

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

SIZE APPEAL OF:

Hardwire, LLC,

Appellant,

RE: Central Lake Armor Express, Inc.

Appealed From

Size Determination No. 04-2018-044/045

SBA No. SIZ-5983

Decided: February 8, 2019

APPEARANCES

Matthew P. Kraeuter, Esq., General Counsel, for Hardwire, LLC

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

DECISION¹

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 the procurement 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 reverse the size determination and grant the appeal.

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

¹ CLAE requested confidential treatment of this appeal under 13 C.F.R. § 134.205(f). After reviewing the original Decision, CLAE requested no redactions. Therefore, I now issue the entire Decision for public release.

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 February 1, 2018, the U.S. Marine Corps, Marine Corps Systems Command, in Quantico, Virginia (USMC), 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 (CO) set the procurement aside for small business, and designated North American Industry Classification System (NAICS) code 339113, with a corresponding 750 employee size standard. Initial Offers were due on March 19, 2018, but Amendment No. 0002, dated March 6, 2018, extended the initial offer date to March 30, 2018. Central Lake Armor Express, Inc. (CLAE) self-certified as a small business on March 30, 2018, with its initial offer on the USMC procurement.

On August 23, 2018, the CO notified unsuccessful offerors that CLAE was the apparent successful offeror. On August 28, 2018, Hardwire, LLC (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 Praesidium Investments LLC (Praesidium), with Spanos Barbers Jesse & Co., LLC (Spanos), which owns Praesidium, and with Generations Management (GM). The CO forwarded the protest to the SBA Area Office for a size determination.

In an unrelated procurement, 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. CLAE self-certified as a small business on December 7, 2017, with its initial offer on the UNICOR procurement.

B. The Size Determination

On October 2, 2018, the Area Office issued Size Determination No. 04-2018-044/045, concluding that CLAE is an eligible small business. The Area Office resolved two protests, the instant protest and that of Point Blank Enterprises, Inc. (Point Blank), involving the UNICOR procurement. The Area Office found that the correct date to determine CLAE's size for Appellant's protest was March 30, 2018, the date CLAE self-certified as small with the submission of its initial offer, including price, on the USMC procurement. (Size Determination at 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 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 under 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 Mar. 30, 2018. (*Id.* at 4, citing 13 C.F.R. § 121.103(e).)

The Area Office found no common management affiliation for several reasons. First, Mr. Henderson did not become CLAE's CEO until January 5, 2018. He became CLAE's president on April 24, 2018, and joined its Board on July 24, 2018, after CLAE's self-certification date. 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 Area Office file contains a record of CLAE's July 24, 2018 action confirming Mr. Henderson's election to the Board. Therefore, there can have been no 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, controlled 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 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, controls CLAE. (*Id.* at 5-6, citing CLAE Bylaws, Art. 3.02.)

The Area Office then considered Point Blank's allegations that CLAE was affiliated with Aerojet Rocketdyne (Aerojet) and Aerojet's subsidiary Easton Development, LLC (Easton), based on the claim that Mr. Henderson served on both their Boards. Again, the Area Office concluded that because Mr. Henderson could be removed from the Board at AEI's discretion, any

control he has over CLAE was illusory, and therefore there was no common management between CLAE and these concerns based on Mr. Henderson's positions. (*Id.* at 6.)

The Area Office further considered Appellant's claim that CLAE is affiliated with 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.) Appellant 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 also found Spanos does not own Praesidium. (*Id.* at 2 n.3.)

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 17, 2018, Appellant filed the instant appeal. Appellant argues the Area Office committed legal error in its common management analysis. Specifically, the Area Office erred in failing to discuss or analyze Mr. Henderson's actual management and operational control of the various entities of which he was CEO, such as CLAE, Praesidium, Steel Connect, and ModusLink, by virtue of his position as CEO. (Appeal at 5-7.)

Appellant points to *Size Appeal of Perry Johnson & Assoc., Inc.*, SBA No. SIZ-5943 (2018), which clarified the regulatory requirement that concerns may be found affiliated either by common management or common ownership. (*Id.*) These are two independent grounds for affiliation. (*Id.*) Appellant further criticizes the Area Office's reliance on OHA case law for its position that because the majority shareholder may remove directors at will, that shareholder has complete control of a company. (*Id.* at 7, citing *Size Appeal of US Builders Group*, SBA No. SIZ-5519 (2013); *Size Appeal of Cambridge Intl. Systems, Inc.*, SBA No. SIZ-5516 (2013).) Appellant points out that the cited cases do not discuss the circumstance where a CEO has management responsibility over several entities. (*Id.*) Appellant maintains this is a significant distinction. Directors focus on strategic decisions in an advisory capacity while CEOs are charged with the actual operation and management of the company, overseeing manufacturing, supply chains, distribution, marketing, human resources, and finances. (*Id.* at 7-8.) This is clearly control of and critical influence over the company. (*Id.* at 8.) Senior leaders such as CEOs are presumed to exercise substantive control over a concern's operations, absent significant evidence to the contrary. (*Id.* at 8-9, citing *Size Appeal of CopaSat, LLC*, SBA No. SIZ-5918 (2018).)

Appellant further states the Area Office incorrectly concluded that because affiliation is not found under common ownership, it could not be found under one of the other grounds of affiliation under 13 C.F.R. § 121.103. (*Id.* at 7.)

Appellant points to exhibits included in its original protest, promotional materials from CLAE, which demonstrate Mr. Henderson is in operational control of the entities of which he is CEO. (*Id.* at 8-9; quoting Protest, Exh. L (“In this role, [Mr. Henderson] will be overseeing all aspects of [CLAE's] operations”) and citing Protest, Exh. J (statement that CLAE's and KDH's founders will serve as president of their respective organizations, reporting to Mr. Henderson.) These exhibits show Mr. Henderson had actual operational control of these entities.

Further, Appellant argues the Area Office's focus on the ability of majority shareholders to remove a director without cause would render the common management ground for affiliation meaningless. (*Id.* at 9, citing *Size Appeal of Radant MEMS, Inc.*, SBA No. SIZ-5600 (2014).) Thus, Appellant concludes, at CLAE's self-certification date, Mr. Henderson had control of CLAE, Praesidium, Steel Connect (a large company), and ModusLink and, therefore, all these concerns are affiliated. (*Id.* at 10.)

D. CLAE's Response to the Appeal

On November 12, 2018, CLAE responded to the appeal. CLAE asserts that as of March 30, 2018, Mr. Henderson's only involvement with CLAE as his “titular role” as CEO. Further, CLAE's Bylaws provide that the President, not the CEO, has critical influence over and exercises substantive control over the concern. (Response at 3.)

CLAE further argues that before the Area Office Hardwire alleged only one ground for affiliation, common management based upon Mr. Henderson's position as CEO and Director of several companies. CLAE argues that Appellant is raising new affiliation issues on appeal, and OHA may not consider them. (*Id.* at 5.)

CLAE maintains Appellant's contentions amount to “mere disagreement” with the Area Office, based on “puffery” found in public statements. (*Id.* at 7.) CLAE asserts Appellant has shown no credible evidence that the Area Office ignored in its conclusion that Mr. Henderson did not control CLAE as CEO. The Area Office rejected the evidence on which Appellant relies, such as its Protest Exhibits J and L. (*Id.* at 8-9.) CLAE asserts Appellant merely speculates as to Mr. Henderson's role as CEO. CLAE argues a size determination requires examination of an individual's actual duties, rather than merely his title, to determine whether he has the ability to control a concern. (*Id.* at 9-10, citing *Size Appeal of Get-A-Way Travel, Inc.*, SBA No. SIZ-2218, at 4 (1985).) CLAE further argues Appellant's reliance on *Size Appeal of Perry Johnson & Assoc., Inc.*, SBA No. SIZ-5943 (2018) is misplaced, because that case turned on the adverse inference rule, not the substantive issue of affiliation. (*Id.* at 11.)

CLAE maintains Appellant relies exclusively on the presumption of control by a CEO, and on speculative and unsupported allegations regarding the type of tasks Mr. Henderson performs, in arguing the size determination is based an error of fact or law. (*Id.* at 13-14.) CLAE argues the Area Office correctly found that AEI owns 100% of its voting stock, that CLAE is not a widely-held concern, and that it has no minority shareholder. Therefore, the Area Office's conclusion that AEI and not Mr. Henderson controls CLAE is not an error of fact or law. (*Id.* at 14.) A concern with 100% ownership of another concern controls that other concern, and any

argument to the contrary is meritless. (*Id.* at 14-25, citing *Size Appeal of DLI Eng'g Corp.*, SBA No. SIZ-4801, at 3 (2006).)

CLAE asserts the Area Office correctly determined it is not a “widely-held concern” under 13 C.F.R. § 121.103(c)(3), and so there is no presumption of control by the CEO. (*Id.* at 15-16.) CLAE maintains that the presumption of control by a CEO occurs only in this section, and that OHA has found control by a CEO in cases where the protested concern produced evidence that the CEO has critical influence or substantive control (*Size Appeal of Radant MEMS, Inc.*, SBA No. SIZ-5600 (2014)), or the adverse inference ruled applied (*Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477 (2013), *recons. denied*, SBA No. SIZ-5493 (PFR)). (*Id.* at 16-17.) Here, CLAE submitted sworn evidence Mr. Henderson did not have critical influence or substantive control of CLAE, and fully complied with all Area Office requests for information. Accordingly, *Radant MEMS* and *AudioEye* are inapposite. (*Id.* at 16-17.)

CLAE further argues that even if there is any presumption of control by Mr. Henderson, CLAE's submissions in response to the protest have successfully rebutted it. CLAE's Bylaws provide that the President, not the CEO, critically influences or exercises substantive control over operations. OHA should therefore find that there is substantial evidence in the record to rebut any such presumption. (*Id.* at 17-18, citing *Size Appeal of National Security Associates, Inc.*, SBA No. SIZ-5097 (2018).)

CLAE argues *Size Appeal of Radant MEMS* is inapposite, because here CLAE submitted its Bylaws to the Area Office, and these Bylaws established the necessary factual foundation to conclude Mr. Henderson could be terminated at any time. The Area Office file contains no evidence that Mr. Henderson was involved in CLAE's day-today management. The Area Office analyzed whether Mr. Henderson had critical influence or substantive control, and concluded that he did not. (*Id.* at 19-20.)

CLAE further argues Mr. Henderson did not have the ability to control Steel Connect even in his capacity as President and CEO, because control lies with majority shareholder, Steel Partners, which controls the Board, and which can remove Mr. Henderson at any time. CLAE further discusses how Steel Connect is a “controlled company” under SEC and NASDAQ rules. Therefore, Mr. Henderson does not control Steel Connect, and so, even if he were found to have control over CLAE, there is no common management affiliation. (*Id.* at 22-26.)

Finally, CLAE asserts Appellant's argument that there is a different common management standard applicable to officers and directors is meritless. CLAE maintains that the regulation does not recognize any difference between officers and directors, and the issue is whether they do control the board or the management of the challenged concern and one or more other concerns. The issue here is whether Mr. Henderson had any ability to control CLAE beyond his mere title of CEO. Appellant maintains he does not. (*Id.* at 27-28.)

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

Appellant's argument is that CLAE is affiliated with Steel Connect under common management. Under the common management rule, concerns are affiliated:

[W]hen 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 the concern'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.* Persons in senior leadership positions, such as the CEO and COO, may be presumed to exercise substantive control over a firm's operations, absent significant evidence to the contrary. *Id.*; *Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477, at 8-9 (2013).

Here, Appellant argues that Jim Henderson is the link that establishes common management between CLAE and Steel Connect. Mr. Henderson has been CEO of Steel Connect since 2016, and was also CEO of ModusLink when he became CLAE's CEO on January 5, 2018. CLAE's size must be determined as of March 30, 2018, the date of its self-certification on this procurement. 13 C.F.R. § 121.404(a).

The Area Office found that, “notwithstanding Mr. Henderson's position as CEO of CLAE, [Steel Connect's] majority owner is Steel Partners[.] Thus, under the terms of § 121.103(c)(1), it — and not Mr. Henderson — controls Steel Connect.” Size Determination at 5. The Area Office further found that there was no common management between CLAE and Steel Connect under OHA precedent holding that where a majority shareholder has the power to call a shareholder meeting and remove any and all directors, it is the majority shareholder, and not the directors, who controls the concern, and any control by the directors is illusory. Size Determination at 5, citing *Size Appeal of US Builders Group, Inc.*, SBA No. SIZ-5519 (2013).

Further, the Area Office found there can be no common management between CLAE and Steel Connect based upon the positions held by Mr. Henderson, because the two concerns are under different ownership. *Id.*

I find that the Area Office erred in its analysis. First, § 121.103(c)(1) provides that a person who controls, or has the power to control, 50% or more of a concern's voting stock controls or has the power to control that concern. This rule does not speak to the issue of affiliation through common management, which is under § 121.103(e). As noted above, affiliation under common management does not require that the manager through whom affiliation is found have total control over the concerns in question, just critical influence or the ability to exercise substantive control over operations. This is the type of influence and control exercised by corporate officers, who are not necessarily majority shareholders. The argument that a concern controlled by a majority shareholder cannot be found affiliated based upon common management would render § 121.103(e) meaningless. That fact that a concern has a majority shareholder does not prevent a finding of common management affiliation with another concern. *Size Appeal of CopaSat, supra; Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477 (2013). Accordingly, the fact that CLAE and Steel Connect have different majority shareholders does not preclude a finding that they are affiliated through common management.

The Area Office's reliance upon *Size Appeal of US Builders Group, Inc.*, SBA No. SIZ-5519 (2013) and the concept of illusory control by directors when there is a majority shareholder who may remove them is also misplaced. Here, Mr. Henderson is CLAE's CEO, not merely a director. In *Size Appeal of Radant MEMS, Inc.*, SBA No. SIZ-5600 (2014), OHA declined to extend the "illusory control" concept beyond the directors of a concern to its officers. "Indeed, to find common management 'illusory' merely because the officer could be removed from his or her position would potentially eviscerate common management as a basis for affiliation, because many officers and managers can be removed by some person or entity." *Id.* at 7. As noted in *Radant*, the tenure of corporate officers is not guaranteed; indeed, consultation with the business pages shows that it can often be precarious. Yet while in office, corporate officers make decisions and have critical influence and can exercise substantive control. The common management regulation appreciates this, and provides for a finding of affiliation apart from common ownership, where concerns share managers who, while they may not have an ownership interest, are able to exercise critical influence or substantive control over than more than one concern at once. Therefore, the Area Office erred in finding that because Mr. Henderson could be removed as CEO, CLAE and Steel Connect could not be found affiliated based upon common management.

Finally, the Area Office erred in finding that there can be no affiliation through common management when the concerns in question have different ownership. The common management regulation does not require that the concerns in question have common ownership in order to find affiliation through common management. These are two separate regulations (§ 121.103(c) and § 121.103(e)) and two separate grounds for affiliation. *Size Appeal of Perry Johnson & Assoc., Inc.*, SBA No. SIZ-5943 (2018). The fact that CLAE and Steel Connect do not have common ownership does not preclude a finding of affiliation based upon common management.

CLAE makes several arguments in support of the Area Office's determination. First, CLAE argues that Appellant raises a new issue on appeal. However, the issue of common management was raised in the protest, so this is not a new issue. Further, CLAE argues its Bylaws support the position that the firm's CEO has no control. The Bylaws do not mention a CEO. They do mention a President, who "shall be the chief executive officer of the corporation . . . and the president shall have the general powers of supervision and management usually vested in the chief executive officer." CLAE Bylaws, Art. 6.02. CLAE's SBA Form 355, submitted under penalty of perjury, identifies Mr. Henderson under "Praesidium/Central Lake Armor Express/KDH" as "Executive Manager & Board Member . . . Assumed CEO role on 1/05/18 at the time of the KDH acquisition." Matt Davis, whom CLAE describes in its pleadings as President, is listed as "Manager & Board Member . . . CEO at time of purchase 7/09/15; subsequently moved to manager status." CLAE SBA Form 355, questions 5 & 6. The Form 355 further states that "Jim Henderson is CEO of Steel Connect Inc. and its subsidiary ModusLink Corporation . . . Jim Henderson is CEO of Praesidium and KDH Defense Systems." *Id.*, questions 9b and 14 a & b. "James Henderson is CEO of Armor Express, KDH, and Praesidium." *Id.* question 15.

I find that while CLAE's Bylaws do not specifically identify a CEO as an officer separate from the President, it is clear from all of CLAE's filings, including its Form 355, that Mr. Henderson was serving as CLAE's CEO, and thus had at least critical influence over CLAE's operations. Further, Mr. Henderson was CEO of CLAE's parent, Praesidium, which owns CLAE through AEI. Praesidium controls CLAE, as its ultimate owner. 13 C.F.R. § 121.103(c)(1). It is settled that affiliation may also be found where an individual, concern, or entity exercises control indirectly through a third party. 13 C.F.R. § 121.103(a)(4); *Size Appeal of Jensco Marine, Inc.*, SBA No. SIZ-4330, at 7 (1998). OHA has held that concerns are affiliated under common ownership where the control exercised by the individual upon one of the concerns was indirect, through his control of the parents of the alleged affiliate. *Size Appeal of Baldt, Inc.*, SBA No. SIZ-4987 (2008) (Firm controlled by one individual affiliated with firm controlled indirectly by that individual through his control of the parent.); *Size Appeal of McLane Advanced Technologies, LLC*, SBA No. SIZ-4746, at 8 (2005) (Firm controlled by one individual is affiliated with other entities controlled, directly or indirectly, by that individual.)

Here, the same principle of control by one concern over another is applicable, but through the common management regulation. As Praesidium's CEO, Mr. Henderson clearly has critical influence or substantive control over Praesidium. Whatever his position with CLAE, he has indirect control over CLAE through his position as the CEO of CLAE's parent, Praesidium. Further, as CEO of Steel Connect, Mr. Henderson has critical influence or substantive control over that concern. Accordingly, Mr. Henderson has control over both concerns, and they are affiliated under his common management. I conclude that when one individual has a management position (such as CEO) with one concern (as Mr. Henderson does with Steel Connect) and another management position with the parent company of a second concern (as Mr. Henderson does with Praesidium, CLAE's parent) then the two concerns are affiliated under common management. Accordingly, CLAE and Steel Connect are affiliated under common management.

CLAE maintains that it has submitted sufficient evidence to rebut the presumption that CLAE's CEO exercises control over CLAE. However, CLAE has submitted no evidence to rebut the presumption for Mr. Henderson in his role as CEO of Praesidium and Steel Connect. Accordingly, the presumption that the CEO of these two concerns has critical influence or substantive control remains un rebutted.

CLAE's argument that *Size Appeal of Radant MEMS* and *Size Appeal of AudioEye* are inapposite is not supported by the record. CLAE argues the record provides sufficient evidence that Mr. Henderson does not have management control, unlike in *Radant MEMS*, and that the adverse inference applied in *AudioEye* is not applicable here. It is true the adverse inference rule is irrelevant here. However, I have determined that even if Mr. Henderson does not directly manage CLAE as its CEO, he has management control as CEO of CLAE's parent, Praesidium, and as CEO of Steel Connect, and therefore both CLAE and Steel Connect are affiliated under common management. Similarly, while the outcome in *Size Appeal of Perry Johnson* hung on the adverse inference rule, the point of law that common management is a separate ground for affiliation remains applicable here.

CLAE's further argument that the common management rule does not permit that officers and directors be considered differently is belied by OHA's precedent. OHA developed the rule that, when a majority shareholder may remove directors at will, any control they have is illusory. *Size Appeal of US Builders Group, Inc.*, SBA No. SIZ-5519 (2013). As discussed above, in *Radant MEMS*, OHA held that it was not appropriate to extend that rule to officers.

CLAE also argues that it is not a widely-held concern and that, therefore, the presumption of CEO control does not apply to it. I disagree. The "widely-held concern" rule is applicable to ownership control under 13 C.F.R. § 121.103(c)(3). Here, CLAE and Steel Connect are affiliated under § 121.103(e), common management, and thus this argument is inapposite. Lastly, CLAE's reliance on the SEC's "control group" rule is wholly inapposite to the issue here, which is whether Mr. Henderson holds management positions where he can exercise critical influence or substantive control over both CLAE and Steel Connect.

Accordingly, I conclude that Appellant has established that the size determination is based upon a clear error of fact and law. CLAE is affiliated with Steel Connect under the common management rule, and because Steel Connect and its subsidiary ModusLink are other than small under the applicable 750 employee size standard, CLAE also is other than small.

IV. Conclusion

Appellant has demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is GRANTED, and the size determination is REVERSED. CLAE is other than small for the instant procurement.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge