

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

NAICS APPEAL OF:

Curtin Maritime Corp.,

Appellant,

Solicitation No. N66001-18-Q-7951

Department of the Navy  
Space and Naval Warfare Systems  
Command  
SPAWAR Systems Center Pacific  
San Diego, CA

SBA No. NAICS-5947

Decided: August 9, 2018

APPEARANCES

Marley Schroeffer, Esq., Associate General Counsel, Curtin Maritime, Corp., Long Beach, California

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DECISION

I. Introduction and Jurisdiction

On June 27, 2018, the U.S. Department of the Navy, Space and Naval Warfare Systems Center Pacific (Navy) issued Request for Quotes (RFQ) No. N660001-18-Q-7951, seeking “[i]nallation of a four (4) point mooring system off-shore near San Clemente Island.” The Contracting Officer (CO) set the entire procurement aside for small business concerns, and assigned North American Industry Classification System (NAICS) code 561990, All Other Support Services, with a corresponding \$11 million annual receipts size standard. Quotes are presently due August 10, 2018.

On July 6, 2018, Curtin Maritime, Corp. (Appellant) filed the instant appeal challenging the CO's NAICS code designation for the subject procurement. In its appeal, Appellant asserts the CO's designation is clearly erroneous based on the procurement's primary purpose, and contends NAICS code 237990, Other Heavy and Civil Engineering Construction, with a corresponding \$36.5 million annual receipts size standard, is the appropriate NAICS code.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides NAICS code appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within ten calendar days after issuance of the RFQ, so the appeal is timely. Federal Acquisition Regulation (FAR) 19.303(c)(1); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. RFQ

According to the RFQ, the subject procurement is a “[s]ervice contract for installation of a four (4) point mooring system off-shore near San Clemente Island” to “secure a barge for at-sea testing” by Navy. (RFQ, at 1.) The RFQ states the “[p]roject will . . . include replacing buoys, installing wire rope, removing degraded chain, adding additional lengths of chain, detachable links, and associated shackles and swivels” and “consists of diving, inspection, mooring installation, and overhaul services, in water depths up to 190 feet of seawater.” (*Id.*)

The Statement of Work (SOW) reiterates the contractor “shall install a four (4) point mooring system . . . to be used to moor the [Navy's] barge within 12 months of installation.” (SOW, at § 1.0.) “The existing anchors and clumps for each mooring leg are planned for re-use based on previous diver inspection of the shallow moorings and sidescan surveys.” (*Id.*, at § 3.0.) The SOW continues, “the [contractor] shall include diver inspection, with video, of the deep moorings for verification of acceptable re-use.” (*Id.*) The contractor shall also have “cutting methods to remove degraded chains, shackles, detachable links, etc.” (*Id.*)

The SOW indicates the following tasks may be required: “[o]n-load dive equipment and support equipment at point of mobilization”; “[t]ransit to San Clemente Island Naval Ordnance Test Station (NOTS) pier to on-load mooring overhaul materials and a government oversight representative”; “[t]ransit to the work site and set up for mooring installation operations”; “[c]onduct visual inspection of each mooring leg [and r]ecord visual inspection on video”; “[i]nstall four (4) point mooring system”; “[p]ull test of each mooring leg overhaul corresponding to typical tensions seen by the planned barge use”; and “[s]ecure from operations and return to NOTS pier to off-load recovered mooring overhaul material”. (*Id.*, at § 3.0)

The SOW further indicates the procuring agency will provide steel can buoys; foam-filled buoys; anchors; cement clumps; various lengths of wire rope; miscellaneous shackles, swivels, D- rings, and detachable links; and various lengths of chain. (*Id.*, at § 3.1.) In addition, the contractor is responsible for delivering a “[f]inal completion report with summary of work, final locations of any installed hardware and type, video inspection of mooring legs, and the pull test data.” (*Id.*, at § 4.0.)

With the solicitation, the CO also provided a description of the “assumed configuration [of each mooring leg] determined from previous documentation, inspections, and test reports.” (RFQ, Mooring parts 1.1, at 1.) According to the description, each mooring leg, generally, comprises a buoy, a riser chain, a clump, an anchor, a chain from the clump to the anchor, and

miscellaneous shackles and connecting hardware. (*Id.*) The description indicates each mooring leg will require a new buoy (*i.e.*, steel can or foam-filled pegtop), a new wire rope pendant, new riser chain, and new miscellaneous shackles and connecting hardware. (*Id.*, 1-2.) Notably, according to the description, each new buoy weighs between 4,000 and 6,000 lbs., each new wire pendant weighs between 130 and 365 lbs., each riser chain weighs between 1,500 and 3,000 lbs., and each group of miscellaneous shackles and connecting hardware weighs 1,000 lbs. (*Id.*, at 1-2.)

### B. Appeal

Appellant argues it has standing to appeal the instant NAICS code designation. Appellant suggests it is small under NAICS code 237990, the code for which it advocates, and is adversely affected by the CO's allegedly erroneous designation of NAICS code 561990. (Appeal, at 2.)

Appellant asserts the subject procurement's primary focus is clearly construction-related services, rather than administrative or day-to-day support services. (*Id.*, at 3.) Appellant stresses the contract requires “diving, inspection, mooring installation, and overhaul services” and specifically requires the offeror to replace buoys, install wire rope, replace degraded chain, and add additional chain. (*Id.*, at 2.) Appellant maintains the work will require use of heavy construction equipment and several vessels, including an anchor handling tug and a crane barge. (*Id.*, at 3.) Further, Appellant stresses the depth of the water requires large ocean-going equipment. (*Id.*) In all, Appellant argues the subject procurement “cannot be performed without heavy marine construction equipment and experienced marine construction operators.” (*Id.*, at 4.)

Appellant, instead, advocates for designation of NAICS code 237990, Other Heavy and Civil Engineering Construction. Appellant highlights that NAICS code 237990 “specifically lists Marine Construction, Pier Construction and Dredging as illustrative examples.” (*Id.*)

### C. CO's Response

On July 12, 2018, the CO responded to the appeal, maintaining that NAICS code 561990 is the appropriate code for the subject procurement. (CO's Response, at 5.) The CO suggests “the purpose of this four-point mooring systems is to provide a temporary mooring for a [Navy] barge using previously emplaced concrete clumps as well as a variety of anchors, buoys, wires, and chains.” (*Id.*, at 2.) The CO stresses the sought mooring is characterized by Navy as a “Fleet mooring” and “Personal Property/Collateral Equipment”, rather than an “Offshore mooring facility (mooring dolphin)” and “Real Property/Installed/Built In Equipment”. (*Id.*, at 2, citing Exhibit C, Property Classification Table at A-8, A-9.) The key distinction, according to the CO, is “whether the construction is occurring and permanent emplacements are being installed” and, for the subject procurement, there is no pile driving or other emplacement of materials required. (*Id.*, at 2.) The CO highlights the contractor will use “[o]nly temporary personal property— primarily anchors, chains, wires, and buoys” for the required work, and “the barge will only be kept in place by the four-point mooring system temporarily and will be moved once the project is complete.” (*Id.*) Moreover, the CO argues, the “most expensive cost associated with this [procurement] is diver labor and diving expenses.” (*Id.*, at 5.) Based on this, the CO asserts, the

appropriate NAICS code is 561990, which encompasses “[d]iving services on a contract or fee basis” as an illustrative example. (*Id.*, at 3.)

According to the CO, the primary work required is diving, specifically diving equipment and divers “needed to inspect what is already in place and to decide what personal property type items need to be added, replaced, or fixed.” (*Id.*, at 5.) The CO argues diving is relevant to NAICS code 561990, because diving is referenced as an illustrative example. Contrarily, the CO argues, diving is not typically relevant to NAICS code 237990.

The CO asserts the subject procurement does not involve any permanent marine construction, and stresses there is no pile driving, dredging, dolphin construction, or any other permanent work or emplacement required. (*Id.*, at 5.) The CO further stresses marine construction operators and specific marine construction equipment, such as cranes and tug boats, are not required. (*Id.*)

The CO also asserts NAICS code 561990 “has regularly and frequently been used by the Navy for work involving diving in the past[,] including repair, inspection, alteration, and maintenance actions.” (*Id.*, at 5.) The CO highlights that, based on its research, there are 985 instances of federal contracts utilizing NAICS code 561990 where diving was involved, including 228 Navy contracts. (*Id.*, at 4.) The CO, conversely, found only 174 instances of federal contracts utilizing NAICS code 237990 where diving was involved and, more particularly, only 14 Navy contracts utilizing that code for contracts involving diving. (*Id.*) The CO further suggested, of those Navy contracts utilizing NAICS code 237990, the two most recent contracts involved dredging. (*Id.*)

With its response, the CO provided a Navy guidance document, titled “Navy Facilities Projects” or “OPNAVINST”, that “provides policy, guidance, and command responsibilities for the classification, preparation, submission, review, programming, approval, and reporting of real property facilities work at Navy shore installations and sites.” (CO's Response, Exh. C, at 1-1.) The guidance document defines a “Facility” as: “[a] real property building, structure, or linear structure, including all associated components, dedicated solely to supporting the mission and necessary for making it complete and usable.” (*Id.*, at 1-5.) A “Linear Structure”, for instance, is a “facility whose function requires that it traverse land (such as a road, rail line, pipeline, pavement, or utility distribution) . . . [and t]he individual assets associated with this system are components of that linear structure.” (*Id.*)

The guidance document further defines “Real Property” as “including land, land rights, and facilities together with buildings, fixtures, affixed improvements, and structures (including linear structures),” and not including personal property “such as weapons systems and other military equipment.” (*Id.*) “Personal Property,” according to the guidance document, is “[a]ccessory equipment and furnishings that are movable in nature and not affixed as an integral part of a real property facility.” (*Id.*, at 1-4.) “Personal property is not required for the operation of the real property facility, but is required for the functional operation and activities utilizing the real property facility.” (*Id.*) The guidance document also specifies “Real Property Equipment,” also known as “installed equipment,” is “considered part of the building or facility [and t]he

removal of this equipment might cause substantial damage to the facility or make the facility incomplete and unusable.

The guidance document notes a “Fleet mooring (fixed with ball and chain)” is personal property, while an “Offshore mooring facility (mooring dolphin)” is real property. (*Id.*, at A-8.)

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

The NAICS code designated by the CO, 561990, All Other Support Services, comprises:

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).

*NAICS Manual*, at 505. Illustrative examples of establishments covered by NAICS code 561990 include: “[b]artering services”; “[f]lagging (i.e., traffic control) services”; “[b]ottle exchanges”; “[f]loat decorating services”; “[c]loth cutting, bolting, or winding for the trade”; “[i]nventory taking services”; “[c]ontract meter reading services”; “[l]umber grading services”; “[d]iving services on contract or fee basis”. *Id.*

The *NAICS Manual* describes the general category of Subsector 561, Administrative and Support Services, as “[a]ctivities of this sector are performing routine support activities for the day-to-day operation of other organizations.” *Id.*, at 489. More particularly, Subsector 5619, Other Support Services, comprises “establishments primarily engaged in providing day-to-day business and other organizational support services.” *Id.*, at 504.

The NAICS code advocated for by Appellant, 237990, Other Heavy and Civil Engineering Construction, comprises:

establishments primarily engaged in heavy and civil engineering construction projects (excluding highway, street, bridge, and distribution line construction). The work performed may include new work, reconstruction, rehabilitation, and repairs. Specialty trade contractors are included in this industry if they are engaged in activities primarily related to heavy and civil engineering construction projects (excluding highway, street, bridge, distribution line, oil and gas structure, and utilities building and structure construction). Construction projects involving water resources (e.g., dredging and land drainage), development of marine facilities, and projects involving open space improvement (e.g., parks and trails) are included in this industry.

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<sup>1</sup> Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2017)*, available at <http://www.census.gov>

*Id.*, at 130-131.

Illustrative examples of establishments covered by NAICS code 237990 include: “[c]hannel construction”; “[l]and drainage construction”; “[d]am construction”; [m]arine construction”; “[d]ock construction”; “[m]icrotunneling contractors”; “[d]redging (e.g., canal, channel, ditch, waterway)”; “[n]uclear waste disposal site construction”; “[e]arth retention system construction”; “[f]lood control project construction”; “[p]ark ground and recreational open space improvement construction”; “[r]ailroad construction”; “[g]olf course construction”; “[s]ubway construction”; “[h]orizontal drilling (e.g., cable, pipeline, sewer installation)”; “[t]renching, underwater”; “[h]ydroelectric generating station construction”; and “[t]unnel construction”. *Id.*, at 131. In addition, the description for NAICS code 237990 cross-references NAICS code 541990, All Other Professional, Scientific, and Technical Services, for establishments primarily engaged in “[i]nspecting pipelines”. *Id.*

The broader Sector 23, Construction, “comprises establishments primarily engaged in the construction of buildings or engineering projects (e.g., highways and utility systems). . . . Construction work done may include new work, additions, alterations, or maintenance and repairs.” *Id.*, at 123.

Subsector 237, Heavy and Civil Engineering Construction, comprises:

establishments whose primary activity is the construction of entire engineering projects (e.g., highways and dams), and specialty trade contractors, whose primary activity is the production of a specific component for such projects. Specialty trade contractors in the Heavy and Civil Engineering Construction subsector generally are performing activities that are specific to heavy and civil engineering construction projects and are not normally performed on buildings. The work may include new work, additions, alterations, or maintenance and repairs. . . . Specialty trade contractors are classified in this subsector if the skills and equipment are specific to heavy or civil engineering construction projects. . . . Construction projects involving water resources (e.g., dredging and land drainage) . . . are included in this subsector.

*Id.*, at 127.

### 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

Having reviewed the solicitation, the descriptions in the *NAICS Manual*, relevant OHA precedent, and the parties' arguments, I find Appellant has not demonstrated the CO clearly erred in selecting NAICS code 561990 for the subject procurement.

In its simplest form, a mooring system is a buoy connected to an anchor by a series of chains or wire ropes, possibly including swivels or shackles. Here, the sought mooring system relies on existing anchors and concrete clumps, leaving the contractor to integrate the buoys, chains, wire ropes, and other necessary components. All of these components, importantly, are to be provided by the procuring agency. *See* Section II.A, *supra*. What is left are diving services, specifically those to inspect the existing mooring system, identify and make any necessary replacements, and, in all, complete the installation of the mooring system. Thus, it is clear the principal purpose of the instant procurement is diving services.

Appellant asserts installation of the four-point mooring system will undoubtedly require heavy construction equipment and vessels such as anchor tug boats and cranes, but it fails to provide any particular evidentiary support for such conclusions. The solicitation does not explicitly require such heavy construction equipment, nor does it allude to more than a vessel to transport divers and supplies to the project site. *See* Section II.A, *supra*. While the solicitation requires additional inspection and testing of the mooring system to determine reliability, the solicitation does not require the contractor to engage in constructing new anchors and concrete clumps. *See id.* The required diving services, such as “underwater cutting methods to remove degraded chains, shackles, detachable links, etc.” and inspection of existing mooring legs, themselves, do not inherently require heavy construction equipment and Appellant provides no evidence to the contrary.

The *NAICS Manual* description for NAICS code 561990 specifically provides “[d]iving services on a contract or fee basis” as an illustrative example of those establishments covered by that code. *See* Section II.D, *supra*. Appellant makes no attempt to exclude the diving services being procured from those covered by NAICS code 561990, and merely asserts the required work is not administrative or day-to-day support without any rationale. *See* Section II.B, *supra*. Rather, the work required by this solicitation is consistent with OHA's characterization of NAICS code 561990 as covering “services requiring manual labor.” *NAICS Appeal of CHP Int'l, Inc.*, SBA No. NAICS-5367, at 3 (2012). Thus, I must conclude the Appellant has failed to demonstrate the CO clearly erred in his designation.

Because Appellant has not established that NAICS code 561990 is clearly erroneous for this RFP, it is unnecessary to consider the NAICS code Appellant advocates, 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 SupplyCore, Inc.*, SBA No. SIZ-5866, at 13 (2017); *NAICS Appeal of Nat'l Elec. Coil*, SBA No. NAICS-5666, at 8 (2015).

Of particular note, the CO identified a number of procurements by Navy for similar projects, which were designated under NAICS code 561990. *See* Section II.C, *supra*. However, those procurements are not before OHA for consideration, and were not considered in the analysis. *See NAICS Appeal of U.S. Small Business Administration*, SBA No. NAICS-5899 (2018); *NAICS Appeal of Arrowhead Contracting, Inc.*, SBA No. NAICS-5725 (2016); *NAICS Appeal of Ferris Optical*, SBA No. NAICS-5825 (2011).

#### IV. Conclusion

For the reasons stated above, Appellant has not demonstrated the CO clearly erred in assigning NAICS code 561990 for the subject solicitation. Therefore, the appeal is DENIED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

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CHRISTOPHER HOLLEMAN  
Administrative Judge