

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

NAICS APPEAL OF:

Elevated Technologies, Inc.,

Appellant,

Solicitation No. 36C24124R0032

U.S. Department of Veterans Affairs

SBA No. NAICS-6264

Decided: January 23, 2024

APPEARANCES

Matthew T. Schoonover, Esq., Timothy J. Laughlin, Esq., Schoonover & Moriarty, LLC, Olathe, Kansas, for Appellant

Andrew J. Baker, Contract Specialist, U.S. Department of Veterans Affairs, Augusta, Maine

DECISION

I. Introduction and Jurisdiction

On December 15, 2023, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. 36C24124R0032 seeking a contractor to replace an elevator system at the Togus VA Medical Center (VAMC) in Augusta, Maine. (RFP, SF 1442.) The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran Owned Small Businesses, and assigned North American Industry Classification System (NAICS) code 238290, Other Building Equipment Contractors, with an associated size standard of \$22 million average annual receipts.

On December 26, 2023, Elevated Technologies, Inc. (Appellant) appealed the NAICS code designation to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant maintains that the CO erred in selecting NAICS code 238290, and that the proper code is 236220, Commercial and Institutional Building Construction, with a corresponding \$45 million size standard. For the reasons discussed *infra*, the appeal is denied.

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 timely filed the instant appeal on December 26, 2023.¹ Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFP

The RFP seeks a contractor to “renovate and replace the elevator system in Building 200 and 200*****E on VAMC Togus Campus and all associated electric work for the repairs.” (RFP, SF 1442.) The period of performance is 915 days after the contractor is instructed to begin work. (*Id.*)

The RFP's Statement of Work (SOW) explains that:

The contractor shall provide construction services to renovate S1-S5 elevator cabs, entrances and replace associated mechanical and electrical drive components including but not limited to motors, controllers, TUG interface, drive brakes, rope brakes, drive ropes, governors, & buffers. Also, this project will extend elevator S3 down to the ground floor, and will include all necessary demolition, pipe relocation and structural work. This project will be completed in building 200 and 200*****E at the [VAMC] in accordance with design drawings and specifications (SOW Attachments 09 & 10).

(RFP, SOW at 1.) Attached to the SOW are drawings and specifications to which the contractor must adhere, entitled “Replace Elevators Buildings 200 & 200*****E.” (RFP, SOW, Attachs. 9 and 10.)

The SOW details how the five elevator cars will be modernized and refurbished. (RFP, SOW at 1.) Because the elevator cars cannot be removed from the elevator shafts, the contractor will “strip the cars down to the bare platform and frame and replace all wear parts and Architectural features.” (*Id.*) Additional work will be done on the lobby elevator doors, controls, annunciation, and trim. (*Id.*) One elevator will also be extended down a floor to the ground level “by removing the false pit bottom.” (*Id.*) VA intends for the building to remain fully operational during the renovation. (*Id.*) Work will be done during normal business hours. (*Id.* at 2.)

¹ Ordinarily, a NAICS code appeal must be filed within 10 calendar days after issuance of the solicitation. 13 C.F.R. §§ 121.1103(b)(1) and 134.304(b); Federal Acquisition Regulation (FAR) 19.103(a)(1). Here, the RFP was issued on December 15, 2023. Ten calendar days after December 15, 2023 was December 25, 2023. Because December 25, 2023 was a federal holiday, the appeal petition was due on the next business day: Tuesday, December 26, 2023. 13 C.F.R. § 134.202(d)(1)(ii).

B. Appeal

On December 26, 2023, Appellant filed the instant appeal. Appellant concedes that, according to the *NAICS Manual*,² NAICS code 238290 encompasses elevator installation and repair. (Appeal at 2.) Appellant argues, however, that the scope of this procurement is substantially broader than NAICS code 238290, which Appellant contends is suitable when a contractor is merely “installing or repairing an elevator in an existing, ready-to-be-used space.” (*Id.*) With the requirement that one elevator shaft be brought down to ground level, Appellant maintains that the work here will have “a significant impact to the surrounding building,” unlike a routine installation or repair job. (*Id.*)

Appellant observes that NAICS code 238290 is one of several industries within the Specialty Trade Contractors subsector, which includes firms that perform specialized activities in conjunction with construction projects but that are not responsible for overseeing the entire effort. (*Id.*, citing *NAICS Manual* at 128.) Furthermore, OHA previously has upheld the use of NAICS code 238290 for a solicitation that “require[d] a contractor to provide repairs and maintenance to a preexisting structure” at a VA medical center. (*Id.*, quoting *NAICS Appeal of Elevated Techs., Inc.*, SBA No. NAICS-6146, at 5 (2022).) The work here, however, is more wide-ranging, including “demolition and structural work, as well as significant alterations to electrical and mechanical systems.” (*Id.* at 3.)

Appellant asserts that NAICS code 236220, Commercial and Institutional Building Construction, is the most appropriate designation due to the nature of the required work. In effect, the RFP seeks “the services of a general contractor working with a myriad of subcontractors, including designers, structural engineers and contractors, demolition contractors, plumbers, electricians, fire/life safety companies, and finish contractors—not to mention the actual elevator installers.” (*Id.*) In *NAICS Appeal of Veterans Electric, LLC*, SBA No. NAICS-5951 (2018), OHA affirmed the choice of NAICS code 236220 for a procurement that involved extensive construction work on buildings and grounds. (*Id.*) In *Veterans Electric*, the solicitation included “demolition and removal of existing structures, structural work, and electrical work, among others,” which Appellant considers “similar to that now at issue.” (*Id.*, citing *Veterans Electric*, SBA No. NAICS-5951, at 5.) Appellant also maintains that other procurements for “elevator modernization and refurbishment” often have used NAICS code 236220. (*Id.* at 5.)

C. CO's Response

On January 11, 2024, the CO responded to the appeal. The CO maintains that NAICS code 238290 is correct for this procurement. (Response at 3.)

The CO disputes Appellant's contention that the RFP is too complex and unrelated to elevator modernization to be designated under NAICS code 238290. (*Id.*) The RFP does not call for general construction, but rather for “specialized elevator modernization designed to bring the current system up to code.” (*Id.*) The SOW requires a contractor with the specific knowledge and

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>.

experience to modernize five elevator wells. (*Id.* at 3-4.) A general contractor would lack the expertise to accomplish such tasks and would need to rely heavily upon a subcontractor, potentially contravening limitations on subcontracting. (*Id.* at 4.)

The selected NAICS code promotes competition by enabling VA to choose from specialized offerors with the requisite elevator installation knowledge and experience. (*Id.*) Regarding the elevator shaft extension to the ground floor, the CO argues that this work is still considered elevator installation. (*Id.* at 5.) Any general construction work, such as the relocation of pipes, is incidental to the elevator modernization effort. (*Id.*) Furthermore, and contrary to Appellant's suggestions, NAICS code 238290, rather than NAICS code 236220, is more commonly utilized for procurements of this type. (*Id.*)

D. Appellant's Motion for Leave to Reply

On January 22, 2024, ten days after the close of record, Appellant moved for leave to reply to the CO's Response. Appellant complains that the CO's Response “seriously downplayed the breadth of the required work” and “introduces legal theories not anticipated” by Appellant. (Motion at 1.) A reply therefore is warranted. (*Id.*)

Under OHA's rules of procedure, a reply to a response generally is not permitted unless OHA so directs. 13 C.F.R. §§ 134.206(e) and 134.309(d). Furthermore, OHA will not consider evidence or argument filed after the close of record. 13 C.F.R. § 134.225(b). Here, OHA did not direct Appellant to reply, and the proposed Reply, which was filed after the close of record, merely elaborates upon arguments that Appellant raised, or could have raised, in its original appeal. Accordingly, Appellant's motion for leave to reply is DENIED and the proposed Reply is EXCLUDED from the record. *NAICS Appeal of PrimeTech Int'l, Inc.*, SBA No. NAICS-6014, at 6 (2019); *NAICS Appeal of Oak Grove Techs., LLC*, SBA No. NAICS-5998, at 6 (2019); *NAICS Appeal of T3 TigerTech*, SBA No. NAICS-5674, at 2, fn. 2 (2015).

E. NAICS Manual

The NAICS code chosen by the CO, 238290, Other Building Equipment Contractors, comprises:

establishments 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.

NAICS Manual at 133. Examples of work within NAICS code 238290 include “[e]levator installation.” *Id.* at 134, 733. NAICS code 238290 falls within NAICS sector 23 “Construction,” subsector 238 “Specialty Trade Contractors.” *Id.* at 119, 128.

The NAICS code advocated by Appellant, 236220, Commercial and Institutional Building Construction, covers:

establishments 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 includes establishments responsible for the on-site assembly 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.

NAICS Manual at 122-23. NAICS code 236220 is one of several industries within subsector 236, “Construction of Buildings.” The *NAICS Manual* indicates that “subsector [236] comprises establishments primarily responsible for the construction of buildings.” *Id.* at 119.

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); FAR 19.102(b)(1). Generally, when a procurement calls for qualitatively different types of products or services, the appropriate NAICS code is the one which represents “the greatest percentage of contract value.” 13 C.F.R. § 121.402(b)(2); *see also* FAR 19.102(b).

B. Analysis

Appellant has not shown that the CO's NAICS code designation is clearly erroneous. This appeal must therefore be denied.

As the CO emphasizes in response to the appeal, the ultimate purpose of this procurement is elevator modernization. Section II.C, *supra*. The SOW makes clear that the contractor will “renovate S1-S5 elevator cabs, entrances and replace associated mechanical and electrical drive components including but not limited to motors, controllers, TUG interface, drive brakes, rope brakes, drive ropes, governors, & buffers.” Section II.A, *supra*. These efforts are akin to elevator installation and servicing, and thus fall within NAICS code 238290. The *NAICS Manual* defines NAICS code 238290 as encompassing “establishments primarily engaged in installing or servicing building equipment,” including “new work, additions, alterations, maintenance, and

repairs.” Section II.E, *supra*. The *NAICS Manual* further specifies that “[e]levator installation” falls under NAICS code 238290. *Id.* OHA has held that “NAICS code 238290 expressly covers elevator installation and repair in new and existing structures.” *NAICS Appeal of Elevated Techs., Inc.*, SBA No. NAICS-6146, at 5 (2022). Furthermore, Appellant itself allows that NAICS code 238290 is suitable when a contractor is “installing or repairing an elevator in an existing, ready-to-be-used space.” Section II.B, *supra*. Such is the case here, as the contractor will refurbish elevator cars in pre-existing elevator shafts. Section II.A, *supra*. I therefore agree with the CO that NAICS code 238290 is appropriate here, because it covers the elevator installation and modernization efforts that comprise the heart of this procurement.

In its appeal, Appellant highlights that, according to the SOW, the contractor must extend an elevator shaft to the ground floor, and perform any associated “demolition, pipe relocation, and structural work.” Sections II.A and II.B, *supra*. Therefore, Appellant maintains, NAICS code 238290 is improper for this RFP because the contractor will perform construction services that go beyond mere elevator modernization.³ Section II.B, *supra*. The CO counters that only one of the five elevator shafts will be extended, and, in that one instance, only a “false pit bottom” will be removed. Sections II.A and II.C, *supra*. The VAMC itself will remain open throughout the duration of the project, and all work will be performed during business hours, further indicating that no large-scale construction is anticipated. *Id.* I find the CO's reasoning persuasive. While it may be true, as Appellant suggests, that a portion of the procurement will go beyond mere elevator installation or renovation, such work nevertheless appears to constitute a minority of the overall effort. The principal purpose of the contract, and the preponderance of contract value, are associated with elevator installation and modernization, and the RFP as a whole therefore is appropriately categorized under NAICS code 238290. Section III.A, *supra*.

Appellant also argues that the NAICS code it advocates, 236220, commonly is utilized for other procurements with similar requirements. Section II.B, *supra*. The CO disputes this claim, however, and in any event, these other procurements are not before OHA. It is well-settled that OHA attaches little weight to the NAICS codes assigned to other procurements that were not appealed to OHA. *E.g.*, *NAICS Appeal of Veterans First Health Care*, SBA No. NAICS-6212, at 6 (2023); *NAICS Appeal of Millennium Health & Fitness, Inc.*, SBA No. NAICS-6094, at 11 (2021); *NAICS Appeal of Oak Grove Techs., LLC*, SBA No. NAICS-5998, at 9 (2019).

Because Appellant has not demonstrated that NAICS code 238290 is clearly incorrect for this procurement, OHA need not consider the NAICS code Appellant advocates, or other alternative codes. It is well-settled 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 Taurean General Servs., Inc.*, SBA No. NAICS-6092, at 6 (2021) (quoting *NAICS Appeal of Dentrust Optimized Care Solutions*, SBA No. NAICS-5761, at 7 (2016)); *NAICS Appeal of Ascendant Program Servs., LLC*, SBA No. NAICS-5832, at 10 (2017).

³ Appellant also observes that the word “construction” appears many times in the RFP. Both of the NAICS codes in question here, though, fall within NAICS sector 23 “Construction.” See Section II.E, *supra*. Use of the word “construction,” then, sheds no light on which of these two NAICS codes is more appropriate.

IV. Conclusion

For the above reasons, the appeal is DENIED. The CO appropriately selected NAICS code 238290, Other Building Equipment Contractors, for this RFP. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge