

# Are You Taking Advantage of NAICS Codes Appeals to Compete for Small Business Set-Aside Contracts?

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When a federal agency issues a small business set-aside contract, it uses North American Industry Classification System (NAICS) codes to determine the size standard that will apply to that contract. The agency must select the single NAICS code that best describes “*the principal purpose of the product or service being acquired.*” [13 CFR 121.402](#).

However, the selected NAICS code can cause drastically different results for the corresponding size standard that is applied to the resulting contract. Therefore, contractors must know their rights related to challenging NAICS codes that are wrongly applied to a solicitation and should act quickly to ensure they are not unfairly eliminated from a competition based on the wrong NAICS code being selected for a procurement.

## 1. How are NAICS Codes and Corresponding Size Standards Selected?

NAICS codes and their corresponding size standards are found at [13 CFR 121.201](#). The size standard corresponding with each NAICS code is based on either: (1) Average annual receipts (i.e., total income plus costs of goods sold) over usually a 5-year period; or (2) Average number of employees over typically a 24-month period.

NAICS codes that have a corresponding size standard based on average annual receipts typically involve services, while employee-based size standards typically involve manufacturing and mining. As shown by the below example, NAICS code 237110 related to Water and Sewer Line and Related Structures Construction (i.e., services) has an annual receipts size standard of \$45 million while NAICS code 332996 related to Fabricated Pipe and Pipe Fitting Manufacturing (i.e., manufacturing) has a size standard of 550 employees. Therefore, if NAICS code 237110 is selected for the solicitation, offerors must certify that they have less than \$45 million in average annual receipts to qualify as a small business for that procurement. If NAICS code 332996 is selected, offerors must certify that they have less than 550 employees to qualify as a small business.

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
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237110	Water and Sewer Line and Related Structures Construction	\$45.0	
332996	Fabricated Pipe and Pipe Fitting Manufacturing		550

Significantly, the NAICS code selection is based on the principal purpose of the contract itself; not the primary business of the offeror. Therefore, using the above NAICS codes as examples, even if a bidder primarily works as a fabricated pipe and pipe fitting manufacturer (NAICS 332996), it is not prevented from bidding on a water and sewer line construction project (NAICS 237110) so long as it has less than \$45 million in average annual receipts and otherwise proves to the agency that it can perform the work. To qualify as a small business, the offeror must simply be small under the size standard associated with the NAICS code that is selected for the solicitation. Therefore, the NAICS code selection has a significant impact on the size standard for a procurement.

Under 13 CFR 121.402(b), a contracting officer must select “the single NAICS code which best describes *the principal purpose* of the product or service being acquired.” Therefore, if a solicitation involves a single award contract, it must contain only one NAICS code that best describes the principal purpose of that contract. If a solicitation seeks bids or proposals for a multiple award contract (i.e., more than one awardee), the contracting officer has two alternative methods it can use to select a NAICS code.

The contracting officer must either:

1. Assign to the solicitation a single NAICS code and corresponding size standard that best describes the principal purpose of the acquisition, but only if the NAICS code will also best describe the principal purpose of each order to be placed under the multiple award contract; or
2. Divide the solicitation into discrete categories (such as Contract Line Item Numbers (CLINs), Special Item Numbers (SINs), Sectors, Functional Areas (FAs), or the equivalent), and assign each discrete category the single NAICS code and corresponding size standard that best describes the principal purpose of the goods or services to be acquired under that category. Significantly, if the contracting officer chooses the second option, the offeror must meet the applicable size standard for each category (CLIN, SIN, Sector, FA or equivalent) for which it seeks an award as a small business concern.

When determining which NAICS code should be selected, the contracting officer must assign the NAICS code that best describes the principal purpose of the product or service being acquired in light of the industry descriptions in the [NAICS Manual](#), the description of the solicitation, the relative value and importance of the components of the procurement making up the end item being purchased, and the function of the goods or services being purchased. [NAICS Appeal of Cuebids Techs., Inc., NAICS-6272, at 8 \(Mar. 14, 2024\)](#). Notably, if a particular contract involves different types of products or services or even products and services, the appropriate NAICS code should be the one that best represents the greatest percentage of the contract value.

## 2. How Can Contractors Appeal The Selection of An Incorrect NAICS Code?

Any offeror or other interested party adversely affected by a NAICS code designation or the corresponding size standard may appeal the decision to the SBA Office of Hearings and Appeals

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(OHA). 13 CFR 121.402(f), 134.302.

NAICS code appeals must be filed within *10 calendar days* after issuance of the solicitation (or after the issuance of an amendment to the solicitation affecting the NAICS code). 13 CFR 134.304. SBA's regulations clearly show that untimely appeals will be dismissed. 13 CFR 134.304(b)-(c). Therefore, time is of the essence with NAICS code appeals and contractors should not wait to challenge improper NAICS codes.

### **3. Why Should Contractors Closely Watch NAICS Code Selections And Appeal Them When They are Wrong?**

As noted above, the selection of NAICS codes can have radically different results. Therefore, the selection of an incorrect NAICS code can greatly increase or reduce competition for a particular award.

#### **a. An Improper NAICS Code Can Increase The Numbers and Strengths of Your Competitors.**

Using the above table related to NAICS codes 237110 and 332996 as an example, consider a solicitation where the Army chooses to construct a new waterline system throughout an aging Army base. Consistent with SBA's regulations, the contracting officer must assign a NAICS code to the solicitation with a corresponding size standard.

Upon reviewing the [NAICS Manual](#), the Army contracting officer will see that NAICS code 237110, Water and Sewer Line and Related Structures Construction, includes the following illustrative examples of the types of work that it covers:

- Distribution line, sewer and water, construction
- Water main and line construction
- Pumping station, water and sewage system, construction
- Water system storage tank and tower construction
- Water well drilling, digging, boring, or sinking (except water intake wells in oil and gas fields)

When reviewing the NAICS Manual related to NAICS code 332996, Fabricated Pipe and Pipe Fitting Manufacturing, the contracting officer will see that this code involves businesses primarily engaged in fabricating pipe, such as cutting, threading, and bending, metal pipes and pipe fittings made from purchased metal pipe.

While a new waterline system likely will involve some use of metal pipe, from those descriptions associated with NAICS codes 237110 and 332996, it is clear that NAICS code 237110, Water and Sewer Line and Related Structures Construction (with its corresponding \$45 million size standard), best describes *the principal purpose* of the product or service being acquired, which is the construction of an entire waterline system. However, if the contracting officer incorrectly chooses 332996, Fabricated Pipe and Pipe Fitting Manufacturing (with its corresponding 550 employee size standard), the small business set-aside competition will be significantly different and could cause direct competitive harm to true small businesses under NAICS code 237110.

If NAICS code 332996 (with its 550 employee size standard) is selected, a construction company with \$500 million in average annual receipts could compete as a small business so long as it has less

than 550 employees. Therefore, a true small business under NAICS code 237110 (with its \$45 million size standard) would be forced to compete with much larger businesses if NAICS code 332996 is improperly selected for the solicitation. In this situation, the small business under NAICS code 237110 should consider appealing the NAICS code selection to eliminate its competitor with \$500M in average annual receipts and any other competitors who cannot meet the \$45 million size standard.

### **b. An Improper NAICS Code Can Eliminate Your Ability to Compete.**

The selection of the wrong NAICS code can also improperly reduce or eliminate a contractor's ability to compete.

For example, assume that the Army base discussed above needs to contract with a new food service provider to manage the mess hall because the incumbent contract is expiring. After reviewing the NAICS Manual, the Army contracting officer will see that NAICS code 722310, Food Service Contractors, involves "establishments primarily engaged in providing food services at institutional, governmental, commercial, or industrial locations of others based on contractual arrangements with these types of organizations for a specified period of time." The NAICS manual separately states that NAICS code, 722320, Caterers, "comprises establishments primarily engaged in providing single event-based food services. These establishments generally have equipment and vehicles to transport meals and snacks to events and/or prepare food at an off-premise site."

From the NAICS Manual's descriptions of 722310 (Food Service Contractors) and 722320 (Caterers), it is objectively clear that the NAICS code applicable to food service contractors (722310) best identifies the principal purpose of the food service contract for the new mess hall. Significantly, SBA's regulations show that NAICS code 722310 (Food Service Contractors) has an average annual receipts size standard of \$47 million while NAICS code 722320 (Caterers) has a size standard of only \$9 million. 13 CFR 121.201.

Therefore, if the contracting officer improperly selects the catering NAICS code (722320) that has a size standard of only \$9 million, multiple food service contractors will be eliminated if they cannot meet that size standard, even though they otherwise could meet the Food Services Contractors NAICS code (722310), which has a much higher size standard of \$47 million. In this situation, an improperly eliminated food service contractor who could meet the correct NAICS code but cannot meet the incorrect one should file a NAICS code appeal.

## **Conclusion**

NAICS code appeals can help contractors win more awards. Therefore, when contractors are reviewing new opportunities in SAM.gov, they would be wise to immediately check the NAICS code selected for the solicitation and to then quickly (within 10 calendar days) file an appeal of the NAICS code if it is incorrectly selected.

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National Law Review, Volume XIV, Number 183

Source URL: <https://natlawreview.com/article/are-you-taking-advantage-naics-codes-appeals-compete-small-business-set-aside>

