

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

NAICS APPEAL OF:

Head, Inc.

Appellant,

Solicitation No. N69450-11-R-1255

U.S. Department of the Navy

Navy Facilities Engineering Command
Southeast

Integrated Product Team South Atlantic
Jacksonville, Florida

SBA No. NAICS-5214

Decided: March 11, 2011

APPEARANCES

Robert E. Little, Jr., Esq., Cohen Seglias Pallas Greenhall & Furman PC, Philadelphia, Pennsylvania, for Appellant

Sam Q. Le, Office of General Counsel, U.S. Small Business Administration, for the Agency

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 an appellant has standing to appeal the NAICS code applied to an unrestricted solicitation when the appellant does not claim to be eligible for any price or evaluation preference in the solicitation.

III. Background

A. Solicitation and Appeal

On November 26, 2010, the Navy Facilities Engineering Command Southeast (NAVFAC) issued Solicitation No. N69450-11-R-1255 (RFP) for pavement project flat lots. The requirement is to construct a handstand staging area, a new container staging and loading lot, and a new container storage lot at the Marine Corps Support Facility Blount Island in Jacksonville, Florida. The solicitation is unrestricted. On January 5, 2011, the Contracting Officer (CO) issued Amendment 003, which assigned to the procurement North American Industry Classification System (NAICS) code 238990, All Other Specialty Trade Contractors, with a corresponding \$14 million annual receipts size standard. Initial offers were due on January 6, 2011, a date that was later extended to January 20, 2011, by Amendment 004.

On January 18, 2011, Head, Inc. (Appellant) filed the instant NAICS code appeal. Appellant asserts that the appropriate code for this procurement is 237990, Other Heavy and Civil Engineering Construction, with a corresponding \$33.5 million annual receipts size standard. Appellant argues the work here requires specialty equipment and activities that require the contractor to act as a general contractor.

On February 4, 2011, I issued a Request for Agency Comments. Ordinarily, OHA would dismiss a NAICS appeal of the code designated in an unrestricted solicitation. *NAICS Appeal of McKissack & McKissack*, SBA No. NAICS-5154 (2010). Because the issue had recently been raised as to whether this was the proper interpretation of the regulation, I requested that the U.S. Small Business Administration's (SBA) Office of General Counsel provide comments on the question of reconsidering OHA's precedent on this issue.

I directed the Agency to address the issue of whether OHA, as part of SBA, may take jurisdiction over procurements not issued under Part 19 of FAR, or not issued under the authority of the Small Business Act. The Agency was also to address the issue of whether any party can be adversely affected by a NAICS code designation in an unrestricted procurement. The Agency was further to address whether OHA taking jurisdiction of NAICS code appeals related to unrestricted procurements would permit appeals by large concerns, which might harm the interests of small businesses or result in inconsistent application of the regulations.

B. Agency Comments

On February 11, 2011, the SBA Office of General Counsel filed the Agency's comments in this matter. SBA raises three main arguments in favor of OHA entertaining NAICS code appeals relating to unrestricted solicitations. First, SBA argues an erroneous NAICS code is harmful because it may result in fewer procurements being set-aside for small businesses. SBA asserts that small business offerors are evaluated separately by contracting officers during performance of the market research required by FAR Part 10. The results of this research can change the contracting officer's decision regarding whether to set aside a procurement. According to SBA, "the simple act of cloaking an additional firm with small business status

could shift an agency's market research so that it is required to set aside the acquisition for small businesses.” (Agency Comments 9).

Second, SBA argues a business that is small under the NAICS code and size standard applied to a solicitation is eligible for benefits not available to firms that are not small. For instance, a certified HUBZone concern is eligible for the 10% HUBZone price evaluation preference. FAR 19.1307. A small business that is not a HUBZone concern is protected from the HUBZone preference if it submits an otherwise successful offer. *Id.* A small business offeror is entitled to appeal a contracting officer's nonresponsibility determination through the Certificate of Competency program. FAR 19.602. A small business is exempt from filing a small business subcontracting plan. FAR 19.702(b). A small business offeror is not bound by cost accounting standards. FAR 30.000. A small business offeror is also eligible for increased contract financing. FAR 32.501-1. SBA contends small business offerors are harmed by the assignment of an incorrect NAICS code to an unrestricted procurement because they are denied these benefits.

Third, SBA argues that small businesses reasonably presume that OHA will accept jurisdiction over all NAICS code appeals because there is no specific indication to the contrary in the applicable regulations. As a result, OHA's practice of dismissing NAICS appeals on unrestricted procurements “has become a trap for the unwary,” which SBA asserts has resulted in over thirty dismissals since 1984. (Agency Comments 6).

Specifically, SBA contends that neither SBA's regulations nor the FAR prohibit NAICS code appeals related to unrestricted procurements. In fact, SBA asserts that SBA's regulations give OHA jurisdiction over all NAICS code designations, as they apply to all Federal procurement programs for which small business status is beneficial. Moreover, SBA argues that nowhere in the text of the SBA regulations or the FAR is it stated that NAICS code designations relating to unrestricted procurements cannot be appealed. OHA is the only forum charged with reviewing NAICS code designations, and, according to SBA, by declining to do so in the case of unrestricted procurements, OHA leaves offerors without an administrative remedy. SBA further dismisses as disingenuous the reasoning in a number of past OHA decisions that although some small business benefits are not ripe at the issuance of the solicitation, they could become so later in the process, thereby offering a firm the opportunity to refile its appeal. SBA urges OHA to depart from its long line of precedent and asserts that an administrative body may depart from precedent if it provides a sufficient reason.

C. Appellant's Reply

On February 11, 2011, Appellant filed a request for leave to reply to the Agency comments, together with the reply. Appellant's request is GRANTED because it does not unduly enlarge the issues, and Appellant should be permitted to respond to Agency arguments it has not previously had the chance to address. Appellant argues that until the advent of the Historically Underutilized Business Zone (HUBZone) preference, no appellant could show harm as a result of misidentification of a NAICS code. Appellant concedes that ordinarily, an appellant cannot show harm in these matters. However, Appellant argues this case presents extraordinary facts requiring review, although it does not specifically identify which facts it considers out of the ordinary. Appellant argues that the HUBZone price evaluation preference places this

procurement under the mandate of the Small Business Act. Appellant does not assert that it is entitled to the HUBZone preference as a certified HUBZone concern, nor does Appellant claim it is entitled to any other small business benefit in relation to the instant procurement.

IV. Discussion

Appellant filed the instant appeal within ten days after issuance of the amendment to the solicitation that designated the NAICS code. Thus, the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1); 134.304(b).

Before addressing issues of substance, I must address the question of whether OHA may consider this appeal at all. As noted above, OHA has consistently held that it may not consider a NAICS code appeal in an unrestricted procurement.

A contracting officer must determine the appropriate NAICS code and related small business size standard and include them in all solicitations above the micro-purchase threshold. 13 C.F.R. § 121.402(b); FAR 19.303(a). The correct NAICS code is that which best describes the principal purpose of the services being procured, in light of the industry description in the *NAICS Manual*,¹ the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b); *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003). The NAICS code designation is final unless appealed to OHA within ten calendar days of the issuance of the solicitation. 13 C.F.R. § 134.304(b); FAR 19.303(c). The applicable regulation provides that an appeal from a NAICS code designation may be filed by “[a]ny person adversely affected by a NAICS code determination.” 13 C.F.R. § 134.302(b).

A. OHA Precedent

OHA has long held that this Office lacks jurisdiction to review NAICS code appeals relating to unrestricted solicitations or that appellants lack standing to bring such appeals.² OHA has held an appellant that is not hindered in its ability to submit an offer on an unrestricted solicitation has no standing to appeal the SIC code designation. *SIC Appeal of Cerberonics, Inc.*, SBA No. SIC-1973 (1984). OHA has held that where an appellant is not hindered in its ability to bid on a procurement, and where no Certificate of Competency is at issue, an appellant cannot appeal the SIC code designation related to an unrestricted procurement. *SIC Appeal of Right Away Foods Corp.*, SBA No. SIC-2309 (1985). OHA has held that because an appellant's right to bid on an unrestricted solicitation is not affected by the SIC code applied to the procurement, this

¹ 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*).

² Many of the earlier cases were decided under the prior Standard Industrial Classification (SIC) code system. Where appropriate, OHA case precedent decided under the prior SIC code system applies to NAICS code appeals. *NAICS Appeal of Phoenix Scientific Corp.*, SBA No. NAICS-4416, at 8 (2000).

Office has no jurisdiction to review the SIC code designation. *SIC Appeal of Machida, Inc.*, SBA No. SIC-2842(1988).

OHA's most thorough consideration of the issue was in *SIC Appeals of Earth Property Services, Inc., et al.*, SBA No. SIC-3296 (1990). In that case, OHA considered whether small businesses could be “adversely affected” by a SIC code designation on an unrestricted procurement because size status might impact benefits such as entitlement to progress payments or a Certificate of Competency. SBA's Associate Administrator for Procurement Assistance (AA/PA) filed an affidavit asserting that even in unrestricted procurements, a solicitation's SIC code designation could affect certain proposal or contract elements, such as progress payments received by the contractor, the requirement that awardees submit subcontracting plans, exemption of a firm from cost accounting standards, and eligibility to participate in the Certificate of Competency program.

OHA held that the price factors discussed in the AA/PA's affidavit did not meet the “adversely affected” test. OHA found that “none of the issues . . . affects bidding,” and therefore “none of the Appellants has been adversely affected and none has standing prior to the happening of one of the noted events [which would create entitlement to the benefits].” *Earth Property Servs.*, SBA No. SIC-3296, at 9. Accordingly, OHA reaffirmed the precedent that OHA has no jurisdiction to consider SIC code appeals related to an unrestricted procurement. OHA did go on to hold that if an appellant were a low bidder, were deemed to lack responsibility, and thus sought a Certificate of Competency, or if some other event occurred later in the procurement process to make an appellant's small business size status relevant, then the appellant would be adversely affected and would have the right to appeal a SIC code designation related to an unrestricted procurement. This reaffirmed the precedent in *Right Away Foods, supra*, which held that a SIC appeal would be considered on the merits if resolution of the SIC code designation would result in a preferential award of the contract to a small business, e.g., in a tie bid situation.

OHA has consistently applied this rule, continuing after the change from the SIC code system to the NAICS code system. *See, e.g., NAICS Appeal of Info. Ventures, Inc.*, SBA No. NAICS-4639 (2004). OHA has continued to hold 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, on the grounds that the NAICS code and size standard assigned to such a solicitation does not affect a firm's eligibility to participate in the contract process, nor does it appear to affect award. *NAICS Appeal of Genome-Commc'ns*, SBA No. NAICS-4995, at 2 (2008).

Nevertheless, OHA has accepted SIC (or NAICS) code appeals from unrestricted solicitations that contain a price or evaluation preference from which the appellant could benefit. OHA has accepted appeals relating to unrestricted solicitations with a Small Disadvantaged Business price evaluation preference. *SIC Appeal of Andrew Searcy, Jr. d/b/a Xerxe Group*, SBA No. SIC-4260, at 2 (1997). OHA has also held that it has jurisdiction over NAICS appeals involving unrestricted solicitations that contain a HUBZone price evaluation preference. *NAICS Appeal of Spherix, Inc.*, SBA No. NAICS-4626, at 4 (2004). OHA has taken jurisdiction over NAICS appeals in connection with an otherwise unrestricted procurement that used the “cascading set-aside” evaluation approach because, under this evaluation scheme, small business

size status is beneficial.³ *NAICS Appeal of Info. Ventures, Inc.*, SBA No. NAICS-4627, at n.1 (2004).

B. Analysis of Agency Comments

SBA's argument that an erroneous NAICS code designation may result in fewer set-asides ignores the timing of when a NAICS challenge is brought. According to regulation, a NAICS challenge may only be filed after a solicitation has been issued. FAR 19.303(c)(1); 13 C.F.R. § 134.304(b). Appeals filed prior to the issuance of the solicitation are premature, whereas those filed beyond the ten-day window are late. Meanwhile, the decision as to whether or not a procurement will be set-aside occurs before the solicitation is issued, during market research or acquisition planning. Thus, in order for a NAICS code challenge to alter a set-aside determination, the procuring agency would have to cancel the solicitation and return to the planning stages to reconsider whether the acquisition should be set-aside.

The FAR provides, however, that if a NAICS code is successfully challenged on appeal, the agency merely amends the solicitation to reflect the new code and proceeds with the procurement.⁴ Because there is no requirement—or even recommendation—that an agency revisit acquisition planning as a result of a successful appeal, changing the NAICS code at the solicitation stage would have no effect on whether or not the procurement is set-aside.

It is also worth noting that NAICS codes are not specifically discussed anywhere in FAR Part 7 (“Acquisition Planning”) or FAR Part 10 (“Market Research”). Thus, even supposing that an agency did decide to cancel a solicitation and return to market research as a result of a NAICS appeal, it is not clear that the set-aside determination would be affected.

³ Under a “cascading set-aside,” the proposals of large business offerors are considered only if the procuring agency did not receive a sufficient number of acceptable proposals from small businesses. OHA has described the “cascading set-aside” approach as follows:

Under this method an agency solicits and receives offers from all types of business concerns at the same time and then considers each category of offers in a designated order of precedence or ‘tiers.’ Whenever there is adequate competition at a tier, the agency stops at that tier and makes award. Any acceptable offer from a higher tier, where there was insufficient competition, ‘cascades’ down to the next layer to be considered with the offers in the lower tier. That is, the agency would begin by considering all the offers submitted by 8(a) firms. If there was insufficient competition among those firms, the agency would next consider all offers submitted by small businesses, and if there was not sufficient competition there, the agency would then consider all offers submitted.

NAICS Appeal of Spondida Prop. Sys., LLC, SBA No. NAICS-4576, at 1 (2003).

⁴ FAR 19.303(c)(5). If OHA sustains a NAICS appeal after the due date for receipt of proposals, the procurement proceeds, but the agency need not amend the solicitation. *Id.*

Because procuring agencies are not required to revisit market research as a result of a NAICS appeal, and would not necessarily reach a different result even if they did do so, OHA has previously declined to accept such arguments as a basis for finding that a party that has been “adversely affected” by a NAICS code designation. *See NAICS Appeal of Integrated Lab. Sys., Inc.*, SBA No. NAICS-4735, at 2 (2005) (“Even if Appellant prevailed, it is mere speculation as to whether the procurement would be reissued as a set aside. This is not sufficient to clothe Appellant with standing.”) Accordingly, I must reject SBA's argument that a reversal of OHA's precedent on this issue would result in more set-aside opportunities for small businesses.

I must also reject SBA's argument that a business that is small under the NAICS code and size standard applied to an unrestricted procurement is eligible for benefits not available to firms which are other than small. The principal problem with SBA's argument is that each of these benefits arises only if the small business is actually awarded the contract, or if other conditions are met. Thus, the harm associated with the denial of these benefits cannot be traced directly to the assignment of a NAICS code.

As an example, SBA observes that a small business that has been selected for award, but which has been determined non-responsible by the procuring agency, is entitled to seek a Certificate of Competency. FAR 19.602-1. In order to obtain this benefit, therefore, a firm would have to: (1) be a small business under the applicable NAICS code; (2) submit a proposal; (3) be selected for award; and (4) be found non-responsible by the procuring agency. Even then, the firm is not automatically deemed responsible—the matter is merely referred to SBA for review. Accordingly, a firm is “denied a benefit” in this situation only if several other conditions, unrelated to the assignment of a NAICS code, are also met.

Similarly, protection from the price evaluation preference for HUBZone small businesses applies only to “otherwise successful offers from small business concerns.” FAR 19.1307(b)(2) (emphasis added). In other words, this benefit arises if a firm: (1) is a small business under the applicable NAICS code; (2) submits a proposal; (3) is competing against one or more HUBZone small business offerors; and (4) would be in line for award except for the HUBZone price evaluation preference. Again, because several conditions must be satisfied before this benefit could arise, the harm from denial of this benefit is not attributable directly to the assignment of a NAICS code.

The remaining issues identified by SBA—exemption from the cost accounting standards, the potential for increased contract financing payments, and exemption from liquidated damages for failure to comply with a subcontracting plan—are all post-award issues. These benefits arise only if the small business is awarded the contract, and only if the contract would otherwise have provided for such benefits. As noted above, OHA held in *Earth Property Services, supra* that none of these issues affected bidding on the contract, and thus the appellants were not adversely affected.

In sum, each of the benefits cited by SBA arises only if the small business is awarded the contract or submits the apparently successful proposal. In addition, for each benefit, various other conditions must also be met (*e.g.*, the offeror must be found non-responsible, must be competing against HUBZone small businesses, etc.). As a result, the harm associated with the

denial of these benefits cannot be traced directly to the assignment of a NAICS code. Stated differently, unlike situations where a NAICS code affects the evaluation of proposals or eligibility to compete, the benefits outlined in SBA's brief are not enjoyed by all small businesses. Rather, the only small businesses that would receive the benefits are those that are selected for award and meet other requisite conditions. OHA would have no way to predict, at the time a NAICS code appeal is filed, which firms would ultimately receive the benefits, and thus which firms would be “adversely affected” by the NAICS code designation.

Finally, SBA's argument that OHA precedent causes widespread confusion is, at best, overstated. Although SBA maintains that thirty dismissals over three decades is indicative of widespread confusion, it could just as easily be argued that this is actually a small number of dismissals given the volume of cases that OHA adjudicates.⁵ SBA's argument also assumes there is ignorance of existing OHA case law. It is more likely that because this limit on OHA's jurisdiction has long been established, the rule is one with which the greater procurement community is familiar and upon which it has come to rely. To the extent that Federal agencies and private parties are aware of—and have been relying upon—established OHA precedent, a sudden reversal of OHA's position could prove problematic. For example, other Federal agencies, which have not been heard in this appeal, might oppose an expansion of OHA's role on the grounds that this would have the potential to delay or disrupt full and open procurements.

OHA's jurisdiction over NAICS code appeals is conveyed by SBA regulations applying to Federal small business programs, 13 C.F.R. §§ 121.401, 134.102(k), and Part 19 of FAR, which also covers small business programs. OHA's jurisdiction, then, must be limited to those solicitations that concern small business programs. Moreover, permitting NAICS appeals on every solicitation would permit appeals by large firms, which have no “direct stake in the outcome” of a solicitation's NAICS code designation. *SIC Appeal of Advanced Tech., Inc.*, SBA No. SIC-2647, at 4 (1987) (citations omitted). Such firms cannot be “adversely affected” by the designation in unrestricted solicitation. To extend the range of appellants with standing to appeal so broadly and so abruptly over all solicitations issued by every procuring agency when there is such a long line of cases to the contrary would be an unwarranted break with long-established precedent.

Nevertheless, SBA is correct that the rulings in earlier cases such as *Right Away Foods, supra*, which indicate that NAICS code appeals might be brought at a later point in the procurement process, are both contrary to the regulation and impractical. NAICS code appeals must be filed within ten days of issuance of the solicitation or amendment affecting the NAICS code. 13 C.F.R. § 134.304(b). Any appeal filed later must be dismissed. 13 C.F.R. § 134.304(c). Accordingly, I now reverse those earlier precedents, to the extent they held that a

⁵ SBA also overstates the number of NAICS code appeals that have been dismissed solely because the subject solicitation was unrestricted. *NAICS Appeal of McKissack & McKissack*, SBA No. NAICS-5154 (2010), was premature; *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4630 (2004), was a denial of reconsideration from the dismissal for untimeliness of *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4628 (2004); and *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4627 (2004), was accepted (and granted) because the solicitation used a cascading set-aside.

NAICS code appeal could be brought at any later point in the procurement than that permitted by the regulation. With that modification, I reaffirm OHA's existing precedent, that an appellant has no standing to appeal the NAICS code designation in an unrestricted solicitation, unless that solicitation includes price and evaluation preferences that make status as a small business advantageous.

C. Analysis of the Instant Appeal

When an unrestricted solicitation does contain price and evaluation preferences for small businesses, an appellant must demonstrate that it will be adversely affected by the NAICS code designation—due to its eligibility for one or more of those preferences—in order to establish standing to bring a NAICS appeal. That is, the appellant must identify the price or evaluation preference for which it claims to be eligible. *NAICS Appeal of X-Ray Assocs., LLC*, NAICS-4728, at 2 (2005). This requirement derives from Appellant's burden to prove, by a preponderance of the evidence, all the elements of its appeal. 13 C.F.R. § 134.314; *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003). Once an appellant has met this requirement, OHA will consider a NAICS code appeal from an otherwise unrestricted solicitation. If an appellant does not demonstrate that it will be adversely affected by the NAICS code applied to an unrestricted procurement, the appeal will be dismissed for lack of standing.

Here, the subject solicitation is unrestricted, and Appellant does not assert that it is eligible for any price or evaluation preference contained in the solicitation. Appellant vaguely references the HUBZone preference in its reply to the SBA's comments, but does not claim that it is a HUBZone-certified firm. Accordingly, because Appellant failed to demonstrate that it will be adversely affected by the NAICS code applied to this RFP, I find Appellant lacks standing to bring this appeal, and I must dismiss it.

V. Conclusion

For the above reasons, Appellant's NAICS code appeal is DISMISSED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge