

***Office of Dispute Resolution for Acquisition***  
**Federal Aviation Administration**  
**Washington, D.C.**

## FINDINGS AND RECOMMENDATIONS

**Matter: Protest of Four Winds Services, Inc.  
Relating to FAA Aeronautical Center “Mail and  
Distribution Services” Acquisition**

**Docket No.: 02-ODRA-00219**

*Appearances:*

For the Protester: Denis M. Carson, General Manager, Four Winds Services, Inc.

For the Agency Product Team: A. L. Haizlip, Esq., Senior Attorney,  
FAA Mike Monroney Aeronautical Center

## I. Introduction

The protest (“Protest”) of Four Winds Services, Inc. (“Four Winds”) challenges a Public Announcement issued by the FAA’s Mike Monroney Aeronautical Center (“MMAC” or “Center”) on April 11, 2002 (“Announcement”), for the acquisition of “Mail and Distribution Services.” The acquisition is a total set-aside for Small and Economically Disadvantaged Businesses (SEDBs) that are expressly certified under the Small Business Administration (SBA) Section 8(a) Program. In its Protest, Four Winds takes issue with basing eligibility for participation in the acquisition on SBA approval under North American Industry Classification System (NAICS) Code 561499, “All Other Business Support Services.” Four Winds contends that the appropriate NAICS Code for the proposed acquisition would be Code 492210, “Local Messengers and Local Delivery,” and that the Center Product Team, by using Code 561499 in lieu of Code 492210, acted improperly. Four Winds seeks confirmation of its position that the appropriate NAISC Code for the acquisition would be Code 492210, “in view of the clear case precedent and functions described in the Statement of Work.” It also asked that the acquisition process

be put “on indefinite hold” pending resolution of the Protest. After the ODRA received filings from both parties on that issue, the ODRA Director advised that the ODRA would not recommend such a “hold” to the Administrator, because Four Winds had failed to present compelling reasons for a stay of procurement and because contract award, scheduled for September 30, 2002, would long post-date the review and resolution of the matters at issue.

Subsequent to the filing of the Protest, the parties explored the possibility of engaging in alternative dispute resolution (ADR) pursuant to the ODRA Procedural Regulations, determined that they would not be able to utilize ADR to resolve the Protest, and notified the ODRA of their desire to proceed with adjudication under the ODRA’s Default Adjudicative Process. The ODRA’s Richard C. Walters, Esq., was designated the Dispute Resolution Officer (DRO) for purposes of the adjudication. The Center submitted its Product Team Response (Agency Report) with respect to the Protest, and Four Winds provided the ODRA with comments on the Response. For the reasons stated below, the ODRA finds that Four Winds failed to meet its burden of establishing that the Center Product Team lacked a rational basis for selecting NAICS Code 561499 for the instant acquisition. Accordingly, the ODRA recommends that the Protest be denied.

## **II. Findings of Fact**

1. By Public Announcement posted on the Internet on April 11, 2002, the Center Product Team announced a requirement for “mail distribution” services at the MMAC in Oklahoma City, Oklahoma. The acquisition is to be a firm-fixed price type contract for one year with options to renew for four additional one year periods. Agency Report (“AR”), Tab 3. The Announcement describes the requirement as follows:

The contractor will be required to provide all personnel, equipment, tools, materials, supervision, and other items and services, except for those specified as Government-furnished, to accomplish the following: (1) processing all incoming and outgoing mail for the MMAC; (2) sorting inter-office mail; (3)

distribution bulk issuance of publications; (4) receiving, storing, and shipping FAA and other publications.

*Id.*

2. The requirements were described in greater detail in an accompanying Performance Work Statement (PWS). PWS Section 1.1, "Scope of Work," contains two subsections, ¶1.1.1 "Mail and Distribution" and ¶1.1.2 "Payroll."

These read as follows:

#### 1.1.1 Mail and Distribution

The contractor shall provide all personnel, equipment, tools, materials, supervision, and other items and services except for the (sic) specified as "Government-Furnished" in Section C-3 and Technical Exhibit 5C, necessary to accomplish: processing all incoming and outgoing mail for the Mike Monroney Aeronautical Center (MMAC); sorting inter-office mail; delivery and pickup includes: picking up all incoming mail from the US Post Office and both routine (daily ongoing) mail and priority mail. Customers include all Aeronautical Center organizations and tenant organizations in any and/or all of the Center buildings and off center sites. Initial delivery for letters will begin from room 17 in the basement of the Multi-Purpose Building (MPB); delivery for flats and boxes will begin from the ILS Building #109 after being inspected. Distribution of bulk issuances of publications; as defined in this Performance Work Statement (PWS); Processing payroll, travel advance delinquency notice letters and W-2 payroll forms. The contractor shall perform to the standards of the contract. The estimated quantities of work are listed in Technical Exhibit 2, Workload Estimates.

1.1.1.2 The Contractor will receive parcels from USPS, FedEx, UPS and other major carriers. All parcels will be inspected in the ILS Building, #109. The parcels will vary in size and shape and will weigh up to 150 lbs. The number of parcels will vary from day to day not to exceed 5,000 parcels. The Contractor is responsible to catalogue parcels either manually or through automated capabilities for the tracking and verification.

### 1.1.2 Payroll

1.1.2.1 The contractor shall furnish all personnel, including supervisor(s) necessary to:

- a. Consolidate by distribution code.
- b. Place in appropriate mailing containers.
- c. Affix mailing addresses and any appropriate markings or stampings on the mailing containers, and
- d. Place the mailing containers into the appropriate mailing channels for the following documents/forms/reports/correspondence:  
Time & Attendance (T&A) Report, DOT F.2740.2  
Statement of Earnings and Leave, DOT Form 2740.1  
Leave Report (SYS-CTL: 201)  
Overtime Report/Region by Individual (SYS-CTL: 076)  
U.S. Coast Guard Payroll Register (SYS-CTL: 201)  
Payroll Office Newsletter  
Form W-2, Wage and Tax Statement (SYS-CTL: 034)  
Form 1099-INT, Interest Income  
Retirement Letters

*Id.*, Performance Work Statement, Section C-1, General, page 1.

3. Performance Work Statement, Section C-5, "Specific Tasks," provides yet further detail on the work that will be required. In addition to pick-up and delivery of letters and parcels, the contractor will be required to receive in bulk, warehouse, and distribute a wide variety of publications (*Id.*, Sections 5.2 and 5.3, pages 14-16), and perform a number of administrative tasks, including *inter alia*: providing walk-in customer assistance at a service desk; creating mailing lists; producing address labels; maintaining equipment; reordering supplies and materials, etc. *Id.*, Section 5.5, pages 17-18.
4. The Announcement states that the acquisition is to be a  
set-aside exclusively for competitive award among Socially and Economically Disadvantaged Businesses (SEDBs) that are expressly certified by the Small Business Administration (SBA) for participation in the SBA's 8(a) program at the time of release of this public announcement.

AR, Tab 3, Announcement, page 1.

5. The Announcement goes on to specify the applicable North American Industry Classification System (NAICS) Code for the acquisition and to state that any prospective offeror will be subject to review and verification for eligibility in this connection:

To be considered the vendor must be approved by SBA under the North American Industry Classification System (NAICS) code 561499, All Other Business Support Services, \$5/million.<sup>1</sup> The FAA will review and verify each firm's program eligibility.

*Id.* The NAICS is the successor to what had been the United States Standard Industrial Classification (SIC) system. The NAICS was developed jointly by the governments of the United States, Canada, and Mexico in order to "provide new comparability in statistics about business activity across North America." See <http://www.census.gov/epcd/www/naics.html>. NAICS Code 561499 replaced and superseded SIC Code 7389, which had been entitled "Business Services, Not Elsewhere Classified."

6. On April 15, 2002, Four Winds filed the instant Protest with the ODR, challenging as improper the selection of NAICS Code 561499, contending that the appropriate code should have been NAICS Code 492210, which corresponds to the now superseded SIC Code 4215. Unlike NAICS Code 561499, which had a \$5 million average annual receipts size standard<sup>2</sup> – a standard under which it appears Four Winds no longer qualifies – NAICS Code 492210 has a size standard of \$18 million average annual receipts.<sup>3</sup> According to Four Winds' Protest, the SBA Office of Hearings and Appeals had consistently held that, for mail distribution services contracts such as the one contemplated here for the MMAC, the appropriate SIC Code was Code 4215, and not Code 7389. In support of this contention, the Protest cites to

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<sup>1</sup> The size standard was increased by the SBA to \$6 million as of February 22, 2002. See AR, Tab 13, page 3.

<sup>2</sup> See Note 1 above.

<sup>3</sup> This size standard also appears to have been increased, to \$21.5 million. See Four Winds letter of May 22, 2002, Exhibit 1.

five decisions of that Office. The Protest asserts that, based on a review of the Statement of Work, 75% of the work under the proposed contract would be that of “Mail Messenger,” and requests that the Administrator “uphold the assignment of the NAICS/SIC codes 492210/4215 [“Local Messengers and Local Delivery”] in view of the clear case precedent and functions described in the Statement of Work.” The Protest requests further that an “indefinite hold” be placed on the acquisition pending resolution of the NAICS Code issue. Four Winds also raises the possibility that the matter be referred to the SBA Office of Hearings and Appeals, “since they alone have the responsibility of determining the application of the correct NAICS/SIC codes for all agencies not exempt from the SBA Regulations and the fact that the SBA under 13 CFR Part 121 is the issuing Authority for the use of the NAICS/SIC codes and their descriptions.” Protest, page 2.

7. As to the request for an “indefinite hold” on the acquisition, the Center Product Team voiced its opposition in a letter to the ODRA dated April 17, 2002, citing the following reasons as to why such a “hold” would be problematic:
  - a. Current contract No. DTFA-02-97-97035 will expire on September 30, 2002. As a result, any delay in the procurement process will ultimately cause the FAA to negotiate an extension of the existing contract with Four Winds, the incumbent contractor, to ensure continued uninterrupted mail and distribution services. Any contract extension(s) of these services will be at the expense of competition.
  - b. The FAA has applied the same Standard Industrial Classification (SIC) code (7389) /\$5M size standard for the previous three contracts over a 15-year period for mail and distribution services performed at the Mike Monroney Aeronautical Center (MMAC).
  - c. Historically, SIC code 7389, and now its corresponding North American Industry Classification System (NAICS) code (561499), has been utilized because these type of mail and distribution services have been deemed appropriate by the FAA and the IPT [Integrated Product Team] for entry-level Socially and Economically Disadvantaged Business (SEDB) set-asides (formerly 8(a) set-asides). The FAA estimates the cost for the total

5-year period for this requirement (DTFA-02-02-R-07074) to be less than \$5M.

- d. Four Winds competed for and won the previous requirement for mail and distribution services performed at the MMAC where participation was limited to 8(a) firms qualifying under SIC code 7389. Now that Four Winds no longer qualifies under the corresponding NAICS code of 561499, it wants NAICS code 492210 to apply. NAICS code 492210 carries an \$18M size standard.
- e. While Four Winds cites several precedents of successful appeals to the Small Business Administration of this issue, the FAA is exempt from the Small Business Act (15 U.S.C. 631 et seq.) and is therefore able to provide reasonable opportunities to SEBDs it considers appropriate. In this case, the IPT with coordination of the FAA MMAC Small and Disadvantaged Business Utilization Specialist (SADBUS) determined these mail and distribution services to be an entry-level requirement for SEBDs through use of NAICS code 561499.

AR, Tab 6, April 17, 2002 Product Team letter, pages 1-2.

- 8. By letter dated April 18, 2002, Four Winds responded to this opposition, as follows:
  - 1) Any delay in the procurement process is solely at (sic) the fault of the FAA IPT since we have provided these cases for well over a year and no decision was finalized until the publication of the solicitation. Even with an extension there is the Option to extend services clause in the contract that allows for uninterrupted services. As the case law is clear and the precedence has been set, if and when it is upheld will increase competition with no expense as stated. The only expense would be the degradation of the procurement process in not using the correct SIC/NAICS that best describes the work to be performed.
  - 2) The correct statement should have been, The FAA has applied the wrong SIC for the last three contracts unchallenged for the last 15 years. The defense of “that’s the way its always been” is the same defense that the University of Maryland used until Thurgood Marshall challenged the “separate but equal” issues that had been allowed to become the way of the land since 1898, by reversing Plessy v. Ferguson in the Supreme Court.

- 3) If the intent of the AMS to compete contracts for certain targeted size companies why have a SIC/NAICS requirement that defines the scope of work and assigns a size standard for determining what is considered to be a Small Business. This excuse appears to be away (sic) of circumventing the sole source award that previously existed within the FAR but was negated to the most part by the AMS. The AMS is clear in it's (sic) requirement to assign a SIC/NAICS even though the FAA is exempt from the Small Business Act. This requirement if not upheld to the highest standards would become a double-edged sword. For example, if we were to say the use of the incorrect SIC/NAICS for the nature of the work was allowed to be used, because of the exemption, than (sic) the Small Business Size could not be enforced either.
- 4) Yes, Four Winds did compete and was successful under the qualifying SIC 7389 and from the pre-performance conference to now has told everybody from contracting to the user that it was the wrong SIC. The point is not weather (sic) we qualify under this SIC that is in question the point is that they are applying the wrong SIC. All as (sic) we are asking is to apply the correct SIC for the scope of work being performed.
- 5) The point of this whole discussion is that SIC/NAICS are being used as required by the AMS. Not having been an author of the AMS I can only assume that the requirement to use the SIC/NAICS in the procurement process was to use it's (sic) application correctly otherwise exceptions would have been addressed within the AMS. The point of our protest is that IPT and the SADBUS are misapplying the SIC/NAICS for the work that is in fact being performed for reasons that are not allowable. To use the correct SIC/NAICS does not negate their intent nor prevent entry level SEDB's (sic) from competing but enhances this opportunity for even more companies to compete because of the larger size standard.

To state our case simply the IPT is attempting to force a square peg into a round hole and it does not fit. Every case we presented discusses the use of SIC 7389 as being a square peg. There is not one case of record that upholds the use of SIC 7389 as a usable SIC for Mail Distribution. As written within every appeal presented the Administrative Judge has stated: "The correct SIC code is that which best describes the principle purpose of the



services being performed, in light of industry description in the SIC Manual, the description in the Solicitation and the relative weight of each element in the solicitation, 13 CFR, 121.402(b). The stand (sic) of review is whether the SIC designation is based on a clear error of fact or law. At no time has the Contracting Officer nor the IPT refuted SIC/NAICS 4215/492210 as being correct, but have simply stated we don't want to use it.

AR, Tab 7, Four Winds letter of April 18, 2002.

9. During a telephonic status conference in this matter conducted by the ODRA on April 19, 2002, the ODRA Director advised the parties that the ODRA had considered the arguments relating to the request for the "indefinite hold" and would not recommend to the Administrator that she stay procurement in this case, since Four Winds had not provided the "compelling reasons" necessary for obtaining a stay of procurement under the AMS and since the matters at issue would be resolved well in advance of the prospective contract award date of September 30, 2002. ODRA Status Conference Memorandum of April 19, 2002. During the same status conference, the parties were asked to confer, with the assistance of William R. Sheehan, Esq., an attorney at the FAA Technical Center and an adjunct ODRA Dispute Resolution Officer, to explore options for using alternative dispute resolution (ADR) to resolve the Protest.
10. Having failed to agree on the use of ADR, the parties advised the ODRA that the matter would have to proceed into the ODRA's Default Adjudicative Process. Accordingly, the ODRA's Richard C. Walters, Esq. was designated the Dispute Resolution Officer for purposes of adjudication.
11. The Center Product Team on May 14, 2002 filed with the ODRA its Product Team Response (Agency Report) with respect to the Protest. In the Response, the Product Team disputes the applicability of SBA case precedent to any procurement under the FAA's Acquisition Management System (AMS), based

on the language of Section 348 of the 1996 Department of Transportation Appropriations Act, Public Law 104-50, expressly providing that the Small Business Act (15 U.S.C. §631, et seq.) “not apply” to the AMS. In the Response, the Product Team notes that, notwithstanding this express “exemption,” the FAA voluntarily supports “the concepts, ideas and objectives articulated by the Small Business Administration and the Small Business Act.” AR, Federal Aviation Administration’s Legal Defenses, page 5. The Product Team Response also indicates that, in part, due to its smaller \$5 million (now \$6 million) business size standard, NAICS Code 561499 was selected, because it would restrict the acquisition to *entry-level* small disadvantaged business entities and thus further the FAA small business utilization program’s aim of fostering the growth of such companies:

Both the IPT and Mr. Lewis, as the SADBUS [Small and Disadvantaged Business Utilization Specialist], determined these mail and distribution services to be an entry-level requirement for SEDBs through use of NAICS code 561499. . . . Additionally, the IPT working in conjunction with the local SADBUS deemed these services to be appropriate for an SEDB set-aside at the entry-level size standard (e.g., \$6M – 561499 v. \$18M<sup>4</sup> – 492210) for SEDBs. . . . The IPT believes that its consideration of the entry-level size standard to be important and consistent with its responsibilities as part of the Procurement Team. Paragraph A.1 of the AMS Toolbox T3.6.1 outlines Procurement Team responsibilities in support of the small business utilization program. A specific responsibility (paragraph A.1.b) calls for the Procurement Team to “Develop small businesses by taking all reasonable action to increase small business participation in the FAA’s procurements (including subcontracts).” Hence consideration of entry-level size standards along with other considerations applicable to the selection of the NAICS Code is not inappropriate.

AR, Tab 13, pages 1, 4 and 5.

12. The Product Team goes on to explain that it considers the selection of NAICS Code 561499, “All Other Business Support Services,” also to have been appropriate, because, contrary to Four Winds’ assertion, 75% of the work

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<sup>4</sup> See Note 3, above.

under the contract would not be that of “Mail Messenger.” The Product Team put forth the results of its analysis of hours expended by Four Winds over a 9-month period in the performance as the incumbent contractor on the current contract, which the Team asserts indicate that only 36.3% of the hours expended were for mail delivery and that the remainder of hours were for a variety of other tasks:

Percentage of time – Administrative	14.5%
Percentage of time – Payroll Functions	11.9%
Percentage of time – Mail Presorting Services	20.6%
Percentage of time – Distributes Publication/ Directives	5.6%
Percentage of time – Machine Operators	11.1%
Percentage of time – Delivery Mail	36.3%

AR, Tab 11, page 1.

13. Finally, the Product Team Response notes, the corresponding SIC Code (7389) has been in place for the current contract and the two preceding contracts, for a period totaling almost 15 years. In this regard, the Product Team states: “When SIC Code 7389 was selected as appropriate for “Mail and Distribution Services” performed at the MMAC almost 15 years ago, consideration was given to the nature and scope of work to be performed.” AR, Tab 13, page 4.

14. By letter dated May 16, 2002, Four Winds provided the ODRA with comments with respect to the Product Team Response. Four Winds again raised, as a “threshold matter,” the possibility that the case be transferred to the SBA Office of Hearings and Appeals and disclaimed any notion that such a transfer was being “requested” by Four Winds:

Before proceeding as a threshold matter, I must clarify a couple of points that have been brought up throughout the response from the Aeronautical Center. ODRA is still empowered to transfer cases to other agencies that it has Agency MOU’s (sic) with, such as GSBCA, if desired by ODRA? My remark to the Office of Hearing and Appeals was preemptive if such an MOU existed, since there was no case precedence involving SIC usage within ODRA decisions. My statement was verbatim “FWSI has no

objection if the ODR wishes to release this case to the SBA, Office of Hearing and Appeals, since they alone have the responsibility of determining the application of the correct NAICS/SIC codes for all agencies not exempt from the SBA Regulations and the fact that the SBA under 13 CFR Part 121 is the issuing Authority for the use of the NAICS/SIC codes and their descriptions[.]” (Underlined for emphasis). I was confused as I made a statement of non-objection which in turn has been made into “I **requested** to refer this matter to the SBA” which is also inappropriate and repeated out of context. Yes, I am aware that the FAA is exempt from the Small Business Act, as I thought I made that clear also.

Four Winds May 16, 2002 Comments, page 1 (emphasis in original).

15. The Four Winds Comments go on to assert that, “although the FAA is exempt from the Small Business Act,” the AMS still contemplates use of SIC/NAICS codes and, in that context, FAA Contracting Officers and Product Teams must use the codes correctly, in the manner “defined by the SBA.” In this regard, Four Winds states: “I have reviewed the AMS and could not find one reference that would empower the IPT to select an SIC arbitrarily to meet a defined Dollar sized company.” *Id.*, page 5. Four Winds, in its Comments, also takes issue with the Product Team’s analysis of hours expended by Four Winds as incumbent contractor during a 9-month period on the current “mail and distribution service” contract. More particularly, in terms of establishing the “predominant portion of the overall requirement,” Four Winds disputes the Product Team’s assignment of a percentage of the hours to a work category of “Mail Presort Services,” a category of work that is specifically included in the definition of work under NAICS Code 561499, contending:

A Presort Service separates mail for reduced postage at USPS not for sorting for delivery by mail clerks. If you review the cases that I provided, a variety of Mail Services including: receiving, sorting (processing), and distributing are all one function as well as applying postage, maintaining records, and other administrative functions.

*Id.*, page 5. Four Winds appears to argue that, by combining the percentages of hours for Mail Sorting and Mail Delivery (20.6% and 36.3%, respectively), the “predominant portion of the overall requirement” (56.9% -- *i.e.*, “greater

than 50%”) for the instant procurement would be work covered by SIC Code 4215/NAICS Code 492210, and that, accordingly, that code should be used rather than NAICS Code 561499. *Id.*

16. The ODRA DRO, by letter to the parties dated May 20, 2002, addressed the definition of “Mail Presorting Services” and requested that both parties provide additional input relating to that definition.
17. By letter dated May 22, 2002, filed with the ODRA on May 24, 2002, Four Winds submitted a response to the ODRA’s request for authority regarding its definition of “mail presorting services.” Four Winds showed, among other things, that the U.S. Postal Service charges lower postage rates for mail that is “pre-sorted” by customers prior to mailing (*Id.*, Exhibit 7), and that there are firms that do pre-sorting as a business service to take advantage of postal rate discounts associated with pre-sorted mail. *Id.*, Exhibits 3, 4, 7 and 8.
18. The Center Product Team, in its response letter of May 24, 2002, states that it had considered the term “mail presorting services” as representing “sorting of mail in advance of delivery” and used “mail presorting services (presort)” and “sort” “interchangeably.” The Product Team asserts that, despite numerous efforts to find a “standard or universally accepted” definition of “mail presorting services,” it could not find one. Hence, it urges that its “interpretation of the term and its application to the requirement” in using NAICS Code 561499 was not “inappropriate.”
19. As to the use of NAICS Code 492210, the Product Team indicates that the kind of mail handling and distribution contemplated by the instant procurement (which includes substantial commingling with similar items, sorting and re-delivery) could not be categorized as the “point-to-point pickup and delivery services” described in the NAICS definition for NAICS Code 492210 – which, based on its research, the Team appears to assert must be

equated with “direct delivery.” The Product Team further states that, of the 26,816 total hours expended by Four Winds (*i.e.*, during the 9-month period in question), only 3,740 hours, or 13.9%, could properly be characterized as “point-to-point pickup and delivery service.” Product Team letter of May 24, 2002, pages 2-4.

20. Upon receipt of the two filings on May 24, 2002, the administrative record was closed.

### **III. Discussion**

As the ODRA has stated on many occasions, in the context of resolving bid protests, the ODRA will not recommend that the Administrator overturn Agency actions, so long as they have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *Protest of Computer Associates International, Inc.*, 00-ODRA-00173, citing *Protests of Information Systems & Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, *aff'd* 203 F.3d 52 (D.C. Cir. 1999); and *Protests of Camber Corporation and Information Systems & Networks, Inc.*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated). It will not substitute its judgment for that of the Product Team. See *Protest of Information Systems & Networks Corporation*, 99-ODRA-00116.

As the Product Team correctly points out, and Four Winds itself acknowledges, the Congress in Public Law 104-50, made the Small Business Act inapplicable to the FAA’s acquisition process. Thus, even though the ODRA may wish to consult decisions of the SBA Office of Hearing and Appeals as “persuasive authority” with respect to such matters as the interpretation of SIC and NAICS codes, those decisions are by no means

binding precedent on the ODRA.<sup>5</sup>

Upon review, it appears that none of the SBA Office of Hearing and Appeals decisions cited and furnished by Four Winds interpret the NAICS codes, but deal strictly with the propriety of using SIC Code 7389, “Business Services, Not Elsewhere Classified” -- and in two cases SIC Code 8744, “Facilities Support Management Services” – rather than SIC Code 4215, “Courier Services, Except by Air.” Thus, even if those cases were to be considered binding authority, which they are not, they would have no direct bearing on the only issue in this case, namely, whether the Product Team had a rational basis for selecting NAICS Code 561499, “All Other Business Support Services,” for use in conjunction with the MMAC “Mail and Distribution Services” contract.

In the present case, although both parties assume that the NAICS codes and their corresponding predecessor SIC codes should be considered equivalent, in fact, they are not identical, and their wording differences can be significant. The ODRA notes that both SIC Code 7389 and SIC Code 8744 are limited in use to those business establishments that are “not elsewhere classified.” According to the SBA Office of Hearings and Appeals, SIC Code 7389 was described in the SIC Manual, as follows:

Establishments primarily engaged in furnishing business services, ***not elsewhere classified***, such as bonds persons, drafting services, lecture bureaus, notaries . . .

*Four Winds Services, Inc.*, Docket No. SIC-94-8-16-108, SBA No. 3968 (emphasis supplied). Similarly, according to the SBA Office of Hearings and Appeals, “Facilities

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<sup>5</sup> Contrary to Four Winds’ assumption, although the ODRA has an Interagency Agreement with the General Services Administration Board of Contract Appeals (GSBCA) under which the GSBCA makes available its Administrative Judges to serve as ODRA Special Masters, any opinions rendered by those Administrative Judges in ODRA matters are **not** GSBCA opinions, but rather findings and recommendations to the FAA Administrator (or her delegee) made by Special Masters under the auspices of the ODRA, in accordance with the ODRA Procedural Regulations, 14 C.F.R. Part 17. The ODRA has no authority to “transfer” or “release” its cases to other forums such as the SBA Office of Hearings and Appeals, under MOUs or otherwise, regardless of expertise in particular areas of the law. In a case such as this, where an FAA procurement specifies certification under an NAICS Code among the qualifications for a prospective contractor, and the use of that Code has been challenged by means of a bid protest, the ODRA has exclusive jurisdiction to determine whether the specification is proper under the AMS.

Management,” a subcategory of SIC Code 8744, “Facilities Support Management Services,” was described in 13 CFR 121.601, as follows:

Establishments, *not elsewhere classified*, which provide overall management and personnel to perform a variety of related support services in operating a complete facility . . . .

*RAI*, Docket No. SIC-93-6-16-70, SBA No. 3808 (emphasis supplied). In contrast, SIC Code 4215, “Courier Services, Except by Air” was described as applying to:

Establishments primarily engaged in the delivery of individually addressed letters, parcels, and packages (generally under 100 pounds), except by means of air transportation or by the United States Postal Service. Delivery is usually made by street or highway within a local area or between cities.<sup>6</sup>

*Id.* The Office of Hearings and Appeals in *RAI*, *supra*, emphasized that the “Facilities Management” classification is “only applicable where the services to be rendered” are “*not elsewhere classified*.” *Id.* (emphasis supplied). Because it found SIC Code 4215 to “encompass” the services being procured by the Justice Department, which it found to “predominantly involve mail processing and delivery functions,” it rejected the appellant’s argument that the agency’s use of SIC Code 4215 in that case – rather than SIC Code 8744 – had been improper.

The NAICS does not have similar restrictive language for the use of NAICS Code 561499. To the contrary, rather than limiting the use of that code to situations that cannot be fit into other classifications, the code applies to “**all**” “other business support services” and the only restriction that seems to be imposed on the use of Code 561499 is that it cannot be used for establishments that are covered specifically by other sub-categories of “business support services” within the NAICS Category 561, Administrative and Support Services:

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<sup>6</sup> Interestingly, the NAICS divides courier and messenger service establishments into intercity establishments (NAICS Code 492110, “Couriers” – which include courier services and local letter and parcel delivery services that are part of intercity networks) and strictly local establishments (NAICS Code 492210, “Local Messengers and Local Delivery” – which include only those courier and delivery services that are within a single city or metropolitan area).



### **561499 All Other Business Support Services**

This U.S. industry comprises establishments primarily engaged in providing business support services (except secretarial and other document preparation services [covered by NAICS Code 561410, Document Preparation Services]; telephone answering and telemarketing services [covered by NAICS Code 561421, Telephone Answering Services, and NAICS Code 561422, Telemarketing Bureaus]; private mail services or document copying services conducted as separate activities or in conjunction with other office support services [covered by NAICS Code 561431, Private Mail Centers, and NAICS Code 561439, Other Business Service Centers (including Copy Shops)]; monetary debt collection services [covered by NAICS Code 561440, Collection Agencies]; and credit reporting services [covered by NAICS Code 561450, Credit Bureaus]; repossession services [covered by NAICS Code 561491, Repossession Services]; and court reporting and stenotype recording services [covered by NAICS Code 561492, Court Reporting and Stenotype Services]).

See AR, Tab 10; <http://www.census.gov/epcd/naics/NDEF561.HTM>.

In the present case, even if *arguendo* the “mail and distribution services” described in the Statement of Work were properly able to be categorized under NAICS Code 492210, “Local Messengers and Local Delivery,” such services also would be “business support services” and would not be covered by the handful of service types addressed by the other sub-categories of NAICS Code Category 561, Administrative and Support Services, that are excepted from the definition of “other business support services.” Further, there is nothing in the NAICS itself that would preclude an agency from utilizing NAICS Code 561499, All Other Business Support Services, in connection with an acquisition for such services. Likewise, there is nothing in the AMS or other applicable law, regulation or guidance that would preclude an FAA Product Team from considering potential impacts on the Agency’s small business utilization program (such as limiting participation in the acquisition to smaller, “entry-level” firms) when selecting among NAICS codes.

The AMS Toolbox Guidance clearly indicates that, in selecting an NAICS code for use when contracting with small business entities, the FAA should choose a code that “is applicable” and that represents the “predominant portion of the overall requirement”:

(5) Industry should be notified of the applicable North American Industry Classification (NAIC) System code ***representing the predominant portion of the overall requirement in the public announcement*** to ensure small business size eligibility requirements are timely known.

AMS Toolbox Guidance: Procurement Guidance/T.3.6.1, Small Business Utilization Program (Revised 02/2001), Section A, Small Business Utilization, Paragraph 3, PRIME CONTRACTING WITH SMALL BUSINESSES, Subparagraph (5). In this regard, the Product Team, by means of its 9-month study of hours expended by Four Winds under its current contract at the Center, sought to demonstrate that MMAC “mail and distribution services” are not “predominantly” the services that are described in the NAICS definition of NAICS Code 492210, Local Messengers and Local Delivery. Four Winds has challenged that analysis and has presented some evidence to support its position that the analysis was flawed in terms of its characterization of a portion of the work as “mail presorting services.” (Finding 17).

Nevertheless, even if the ODRA were to conclude that Four Winds is correct in this regard, it has not demonstrated that the broad descriptive language of the NAICS Code selected by the Product Team – NAICS Code 561499 – was not also “applicable,” *i.e.*, that it would not also “encompass” the services to be provided, including mail and package “sorting” and “processing” of any nature (regardless of whether or not such “sorting” properly could be categorized as “mail pre-sorting services”), as well as the “point-to-point pickup and delivery service” that Four Winds maintains was the “predominant portion of the overall requirement.” Thus, Four Winds has not shown that the Product Team’s action in selecting NAICS Code 561499 for the MMAC “mail and distribution services” procurement lacked a rational basis. In the context of this bid protest, the ODRA will not substitute its judgment for that of the Product Team as to which of two “applicable” NAICS codes is more appropriate for use. *See Protest of Information Systems & Networks Corporation, supra.*

#### **IV. Conclusion**

For the foregoing reasons, the ODRA finds that Four Winds has not borne its burden of demonstrating that the Product Team lacked a rational basis for selecting NAICS Code 561499 for the instant acquisition. Therefore, it recommends that the Protest be denied.

\_\_\_\_\_/s/\_\_\_\_\_  
Richard C. Walters  
Dispute Resolution Officer  
FAA Office of Dispute Resolution for Acquisition

APPROVED:

\_\_\_\_\_/s/\_\_\_\_\_  
Anthony N. Palladino  
Associate Chief Counsel and Director  
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