

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

NAICS APPEAL OF:

Caduceus Healthcare, Inc.,

Appellant,

Solicitation No. 70T05020R9NSPP019

U.S. Department of Homeland Security
Transportation Security Administration

SBA No. NAICS-6058

Decided: June 17, 2020

APPEARANCES

Katherine S. Nucci, Esq., Thompson Coburn LLP, Washington, D.C., for Appellant

Michael D. Kiffney, Esq., Office of Chief Counsel, Transportation Security
Administration

DECISION

I. Introduction and Jurisdiction

On May 7, 2020, the U.S. Department of Homeland Security, Transportation Security Administration (TSA) issued Request for Proposals (RFP) No. 70T05020R9NSPP019, seeking a contractor to provide Airport Security Screening Services at airports participating in TSA's Screening Partnership Program (SPP). The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 561612, Security Guards and Patrol Services, which has a corresponding size standard of \$22 million average annual receipts.¹

On May 14, 2020, Caduceus Healthcare, Inc. (Appellant) filed the instant appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant maintains that the CO clearly erred in selecting NAICS code 561612, and that the correct NAICS code for this procurement is 488190, Other Support Activities for Air Transportation, with an

¹ The RFP incorrectly indicates that the size standard for NAICS code 561612 is \$20.5 million. Effective August 19, 2019, SBA increased the size standard for NAICS code 561612 from \$20.5 million to \$22 million. *See* 84 Fed. Reg. 34,261 (July 18, 2019).

associated size standard of \$35 million average annual receipts. For the reasons discussed *infra*, the appeal is granted.

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 the instant appeal within ten calendar days after issuance of the RFP, so the appeal is timely. 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

According to the RFP, TSA plans to award up to ten indefinite delivery indefinite quantity (IDIQ) contracts “to the best qualified Offerors with core expertise in security screening.” (RFP at 3.) The contractor(s) will perform “airport security screening services,” including all labor and associated costs, to “prevent the introduction of prohibited articles into [] sterile areas.” (*Id.* at 14.)

The RFP explains that contractor personnel will “screen passengers and baggage (including cargo screened as baggage) at commercial airports for explosives, weapons, and other prohibited items.” (*Id.*) Specific services may include, but are not limited to:

- Screening persons entering designated security areas;
- Screening baggage and other items entering designated security areas;
- Travel document checking (TDC);
- Executing security activities on and off airport grounds, also known as Layered Security Programs. . .;
- Security training;
- Preventative maintenance of designated screening equipment;
- Temporary screening for pilots and surge requirements (as needed); and
- Screening workforce management.

(*Id.*) The place(s) of performance will be specified in task orders issued after award of the base contract(s). (*Id.* at 63.) The contract(s) will have an expected period of performance of November 11, 2020 to June 1, 2026. (*Id.* at 2.)

Proposals are due June 22, 2020. (RFP, Amendment No. A00002.)

B. Appeal

On May 14, 2020, Appellant filed the instant appeal. Appellant highlights that the NAICS code selected by the CO, 561612, “comprises establishments primarily engaged in providing guard and patrol services, such as bodyguards, guard dog, and parking security services.”

(Appeal at 4, quoting *NAICS Manual*² at 501.) An airport security screener, though, is not a security guard, defined as a “person whose job is to guard a place (such as a store or museum) and make sure the people and things in it are not harmed.” (*Id.* at 3-4, quoting Merriam-Webster.com.) Further, airport security screeners do not “patrol” airports, nor do they provide “parking security.” (*Id.* at 4.) Instead, airport security screeners ensure that explosives, weapons, or other prohibited items are not carried onto aircrafts at commercial airports. (*Id.*)

Appellant urges that NAICS code 488190, Other Support Activities for Air Transportation, best describes the work called for by the RFP. This NAICS code encompasses a wide range of specialized services in support of the air transportation industry, and specifically includes “[a]ircraft passenger security screening services.” (*Id.*, quoting *NAICS Manual* at 398.) Such work is “precisely the type of services sought by the subject RFP.” (*Id.*) In addition, Appellant maintains, a majority of the contract value is for labor costs associated with aircraft passenger screening services. (*Id.* at 2.)

C. Motion to Dismiss

On May 19, 2020, TSA moved to dismiss the appeal as untimely. TSA states that on September 18, 2015, TSA issued an earlier solicitation, No. HSTS05-15-R-SPP047, for “airport screening services” under the SPP. (Motion at 1.) The earlier solicitation was assigned NAICS code 561612, and subsequently resulted in the award of “15 identical IDIQ contracts.” (*Id.*) Both solicitation No. HSTS05-15-R-SPP047 and the ensuing contracts contained a clause H.9, “Rolling Admissions,” which stated:

H.9. ROLLING ADMISSIONS

TSA reserves the right to periodically hold a new competition for the purpose of adding additional IDIQ holders, or to allow an airport authority to submit a proposal for an IDIQ contract in the instance that TSA will be releasing a task order RFP for that airport. At TSA's sole discretion, TSA should assess the quality of performance by each IDIQ holder, the number, value and complexity of work assigned to each holder, the amount of competition achieved on each order, the amount of small business participation, whether revisions are needed to the scope of the Statement of Work, and if the ceiling amount of the IDIQ contract needs to be revised. Based on these criteria and the anticipated need for task orders at additional airports, if it is in the best interest of [TSA], the Contracting Officer [may] conduct a new competition to add additional IDIQ holders. [TSA] reserves the right to limit rolling admissions to small businesses or other socioeconomic categories, or interested airport authorities. Additionally, [TSA] reserves the right to revise the evaluation criteria for new IDIQ contract competitions.

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

Any new awards will have the same contract expiration date as previously awarded contracts.

(*Id.* at 2.)

TSA maintains that the instant RFP merely reopens the original SPP competition pursuant to clause H.9, providing “an opportunity for additional small business[es] to enter the existing IDIQ contract.” (*Id.* at 3.) As such, any challenge to the assigned NAICS code should have been filed within 10 days after the issuance of solicitation HSTS05-15-R-SPP047 on September 18, 2015. (*Id.*) The instant appeal therefore is untimely and should be dismissed.

TSA argues that the appeal also may be untimely because TSA published a draft of the current RFP, which included NAICS code 561612, on April 21, 2020. Based on the draft RFP, Appellant has known, or should have known, that NAICS code 561612 would apply to this solicitation, since April 21, 2020. (*Id.* at 3 n.2.)

D. Appellant's Opposition

On May 21, 2020, Appellant opposed TSA's motion. Appellant insists that the appeal is timely because it was filed within 10 days after the issuance of the instant solicitation, No. 70T05020R9NSPP019, on May 7, 2020. (*Opp.* at 2.)

Appellant disputes the notion that the current RFP merely reopens or continues solicitation HSTS05-15-R-SPP047. (*Id.* at 3.) Appellant contends that the two solicitations are not the same, because:

The two solicitations have different numbers, one is unrestricted while the other is a 100% small business set-aside, the proposal instructions and award criteria are different, and the periods of performance are different. Further, the Clause H-9 — upon which [TSA] apparently relies as the foundation for its Motion — contemplated adding more IDIQ awards to the original 15 awards pursuant to a “new competition” conducted by TSA at its discretion. The [instant] RFP simply represents that “new competition.”

(*Id.*) Appellant observes that a section of the current RFP entitled “Important Information for Solicitation 70T05020R9NSPP019” made no mention the earlier solicitation. (*Id.* at 2, citing RFP at 3-4.)

Appellant argues that it is “irrelevant” that the earlier solicitation was assigned NAICS code 561612, because no NAICS code appeal was filed pertaining to the earlier solicitation, and OHA has long recognized that “[t]he decision in a NAICS code appeal must be based upon the requirements of the solicitation at issue.” (*Id.* at 3, quoting *NAICS Appeal of Ferris Optical*, SBA No. NAICS-5285, at 7 (2011).) Appellant also denies TSA's suggestion that the appeal may be untimely because it was not filed within 10 days after issuance of the draft RFP. (*Id.* at 4.) It would not have been possible for Appellant to pursue a NAICS code appeal based on a draft RFP, as “OHA has consistently held a NAICS code appeal based on a presolicitation notice is

premature and must be dismissed.” (*Id.*, quoting *NAICS Appeal of Willowheart, LLC*, SBA No. NAICS-5938, at 1 (2018).)

E. Amendment No. A00003

On May 22, 2020, the CO issued Amendment No. A00003 to the instant RFP “to notify all potentially interested parties that this solicitation is intrinsically linked to solicitation No. HSTS05-15-R-SPP047.” (Amendment No. A00003, at 1.) According to Amendment No. A00003, the procurement will be known as the “Screening Partnership Program Reopener,” a title which “refers to the ‘reopening’ or rolling admission of the existing [SPP] multiple-award IDIQ contract vehicle.” (*Id.* at 2.) After reciting the full text of clause H.9 from solicitation No. HSTS05-15-R-SPP047, Amendment No. A00003 states that TSA is “invoking its rights to a new competition for the purpose of adding additional IDIQ holders as per [clause] H.9.” (*Id.*)

F. NAICS Manual

The NAICS code chosen by the CO, 561612, Security Guards and Patrol Services, covers:

establishments primarily engaged in providing guard and patrol services, such as bodyguard, guard dog, and parking security services.

NAICS Manual at 501. Index entries which refer to NAICS code 561612 include “[b]ody guard services”; “[g]uard dog services”; “[g]uard services”; “[p]atrol services, security”; “[p]ersonal protection services (except security systems services)”; “[p]roperty protection services (except armored car, security systems)”; “[p]rotection services (except armored car, security systems), personal or property”; “[p]rotective guard services”; “[s]ecurity guard services”; and “[s]ecurity patrol services.” *Id.* at 683, 781, 852, 855, 872, 873, and 896.

The NAICS code Appellant advocates, 488190, Other Support Activities for Air Transportation, covers:

establishments primarily engaged in providing specialized services for air transportation (except air traffic control and other airport operations).

NAICS Manual at 398. The *NAICS Manual* provides three illustrative examples of work under NAICS code 488190: “[a]ircraft maintenance and repair services (except factory conversions, overhauls, rebuilding); “[a]ircraft passenger screening security services”; and “[a]ircraft testing services.” *Id.* The index entry for “[a]irport passenger screening security services” refers to NAICS code 488190. *Id.* at 658.

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. 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. Motion to Dismiss

I find the appeal to be timely because the instant solicitation, RFP No. 70T05020R9NSPP019, was issued on May 7, 2020, and the appeal was filed within 10 calendar days thereafter, on May 14, 2020. 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). Contrary to TSA's motion to dismiss, it is immaterial that Appellant did not file an appeal within 10 days after the issuance of the earlier solicitation, No. HSTS05-15-R-SPP047, on September 18, 2015, because that solicitation is not before OHA in this appeal. As Appellant observes, prior to the issuance of Amendment No. A00003 on May 22, 2020, the instant RFP did not even mention the earlier procurement. Sections II.A and II.E, *supra*. Moreover, although TSA contends that the instant RFP merely “reopens” solicitation no. HSTS05-15-R-SPP047 pursuant to clause H.9 of the earlier solicitation, clause H.9 itself indicated that any such reopening would take the form of a “new competition.” Section II.C, *supra*. Amendment No. A00003 likewise characterized the instant RFP as “a new competition for the purpose of adding additional IDIQ holders as per [clause] H.9.” Section II.E, *supra*. I therefore conclude that the instant RFP is a new procurement and not simply a reopening or continuation of solicitation no. HSTS05-15-R-SPP047.

In its motion to dismiss, TSA also suggests that the appeal could be untimely because Appellant did not file an appeal within 10 days after publication of a draft solicitation on April 21, 2020. Section II.C, *supra*. This argument fails because OHA has long recognized that:

OHA's NAICS code appeal jurisdiction extends only to the issuance of solicitations. The publication of a presolicitation notice or a draft solicitation does not guarantee that the procuring agency will issue a solicitation, or that the agency will assign the same NAICS code originally anticipated in the presolicitation notice. Consequently, a NAICS appeal based upon a presolicitation notice or a draft solicitation must be dismissed as premature.

NAICS Appeal of Secure Network Systems, LLC, SBA No. NAICS-5246, at 1 (2011). Accordingly, Appellant's 10-day deadline to file a NAICS code appeal did not begin until May 7, 2020, when RFP No. 70T05020R9NSPP019 was formally issued.

For these reasons, TSA's motion to dismiss is denied.

C. Analysis

Having reviewed the RFP, the *NAICS Manual*, OHA's prior decisions, and the arguments of the parties, I find that the Appellant has met its burden of proving that the CO clearly erred in selecting NAICS code 561612. As a result, this appeal must be granted.

The NAICS code selected by the CO, 561612, Security Guards and Patrol Services, covers establishments “primarily engaged in providing guard and patrol services, such as bodyguard, guard dog, and parking security services.” Section II.F, *supra*. The instant RFP, though, is for “airport security screening services,” described in the RFP as “screen[ing] passengers and baggage (including cargo screened as baggage) at commercial airports for explosives, weapons, and other prohibited items.” Section II.A, *supra*. There is no indication in the *NAICS Manual* that NAICS code 561612 applies to firms that engage in “screening” of persons or items. Similarly, the RFP does not contemplate that airport security screeners will perform “guard and patrol services” or “parking security services,” to which NAICS code 561612 would apply. Accordingly, NAICS code 561612 does not accurately describe the work called for in this RFP.

Because Appellant has shown that the CO erred in selecting NAICS code 561612, 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).

I agree with Appellant that NAICS code 488190, Other Support Activities for Air Transportation, is the correct code for this RFP. As Appellant observes, the *NAICS Manual* twice states that “[a]irport passenger screening security services” are classified under NAICS code 488190. Section II.F, *supra*. Further, airport security screening can be considered a type of “specialized service[] for air transportation,” to which NAICS code 488190 generally applies.³

³ It is worth noting in this regard that the *NAICS Manual* enumerates certain services — such as janitorial services and food services — that do not fall under NAICS code 488190, notwithstanding that they are commonly performed at airports. *NAICS Manual* at 397-98. The drafters of the *NAICS Manual* thus clearly could have excluded airport passenger screening services from NAICS code 488190, had they not considered such work a specialized service in support of air transportation.

IV. Conclusion

For the above reasons, the appeal is GRANTED. The CO clearly erred in assigning NAICS code 561612 to this RFP. The correct NAICS code designation for the procurement is 488190, Other Support Activities for Air Transportation, with an associated size standard of \$35 million average annual receipts. 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 561612 to 488190. 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