

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

NAICS APPEAL OF:

Allserv, Inc.,

Appellant,

Solicitation No. VA786-15-R-0006
U.S. Department of Veterans Affairs

SBA No. NAICS-5629

Decided: December 30, 2014

APPEARANCES

Steven J. Koprince, Esq., Amanda M. Wilwert, Esq., Petefish, Immel, Heeb & Hird, LLP,
Lawrence, Kansas, for Appellant

Joseph M. Mendoza, Contracting Officer, U.S. Department of Veterans Affairs, Stafford,
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Cresskill, New Jersey, for Native Contractors, Inc.

DECISION

I. Introduction and Jurisdiction

On December 3, 2014, the U.S. Department of Veterans Affairs (VA), National Cemetery Administration (NCA) Contracting Service issued Request for Proposals (RFP) No. VA786-15-R-0006 for “Cemetery Grounds and Facilities Maintenance Services” at the Fort Jackson National Cemetery in Columbia, South Carolina. The RFP is structured as an acquisition of commercial items pursuant to Federal Acquisition Regulation (FAR) part 12. 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 812220, Cemeteries and Crematories, with a corresponding size standard of \$20.5 million. Proposals are due January 5, 2015.

On December 10, 2014, Allserv, Inc. (Appellant) filed the instant appeal. Appellant contends that the correct NAICS code for the procurement is 561730, Landscaping Services, with an associated size standard of \$7.5 million average annual receipts. 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 RFP, so the appeal is timely. FAR 19.303(c); 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

The RFP explains that “[t]he overall responsibility of the Contractor is to plan, coordinate, organize, manage, and perform the activities described herein, which are required to maintain an acceptable appearance of the cemetery grounds and facilities.” (RFP at 7.) The required services “include, but are not limited to maintenance of grounds and facilities, regular mowing, trimming, edging, removal of leaves and debris, as well as, sweeping or blowing off roads and sidewalks, maintenance of gravesites and headstones, and the alignment and washing of headstones, headstone installation and maintenance, turf maintenance, plant and tree maintenance, sunken grave repair, trash removal, and janitorial services.” (*Id.* at 18-19.) The RFP elaborates:

The Contractor shall be responsible for:

(1) **Grounds and Facilities Maintenance;** Grounds Maintenance Services to include turf maintenance, plant and tree maintenance, mowing, trimming and edging; tree wells maintenance and edging, maintenance and labor for mulch beds (Main Entrance, Memorial Trail, 3 Shelter beds, Island Beds, Barrier bed between section 5 and 6, Columbarium, Flagpole assembly area, Admin Bldg, etc.) Maintenance of forested buffer areas including the removal of fallen trees, pruning dangerous limbs, weeds and unsightly undergrowth. Sweeping or blowing off of roads and walkways; power washing sidewalks, curbs, shelters and site facilities as required; trash and floral removal; daily refilling and cleaning floral vase holders (vases provided by GOV); debris removal; (approximately 35 acres).; Snow and Ice Removal.

(2) **Turf Maintenance;** Fertilization Applications; Soil Testing; Weed & Disease Control application. Spot spraying. Fire Ant Control & Pest Control as required. Aeration, dethatching, maintaining and adjusting grade as required.

(3) **Irrigation System Management;** adjust/replace damaged heads, leak repair, operation of irrigation and pump controllers and adjusting programmed intervals. Troubleshoot and repair faulty valves, solenoid and other components. Provide internet connectivity for irrigation controller laptop.

(4) **Buffer Areas;** Edge and perimeter spray treatment to include complete Buffer Areas with non-selective herbicide with first edging to be trench treatment. Treat Buffer Areas with a pre-emergent herbicide 2 times per year. Dress Buffer Areas

with pine straw once annually in the spring, including material and labor (pine straw to be furnished by the contractor). Removal of fallen trees, pruning dangerous limbs, removing suckers, weeds and unsightly undergrowth.

(5) **Gravesite Maintenance;** Sunken Grave Repair. Repair of damaged turf. Top dressing/grade adjustment. Sod placement of casketed sites. Mowing and trimming of gravesites.

(6) **Headstone Maintenance;** Headstone receiving and setting, Headstone cleaning and maintenance, Headstones raise, lower, realign, reset and backfill, Headstone replacements, including pulling and setting R2's. Receiving blank headstones from delivery truck (forklift) and breaking down pallets of blank headstones.

(7) **Committal Shelter/Transporting of Remains;** Daily interment shelter set-up, take down and cleaning (2 shelters), including complete cleaning of shelter (interior and exterior). Cleaning of shelters as required between committal services daily. Pest control as required. Semi- annual deep cleaning of shelter exterior and interior with power washer, including skylight/cupola. Transportation of casketed remains and floral arrangements from committal shelter to gravesite. Tagging floral arrangements with grave number and completion of "chain of custody" documents.

(8) **Janitorial;** Janitorial service including providing maintenance and restroom supplies for Administration & Maintenance Complex, including all staff and public restrooms, approx. 5,000 net sq. footage. Window washing, strip and wax floors, and carpet cleaning, refer Appendix N for details.

(9) **Support Services;** Support Services for Memorial Day, Veteran's Day, Wreaths Across America, and other weekend special events as needed. Manpower and equipment for high priority events and services at the cemetery. Support Services for weekend or holiday burials as per NCA's Standardized Burial Schedule for Federal Holidays, as required. This includes Active Duty KIA interments scheduled on a weekend.

(*Id.* at 19-20.) The RFP requests pricing information for the following Contract Line Item Numbers (CLINs) and estimated quantities:

BASE YEAR: January 1, 2015 - September 30, 2015					
CLIN	ITEM	EST QTY	UNIT	UNIT PRICE	TOTAL PRICE
001	Headstone cleaning and maintenance.	6000	Each		
002	Headstones raise, lower, realign, reset and backfill.	600	Each		
003	Headstone receiving and setting.	600	Each		
004	Headstone replacements, including pulling and	150	Each		

	setting R2's.				
005	Receiving blank headstones from delivery truck (forklift) and breaking down pallets of blank headstones.	69	Pallet		
006	Sunken Grave Repair. Repair of damaged turf. Top dressing/grade adjustment.	200	Each		
007	(Complete Phase 1 Site) Grounds and Facilities Maintenance Services to include turf maintenance, plant and tree maintenance, mowing, trimming and edging; tree wells maintenance and edging, maintenance and labor for mulch beds (Main Entrance, Memorial Trail, 3 Shelters, Island Beds, Barrier bed between section 5 and 6, Columbarium, Flagpole assembly area, Admin Bldg., etc.) Maintenance of forested buffer areas including the removal of fallen trees, pruning dangerous limbs, weeds and unsightly undergrowth. Sweeping or blowing off of roads and walkways; power washing sidewalks, curbs, shelters and site facilities as required; trash and floral removal; daily refilling and cleaning floral vase holders (vases provided by GOV); debris removal; (approximately 35 acres). Mulch supplied by the contractor.	9	Month		
008	(Partial Phase 1A Developed Site) Grounds Maintenance Services to include Turf Maintenance, plant and tree maintenance, tree removals, mowing, trimming and edging; tree wells edging, maintenance and labor for mulching beds (Main Entrance, 1 Shelters, Flagpole assembly area, Admin Bldg., etc.) sweeping or blowing off of roads and walkways; power washing sidewalks, curbs, shelters and site facilities as required; trash and floral removal; debris removal (approximately 14 acres). Mulch supplied by the Month contractor.				
009	Irrigation System Management, adjust/replace damaged heads, leak repair, operation of irrigation and pump controllers and adjusting programmed intervals. Troubleshoot and repair faulty valves, solenoid and other components. Provide internet connectivity for irrigation controller laptop.	9	Month		
010	Snow and Ice Removal	2	Job		

011	Sod removal & placement of casketed sites.	450	Each		
012	Turf Maintenance; 4 ea Fertilization Applications; Soil Testing; 4 ea Weed & Disease Control application. Fire Ant Control & Pest Control as required. (approximately 35 acres)	8	Job		
013	Edge and perimeter spray treatment to include complete Buffer Areas with non-selective herbicide (1 per month/9 times per year) with first edging to be trench treatment.	29500	Foot		
014	Treat Buffer Areas with a pre-emergent herbicide 2 times per year. (6 Acres).	6	Acres		
015	Dress Buffer Areas with pine straw once annually in the spring, including material and labor (pine straw to be furnished by the contractor).	3,500	Bales		
016	Daily interment shelter set-up, take down and cleaning (2 shelters), including complete cleaning of shelter (interior and exterior). Cleaning of shelters as required between committal services daily. Pest control as required. Semi- annual deep cleaning of shelter exterior and interior with power washer, including skylight/cupola.	260	Daily		
017	Transportation of casketed remains and floral arrangements from committal shelter to gravesite. Tagging floral arrangement with grave number and completion of "chain of custody" documents.	450	Each		
018	Janitorial service including providing maintenance and restroom supplies for Administration & Maintenance Complex, including all staff and public restrooms, approx. 5,000 net sq. footage. Window washing, strip and wax floors, and carpet cleaning.	9	Month		
019	(Partial Phase 1A Developed Site) Janitorial service including restroom and maintenance supplies - Administration & Maintenance Complex (including all restrooms) approx. 4,000 net sq. footage. Washing windows as needed. Floor waxing and carpet cleaning as needed.	0	Month		
020	Support Services for Memorial Day, Veteran's Day, Wreaths Across America, and other weekend special events as needed. Manpower	3	Each		

	and equipment for high priority events and services at the cemetery.				
021	Support Services for weekend or holiday burials as per NCA's Standardized Burial Schedule for Federal Holidays, as required. This includes Active Duty KIA interments scheduled on a weekend.	8	Each		
Base Year - Total Estimated Price:					

(*Id.* at 8-9 (emphasis in original).)

The RFP states that VA will select the proposal that represents the best value to the agency, with non-price factors significantly more important than price. (*Id.* at 98.) There are two non-price factors: (1) Technical Capability; and (2) Past Performance. (*Id.*) The Technical Capability factor consists of three subfactors: (1) Detailed Technical/Management Requirements; (2) Cemetery Maintenance Plan; and (3) Staffing Plan/Contractor Team Arrangements. (*Id.* at 99-100.) For the Past Performance factor, the RFP indicates that offerors must demonstrate “[a]bility to perform the work in a requirement the size of this solicitation” and “[e]xtensive knowledge of turf management.” (*Id.* at 101.)

The RFP states that Government personnel “will evaluate the contractor's daily performance through direct inspections of services and demonstrated knowledge of applicable regulations.” (*Id.*, Attachment S.) The RFP also includes a sample inspection report. (*Id.*, Attachment T.) According to the sample report, the contractor's performance will be assessed weekly in the following areas: overall appearance; sod/grass appearance; sunken graves; holes/wash outs; headstone cleaning; sunken headstones; headstones alignment; grass mowing/clippings removal; trimming around headstones/wall/trees; leaf/nut removal; shrub/plant maintenance; tree maintenance; trash and other debris removal; snow/ice removal; weed control; pest control; edging roads and walkways; property outside wall; building restrooms; committal shelter; damage to cemetery property; damage to cemetery grounds; floral regulations being followed; conduct/appearance of employees; contractor inspection/reports; safety: work, clothing, and equipment; and training. (*Id.*)

B. The Appeal

On December 10, 2014, Appellant filed its appeal of the NAICS code. Appellant argues that the primary purpose of the RFP is day-to-day maintenance of cemetery grounds and facilities, not the operation of a cemetery.

Appellant observes that the NAICS code selected by the CO, 812220, “comprises establishments primarily engaged in operating sites or structures reserved for the internment of human or animal remains and/or cremating the dead.” (Appeal at 6, quoting *NAICS Manual* at 919 (emphasis added by Appellant).) Appellant argues that this code does not best describe the RFP's primary purpose because it is VA itself that operates the Fort Jackson National Cemetery.

For this procurement, VA seeks a contractor to provide landscape care and maintenance services for the cemetery. (*Id.* at 6-7.)

These solicited services, Appellant argues, are best described by NAICS code 561730, which comprises establishments providing landscape care and maintenance services. Furthermore, Appellant argues, this code specifically includes cemetery plot care services. (*Id.* at 7.)

Appellant estimates that more than half of the work will consist of landscaping and grounds maintenance, less than 20% will consist of gravesite and headstone maintenance, and less than 30% of ancillary support services. (*Id.* at 8.) Therefore, in weighing the relative value of the procurement's components, NAICS code 561730 is the correct code. 13 C.F.R. § 121.402(b); *NAICS Appeal of Evanhoe & Assocs., LLC*, SBA No. NAICS-5505 (2013) (finding a NAICS code appropriate where it represented the highest percentage, although less than a majority, of contract value).

C. CO's Response

On December 10, 2014, the CO responded to the appeal. The CO defends his choice of NAICS code 812220 for this RFP.

The CO references the CLINs for the base year, and notes that the RFP covers more than landscaping services. For instance, “[t]here are facilities management, cemetery interments, and Janitorial requirements that NAICS [code] 561730 cannot support.” (CO's Response at 1.)

D. Reply

On December 19, 2014, the date of the close of record, Appellant moved to reply to the CO's response. Appellant argues that there is good cause to admit the reply because the CO's response raised new matters, and the reply is brief and does not raise new issues. (Reply at 1.) Under applicable regulations governing NAICS code appeals, a reply to a response is not permitted unless OHA so directs. 13 C.F.R. § 134.309(d). No such direction occurred here. Moreover, the CO's response presented argument based on the RFP's CLIN structure, but did not raise new legal or factual questions. *Cf.*, *NAICS Appeal of SAC Cleaners, Inc.*, SBA No. NAICS-5468 (2013) (granting a motion to reply where the CO's response raised an issue of standing, and the firm challenging the NAICS code had not previously addressed the issue). Accordingly, Appellant's motion to reply is DENIED, and the reply is EXCLUDED from the record.

E. NCI's Response

On December 19, 2014, Native Contractors, Inc. (NCI) intervened and responded to the appeal. NCI argues it has standing to intervene because it qualifies as a small business under the \$20.5 million size standard, but not under the \$7.5 million size standard. Therefore, if the appeal is granted, NCI will not be an eligible offeror.

NCI argues that the CO did not clearly err in designating NAICS code 812220. This procurement, NCI argues, “goes well beyond landscaping and includes funeral services preparation, transporting casketed human remains, transporting floral arrangements, interment shelter setup, interment of human remains; maintaining thousands of headstones, [and] providing janitorial services to the staff and public.” (NCI Response at 3-4.) To support this argument, NCI argues that CLINs 001-006 and 016-021 are unrelated to landscaping and include cemetery related services. NCI further contends that categories 5, 6, 7, and 9 of the contractor's responsibilities in the SOW are unique to cemetery operations. (*Id.* at 4-5.)

NCI maintains that landscaping services are integral to cemetery operation. Appellant then argues that where, as here, two NAICS codes both apply to particular tasks in a procurement, the broader code is appropriate where it best describes the principal purpose. (*Id.* at 6, citing *NAICS Appeal of Global Travel Network*, SBA No. NAICS-4420 (2001), *NAICS Appeal of Circle Solutions, Inc.*, SBA No. NAICS-5181 (2011), and *NAICS Appeal of AOC Connect, LLC*, SBA No. NAICS-5165 (2010).)

NCI asserts that NAICS code 812220 is appropriate because the RFP requires that all services “conform to the ‘NCA Operational Standards and Measures.’ ” (*Id.*, quoting RFP at 19.) These standards specify requirements for gravesite layout and the maintenance of turf, cemetery, and grounds. Because these standards describe the entire range of activities required to operate a cemetery, NCI reasons that NAICS code 812220 is the appropriate code. (*Id.* at 7.)

NCI takes issue with Appellant's estimate of the percentages of work allocable to landscaping, gravesite and headstone maintenance, and ancillary services. To NCI, the services cannot be divided into landscaping and non-landscaping activities because all of the services in the RFP are necessary to operate a cemetery. NCI also argues that “gravesite and headstone maintenance” and “ancillary services” are both necessary to operate a cemetery and should not be considered two categories. Therefore, even assuming it is proper to divide the contract's tasks into landscaping and non-landscaping, the services are evenly split. Such an equal division does not warrant overturning the CO's designation. (*Id.* at 8.)

F. Reply

On December 24, 2014, five days after the close of record, Appellant moved to reply to NCI's response. In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Here, Appellant's reply was filed after the close of record, and elaborates upon legal points raised in the appeal petition. Accordingly, Appellant's motion to reply is DENIED, and the reply is EXCLUDED from the record. *NAICS Appeal of Delphi Research, Inc.*, SBA No. NAICS-5377, at 7 (2012).

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, 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. *NAICS Manual*¹ Descriptions

The NAICS code selected by the CO, 812220, Cemeteries and Crematories, covers “establishments primarily engaged in operating sites or structures reserved for the interment of human or animal remains and/or cremating the dead.” *NAICS Manual* at 919. The *NAICS Manual* provides the following examples of establishments classified under NAICS code 812220: cemetery associations (*i.e.*, operators of cemeteries); crematories (except combines with funeral homes); pet cemeteries; mausoleums; and memorial gardens (*i.e.*, burial places). *Id.*

The NAICS code Appellant advocates, 561730, Landscaping Services, covers:

- (1) establishments primarily engaged in providing landscape care and maintenance services and/or installing trees, shrubs, plants, lawns, or gardens and
- (2) establishments primarily engaged in providing these services along with the design of landscape plans and/or the construction (*i.e.*, installation) of walkways, retaining walls, decks, fences, ponds, and similar structures.

Id. at 801. Index entries which refer to this code include “[c]emetery plot care services” and “[l]andscape care and maintenance services.” *Id.* at 1121, 1265.

C. Analysis

Having examined the RFP, the descriptions in the *NAICS Manual*, OHA's prior decisions, and the arguments of the parties, I must agree with Appellant that, although the instant procurement calls for support services to be performed at a cemetery, it does not call for operation of an entire cemetery as contemplated by NAICS code 812220. Therefore, the designated NAICS code is clearly erroneous.

¹ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2012)*, available at <http://www.census.gov>.

OHA has not previously addressed the application of NAICS code 812220 in any prior decision. OHA has, however, indicated that the mere fact that work will be performed at a cemetery or crematory does not establish that the procurement should be classified under NAICS code 812220. For example, in *NAICS Appeal of Dial General Engineering*, SBA No. NAICS-5375 (2012), where the contractor would build a marker grid support system at a cemetery, but would not operate the cemetery as a whole, OHA found that “the great majority of the work here will be construction work” such that the CO should have assigned a construction NAICS code to the solicitation. *Dial*, SBA No. NAICS-5375, at 6-7.

Likewise, in the instant case, the contractor will perform support services at the Fort Jackson National Cemetery, but will not operate the entire cemetery. Rather, it is clear that the bulk of the services to be performed are landscaping in nature. According to the RFP, the focus of the procurement is to “maintain an acceptable appearance of the cemetery grounds and facilities.” See Section II.A, *supra*. Of the nine enumerated categories of work called for in the SOW, four-Grounds and Facilities Maintenance; Turf Maintenance; Irrigation System Management; and Buffer Areas-are purely landscaping activities. They require routine landscaping services such as maintaining trees, plants, tree wells, and an irrigation system; mowing; trimming; edging; sweeping walkways; power washing; fertilizing; soil testing; and spraying herbicide. *Id.* Conversely, only three categories-Gravesite Maintenance, Headstone Maintenance, and Committal Shelter/Transporting of Remains-are particular to cemetery operations, and one of these three-Gravesite Maintenance-consists mostly of landscaping work, such as repair of damaged turf, top dressing/grade adjustment, sod placement, mowing, and trimming. *Id.* Further, of the 21 CLINs set forth in the RFP, nine are landscaping in nature (CLINs 007-015), and only one is unquestionably within the bounds of cemetery operations (CLIN 017).²

RFP Attachment T, which describes the services to be inspected for evaluating the contractor's performance, confirms that the primary purpose of this procurement is to maintain the appearance of the cemetery grounds and facilities, and the bulk of the items on this rubric pertain specifically to landscaping. It is thus apparent that the procurement here calls for support services at a cemetery, not for operation of the cemetery in its entirety. The CO's determination that the primary purpose of this procurement is cemetery operation is thus not supported by the SOW, the CLINs, or the sample inspection report.³ Accordingly, I find that the CO clearly erred in designating NAICS code 812220.

² CLINs 001-006 relate to the handling of headstones and sunken grave repair, but this work too can arguably be considered a type of landscaping services. The *NAICS Manual* classifies “cemetery plot care services” as landscaping services, not as cemetery operations. See Section III.B, *supra*.

³ It is also worth noting that the CO structured the instant RFP as a “commercial items” acquisition under FAR part 12. According to FAR 2.101, it is possible for services to be considered commercial items if they are “of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.” While ordinary landscaping services certainly qualify under this

Because Appellant has established that the CO erred in assigning NAICS code 812220, I must consider which NAICS code best describes the principal purpose of the acquisition. 13 C.F.R. § 121.402(b). I agree with Appellant that NAICS code 561730, Landscaping Services, is most appropriate here because it encompasses the preponderance of the activities to be performed in this procurement. As discussed above, the bulk of this procurement involves routine landscaping services, and/or work falling within the scope of “cemetery plot care services.” By regulation, a procurement ordinarily is classified under the NAICS code which constitutes the greatest percentage of contract value. FAR 19.102(d) and 13 C.F.R. § 121.402(b)(2). Thus, NAICS code 561730, which includes routine landscaping services as well as cemetery plot care services, is most appropriate for this RFP.

IV. Conclusion

For the above reasons, the instant appeal is GRANTED. The appropriate NAICS code for this procurement is 561730, Landscaping Services, with a size standard of \$7.5 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 812220 to 561730. FAR 19.303(c)(5); 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

definition, the CO does not explain how cemetery operations could be considered “commercial items.” Thus, the underlying acquisition strategy further suggests that this procurement does not call for cemetery operations.