

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

NAICS APPEAL OF:

American Systems Corporation

Appellant

Solicitation No. M67854-09-R-8005
Marine Corps System Command
Orlando, FL

SBA No. NAICS-5060

Decided: August 7, 2009

ORDER DISMISSING APPEAL¹

HOLLEMAN, Administrative Judge:

I. BACKGROUND

A. The Solicitation

On July 2, 2009, the Marine Corps System Command, Orlando, Florida (Marine Corps), issued Solicitation No. M67854-09-R-8005 for underwater egress training at four sites worldwide. The Contracting Officer (CO) set the procurement totally aside for small business. Proposals were due on August 3, 2009. On July 10, 2009, the Contracting Officer (CO) issued Amendment 3, which designated the solicitation under North American Industry Classification System (NAICS) code 611512, Flight Training, with a corresponding \$25.5 million annual receipts size standard.

B. The Appeal

On July 7, 2009, American Systems Corporation (Appellant) filed a NAICS code appeal with the Office of Hearings and Appeals (OHA). Appellant requests the CO change the assigned NAICS code to 611699, Survival Training Instruction, which has a corresponding \$7 million annual receipts size standard. (The actual title of the code is All Other Miscellaneous Schools and Instruction.)

Appellant asserts the purpose of the solicitation is to train military non-aircrew helicopter passengers to exit from submerged aircraft and vehicles. This is will include shallow water egress training and familiarization with the Intermediate Passenger Helicopter Aircrew Breathing

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.

Device, Survival Egress Air, and newer flotation devices. Appellant asserts that the Submerged Vehicle Egress Trainer will be used to train personnel to egress from submerged vehicles. Because the training the solicitation calls for is not actual flight training, but training in exiting not merely from submerged aircraft, but from submerged vehicles, Appellant argues that Flight Training is not the appropriate NAICS code. The training is more accurately described as survival instruction, and thus should be classified under that code.

C. The Motion to Dismiss

On July 14, 2009, Survival Systems USA, Inc. (Survival), moved for intervention in this matter. Together with this motion, Survival filed a motion to dismiss. Survival asserts it may intervene because it is a small business under the CO's NAICS code designation. Survival argues that Appellant has no standing to appeal, because it is other than small under both the original NAICS code's size standard and that of the NAICS code Appellant seeks on appeal. Survival points to information from Appellant's website which indicates Appellant it has over 1,500 employees and \$200 million in annual revenues.

On July 22, 2009, Survival filed its substantive response to the appeal. Survival asserts the CO's NAICS code designation is correct because it is consistent with the designations for similar procurements, and because egress training is part of flight training.

Also on July 22nd, the Marine Corps filed a motion for extension of time, asking that it be permitted to file a response on August 3, 2009. The Marine Corps also stated that it would consider extending the due date for proposals. Together with this motion, the Marine Corps also filed a motion to dismiss, based upon Appellant's lack of standing. The Marine Corps submitted a printout from Appellant's listing on Central Contractor Registration system, which does not indicate that Appellant is a small business.

On July 23, 2009, I issued an Order directing Appellant to respond to the allegations in Survival's motion by July 28th. Appellant failed to comply with this Order, and has made no filing in response to Survival's motion to dismiss, or any other filing whatever.

On July 30, 2009, the CO extended the due date for proposals to August 17, 2009.

Also on July 30, 2009, I issued an Order reopening and extending the close of record to August 3, 2009. Nevertheless, no further filings have been made by any party.

II. DISCUSSION

Appellant filed its appeal within ten days after issuance of the solicitation. Thus, the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1), 134.304(a)(3).

As a potential offeror, Survival has an interest in the outcome of this appeal, and therefore its motion to intervene is GRANTED. 13 C.F.R. § 134.210(b).

Under OHA's rules, once a motion is filed, an opposing party has 20 days in which to respond to the motion. 13 C.F.R. § 134.211(c). If the party does not respond, it is deemed to have consented to the relief requested. *Id.* Here, Appellant has failed to respond to Survival's motion to dismiss, and more than 20 days have passed. Further, Appellant has failed to comply with my Order of July 23rd, specifically directing it to respond to the factual allegations in Survival's motion to dismiss.

Appellant has thus failed to respond both to the motion and to the allegation that it is other than small. Appellant must thus be deemed to be a large business and to have consented to the motion to dismiss. OHA has held that a firm which is other than small under both the NAICS code designated in the solicitation and the NAICS code it seeks on appeal has no standing to file a NAICS code appeal. *NAICS Appeal of Spendida Property Systems, LLC*, SBA No. NAICS-4576 (2003). Accordingly, I find Appellant has no standing here and must DISMISS the instant appeal.

III. CONCLUSION

In consideration of the foregoing, I find Appellant has no standing to bring the instant appeal and, therefore, I must DISMISS the instant appeal.

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

CHRISTOPHER HOLLEMAN
Administrative Judge