

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

IN THE MATTER OF:

Science & Technology Solutions, Inc.

Petitioner

SBA No. BDP-329

Decided: September 21, 2009

FINAL DECISION

APPEARANCES

Charles W. Dean, CEO, *pro se*, for Science & Technology Solutions, Inc.

Christopher J. McClintock and Sara Lipscomb for the Small Business Administration's Office of General Counsel.

BACKGROUND

By letter dated February 9, 2009, the Small Business Administration's (SBA), Deputy Associate Administrator, Office of Business Development, notified Science & Technology Solutions, Inc. (Petitioner), that it intended to terminate Petitioner from the 8(a) program (Intent Letter) for failing to submit annual review update information requested by SBA's Washington, D.C., Business Development staff, by a letter dated June 13, 2008, and another letter sent certified mail on June 30, 2008. The Intent Letter stated that Petitioner had thirty days from receipt of the letter to submit a written response explaining why the grounds did not justify termination.

On April 14, 2009, SBA's Associate Administrator, Office of Business Development, notified Petitioner that it was terminated from the 8(a) program because Petitioner did not overcome the reasons cited for termination. (Termination Letter).

ISSUE

The issues are whether, as a matter of law, Petitioner's appeal of SBA's termination of its participation in the 8(a) program should be dismissed for lack of jurisdiction, or, alternatively, whether SBA should prevail on summary judgment.¹

¹ There is jurisdiction to decide this appeal and the appeal is timely. *See* 15 U.S.C. § 637(a)(9)(A), (B)(ii); 13 C.F.R. §§ 134.102(j)(1) (2004), .202(a)(1).

FACTS

On May 15, 2009, Petitioner filed an 8(a) Program Termination Appeal Petition. In its Appeal Petition, Petitioner states that it received SBA's Intent Letter several days after February 9, 2009. Petitioner argues that SBA's termination action was arbitrary, capricious, and contrary to law. It maintains that it reached out to SBA for assistance and that it could have overcome the filing issues if SBA had provided guidance. Appeal Petition. Specifically, Petitioner claims it tried to call Mary Pasker, a person named in the Intent Letter, for a couple of weeks before it was told that she had been retired for quite some time.

On May 20, 2009, an Administrative Law Judge issued a Notice and Deficiency Order directing Petitioner to accomplish service of its Appeal Petition on SBA's Associate General Counsel for Litigation and Associate Administrator for 8(a) Business Development, and to file a certificate of service noting the method used and date of service on those persons.

On May 27, 2009, Petitioner filed a Certificate of Service stating service was accomplished by facsimile on May 27, 2009.

On May 27, 2009, an Administrative Law Judge issued a Notice and Order that required the parties to explore the possibility of settlement, and required SBA to file a notice of appearance by June 5, 2009, to file a response, including its arguments and brief to the Appeal Petition, and to file and serve an authenticated administrative record, including any claims of privilege, by July 13, 2009.

On June 5, 2009, SBA filed a Notice of Appearance for Christopher J. McClintock.

On June 12, 2009, SBA filed a Notice of Settlement Negotiations.

On July 10, 2009, SBA filed a Motion to Dismiss for Lack of Jurisdiction, or, in the Alternative, for Summary Disposition (Motion to Dismiss). The Motion to Dismiss includes:

Exhibit A, a letter dated March 17, 2005, to Petitioner from SBA's Associate Administrator, Office of Business Development, stating that it had been certified as a participant in the 8(a) program for a nine year term;

Exhibit B, a Participation Agreement in the 8(a) program signed by Charles W. Dean, Chairman and CEO of Petitioner, on March 24, 2005;

Exhibit C, a Firm Activity print out, dated July 7, 2009, showing that Petitioner was subject to annual eligibility reviews in 2006 and 2007;

Exhibit D, a letter to Petitioner from an SBA Business Development Specialist, 8(a) Business Development, to Petitioner, requesting annual review information by June 27, 2008, and warning that "failure to submit [the] annual update [would] result in a recommendation for

termination from the 8(a) Program.” A United States Postal Service Certified Mail Receipt shows delivery to Petitioner on June 14, 2008;

Exhibit E, a letter headed “2nd Notice,” from an SBA Business Development Specialist, to Petitioner extending the date for submission of material to July 18, 2008, and warning that failure to submit the required documentation may result in termination from the 8(a) program. This letter was delivered to Petitioner on July 9, 2008;

Exhibit F, a letter, dated February 9, 2009, from the Deputy Associate Administrator, notifying Petitioner that the SBA intends to terminate Petitioner’s 8(a) program participation, citing the reasons for its action, and stating that Petitioner had thirty days from receipt of the Intent Letter to submit a written response to SBA explaining why the proposed grounds should not justify termination. The Intent Letter was delivered to Petitioner on February 23, 2009;

Exhibit G, a termination letter, dated April 14, 2009, from the Associate Administrator, Office of Business Development, that was delivered to Petitioner on April 21, 2009; and

Exhibit H, a memorandum to the Associate Director, Office of Business Development, from the Senior Team Leader for Terminations, Office of Certification and Eligibility, dated April 14, 2009, recommending termination.

On July 15, 2009, the Administrative Law Judge Ordered Petitioner to file a response to SBA’s Motion to Dismiss no later than August 10, 2009, or be deemed to have consented to the relief that SBA seeks.

On August 10, 2009, Petitioner filed a Response to the Motion to Dismiss (Petitioner’s Response).

POSITIONS OF THE PARTIES

SBA requests that the Motion to Dismiss be granted for lack of jurisdiction because the Appeal Petition “does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification” of SBA’s decision to terminate Petitioner’s participation in the 8(a) program. 13 C.F.R. §§ 134.405(a)(1) (2009). Alternatively, SBA argues that the Office of Hearings and Appeals should grant summary disposition in its favor because there is “no genuine issue as to any material fact and [SBA] is entitled to a decision in its favor as a matter of law.” Motion to Dismiss, 8-13; 13 C.F.R. § 134.212(a), .408(a).

In Petitioner’s Response, it contends that its appeal should not be dismissed for lack of jurisdiction because it has followed the instructions it received in a document titled “8(a) TERMINATION APPEAL INSTRUCTIONS.” Petitioner’s Appeal Petition alleged that SBA’s Intent Letter was arbitrary, capricious, and/or contrary to law because SBA failed to provide Petitioner with proper information so that it could meet the filing date.

CONCLUSIONS OF LAW

The applicable regulations for appeals under the 8(a) program provide that an Administrative Law Judge shall decline to accept jurisdiction over any matter if “[t]he appeal does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the determination” and that, “[e]xcept in suspension appeals, the Administrative Law Judge’s review is limited to determining whether the Agency’s determination is arbitrary, capricious, or contrary to law. As long as the Agency’s determination is reasonable, the Administrative Law Judge must uphold it on appeal.” 13 C.F.R. §§ 134.405(a)(1), .406(b).

It is well settled that to remain eligible for the 8(a) program, a participant must continue to meet all 8(a) eligibility requirements. See 13 C.F.R. § 124.112(a). SBA’s authority to require the submission of annual 8(a) BD program update reports and documents supporting a participant’s continued eligibility in the 8(a) program is found in the regulations at 13 C.F.R. §§ 124.112(b), .602. Participants must submit annually to the SBA a certificate of continued eligibility and certain financial documents, including a personal financial statement, tax returns, and fiscal end-of-year financial statements. 13 C.F.R. § 124.112(b).

In a letter dated June 13, 2008, SBA specifically required Petitioner to complete and return 8(a) Annual Update forms by June 27, 2008. Motion to Dismiss Ex. D. SBA reiterated its request for information on June 30, 2008, and extended the date for submission. Motion to Dismiss Ex. E. Petitioner did not supply the required information by July 18, 2008, the time specified. SBA informed Petitioner in a letter dated February 9, 2009, almost seven months after the date the materials should have been submitted, that it proposed to terminate Petitioner’s participation because petitioner had failed to complete and return documentation SBA required to conduct its annual review of Petitioner’s approved 8(a) business plan. SBA’s February 9, 2009, letter specifically stated that it had failed to receive Petitioner’s “financial statements, requested tax returns, reports, and updated business plans.” Motion to Dismiss Ex. F.

Motion to Dismiss

The regulations provide that an Administrative Law Judge shall decline to accept jurisdiction over any matter “if the appeal does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the [SBA’s] determination.” 13 C.F.R. §§ 134.405(a)(1). I GRANT the Motion to Dismiss because Petitioner’s inability to contact one particular individual at SBA for several weeks does not excuse Petitioner’s failure to submit the written documentation it was requested to provide in separate requests on June 13, 2008, June 30, 2008, and on February 9, 2009, an almost seven-month period. Petitioner’s excuse for non-compliance does not warrant reversal or modification of SBA’s decision to terminate its participation in the 8(a) program for failure to maintain its eligibility for program participation, for a pattern of failure to make required submissions or responses in a timely manner, and for a material breach of the Participation Agreement.

Summary Disposition

Summary disposition is appropriate where there is no genuine issue as to any material fact, and the moving party is entitled to a decision in its favor as a matter of law. See 13 C.F.R. §§ 134.212(a), .408. There is no genuine issue as to any material fact and the evidence shows that SBA acted with good cause on April 14, 2009, when, acting pursuant to 13 C.F.R. § 124.303(a), it issued a termination letter to Petitioner citing:

(2) Failure by Petitioner to maintain its eligibility for 8(a) program participation;

(7) A pattern of failure to make required submissions or responses to SBA in a timely manner, including a failure to provide required financial statements, requested tax returns, reports, updated business plans, information requested by SBA's Office of Inspector General, or other requested information or data within 30 days of the request; and

(19) Material breach of any terms and conditions of the 8(a) BD Program Participation Agreement.

For all the reasons stated, I find that SBA's termination decision was not arbitrary, capricious, or contrary to law. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b). Subject to 13 C.F.R. § 134.409(c), this is the final decision of the Small Business Administration. *See* 15 U.S.C. § 637(a)(9)(D); 13 C.F.R. § 134.409(a).

BRENDA P. MURRAY
Administrative Law Judge