

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

SIZE APPEAL OF:

ONS21 Security Services, LLC

Appellant

Re: Trinity Technology Group, Inc.

Appealed from
Size Determination No. 2-2010-51

SBA No. SIZ-5131

Decided: May 12, 2010

APPEARANCES

PJ Rowdon, Chief Operations Officer, for ONS21 Security Services, LLC.

Brian A. Darst, Odin Feldman & Pittleman, P.C., Fairfax, VA, for Trinity Technology Group, Inc.

DECISION

On September 14, 2009, the United States Air Force issued Solicitation No. FA8630-09-R-5080 (RFP) to provide the Pakistan's government with communications security custodians. The RFP provides, in Clause 52.204-08, that the North American Industry Classification (NAICS) Code applicable to the procurement is 541690, Other Scientific and Technical Consulting Services, with a corresponding size standard of \$7 million. On December 30, 2009, the Contracting Officer (CO) awarded the contract arising from the RFP to Trinity Technologies Group, Inc. (Trinity). On January 4, 2010, The CO notified unsuccessful offerors, including ONS21 Security Services, LLC (Appellant), of the award to Trinity.

On January 11, 2010, Appellant filed a timely protest of Trinity's size. Appellant's size protest (including updates thereto) alleged Trinity: (1) is affiliated with other concerns; (2) violated the ostensible subcontractor rule; and (3) is not a small concern under the applicable NAICS code regardless of its affiliation with other concerns. In addition, Appellant stressed to the Area Office that the appropriate NAICS code for the procurement is 541690.

On January 14, 2010, the CO forwarded the protest to the Small Business Administration's (SBA) Office of Government Contracting, Area II (Area Office). In his letter accompanying the protest, the CO explained that he determined that NAICS code 541513, Computer Facilities Management Services, with a size standard of \$25 million, was the most appropriate NAICS code for this procurement. He further explained that he clearly intended to

designate NAICS code 541513—as indicated by the use of NAICS code 541513 in the notice announcing the procurement posted to the Federal Business Opportunities website, <http://www.fbo.gov>, and the use of NAICS code 541513 in the award notice—and that the designation of NAICS code 541690 was a mistake.

On March 12, 2010, the Area Office issued Size Determination No. 2-2010-51 (Size Determination) finding that Trinity is a small concern. The Area Office rejected Appellant's arguments regarding affiliation and Trinity's alleged violation of the ostensible subcontractor rule. In addition, despite the fact that the RFP explicitly provides that the applicable NAICS code is 541690, the Area Office accepted the CO's explanation that the designation was in error and applied NAICS code 541513, and its \$25 million size standard, to the Size Determination. The Area Office explained that it made the decision to change the NAICS code under the authority of 13 C.F.R. § 121.402(c).

On March 18, 2010, Appellant timely appealed the Size Determination to SBA's Office of Hearings and Appeals (OHA). 13 C.F.R. § 134.304(a)(1). OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Although Appellant appealed the Area Office's affiliation findings, Appellant also specifically appealed the Area Office's application of NAICS code 541513 to the Size Determination.

I hold the Area Office made a clear error of law when it applied NAICS code 541513 to the Size Determination. 13 C.F.R. § 121.402(c) provides: "The NAICS code assigned to a procurement and its corresponding size standard is final unless timely appealed to SBA's Office of Hearings and Appeals (OHA), or unless SBA assigns an NAICS code or size standard as provided in paragraph (d) of this section." Clearly, the primary intent of this provision is to allow OHA to change the NAICS code pursuant to a timely NAICS appeal, which was not undertaken here. Moreover, pursuant to 13 C.F.R. § 121.402(d), an area office may only address a NAICS code in connection with a size determination if the code in the solicitation is unclear, incomplete, or missing. Hence, when the NAICS code is clear on the face of the solicitation, as it is here, an area office has no authority to change it in any way.

I note that all offerors under the RFP had to know that NAICS code 541690 applied to this procurement because the RFP plainly provides so. Thus, concerns larger than \$7 million had to know they were ineligible to submit an offer under the RFP, regardless of what any pre-solicitation notice may have provided. If a firm thought a mistake had been made or disagreed with the CO's designation of the NAICS code in the RFP, then it was incumbent upon that firm to appeal the designation to OHA pursuant to 13 C.F.R. § 134.302. Absent a timely appeal, 13 C.F.R. § 134.304(a)(3) compels the conclusion that the CO's NAICS code designation becomes final within ten days after the CO designates the NAICS code.

Accordingly, I conclude that the Area Office had no authority to change the NAICS code designation in the RFP. Similarly, the Area Office had no authority to honor any representations from the CO that the NAICS code provided in the RFP was a mistake. The CO's ability to change a NAICS code expires once the solicitation closes for the receipt of offers and he or she can no longer issue amendments to the RFP. I also find the Area Office's decision to change the

NAICS code is fundamentally unfair to any offeror that may have decided not to submit an offer under this procurement because it knew it exceeded the size standard applicable to the NAICS code designated in the RFP. Hence, the Area Office's decision to change the NAICS code, along with the CO's request that it do so: (1) undermines the integrity of the procurement process; and (2) is inimical to SBA's NAICS appeal regulations.

In addition, I find that the evidence in the Record, including Trinity's Tax Returns, conclusively establishes Trinity's average annual receipts well exceed \$7 million for the last three relevant fiscal years. Based on this finding, I need not address the other arguments presented by the parties because Trinity is clearly other than small.

For the foregoing reasons, Appellant's Appeal is GRANTED, and the Size Determination is REVERSED. Trinity is ineligible to receive award of the contract arising from this RFP, and the Air Force must not count award of the contract to Trinity toward meeting its small business goals.

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

THOMAS B. PENDER
Administrative Judge