

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

NAICS APPEAL OF:

CueBid Technologies, Inc.,

Appellant,

Solicitation No. 191BWC-24-R-0003

U.S. Section of the International Boundary
and Water Commission

SBA No. NAICS-6272

Decided: March 14, 2024

Eyal Ben-Gal, President of CueBid Technologies, Inc., Palmview, Texas

Philip Johnson, Contracting Officer, U.S. Section of the International Boundary and
Water Commission, El Paso, Texas

DECISION

I. Introduction and Jurisdiction

On January 31, 2024, the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) received the above-captioned appeal from CueBid Technologies, Inc. (Appellant). The appeal challenges the North American Industry Classification System (NAICS) code assigned to the U.S. Section of the International Boundary and Water Commission's (USIBWC) Solicitation No. 191BWC-24-R-0003 (Solicitation).

In its appeal, Appellant maintains the Contracting Officer (CO) clearly erred in assigning NAICS code 562211, Hazardous Waste Treatment and Disposal, with a corresponding \$47 million annual receipts size standard, to the Solicitation. Appellant contends the appropriate NAICS code for this order is 541330, Engineering Services, with a corresponding \$25.5 million annual receipts size standard. 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 10 calendar days after issuance of the Solicitation, so the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1), 134.304(b); Federal Acquisition Regulation (FAR) 19.103(a)(1). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Solicitation

On December 22, 2023, the USIBWC issued the instant Solicitation, seeking to secure the services of a contractor with the knowledge, skills and abilities to provide sludge dewatering/drying technology or alternatives for reducing the weight and volume of daily sludge production with maximum drying efficiency through additional equipment installation for the Nogales International Wastewater Treatment Plant (NIWTP). (Solicitation, at 1; CO's Memorandum.) At that time, the Contracting Officer (CO) did not identify the type of solicitation and whether it was totally set aside for small business and designated NAICS code 236210, with a corresponding \$45 million annual receipts size standard as the applicable code. (Solicitation, at 1.)

On January 12, 2024, the CO issued Amendment No. 0001, which stated “this is primarily a service contract” and changed the NAICS code designation to NAICS 236210, Industrial Building Construction with a corresponding \$45 million annual receipts size standard, NAICS code 333310 Commercial and Service Industry Machinery Manufacturing with a corresponding 1,000 employees size standard, and NAICS code 423830 Industrial Machinery and Equipment Merchant Wholesalers with a corresponding 100 employees size standard. (Amend. 0001, at 1.)

On January 24, 2024, the CO issued Amendment No. 0002, changing the NAICS code to 562211, Hazardous Waste Treatment and Disposal, with a corresponding \$47 million annual receipts size standard, and removing the three codes designated in Amendment No. 0001. (Amend. 0002, at 1.) The CO extended offers due date from February 2, 2024, to March 4, 2024. Further, the amendment changed “the solicitation from full and open competition to a Total Small Business Set-Aside.” (*Id.*) Lastly, the CO stated that the “Evaluation Criteria will be added as an Amendment 003 no later than February 1, 2024, if not sooner.” (*Id.*)

On February 1, 2024, the CO issued Amendment No. 0003, to pause the due date for receipt of offers for this Solicitation per OHA's Notice and Order, with a copy of OHA's Order. (Amend. 0003, at 1.)

B. Statement of Objectives and Evaluation Criteria

In the original Solicitation, the CO included a Statement of Objectives (SOO) and Evaluation Criteria. The SOO identified the purpose of the procurement “is to secure the services of a Contractor with the knowledge, skills and abilities for innovative dewatering/drying technology alternatives for reducing the weight and volume of daily sludge production with maximum drying efficiency at the [NIWTP]. The production and transportation of reduced sludge is a critical element in NIWTP's cost-effective operation.” (SOO, at 1.) Further, “USIBWC is seeking proposals to provide recommendations for upgrades and/or innovative technology to reduce the volume of sludge produced and transported to landfill, reducing costs and environmental impact.” (*Id.*)

Moreover, “the scope of this SOO is to improve sludge dewatering efforts at the NIWTP by utilizing innovative technology that will reduce the volume of sludge that is produced and transported to the landfill, providing unattended operating capabilities and reducing operating and maintenance costs and environmental impacts. As part of their proposal, interested parties shall include a Scope of Work (SOW).” (*Id.*)

The performance objectives are described as:

1. Minimize sludge volume: Propose an innovative dewatering/drying technology alternative for daily sludge production that will produce 80% or better of dry solids content.
2. Improve efficiency: Propose an innovative dewatering/drying technology alternative that will operate 24 hours per day with the capability to operate at a minimum of 16 hours unattended with minimal staff input and skill sets.
3. Reduce operating and maintenance costs: Propose an innovative dewatering/drying technology alternative for daily sludge reduction that will reduce the USIBWC's operating and maintenance costs at NIWTP.
4. Reduce environmental impact and/or improve public health: Propose an innovative dewatering/drying technology alternative for daily sludge reduction that will reduce carbon dioxide emission and/or reduce pathogens and produce safer sludge.

(*Id.*, at 2-3.)

Interested parties are to include and/or be aware the following minimum requirements:

- A Performance Work Statement (PWS) shall be included as part of the proposal
- Potential technology alternative shall have the capacity to process up to 28,000 tons of wet sludge per year
- Achieve minimum monthly production rates: 350 dry tons at 80% solids
- Potential system can be operated on electric power, diesel fuel or natural gas
- Have a life expectancy of 20 years or more
- Proposed technology shall be able to interface with the current NIWTP SCADA system
- Implementation and installation of the technology shall not interfere with the continued production of solids

- Obtain all required permits [i.e., Arizona Department of Environmental Quality (ADEQ), Environmental Protection Agency (EPA) and Union Pacific Railroad Company (UP)]
- Clearance of all personnel working on the project
- Design shall be stamped and sealed by a licensed Professional Engineer in Arizona

(*Id.*, at 3.)

In the Evaluation Criteria, offerors are required to submit a PWS. The PWS must identify primary team members, including major subcontractors with over 15% of project value; provide resumes for all key personnel; provide a minimum of 10 years of experience in dewatering technology design for wastewater treatment plants with Contractor's experience leading this type and magnitude of project; provide a narrative or list describing the roles and responsibilities of each team member, including address and primary point of contact; include prior experience with similar complexity and a list of successful projects utilizing the proposed dewatering technology within the past seven years with a minimum of three years of consistent operation; include Contractor's cost estimate of the proposed dewatering technology, including but not limited to, design, equipment, installation, training of USIBWC staff and potential O&M expenses; include Contractor's baseline schedule, including but not limited to, the time required to obtain permits, design, equipment, installation and training of USIBWC staff for the proposed dewatering technology; and include Contractor's proposed tasks and standards to achieve the objectives; and include details of available resources to handle unforeseen problems and delays to maintain the schedule and completion date. (Evaluation Criteria (002), at 1.)

C. Appeal

On January 31, 2024, Appellant filed the instant appeal. Appellant provides the background of the Solicitation with Amendments 0001 and 0002, where the CO designated NAICS code 562211, Hazardous Waste Treatment and Disposal, as the appropriate code for this procurement. Appellant argues the CO has been inconsistent in the NAICS code designations here and appears to be unsure of what the appropriate code actually is for this procurement. Appellant argues NAICS code 541330, Engineering Services, is the appropriate code. (Appeal, at 1.)

Appellant then asserts it is an interested party because it is a small business, has participated in a site visit for this procurement, has the relevant knowledge and experience for this procurement, and intends to enter a bid. (*Id.*, at 2.)

Next, Appellant describes the procuring agency and the Solicitation, noting that the Solicitation requires Dryer Alternatives and referencing a Document No. 20234321001. However, Appellant maintains this document is not included in the Solicitation. Instead, Appellant identifies a pre-solicitation Notice at SAM.gov, referring to Purchase and Installation of Dewatering/Drying Equipment. Appellant highlights that it does not refer to hazardous waste

haulage and disposal, but the purchase and installation of dewatering or drying equipment. It is a machinery supply procurement and demonstrates the CO's notice at an early stage. (*Id.*, at 3.)

Appellant explains the Solicitation does not link to any Performance Work Statement to clearly explain the specific requirements. At SAM.gov, there is a Statement of Objectives (SOO), which refers to “[t]he United States Section of the International Boundary and Water Commission (USIBWC) is seeking proposals from interested parties to provide recommendations for upgrade and/or innovative technology to the existing dewatering/drying process at the NIWTP.” (SOO, at 1.) Appellant makes note that the scope of the SOO seeks a contractor's services for innovative dewatering/drying technology for NIWTP.

Appellant identifies the main goals of the procurement under the SOO as:

a. **Knowledge, Skills and Abilities in Innovative Technology:** The contractor is expected to have expertise in innovative technologies to improve the dewatering/drying process at the NIWTP.

b. **Recommendations for Upgrades or Innovative Technology:** The Government is seeking proposals for potential upgrades or the implementation of new technology to enhance the existing dewatering/drying processes.

c. **Scope of Work (SOW) Requirement:** Offerors must include a detailed SOW in their proposal, outlines the approach, methods and technologies they recommend.

d. **Focus on Reducing Sludge Volume and Improving Efficiency:** The objective is to reduce the volume and weight of sludge produced and transported, thereby lowering the operating and maintenance costs, as well as reducing environmental impact.

e. **Consulting Period and Location:** The performance period is one year, at the NIWTP at Rio Rico, Arizona.

f. **Background and Specific Challenges at NIWTP:** The SOO has detailed background information on current operations at NIWTP, volume of sludge processed, and challenges due to nearing capacity of the local landfill.

(*Id.*, at 3-4.)

Thus, Appellant argues the SOO is essentially a call for expert consulting services to evaluate, recommend and potentially design solutions for NIWTP's specific challenges in terms of sludge minimization. Appellant maintains this is not a procurement of a product but for professional expertise and the engineering of what the Agency considers innovative solutions. Appellant further maintains the designation of NAICS code 562211 is in error, as the code is applicable to the haulage, treatment and disposal of hazardous waste. Here, this is not what the agency lists in its requirements. (*Id.*, at 4.)

Appellant admits it has not determined if the SOO is part of the procurement requirements, as it is not linked to the Solicitation. The SOO states that “USIBWC is interested in reducing the weight and volume of generated sludge and increasing the average dry solids content to 80% or better. This will reduce trips to the landfill, reducing disposal costs.” A significant reduction in sludge removal may allow USIBWC to perform this work, eliminating the need to enter into a contract for transportation of sludge to landfill. (*Id.*, at 4.) While NAICS code 562211 calls for the operation of a treatment and disposal facility of hazardous waste or to collect and haul hazardous waste to a treatment and disposal facility, this procurement is a request for consultancy and identification technology to significantly reduce landfill haulage. Appellant affirms that it is a call for expert consulting services to evaluate, recommend, and potentially design solutions for NIWTP's specific challenges in sludge minimization. This is a procurement for professional expertise, not a product. Therefore, the NAICS code designation is erroneous. (*Id.*)

Appellant's supports its choice of NAICS code based on Line Item 001, which calls for “Dryer Alternatives” rather than hazardous waste treatment, haulage, or disposal services. Appellant maintains the sludge in the plant is not classified as hazardous material under EPA guidelines, and the need here is for consultancy in technological innovation and the engineering of efficient drying technologies, not waste haulage or treatment. With no hazardous waste involved and no requirement for haulage, treatment or disposal of such materials, NAICS code 562211 is an erroneous designation. (*Id.*)

Appellant also asserts the SOO wants the solution offered to meet certain minimum requirements, identified in Section II.B, *supra*. (*Id.*, at 5.) Appellant argues this procurement's SOO will require the contractor to apply physical laws and principles of engineering to design, develop and utilize machines, materials, instruments, structure processes and systems. The contractor will have to provide advice, prepare feasibility studies, prepare preliminary and final plans and designs, provide technical services during construction and installation phase, and evaluate engineering projects such as sludge dewatering alternatives. (*Id.*)

Here, Appellant maintains these services would require multiple engineering disciplines, including civil engineering services, construction engineering services, environmental engineering services, mechanical engineering services and robotics automation engineering services. These services are all included in the description of NAICS code 541330 and shows a “perfect match” between NAICS code 541330 and this procurement. (*Id.*, at 6.)

C. The CO's Response

On February 3, 2024, the CO responded to the appeal. The CO stated that the NIWTP is owned and operated by USIBWC and treats daily approximately 15 million gallons of raw sewage from Nogales, Mexico and Nogales, Arizona. The plant uses the Biological Nutrient Removal process and treats Waste Activated Sludge by drum thickening followed by an open pit aerobic digestion. Digested sludge flows to a storage pond to be pumped into one of two belt filter presses for polymer assisted dewatering. The final dewatered sludge is then hauled to a landfill by truck. (CO's Response, at 1.)

The plant operates under a National Pollutant Discharge Elimination System permit that requires the sludge be taken to a landfill. This requirement is for sludge dryer or alternative technology that reduces solids along with the installations at the plant. The Agency will not invest in alternative energy sources. (*Id.*)

The CO admits he posted Solicitation No. 191BWC24R0003 entitled Sludge Dryer to SAM.gov on December 22, 2023, mistakenly designating NAICS code 236210, Industrial Building Construction, with a corresponding \$5 million annual receipts size standard. The CO concedes that Amendment 0001 further mistakenly changed the NAICS code designation to include three NAICS codes, as discussed on Section II.A, *supra*. As for Amendment 0002, the CO notes that it changed the NAICS code designation to Hazardous Waste Treatment and Disposal, with a corresponding \$47 million annual receipts size standard, and set the procurement 100% aside for small business. (*Id.*)

The CO concludes that the requirement is to secure the services of a contractor with the knowledge, skill and abilities to provide sludge dewatering/drying technology or alternatives for reducing the weight and volume of daily sludge production with maximum drying efficiency for the Nogales International Wastewater Treatment Plant. The CO explains the mistakes made were the result of attempts to open the procurement to multiple interested vendors with different solutions. (*Id.*, at 2.)

D. CueBid's Reply

On February 15, 2024, Appellant filed a reply to the CO's response. Appellant first questions whether the USIBWC actually owns the facility. Appellant then notes that the NIWTP operates under a permit from the Arizona Pollutant Discharge Elimination System, Permit Number AZ0025607. This permit stipulates that "All biosolids generated at this facility shall be disposed of in a landfill meeting the criteria in 40 C.F.R. § 238." This section pertains to "Criteria for Municipal Solid Waste Landfills" designed for nonhazardous waste. Had NIWTP's biosolids been classified as hazardous, the relevant regulation would have been 40 C.F.R. §§ 260-264, which deals with hazardous waste. Therefore, the CO's NAICS code designation is in error. (CueBid Reply, at 1-3.)

Appellant points out an inconsistency between the SOO statement that the local landfill will stop accepting sludge from the NIWTP, and the CO's statement that the dewatered sludge will be taken to the landfill. The local landfill is a municipal waste landfill under 40 C.F.R. § 258 and does not handle hazardous waste. (*Id.*, at 4.)

In references to statements made by the CO in Appellant's pre-award bid protest, Appellant considers it vague as to the reasons for the change in NAICS code designation and gives grounds to question the accuracy and transparency of the CO's statements. (*Id.*)

Appellant then questions the CO's statement in the Response, where the USIBWC seeks to reduce the weight and volume of sludge through the installation of new equipment. This is contrary to the SOO, which primarily discusses the provision of knowledge and expertise, and

states that its purpose is to secure the services of a Contractor with the knowledge, skills and abilities to develop innovative dewatering and drying technologies. While Amendment 0001 states that this is primarily a services contract, Appellant alleges the CO has stated in a telephone call that the procurement is for replacing the existing sludge dryer. Appellant questions whether the CO has a clear understanding of the procurement. (*Id.*, at 5.)

In the interest of a more complete record and discussion of the issues here, I ADMIT Appellant's Reply into the record.¹

III. NAICS Manual²

The CO's designated NAICS code, 562211, Hazardous Waste Treatment and Disposal covers:

[E]stablishments primarily engaged in (1) operating treatment and/or disposal facilities for hazardous waste or (2) the combined activity of collecting and/or hauling of hazardous waste materials within a local area and operating treatment or disposal facilities for hazardous waste.

NAICS Manual, at 505.

Appellant's preferred NAICS code 541330, Engineering Services, covers:

[E]stablishments primarily engaged in applying physical laws and principles of engineering in the design, development, and utilization of machines, materials, instruments, structures, processes and systems. The assignments undertaken by these establishments may involve any of the following activities: provision of advice, preparation of feasibility studies, preparation of preliminary and final plans and designs, provision of technical services during the construction or installation phase, inspection and evaluation of engineering projects, and related services.

Illustrative examples:

Civil Engineering Services
Environmental engineering services
Construction engineering services

¹ The CO and/or the procuring agency did not object to Appellant's reply and did not submit any further comments.

² Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2022)*, available at <http://www.census.gov>. SBA has instructed that, for purposes of SBA programs, the 2022 edition of the *NAICS Manual* is utilized effective October 1, 2022, "the beginning of the new fiscal year following the effective date of the OMB's release of the NAICS 2022 revision." See 87 Fed. Reg. 59,240 (Sept. 29, 2022).

Mechanical engineering services
Engineers' offices
Robotics automation engineering services

NAICS Manual, at 460.

IV. 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

Appellant correctly noted that there seems to be some confusion in the CO's NAICS code designation for the instant Solicitation. The CO has made a number of different choices before settling on NAICS code 562211. However, OHA has held that this code covers the actual treatment and disposal of hazardous waste. *NAICS Appeal of Energx, LLC*, SBA No. NAICS-4952 (2008). The *NAICS Manual* description states that it covers establishments which either treat and/or dispose of hazardous waste, or which collect and/or haul hazardous waste. Thus, NAICS code 562211 can be designated only for procurements which call for actual treatment, collection, hauling and/or disposal of hazardous waste. This procurement does not call for that work. Rather, this procurement seeks proposals on how to accomplish the treatment of the sludge and waste which flows into the treatment center. Section II.B, *supra*. The contractor for this procurement will not be collecting, treating, hauling or otherwise disposing of hazardous waste, they will be providing advice on just how to dispose to the sludge, and designing a method of handling it. *Id.*

In contrast, OHA considered NAICS code 541330 in past cases:

OHA has held NAICS code 541330 describes an industry where the establishments provide engineering services, including providing advice, feasibility studies, preparing preliminary and final plans, and inspecting and evaluating engineering projects. *NAICS Appeal of Inkling Media Co.*, SBA No. NAICS-5054, at 10 (2009).

OHA has found NAICS code 541330 appropriate for procurements calling for highly technical analyses. *NAICS Appeal of Millenium Engineering and Integration Co.*, SBA No. NAICS-5309, at 8 (2011) (finding that the SOW called specifically for safety engineering, which required offerors to provide “technical responses to realistic safety-related scenarios.”) Further, NAICS code 541330, Engineering Services, cover services involving the design and utilization of machines materials and systems. *NAICS Appeal of Rhinocorps, Ltd.*, SBA No. NAICS-4736, at 5 (2005).

NAICS Appeal of EYP Squared Joint Venture, LLC, SBA No. NAICS-6044, at 9 (2020).

Here, the procurement calls not for the actual handling of hazardous waste, but for the contractor to propose innovative dewatering/drying technology alternatives that will produce 80% or better solids, operate 24 hours a day, and reduce operating and maintenance costs and reduce environmental impact. Section II.B, *supra*. For each requirement, the solicitation requires the contractor to propose a solution, not to actually implement the solution proposed. *Id.* This contractor will have to propose solutions, perform feasibility studies, prepare preliminary and final plans, perform highly technical analyses and design systems. *Id.* These activities fall under NAICS code 541330. Thus, this is a contract to propose a new method for handling waste, not the actual treatment and hauling of it.³ Accordingly, NAICS code 562211 is not appropriate, and the appropriate code is 541330, Engineering Services.

V. Conclusion

Appellant has established the CO clearly erred in assigning NAICS code 562211, Hazardous Waste Treatment and Disposal, with a corresponding \$47 million annual receipts size standard, to the Solicitation. The appropriate NAICS code for this Solicitation is 541330, Engineering Services, with a corresponding \$25.5 million annual receipts size standard. I therefore GRANT this appeal.

Accordingly, because this decision is being issued before the close of the solicitation, the CO MUST amend the Solicitation to change the NAICS code from 562211, Hazardous Waste Treatment and Disposal, with a corresponding \$47 million annual receipts size standard, to 541330, Engineering Services, with a corresponding \$25.5 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 U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d); FAR 19.103(a)(7).

CHRISTOPHER HOLLEMAN
Administrative Judge

³ Notably, the CO does not discard the scope and requirements of the SOO and/or Evaluation Criteria, which are part of the Solicitation, and ultimately, fails to explain why Appellant's NAICS code is inappropriate based on OHA case law or NAICS Manual.