

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

NAICS APPEAL OF:

King's Thrones LLC,

Appellant,

Solicitation No. 075360B CSW
Montana DNRC
Helena, Montana

SBA No. NAICS-4845

Decided: April 18, 2007

APPEARANCE

Tamara Ragains, Owner, Kings's Thrones LLC, Lewiston, Idaho

DECISION

I. Introduction and Jurisdiction

On April 10, 2007, King's Thrones LLC (Appellant) filed a North American Industry Classification System (NAICS) Appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) after the agency responsible for issuing Solicitation No. 075360B CSW (solicitation) informed Appellant, in the text of an e-mail dated April 9, 2007, that the solicitation “shall be issued under NAIC (sic) code 115310 thus settling the dollar limit for business to be considered as small businesses at \$16,500,000.” Appellant contends that the proper NAICS code for the procurement should not be 115310, Support Activities for Forestry, but rather should be NAICS code 562991, Septic Tank and Related Services, with a \$6.5 million dollar size standard.

While Appellant's argument that NAICS code 562991 is the proper code for this procurement is correct, this appeal presents an important threshold issue to consider. Specifically, I must first decide whether the appeal is timely because Appellant's appeal came more than 10 days after the issuance of the solicitation. Normally, OHA would dismiss a NAICS code appeal filed more than 10 days after the issuance of a solicitation as untimely under 13 C.F.R. § 134.304(a)(3) and (4). However, the solicitation did not designate a NAICS code, while containing clauses that made designation of the NAICS code mandatory. Accordingly, for reasons I will explain further below, the appeal is timely.

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 matter is properly before OHA for decision.

II. Issues

1. Must a small business set-aside solicitation first designate a NAICS code for the 10 day appeal period under 13 C.F.R. § 134.303(a)(3) to be relevant?
2. Does a procurement for portable toilets and other sanitary services to support fire fighters fighting forest fires require the designation of NAICS code 562991, Septic Tank and Related Services?

III. Facts

1. On February 16, 2007, the Montana Department of Natural Resources and Conservation (DNRC) first issued Solicitation No. 075360B CSW, an invitation for bids (IFB) for “Portable Toilet and Hand Washing Station Rentals for multiple Federal and State Agencies throughout the Northern Rockies Geographic Area.” DNRC did not provide a closing date for the IFB and accordingly DNRC re-issued the IFB on March 29, 2007 and set the closing date for bids as April 19, 2007.

2. The solicitation anticipated that orders would be placed against a contract arising from it. Moreover, as constructed, the solicitation is a hybrid between state forms and federal forms. In fact, the solicitation, at page 2, states:

The Montana Department of Natural Resources and Conservation (DNRC), The Idaho Department of State Lands (IDSL), the USDA Forest Service (FS), the Bureau of Land Management (BLM), Bureau of Indian Affairs (BIA), Fish and Wildlife Service (FWS), and the National Park Service (NPS), are hereby authorized to use the agreement in accordance with the terms and conditions set forth herein.

NOTE: When equipment covered by the agreement is under hire by one of the federal agencies, Attachments A, B, C, D and E will apply. When equipment covered by the agreement is under hire by the State of Montana DNRC, Attachments A, C, E and the DNRC general terms and conditions will apply. When equipment covered by the agreement is under hire by the State of Idaho Department of state lands, Attachments A, C, F will apply. A given piece of equipment can be under hire to only one agency at a time.

(emphasis omitted).

3. IFB Attachment A contains information generally applicable to all offerors.

a. The first division (Division A) addresses payment and order terms. In addition, it contains a requirement for offerors to be registered on the Central Contractor Registration Database (CCR).

b. The second division (Division B) contains the Technical Specifications. In general, the technical specifications only describe requirements for portable toilets and hand washing stations.

4. IFB Attachment B contains Federal Acquisition Regulation (FAR) clauses (starting on page 13). The clauses cited apply to part 12 of the FAR, which means the IFB is for the purchase of Commercial Items. FAR Clause 52-219-6, Notice of Total Small Business Set-Aside (June 2003) was checked as applicable. Starting on page 18 of the IFB are Offeror Representations and Certifications — Commercial Items. The first reference to NAICS codes is on page 18, which is relevant to the emerging small business language. The second reference is directly applicable and addresses the annual representations and certifications (ORCA) applicable to the NAICS code referenced for the solicitation.

5. The IFB does not designate a NAICS code.

6. On or before April 9, 2007, Appellant conducted conversations with the DNRC purchasing agent responsible for the IFB. In response to these conversations the Purchasing Agent sent an April 9, 2007 e-mail to Appellant that stated, in relevant part:

In order to address your concerns over this solicitation being issued under the proper NAIC codes I contacted Debby Y Wesselius who is a contracting officer with the US Forest Service in Missoula MT. Ms Wesselius instructed me that this solicitation shall be issued under NAIC Code 115310 thus setting the dollar limit for businesses to be considered as small business at \$16,500,000.

[Text is per the e-mail.]

7. Approximately one day after receiving the DNRC April 9, 2007 e-mail Appellant filed the instant appeal with this office. Appellant alleged:

a. It is a woman-owned small business;

b. That a designation of NAICS code 115310 and a resulting size standard of \$16.5 million was incorrect given the description of that code in the applicable Manual;

c. That Appellant did not have the capacity to meet that NAICS code; and

d. NAICS code 562991, Septic Tank and Related Services, was the correct NAICS code.

In support of its argument Appellant cited to applicable portions of the CFR, provided an excerpt from the 2002 NAICS *Manual*¹ (*Manual*), and included copies of cover pages to solicitations designating NAICS code 562991.

8. The *Manual* describes NAICS code 562991, Septic Tank and Related Services, as:

This U.S. industry comprises establishments primarily engaged in (1) pumping (i.e., cleaning) septic tanks and cesspools and/or (2) renting and/or servicing portable toilets.

9. The *Manual* describes NAICS code 115310, Support Activities for Forestry, as:

This industry comprises establishments primarily engaged in performing particular support activities related to timber production, wood technology, forestry economics and marketing, and forest protection. These establishments may provide support activities for forestry, such as estimating timber, forest firefighting, forest pest control, and consulting on wood attributes and reforestation.

IV. Discussion

A. Applicable Regulations

The primary regulation requiring the use of NAICS codes in federal procurements is 13 C.F.R. § 121.402. In relevant part, it provides:

(a) A concern must not exceed the size standard for the NAICS code specified in the solicitation. The contracting officer *must specify the size standard in effect on the date the solicitation is issued*. . . .

(b) The procuring agency contracting officer, or authorized representative, designates the proper NAICS code and size standard in a solicitation, selecting the NAICS code which best describes the principal purpose of the product or service being acquired. Primary consideration is given to the industry descriptions in the NAICS United States Manual, the product or service description in the solicitation and any attachments to it, 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 purchased. . . .

(c) The NAICS code assigned to a procurement and its corresponding size standard is final unless timely appealed to SBA's Office of Hearings and Appeals (OHA), or unless SBA assigns an NAICS code or size standard as provided in paragraph (d) of this section.

¹ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System Manual* (2002).

(d) An unclear, incomplete or missing NAICS code designation or size standard in the solicitation may be clarified, completed or supplied by SBA in connection with a formal size determination or size appeal.

(e) Any offeror or other interested party adversely affected by an NAICS *code designation* or size standard designation may appeal the designations to OHA under part 134 of this chapter.

(emphasis added).

Any person adversely affected by a NAICS code designation has the right to appeal a NAICS code designation. 13 C.F.R. § 134.302.

The rules governing timeliness of NAICS code appeals to OHA are governed by 13 C.F.R. § 134.304(a)(3), which provides:

(a) Appeals from size determinations and NAICS *code designations* must be commenced by filing and serving an appeal petition as follows:

...

(3) If the appeal is from a NAICS *code designation*, then the appeal petition must be filed and served within 10 days after the issuance of the initial solicitation. If the appeal relates to an amendment affecting the NAICS code, then the appeal petition must be filed and served within 10 days after the issuance of the amendment.

(emphasis added).

Size standards for NAICS codes are found in 13 C.F.R. § 121.201. The size standard for NAICS code 562991, Septic Tank and Related Services, is \$6.5 million in average annual receipts. The size standard for NAICS code 115310, Support Activities for Forestry, is \$6.5 million in average annual receipts. However, there are two components of Support Activities for Forestry with an increased \$16.5 million size standards. 13 C.F.R. § 121.201 n.17. These components include Forest Fire Suppression and Fuels Management Services and usually include firms that have firefighting crews, equipment, and are capable of clearing land of hazardous materials that would fuel forest fires. *Id.* In the email sent to Appellant, the Purchasing Agent cited the higher \$16.5 million size standard as the dollar limit for the IFB.

B. Analysis

1. A NAICS Code is Required for Small Business Set-Aside Federal Procurements

The size of a concern is determined by the NAICS code applicable to the procurement. 13 C.F.R. § 121.402(a). This is because each NAICS code, which describes an industry or business

type, has a specific size standard, either in terms of average annual receipts or the number of employees. *See generally*, 13 C.F.R. § 121.201. Hence, a concern may be small under one NAICS code and other than small for another.

To make the set-aside system for small business work, the regulations require that contracting officers *must* specify the size standard in effect for the solicitation. 13 C.F.R. § 121.402. This necessarily requires the contracting officer designate a NAICS code for a small business set-aside solicitation because otherwise, there can be no size standard. In addition, as with the IFB relevant to this appeal, FAR contract clauses anticipate a contracting officer will designate a NAICS code. (*See* Fact 4).

In the instant appeal, there is no Federal contracting officer. Rather, there is a DNRC Purchasing Agent who is standing in the stead of Federal contracting officers. Nevertheless, if the procurement is to be a set-aside procurement, as is this one (Fact 4), to be utilized by Federal Agencies or contracting officers, the DNRC Purchasing Agent, as the agent of Federal contracting officers, must follow SBA's set-aside rules. If not, then the procurement is not in accordance with law and Federal contracting officers may not use it as a contracting vehicle.

2. Timeliness

Appeals from NAICS code *designations* must be filed with OHA within 10 days from the issuance of the original solicitation. 13 C.F.R. § 134.304(a)(3). Further, a NAICS code is only final, absent a timely appeal, when a NAICS code is assigned to a procurement. 13 C.F.R. § 121.402(c). Standing is also governed by the designation of a NAICS code, *i.e.*, the right to appeal a NAICS code *designation* may be filed by persons adversely affected by the NAICS code *designation*. 13 C.F.R. § 134.302(b). Based upon these requirements, it is evident the *sine qua non* for the NAICS code finality and the 10 day appeal period is that the contracting officer actually has *designated* the NAICS code as required by 13 C.F.R. § 121.402(a). Failing the designation of a NAICS code, there is no 10 day limit upon which to file an appeal with OHA.

A small business set-aside solicitation without a NAICS code is in violation of 13 C.F.R. § 121.402(a) and is materially defective until such time as the contracting officer designates a NAICS code. As a practical matter, this will only apply when a procurement is set-aside for one or more of SBA's small business programs. This is because assigning a NAICS code is the only way a small business can be identified as qualifying to submit an offer or a bid under a solicitation.

Therefore, when a contracting officer fails to designate a NAICS code in a solicitation set-aside or partially set-aside for small businesses, it creates an insurmountable barrier to awarding a set-aside contract. This is because: (1) A missing NAICS code makes it impossible to determine the size of any offeror under the solicitation; and (2) Offerors are not self-certifying their size under a procurement as required by 13 C.F.R. § 121.404(a), FAR 52.219-1, FAR 52.204-8, or FAR 52.212.3 for commercial item solicitations like this one. Thus, a solicitation absent a NAICS code designation contains a material and continuing defect.

Where a contracting officer fails to designate a NAICS code, the CFR does not contain a timeliness requirement for making an appeal to OHA. Moreover, because the defect is both continuing and fatal in the case of a set-aside procurement, OHA will consider appeals concerning the lack of a NAICS code until such time as a contract has been fully performed. After performance, the appeal would be moot under 13 C.F.R. § 134.316(a) because even if there was a termination no relief could be obtained for any party and because common sense demands relief have been sought long before that event.

In this Appeal, it was not a lack of a NAICS code, which is an appropriate basis for a NAICS code appeal that prompted Appellant's appeal of the NAICS code attached to the IFB. Rather, Appellant appealed what it thought was DNRC's erroneous assignment of NAICS code 115310. Appellant's appeal was a prudent and ultimately an effective act for Appellant could not risk failing to appeal the e-mail. However, I find the DNRC Purchasing Agent did not officially designate NAICS code 115310 with his April 9, 2007 e-mail to Appellant, for the e-mail is not an official amendment to the solicitation sent generally to all those that might be interested or an official public notice of such an amendment. Thus, I do not find that the Purchasing Agent has assigned NAICS code 115310 to this procurement. However, had the Purchasing Agent designated or assigned a NAICS code with the e-mail, Appellant's appeal would have been timely.

Under the unique facts of this case, I hold that Appellant's protest is sufficient to act as a timely appeal to OHA concerning the DNRC's failure to designate a NAICS code for this procurement. Alternatively, Appellant's appeal is sufficient to constitute a request that SBA supply a NAICS code, which SBA has the authority to do since SBA (OHA in this instance) has the right to clarify, complete, or supply an appropriate NAICS code when a NAICS code in a procurement is unclear, incomplete, or missing and there is a NAICS appeal before OHA. 13 C.F.R. § 121.402(c) and (d).

3. The Correct NAICS code

There is no doubt about what DNRC sought to buy with this solicitation. Specifically, the Technical Specifications relate only to the provision of portable toilets and hand washing stations (Fact 3). Moreover, in buying hand washing stations, DNRC made the recovery of "grey water" (waste water from washing hands). Under these facts there is only one NAICS code in the *Manual* with any relevance to this procurement and that is NAICS code 562991, which specifically covers the rental and or servicing of portable toilets. Certainly, there is no relationship between the technical forestry requirements anticipated by NAICS code 115310 and the rental of portable toilets and hand washing stations. Moreover, in this instance, I hold that the provision of hand washing stations in conjunction with the provision of portable toilets is foreseeable under NAICS code 562991. (See Fact 8.)

C. Summary

It is a critical regulatory requirement that Federal contracting officers or their agents designate a NAICS code when setting a procurement aside for a small business concern. Absent a NAICS code designation the procurement is materially and continuously defective. Thus, the

only time limit upon which to appeal a failure to designate a NAICS code for any kind of small business set-aside procurement is if the contract has been fully performed.

In this appeal the DNRC has not properly designated a NAICS code as required by applicable regulations. Absent a NAICS code Appellant's appeal, which brought this entire matter to the attention of SBA, is timely. Moreover, when the lack of a designated NAICS code is brought to the attention of SBA (OHA) as Appellant did in this Appeal, OHA has the authority to designate a NAICS code when one is unclear, incomplete, or missing.

Based upon the technical requirements contained in the IFB, the NAICS code applicable to the IFB is 562991, Septic Tank and Related Services.

V. Conclusion

Appellant has filed a timely appeal of the DNRC's failure to designate a NAICS code for the IFB. The appropriate NAICS code for the IFB is 562991, with a size standard of \$6.5 million. DNRC is ORDERED to inform all potential bidders of the correct NAICS code.

Appellant's appeal is SUSTAINED.

This is the Small Business Administration's final decision. 13 C.F.R. § 134.316(b).

THOMAS B. PENDER
Administrative Judge