

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

NAICS APPEAL OF:

GEM Technologies, Inc.

Appellant

Solicitation No. DE-RP05-08OR23286

U.S. Department of Energy

Oak Ridge, Tennessee

SBA No. NAICS-4902

Decided: February 27, 2008

ORDER DISMISSING APPEAL AS PREMATURE¹

I. BACKGROUND

On February 15, 2008, the U.S. Department of Energy (DOE) posted Pre-Solicitation Notice DE-RP05-08OR23286 for waste management activities at the Transuranic Waste Processing Center on the DOE Industry Interactive Procurement System, <http://e-center.doe.gov/iips/busopor.nsf>. The Pre-Solicitation Notice, which contained no statement of work, stated that the solicitation would be a total small business set aside and cited North American Industry Classification System (NAICS) code 562211 (Hazardous Waste), which has a small business size standard of \$11.5 million. The Pre-Solicitation Notice indicated that the entire solicitation would be available on or about March 3, 2008. As of today's date, the DOE has not issued the solicitation.

On February 25, 2008, GEM Technologies, Inc. (Appellant) filed a NAICS code appeal with the Small Business Administration's (SBA) Office of Hearings and Appeals (OHA). Appellant asserts that the correct NAICS code is 561210 (Facilities Support Services), which has a small business size standard of \$32.5 million. Appellant argues the assigned NAICS code, 562211, does not account for the multi-disciplinary scope of this procurement and fails to address the high degree of skill necessary to dispose of the radioactive waste covered by the procurement. Appellant indicates it believes 500 employees is the proper size standard for the scope of the project, but acknowledges the lone code with this size standard in the waste or operations category is 562910 (Environmental Remediation Services) and it has already been determined to be inapplicable by the SBA. Therefore, Appellant argues 561210 (Facilities Support Services) best addresses the multi-disciplined capabilities required by the procurement.

¹ This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. DISCUSSION

A NAICS code appeal must be filed within 10 calendar days after the issuance of the initial solicitation. 13 C.F.R. § 121.1103(b)(1), 134.304(a)(3); 48 C.F.R. § 19.303(c)(1). OHA “will summarily dismiss an untimely NAICS code appeal.” 13 C.F.R. § 121.1103(b)(1).

OHA has held that internet publication of a pre-solicitation notice does not constitute a NAICS code designation within the meaning of the jurisdictional provisions of 13 C.F.R. § 134.102(k) or the timeliness requirements of 13 C.F.R. § 134.304(a)(3), and, therefore, an appeal of a pre-solicitation notice must be dismissed as premature. *NAICS Appeal of Advanced Systems Technology Inc.*, SBA No. NAICS-4667 (2004). Mere publication of a notice does not guarantee either that the procuring agency will issue a solicitation or that the contracting officer will assign the NAICS code anticipated in the notice. *Id.*

OHA’s NAICS code appeal jurisdiction extends only to the issuance of solicitations, which by its terms does not include pre-solicitation notices such as the notice at issue here. 13 C.F.R. § 134.102(k); 48 C.F.R. § 19.303(c)(1). Further, this Pre-Solicitation Notice lacks a complete statement of work, essential to the adjudication of a size determination. 13 C.F.R. § 121.402(b); *NAICS Appeal of Advanced Systems Technology Inc.*, SBA No. NAICS-4667 (2004).

Absent a formally issued solicitation, this appeal is premature, OHA has no jurisdiction to consider it, and the case must be dismissed. This dismissal does not preclude Appellant from submitting a response to the Pre-Solicitation Notice. Further, this dismissal does not prejudice any timely NAICS code appeal Appellant may file once the DOE actually issues the solicitation itself.

III. CONCLUSION

I DISMISS WITHOUT PREJUDICE the instant NAICS appeal.

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

CHRISTOPHER HOLLEMAN
Administrative Judge