

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

NAICS APPEAL OF:

RhinoCorps, Ltd.,

Appellant,

Solicitation No. W31P4Q-13-R-0003
U.S. Department of the Army
Army Contracting Command
Redstone Arsenal, Alabama

SBA No. NAICS-5481

Decided: July 1, 2013

ORDER DISMISSING APPEAL

I. Background

A. Solicitation

On June 7, 2013, the U.S. Department of the Army, Army Contracting Command, issued Solicitation No. W31P4Q-13-R-0003 (RFP) seeking a contractor to provide support for the System Simulation Development Directorate. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology). The RFP stated that the applicable size standard was 1,000 employees.¹

B. OHA Proceedings

On June 18, 2013, the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) received by electronic mail a NAICS code appeal from RhinoCorps, Ltd. (Appellant). In its appeal, Appellant asserted that the CO incorrectly assigned NAICS code 541712 because “[n]othing in the [RFP] or the specified labor categories indicate that the contractor is to perform any research or development.” (Appeal at 2.) Appellant maintained that the procurement would be better classified under the Military and Aerospace Equipment and Military Weapons (MAE&MW) exception to NAICS code 541330, Engineering Services, with a

¹ NAICS code 541712 ordinarily is associated with a size standard of 500 employees. 13 C.F.R. § 121.201. There are, however, certain exceptions available which allow for higher size standards. *Id.*

corresponding size standard of \$35.5 million average annual receipts. The appeal petition was dated June 18, 2013, and Appellant acknowledged in its appeal that the instant RFP was issued on June 7, 2013. (*Id.* at 1.)

Because the appeal appeared to have been filed more than 10 calendar days after issuance of the RFP or any amendment to the RFP, OHA ordered Appellant to show cause why the appeal should not be dismissed as untimely. On June 26, 2013, Appellant responded to OHA's order. Appellant explained that it relied on the language of 13 C.F.R. § 121.1103(b)(1), which states that “[a]n appeal from a contracting officer's NAICS code or size standard designation must be served and filed within 10 business days after the issuance of the solicitation or amendment affecting the NAICS code or size standard.” Although other regulations express the appeal deadline in calendar days rather than business days, Appellant contended that 13 C.F.R. § 121.1103(b)(1) is not ambiguous, and that Appellant “should not suffer for SBA's failure, over the course of twenty-eight months, to amend 13 C.F.R. § 121.1103.” (Response at 1.)

Appellant urged OHA to grant jurisdiction on this matter, arguing that, by allowing the conflicting regulatory deadlines to persist, “SBA created and maintained, in what can at best be described as willful ignorance, a trap for NAICS code appellants.” (*Id.* at 3.) Appellant argued that, although OHA has determined that the use of business days in 13 C.F.R. § 121.1103(b)(1) was inadvertent, SBA cannot claim continued ignorance of the issue. SBA could have amended its regulations to clarify the deadline in any of five proposed rules involving 13 C.F.R. Part 121. Appellant argued that it should not suffer the detriment of having its appeal dismissed as a result of SBA's “inadvertent” error in the regulations. (*Id.* at 4.)

Appellant also argued that there is good cause for OHA to consider the merits of appeal because the NAICS designation is clearly erroneous. Appellant reiterated contentions from its appeal as to why NAICS code 541712 is incorrect.

II. Analysis

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). OHA has no discretion to extend, or waive, the deadline for filing a NAICS code appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A) and 134.304(c); FAR 19.303(c)(1). In this case, Appellant filed its appeal with OHA on June 18, 2013 — 11 calendar days after the RFP was issued — and Appellant does not dispute that its appeal was filed more than 10 calendar days after issuance of the RFP. Thus, the appeal is untimely and may not be entertained.

Appellant emphasizes that 13 C.F.R. § 121.1103(b)(1) defines the appeal deadline in business days rather than calendar days. While this is true, OHA has addressed the inconsistency between the regulations in several recent decisions, and has declined to extend the NAICS appeal deadline on this basis. *NAICS Appeal of Cape Fox Govt. Servs., LLC*, SBA No. NAICS-5422 (2012); *NAICS Appeal of R. Christopher Goodwin & Assocs., Inc.*, SBA No. NAICS-5382 (2012); *NAICS Appeal of Eagle Home Med. Corp.*, SBA No. NAICS-5378 (2012). SBA

amended 13 C.F.R. § 121.1103(b)(1) in February 2011 to change calendar days to business days. However, OHA has explained that:

[A] review of the regulatory history suggests that the recent change to 13 C.F.R. § 121.1103(b)(1) was in the nature of a clerical or administrative error. As Appellant acknowledges, 13 C.F.R. § 121.1103(b)(1) previously provided for a deadline of 10 calendar days, consistent with both 13 C.F.R. § 134.304(b) and the FAR. SBA amended 13 C.F.R. § 121.1103(b)(1) in February 2011, but included no discussion of this change in the preamble.⁷⁶ Fed. Reg. 5680, 5681 (Feb. 2, 2011). Furthermore, in the proposed rule which led to the new iteration 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) appears to have been inadvertent, not the result of any conscious intent by the agency to extend the deadline for NAICS code appeals. It is well-settled that, when there is doubt about the meaning of regulatory provisions, it is appropriate to examine the intent of the drafters. *Kearfott Guidance & Navigation Corp. v. Rumsfeld*, 320 F.3d 1369, 1373-74 (Fed. Cir. 2003). Accordingly, the fact that the change to business days in 13 C.F.R. § 121.1103(b)(1) was unexplained, and apparently unintentional, weighs in favor of utilizing the 10 calendar day deadline.

Eagle, SBA No. NAICS-5378, at 2-3. Therefore, because the use of business days in 13 C.F.R. § 121.1103(b)(1) stemmed from a clerical or administrative error, OHA has applied a timeline of 10 calendar days for NAICS appeals. Appellant cites no instance in which OHA has deviated from this practice.

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