

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

NAICS APPEAL OF:

Validata Chemical Services, Inc.,

Appellant,

Solicitation No. 30492-RFP-RR014  
URS | CH2M Oak Ridge LLC (UCOR)  
Oak Ridge, Tennessee

SBA No. NAICS-5449

Decided: February 14, 2013

**ORDER DISMISSING APPEAL**

**I. Background**

**A. Solicitation**

On August 2, 2012, URS | CH2M Oak Ridge LLC (UCOR) issued Request for Proposal No. 30492-RFP-RR014 (RFP) for analytical data evaluation services. UCOR is a prime contractor for the U.S. Department of Energy (DOE), at Oak Ridge, Tennessee, and the RFP was for a subcontract under UCOR's DOE Contract No. DE-SC-0004645. The RFP was set aside for a prequalified small business. Responses to the RFP were due on August 20, 2012. On August 15, 2012, UCOR posted Questions and Answers on its website<sup>1</sup> Question 14 inquired about the applicable North American Industry Classification System (NAICS) code and size standard. UCOR responded, "NAICS code is 562910. Size standard is 500 employees."

On September 17, 2012, UCOR awarded the subcontract to Portage, Inc. (Portage). On September 19, 2012, Validata Chemical Services, Inc. (Appellant), an unsuccessful offeror, sent an email to UCOR's Subcontract Administrator stating, "we have one pressing concern about the named awardee. Based on our information, we are not sure they are a small business." (Appeal, Attachment 5.) Over the ensuing weeks, there were several other communications between Appellant and UCOR's Subcontract Administrator regarding the filing of a size protest against Portage. (Appeal, Attachments 5-10.)

On December 11, 2012, Appellant sent an email to an SBA procurement analyst asking the "general question" of whether NAICS code 562910, Environmental Remediation Services, is correct for a subcontract which calls for science services only. Later that same day, the SBA procurement analyst responded that, for a subcontract, the NAICS code would reflect what

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<sup>1</sup> UCOR's website for this RFP is at <http://info.ettp.energy.gov/rfp/rr014/> (website).

portion of the contract the subcontractor is doing. Thus, for science services, the NAICS code could fall under Subsector 541, Professional, Scientific and Technical Services. (Appeal, Attachment 4.)

## B. OHA Proceedings

### 1. Appeal Petition and Response to Show Cause Order

On January 3, 2013, Appellant filed the instant NAICS code appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant contends that UCOR issued the RFP without any NAICS code or size standard and never amended the RFP to incorporate the NAICS code. Consequently, “the solicitation process was conducted incorrectly.” (Appeal at 1.) In support, Appellant points to the portion of the RFP entitled “Instructions and Information to Offerors (Services)” (Instructions) and contends that the small business set-aside clause there references the RFP's Exhibit C, Form P, “Representations, Certifications and Other Statements of Offerors” (Form P), and that Form P is “the only valid source for the size standards”. (*Id.* at 2.) Appellant attaches a copy of Form P noting that the Small Business Program Representations at Paragraph 2 did not identify the NAICS code and size standard.

Appellant observes that the one amendment to the RFP also did not include the NAICS code or the size standard. Although UCOR did address the NAICS code and size standard in the Questions and Answers, Appellant asserts these cannot be considered a formal part of the RFP, because they were posted just five days before the deadline for offers. (*Id.* at 4.) Referencing 13 C.F.R. § 134.304, which requires that a NAICS code appeal “must be filed within 10 calendar days after issuance of a solicitation,” Appellant reasons that “there must be a NAICS code issued in the solicitation for the bidder to see and evaluate and to determine its applicability to the solicitation to form the basis of any appeal. Without it, a small business set-aside solicitation cannot be considered fully issued. . . . [A] solicitation issued without a NAICS code has not been issued at all with respect to the time limitation in 13 CFR 134.304.” (*Id.* at 3.) Therefore, Appellant contends, the instant RFP was not a valid set-aside for small businesses, and the time clock for filing a NAICS code appeal never began to run.

With respect to the Questions and Answers, Appellant continues:

Prior to that communication, [Appellant] did not have any idea what NAICS code UCOR wanted to apply to the solicitation. When UCOR made known its plans to use 562910, Environmental Remediation Services, with a size standard of 500 employees, there were only 5 days left until bids were due.

(*Id.* at 4.) Further, although Appellant did self-certify under that size standard, that action should not be construed as agreement with the size standard. (*Id.* at 6.)

On the issue of the correct NAICS code for the subcontract, Appellant advocates 541620, Environmental Consulting Services, with a \$14 million annual receipts size standard. (*Id.* at 6-11.) Appellant asserts that the award to Portage resulting from the RFP is also “improper”. (*Id.* at 5.) Appellant describes at length its efforts to file a size protest against Portage. (*Id.* at 11-16.) As

relief, Appellant requests that OHA “enforce the use of the correct NAICS code and size standard”, order UCOR to amend the RFP to reflect the correct NAICS code and size standard, and obtain new representations and certifications from offerors. If Portage fails to meet the size standard, the award should be rescinded. (*Id.* at 16.)

On January 8, 2013, OHA ordered Appellant to show cause why its appeal should not be dismissed as untimely. On January 15, 2013, Appellant responded to the show cause order. Appellant maintains that its appeal is timely because the RFP was issued without a NAICS code or size standard, and neither was ever formally incorporated by amendment. Thus, Appellant contends, the RFP was not a proper set-aside solicitation, and its issuance did not trigger the ten-day time period for filing a NAICS code appeal. Appellant maintains that because the time clock for NAICS appeal timeliness never started ticking, the NAICS appeal is timely.

## 2. UCOR's Response to the Appeal Petition

On January 17, 2013, UCOR responded to the appeal. UCOR contends that this competition was conducted correctly. UCOR notes that it used a Pre-Qualification procedure for this subcontract, and posted the Pre-Qualification requirements on its website on April 24, 2012. (UCOR Response at 1.) This material included “Prequalification Criteria” (Criteria) which, among other things, announced that UCOR “intends to issue a Request for Proposal (RFP) for award of a Subcontract to provide services/goods generally described below to prequalified offerors only”. (Criteria at 1.) The Criteria made clear that “Only **Small Businesses** are eligible [for the subcontract]. NAICS Code: 562910, Environmental Remediation Services, Size Standard: 500 employees.” (*Id.* at 3 (emphasis in original).) The Pre-Qualification submittal was due May 9, 2012.

UCOR attached to its response a copy of Appellant's actual Pre-Qualification submittal dated May 9, 2012. Appellant's submittal referenced NAICS code 562910 and the 500 employees size standard. (UCOR Response, Attachment C.) UCOR also attached a copy of Appellant's August 17, 2012 Form P, in which Appellant self-certified as a small business under NAICS code 562910 and the 500 employees size standard. (*Id.*, Attachment D at 2 ¶ 2.)

UCOR observes that Appellant's correspondence with the Subcontract Administrator initially focused only on Portage's size status, and that Appellant did not voice any concern about the applicable NAICS code until November 6, 2012, after “it was established that [Portage] met the size requirements” under NAICS code 562910. (*Id.* at 1.)

## II. Analysis

The instant appeal is fatally flawed in two respects.

First, Appellant seeks to challenge the NAICS code assigned to a subcontract that has already long since been awarded. Under OHA case precedent, once a procurement has been awarded, any further dispute over the NAICS code is moot. *E.g.*, *NAICS Appeal of Genome-Communications*, SBA No. NAICS-4982, at 1 (2008), *recons. dismissed*, SBA No. NAICS-4991 (2008) (PFR) (“Based on well-established case precedent, when a contract award is made in a

NAICS code appeal OHA dismisses the proceeding and does not consider the substantive appeal.”); *NAICS Appeal of Guidry Liason Group, Inc.*, SBA No. NAICS-4618, at 2 (2004) (“It is settled law beyond all doubt that when the procuring agency awards the contract in issue in a NAICS code appeal, the appeal becomes moot, and the case must be dismissed.”). In the instant case, even if OHA were to agree with Appellant that the RFP should have been assigned a different NAICS code, the issue is inconsequential at this late stage of the acquisition. OHA has no authority to order UCOR to reopen the competition, or to terminate the subcontract with Portage. Accordingly, because UCOR has already awarded the subcontract in question, OHA will not entertain argument as to which NAICS code should have been assigned to the solicitation.

In addition to being moot, the appeal is also untimely. Under applicable regulations, a NAICS code appeal must be filed within 10 calendar days after issuance of the solicitation or amendment to the solicitation affecting the NAICS code or size standard. 13 C.F.R. § 134.304(b); Federal Acquisition Regulation (FAR) 19.303(c)(1). Here, Appellant filed its appeal with OHA on January 3, 2013, 154 calendar days after the August 2, 2012 issuance of the solicitation. Thus, the appeal is clearly untimely. The regulations explicitly require that an untimely appeal must be dismissed. 13 C.F.R. § 134.304(c); FAR 19.303(c)(1).

Appellant argues that its failure to meet the ten-day deadline should be excused because neither the RFP nor the amendment identified a specific NAICS code or size standard. OHA accepted similar reasoning in *NAICS Appeal of King's Thrones, LLC*, SBA No. NAICS-4845 (2007), where OHA held that the deadline to file a NAICS code appeal may be tolled if the procuring activity fails to designate any NAICS code or size standard in the solicitation. In *King's Thrones*, though, prospective offerors had no way of determining which NAICS code might ultimately be assigned to the procurement. By contrast, in the instant case, the Pre-Qualification Criteria on the UCOR website did identify the NAICS code and size standard. Appellant's representative acknowledged these criteria on May 9, 2012, well before the RFP was even issued. Further, the RFP's Questions and Answers, even if not formally incorporated into the solicitation, nevertheless reiterated that the assigned NAICS code was 562910. As distinguished from *King's Thrones*, then, Appellant here had ample notice of the applicable NAICS code and size standard. I therefore find that Appellant could have pursued a NAICS code appeal much earlier in the acquisition process, and Appellant's failure to do so renders this appeal untimely.

### III. Conclusion

The instant appeal is moot because it seeks to challenge the NAICS code assigned to a procurement that has already been awarded. In addition, the appeal was filed more than 10 calendar days after issuance of the solicitation, thus it is untimely. For these reasons, the 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