

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

NAICS APPEAL OF:

Credence Management Solutions,

Appellant,

Engineering, Professional, and
Administrative Support Services (EPASS)
Air Force Task Orders, Fair Opportunity
Proposal Requests #39 & #40

SBA No. NAICS-5914

Decided: May 24, 2018

ORDER GRANTING MOTION TO DISMISS¹

I. Background

A. Solicitations

On April 27, 2018, the Department of the Air Force (Air Force), Air Force Life Cycle Management Center (AFLCM) issued Fair Opportunity Proposal Requests (FOPRs) #39 & #40 for the Engineering, Professional, and Administrative Support Services (EPASS) task orders. Credence Management Solutions (Appellant) has filed two separate Appeals, one for FOPR #39 and one for FOPR #40. The FOPRs were issued against the General Services Administration (GSA) One Acquisition Solution for Integrated Services (OASIS) Multiple Award Contract (MAC), Pool 6 (GSA OASIS Pool 6). The GSA OASIS Small Business (SB) vehicle offers services across 28 NAICS codes that span seven contract award Pools, with each Pool sharing a common small business size standard. The Air Force awarded GSA OASIS Pool 6 on February 24, 2014, to 40 small businesses. At that time, the Air Force designated North American Industry Classification System (NAICS) code 541715, Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology) as the appropriate code for GSA OASIS Pool 6. Appellant was not one of the awardees, and has not since received an award from GSA OASIS Pool 6.

¹ Appellant submitted two separate appeals, one for FOPR #39 and one for FOPR #40. While the task orders were issued separately, the PWSs are nearly identical in scope, with only a geographical difference distinguishing them. Therefore, I have CONSOLIDATED the two NAICS appeals and herewith issue a single decision.

The Contracting Officer (CO) set aside the task orders entirely for small businesses, and designated NAICS code 541715 as the appropriate NAICS code. NAICS code 541715 is the code previously designated for GSA OASIS Pool 6, the underlying indefinite-delivery/indefinite—quantity (IDIQ) contract from which the FOPRs were issued. NAICS code 541715 ordinarily is associated with a size standard of 1,000 employees, but the FOPRs indicated that the task orders fit within the exception for Aircraft, Aircraft Engine and Engine Parts, which utilizes a 1,500-employee size standard. The Air Force noted that predecessor task orders being subsumed were awarded under NAICS code 541712,² which falls under GSA OASIS Pool 6.

B. Appeals

On May 7, 2018, Appellant filed the instant appeals. Appellant contends that NAICS code 1715 is inappropriate for these task orders because the task orders do not call for research and development (R&D). Appellant urges OHA to assign either NAICS code 541611, Administrative Management and General Management Consulting Services, or 541330, Engineering Services, both with a corresponding \$15 million annual receipts size standard. (Appeal at 2.)

Appellant contends that:

Credence has been adversely affected by the USAF's improper NAICS code designation because it does not have awards for OASIS SB Pool 6 and is not able to compete for task orders in Pool 6. In contrast, it does have awards for OASIS SB Pools 1 and 3. *See* 13 C.F.R. § 134.302(b); 13 C.F.R. § 121.1103(a); *see also see also* [sic] Ex. 16 (Declaration of J. Stapleford) at ¶ 4. Correction of the USAF's improper NAICS code designation would also require that the USAF issue the FOPR under Pool 1 and would permit Credence to compete for the effort as a small business.

Appeal, at 4.

Appellant further contends that the Air Force's own Level of Effort (LOE) Matrix states that the majority of the work performed by the full-time employees (FTEs) is for work reflective of NAICS code 541611. Further, work associated with NAICS code 541611 reflects about 27.9% of the full-time work, thus rendering the CO's chosen code as erroneous because over 85% of the work “is expressly excluded from the definition of NAICS code 541712, Exception A.” (*Id.*)

Appellant argues that the Air Force modified the FOPRs in order to make it seem like R&D are integral to the work sought, and the PWS makes it clear that the majority of the work consists of advisory and assistance services (A&AS). (*Id.* at 10.) Appellant contends that the CO's code is for the conduct of R&D services, not the support of them. Appellant cites to past OHA cases that previously found that work under code 541712 must lead to the creation of new processes or products. (*Id.* at 13; citing *NAICS Appeal of Dayton T. Brown, Inc.*, SBA No.

² NAICS code 541712 has been superseded by NAICS code 541715 in NAICS 2017. The two codes are interchangeable.

NAICS-5164 (2010).) Thus, based on OHA case law, Appellant argues that merely supporting R&D is not sufficient to justify a R&D NAICS code. The work must be in performing an integral part of the R&D sought. (*Id.* at 14; citing *NAICS Appeal of Delphi Research, Inc.*, SBA No. NAICS-5377 (2012).)

Appellant here contends that the PWS shows that only 4.4% of the labor sought might be related to R&D, yet the majority of the work is for A&AS. Particularly, the PWS states that the contract is to provide “a broad range of professional acquisition, engineering, logistics and cost analysis support activities”, thus some of the work is in support of R&D and not to conduct R&D. (*Id.* at 14; citing PWS at 75.) Appellant concedes that while some of the work is aircraft-related, the PWS makes clear that it is not aircraft-related R&D. Further, the PWS fails to include any R&D work that calls for “new products or processes that *do not* include economic, education, engineering, operations systems, or other non-physical research; or computer programming, data processing.” (*Id.* at 14-15.) (emphasis original) Conversely, the PWS includes program management, professional acquisition, engineering, logistics, cost analysis, technical, and developmental support. (*Id.* at 15.) According to the Appellant, the labor categories in the PWS further show that R&D is not the primary work sought here, as only five of the positions could be considered R&D; and many of those involve engineering work, which is excluded from the CO's chosen NAICS code. (*Id.*)

In support for the proposed codes, Appellant argues that an appropriate NAICS code is one whose work descriptors align with the greatest percentage of contract value. Here, according to Appellant, the labor categories and the Air Force's LOE Matrix show that the majority of the work falls under either code 541611 or 541330, especially when measured by labor hours and FTEs. (*Id.* at 17-18.)

C. Motion to Dismiss

On May 18, 2018, Oasis Systems, LLC (Oasis) moved to dismiss the instant appeals for untimeliness and OHA's lack of jurisdiction. (Motion, at 1.) Oasis contends that under 13 C.F.R. § 121.402(c)(1), each order must be assigned a single NAICS code that was identified in the underlying IDIQ contract. Therefore, the CO “does not have the discretion to assign a different NAICS to a task order solicitation issued under a multiple-award or long-term IDIQ contract when the underlying contract has only been assigned a single NAICS.” (*Id.* at 6; citing *NAICS Appeal of Dellew Corp.*, SBA No. NAICS-5837 (2017); *NAICS Appeal of Global Dynamics, LLC*, SBA No. NAICS-5470 (2013).) According to Oasis, Appellant's objection to the NAICS code needed to be made at the time of the original NAICS code designation for the underlying multiple-award contract in 2014. At this date, Appellant was on notice that NAICS code 541715 “would describe the principal purpose of each order placed under Pool 6 IDIQ contracts.” (*Id.* at 7.)

Further, Oasis argues that OHA lacks the jurisdiction to require the Air Force to reverse its decision that the work falls under the scope of GSA OASIS Pool 6 IDIQ contracts and to issue the task orders under Pools 1 or 3. Because Appellant is not eligible to compete under GSA OASIS Pool 6, their only option is for OHA to compel the Air Force to reissue the task orders under Pools 1 or 3, which falls outside of OHA's jurisdiction. Oasis notes that OHA's jurisdiction

over NAICS appeals is pursuant to part 121 of title 13 of the U.S. Code of Federal Regulations. Thus, because 13 C.F.R. § 121.402(b)-(c) requires a contracting officer to use the NAICS code associated with the underlying IDIQ contract, and because OHA cannot dictate the proper scope of a task order to an agency, OHA lacks the jurisdiction to grant Appellant's request. (*Id.* at 8-10.)

D. OHA's Order

On May 21, 2018, OHA issued an order directing Appellant to respond to Oasis's Motion to Dismiss. In the order, OHA states that Appellant will have consented to the request sought if it fails to respond to the motion no later than May 22, 2018. (OHA's Order, at 2; citing 13 C.F.R. § 134.211.)

E. Appellant's Response

On May 22, 2018, Appellant responded to OHA's order. Appellant contends the motion to dismiss should be denied because the appeals were timely and OHA has jurisdiction to adjudicate the appeals. Appellant explains that its appeals are not to the NAICS code assigned to the underlying OASIS SB Pool 6 contract, but to an individual Air Force procurement. (Appellant's Response, at 3.) Citing 13 C.F.R. § 134.304(b), Appellant argues that the timeline to file an appeal with OHA is triggered by the solicitation's issuance date and task orders are not excluded in the regulation.

Appellant further contends that the reliance on *Dellew* is misplaced, because in that case the MAC in question had placed the appellant and all other contract holders on notice of the NAICS code to be used. Contrarily, here GSA's OASIS program “divided its requirements into discrete solicitations and contracts for different pools, each of which has a different set of NAICS Codes that may apply.” (*Id.* at 4.) OASIS's Ordering Guide further requires agencies to award task orders to the available Pools that better describe the main purpose for the work sought. Therefore, Appellant had no reason to be on notice that the Air Force would award a task order whose purpose did not fall under NAICS code 541715. According to Appellant, OASIS made available to the Air Force a number of Pool contracts to choose from, yet if the Air Force assigns an incorrect NAICS code in violation of the OASIS Ordering Guide, “an appeal of that incorrect NAICS assignment is timely if filed within 10 days of release of the final solicitation for that individual order procurement.” (*Id.* at 5.)

In regards to OHA's jurisdiction, Appellant argues that under § 121.402(c), the NAICS code for a task order must mirror the primary purpose of the work sought. Hence, the Air Force must comply “by selecting the NAICS code and corresponding OASIS SB Pool and contract that, pursuant to [§ 121.402(c)] and OHA precedent, best described the principal purpose of FOPR #39 and FOPR #40.” (*Id.* at 8.)

Appellant further disputes the reliance on *Global Dynamics* in support of dismissing the appeals. Appellant explains that in *Global Dynamics* the contracting agency had only one available NAICS code to choose from, whereas here the Air Force had other OASIS SB Pools to choose from. Appellant further argues that *Global Dynamics* conflates the requirements of §

121.402(c) with those of § 121.404(g)(3)(iv), which require that the NAICS code assigned match the NAICS code assigned to the underlying long-term contract and also follow the requirements of §§ 121.402(b) and (c). Thus, Appellant contends, *Global Dynamics* creates an exception to § 121.402(b) that is not supported by SBA regulations. (*Id.* at 9-10.)

F. CO's Response

On May 18, 2018, the CO responded to the appeals. The CO contends the appeals should be dismissed because Appellant lacks standing. The CO notes that the FOPRs were issued to holders of GSA OASIS MAC IDIQ task order contracts under Pool 6. The GSA OASIS Pool 6 contract was awarded February 24, 2014 to 40 small businesses under NAICS code 54712. (CO Response, at 1.) Citing *Dellew*, the CO argues that the time to challenge the NAICS code designation was at the time the RFP was issued for the underlying MACs, not at the task order level. Additionally, because Appellant is not a prime contractor under GSA OASIS Pool 6, Appellant is not a potential offeror and thus lacks standing to file the appeals because it is not adversely affected by the chosen NAICS code. (*Id.* at 2-3.) Lastly, the CO disputes the Appellant's argument that NAICS code 541712 does not fit the work sought here. The CO notes that the principal nature of the work, plus the CO's "robust and lengthy analysis of the requirement", shows that NAICS code 541712 was the correct choice. (*Id.* at 7.)

G. Other Responses

Also on May 18, 2018, other offerors responded to Appellant's appeals. Odyssey Systems Consulting Group, Ltd. (Odyssey) argued that Appellant's appeals were untimely and thus OHA should dismiss them. Odyssey contends that because the FOPRs were issued under GSA OASIS Pool 6, which contains only one NAICS code, the Air Force "could not assign a different NAICS Code to a task order awarded under a [small business] Pool 6 IDIQ Contract." (Odyssey Response, at 2.) Therefore, the appeals are not NAICS code appeals but instead a challenge to the Air Force's small business GSA OASIS Pool 6 IDIQ contracts. Given that (i) OHA lacks jurisdiction over an agency's decision to issue task orders utilizing a particular type of contract, and (ii) that OHA cannot add a new NAICS code to an underlying IDIQ contract, Odyssey contends the appeals should be dismissed. (*Id.* at 3.) Odyssey also adds that because Appellant is not a GSA OASIS Pool 6 contract holder, Appellant lacks standing to file the instant appeals. Lastly, Odyssey argues that the work sought here, highlighted by the labor categories that are to be fulfilled by the contractor, show that the contractor will play an integral part in the Air Force's R&D mission, and as such, the CO correctly chose NAICS code 541712.

Abacus Technology Corporation (Abacus), in its response, contends that code 541715 is the correct code for the FOPRs. Abacus states that R&D "reflects the preponderance of work requirements associated with each of these two task orders." (Abacus Response, at 1.)

COLSA Corporation (COLSA) states that after conducting their own analysis of the instant FOPRs, it concluded that "the preponderance of the work to be performed is directly related to Aircraft-related programs and integration efforts, as well as research and development support needed to meet the requirements of the AFLCM Battle Management (HB) Directorate's mission." (COLSA Response, at 2.)

Lastly, BTAS, Inc. (BTAS) submitted a response to the appeals, stating that the CO's chosen code is the correct NAICS code. According to BTAS, the PWS describes work that aligns with aircraft program R&D, and per their own analysis, the LOE Matrix requires over 80% of hours in support programs that conduct R&D for Aircraft-related systems. (BTAS Response, at 1-2.)

H. Motion to Reply

On May 22, 2018, Appellant filed a motion to reply to the responses to its appeals. Appellant explains that the responses “fail to rebut [Appellant]'s position that the Air Force clearly erred in assigning NAICS code 541712” to the instant task orders. (Motion to Reply, at 2.)

Under applicable regulations governing NAICS code appeals, a reply to a response is generally not permitted unless OHA so directs. 13 C.F.R. § 134.309(d). No such direction occurred here. Accordingly, Appellant's motion to reply to the responses is DENIED. *NAICS Appeal of T3 TigerTech*, SBA No. NAICS-5674, at 2 fn.2 (2015); *NAICS Appeal of Allserv, Inc.*, SBA No. NAICS-5629, at 7 (2014).

II. Analysis

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must show that the CO's NAICS code designation is based upon a clear error of fact or law. 13 C.F.R. § 134.314; *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003).

The general rule is a CO must assign the NAICS code that best describes the principal purpose of the product or service being acquired in light of the industry descriptions in the *NAICS Manual*,³ the description in the solicitation, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being acquired. 13 C.F.R. § 121.402(b).

However, SBA's regulations provide for an exception to the general rule for orders placed under long term contracts. For such procurements, the CO “must assign a NAICS code and size standard to each order under a long-term contract,” and “[t]he NAICS code and size standard assigned to an order must correspond to a NAICS code and size standard assigned to the underlying long-term contract.” 13 C.F.R. § 121.404(g)(3)(iv). This is consistent with the requirement that for MACs, the CO must “[a]ssign to the solicitation a single NAICS code and corresponding size standard which best describes the principal purpose of the acquisition as set forth in paragraph (b) of this section, only if the NAICS code will also best describe the principal purpose of each order to be placed under the Multiple Award Contract.” 13 C.F.R. §

³ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States* (2017), also available at <https://www.census.gov/econ/isp/index.php>.

121.402(c)(1)(i). If the MAC requires multiple NAICS codes, “[t]he contracting officer must assign the NAICS code and size standard that best describes the principal purpose of each order.” 13 C.F.R. § 121.402(c)(2)(i). There must be a single NAICS code for each order. *Id.*

Here, the Air Force issued the FOPRs to holders of GSA OASIS Pool 6, a MAC IDIQ with a 541712 NAICS code designation. That GSA OASIS Pool 6 contract was awarded on February 24, 2014 to 40 small businesses. Appellant admits it was not among them, and has not since received an award into GSA OASIS Pool 6. Appellant claims it is adversely affected by the subject NAICS code designation because it does not have an award for GSA OASIS Pool 6, and correction of the NAICS code designation would require the Air Force to use one of the Pools for which Appellant has an award.

However, Appellant has misunderstood the nature of a NAICS code appeal. The regulation only gives OHA the power to correct a NAICS code designation if filed within 10 days of the issuance of the solicitation. Despite Appellant's contentions to the contrary, OHA has no power to direct a procuring agency which MAC to utilize to meet its needs. I agree with Odyssey that OHA cannot exercise jurisdiction over the type of MAC from which an agency issues task orders. The Air Force has decided to use GSA OASIS Pool 6, and the FOPRs have, as required by regulation, the NAICS code designated in the underlying long term contract. SBA regulations required the CO to designate NAICS code 541715 for these FOPRs, because that is the code designated for GSA OASIS Pool 6. *NAICS Appeal of Dellew Corp.*, SBA No. NAICS-5837 (2017); *NAICS Appeal of Global Dynamics, LLC*, SBA No. NAICS-5470 (2013).

While Appellant is correct that a NAICS code designation should match the principal purpose of the work sought, here, the CO lacked the discretion to assign a different NAICS code than that already designated for GSA OASIS Pool 6. *Id.* Despite Appellant's attempts to distinguish the facts here with those found in *Global Dynamics*, the truth remains that these OASIS MACs do not have a special exception from § 121.402. The existence of several MACs under OASIS, and that Appellant had no advance notice of which MAC the Air Force would utilize for this requirement, does not alter the CO's requirement to use NAICS code 541715 when issuing task orders under Pool 6. This choice mandates the NAICS code designation for the FOPR, and OHA has no jurisdiction over that decision.

Moreover, I must add that contrary to Appellant's arguments, OHA is not required to follow the OASIS Ordering Guide when adjudicating a NAICS appeal, because OHA is bound to follow SBA regulations found in the Code of Federal Regulations. SBA regulations are clear as to which NAICS code a contracting officer must designate when issuing task orders under a MAC and OHA precedent has consistently interpreted these regulations.

The Air Force designated NAICS code 541712 for GSA OASIS Pool 6 in 2014. The whole world, including Appellant, was on notice in 2014 that task orders issued under GSA OASIS Pool 6 would be designated under NAICS code 541712 and its successor 541715. Therefore, any objection Appellant had to the designation of NAICS code 541715 for GSA OASIS Pool 6 should have been filed within 10 days of the issuance of the RFP for that contract. The instant appeals were filed on May 7, 2018. Appellant failed to challenge the GSA OASIS

Pool 6 NAICS code designation at the time that the Air Force issued the RFP. Accordingly, I must dismiss the instant appeals as untimely.

Even if the appeals were not untimely, Appellant would lack standing to file them. A NAICS code appeal may only be filed by a party “adversely affected” by the NAICS code designation. 13 C.F.R. §§ 121.402(f), 121.1103(a)(1) and 134.302(b). OHA has long held that a party must show it is a potential bidder or offeror on a procurement in order to establish its standing to bring a NAICS code appeal. *NAICS Appeal of Rotech Healthcare, Inc.*, SBA No. NAICS-5550 (2014). These task orders are limited to firms which hold awards of the GSA OASIS Pool 6 contract, and Appellant admits it does not hold such an award. Appellant does not have standing to file this NAICS code appeal, because it is not an awardee of the contract under which these FOPRs are issued. *NAICS Appeal of Bridges Systems Integration, LLC*, SBA No. NAICS-5836 (2017).

Accordingly, I conclude that I must dismiss the appeals, because they are untimely and Appellant has no standing to bring them.

III. Conclusion

For the above reasons, I DISMISS the instant appeals. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge