

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

NAICS APPEAL OF:

Veterans Electric, LLC,

Appellant,

Solicitation No. 36C25618R0765

Dept. of Veterans Affairs  
Network Contracting Office  
Michael E. DeBakey VA Medical Center  
Houston, TX

SBA No. NAICS-5951

Decided: August 14, 2018

APPEARANCE

Andrew R. Newell, Esq., Whitcomb Selinsky McAuliffe, P.C., Denver, CO, for Veterans Electric, LLC

DECISION

I. Introduction and Jurisdiction

On July 10, 2018, the U.S. Department of Veterans Affairs, Network Contracting Office (VA) issued Request for Proposals (RFP) No. 36C25618R0765 for construction work to provide Nurse Call and Code Blue Systems installation to act as the primary patient-to-staff communications and notification system for the Michael E. DeBakey VA Medical Center. The Contracting Officer (CO) set aside the procurement entirely for service-disabled veteran-owned small businesses (SDVOSBs), and assigned North American Industry Classification System (NAICS) Code 236220, Commercial and Institutional Building Construction, with a corresponding \$36.5 million annual receipts size standard.

On July 19, 2018, Veterans Electric, LLC (Appellant) filed the instant appeal. Appellant maintains that the CO clearly erred in assigning NAICS code 236220. For the reasons discussed *infra*, the appeal is DENIED.

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 RFP, 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. The RFP

The RFP explains that the contractor, in accordance with the construction specifications, “shall provide labor, materials, tools, equipment, expertise, administration, supervision and transportation as necessary.” (RFP, Attachment A, Scope of Work, at 1.) Further, the RFP calls for the following work:

- 2.1.1 Install a headend/control network to replace existing nurse call system.
- 2.1.2 Install Nurse call consoles in place of existing nurse call consoles.
- 2.1.3 Install the Nurse call software suite.
- 2.1.4 Upgrade the existing hardware to Nurse call.
- 2.1.5 Provide warranties on all components and software packages as applicable for a minimum of 1 year post project acceptance.  
Provide an installers warranty on all installations to be free from defect in
- 2.1.6 workmanship or manufacture for a minimum of 1 year post project acceptance.  
Michael E. DeBakey VA Medical Center seeks the turnkey installation of a
- 2.1.7 worry-free Nurse Call System that includes certification training for up to 4 Houston VA HTM staff members.

(*Id.*)

The RFP specifies that the work “includes specialized construction labor & supervision for electrical and communications work as required by provided construction documents.” (*Id.*) Regarding the Nurse Call System, the contractor will need to provide a computing virtualized server that must include certain applications and specifications as dictated by the RFP.

The RFP states that the work will include general construction, alterations, electrical work, communications systems, necessary removal of existing structures, and construction. (RFP, Attachment C, Project Manual, at 6.) The contractor will perform demolition and removal of existing structures, and furnishing, installation and connection of the Patient Bed Service Walls (PBSW). These units are structural frameworks which house all bedside services. (*Id.* at 115-116.) The contractor must furnish and install electrical systems. This will include underground electrical construction where necessary, and cutting holes in structural elements, concrete and masonry. (*Id.* at 150-154.) The contractor must install the necessary electrical conductors and cables, grounding and bonding equipment. (*Id.* at 170-179.) Further, the contractor must install grounded raceway systems (enclosed conduits that form a protective pathway for electrical wiring), Underwriters Laboratories (UL) master labeled lighting protection system. (*Id.* at 183-223.) The Contractor must also furnish and install communications systems,

including grounding and bonding for equipment operations, raceway systems, communication and signal wiring for a comprehensive system infrastructure that includes excavation and backfill for cable conduits; furnishing, installation, certification, testing, and guaranty of a complete and operating Voice and Digital Cable Distribution System and associated equipment and hardware. (*Id.* at 218-220.) The Contractor will install an NFPA listed Master Antenna Television equipment and systems; and installation of an extension to the existing public address system. (*Id.* at 264-289.)

### B. The Appeal

On July 19, 2018, Appellant filed the instant appeal. Appellant asserts that under the RFP's scope of work, the work sought falls under two construction divisions: electrical and communications work. (Appeal at 2.) Appellant notes that the only contractors with the appropriate licensing for the work sought are electrical contractors. (*Id.*) Appellant thus contends that NAICS code 238210, Electrical Contractors and Other Wiring Installation Contractors, is the code that most closely describes the work sought.

In arguing for its preferred NAICS code, Appellant relies on *NAICS Appeal of Pueblo Electric, Inc.*, SBA No. NAICS-4860 (2007), which considered the same issue as that in dispute here. In *Pueblo Electric, Inc.*, the scope of work included the installation of specialized electrical equipment, and OHA reversed the CO's assignment of code 236220 in favor of code 238210. (*Id.* at 3-4; citing *Pueblo Electric, Inc.*, at 3.)

Appellant goes on to argue that the CO's chosen code is prejudicial to Appellant and other concerns similarly situated, because it allows any general contractor to bid on the procurement even though may not possess the qualifications set forth under the solicitation's specifications. (*Id.* at 5.) Appellant adds that the use of code 236220 could result in an up to 85% of the contract's value going to a non-SDVOCB concern, which “would frustrate the purpose of the SDVOSB set-aside”. (*Id.*)

OHA received no responses to the appeal from other interested parties.

### C. CO's Response

On August 7, 2018, the CO filed a response to the appeal. The CO contends that NAICS code 236220 is the appropriate code. The CO explains that the work sought “allows the construction contractor to reuse the existing cabling and conduit; therefore, electricians are not needed to run all new wiring.” (CO Response, at 1.) While new wire may be needed, the VA anticipates that this cost will account for less than 10% of the scope of work.

Further, the CO states it believes that “the predominance of effort under this project is the coordination aspect of the multiple install phases while maintaining patient care support during construction,” thus the work sought falls under construction management, which is included in code 236220. (*Id.*) Areas will need to be demolished, patched, painted, and structural loads reviewed, work that again falls under the CO's chosen code. The prime contractor will be expected to provide a project manager and superintendent, with an expectation that

subcontractors will also be performing work. Thus, electricians will not be performing the work of coordinating with all other trade areas. Project management is the second highest cost for the project, after equipment. (*Id.*)

The CO disputes Appellant's claims that only two construction divisions were included in the RFP. The CO explains that the additional division of "General Requirements" is one of the divisions listed in the RFP, which includes a general contractor to provide project management. Because the project management team is responsible for supervising all work performed onsite, as well as coordinating with all individuals responsible for the trade work, the CO states "the contractor's project management is the most critical aspect to successfully" completing the work sought. (*Id.* at 2.) Specialized work, as claimed by Appellant, accounts for less than 10% of the work sought, with the majority of the expected costs coming from project management.

NAICS Code 238210 calls for electrical contractors, and while electricians might be required to run new wire, the specifications do not call for electricians to perform equipment installation, nor project management or demolition work. Additionally, the CO notes that electricians are not required to install the nurse call equipment, further showing that code 238210 is not appropriate. (*Id.*) The RFP's evaluation factors, according to the CO, require that offerors provide evidence of experience in nurse call installation by the proposed project manager and superintendent. Finally, other clauses in the solicitation pertain to construction contractors, and equipment costs account for the majority of the expected costs here, thus advancing the CO's contention that code 236220 is the correct code.

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

The NAICS code designated by the CO, 236220, Commercial and Institutional Building Construction, comprises:

[E]stablishments 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";

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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>.

“[r]adio and television broadcast studio construction”; “[f]ire station construction”; and “[g]rain elevator or bin construction.” *Id.*, at 126.

NAICS code 238210, Electrical Contractors and Other Wiring Installation Contractors, promulgated by Appellant, includes:

[E]stablishments primarily engaged in installing and servicing electrical wiring and equipment. Contractors included in this industry may include both the parts and labor when performing work. These contractors may perform new work, additions, alterations, maintenance, and repairs.

*NAICS Manual* at 135. Examples of work included under this NAICS code are “[a]irport runway lighting contractors,” “[f]iber optic cable (except transmission line) contractors,” “[a]larm system (e.g., fire, burglar), electric, installation only,” “[h]ighway, street, and bridge lighting and electrical signal installation,” “[a]udio equipment (except automotive) installation contractors,” “[h]ome automation system installation,” “[l]ighting system installation,” “[c]able television hookup contractors,” “[t]elecommunications equipment and wiring (except transmission line) installation contractors,” “[c]omputer and network cable installation,” “[t]raffic signal installation,” “[e]nvironmental control system installation,” and “[c]able splicing, electrical or fiber optic.” *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 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 and 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

This procurement seeks to install a Nurse Call System in a hospital to act as the primary patient-to-staff communication system. In order to do so, the contractor will have to perform extensive construction work. The procurement calls for the demolition and removal of existing structures, and installing the PBSWs, which are structural frameworks which house all the bedside services provided to patients. There will be underground electrical construction, and excavation and backfill for the cable conduits. Further, the work will include cutting holes in

existing concrete and masonry in order to install the communication system. In sum, this procurement will require a great deal of construction work, from different trades, to be performed on the hospital buildings in order to install this call system.

I therefore find that the principal purpose of this procurement is construction. The CO's designated code, 236220, covers the construction of buildings, including new work, additions, alterations, maintenance, and repairs, and procurements which require construction services. *NAICS Appeal of SBA*, SBA No. NAICS-5899, at 8-9 (2018) (quoting *NAICS Appeal of SD Titan Resources* SBA No. NAICS-5187, at 5 (2011).) As the CO correctly points out, this procurement will require extensive construction management, which is also covered by NAICS code 236220. *NAICS Appeal of Ascendant Program Svcs.* SBA No. NAICS-5832, at 10 (2017).

Appellant's argument that the only contractors who can perform this work are electrical contractors ignores the significant amount of ordinary construction work required by this procurement, which will not require the services of electrical contractors. I must also add that the RFP itself states that electrical contractors are expected to be subcontractors, not the prime contractors selected to perform the work. (RFP, at 10.) While electrical contractors will be required to perform some of the work sought, the RFP is clear that a significant amount of the work will be providing construction management services in order to achieve the RFP's goal, which is the installation of the Nurse Call System.

In addition, Appellant's reliance on *NAICS Appeal of Pueblo Electric, Inc.*, SBA No. NAICS-4860 (2007) is inapposite. In that case, the procurement called for the installation of electronic equipment to provide additional computing power; it did not require extensive construction work on the buildings and grounds themselves, as this procurement does. Furthermore, OHA gives little weight to the NAICS codes assigned to other procurements. *E.g.*, *NAICS Appeal of R. Christopher Goodwin & Assocs., Inc.*, SBA No. NAICS-5393, at 5 (2012) (recognizing that "because each acquisition presents unique facts and circumstances, the NAICS codes assigned to other procurements have little probative value in assessing the appropriate NAICS code.").

Accordingly, I conclude that Appellant has failed to meet its burden, and that NAICS code 236220 is the appropriate code for the instant procurement. 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 reasons stated above, Appellant has not demonstrated the CO clearly erred in assigning NAICS code 236220 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).

CHRISTOPHER HOLLEMAN  
Administrative Judge