

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

NAICS APPEAL OF:

The McConnell Group, Inc.,

Appellant,

Solicitation No. NIH-OD-2012-317
U.S. Department of Health and Human
Services
National Institutes of Health

SBA No. NAICS-5463

Decided: April 24, 2013

ORDER DISMISSING APPEAL

I. Background

A. Solicitation

On August 29, 2012, the U.S. Department of Health and Human Services, National Institutes of Health (NIH) issued Solicitation No. NIH-OD-2012-317 (RFP) seeking a contractor to perform technical and support services for the proper care and use of laboratory animals at NIH. The RFP was assigned North American Industry Classification System (NAICS) code 541490, Veterinary Services. NIH amended the RFP on September 17, 2012 and again on September 27, 2012.

B. OHA Proceedings

On April 10, 2013, The McConnell Group, Inc. (Appellant) submitted a NAICS code appeal to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). In its appeal, Appellant complained the NAICS code selected for the RFP was “improper, insufficient and unduly restrictive.” (Appeal at 1.) Appellant further asserted that NIH had previously assigned codes within NAICS industry group 54171, Research and Development in the Physical, Engineering, and Life Sciences, for similar procurements. The appeal petition acknowledged that the instant RFP was issued on August 29, 2012, and offered no explanation for the long delay in filing an appeal.

Because the appeal appeared to have been filed more than 10 days after issuance of the RFP or any amendment to the RFP, OHA ordered Appellant to show cause why its appeal should not be dismissed as untimely. On April 18, 2013, Appellant responded to the show cause order. Appellant maintains that the 10-day appeal deadline is inconsistent with 13 C.F.R. § 121.1102, which provides that “[t]he OHA appeal is an administrative remedy that must be exhausted

before judicial review of a NAICS code designation may be sought in a court.” (Response at 2.) In Appellant's view, strict enforcement of the 10-day deadline “expressly denies a NAICS code protestor of the very reason for appealing to OHA — an administrative decision on valid merits such that the protester need not proceed to court.” (*Id.*) Appellant also argues that the 10-day deadline has been “consistently challenged by small businesses as manifestly unreasonable,” particularly since a NAICS appeal brought by SBA need not comply with the same deadline. (*Id.* at 3.)

II. Analysis

The instant appeal is untimely and must be dismissed. Under applicable regulations, a NAICS code appeal must be filed within 10 calendar days after issuance of the solicitation, or within 10 calendar days of a solicitation amendment affecting the NAICS code or size standard. 13 C.F.R. § 134.304(b); Federal Acquisition Regulation (FAR) 19.303(c)(1); *NAICS Appeal of Trans Aero Ltd.*, SBA No. NAICS-5443 (2013). Here, Appellant filed its appeal with OHA on April 10, 2013, several months after the August 29, 2012, issuance of the solicitation. Thus, the appeal is plainly untimely. OHA has no discretion to extend, or waive, the deadline for filing a 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).

Appellant does not dispute that its appeal was filed more than 10 days after the issuance of the subject RFP. Rather, Appellant insists that the 10-day deadline itself is unreasonable, and that a longer deadline, or no deadline at all, would be appropriate. Such arguments should be directed to SBA policy officials, not to OHA. It is well-settled that OHA has no authority to determine the validity of SBA regulations and will entertain no challenge to them. *E.g.*, *Size Appeal of ADVENT Environmental, Inc.*, SBA No. SIZ-5325, at 9 (2012).

III. Conclusion

The instant appeal was filed more than 10 calendar days after issuance of the RFP, and is therefore untimely. OHA cannot extend or waive the deadline for filing an appeal. Accordingly, the appeal is DISMISSED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge