

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

NAICS APPEAL OF:

LJR solutions, LLC,

Appellant,

Solicitation No. FDA-SOL-1153590

U.S. Food & Drug Administration
Jefferson, Arkansas

SBA No. NAICS-5790

Decided: November 17, 2016

APPEARANCE

Christopher R. Shiplett, Esq., Randolph Law, PLLC, Falls Church, Virginia, for
Appellant

DECISION

I. Introduction and Jurisdiction

On October 18, 2016, the Food and Drug Administration (FDA) issued Solicitation No. FDA-SOL-1153590, a Request for Proposals (RFP) for On-Site Animal Husbandry Support Services of FDA's Animal Care and Use Program (ACUP) at two locations in Maryland. The Contracting Officer (CO) set the procurement aside entirely for Small Business and designated North American Industry Classification System (NAICS) code 541711, Research and Development in Biotechnology, with a corresponding 1,000 employee size standard, as the appropriate code. Offers were due November 18, 2016, later extended by Amendment 3 to December 5, 2016.

On October 28, 2016, LJR Solutions, LLC (Appellant) filed the instant appeal. Appellant argues the appropriate NAICS code for this procurement is 561210, Facilities Support Services, with a corresponding \$38.5 million annual receipts size standard. For reasons discussed *infra*, the appeal is denied.

The SBA Office of Hearings and Appeals (OHA) decides NAICS code appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal timely. Federal Acquisition Regulation (FAR) 19.303(c)(1); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b), 134.202(d). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Performance Work Statement

The objective of this procurement is:

to provide animal husbandry services to FDA's animal research programs, specifically the provision of quality care to all research animals, sanitation of all animal care and formulation facilities and provision of protocol-specified technical procedures support. Ancillary tasks necessary to accomplish these services are also included (i.e.: quality control, occupational safety and health, inventory control, equipment maintenance, development and maintenance of standard operating procedures, and a comprehensive employee training program). The need for these services is paramount as the preponderance of FDA's research mission can only be accomplished through animal research. Animal-based research projects are highly regulated and demand exemplary execution.

(Performance Work Statement (PWS), Attachment 1, at 3-4.) Two facilities housing laboratory animals are covered in this RFP. They house mice, rats, hamsters, guinea pigs, rabbits, ferrets, non-human primates, swine, dogs, and frogs, and other laboratory animals (*Id.* at 3.) PWS Annexes 1 and 2 separately cover each facility. (*Id.* at 4.)

The Contractor shall provide the necessary professional, technical, and administrative personnel with the required qualifications needed to provide the FDA with high-quality animal husbandry, animal care and technical support services. (*Id.* at 8.) The Government places a high priority on the technical workforce (foremen, technicians, assistant technicians, and animal caretakers) being American Association for Laboratory Animal Science (AALAS) certified at the Assistant Laboratory Animal Technician level or higher. "At least 85% of the technical workforce is required to be AALAS certified at all times." (*Id.*)

Personnel at each facility include: an onsite Project Manager and Assistant Project Manager certified as Laboratory Animal Technologists; Supervisors who are at least Laboratory Animal Technicians and have two years' experience in laboratory animal research and the performance of animal husbandry and technical procedures; Cage Wash Technicians; Floor Leaders certified as the Laboratory Animal Technicians, Research Assistants, Institutional Animal Care and Use Committee Assistant (a compliance position for animal research), Veterinary and Animal Health Technicians and Animal Caretakers. (PWS Attachment 1, Annex 1, at 3-4 and Annex 2, at 4-5.)

The General Requirements are described as:

The Contractor shall provide animal husbandry services that include, but are not limited to, feeding, watering, maintaining a clean environment, and observations of research animals in addition to parameter checks of the facility. The services may be performed in an Animal Biosafety Level 1 (ABSL-1),

Animal Biosafety Level 2 (ABSL-2) or an Animal Biosafety Level 3 (ABSL-3) environment.

The Contractor shall provide technical assistance in support of approved protocols for animal studies associated with, but not limited to, the use of invertebrates, rats, mice, rabbits, guinea pigs, hamsters, sand rats, gerbils, miscellaneous rodents, and/or other species of laboratory animals, including poultry and swine. Experimental procedures include administration of substances by subcutaneous, intravenous, and/or intraperitoneal injections, gavaging, collection of tissues and body fluids, behavioral observations, and surgical support. The number of dose groups, the concentration(s), volume and methods of administration are dictated by the experimental protocol and design. The Contractor shall also provide analytical support for approved research protocols.

(PWS, Annex 2, Revision 1, at 2.)

Animal Technicians shall have demonstrated expertise in experimental procedures including (1) administration of substances by injections, euthanasia of animals, skin painting, (2) collection of physiologic data, tissues, body fluids or blood) (3) necropsy, (4) tattooing or identification of animals, (5) routine husbandry procedures (animal weights, trimming teeth, trimming nails, provision of exercise to dogs), (6) euthanasia, (7) anesthesia and surgical assistance, (8) the observation and recording of animal activity and/or behavior, (9) electronic data entry, and (10) quality control activities (microbiological surveillance, collection of diagnostic samples, etc.). (PWS Annex 2, Revision 1, at 8.)

In addition to animal care such as daily feeding and watering animals, cleaning enclosures and facilities, contractor services include (1) animal handling, standard laboratory animal procedures, technical and program support, (2) extensive technical research support including dosing by gavage, intravenous, intraperitoneal, and topical routes, (3) technical laboratory animal services, such as injections, bleeding, treatment, breeding management, weaning, record keeping, animal observations, assisting researches, and report generation; (4) blood collection, and (5) performing environment monitoring, microbiological surveillance, and daily health observations. (PWS Annex 1, at 6-8.)

The evaluation factors for award are Technical Proposal, Past Performance and Price. In evaluating the Technical Proposal, the FDA will consider the subfactors (a) Technical Approach and (b) Management Approach and Personnel Qualifications. In evaluating Technical Approach, FDA will evaluate proposals to determine the extent the offeror's technical strategy/approach will ensure the scope, schedule, performance and offeror's resources are controlled and consistent with the contract and present minimal risk to the Government. As to Management Approach and Personnel Qualifications, proposals will be evaluated to determine whether the offeror's proposed methodology for organizing, staffing and managing the project will result in successfully providing Animal Care, Technical Procedures, Formulation and Veterinary Care Services as described in the PWS. (RFP at 23-24.)

B. The Appeal

On October 28, 2016, Appellant filed the instant appeal. Appellant argues the appropriate NAICS code for this procurement is 561210, Facilities Support Services, with a corresponding \$38.5 million annual receipts size standard.

Appellant notes that the RFP calls for animal husbandry services for the FDA at two Maryland locations. These services include providing quality care to research animals, including feeding, sanitation and technical procedures support. (Appeal at 3-4.) Appellant asserts that FDA frequently releases solicitations under NAICS code 541711. Appellant points to four other FDA solicitations, portions of which Appellant attaches to its appeal as Exhibits 5-8. These solicitations call for hip simulator tests; production of monoclonal antibodies from mice using influenza antigens; a study of factors that control the safety and biodistribution of Adenovirus vectors; and MircoRNA sequencing in conjunction with a study of translational Biomarkers for Drug-Induced Liver Injury. (*Id.* at 5-6.)

Appellant argues that based upon the *NAICS Manual* description of NAICS code 541711 and the other solicitations which have used it, the code applies to scientific research services directly involved in experimentation related to biological processes. The services required in the four sample solicitations are examples of the conduct of biotechnological research and the development of biotechnological experiments. (*Id.* at 6.) By contrast the instant RFP seeks services to maintain the research animals and research facilities and equipment. The solicitation seeks “quality care to all research animals, sanitation of all animal care and formulation facilities and provision of protocol-specified technical procedures support.” The contractor here will not engage in research or develop experiments. (Appeal at 6, citing RFP at 4.) This RFP does not describe biotechnological research, which NAICS code 541711 covers. (Appeal at 6.)

Appellant argues NAICS code 561210 best describes the services sought in this RFP. This code describes establishments who provide and operating staff to perform a combination of services within a client's facility and the company is not involved with or responsible for the core business or activities of the client. (*Id.* at 7.) The RFP calls for operating staff from a number of different disciplines. (*Id.* at 8.) It requires interdisciplinary services, animal care, diet preparation and veterinary services. The RFP requires staff with animal husbandry experience, which fits within either NAICS codes 812910, Pet Care (except Veterinary) Services, or 115210, Support Activities for Animal Production. The Animal Caretakers must have training and experience working in laboratory animal facilities performing animal husbandry duties. Administrative staff, such as the Administrative Assistant who provides administrative support including answering telephones, receiving packages, maintaining hard copy and electronic files and preparing standardized reports and records, must be experienced in document preparation and administrative support. This task would be covered by NAICS code 561410, Document Preparation Services. (*Id.* at 8, citing RFP at 4.)

The RFP also calls for veterinary testing service staff, the Lead Technician, and the Animal Health Technicians to dose animals by injection or other means, collect blood, collect physiologic data, such as tissues, observe and record animal activity and behavior, induce anesthesia, perform pre-surgical preparation and post surgical monitoring, and assemble, use and

disassemble cages. These tasks would be covered by NAICS code 541940, Veterinary Services. (*Id.*)

Finally, the RFP calls for cleaning services covered by NAICS code 561720, Janitorial Services. The Cage Wash personnel will wash machinery and autoclave equipment, maintain an inventory of cleaning supplies and wash lab clothing. (*Id.*) The contractor is not required to perform any research.

Appellant thus argues that NAICS code 561210 best describes the services sought here, and is the appropriate NAICS code for this solicitation.

On November 14, 2016, Appellant corrected typographical errors in its petition.

The FDA did not respond to this appeal.

C. NAICS Manual¹ Descriptions

The NAICS code designated by the CO, 541711, Research and Development in Biotechnology, comprises:

[E]stablishments primarily engaged in conducting biotechnology research and experimental development. Biotechnology research and experimental development involves the study of the use of microorganisms and cellular and biomolecular processes to develop or alter living or non-living materials. This research and development in biotechnology may result in development of new biotechnology processes or in prototypes of new or genetically-altered products that may be reproduced, utilized, or implemented by various industries.

Illustrative Examples:

Recombinant DNA research and experimental development laboratories
DNA technologies (e.g., microarrays) research and experimental development laboratories
Cloning research and experimental development laboratories
Protein engineering research and experimental development laboratories
Nucleic acid chemistry research and experimental development laboratories
Nanobiotechnologies research and experimental development laboratories

NAICS Manual, at 762-63. NAICS code 541711 is one of two industries that are part of industry group 5417, Scientific Research and Development Services, which is described as follows:

This industry group comprises establishments engaged in conducting original investigation undertaken on a systematic basis to gain new knowledge (research)

¹ Executive Office of the President, Office of Management and Budget, North American Industry Classification System-United States (2012), *available* at <http://www.census.gov>.

and/or the application of research findings or other scientific knowledge for the creation of new or significantly improved products or processes (experimental development). The industries within this industry group are defined on the basis of the domain of research; that is, on the scientific expertise of the establishment.

NAICS Manual, at 761. The other industry included in industry group 5417 is NAICS code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology).

NAICS code 541711 is further described in SBA's size regulations.

(a) "Research and Development" means laboratory or other physical research and development. It does not include economic, educational, engineering, operations, systems, or other nonphysical research; or computer programming, data processing, commercial and/or medical laboratory testing. . . .

13 C.F.R. § 121.201, fn. 11.

The NAICS code advanced by Appellant, 561210, Facilities Support Services, comprises:

[E]stablishments primarily engaged in providing operating staff to perform a combination of support services within a client's facilities. Establishments in this industry typically provide a combination of services, such as janitorial, maintenance, trash disposal, guard and security, mail routing, reception, laundry, and related services to support operations within facilities. These establishments provide operating staff to carry out these support activities; but are not involved with or responsible for the core business or activities of the client. Establishments providing facilities (except computer and/or data processing) operation support services and establishments providing private jail services or operating correctional facilities (i.e., jails) on a contract or fee basis are included in this industry.

NAICS Manual, at 782.

This NAICS code is also described in SBA's size regulations:

(a) If one or more activities of Facilities Support Services as defined in paragraph (b) (below in this footnote) can be identified with a specific industry and that industry accounts for 50% or more of the value of an entire procurement, then the proper classification of the procurement is that of the specific industry, not Facilities Support Services.

(b) "Facilities Support Services" requires the performance of three or more separate activities in the areas of services or specialty trade contractors industries. If services are performed, these service activities must each be in a separate NAICS industry. If the procurement requires the use of specialty trade contractors

(plumbing, painting, plastering, carpentry, etc.), all such specialty trade contractors activities are considered a single activity and classified as “Building and Property Specialty Trade Services.” Since “Building and Property Specialty Trade Services” is only one activity, two additional activities of separate NAICS industries are required for a procurement to be classified as “Facilities Support Services.”

13 C.F.R. § 121.201, fn. 12.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must show that the CO's NAICS code designation is based upon a clear error of fact or law. 13 C.F.R. § 134.314; *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003). SBA regulations do not require the CO to select the perfect NAICS code. *NAICS Appeal of Evanhoe & Assocs., LLC*, SBA No. NAICS-5505, at 14 (2013). Rather, the CO 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 in the solicitation, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being acquired. FAR 19.303(a)(2); 13 C.F.R. § 121.402(b). OHA will not reverse a NAICS code designation “merely because OHA would have selected a different code.” *NAICS Appeal of Eagle Home Med. Corp.*, SBA No. NAICS-5099, at 3 (2009).

B. Analysis

This procurement seeks a contractor to care for the animals used in the FDA's research. The contractor will be in charge of the animals' diet. This will involve more than merely feeding them and providing them with clean drinking water, although these tasks are required. The contractor will have to formulate and prepare the animals' diet. The contractor must also clean the animals' environments and ensure they are sanitary. The contractor is to provide technical assistance in support of the animal studies. The contractor will administer injections, collect tissues and fluids, make behavioral observations, and provide surgical support. The contractor will collect physiological data on the animals. The contractor will perform routine husbandry procedures (weighing, trimming teeth and nails, and providing exercise if necessary). The contractor will observe and record animal activity, and/or behavior. The contractor will also provide analytical support for approved research protocols.

All of these activities are part of the research process. The contractor here will be caring for the animals, which are vital for the continuing research. Further, the contractor will be involved in the research process itself, administering injections, identifying animals, collecting data and observing and recording behavior.

While OHA has not considered NAICS appeals of code 541711, OHA has ruled in NAICS appeals on the other industry that is part of industry group 5417, Scientific Research and Development Services. That NAICS code is 541712, Research and Development in the Physical, Engineering and Life Sciences (except Biotechnology). The industry group description states that both industries in this group “are defined on the basis of the domain of research; that is, on the scientific expertise”. *NAICS Manual*, at 761. Thus, both codes describe scientific research and development, and one may draw analogies based on those concepts from one industry to the other.

In its decisions regarding NAICS code 541712, OHA considered what type of activity is properly included under a research NAICS code. Work which is an integral part of an agency's research, and essential for the conduct of the research, is properly classified under a research NAICS code. *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4882 (2008). Even if the contractor will not perform any research itself, nor provide advice and assistance, but it will perform work which is a vital part of the research process, the contract is properly classified under a research NAICS code. *NAICS Appeal of Information Ventures, Inc.*, SBA No. NAICS-4945 (2008). Researchers do not work in a vacuum, and when they require the support of technically experienced personnel to assist their efforts, it cannot be said that a contracting officer is incorrect to assign a research NAICS code to support competencies required for the success of the research effort. *NAICS Appeal of Inklings Media Company*, SBA No. NAICS-5054 (2009).

Here, the contractor's work will be an integral part of FDA's research effort. The care of the subject animals is a vital part of the research effort. The requirement that “[a]t least 85% of the technical workforce is required to be AALAS certified at all times” is very persuasive that the core purpose of this RFP is to care for laboratory animals that are the subject of scientific research. These animals are neither pets nor livestock, so Appellant's attempt to classify this care under NAICS codes 812910 (pet care) or 115210 (agricultural animal production) are meritless. Further, contractor personnel will be taking active part in the research, by administering injections, collecting samples, collecting data and observing and recording behavior. The contractor's work is vital for the animal research to succeed. I therefore conclude the CO's designation of NAICS code 541711 for this RFP is correct.

Because Appellant has not established that NAICS code 541711 is not appropriate for this RFP, OHA need not consider any alternate code or size standard. It is settled law that OHA will not assign a different NAICS code to a procurement unless the contracting officer's choice of NAICS code is shown to be clearly erroneous. *NAICS Appeal of DCS Corporation*, SBA No. NAICS-5703 (2016).

Nevertheless, I find Appellant's argument that NAICS code 561210 is appropriate to be unpersuasive. NAICS code 561210 covers establishments which provide a combination of support services, but are not involved with the client's core business. *NAICS Appeal of CWU, Inc.*, SBA No. NAICS-5226 (2011). Contracts covered by the code are usually for an agency's ancillary support services, such as maintenance, janitorial and clerical services. *NAICS Appeal of Alon, Inc.*, SBA No. NAICS-5148 (2010). Services which are central to the procuring agency's mission cannot be classified under NAICS code 561210. *NAICS Appeal of JBS International*,

Inc., SBA No. NAICS-5021 (2008). Here, the services required are vital to the animal experiments which are central to FDA's mission. Accordingly, NAICS code 561210 is not an appropriate code for this procurement.

Further, Appellant's reference to other solicitations whose NAICS codes OHA have not decided is unavailing here. These are other procurements, with different statements of work. Each NAICS code appeal must be decided based upon the solicitation at issue, and other solicitations are not of great probative value. *NAICS Appeal of Ferris Optical*, SBA No. NAICS-5285 (2011).

I therefore conclude Appellant has failed to establish clear error in the CO's NAICS code designation. NAICS code 541711, Research and Development in Biotechnology, with a corresponding 1,000 employee size standard, is the appropriate code for this procurement

Accordingly, I conclude that Appellant has failed to meet its burden of establishing clear error in the CO's NAICS code designation, and I must deny this appeal.

IV. Conclusion

For the above reasons, the appeal is DENIED. The CO reasonably selected NAICS code 541711, Research and Development in Biotechnology, with a corresponding 1,000 employee size standard.

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

CHRISTOPHER HOLLEMAN
Administrative Judge