UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

NAICS APPEAL OF: SCI Consulting, Inc. Appellant Solicitation No. DE-RQ01-02NA00019 Department of Energy Office of Procurement Operations Washington, DC	Docket No. NAICS-2002-05-06-17 Decided: June 12, 2002

APPEARANCES

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Thedlus L. Thompson, Esq., for Intervenor General Services Administration

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DIGEST

For a North American Industrial Classification (NAICS) code appeal to be justiciable, this Office must have jurisdiction over its subject matter and the Appellant must have standing to file an appeal with this Office.

DECISION

BLAZSIK, Administrative Judge:

Jurisdiction

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.

Issue

Whether this NAICS code appeal is justiciable.

Facts

On April 24, 2002, the Contracting Officer (CO) for the Department of Energy, Office of Procurement Operations, in Washington, D.C. (DOE), issued a Request for Quotations (RFQ) to selected vendors from the General Services Administration (GSA) Federal Supply Schedule (FSS) #70, Special Line Number (SIN) 132-51, to submit proposals for a single task order (with multiple task assignments), to be placed under the awardee's FSS contract.[1] The contractor will provide computer-related technologies, information systems, and operational support for the National Nuclear Security Administration (NNSA).

The CO did not assign to the task order a size standard or a North American Industry Classification System (NAICS) code. The solicitation stated: "Pursuant to GSA Schedule #70, SIN 132-51, only small business concerns will be eligible for award of this task order." Attachment C stated: "NNSA intends to award one task order to the responsible small business contractor whose proposal is responsive to the solicitation and determined to be the best value to the Government."[2] Proposals were due on May 31, 2002.

Appeal and Responses

SCI Consulting, Inc. (Appellant) filed this appeal on May 6, 2002. Appellant asserts that, although there is no NAICS code shown in the solicitation, it is a "de facto small business set-aside." Also, DOE is evading the small business regulations by not

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[1] The Federal Acquisition Regulation (48 C.F.R. or FAR), at Subpart 8.4, uses the terms Federal Supply Schedule (FSS) and Multiple Award Schedule (MAS) interchangeably.

[2] There are no references to "set-aside" and no other references to "small business" in the RFQ. The remainder of the RFQ contains no FAR provisions or clauses relating to small business set-asides, i.e., 48 C.F.R. § 52.219-6, Notice of Total Small Business Set-Aside; 48 C.F.R. § 52.219-7, Notice of Partial Small Business Set-Aside; 48 C.F.R. § 52.219-14, Limitations on Subcontracting.

formally setting aside this task order. Moreover, because this task order is a "follow on" to a previous small business set-aside, under DOE's own regulations, it must also be a set-aside.

Appellant asserts the CO must include a NAICS code, citing 48 C.F.R. §§ 19.501(g) and 19.1007(a)(1). Accordingly, Appellant requests this Office to supply the missing NAICS code and cites 13 C.F.R. § 121.402(d), which authorizes the Small Business Administration (SBA) to supply a missing or incomplete NAICS code and size standard "in connection with a formal size determination or size appeal." Appellant also asserts the appropriate NAICS code is 541519 (Other Computer Related Services), with a $21 million size standard. This NAICS code was assigned by an SBA Area Office to a similar NNSA solicitation in connection with a size protest filed by Appellant in 2001. In the alternative, Appellant requests three other NAICS codes, each with the same size standard.

On May 17, 2002, DOE filed a response.[3] It asserts the Administrative Judge must dismiss this appeal first, because the instant GSA FSS task order competition is not a small business set-aside or a "de facto" set-aside subject to this Office's jurisdiction and, second, Appellant is not an interested party to seek a NAICS code designation.[4]

DOE also asserts it correctly followed all FSS ordering procedures and is not legally required to designate a NAICS code for this task order. Finally, Appellant's cited DOE regulation requiring a follow-on to a set-aside to be also a small business set-aside, is now obsolete and does not apply here.

The GSA filed a response on May 17, 2002.[5] GSA agrees with DOE that this task order is not a small business set-aside, but an order under the FSS program. Thus, 48 C.F.R. Part 19 (Small Business Programs) is inapplicable. Further, although under SIN 132-51, a contracting officer "may limit consideration to those schedule contractors that are small business concerns," and 48 C.F.R. § 8.404 encourages preference for small businesses, this remains within the contracting officer's discretion.

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[3] It was signed by DOE's counsel and the CO.

[4] DOE's response reiterates that this is not a small business set aside. Although the Administrative Judge accepts this ultimately, a certified statement from the CO would have been more probative.

[5] Although GSA failed to move for permission to intervene, 13 C.F.R. § 134.210(b), the Administrative Judge waives that requirement and accepts the response into the record, 13 C.F.R. § 134.218(b).

On May 29, 2002, the SBA intervened in this proceeding in support of Appellant.[6] SBA asserts that, because DOE limited competition for this task order to small business concerns, it has, in fact, set it aside for small businesses, even though it has not assigned it a NAICS code or a size standard. SBA agrees with Appellant that DOE's action is to evade the size protest process.

SBA asserts this Office has recognized that FAR does not prohibit MAS procurements from being set aside for small business concerns, although the self-certifications submitted to GSA as part of the MAS contracting process are not relevant here. *Size Appeals of SETA Corporation and Federal Emergency Management Agency*, SBA No. SIZ-4477 (*SETA-FEMA*), at 11 (2002). Further, the GSA FSS contract, SIN 132-51, contains not one NAICS code and size standard, but many different ones based on both number of employees and annual receipts. If a NAICS code and size standard are not assigned to this task order, businesses of varying sizes will be competing for it. Clearly, asserts SBA, there is one NAICS code "which best describes the principal purpose of the product or service being acquired" by DOE, and if DOE will not designate it, this Office should. 13 C.F.R. § 121.402(b).

Discussion

The appeal was filed within 10 calendar days from the issuance of the solicitation. Thus it is timely filed. 13 C.F.R. § 134.304(a)(3).

Even though this Office has subject matter jurisdiction over NAICS code designation appeals, 13 C.F.R. §§ 121.1102 & 134.102(k), the Administrative Judge must dismiss the appeal. This task order is not a small business set-aside and Appellant has failed to demonstrate that it would be adversely affected by the lack of a NAICS code designation on an unrestricted task order. Thus, Appellant lacks standing to bring this appeal. 13 C.F.R. §§ 121.1103(a) & 134.302(b).

First, it is clear from an examination of the record, that the instant task order is not a small business set-aside. The FAR defines "set-aside for small business" as "the reserving of an acquisition exclusively for participation by small business concerns." 48 C.F.R. § 19.501(a). All solicitations involving set-asides must specify the applicable small business size standard and NAICS code. 48 C.F.R. § 19.501(g). The FAR further requires the CO to insert into solicitations involving small business set-asides certain clauses, i.e., 48 C.F.R. § 52.219-14, Limitations on Subcontracting; and either 48 C.F.R. § 52.219-6, Notice of Total Small Business Set-Aside; or 48 C.F.R. § 52.219-7, Notice of Partial Small Business Set-Aside, as applicable. 48 C.F.R. § 19.508(c)-(e). Thus, in a small business set-aside, the solicitation will clearly

[6] The SBA may intervene at any time in any case prior to final decision. 13 C.F.R. § 134.210(a).

indicate that the entire procurement, or part of it, is restricted to small business offerors. Such standard FAR clauses in solicitations help to determine whether a particular procurement is a set-aside. *See SIC Appeal of Applied Management & Services,* SBA No. SIC-3589, at 3 & n.5 (1992).

There is no indication that the instant task order is a small business set-aside. The RFQ contains none of the required FAR clauses. It nowhere refers to a "set-aside."[7] Moreover, in this proceeding, the CO's response stated and reiterated that the task order is not a set-aside. Therefore, notwithstanding the two references to "small business" in the RFQ, the Administrative Judge concludes, based on the preponderance of the evidence in the record before her, that the instant task order is not a small business set-aside. 13 C.F.R. § 134.224.[8]

Second, this Appellant lacks standing to bring this appeal because of its failure to demonstrate that it would be adversely affected by the lack of a NAICS code designation on this unrestricted task order.

The Administrative Judge notes that in NAICS code appeals, the distinction between jurisdiction and standing usually is not significant. Nearly all procurements litigated are small business set-asides and adverse effect of a NAICS code or size standard on a prospective offeror is obvious. Here, in contrast, the distinction is significant.

Where a procurement is not a set-aside for small business, standing is not automatic. Generally, an appellant will argue that it would receive some special benefit as a small business under the procurement. This benefit may be in the form of a 10 percent evaluation preference for a small disadvantaged business appellant, *SIC Appeal of Andrew Searcy, Jr. d/b/a Xerxe Group,* SBA No. SIC-4260, at 2 & n.2 (1997); or a preferential award, *SIC Appeal of Right Away Foods Corporation,* SBA No. SIC-2309 (1985). Also, *see generally Earth Property,* supra at 11-18.

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[7] In contrast, the RFQ's cover sheet in *SETA-FEMA* stated the procurement there was totally set aside for small business, and the RFQ included FAR clause 52-219-1 designating a NAICS code and requiring each quoter to self-certify whether it is or is not a small business. *See SETA-FEMA, supra* at 3.

[8] Appellant's appeal essentially is a request for this Office to set-aside this task order for small business and assign it a NAICS code. However, it is well-established that this Office has no authority to order a contracting officer to set aside a procurement for small business. *SIC Appeals of Earth Property Services, Inc., et al.,* SBA No. SIC-3296, at 17 (1990). This Office specifically has held so where, as here, the Appellant is the incumbent contractor on a small business set-aside, and the follow-on is unrestricted. *SIC Appeal of Griffin Services, Inc.,* SBA No. SIC-3297 (1990).

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Here, Appellant has not established that it would obtain any benefit because of its status as a small business, on this unrestricted task order.[9] Accordingly, because the instant task order is not a small business set-aside, and Appellant has not shown otherwise that it is adversely affected by the lack of a NAICS code, the Administrative Judge concludes Appellant lacks standing to bring this appeal.

Conclusion

For the above reasons, the Administrative Judge DISMISSES the instant appeal.

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

GLORIA E. BLAZSIK
Administrative Judge

[9] In asserting that the self-certifications submitted to GSA as part of the MAS contracting process are not relevant here, SBA ignores the distinction, pointed out in *SETA-FEMA*, between a task order and a Blanket Purchase Agreement (BPA) under an MAS contract. A task order is not a separate procurement from the MAS contract, while a BPA is. Thus, in the event of a size protest, different rules would apply concerning protest timeliness and the date as of when the challenged firm's size is measured. *See* 13 C.F.R. § 121.1004(a)(3); *SETA-FEMA, supra* at 11-12 & n.7, *Size Appeal of Advanced Technologies and Laboratories International, Inc.*, SBA No. SIZ-4484, at 4 (2002).

CERTIFICATE OF SERVICE

I hereby certify that, on June 12, 2002, I served the foregoing, by facsimile and first-class mail, to the following:

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