

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

NAICS APPEAL OF:

Trans Aero Ltd.,

Appellant,

Solicitation No. AG-84N8-S-13-0004
U.S. Department of Agriculture
Forest Service

SBA No. NAICS-5443

Decided: January 31, 2013

ORDER DISMISSING APPEAL

I. Background

On November 8, 2012, U.S. Department of Agriculture, Forest Service, Utah Acquisition Support Center (Forest Service) in Salt Lake City, Utah, issued Solicitation No. AG-84N8-S-13-0004 (RFP) for aerial application of mulch. The Forest Service set aside the procurement exclusively for small businesses, and assigned North American Industry Classification System (NAICS) code 115310, Support Activities for Forestry, with a corresponding size standard of \$7 million in average annual receipts.

On December 14, 2012, the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) received by electronic mail an appeal from Trans Aero Ltd. (Appellant). The appeal stated that Appellant “does not protest the NAICS code applied to the [instant] Solicitation. Rather, [Appellant] protests, generally, the Forest Service's arbitrary application and selection of NAICS codes in its solicitations for aerial application of mulch in response to post fire ... rehabilitation efforts.” (Appeal at 2.)

On December 20, 2012, OHA ordered Appellant to show cause why the appeal should not be dismissed as untimely. OHA noted that NAICS code appeals must be filed within 10 days of a solicitation's issuance, or within 10 days of an amendment affecting the NAICS code. 13 C.F.R. § 134.304(b). Here, Appellant filed its appeal 37 days after the solicitation was issued. OHA also directed Appellant to explain why the appeal should not be dismissed for lack of subject matter jurisdiction, given that Appellant apparently did not dispute the NAICS code assigned to this particular acquisition.

On December 24, 2012, Appellant responded to the order to show cause. Appellant maintains that OHA does have subject matter jurisdiction over this appeal, and that the appeal is timely.

Appellant begins by reiterating that it is “not necessarily protesting the NAICS code” selected for this solicitation, but rather is “protesting the Forest Service’s arbitrary and inconsistent application of NAICS code 115310” across multiple procurements. In Appellant’s view, OHA has subject matter jurisdiction over the appeal “to the extent [the appeal] constitutes a challenge of an ‘NAICS code designation’ under [13 C.F.R. §§ 134.102 and 121.1103].” (Response at 2.)

Appellant next addresses the question of timeliness. Appellant concedes that it filed the instant appeal with OHA 37 calendar days after the Forest Service issued the RFP. (Response at 2.) Nevertheless, Appellant advances four theories as to why OHA should consider the appeal to be timely: (1) the language of 13 C.F.R. § 134.304(b) supports a finding of timeliness; (2) “ambiguity in the statutory framework requires a more expansive interpretation of the delivery requirement in 13 C.F.R. § 121.1003(b)”; (3) public policy supports finding the appeal timely; and (4) the doctrine of excusable neglect applies.

Appellant first contends that the appeal is timely under 13 C.F.R. § 134.304(b), which states that “NAICS code appeals must be filed within 10 calendar days after the issuance of the solicitation. . . .” Appellant states that, before filing the instant appeal at OHA, Appellant submitted an agency-level bid protest to the Forest Service on November 16, 2012, eight days after issuance of the RFP. The Forest Service did not address the merits of the protest, but instead advised Appellant on December 6, 2012 that “an appeal of the Contracting Officer’s designation of a NAICS code must be appealed to SBA’s Office of Hearings and Appeals.” Appellant then filed the instant appeal with OHA less than 10 days later. Appellant reasons that 13 C.F.R. § 134.304(b) does not specify where a NAICS code appeal must be filed, or define the term “filed.” Thus, Appellant asserts, the submission of a timely agency-level bid protest is sufficient to meet the requirements of 13 C.F.R. § 134.304(b). Appellant acknowledges that 13 C.F.R. § 121.1103(b)(2) does instruct that NAICS code appeals must be filed with OHA, but asserts that this is a “delivery and/or location requirement,” not a “timeliness requirement.” (*Id.*)

Next, Appellant argues that the regulations governing timeliness are ambiguous and should be construed in Appellant’s favor. Appellant observes that 13 C.F.R. § 121.1103(a) states that “[a]ny interested party adversely affected by a NAICS code designation may appeal the designation to OHA.” Appellant contends that the use of the word “may” in this regulation implies that OHA is not the exclusive forum for challenging a NAICS code. (*Id.* at 3.)

Appellant argues that to conclude that NAICS code appeals may be filed only at OHA is inconsistent with Federal Acquisition Regulation (FAR) 33.101 and 33.103(e), which, Appellant maintains, allow parties to protest NAICS code designations at the agency level. Under FAR 33.103(e), a party may challenge “alleged improprieties in a solicitation” in an agency-level bid protest. FAR 33.101 defines a “protest” as a “written objection by an interested party to . . . a solicitation.” Because neither regulation limits the subject matter or scope of an agency-level bid protest, Appellant contends that, “[a]rguably, problems with [a] NAICS code would fall within the scope of an ‘alleged impropriety’ in a solicitation.” (*Id.*)

Appellant goes on to argue that its proffered interpretation is consistent with canons of

statutory construction. When faced with an ambiguity within a statute or the statutory framework, tribunals should seek an interpretation that does the “least violence to the text.” *Green v. Block Laundry Mach. Co.*, 490 U.S. 504, 529 (1989). In this case, a ruling that OHA is the exclusive forum for NAICS code appeals would, in effect, add language to 13 C.F.R. § 134.304(b) which is not found in the actual regulation. Appellant asserts that its interpretation does less harm to the regulation. (Response at 3-4.)

Appellant then argues it would be an abuse of discretion for OHA to dismiss the appeal as untimely, because Appellant relied on materially misleading information. Appellant reiterates that 13 C.F.R. § 134.304(b) does not specify where an appeal must be filed, and 13 C.F.R. § 121.1103(a) indicates only that an appeal “may” be filed at OHA, without prohibiting other possible forums. Further, an incorrect NAICS code can be viewed as a type of solicitation defect, which could be challenged through an agency-level bid protest. Appellant also argues that the instant RFP made no mention of NAICS code appeals to OHA. (*Id.* at 4.)

Third, Appellant observes that there is a strong public policy preference for informally resolving protests and disputes, rather than resorting to litigation. *E.g.*, Executive Order 12979; FAR 33.103 and 33.204. Thus, Appellant should not be penalized for attempting to resolve its concerns with the Forest Service, before bringing an appeal to OHA. Appellant goes on to contend that 13 C.F.R. § 121.1103 is a “remedial regulation” intended to benefit those adversely affected by erroneous NAICS code designations. Because Appellant is adversely affected, the regulation should be construed in Appellant's favor. (Response at 5-6.)

Lastly, Appellant contends that the doctrine of excusable neglect applies. Under this doctrine, a tribunal may grant a party a reprieve from a deadline after considering:

all relevant circumstances surrounding the party's omission . . . [including] the danger of prejudice [to other parties], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, et al., 507 U.S. 380, 395 (1993). In this case, Appellant emphasizes that it filed an agency-level bid protest within 10 days of the RFP's issuance. Once that protest was rejected, Appellant promptly filed an appeal with OHA. Any error was done in good faith reliance on the applicable statutes, regulations, and the RFP. Appellant asserts that finding the instant appeal to be timely would not prejudice other parties because the subject contract has yet to be awarded. Further, applying the doctrine of excusable neglect here would not generally extend the deadline for NAICS code appeals, because it would be limited to situations where a party diligently pursues an agency-level bid protest within 10 days of a solicitation's issuance. (Response at 6-7.)

II. Analysis

Appellant's response to OHA's show cause order is meritless. As a result, the appeal must be dismissed.

First, contrary to Appellant's arguments, the instant appeal does not fall within OHA's subject matter jurisdiction. OHA's jurisdiction is defined in 13 C.F.R. § 134.102. That regulation provides that OHA has authority to decide appeals arising from "NAICS code designations under [13 C.F.R.] part 121." 13 C.F.R. § 134.102(k). As explained in 13 C.F.R. part 121, the procuring agency selects an appropriate NAICS code for each individual solicitation, after considering the industry definitions in the *NAICS Manual*,¹ the descriptions in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b); *see also* FAR 19.303; *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003). Accordingly, the propriety of a NAICS code can be assessed only in conjunction with a specific solicitation. In this case, though, Appellant repeatedly states that it is not challenging the NAICS code assigned to the instant RFP. Rather, Appellant seeks to challenge the purportedly inconsistent use of NAICS code 115310 across other solicitations, which were never appealed and are not before OHA. Appellant therefore has not presented a proper NAICS code appeal that can be adjudicated by OHA. I find this matter is beyond OHA's subject matter jurisdiction.

Even assuming OHA had jurisdiction to entertain the appeal, the appeal is also untimely. The regulations governing NAICS codes mandate that the procuring agency must specify a NAICS code and size standard in the solicitation. 13 C.F.R. § 121.402(b); FAR 19.303(a) and 19.501(f). The designated NAICS code and size standard become final unless timely appealed to OHA. 13 C.F.R. §§ 121.402(c) and 121.1103(b); FAR 19.303(c). To be timely, a NAICS code appeal must be filed within 10 calendar days after issuance of the solicitation, or within 10 calendar days of an amendment affecting the NAICS code designation. 13 C.F.R. §§ 134.304(b) and 121.1103(b); FAR 19.303(c); *NAICS Appeal of Eagle Home Med. Corp.*, SBA No. NAICS-5378, at 2-3 (2012). OHA has no discretion to consider an untimely NAICS code appeal. 13 C.F.R. §§ 134.304(c), 134.202(d)(2)(i)(A), and 121.1103(b)(1); FAR 19.303(c)(1). Here, Appellant acknowledges that it filed the appeal with OHA 37 calendar days after issuance of the solicitation. The appeal is therefore plainly untimely and must be dismissed.

Appellant maintains that 13 C.F.R. § 134.304(b) requires that a NAICS code appeal be filed within 10 calendar days of solicitation issuance, but does not specifically state where such an appeal is to be filed. While this is true, the applicable regulations elsewhere make clear that a NAICS code appeal can be filed only at OHA. 13 C.F.R. §§ 121.402(c), 121.1102, and 121.1103(b)(2)(i); FAR 19.303(c)(2)(i). Further, 13 C.F.R. § 134.304(b) itself appears among the group of regulations pertaining to OHA's rules of practice,² and OHA's rules define "filing" as "the receipt of pleadings and other submissions at OHA." 13 C.F.R. § 134.204(b). I thus find no merit to Appellant's claim that the regulations could be construed as permitting a party to bring a NAICS code appeal somewhere other than OHA, or that the regulatory scheme is misleading or ambiguous.

¹ Executive Office of the President, Office of Management and Budget, North American Industry Classification System-United States (2012), available at <http://www.census.gov> (*NAICS Manual*).

² *See generally* 13 C.F.R. part 134.

Appellant emphasizes that it raised its concerns in an agency-level bid protest with the Forest Service on November 16, 2012, and that FAR part 33 encourages the informal resolution of protests and disputes. FAR part 33, however, does not govern appeals of NAICS code designations; rather, such appeals are discussed in FAR 19.303. Further, OHA has repeatedly held that efforts to resolve a NAICS code dispute with the procuring agency do not extend or toll the deadline for pursuing an appeal at OHA. *NAICS Appeal of R. Christopher Goodwin & Assocs., Inc.*, SBA No. NAICS-5382, at 2 (2012); *NAICS Appeal of Secure Network Sys., LLC*, SBA No. NAICS-5236, at 2 (2011). Accordingly, the instant appeal is still untimely, notwithstanding Appellant's filing of an agency-level bid protest within 10 days of the solicitation's issuance.

Finally, the doctrine of excusable neglect does not apply to the circumstances of this case. As discussed *supra*, once an appeal is found to be untimely, OHA has no discretion to consider it.

III. Conclusion

For the above reasons, the appeal is DISMISSED as untimely and for lack of subject matter jurisdiction. This is the final decision of the U.S. Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge