

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

NAICS APPEAL OF:

EYP Squared Joint Venture, LLC,

Appellant,

Solicitation No. 47PJ0020R0006

General Services Administration  
One Denver Federal Center  
Denver, Colorado

SBA No. NAICS-6035

Decided: November 1, 2019

ORDER DISMISSING APPEAL<sup>1</sup>

I. Background

On October 10, 2019, the General Services Administration (GSA) issued presolicitation notice No. 47PJ0020R0006 for the modernization of Building 53 at the Denver Federal Center in Lakewood, Colorado. According to the presolicitation notice, the prospective solicitation will be set aside completely for small businesses and designated under North American Industry Classification System (NAICS) code 541310, Architectural Services, with a corresponding \$7.5 million annual receipts size standard.

On October 21, 2019, EYP Squared Joint Venture, LLC (Appellant) filed an appeal with the U.S. Small Business Administration (SBA) Office of Hearings Appeals (OHA), challenging the NAICS code designation in the presolicitation notice. On October 22, 2019, I ordered Appellant to show cause why the appeal of a presolicitation notice should not be dismissed as premature. On October 24, 2019, Appellant responded to the order, arguing that because this contract will be procured under the Brooks Act and FAR Part 36, and the notice describes a two-stage submittal process with definite dates for offerors to make submissions, that this notice is “the functional equivalent of a solicitation.” *NAICS Appeal of Applefore Marine Engineering, Inc.*, SBA No. NAICS-5240 (2011). Appellant further argued that the presolicitation notice is silent as to when GSA might issue invitations or open bids, and thus maintains this is Appellant's only opportunity to challenge the CO's NAICS code designation.

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<sup>1</sup> This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

On October 28, 2019, I ordered the CO to respond to questions concerning the presolicitation. The questions I asked and answers provided by the CO are as follows:

(1) How is the presolicitation notice at issue not the functional equivalent of a solicitation?

In accordance with FAR Part 5.203 (Publicizing and Response Time), the pre-solicitation notice was posted in FBO as a pre-solicitation notice with information that a solicitation is forthcoming and would be posted in the near future.

(2) Will there be another solicitation for Stage 1 proposals for the instant procurement?

Yes. The presolicitation notice is posted for a minimum of 15 days. After which the Solicitation notice is posted.

(3) If the answer to question 2 is “yes,” when does the CO anticipate issuing that Solicitation?

GSA intends to post the Solicitation by November 1, 2019, and no later than December 1, 2019.

## II. Discussion

A NAICS code appeal must be filed within 10 calendar days after issuance of the initial solicitation. 13 C.F.R. §§ 121.1103(b)(1), 134.304(b); 48 C.F.R. § 19.303(c)(1). OHA will summarily dismiss an untimely NAICS code appeal. 13 C.F.R. §§ 121.1103(b)(1), 134.304(c).

I find the CO's responses vague yet sufficient to establish that the instant appeal is premature. The CO provides that the challenged notice is a presolicitation notice and not a solicitation. Further, the CO makes clear that a solicitation will be issued at some time in the near future. OHA has consistently held that the publication of a presolicitation notice does not constitute a NAICS code designation within the meaning of the jurisdictional provision of 13 C.F.R. § 134.102(k) or the timeliness requirement of 13 C.F.R. § 134.304(b). *See NAICS Appeal of Marvin Test Solutions, Inc.*, SBA No. NAICS-5826 (2017); *NAICS Appeal of Secure Network Systems, LLC*, SBA No. NAICS-5246. OHA's NAICS code appeal jurisdiction extends only to the issuance of solicitations, which by its terms does not include presolicitation notices such as the one at issue here. 13 C.F.R. § 134.102(k); 48 C.F.R. § 19.303(c)(1). Absent a formally issued solicitation, this appeal is premature. OHA has no jurisdiction to consider it, and the case must be dismissed. *NAICS Appeal of Ukpik, LLC*, SBA No. NAICS-5006 (2008).

Although the CO's response provides insight regarding the subject procurement, I agree with Appellant that information pertaining to a date by which the solicitation would be issued is absent from the presolicitation notice. Although the presolicitation notice is labeled as such, it only provides for a date by which submissions are due, which is misleading in light of the

circumstances, as there is no information describing some future date by which a solicitation for bids would be issued. Thus, I find it perfectly understandable that Appellant was led to believe this was its only opportunity to challenge the CO's NAICS code designation. Nevertheless, the CO has clarified through its response to the order that a formal solicitation would be issued in the future. At the time of the issuance of the solicitation, Appellant will have an opportunity to challenge the CO's NAICS code designation before OHA.

Accordingly, because the appeal is premature, I must DISMISS the instant appeal.

### III. Conclusion

For the above reasons, Appellant's NAICS code appeal is DISMISSED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge