

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

NAICS APPEAL OF:

Elevated Technologies, Inc.,

Appellant,

Solicitation No. 36C25622Q058

Department of Veterans Affairs

SBA No. NAICS-6146

Decided: April 12, 2022

APPEARANCES

Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., John M. Mattox II, Esq., Ian P. Patterson, Esq., Schoonover & Moriarty, Esq., for Appellant

DECISION

I. Introduction and Jurisdiction

On March 8, 2022, the Department of Veterans Affairs (VA) issued the subject solicitation for elevator maintenance and repair services at the Southeast Louisiana Veterans Health Care System in New Orleans, LA. (Solicitation, at 1.) The Contracting Officer (CO) set the procurement aside for Service-Disabled Veteran Owned Small Business Concerns and designated North American Industry Classification System (NAICS) code 238290, Other Building Equipment Contractors, with a corresponding \$16.5 million annual receipts size standard, as the applicable code. (Id., at 3.) On March 10, 2022, the CO amended the solicitation, changing the NAICS code to 811310, Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance, with a corresponding \$8 million annual receipts size standard. (Solicitation, Amendment 0001, at 3.) On March 18, 2022, Elevated Technologies, Inc. (Appellant) filed the instant NAICS code appeal, arguing that 238290 was in fact the appropriate code. For the reasons discussed *infra*, the appeal is 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. Appellant filed the instant appeal within ten calendar days after issuance of the solicitation, 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 Performance Work Statement

The Performance Work Statement (PWS) of the solicitation states that “[t]he purpose of this service is to provide the New Orleans VA Medical Center Campus with continual maintenance and repair of freight and personnel elevators.” (PWS, at 5.)

The contractor shall provide all parts, travel, labor and materials necessary to provide maintenance. Repair services, and preventative maintenance and service calls described herein on the elevators, controls, subsequent parts and systems, etc. located at 2400 Canal St., New Orleans, LA. The Contractor will be responsible for providing all background paperwork certifying part installation and/or repair, calibration, testing of the systems, and certifications of maintenance. Contractor shall also provide an extended warranty on all applicable parts and equipment for the systems. All preventative maintenance work shall be in strict adherence to the recommended manufacturer's specifications and standard operating procedures for equipment maintenance.

All work shall be performed by personnel specifically qualified and trained to work on the vertical transport systems, specifically elevator cars, controls, equipment, etc., described herein. Evidence of all required licenses, as well as documentation of qualifications of personnel, shall be provided to the Contracting Officer prior to award of contract.

(Id., at 5-6.)

The Contractor shall perform all inspections, testing repairs and preventive maintenance of the facility's elevators in compliance with all the relevant safety codes and Federal regulations on Vertical Transport systems in Federal and medical facilities. (Id., at 6.) The Contractor shall furnish all labor, equipment, tools and management required to maintain the elevators in accordance with the manufacturer's original specifications. (Id., at 7.) The Contractor must have a Louisiana state license. (Id., at 8.)

B. The Appeal

On March 18, 2022, Appellant filed the instant appeal. Appellant argues “[t]he VA had it right the first time.” (Appeal at 3.) Appellant argues that elevator repair is a specialty construction trade under NAICS code 238290. (Id.) The Construction sector comprises establishments engaged in building or engineering projects, and may include new work, additions or maintenance and repairs. (Id., at 4.) Accordingly, building maintenance services are

described in Section 23, Construction, of the NAICS Manual.¹ (Id., at 3-4, citing NAICS Manual at 123.) Appellant notes Section 23 is divided into several industry groups, including Building Equipment Contractors. Appellant notes that this section includes establishments engaged in servicing equipment that forms part of the building mechanical system, and includes contractors installing specialized building equipment, expressly including elevators. (Id., at 5 citing NAICS Manual, at 135.) Appellant notes code 238290 covers the installing, servicing, and performing maintenance in building equipment, and explicitly covers elevator installation. (Id.)

Appellant notes the purpose of the contract is the continued maintenance and repair of the passenger and freight elevators at the New Orleans VA Medical Center campus. (Id., at 5.) The contractor must perform repair services, preventive maintenance and service calls on the elevators. (Id., at 5-6.) The contractor must also perform the necessary maintenance to keep the elevators in compliance with the applicable safety codes. (Id.) All this is precisely the type of maintenance covered by code 238290. (Id., at 6, citing PWS at 1, §§ 5, 13.)

Appellant argues that the NAICS Manual description of Repair and Maintenance subsector explicitly states it does not cover all establishments which perform repair and maintenance. (Id., at 6.) Maintenance and repair of buildings belongs in the Construction Sector. (Id., at 6, citing NAICS Manual at 567.) Conversely, code 811310 is limited to establishments which sharpen industrial saws and blades or service heavy equipment. (Id., at 6-7.) The successful offeror is not required to sharpen or install blades, repair forklifts, perform welding, or service the type of heavy equipment contemplated under code 811310. (Id.)

Finally, Appellant argues there are strong policy reasons for choosing code 238290. (Id., at 7.) Malfunctioning elevators are a threat to public health and safety. (Id.) This equipment has little tolerance for error and should be serviced by specialty trade contractors. (Id.) Turning the contract over to a general maintenance contractor could jeopardize a delicate mechanical system. (Id. at 7-8.)

C. NAICS Manual Descriptions

The NAICS code designated by the CO, 811310, Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance, covers:

[E]stablishments primarily engaged in the repair and maintenance of commercial and industrial machinery and equipment. Establishments in this industry either sharpen/install commercial and industrial machinery blades and saws or provide welding (e.g., automotive, general) repair services; or repair agricultural and other heavy and industrial machinery and equipment (e.g., forklifts and other material

¹ Executive Office of the President, Office of Management and Budget, North American Industry Classification System-United States (2017), available at <http://www.census.gov>. SBA is using the 2017 edition of the NAICS Manual until October when it will have had the opportunity to update its small business size standards. See Guidance on Using NAICS 2022 for Procurement, available at <https://www.sba.gov/article/2022/feb/01/guidance-using-naics-2022-procurement>.

handling equipment, machine tools, commercial refrigeration equipment, construction equipment, and mining machinery).

NAICS Manual at 573.

This code is part of SubSector 811, Repair and Maintenance. However, this subsector does not include all establishments which perform repair and maintenance. Subsector 811 covers:

A particularly unique situation exists with repair of buildings. Plumbing, electrical installation and repair, painting and decorating, and other construction-related establishments are often involved in performing installation or other work on new construction as well as providing repair services on existing structures. While some specialize in repair, it is difficult to distinguish between the two types and all are included in the Construction sector.

NAICS Manual, at 567

The NAICS code advocated by the Appellant, 238290, Other Building Equipment Contractors, is part of Sector 23 - Construction. "The Construction Sector 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." NAICS Manual, at 123. Sector 23 is further divided into industry groups, including Subsector 238, Specialty Trade Contractors, which covers:

[E]stablishments 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. The work performed may include new work, additions, alteration, maintenance and repairs.

NAICS Manual, at 131.

Under this subsector comes industry group 2382, Building Equipment Contractors, which comprises:

[E]stablishments primarily engaged in installing or servicing equipment that forms part of a building mechanical system (e.g., electricity, water, heating, and cooling). The work performed may include new work, additions, alterations, maintenance, and repairs. Contractors installing specialized building equipment, such as elevators, escalators, service station equipment, and central vacuum cleaning systems, are also included.

NAICS Manual, at 135 (emphasis supplied).

Appellant's preferred code 238290, Other Building Equipment Contractors, is part of that industry group, and it comprises:

[E]stablishments primarily engaged in installing or servicing building equipment (except electrical, plumbing, heating, cooling, or ventilation equipment). The repair and maintenance of miscellaneous building equipment is included in this industry. The work performed may include new work, additions, alterations, maintenance, and repairs.

Illustrative Examples:

Automated and revolving door installation
Lightning protection equipment (e.g., lightning rod) installation
Boiler and pipe insulation installation
Machine rigging
Commercial-type door installation
Millwrights
Conveyor system installation
Overhead door, commercial-or industrial-type, installation
Dismantling large-scale machinery and equipment
Revolving door installation
Elevator installation
Satellite dish, household-type, installation
Escalator installation
Vacuum cleaning system, built-in, installation
Gasoline pump, service station, installation

NAICS Manual, at 136-37 (emphasis supplied).

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). A procurement is usually classified according to the component that accounts for the greatest percentage of contract value. (Id.) 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, OHA's prior decisions, and the arguments of the parties, I must agree with Appellant, and I therefore grant the appeal.

As discussed, *supra*, NAICS code 238290, covers construction projects that “may include new work, additions, alterations, or maintenance and repairs.” Section II.C, *supra*. The NAICS Manual includes elevator installation as an illustrative example of the work considered under this designation. *Id.* Generally, the construction sector contains construction, repair, and maintenance of new or existing structures. The description of the Repair and Maintenance Subsector notes that repair and maintenance related to buildings is included in the Construction Sector. Section II.B, *supra*. Also within this sector is the installation or service of building equipment, including elevators. *Id.* Here, the principal purpose of this PWS is to provide “maintenance and repair of freight and personnel elevators.” Section II.A, *supra*. The PWS makes it clear that a contractor is required to maintain elevators by providing repairs, preventative maintenance, and service calls for elevators. *Id.* Further, I find persuasive Appellant's argument that the services sought by this solicitation require a specialty trade contractor, as argued by Appellant, and should be designated under the construction sector. *Id.* The descriptions of covered activity for this code and its industry group include the installation of elevators specifically, and maintenance and repairs generally. Further, the PWS requires qualified and trained personnel, and as argued by Appellant, specialty trade contractors best meet the PWS requirements and ensure public health and safety. Section II.B and II.C, *supra*.

The CO's designation of NAICS code 811310 for the solicitation of elevator maintenance and repair was based upon a clear error. NAICS code 811310 is limited to installation, sharpening, or welding of commercial and industrial machinery blades; as well as repair of agricultural and industrial machinery, such as machine tools, commercial refrigeration, and construction equipment. Section II.C, *supra*. The PWS does not require that a contractor provide sharpening or welding services of industrial, agricultural, or commercial machinery. Section II.B, *supra*. Further, the description of the broader NAICS code Subsector 811 notes that work involving the repair and maintenance of buildings, including plumbing and electrical equipment, is properly classified under the Sector 23 - Construction. Section II.C, *supra*. It is clear from the NAICS Manual that elevator repair, installation, and maintenance is most properly designated under the Code 238920, within Specialty Trade Contractors as part of the Construction Sector. *Id.*

Here, the solicitation requires a contractor provide repairs and maintenance to a preexisting structure in New Orleans VA Medical Center Campus. Section II.A, *supra*. The PWS specifies the services as elevator maintenance and repair; therefore, this procurement must be classified under a code which covers those services. *Id.* Although NAICS code 811310 designates repairs for machinery and equipment, it does not explicitly include elevators, whereas NAICS code 238290 expressly covers elevator installation and repair in new and existing structures. Section II.C, *supra*. Thus, I find the CO made an error of fact or law by amending the NAICS code from code 238290 to 811310. I conclude that the NAICS code 238290 best

describes the principal purpose of the solicitation, because it explicitly covers repairs and installations of existing elevators.

Accordingly, I conclude that the appropriate NAICS code for this solicitation is 238290, Other Building Equipment Contractors, and that Appellant has met its burden of establishing an error in the CO's designation.

IV. Conclusion

Appellant has shown that the CO clearly erred in selecting the NAICS code, and I GRANT the instant appeal. NAICS code 238290, Other Building Equipment Contractors, is the most appropriate NAICS code for this procurement with a corresponding \$16.5 million annual receipts size standard. 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 811310, Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance with its corresponding \$8 million annual receipts size standard. FAR 19.303(c)(8); 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).

CHRISTOPHER HOLLEMAN
Administrative Judge