Cite as: *Size Appeal of Hardie's Fruit & Vegetable Company South, LP,* SBA No. SIZ-5347 (2012)

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

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| SIZE APPEAL OF:<br><br>Hardie's Fruit & Vegetable Company South, LP,<br><br>Appellant,<br><br>RE: M&S Foods Co., Ltd.<br><br>Appealed From<br>Size Determination No. 3-2012-037 | SBA No. SIZ-5347<br><br>Decided: May 8, 2012 |

## APPEARANCES

Johnathan M. Bailey, Esq., and Christopher G. Burwell, Esq., Bailey & Bailey, P.C., San Antonio, Texas, for Appellant

Pamela J. Mazza, Esq., and Isaias "Cy" Alba, IV, Esq., PilieroMazza PLLC, Washington, D.C., for M&S Foods Co., Ltd.

## DECISION[1]

### I. Introduction and Jurisdiction

This case is the latest in a series of legal battles between Hardie's Fruit & Vegetable Company South, LP (Appellant) and M&S Foods Co., Ltd. (M&S) over procurements to provide fresh fruits and vegetables to Department of Defense (DoD) installations. The prior disputes between these parties have spanned several years, and have given rise to numerous size determinations, multiple appeals to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA), and litigation in the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit.

The instant dispute arises from Size Determination No. 3-2012-037, issued on January 31, 2012 by SBA's Office of Government Contracting Area III (Area Office), finding that M&S is a small business for Blanket Purchase Agreements (BPAs) Nos. SPM300-12-D-P116 and

[1] This decision was initially issued on April 30, 2012. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information withheld from the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

SPM300-12-D-P117. Appellant maintains that the size determination is clearly erroneous and requests that OHA reverse the size determination and find that M&S is not a small business. For the reasons discussed *infra*, the size determination is vacated and the matter is remanded to the Area Office for further review and investigation.

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. Prior Litigation

The parties disagree, among other matters, as to whether the prior litigation between them is dispositive of the issues presented here. Consequently, a review of these prior decisions is essential in considering the instant dispute.

#### 1. *M&S I*

On July 24, 2006, the Defense Logistics Agency, Defense Supply Center Philadelphia (DSCP) issued solicitation SMP300-06-R-0008 seeking a full line of fresh fruits and vegetables for DoD activities located throughout the United States. The Contracting Officer (CO) set aside the procurement exclusively for small businesses. The solicitation indicated that contracts would be awarded for various geographical regions of the country, and notified prospective offerors that SBA's Associate Administrator for Government Contracting had granted a waiver of the nonmanufacturer rule, 13 C.F.R. § 121.406, for this particular acquisition.

In March 2008, the CO announced that M&S was the apparent successful offeror for the San Antonio region. Appellant subsequently protested M&S's size. The Area Office determined that M&S was affiliated with Fresh Point-City Produce, LP (Fresh Point), a subsidiary of Sysco Corporation (Sysco), under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). M&S then appealed to OHA. OHA reversed the size determination and concluded that M&S was a small business. *Size Appeal of M&S Foods Ltd. Co.*, SBA No. SIZ-4971 (2008) (*M&S I*). In its decision, OHA focused largely on the fact that SBA had waived the nonmanufacturer rule for this procurement, explaining that:

> SBA granted the CO's request for a waiver of the nonmanufacture[r] rule for this procurement without limitations. SBA accepted the CO's determination that no small business manufacturers are capable of performing the contract in accordance the government's specifications. Therefore, it was clear error for the Area Office to attempt to constrain a waiver of the nonmanufacture[r] rule specifically granted for this procurement and inappropriate for the Area Office to find [M&S] other than small due to unusual reliance on a subcontractor.

*M&S I*, at 6.

Appellant sought review of *M&S I* in the U.S. Court of Federal Claims. On September 15, 2008, the Court issued an unpublished Order denying Appellant's complaint and upholding OHA's decision. *Hardie's Fruit & Vegetable Co. — South, LP v. U.S.*, Docket No. 08-534C (2008). The Court found that OHA's determination that the waiver covered all aspects of the solicitation was reasonable, as was its reliance on SBA's waiver of the nonmanufacturer rule. Appellant later appealed the Court's ruling to the U.S. Court of Appeals for the Federal Circuit, but the appeal was dismissed because the underlying solicitation had since been cancelled, rendering the appeal moot. *Hardie's Fruit and Vegetable Co. South, LP v. U.S.*, 329 F. App'x 264 (Fed. Cir. 2009).

2. *M&S* II and *Tulsa Fruit*

While the *M&S I* litigation was ongoing, the Area Office issued another size determination finding that M&S was unduly reliant upon a subcontractor for a different geographical region of the same procurement. M&S again appealed to OHA. In light of the similarities with *M&S I*, OHA solicited comments from SBA regarding the appeal. SBA moved to remand the matter to permit the Area Office to issue a new size determination, and OHA granted the motion. *Size Appeal of M&S Foods Ltd. Co.*, SBA No. SIZ-4988 (2008) (*M&S II*). Following remand, the Area Office reversed course and determined that M&S was an eligible small business. The original protester, Tulsa Fruit Co., Inc. (Tulsa Fruit), attempted to challenge the new size determination before OHA, but the appeal was untimely and was dismissed. *Size Appeal of Tulsa Fruit Co., Inc.*, SBA No. SIZ-5015 (2008).

3. Subsequent Litigation

DSCP cancelled solicitation SMP300-06-R-0008 and began planning a new long-term procurement for the provision of produce. In the interim, DSCP has met its produce requirements by awarding short-duration procurements to competing vendors. In August 2010, Appellant and Tulsa Fruit challenged one such award to M&S. The Area Office determined that M&S was a small business. Appellant and Tulsa Fruit then appealed to OHA. OHA dismissed the appeals because the issues presented (nonmanufacturer rule and ostensible subcontractor rule) were contract-specific, and a regulation existing at that time restricted OHA from considering contract-specific matters after award. *Size Appeals of Hardie's Fruit and Vegetable Co. South, LP, et al.*, SBA No. SIZ-5156 (2010).

B. Current Solicitations and Protests

The instant appeal arises from a size determination pertaining to two different BPAs.[2] BPA No. SPM300-12-D-P116 (the "Fort Hood BPA") is for fresh fruits and vegetables

[2] The record is unclear as to whether the procurements in question were intended as new BPAs, or as new purchase orders under existing BPAs. The procurements themselves are in the nature of purchase orders, as there is no statement of work and the solicitations incorporated the terms and conditions from an existing BPA. Further, offerors' proposals consisted merely of

at Fort Hood, Texas. BPA No. SPM300-12-D-P117 (the "San Antonio BPA") is a substantially similar procurement for troop customers in San Antonio, Texas. The BPAs were awarded under FAR Part 13 (Simplified Acquisition Procedures), with a three-month period of performance, covering January 2012 to March 2012. Following receipt of proposals from competing vendors, DSCP ultimately awarded the BPAs to M&S.

DSCP issued the solicitation which led to the Fort Hood BPA on November 22, 2011. The solicitation indicated that DSCP was seeking fresh fruits and vegetables for a three-month period, and provided estimated quantities of various types of produce representing "anticipated usage for this period." The solicitation stated that the procurement "is a small business set-aside," but no North American Industry Classification System (NAICS) code or size standard is identified in the solicitation.[3] The quotations submitted by Appellant and M&S are included in the record, but do not identify a NAICS code or size standard. M&S offered the lowest total price ($169,967.53), and was selected for award. On December 7, 2011, Appellant was notified that M&S would be awarded the Fort Hood BPA. Appellant filed its size protest on December 9, 2011.

On November 23, 2011, DSCP issued the solicitation which led to the San Antonio BPA. Like the solicitation for the Fort Hood BPA, the solicitation for the San Antonio BPA indicated that DSCP was seeking three months' worth of fresh fruits and vegetables, and provided estimated quantities of produce that were expected to be ordered over that three-month term. The solicitation indicated that the procurement was set-aside for small businesses, but did not identify any NAICS code or size standard. DSCP received quotations from four vendors, including Appellant and M&S. M&S offered the lowest total price ($726,018.06) and was selected for award. On December 15, 2011, Appellant was notified that M&S would be awarded the San Antonio BPA. Appellant subsequently filed a size protest with the CO.[4]

Appellant's protest alleged that M&S will not perform the primary and vital requirements of the procurement, and that M&S is unduly reliant on its subcontractor, Fresh Point, a Sysco

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proposed pricing for various estimated quantities of fruits and vegetables. On the other hand, the solicitations characterized each of the procurements as a "Fixed Price BPA," and the CO advised the Area Office that individual orders under the BPAs would be between $500 and $1500. No such orders are included in the record. The Area Office determined that the procurements were new BPAs, and OHA adopts this interpretation for purposes of this decision.

[3] The solicitation further indicated that the terms and conditions of an earlier BPA were incorporated by reference. A copy of that BPA is included in the record as Exhibit F to M&S's protest response. The earlier BPA likewise does not identify any NAICS code or size standard.

[4] The record contains only Appellant's protest pertaining to the Fort Hood BPA, not the San Antonio BPA. In response to an inquiry from OHA, the Area Office indicated that Appellant filed a separate size protest for each procurement, and that the issues raised in the protests are identical.

subsidiary. Appellant also questioned whether M&S can qualify as a small business if it does not provide the product of a small business, and asserted that DSCP did not request a waiver of the non-manufacturer rule for the particular procurement. Appellant further claimed that M&S did not comply with new requirements of the nonmanufacturer rule set forth at 13 C.F.R. § 121.406(b)(iii).

DSCP forwarded Appellant's protest to the Area Office. In an accompanying memorandum, the CO stated that the applicable NAICS code was 424480, Fresh Fruit and Vegetable Merchant Wholesalers, and that the applicable size standard was 500 employees. The CO further indicated that the approximate value of individual orders under the BPAs was between $500 and $1500.

## C. Size Determination

On January 31, 2012, the Area Office issued its size determination finding that M&S is a small business for the procurements.[5] According to the size determination, the applicable NAICS code was 424480, Fresh Fruit and Vegetable Merchant Wholesalers, with an associated size standard of 500 employees. (Size Determination at 1.)

The Area Office recognized that SBA previously had granted a waiver of the nonmanufacturer rule for the procurement at issue in *M&S I*, *M&S II*, and *Tulsa Fruit*. However, that waiver was specific to the particular acquisition, which has since been cancelled. (*Id.* at 5.) The Area Office found that DSCP did not request a waiver of the nonmanufacturer rule for the instant procurements. (*Id.*)

The Area Office next determined that the procurements fell within the exception to the nonmanufacturer rule for simplified acquisitions less than $25,000. 13 C.F.R. § 121.406(d); FAR 19.102(f)(7). The Area Office observed that the BPAs were processed under the simplified acquisition procedures, as set forth in FAR Part 13. Furthermore, the Area Office stated that a BPA is not a formal contract, and that a binding contract is not formed until orders are issued under the BPA. Because individual orders were expected to be less than $25,000, the Area Office concluded that the exception was applicable. The Area Office explained:

> For the instant BPA the contracting officer provided SBA a maximum anticipated dollar value for individual purchase orders based on past ordering history well below $25,000. Therefore, since this BPA was established under FAR Part 13 and each individual purchase order under the BPA is anticipated to be below the $25,000 threshold, SBA provides an exception to the nonmanufacturer rule ....

[5] Although Appellant reportedly filed protests against the awards of both BPAs, the size determination referred only to BPA No. SPM300-12-D-P117, which is mistakenly labeled the "Fort Hood Purchase Order." (Size Determination at 1.) On February 24, 2012, OHA issued an order for clarification as to which procurement or procurements size determination 3-2012-037 addressed. On February 28, 2012, the Area Office responded that the size determination in fact addressed both the San Antonio and Fort Hood BPAs.

> The issues of whether the products supplied are manufactured by a large business concern or whether a nonmanufacturer waiver is extant are moot.
> Additionally, the issue of whether an ostensible subcontractor relationship exists is also moot since this issue is inapplicable to a contract for supplies from a nonmanufacturer.
>
> . . .
>
> M&S may provide a product made by a large business in the United States due to the Simplified Acquisition Procedures used to establish the BPA and due to the value of each order being under the $25,000 threshold.

(Size Determination at 6-7.)

D. Appeal Petition

On February 15, 2012, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the size determination is clearly erroneous and should be overturned.

Appellant argues the Area Office erred as a matter of law in applying the exception to the nonmanufacturer rule for simplified acquisitions below $25,000. Appellant maintains that the exception applies to procurements, not to contracts or individual orders. In this case, the procurements were for three months' worth of fresh fruits and vegetables. According to M&S's own proposals, the value of such produce was $169,967.53 for the Fort Hood BPA and $726,018.06 for the San Antonio BPA. Appellant asserts that the exception applies only if the procurement as a whole is less than $25,000. Because the value of these BPAs exceeded the $25,000 threshold, Appellant insists that the Area Office erred in applying the exception. Instead, according to Appellant, the Area Office should have considered whether M&S otherwise satisfied the nonmanufacturer rule.

Appellant next contends that M&S's relationship with Sysco violates a provision recently added to the nonmanufacturer rule, which requires that a firm "[t]ake[ ] ownership or possession of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice." 13 C.F.R. § 121.406(b)(iii). Appellant argues that SBA's intent in adopting this provision was to address:

> situations where SBA has waived the nonmanufacturer rule and the prime contractor essentially subcontracts all services, such as warehousing or delivery, to a large business. Such an arrangement, where the prime contractor can legally provide the product of a large business and then subcontract all tangential services to a large business, is contrary to the intent and purpose of the Small Business Act, i.e., providing small businesses with an opportunity to perform prime contracts.

(Appeal at 4, quoting 76 Fed. Reg. 8222, 8226 (Feb. 11, 2011)). Appellant asserts that the M&S-Sysco relationship is the kind of relationship the new rule was designed to target. Appellant argues that M&S cannot take possession of the produce or arrange for transportation because

M&S has no warehouses or trucks. Therefore, contends Appellant, M&S brings nothing to the relationship with Sysco other than its small business status.

Appellant further contends the size determination was clearly erroneous because the Area Office did not evaluate the substance of M&S's argument that M&S did not need trucks or warehouses to satisfy 13 C.F.R. § 121.406(b)(iii). Appellant contends that if the regulation can be satisfied with bare theoretical ownership, the rule would permit the sorts of relationships that SBA intended to prevent.

Appellant further argues that M&S is affiliated with Fresh Point under the ostensible subcontractor rule and under the totality of the circumstances. According to Appellant, affiliation exists under the ostensible subcontractor rule because M&S is reliant upon Sysco to perform the primary and vital contract functions, including obtaining, storing, and delivering produce to the end customers. Appellant acknowledges that, in *M&S I*, OHA overturned a finding that M&S was affiliated with a subcontractor which had been based on the ostensible subcontractor rule; however, Appellant maintains that OHA's reasoning centered on the waiver of the nonmanufacturer rule that had been granted for that particular procurement, a factual circumstance not present in the instant case. (Appeal at 11.) Appellant also argues that affiliation exists under the totality of the circumstances for two reasons. First, Appellant alleges that M&S and Sysco have a lengthy history of using M&S's name to bid on contracts that Sysco performs entirely. Second, Appellant asserts that Sysco has substantial power to control M&S by withholding facilities and the supply of fresh produce.

E. M&S's Response

On March 15, 2012, M&S filed a response to Appellant's size appeal. In the response, M&S contends that it does satisfy the new requirements set forth at 13 C.F.R. § 121.406(b)(iii), which contemplate that a non-manufacturer take "ownership or possession" of the items produced. M&S maintains that by purchasing goods from its suppliers, it is taking ownership. M&S does not specifically address the remainder of Appellant's arguments because M&S asserts that "this new 'ownership or possession' requirement is the only difference between the instant case and the prior five years of litigation over these produce contracts." (Response at 1-2, emphasis in original.) M&S maintains that the prior litigation is dispositive of the issues presented here.

M&S also directs OHA's attention to M&S's January 19, 2012 response to Appellant's protests. In its protest response, M&S asserted that Appellant's arguments with respect to 13 C.F.R. § 121.406(b)(iii) were baseless because M&S would take ownership of the produce being delivered by purchasing it. M&S's protest response further argued that "the issue of whether a nonmanufacturer waiver exists is moot" because DSCP established the BPAs under the simplified acquisition procedures. (Protest Response at 2.) M&S asserted that the exception to the nonmanufacturer rule in 13 C.F.R. § 121.406(d) would apply, such that no waiver was necessary. M&S also noted that, supposing that a waiver were necessary, DSCP obtained one in 2006 for the predecessor solicitation which was at issue in *M&S I*, *M&S II*, and *Tulsa Fruit*. The M&S protest response argued that the ostensible subcontractor rule was not applicable because the BPAs were supply contracts, so the nonmanufacturer rule applied instead.

Finally, M&S's protest response addressed Appellant's contention that M&S and Fresh Point were affiliated under the totality of the circumstances. M&S stated that its contracts with Fresh Point constitute a limited percentage of M&S's total revenues. M&S further asserted that the only reason M&S entered into multiple contracts with Fresh Point was because of litigation brought by Appellant and other competitors. As a result, according to M&S, DSPC had little choice but to issue multiple procurements of short duration. Finally, M&S addressed Appellant's allegation that Fresh Point/Sysco controlled M&S. According to M&S, Appellant alleged only that M&S could not adequately perform the instant procurements without Fresh Point's cooperation. M&S contended that the ability to control a single contract or aspect of a business is not sufficient grounds for a finding of general affiliation because there is no true control of the company as a whole. *Size Appeal of Weidlinger Assocs., Inc.*, SBA No. SIZ-4846 (2007).

F. Appellant's Supplemental Comments and Motion to Introduce Additional Evidence

On March 15, 2012, the date of the close of record, Appellant filed supplemental comments in support of its appeal petition, and a motion to introduce various exhibits attached to the supplemental comments. Appellant argues that there is good cause to admit such evidence because Appellant did not have access to the information M&S submitted to the Area Office until the appeal was initiated and OHA issued a protective order for the case.

Appellant's supplemental comments advance three arguments. First, Appellant maintains that M&S did not describe how it would take ownership or possession of the items to be sold "with its personnel, equipment, or facilities in a manner consistent with industry practice" pursuant to 13 C.F.R. § 121.406(b)(iii). Second, Appellant asserts that M&S answered questions affirmatively in its SBA Form 355 which support a finding of affiliation with Fresh Point/Sysco. Third, Appellant argues that the revenue data M&S reported to the Area Office does not correspond with other public information.

With regard to 13 C.F.R. § 121.406(b)(iii), Appellant offers three reasons why M&S's operations are noncompliant. First, Appellant asserts that M&S did not expressly claim that its operations are consistent with standard industry practice. Next, Appellant maintains that M&S did not describe the details of Fresh Point/Sysco's role in M&S's operations. For example, while M&S indicated that it has a "vast network" of other suppliers, M&S did not specifically identify those other suppliers. Finally, Appellant contends it is unclear whether M&S ever owns the produce because Fresh Point reportedly keeps the produce in its warehouses until it delivers the produce to the Government. In Appellant's view, there is no definite point when Fresh Point transfers the risk of loss to M&S.

Next, Appellant argues that M&S's responses on the SBA Form 355 indicate general affiliation between M&S and Fresh Point. Appellant complains that M&S answered the following questions affirmatively, but did not provide explanatory detail:

> 16. At the time of bid opening or request for assistance or at the present, have any services been performed by business for any alleged, acknowledged, or possible affiliate, or vice versa?

> 19. Have there been or are there any current financial obligations between business and an alleged or acknowledged affiliate?
> 25. Have there been or are there any actual or proposed subcontracts between business and any of the alleged or acknowledged affiliates?
> 26. Were there any discussions as to specific terms or conditions relating to the subject contract which took place between business and any of the alleged or acknowledged affiliates prior to bid opening?
> 27. Will any of the alleged or acknowledged affiliates perform more than 25 percent of this contract?

Appellant argues that the answers to these questions are relevant to an analysis of whether there is affiliation under the totality of the circumstances.

Finally, Appellant maintains in its supplemental comments that the revenue data M&S submitted does not correspond with publicly available information. Specifically, M&S reported on its Form 355 that its total gross sales were $753,261 in 2008, $706,575 in 2009, and $672,111 in 2010. Appellant argues that these figures differ substantially from data on the Government's public spending disclosure website, USAspending.gov. Appellant insists that "a discrepancy of this magnitude cannot be easily explained," and should have prompted further inquiry. (App. Supp. Comments at 8.)

M&S did not respond to the supplemental comments or Appellant's motion to introduce new evidence.

## 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 instant size determination is problematic in two respects. First, OHA is unable to ascertain which NAICS code(s) and size standard(s), if any, were assigned to the solicitations which led to the underlying BPAs. The NAICS code referenced by the Area Office is a wholesale trade code, impermissible for Government contracts. As a result of the NAICS code uncertainty, it is unclear whether the Area Office should have analyzed these procurements under the nonmanufacturer rule, and whether the Area Office properly disregarded Appellant's protest allegations pertaining to the ostensible subcontractor rule. Second, assuming that the Area Office was correct to invoke the nonmanufacturer rule in the first instance, Appellant has persuasively demonstrated that the Area Office erred in applying the simplified acquisition exception to these

procurements. At a minimum, then, a more comprehensive analysis of M&S's compliance with the nonmanufacturer rule would be necessary. In light of these issues, I find it appropriate to remand this matter to the Area Office for further review and analysis.

1. Wholesale Trade NAICS Code

According to SBA regulation, the NAICS code assigned to a given procurement is the crucial consideration in determining whether the nonmanufacturer rule is applicable. Specifically, the regulation instructs that the nonmanufacturer rule applies "only to procurements that have been assigned a manufacturing or supply NAICS code."13 C.F.R. § 121.406(b)(3). Conversely, the nonmanufacturer rule does not apply to procurements with a services NAICS code, even when there is also a substantial supply component to such an acquisition. *Id.* at (b)(3) and (b)(4). Additionally, SBA has previously opined in the *Federal Register* that the nonmanufacturer rule does not apply to NAICS codes for agricultural commodities. *See* 74 Fed. Reg. 55,694, 55,696-97 (Oct. 28, 2009) ("the nonmanufacturer rule would not apply to situations where a procuring agency is acquiring agricultural commodities that are not processed or changed and the procuring agency classifies the contract as crop production under NAICS Subsector 111.").

In this case, the solicitations which led to the Fort Hood and San Antonio BPAs are in the record. Both solicitations indicate that "[t]his solicitation is a small business set aside," without identifying a particular NAICS code. Nor does the record reveal which NAICS code(s) and size standard(s) were used by offerors to self-certify themselves as small businesses. Accordingly, the record does not demonstrate which NAICS code was assigned to the procurements, information essential to determining whether the nonmanufacturer rule is applicable.

The size determination indicates that the procurements were assigned NAICS code 424480, Fresh Fruit and Vegetable Merchant Wholesalers. (Size Determination at 1.) This code, however, is a wholesale trade NAICS code, and SBA regulation prohibits the use of wholesale trade NAICS codes in the context of Government procurements. Specifically, 13 C.F.R. § 121.402(b) provides that: "Acquisitions for supplies must be classified under the appropriate manufacturing NAICS code, not under a Wholesale Trade or Retail Trade NAICS code." Similarly, in a notation to the size standards for the Wholesale Trade NAICS sector, SBA warns that:

> These NAICS codes shall not be used to classify Government acquisitions for supplies. They also shall not be used by Federal Government contractors when subcontracting for the acquisition for supplies. The applicable manufacturing NAICS code shall be used to classify acquisitions for supplies.

13 C.F.R. § 121.201 (notation to Sector 42). As discussed above, then, OHA is not able to verify from the record which NAICS code was actually assigned to these procurements. Even supposing that NAICS code 424480 had been assigned, however, that code was improper.

The record contains a prior size determination involving a predecessor procurement, in which the Area Office considered the use of NAICS code 424480. (M&S Response at Exhibit

M.) In this earlier determination, the Area Office found that NAICS code 424480 was inappropriate in light of the regulatory restrictions on wholesale trade NAICS codes; the Area Office instead conducted its own analysis of that solicitation and selected NAICS code 111998, All Other Miscellaneous Crop Farming.[6] Because NAICS code 111998 is for agricultural commodities, the nonmanufacturer rule might not apply if that code were used, pursuant to SBA's above-referenced guidance in the *Federal Register*. Thus, I cannot conclude that the nonmanufacturer rule necessarily applies to these procurements.

In sum, based on the record provided, OHA is unable to ascertain how the Area Office determined that NAICS code 424480 was assigned to the BPAs, or why the Area Office believed NAICS code 424480 would be appropriate even if it had been assigned. Depending upon which NAICS code is applicable, the nonmanufacturer rule may or may not apply. The Area Office therefore erred in applying the nonmanufacturer rule without first determining the relevant NAICS code.

Because the Area Office concluded that the nonmanufacturer rule was applicable, the Area Office did not address Appellant's protest allegations concerning the ostensible subcontractor rule. Rather, the Area Office found those allegations ""moot" on the grounds that "this issue is inapplicable to a contract for supplies from a nonmanufacturer." (Size Determination at 6.) Accordingly, the Area Office's assumption that the nonmanufacturer rule applied was not harmless, as it resulted in a large portion of Appellant's protest allegations being summarily rejected. Before disregarding these allegations, the Area Office should first have determined the relevant NAICS code, and considered whether the nonmanufacturer rule applied to the BPAs.

2. Exception for Simplified Acquisitions

A second problem with the size determination involves its conclusion that the BPAs fell within the exception to the nonmanufacturer rule for simplified acquisitions that are less than $25,000. As discussed below, Appellant has persuasively shown that, even assuming the nonmanufacturer rule were applicable in the first instance, the Area Office erred in determining that the BPAs fell within this exception.

The "nonmanufacturer rule" provides that, when a manufacturing or supply contract is set aside for small businesses, an offeror either must be the manufacturer or producer of the end item, or must fall within certain ""nonmanufacturer" exceptions. 13 C.F.R. § 121.406; FAR 19.102(f). One such exception, recognized at 13 C.F.R. § 121.406(d) and FAR 19.102(f)(7), is for suppliers under the Simplified Acquisition Procedures set forth in FAR Part 13. Specifically, 13 C.F.R. § 121.406(d) permits that:

[6] In its protest response, M&S likewise stated that the use of NAICS code 424480 for the instant BPAs would be "incorrect." (M&S Response at n.1.) Referring to the earlier size determination, M&S urged that "this Area Office [[has previously] ruled that, with regard to an identical contract, the correct NAICS code was 111998 ...." (*Id.*)

> Where the procurement of a manufactured item is processed under Simplified Acquisition Procedures, as defined in § 13.101 of the Federal Acquisition Regulation (FAR) (48 CFR 13.101), and where the anticipated cost of the procurement will not exceed $25,000, the offeror need not supply the end product of a small business concern as long as the product acquired is manufactured or produced in the United States, and the offeror does not exceed 500 employees. The offeror need not itself be the manufacturer of any of the items acquired.

The FAR's version of the exception is substantially similar to 13 C.F.R. § 121.406(d), stating that:

> The SBA provides for an exception to the nonmanufacturer rule if--
> (i) The procurement of a manufactured end product processed under the procedures set forth in part 13--
> (A) Is set aside for small businesses; and
> (B) Is not anticipated to exceed $25,000; and
> (ii) The offeror supplies an end product that is manufactured or produced in the United States or its outlying areas.

FAR 19.102(f)(7).

In the instant case, the Area Office found that the procurements in question were simplified acquisitions conducted under FAR Part 13. Specifically, the procurements are BPAs as described in FAR 13.303. Although the total estimated value of each BPA was much larger than $25,000, the Area Office reasoned that a BPA is not a formal contract, because no legally enforceable instrument exists until such time as a procuring agency issues orders against the BPA. *See generally* 13 C.F.R. § 121.404(g)(3)(vi) ("A Blanket Purchase Agreement (BPA) is not a contract. Goods and services are acquired under a BPA when an order is issued."). The Area Office observed that, according to DSCP, the anticipated value of individual orders under the BPAs was between $500 and $1500. As a result, the Area Office found that the exception for simplified acquisitions was applicable to the procurements, because each individual order would be less than $25,000.

Appellant counters that the nonmanufacturer exception for simplified acquisitions does not apply here because each procurement is for three months' worth of fresh fruits and vegetables, the value of which exceeds $25,000. Indeed, M&S itself proposed $169,967.53 for the Fort Hood BPA, and $726,018.06 for the San Antonio BPA. Appellant insists that the Area Office misinterpreted the exception because the Area Office applied the $25,000 threshold to individual orders within each procurement, rather than to the total value of each procurement.

I must agree with Appellant that the Area Office erred in applying the exception for simplified acquisitions. While it is true that both procurements were conducted under the simplified acquisition procedures of FAR Part 13, the plain language of 13 C.F.R. § 121.406(d) and FAR 19.102(f)(7) indicates that the exception applies only if the anticipated cost of "the procurement" will not exceed $25,000. This language makes clear that the exception applies when the acquisition as a whole is less than $25,000, not when individual orders within a

procurement are less than $25,000. In this case, the solicitations stated that the procuring agency was seeking three months' worth of fresh fruits and vegetables. The solicitations provided estimated quantities of produce that would be purchased over that three-month period, and offerors submitted pricing covering the full three months. Thus, both DSCP and the competing vendors plainly viewed each BPA as a single procurement covering a three-month period, not as series of discrete micro-purchases. I find, therefore, that the value of each procurement exceeded $25,000, and the exception to the nonmanufacturer rule for simplified acquisitions does not apply.

As Appellant emphasizes, the Area Office's reasoning also is questionable from a policy standpoint. If the exception for simplified acquisitions were to apply whenever individual orders are less than $25,000, the nonmanufacturer rule could easily be circumvented simply by limiting each order to $25,000 or less. Such a practice would also be at odds with FAR 13.003(c)(2), which prohibits Government agencies from subdividing a procurement into multiple small purchases "merely to permit the use of simplified acquisition procedures" or to avoid legal requirements.

In reaching its decision, the Area Office gave significant weight to the fact that a BPA is not a legally enforceable "contract." While this may be so, the above regulations indicate that the exception applies to "procurements" less than $25,000, not to "contracts" less than $25,000. "Procurement" and ""contract" are not synonymous terms. Rather, "procurement" is much broader in scope, encompassing the entire life-cycle of an acquisition. 41 U.S.C. § 111 ("the term 'procurement' includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout"); *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008) (adopting above statutory definition of "procurement."). Further, a single "procurement" may potentially include multiple "contracts." FAR 2.101 (defining "procurement" as synonymous with "acquisition," and distinct from "contract," and indicating that there may be more than one contract within a given acquisition). Accordingly, although the BPAs may not be binding ""contracts," I find that each BPA, including the various orders issued thereunder, is nevertheless a "procurement" within the meaning of 13 C.F.R. § 121.406(d) and FAR 19.102(f)(7).

Because each BPA is a procurement exceeding $25,000, the Area Office erred in applying the exception to the nonmanufacturer rule for simplified acquisitions that are less than $25,000. Rather, assuming the nonmanufacturer rule was applicable based on the NAICS code assigned, the Area Office should have conducted a more comprehensive examination of M&S's compliance with the rule.

3. Effect of Prior Litigation

M&S urges OHA to conclude that the prior litigation between the parties is dispositive of the issues presented here. As outlined in Section II.A, *supra*, it is quite true that there have been numerous prior cases involving similar procurements. Nearly all of these cases, however, were ultimately dismissed on procedural grounds. Only one prior case — *M&S I* and the related litigation before the U.S. Court of Federal Claims — reached the merits, and that case is readily

distinguishable from the instant dispute. *M&S I* turned largely on the fact that SBA had granted a waiver of the nonmanufacturer rule for that particular acquisition. The solicitation that was at issue in *M&S I*, however, has since been canceled. The Area Office recognized that the waiver applied only to that specific procurement, and that DSCP did not seek a waiver of the nonmanufacturer rule for the procurements currently at issue. (Size Determination at 5.) As a result, the decisive factor in *M&S I* is not extant in the instant case. For this reason, the prior litigation is not dispositive of the issues presented here.

It is also worth noting that the nonmanufacturer rule itself was amended subsequent to *M&S I*. As Appellant emphasizes, the rule now envisions that a nonmanufacturer will "take[ ] ownership or possession of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice." 13 C.F.R. § 121.406(b)(iii). The issue was not, and could not have been, addressed in *M&S I*. Accordingly, the prior litigation does not control the instant case.

4. Remand

On remand, the Area Office should examine which NAICS code and size standard apply to the BPAs. Depending upon the applicable NAICS code, the Area Office should consider whether the nonmanufacturer rule applies. If the nonmanufacturer rule does apply, each BPA is a procurement exceeding $25,000; therefore, the Area Office should examine whether M&S complies with 13 C.F.R. § 121.406 and FAR 19.102(f), without utilizing the exception to the nonmanufacturer rule for simplified acquisitions that are less than $25,000. If the Area Office finds that the nonmanufacturer rule does not apply, the Area Office should then consider whether M&S is otherwise affiliated with Fresh Point, as alleged in Appellant's protests.

## IV. Conclusion

Appellant has demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is GRANTED, the size determination is VACATED, and the matter is REMANDED to the Area Office for further determination. Because I am remanding this case for further review and investigation, it is unnecessary to rule upon Appellant's motion to introduce new evidence on appeal. *Size Appeal of Mark Dunning Industries, Inc.*, SBA No. SIZ-5284, at 12 (2011); *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5069, at 5 (2009).

KENNETH M. HYDE
Administrative Judge