

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

DECISION FOR PUBLIC RELEASE

NAICS APPEAL OF:

SupplyCore, Inc.,

Appellant,

Solicitation No. SPE7LX-17-R-0090

Defense Logistics Agency
DLA Land and Maritime — BSM
Columbus, Ohio

SBA No. NAICS-5866

Decided: November 14, 2017

APPEARANCES

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John J. Pritchard, Esq., Adam J. Heer, Esq., William I. Winegarner, Contracting Officer,
Columbus, Ohio, for the Defense Logistics Agency

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Jacobson LLP, Washington, D.C., for Science Applications International Corporation, Inc.

DECISION¹

I. Introduction and Jurisdiction

On September 29, 2017, the Defense Logistics Agency (DLA) Land and Maritime (L&M) issued Solicitation No. SPE7LX-17-R-0090 for supply chain management support of tires for the Global Tires Program (GTP). The Contracting Officer (CO) designated the procurement as unrestricted and assigned North American Industry Classification System

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. No redactions were requested, and OHA now publishes the decision in full.

(NAICS) code 493190, Other Warehousing and Storage, with a corresponding \$27.5 million annual receipts size standard. Proposals are due on November 28, 2017.

On October 6, 2017, SupplyCore, Inc. (Appellant) filed the above-captioned appeal, asserting the CO erred in selecting NAICS code 493190. Appellant asserts the procurement is best described by either NAICS code 326211, Tire Manufacturing (except Retreading), or NAICS code 336390, Other Motor Vehicle Parts Manufacturing. The corresponding size standards are 1,500 employees and 1,000 employees, respectively. For the reasons discussed *infra*, the appeal is denied.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (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 this appeal within ten calendar days after issuance of the RFQ, so the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1) and 134.304(b). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation

The solicitation seeks to procure supply and supply chain management support of certain tires under FAR Part 12 (Acquisition of Commercial Items). (RFP, § A.1.4.) The Performance Work Statement (PWS) indicates “[t]he GTP scope of work is for the supply and supply chain management support of certain tires . . . managed by DLA L&M.” (PWS, § C.2.1.) According to the PWS, GTP is intended to provide a single supply chain management process to replace the DLA's Tires Successor Initiative (TSI) and the Department of Navy's (Navy) Tires Performance Based Logistics Successor (TPS) contract. (PWS, § C.1.2.) “The acquisition strategy requires the GTP Integrator to utilize DLA L&M established Vendor [Long Term Contracts] (LTC) for its supply of tires for supply chain management and to provide responsive global supply support to military customers.” (PWS, § C.1.2.) The Government will negotiate and award Vendor LTCs for all tires to be supplied under this contract, and the LTCs are the mandatory source of tire supply for the awardee. (PWS, § P1-5.0, P2-3.0.)

According to the PWS, the GTP Integrator is responsible for: Demand Planning (PWS, § C.2.5.1); Forecasting Orders to Tire Suppliers (PWS, § C.2.5.2); Purchasing from Government directed sources (*i.e.*, LTC Vendors) (PWS, § C.2.5.3); Order Processing and Fulfillment (PWS, § C.2.5.4); Reconciliation (PWS, § C.2.5.5); Supplier Management (PWS, § C.2.5.6); Finance (PWS, § C.2.5.7); Item Management (PWS, § C.2.5.8); Quality (PWS, § C.2.5.9); Warehouse Management and Operations (PWS, § C.2.5.10); Management of Retreads and Tire Carcass Disposal (PWS, § C.2.5.11); Distribution and Transportation Management and Execution (PWS, § C.2.5.12); Packaging and Shipment Preparation (PWS, § C.2.5.13); Customs Clearance (PWS, § C.2.5.14); Obsolescence Management (PWS, § C.2.5.15); Customer Support (PWS, § C.2.5.16); Data Management (PWS, § C.2.5.17); Global Contiguous United States (CONUS) and Outside the Continuous United States (OCONUS) support (PWS, § C.2.5.18); Foreign Military Sales support (PWS, § C.2.5.19); and related environmental, safety and occupational health

matters (PWS, § C.2.5.20). (PWS, § C.2.5) The PWS also indicates the GTP Integrator is responsible for packaging and marking. (PWS, § P2-24.0.)

The PWS specifies “[t]he Government shall establish Vendor LTCs for all tires ... to be supported under the GTP by the GTP Integrator, [which] shall utilize the Government established [LTC Vendors] for its supply of tires.” (PWS, § C.2.2.) The PWS further specifies “[i]n performing GTP support, the GTP Integrator shall only purchase tires through the [LTC Vendors] identified by the Government” in a list provided by the CO. (PWS, § P2 — 3.2.1.) These LTC Vendors are “the exclusive sources of tires for use by the GTP Integrator” and “shall fill and deliver the GTP Integrator orders at the price and delivery terms in the Vendor LTC.” (PWS, § P2 — 3.3.2.1.) The CO, according to the PWS, “shall provide the ... tire price(s) to the GTP Integrator for its ordering of tires from the [LTC Vendor](s).” (PWS, § P2 — 3.5.1.) The GTP Integrator is responsible for inspecting tire shipments from the [LTC Vendors] and must notify the CO and vendor of any nonconformance. (PWS, § P2 — 3.3.3.1.) The PWS also states the GTP Integrator “shall make payment(s) to the LTC Vendor(s)” and any failure to pay may be cured by direct payment from the Government and then offset in payment to the GTP Integrator. (PWS, §§ P2 — 3.3.4.1, P2 — 3.3.4.1.3.)

The Contract Line Item Number (CLIN) structure used for the GTP comprises: CLIN 0001 — Tire Price; CLIN 0002 — Supply Chain Management Fee (CONUS); CLIN 0003 — Supply Chain Management Fee (OCONUS); CLIN 0004 — Navy Aircraft Supply Chain Management Fee (CONUS); CLIN 0005 — Navy Aircraft Supply Chain Management Fee (OCONUS); CLIN 0006 — Supply Chain Management Fee (FMS); CLIN 0007 — Scrap / Disposal Management Fee; CLIN 0008 — CONUS Retread Management Fee; CLIN 0009 — OCONUS Retread Management Fee; CLIN 0010 — Palletization; CLIN 0011 — Surge and Sustainment (S&S) Tire Price; CLIN 0012 — Reconciliation; CLIN 0013AA — TSI to GTP Implementation Fee; and CLIN 0013AB — TPS to GTP Implementation Fee. (PWS, § C.2.10.) Notably, the PWS states CLIN 0001 — Tire Price is “a pass through cost that reflects the tire price in the applicable Vendor LTC, which is the GTP Integrator purchase price under the GTP construct” and “this CLIN shall not contain any additional pricing other than the actual tire price in the applicable Vendor LTC.” (PWS, § C.2.10.)

There are five evaluation factors for award: Technical, Past Performance, Small Business Participation, Cybersecurity and Price. (RFP, at 133.) The nonprice factors are listed in descending order of importance. (*Id.*) Small Business Participation and Cybersecurity are significantly less important than Technical and Past Performance. (*Id.*)

Small Business Participation “will evaluate all offeror's (regardless of business size) on the extent of proposed participation / commitment to use small businesses in performance of this acquisition (as small business prime offerors or small business contractors).” (*Id.*, at 138.) “The work to be performed directly by a small business prime offeror will also be evaluated as Small Business Participation.” (*Id.*) The Government intends to determine “which offeror proposes the best value in terms of Small Business Participation.” (*Id.*)

Technical has three subfactors, Management and Operations, Transition and Implementation, and Resource Availability and Financing, which again are listed in descending

order of importance. (*Id.*, at 133.) The Government will evaluate the technical factors based upon a proposal's soundness, reasonableness and effectiveness in meeting the PWS requirements. (*Id.*) Management and Operations, the most important subfactor, will evaluate the offeror's supply chain management, infrastructure, information and data system capabilities. (*Id.* at 134.) Past Performance will be evaluated in part based upon performance involving supply and supply chain management. (*Id.*, at 136.)

Prior to issuing the Solicitation, the CO issued a Determination and Finding (D&F), documenting his reasons for selecting NAICS code 493190. It describes the GTP as global supply and supply chain management support of certain tires. The contractor is to use the LTC Vendors to purchase tires that will make up its inventory. (D&F, ¶ 1.) The CO estimates that 70% of the value of the contract is based on the purchase of tires from the contractor. However, he expected that the focus of efforts under GTP would be the many services required under the PWS. (*Id.*, ¶ 3.) The CO reviewed a number of NAICS codes he had considered, and his reasons for rejecting them. (*Id.*) He considered manufacturing codes inappropriate, because the contractor will not manufacture the tires, but purchase them from LTC Vendors. The cost of the tires will pass through the contractor here to DLA without an increase. The cost of the tires does not represent the contract's principal purpose. (*Id.*, ¶ 5.)

The CO found that this procurement is a hybrid of supply and service functions, including planning, purchasing tires, warehouse/storage and issuance of tires to customers. The majority of the contractor's time will be spent on warehousing and storage. There are particular requirements for tire storage which the contractor will have to follow. The CO therefore found a services code to be most appropriate. (*Id.*, ¶ 7.)

B. Appeal

Appellant contends the CO clearly erred in selecting NAICS code 493190 for the instant procurement because DLA seeks “the provision of supplies, not services.” (Appeal, at 2.) According to Appellant, the procurement is “not merely warehousing, storing, shipping, palletizing, or keeping track of the inventory of tires that have already been procured by the Government,” but requires “purchas[ing] all of the tires that it is supplying to the Government.” (*Id.*, at 3.) Appellant asserts the contractor “takes title to the tires upon purchasing them ... and then resells those tires *from its own inventory* to the Government when they are needed.” (*Id.*, emphasis in appeal.) Appellant further asserts the contractor “provides several additional services to complement its role as a tire supplier in order to ‘provide the complete tire supply chain solution’ for the government.” (*Id.*) Therefore, in Appellant's view, the CO must assign a supply-related NAICS code, rather than a service-related NAICS code such as NAICS code 493190, because the procurement is primarily for supplying tires and any supply chain management is merely ancillary. (*Id.*)

Appellant also contends the *NAICS Manual* further suggests the designation of NAICS code 493190 was erroneous. (*Id.*, at 6.) Appellant argues the *NAICS Manual* suggests NAICS code 493190 “contemplates an establishment that passively stores property owned by some other entity” rather than one that “also purchase[s] and sell[s] the supplies in the warehouse.” (*Id.*) Further, Appellant notes the *NAICS Manual* indicates “the warehousing or storage of goods must

be more than incidental to the performance of services,” and the procurement devotes approximately 80% of its dollar value to the cost of the tires and merely 20% to supply chain management. (*Id.*)

Appellant argues that this solicitation's primary purpose is to allow DLA's customers to acquire a wide range of tires in a timely, streamlined fashion. Therefore, this is a procurement for supplies, and must be assigned a manufacturing NAICS code. (*Id.* at 7, citing 13 C.F.R. § 121.402(b).) A procurement cannot be classified based upon ancillary services included in the requirements, even if those services are necessary to the procurement. (*Id.*, citing *NAICS Appeal of The U.S. Small Business Administration*, SBA No. NAICS-5526 (2014) (*NAICS Appeal of SBA*).) Appellant further point to the language in *NAICS Appeal of SBA* that the procurement in that case was structured as a commercial items procurement under FAR Part 12, and that the procuring agency there offered no explanation of how the engineering services required constituted commercial items. In such a case, the use of FAR Part 12 suggests that the procuring agency is not seeking services. (*Id.* at 7-8.)

Appellant asserts the instant procurement is best described by either NAICS code 326211, Tire Manufacturing (except Retreading), or NAICS code 336390, Other Motor Vehicle Parts Manufacturing. (*Id.*, at 9.) Appellant suggests the instant procurement was initially designated with NAICS code 326211 during the planning stages and the SBA Procurement Center Representative (PCR) even advised the CO to select a manufacturing-related NAICS code. (*Id.*, at 4.) Appellant also noted DLA's predecessor program to its GTP and Navy's TPS were not assigned service-related NAICS codes. (*Id.*, at 5.) In particular, the programs were assigned NAICS code 423130, Tire and Tube Merchant Wholesalers, and NAICS code 326211, respectively. (*Id.*)

Appellant also maintains it has standing to bring this appeal. Appellant asserts that if the solicitation is classified under one of the codes it advocates for, it would be considered a small business. Therefore, even though this is an unrestricted procurement, Appellant has standing. (*Id.* at 8, citing 13 C.F.R. § 121.1103(a)(1).)

C. DLA's Response

On October 25, 2017, counsel for DLA filed a response to the appeal, maintaining the CO properly designated NAICS code 493190 for the “total supply chain management and support of tires across the Department of Defense.” (DLA's Response, at 1, internal quotes omitted.)

DLA asserts Appellant mischaracterizes the principal purpose of the procurement based on percentage of dollar value devoted to the supply of tires. (*Id.*, at 1.) DLA states the GTP “is comprised of two main components: an integrator contractor — the subject of the instant appeal — and multiple tire supplier [long term contract (LTC) vendors].” (*Id.*, at 4-5.) According to DLA, the principal purpose is “for the GTP Integrator to provide a total supply chain management solution for tires . . . [and] to perform a wide range of supply chain management services, including warehousing and storage” as “the actual procurement of tires occurs through separate long term contracts established by DLA directly with tire manufacturers and dealers.” (*Id.*, at 2.) DLA stresses the GTP integrator is responsible for purchasing its supply of tires from

DLA's established vendors, "has no privity of contract with the tire manufacturers and dealers," and has no "discretion regarding which [DLA tire vendor] to use or pricing and delivery terms." (*Id.*, at 5, 10.) DLA further stresses "no financial transaction even takes place between the GTP Integrator and the customer [as t]he GTP Integrator is simply reimbursed" for the price paid to acquire the tires from DLA's LTC vendors. (*Id.*, at 17.)

According to DLA, the cost of purchasing the tires, while a majority of dollar value, "represents a non-profit pass-through cost that is fully reimbursable [and] [a]ll profit realized by the GTP Integrator is attributable to the various supply chain management services." (*Id.*, at 2, 11.) DLA, in contrast, points to the procurement's 13 priced CLINs, nine of which "pertain to supply chain management and other logistics services" and only two pertain to tire supply costs. (*Id.*, at 11.) Similarly, DLA stresses the evaluation factors also reflect the relative importance of supply chain management services, as "Management and Operations" is "the most important subfactor within the most important non-price factor" and evaluates "the offeror's supply chain management, infrastructure, information and data system capabilities necessary." (*Id.*, at 12.) In addition, DLA notes the cost value of the tires is not itself dispositive, as OHA has held "[w]hile cost values of different components of a procurement are important in evaluating the correct NAICS code, it is not conclusive." (*Id.*, at 13, citing *NAICS Appeal of Global Solutions Network, Inc.*, SBA No. NAICS-4478, at 3 (2002).)

DLA distinguishes GTP from its predecessor contracts, Tire Privatization Initiative (TPI) and TSI. (*Id.*, at 3.) According to DLA, the TPI was assigned NAICS code 326211 because the procurement was "open to tire manufacturers" and "the awardee, itself a tire manufacturer, was responsible for performing all supply, storage, and distribution functions, including the actual procurement of tires." (*Id.*, at 3-4.) DLA suggests TPI was succeeded by TSI to bifurcate the procurement process "for tires between . . . a third-party integrator [who] is responsible for all logistics, warehousing, transportation, and other supply chain management functions ... [and] separate LTCs established between DLA and various tire manufacturers and dealers" for directly sourcing all tires. (*Id.*, at 4.) DLA notes TSI expires in October 2018 and will be succeeded by GTP utilizing the same acquisition strategy. (*Id.*) DLA also notes GTP will also absorb Navy's aircraft tire procurement regime, assigned NAICS code 439190, that also required the contractor to directly source tires from tire manufacturers and dealers itself. (*Id.*)

DLA maintains the CO considered several NAICS codes for the instant procurement, and properly selected NAICS code 493190 as best describing "the global supply and supply chain management support of tires" sought through the instant procurement. (*Id.*, at 5.) According to DLA, the CO initially proposed NAICS code 423130, Tire and Tube Merchant Wholesalers, which was used for the current TSI integrator contract. (*Id.*) However, according to DLA, the SBA Procurement Center Representative urged the CO to refrain from using wholesale and retail NAICS codes for government acquisitions, "regardless of whether the contracts are for services or supplies," and the CO obliged. (*Id.*, at 6.) DLA suggests the CO then determined NAICS code 326211 was inappropriate for the instant procurement as, unlike for TPI and Navy's TPS, the GTP Integrator is not responsible for manufacturing or directly sourcing tires. (*Id.*, at 6, 18-19.) In DLA's view, the CO properly concluded NAICS code 493190, among the various non-manufacturing NAICS codes considered, best described the instant procurement's principal purpose of providing supply chain management services for the global supply of tires. (*Id.*, at 6,

10.) According to DLA, the “majority of program time [will be] spent on warehousing and storage” and “more often than not predominately on the many service-based aspects” of the procurement. (*Id.*, at 12.)

DLA also asserts Appellant's reliance on *NAICS Appeal of SBA* is misguided, as that appeal involved “the designation of an engineering NAICS code for two procurements that required contractors to source, acquire, and deliver a broad range of support equipment.” (*Id.*, at 12-13, citing *NAICS Appeal of SBA*, SBA No. NAICS-5526, at 2.) According to DLA, OHA reversed the NAICS code designation in that appeal because the procuring agency did not consider engineering services the primary purpose and the services represented a minor aspect of the overall procurement. (*Id.*, at 13.) Here, in DLA's view, “the procurement is for supply chain management services . . . [which] cannot be fairly characterized as merely ‘incidental’ or ‘ancillary’ to the supply of tires.” (*Id.*, at 13, quotations in original.)

D. SAIC's Response

On October 17, 2017, Science Applications International Corporation, Inc. (SAIC) moved to intervene in the above-captioned NAICS appeal, asserting it has standing as a prospective offeror that would be precluded from competing for this procurement if Appellant prevails. (Motion to Intervene, at 1.)

On October 25, 2017, SAIC responded to the appeal, asserting Appellant failed to show the CO's designation of NAICS code 493190 was clearly erroneous. (SAIC's Response, at 1.) SAIC contends Appellant's arguments based on previous iterations of the GTP and other solicitations are inapplicable, as each involved different requirements. (*Id.*, at 2.) SAIC also argues Appellant's characterization of GTP is improper, stating the GTP contractor “is not authorized to source tires commercially.” (*Id.*) According to SAIC, “the tire supply is fulfilled separately by distinct contracts (“DLA vendor contracts”) . . . and the [GTP] contractor has no privity of contract with the DLA vendor contractors.” (*Id.*) SAIC suggests the costs of the tires are “simply passed from the DLA vendor contractors through the [GTP] contractor to the end user” and any “costs (and profits) relevant to the [GTP] contractor are those associated with supply chain management services.” (*Id.*) SAIC further notes the solicitation excludes the cost of tires from the evaluated price, and excuses the contractor from negative performance impacts from late deliveries from DLA vendors or from defects in manufacturing, design, or material. (*Id.*)

SAIC also contends Appellant's proposed NAICS codes are inapplicable. (*Id.*, at 3.) According to SAIC, the instant procurement does not require the contractor to “manufacture or otherwise create . . . tires” but seeks “warehousing, inventory management, and worldwide distribution of tires to DLA's customers.” (*Id.*) Neither NAICS codes proposed by Appellant encompasses establishments performing these tasks, in SAIC's view. (*Id.*)

SAIC argues *NAICS Appeal of SBA* is distinguishable from the instant appeal, as the contractor in that case was required to source the equipment itself. (*Id.*, citing *NAICS Appeal of SBA*, SBA No. NAICS-5526 (2014).) SAIC suggests *NAICS Appeal of Ferris Optical* is more applicable. (*Id.*, citing *NAICS Appeal of Ferris Optical*, SBA No. NAICS-5285, at 6 (2003).)

According to SAIC, OHA rejected the appellant's proposed manufacturing NAICS code in *Ferris Optical* because the solicitation “call[ed] for much more . . . than merely the delivery of manufactured eyeglasses” for the sought prescription eyeglass dispensary services. (*Id.*, citing NAICS-5285, at 6 (2003).)

E. NAICS Manual² Descriptions

The NAICS code designated by the CO and supported by SAIC, 493190, Other Warehousing and Storage, comprises:

establishments primarily engaged in operating warehousing and storage facilities (except general merchandise, refrigerated, and farm product warehousing and storage).

NAICS Manual, at 655. The illustrative examples include bulk petroleum storage, lumber storage terminals, document storage and warehousing, and whiskey warehousing. *Id.*

The broader NAICS code 493, Warehousing and Storage, which incorporates NAICS code 493190, states:

Industries in the Warehousing and Storage subsector are primarily engaged in operating warehousing and storage facilities for general merchandise, refrigerated goods, and other warehouse products. These establishments provide facilities to store goods. They do not sell the goods they handle. These establishments take responsibility for storing the goods and keeping them secure. They may also provide a range of services, often referred to as logistics services, related to the distribution of goods. Logistics services can include labeling, breaking bulk, inventory control and management, light assembly, order entry and fulfillment, packaging, pick and pack, price marking and ticketing, and transportation arrangement. However, establishments in this industry group always provide warehousing and storage services in addition to any logistics services. Furthermore, the warehousing or storage of goods must be more than incidental to the performance of services, such as price marking.

Id., at 653.

² Executive Office of the President, Office of Management and Budget (OMB), *North American Industry Classification System-United States* (2012), available at <http://www.census.gov>. While SBA issued a final rule adopting the 2017 edition of the NAICS Manual effective October 1, 2017 (82 Fed. Reg. 44,886 (Sept. 27, 2017)) this appeal involves a solicitation issued before October 1, 2017, and so the 2012 edition still controls.

The first NAICS code advocated by Appellant, 326211, Tire Manufacturing (except Retreading), comprises:

establishments primarily engaged in manufacturing tires and inner tubes from natural and synthetic rubber.

Id., at 336. The corresponding index entries include: aircraft tire manufacturing; motor vehicle tires manufacturing; and tire (*e.g.*, pneumatic, semi-pneumatic, solid rubber) manufacturing. *Id.*, at 1064, 1298, 1432.)

The second NAICS code advocated by Appellant, 336390, Other Motor Vehicle Parts Manufacturing, comprises:

establishments primarily engaged in manufacturing and/or rebuilding motor vehicle parts and accessories (except motor vehicle gasoline engines and engine parts, motor vehicle electrical and electronic equipment, motor vehicle steering and suspension components, motor vehicle brake systems, motor vehicle transmissions and power train parts, motor vehicle seating and interior trim, and motor vehicle stampings).

Id., at 470. Illustrative examples include: air bag assemblies manufacturing; air-conditioners, motor vehicle, manufacturing; air filters, automotive, truck, and bus, manufacturing; catalytic converters, engine exhaust, automotive, truck, and bus, manufacturing; compressors, motor vehicle air-conditioning, manufacturing; mufflers and resonators, motor vehicle, manufacturing; radiators and cores manufacturing; and wheels (*i.e.*, rims), automotive, truck, and bus, manufacturing. *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 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 and services being acquired. Federal Acquisition Regulation (FAR) 19.303(a)(2); 13 C.F.R. § 121.402(b). OHA will not reverse a NAICS code designation “merely because OHA would have selected a different code.” *NAICS Appeal of Eagle Home Med. Corp.*, SBA No. NAICS-5099, at 3 (2009).

B. Analysis

This is an unrestricted procurement. Nevertheless, the Appellant has standing to appeal the CO's NAICS code designation. SBA regulations dictate:

Any interested party adversely affected by a NAICS code designation may appeal the designation to OHA. An interested party would include a business concern seeking to change the NAICS code designation in order to be considered a small business for the challenge procurement, regardless of whether the procurement is reserved for small businesses or unrestricted.

13 C.F.R. § 121.1103(a)(1). In this case, the challenged procurement evaluates offerors on small business participation, and looks favorably on use of small business in performing the contract. *See* Section II.A, *supra*. The procurement specifically equates performance by a small business prime offeror with small business participation by other offerors. *Id.* Appellant asserts that it would qualify as a small business prime offeror under the NAICS codes it advocates, rather than the one assigned by the CO. *See* Section II.B, *supra*. Therefore, Appellant has standing as an interested party. *See NAICS Appeal of National Electric Coil*, SBA No. NAICS-5666 (2015).

I find Appellant has failed to demonstrate the CO's NAICS code designation is based upon clear error of fact or law, and I therefore must deny the appeal.

Appellant's characterization of the procurement as one for the provision of supplies, rather than for services, has little traction aside from the cost of the tires themselves. OHA has held the “breakdown of the costs of the tasks required by a procurement is a good indicator of the procurement's principal purpose.” *NAICS Appeal of Milani Construction, LLC*, SBA No. NAICS-5749, at 8 (2016) (citing *NAICS Appeal of Computer Cite*, SBA No. NAICS-5010 (2008)). But, the cost of particular components is not alone conclusive. *See NAICS Appeal of Global Solutions Network, Inc.*, SBA No. NAICS-4478, at 3 (2002). Here, the PWS specifies the GTP Integrator is responsible for purchasing its supply of tires, and the majority of the procurement's cost is associated with purchasing the tires. *See* Section II.A, *supra*. However, the GTP Integrator has no authority to negotiate price or delivery with the LTC Vendors, as these terms are negotiated beforehand by DLA in the long-term contracts. *Id.* In fact, the solicitation provides that the GTP Integrator's purchase price is passed through to the Government under CLIN 0001 and that the GTP Integrator may not receive any profit on the tires themselves. *Id.* Further, in the event the GTP Integrator fails to pay the LTC Vendor, the Government will pay the LTC Vendor directly and off-set payments to the GTP Integrator. *Id.* The principal purpose is clearly other than passing through the cost of tires to DLA.

Aside from purchasing tires, the PWS identifies twenty supply chain management functions performed by the GTP Integrator, including: forecasting orders to tire suppliers, warehouse management and operations, tire disposal, distribution, packing and shipment and customer support. *Id.* All of these activities can be considered a part of warehouse operations. DLA intends to evaluate each offeror's soundness, responsibility, and effectiveness in meeting these requirements, placing particular importance on its supply chain management,

infrastructure, information and data capabilities. *Id.* DLA also seeks to evaluate each offeror's past performance in supply chain management. *Id.*

The solicitation also specifies thirteen CLINs for the procurement, only two of which cover tire price (*i.e.*, CLIN 0001 — Tire Price, CLIN 0011 — Surge and Sustainment (S&S) Tire Price). The remaining eleven CLINs cover supply chain management, program implementation, reconciliation, palletization, and disposal management. It is clear the emphasis of the solicitation is on supply chain management. *See NAICS Appeal of ACE Consulting Services, LLC*, SBA No. NAICS-5574, at 4 (2014) (finding the principal purpose was training and mentoring services when four of nine CLINs were for training services while only one was for consulting services).

From this, it is clear the principal purpose of the instant procurement is securing a GTP Integrator for supply chain management of DOD's global supply of tires. *See* Section II.A, *supra*. The instant procurement is part of DLA's larger acquisition plan for a consolidated program in GTP for “provid[ing] a single supply chain management process.” *Id.* DLA separately contracts with tire vendors and manufactures on a long-term basis for its supply of tires, and these LTC Vendors are the GTP Integrator's “exclusive source of tires.” *Id.* Further, DLA carefully prepared for this procurement with an extensive D&F which describes the procurement as providing for global supply and supply chain management support, and states that efforts under the contract will focus on the service-based aspects of the procurement. *See NAICS Appeal of Pinnacle Solutions, Inc.*, SBA No. NAICS-5651, at 9 (2015) (relying, in-part, on the CO's D&F in determining the principal purpose of the related procurement).

According to the *NAICS Manual*, NAICS code 493190 covers “establishments primarily engaged in operating warehousing and storage facilities.” *See* Section II.E, *supra*. The *NAICS Manual*, under the broader NAICS code 493, explains these establishments providing warehousing and storage may also provide logistics services, including inventory control and management as well as order and entry fulfillment. *Id.* Here, the GTP Integrator is responsible for warehousing DLA's tire supply. *See* Section II.A, *supra*. The GTP Integrator's other responsibilities are logistics services foreseen in the larger NAICS code 493 for its narrower subgroupings. NAICS code 493 specifies establishments engaged in warehousing and storage “do not sell the goods they handle.” *See* Section II.E, *supra*. As discussed, the GTP Integrator pays the LTC Vendors for the tires pursuant to their contracts with DLA, and passes the actual cost through to the Government without any additional pricing. *See* Section II.A, *supra*. This relationship between the GTP Integrator and LTC Vendor is more akin to a warehouse than a wholesaler, the likely focus of the exclusion for sale of goods. *See NAICS Manual*, at 503 (describing “Sector 42 — Wholesale Trading” as “establishments engaged in wholesaling merchandise, generally without transformation . . . [that] sell merchandise to other businesses and normally operate from a warehouse or office”). Further, these establishments provide a range of logistics services, related to the distribution of goods. This is consistent with the logistics services required of the GTP Integrator in this case. Therefore, I find the CO's designation of NAICS code 493190, Other Warehousing and Storage, is appropriate for the instant procurement.

I agree with counsel for DLA and SAIC that *NAICS Appeal of SBA* is distinguishable from the instant appeal. In *NAICS Appeal of SBA*, the Air Force issued a solicitation which

replaced a number of contracts for equipment. *NAICS Appeal of SBA*, SBA No. NAICS-5526, at 2. The contract called for contractors to acquire and deliver a broad range of support equipment from a list of thousands of items. *Id.* The Air Force designated the procurement under NAICS code 541330, Engineering Services, under the Military and Aerospace Equipment and Military Weapons exception. *Id.*, at 1. OHA noted that the contract contemplated the use of engineering services only sporadically, and not routinely, in the performance of the contracts. *Id.*, at 7. That RFP did not request information about offerors' engineering capabilities or personnel, and gave no weight to engineering in its evaluation criteria. Further, while the procurement was structured as a commercial items procurement under FAR Part 12, the Air Force offered no explanation as to how the engineering services in question met the definition of commercial items. *Id.* OHA held that the procurement was not properly classified as a procurement for engineering services, but as a procurement for equipment, and required a manufacturing NAICS code. *Id.*

Here, however, the RFP emphasizes the services to be provided by the GTP Integrator. Unlike the awardees in *NAICS Appeal of SBA*, this contractor will not be the source of the tires provided. *See* Section II.A, *supra*. The Government has already arranged for the purchase of the tires without the contractor. *Id.* The contractor must obtain these tires from the approved LTC Vendors, and is not permitted to charge any markup for them. *Id.* If the contractor here fails to pay the LTC Vendors, the Government will step in and make the payments, and adjust its payments to the GTP contractor accordingly. *Id.* This contractor, then, will not provide supplies to the Government in the same way as the contractor in *NAICS Appeal of SBA*. Further, while the RFP in *NAICS Appeal of SBA* did not have requirements for engineering services, this RFP requires a wide range of logistics services, including Warehouse Management and Operations. *See* Section II.A, *supra*. In fact, nine of the eleven CLINs are services related. *Id.* Thus, the logistics and supply chain management and warehouse services are clearly emphasized in the RFP, in contrast to that in *NAICS Appeal of SBA*.

Moreover, the RFP in this case also emphasizes supply chain management services as part of the evaluation process, in contrast to the RFP in *NAICS Appeal of SBA*. While the evaluation factors in *NAICS Appeal of SBA* did not mention engineering services, the evaluation factors here emphasize supply chain management, and the Past Performance evaluation will emphasize the offerors' experience in supply chain management. *Id.* Finally, while the RFP in *NAICS Appeal of SBA* did not explain how the engineering services met the definition of commercial items under FAR Part 12, here the services required are services provided in support of the acquisition of the tires, which are certainly items “of a type customarily used by the general public” and thus would qualify as commercial items. FAR 2.101. Therefore, I conclude that *NAICS Appeal of SBA* is inapposite here.

Appellant argues that the predecessor programs, TPI, TSI, and TPS, involved similar requirements and were assigned non-service NAICS codes. However, procurements for the predecessor programs are not before OHA, and OHA attaches little weight to the NAICS codes assigned to other procurements that were not appealed to OHA. *NAICS Appeal of Arrowhead Contracting, Inc.*, SBA No. NAICS-5725, at 8 (2016).

Because Appellant has not established that NAICS code 493190 is clearly erroneous for this procurement, it is unnecessary to consider the NAICS codes Appellant advocates, or any

other alternate code. 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 Nat'l Elec. Coil*, SBA No. NAICS-5666, at 8 (2015); *NAICS Appeal of Env't. Int'l Ltd.*, SBA No. NAICS-5628, at 7 (2014).

IV. Conclusion

For the above reasons, the appeal is DENIED and the CO's designation of NAICS code 493190 is AFFIRMED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge