

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

NAICS APPEAL OF:

Phoenix Environmental Design, Inc.

SBA No. NAICS-5212

Appellant

Decided: March 10, 2011

Solicitation No. AG6538S11AA25

U.S. Department of Agriculture

Agricultural Research Service

APPEARANCES

C. Chad Gill, President, De Smet, South Dakota, for Phoenix Environmental Design, Inc., Appellant.

Donita Furman, Contracting Officer, Clay Center, Nebraska, for the U.S. Department of Agriculture, Agricultural Research Service

DECISION

HYDE, Administrative Judge:

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 designation of North American Industry Classification System (NAICS) code 424910, Farm Supplies Merchant Wholesalers, to the subject solicitation was clearly erroneous. *See* 13 C.F.R. § 134.314.

III. Background

A. Introduction

On February 11, 2011, the U.S. Department of Agriculture, Agricultural Research Service (USDA) posted to the Federal Business Opportunities (FBO) website

(<https://www.fbo.gov>) Request for Quotations (RFQ) No. AG6538S11AA25 seeking quotes for herbicides. The Contracting Officer (CO) set aside the acquisition totally for small business. On February 16, 2011, the CO designated NAICS code 424910, Farm Supplies Merchant Wholesalers, with a corresponding size standard of 100 employees, as the applicable NAICS code for the RFQ.

On February 22, 2011, Phoenix Environmental Design, Inc. (Appellant) filed an appeal, asserting that the appropriate NAICS code for this procurement is 325320, Pesticide and Other Agricultural Chemical Manufacturing, with a corresponding size standard of 500 employees.

B. Scope of Work

The RFQ indicates that the contractor must deliver quantities of nine different herbicides, which are required for feed production purposes, to the USDA. The contractor is responsible for delivering a pump capable of dispensing each of the herbicides. The contractor is also responsible for retrieving any empty containers from the USDA.

C. The Appeal

Appellant asserts the appropriate NAICS code for this procurement is 325320, Pesticide and Other Agricultural Chemical Manufacturing. To support its contention, Appellant emphasizes language formerly found in 13 C.F.R. § 121.402(b): “Procurements for supplies must be classified under the appropriate manufacturing NAICS code, not under the wholesale trade NAICS code.”¹ Appellant indicates it brought this information to the attention of the CO, who elected not to change the NAICS code designated for the RFQ. Appellant goes on to explain that the U.S. Small Business Administration (SBA) recently amended the notation to the wholesale trade NAICS codes (Sector 42) to clarify that such codes should not be used for the Government’s procurement of supplies. 75 Fed. Reg. 61,597 (Oct. 6, 2010). Accordingly, Appellant contends the appropriate NAICS code for the instant procurement is 325320, a manufacturing code, not 424910, a wholesale trade code.

D. CO’s Response

On March 8, 2011, the CO submitted her response to the appeal petition. Attached to the CO’s response is a copy of the SBA Office of Government Contracting nonmanufacturer rule class waivers in effect as of September 9, 2010. The CO points out that herbicides are currently covered by a class waiver and explains that such a waiver allows a small business to supply

¹ Effective November 5, 2010, this provision was revised to state: “Acquisitions for supplies must be classified under the appropriate manufacturing NAICS code, not under a Wholesale Trade or Retail Trade NAICS code.” 75 Fed. Reg. 61,597, 61,604 (Oct. 6, 2010). A recent amendment with an effective date of March 14, 2011, again changes the language to: “Acquisitions for supplies must be classified under the appropriate manufacturing or supply NAICS code, not under a wholesale trade or retail trade NAICS code.” 76 Fed. Reg. 8,222, 8,252 (Feb. 11, 2011).

products the firm did not itself manufacture. The CO contends that because herbicides are covered by a class waiver, the designation of NAICS code 424910 was proper.

IV. Discussion

Appellant filed the instant appeal within ten days after the CO's designation of the NAICS code. Thus, the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1), 134.304(a)(3). Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the CO's NAICS code designation is based upon a clear error of fact or law. 13 C.F.R. § 134.314; *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003).

The *NAICS Manual*² description of the NAICS code designated by the CO, 424910, Farm Supplies Merchant Wholesalers, provides that this industry comprises “establishments primarily engaged in the merchant wholesale distribution of farm supplies, such as animal feeds, fertilizers, agricultural chemicals, pesticides, plant seeds, and plant bulbs.” *NAICS Manual*, at 546.

The *NAICS Manual* description of Appellant's requested NAICS code, 325320, Pesticide and Other Agricultural Chemical Manufacturing, provides that this industry comprises “establishments primarily engaged in the formulation and preparation of agricultural and household pest control chemicals (except fertilizers).” *NAICS Manual*, at 316.

There is no dispute in this case regarding the nature of products being acquired. It is clear that the USDA is procuring herbicides, and both of the codes outlined above encompass the provision of herbicides. It is also clear that the herbicides being procured are “supplies.”³ Accordingly, the only issue here is whether the CO can properly apply a wholesale trade NAICS code to a Government acquisition for supplies.

As noted above, 13 C.F.R. § 121.402(b) specifically provides: “Acquisitions for supplies must be classified under the appropriate manufacturing NAICS code, not under a Wholesale Trade or Retail Trade NAICS code.” The notation to the Wholesale Trade NAICS codes (Sector 42) further states:

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.

² Executive Office of the President, Office of Management and Budget, *North American Industry Classification System* (2007), available at <http://www.census.gov/eos/www/naics/> (hereinafter *NAICS Manual*).

³ The term “supplies” is defined in section 2.101 of the Federal Acquisition Regulation (FAR) to mean “all property except land or interest in land.”

13 C.F.R. § 121.201. These provisions clearly indicate that the application of a wholesale trade code to a Government procurement for supplies is improper.⁴

The nonmanufacturer rule indicates that a firm may provide manufactured products to the Government if the firm has no more than 500 employees, normally sells the type of item being supplied, and will supply the end item of a small business manufacturer in the United States. 13 C.F.R. § 121.406(b)(1). SBA's class waiver for herbicides indicates there are no small business manufacturers available in the United States, so the nonmanufacturing offeror need not supply a U.S. small business product.

The CO contends that the current class waiver for herbicides authorizes use of a wholesale trade code for the instant procurement. The CO is incorrect. The language in both 13 C.F.R. § 121.201 and 13 C.F.R. § 121.402(b) is very clear. The Government may not apply a wholesale trade NAICS codes to a procurement for supplies. The procurement at issue undoubtedly requires supplies, and the class waiver has no bearing upon that fact. As the CO herself point out, the class waiver merely releases the contractor from the requirement that it supply the product of a small business within the United States.

Based upon the foregoing analysis, the CO was required to use the applicable manufacturing NAICS code for this RFQ and was not permitted to use a wholesale trade NAICS code. Thus, Appellant is correct that the CO should have used NAICS code 325320 in lieu of NAICS code 424910 for the instant procurement.

V. Conclusion

The CO's NAICS code designation is clearly erroneous. The USDA is procuring supplies. The applicable regulations provide that a manufacturing NAICS code shall be used to classify acquisitions for supplies. Thus, the CO should have assigned the manufacturing NAICS code 325320, Pesticide and Other Agricultural Chemical Manufacturing, instead of the wholesale trade NAICS code 424910, Farm Supplies Merchant Wholesalers, to this RFQ. Accordingly, this appeal is GRANTED. Because this decision is being issued after the close of the instant solicitation, it does not apply to the instant RFQ but shall apply to future solicitations requiring the same products. FAR § 19.303(c)(5).

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

KENNETH M. HYDE
Administrative Judge

⁴ As discussed in the *Federal Register*, the wholesale and retail NAICS codes are intended for use in SBA's loan and other financing programs, not in the procurement context. See generally 75 Fed. Reg. 61,597, 61,598-99 (Oct. 6, 2010).