United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF: Accent Services Co., Inc., Petitioner	SBA No. BDP-421 Decided: November 16, 2011

APPEARANCES

Theodore P. Watson, Esq., Theodore P. Watson and Associates, LLC, for Petitioner, Accent Services Company, Inc.

April Alongi, Esq., Office of General Counsel, for Respondent Small Business Administration

FINAL DECISION

I. Introduction and Jurisdiction

This proceeding arises under the authority of Section 8(a) of the Small Business Act ("Act"), 15 U.S.C. § 637(a), and is governed by the Rules of Procedure Governing Cases before the Office of Hearings and Appeals ("Rules"), 13 C.F.R. Part 134. Petitioner Accent Services Company, Inc. ("Petitioner" or "ASC") appeals a decision by the Respondent Small Business Administration ("SBA") terminating it from the 8(a) Business Development ("BD") program.

There is jurisdiction to decide this appeal. *See* Small Business Act § 8(a)(9)(A), (B)(ii), 15 U.S.C. § 637(a)(9)(A), (B)(ii);13 C.F.R. § 134.401.[1] The appeal is timely. *See* 13 C.F.R. §§ 134.202(a)(1) and 134.404.

[1] The applicable substantive regulations were updated effective March 14, 2011. Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations, 76 Fed. Reg. 8222 (February 11, 201 1) (codified at 13 C.F.R. pt. 124). The applicable procedural regulations were updated effected September 20, 2010. Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, 75 Fed. Reg. 47435 (August 6, 2010) (codified at 13 C.F.R. pt. 134). All citations to Title 13 of the Code of Federal Regulations are to the current regulations unless otherwise noted.

II. Issue

Whether the SBA's termination of Petitioner Accent Services Company, Inc., from the 8(a) BD program was arbitrary, capricious, or contrary to law. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

III. Background and Arguments

Petitioner, a janitorial services company, is a member of the SBA's 8(a) BD program. Resp. at 4. On March 17, 2003, Dan Yasui, Petitioner's president, signed a Participation Agreement on behalf of Petitioner "in consideration of the benefits of participation in the Small Business Administration's Section 8(a) program ...." AR. Ex. 4. Petitioner agreed that it could be terminated from the 8(a) program upon the occurrence of a long list of events, including the "[f]ailure by the concern to obtain prior SBA approval of any management agreement, joint venture agreement or other agreement relative to the performance of a section 8(a) subcontract." AR. Ex. 4.

On November 21, 2003, Petitioner entered into a Strategic Alliance Agreement ("SAA") with Contract Acquisitions Group, LLC ("CAG"). AR. Ex. 6. On February 27, 2004, Petitioner entered into a Master Subcontract Agreement ("MSA") with Teltara, LLC. AR. Ex. 6. On June 10, 2005, Petitioner entered into a Teaming Agreement with Teltara, LLC. AR. Ex. 6. According to the "recitals" provision of the Teaming Agreement, the parties agreed that Petitioner would "serve as Prime Contractor on behalf of the Team (Petitioner and Teltara) in connection with Unrestricted Small Business and 8(a) set aside and sole source requirements from Federal agencies (CUSTOMER) and performing contracts resulting therefrom for those opportunities that the Team members agree will be jointly pursued." AR. Ex. 6. Neither the SAA nor the MSA have similarly specific recital provisions. Petitioner did not seek or obtain the approval of the SBA prior to entering into the SAA, the MSA, or the Teaming Agreement. *See* AR. Ex, 5 at 12.

On February 11, 2011, in a formal size determination, the Area Director for Government Contracting, Area Office VI, concluded that Petitioner was affiliated with Teltara, LLC and CAG as a result of entering into the MSA and the SAA and thus was considered to be "other than a small business concern." AR. Ex. 3.

On February 18, 2011, SBA notified Petitioner of its intent to terminate it from the 8(a) BD Program ("Letter of Intent to Terminate). AR. Ex. 3. As reasons for the termination, the SBA cited i) Petitioner's failure to maintain its eligibility for program participation; ii) its "[f]ailure to report changes that adversely affect the program eligibility of an applicant program participant under § 124.404 and § 124.112, where responsible officials of the 8(a) BD Participant knew or should have known the submission to be false;" and iii) a "[m]aterial breach of any terms and conditions of the 8(a) BD Program Participation Agreement." AR. Ex. 3; 13 C.F.R. §§ 124.303(a)(2), (15), (19). Regarding the first ground, the SBA found that Petitioner was affiliated with Teltara, LLC and CAG and thus it was ineligible for continued participation in the 8(a) BD program because it was "other than a small business concern." AR. Ex. 3. Regarding the second ground, the SBA found that Petitioner violated 13 C.F.R. § 124.303(a)(15) because it did not

inform SBA of the MSA and the SAA until the summer of 2009 when Petitioner attempted to terminate the agreements. Regarding the third ground, the SBA found that Petitioner breached its Participation Agreement for the reasons cited in the first two grounds, and also for failing "to obtain prior SBA approval of any management agreement, joint venture agreement or other agreement relative to the performance of a section 8(a) subcontract." AR. Ex. 3.

On March 18, 2011, Petitioner responded to the Letter of Intent to Terminate. AR. Ex. 5. Petitioner argued that MSA and SAA were not joint venture agreements and they did not need to be submitted to the SBA for approval. AR. Ex. 5. Moreover, the MSA was superseded by the Teaming Agreement so the MSA had no legal effect. AR. Ex. 5. Petitioner further argued that none of the agreements adversely affected it eligibility for the 8(a) ED program so it was not obligated to disclose the existence of the agreements to the SBA. AR. Ex. 5. Petitioner further argued that it did not materially breach the 8(a) BD Program Participation Agreement because the MSA, SAA, and the Teaming Agreement are "Contractor Team Arrangements as defined under F.A.R. 9.601(2)" and it had no duty to disclose these agreements to the SBA because, according to the SBA's own Standard Operating Procedures (SOP 80-05-3, Ch. 8, § 22), the SBA "is not normally involved with these arrangements, and the SBA is not required to review or approve them." AR. Ex. 5. Finally, Petitioner argued that mitigating circumstances warrant its continued participation in the 8(a) BD program because i) the SBA had actual knowledge of Petitioner's relationships with Teltara and CAG prior to 2009 but did not advise Petitioner of the need to disclose, and submit for SBA approval, any of the agreements; ii) Petitioner did not knowingly fail to disclose changes adversely affecting its program eligibility; and iii) Petitioner has a proven track record of demonstrating good character. AR. Ex. 5.

On May 26, 2011, the SBA Office of Hearings and Appeals reversed the February 11, 2011 formal size determination. *Size Appeal of Accent Service Company, Inc.*, SBA No. SIZ-5237 (2011). The Administrative Judge found that "the Area Office erred in finding [Petitioner] affiliated with Teltara/CAG based on identity of interest due to economic dependence, on being engaged in a joint venture, through contractual relations, and under the totality of the circumstances." *Id.*

On June 15, 2011, Petitioner received a letter ("Termination Letter") from the SBA informing Petitioner that it was terminated from the 8(a) BD Program effective 45 days from the date of receipt of the letter, unless Petitioner filed an appeal within that time. Appeal Pet. at 2; Appeal Pet. Attach. 1; AR. Ex. 1. The Termination Letter stated that, as a result of the May 26, decision reversing the formal size determination, Petitioner has overcome the first ground cited in SBA's February 18, Letter of Intent to Terminate. AR Ex. 1. The Termination Letter stated that Petitioner failed to overcome the second and third grounds because Petitioner has "consistently failed to notify SBA of any changes ... that adversely affect its 8(a) program eligibility" and it failed to notify SBA of the MSA, the SAA, and Teaming Agreement. AR. Ex. 1. The Termination Letter stated that the SBA only learned of the MSA and the SAA when Petitioner attempted to terminate the agreements to avoid possible suspension or debarment; and it only learned about the Teaming Agreement on March 21, 2011, in Petitioner's response to the Letter of Intent to Terminate. AR. Ex. 1. SBA acknowledged that it was aware that Petitioner worked with Teltara and CAG on several contracts, but claimed that Petitioner did not disclose

the extent of its relationship with these two companies and therefore Petitioner materially breached the Participation Agreement. AR. Ex. 1.

The Appeal

On July 11, 2011, Petitioner appealed the determination of the SBA terminating Petitioner from the 8(a) BD program. Appeal Pet. at 1. Petitioner alleges that the SBA's determination was arbitrary, capricious, and contrary to law because:

> (1) SBA failed to show an adverse affect on Appellant's Program Eligibility under the statute,
> (2) SBA failed to establish that the Appellant materially breached any terms and conditions of the 8(a) BD Program Participation Agreement,
> (3) Appellant overcame all reasons proffered by the SBA in its Letter of Intent to Terminate and
> (4) SBA raised a new issue in its Termination Letter and not allowing Appellant to have addressed the issue during the initial procedural stages and possibly violating Appellant's due process rights.

Appeal Pet. at 2.

Petitioner acknowledged that it did not seek or obtain the approval of the SBA prior to entering into the SAA, the MSA, or the Teaming Agreement. *See* Appeal Pet. at 6 (incorporating, by reference, arguments made in response to the Letter of Intent to Terminate); AR. Ex. 5 at 12. However, Petitioner argues that the SBA's Standard Operating Procedures establish the fact that these agreements do not require preauthorization. Appeal Pet. at 14.

The Response

On September 1, 2011, the SBA submitted its Response to the Appeal Petition ("Response"). The SBA elected to argue only one of the three grounds for termination cited in the Termination Letter: "[a] material breach of the Participation Agreement." Resp. at 5.

The SBA argues that Petitioner's failure to obtain approval of the Agreements with Teltara and CAG is a material breach of the Participation Agreement and constitutes good cause for termination from the 8(a) BD program. Resp. at 8. The SBA further argues that even if the SBA's Standard Operating Procedures (SOP) preclude teaming agreements from the SBA's preauthorization requirements, the SAA and the MSA are not teaming agreements, and as such, are "clearly 'other agreement[s] relative to the performance of a section 8(a) subcontract." Resp. at 10. The SBA argues in the alternative that, assuming all three agreements are teaming agreements, the 8(a) regulations take precedence over the conflicting terms in the Standard Operating Procedures. Resp. at 10 (citing Standard Operating Procedure 80 05 3A, ch. 1. § 2). The Participation Agreement's terms and conditions are incorporated into the 8(a) regulations and thereby take precedence over any conflicting terms in the SOP. *Id.*

The SBA concedes that it is hot normally involved with teaming arrangements, where

those agreements relate to the performance of 8(a) contracts. *Id.* at 11. However, the SBA argues that 8(a) BD program participants must present these agreements to the SBA so that the SBA can ensure that the benefits of the 8(a) BD program flow to the participants and no others. *Id.*

IV. Discussion

The 8(a) BD program exists "to assist eligible small disadvantaged business concerns compete in the American economy through business development." 13 C.F.R. § 124.1. Only those small businesses which are "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States" may participate in the 8(a) BD program. 13 C.F.R. § 124.101. The applicant concern must also demonstrate its potential for success. *Id.* On application to the 8(a) BD program, the SBA must determine, among other things, that the applicant concern qualifies as a small business concern as defined in Title 13 part 121 of the Code of Federal Regulations. 13 C.F.R. § 124.102(a); *see* 15 U.S.C. § 632(a). Once admitted, a Participant "must continue to meet all eligibility criteria contained in § 124.101 through § 124.108." 13 C.F.R. § 124.112.

Standard of Review

This tribunal must sustain the SBA's determination unless a review of the written administrative record demonstrates that the SBA acted arbitrarily, capriciously, or contrary to law in terminating Petitioner from the 8(a) BD program. *See* 13 C.F.R. § 134.406(a)-(b). My review of the administrative record is narrow and does not permit me to substitute my own judgment for that of the SBA. I must examine whether the SBA considered all of the facts presented as well as the laws and regulations that guide the decision-making process. Then, I must determine whether the SBA made a clear error of judgment in its decision before I can find the SBA acted arbitrarily, capriciously, or contrary to law. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

A clear error of judgment can be found if the SBA (1) fails to properly apply the law and regulations to the facts of the case, (2) fails to consider an important aspect of the problem, (3) offers an explanation for its decision that runs contrary to the evidence, or (4) provides an implausible explanation that is more than a difference between the views of the undersigned and those of the SBA. *See id.* The SBA must articulate a reasonable explanation for its action, including a rational connection between the facts found and its determination. *See id.* As long as the SBA's determination is reasonable, the undersigned must uphold it on appeal. 13 C.F.R. § 134.406(b).

Termination

Participants may be involuntarily terminated from the 8(a) BD Program for "good cause." 13 C.F.R. § 124.303(a). Examples of "good cause" include, but are not limited to "[m]aterial breach of any terms and conditions of the 8(a) BD Program Participation Agreement." 13 C.F.R. § 124.303(a).

Analysis

The SBA proposes to terminate Petitioner because Petitioner failed to "obtain prior SBA approval of any management agreement, joint venture agreement or other agreement relative to the performance of a section 8(a) contract" and, thereby, materially breached the terms of the Participation Agreement in violation of 13 C.F.R. § 124.303(a)(19). The SBA relies on the fact that Petitioner did not seek or obtain the approval of the SBA prior to entering into the SAA, the MSA, or the Teaming Agreement. The SBA may not characterize the SAA or the MSA as joint venture agreements because that issue has already been decided. *Size Appeal of Accent Service Company, Inc.*, SBA No. SIZ-5237 (2011). The terms of the SAA and the MSA do not identify any 8(a) contracts that would be governed by the agreements, nor do the terms identify them as "management agreements."

Petitioner's contention that it was not required to obtain prior approval for the Teaming Agreement is meritless. That Agreement, by its terms, related to the performance of a section. 8(a) contract. AR. Ex. 6. While the SOP does contain language that, taken by itself and out of context, suggests that Petitioner need not seek prior approval of the Teaming Agreement because the "SBA is not normally involved with [teaming] arrangements, and the SBA is not required to review or approve them," SOP 80 05 3, ch. 8, ¶ 22, the SOP cannot override the regulation *Arcata Econ. Dev. Corp. v. SBA*, SBA No. DEV-644, 2000 WL 1612177, at *4 (2000). The applicable regulation provides that a Participant may be terminated from further participation in the 8(a) BD program if the Participant materially breaches any of the terms and conditions of the 8(a) BD Program Participation Agreement. 13 C.F.R. § 124.303(a)(19). The SOP "provides internal policy and procedural guidance for SBA employees to use in performing their official duties." SOP 80 05 3, ch. 1, ¶3. The SOP is not a document intended for Participants in the 8(a) BD program to rely on in fulfilling their obligations under their Participation Agreements. Moreover, the SOP states that

> "[i]n resolving any programmatic issue, the following order of precedence applies:
> a. Statute;
> b. Regulations;
> c. Decisions of the Administrative Law Judge in the Office of Hearings and Appeals . . .; and
> d. Standard Operating Procedure (SOP)."

SOP 80 05 3, ch. 1, ¶ 2.

It is clear that Petitioner breached its 8(a) BD Program Participation Agreement when Petitioner did not seek and obtain prior approval from the SBA before entering into the Teaming Agreement. The remaining issue is whether that breach was material. 13 C.F.R. § 124.303(a)(19). I find that it was a material breach. A teaming arrangement "may affect a participant's eligibility if it results in circumstances of actual or negative control, affiliation, or loss of small business status." SOP 80 05 3, ch. 8, ¶ 23. Because a teaming agreement has the potential to negatively affect the continued eligibility of a Participant it is important that these

agreements, as they relate to the performance of a section 8(a) contract, be submitted to the SBA by the Participant prior entering into them. That is why this provision was included in the Participation Agreement.

The SBA has elected to proceed only on the ground that Petitioner materially breached its Participation Agreement. The Administrative Record reflects that the SBA correctly applied, to the facts of this case, the laws and regulations applicable to the termination of participants from the 8(a) BD program as to this ground for termination. Therefore, the other grounds and Petitioner's remaining arguments need not be addressed. *Fairfield Trucking Co.*, SBA No. BDP-223 at 5 (2005).

V. Conclusion

The SBA's June 15, 2011 determination to terminate Petitioner from further participation in the 8(a) BD program is NOT ARBIRTRARY, CAPRICIOUS, OR CONTRARY TO LAW. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b). The determination is upheld, and Accent Services Company, Inc.'s appeal is denied.

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).

SPENCER T. NISSEN
Administrative Law Judge