

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

NAICS APPEAL OF:

Aerial Timber Applicators, Inc., and
Western Pilot Service, Inc.,

Appellants,

Solicitation No. 12D801-18-R-0015
U.S. Department of the Interior
Boise, Idaho

SBA No. NAICS-5965

Decided: October 10, 2018

APPEARANCES

Katherine S. Nucci, Esq., Thompson Coburn, LLP, Washington, District of Columbia, for Appellant Aerial Timber Applicators, Inc.

John R. Prairie, Esq., George E. Petel, Esq., Wiley Rein, LLP, Washington, District of Columbia, for Appellant Western Pilot Service, Inc.

Gary J. Campbell, Esq., Nathaniel S. Greeson, Esq., Womble Bond Dickinson, LLP, for Intervenor G.B. Aerial Applications, Inc.

Brian G. Walsh, Esq., Moshe B. Broder, Esq., Wiley Rein, LLP, Washington, District of Columbia, for Intervenor Henry's Aerial Service, Inc.

DECISION

I. Introduction and Jurisdiction

On September 18, 2018, the U.S. Department of the Interior (DOI) issued Request for Proposals (RFP) No. 12D801-18-R-0015 seeking “single engine air tanker (SEAT) aircraft services for the Bureau of Land Management (BLM), Bureau of Indian Affairs, (BIA), United States Forest Service (USFS) and other federal and state agencies as needed for the suppression of wildland fires.” (RFP, Section A1). The RFP stated that multiple indefinite delivery indefinite quantity (IDIQ) contracts will be awarded, and that task orders would be competed and awarded for known, extended guaranteed periods at specific locations. (*Id.*) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and designated North American Industry Classification System (NAICS) code 481212, Nonscheduled Chartered Freight Air

Transportation with a corresponding 1500 employee size standard, as the appropriate code for the procurement.

On September 21, 2018, Aerial Timber Applicators, Inc. (Aerial) filed an appeal of the CO's NAICS code designation, Docket No. NAICS-2018-09-20-103. On September 24, 2018, Western Pilot Service, Inc. (WPS) also filed an appeal of the CO's NAICS code designation, Docket No. NAICS-2018-09-24-104. Aerial and WPS (collectively referred to as Appellants) assert that the correct NAICS code for this procurement is 115310, Support Activities for Forestry which has a footnote specifically for "Forest Fire Suppression" providing for a \$19 million annual receipts size standard. 13 C.F.R. § 121.201, fn. 17. Because the two appeals are appealing the same solicitation and raise nearly identical issues, I herewith CONSOLIDATE them for adjudication. For the reasons discussed *infra*, the appeals are granted.

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. Both Appellants filed their respective appeals within ten calendar days after issuance of the RFP, and so both appeals are 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. Pre-Solicitation Notices

On May 15, 2018, the CO issued a draft RFP, seeking "single engine air tanker (SEAT) aircrafts for the Bureau of Land Management (BLM)." (Draft RFP, Section A1). designating the procurement under NAICS code 481212 and seeking industry input. On September 4, 2018, the CO issued Amendment 1 to the draft RFP, designating the procurement under NAICS code 115310 with a \$19.5 million size standard and stating in part:

The Interior Business Center (IBC), Acquisition Services Directorate (AQD), Boise, ID has a requirement for fully contractor operated and maintained, Single Engine Air Tanker (SEAT) aircraft for the national response framework to suppress wildland fires throughout the lower 48 States. The national aerial firefighting capabilities require water/retardant operations for the Bureau of Land Management (BLM), Bureau of Indian Affairs (BIA), United States Forest Service (USFS) and other federal and state agencies as needed.

(Amendment 1).

On September 12, 2018, the CO sent an email to SEAT contractors with the subject line, "NAICS Code Change," which stated the following:

SEAT Vendors - I wanted to reach out to all of you regarding a change in NAICS code from 481212 (non-scheduled freight transportation) with an employee cap of 1500 employees to 115310 (support activities for forestry) with

an average annual receipts revenue cap of \$19.0M for the solicitation that is about to be released.

I am aware that 481212 has been used in the past, but FAR part 19 requires the CO to classify the acquisition into the industry that best describes the principal nature of service being acquired and I do feel that forest fire-fighting (115310) is more appropriate than non-scheduled freight transport (481212).

One of the vendors has expressed concern over this change and I wanted to see if the majority of the vendors share similar concern or if the revenue cap will impact some of the larger operators from proposing on this solicitation as they would not be able to represent themselves as a Small Business under NAICS 115310.

Please review the two NAICS codes and let me know of any concerns you may have as soon as possible.

(CO September 12, 2018 E-mail.)

B. The Final RFP

On September 18, 2018, the CO issued the final RFP with 481212, Nonscheduled Freight Transportation, as the NAICS code designation for the instant procurement. The final RFP states:

The intent of the Government in this solicitation is to award multiple indefinite delivery indefinite quantity (IDIQ) contracts to acquire single engine air tanker (SEAT) aircraft services for the Bureau of Land Management (BLM), Bureau of Indian Affairs, (BIA), United States Forest Service (USFS) and other federal and state agencies as needed for the suppression of wildland fires. The Government may use these IDIQ contracts to fulfill any need for SEAT services for wildland fire suppression including task orders with very long or very short periods of performance, and task orders with options.

RFP, at Section A1, "Solicitation Requirement." The RFP also notes that, "aircraft, flight crews and ground crews under this contract will be part of the national response framework for the suppression of wildland fires and may be dispatched at the direction of the Government to locations throughout the Lower 48 States." (*Id.*) The RFP also requires each aircraft procured to be certified "in the restricted category under 14 CFR Part 21.25 and 21.185 to include the special purpose of forest and wildlife conservation (fire suppression) work or certificated in a standard airworthiness category under 14 CFR Part 21.187 'Multiple Airworthiness Certification.'" (*Id.* at Section B2.2, "Certifications.")

C. The Appeals

Appellants argue that NAICS code 115310 is the appropriate code that best describes the principal purpose of the instant procurement. (Aerial Appeal, at 4; WPS Appeal, at 1-2.)

Appellants contend that the RFP sought firefighting services utilizing aircraft, and not the transportation of cargo. (Aerial Appeal, at 5; WPS Appeal, at 5.) Appellants find the CO's September 12, 2018 e-mail to support their claims that NAICS code 115310 is the more appropriate code for the procurement. (Aerial Appeal, at 5; WPS Appeal, at 5.)

Appellants rely on *NAICS Appeal of System Studies & Simulation, Inc.*, SBA No. NAICS-4857 (2007). (Aerial Appeal, at 5; WPS Appeal, at 6-7). There, OHA found that “the transportation of fire retardants to drop on forest fires is not the same as the transportation of cargo. This would be more appropriately characterized under NAICS code 115310, Support Activities for Forestry, which specifically includes Forest First Suppression as a subcode. This subcode covers activities primarily related to forest fire suppression.” *Systems Studies & Simulation, Inc.*, SBA No. NAICS-4857, at 3.

Appellants found the CO's reasoning that designating the procurement under NAICS code 481212 would allow for broader competition to be irrelevant and not the proper criteria upon which a NAICS code should be chosen for a procurement. (Aerial Appeal, at 5; WPS Appeal, at 4.)

WPS highlights that the RFP requires the aircraft for this procurement be certified under 14 C.F.R. § 137, which “contemplates forest-[fire]fighting activities” and is more aligned with NAICS Code 115310. (WPS, at 6.)

D. Response of Henry's Aerial Service, Inc.

On October 3, 2018, Henry's Aerial Service, Inc. (Henry's), a potential offeror, submitted a Motion to Intervene and Response to Appellants' appeals. Henry's Response mirrors the arguments made by Appellants and requests that the CO designate NAICS code 115310 for this procurement.

E. Response of G.B. Aerial Applications, Inc.

On October 4, 2018, G.B. Aerial Applications, Inc. (GBAA), another potential offeror, submitted a response to Appellants' appeals. GBAA also supports Appellants' arguments. GBAA asserts this procurement does not contemplate the transportation of cargo. (GBAA Response at 3.) Rather, GBAA follows Appellants' arguments that *Systems Studies and Simulation* supports a designation of NAICS code 115310 for this procurement. (*Id.* at 4-6.)

F. CO's Response

On October 4, 2018,¹ the CO responded to the appeal. The CO argues that NAICS Code 481212 best describes the principal purpose of the services being acquired under the RFP. (CO's Response, at 1-2.) The CO conducted market research to determine the “interested and qualified

¹ The CO's Response was received on October 3, 2018 at 5:20 pm eastern standard time (EST). Any submission received at OHA after 5:00pm EST is considered filed the next business day under 13 C.F.R. § 134.204(b)(2).

vendor pool, identify the size and status of the vendors that could support this requirement (i.e. set-aside for small business or not)[,] and to understand if this requirement could be competed to the maximum extent practicable.” (*Id.* at 2.)

In reviewing potential NAICS codes for the RFP, the CO found that neither NAICS code 481212, nor NAICS code 115310 “were exact fits for the Aerial Fire-Fighting mission.” (*Id.*) The CO also found that there were more aviation companies participating under NAICS code 481212, and NAICS code 115310 “did not represent aerial fire-fighting or aviation in general.” (*Id.*) Further, NAICS code 481212 has successfully been used by the CO's office in procuring aerial firefighting services in the past. (*Id.* at 3.)

The CO sent the September 12, 2018 e-mail to all current SEAT contract holders in an attempt to gain a greater understanding from the community as a whole. In response to his e-mail, the CO received an even split of contractors “for” and “against” designating the procurement under NAICS code 115310. (*Id.* at 3-4.) The CO determined it best to use NAICS code 481212 “taking into account the vendors' concern for possible future growth.” (*Id.* at 4.) The CO also argues, “in order to procure as many aircraft as possible, the agency needs to use a NAICS code broad enough to cover as many vendors as possible.” (*Id.*)

G. NAICS Manual Descriptions

The NAICS code designated by the CO, 481212, Nonscheduled Charter Freight Air Transportation, covers “establishments primarily engaged in providing air transportation of cargo without transporting passengers with no regular routes and regular schedules.” *NAICS Manual* at 382.

Index entries which refer to this NAICS Code are:

Air cargo carriers (except air couriers), nonscheduled
Charter air freight services
Freight charter services, air
Freight transportation, air, charter services
Freight transportation, air, nonscheduled
Helicopter carriers, freight, nonscheduled
Nonscheduled air freight transportation
Space transportation, freight nonscheduled
Transportation by spacecraft, freight

NAICS Manual at 657, 702, 767, 787, 840, 910, and 937.

The NAICS code Appellants advocate, 115310, Support Activities for Forestry, covers:

establishments primarily engaged in performing particular support activities related to timber production, wood technology, forestry economics and marketing, and forest protection. These establishments may provide support activities for forestry, such as estimating timber, forest firefighting, forest pest control, treating

burned forests from the air for reforestation or on an emergency basis, and consulting on wood attributes and reforestation.

NAICS Manual at 103.

Generally, NAICS Code 115310 has \$7.5 million annual receipts size standard. However, there is an exception under this NAICS code for Forest Fire Suppression, which mandates a \$19 million annual receipts size standard. Under footnote 17, Forest Fire Suppression includes, “establishments which provide services to fight forest fires. These firms usually have fire-fighting crews and equipment.” 13 C.F.R. § 121.201, fn. 17.

Index entries which refer to this NAICS code are:

- Aerial forest mulching and seeding
- Cruising timber
- Estimating timber
- Fire prevention
- Firefighting, forest
- Forest management plans preparation
- Forest thinning
- Forestry services
- Pest control services, forestry
- Reforestation
- Timber valuation

NAICS Manual, at 655, 726, 750, 759, 765, 855, 882, 932.

III. Discussion

A. Standard of Review

Appellants have the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellants 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 RFP, the descriptions in the *NAICS Manual*, and the arguments of the parties, I must agree with Appellants that the principal purpose of the instant procurement is the service of engaging in forest firefighting by aircraft. As a result, the CO clearly erred in selecting NAICS code 481212, because the appropriate NAICS code is 115310.

Appellants argue that NAICS code 481212 is inappropriate in light of the services sought under the RFP. The *NAICS Manual* classifies establishments under NAICS code 481212 as primarily engaging in the transportation of cargo. The CO argues that NAICS code 481212 was designated as the appropriate code for the instant procurement because it would allow for broader competition in light of the concerns raised by some SEAT contractors. Considering the level of competition is not one of the factors relied in designating a NAICS code under 13 C.F.R. § 121.402(b) or OHA precedent. OHA has held that “arguments based on the level of competition afforded by particular size standards are meritless, because size standards are not part of the criteria for selecting the NAICS code.” *NAICS Appeal of Downrange Operations and Training, LLC, et al.*, SBA No. NAICS-5647, at 8 (2015); citing to *NAICS Appeal of Circle Solutions, Inc.*, SBA No. NAICS-5181, at 14 (2011) and *NAICS Appeal of Eagle Design and Management, Inc.*, SBA No. NAICS-4521 (2002).

The CO contends NAICS code 481212 was successfully designated for similar procurements in the past. However, OHA has not reviewed the use of NAICS code 481212 for any prior, similar procurements. Thus, the fact that NAICS code 481212 was designated for prior procurements for the same or similar services is not probative of the correct designation for this procurement, nor are those prior designations binding for this proceeding. *See NAICS Appeal of STG, Inc.*, SBA No. NAICS-5936 (2018); citing to *NAICS Appeal of Arrowhead Contracting, Inc.*, SBA No. NAICS-5725 (2016).

The plain text of the RFP makes it clear that not simply the principal, but the sole purpose of the instant procurement is for forest fire suppression services, and not to merely transport cargo. The SEATs will be utilized for the “suppression of wildland fires.” RFP, at Section A1. The aircraft, along with the flight and ground crews, will be part of a “national response framework for the suppression of wildland fires.” *Id.* Further, aircraft must be certified for the “special purpose of forest and wildlife conservation (fire suppression) work.” RFP, at Section B 2.2. Therefore, DOI is seeking to acquire much more than the mere transportation of cargo, but seeking the services of firms that engage in fighting forest fires using aircraft. Therefore, NAICS code 481212, Nonscheduled Chartered Freight Air Transportation is not the appropriate code designation for the instant procurement.

After determining NAICS code 481212 is an inappropriate NAICS code for the instant procurement, I must decide upon the most appropriate NAICS code. The *NAICS Manual* classifies firms operating under NAICS code 115310 as engaging in, among other activities, forest firefighting. In his e-mail to SEAT contractors, the CO opined “forest fire-fighting (115310) is more appropriate than non-scheduled freight transport (481212)” for this procurement. (CO's September 12, 2018 e-mail.)

I agree with Appellants that *NAICS Appeal of System Studies & Simulation, Inc.*, SBA No. NAICS-4857 (2007) is instructive in this matter. There, OHA held that NAICS code 481219, Other Nonscheduled Air Transportation, was the appropriate code as a catchall for a wide range of specialized air transport activities sought by the Department of the Army. *Id.* at 3. That appellant argued NAICS code 481212 was the appropriate NAICS code designation, because the services sought were primarily that of fire suppression. *Id.* at 2. The CO disagreed with the appellant, stating that the Performance Work Statement called for numerous types of missions other than fire suppression, under which NAICS code 115310 would be the appropriate NAICS code, not 481212. *Id.* OHA agreed that a procurement seeking forest fire suppression would be more appropriate under NAICS code 115310, but that “neither of these codes applies to this procurement.” *Id.* at 3.

Although the discussion of NAICS codes 481212 and 115310 is dicta in *Systems Studies & Simulation, Inc.*, I do agree that the analysis is instructive here. There, OHA agreed with the CO that NAICS code 115310 was more aligned with a procurement that primarily called for forest fire suppression than the appellant's proposed NAICS code, 481212. Here, the procurement calls for forest fire suppression services, and not for air transportation of any kind. Accordingly, I conclude that the appropriate code for this procurement is NAICS code 115310, under the Forest Fire Suppression size standard.

IV. Conclusion

Appellants have met their burden of establishing error in the CO's NAICS code designation. The instant procurement does not call for the transportation of cargo by aircraft, but for forest firefighting services by aircraft. The appropriate NAICS code for this procurement is 115310, Support Activities for Forestry, falling under the Forest Fire Suppression exception with a \$19 million annual receipts size standard. For that reason, I REVERSE the CO's NAICS code designation and GRANT the instant appeals.

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

CHRISTOPHER HOLLEMAN
Administrative Judge