

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

NAICS APPEAL OF:

Solvent Services, LLC,

Appellant,

Solicitation No. 36C24924R0097

U.S. Department of Veterans Affairs

SBA No. NAICS-6313

Decided: October 30, 2024

APPEARANCES

Jonathan D. Perrone, Esq., Joshua Sather, Esq., Whitcomb, Selinsky, P.C., Denver, CO,
for Appellant

Dana Dixon, Contracting Officer, Melvin Cole, Contract Specialist, U.S. Department of
Veterans Affairs, Murfreesboro, TN, for U.S. Department of Veterans Affairs

DECISION

I. Introduction and Jurisdiction

On August 22, 2024, the U.S. Department of Veterans Affairs (VA) posted Solicitation No. 36C24924R0097 on the Governmentwide Point of Entry (GPE), i.e. www.SAM.gov. The Solicitation is a total SDVOSB set-aside for the provision of medical technologists or medical laboratory technicians to support the medical laboratories at VA facilities in Nashville, TN and Murfreesboro, TN, as described within the Solicitation's Performance Work Statement (PWS) and Price/Cost Schedule. Specifically, the PWS states that the contractor is required to provide a specified number of American Medical Technologist (AMT) or American Society for Clinical Pathology (ASCP) certified medical laboratory scientists for the temporary staffing of the VA's laboratories in the aforementioned locations. On September 17, 2024, the VA issued the Solicitation as a total set aside for Service-Disabled Veteran Owned Small Business and designated NAICS code 621511 — Medical Laboratories — with a corresponding \$41.5 million annual receipts size standard as the appropriate code.

On September 27, 2024, Solvet Services, LLC (Appellant) filed the instant appeal challenging the NAICS code designation. Appellant asserts that the NAICS code 621511 does not best describe the principal purpose of the procurement and is thus inappropriate. Appellant argues that the most appropriate NAICS code is 561320, Temporary Help Services, with a corresponding \$34 million annual receipts size standard. For the reasons discussed *infra*, I DENY this appeal.

OHA decides appeals of NAICS code designations 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 within ten calendar days after issuance of the Solicitation, so the appeal is timely. Federal Acquisition Regulation (FAR) 19.303(c)(1); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation / Performance Work Standard (PWS)

The Solicitation states the VA seeks a contractor to “[P]rovide Medical Technologist/Medical Laboratory Technician Services as specified by the schedule services... and the performance work statement.” (Solicitation at 1). The Performance Work Statement (PWS) further outlined that the purpose of the solicitation is for the provision of AMT or ASCP certified Medical Laboratory Scientist/Medical Technologist Services at the Nashville and Alvin C. York campuses of the VA, both located in Tennessee. (Solicitation at 25).

The PWS outlines requirements for the contractor as it pertains to medical technologists/medical laboratory technicians and their tasks/services at the respective VA campuses, as would be provided in a state of the art civilian medical treatment facility, and the standard of care shall be of a quality meeting or exceeding those set by the VA. The PWS also outlines the requirements for their licenses, credentials, technical proficiency, and training, as well as further requirements pertaining to matters such as vaccination statuses and citizenship. (*Id.* at 26-31). Additional matters such as work schedules (days/hours, federal holidays, etc.), contractor responsibilities pertaining to HIPAA, and general performance standards/quality assurance are also outlined in the PWS. (*Id.* at 31-34). The technicians must have a detailed technical knowledge of chemistry, of laboratory safety procedures, demonstrate civility in communications, and consistently perform proper patient sample identification and specimen collection. The Solicitation explicitly states that any contracted personnel “shall not be considered VA employees for any purpose.” (*Id.* at 30).

Notably, nowhere within the Solicitation is there a requirement that the contractor provide any laboratory space, and the Solicitation furthermore disclaims such a requirement by specifying that all contracted work shall be performed in the VA's existing laboratory space. (*Id.* at 26.)

B. The Appeal

On September 27, 2024, Appellant filed the instant appeal. Appellant alleges that the CO erred in choosing NAICS code 621511 for the purposes of the subject procurement. Appellant argues that NAICS code 621511 most appropriately applies to procurements with a principal purpose involving the acquisition of outside laboratory space and does not apply to the staffing of on-site medical laboratories, nor to staffing generally. (Appeal at 1-2).

Appellant argues that the CO's designation is based on clear error for two reasons: First, NAICS code 621511 should be reserved for solicitations primarily seeking laboratory space. Second, Appellant argues that NAICS code 561320, which pertains to temporary staffing services generally, would be more appropriate for this procurement. (*Id.* at 1, 4.)

First, Appellant argues that, while this procurement may also involve the acquisition of laboratory diagnostic services, a solicitation with a NAICS code 621511 designation must be reserved for procurements principally involving the acquisition of laboratory space. In other words, laboratory diagnostic services must be an ancillary function to the provision of laboratory space itself. The plain language of the Solicitation states the principal purpose of the Solicitation is to provide temporary labor services to the VA, and the Solicitation expressly disclaims the possibility of a contractor providing off-site or remote laboratory space as it specifies that all contract work shall be performed at the aforementioned VA campuses. The Solicitation's Cost/Price schedule confirms the principal purpose is the acquisition of temporary staff. The schedule anticipates the labor hours of the technologists and technicians but has no cost or pricing breakdown suggesting the contractor is responsible for providing laboratory space. (*Id.*, at 3.) Appellant cites to a number of past VA Solicitations for the acquisition of laboratory space, which used the NAICS code 621511 designation. Accordingly, Appellant argues the CO's assignment of NAICS code 621511 constituted clear error on these grounds. (*Id.* at 5-6).

Second, Appellant argues that NAICS code 561320 is more appropriate, because it covers the type of temporary staffing sought by this Solicitation. Further, the Solicitation specifies that technicians and technologists to be provided individuals will not be VA employees, but contractor employees only, it is clear this is a temporary staffing contract rather than a contract for the acquisition or provision of laboratory space. Accordingly, given that not only is the CO's chosen NAICS code designation clear error, but that there is also a more appropriate designation available, Appellant argues OHA should grant the instant appeal. (*Id.* at 6).

C. CO's Response

On October 4, 2024, the CO responded to the appeal, defending his choice of NAICS code. The CO argues the current contract carried that designation without any objection.

The CO asserts the VA conducted market research on this requirement, considering the codes 541380 Testing Laboratories under Professional, Scientific and Technical Services; 561320 Temporary Help Services under Administrative and Support Services; and 621511 Medical Laboratories under Ambulatory Health Care Services.

The CO further asserted the VA rejected NAICS Code 561320 because this is a contract for a long-term need. Use of NAICS code 561320 creates a personal services contract and employment of an individual is not permitted beyond a one-year period. The Tennessee Valley Healthcare System (TVHS) Department of Veterans Affairs Medical Center (VAMC) has employed individuals under the current contract for 4 years or more, and the current employees will apply to continue working at TVHS under the new contract. Limiting employment to only one year for individual contract employees will undermine the stability and efficient operation of

the TVHS lab. Use of this code would not provide the TVHS VAMC with the support services they need.

The VA further determined that NAICS Code 541380 was more applicable for services not performed in a healthcare setting and that NAICS Code 621511 was most appropriate for long-term employment of contract staff in a medical laboratory setting. (CO Response 1-2).

The CO also noted that no objections were received upon the initial pre-solicitation announcement on August 19, 2024, and that VA did not receive the instant Appeal until September 27th. This was more than 8 months after the initial posting of the upcoming requirement, and more than a month after the official posting of a Contract Opportunities notice. (*Id.* at 1.)

The CO requests an OHA ruling affirming the NAICS code 621511 designation in order to meet the VA's long-term needs. The CO argues that requiring NAICS code 561320 would cause extreme difficulty in the operation of the VA Medical Center's laboratory with an inexperienced and unstable staff. (*Id.*, at 2.)

D. *NAICS Manual*¹ Descriptions

The NAICS code designated by the CO, 621511, Medical Laboratories, comprises:

[E]stablishments known as medical laboratories primarily engaged in providing analytic or diagnostic services, including body fluid analysis, generally to the medical profession or to the patient on referral from a health practitioner.

Illustrative Examples: Blood analysis laboratories; Medical pathology; Medical bacteriological laboratories; Medical testing laboratories; Medical forensic laboratories.

NAICS Manual, at 527.

The NAICS code proposed by Appellant, 561320, Temporary Help Services, comprises:

[E]stablishments primarily engaged in supplying workers to clients' businesses for limited periods of time to supplement the working force of the client. The individuals provided are employees of the temporary help services establishment. However, these establishments do not provide direct supervision of their employees at the clients' work sites.

¹ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2022)*, available at [2022_NAICS_Manual.pdf](https://www.census.gov/naics/) (census.gov)

Illustrative Examples: Help supply services; Model supply services; Labor (except farm) contractors (i.e., personnel suppliers); Temporary employment or temporary staffing services; Manpower pools.

NAICS Manual, at 488.

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

Having reviewed the Solicitation, the descriptions in the *NAICS Manual*, OHA's prior decisions, and the arguments presented by the parties, I find that Appellant has not established that the CO's NAICS code designation is clearly erroneous. I therefore must DENY this appeal.

Appellant argues that the CO designation of NAICS code 621511 is inappropriate because this code covers the acquisition of physical laboratory space, while this procurement seeks the acquisition of services. However, merely because the code covers laboratories, does not mean this NAICS code can only designate the acquisition of laboratory space. NAICS code 541714, Research and Development in Biotechnology (except Nanobiotechnology) covers Cloning research and experimental development laboratories, Nucleic acid chemistry research and experimental development laboratories, Protein engineering research and experimental development laboratories and Recombinant DNA research and experimental development laboratories. *NAICS Manual*, at 471-72. While NAICS 541714 code covers laboratories, it does not cover the acquisition of physical laboratory space, but research. *NAICS Appeal of LJR Solution, LLC*, SBA No. NAICS-5790, at 7 (2016) (applying predecessor code 541711 to a research procurement.) NAICS code 541380, Testing Laboratories, also covers establishments engaged in performing physical, chemical and other analytical testing services. *NAICS Manual*, at 462. OHA has found this code to cover procurements for testing services, not for the acquisition of physical laboratories. *NAICS Appeal of Dayton Brown, Inc.*, SBA No. NAICS-5164, at 4-5 (2010); *NAICS Appeal of SVL Analytical, Inc.*, SBA No. NAICS-4721 (2005).

It is clear then that a procurement's NAICS code designation for laboratories covers not the acquisition of physical laboratories, but of the testing and analytical services that laboratories provide. The instant procurement is seeking such services. Appellant cites to no precedent to support its contention that NAICS code 621511 covers the acquisition of physical space, rather than analytical and testing services.

Appellant attempts to rely on the designations for other procurements. However, the NAICS code designations of other procurements which have not been appealed to OHA are not of great probative value. *NAICS Appeal of U.S. Small Business Administration*, SBA No. NAICS-5899, at 10 (2018); *NAICS Appeal of Eagle Design and Management, Inc.*, SBA No. NAICS-4521, at 5-6 (2002); *aff'd sub nom. Eagle Design and Management, Inc. v. United States*, 57 Fed. Cl. 271 (2002). Accordingly, I will not consider them here.

Because Appellant has failed to establish that NAICS code 621511 is clearly incorrect for this procurement, OHA need not consider the NAICS code Appellant advocates, or other alternative codes. It is well-settled that “OHA will not assign a different NAICS code to a procurement unless the CO's choice of NAICS code is shown to be clearly erroneous.” *NAICS Appeal of Taurean General Servs., Inc.*, SBA No. NAICS-6092, at 6 (2021) (*quoting NAICS Appeal of Dentrust Optimized Care Solutions*, SBA No. NAICS-5761, at 7 (2016)); *NAICS Appeal of Ascendant Program Servs., LLC*, SBA No. NAICS-5832, at 10 (2017).

IV. Conclusion

For the above reasons, this appeal is DENIED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge