

Cite as: *NAICS Appeal of Noble Sales Co., Inc., d/b/a Noble Supply & Logistics*, SBA No. NAICS-6067 (2020)

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

NAICS APPEAL OF:

Noble Sales Co., Inc., d/b/a Noble Supply  
& Logistics,

Appellant,

Solicitation No. 47QSCC20R0014

SBA No. NAICS-6067

Decided: August 19, 2020

APPEARANCES

Gary J. Campbell, Esq., G. Matthew Koehl, Esq., Lidiya Kurin, Esq., Womble Bond Dickinson (US) LLP, Washington, D.C., for Appellant

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DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On June 25, 2020, the U.S. General Services Administration (GSA) issued Request for Proposals (RFP) No. 47QSCC20R0014, seeking a contractor to provide Logistics Operations Solutions Support for Department of Defense (DoD) components and Federal civilian agencies operating in and around Hawaii. The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 493190, Other Warehousing and Storage, with a corresponding size standard of \$30 million average annual receipts.<sup>2</sup>

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<sup>1</sup> This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to request redactions if desired. After reviewing the decision, the parties informed OHA that they had no requested redactions. Therefore, OHA now issues the entire decision for public release.

<sup>2</sup> Effective August 19, 2019, SBA increased the size standard for NAICS code 493190 from \$27.5 million to \$30 million. 84 Fed. Reg. 34,261 (July 18, 2019).

On July 2, 2020, Noble Sales Co., Inc. d/b/a Noble Supply & Logistics (Appellant) filed the instant appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant maintains that the CO clearly erred in selecting NAICS code 493190, and that the correct NAICS code for this procurement is 339940, Office Supplies (except Paper) Manufacturing, with an associated size standard of 750 employees. For the reasons discussed *infra*, the appeal is denied.

OHA decides appeals of NAICS code designations under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within ten calendar days after issuance of the RFP, so the appeal is timely. 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. The RFP

According to the RFP's Performance Work Statement (PWS), the contractor will perform Logistics Operations Solutions Support for federal civilian and DoD consumers operating in and around Hawaii. (RFP, Attach. 2, at 1.) The contractor is responsible for “a total supply chain solution” including “sourcing, procuring, warehousing, [and] transporting or arranging for transportation/delivery” of various supplies and products, predominantly “office supplies, janitorial and sanitation supplies, and industrial products.” (*Id.* at 1, 3.) The purpose of the procurement is “to support overseas customers by utilizing a more expeditious solution to supply items to the customer.” (*Id.* at 1.) The RFP indicates that the Service Contract Act will apply to the procurement. (RFP at 21-22.)

Attachment 3 of the RFP provides a list of the supplies and products ordered during calendar year 2018, with the quantities ordered. The contractor must be prepared to furnish all supplies and products listed in Attachment 3, as well as other supplies or products that may be added during the life of the contract. (RFP, Attach. 2, at 3.) Many, but not all, of the supplies and products in Attachment 3 are required by law to be obtained from mandatory sources of supply, particularly Federal Prison Industries, Inc. and the AbilityOne program. (*Id.*) The RFP stipulates that, if a mandatory source of supply is identified in Attachment 3, “the contractor must procure those items from” the mandatory source. (*Id.*) The contractor also must ensure suppliers are compliant with domestic sourcing restrictions, such as the Trade Agreements Act. (*Id.*)

The PWS outlines specific tasks the contractor will perform:

- Procuring - The contractor is responsible for procuring supplies and products identified in Attachment 3, and other supplies and products subsequently added. (*Id.*)
- Warehousing - The contractor must own, or have access to, at least one warehouse in the state of Hawaii. (*Id.* at 4.)

- Transportation/Delivery - The contractor will deliver supplies and products to the destinations specified in individual delivery orders, and must prepare associated “supply and shipping documentation, shipping labels, and package markings.” (*Id.*)
- Vendor e-Portal - The contractor will provide GSA and its customers access to an e-portal system that will be used for placing and tracking orders. (*Id.* at 5.)

The RFP states that GSA plans to award a single indefinite delivery/definite quantity (ID/IQ) contract. (RFP at 10.) Proposals initially will be evaluated based on five evaluation factors: Technical Excellence; Operational Quality Assurance; Experience; Past Performance; and Small Business Participation. (*Id.* at 15-19.) For the Technical Excellence factor, offerors are instructed to “discuss the distribution equipment and resources planned to execute the requirement,” and to provide documentation that it “has/will have warehouse(s) upon contract award in Hawaii.” (*Id.* at 16.) For the Operational Quality Assurance factor, offerors must provide the resumes of key personnel who will “lead or are in charge of: sourcing the items in Attachment 3; warehouse facility(s); delivery, and [electronic data interface] compliance.” (*Id.* at 17.) For the Experience factor, “[t]he proposal must demonstrate the [offeror's] experience in regards to sourcing commodities, warehousing and delivering in Hawaii as identified in the solicitation.” (*Id.* at 18.)

Offerors whose proposals are rated as at least “Acceptable” will be invited to participate in a “Phase II Live Test Demonstration” of the e-portal system. (*Id.* at 19-20.) GSA will select the winning offeror on a best value basis, considering the above evaluation factors as well as price. (*Id.* at 20-21.) Technical Excellence is the most important non-price factor, and the non-price factors collectively are significantly more important than price. (*Id.* at 21.)

The RFP states that proposals would be due August 11, 2020, but the CO suspended the deadline pending resolution of this NAICS code appeal. (RFP, Amendment 00001.)

### B. Appeal

On July 2, 2020, Appellant filed the instant appeal, contending that the CO clearly erred in selecting NAICS code 493190, and that the correct NAICS code for this procurement is 339940.

Appellant argues that the instant procurement is primarily for products, with only an incidental requirement for warehousing. (Appeal at 8.) SBA regulations require that “[a]cquisitions for supplies must be classified under the appropriate manufacturing or supply NAICS code.” (*Id.*, quoting 13 C.F.R. § 121.402(b)(2).) The CO therefore was required to assign a manufacturing NAICS code, not a services NAICS code such as 493190. Because the primary purpose of the acquisition is supplies, the CO clearly erred by not assigning the NAICS code that best describes the principal purpose of the procurement. (*Id.*, citing *NAICS Appeal of Active Deployment Sys., Inc.*, SBA No. NAICS-5712 (2016).) Likewise, OHA has repeatedly held that where the primary purpose of a procurement is to acquire a range of supplies or equipment, a

manufacturing NAICS code must be used. (*Id.* at 8-9, citing *NAICS Appeal of U.S. Small Bus. Admin.*, SBA No. NAICS-5526 (2014).)

Appellant claims that the primary purpose of a solicitation is dispositive on what the correct NAICS code should be. (*Id.* at 9.) The mere fact that a solicitation may also call for ancillary services does not convert a manufacturing/supply contract into a services contract. (*Id.*, citing *NAICS Appeal of Global Precision Sys., LLC*, SBA No. NAICS-5681 (2015).) In the *Small Bus. Admin.* case, OHA found that a procurement where 75% of the dollar value was for equipment was primarily a contract for supplies. (*Id.* at 9-10.)

Appellant argues that the primary purpose of this procurement is supplies, not the operation of warehouse. (*Id.* at 11.) Warehousing is merely incidental to delivery. (*Id.*) Supplies in the instant case represent an even greater proportion of the contract value than the 75% seen in the *Small Bus. Admin.* case. Because the bulk of the supplies here are office supplies, the correct NAICS code for the RFP is 339940, Office Supplies (except Paper) Manufacturing. (*Id.* at 12.)

### C. GSA's Response

On July 21, 2020, GSA responded to the appeal. GSA argues that the CO did not err in selecting NAICS code 493190 for the RFP because the principal purpose of the procurement is the performance of logistics and supply chain management services related to the distribution of goods. (GSA Response at 1.)

GSA highlights that the RFP requires the contractor to: procure and source items from suppliers; perform inventory management; package and ship orders; ensure that suppliers comply with domestic sourcing restrictions; comply with transportation requirements; acquire and maintain distribution equipment and resources; and perform warehouse management and operations. (*Id.* at 2.) These services represent “the bulk of the requirement” and are “most heavily weighted in the evaluation.” (*Id.*)

Other factors support the conclusion that the RFP is for services. The RFP requires the contractor to propose key personnel, who will be responsible for ensuring the timely sourcing of items, managing warehouse facilities, managing delivery, and other tasks “to ensure high-quality, seamless supply chain operations.” (*Id.*) Further, GSA will evaluate each offeror's experience and past performance in sourcing, warehousing, and delivering products to Hawaii. (*Id.*) The RFP states that the Service Contract Act applies to the procurement. (*Id.*) The pricing for the procurement encompasses not only the cost of the product but also a markup percentage inclusive of the services the contractor will perform. (*Id.*)

GSA argues that OHA precedent has established that NAICS code 493190 is appropriate for procurements where a contractor will perform “supply chain management functions such as forecasting orders, warehouse management and operations, disposal, distribution, packaging, and shipment.” (*Id.* at 3.) GSA points in particular to *NAICS Appeal of SupplyCore, Inc.*, SBA No. NAICS-5866 (2017), *aff'd sub nom. SupplyCore, Inc. v. U.S.*, 137 Fed. Cl. 753 (2018) and *NAICS Appeal of PrimeTech Int'l, Inc.*, SBA No. NAICS-6014 (2019). (*Id.*) In GSA's view, the

procurements at issue in *SupplyCore* and *PrimeTech* involved nearly the same logistics and supply chain management services as the instant RFP. (*Id.*)

Conversely, the OHA decisions cited by Appellant are distinguishable from the instant procurement. (*Id.* at 4.) The procurements in those decisions “were clearly for provision of supplies, whereas the primary purpose of this procurement is the provision of a range of logistics services related to the distribution of goods.” (*Id.*) Further, “none of the decisions referenced by [Appellant] actually analyze NAICS Code 493190.”

Finally, GSA insists that Appellant has not met its burden of proving that NAICS code 493190 is clearly incorrect. (*Id.*) According to GSA, NAICS code 493190 is suitable for this procurement, which has the principal purpose of the “performance of logistics and supply chain management services related to the distribution of goods.” (*Id.* at 4-5.)

#### D. Motion to Reply

On July 24, 2020, three days after the close of record, Appellant moved to reply to GSA's Response and submitted a proposed Reply. A reply is warranted, Appellant argues, to “clarify[] assertions made by GSA regarding Solicitation No. 47QSCC20R0014 and to distinguish the two cases cited by GSA.” (Motion at 1.)

Under applicable regulations governing NAICS code appeals, a reply to a response is generally not permitted unless OHA so directs. 13 C.F.R. § 134.309(d). No such direction occurred here. Further, OHA does not entertain evidence or argument filed after the close of record. 13 C.F.R. § 134.225(b). Accordingly, Appellant's motion to reply is DENIED, and the proposed Reply is EXCLUDED from the record. *NAICS Appeal of T3 TigerTech*, SBA No. NAICS-5674, at fn.2 (2015); *NAICS Appeal AllServ, Inc.*, SBA No. NAICS-5629, at 7 (2014).

#### E. NAICS Manual<sup>3</sup>

The NAICS code chosen by the CO, 493190, Other Warehousing and Storage, covers:

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

*NAICS Manual* at 406. NAICS code 493190 is one of several codes in NAICS subsector 493, Warehousing and Storage. The *NAICS Manual* contains the following description of NAICS subsector 493 as a whole:

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

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<sup>3</sup> Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2017)*, available at <http://www.census.gov>.

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 or storage services in addition to any logistic services. Furthermore, the warehousing or storage of goods must be more than incidental to the performance of services, such as price marking.

*Id.* at 405.

The NAICS code Appellant advocates, 339940, Office Supplies (except Paper) Manufacturing, consists of:

establishments primarily engaged in manufacturing office supplies. Examples of products made by these establishments are pens, pencils, felt tip markers, crayons, chalk, pencil sharpeners, staplers, modeling clay, hand operated stamps, stamp pads, stencils, carbon paper, and inked ribbons.

*Id.* at 307.

### 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. 13 C.F.R. § 121.402(b). OHA will not reverse a NAICS code designation “merely because OHA would have selected a different code.” *NAICS Appeal of Eagle Home Med. Corp.*, SBA No. NAICS-5099, at 3 (2009).

#### B. Analysis

Having reviewed the RFP, the *NAICS Manual*, OHA's prior decisions, and the arguments of the parties, I find that Appellant has not met its burden of proving that the CO clearly erred in selecting NAICS code 493190 for this RFP. As a result, the appeal must be denied.

Appellant correctly observes that the instant procurement appears to be predominantly for supplies. According to SBA regulations, “[a]cquisitions for supplies must be classified under the appropriate manufacturing or supply NAICS code.” 13 C.F.R. § 121.402(b)(2). Similarly, OHA has held that, if the principal purpose of a procurement is the supply of goods, a manufacturing NAICS code should be utilized. *E.g.*, *NAICS Appeal of Noble Supply & Logistics*, SBA No. NAICS-5886 (2018); *NAICS Appeal of U.S. Small Bus. Admin.*, SBA No. NAICS-5526 (2014). Appellant highlights that NAICS code 493190 is a services NAICS code, not a manufacturing or supply NAICS code.

Nevertheless, OHA has recognized that when the supplies in question must be obtained from mandatory sources, and when the contractor also will perform warehouse management and other logistical services, NAICS code 493190 is appropriate. *NAICS Appeal of SupplyCore, Inc.*, SBA No. NAICS-5866 (2017), *aff’d sub nom. SupplyCore, Inc. v. U.S.*, 137 Fed. Cl. 753 (2018); *NAICS Appeal of PrimeTech Int’l, Inc.*, SBA No. NAICS-6014 (2019). In such situations, because the contractor acts essentially as a pass-through agent with regard to the supplies, greater importance is attached to the services aspects of the acquisition.

OHA's reasoning in *SupplyCore* is instructive. In *SupplyCore*, a large majority (70%) of the contract dollar value was associated with supplies, specifically the procurement of tires. *SupplyCore*, SBA No. NAICS-5866, at 3. The contractor was required to purchase those tires, however, only from particular vendors designated by the procuring agency. *Id.* at 2. In addition, the contractor would perform a variety of “supply chain management” functions, to include warehouse management, inventory control, and transportation. *Id.* On these facts, OHA found that NAICS code 493190 was properly assigned to the procurement. *Id.* at 10-11. OHA noted that NAICS code 493190 encompasses not only warehouse operations, but also “a range of services, often referred to as logistics services, related to the distribution of goods.” *Id.* at 8 (quoting *NAICS Manual*).

In the instant case, as in *SupplyCore*, although supplies and products do appear to constitute a majority of contract dollar value, many of the supplies and products must be obtained from mandatory sources of supply. Section II.A, *supra*. With regard to such supplies and products, the contractor will have limited, if any, ability to negotiate price, and instead will function as a conduit for the delivery of supplies and products from the mandatory sources. Further, the RFP makes clear that, in addition to providing supplies and products, the contractor must offer a “total supply chain solution,” including warehousing, transportation, a customized e-portal system, and other related services. *Id.* Indeed, the RFP states that the awardee will be selected based largely on its capability and experience in performing such work. *Id.* Thus, as in *SupplyCore*, NAICS code 493190 is appropriate for the instant procurement.

It is worth noting that the instant case differs from *SupplyCore* in that a substantial portion of the supplies and products here are not designated as having a mandatory source of supply. Section II.A, *supra*. Appellant, though, bears the burden of proof in this proceeding, and is silent as to whether a majority of the supplies and products do, or do not, have mandatory sources of supply. Section II.B, *supra*. Nor has Appellant effectively distinguished OHA precedent as set forth in the *SupplyCore* and *PrimeTech* decisions. *Id.* Accordingly, Appellant

has not carried its burden of proving that the assignment of NAICS code 493190 to this RFP was clearly in error.

Because Appellant has not established that NAICS code 493190 is clearly incorrect for the instant procurement, it is unnecessary to consider the NAICS code Appellant advocates, or other alternative codes. It is well-settled that “OHA will not assign a different NAICS code to a procurement unless the CO's choice of NAICS code is shown to be clearly erroneous.” *NAICS Appeal of 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)); *NAICS Appeal of Ascendant Program Servs., LLC*, SBA No. NAICS-5832, at 10 (2017).

#### IV. Conclusion

Appellant has not demonstrated that the CO clearly erred in selecting NAICS code 493190 for this RFP. The appeal therefore is DENIED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge