

SBA No. NAICS-5030 (S.B.A.), 2009 WL 1030590

Small Business Administration (S.B.A.)

Office of Hearings and Appeals
[North American Industry Classification System]

NAICS APPEAL OF: KVA ELECTRIC, INC., APPELLANT

SBA No. NAICS-5030
Solicitation No. W912DW-09-Q-0067

***1 Department of the Army**

U.S. Army Corps of Engineers

Seattle, Washington

March 19, 2009

Appearances

James F. Nagle
Oles Morrison Rinker & Baker LLP
Seattle, Washington
For Appellant
Patricia Blackwood
Chief
Civil and Environmental Branch
Contracting Division
Department of the Army
Seattle District Corps of Engineers
Seattle, Washington

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

On February 11, 2009, the Department of the Army, Seattle District Corps of Engineers (Corps) issued Request for Quotations No. W912DW-09-Q-0067 (RFQ) to provide all plant, labor, tools, equipment, and materials and perform all work required to replace south substation breakers with vacuum breakers at Fort Lewis, Washington. The Contracting Officer (CO) set the procurement totally aside for small businesses, and assigned North American Industry Classification System (NAICS) code 335313, Switchgear and Switchboard Apparatus Manufacturing, with a corresponding 750 employee size standard. Initial offers were due February 16, 2009 and, according to the CO, offerors were notified of the apparent successful offeror on February 17, 2009.¹

On February 23, 2009, KVA Electric, Inc. (Appellant) filed a NAICS code appeal with the Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant argues that the appropriate NAICS code for this solicitation is

238210, Electrical Contractors and Other Wiring Installation Contractors, with a corresponding \$14.0 million² average annual receipts size standard. For the reasons discussed below, Appellant's appeal is granted.

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. Accordingly, this appeal is properly before OHA for decision.

II. Issue

Whether the CO's designation of NAICS code 335313, Switchgear and Switchboard Apparatus Manufacturing, for a solicitation requiring expert replacement of substation medium voltage breakers with vacuum breakers is based on a clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. The RFQ

1. The RFQ's Schedule provides the successful offeror is to provide the following:

Replace South Substation Medium Voltage Breakers with Vacuum Breakers. Provide necessary tools, equipment, material, engineering, and labor to ensure complete functionality of vacuum breakers in accordance with the attached Statement of Work entitled "Replace South Substation Breakers with Vacuum Breakers, Fort Lewis, Washington" dated 10 July 2008.

*2 2. The RFQ's Statement of Work (SOW), provides, in relevant part:

1. DESCRIPTION OF WORK: Provide all plant, labor, tools, equipment, and materials (except as indicated otherwise in the specifications) and perform all work in strict accordance with applicable codes and standards and specifications and plans required to Replace South Substation Breakers with Vacuum Breakers.

...

1.2.1.6. Reconfigure breaker power so that the breakers trip, close, and charge with 48 VDC power. Currently, the breakers close on rectified AC power.

1.2.1.7. Testing. The following field tests shall be performed on newly installed vacuum breakers:

- a. Insulation resistance test phase-to-phase.
- b. Insulation resistance test phase-to-ground.
- c. Closed contact resistance test.
- d. Power factor test.
- e. High-potential test.
- f. Manual and electrical operation of the switchgear.

1.2.1.8 Final Drawings - The contractor shall furnish 3 copies of final drawings (Shop Drawings) for the circuit breaker replacement and a CD with these final drawings in AutoCAD DWG format. Drawings shall contain the following information.

- a. Physical outlines showing the overall size and weight of the new circuit breaker and the interrelationship of the various breaker components
- b. Complete circuit breaker wiring diagrams
- c. Details of any modifications to the switchgear assembly.

...

1.2.2 Properly dispose of existing circuit breakers IAW standard industry handling procedures for Asbestos Containing Materials (ACM). Contractor shall be required to provide documentation verifying proper disposal of ACM.

1.2.3. Other work necessary to accomplish the above items.

1.2.4. QUALIFIED LABOR. All personnel used in the performance of this work shall be qualified high voltage electricians as recognized by the State of Washington, Department of Labor and Industries Standards for high voltage energized work (WAC 295-45).

1.2.4.1. Contractor shall provide certification that all employees have demonstrated the proficiency required under WAC 296-45. Contractor shall be required to provide employee's training records

1.2.4.2 At least two team members must have 3 or more years of applicable electrical high voltage experience

1.2.4.3 USE OF NON-QUALIFIED LABOR. Contractor use of non-qualified electrical laborers, helpers, etc., to execute, plan, lay out, or otherwise direct the execution of the electrical activities, under this contract is not allowed.

B. Appeal

On February 23, 2009, Appellant filed an appeal with OHA. Appellant argues the CO's assignment of NAICS code 335313 constitutes a clear error of law and fact.

Appellant states the RFQ is a procurement of supplies and services that were previously procured under Solicitation No. W912DW-08-Q-0111, issued on August 27, 2008. Appellant asserts the original solicitation was a small business set-aside assigned NAICS code 238210, Electrical Contractors and Other Wiring Installation Contractors, with a corresponding \$14.0 million average annual receipts size standard. Appellant states it filed a size protest against the apparent awardee of the original solicitation, Cufis Technologies, Inc. (Cufis), and, on October 30, 2008, the SBA Office of Government Contracting, Area I (Area Office) issued Size Determination No. 6-2009-012 (size determination) finding Cufis to be other than small based on Cufis's affiliation with its ostensible subcontractor, E C Power Systems.

*3 Appellant argues, in an effort to thwart the SBA's size determination, the CO terminated the contract and issued the RFQ with a new NAICS code, 335313. Appellant states the CO, again, issued an intent to award to Cufis on February 19, 2009. Appellant states the original NAICS code, 238210, is the proper code and Appellant asserts the statement of work in the RFQ is identical to the original solicitation. Appellant argues the RFQ does not call for manufacturing, but seeks

procurement, engineering, and installation of replacement breakers. Appellant cites the SOW to support its contention that the work is consistent with a contract for construction, not manufacturing. Appellant asserts a manufacturing contract would require end item drawings where the RFQ lacks drawings and includes detailed requirements for the means and methods of construction. Additionally, Appellant argues Cufis is other than small.

C. CO Response

On March 6, 2009, the CO responded to the NAICS Appeal. The CO provided basic information on the RFQ and a copy of Amendment 1. Amendment 1 notifies interested parties of the pending NAICS appeal, indicates the closing date will be revised, states another amendment will be issued after OHA issues a decision, and requires offerors to acknowledge receipt of the amendment.

On March 10, 2009, the CO filed additional background on the RFQ. The CO's response corroborates Appellant's assertion that the RFQ is a reprourement of Solicitation No. W912DW-08-Q-0111. The CO states, after the SBA sustained the size protest against Cufis, the Corps terminated the contract for convenience and issued the RFQ under a different NAICS code. The CO determined the NAICS code assigned to the original solicitation was inappropriate due to the ratio of supplies to services for this requirement based on the Independent Government Estimate. To support her rationale in changing the NAICS code to 335313, the CO supplied a copy of a letter to the U.S. Army Inspector General, dated December 8, 2008, and a copy of the CO's determination to terminate for convenience, dated January 12, 2009. The CO asserts 238210, the original NAICS code, was inappropriate because over 50 percent of the estimated cost of this procurement is for the purchase of the equipment to be installed.

IV. Discussion

A. Timeliness

Appellant filed this appeal within ten days³ after the Corps issued the RFQ. Thus, the appeal is timely. [13 C.F.R. §§ 121.1103\(b\)\(1\), 134.304\(a\)\(3\)](#).

B. Standard of Review

The SBA's regulations do not require a contracting officer to designate the perfect NAICS code. Rather, [13 C.F.R. § 121.402\(b\)](#) charges the procuring agency contracting officer with designating the NAICS code which best describes the principal purpose of the product being acquired in light of the industry description in the NAICS MANUAL,⁴ the description in the solicitation, and the relative weight of each element in the solicitation. To overcome a contracting officer's designation of a NAICS code, an appellant must establish the contracting officer's NAICS code designation is based on a clear error of fact or law. [13 C.F.R. § 134.314](#).

^{*4} The clear error standard is rigorous but not as deferential as review under the arbitrary and capricious standard. See RICHARD S. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 11.2 (4th ed. 2002). For example, Black's Law Dictionary defines clear error as a "trial judge's decision or action that appears to a reviewing court to have been unquestionably erroneous." BLACK'S LAW DICTIONARY 563 (7th ed. 1999). Appellate courts also apply the clear error standard in reviewing a trial court's factual findings. See *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). A reviewing court will not reverse the lower court's finding of fact simply because they would have decided the case differently. *Id.* Instead, the reviewing court will reverse only if, on the basis of the entire evidence, it is left with the "definite and firm conviction that a mistake has been committed." *Id.* (quoting the clearly erroneous standard applied in *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). In *Easley*, the Supreme Court engaged in an extensive review of the lower court's findings, for clear error, and found that the review left them "with the definite and firm conviction" that the lower court's *key findings* were mistaken. *Id.* at 243 (emphasis added).

While NAICS code appeals involve a review of a contracting officer's designation and not a lower court's decision, OHA looks to how the clear error standard has been interpreted in the appellate review setting. Consequently, OHA's review is deferential and OHA will not modify a contracting officer's designated code unless OHA has a "definite and firm conviction that a mistake has been committed." See *Concrete Pipe and Products of Cal. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 623 (1993). OHA will not reverse a contracting officer merely because OHA would have selected a different code. If OHA finds a contracting officer committed clear error or a contracting officer's designation was unquestionably erroneous, only then will OHA select a NAICS code it believes is correct.

C. Analysis

1. Relevant NAICS Code Definitions

NAICS code 335313, Switchgear and Switchboard Apparatus, applies to concerns "primarily engaged in manufacturing switchgear and switchboard apparatus." NAICS MANUAL, at 454-55. Cross-References include: 335314, Relay and Industrial Control Manufacturing; 334419, Other Electronic Component Manufacturing; and 335931, Current-Carrying Wiring Device Manufacturing

NAICS code 238210, Electrical Contractors and Other Wiring Installation Contractors, applies to concerns:

*5 primarily engaged in installing and servicing electrical wiring and equipment. Contractors included in this industry may include both the parts and labor when performing work. These contractors may perform new work, additions, alterations, maintenance, and repairs.

Cross-References. Establishments primarily engaged in—

- Installing and maintaining telecommunications lines by telecommunications companies—are classified in Subsector 517, Telecommunications;
- Constructing power and communication transmission lines—are classified in Industry 237130, Power and Communication Line and Related Structures Construction; and
- Burglar and fire alarm installation combined with sales, maintenance, or monitoring services—are classified in U.S. Industry 561621, Security Systems Services (except Locksmiths).

Id. at 188.

2. The Merits

NAICS code 335314 describes an industry where concerns manufacture switchgear and switchboard apparatus. NAICS code 335314 does not describe an industry where manufacturers expertly install and test vacuum breakers. While it may be true that the greatest cost of the RFQ is the value of the vacuum breakers, cost is not the relevant standard for selecting an appropriate NAICS code. Rather, as provided by 13 C.F.R. § 121.402(b), contracting officers are responsible for selecting the NAICS code that best describes the principal purpose of the product or service being acquired.

The RFQ does not require the successful offeror to supply vacuum breakers on a pallet at the front gate of Fort Lewis for the government to install. Instead, the RFQ requires installation of vacuum breakers by experienced high voltage electricians, in accordance with applicable codes and standards, and testing of the functionality of the installed vacuum breakers. In addition, the successful offeror must provide shop drawings containing wiring diagrams and properly

dispose of the old medium voltage breakers. Based upon the RFQ, the principle purpose of the RFQ, as anticipated by [13 C.F.R. § 121.402\(b\)](#), is that the successful offeror expertly install, test, and document the installation of vacuum breakers (with final shop drawings) while being responsible for the disposal of the old breakers. Hence, it was clear error for the CO to designate NAICS code 335313 to the RFQ.

The definition of NAICS code 238210, Electrical Contractors and Other Wiring Installation Contractors, parallels the text of the RFQ, which requires the successful offeror to install and service electrical wiring and equipment. Moreover, as anticipated in the NAICS MANUAL, the RFQ requires the successful offeror will provide both the parts and labor when performing the work.

V. Conclusion

Based on the foregoing, I GRANT the instant appeal. Accordingly, I REVERSE the CO's NAICS code designation. NAICS code 238210, Electrical Contractors and Other Wiring Installation Contractors, with a corresponding \$14.0 million average annual receipts size standard, is appropriate for the RFQ.

*6 This is the final decision of the Small Business Administration. [13 C.F.R. § 134.316\(b\)](#).

Thomas B. Pender
Administrative Judge

Footnotes

- 1 Appellant indicates the intent to award was issued on February 19, 2009. Appeal, at 3. Although the exact date of intent to award can be of critical importance in determining the timeliness of a size protest, [13 C.F.R. § 121.1004\(a\)\(2\)](#), it is irrelevant in a NAICS appeal and does not influence my decision.
- 2 The SBA changed the size standard for NAICS 238210 to \$14 million to adjust for inflation, effective August 18, 2008. [73 Fed. Reg. 41, 237, 41, 243 \(July 18, 2008\)](#).
- 3 In accordance with [13 C.F.R. § 134.103](#), when the deadline for filing falls on a Saturday, Sunday, or Federal holiday the filing is due on the following business day.
- 4 EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (2007) (hereinafter NAICS MANUAL).
SBA No. NAICS-5030 (S.B.A.), 2009 WL 1030590