

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

NAICS APPEAL OF:

Laredo Technical Services, Inc.,

Appellant,

Solicitation No. 15BFA023Q00000082

U.S. Department of Justice
Federal Bureau of Prisons

SBA No. NAICS-6233

Decided: July 28, 2023

ORDER DISMISSING APPEAL¹

I. Background

On June 26, 2023, the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) received the above-captioned appeal from Laredo Technical Services, Inc. (Appellant). The appeal purports to challenge the North American Industry Classification System (NAICS) code assigned to Request for Quotations (RFQ) No. 15BFA023Q00000082. Pursuant to the RFQ, the procuring agency intends to establish a Blanket Purchase Agreement (BPA) under an existing Multiple Award Contract (MAC), the U.S. General Services Administration (GSA) Federal Supply Schedule (FSS) 621 I. (RFQ at 5.)

In its appeal, Appellant acknowledges that the NAICS code assigned to the RFQ, 561320, Temporary Help Services, is the only NAICS code available on the underlying Schedule 621 I MAC. (Appeal at 2, 4.) Appellant therefore anticipates that the Contracting Officer (CO) would oppose the appeal on the grounds that “‘his hands are tied’ and that he is just using NAICS code 561320, Temporary Help Services, because this NAICS code was the overall NAICS code for the original award of the [MAC].” (*Id.* at 4.) Appellant urges that OHA should reject such reasoning, based on recent revisions to 13 C.F.R. § 121.402(c)(2)(i). As revised, that rule now provides that “**‘[i]f the NAICS code corresponding to the principal purpose of the order is not contained in the underlying [MAC], the [CO] may not use the [MAC] to issue that order.’**” (*Id.*, quoting 13 C.F.R. § 121.402(c)(2)(i) (emphasis added by Appellant).)

¹ 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.

Because the appeal did not make clear what relief Appellant was seeking from OHA, or what error(s), if any, Appellant alleged the CO to have committed, OHA ordered Appellant to show cause why the appeal should not be dismissed. In response to OHA's Order, Appellant reiterates that its appeal “is ***not*** about using the NAICS Code assigned by GSA FSS 621-I, for which the ***only*** NAICS Code available is 561320.” (Response at 1 (emphasis Appellant's).) Instead, Appellant seeks to challenge the CO's decision to conduct the procurement through the Schedule 621 I in the first instance. In Appellant's view, “the [CO] erred in using the GSA FSS 621 I contract vehicle because GSA FSS 621 I does not provide any ‘NAICS Code corresponding to the principal purpose’ of the order concerned.” (*Id.* at 2, quoting 13 C.F.R. § 121.402(c)(2)(i).) OHA, therefore, should “direct the [CO] ***to cancel his solicitation.***” (*Id.* (emphasis Appellant's).) Furthermore, although the revisions to 13 C.F.R. § 121.402(c)(2)(i) refer specifically to the issuance of an “order” under a MAC, and the instant RFQ does not involve such an order, OHA should “disregard the term ‘Task Order,’ and substitute the term ‘solicitation’ for the purposes of evaluating this [appeal].” (*Id.* at 1.)

II. Discussion

The instant case is analogous to OHA's decision in *NAICS Appeals of Credence Mgmt. Solutions*, SBA No. NAICS-5914 (2018). In that case, OHA explained that, pursuant to SBA regulations, a CO must assign a NAICS code and size standard to each order under a MAC. *Credence*, SBA No. NAICS-5914, at 6-7. In addition, by regulation, such NAICS code and size standard must correspond with a NAICS code and size standard included in the underlying contract. *Id.* OHA found that the CO in *Credence* did not err by assigning NAICS code 541715 to the task orders in question, because “that is the code designated” in the MAC. *Id.* at 6. OHA also rejected arguments that a new NAICS code might have resulted in a change of acquisition strategy, such as the use of a different MAC, stating that “OHA cannot exercise jurisdiction over the type of MAC from which an agency issues task orders.” *Id.* Nor does OHA have authority “to direct a procuring agency which MAC to utilize to meet its needs.” *Id.* OHA therefore dismissed the appeals.

Here, as in *Credence*, Appellant concedes that, under applicable regulations, the CO was required to assign NAICS code 561320 to the instant RFQ, because NAICS code 561320 is the only NAICS code available on the underlying MAC. Section I, *supra*. Appellant further states that its appeal does not contest the NAICS code assigned to the RFQ, but rather the CO's decision to conduct the procurement under the Schedule 621 I MAC. *Id.* As discussed above, however, OHA in *Credence* expressly held that such matters are beyond OHA's jurisdiction and authority in the context of a NAICS appeal.

In response to OHA's Order to Show Cause, Appellant advances the claim that recent revisions to 13 C.F.R. § 121.402(c)(2)(i) would permit OHA to instruct the CO to cancel the instant RFQ, if OHA determines that “the NAICS code corresponding to the principal purpose of the order is not contained in the underlying [MAC].” Section I, *supra*. The revisions in question were added to SBA regulations in late 2020, and thus did not exist at the time of OHA's *Credence* decision. 85 Fed. Reg. 66,146, 66,150 (Oct. 16, 2020). I find it unnecessary to resolve Appellant's argument here, because the regulatory revisions refer specifically to an “order” under a MAC, and as Appellant itself acknowledges, the instant RFQ is not for an order but rather for a

BPA. Section I, *supra*. Under the circumstances presented here, then, the revisions to § 121.402(c)(2)(i) would provide no basis for OHA to instruct the CO to cancel this RFQ.

III. Conclusion

OHA does not issue “advisory opinions”, and thus will not adjudicate matters that are merely of hypothetical interest. 13 C.F.R. § 134.303; *Size Appeal of [Drug Applicant]*, SBA No. SIZ-5616 (2014). Such is the case here, as the instant appeal is premised on recent revisions to 13 C.F.R. § 121.402(c)(2)(i), but those revisions are not applicable to the procurement in question here. Accordingly, the appeal is DISMISSED. This is the final decision of the U.S. Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge