

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

SIZE APPEAL OF:

Point Blank Enterprises, Inc.

Appellant,

RE: Central Lake Armor Express, Inc.

Appealed From

Size Determination No. 04-2018-044/045

SBA No. SIZ-5982

Decided: February 8, 2019

APPEARANCES

James Y. Boland, Esq., Paul A. Debolt, Esq., Michael T. Francel, Esq., Chelsea B. Knudson, Esq., Venable LLP, Washington, D.C., for Point Blank Enterprises, Inc.

Ronald L. Fouse, Esq., Karlee Starr Blank, Esq., McGuireWoods LLP, Washington, D.C., for Central Lake Armor Express, Inc.

Alison Mueller Amann, Esq., Office of General Counsel, for the Small Business Administration

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On October 2, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office), issued Size Determination No. 04-2018-044/045, concluding that Central Lake Armor Express, Inc. (CLAE), is an eligible small business for two procurements at issue.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find that CLAE is not an eligible small business for this procurement. For the reasons discussed *infra*, I affirm the size determination and deny the appeal.

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<sup>1</sup> I originally issued this Decision under a Protective Order. After receiving and considering one or more timely request for redactions, I now issue this redacted Decision.

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 October 31, 2017, UNICOR/Federal Prison Industries, Inc., in Manchester, Kentucky (UNICOR), issued Request for Quotations (RFQ) No. RFQ CT2232-18 for ballistic panels and inserts for vests (the UNICOR procurement). The RFQ was unrestricted, but contained Federal Acquisition Regulation (FAR) clause 52.219-4 providing for a HUBZone Price Evaluation Preference (PEP). The Contracting Officer (CO) assigned to the RFQ North American Industry Classification System (NAICS) code 315990, with a corresponding 500-employee size standard. Central Lake Armor Express, Inc. (CLAE) self-certified as a small business on December 7, 2017, with its initial offer on the UNICOR procurement.

On August 24, 2018, the CO notified unsuccessful offerors that CLAE was the apparent successful offeror for the UNICOR procurement. On August 30, 2018, Point Blank Enterprises, Inc. (Appellant), filed with the CO a size protest against CLAE. Appellant alleged CLAE is not an eligible small business because it is affiliated through common management with ModusLink Corp. (ModusLink), Steel Connect, Inc. (Steel Connect), and Aerojet Rocketdyne (Aerojet) and Aerojet's subsidiary Easton Development, LLC (Easton), and affiliated by merger with KDH Defense Systems, Inc. (KDH). The CO forwarded the protest to the SBA Area Office for a size determination.

In an unrelated procurement, on February 1, 2018, the U.S. Marine Corps, Marine Corps Systems Command, in Quantico, Virginia, issued Request for Proposals (RFP) No. M67854-18-R-1305 for the purchase of Plate Carrier Generation III Soft Armor Inserts (the USMC procurement). The Contracting Officer set the USMC procurement aside for small business, and designated it under NAICS code 339113, with a corresponding 750 employee size standard. Initial offers were originally due on March 19, 2018, but Amendment No. 0002, dated March 6, 2018, extended the initial offer date to March 30, 2018. CLAE self-certified as a small business on March 30, 2018, with its initial offer on the USMC procurement.

### B. The Size Determination

On October 2, 2018, the Area Office issued Size Determination No. 04-2018-044/045, concluding that CLAE, combined with its affiliates, is an eligible small business for both procurements. The Area Office found that the correct date to determine CLAE's size was December 7, 2017, the date CLAE self-certified as small with the submission of its initial offer, including price. The Area Office dismissed Appellant's argument, that CLAE's size should also be determined as of the date of contract award under 13 C.F.R. § 126.601(c), because that rule does not apply to size determinations. (Size Determination at 2-3.)

The Area Office found that Armor Express Intermediate, Inc. (AEI), owns a majority interest in CLAE and therefore controls it. AEI is in turn owned and controlled by Praesidium, LLC (Praesidium). The Area Office thus found both AEI and Praesidium affiliated with CLAE. Praesidium is majority-owned and controlled by SBJ Fund, LP (SBJ). The Area Office found SBJ is not affiliated with CLAE because SBJ is a small business investment company. (*Id.* at 3, citing 13 C.F.R. § 121.103(b)(1).) The Area Office further found CLAE owns a majority interest in, and is affiliated with, three other firms: KDH, Armor Express Properties, LLC (AEP), and Armor Express Canada, Ltd. (AEC). (*Id.* at 4.)

The Area Office then considered Appellant's argument that CLAE is affiliated through common management with Steel Connect and its subsidiary, ModusLink, because James Henderson serves as Chief Executive Officer (CEO) of all three concerns. The Area Office noted that a director merely serving on more than one board or as part of management is not enough to cause affiliation. Rather, the person exercising common management must have critical influence or the ability to exercise substantive control over a concern's operations. Thus, for there to be common management, Mr. Henderson must have the ability to control both CLAE and Steel Connect as of December 7, 2017. (*Id.* at 4, citing 13 C.F.R. § 121.103(e).)

The Area Office found no common management for several reasons. First, Mr. Henderson did not become CLAE's CEO until January 5, 2018, after CLAE's self-certification date. He became CLAE's president on April 24, 2018, and joined its Board on July 24, 2018. (*Id.* at 5.) The Area Office found some confusion as to Mr. Henderson's appointment to the Board, but CLAE's bylaws provide for directors to be elected at the shareholders' annual meeting, and the file contains a record of CLAE's July 24, 2018 action confirming Mr. Henderson's election to the Board. (*Id.* at 5 and n.9.) Therefore, there cannot have been common management between CLAE and Steel Connect as of the date to determine size. Further, the Area Office found Steel Connect's majority shareholder is Steel Partners Holdings, L.P. (Steel Partners), and that it, not Mr. Henderson, controls Steel Connect. (*Id.* at 5.)

The Area Office further found that under CLAE's and Steel Connect's bylaws, any director or the entire Board may be removed by a vote of the majority of shares. Therefore, AEI, CLAE's majority owner, controls CLAE. Steel Partners owns a majority of Steel Connect. There was, therefore, no common management between the two concerns based on Mr. Henderson's positions. (*Id.* at 5.)

The Area Office noted that the Boards of CLAE and Steel Connect are each composed of seven individuals, and that Mr. Henderson, as one director, could never have the power to control the seven-member Board. Further, CLAE's bylaws provide that a director may be removed by a majority vote of the shareholders with or without cause, and so any control by the directors is illusory, and Mr. Henderson's position on the Board does not support a finding of common management. Because AEI is the majority shareholder, AEI, not Mr. Henderson, controlled CLAE. (*Id.* at 5-6, citing CLAE Bylaws, Art. 3.02.)

The Area Office then considered Appellant's allegations that CLAE is affiliated with Aerojet and Easton, based on the claim that Mr. Henderson served on both Boards. Again, the Area Office concluded that Mr. Henderson was not on CLAE's Board on December 7, 2017, so

Appellant's common management allegation must fail. Also, because Mr. Henderson could be removed from CLAE's Board at AEI's discretion, any control he has over CLAE was illusory, and therefore there was no common management between the concerns. (*Id.* at 6.)

The Area Office further considered the claim by Hardwire, LLC (Hardwire), the protestor in the USMC procurement, that CLAE is affiliated with Generations Management (GM). The Area Office found GM has a small holding in Praesidium that could not serve as a basis for finding control. (*Id.* at 6.) Hardwire also claimed GM controls two seats on CLAE's Board. GM owns a majority of, and thus controls, Bullet Proof Investment, LLC (Bullet Proof), and Bullet Proof names two of CLAE's seven Board members. However, because AEI has the power to remove any directors with or without cause, GM has no power to control Praesidium, and thus no affiliation with CLAE. (*Id.* at 6-7.)

The Area Office concluded that CLAE's employees, combined with those of its affiliates Praesidium, AEI, KDH, AEP, and AEC, do not exceed the applicable 500 employee (UNICOR) and 750 employee (USMC) size standards.

### C. The Appeal

On October 2, 2018, Appellant received the size determination and, on October 5, 2018, filed the instant appeal. Appellant takes issue with some of the Area Office's factual findings. Appellant argues Mr. Henderson has served on AEI's Board since at least 2016, became Executive Chairman in January 2018, and is also AEI's CEO. Mr. Henderson became CEO of ModusLink in March 2016, and CEO of Steel Connect in February 2018. Mr. Henderson has also served as a director of Aerojet and a manager of Easton. Appellant notes that exhibits included with its protest show ModusLink and Aerojet each have over 1000 employees. In January 2018, Mr. Henderson became CEO of Praesidium, the owner of CLAE and KDH. Also, CLAE and KDH have completed a merger. (Appeal at 2-3.) Appellant also states, "upon information and belief" that the Area Office's calculation of CLAE's and KDH's number of employees failed to include substantial augmentation by temporary employees. (*Id.* at 3.)

Appellant's principal argument is that because the instant UNICOR RFQ includes Federal Acquisition Regulation (FAR) clause 52.219-4 providing for a PEP for HUBZone small business concerns, CLAE's size should be determined as of the date of the award, as well as of the date of its initial offer. (*Id.* at 3.) Appellant cites to FAR clause 52.219-4, which states:

The HUBZone small business offeror acknowledges that a prospective HUBZone awardee must be a HUBZone small business concern at the time of award of this contract. . . . If the apparently successful HUBZone offeror is not a HUBZone small business concern at the time of award of this contract, the Contracting Officer will proceed to award to the next otherwise successful HUBZone small business concern or other offeror.

FAR 52.219-4(g).

Appellant argues the Area Office erred in not determining CLAE's size as of the date of award. (*Id.* at 7.) The RFQ expressly incorporated FAR 52.219-4 which requires a HUBZone offeror to be small at time of award (here on August 24, 2018), and also requires that offeror to notify the contracting officer of any material changes pursuant to 13 C.F.R. § 126.501. Material changes include a change in ownership, business structure, or principal office of the concern, which are directly related to a concern's size. (*Id.* at 7-8.) In not determining CLAE's size at time of award, the Area Office has rendered meaningless FAR 52.219-4 and the HUBZone rules requiring a HUBZone concern also to be a small business. (*Id.* at 7-8.) Appellant also argues that *Size Appeal of Tescom*, SBA No. SIZ-5641 (2015), on which the Area Office relied, is inapposite because it does not deal with FAR 52.219-4 or a HUBZone PEP. (*Id.*)

Appellant asserts the Area Office erred in determining when Mr. Henderson became a director of CLAE. Appellant points to an apparent contradiction in the size determination, which states that Mr. Henderson was neither an officer nor a director of CLAE at the time it self-certified, but which later states that he was serving as a director at the time of the UNICOR procurement. (*Id.* at 10.) Appellant further states that publicly-available information, including a Securities and Exchange Commission (SEC) filing, shows Mr. Henderson as a CLAE Board member since September 2015 and September 2016. (*Id.*, citing Protest Exhibits 11, 13, 16, 19.) Appellant argues the Area Office's admitted confusion about Mr. Henderson's status establishes that it did not know whether he was a member of CLAE's Board at the time size must be determined. Appellant argues the totality of the circumstances establish that Mr. Henderson was a CLAE Board member and CEO-in-waiting at the time of proposal submission, because the CEO appointment was announced just weeks after proposal submission. (*Id.* at 10-11.)

Appellant further argues the Area Office erred in not finding common management affiliation between CLAE and Steel Connect at time of award. A finding of common management affiliation does not require that the person exercising common management have total control of the concern, just critical influence or the ability to exercise substantive control over operations. The Area Office's analysis focused only on actual board control and ownership, and ignored the presumption that senior officers of a concern (CEOs, Presidents) exercise critical influence over each concern. Mr. Henderson was CLAE's CEO, president and director at the time of award, but the Area Office failed to address these facts due to its misplaced focus on the wrong date for determining size. (*Id.* at 11-12.)

Appellant maintains the Area Office erred in focusing on the power of a majority shareholder to remove directors without cause. Appellant points to *Size Appeal of Radiant MEMS, Inc.*, SBA No. SIZ-5600 (2014), where OHA held that to find common management illusory merely because an officer could be removed from their position would eviscerate common management as a basis for affiliation. Appellant argues that here, to conclude that there is no common management because Mr. Henderson may be removed would end common management as a basis for affiliation. (*Id.* at 13-15.)

Finally, Appellant argues the Area Office erred in failing to find affiliation between CLAE and Steel Connect under the totality of circumstances at the time of CLAE's initial offer. Appellant maintains that publicly-available information proves that in December, 2017, Mr. Henderson served as a director of CLAE. Further, the Area Office should have considered that

because CLAE's merger with KDH was nearing completion, Mr. Henderson was CEO-in-waiting of CLAE, and the Area Office should have analyzed whether he had already begun to exercise control over CLAE. (*Id.* at 15-16.)

#### D. CLAE's Response to the Appeal

On October 24, 2018, CLAE responded to the appeal. CLAE begins by taking issue with Appellant's factual assertions. CLAE's employee counts submitted to the Area Office expressly included temporary workers and totaled fewer than 500. CLAE reasserted that Mr. Henderson became CLAE's CEO, but not president, on January 5, 2018, despite the information in news reports Appellant relies upon. While the Area Office noted some confusion, it did resolve these issues. (Response at 4-5.)

CLAE maintains that its size must be determined only as of December 7, 2017, the date of its self-certification with its initial offer, and not also at award. Nothing in the solicitation, including FAR clauses, can override the SBA's regulations which require a determination of size as of the date of the initial offer, including price. Further, nothing in the HUBZone regulations or FAR clause 52.219-4 requires a size determination be issued as of date of contract award. (*Id.* at 7-10.)

CLAE further maintains that as of the date of the initial offer, Mr. Henderson had no role in CLAE's management, and the Area Office was therefore correct in finding he had no control over CLAE. Mr. Henderson became CLAE's CEO on January 5, 2018, president on April 24, 2018, and a Board member on July 24, 2018. As of December 7, 2017, the date for determining size, Mr. Matt Davis was still CLAE's president. (*Id.* at 11.)

CLAE further notes that it stated in its SBA Form 355 that Mr. Henderson was elected to its Board on July 24, 2018, well after the date for determining size. This fact resolves any confusion as to when Mr. Henderson joined CLAE's Board. Even so, as one of only seven Board members, Mr. Henderson could not control the Board. (*Id.* at 12-13.)

Further, CLAE maintains that while Mr. Henderson is Steel Connect's president and CEO, control lies with Steel Partners, which owns a majority of stock and controls Steel Connect's Board. The majority shareholder controls the Board by appointing four of its seven seats. This makes it clear there is no common control by virtue of Mr. Henderson's position with Steel Connect. (*Id.* at 14, citing *Size Appeal of U.S. Builders Group*, SBA No. SIZ-5519 (2013).) CLAE further states that Steel Connect's publicly-available proxy statement filed with the SEC discloses it is a "controlled company." CLAE argues OHA should defer to the judgment of the SEC and apply its definition of control. Mr. Henderson, despite his title, does not control Steel Connect. (*Id.* at 15-17.)

CLAE further asserts the Area Office properly concluded it was a small business even with its affiliates' employees added to the headcount. Further, Mr. Henderson was not on CLAE's leadership team on the date to determine size, and had no ability to control CLAE. (*Id.* at 18-20.)

### E. Appellant's Supplemental Appeal

On November 7, 2018, after reviewing the file under the terms of a protective order, Appellant filed its Supplemental Appeal. Appellant reasserts its position CLAE's size must be determined as of the date of award. CLAE's precedents are inapposite to this appeal. The HUBZone regulations expressly require that to be eligible, a firm must be a small business concern. (Supplemental Appeal at 1-4, citing 13 C.F.R. § 126.103.)

Appellant further argues that nothing in the record rebuts the presumption of control of Steel Connect by Mr. Henderson, its CEO. The Area Office failed to consider the well-established presumption that officers in senior leadership positions exercise critical influence over a company. There is no evidence Mr. Henderson does not exercise critical influence over Steel Connect. The Area Office considered only stock ownership, without considering common management as a basis for finding affiliation. The Area Office also erred in failing to consider Mr. Henderson's duties and responsibilities in his ability to control the company. (*Id.* at 4-9.)

Appellant asserts the Area Office erred as a matter of fact and law in determining when Mr. Henderson became a director of CLAE. (*Id.* at 9-11.) The Area Office relied on the “Action by Written Consent of Sole Stockholder” of CLAE dated July 24, 2018 (July 24th Action) along with an email from CLAE's counsel to establish that Mr. Henderson joined the Board on July 24, 2018. However, Appellant points to a September 28, 2018 email from the Area Office, requesting clarification because Steel Connect's Definitive Proxy Statement states Mr. Henderson became a member of CLAE's Board in September, 2015. In response, CLAE's counsel pointed to the July 24th Action as well as to Praesidium's bylaws which state the board of directors of Praesidium is the same as the board of directors of its subsidiaries (including CLAE). CLAE's counsel stated, “[xxx].” (*Id.* at 10, quoting email from R. Fouse to D. Gordon (Sep. 28, 2018).) Appellant maintains CLAE's counsel here conceded [xxx]. Thus, the Area Office erred in relying on the July 24th Action to come to a contrary conclusion. (*Id.* at 9-11.)

Appellant further argues the Area Office's reliance on the fact that CLAE's bylaws provide for directors to be elected at each annual meeting of shareholders as evidence Mr. Henderson was elected to CLAE's Board in July 2018 is also misplaced. The bylaws provide that directors are elected at each annual meeting of shareholders, and hold office until the next annual meeting and the director's successor is elected. This means a director could be elected every year. Therefore, the July 24th Action does not establish that Mr. Henderson had not previously been elected a director. (*Id.* at 11.)

Further, the Area Office ignored CLAE's Form 355. In its responses to questions 5 and 6, CLAE provided a chart outlining its directors and officers, along with roles and dates appointed. (*Id.* at 11-12.) In the chart, CLAE stated Mr. Henderson serves as “Executive Manager & Board Member,” and “assumed CEO role on 1/05/18.” (*Id.* at 11.) However, CLAE lists as Mr. Henderson's date of appointment July 9, 2015. Appellant argues this establishes Mr. Henderson's presence on the Board prior to 2017. As a director, Mr. Henderson exercised critical influence over CLAE. Therefore, CLAE is affiliated with Steel Connect through common management. (*Id.* at 11-13.)

#### F. CLAE's Response to the Supplemental Appeal

On November 12, 2018, CLAE responded to Appellant's Supplemental Appeal. CLAE argues that Appellant's Supplemental Appeal is actually an unauthorized reply to CLAE's Response, or a mere rehashing of its protest grounds, neither of which are an appropriate basis for supplementing an appeal. CLAE argues that an undirected reply to a response should be stricken from the record. (CLAE's Response to Supplemental Appeal at 2-3, citing *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701, at 9 (2015).)

CLAE further asserts Appellant failed to identify any evidence in the Area Office file to support its arguments on appeal. (*Id.* at 3.) Further, CLAE maintains Appellant failed to identify any legal authority to support its argument that the Area Office should have determined CLAE's size as of the date of award. (*Id.* at 4-5.)

CLAE further maintains Appellant has failed to show any error by the Area Office in its determination that Mr. Henderson did not control Steel Connect in his role as CEO. Appellant maintains the argument that CLAE and Steel Connect are affiliated through common management because Mr. Henderson was CEO of Steel Connect is a new argument on appeal, and should be dismissed. (*Id.* at 6.) CLAE maintains that because Steel Partners owns a majority of Steel Connect's stock, Mr. Henderson as CEO cannot be said to control Steel Connect. Further, Mr. Henderson had no role in CLAE as of December 7, 2017, and he therefore cannot be a common manager of CLAE and Steel Connect. (*Id.* at 6-7.)

CLAE further argues that regardless of when Mr. Henderson was elected to CLAE's Board, he cannot be said to control that Board through his one vote. (*Id.* at 8-9.) CLAE also argues that Appellant's assignment of error to the Area Office determination that Mr. Henderson did not become a director of CLAE until 2018 is an impermissible new argument on appeal. (*Id.* at 8.) CLAE maintains the Area Office considered the issue of when Mr. Henderson became a director, asked further questions of CLAE, and resolved this issue. (*Id.* at 9.)

Finally, CLAE notes that the Government Accountability Office (GAO) has dismissed Appellant's protest of the award to CLAE as “academic”; and that SBA has denied Appellant's HUBZone protest of CLAE's HUBZone status. (*Id.* at 10-11.)

#### G. Appellant's Reply

On November 13, 2018, Appellant filed a motion to reply, the proposed reply, and a copy of the decision in a GAO bid protest *Matter of Point Blank Enterprises, Inc.*, B-416764 (Nov. 6, 2018). Appellant argues that neither the GAO decision nor the SBA's HUBZone decision has any bearing on the issues in this appeal.

#### H. SBA Comments

On November 14, 2018, I requested that the SBA submit comments on the issue of whether the Area Office erred in determining CLAE's size as of the December 7, 2017. On



December 3, 2018, the SBA, through its Office of General Counsel, filed its comments. SBA asserts that the Area Office was correct.

SBA notes that “The rules set forth in §§ 121.401 through 121.413 apply to all Federal procurement programs for which status as a small business is required or advantageous, including . . . SBA's HUBZone program.” (SBA Comments at 2, quoting 13 C.F.R. § 121.401.) Thus, the rule at 13 C.F.R. § 121.404(a) applies to HUBZone contracts, which include awards to HUBZone SBCs after a PEP is applied. (*Id.* at 3, citing 13 C.F.R. § 126.600(c).) The HUBZone regulations provide that a HUBZone SBC must be small at the time of initial contract offer. (*Id.*, citing 13 C.F.R. § 126.203(b).) SBA promulgated this regulation at the time SBA implemented the HUBZone program, and has not changed it except to implement the change from the Standard Industrial Classification (SIC) system to the NAICS. (*Id.* at 3-4, citing 63 Fed. Reg. 31896, 31913 (June 11, 1998); 67 Fed. Reg. 3826, 3830 (Jan. 28, 2002).)

SBA asserts it always intended for the size regulations to govern the size of HUBZone SBCs. If SBA had intended for a HUBZone concern's size status to be determined at the time of award, it would have provided for such a rule in 13 C.F.R. § 126.203. (*Id.*) Further, in order for a HUBZone concern to submit an offer on a HUBZone contract, it must be small under the size standard for the NAICS assigned to that contract. (*Id.*, citing 13 C.F.R. § 126.601(b).)

In 2002, SBA proposed to amend § 126.601 to require that a concern must be a qualified HUBZone SBC at time of initial offer and award. SBA asserts the intent of this proposed rule was to ensure that HUBZone firms met the 35% residency and principal office requirements both at time of initial offer and award. (*Id.* at 4.) In publishing the final rule, SBA kept this provision as proposed, and noted in the preamble that a comment had argued the proposed § 126.601(b) was inconsistent with § 121.404. (*Id.* at 4-5, citing 69 Fed. Reg. 29411, 29415 (May 24, 2004).) SBA dismissed this inconsistency in the preamble, and stated it was SBA's intent to continue to determine size as of the date of initial offer. (*Id.*) SBA asserts it has consistently applied § 126.601 in this way. (*Id.* at 5.)

SBA notes that FAR 52.219-4 provides that a HUBZone offeror must notify the contracting officer if there is a material change which affects its HUBZone eligibility. A material change under the HUBZone regulations includes change in ownership, business structure, principal office, or failure to meet the 35% residency requirement, but it does not include size. Contrary to Appellant's assertion, SBA maintains, changes to ownership or business structure do not only implicate size, but also affect a firm's ability to meet HUBZone ownership requirements (*Id.* at 5, citing 13 C.F.R. §§ 126.200 & 126.501.)

SBA further points out that FAR 52.219-4 was added by a final rule which stated that it was implementing SBA's 2004 rule. The FAR Council stated that if a contracting officer receives a notice of material change from a HUBZone concern, the contracting officer should file a HUBZone status protest, not a size protest. Further, it stated that material changes would mean some small businesses would no longer be eligible, meaning that HUBZone material changes would not impact size. (*Id.* at 6, citing 75 Fed. Reg. 77727 (Dec. 13, 2010).)

SBA also asserts the HUBZone regulations provide that all protests relating to whether a HUBZone SBC is other than small are filed under 13 C.F.R. Part 121. (*Id.* at 6-7, citing 13 C.F.R. 126.801(a).) Had SBA intended a HUBZone concern's size to be determined at a different time than the time of the initial offer, SBA would have amended its regulations to state where a concern's size is not determined as of the date of its initial offer. HUBZone procurements are not among them. (*Id.* at 7.)

### I. Responses to SBA Comments

On December 10, 2018, Appellant filed its Response to SBA's Comments. Appellant maintains that the language of FAR 52.219-4(g) does not limit the qualification requirement that must be satisfied at time of award solely to non-size eligibility requirements specific to the HUBZone program. Rather, FAR 52.219-4 and 13 C.F.R. § 126.601(c) create a unique requirement that set the HUBZone program apart from all other small business programs, as only the HUBZone regulations specify that eligibility must be satisfied at the time of award. (Appellant's Response to SBA Comments at 2.)

Appellant argues SBA's interpretation is inconsistent and thus irrational, reading the regulation as requiring compliance with HUBZone-specific requirements and size at the time of offer, but only HUBZone-specific requirements at time of award. If SBA had meant to treat size and HUBZone-specific requirements differently, the regulation would have lumped the two operative dates together. SBA seeks to read into the regulation a qualification that does not exist. (*Id.* at 2-3.)

SBA's concerns about previous practices and alleged intent should not be dispositive in the face of clear regulatory language. SBA could have addressed this issue when it issued the final rule, but rejected a commenter's concerns regarding the new rule's apparent inconsistency with SBA's existing rule. (*Id.* at 4, citing 69 Fed. Reg. 29411, 29415 (May 24, 2004).) OHA has previously relied on SBA's responses to comments during the rulemaking process when determining how regulations should be interpreted. Appellant argues SBA's response to the commenter in 2004 supports Appellant's interpretation of the regulation. (*Id.* at 5, citing *Size Appeals of Agbayani Constr. Co., et al.*, SBA No. SIZ-4538 (2003).)

Appellant maintains SBA's *post hoc* explanations lack support, cite to no authority, and cannot counter the plain meaning of the regulation. SBA's rejection of the commenter's concern amounts to an explicit acceptance and acknowledgement of the inconsistency, indicating SBA intended size to be determined at time of award. (*Id.* at 6.)

Appellant further maintains that, with regard to § 126.601, neither the proposed nor final rules, nor the contemporaneous commentary, limited the section to applying to HUBZone-specific requirements, and not size. While OHA will afford SBA deference in interpreting its own regulations, that deference is appropriate only where the regulation is ambiguous, and this is not the case here. (*Id.*)

Further, SBA described the requirements for determining eligibility at offer and award as similar, reinforcing the fact that there is no difference between the eligibility requirements at the time of initial offer and time of award. (*Id.* at 8, citing 67 Fed. Reg. 3826, 3831 (Jan. 28, 2002).)

Further, Appellant argues, CLAE was required to disclose to SBA and the CO any material change, including ownership and business structure, which could affect HUBZone eligibility prior to award. [xxx]. Appellant argues SBA unreasonably downplays the notice requirement, implying it only relates to the HUBZone program rule that requires direct ownership by a U.S. citizen. Ownership and business structure also pertain to size. These issues may be addressed after submission of an initial offer by filing a protest. (*Id.* at 8-9.)

Also on December 10, 2018, CLAE responded to SBA's Comments. CLAE emphatically supports SBA's position that the size regulations do not provide any alternative procedures for size determinations for HUBZone concerns. CLAE points out that SBA dismissed the commenter's assertion that the proposed rule was inconsistent with § 121.404, because SBA intended that size must be determined as of the date of initial offer. CLAE maintains the Area Office was not permitted to deviate from § 121.404(a) and may not determine size as of a date other than that of CLAE's initial offer. (CLAE Response at 2-4.)

CLAE also supports SBA's position that FAR 52.219-4 does not affect a size determination, and that Appellant's interpretation is inconsistent with § 121.404(a) establishing the date to determine size. Finally, CLAE disputes Appellant's argument that it was required to notify the CO of a “material change” affecting its eligibility, because the definition of material change did not include changes to size. (*Id.* at 4-7.)

### III. Discussion

#### A. Timeliness and Standard of Review

Appellant filed its appeal within fifteen days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the size determination only if the Judge, after reviewing the record and pleadings, has a definite and firm conviction 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

##### 1. Date to Determine Size

The threshold question here is whether the Area Office erred in determining CLAE's size as of December 7, 2017, the date of CLAE's initial offer including price, or should it also have determined CLAE's size as of the date of award.

The general rule is that, in a size determination arising from a Government procurement, SBA will determine a concern's size as of the date of its submission of its written self-certification that it is small with its initial offer, including price. 13 C.F.R. § 121.404(a). SBA's regulations specify that in certain situations, an exception to the rule applies and a different date will be used to determine size. The size of an applicant for a certificate of competency is to be determined as of the date of its application. 13 C.F.R. § 121.404(c). SBA determines size for purposes of compliance with the nonmanufacturer rule and ostensible subcontractor rule as of the date of final proposal revisions. 13 C.F.R. § 121.404(d). For purposes of architect-engineering, design/build or two-step sealed bidding procurements, SBA determines size as of the date the concern certifies it is small as part of its initial bid or proposal (which may or may not include price). 13 C.F.R. § 121.404(f). For the Small Business Innovation Research and Small Business Technology Transfer programs, SBA determines size as of date of award. 13 C.F.R. § 121.702. The size of applicants for financial assistance is determined as of the date the application is accepted for processing. 13 C.F.R. § 121.302(a). For sales or lease of Government property, SBA determines the size as of the date of the firm's self-certification as part of its initial offer, including price. 13 C.F.R. § 121.504.

It is therefore clear that SBA has established a detailed regulatory scheme for setting the date as of which it will determine whether a business is an eligible small business. SBA has established a general rule, and explicitly stated the exceptions to that rule, and to which situations those exceptions apply.

Appellant here argues there is another exception, for HUBZone concerns taking advantage of HUBZone PEPs or HUBZone set-asides. Appellant relies on FAR 52.219-4:

The HUBZone small business offeror acknowledges that a prospective HUBZone awardee must be a HUBZone small business concern at the time of award of this contract. . . . If the apparently successful HUBZone offeror is not a HUBZone small business concern at the time of award of this contract, the Contracting Officer will proceed to award to the next otherwise successful HUBZone small business concern or other offeror.

FAR 52.219-4(g). This FAR clause appears intended to implement SBA's regulation on the necessary qualifications of HUBZone small businesses.

The HUBZone eligibility rule states:

A firm must be a qualified HUBZone SBC both at the time of its initial offer and at the time of award in order to be eligible for a HUBZone contract.

13 C.F.R. § 126.601(c). In its preamble to the proposed rule, SBA stated:

SBA proposes to add a new paragraph (b) that would specify that a firm must be a qualified HUBZone SBC both at the time of its initial offer and at the time of award in order to be eligible for a HUBZone contract. Further, SBA proposes to

amend § 126.601 to clarify that a qualified HUBZone SBC must make certain representations to a CO at the time it submits its *initial and final* offers for a HUBZone contract. . . . Similarly, a concern that is not qualified at the time of award can not receive a HUBZone contract.

67 Fed. Reg. 3826, 3831 (Jan. 28, 2002) (emphasis in original). In its preamble to the final rule, SBA replied to a pertinent comment on the proposed rule stating:

SBA received one comment on proposed § 126.601(b), which provided that a qualified HUBZone SBC must be qualified at both bid submission and at contract award. The commenter stated that the proposal is counterproductive and inconsistent with 13 C.F.R. 121.404, which provides that the size of an SBC is determined as of the date of the initial offer, with two exceptions. In addition, the commenter noted that sometimes there is a lengthy time between bid submission and award and this is out of the control of the HUBZone SBC.

SBA notes that a concern that is not a qualified HUBZone SBC at the time it submits its initial offer can not submit an offer on a HUBZone sole source or set-aside contract, or receive the benefits of the HUBZone price evaluation preference. Although it is true that there may be a lengthy time period between bid submission and award, SBA believes that awarding a HUBZone contract to a concern that does not meet the requirements of the program provides no help to the HUBZone community or its residents. Therefore, SBA has decided to implement this rule as proposed.

69 Fed. Reg. 29411, 29415 (May 24, 2004).

Appellant argues that this regulation, and SBA's dismissal of the comment pointing out an apparent inconsistency, amount to SBA's creating another exception to the general rule that size is determined as of the date of initial offer, and requires two size determinations, one at the date of initial offer, and a second at the date of award. Appellant maintains this is the unambiguous plain meaning of the regulation, and therefore OHA must adopt this view.

The problem with Appellant's argument is that SBA has a carefully constructed regulatory scheme for conducting size determinations, and Appellant's argument would disturb that scheme. As noted above, SBA has explicitly set forth in 13 C.F.R. part 121 the date for determining size for the various situations. For procurements, as here, the date is that of the initial offer, including price, except for those instances where the use of another date is specifically required. The HUBZone program is not mentioned in part 121. The HUBZone regulations require:

All protests relating to whether a qualified HUBZone SBC is other than small for purposes of any Federal procurement are subject to part 121 of this chapter and must be filed in accordance with that part. If a protestor protests both the size of the HUBZone SBC and whether the concern meets the HUBZone qualifying requirements set forth in § 126.200, SBA will process protests

concurrently, under the procedures set forth in part 121 of this chapter and this part.

13 C.F.R. § 126.801(a).

The HUBZone regulations thus explicitly adopt part 121 as the applicable regulations for protests of the size status of HUBZone SBCs. The HUBZone regulations also address the question of what size standard will apply to a HUBZone SBC: “*At time of initial contract offer.* A HUBZone SBC must be small for the size standard corresponding to the NAICS code assigned to the contract.” 13 C.F.R. § 126.203(b). Therefore, the HUBZone regulations also adopt the rule of determining size as of the date of initial offer. They do not mention any additional date for determining size.

By adopting part 121, the HUBZone regulations also adopt the part 121 rules for establishing the date to determine size. Further, “The rules set forth in §§ 121.401 through 121.413 apply to all Federal procurement programs for which status as a small business is required or advantageous, including . . . SBA's HUBZone program . . .” 13 C.F.R. § 121.401. Part 121 thus specifically includes the HUBZone program among those procurement programs which its rules cover. It is therefore clear that when a protest arises as to the size of a HUBZone SBC in connection with a Federal procurement, the protest is subject to the rules of 13 C.F.R. part 121. This includes the rule that the concern's size must be determined as of the date of its initial offer, including price. Part 121 includes no specific provision dealing with the date for determining size for a HUBZone concern, and SBA easily could have included one had it chose to.

Appellant hangs its argument on FAR clause 52.219-4(g), which is meant to implement 13 C.F.R. 126.601(c), requiring that “A firm must be a qualified HUBZone SBC both at the time of its initial offer and at the time of award in order to be eligible for a HUBZone contract.” Further, there is SBA's dismissal of the comment on the proposed rule, which suggested this rule caused an inconsistency. However, this general requirement of HUBZone eligibility at the time of award cannot overturn the clear mandate in the HUBZone regulations requiring a firm to be small only at the time of initial offer, and the further clear mandate adopting part 121 for the purposes of processing size protests of HUBZone concerns, and requiring that size be determined as of the date of initial contract offer. The regulations upon which Appellant relies speak only of HUBZone eligibility in a general sense, and therefore cannot be taken to vary the specific requirements of the regulatory scheme for determining size. SBA's dismissal of the comment must be viewed in this context. SBA did not adopt Appellant's interpretation of the rule as requiring a size determination as of date of award, but emphasizes the need for a concern to meet the specific HUBZone requirements.

I therefore conclude that the Area Office did not err in determining CLAE's size only as of the date of its initial offer, including price. Appellant's argument would attempt to disrupt SBA's regulatory scheme for processing size protests, and I must reject it.

## 2. Affiliation

In determining CLAE's size as of December 7, 2017, the Area Office considered the issue of whether CLAE was affiliated with Steel Connect because of common management. Concerns are affiliated due to common management:

[W]here one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns.

13 C.F.R. § 121.103(e). A finding of affiliation through common management does not require that the person exercising the common management have total control of a concern, just critical influence or the ability to exercise substantive control over a firm's operations. *Size Appeal of CopaSat, LLC*, SBA No. SIZ-5918, at 5 (2018). The influence must be wielded by someone in overall management of both concerns. *Id.* A position as a member of a concern's Board of directors could be said to have influence over that concern's operations. *Id.* However, the inference is rebuttable, and a concern can come forward with evidence to show that the individual officer does not have substantive control. *Id.*

Here, Appellant argues that James Henderson is the link that establishes common management between CLAE and Steel Connect. However, while Mr. Henderson has been CEO of Steel Connect since 2016, as of the date to determine size he was not an officer of CLAE, and did not hold a management position there. It is true that the size determination contains some confusion as to whether he was a member of CLAE's Board of Directors as of that date. At one point, the Area Office states that he joined CLAE's Board on April 24, 2018, at another point, it states that he was on the Board at the time of the instant, UNICOR procurement. Further, the Area Office file contains the Praesidium bylaws, which state that that Praesidium's Board is the same as the board of directors of its subsidiaries (including CLAE). CLAE's counsel stated that “[xxx].” There is thus some question, then, as to whether Mr. Henderson was a CLAE director as of the date to determine size. The Area Office did not definitively resolve this issue.

However, the Area Office's error in this case is harmless. *Size Appeal of OSG, Inc.*, SBA No. SIZ-5728, at 6-7 (2016) (PFR).

First, even if Mr. Henderson were a director of CLAE, he would have been only one director of seven. Where an individual is only one of a number of directors, OHA has held that he would not have had critical influence or control of the concern. *Size Appeal of Cambridge Intl. Systems, Inc.*, SBA No. SIZ-5516, at 6 (2013). Further, CLAE's bylaws provided that any director may be removed at the discretion of the majority shareholder (Steel Connect). CLAE Bylaws, Article 3.02.<sup>2</sup> Because Mr. Henderson was subject to removal at the discretion of the majority shareholder, any control he would have had was illusory, and thus he could not be said to control CLAE. *Size Appeal of US Builders Group*, SBA No. SIZ-5519 (2013) (Control by directors is illusory where a 75% majority shareholder has power to remove them at his

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<sup>2</sup> Members of Praesidium's Board may also be removed at the discretion of the majority owners. Praesidium LLC Agreement, Art. 5.2(b).

discretion); *Size Appeal of Environmental Quality Mgmt., Inc.*, SBA No. SIZ-5429 (2012) (Control by directors is illusory where a majority shareholder may remove and replace them with or without cause); *Size Appeal of The Clement Group, LLC*, SBA No. SIZ-5146 (2010) (Directors who may be unilaterally removed by majority shareholder have only illusory control).

Appellant's reliance on *Size Appeal of Radant MEMS, Inc.*, SBA No. SIZ-5600 (2014) is misplaced. There, the majority shareholder of the challenged concern was also President of another concern, and a full-time employee of that other concern. The area office found affiliation on the basis of common management. On appeal, the challenged concern argued that this was illusory control, because an officer may be removed. OHA rejected this argument, declining to extend the concept of illusory control from directors to officers of a concern, because doing so would eviscerate common management as a basis for affiliation. Here, because Mr. Henderson was not an officer of CLAE as of the date for determine size, the argument for common management hangs on his status as a director. Therefore, *Radant MEMS* is inapposite here, because it does not deal with directors alone as a basis for common management.

Accordingly, I conclude that Appellant has failed to establish that the Area Office erred in finding CLAE was not affiliated with Steel Connect. CLAE, thus, is an eligible small business for this procurement.<sup>3</sup>

#### IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, 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).

CHRISTOPHER HOLLEMAN  
Administrative Judge

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<sup>3</sup> Appellant's allegation that "on information and belief" CLAE and KDH have additional temporary employees is belied by the Area Office file, which includes the documentation establishing the total number of employees is within the size standard.