

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

SIZE APPEAL OF:

All Around Access, LLC,

Appellant,

RE: DAL KAWA Cycle Center, Inc.

Appealed From

Size Determination No. 3-2015-040

SBA No. SIZ-5656

Decided: May 11, 2015

APPEARANCES

Rick Mellert, President, All Around Access, LLC, Naples, Florida

Davis A. Whitfield-Cargile, Esq., Conrad & Scherer LLP, Brevard, North Carolina, for  
DAL KAWA Cycle Center, Inc.

DECISION

I. Introduction and Jurisdiction

On March 2, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2015-040 finding that DAL KAWA Cycle Center, Inc. (DKCC) is an eligible small business for the subject procurement. All Around Access, LLC (Appellant), which had protested DKCC's size, maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

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.

## II. Background

### A. Solicitation and Protest

On December 11, 2014, the U.S. Department of the Air Force (Air Force) issued Request for Quotations (RFQ) No. FE440742730008 for utility vehicles. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 336112, Light Truck and Utility Vehicle Manufacturing, with a corresponding size standard of 1,000 employees. Quotations were due December 23, 2014. The RFQ stated that the acquisition was for commercial items and was being conducted under parts 12 and 13 of the Federal Acquisition Regulation (FAR).

The utility vehicles being procured were required to meet the following specifications: diesel engine; four-wheel drive with front limited slip differential and rear locking differential; heavy duty tires 25 x 12 - 12, 6 ply; heavy duty metal cargo bed; spray on bed liner; two-inch front and rear receiver hitch; front brush guard; electric or hydraulic cargo bed lift; weather-tight cab enclosure; roll down or sliding windows on doors; cab heater; side mirrors; strobe light for top of cab; backup alarm; seat belts; instrument package that includes a speedometer; horn; front headlights; front and rear turn signals; rear brake lights; and spark arresting muffler. (RFQ at 6-7.)

The utility vehicles would also have plows installed. The plow specifications included a 72-inch heavy duty front blade; electric lift; mechanical angulation; 19-inch moldboard height; 72-inch overall cutting width; 48-inch, 7 gauge steel trip frame; standard 2-inch hitch receiver to mount the plow to the vehicle; and blade markers. (*Id.* at 7.)

DKCC submitted its quotation on December 22, 2014, self-certifying as a small business. The quotation was for the Kawasaki 4010 Diesel Mule, Model No. KAF950FDF. On January 26, 2015, the CO announced that DKCC had been selected for award.

On January 29, 2015, Appellant, a disappointed offeror, protested DKCC's eligibility as a small business. Appellant alleged that DKCC is ineligible for award because DKCC would not manufacture the items being procured or comply with the nonmanufacturer rule. Specifically, Appellant asserted, DKCC could not comply with the requirement to provide "the end item of a small business manufacturer or processor made in the United States, or obtain [] a waiver of such requirement." (Protest at 2, citing 13 C.F.R. § 121.406(b)(iv).) Appellant maintained that Kawasaki is a large business and that no waiver applies to the utility vehicles being acquired through this procurement.

Appellant contended that, although there is a class waiver that references NAICS code 336112, the waiver does not apply to the instant procurement. Appellant offered two reasons for this conclusion. First, the NAICS descriptor of the waiver, Automobile Manufacturing, does not match this procurement's NAICS descriptor, Light Truck and Utility Vehicle Manufacturing. Second, there is a mismatch regarding the Product Service Code (PSC). Appellant explained that for a waiver to apply, the PSC for the waiver must match the PSC for the procurement. A PSC is four-digits, the first two of which come from the classification code. In this case, there was no

PSC assigned to the RFQ, and the designated classification code was 99 (Miscellaneous). The PSC for the waiver, however, is 2310 (Passenger Motor Vehicles). As a result, the procurement's classification code is at odds with the waiver's PSC.

With its protest, Appellant attached a copy of *Hydroid LLC*, B-299072, Jan. 31, 2007, 2007 CPD ¶ 20, a bid protest decision from the U.S. Government Accountability Office (GAO). In *Hydroid*, GAO found that the procuring agency acted unreasonably in accepting a firm's statement that it qualified as a small business under the nonmanufacturer rule. The procurement in that case was for an autonomous underwater vehicle (AUV), and the NAICS code designated to the procurement was 334511, Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing. Although SBA's class waiver list included a waiver for NAICS code 334511, GAO determined that the waiver did not apply to the procurement, because the waiver was for "airborne integrated components." *Hydroid*, at 2. The AUV being procured could not be considered "airborne integrated components," so GAO determined that it was unreasonable for the procuring agency to accept the protested firm's representation that it was a small business. The procuring agency instead should have referred the matter to SBA for a determination of whether the protested firm complied with the nonmanufacturer rule. *Id.* at 3. GAO also noted that the procuring agency did not determine that the waiver applied. *Id.* at 2.

On January 30, 2015, the CO responded to Appellant's protest. The CO stated that NAICS code 336112 was "appropriate for the requirement of Utility Vehicles" because the "minimum spec[ification]s required a vehicle complete with front and rear turn signals, hazard lights, break lights, and seat belts. Based on these features, the [PSC] of 2310 Passenger Motor Vehicles . . . was selected as it is the best fit for the requirement." (CO Response, at 1.) The CO also noted that PSC 2310 is listed on the class waiver list in conjunction with NAICS code 336112. *Id.*

On February 17, 2015, the Area Office asked the CO to explain, "If the [PSC] is 2310, why did you put classification code 99 in the solicitation? Shouldn't it have been 23?" (E-mail from D. Inhulsen to K. Watson and S. Back (Feb. 17, 2015). The CO responded that "[t]he 99 used in the posting was an error, but should not change the fact that the NAICS [code] used for this purchase is on the [class waiver] list." (E-mail from S. Back to D. Inhulsen (Feb. 17, 2015).)

### B. Size Determination

On March 2, 2015, the Area Office issued Size Determination No. 3-2015-040, concluding that DKCC is eligible for the instant procurement.

The Area Office stated that, to qualify for a small business set-aside to provide manufactured products, the prime contractor either must manufacture the end item being procured or comply with the nonmanufacturer rule. 13 C.F.R. § 121.406(a). The nonmanufacturer rule provides:

A firm may qualify as a small business concern for a requirement to provide manufactured products or other supply items as a nonmanufacturer if it:

- (i) Does not exceed 500 employees;
- (ii) Is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied;
- (iii) Takes ownership or possession of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice; and
- (iv) Will supply the end item of a small business manufacturer, processor or producer made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(5) of this section.

13 C.F.R. § 121.406(b)(1). SBA regulations further indicate that, where SBA determines that there are no domestic small business manufacturers for a given NAICS code, SBA will issue a waiver to the requirement in paragraph (iv) for that NAICS code. *Id.* § 121.406(b)(5)(ii).<sup>1</sup> The Area Office found that there is a class waiver for NAICS code 336112, which applies to the subject procurement. Accordingly, DKCC did not need to supply the end item of a domestic small business manufacturer.

In finding that there was a waiver for NAICS code 336112, the Area Office observed the following excerpt from the class waiver list:<sup>2</sup>

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<sup>1</sup> Due to an administrative error, this regulation incorrectly refers to a waiver of the requirement in paragraph (b)(1)(iii) instead of paragraph (b)(1)(iv). In 2011, the nonmanufacturer rule was amended to include a new requirement that the firm qualifying as a nonmanufacturer “take[] ownership or possession of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice.” 76 Fed. Reg. 8226, 8252 (Feb. 11, 2011). This requirement was then codified at 13 C.F.R. § 121.406(b)(1)(iii). Prior to this amendment, paragraph (iii) contained the requirement that the qualifying firm “supply the end item of a small business manufacturer . . . made in the United States, or obtain [] a waiver of such requirement pursuant to paragraph (b)(5).” This requirement was redesignated as paragraph (iv) when SBA amended the regulation to include the new requirement in paragraph (iii). *Id.* SBA, however, did not amend paragraph (b)(5) to reflect this change. As a result, although paragraph (iv) refers to paragraph (b)(5), the converse is not true. It is clear from the regulation's context and history, though, that paragraph (b)(5) refers to a waiver of the requirement to provide the end item of a domestic small business manufacturer and not a waiver of the requirement to take possession of the items being procured.

<sup>2</sup> The complete list is published on SBA's website at [https:// www.sba.gov/content/class-waivers](https://www.sba.gov/content/class-waivers).

**CLASS WAIVER LIST as of January 1, 2015**

NOTE: A Class Waiver is not applicable to a procurement unless the NAICS code, Product Service Code (PSC) and NAICS Code Descriptor currently in effect, match the item(s) being procured

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<b>NAICS CODE PRIOR TO 1 OCT 2012</b>	<b>NAICS DESCRIPTOR PRIOR TO 1 OCT 2012</b>	<b>NAICS CODE as of 1 OCT 2012</b>	<b>PRODUCT SERVICE CODE</b>	<b>NAICS DESCRIPTOR as of 1 OCT 2012</b>
336111	Automobile Motor Vehicles, Motor Trucks	336111: Auto-mobile Manufacturing/ 336112: Motor Trucks	2310	Automobile Manufacturing

(Size Determination at 3.) The Area Office noted that the class waiver list contains NAICS codes 336111 and 336112, but only the NAICS descriptor for NAICS code 336111. Although the NAICS descriptor for 336112 is absent, the Area Office determined the descriptor “was inadvertently left off the list.” (*Id.*) The Area Office offered several considerations to support this interpretation. First, when SBA originally issued this waiver, SBA stated that it covers “Automobile Motor Vehicles and Motor Trucks.” 63 Fed. Reg. 38,742 (July 20, 1998). Correspondingly, Automobile Manufacturing is the descriptor for NAICS code 336111, and Light Trucks and Utility Vehicle Manufacturing is the descriptor for NAICS code 336112. Next, NAICS codes 336111 and 3336112 are cited together in the waiver, and PSC 2310 applies to both.

Third, the procuring agency in this case intended that the waiver would apply. On this point, the Area Office observed that PSC 2310 was “not included in the solicitation” but is marked on the DD 2579, an internal small business coordination form. (*Id.*) The “remarks” section of the completed DD 2579 stated that “the manufacturer of the equipment being purchased is a large business; however, the NAICS code, Product Service Code, and NAICS Code Descriptor currently in effect are included on the non-manufacturer rule class waiver list.” (*Id.*) Further, the CO advised the Area Office that a pre-solicitation “sources sought” announcement did not reveal any domestic small business manufacturers. (*Id.*)

The Area Office then concluded that, because SBA had waived the requirement in paragraph (iv) of the nonmanufacturer rule, DKCC only had to comply with the requirements in paragraphs (i)-(iii). The Area Office observed that DKCC has fewer than 500 employees, is an authorized dealer of the items being procured, and has taken possession of the utility vehicles. Accordingly, the Area Office determined, DKCC complies with the nonmanufacturer rule and is eligible for award. (*Id.* at 4.)

### C. Appeal

On March 3, 2015, Appellant filed the instant appeal with OHA. Appellant maintains that the size determination is in error and should be reversed or remanded.

Appellant argues that the Area Office correctly recognized that the original waiver applied to automobile motor vehicles and motor trucks. (Appeal at 2.) However, Appellant maintains, the Area Office “is in error for including new items that did not exist in the original 1998 class waiver.” (*Id.*) Appellant highlights that NAICS code 336112 includes items such as minivans, commercial vans, and motor homes. As a result, Appellant reasons, NAICS code 336112 has a broader scope than “motor trucks.” From this premise, Appellant draws two conclusions: (1) the omission of a PSC and NAICS descriptor for NAICS code 336112 in the Class Waiver List is intentional; and (2) by concluding that the waiver applies to vehicles other than automobiles, the Area Office improperly expanded the scope of the waiver. (*Id.* at 3.)

Appellant then addresses the Area Office's finding that a waiver applies because PSC 2310 matches NAICS codes 336111 and 336112. Appellant argues that there is no basis to conclude that the PSC on the waiver matches the PSC on the RFQ. Appellant observes that the classification code for the RFQ listed the category of items being procured as 99 (Miscellaneous), so the four-digit PSC would begin with that number. For the PSC to be 2310, the RFQ would have had to list a category of 23 (Ground Effect Vehicles, Motor Vehicles, Trailers, and Cycles), which it did not. Assuming the existence of a waiver, on the grounds that PSC 2310 applies to NAICS codes 336111 and 336112, is therefore inconsistent with the text of the solicitation. (*Id.*)

### D. DKCC's Response

On April 13, 2015, DKCC responded to the appeal.<sup>3</sup> DKCC argues that the appeal should be denied, dismissed as moot, or dismissed for lack of standing.

The appeal is moot, DKCC contends, because the nonmanufacturer rule is a contract-specific issue rendered moot by the award of the contract to DKCC. *Size Appeal of Ross Aviation, Inc.*, SBA No. SIZ-4840 (2007).

DKCC argues further that the appeal should also be dismissed because it is not evident that Appellant has suffered a redressable injury. DKCC posits that Appellant does not manufacture the product it proposed, and has submitted no documentation that the manufacturer is a small business. As a result, Appellant may be ineligible for award of the subject contract. (Response at 13-14.)

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<sup>3</sup> On March 4, 2015, OHA issued a Notice and Order establishing a close of record of March 19, 2015. However, DKCC did not receive the Notice and Order until March 25, 2015. On DKCC's motion, OHA reopened the record until April 13, 2015 to permit DKCC an opportunity to respond to the appeal.

If the appeal is not dismissed, DKCC argues that OHA should deny the appeal on the merits. DKCC maintains that NAICS code 336112 best describes the acquisition, it is on the class waiver list, and Appellant did not object to the NAICS designation.<sup>4</sup> The Area Office's determination that the waiver applies to this procurement, moreover, is consistent with the notice in the *Federal Register*, which expressed intent to waive the nonmanufacturer rule for "Automobile Motor Vehicles and Motor Trucks." (*Id.* at 11-12 (quoting 63 Fed. Reg. 38,742 (July 20, 1998).) SBA confirmed this intent when it conducted its Periodic Review of Approved Class Waivers, stating:

Product Service Code	Date in Federal Register	NAICS	Product
2310	7/15/1998	336111	AUTOMOBILE MOTOR VEHICLES, MOTOR TRUCKS.

(*Id.* at 12, citing 74 Fed. Reg. 13,296, 13,297 (Mar. 26, 2009).)

DKCC contends further that PSC 2310, which is on the class waiver list, matches the product being procured. The fact that PSC 2310 was not specifically mentioned in the RFQ is immaterial because, unlike a NAICS code, the regulations do not require a CO to specify the PSC in the solicitation. (*Id.* at 10.)

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 that 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. Preliminary Matters

DKCC moves to dismiss the appeal as moot because the underlying contract has already been awarded to DKCC. This argument fails because "SBA's regulations make clear that, if an area office determines that a challenged concern is an eligible small business, and OHA subsequently reverses after contract award, "the contracting officer may apply the OHA decision to the procurement in question." *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5392, at 5 (2012) (PFR) (quoting 13 C.F.R. § 121.1009(g)(1).) Similarly, FAR 17.207(e)(2) provides that a procuring agency "[m]ay consider the effect on small business" in deciding

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<sup>4</sup> DKCC argues alternatively that other possible NAICS codes—such as 336999, All Other Transportation Equipment Manufacturing—are also on the Class Waiver List. (Response at 9.)

whether or not it will exercise options on an existing contract. The procuring agency also must apply OHA's decision for purposes of determining whether the contract is counted as a proper small business award. 13 C.F.R. § 121.1009(g)(3). Thus, this dispute is not moot merely because the contract has already been awarded to DKCC.

DKCC's argument that Appellant lacks standing to pursue this appeal is also meritless. SBA regulations permit that “[a]ny offeror whom the contracting officer has not eliminated for reasons unrelated to size” may file a size protest. 13 C.F.R. § 121.1001(a)(1)(i). Here, Appellant was an offeror for the procurement in question, and, although Appellant was not selected for award, there is no indication that Appellant was ever “eliminated” from the competition. Further, it is settled law that a protester “has standing to appeal any issue addressed in a size determination, even if the protester did not raise the same issues in its underlying protest.” *Size Appeals of BA Urban Solutions, LLC, et al.*, SBA No. SIZ-5521, at n.5 (2013) (quoting *Size Appeal of Profl Performance Dev. Group, Inc.*, SBA No. SIZ-5398, at n.1 (2012)). Accordingly, Appellant could properly protest the award to DKCC, and has standing to bring the instant appeal.

For these reasons, DKCC's motions to dismiss are DENIED.

### C. Merits

The key issue presented in this case is whether a class waiver of the nonmanufacturer rule applies to the instant procurement. As the Area Office recognized, in order for a class waiver to apply, the NAICS code, PSC, and NAICS code descriptor must match the end item(s) being procured. *See generally* 13 C.F.R. § 121.1202; 79 Fed. Reg. 20,294, 20,294-95 (April 11, 2014) (explaining that “SBA defines ‘class of products’ as an individual subdivision within a NAICS code” and “uses Product Service Codes (PSCs) to further identify particular products within the NAICS code to which a waiver would apply. SBA may then identify a specific item within a PSC and NAICS code to which a class waiver would apply.”). The official list of the classes of products for which waivers of the nonmanufacturer rule have been granted is maintained on SBA's web site. 13 C.F.R. § 121.1205.

Here, there is no dispute that the NAICS code assigned to this procurement, 336112, Light Truck and Utility Vehicle Manufacturing, is the subject of a class waiver. This waiver applies in conjunction with PSC 2310, Passenger Motor Vehicles. Although Appellant emphasizes that PSC 2310 was not identified in the RFQ, the procuring agency represented to the Area Office, and the Area Office verified through contemporaneous evidence, that the intended PSC was 2310. *See* Section II.B, *supra*. Further, according to the definitions in the *PSC Manual*, PSC 2310 includes “complete passenger motor vehicles, and chassis therefor,” and encompasses not only automobiles but also other types of motorized vehicles, such as ambulances and busses. PSC MANUAL at 145.<sup>5</sup> The utility vehicles' specifications included seatbelts, front and rear turn signals, hazard and break lights, a speedometer, and weather-tight

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<sup>5</sup> U.S. General Services Administration, Office of Governmentwide Policy, *Federal Procurement Data System Product Service Code Manual* (2011), available at <http://www.acquisition.gov/pscmanual-final-T1august2011.pdf>.

cab enclosure with doors that have roll down or sliding windows and break lights. Section II.A, *supra*. It is therefore clear that the utility vehicles at issue here can reasonably be considered “complete passenger motor vehicles” under PSC 2310. Accordingly, I find no error in the Area Office's determination that a class waiver applies to the NAICS code and the PSC applicable to this procurement.

Appellant observes that the class waiver list for NAICS code 336112 and PSC 2310 uses the NAICS descriptor “Automobile Manufacturing.” *See* Section II.B, *supra*. In Appellant's view, though, the instant utility vehicles are not automobiles but are more akin to a type of truck. Moreover, according to the class waiver list, prior to October 1, 2012, the NAICS descriptor applicable to this waiver was “Automobile Motor Vehicles, Motor Trucks” but after October 1, 2012 the NAICS descriptor was only “Automobile Manufacturing.” *Id.* By removing the NAICS descriptor “Motor Trucks,” Appellant argues, SBA may have restricted the scope of the class waiver. I find no merit to this argument. As the Area Office explained, when SBA originally issued the instant class waiver in 1998, the waiver applied to “Automobile Motor Vehicles and Motor Trucks,” and contrary to Appellant's contention, there is no indication in the regulatory history that SBA subsequently intended to restrict the waiver only to automobiles. On the contrary, SBA has issued a separate class waiver for trucks which applies to NAICS code 333924 (Industrial Truck, Tractor, Trailer, and Stacker Machinery Manufacturing) and PSC 2320 (Trucks And Truck Tractors, Wheeled). It therefore is clear that SBA does still view trucks as subject to a class waiver. Further, if SBA had intended to exclude light trucks or utility vehicles from the class waiver, there would have been no reason for SBA to continue to include NAICS code 336112 on the class waiver list.

Lastly, Appellant argues that *Hydroid LLC*, B-299072, Jan. 31, 2007, 2007 CPD ¶ 20 is analogous to this case. Key factors, though, distinguish *Hydroid* from the instant case. The waiver at issue in *Hydroid* was for “airborne integrated data components” under PSC 5821 (Radio and Television Communication Equipment, Airborne). *Hydroid* at 2. However, the procurement was for an autonomous underwater vehicle, an end-item plainly beyond the scope of the waived class of products. Here, the class waiver is for automobiles and motor trucks, and the procurement is for utility vehicles with product specifications consistent with those of a passenger vehicle. Unlike the end-item being procured in *Hydroid*, then, the utility vehicles being procured here match the description and examples of the waived PSC. Also dissimilar to *Hydroid*, the procuring agency contends that the waiver applies. Appellant's arguments with respect to *Hydroid* are therefore unconvincing.

#### IV. Conclusion

For the above reasons, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge