

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

NAICS APPEAL OF:

J.D. Broco, LLC,

Appellant,

Solicitation No. FA8101-12-R-0037

U.S. Air Force

Tinker Air Force Base, Oklahoma

SBA No. NAICS-5389

Decided: August 7, 2012

APPEARANCES

Theodore M. Bailey, Esq., Bailey & Bailey, P.C., San Antonio, Texas, for Appellant

Phyllis Schmit, Contracting Officer, U.S. Air Force, Tinker Air Force Base, Oklahoma

ORDER DISMISSING APPEAL¹

I. Background

On June 8, 2012, the U.S. Air Force issued solicitation FA8101-12-R-0037 for operations and maintenance of the base telecommunications system (BTS) at Tinker Air Force Base, Oklahoma. The solicitation sought a contractor to perform a task order under the Air Force's Network-Centric Solutions (NETCENTS) contract vehicle, a multiple-award indefinite delivery/indefinite quantity (ID/IQ) arrangement.

The solicitation stated that the order would be awarded to a NETCENTS prime contractor that qualified as a small business under North American Industry Classification System (NAICS) code 517110, Wired Telecommunications Carriers, with a corresponding size standard of 1,500 employees. J.D. Broco, LLC (Appellant) is not a NETCENTS prime contractor, and therefore is ineligible to compete for the instant procurement.

On June 26, 2012, Appellant filed this appeal with OHA. Appellant insists that NAICS code 517110 is inappropriate for the solicitation, and that the Contracting Officer (CO) should instead have selected NAICS code 811213, Communication Equipment Repair and Maintenance, with a corresponding size standard of \$10 million in average annual receipts.

¹ The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides NAICS appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

On July 10, 2012, the CO responded to the appeal, defending her choice of NAICS code 517110. The CO explained that the Air Force has established a preference for use of the NETCENTS contracts to fulfill the agency's networking and communications requirements. The CO also disputed Appellant's standing to bring the instant NAICS code appeal, arguing: There are eight possible vendors holding NETCENTS [prime] contracts. Regardless of NAICS or if it is a Small Business Set Aside, we are still required to utilize NETCENTS [], which has eight mandatory vendors to fulfill BTS requirements. Therefore, [Appellant] would not be allowed to submit a proposal and is not considered an interested party. (CO Response ¶ 5.)

OHA directed Appellant to address the question of standing raised by the CO. On July 27, 2012, Appellant filed its response. Appellant argues that it does have standing to bring this appeal because there is no legal requirement that the work be procured through NETCENTS. Although the Air Force has, as a policy matter, established a preference to meet networking and communications needs through NETCENTS, a requiring activity may seek a waiver under certain circumstances. Thus, Appellant reasons, the CO was not required to utilize NETCENTS for this particular acquisition. Appellant argues further that none of the eight NETCENTS prime contractors qualifies as a small business under the NAICS code Appellant advocates, 811213. Appellant suggests that, if the CO had selected the appropriate NAICS code, there would be no eligible small businesses under NETCENTS, thereby necessitating a different choice of acquisition strategy.

On August 3, 2012, the CO responded to Appellant's arguments. The CO explains that she is not pursuing a waiver of the NETCENTS preference because the agency can fulfill its acquisition strategy by using NETCENTS. The CO reiterates that Appellant is not a potential offeror under NETCENTS.

II. Discussion

I agree with the CO that Appellant lacks standing to bring this appeal. Under SBA regulations, an appeal of a NAICS code or size standard designation may only be brought by a party that has been “adversely affected” by the designation. 13 C.F.R. §§ 121.402(e), 121.1103(a), and 134.302(b). In interpreting these provisions, OHA has long held that “in order for an aggrieved party to establish its standing to bring a [NAICS] code appeal, it must show that it is a potential bidder or offeror on a small business set-aside.” *SIC Appeal of Advanced Tech., Inc.*, SBA No. SIC-2647, at 4 (1987). Here, it is undisputed that Appellant is not a NETCENTS prime contractor, and therefore is not a potential offeror for the instant solicitation. As a result, Appellant is not “adversely affected” by the NAICS code designation within the meaning of SBA regulations.

Appellant maintains that, if the NAICS code Appellant advocates were selected, the Air Force might be obliged to pursue a different acquisition strategy, such that Appellant potentially could compete for the work. This argument, however, is largely speculative, and OHA has declined to accept such conjecture as a basis for finding that a party has been “adversely affected” by a NAICS code designation. *E.g., 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.”). Supposing that Appellant were to prevail in this appeal, it does not follow that the Air Force would revisit acquisition planning in the manner Appellant suggests.

III. Conclusion

For the above reasons, the instant appeal is DISMISSED for lack of standing. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge