

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

NAICS APPEAL OF:

Regency Consulting, Inc.

Appellant,

Solicitation No. 36C25921R0025

Department of Veterans Affairs

SBA No. NAICS-6101

Decided: June 1, 2021

ORDER DISMISSING APPEAL

I. Background

On April 14, 2021, the U.S. Department of Veterans Affairs issued Request for Proposals (RFP) No. 36C25921R0025. The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 561320, Temporary Health Services, with a corresponding \$30 million average annual receipts size standard. On May 17, 2021, the CO issued Amendment 0004 extending the deadline of offers to June 7, 2021.

On April 24, 2021, Regency Consulting, Inc. (Appellant) e-mailed the CO and requested a NAICS code change, indicating that “the most appropriate NAICS code is 621399” because NAICS codes beginning with 62 apply to Healthcare and Social Assistance, while codes beginning with 52 apply to Administrative and Support and Waste Management and Remediation Services. (E-mail from C. Pureti to J. Balsiger (Apr. 24, 2021).)

On April 28, 2021, Appellant forwarded the instant e-mail to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant asked OHA to “Please see the attached certificate of service for NAICS change request.” (E-mail from C. Pureti to OHA (Apr. 28, 2021).)

On May 13, 2021, the CO issued Amendment 0003 with final Questions and Answers (Q&A) document on the beta.SAM.gov website, responding to 23 industry questions. Q&A No. 9 of the Q&A document stated:

Q: On reviewing this solicitation, according to SBA 13 CFR 121.402 and Census Bureau NAICS policies and procedures, we feel that the most appropriate NAICS code is 621399. We are noticing more and more temporary help services NAICS

code 561320 assigned for healthcare staffing despite 62 series of NAICS codes are designated for all healthcare related activities.

A: The Government has reviewed this request and will allow proposals from both NAICS 561320 and 621399.

(Q&A, at 3.)

On May 25, 2021, Appellant certified to OHA that it submitted the instant appeal on April 28, 2021. Appellant further stated:

According to SBA 13 CFR 121.402 and Census Bureau NAICS policies and procedures, we feel that the most appropriate NAICS code should be 621399. This is wrongly assigned to temporary help services NAICS code 561320. Therefore, we request to change the NAICS code for this solicitation to 621399.

On May 26, 2021, because the appeal appeared to have been filed more than 10 days after issuance of the RFP or any amendment affecting the RFP, OHA ordered Appellant to show cause why its appeal should not be dismissed as untimely.

On the same day, Appellant responded to the show cause order. Appellant states that it was waiting for a response from the CO after the initial e-mail sent on May 24, 2021, requesting a change in the NAICS code. Appellant further states that there are four amendments subsequent to the RFP and contends that because [Amendment 0003] is dated May 13, 2021, and it “did discuss the NAICS code but not appropriately under [Federal Acquisition Regulation (FAR)] 19.102b,” the appeal should not be dismissed as untimely.¹ (Response, at 1.)

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 an amendment affecting the NAICS code or size standard. 13 C.F.R. §§ 121.1103(b)(1) and 134.304(b); FAR 19.303(c). “OHA will summarily dismiss an untimely NAICS code appeal.” 13 C.F.R. § 121.1103(b)(1); *see also* 13 C.F.R. § 134.304(c), FAR 19.303(c)(4). Further, OHA has no discretion to extend, or waive, the deadline for filing an appeal. 13 C.F.R. § 134.202(d)(2)(i)(A). Here, Appellant filed this appeal 14 calendar days after issuance of the RFP, and 15 calendar days before the issuance of Amendment 0003. Section I, *supra*. Although Appellant requested the CO to change the assigned NAICS code on April 24, 2021, within the 10 calendar days after issuance of RFP, the applicable regulations make it clear that a NAICS code appeal may be filed only at OHA. 13 C.F.R. §§ 121.402(d), 121.1102, and 121.1103(b)(2)(i); FAR 19.303(c)(5); *NAICS Appeal of Trans Aero Ltd.*, SBA No. NAICS-5443 (2013).

¹ On its response to the order to show cause, Appellant does not challenge Amendments 0001, 0002, and 0004, and therefore, further discussion of these is unnecessary.

Moreover, OHA has repeatedly held that “deliberations with a procuring agency, which do not result in any change to the solicitation, do not extend the [NAICS] appeal deadline.” *NAICS Appeal of Metris, LLC*, SBA No. NAICS-5700, at 2 (2015) (quoting *NAICS Appeal of R. Christopher Goodwin & Assocs., Inc.*, SBA No. NAICS-5382, at 2 (2012)). Thus, the fact that Appellant requested that the CO reconsider the NAICS code does not alter Appellant's deadline for bringing a NAICS code appeal at OHA.

It is undisputed that Appellant did not file any NAICS code appeal with OHA within 10 calendar days after issuance of the solicitation. Section I, *supra*. The remaining issue, then, is whether the appeal was filed within 10 calendar days after an amendment affecting the NAICS code or size standard.

OHA has held that “an exception to the 10-calendar day timeline occurs when an amendment puts into question the solicitation's original NAICS code designation.” *NAICS Appeal of Kalotech*, SBA No. NAICS-5665, at 2 (2015); citing *NAICS Appeal of Stephen Coakley*, SBA No. NAICS-4754 (2006). The limitation on this exception is required by the clear language of the regulation. The type of changes that could affect the NAICS code or size standard are “a change in the NAICS code designation itself, a change in the stated size standard, or a change in the Performance Work Statement (PWS) that called into question whether the NAICS code designation was still appropriate.” 13 C.F.R. § 134.304(b); *NAICS Appeal of Kalotech*, SBA No. NAICS-5665, at 2 (2015); *See also NAICS Appeal of DCX/CHOL*, SBA No. NAICS-4925 (2008); citing *SIC Appeal of Jing Xing Technologies, Inc.*, SBA No. SIC-4396, at 4 (2000).

In reviewing the record, this case does not fall within any exception, which extends the time for filing a NAICS code appeal under the regulation. Amendment 0003 does not affect the chosen NAICS code or the accompanying size standard. Section I, *supra*. Contrary to Appellant's argument, Amendment 0003 did not expressly change the NAICS code or size standard assigned to the solicitation and did not make revisions to the Statement of Work. Section I, *supra*. The Q&A makes no substantive changes in the solicitation. *Id.* Appellant does not contend that Amendment 0003 itself made any material change to the NAICS code or size standard. *Id.* As such, Amendment 0003 is not the type of amendment that makes timely an otherwise untimely NAICS code appeal. *NAICS Appeal of Caduceus Healthcare, Inc.*, SBA No. NAICS-6074 (2020); *NAICS Appeal of Kalotech*, SBA No. NAICS-5665 (2015). While the CO stated in Q&A No. 9 that the government would accept proposals from concerns which met the size standards for both NAICS codes 561320 and 621399, it made no material changes to the instant solicitation.

Moreover, it is clear that the CO's invitation does not change the NAICS code or size standard assigned to the solicitation and does not make any substantive changes to the requirements of the RFP in any way that affects the NAICS code designations. Section I, *supra*. Thus, Appellant's time to file its appeal begins to run from the date of issuance of the solicitation, not from the issuance of Amendment 0003. By that standard, the instant appeal is untimely, and I must dismiss it.

III. Conclusion

For the above reasons, the appeal is DISMISSED as UNTIMELY. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge