

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

NAICS APPEAL OF:

Consolidated Safety Services, Inc.

Appellant,

Solicitation No. 1305M223QNCNS0003

National Oceanic and Atmospheric  
Administration

SBA No. NAICS-6203

Decided: March 30, 2023

APPEARANCES

Stephen P. Ramaley, Esq., Roger V. Abbott, Esq., Miles & Stockbridge P.C., for  
Consolidated Safety Services, Inc., Washington, District of Columbia

Dorothy Curling, Contracting Officer, U.S. Department of Commerce, National Oceanic  
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DECISION

I. Introduction and Jurisdiction

On February 17, 2023, the U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), Eastern Acquisition Division, issued Solicitation No. 1305M223QNCNS0003 for scientific, technical, and administrative services to support the mission and goals of the National Centers for Coastal Ocean Science (NCCOS). The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 541620, Environmental Consulting Services, with a corresponding \$19 million annual receipts size standard.

On February 27, 2023, Consolidated Safety Services, Inc. (Appellant) filed an appeal with the U.S. Small Business Administration (SBA) Office of Hearing and Appeals (OHA), arguing that the correct NAICS code for the Solicitation is 541715, Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology), with a corresponding 1,000 employee size standard.

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 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. The Procurement

The procuring agency conducted market research from November 2021 through March 2022, to determine the appropriate NAICS code for the instant Solicitation. (CO's Declaration, at 1, ¶ 4.) On March 24, 2022, a contracting officer documented the agency's rationale for the designation of NAICS Code 541620, Environmental Consulting Services. (*Id.*) The report described NCCOS's "need for contractor support services to provide Administrative, Scientific, and Technical Support Services (ASTSS) to assist NCCOS in finding the best ways protect environmental resources and public health, preserve valued habitats, and improve the way communities interact with coastal ecosystems." (CO's Attach. 1, at 1.) Further, in support of this NAICS code, it explained:

[The procuring agency] requires the Contractor to provide technical and scientific support in disciplines such as marine biology and oceanography, environmental toxicology, social science, ecological modeling and statistics, program and project management, administrative support, technical writing, and graphical support. The principal purpose and greatest percentage of anticipated work is for marine science data acquisition, which comprises an estimated 60% of the estimated dollar value for this [Blanket Purchase Agreement]. Marine science data acquisition includes data collection, field surveys that include data sampling for biological, physical, chemical, oceanographic, meteorological, acoustic, photo/video, geospatial, and bathymetry data. Marine science data acquisition is used for advancing ecosystem science for conservation and sustainable use, developing and implementing advanced observation technologies, ecological forecasts, facilitating resilience and adaptation to inundation and climate impacts, and detecting, monitoring and mitigating impacts of chemical and biological stressors. Additionally, the Contractor will assist in conducting experiments and analysis for algal cell cultures, bacterial strains, cell lines and laboratory animals and toxins, as a result of environmental impacts. Other tasks may include but are not limited to laboratory research. . .

(*Id.*, at 3.)

On February 16, 2023, the CO issued a memorandum relying upon the same rationale for the selection of NAICS code 541620 as found above. (CO's Attach. 2.) Accordingly, on February 17, 2023, the CO issued the instant request for quotations (RFQ).

## B. Performance Work Statement

The RFQ's Performance Work Statement (PWS) explains the purpose of this procurement is to obtain the necessary scientific, technical, and administrative services to support the mission and goals of NCCOS. (PWS, at 2.) NCCOS delivers ecosystem science solutions for stewardship of the nation's ocean and coastal resources in direct support of the National Oceanic and Atmospheric Administration (NOAA) National Ocean Service (NOS) priorities, offices, and customers to sustain thriving coastal communities and economies. (*Id.*) Thus, the contractor must provide the staff, establish partnerships, and develop outputs and deliverables to support the tasks identified in Section 2.0 of the PWS. (*Id.*)

As part of the objective, the PWS states that NCCOS requires support in conducting field, laboratory, and computer-based research, administering grants and cooperative agreements, and providing operational activities that support the NCCOS mission. The contractor shall furnish technical and scientific support services and equipment where necessary in disciplines, such as marine biology and oceanography, environmental toxicology, social science, ecological modeling and statistics, program and project management, scientific and policy analysis, administrative support, technical writing, and graphical support. (*Id.*, at 6.)

Specifically, under Section 2.0, NCCOS seeks the contractor to perform and support these categories of tasks: (2.1) Administration, Management, Planning, Analysis, and Coordination, (2.2) Marine Science Data Acquisition, (2.3) Scientific Data Enterprise, (2.4) Geospatial, Statistical, and Modeling Analyses, (2.5) Publications, Communications, Outreach, (2.6) Program Execution & Analysis, and (2.7) NOAA Mission Support. (*Id.*, at 7-18.)

### Task 2.1: Administration, Management, Planning, Analysis, and Coordination

Task 2.1 is overall administrative work. It includes participation in meetings with principal investigators, team leads, and NCCOS Branch Chiefs; assistance with creation of Interagency Agreements and Cooperative Research and Development Agreements; scientific and subject matter expertise support in permitting and environmental reporting processes; and assistance in record keeping and reporting, etc. (*Id.*, at 7-8.)

Other duties include support in the execution of business operations and program unit leadership initiatives; assistance to strategic and tactical project management; conducting briefings; interfacing between Government and contractor personnel; supervising all contractor personnel; handling day-to-day management of staff; maintaining compliance with publication, data plan, and data reporting; developing scientific assessments and reviews; supporting the oversight and implementation of NCCOS science programs; developing standard operating procedures to ensure compliance for laboratory-related and science processes; involvement in the acquisition process; and assistance with tracking budgets and inputting financial data. (*Id.*, at 8-10.)

### Task 2.2: Marine Science Data Acquisition

Under Task 2.2, the contractor assists in the development of experimental/survey design and selection of methods for data collection; develops new protocols when needed; plans and coordinates logistics for data collection; conducts field surveys from a variety of platforms; collects data sampling of biological, physical, chemical, oceanographic, meteorological, acoustic, etc.; conducts laboratory research to provide data to inform coastal management decisions or product development; provides laboratory research of manipulative experiments; and documents, maintains, and inputs field, experimental, and laboratory data and observations. (*Id.*, at 10.)

The contractor plans and conducts primary data collection to support social science research and secondary data collection to support social science research; obtains existing data from project partners, publicly available data, or data purchased from other providers; synthesizes/integrates data across multiple sources; assists in logistical planning, development of experimental designs, and selection of methods; provides expert support in design of field collection programs; assists NCCOS leadership in the development of a research strategy for sentinel habitats and organisms for human health risk assessments in marine ecosystems; and supports with field and laboratory research activities leading to the development of an integrated ecosystem risk assessments and models. (*Id.*, at 11.)

In addition, the contractor provides logistical, mentorship, laboratory and field support for interns, students, and postdoctoral researchers; conducts research with minimal guidance to support ecosystem, environmental, socioeconomic, and/or marine animal health; assists with planning, design, setup, and implementation of laboratory studies and complex experiments; participates in the collection, processing, archival, identification, and enumeration of marine animals from a variety of sources; performs scientific analysis/research in support of chemical impacts and other water quality issues for environmental measurement; handles inventory and disposal of biological materials, radioactive materials, hazardous chemicals, etc. (*Id.*)

Further, the contractor is to perform a wide variety of laboratory procedures, and lead or assist with logistical planning and associated execution of fieldwork. The contractor participates in field investigations for ecological risk assessments and related characterization of sites for chemical contaminants and health indicators; and offers deployment and use of control/capture strategies and equipment for contaminants and habitats. (*Id.*, at 12-13.)

### Task 2.3: Scientific Data Enterprise

The contract provides data entry from field sheets, obtains data from an outside organization, and identifies outliers and possible errors in the data. It conducts quality assurance and quality control of entered or obtained data, using appropriate methodologies and protocols. (*Id.*, at 13.)

The contractor creates, publishes, and maintains dataset, service, and project-level data packages; develops, implements, and ensures compliance with quality control and quality assurance protocols for projects and programs; writes and maintains a data stewardship plan;

maintains data repositories; develops and implements processes for data modifications; devises practices for eliminating corrupt, redundant, or outdated information; and facilitates data stewardship and coordinates data management plans across partners. (*Id.*)

#### Task 2.4: Geospatial, Statistical, and Modeling Analyses

In this section, the contractor provides expertise in geospatial and geostatistical analysis, and supports data visualization and the formulation of geospatial products. It analyzes data using cutting edge statistical and pattern analysis methods; develops and modifies integrated biophysical models and predictive ecological models; evaluates model performance, and develops improvements as needed; conducts statistical analysis to analyze scientific data and to determine accuracy of derived products; and develops biogeographic, ecosystem, socio-economic, and vulnerability assessments, as needed to inform coastal management decision-making. (*Id.*, at 14.)

The contractor documents and maintains experimental data and observations, and assists or leads compilation, summarization, verification, graphical representations, extraction, logging, analysis and interpretation of data. It also develops and adapts new methods for the analysis of contaminants in environmental samples; develops environmental and toxicological models and conducts statistical analysis of data; develops and maintains contaminant and risk assessment databases; and researches and develops models of ecological and/or disease processes to support forecasts of ecosystem conditions in relation to environmental and/or anthropogenic stressors. (*Id.*)

Additionally, the contractor develops algorithms to process and classifies remotely-sensed multispectral data; modifies, improves, and evaluates algorithms producing currently operational products; conducts statistical analysis; develops, modifies, evaluates, and improves integrated biophysical models; develops ecological models to conduct impact assessments under various management strategies; and characterizes and develops indexes of land-based sources of pollution including contaminants in coastal and marine ecosystems. (*Id.*, at 14-15.)

#### Task 2.5: Publications, Communications, Outreach

Under Task 2.5, the contractor organizes and prepares technical reports, oral presentation materials, peer-reviewed scientific journal publications, and other written materials to communicate scientific results; tracks and facilitates the internal review of scientific communication products; develops, coordinates, facilitates, and supports technical, training, or stakeholder engagement workshops; develops opportunities to engage partners and increase awareness of NCCOS capabilities through professional seminars, briefing with key scientific and political representatives, and other events; provides training and technical assistance to federal or contractor staff; and represents NOAA at workshops and scientific conferences. (*Id.*, at 15.)

The contractor participates, supports and assists with education and outreach events; produces weekly reports, graphical presentations, briefing material, fact sheets, or other publications; supports activities to publicly distribute data; manages the collection, use, and

archiving of images, video, and audio resources; and participates in site visits and field studies to support ongoing scientific research efforts across the organization. (*Id.*, at 15-16.)

#### Task 2.6: Program Execution & Analysis

The contractor solicits input from user communities on the utility, quality, and application of NCCOS's scientific products, to ensure decision-support needs of federal, state, local, and tribal coastal management agencies; conducts needs assessment of coastal ecosystem information; leads and/or coordinates NCCOS projects and programs; supports the technical and administrative grants management requirements; and assist Federal Program Officers in executing funding competition announcements, grant managements and cooperative agreements. (*Id.*, at 16.)

The contractor also supports building coalitions and maintains effective relationships with other institutions, consortia, or entities focused on ecosystem science and its application; assists in meeting environmental compliance requirements; and supports grants program. (*Id.*)

#### Task 2.7: NOAA Mission Support

In this final task, the contractor provides coordination and continuity of research and laboratory operations; maintains research and office spaces; contributes to Job Hazard Analysis; participates in laboratory safety committees; provides qualified scientific divers; assists with maintenance and/or diagnosis of malfunctions of analytical instrumentation; maintains and cultures living organisms; provides for system monitoring, and maintenance of the culture infrastructure; and provides qualified boats, uncrewed systems, and operators to support the mission's needs. (*Id.*, at 17.)

The contractor also assists with the design specification development, maintenance, integration, diagnosis, and/or repair of scientific instrumentation and equipment; and assists in development of responses for requests of funding. (*Id.*)

The contractor further maintains and cultures live corals and associated species under controlled environmental conditions; maintains laboratory water filtration and purity systems; and maintains aquaculture systems designed for coral, invertebrate, and fish reproduction. (*Id.*, at 18.)

### C. Evaluation Criteria

The RFQ states the contract will be awarded to the offeror whose quote is most advantageous to the Government, price and other factors considered. There are three evaluation factors: Technical Approach, Management Approach, and Past Performance. Quotes will be evaluated on their strengths, weaknesses, and deficiencies as they relate to the non-price factors. Within the non-price factors, Technical Approach and Management Approach are weighted equally and when combined are more important than Past Performance. All three non-price factors, when combined, are significantly more important than Price. (RFQ, at 85-86.)

#### D. The Appeal

On February 27, 2023, Appellant filed the instant appeal. Appellant asserts that the work procured under the RFQ predominantly involves Scientific Research and Development Services, and therefore, NOAA should have designated NAICS code 541715, Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology). (Appeal, at 1-2.) Particularly, Appellant complains that the RFQ does not seek any form of consulting services, but only seeks research and development services. (*Id.*, at 3.)

Appellant holds two incumbent BPAs that have been consolidated into a single procurement under this RFQ. (*Id.*, at 3.) Appellant takes issue with the CO's prior selection of two different NAICS codes for the incumbent solicitations, despite both involving the same services, and characterizes the agency's NAICS Code designations as erratic. (*Id.*, at 4-5.)

For this RFQ, Appellant revisits the objective and purpose of the PWS. (*Id.*, at 6-9.) Appellant notes that consistent with this research orientation, four of the five locations where contract staff are to be located are research laboratories. (*Id.*, at 9, citing PWS at 4-5.) Further, in the PWS, Section 2, the seven tasks include a mix of scientific research and development services, as well as programmatic tasks that are integral to NCCOS's research mission. (*Id.*, at 9-11.) Appellant contends the PWS comprises three scientific research and development task areas, Sections 2.2, 2.3, and 2.4, that involve the performance of various scientific tasks and four programmatic task areas that support and are integral to those research and development task areas. These task areas do not involve providing advice and assistance and are not oriented toward recommending solutions. (*Id.*, at 11.)

Appellant relies on the expected level of effort (LOE) by labor category and the narrative description of each labor category of the RFQ, to confirm the services primarily involve research and development, and that the programmatic services included in the procurement are in service of NCCOS's research and development activities. (*Id.*) In reviewing the RFQ Attachment B, Appellant argues that the Agency expects 85.44% of the LOE to be performed by labor categories from the life sciences, which include four Environmental Scientist labor categories (66.99%) and the four Geospatial Scientist labor categories (18.45%). (*Id.*, 11-13.) Further, the descriptions of the labor categories in RFQ Attachment A.1 confirm that the scientist labor categories are scientific, research and development-oriented, roles. These Environmental Scientist labor categories include performing scientific tasks. As an example, Appellant states the RFQ allocates 40.78% (78,960 labor hours) of the overall LOE to the Environmental Scientist III labor category, which is described in the following terms:

Independently manages or leads day-to-day scientific project tasks and has substantial expertise in a subject area. Independently conducts day-to-day scientific tasks, provides limited direction for more junior staff, and is responsible for data review, analysis, and reports before approval by more senior staff. Subject areas include marine biology, ecology, chemistry, oceanography, ecological modeling and statistics.

(RFQ, Attach. A.1, at 138.)

Senior-most level Environmental Scientist V are required to have:

Expert knowledge of a subject area enables substantive senior role in planning and leading research portfolios, including directing the work of more junior individuals/teams. Independently conducts day-to-day scientific projects, which may include project management, conducting research activities, and reviewing reports. Subject areas include marine biology, ecology, chemistry, oceanography, ecological modeling and statistics.

(*Id.* (emphasis supplied).)

Appellant argues the Geospatial Scientist labor duties include performing scientific tasks, not merely advising. (*Id.*, at 13-14.) Similarly, the Social Scientist duties involve performing research, not merely advising. (*Id.*, at 14.) Appellant provides examples of these categories and descriptions. (*Id.*)

Appellant describes NAICS code 541620 under the 2022 *NAICS Manual*<sup>1</sup> and relies on OHA precedent to support its contention that NAICS code 541620 covers procurements that are “of advisory and consulting nature.” (*Id.*, at 15-16, citing *NAICS Appeal of Prudent Techs., Inc.*, SBA No. NAICS-4710 (2005).) Therefore, Appellant takes at issue with the current RFQ, which does not involve “providing advice and assistance” with the purpose of recommending solutions, but rather involves conducting field laboratory and computer-based research, etc. (*Id.*, at 16, citing PWQ at 6.) Appellant gives examples of Section 2 tasks, which are not oriented toward recommending solutions. (*Id.*) Further, Appellant contends the word “consult” or “consulting” does not appear in the PWS, whereas the word “research” appears 118 times, consistent with NAICS code 541715. (*Id.*, at 17.)

In support of Appellant's advocated NAICS code 541715, Appellant states that the RFQ services qualify as “research.” (*Id.*, at 18-19.) Here, Appellant advances two arguments. First, the RFQ involves not just research support but requires the contractor to perform actual research and 85.44% of the LOE are to be performed by labor categories from various environmental scientist and geospatial scientist labor categories. These scientists will be required to perform numerous research activities such as conducting field survey, conduct laboratory research to support ecosystem, environmental, socioeconomic, and/or marine animal health related research, and provide research and development models of ecological and/or disease processes to support forecasts of ecosystem conditions. (*Id.*, citing PWS at 10-12, 14.)

Second, the Solicitation requires the contractor to perform work that is “integral to an agency's research process,” which include participation “in the collection, processing, archival, identification, and enumeration of marine benthic invertebrate, coral, fish and or marine mammal

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<sup>1</sup> Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States* (2022), available at <http://www.census.gov/naics>. SBA has adopted this version of the *NAICS Manual* effective October 1, 2022. 87 Fed. Reg. 59240 (Sept. 29, 2022).



samples from a variety of sources,” performing “a wide variety of laboratory procedures,” maintaining “laboratory cultures of marine and estuarine organisms,” entering “data from field sheets or other hard copy documents and/or obtain data from an outside organization,” conducting “quality assurance/quality control of entered or obtained data” etc. (*Id.*, at 19-20, citing PWS at 11-17.) Appellant finds *NAICS Appeal of LRJ Sols., LLC*, SBA No. NAICS-5790 (2016) instructive, because there OHA held the procuring agency's selected research NAICS code was not in error, because “[t]he 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.” (*Id.*, at 20.) Thus, Appellant applies this standard to conclude the services provided under this RFQ qualify as “integral” to NCCOS's research programs. (*Id.*, at 21.)

Next, Appellant argues the Solicitation easily satisfies the “development” component of “research and development.” Appellant revisits the 2022 NAICS manual definition of “experimental development” as “application of research findings or other scientific knowledge for the creation of new or significantly improved products or processes.” The tasks specified by the RFQ include numerous examples of applying research to create new or significantly improved processes. Appellant offers the tasks such as “[s]upport with field and laboratory research activities including sentinel habitat and species monitoring and assessment leading to the development of an integrated ecosystem risk assessments and models,” “[i]nvestigate, assess, present on new technologies and techniques for detecting, tracking, and predicting the occurrence of microbes of public health concern,” “[d]evelop and modify integrated biophysical models and predictive ecological models,” “[d]evelop and adapt new methods for the analysis of contaminants in environmental samples,” “[research and develop] models of ecological and/or disease processes to support forecasts of ecosystem conditions,” “[d]evelop, modify, evaluate, and improve integrated biophysical models,” and “[c]haracterize and develop indexes of land-based sources of pollution.” Thus, Appellant maintains, the Solicitation requires contract staff scientists to use the research and the new data they collect to develop new and improved predictive models for various environmental hazards. These requirements qualify as “development,” as defined by the NAICS Manual and OHA case law. (*Id.*, at 21-22.)

Therefore, Appellant concludes the NAICS code that best describes the principal purpose of this Solicitation is NAICS Code 541715, Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology).

#### E. CO's Response to the Appeal

On March 9, 2023, the CO submitted a declaration with two redacted NAICS determinations and a Federal Procurement Data System (FPDS) Report. The CO maintains the RFQ requirement is “to assist NCCOS in finding the best way to protect environmental resources and public health, preserve valued habitats and improve how communities interact with coastal ecosystems.” It involves a wide range of support services, while the primary purpose of the acquisition involves data collection and field surveys. The RFQ does not require the contractor to provide Research and Development as defined in Federal Acquisition Regulation (FAR) Part 35.001, Research and Development Contracting. This requirement is not focused on determining

and exploiting the potential of scientific discoveries or improvements nor is the predominant focus of the work to create new processes or products. (CO's declaration, ¶ 3.)

Further, the CO maintains “[i]t is the mission of NCCOS to provide coastal managers with the scientific information necessary to decide how best to protect environmental resources and public health, preserve valued habitats, and improve the way communities interact with coastal ecosystems.” (*Id.*, at ¶ 12.) In the PWS, Section 1.3, it states:

NCCOS provides science for a large customer base, including other NOAA offices, federal agencies, and state agencies. NCCOS works with these agencies to understand their management needs and design science to inform those management decisions. NCCOS has a wide variety of needs for business operation support, including administration, management, planning, analysis, and coordination. NCCOS also requires substantive scientific program support, such as publications, communication, outreach, program execution and analysis, and general mission support.

(*Id.*) These required services align with NAICS code 541620, which states that the industry is primarily engaged in providing advice and assistance to businesses and organizations on environmental issues. The CO maintains, while NCCOS provides external users with scientific information to protect environmental resources and public health, NCCOS's mission does not include research and development within the meaning of FAR Part 35. Therefore, this is not a contract for research and development. Moreover, the funding that NCCOS receives for the activities referenced in PWS Section 1.3, NCCOS Research Enterprise, associated with this BPA is not classified as “Research and Development” as defined by the National Science Foundation Glossary of Federal Funds and as defined by Office of Management and Budget (OMB) Circular A-11, Appropriation. (*Id.*)

To support NCCOS's mission, the contractor is required to provide technical and scientific support in disciplines, such as marine biology and oceanography, environmental toxicology, social science, ecological modeling and statistics, program and project management, administrative support, technical writing, and graphical support. The CO contends “the principal purpose and greatest percentage of anticipated work are for *marine science data acquisition*, which comprises approximately 60% of the estimated value of this BPA.” (*Id.*, at ¶ 13 (emphasis supplied).)

All the tasks areas in the PWS Section 2.0, including those in marine science data acquisition, best align with NAICS Code 541620, as the tasks relate closely to providing advice and assistance to businesses and other organizations on environmental issues, such as the control of environmental contamination from pollutants, toxic substances, and hazardous materials as well as employing a multidiscipline staff of scientists, engineers, and other technicians with expertise in areas, such as air and water quality, contamination, remediation, ecological restoration, and environmental law. (*Id.*) Therefore, the CO maintains 80% (60% of marine science data acquisition activities and 20% of Scientific Data Enterprise; Geospatial, Statistical, and Modeling Analysis; Publications, Communications, Outreach and Training and Program Execution and Analysis) of the estimated BPA ordering value, is comprised of the scientific

professionals required to assist in finding the best ways to protect environmental resources and public health, preserve valued habitats and improve the way communities interact with coastal ecosystems. (*Id.*, at ¶ 14.)

In response to Appellant's appeal, the CO argues the appeal overly relied on NCCOS's overall mission statement included in PWS Section 1.1, Background, rather than the required contractor services listed in PWS Section 2 when making the argument that this is a research and development requirement in support of NAICS Code 541715. The CO notes Appellant's argument is made in reference to PWS Section 1.1. Most importantly, the requirements of this solicitation and choice of NAICS code 541620 are stated in PWS Section 2, Specific Requirements/Tasks, as opposed to the entire mission of NCCOS. (*Id.*, at ¶ 15.) NCCOS performs a wide-range of mission requirements for a large customer base, including other NOAA offices, federal agencies, and state agencies. NCCOS works with these agencies to understand their management needs and design science to inform those management decisions. NCCOS also requires substantive scientific program support, such as publications, communication, outreach, program execution and analysis, and general mission support. Together these areas support NCCOS's scientific research mission. *See* PWS Section 1.3. In contrast, the contractor under this requirement is responsible for data collection and other support services but not research and development. (*Id.*)

As for Appellant's argument that PWS Section 2.0 and seven tasks are integral to NCCOS's research mission, the CO maintains there is no support for their argument that the principal purpose of this requirement is research and development, as opposed to assistance with environmental issues. (*Id.*, at ¶ 16.)

In the CO's view, Appellant relies on various labor categories and the associated level of effort. Some of the requirements listed in PWS Section 2.0 may require labor categories that have an understanding of the science used in the field for conducting the required work, but this does not mean that they are engaging in research and development. As an example, the categories of Environmental Scientist I through Environmental Scientist III are junior scientists that are predominantly involved with conducting day-to-day scientific tasks. The level of effort associated with these three labor categories comprises 55% of the estimated level of effort of the BPA. The CO states there is nothing listed in these labor category descriptions that is specific to research and development. In contrast, the labor category description of Environmental Scientist V includes leading a research portfolio and conducting research activities. The CO explains the level of effort associated with this labor category only comprises 2% of the level of effort for this entire BPA. Thus, Appellant's emphasis on the required labor categories in the current solicitation in support of their argument that this is a Research and Development Contract, is not consistent with Appellant's GSA Schedule Contract identifying the exact same labor categories for NAICS Code 541620 and 541715. (*Id.*, at ¶ 17.)

Finally, the CO highlights that FAR 52.227-17, Rights in Data-Special Works (Dec. 2007) is included in the solicitation because this is a support services requirement. However, FAR 52.227-16 additional data requirements (Jun. 1987), which is required for research and development contracts involving experimental, developmental, research, or demonstration work, is not included in the solicitation. (*Id.*, at ¶ 18.) The CO states that NAICS code 541620 best

describes the principal purpose of the support services being procured, in light of the industry descriptions in the NAICS code manual, the description in the solicitation, and the relative weight of each element in the solicitation. (*Id.*, at ¶ 19, see 13 CFR Section 121-402(b).)

#### F. Appellant's Motion and Reply

On March 15, 2023, Appellant filed a Motion for Leave to Submit a Reply and its Reply.<sup>2</sup> In support of its Motion, Appellant maintains the CO's statement “proffers certain erroneous statements as if they are fact, and otherwise offers facts that, although true, are legally irrelevant to a NAICS Code determination.” (Motion, at 1.) Thus, Appellant argues that pursuant to 13 C.F.R. § 134.206(e), it has good cause to submit this reply, because it seeks to “clarify these issues and, where appropriate, emphasize the correct legal standard.”

Appellant points to the CO's statement that 60% of the estimated value of work relates to marine science data acquisition and assertion that the primary purpose of the acquisition involves data collection and field surveys, to show why OHA should grant this appeal. In Appellant's view, data collection and field surveys are research and development tasks, not consulting work. Since these activities relate to marine science, NAICS 541715 is the right NAICS code for this BPA. Further, Appellant argues the CO Statement fails to provide a plausible explanation of why the consulting code of NAICS 541620 is appropriate for a procurement that focuses on “data collection and field surveys,” among research and development tasks. (Reply, at 3.)

Next, Appellant takes issue with what it characterizes as a potential misunderstanding of the basis upon which NAICS codes are assigned to procurements. In the CO Statement, Attach. 1, NAICS Determination, at ¶ 8, the CO observes that NAICS 541620 does not “exclude biotechnology.” However, simply because the BPA might involve some biotechnology research work does not mean that NAICS 541715 is inappropriate. Rather, such code would be inappropriate if the principal purpose of the work was research into biotechnology, where that is not the case here and the CO concedes. (*Id.*)

Appellant also argues that the CO's Statement appears to offer a bootstrapping argument, when highlighting that the RFQ does not include FAR 52.227-16, while the CO chooses which FAR clauses are included in a solicitation, and thus, such choice cannot be used as support for the CO's choice of a particular NAICS code. (*Id.*, at 3-4.)

Particularly, Appellant contends that data acquisition and field surveys are essential features of research and development, and the CO Statement and NAICS Determination confirm that the assignment of a consulting NAICS code, rather than a research and development NAICS code, is plainly erroneous. (*Id.*, at 4.) Appellant argues the CO failed to provide any rationale for its assertion that “data acquisition and field surveys” fall outside the field of research and development, and mistakenly describes marine science data acquisition, modelling analysis, publications, communications, outreach and training as if they were separate, isolated activities. Appellant claims data acquisition is the first step of the research enterprise, and the other

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<sup>2</sup> Appellant's Motion and Reply were filed after the close of business on March 14, 2023. Therefore, they are counted as filed on the next business day. 13 C.F.R. § 134.204(b)(2).

activities listed above also support the continuum of research and development, from beginning to end. (*Id.*)

Appellant indicates that the NAICS Determinations fail to mention or encompass the RFQ as providing advice or consulting services. Instead, the summary of those covered tasks is essential to the research enterprise, which includes activities ranging from data acquisition, at the start of the research and development process; data management and analysis, from intermediate stage of the process; publications, communications, and outreach, at the end of the research process; and program management support, throughout the process. (*Id.*, at 5.) Further, the “NAICS Code Explanation” paragraph of the NAICS Determination is consistent with a research and development NAICS code. (*Id.*)

Appellant takes the position that all the activities identified in the NAICS Determination relate directly to research and development, while the RFQ does not include a single reference to providing advisory or consulting services. (*Id.*, at 6.)

Moreover, Appellant claims the “scientific information” that NCCOS provides to “external users” is not created out of thin air, but it is the product of research and development. While NCCOS may provide “advice and assistance” to businesses and organizations on environmental issues, the CO erroneously concludes that simply because the BPA awardee's research will eventually be used to formulate environmental management strategies, that this BPA awardee's work is therefore consulting. Here, as the CO concedes, the BPA awardee will predominantly perform “marine science data acquisition.” Appellant firmly states that data acquisition is not consulting, but it is research and development. Hence, NAICS 541715 is the appropriate code for this BPA. (*Id.*, at 8.)

Finally, the CO's arguments regarding staffing also miss the mark. Appellant offers examples, such as the labor category description for Environmental Scientist V includes leading a research portfolio and conducting research activities, but the level of effort associated with this category “only comprises 2% of the level of effort for this entire BPA.” However, Appellant maintains the responsibilities of Environmental Scientist V include “directing the work of more junior individuals/teams.” The more junior environmental scientists will be performing research and development activities as directed by persons holding the Environmental Scientist V position, and not for any other purpose. (*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). A procurement is usually classified according to the component that accounts for the greatest percentage of contract value. (*Id.*) 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. NAICS Manual Descriptions

The NAICS code designated by the CO, 541620, Environmental Consulting Services, covers:

[E]stablishments primarily engaged in providing advice and assistance to businesses and other organizations on environmental issues, such as the control of environmental contamination from pollutants, toxic substances, and hazardous materials. These establishments identify problems (e.g., inspect buildings for hazardous materials), measure and evaluate risks, and recommend solutions. They employ a multidisciplined staff of scientists, engineers, and other technicians with expertise in areas, such as air and water quality, asbestos contamination, remediation, ecological restoration, and environmental law. Establishments providing sanitation or site remediation consulting services are included in this industry.

*NAICS Manual* at 469.

The *NAICS Manual* provides the covered industries are:

Ecological restoration consulting services  
Environmental reclamation planning services  
Sanitation consulting services  
Site remediation consulting services  
Wetland restoration planning services

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

[E]stablishments 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 472-3.

The *NAICS Manual* provides the following illustrative examples of such establishments:

Artificial Intelligence Research and Development Laboratories or Services  
Biology research and development laboratories or services  
Computer and Related Hardware Research and Development Laboratories or Services  
Engineering Research and Development Laboratories or Services  
Electronic Research and Development Laboratories or Services

Additionally, 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.” *NAICS Manual*, at 470.

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 economical, 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).

### C. Analysis

Having reviewed the solicitation, the PWS, the descriptions in the *NAICS Manual*, OHA's prior decisions, and the arguments presented by the parties, I conclude that the CO did not err in designating NAICS code 541620, Environmental Consulting Services.

As discussed above, the *NAICS Manual* states that in order to be classified as a research and development procurement, a procurement must call for original investigation undertaken on a systemic basis to gain new knowledge, and/or the application of research findings for the creation of new or significantly improved products. *NAICS Manual*, at 470; *see e.g., NAICS Appeal of Dayton T. Brown, Inc.*, SBA No. NAICS-5164, at 5-6 (2010). When assigning NAICS Code 541715, the project must include “research and experimental development.” *NAICS Manual*, at 472-3. OHA will overturn the assignment of a research and development NAICS code if the procurement does not call for both research and experimental development. *NAICS Appeal of Delphi Research, Inc.*, SBA No. NAICS-5377 (2012), *aff'd sub nom. Arcata Associates, Inc. v. United States*, 110 Fed. Cl. 290 (2013).

In the present case, the RFQ states the Contractor will provide administrative, scientific, and technical support services to assist NCCOS's mission to protect environmental resources and public health, preserve valued habitats, and improve the way communities interact with coastal ecosystems. Sections II.A and II.B, *supra*. Any argument that this is a Research and Development procurement is simply not supported by the record or OHA case law. While Appellant points to the RFQ key word tasks for “research” and for “development” or the LOE being substantially performed by scientists in support of NAICS code 541715, such claim is

farfetched and not within the meaning of the *NAICS Manual*. Clearly, the RFQ seeks a contractor to perform an array of skills in the areas of (2.1) Administration, Management, Planning, Analysis, and Coordination, (2.2) Marine Science Data Acquisition, (2.3) Scientific Data Enterprise, (2.4) Geospatial, Statistical, and Modeling Analyses, (2.5) Publications, Communications, Outreach, (2.6) Program Execution & Analysis, and (2.7) NOAA Mission Support. Section II.B, *supra*. These tasks do not call for research and experimental development of new processes as the principal purpose of the service being acquired.

Particularly, NAICS code 541620 has covered procurements which involved research, analysis, evaluation of contaminated sites, development of documentation, and participation in strategy sessions with Government counsel. *Prudent Technologies, Inc.*, SBA No. NAICS-4710, at 5 (2005). When the work of a contractor includes the identification of problems, the evaluation of risks, and the recommendation of solutions, OHA found that it fit squarely within the definition of NAICS code 541620. *Id.* Here, the Contractor will perform marine science data acquisition as 60% of the work and as the principal purpose of the RFQ. This work involves collecting, organizing, processing and archiving samples, and collecting data from a number of platforms, to provide expert support, mentoring, and field investigation with NCCOS leadership, coastal management decision-making, laboratories, and programs to support social science research, not for experimental development of new processes and products, such as a NAICS code for Research and Development requires. Section II.B, *supra*.

As the CO noted, marine science data acquisition includes “data collection, field survey, etc.; and marine science data acquisition is for advancing ecosystem science for conservation and sustainable use, developing and implementing advanced observation technologies, ecological forecasts, facilitating resilience and adaptation to inundation and climate impacts, and detecting, monitoring and mitigating impacts of chemical and biological stressors.” Section II.A, *supra*. When the Contractor will collect data entry from field sheets or other documents and publish the data, this does not constitute original research. Similarly, when the Contractor will perform geospatial/geostatistical analysis and prepare maps, this work does not constitute original research. Analyzing contaminants in environmental samples and developing environmental and toxicological models work identified in this RFQ clearly fall under the *NAICS Manual* description for NAICS code 541620. Organizing and preparing technical reports also falls under NAICS code 541620, as the Contractor will provide advice on environmental matters to the procuring agency. When the Contractor will solicit input from user communities on the application of NCCOS scientific products and support coordination of laboratory operations, this RFQ does not become research itself. Rather, it aligns with the performance of technical and administrative functions in support of NCCOS's operations.

Consequently, Appellant's reliance on *NAICS Appeal of LRJ Sols., LLC*, SBA No. NAICS-5790 (2016) is misplaced. In *LRJ Sols.*, the procurement in question was for a contractor to care for animals (neither pet or livestock) used in research and actively participate in the research effort by formulating the animal's diet, administering injections, collecting samples and data, and observing and recording behavior. That procurement was directly involved with the conduct of particular research. *Id.*, at 6-7. In contrast, here, the primary work is the data collection to support general social science research, which does not call for research and development.



Certainly, OHA has decided cases rejecting the selection of a consulting NAICS code or finding in favor of a research NAICS code. However, the instant RFQ most resembles technical and administration functions already in existence. *See e.g., NAICS Appeal of Rollout Systems, LLC*, SBA No. NAICS-5901 (2018) (IT work upon network administration functions “already in existence” was not a research and development procurement). OHA also held that the mere fact that the contractor will provide assistance or support to a research organization is not sufficient to justify classifying the procurement as research and development, rather, the procurement must call for the contractor to directly perform work that is an integral part of research and development. *Id.*, at 11. As already discussed, the development aspect is essential to the definition. In other words, the procurement in question must call for the application of the knowledge gained to the development of improved products or processes. Here, the Contractor will perform mostly data collection and support for NCCOS's laboratories. The RFQ does not seek original research toward the development of new processes or products. Rather, the data collected will be supportive of NCCOS's mission and provide information on coastal ecosystems.

Thus, Appellant has not established that the CO clearly erred in selecting NAICS code 541620. Because Appellant has not demonstrated that the CO's choice was erroneous, it is unnecessary to consider other alternative NAICS codes. *E.g., NAICS Appeal of Pacific Shipyards International, LLC*, SBA No. NAICS-5464, at 7 (2013) (“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 Katmai Simulations & Training*, SBA No. NAICS-5445, at 6 (2013).

Therefore, I conclude that the CO made the appropriate NAICS code designation for this procurement, and that Appellant has failed to meet its burden of establishing there was clear error in the designation.

#### IV. Conclusion

For the above reasons, the appeal is DENIED and the CO's designation of NAICS code 541620, Environmental Consulting Services, is AFFIRMED. This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge