

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

NAICS APPEAL OF:

Ash Stevens, Inc.,

Appellant

Solicitation No. N02CM17029-73

U. S. Department of Health and Human
Services

National Cancer Institute
Frederick, Maryland

SBA No. NAICS-5368

Decided: July 9, 2012

ORDER DISMISSING APPEAL¹

On December 9, 2011, the U.S. Department of Health and Human Services (HHS) issued Request for Proposals (RFP) No. N02CM17029-73, seeking the manufacture of bulk chemicals and bulk pharmaceutical ingredients for preclinical and clinical studies. The Contracting Officer (CO) set aside the procurement exclusively for small businesses and designated North American Industry Classification System (NAICS) code 541990, All Other Professional, Scientific and Technical Services. The solicitation erroneously stated that the applicable size standard was 500 employees. (RFP at § L.1.d.) Pursuant to regulations promulgated by the U.S. Small Business Administration (SBA), the correct size standard for NAICS code 541990 was \$7 million average annual receipts. 13 C.F.R. § 121.201 (2011).

On January 18, 2012, initial proposals were due. Ash Stevens, Inc. (Appellant) submitted a proposal and subsequently was included in the competitive range. On April 30, 2012, after conducting discussions with offerors, the CO informed Appellant by email that the size standard identified in the solicitation was incorrect. The CO stated that the NAICS code in the RFP was accurate, but that the size standard should have been \$14 million average annual receipts.² On May 2, 2012, Appellant responded to the CO via email. Appellant indicated that it was unable to

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.

² Effective March 12, 2012, SBA increased the size standard for NAICS code 541990 to \$14 million average annual receipts. 77 Fed. Reg. 7490, 7514 (Feb. 10, 2012). However, SBA regulations provide that “the size standard in effect on the date the solicitation is issued” is controlling, unless the CO formally amends the solicitation to adopt the new size standard. 13 C.F.R. § 121.402(a). No such solicitation amendment occurred here, so the applicable size standard remains at \$7 million average annual receipts.

represent itself as a small business under that size standard, and asked the CO to retain the 500 employee size standard or to grant Appellant a waiver of the requirement. On May 3, 2012, Appellant submitted its final proposal revisions. On May 14, 2012, HHS advised Appellant that the agency lacks the authority “either to waive or alter that (or any other) small business size standard.” As a result, Appellant's proposal would not be considered for award.

On May 24, 2012, Appellant filed the instant NAICS code appeal with SBA's Office of Hearings and Appeals (OHA). Appellant challenges the CO's designation of NAICS code 541990, and maintains that the CO should instead have assigned NAICS code 541712, Research and Development in Physical, Engineering, and Life Sciences (except Biotechnology), with a corresponding size standard of 500 employees.

On June 1, 2012, HHS moved to dismiss the appeal as untimely. On June 11, 2012, Appellant responded to the motion. Appellant acknowledges that a NAICS code appeal ordinarily must be filed within ten days after issuance of a solicitation. In this case, though, Appellant insists that HHS failed to meet its obligation to accurately identify the NAICS code and size standard in the RFP. Appellant asserts that HHS “issued an RFP stating a correct size standard, but an incorrect NAICS code,” and complains that HHS never subsequently amended the RFP to correct the defect. (Response at 3.) Appellant further argues that “[w]hen [an agency] issues a defective RFP, the Code of Federal Regulations does not contain a timeliness requirement for [a NAICS] appeal.” (*Id.*) In support, Appellant cites *NAICS Appeal of King's Thrones, LLC*, SBA No. NAICS-4845 (2007), where OHA found a NAICS code appeal filed more than ten days after issuance of a solicitation to be timely because the procuring agency failed to designate any NAICS code or size standard in the solicitation.

I agree with HHS that the instant appeal must be dismissed as untimely. In accordance with 13 C.F.R. § 134.304(b) and 48 C.F.R. § 19.303(c)(1), an appeal from a NAICS code designation must be filed and served within ten days after the issuance of the initial solicitation, or within ten days after an amendment affecting the NAICS code. The NAICS code and its corresponding size standard are final unless timely appealed to OHA. 13 C.F.R. § 121.402(c); 48 C.F.R. § 19.303(c). Furthermore, OHA has no discretion to accept an untimely appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A) and 134.304(c). Here, the RFP was issued on December 9, 2011, and there were no subsequent amendments affecting the NAICS code. Thus, any appeal of the RFP's NAICS code designation must have been filed no later than December 19, 2011. Appellant filed its appeal approximately five months later, on May 24, 2012. As a result, the appeal is untimely and I must dismiss it. 13 C.F.R. § 134.304(b); 48 C.F.R. § 19.303(c)(1); *NAICS Appeal of Hardie's Fruit & Vegetable Co. South, LP*, SBA No. NAICS-5174 (2010) (dismissing NAICS appeal filed one day after deadline).

Appellant's reliance on the *King's Thrones* decision is misplaced. OHA did not hold in that case that NAICS appeal deadlines are indefinitely tolled by any solicitation defect pertaining to a NAICS code or size standard. Rather, the decision in *King's Thrones* turned upon the specific nature of the solicitation defect. In *King's Thrones*, no NAICS code at all had been specified, and OHA reasoned that, under applicable regulations, the deadline for filing a NAICS code appeal begins to run only after a NAICS code is ““designated.” *King's Thrones*, SBA No. NAICS-4845, at 6-7. “[Absent] the designation of a NAICS code, there is no 10 day limit upon

which to file an appeal with OHA.” *Id.* at 6.

In contrast with *King's Thrones*, the CO in the instant case did designate a NAICS code (albeit with a size standard that did not correspond to the code). Appellant therefore had full opportunity to review the assigned NAICS code and size standard, and could have challenged them upon issuance of the solicitation. Indeed, Appellant argues at length in its appeal that NAICS code 541990 is inappropriate for this procurement, a concern which could have been voiced months ago. Further, the CO specifically notified Appellant on April 30, 2012 that the size standard in the solicitation was incorrect, yet Appellant did not file a NAICS appeal within 10 days of that date. Accordingly, even assuming, for purposes of argument, that the defect in the instant RFP was so subtle that Appellant could not reasonably have noticed it upon issuance of the solicitation, the appeal is nevertheless still untimely.³

For the above reasons, Appellant's NAICS code appeal is DISMISSED as UNTIMELY. The applicable NAICS code is 541990 with a size standard of \$7 million average annual receipts. This is the final decision of the U.S. Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge

³ It is worth noting that, even if OHA were to accept the appeal as timely, OHA could grant little relief at this late stage of the procurement. Pursuant to 13 C.F.R. § 134.318(b) and 48 C.F.R. § 19.303(c)(5), a decision on a NAICS code appeal that is rendered after the deadline for receipt of initial proposals will not apply to the pending solicitation.