

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

NAICS APPEAL OF:

Hardie's Fruit & Vegetable Co.

Appellant

Solicitation No. SPM300-11-R-0009  
Defense Logistics Agency Troop Support  
Philadelphia, Pennsylvania

SBA No. NAICS-5175

Decided: December 15, 2010

APPEARANCE

Jonathon M. Bailey, Bailey & Bailey, P.C., San Antonio, Texas, for Hardie's Fruit & Vegetable Co.

DECISION

I. Jurisdiction

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. Issue

Whether the Contracting Officer's designation of North American Industry Classification System (NAICS) code 111998, All Other Miscellaneous Crop Farming, to a solicitation to supply a full line of fresh fruit and vegetables for Department of Defense (DOD) and non-DOD customers was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. BACKGROUND

A. The Solicitation

On November 22, 2010, the Defense Logistics Agency (DLA) Troop Support issued Solicitation No. SPM300-11-R-0009. The Contracting Officer (CO) set the procurement entirely aside for small business and designated NAICS code 111998, All Other Miscellaneous Crop Farming, with a 500 employee size standard. The purpose of the contract is to supply a full line of fresh fruit and vegetables for DOD Troop Support customers and non-DOD customers to include United States Department of Agriculture supported schools located in San Antonio, Texas.

The solicitation seeks a contractor prepared to receive and process orders for fruits and vegetables. The successful contractor is required to maintain electronic catalogs that list all items available to the customers, including national or local stock numbers, item descriptions, packaging characteristics, unit of issue, and unit prices. Under the contract, if a customer wants to order a fresh fruit or vegetable item that is not a part of the ordering catalog, the contractor has a maximum of twenty days to source the item, obtain a stock number, and add the item to the ordering catalog. The solicitation covers catalog pricing, rebates, discounts, excessive pass-through charges, customer service, and weekly produce market forecast bulletins. The solicitation details the ordering system that will be used and how orders will be placed. The solicitation also covers item availability, packaging, packing, labeling, and markings, as well as delivery, inspection, and acceptance and return procedures. The solicitation details invoicing, audits, warehousing, food safety and sanitation, surges and mobilization demands, and management reports.

### B. The Appeal

On December 2, 2010, Hardie's Fruit & Vegetable Co. (Appellant) filed the instant appeal of the CO's NAICS code designation. Appellant asserts NAICS code 111998, All Other Miscellaneous Crop Farming, is not applicable to this procurement and the proper NAICS code for this procurement is NAICS 424480, Fresh Fruit and Vegetable Merchant Wholesalers, with a corresponding 500 employee size standard. Appellant argues All Other Miscellaneous Crop Farming does not describe this procurement. Appellant states the definition of NAICS code 111998 specifically excludes vegetables, melons, and fruits, which is exactly what the solicitation requires. Appellant argues a review of the plain language of the statement of work demonstrates that none of the services and functions required match the definition of NAICS code 111998, All Other Miscellaneous Crop Farming.

Appellant asserts the statement of work demands the wholesale distribution of fresh fruit and vegetables, as defined by NAICS code 424480. Appellant states the successful contractor will not be paid to grow food, but will be paid a distribution price for the contractor's cost in ordering, warehousing, and delivering produce. Appellant asserts the solicitation is not looking for farmers; Appellant states the solicitation is seeking wholesalers and, accordingly, NAICS code 424480, Fresh Fruit and Vegetable Merchant Wholesalers, is the applicable NAICS code for the procurement.

Moreover, Appellant states that the solicitation is not for manufacturing and therefore the nonmanufacturer rule does not apply. Appellant notes the Small Business Administration (SBA) clarified the nonmanufacturer rule only applies to NAICS codes which actually involve manufacturing and SBA specifically stated the nonmanufacturer rule does not apply to NAICS code 111998. Appeal at 12 (quoting Small Business Size Regulations, 74 Fed. Reg. 55,694, 55,696-97 (Oct. 28, 2009) ("the nonmanufacturer rule would not apply to situations where a procuring agency is acquiring agricultural commodities that are not processed or changed and the procuring agency classifies the contract as crop production under NAICS Subsector 111.")).

Finally, Appellant asserts the appropriate size standard for NAICS code 424480, Fresh Fruit and Vegetable Merchant Wholesalers, is 500 employees. Appellant cites the notation for

Sector 42-Wholesale Trade NAICS codes. The note states Wholesale Trade NAICS codes are “Not applicable to Government procurement of supplies. The nonmanufacturer size standard of 500 employees shall be used for purposes of Government procurement of supplies.” Appeal at 12 (citing 13 C.F.R. § 121.201). Appellant argues the procurement should be classified under the appropriate wholesale trade code using the 500 employee size standard.

#### IV. DISCUSSION

##### A. Timeliness

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

##### B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the NAICS code designation assigned to the solicitation is based on a clear error of fact or law. 13 C.F.R. § 134.314. The NAICS code designation should be based on the code that best describes the principal purpose of the services being procured, in light of the industry description in the NAICS MANUAL,<sup>1</sup> the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b).

##### C. Analysis

On October 6, 2010, SBA published a final rule modifying SBA’s small business size regulations to clarify that a NAICS code that represents a wholesale trade (NAICS Sector 42) shall not be used for the government’s procurement of supplies. Small Business Size Standards: Retail Trade, 75 Fed. Reg. 61,597, 61,602-604 (Oct. 6, 2010). Specifically, the rule amends the notation to Sector 42-Wholesale Trade:

These NAICS codes shall not be used to classify Government acquisitions for supplies. They also shall not be used by Federal Government contractors when subcontracting for the acquisition for supplies. The applicable manufacturing NAICS code shall be used to classify acquisitions for supplies. A Wholesale Trade or Retail Trade business concern submitting an offer or a quote on a supply acquisition is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406.

*Id.* at 61,602.

Accordingly, despite Appellant’s compelling arguments that the principal purpose of the procurement is the wholesale supply of fruits and vegetables and should be

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<sup>1</sup> EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM-UNITED STATES (2007), *available at* <http://www.census.gov>. [NAICS MANUAL].

assigned NAICS code 424480, Fresh Fruit and Vegetable Merchant Wholesalers, that NAICS code is prohibited for government acquisitions of supplies. *Id.*; 13 C.F.R. § 121.402(b). “Acquisitions for supplies must be classified under the appropriate manufacturing NAICS code, not under a Wholesale Trade” code. 13 C.F.R. § 121.402(b).

Although the guidance is clear, it presents a conundrum when applied to Solicitation No. SPM300-11-R-0009 because the procurement is seeking produce, fruits and vegetables, not manufactured products. Faced with this challenge, the CO selected an agricultural code, NAICS code 111998, All Other Miscellaneous Crop Farming, because the supplies sought are agricultural products. However, All Other Miscellaneous Crop Farming falls within Sector 11- Agriculture, Forestry, Fishing and Hunting and therefore does not comply with the regulation’s requirement that procurements for “supplies must be classified under the appropriate *manufacturing NAICS code.*” *Id.* (emphasis added). Thus, the CO’s NAICS designation is based on a clear error of law.

Working within the confines of the regulation, which prohibits both Appellant’s proposed NAICS code designation, NAICS 424480, Fresh Fruit and Vegetable Merchant Wholesalers, and the CO’s assigned NAICS code, NAICS code 111998, All Other Miscellaneous Crop Farming, I am assigning NAICS code 311991, Perishable Prepared Food Manufacturing with a corresponding 500 employee size standard.

NAICS code 311991 comprises establishments:

primarily engaged in manufacturing perishable prepared foods, such as salads, sandwiches, prepared meals, fresh pizza, fresh pasta, and peeled or cut vegetables.

NAICS MANUAL 229, *available at* <http://www.census.gov/naics>.

A NAICS code need not be a perfect fit for a solicitation, in order to be the most appropriate NAICS code. *NAICS Appeal of Computer Cite*, SBA No. NAICS-5010 (2008). Although NAICS code 311991, Perishable Prepared Food Manufacturing, is not perfect, the code complies with the requirements of 13 C.F.R. § 121.402(b); it is not a Wholesale Trade NAICS code and it is a manufacturing NAICS code. NAICS code 311991 also addresses the perishable nature of the produce being supplied.

NAICS code 311991 is thus the most appropriate NAICS code for the instant procurement. It is neither a wholesale nor agricultural code, but a manufacturing code and thus meets the requirements of the regulation. Further, it covers the provision of perishable food items, which is ultimately what this contract seeks to procure.

V. CONCLUSION

Upon consideration of the solicitation, the Appeal Petition, and 13 C.F.R. § 121.402(b), I REVERSE the CO's NAICS code designation set forth in Solicitation No. SPM300-11-R-0009. I hold NAICS code 311991, Perishable Prepared Food Manufacturing, with a corresponding 500 employee size standard is an appropriate code for the procurement.

Accordingly, because this decision is being issued before the close of the solicitation, the CO MUST amend the solicitation to change the NAICS code designation from 111998 to 311991. FAR § 19.303(c)(5); *Matter of Eagle Home Med. Corp.*, Comp. Gen. B-402387, March 29, 2010, available at <http://www.gao.gov/decisions/bidpro/402387.pdf>.

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

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CHRISTOPHER HOLLEMAN  
Administrative Judge