On January 14, 2016, the U.S. Department of the Navy (Navy) issued Request for Proposals (RFP) No. N62473-15-R-3001 seeking a contractor to provide construction services in Fallon, Nevada; and Bridgeport, California (RFP § C.2, B.2.) The RFP contemplated award of a firm fixed price, Indefinite Delivery-Indefinite Quantity (IDIQ) Job Order Contract (JOC). (Id. § A.2., B.2.) The period of performance would be one year with four, one-year option periods. (Id. § A.2.) The Contracting Officer (CO) set the acquisition aside entirely for participants in the Small Business Administration (SBA) 8(a) Business Development (BD) Program, and assigned North American Industry Classification System (NAICS) code 238990, All Other Specialty Contractors, with a corresponding $15 million annual receipts size standard. (Id. § A.3.)

On January 20, 2016, Fortis Networks, Inc. (Appellant) filed the instant appeal. Appellant argues that the “more accurate” NAICS code is 236220, Commercial and Institutional Building Construction, which has a $36.5 million annual receipts size standard. For the reasons discussed infra, the appeal is denied.

The 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. 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 RFP

The RFP's Statement of Work (SOW) explains, “The purpose of this [JOC] is to provide specialty trade construction services with minimal design requirements for new minor construction, facility repair, rehabilitation, and alterations for a broad range of renovation and construction work.” (RFP § C.2.1.) Further, the contractor will “provide rapid response for construction, maintenance, rehabilitation and repair of real property in a cost effective manner.” (Id.) Although “[t]ask orders for design only shall not be placed against the contract . . , , minimal design services related to construction may be required.” (Id.)

With each task order, “[t]he Government will provide a detailed scope of work, detailing the work to be accomplished. Depending on the complexity of the project, the detail provided may vary from a general idea of what is required, with no drawings, to complete design documents.” (Id. C.2.2.) The contractor will then “use the information provided by the Government and submit a complete proposal. For task orders where the Government provides no drawings, the [c] ontractor shall provide sketches to clearly show an understanding of what work is included in the proposal.” (Id.)

Upon receiving a task order, the contractor will provide “all labor, materials, supplies, parts (to include system components), plant, supervision, equipment, and related services, (except when specified as Government furnished), for projects.” (Id.) Such inputs include “electrical, mechanical, painting, engineering/design, paving (asphaltic and concrete), flooring (tile work/carpeting), roofing, structural repair, fencing, HVAC, and fire suppression/protection system installation.” (Id.) The contractor will be responsible for “all project planning, scoping meetings, programming, administration, and management necessary to provide support for task orders awarded.” (Id.) The RFP does not include the phrase “provide complete and usable facilities” to describe the work required.

The RFP states that the Navy would award the contract to the offeror with the lowest price, technically acceptable proposal. (RFP § M, at 126) The Navy would determine whether a proposal was technically acceptable according to three non-price evaluation factors: (1) Experience; (2) Past Performance; and (3) Safety. (Id., at 128) Each non-price factor would be rated as either acceptable or unacceptable. (Id. at 126.)

The Navy would evaluate price based on offerors' responses to Proposed Task Order 001. (RFP § M, at 129-30) The proposed task order calls for the removal and installation of vinyl composition tile, removal and installation of cover base, precleanning with a High-Efficiency Particulate Arrestance (HEPA) vacuum, a separation barrier, set up of a negative air machine, set up and removal of a portable shower, asbestos sampling, removal of decontamination facility, collection and bagging of bulk material, double bag and decontamination, containerizing bagged material in drums, and disposal of material. (RFP, Exh. J.)
B. The Appeal

Appellant argues the appropriate NAICS code for this procurement is 236220. Appellant contends the tasks to be performed are “the supervision, material labor, overhead, and all means necessary to provide complete and usable facilities,” which Appellant argues is covered by code 236220. (Appeal at 2, 3.) The code designated by the CO, however, is typically used for specialty trade purposes, such as billboard erection, outdoor swimming pool construction, post-construction clean-up, paving, sandblasting, fence installation, and erecting and dismantling scaffolding. (Id.) Appellant argues that these are not complete and usable facilities. Appellant maintains that NAICS code 236220 does cover the construction of commercial and institutional and related structures, and thus is a more appropriate designation for a procurement for complete and usable facilities.

C. The Contracting Officer's Response

On February 1, 2016, the CO responded to the appeal. The CO argues NAICS code 238990 is the correct code, and OHA should deny the appeal.

The CO explains that the Navy issued a Sources Sought Notice for the instant IDIQ JOC on May 4, 2015. It stated the work would include, but not be limited to, electrical, mechanical, painting, engineering/design, paving (asphalt and concrete), flooring (tile work/carpeting), roofing, structural repair, fencing, HVAC, and fire suppression/protection system installation. (CO Response at 1.)

On December 30, 2015, the Navy issued a pre-solicitation notice, announcing the Navy's intent to make a single award of an IDIQ JOC for various construction projects at Fallon and Bridgeport. The notice stated that “This JOC will provide the supervision, equipment, material, labor, overhead and all means necessary to provide complete and usable facilities at various locations [in] Bridgeport and Fallon.” (Notice at 1.)

Next, the CO explains that an audit of three previous contracts suggests NAICS code 238990 is the most appropriate code. One contract was designated NAICS code 236220; however, most, if not all, of the task orders would have been appropriate under NAICS code 238990, so NAICS code 236220 was not appropriate. On another contract for which Appellant is the incumbent, NAICS code 236220 was appropriate, but most of the task orders could also have been issued under NAICS code 238990. The third contract, which was the most recent JOC for Fallon was designated NAICS code 238990, and an audit of the task orders issued under this contract determined this was an appropriate designation. Based upon this historical information, then, NAICS code 238990 is the most appropriate code for this solicitation. (CO Response at 2.)

D. NAICS Manual1 Descriptions

The NAICS code designated by the CO, 238990, All Other Specialty Trade Contractors,

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NAICS-5713

comprises:

establishments primarily engaged in specialized trades (except foundation, structure, and building exterior contractors; building equipment contractors; building finishing contractors; and site preparation contractors). The specialty trade work performed includes new work, additions, alterations, maintenance, and repairs.

NAICS Manual at 220. The NAICS MANUAL goes on to include the following illustrative examples of activities included under include this NAICS code. Such activities include:

Billboard erection
Outdoor swimming pool construction
Cleaning building interiors during and immediately after construction
Paver, brick (e.g., driveway, patio, sidewalk), installation
Crane rental with operator
Paving, residential and commercial driveway and parking lot
Driveway paving or sealing
Sandblasting building exteriors
Fence installation
Scaffold erecting and dismantling
Interlocking brick and block installation
Steeplejack work
Manufactured (mobile) home, set up and tie-down

Id.

The NAICS code advanced by Appellant, 236220, Commercial and Institutional Building Construction, comprises:

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 197-98. The NAICS MANUAL goes on to include the following illustrative examples of activities included under include this NAICS code. Such activities include:

Airport building construction
Office building construction
Arena construction
Parking garage construction
Barrack construction
Prison construction
Farm building construction
Radio and television broadcast studio construction
Fire station construction
Religious building (e.g., church, synagogue, mosque, temple) construction
Grain elevator construction
Restaurant construction
Hospital construction
School building construction
Hotel construction
Shopping mall construction
Indoor swimming facility construction
Warehouse construction (e.g., commercial, industrial, manufacturing, private)

Id. This NAICS code cross references Subsector 238, Specialty Trade Contractors, and explains that this Subsector includes “specialized construction work on commercial and institutional buildings, generally on a subcontract basis.” Id.

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). 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

I find Appellant has not persuasively demonstrated the CO erred in designating NAICS code 238990. The appeal is therefore denied.

The difference between the designated NAICS code and the code advocated by Appellant is significant. NAICS code 238990, which the CO chose, covers minor construction work such as repairs, cleaning, and the construction of items such as billboards, swimming pools, fences, and paving of driveways and parking lots. Work under Subsector 238, Specialty Trade
Contractors, moreover, includes specialized construction work suitable for subcontracting. By contrast, Appellant's preferred code, 236220, covers the construction of major buildings, offices buildings, airports, arenas, hospitals, barracks, and schools.

The SOW for the subject RFP calls for “minor construction, facility repair, rehabilitation, and alterations for a broad range of renovation and construction work.” The Proposed Task Order in the solicitation covers the removal and installation of tile, and cleanup afterwards. On the basis of this information, I conclude that this solicitation is for minor construction, and does not call for the construction of major buildings. Accordingly, the CO's designated code is the most appropriate code.

Appellant argues NAICS code 236220 is “more accurate” because the contractor is required to “provide complete and usable facilities.” The problem with this argument, though is that while this phrase is in the presolicitation notice, it does not appear in the solicitation itself. As OHA has explained, it is the solicitation that determines the primary purpose of the procurement, and extraneous evidence to the contrary is not persuasive. *NAICS Appeal of Ace Consulting Servs., LLC*, SBA No. SIZ-5574, at 5 (2014) (“it is the solicitation itself, not post-hoc statements from the CO, that determines the primary purpose of the procurement.”) In this case, the solicitation does not call for the construction of buildings, but explicitly calls for minor construction and has a sample task order for tile replacement and removal. Accordingly, Appellant has not established clear error in the NAICS code designation here, and the appeal is therefore denied.

**IV. Conclusion**

For the above reasons, the appeal is DENIED. The CO reasonably selected NAICS code 238990, All Other Specialty Contractors, with a corresponding $15 million annual receipts size standard.

This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge