

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

SIZE APPEAL OF:

Cypher Analytics, Inc. d/b/a Crown Point  
Systems,

Appellant,

Appealed From  
Size Determination No. 06-2019-006

SBA No. SIZ-5986

Decided: February 19, 2019

APPEARANCES

Steven J. Koprince, Esq., Ian P. Patterson, Esq., Robert D. Kampen, Esq., Koprince Law LLC, Lawrence, Kansas, for the Appellant

Lynda F. Hall, Contracting Officer, Space and Naval Warfare Center Pacific, San Diego, California

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DECISION

I. Introduction and Jurisdiction

On November 8, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2019-006, concluding that Cypher Analytics, Inc. d/b/a Crown Point Systems (Appellant) is not eligible for award of the subject procurement, because Appellant is not the manufacturer of the end items being acquired and does not qualify as a nonmanufacturer. Appellant 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 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. The Solicitation

On January 25, 2018, the U.S. Department of the Navy, Space and Naval Warfare Systems Center Pacific (SPAWAR) issued Request for Proposals (RFP) No. N66001-17-R-0191 for “OCONUS Navy Enterprise Network (ONE-NET) Technology Procurement Support for IT Hardware.” More specifically, the contractor will provide “PCs and IT hardware in accordance with specifications,” and will ship the equipment primarily to locations outside of the continental United States (OCONUS) in Europe, the Far East, and Middle East. (RFP, Statement of Work (SOW) at 1.) The RFP specified minimum technical requirements for various types of computer equipment, including desktops, notebooks, tablets, and mini desktop PCs. (RFP at 3-40; SOW at 3-9.) The RFP did not call for the contractor to provide mainframe computers. (*Id.*)

The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industrial Classification System (NAICS) code 334111, Electronic Computer Manufacturing, with a corresponding size standard of 1,250 employees. (RFP at 1.) According to the RFP, “the small business size standard for a concern which submits an offer in its own name, but which proposes to furnish an item which it did not itself manufacture, is 500 employees.” (*Id.* at 43). The RFP stated that the Navy planned to award a single indefinite-delivery/indefinite-quantity (ID/IQ) contract with a one-year base period and two one-year options. (*Id.* at 40-41.) In an announcement accompanying the RFP, the CO informed prospective offerors that “[a] class non-manufacturer rule (NMR) waiver will apply to the solicitation.”

### B. Proposal

Appellant submitted its initial proposal, including price, on March 19, 2018. The proposal included Appellant's unit pricing for the various items of equipment identified in the RFP. Appellant certified that it was authorized by the manufacturers of the products to sell the items, and noted that many items would be ordered from, and shipped directly from, Dell EMC, a large business. (Proposal at I-1.) Appellant represented that it is a small business under NAICS code 334111, with fewer than 1,250 employees. (*Id.* at I-51.) On June 15, 2018, Appellant submitted its final proposal revisions.

### C. Protest

On October 9, 2018, the CO announced that Appellant was the apparent awardee. A disappointed offeror, GovSmart, Inc. (GovSmart), filed a size protest with the CO, challenging Appellant's size. GovSmart alleged that Appellant will not itself manufacture the computer equipment described in the RFP. According to GovSmart, “no company can provide computers as a small business unless they make them in-house, which [Appellant] do[es] not.” (Protest at 1.) Further, GovSmart contended, Appellant does not qualify as a nonmanufacturer. Although there is a class waiver of the nonmanufacturer rule for NAICS code 334111, that waiver applies

only to mainframes, “which are large super-computers the size of a room,” not to ordinary computer equipment. (*Id.*)

#### D. Protest Referral and Protest Response

The CO forwarded GovSmart's protest to the Area Office for review, along with an explanation of events surrounding the instant procurement. (Letter from M. Tell to E. Sanchez (Oct. 10, 2018).) According to the CO, before the RFP was issued, SBA's Procurement Center Representative (PCR) and the SPAWAR Small Business Office agreed that the class waiver of the nonmanufacturer rule for NAICS code 334111 does apply to this procurement. (*Id.*) On March 16, 2018, shortly before proposals were due, GovSmart wrote the CO, arguing that “the class waiver for [NAICS code] 334111 applies to mainframes and nothing else.” (*Id.*) SPAWAR rejected this contention because “stand-alone work stations [are] the modern equivalent of a mainframe computer,” and the docking stations and accessories identified in the RFP are comparable to mainframe “periphery equipment.” (*Id.*) The CO also urged the Area Office to dismiss GovSmart's protest as untimely because it “does not relate to the size standard, but rather, to the class waiver of the non-manufacturer rule.” (*Id.*)

On October 18, 2018, Appellant responded to the protest, and provided its completed SBA Form 355, payroll documentation, corporate documents, and a spreadsheet detailing the manufacturers of the equipment sought in the RFP. Appellant acknowledged that it is not the manufacturer of the end items being acquired, but asserted that “[u]nder this NAICS code [334111] there is a Non-Manufacturer class waiver allowing [Appellant] to provide a proposal, as a small business, even though [Appellant] is not manufacturing the goods.” (Letter from R. Marovich to E. Sanchez (Oct. 18, 2018).)

#### E. Size Determination

On November 8, 2018, the Area Office issued Size Determination No. 06-2019-006, concluding that Appellant is ineligible for the subject procurement. The Area Office found that the class waiver of the nonmanufacturer rule was incorrectly applied, and that Appellant does not qualify as a nonmanufacturer. (Size Determination at 2.)

The Area Office first explained that Appellant itself is a small business. Based on Appellant's payroll records, Appellant has fewer than 1,250 employees, the size standard associated with this RFP. (*Id.* at 6.)

Next, the Area Office observed that the RFP calls for the delivery of manufactured items, specifically computer hardware. (*Id.* at 6-7.) Under 13 C.F.R. § 121.406(a), a concern qualifies to provide manufactured goods for a small business set-aside if it is the manufacturer of the end items, or if it meets certain nonmanufacturer exceptions. (*Id.* at 7.) Appellant conceded that it is not the manufacturer of the end items here. (*Id.*) Further, the exceptions for kit assemblers and simplified acquisitions are not applicable. (*Id.*) As a result, Appellant is eligible for award of this procurement only if it complies with the nonmanufacturer rule at 13 C.F.R. § 121.406(b).

The Area Office explained that the nonmanufacturer rule consists of four required elements, the last of which is that the prime contractor “[w]ill supply the end item of a small business manufacturer, processor, or producer made in the United States, or obtains a waiver of such requirement . . . .” (*Id.* at 12, quoting 13 C.F.R. § 121.406(b)(1)(iv).) By Appellant's own admission, Appellant will supply the products of large businesses including Dell EMC. (*Id.*) The Area Office therefore addressed whether a waiver of the fourth element is applicable to this procurement.

The Area Office reviewed the SBA Class Waiver List<sup>1</sup> and found that there is a class waiver pertaining to NAICS code 334111. (*Id.* at 8.) However, the waiver applies only to procurements of “Mainframe Computers and Peripherals” under Product Service Code (PSC) 7021. (*Id.*) The Area Office noted that, in describing the waiver in the *Federal Register*, SBA commented that “[o]nly mainframe computers within [PSC 7021] are being waived; smaller central processing units are not being waived.” (*Id.*, quoting 56 Fed. Reg. 42,524, 42,525 (Aug. 28, 1991).) SBA added that the waiver applies “only to mainframe computers and peripheral equipment (not other computers) acquired on the same procurement and necessary to support that mainframe in an operational systems environment.” (*Id.*, quoting 56 Fed. Reg. at 42,524.)

The Area Office found that SBA issued a class waiver for mainframe computers because SBA determined that there are no small business manufacturers of such items. (*Id.*) Conversely, SBA made clear that it did not intend to issue a waiver for other types of computer equipment, because small manufacturers do exist. (*Id.* at 8-9, citing 55 Fed. Reg. 22,799, 22,800 (June 4, 1990).) The Area Office found no evidence that the scope of the waiver was subsequently revised to include other equipment such as personal computers, workstations, or micro-computers, or to include evolving technology. (*Id.* at 10.) SBA reviewed its Class Waiver List in March 2009 and concluded that there were no small business manufacturers of mainframes, so the waiver remained in effect. (*Id.*)

The Area Office noted that although the class waiver does not define a “mainframe,” SBA did identify types of computer equipment were excluded from the waiver, either because the products are not mainframes or because small manufacturers of the products were found. (*Id.*) The Area Office reviewed the instant RFP and found that it primarily requires desktop computers, notebooks, tablets, and mini desktop PCs, none of which are mainframe computers covered by the class waiver. (*Id.*) “Instead, the equipment being procured in the [RFP] appears to fall in the equipment classes that SBA intentionally excluded from [the] class waiver.” (*Id.*) The Area Office also verified that SBA did not issue any procurement-specific waiver for the instant RFP. (*Id.* at 12.)

Appellant acknowledged that it would not manufacture the end items in question, and would not supply the products of small businesses. (*Id.*) Since there is no individual or class waiver applicable to this procurement, the Area Office found Appellant did not meet the fourth element of the nonmanufacturer rule at 13 C.F.R. § 121.406(b)(1)(iv). (*Id.* at 13.) Therefore,

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<sup>1</sup> The list is available online at <https://www.sba.gov/document/support—non-manufacturer-rule-class-waiver-list>.

Appellant is ineligible for this procurement. (*Id.*) The Area Office declined to address whether Appellant meets the other elements of the nonmanufacturer rule. (*Id.*)

#### F. Appeal

On November 21, 2018, Appellant filed the instant appeal, arguing that the Area Office clearly erred in determining that Appellant is ineligible for award. (Appeal at 1.) Appellant contends that it reasonably relied on the CO's representation that a class waiver would apply to the RFP. By concluding that the CO was mistaken, the Area Office “effectively invalidated the SBA's policy objectives in making contracting officers responsible for determining class waiver applicability.” (*Id.* at 2.)

Appellant characterizes GovSmart's protest as “nothing more than an untimely challenge to the terms of the Solicitation.” (*Id.*) In Appellant's view, GovSmart could have contested the NAICS code assigned to the RFP, or the terms of the RFP, but instead waited until SPAWAR had made an award decision before challenging Appellant's size. (*Id.*) Appellant maintains “the fact GovSmart's protest was even considered is an additional clear error.” (*Id.* at 6.)

Appellant first argues that the size determination is flawed because the Area Office “second guesses the [CO's] determination that a class waiver applies to the procurement, and subsequently penalizes [Appellant] for relying on the [CO's] assertion that [a nonmanufacturer rule] class waiver applied to the procurement.” (*Id.*) Appellant highlights that SBA may issue a class waiver when it “determines that no small business manufacturer or processor of the product or class of products is available to participate in the Federal procurement market.” (*Id.* at 7, quoting 13 C.F.R. § 121.406(b)(5)(ii).) Rather than expecting small businesses to ascertain for themselves whether a class waiver is applicable to a given procurement, though, SBA places this responsibility with the CO. (*Id.* at 8.) As a result, SBA regulations stipulate that a waiver cannot be applied to a procurement unless the CO first notifies prospective offerors of the waiver at the time the solicitation is issued. (*Id.* at 9, citing 13 C.F.R. § 121.1206.)

Appellant reasons that “[l]ogically, the inverse must also be true.” (*Id.* at 10.) That is, “[i]n the event the [CO] notifies offerors a class waiver applies to a particular procurement, such waiver must apply even if the [CO] is mistaken.” (*Id.*) To hold otherwise would destabilize the procurement process because offerors could not rely on a CO's statements as to whether a class waiver applies to a procurement. (*Id.* at 10-11.) Appellant maintains that SBA regulations reflect the underlying policy priority that there must be “a level playing field for offerors, even if some competitions were not in absolute conformity with [nonmanufacturer rule] waivers.” (*Id.* at 11.) In Appellant's view, the Area Office should not have questioned the CO's assertion that a class waiver applies to this procurement, and should instead have limited its review to considering whether Appellant meets the other elements of the nonmanufacturer rule. (*Id.* at 14.)

The Appellant also contends that the Area Office erred in not dismissing GovSmart's protest as an untimely challenge to the assigned NAICS code and/or to the terms of the solicitation. (*Id.*) Appellant highlights that GovSmart's protest indicated that GovSmart considered the RFP non-compliant with procurement regulations, and as such, “GovSmart's

protest is really a challenge to the application of the [nonmanufacturer rule] class waiver.” (*Id.* at 15.) Further, the protest suggested that no small business could comply with the terms of the RFP. Thus, GovSmart did not take issue specifically with Appellant's size, but rather with the procurement itself. (*Id.*)

Appellant observes that a bid protest against the terms of a solicitation must be filed prior to the deadline for receipt of proposals. (*Id.* at 16.) Requiring a protester to voice any objections to a class waiver prior to the due date for proposals is similarly sound policy, as it encourages an efficient and fair procurement process. (*Id.* at 17.) Appellant construes GovSmart's approach as pure gamesmanship, because GovSmart competed for the award, and, when not selected, “GovSmart protested a feature of the [RFP] it has known about since the [RFP's] issuance.” (*Id.*)

#### G. Motion to Supplement the Record

Accompanying the appeal, Appellant moved to introduce new evidence. Specifically, Appellant seeks to admit the CO's announcements that a class waiver would apply to the instant RFP. Appellant argues that there is good cause to admit the announcements because they “should have been determinative for the Area Office's class waiver analysis.” (Motion at 2.) Further, although Appellant did not provide the announcements to the Area Office during the size review, Appellant “was unaware that the Area Office would erroneously undertake its own investigation into the underlying applicability of [nonmanufacturer rule] waivers” until after the size determination was issued. (*Id.* at 4.) No party opposes Appellant's motion to introduce new evidence.

I find that Appellant has shown good cause to admit the announcements. It is undisputed that the CO did inform prospective offerors of her belief that a class waiver would apply to this procurement. The announcements therefore are relevant to the issues on appeal and do not enlarge the issues. Further, Appellant reasonably explains that it could not have anticipated the need to provide the announcements to the Area Office during the size review. For these reasons, Appellant's motion to admit new evidence is GRANTED and the two announcements regarding the class waiver are ADMITTED into the record.

#### H. CO's Response

On December 10, 2018, the CO responded to the appeal. The CO agrees with Appellant that GovSmart's protest should have been dismissed. (CO's Response at 1.) GovSmart did not provide any specific facts to suggest that Appellant is not small, nor did GovSmart challenge Appellant's self-certification as a small business. Thus, “[w]hile styled as a size protest, the substance of GovSmart's protest was not size.” (*Id.* at 3.)

The CO argues that GovSmart's protest should be viewed as an untimely NAICS code appeal. GovSmart's protest ultimately pertained to the assigned NAICS code and the associated class waiver, and GovSmart was well aware of these issues when the RFP was issued. According to the CO, allowing GovSmart to invalidate the award when GovSmart had the opportunity to challenge the NAICS code at a much earlier stage is detrimental to the procurement process. (*Id.*)

### I. SBA's Response

On December 11, 2018, SBA responded to the appeal. SBA argues that the Area Office correctly found that Appellant is ineligible for award. Therefore, the appeal should be denied.

SBA asserts that the CO mistakenly determined that a class waiver for mainframe computers applies to the instant procurement, even though the procurement is not for mainframe computers. The CO's error, however, does not alter the fact that only SBA has authority to grant a waiver of the nonmanufacturer rule. (SBA Response at 5.) Similarly, under OHA case precedent, in order to waive the requirements of the nonmanufacturer rule, "the dispositive fact is not whether the [CO] has identified a given class waiver, but whether the items being procured are in fact covered by the waiver." (*Id.* at 3, citing *Size Appeal of All Around Access, LLC*, SBA No. SIZ-5656 (2015).)

SBA argues that Appellant has not presented facts or arguments to support the conclusion that Appellant meets the requirements of the nonmanufacturer rule, nor does Appellant argue that it will supply products made by a small businesses or that an individual waiver has been granted for this procurement. (*Id.* at 4.) Instead, Appellant contends that a class waiver should apply to this procurement because the CO said so. (*Id.*) Such an argument has no support in the Small Business Act or in SBA regulations. (*Id.* at 4-5.)

SBA concludes:

The Small Business Act gives the authority for deciding which items should be waived to the Administrator of the [SBA], not to the contracting officer. The Administrator has provided neither a class waiver nor individual waiver for the items being procured. Therefore, SBA believes that the Area Office[']s decision not to apply the [nonmanufacturer rule] waiver exception if the items being procured have not themselves been waived should be affirmed on appeal.

(*Id.* at 5.)

### J. GovSmart's Comments

While this appeal was pending, GovSmart copied OHA on several e-mails indicating that GovSmart agrees with SBA's response, and disagrees with the CO's response and with the appeal petition. Under OHA's rules of procedure, however, a reply to another party's response typically is not permitted. 13 C.F.R. § 134.309(d). Further, because GovSmart directed the communications to other parties rather than to OHA, it does not appear that GovSmart intended the messages to constitute a response to the appeal. Accordingly, OHA will treat the e-mails as expressing GovSmart's concurrence with SBA's response, rather than as replies to other parties' responses, or as GovSmart's own response to the appeal.

### 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. Analysis

The Area Office determined, and Appellant does not dispute, that the end items being procured here are not subject to a class waiver of the nonmanufacturer rule. Specifically, the instant procurement calls for computer equipment under NAICS code 334111, but not mainframe computers. Section II.A, *supra*. Although SBA has granted a class waiver for NAICS code 334111 and PSC 7021, that waiver applies only to “mainframe computers and peripherals,” and peripheral equipment is covered only if a mainframe computer is acquired in the same procurement. Section II.E, *supra*. Indeed, when issuing the class waiver, SBA repeatedly emphasized that the waiver does not apply to computers other than mainframes. 56 Fed. Reg. 42,524 (Aug. 28, 1991). Similarly, OHA has previously examined the scope of the waiver, and has found that the waiver does not extend to non-mainframe computers, even if the other computers have enhanced performance capabilities that are comparable to those of a mainframe computer. *Size Appeals of Mela Assocs., Inc. and Encore Computer Corp.*, SBA No. SIZ-3632 (1992). Accordingly, the Area Office correctly concluded that there is no class waiver covering the end items in this procurement. Because there is no waiver, and because Appellant will not supply the products of small businesses, it follows that Appellant is not compliant with the nonmanufacturer rule and is not eligible for award of the subject procurement. 13 C.F.R. § 121.406(b).

In seeking to overturn the size determination, Appellant does not take issue with the conclusion that the end items here fall outside the scope of the waiver granted for NAICS code 334111 and PSC 7021. Rather, Appellant argues that offerors should be permitted to rely on the CO's assertion that a class waiver applied to this procurement, even though the CO was incorrect on this point. Section II.F, *supra*. Appellant points to 13 C.F.R. § 121.1206, which requires that a CO notify prospective offerors of a waiver of the nonmanufacturer rule. Under the regulation, if the CO fails to provide such notice, the waiver will not apply to that procurement. Appellant urges that “the inverse must also be true,” such that the CO's opinion as to whether a waiver applies is controlling, even if the CO is incorrect. *Id.*

I find no merit to Appellant's argument. Both the Small Business Act and accompanying regulations make clear that only SBA may grant a class waiver of the nonmanufacturer rule. 15 U.S.C. § 637(a)(17)(B)(iv); Federal Acquisition Regulation (FAR) 19.102(f); 13 C.F.R. § 121.406(b)(5). Further, a proper class waiver is the result of notice and comment rulemaking. 13 C.F.R. § 121.1204. To give effect to a CO's erroneous belief that a class waiver applies would,



essentially, allow individual COs to create new class waivers, bypassing SBA and circumventing notice and comment requirements, and thus is contrary to law.

The regulatory history of 13 C.F.R. § 121.1206 further demonstrates that SBA did not intend that there could be any waiver of the nonmanufacturer rule absent SBA's express authorization. SBA rejected suggestions that requests for waivers be assumed to be granted unless SBA objected, explaining:

[T]he commenters requested that a waiver requested by CO be assumed granted if SBA does not respond in [a] specified period of time. Two commenters requested language that would allow bidders to assume pending waiver requests are granted when they submit offers. SBA cannot adopt these recommendations. The Small Business Act is clear that only SBA may grant a waiver of the [nonmanufacturer rule].

81 Fed. Reg. 32,243, 34,255 (May 31, 2016).

Contrary to Appellant's suggestions, then, 13 C.F.R. § 121.1206 merely requires that a CO must provide notice of any nonmanufacturer rule waivers granted by SBA. Nothing in § 121.1206 indicates that an individual CO has authority to issue a class waiver. In fact, SBA's *Federal Register* commentary underscores that SBA intended to retain the exclusive prerogative to grant waivers of the nonmanufacturer rule. Because SBA alone has authority to grant a new class waiver, a CO's mistaken belief that a class waiver applies to a given procurement is not binding.

Appellant also argues that, from a policy standpoint, prospective offerors should be permitted to rely on the CO's opinion as to whether a waiver applies, instead of being obliged to conduct their own research into the matter. Disagreement with the policies reflected in SBA rules, though, are beyond OHA's jurisdiction, and must instead be directed to SBA policy officials. It is well-settled that OHA has no authority to determine the propriety of the regulations themselves. *E.g.*, *Size Appeals of GTA Containers, Inc. and MPC Containment Systems, LLC*, SBA No. SIZ-5760, at 7 (2016); *Size Appeal of Rich Chicks, LLC*, SBA No. SIZ-5556, at 7 (2014).

Appellant and the CO also maintain that the Area Office should have dismissed GovSmart's protest as an untimely NAICS code appeal or as an untimely challenge to the terms of the RFP. These arguments too are meritless. While brief, GovSmart's protest alleged that Appellant is not an eligible small business because no class waiver applies to this procurement, and because Appellant will not manufacture the computer equipment described in the RFP. Section II.C, *supra*. These allegations are directly pertinent to deciding whether Appellant is an eligible small business for purposes of the instant procurement. Thus, the Area Office correctly treated the protest as presenting size allegations. Because GovSmart raised a valid size protest, the timeliness of the protest is assessed under size protest rules rather than the deadlines associated with bid protests. *Size Appeal of Red River Computer Co., Inc.*, SBA No. SIZ-5512, at 14 (2013). Appellant and the CO also complain that GovSmart should have voiced its concerns earlier in the procurement process. Under 13 C.F.R. § 121.1004(e), though, any size protest filed

before award would have been dismissed as premature. While it may be true that GovSmart could have filed a NAICS code appeal and/or a bid protest against the RFP, Appellant and the CO cite no authority for the proposition that GovSmart was required to do so in order to preserve its right to subsequently bring a size protest.

IV. Conclusion

Appellant has not shown clear error in the size determination. The appeal therefore 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