

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

NAICS APPEAL OF:

R. Christopher Goodwin & Assocs., Inc.,

Appellant,

Solicitation No. W9128F-12-T-0130  
Department of the Army  
USACE District, Omaha  
Omaha, Nebraska

SBA No. NAICS-5382

Decided: July 23, 2012

**ORDER DISMISSING APPEAL**

**I. Background**

On June 22, 2012, the U.S. Army Corps of Engineers, Omaha District, issued Solicitation No. W9128F-12-T-0130 (RFQ) seeking a contractor for an Historic American Building Survey/Historic American Engineering Record Documentation (HABS/HAER) Level III project. The Contracting Officer (CO) set aside the procurement for small businesses and designated North American Industry Classification System (NAICS) code 712120, Historical Sites, with a corresponding size standard of \$7 million in average annual receipts. Offers were due on July 6, 2012.

On July 5, 2012, at 5:25 P.M. Eastern time, the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) received by electronic mail a NAICS appeal from R. Christopher Goodwin & Associates, Inc. (Appellant). In its appeal, Appellant contends that the CO designated an incorrect NAICS code for the RFQ. Appellant requests that OHA select a NAICS code appropriate for the work required by the HABS/HAER project.

Because the appeal appeared to be untimely, I ordered Appellant to show cause why its appeal should not be dismissed. On July 19, 2012, Appellant responded to the Order to Show Cause. Appellant does not contend that its appeal was filed within 10 calendar days after issuance of the RFQ. Instead, Appellant advances two arguments that its appeal was timely.

Appellant first maintains that the CO waived the deadline. In support, Appellant asserts that, on July 3, 2012, Appellant notified the CO of its objection to the NAICS code, and that in his written response to Appellant, the CO did not respond that Appellant's objection, submitted 11 calendar days after issuance of the RFQ, was untimely, but rather addressed the merits of Appellant's objection. Thus, in Appellant's view, the CO waived the 10-day deadline.

Appellant also argues that there is an inconsistency between 13 C.F.R. § 121.1103(b)(1), which expresses the appeal deadline in business days, and 13 C.F.R. § 134.304(b), which expresses the deadline in calendar days. The appeal would be timely under 13 C.F.R. § 121.1103(b)(1) (counting business days) but not under 13 C.F.R. § 134.304(b) (counting calendar days). Appellant urges that the inconsistency should be resolved in Appellant's favor, and points to *NAICS Appeal of Eagle Home Medical Corporation*, SBA No. NAICS-5099 (2009) (*Eagle*) in support of its position. In *Eagle*, OHA found timely an appeal filed on November 27, 2009, 11 calendar days (but fewer than 10 business days) after issuance of a November 16, 2009, solicitation amendment changing the NAICS code. Thus, contends Appellant, an appeal found timely under 13 C.F.R. § 121.1103(b)(1) need not also be timely under 13 C.F.R. § 134.304(b).

## II. Discussion

I must dismiss the instant appeal as untimely.

First, Appellant's assertion that the CO waived the NAICS appeal deadline is unavailing. Contrary to Appellant's contention, OHA has held that deliberations with a procuring agency, which do not result in any change to the solicitation, do not extend the appeal deadline. *NAICS Appeal of Secure Network Systems, LLC*, SBA No. NAICS-5236 (2011).

Second, a review of the regulatory history indicates that the current language of 13 C.F.R. § 121.1103(b)(1), which expresses the appeal deadline in business days rather than calendar days, is in the nature of a clerical or administrative error. Prior to March 4, 2011, 13 C.F.R. § 121.1103(b)(1) provided for a deadline of 10 calendar days, consistent with both the corresponding OHA rule then at 13 C.F.R. § 134.304(a)(3) and the Federal Acquisition Regulation (FAR). SBA amended 13 C.F.R. § 121.1103(b)(1) in February 2011 to change calendar days to business days, but included no discussion of this change in the preamble. 76 Fed. Reg. 5680, 5681 (Feb. 2, 2011). Furthermore, in the proposed rule which eventually led to the current version of 13 C.F.R. § 121.1103(b)(1), the deadline was expressed in calendar days. 75 Fed. Reg. 9129, 9135 (Mar. 1, 2010).

Thus, the switch to business days in 13 C.F.R. § 121.1103(b)(1) was evidently inadvertent, not the result of any conscious intent by the agency to extend the deadline for NAICS code appeals. In a very recent decision, *NAICS Appeal of Eagle Home Medical Corporation*, SBA No. NAICS-5378 (2012), OHA reached the same conclusion, dismissing as untimely a NAICS code appeal that had been filed within 10 business days, but more than 10 calendar days, after issuance of a solicitation.

Appellant's reliance on the 2009 *Eagle* decision is also misplaced. The portion of the decision cited by Appellant states:

Appellant filed the instant appeal within ten business days after the [[procuring agency] amended the [solicitation]. Thus, the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1), 134.304(a)(3).

*Eagle*, SBA No. NAICS-5099, at 3. The 2009 *Eagle* decision, however, was reached under the version of the regulations in effect before March 4, 2011. At that time, both of the regulations referenced in the decision actually used calendar days, not business days, as the measure of time for appealing a NAICS code. Thus, the reference to business days in the 2009 *Eagle* decision is immaterial. Furthermore, because there was no inconsistency with regard to the appeal deadlines at that time, the 2009 *Eagle* decision did not address how any such inconsistency should be resolved.

### III. Conclusion

The instant appeal was filed more than 10 calendar days after issuance of the RFQ, and is therefore untimely. 13 C.F.R. § 134.304(b); FAR 19.303(c)(1). OHA has no discretion to accept an untimely appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A) and 134.304(c). Accordingly, Appellant's NAICS code appeal is DISMISSED. This is the final decision of the U.S. Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge