SBA No. NAICS-5285 (2011).) Therefore, according to the CO, OHA should not consider previous VA procurements utilizing NAICS code 238120. Even so, the CO continues, SBA does not explain whether these procurements involve pre-cast concrete rather than pour-in-place concrete and also ignores previous VA procurements for parking garage projects utilizing NAICS code 238120. (*Id.*, at 5.) In particular, the CO highlights the previous VA procurement for the initial pre-cast concrete parking garage that utilized NAICS code 238120 in unrestricted, full and open competition. (*Id.*, at 9.) The CO states “[t]he SBA and NCO 15 Small Business Liaison were both extremely pleased with the small business subcontracting plan effectuated by the awardee,” under which 75% of the work was performed by small business concerns. (*Id.*, at 9.)

The CO argues *SD Titan* is inapplicable because it concerned a NAICS code for prefabricated wood building manufacturing, not structural steel and pre-cast concrete. (*Id.*, at 6.) The CO argues “stretching of the *SD Titan* case to suggest that essentially all cases involving extensive construction fall under the 236220 NAICS code would seemingly eliminate [the] need for any other NAICS codes involving building construction of any sort.” (*Id.*) The CO similarly argues *Arrowhead*, contrary to SBA's suggestion, “does [not] stand for the premise that all buildings shall be handled under [NAICS code 236220].” (*Id.*) The CO argues *Fortis Networks* is equally inapplicable in the instant appeal, because the minor construction work required supported designating NAICS code 238990 over NAICS code 236220. (*Id.*, at 7.)

#### D. NAICS Manual<sup>2</sup> Descriptions

The NAICS code assigned by the CO, 238120, Structural Steel and Precast Concrete Contractors, comprises:

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<sup>2</sup> Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States* (2017), also available at <https://www.census.gov/econ/isp/index.php>.

establishments primarily engaged in: (1) erecting and assembling structural parts made from steel or precast concrete (e.g., steel beams, structural steel components, and similar products of precast concrete); and/or (2) assembling and installing other steel construction products (e.g., steel rods, bars, rebar, mesh, and cages) to reinforce poured-in-place concrete. The work performed may include new work, additions, alterations, maintenance, and repairs.

*NAICS Manual*, at 132. The *NAICS Manual* includes the following illustrative examples: “[c]oncrete product (e.g., structural precast, structural prestressed) installation”; “[r]ebar contractors”; “[e]recting structural steel”; “[r]einforcing steel contractors”; “[p]lacing and tying reinforcing rod at a construction site”; “[s]tructural steel contractors”; and “[p]recast concrete panel, slab, or form installation”. *Id.*, at 132.

Appellant's proposed NAICS Code, 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 also includes establishments responsible for the on-site delivery 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.

*Id.*, at 126.

The NAICS Manual lists the following illustrative examples: “[a]irport building construction”; “[o]ffice building construction”; “[a]rena construction”; “[p]arking garage construction”; “[b]arrack construction”; “[p]rison construction”; “[f]arm building construction”; “[r]adio and television broadcast studio construction”; “[f]ire station construction”; and “[g]rain elevator or bin construction”. *Id.*, at 126.

### III. Discussion

#### A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the NAICS code designation assigned to the solicitation is based on a clear error of fact or law. 13 C.F.R. § 134.314; *NAICS Appeal of Fortis Networks, Inc.*, SBA No. NAICS-5713 (2016), at 10.

The correct NAICS code is that code which best describes the principal purpose of the goods or services being procured, in light of the industry description in the *NAICS Manual*, the description in the solicitation, and the relative weight of each element in the solicitation. 13

C.F.R. § 121.402(b); *NAICS Appeal of Ferris Optical*, SBA No. NAICS-5713 (2016). The solicitation determines the primary purpose of the procurement. *Fortis Networks*, at 12. OHA will not reverse a NAICS code designation simply because it would have selected a different code. *NAICS Appeal of Eagle Home Med. Corp.*, SBA No. NAICS-5099, at 3 (2009); *NAICS Appeal of Fortis Networks, Inc.*, SBA No. NAICS-5713, at 11 (2016).

### B. Threshold Matters

I hold that SBA has standing to file the instant appeal concerning an unrestricted procurement. SBA regulations permit “SBA to file a NAICS code appeal at any time before offers are due” and “[a]ppeals . . . from NAICS code designations may be filed with OHA by the following, as applicable: . . . (c) The Associate or Assistant Administrator for the SBA program involved, through SBA's [OGC]”. 13 C.F.R. §§ 121.1103(b)(1), 134.302(c). Here, SBA's Office of Government Contracting is appealing the CO's NAICS code designation through SBA's OGC. *See* Section II.B, *supra*. Therefore, SBA has standing to file the instant appeal.

### C. Analysis

Appellant has met its burden of proving that the CO's NAICS Code is clearly erroneous. As a result, this appeal is granted.

SBA regulations dictate “[t]he procuring agency contracting officer . . . designates the proper NAICS code and corresponding size standard in a solicitation, selecting the single NAICS code which best describes the principal purpose of the product or service being acquired.” 13 C.F.R. § 121.402(b). SBA regulations specify “[p]rimary consideration is given to the industry descriptions in the U.S. NAICS Manual, the product or service description in the solicitation and any amendments to it, the relative value and importance of components of the procurement that make up the end item being procured, and the function of the goods and services being purchased.” *Id.*, at § 121.402(b)(1). The regulation further states “[a] procurement is usually classified according to the component which accounts for the greatest percentage of contract value.” *Id.*, at § 121.402(b)(2).

FAR § 19.303(a)(2), cited by the CO, almost identically mirrors § 121.402(b), first stating “[t]he contracting officer shall select the NAICS code which best describes the principal purpose of the product or service being acquired . . .” before stating “a procurement is usually classified according to the component which accounts for the greatest percentage of contract value.” 48 C.F.R. § 19.303(a)(2). FAR § 19.102(c) similarly requires that “[f]or size standard purposes, a product or service shall be classified in only one industry, whose definition best describes the principal nature of the product or service being acquired even though for other purposes it could be classified in more than one.” *Id.*, at § 19.102(c). The regulation continues, stating that if the product or service can be classified under two different NAICS codes with different size standards, “contracting officers shall apply the size standard for the industry accounting for the greatest percentage of the contract price.” *Id.*, at § 19.102(d).

Interpreting these regulations, OHA has consistently held the proper NAICS code is the one which best describes the principal purpose of the product or service being acquired through a

subject procurement. *See e.g., NAICS Appeal of Ferris Optical*, SBA No. NAICS-5713 (2016). Although the CO's NAICS code need not be perfect, it must best describe the principal purpose of the service being offered. *NAICS Appeal of Arrowhead Contracting, Inc.*, SBA No. NAICS-5725 (2016). While a procurement is “usually” classified according to the component accounting for the greatest percentage of the contract value, the CO may rely on other factors in selecting a NAICS code, such as the relative importance of the components involved and the function of the goods or services being procured. *See e.g., NAICS Appeal of Pinnacle Solutions, Inc.*, SBA No. NAICS-5651, 9-10 (2015) (holding that aircrew training accounted for the largest portion of the procurement, but “such services [were] nevertheless of secondary importance to the [device] upgrades” that warranted the NAICS code designation).

I find the principal purpose of the procurement at issue is the general construction of a parking garage that is to be an expansion of an existing garage. The solicitation requires general construction, as well as resurfacing, alterations, roads, walkways, drainage, electrical work, and the removal of existing structures. *See* Section II.A, *supra*. The RFP calls for a prime contractor, with an expectation that subcontractors will be fulfilling various aspects of the contract. *Id.*

The *NAICS Manual* states that NAICS subsector 238, “Specialty Trade Contractors,” “comprises establishments whose primary activity is performing specific activities (e.g., pouring concrete, site preparation, plumbing, painting, and electrical work) involved in building construction or other activities that are similar for all types of construction, but that are not responsible for the entire project.” *NAICS Manual*, at 131. The manual further notes that, “the production work performed by establishments in this subsector is usually subcontracted from establishments of the general contractor type. . . .” *Id.* OHA has held that work under subsector 238 includes specialized construction work suitable for subcontracting. *Fortis Networks*, at 11. The RFP calls for a prime contractor, with the expectation that subcontractors will be brought in. The RFP identifies a number of activities more beyond pouring concrete, such as plumbing, drainage, and demolition and is too broad to be covered by a specific activity NAICS code that is mainly designated for subcontractors.

Subsector 236 is broader and “comprises establishments responsible for the construction of buildings. The work performed may include new work, additions, alterations, or maintenance and repairs.” (*Id.* at 123.) OHA has held that NAICS Code 236220 is well suited for an RFP which requires extensive construction services. *NAICS Appeal of SD Titan Resources/SM&MM*, SBA No. NAICS-5187, at 14 (2011). The instant procurement involves not only pouring concrete, but also extensive additional services, such as plumbing, drainage, and demolition, indicating that NAICS code 236220 is more appropriate for the extensive amount of work of various types required to build a parking garage addition. Further, as noted above, the *NAICS Manual* explicitly includes parking garage construction as an example of the work covered by NAICS code 236220. *See* Section II.D, *supra*.

The CO argues *SD Titan* is inapposite here, because that case involved a NAICS code for prefabricated wood manufacturing, and this case involves pre-cast concrete construction. (CO's Response, at 6.) However, Appellant misunderstands the case. *SD Titan* concerned a contracting officer's designation of prefabricated wood building manufacturing for a procurement which OHA concluded was really for commercial construction, because it required extensive

construction services. OHA rejected the procuring agency's designation of wood, in favor of the construction code, because the procurement required more extensive construction services than merely the assembly of prefabricated wood. Here, the procurement calls for the construction of a parking garage and requires more extensive construction than merely the installation of precast concrete. As in *SD Titan*, the more extensive construction required calls for a designation of NAICS code 236220.

The instant RFP identifies a project manager, quality control manager, safety officer, and site superintendent as key employees on the contract, and requires that each proposal list each employee's previous *construction* experience, and requires evidence of significant related experience. *See* Section II.A, *supra*. These requirements that project managers and other personnel have extensive construction background support a designation of NAICS Code 236220. *NAICS Appeal of Ascendant Program Services, LLC*, SBA No. NAICS-5832 (2017). Further, the RFP's inclusion of a number of clauses pertaining to construction contracts also supports a designation of NAICS Code 236220. *See* Section II.A, *supra*.

Appellant identified a number of procurements by VA for similar projects, using Appellant's proposed NAICS code, however, those procurements are not before OHA for consideration, so will not be considered in the analysis. *See NAICS Appeal of Arrowhead Contracting, Inc.*, SBA No. NAICS-5725 (2016); *NAICS Appeal of Ferris Optical*, SBA No. NAICS-5825 (2011). In addition, OHA has held that recommendations from other officials, vendors, or potential bidders carry no weight as the analysis remains whether the NAICS code designated by the CO best describes the principal purpose of the subject procurement. *NAICS Appeal of Active Deployment Systems, Inc.*, SBA No. NAICS-5712, at 17 (2016).

Upon consideration of the RFP, the *NAICS Manual*, and the parties' positions, I conclude the CO's designation of NAICS Code 238120 is clearly erroneous. I conclude that NAICS Code 236220 best fits the requirements of the RFP.

#### IV. Conclusion

For the above reasons, the appeal is GRANTED, and the CO's designation of NAICS code 238120 is REVERSED. The NAICS code that best describes the principal purpose of the subject procurement is NAICS Code 236220, Commercial and Institutional Building Construction, with a corresponding \$36.5 million annual receipts size standard.

Consequently, because OHA is issuing this decision before the bid proposals are due, the CO MUST amend the RFP to change the NAICS code from 238120 to 236220. FAR § 19.303(c)(5); 13 C.F.R. § 134.318(b); *see e.g., NAICS Appeal of Noble Supply & Logistics*, SBA No. NAICS-5886 (2018).

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

CHRISTOPHER HOLLEMAN  
Administrative Judge