

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

NAICS APPEAL OF:

Genome-Communications

Appellant

Solicitation No. FDA-RFQ-1048351-1

Food and Drug Administration

Rockville, Maryland

SBA No. NAICS-4995

Decided: September 10, 2008

ORDER DISMISSING APPEAL<sup>1</sup>

I. BACKGROUND

On August 23, 2008, the Food and Drug Administration (FDA) issued the subject Solicitation No. FDA-RFQ-1048351-1 for professional services to support a nanotechnology program. The Contracting Officer (CO) did not set the contract aside for small business. The CO designated North American Industry Classification System (NAICS) code 541690, Other Scientific and Technical Consulting Services, with a corresponding \$6.5 million annual receipts size standard, as the applicable code for this procurement. Offers were due on September 8, 2008.

On August 25, 2008, Genome-Communications (Appellant), filed a NAICS code appeal with the Small Business Administration's Office of Hearings and Appeals (OHA). Appellant argues that portions of the work in this procurement may be performed by a small business, and requests that OHA direct FDA to set aside portions of this procurement for small business. Appellant also asserts that the NAICS code is inappropriate, and should be changed to a scientific research NAICS code.

II. DISCUSSION

Appellant filed the instant appeal within 10 days after FDA issued the solicitation. Thus, the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1); 134.304(a)(3).

Nevertheless, I must dismiss this appeal. It is settled law that OHA has no jurisdiction to review a contracting officer's decision not to set aside a procurement for small business, and thus

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<sup>1</sup> 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.

I cannot consider Appellant's request that I order the FDA to do so. *NAICS Appeal of Encompass Group LLC*, SBA No. NAICS-4715, at 3 (2005); *SIC Appeals of Earth Property Services Inc., et al.*, SBA No. SIC-3296 (1990).<sup>2</sup>

Further, Appellant lacks standing. The instant solicitation is an unrestricted procurement. This Office has consistently held that a small business lacks standing to appeal the NAICS code classification of an unrestricted solicitation unless the firm can demonstrate that it has been adversely affected. *NAICS Appeal of Integrated Laboratory Systems, Inc.*, SBA No. NAICS-4733, at 2 (2005). The size standard here does not affect Appellant's eligibility to participate in the contract process, nor does it appear to affect award. Accordingly, Appellant is not adversely affected here. *Id.*<sup>3</sup>

Accordingly, because OHA has no jurisdiction over a challenge to the CO's decision to set aside the procurement, and because Appellant lacks standing to challenge the NAICS code designation, I must dismiss this appeal.

### III. CONCLUSION

For the above reason, Appellant's NAICS code Appeal is DISMISSED.

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

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CHRISTOPHER HOLLEMAN  
Administrative Judge

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<sup>2</sup> Where appropriate, OHA's case precedent decided under the prior Standard Industrial Classification (SIC) code system will apply to NAICS code appeals. *NAICS Appeal of Phoenix Scientific Corporation*, SBA No. NAICS-4416 (2000).

<sup>3</sup> The only cases where this Office did not dismiss appeals of code designations in unrestricted procurements for lack of standing were those where the issue of standing was not reached because the appeals were untimely. *NAICS Appeal of Integrated Laboratory Systems, Inc.*, SBA No. NAICS-4733, at fn. 3 (2005).