

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

SIZE APPEAL OF:

Professional Product Services, Inc.,

Appellant,

Appealed From
Size Determination No. 3-2012-093

SBA No. SIZ-5411

Decided: October 26, 2012

APPEARANCES

Richard B. Oliver, Esq., and Keith M. Byers, Esq., McKenna Long & Aldridge LLP, Los Angeles, California, for Appellant

JiSan López, Esq., U.S. Department of Energy, National Nuclear Security Administration Albuquerque, New Mexico, for the Agency

DECISION¹

I. Introduction and Jurisdiction

This appeal arises from a size determination in which the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) concluded that Professional Project Services, Inc. (Appellant) is not an eligible small business for the subject procurement. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

SBA's Office of Hearings and Appeals (OHA) decides size determination 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 fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

¹ This decision was initially issued on October 18, 2012. Pursuant to 13 C.F.R. § 134.205, I afforded Appellant an opportunity to file a request for redactions if Appellant desired to have any information redacted from the published decision. OHA received a timely request for redactions and considered that request in redacting the decision. OHA now publishes a redacted version of the decision for public release.

II. Background

A. Solicitation, Proposal, Award, and Protest

On March 15, 2012, the U.S. Department of Energy (DOE) issued Request for Quotations (RFQ) DE-DT0003527 seeking security support services at the National Nuclear Security Administration (NNSA) Nevada Site Office (NSO). The RFQ stated that the procurement would be conducted under the General Services Administration (GSA) Federal Supply Schedules,² and that the resulting task order would be issued to a contractor under either Schedule 84 (Total Solutions for Law Enforcement, Security, Facilities Management, Fire, Rescue, Clothing, Marine Craft and Emergency/Disaster Response) or Schedule 871 (Professional Engineering Services). The Contracting Officer (CO) set aside the procurement entirely for small businesses but did not specify a North American Industry Classification System (NAICS) code. Rather, the RFQ stated:

This acquisition will have a strong preference for small business concerns. [[Offerors] shall certify their current business size status as it applies to the GSA Schedule under which the quote is being submitted. In accordance with Interim rule for FAR Case 2011-24, effective November 2, 2011:

This is a notice that the ensuing ‘Task Order’ will be a total set aside for a ‘Small Business Concern.’ Only quotes submitted by ‘small business concerns’ will be accepted by the Government. Any quote that is submitted by a contractor that is not a ‘small business concern’ will not be considered for award.

(RFQ cover memo at 4, emphasis in original.) Box 10 of the RFQ's Standard Form 1449 identified the acquisition as a 100% small business set-aside. The RFQ also incorporated by reference FAR clause 52.219-6, Notice of Total Small Business Set-Aside (NOV 2011). (RFQ at 20.) The clause provides that proposals will be accepted only from firms that are “qualified as a small business under the size standards in this solicitation.”

The RFQ included a Performance Work Statement (PWS) outlining contractual requirements. (RFQ, Attachment 2.) The PWS stated that the contractor will perform a wide range of security support services, including “vulnerability assessments, information classification, personnel security, badge office operations, clearance processing, operations security (OPSEC), security awareness, classified matter protection and control (CMPC), visitor control, [[and] several related activities.” (PWS § 1.2.) Section 3.1 of the PWS described vulnerability assessments in greater detail. The PWS stated that, in carrying out this function, the contractor will continuously evaluate site protection strategies; develop, conduct, and model threat scenarios; and prepare associated reports. (*Id.* § 3.1.) According to the PWS, individuals performing vulnerability assessments must possess “at least one year specialized experience in

² See generally Federal Acquisition Regulation (FAR) Subpart 8.4.

the conduct of vulnerability assessments and DOE or DOE-equivalent training and at least three years of professional work in safeguards and security, engineering and/or scientific field.” (*Id.*)

On April 6, 2012, Appellant submitted its proposal in response to the RFQ. Appellant proposed [***] to perform the badging, personnel security, access control, and security awareness functions, which the proposal acknowledged are “typically viewed as ‘administrative and routine’”; [***] to perform vulnerability assessments and related work; and [***] to perform the remaining tasks, including information security and classification. (Proposal, Part I, at 3-4.) In its proposal, Appellant “certifie[d] that [it is] a small business concern as applied to [its] GSA Schedule [871] Professional Engineering Services (PES), contract number GS-23F-0244K, under which [it is] submitting [[its] quote for the subject solicitation.” (*Id.* at 1.) Appellant did not indicate which NAICS code or size standard it utilized for its small business certification.

On June 7, 2012, the CO awarded the task order to Appellant, and notified unsuccessful offerors. On June 11, 2012, a disappointed offeror, GEM Technology International Corporation (GEM), protested Appellant's small business size status. GEM asserted that, to be eligible for award, Appellant must be a small business under Schedule 84 and/or Schedule 871. Appellant holds contracts under both Schedules, but was awarded its Schedule 84 contract as a large business in 2007. As a result, GEM inferred that Appellant must have submitted the instant proposal under Schedule 871. (Protest at 2.) GEM then recited the NAICS codes associated with Schedule 871. GEM contended that the subject matter of the RFQ does not involve research and development (NAICS code 541712) or commercial and institutional building construction (NAICS code 236220), and that Appellant's revenues are too large for Appellant to qualify as a small business under any other Schedule 871 NAICS code. (*Id.* at 3.) As a result, GEM maintained, Appellant is not a small business for the RFQ.

The CO forwarded GEM's protest to the Area Office for a size determination. On June 22, 2012, Appellant responded to the protest. Appellant argued that, under the RFQ, “offerors need only show that they meet the size criteria of one of the [applicable] GSA schedules.” (Response at 2.) Appellant stated that it submitted its proposal under Schedule 871, and that NAICS code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), with a size standard of 500 employees, is a permissible NAICS code under that Schedule. Appellant provided evidence that its employee headcount is less than 500. Appellant thus reasoned that it “is, by definition, a small business under the RFQ.” (*Id.* at 3.) Appellant did not assert that the instant task order calls for any research and development, or that NAICS code 541712 best describes the work contemplated by the RFQ.

B. Size Determination

On July 31, 2012, the Area Office issued its size determination, concluding that Appellant is not an eligible small business for this procurement.

The Area Office began by considering which NAICS code and size standard should apply to the acquisition. The Area Office found that Schedule 871 consists of a 5-year base period and two 5-year options, and is therefore a long-term contract within the meaning of SBA's regulations. (Size Determination at 3.) The Area Office noted that, under SBA regulations, “[a]

contracting officer must assign a NAICS code and size standard to each order under a long term contract.” (*Id.*, quoting 13 C.F.R. § 121.404(g)(3)(iv).) In this case, however, no NAICS code had been specified in the RFQ. The Area Office therefore invoked 13 C.F.R. § 121.402(d), which permits that an unclear, incomplete or missing NAICS code designation may be supplied by SBA in conjunction with a size determination.

After reviewing the RFQ, the Area Office determined that the NAICS code which best described the work was 541690, Other Scientific and Technical Consulting Services, because that code “specifically includes safety consulting services and security consulting services.” (Size Determination at 4.) NAICS code 541690, however, is not among the codes listed in the underlying Schedule 871 contract. Rather, the Schedule identified three other potential NAICS codes: 541330, Engineering Services; 541711, Research and Development in Biotechnology; and 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology). The Area Office determined that “[n]o research or development effort is required” by the RFQ, so NAICS codes 541711 and 541712 were not appropriate. (*Id.*) The Area Office therefore selected the remaining NAICS code, 541330, for the RFQ. The Area Office noted that NAICS code 541330 has same size standard (\$4.5 million) as NAICS code 541690, which the Area Office found to best describe the required work.

The Area Office proceeded to identify various affiliates of Appellant, and found that the combined average annual receipts of Appellant and those affiliates exceed the \$4.5 million size standard.³ As a result, the Area Office determined Appellant to be other than a small business.

C. Appeal Petition

On August 15, 2012, Appellant appealed the size determination to OHA. Appellant maintains that the size determination is erroneous in two respects.

First, Appellant contends that the Area Office did not substantively review the RFQ before selecting a NAICS code, in violation of 13 C.F.R. § 121.402(b). Appellant emphasizes that, pursuant to the regulation, the Area Office should have chosen the NAICS code which best describes the principal purpose of the product or service being acquired, in light of the industry descriptions in the *NAICS Manual*,⁴ the work described in the solicitation, and the relative weight of each element in the solicitation. Appellant asserts, however, that the Area Office did not meaningfully consider these criteria and only superficially analyzed the RFQ. In Appellant's view, the Area Office improperly “rel[ied] solely upon the PWS' introductory sentence to justify its size decision.” (Appeal at 10.)

Second, Appellant contends that the Area Office selected the wrong NAICS code for the RFQ, and that the correct NAICS code is 541712. Appellant highlights the vulnerability

³ Appellant does not challenge the Area Office's findings of affiliation, so detailed discussion of them is not warranted.

⁴ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System* (2007), available at <http://www.census.gov/eos/www/naics/> (hereinafter, *NAICS Manual*).

assessments, and maintains that they are “the single largest (*i.e.*, in terms of FTEs required) element of work.” (Appeal at 12.) Appellant recites language from Section 3.1 of the PWS pertaining to vulnerability assessments, and argues that vulnerability assessments involve research and development because the contractor will “**develop** threat scenarios based on its identification and research related to those threat scenarios.” (*Id.* at 13, emphasis in original.) Appellant explains that “[t]he development of threat scenarios as required by [PWS] Section 3.1 is a highly technical developmental process that is performed to ascertain/determine the optimal level of protective force staffing in combination with physical features to offset or overcome a perceived threat and/or challenge to facility security.” (*Id.*) Appellant argues that successful performance of vulnerability assessments requires personnel with considerable expertise, including familiarity with threat modeling and simulation computer software and an understanding of the capabilities and limitations of security systems. (*Id.* at 14.)

Appellant further contends that, in addition to vulnerability assessments, other aspects of the RFQ may be construed as research and development, because the contractor will perform its services in support of all missions under NNSA/NSO's purview, including research and development. (*Id.* at 14-15.) Appellant maintains that NSO performs experimental work, such as underground explosives testing. (*Id.* at 15-18.)

Appellant also argues that the NAICS code selected by the Area Office — 541330, Engineering Services — is clearly improper. Appellant emphasizes that the instant RFQ does not involve traditional engineering work, and does not call for the delivery of an engineering report or design. (*Id.* at 18-20.)

Appellant requests that OHA grant the appeal, and determine that NAICS code 541712 applies to the RFQ.

D. Motion to Supplement the Record

Accompanying its appeal petition, Appellant moved to introduce a press release describing a recent experiment conducted by the NNSA, and a declaration from Appellant's [***], explaining why he believes NAICS code 541712 to be appropriate for the instant RFQ. Appellant acknowledges that it did not provide this material to the Area Office during the size review, but maintains that it could not have done so because it was unaware, until the size determination was issued, that the Area Office was considering application of NAICS code 541330. Appellant asserts that, “[h]ad Appellant been aware of the existence of this issue, Appellant would have presented evidence to demonstrate that NAICS [c]ode 541712 was the appropriate and applicable code.” (Appeal at 4-5.)

E. DOE's Response

On August 31, 2012, DOE responded to the appeal petition. DOE agrees with Appellant that NAICS code 541712 best describes the work contemplated by the RFQ. In addition, DOE maintains that GEM's protest should have been dismissed as untimely, and that the Area Office lacked authority to assign a NAICS code to the RFQ.

DOE asserts that GEM's protest was untimely because Appellant self-certified as a small business for the Schedule 871 contract on March 5, 2010. In DOE's view, any size protest should have been lodged within five days after that certification, and GEM's protest, filed on June 11, 2012, is therefore untimely. (DOE Response at 5-6.)

Next, DOE argues that the contracting officer was not required to, and legally could not, assign a NAICS code to the instant task order. DOE emphasizes that the provisions of FAR Part 19 ordinarily do not apply to GSA Schedule acquisitions, and that FAR 8.405-5(b) instructs that “[o]rdering activities should rely on the small business representations made by schedule contractors at the contract level.” DOE contends that assigning a NAICS code to an individual task order “would be in contravention to FAR 8.405-5(b).” (*Id.* at 7.) DOE argues that the Area Office exceeded its authority by assigning a NAICS code when none was required, or permitted.

DOE concurs with the arguments advanced by Appellant in the appeal petition. DOE agrees with Appellant that “[t]he SBA Area Office relied on an overly general statement of the Task Order work scope without delving into the details of the actual work being performed under the Task Order,” and further agrees that NAICS code 541712 is the most appropriate code for the RFQ. (*Id.* at 9-10.) DOE maintains that the vulnerability assessments are “the most important function” of the task order, accounting for the single greatest percentage of the task order dollar value. (*Id.* at 10.) DOE asserts that the vulnerability assessment work “is comprised of research and analysis of tactical operations and threats, requirements analysis and compliance, development of threat scenarios, and evaluation of protection strategies.” (*Id.* at 11.) According to DOE, “[t]his work requires substantial use of physics, mathematics and the utilization of computer based modeling programs to evaluate blast effects and simulations of attack scenarios.” (*Id.* at 12.)

DOE requests that OHA vacate the size determination due to the alleged procedural defects, or remand the matter to the Area Office for a new size determination under NAICS code 541712.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not

admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Engineering Technologies, LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, I find that Appellant has not shown good cause to admit the new evidence. Although Appellant maintains that it could not have offered the evidence to the Area Office during the size review, the record indicates that the issue of which NAICS code applied to the RFQ was specifically raised in GEM's protest. *See* Section II.A, *supra*. In addition, GEM urged that NAICS code 541712 did not apply, because the RFQ involved no research and development. *Id.* Based on the protest, then, Appellant had notice that the Area Office would be considering these issues, and could have addressed them in its response to the protest. OHA has repeatedly declined to accept new evidence when the proponent did not first submit the material to the Area Office during the size review. *Size Appeal of ADVENT Environmental, Inc.*, SBA No. SIZ-5325, at 6 (2012) (“if [the proponent] wished to have the new evidence considered, [the proponent] could, and should, have produced it to the Area Office during the size review.”); *Size Appeal of BR Construction, LLC*, SBA No. SIZ-5303, at 7 (2011) (denying motion to admit new exhibit, which “sets forth factual information that could have been communicated to the Area Office”).

An additional obstacle for Appellant is that the new material seemingly has little, if any, relevance to this case. Appellant seeks to introduce: (1) a press release announcing a recent experiment conducted by the NNSA; and (2) a declaration from Appellant's [***] expressing his views why NAICS code 541712 is appropriate for the RFQ. As to the press release, the mere fact that NNSA performs some experimental work - without involvement by the instant contractor - sheds no light on whether this particular acquisition involves research and development. The press release therefore is not relevant to the issues on appeal. The declaration from [***] repeats (often verbatim) arguments already made in the appeal petition, and thus does not clarify pertinent facts or issues. Moreover, the selection of a NAICS code is made based on the solicitation, the definitions in *NAICS Manual*, and applicable regulations and case precedent. The views of [***] have no weight in this analysis.

For these reasons, Appellant's motion to supplement the record is DENIED.

C. Procedural Issues

DOE argues that the size determination should be vacated due to two alleged procedural defects. First, DOE contends that the Area Office should have dismissed GEM's protest as untimely. Second, DOE asserts that the Area Office exceeded its authority by assigning a NAICS code to the RFQ. As discussed below, neither argument is meritorious.

With regard to protest timeliness, DOE maintains that GEM should have filed any size protest upon award of the underlying Schedule 871 contract, rather than at the time of task order

award. This argument misunderstands the basis for GEM's protest. The protest did not challenge Appellant's size for all orders under Schedule 871, but rather asserted that Appellant did not qualify as a small business for this particular task order. It would therefore have been impossible for GEM to raise such allegations until the instant task order was issued. Moreover, OHA has recognized that size protests may be filed against individual task orders issued under the GSA Schedules or other long-term contracting vehicles, if the contracting officer requests size certification for that task order. 13 C.F.R. § 121.1004(a)(3)(iii); *Size Appeal of Quantum Professional Services, Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR). Here, the RFQ instructed that offerors "shall certify their current business size status," and Appellant did so certify in its proposal.⁵ See Section II.A, *supra*. I find, then, that a size protest could properly be filed upon award of the task order, and that the Area Office did not err in determining GEM's protest was timely.⁶

DOE also argues that the Area Office lacked authority to specify a NAICS code for the RFQ. In support, DOE observes that the requirements of FAR Part 19 ordinarily do not apply to orders under GSA Schedule contracts. See FAR 8.404(a). Further, DOE cites the last sentence of FAR 8.405-5(b), which indicates that "[o]rdering activities should rely on the small business representations made by schedule contractors at the contract level." DOE maintains that assigning a NAICS code to an individual task order is contrary to FAR 8.405-5(b), and therefore improper. (DOE Response at 7.)

I find no merit to DOE's argument. SBA's regulations at 13 C.F.R. § 121.404(g)(3)(iv) instruct that "[a] contracting officer must assign a NAICS code and size standard to each order under a long term contract," and 13 C.F.R. § 121.402(d) permits SBA to designate a NAICS code or size standard if they are absent from a solicitation. Because the contracting officer failed to assign a NAICS code to the RFQ, the Area Office had authority to designate a code for purposes of the size review.

DOE's reliance on the last sentence of FAR 8.405-5(b) is also misplaced. Recent changes to the FAR now permit procuring agencies to set aside individual GSA Schedule task orders for small businesses. See FAR 8.405-5(a)(1). When doing so, however, agencies must adhere to the

⁵ Recent amendments to the Small Business Act provide that the mere submission of a proposal on a small business set-aside "shall be deemed [an] affirmative, willful, and intentional certification[] of small business size and status." Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1341, 15 U.S.C. § 632(w)(2). Because the instant RFQ made clear that the task order was set-aside exclusively for small businesses, offerors that submitted proposals for the order may have certified themselves as small businesses, even in the absence of an express requirement to self-certify.

⁶ Because GEM's protest focused largely on the issue of which NAICS code should apply to the RFQ, and was filed more than 10 days after issuance of the solicitation, it might be argued that GEM's protest was, essentially, an untimely NAICS code appeal. 13 C.F.R. § 134.304(b); FAR 19.303(c)(1). Appellant and DOE, however, do not contend that the protest was untimely on this basis. Further, OHA has recognized that the deadline to file a NAICS code appeal may be tolled when (as here) the procuring agency does not designate any NAICS code or size standard in the solicitation. *NAICS Appeal of King's Thrones, LLC*, SBA No. NAICS-4845 (2007).

applicable requirements of FAR Part 19. FAR 8.405-5(a)(2)(ii). Part 19 mandates, *inter alia*, that “[a]ll solicitations involving set-asides must specify the applicable small business size standard and NAICS code.” FAR 19.501(f); *see also* FAR 19.303(a) (“The contracting officer shall determine the appropriate NAICS code and related small business size standard and include them in solicitations above the micro-purchase threshold.”). It is evident, then, that when a procuring agency chooses to set aside a GSA Schedule task order for small businesses, a NAICS code and size standard must be specified in the solicitation. The last sentence of FAR 8.405-5(b) does not alter this analysis. When read in context, that provision merely indicates that procuring agencies may claim small business credit for orders that are not set asides, and that agencies may, in that situation, utilize the small business representations at the contract level to determinate whether the awardee is a small business.⁷ Contrary to DOE's argument, then, FAR 8.405-5(b) does not bar agencies from assigning NAICS codes to individual GSA Schedule task orders. Rather, if the task order is set aside for small business, a NAICS code and size standard must be specified in the solicitation.

For these reasons, DOE's request to vacate the size determination is denied.

D. NAICS Manual Descriptions

The NAICS code which both Appellant and DOE support, 541712, Research and Development in the Physical, Engineering, and Life Sciences (Except Biotechnology), provides that this industry comprises “research and experimental development (except 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 748-49. SBA's regulations expound upon this definition, stating 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 which the Area Office found to best describe the required services, 541690, Other Scientific and Technical Consulting Services, “comprises establishments primarily engaged in providing advice and assistance to businesses and other organizations on scientific and technical issues (except environmental).” NAICS MANUAL 746. Illustrative examples include “[s]afety consulting services” and “[s]ecurity consulting services.” *Id.* at 747.

⁷ The complete text of FAR 8.405-5(b) reads as follows:

Orders placed against schedule contracts may be credited toward the ordering activity's small business goals. For purposes of reporting an order placed with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to the work performed. Ordering activities should rely on the small business representations made by schedule contractors at the contract level.

The NAICS code selected by the Area Office, 541330, Engineering Services, “comprises establishments primarily engaged in applying physical laws and principles of engineering in the design, development, and utilization of machines, materials, instruments, structures, processes, and systems.” *Id.* at 733.

E. The Merits

The principal argument advanced by both Appellant and DOE in this case is that the Area Office should have selected NAICS code 541712, Research and Development in the Physical, Engineering, and Life Sciences (Except Biotechnology), for the RFQ. Both Appellant and DOE emphasize in particular the vulnerability assessments described in section 3.1 of the PWS. Appellant and DOE maintain that this work may be construed as research and development because the contractor will “**develop** threat scenarios based on its identification and research related to those threat scenarios.” (Appeal at 13, emphasis in original.) Furthermore, Appellant and DOE highlight that vulnerability assessments comprise the single largest aspect of the task order, and require personnel with a significant level of technical expertise. As discussed *infra*, these arguments are unpersuasive for several reasons. I instead find no reversible error in the Area Office's selection of NAICS code 541330.

Appellant and DOE are silent with regard to OHA case precedent which has interpreted the types of work that constitute “research and development.” OHA has recognized, however, that “procurements classified under NAICS code 541712 must be for research and development, and thus must look to creating new processes or products.” *NAICS Appeal of Dayton T. Brown, Inc.*, SBA No. NAICS-5164, at 5-6 (2010) (emphasis in original); *NAICS Appeal of Delphi Research, Inc.*, SBA No. NAICS-5377, at 9 (2012). Here, Appellant and DOE have not demonstrated that the vulnerability assessments entail the creation of any new products or processes. A review of the PWS reveals that the contractor will continuously evaluate site protection strategies; develop, conduct, and model threat scenarios with the aid of existing computer software; and prepare associated reports. (PWS § 3.1.) Thus, the PWS does not indicate that the contractor will create new products or processes. Similarly, the appeal petition states that vulnerability assessments are conducted to determine “the optimal level of protective force staffing in combination with physical features to offset or overcome a perceived threat.” (Appeal at 13.) Again, though, new products or processes are not created. Nor do the vulnerability assessments appear to involve any laboratory or experimental work, as contemplated by 13 C.F.R. § 121.201, n.11(a). I find, therefore, that the vulnerability assessments are more accurately described as analytical or advisory services, not research and development.

Appellant and DOE also emphasize the high level of technical expertise purportedly required to perform vulnerability assessment work. This argument, however, is undermined by the PWS itself, which requires that personnel performing vulnerability assessments possess only limited work experience, and need not have a scientific background. (PWS § 3.1.) Moreover, even assuming that the vulnerability assessments require greater expertise than the PWS suggests, this would not be sufficient grounds to conclude that the vulnerability assessments are research and development. It is well-settled that the mere fact that work may be technically sophisticated does not establish that it is research and development. *E.g.*, *NAICS Appeal of*

Dynamac Corp., SBA No. NAICS-5025, at 8 (2009) (“[w]hile many of [the] tasks [identified in the solicitation] require scientific experience/expertise, they do not require the development of a new or improved product, which is the predicate of a research and development contract.”).

It is also worth noting that the vulnerability assessments represent only a fraction of the overall task order. The RFQ plainly contemplated that the contractor will perform a wide range of security support services, many of which cannot possibly be considered “research and development.” In its response to the RFQ, Appellant proposed [***] to perform the badging, personnel security, access control, and security awareness functions, which Appellant conceded are “typically viewed as ‘administrative and routine’”; [***] to perform vulnerability assessments and related work; and [***] to perform the remaining tasks, including information security and classification. (Proposal, Part I, at 3-4.) Based on this distribution of labor, it is apparent that the bulk of the procurement is devoted not to vulnerability assessments, but rather to conventional security support functions, which Appellant itself characterized as “administrative and routine.” Under applicable regulations, when no single NAICS code applies to the full range of services being acquired under a contract, the appropriate code is that “which accounts for the greatest percentage of contract value.” 13 C.F.R. § 121.402(b); *see also* FAR 19.102(d). Thus, even if I were to accept the contention that NAICS 541712 is suitable for vulnerability assessments, that code still would not be appropriate for task order as a whole, which is dominated by “administrative and routine” support services.

Both Appellant and DOE also argue that NAICS code 541712 applies because the task order supports the overall mission and functions of the NNSA NSO, which include research and development. OHA has repeatedly held, however, that the mere fact that contractor supports or assists an entity engaging in research and development is not sufficient to establish that a research and development code is appropriate for that particular procurement. *E.g.*, *Delphi*, SBA No. NAICS-5377, at 9 (“contracts to ‘support’ or ‘assist’ a research organization cannot automatically be deemed as ‘research and development.’ Only if the contractor will directly perform work that is an integral part of the research and development is such a code appropriate.”); *NAICS Appeal of Bevilacqua Research Corp.*, SBA No. NAICS-5243, at 6 (2011). Here, the PWS calls for security support services, and there is no indication that contractor would participate in any research and development effort conducted by the NNSA NSO. Thus, the fact that the procuring agency conducts research and development is immaterial, because the instant task order does not involve such work.

Appellant and DOE lastly argue that NAICS code 541330, Engineering Services, is incorrect for the instant task order, because this procurement does not involve any recognized engineering discipline, such as electrical engineering or civil engineering. The Area Office, however, reviewed the RFQ and found that the order did not involve any research and development, and that the most appropriate code was 541690, Other Scientific and Technical Consulting Services, which encompasses safety consulting services and security consulting services. *See* Section II.B, *supra*. NAICS code 541690, though, is not among the codes associated with the underlying Schedule 871. As result, the Area Office selected 541330, which has the same size standard as NAICS code 541690. *Id.* I find no reversible error in the Area Office's analysis. NAICS codes 541330 and 541690 have the same size standard, so the selection of one code instead of the other is, at most, harmless error. *E.g.*, *Size Appeal of Active*

Deployment Systems, Inc., SBA No. SIZ-5230, at 2 n.3 (2011) (reference to an incorrect NAICS code was immaterial “[b]ecause both NAICS codes have the same size standard.”). Moreover, NAICS code 541330 is defined broadly in the *NAICS Manual* to include a variety of applied science, such as the preparation of analyses and studies. *See* Section III.D, *supra*. Accordingly, NAICS code 541330 is the most germane of the three codes available on Schedule 871.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge