

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

NAICS APPEAL OF:

Technology Security Associates, Inc.

Appellant,

Solicitation No. N68335-18-R-0092

Naval Air Warfare Center

Aircraft Division

Lakehurst, New Jersey

SBA No. NAICS-5950

Decided: August 13, 2018

APPEARANCES

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DECISION

I. Introduction and Jurisdiction

On May 31, 2018, the U.S. Department of the Navy, Naval Air Warfare Center Aircraft Division (NAWCAD) issued Request for Proposals (RFP) No. N68335-18-R-0092 for cybersecurity solutions and support. The RFP contemplated the award of a task order to a firm holding a Cyber Warfare Detachment (CWD) Basic Ordering Agreement (BOA) “within pools five (5), Protection Solutions and System Integration Services, and/or six (6), Full Spectrum Operational Cyber Warfare Support.” (RFP at 2.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541715, Research and Development in the Physical, Engineering, and

Life Sciences (except Nanotechnology and Biotechnology), with a corresponding size standard of 1,000 employees. (*Id.*)

On June 6, 2018, Technology Security Associates, Inc. (Appellant) filed the instant appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant asserts that the CO clearly erred in selecting NAICS code 541715 because the subject procurement does not call for research and development, but rather involves work best described by NAICS code 541512, Computer Systems Design Services. For the reasons discussed *infra*, the appeal is denied.

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 RFP, 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. The Procurement

In August 2017, NAWCAD issued a Request for Information (RFI) to CWD BOA holders, seeking comments on a draft Statement of Work. (RFI, at 1.) The RFI stated that:

The Government anticipates that this [solicitation] will be released under [NAICS code] 541712 Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology). Under this classification, a small business participant is identified as a business having a size standard of 1,000 employees. This requirement will require a TOP SECRET facilities clearance. The Government welcomes responses from industry, to include small business as well as large business. If your company is considered a large business, provide your subcontracting strategy of how you would best incorporate small business, small disadvantaged business, woman-owned small business, HUB Zone small business, veteran owned small business, and service disabled veteran owned small business, in the overall performance of this effort.

(*Id.* at 10.)

On February 20, 2018, NAWCAD published a synopsis indicating that the forthcoming solicitation would be issued under NAICS code 541512, Computer System Design Services. On April 3, 2018, NAWCAD amended the synopsis to instead reference NAICS code 541715, without explanation.

On May 31, 2018, NAWCAD issued the instant RFP under NAICS code 541715. According to the RFP's Statement of Work (SOW), the contractor will provide cybersecurity solutions and support for NAWCAD's Research, Development, Test and Evaluation (RDT&E) Infrastructure Division. The SOW explains that “[t]he RDT&E Infrastructure Division develops,

operates, and maintains secure, reliable communications and computing infrastructure to RDT&E labs, enabling these labs to develop and test new and innovative weapon systems.” (SOW § 1.0.) The SOW continues:

Supplies and services are required by [NAWCAD] to rapidly research, develop, mature, procure, integrate, train, support and sustain cyber resilient and full spectrum cyber warfighting capabilities for platforms, weapons, sensors, communications and networks, computing systems, mission systems, support equipment, logistics and maintenance systems[,] and ashore and afloat enterprise systems. These solutions are needed to support all phases of acquisition programs, operational field demonstrations, prototyping, experiments, operational assessments, extended user evaluations, and fleet/force deployments.

(*Id.*)

The SOW divides the required work into five sections: (1) Protection Solutions and Systems Integration Services; (2) Full Spectrum Operational Cyber Warfare Support; (3) RDT&E; (4) Certification and Authorization Support; and (5) Project Management. (*Id.* § 3.3.) Under “Protection Solutions and Systems Integration Services,” the contractor will “provide identification and mitigation of cyber vulnerabilities for aircraft [and] weapon [systems]” as well as for “networks, simulators, maintenance laptops, mission loaders, [and] critical physical and industrial control system interfaces with air vehicles. . . .” (*Id.* § 3.3.1.) The contractor will “provide cyber monitoring [and] warning systems and techniques for operators, maintainers, and logisticians.” (*Id.*) In addition, “[t]he contractor shall provide detection, protection, incident response, recovery from malware and/or effects on aircraft [and] weapon [systems] and supporting infrastructure - tools, response kits [and] methods.” (*Id.*) Deliverables for this section include studies, reports, and integrated protection solutions. (*Id.*)

Under “Full Spectrum Operational Cyber Warfare Support,” the contractor will “provide critical access point determination and protection, detection, response recovery based on multiple spectrum apertures,” and will “provide cyber monitoring [and] warning systems [and] techniques.” (*Id.* § 3.3.2.) The contractor also is responsible for “cyber threat attribution, identification, and geo-location.” (*Id.*) Deliverables for this section include studies, reports, and integrated protection solutions. (*Id.*)

Under “RDT&E,” the contractor will “conduct cyber RDT&E and system development, prototyping, and limited production on hardware and software for platforms, weapons, systems, subsystems, and items.” (*Id.* § 3.3.3.) The contractor will conduct RDT&E and systems development on several topics, including: “cyber sensor development and integration of Government off the shelf and commercial off the shelf sensors and systems”; “integration of existing and developed systems . . . for enabling new cyber capabilities and higher order products than the individual systems provide alone”; “algorithms and processing including big-data storage and analytics, access, replication, and reduction . . . to enable new cyber capabilities or enhancements to existing capabilities”; multi-level security devices and interfaces; and “cyber related standards.” (*Id.*) Deliverables for this section include studies and reports. (*Id.*)

Under “Certification and Authorization Support”, the contractor will support NAWCAD's existing certification processes through “preparation, configuration management and maintenance of required documentation, support for required testing, and certification of trusted agents. . . .” (*Id.* § 3.3.4.) Deliverables for this section include studies, reports, and “Certification and Accreditation” and “Assessment and Authorization” packages. (*Id.*)

Under “Project Management”, the contractor will provide “management and oversight of all issued tasks,” and is responsible for program management reviews, monthly status and financial reports, and progress reviews. (*Id.* § 3.3.5.)

The RFP identifies 16 labor categories and provides estimated labor hours for each labor category for each year of contract performance. The labor categories are: Senior Program Manager; Principal Cybersecurity Technical Manager/Lead; Cybersecurity Engineer/Analyst (“Journey,” “Junior,” and “Trainee”); Senior Information Assurance Analyst; System Analyst (“Senior” and “Journey”); Information Management and Technology Analyst (“Senior” and “Journey”); System Administrator (*i.e.*, “Senior” and “Junior”); Field Technician; Computer Programmer; Program Analyst; and Administrative Assistant. (RFP at 50-51, 56-57.) All labor categories, other than Program Analyst and Administrative Assistant, require Top Secret security clearance. (SOW § 5.5.) The RFP estimates that a total of 120,960 labor hours will be required for the base year of the task order, and a total of 528,000 labor hours over the entire duration of the order. (RFP at 51, 56-57.) Approximately 95% of work will be performed at Government facilities, and the remaining 5% at contractor sites. (SOW § 3.1.2.)

The RFP provides “Labor Category Qualifications” for each of the 16 labor categories. (*Id.* § 5.5.) The Principal Cybersecurity Technical Manager/Lead “[s]erves as a functional expert in support of tasking that involves advanced knowledge of Information Assurance policy or technical cybersecurity solutions,” including “evaluating the integration of emerging cybersecurity technologies into multiple systems,” “performing cyber forensics,” and “developing mitigation strategies to reduce risk for systems with a high cyber-attack risk.” (*Id.* § 5.5.2.)

The Cybersecurity Engineer/Analyst, Journey “[c]onducts and supports Cybersecurity through all phases of the system development life cycle, including planning, requirements analysis, design, development, testing and evaluation, and implementation.” (*Id.* § 5.5.3.) Similarly, the Cybersecurity Engineer/Analyst, Junior and Cybersecurity Engineer/Analyst, Trainee both “[a]ssist and support Cybersecurity through all phases of the system development life cycle. . . .” (*Id.* §§ 5.5.4 and 5.5.5.)

The System Analyst, Senior “[p]erforms comprehensive analyses of hardware/software concepts, designs and test requirements” and “[r]eviews, analyzes, integrates and conducts test and evaluation of Contractor or Government-generated source data and develops interim documentation.” (*Id.* § 5.5.7.) The System Analyst, Journey “[c]onducts technical research on system upgrades to determine feasibility, cost, time required, and compatibility with system” and “[w]orks on special problem areas; administers complex areas of network, security analysis and planning.” (*Id.* § 5.5.8.) The System Administrator, Senior “[m]anages the functionality and efficiency of a group of computers running on one or more operating systems”, “maintains the

integrity and security of servers and systems”, and “[d]evelops and monitors policies and standards for allocation related to the use of computing resources.” (*Id.* § 5.5.11.)

According to the RFP, “[t]his Task Order is reserved for only those contractors which were issued a Cyber [BOA] in pools five (5), Protection Solutions and System Integration Services, and/or pool six (6), Full Spectrum Operational Cyber Warfare Support.” (RFP at 64.) The RFP indicates that NAWCAD will select the offer which represents the best value, meaning “the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit(s) in response to the requirement.” (*Id.*) Proposals will be evaluated based on three factors: (1) Technical, (2) Past Performance, and (3) Cost/Price. (*Id.* at 65.) The Technical factor consists of three subfactors: (i) Understanding of the Work; (ii) Workforce; and (iii) Management Plan. (*Id.*) Proposals are due September 25, 2018.

In an amendment to the RFP, the CO stated that, although each BOA was assigned a single NAICS code at the time the BOA was established, “[t]he NAICS code under which their BOA was issued will not limit any BOA holders from being eligible to compete under this solicitation. Additionally, a vendor issued a BOA under one NAICS code can be issued a task order under a different NAICS code as set at the task order/solicitation level.” (RFP, Amendment 0005, at 2.)

### B. Appeal

On June 6, 2018, Appellant filed the instant appeal. Appellant states that it is CWD BOA holder, and that it is adversely affected by the assignment of NAICS code 541715 because, as a small business, Appellant “cannot effectively compete against the significantly larger businesses that fall under the 1,000 person size standard.” (Appeal, at 1.)

Appellant focuses on the RFI issued to BOA holders, and argues that NAWCAD, based on the results of that RFI, properly stated in the synopsis that NAICS code 541512 would apply. (*Id.*) Without any rational basis, NAWCAD subsequently amended the synopsis to reflect NAICS code 541715, and then incorrectly issued the RFP under that NAICS code. (*Id.*)

Appellant maintains that NAICS code 541715 does not best describe this procurement because none of the work requirements entail laboratory-based or physical research and development. (*Id.* at 2, citing *NAICS Appeal of Delphi Research, Inc.*, SBA No. NAICS-5377 (2012).) According to Appellant, NAWCAD's RDT&E Infrastructure Division, the primary customer for the instant procurement, “does no research and development work for Navy aircraft or weapons systems.” (*Id.*) Rather, the RDT&E Infrastructure Division “develops, operates, and maintains secure, reliable communications and computing infrastructure to RDT&E labs.” (*Id.*)

Moreover, the services described in the RFP “involve engineering development and systems integration”, not “physical research and development of **new technology**”. (*Id.* (emphasis Appellant's).) Appellant reviews the five sections of the SOW, and contends that only § 3.3.3, RDT&E, potentially constitutes research and development. (*Id.*) In Appellant's view, the remaining sections are “clearly not” research and development. (*Id.*)

Appellant argues that the work described in § 3.3.3 is specifically excluded from SBA's definition of “research and development”, because SBA excepts “economic, educational engineering, operations, systems, or other nonphysical research; or computer programming data processing, commercial and/or medical laboratory testing.” (*Id.*, quoting 13 C.F.R. § 121.201, n. 11(a).) Appellant asserts that “[t]he efforts described in section 3.3.3 ‘RDT&E’ of the SOW do not include any *physical* research.” (*Id.* (emphasis Appellant's).) Although § 3.3.3 uses the words “research and development”, the work described is actually systems integration and engineering, not true research and development. (*Id.* at 3.)

Appellant contends that the RFP's labor categories consist primarily of “general information technology support professionals.” (*Id.*) In Appellant's view, the Cybersecurity Engineers are “[t]he only labor categories that could conceivably address R&D”, but the labor category descriptions “make it clear that they are IT professionals, focused on IT security, and do not perform R&D.” (*Id.*)

Appellant argues that the NAICS code originally identified in the synopsis, 541512, Computer Systems Design Services, best describes this procurement. (*Id.*) Appellant asserts that the work required here involves computer hardware, software, system design, and system integration. (*Id.* at 3-4.) Appellant also points to OHA's decision in *NAICS Appeal of Rollout Systems, LLC*, SBA No. NAICS-5901 (2018), where OHA overturned the use of NAICS code 541715 for a different NAWCAD procurement, after concluding that the procurement was “predominantly information technology” services rather than research and development. (*Id.* at 4.)

### C. CO's Response

On June 22, 2018, the CO responded to the appeal. The CO defends his choice of NAICS code 541715 and urges OHA to deny the appeal.

The CO, first, disputes Appellant's characterizations of the RFI and synopsis, stating that the RFI clearly expressed NAWCAD's intent to release the RFP under NAICS code 541712, the predecessor to NAICS code 541715. NAWCAD received no objections or comments from BOA holders, including Appellant, advocating for any different NAICS code. (CO's Response at 1.) Although the synopsis issued in February 2018 originally identified NAICS code 541512 for the procurement, this was the result of a clerical error and, further, was inconsistent with the RFI responses and market research. (*Id.*)

The CO argues that Appellant misconstrues the RFP as requiring no research and development. On the contrary, the CO contends, cybersecurity is an emerging technological field “with non-traditional based architectures”, and requires “a tremendous amount of R&D, hands-on experimentation, and close coordination with the intel community”. (*Id.* at 2.) The CO continues:

This effort requires the development of new cyber tools, which includes: tools, standards, processes, and methods to conduct surveillance of Navy weapons systems in real time, without affecting operation. None of the above tools,

standards, processes, and methods currently exist. All tools, standards, processes, and methods need to be developed from the ground up and created by the contractor. There is no clear guide or process as to the development of these tools or what will work without ongoing research as threats are constantly evolving and cybersecurity within Navy weapons and aircraft systems as whole is in its infancy.

(*Id.* at 5.) In particular, the CO asserts, sections 3.3.1, 3.3.2, and 3.3.3 of the SOW “require the research of cyber warfare techniques used by our foreign adversaries and the development of RDT&E tools based on those techniques to be used for Naval aviation testing.” (*Id.* at 2.) Further, the deliverables required in the RFP (*i.e.*, studies, reports, and integrated protection solutions) demonstrate that the procurement is for “development of new cyber tools and processes, not engineering development or system integration.” (*Id.*)

The CO argues that, contrary to Appellant's suggestions, “[f]or combat platforms and weapons systems, protection cyber solutions simply do not exist and/or are not commercially available.” (*Id.*) Thus, the RFP does involve research and development, such as creating new techniques and capabilities, developing protection solutions based on vulnerabilities, and testing the resiliency of new solutions. (*Id.* at 2-3.) The CO takes issue with Appellant's claim that sections 3.3.1, 3.3.2, and 3.3.3 do not involve research and development tasks, arguing that each of these sections seeks new techniques or technologies not commercially available.

According to the CO, the labor categories in the RFP are appropriate for research and development tasks. The CO maintains that “[e]ngineers and other technical positions will be responsible for developing new cyber tools and then testing those tools within and against Navy systems.” (*Id.* at 4.) Moreover, the CO posits, except for the program manager and administrative assistant, “all of the remaining positions will be performing R&D tasking.” (*Id.*)

The CO contends that NAICS code 541512 is inappropriate for this RFP, because the work involves much more than computer systems. In the CO's view, “the [RFP] is not for computer systems but [for] the development and evaluation of tools against Navy weapons systems and aircraft.” (*Id.*) The CO adds that “[c]yber threats exist across a vast array of Navy components including: platforms, weapons, sensors, communications and networks, etc.” (*Id.*) The CO distinguishes *Rollout Systems*, asserting that the solicitation there called for “IT engineering and management support services” rather than cyber-related research and development. (*Id.*)

Instead, the CO maintains, NAICS code 541715 is most suitable because the RFP seeks development of new technologies, tools, standards, processes, and methods that do not presently exist. The CO also specifies that “the R&D and testing being conducted as part of this effort . . . will be conducted within government labs” and, therefore, is physical in nature. (*Id.* at 5.)

\*8 The CO provided OHA copies of the BOAs awarded to Appellant and to each intervenor. Section 4.2.1 of each BOA describes requirements for research, development, test, and evaluation.

#### D. Sabre's Response

On June 21, 2018, Sabre Solutions, Inc. (Sabre) responded to the appeal, supporting the CO's selection of NAICS code 541715. Sabre states that it is CWD BOA holder and would be ineligible to compete for the task order if the NAICS code were changed to 541512. In Sabre's view, while Appellant expresses disagreement with the assigned NAICS code, Appellant has not met its burden of proving that NAICS code 541715 is clearly erroneous.

Sabre highlights that OHA has long held that procurements classified under a research and development NAICS code “must be for research and development, and thus must look to creating new processes or products.” (Sabre Response at 6, quoting *NAICS Appeal of Dayton T. Brown, Inc.*, SBA No. NAICS-5164, at 5 (2010) (emphasis in original).) The instant procurement calls for a contractor to rapidly research, develop, mature, integrate, and sustain cyber resilient and full spectrum cyber warfighting capabilities. (*Id.* at 3.) Moreover, a review of the SOW confirms that the procurement involves the creation of new or improved cyber capabilities and solutions. (*Id.* at 8-9.)

Sabre observes that section 3.3.1 of the SOW seeks the development of mitigation solutions and methodologies, and the provision of cyber monitoring and warning systems and cyber resiliency solutions. (*Id.* at 8.) Each, in Sabre's view, entails research and development. Similarly, the requirements in sections 3.3.2 and 3.3.3 are strongly indicative of research and development under NAICS code 541715. (*Id.* at 9.) Sabre asserts that “[p]rototyping and the provision of new or improved hardware and software fall squarely within the NAICS code definition [of research and development].” (*Id.*, citing *NAICS Appeal of DCX-Chol Enters., Inc.*, SBA No. NAICS-5140, at 6 (2010).) In addition, the testing and certification support and project management in sections 3.3.4 and 3.3.5 of the SOW “are necessary to complement the R&D effort” and do not detract from the primary purpose of research and development. (*Id.* at 9-10.) Sabre also disputes Appellant's arguments regarding the RFP's labor categories. According to Sabre, the labor categories represent “a mix of engineers and scientists certainly capable of providing research and development.” (*Id.* at 10.)

#### E. MIL's Response

On June 22, 2018, The MIL Corporation (MIL) intervened and responded to the appeal. MIL states that it is CWD BOA holder, and may be ineligible to compete for the order if the appeal is granted.

According to MIL, the RFP is for “research and development of cutting-edge cybersecurity technology, including the development of new integrated cyber hardened architectures and innovative integration products, processes, and methodologies.” (MIL's Response at 2.) Furthermore, “[e]ach task area [in the SOW] supports the research, development, testing, and evaluation of weapons systems to identify cyber vulnerabilities, develop solutions, and develop methods and processes to incorporate new cyber solutions into the products being developed across the RDT&E labs.” (*Id.* at 7.) MIL stresses that the RFP seeks “the development of entirely new science”, as no commercial solutions exist that could meet NAWCAD's needs. (*Id.* at 7, 13.)



MIL argues that NAICS code 541715 best describes the subject procurement because the RFP requires the creation of new or improved cybersecurity products and processes. (*Id.* at 11.) Further, “the cyber resiliency research and development will be performed as an integral part of the research and development of the underlying weapon systems,” and OHA has recognized that a research and development NAICS code is appropriate when a contractor will perform work that is a vital part of the research process. (*Id.* at 13.) Consistent with the *NAICS Manual* and OHA precedent, the RFP's purpose is “to develop new and complex cyber capabilities and solutions to protect our Nation's weapon and control systems”, not merely to install and configure commercially-available products. (*Id.* at 13-14.) MIL argues that the labor categories are appropriate for a research and development effort, as NAWCAD seeks personnel with the technical expertise to create new and improved products and processes, rather than “a PhD in computer science theory.” (*Id.* at 15.) The RFP also is within scope of the underlying CWD BOAs, which made clear that BOA holders could be tasked to perform cyber research and development. (*Id.* at 4.)

MIL challenges Appellant's reliance on *Rollout Systems*, and asserts that NAICS code 541513, the resulting NAICS code in *Rollout Systems*, is wholly inapplicable here. According to MIL, *Rollout Systems* involved a procurement for traditional on-site IT support, such as systems administration and network engineering. (*Id.* at 16.) Conversely, MIL argues, the instant RFP is “focused primarily on cybersecurity research and development” such as “developing new processes, methodologies, and products for integrating cyber-resilience concurrent with the research and development of the weapon and control systems.” (*Id.* at 17.)

#### F. RMC's Response

On June 22, 2018, Resource Management Concepts, Inc. (RMC) intervened and responded to the appeal. RMC states that it is CWD BOA holder, and that the NAICS code assigned to its BOA is 541512. (RMC's Response at 4.) RMC supports Appellant's view that NAICS code 541715 is incorrect for this procurement.

RMC allows that “[o]ne can describe the technical nature of this work as high level, cutting edge cybersecurity research and development work.” (*Id.* at 11.) However, RMC continues, “that does not make it NAICS 541715 research and development which requires actual laboratory research and experimental development.” (*Id.*) According to RMC, “[t]here is not a hint of laboratory or other physical research and development” in section 3.3.1 of the SOW, only “IT system assessment, development, and integration.” (*Id.*) Similarly, section 3.3.2 is for “IT analytical work”, and section 3.3.3 for is “IT system development, integration, and analysis”. (*Id.* at 12.) None of these, in RMC's view, involve research and development within the meaning of the *NAICS Manual* and 13 C.F.R. § 121.201 n.11(a). (*Id.* at 11-13, 21.)

RMC cites several OHA decisions in arguing that a research and development NAICS code is inappropriate for ordinary information technology procurements. Further, a research and development NAICS code “requires research and experimental scientific development, and not business, computer, or related types of research.” (*Id.* at 18, citing *NAICS Appeal of RhinoCorps, Ltd.*, SBA No. NAICS-4736 (2005).) Although OHA has held that a research and development

NAICS code may be utilized when the contractor will perform work which is “an integral part of an agency's research, and essential for the conduct of the research”, such conditions are not present here. (*Id.* at 20, quoting *NAICS Appeal of LJR Solutions, LLC*, SBA No. NAICS-5791, at 8 (2016).)

RMC also argues that, even if NAWCAD were seeking research and development through the subject solicitation, the procurement must be covered by the NAICS code designated for the underlying BOAs. (*Id.* at 21, citing FAR 16.703.) RMC suggests that, because RMC's BOA was issued under NAICS code 541512, the use of NAICS code 541715 is beyond the scope of the BOA, and would contravene the FAR unless overturned. (*Id.*)

#### G. *NAICS Manual*<sup>1</sup>

The NAICS code designated by the CO, 541715, Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology), covers:

establishments primarily engaged in conducting research and experimental development (except nanotechnology and biotechnology research and experimental development) in the physical, engineering, and life sciences, such as agriculture, electronics, environmental, biology, botany, computers, chemistry, food, fisheries, forests, geology, health, mathematics, medicine, oceanography, pharmacy, physics, veterinary and other allied subjects.

*NAICS Manual* at 476. The *NAICS Manual* defines “research” as “original investigation undertaken on a systematic basis to gain new knowledge”, and “experimental development” as “the application of research findings or other scientific knowledge for the creation of new or significantly improved products or processes”. *Id.* at 475.

For NAICS code 541715, a footnote in the Size Standards table states that:

“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, n.11(a).

The NAICS code Appellant and RMC advocate, 541512, Computer System Design Services, covers:

establishments primarily engaged in planning and designing computer systems that integrate computer hardware, software, and communication technologies. The

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<sup>1</sup> Executive Office of the President, Office of Management and Budget, *North American Industry Classification System — United States (2017)*, available at <https://www.census.gov/econ/isp/index.php>.

hardware and software components of the system may be provided by this establishment or company as part of integrated services or may be provided by third parties or vendors. These establishments often install the system and train and support users of the system.

*NAICS Manual* at 470. The *NAICS Manual* provides the following illustrative examples of such establishments: “[c]omputer systems integration design consulting services”; “[l]ocal area network (LAN) computer systems integration design services”; “[i]nformation management computer systems integration design services”; and [o]ffice automation computer systems integration design services”. *Id.*

### 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 RFP, the descriptions in the *NAICS Manual*, OHA's prior decisions, and the arguments of the parties, I find that Appellant has not met its burden of proving that the CO clearly erred in selecting NAICS code 541715 for this procurement. As a result, this appeal must be denied.

Appellant's principal argument here is that the contractor will neither be engaged in original investigation to gain new knowledge, nor in the creation of new products or processes, and thus will not conduct “research” or “development” as those terms are defined in the *NAICS Manual*. The CO maintains in his response to the appeal, though, and Appellant does not dispute, that there are no existing solutions capable of meeting the Navy's needs for cybersecurity of its weapons and aircraft systems. *See* Section II.C, *supra*. It follows, therefore, that the new cyber tools, standards, processes, and methods called for in this RFP must be investigated and created by the contractor in the first instance. The CO further maintains that cybersecurity is relatively new industry, in which new threats and vulnerabilities are constantly emerging. *Id.* Thus, once investigated and created, new cyber tools, standards, processes, and methods must thereafter be continually refined, tested, and improved.

I find the CO's reasoning persuasive. Contrary to the premise of the appeal, this RFP does call for original investigations to gain new knowledge, and for the creation of new products and processes, specifically the research and development of new cybersecurity tools, standards, processes, and methods for Naval aircraft and weapons systems. Consistent with the CO's arguments, the RFP makes clear that the contractor will “rapidly research, develop, mature, procure, integrate, train, support and sustain cyber resilient and full spectrum cyber warfighting capabilities for platforms, weapons, sensors, communications and networks, computing systems, mission systems, support equipment, logistics and maintenance systems[,] and ashore and afloat enterprise systems.” Section II.A, *supra*. Similarly, sections 3.3.1 and 3.3.2 of the SOW contemplate the development of “integrated protection solutions” to address cyber threats and vulnerabilities, and section 3.3.3 requires the contractor to perform a variety of research, development, test, and evaluation tasks. *Id.* Accordingly, Appellant has not shown that a research and development NAICS code is improper for this RFP.

Appellant also argues that the RFP's labor categories are incompatible with a research and development effort. It is true, as Appellant observes, that many of the labor categories have job titles typically associated with traditional information technology. *Id.* The descriptions of these labor categories, though, indicate that contractor personnel will be engaged in conducting research and development of new cyber products and processes. Thus, the description of Principal Cybersecurity Technical Manager/Lead position states that he or she will serve as a subject matter expert on “technical cybersecurity solutions”, and will “evaluat[e] the integration of emerging cybersecurity technologies into multiple systems”. *Id.* Likewise, the Cybersecurity Engineer/Analyst positions will “[c]onduct[] and support[] Cybersecurity through all phases of the system development life cycle, including planning, requirements analysis, design, development, testing and evaluation, and implementation.” *Id.* Particularly in light of the CO's explanation that contractor personnel must investigate and create new cybersecurity solutions, the RFP's labor categories are not clearly unsuitable for research and development work.

In its response to the appeal, RMC acknowledges that “[o]ne can describe the technical nature of this work as high level, cutting edge cybersecurity research and development work.” Section II.F, *supra*. Both RMC and Appellant, however, suggest that a research and development NAICS code should not have been assigned to the RFP due to 13 C.F.R. § 121.201 footnote 11(a). The footnote provides that “‘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.” Section II.G, *supra*. According to Appellant and RMC, this procurement does not call for “laboratory or other physical” research and development.

This argument fails for two reasons. First, the CO asserts in his response that “the R&D and testing being conducted as part of this effort . . . will be conducted within government labs.” Section II.C, *supra*. It therefore is not evident that this procurement will not involve laboratory or other physical research and development within the meaning of footnote 11(a). Second, OHA interpreted footnote 11(a) in *NAICS Appeal of Evanhoe & Associates, LLC*, SBA No. NAICS-5505, at 16 (2013), and explained that the footnote “means only that [a research and

development NAICS code] does not apply to a solicitation that is primarily engineering, operations, systems, computer programming, or data processing.” Rather, “[i]t is the principal purpose of the procurement that is decisive in classifying the solicitation.” *Id.* The principal purpose of the *Evanhoe* procurement was research and development, so it was immaterial that “some of the work requires software development (programming)” *Id.* Likewise, in the instant case, although the RFP does contain some work that could best be described as computer programming or data processing, Appellant and RMC have not established that these constitute the principal purpose of the procurement. Therefore, footnote 11(a) does not preclude the use of a research and development NAICS code for this RFP.

RMC also argues that, because RMC's BOA was assigned NAICS code 541512, the CO could not properly designate a different NAICS code for the instant task order. This argument is meritless. The underlying CWD BOAs expressly discuss research and development, and contain standard FAR clauses pertaining to research and development procurements, such as FAR clause 52.246-8, Inspection of Research and Development — Cost Reimbursement. *See* Section II.C, *supra*. I therefore see no basis to conclude that the instant order is beyond the scope of the CWD BOAs. Moreover, RMC points to no language, whether in regulation or in the BOAs, that would restrict the CO from selecting a different NAICS code for an individual order than was assigned to a BOA. Although SBA regulations do require that “[t]he NAICS code and size standard assigned to an order must correspond to a NAICS code and size standard assigned to [a] long-term contract”, 13 C.F.R. § 121.404(g)(3)(iv), that regulation is inapplicable here because a BOA is not a contract. *See* FAR 16.703(a) (“A basic ordering agreement is not a contract.”). Accordingly, the CO could properly assign NAICS code 541715 to this RFP, notwithstanding that other NAICS codes may have been assigned to some of the CWD BOAs.

Because Appellant has not established that NAICS code 541715 is clearly erroneous for this RFP, it is unnecessary to consider the NAICS code Appellant and RMC advocate, or other alternative codes. OHA has long held 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 Dentrust Optimized Care Solutions*, SBA No. NAICS-5761, at 7 (2016) (quoting *NAICS Appeal of Pac. Shipyards Int'l, LLC*, SBA No. NAICS-5464, at 7 (2013)); *see also NAICS Appeal of SupplyCore, Inc.*, SBA No. NAICS-5866, at 13 (2017); *NAICS Appeal of Nat'l Elec. Coil*, SBA No. NAICS-5666, at 8 (2015).

#### IV. Conclusion

Appellant has not demonstrated the CO clearly erred in assigning NAICS code 541715 to this RFP. Therefore, the appeal is DENIED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge