United States Small Business Administration
Office of Hearings and Appeals

NAICS APPEAL OF:

Noble Supply & Logistics,
Appellant,

Solicitation No. FA4690-16-R-0004
Department of the Air Force

SBA No. NAICS-5748
Decided: June 8, 2016

APPEARANCES

Michael A. Hordell, Esq., Gary J. Campbell, Esq., Kristopher Berr, Esq., Pepper Hamilton LLP, Washington, D.C., for Appellant

Paula Moore, Contracting Officer, U.S. Department of the Air Force, Ellsworth Air Force Base, South Dakota

Sam Q. Le, Esq., Office of General Counsel, U.S. Small Business Administration, Washington D.C.

DECISION

I. Introduction and Jurisdiction

On May 9, 2016, the U.S. Department of the Air Force (Air Force), 28th Contracting Squadron at Ellsworth Air Force Base (AFB), South Dakota, issued Request for Proposals (RFP) No. FA4690-16-R-0004 for a “one-stop shop” Contractor-Operated Civil Engineer Supply Store (COCESS). (RFP, Statement of Work (SOW) § 1.1.) The RFP contemplates the award of a single Firm Fixed Price (FFP) contract pursuant to parts 12 and 15 of the Federal Acquisition Regulation (FAR). The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 444190, Other Building Material Dealers, with a corresponding size standard of $20.5 million in annual receipts. Proposals are due June 27, 2016.

1 This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA received one or more requests for redactions and considered any requests in
On May 19, 2016, Noble Supply & Logistics (Appellant) filed the instant appeal. Appellant argues that the CO clearly erred in selecting NAICS code 444190 because applicable regulations prohibit the use of a Retail Trade sector NAICS code for a supply procurement. Instead, Appellant maintains, the CO should have assigned NAICS code 332510, Hardware Manufacturing, which has a corresponding size standard of 750 employees. For the reasons discussed infra, the appeal is granted.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides appeals of NAICS codes 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 this appeal within ten calendar days after issuance of the RFP, so the appeal is timely. 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 SOW states that the contractor will “provide all necessary labor, supervision, equipment, supplies, and materials” to support a COCESS on Ellsworth AFB. (SOW § 1.1.) To this end, the contractor must “acquire, issue, deliver, and store a variety of material, equipment, parts, tools, and supplies for construction, and facility maintenance and repair, and lawn and garden equipment repair.” (Id.)

The COCESS must “provide easy access for authorized individuals and contain a wide variety of commercial and industrial products (i.e., items found in commercial stores like Lowes, Home Depot or other local lumber and hardware stores).” (Id. § 1.2.) Specifically, the COCESS “shall stock high use/consumable items for immediate purchase.” (Id.) The contractor is “[t]o provide a simplified method for authorized personnel to purchase quality material, tools, and equipment used for work orders, construction, recurring maintenance and repair, and self-help type work.” (Id.)

According to the RFP, contract pricing is divided into four Contract Line Item Numbers (CLINs) during each year of contract performance:

<table>
<thead>
<tr>
<th>CLIN</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>0001</td>
<td>Operate COCESS — FFP: The Contractor shall include a price for this CLIN to provide all necessary labor, supervision, equipment, supplies, and materials to support and operate a [COCESS]. Refer to Statement of Work Paragraphs 1.2, 1.3, 1.5.2, 1.5.3, 4.1, 4.3.1, 4.3.2, and 4.4.1.5. Period of Performance 1 Oct 16 -30 Sep 17</td>
</tr>
<tr>
<td>0002</td>
<td>Fixed-Price Items: The contractor shall provide all requested firm fixed price</td>
</tr>
</tbody>
</table>

2 Effective February 26, 2016, SBA increased the size standard for NAICS code 332510 from 500 employees to 750 employees. 81 Fed. Reg. 4,469, 4,480 (Jan. 26, 2016).
materials to support a [COCESS] located on Ellsworth [AFB]. The contractor shall acquire, issue, deliver, and store a variety of material, equipment, parts, and supplies for construction and repair in accordance with [SOW] paragraph 1.2. These items will be for use by authorized government employees. The contractor shall perform to the all standards in the contract, federal regulations; as well as, in accordance with the SOW.

0003 Non-Priced Items — FFP: The contractor shall provide all requested non-priced items to support a [COCESS] located on Ellsworth [AFB]. The contractor shall acquire, issue, deliver, and store a variety of material, equipment, parts, and supplies for construction and repair in accordance with [SOW] paragraphs 1.4.5.3, 1.10.2, 1.10.3, and 5.13.1. These items will be for use by authorized government employees. The contractor shall perform to the all standards in the contract, federal regulations; as well as, in accordance with the SOW. Offerors shall NOT submit a price for this CLIN. The Government will place a Not To Exceed amount on this CLIN that shall not exceed 20% of the actual amount paid on CLIN 0001 & CLIN 0002 in resulting contract. DO NOT PRICE

0004 Standby Emergency Support — FFP: The Contractor shall include an hourly labor rate for this CLIN that accounts for all Standby Emergency Support (outside normal duty hours). The rate listed will cover the total crew rate per hour for support. Services are [in accordance with] SOW paragraph 4.3.1

(RFP at 3-4.)

Attached to the RFP was a spreadsheet entitled “Fixed Price Item List”. (RFP, Attach. 1.) The spreadsheet provides data concerning the quantities of various items purchased at the COCESS since June 1, 2015. The total number of all items was 88,208. Of these items, the most commonly-purchased item was Thermoplastic High Heat-resistant Nylon-coated (THHN) wire, at 19,868. (Id.) Much of the THHN wire was described as copper; none was described as aluminum. The next most common items were fluorescent lamps, 9,627; air filters, 6,546; taxiway bolts, 6,000; potassium, 4,400; and fireguard tee, 2,023. (Id.) Hinges were purchased 138 times; handles, 37 times. (Id.) Padlocks were purchased 106 times; other locks, 88 times. (Id.)

B. Appeal

Appellant contends that the CO should have designated a supply or manufacturing NAICS code, and not a retail code. SBA regulations specifically provide that “Acquisitions for supplies must be classified under the appropriate manufacturing or supply NAICS code, not under a Wholesale Trade or Retail Trade NAICS code.” (Appeal at 7, quoting 13 C.F.R. § 121.402(b)(2) (emphasis Appellant's).) The instant procurement is predominantly for supplies, and although there are references to services in certain CLINs, these services are ancillary and minimal. The services called for in CLIN 0001, for example, “are all services that are customary in the industry when supplying goods to the government.” (Id. at 6.) Appellant estimates that services represent [less than 25%] of this CLIN. (Id. at 5.) The services called for in CLIN 0003 are “incidental and customary to the supply of goods to the government.” (Id. at 6.) Historically,
the requirement in CLIN 0004 is seldom used. (Id.) Accordingly, because the services aspects of the procurement are *de minimis*, the RFP cannot be reasonably viewed as one for services.

The use of a services NAICS code would be improper, moreover, because it would not describe the principal purpose of the procurement. The primary purpose of the contract is to “acquire, issue, deliver and store a variety of materials, equipment, parts, tools, and supplies for construction, and facility maintenance and repair, and lawn and garden equipment repair for use by authorized government personnel.” (Id. at 11, quoting SOW § 1.1.) The value of the supplies being acquired “far exceed[s]” 75% of the value of the contract. (Id., citing *NAICS Appeal of U.S. Small Bus. Adm.*, SBA No. NAICS-5526, at 7-8 (2014) (where equipment constituted more than 75% of the dollar value of the procurements at issue, OHA concluded that the contract was primarily for supplies).)

C. CO's Response

On May 25, 2016, the CO responded to the appeal. The CO defends her choice of NAICS code 444190.

The CO explains that she initially intended to use NAICS code 332510, Hardware Manufacturing, and this code was utilized on the predecessor COCESS contract at Ellsworth AFB. When the CO submitted the Small Business Coordination Record for concurrence, however, small business officials instead recommended NAICS code 444130 or 444190, based on OHA's decision in *NAICS Appeal of Heritage Health Solutions, Inc.*, SBA No. NAICS-5650 (2015). Of the latter two NAICS codes, the CO considered NAICS code 444190 “a better representation of the services being provided.” (CO's Response at 1.)

Another reason the CO chose NAICS code 444190 is that CLIN 0001 “requires contractors to provide monthly prices for operation of the COCESS store (labor, supervision, equipment, supplies, and materials).” (Id.) The purpose of this CLIN, the CO continues, is to “identify the cost associated with providing the services needed to operate the COCESS Supply Store.” (Id.) According to the CO, “a manufacturing NAICS such as 332510 does not appropriately represent the requirement to operate a COCESS supply store.” (Id.)

In addition, the CO asserts, officials at a different Air Force base “recently awarded a COCESS contract using NAICS Code 444130.” (Id.)

D. Reply

On May 27, 2016, one week before the close of record, Appellant moved to reply to the CO's response and submitted its reply. Appellant argues there is good cause to permit the reply because the CO's response raises new substantive issues to which Appellant has not yet had the opportunity to respond. (Motion at 1, citing *NAICS Appeal of SAC Cleaners, Inc.*, SBA No. NAICS-5468 (2014).) For example, the CO indicates that she relied on OHA's decision in *Heritage Health Solutions* and that a different Air Force COCESS procurement used NAICS code 444130.
I find Appellant has demonstrated good cause to reply. As Appellant observes, the CO's response raises new factual and legal issues, so it is appropriate that Appellant have the opportunity to respond to them. In addition, Appellant submitted its reply well before the close of record. Appellant's motion is therefore GRANTED, and the reply is ADMITTED into the record.

In the reply, Appellant contends that the CO's response misses the mark because it does not address Appellant's contention that the RFP is predominantly for supplies. The CO's reliance on *Heritage Health Solutions* is misplaced, Appellant argues, because the procurement at issue there was “for pharmacy services.” (Reply at 3 (emphasis added by Appellant).) Conversely, in the instant case, [more than 75%] of the contract's value each year will be for supplies. (*Id.* at 4.) Accordingly, a Retail Trade sector NAICS code is impermissible.

Further, Appellant contends, the fact that the Air Force may have used NAICS code 444130 for another COCESS contract is irrelevant. As OHA has explained, “NAICS classifications in other procurements are not of great probative value” because “[t]he decision in a NAICS code appeal must be based upon the requirements of the solicitation at issue.” (*Id.*, quoting *NAICS Appeal of Ferris Optical*, SBA No. NAICS-5285, at 7 (2011) (emphasis added by Appellant).) Here, Appellant reiterates, the RFP is overwhelmingly for the provision of supplies. By regulation, then, the CO was required to designate a manufacturing or supply code.

**E. SBA Response**

On June 2, 2016, the date of the close of record, SBA timely intervened and responded to the appeal. SBA agrees with Appellant that the CO erred in assigning NAICS code 444190 to this RFP because “wholesale and retail [NAICS] codes are not to be used in procurements under any circumstances.” (*SBA Response at 3.* OHA's decision in *Heritage Health Solutions* — where OHA assigned a Retail Trade sector NAICS code after concluding that the underlying procurement was predominantly for services — is inconsistent with agency policy, according to SBA. (*Id.* at 7.) Instead, “[i]f the principal purpose of the procurement is services, the [CO] must designate a services NAICS code”, but “[u]nder no circumstances should a retail or wholesale code be used for a government procurement.” (*Id.* at 2.) SBA requests that OHA grant the instant appeal and select a new code “that best describes the principal product or service being procured.” (*Id.* at 7.)

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3 “SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first.” 13 C.F.R. § 134.210(a).
F. *NAICS Manual* Descriptions

The NAICS code selected by the CO, 444190, Other Building Material Dealers:

comprises establishments (except those known as home centers, paint and wallpaper stores, and hardware stores) primarily engaged in retailing specialized lines of new building materials, such as lumber, fencing, glass, doors, plumbing fixtures and supplies, electrical supplies, prefabricated buildings and kits, and kitchen and bath cabinets and countertops to be installed.

*NAICS Manual*, at 569.

The *NAICS Manual* contains several illustrative examples of establishments under NAICS code 444190. These examples include:

- Electrical supply stores
- Kitchen cabinet (except custom) stores
- Fencing dealers
- Floor covering stores, wood or ceramic tile only
- Plumbing supply stores
- Garage door dealers
- Prefabricated building dealers
- Glass stores
- Lumber yards, retail

*Id.*

NAICS code 444190 is part of NAICS sector 44-45, Retail Trade, which “comprises establishments engaged in retailing merchandise, generally without transformation, and rendering services incidental to the sale of merchandise.” *Id.* at 553.

The NAICS code advocated by Appellant, 332510, Hardware Manufacturing, “comprises establishments primarily engaged in manufacturing metal hardware, such as metal hinges, metal handles, keys, and locks (except coin-operated, time locks).” *Id.*, at 376.

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 & Assoc., 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**

Having reviewed the record and the arguments of the parties, I must agree with Appellant and SBA that the CO clearly erred in selecting a Retail Trade sector NAICS code, 444190, for this RFP. SBA regulations make clear that “[a]cquisitions for supplies must be classified under the appropriate manufacturing or supply NAICS code, not under a Wholesale Trade or Retail Trade NAICS code.” 13 C.F.R. § 121.402(b)(2). Similar language is repeated in the table at 13 C.F.R. § 121.201 for both the Wholesale Trade and Retail Trade sectors. As Appellant emphasizes in its appeal, the instant RFP requires the contractor to make available for purchase “a variety of material, equipment, parts, tools, and supplies for construction, and facility maintenance and repair, and lawn and garden equipment repair.” Section II.A, supra. Any services related to providing these supplies are ancillary, and constitute a small proportion of the contract value. It is settled law that “the mere fact that a procurement calls for incidental or ancillary services ‘does not justify classifying the procurement based upon the ancillary services,’ even if those ancillary services are ‘necessary to the procurement.’” *NAICS Appeal of the U.S. Small Bus. Admin.*, SBA No. NAICS-5526, at 7 (2014) (quoting *NAICS Appeal of Dial General Eng’g*, SBA No. NAICS-5375, at 7 (2012)). Accordingly, because the RFP is primarily for supplies, SBA regulations prohibit the use of a Retail Trade sector NAICS code. The CO therefore clearly erred in selecting NAICS code 444190. *NAICS Appeal of Global Precision Sys., LLC*, SBA No. NAICS-5681 (2015); *NAICS Appeal of Phoenix Envtl. Design, Inc.*, SBA No. NAICS-5212 (2011).

The CO's reliance on the NAICS code assigned to a different COCESS procurement is misplaced. As OHA has explained, “the codes assigned to other procurements are entitled to little weight, particularly if those other procurements were not themselves the subject of a NAICS code appeal to OHA.” *NAICS Appeal of DCS Corp.*, SBA No. NAICS-5703, at 5-6 (2016); see also *NAICS Appeal of R. Christopher Goodwin & Assoc., Inc.*, SBA No. NAICS-5393, at 5 (2012) (recognizing that “because each acquisition presents unique facts and circumstances, the NAICS codes assigned to other procurements have little probative value in assessing the appropriate NAICS code.”). Accordingly, I find no merit to the CO's statement that she considered the NAICS code assigned to a different COCESS solicitation which OHA has not reviewed. Similarly, the CO's reliance on advice from small business officials does not insulate the NAICS code designation from scrutiny. OHA has long held that “recommendations the Contracting Officer received from other officials carry no weight” at OHA in a NAICS appeal proceeding. *NAICS Appeal of The Tolliver Group, Inc.*, SBA No. NAICS-5705, at 10 (2016); *NAICS Appeal of eScience & Tech. Solutions, Inc.*, SBA No. NAICS-5586, at 9 (2014); *NAICS Appeal of JBS Int'l, Inc.*, SBA No. NAICS-5021, at 7 (2008).
Because Appellant has established that the CO erred in selecting NAICS code 444190, OHA must assign the NAICS code that best describes the principal purpose of the products or services being acquired. Section III.A, supra. In making this decision, OHA will consider, but is not limited to, the NAICS codes recommended by the parties. E.g., *NAICS Appeal of Active Deployment Sys., Inc.*, SBA No. NAICS-5712 (2016) (selecting a code not advocated by any litigant). When there is no single NAICS code that applies to the full range of products or services being acquired, the procurement normally will be classified under the NAICS code which represents the greatest percentage of contract value. FAR 19.102(d) and 19.303(a)(2); 13 C.F.R. § 121.402(b)(2); *NAICS Appeal of Allserv, Inc.*, SBA No. NAICS-5629 (2014).

In the instant case, the NAICS code Appellant advocates, 332510, Hardware Manufacturing, “comprises establishments primarily engaged in manufacturing metal hardware, such as metal hinges, metal handles, keys, and locks (except coin-operated, time locks).” Section II.F, supra. Although the procurement does include items that can be classified under NAICS code 332510, such as hinges, handles, locks, and keys, the combined quantities of these items amount to no more than a few hundred items out of a total of 88,208, according to the data provided in the RFP. Section II.A, supra. As a result, NAICS code 332510 does not best describe the supplies the Air Force seeks to acquire through the COCESS.

THHN wire, by contrast, constitutes a plurality of the anticipated items to be purchased at the COCESS, nearly double the next most common item, fluorescent lamps. *Id.* The *NAICS Manual* indicates that manufacturers of THHN wire are classified under NAICS code 331420, Copper Rolling, Drawing, Extruding, and Alloying. Index entries that direct the reader to NAICS code 331420 include: “Cable, copper (e.g., armored, bare, insulated), made from purchased copper in wire drawing plants,” *NAICS Manual*, at 1110; “Cable, copper (e.g., armored, bare, insulated), made in integrated secondary smelting and wire drawing plants,” *Id.*; “Coaxial cable, copper, made from purchased copper in wire drawing plants,” *Id.* at 1133; “Communications wire or cable, copper, made from purchased copper in wire drawing plants,” *Id.* at 1139; “Cord sets, flexible, made from purchased copper in wire drawing plants”; *Id.* at 1149; “Insulated wire or cable made from purchased copper in wire drawing plants,” *Id.* at 1253; “Insulated wire or cable, copper, made in integrated secondary smelting and wire drawing plants,” *Id.*; “Insulated wire or cable, copper, made in integrated secondary smelting and wire drawing plants,” *Id.*; “Wire, copper (e.g., armored, bare, insulated), made from purchased copper in wire drawing plants,” *Id.* at 1465; “Wire, copper (e.g., armored, bare, insulated), made in integrated secondary smelting and wire drawing plants,” *Id.*; and “Wire, mechanical, copper and copper alloy, made from purchased copper or in integrated secondary smelting and rolling, drawing or extruding plants,” *Id.* at 1466. As the index entries demonstrate, NAICS code 331420 covers insulated copper wire. Because THHN wire makes up a plurality of the items to be purchased through the COCESS, NAICS code 331420 best describes the principal purpose of the instant RFP.

**IV. Conclusion**

For the above reasons, the appeal is GRANTED. The CO clearly erred in assigning a Retail Trade sector NAICS code, 444190, to this RFP. The correct NAICS code designation for the procurement is 331420, Copper Rolling, Drawing, Extruding, and Alloying, with a corresponding 1,000-employee 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 444190 to 331420. FAR 19.303(c)(8); 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