United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Reality Technologies, Inc.,	SBA No. BDP-455
Petitioner	Decided: November 21, 2012

RULING AND ORDER ON RESPONDENTS MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT

On June 7, 2012, the Small Business Administration ("SBA" or "Respondent") filed its *Motion to Dismiss or for Summary Judgment* ("Motion"). As the grounds for the *Motion*, the SBA asserts that (1) Petitioner's appeal should be dismissed as the appeal petition fails to allege facts that, if proven to be true, would warrant reversal or modification of the determination; and (2) summary judgment in SBA's favor is warranted as there are no genuine issues as to any material fact, and SBA is entitled to a decision in its favor as a matter of law.

On July 9, 2012, Petitioner timely filed its *Opposition to SBA's Motion to Dismiss or for Summary Judgment* ("Opposition to the Motion").[1] In its *Opposition to the Motion*, Petitioner claims the SBA has failed to meet the standards for both a motion to dismiss and a motion for summary judgment.

Also before the Court is Petitioner's *Cross-Motion for Summary Judgment* ("Cross-Motion"). In its *Cross-Motion*, Petitioner moves the Court to grant summary judgment in Petitioner's favor on several issues related to this case.

I. Applicable Law

The 8(a) Program. The 8(a) Business Development program ("8(a) program") was developed to assist eligible small disadvantaged business concerns competing in the American economy through business development. 13 C.F.R. § 124.1. The SBA accepts eligible concerns into the 8(a) Business Development program ("8(a) program") for a period of nine years so long as the concern maintains its program eligibility. 13 C.F.R. § 124.2. However, the SBA may

[1] By order dated June 20, 2012, Petitioner was granted an extension of time to file its Opposition to the Motion on or before July 9, 2012.

terminate the participation of a concern prior to the expiration of the program term for good cause. 13 C.F.R. § 124,303. Included in the definition of "good cause" are the following:

> (5) Failure by the concern to disclose to SBA the extent to which non-disadvantaged persons or firms participate in the management of the Participant business concern.
>
> . . .
>
> (20) Willful violation by a concern, or any of its principals, of any SBA regulation pertaining to material issues.

13 CF.R. § 124.303(a).

Standard of Review. The Court is authorized to review an SBA determination terminating a concern from the 8(a) program upon timely appeal by the concern. 13 CF.R. § 134.218(a); 15 U.S.C. § 637(a)(9)(A). Jurisdiction in termination cases is limited to whether the SBA's determination was arbitrary, capricious, or contrary to law. 13 CF.R. § 134.406(b); *Matter of Accent Services Company, Inc.*, BDP-421 (2011). However, the Court must decline to accept jurisdiction over a 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. . . ." 13 CF.R. § 134.405(a)(1); *Matter of Science & Technology Solutions, Inc.*, BDP-329 (2009).

II. Discussion

The SBA moves for dismissal of Petitioner's appeal on the basis that "Petitioner has admitted facts that make it clear that it violated the law and SBA regulations by acting as a front to get the proceeds from 8(a) contracts into the hands of an ineligible business." The SBA claims that this basis constitutes "sufficient grounds to terminate Petitioner from the 8(a) Business Development program... and SBA's decision to do so cannot be held to be arbitrary or capricious." As grounds for the Petitioner's termination from the 8(a) program, the SBA determined Petitioner willfully violated SBA regulations pertaining to material issues. Specifically, the SBA alleges Petitioner willfully violated 13 C.F.R. § 125.6(a)(1) and (a)(2), by failing to perform 50 percent of the work in its 8(a) contracts that were subcontracted to a non-disadvantaged firm. Petitioner, however, argues that it "never willfully agreed or intended for all the work... to be performed by CounterTrade," and that the regulations cited by the SBA do not apply because the contracts were for supplies or products procured from a non-manufacturer of the supplies or products.[2]

Although SBA regulations cite a "willful violation of any SBA regulation" as good cause for terminating a concern from the 8(a) program, the regulations do not define the term "willful." Accordingly the Court looks to the ordinary or natural meaning of the term. *See F.D.I.C v. Meyer*, 510 U.S. 471, 476 (1994); *see also* Black's Law Dictionary (9th ed. 2009) (defining

[2] CounterTrade Products, Inc ("CounterTrade") is a former participant in, and graduate of. the 8(a) program. As a result, CounterTrade is considered a non-disadvantaged firm.

"willful" as meaning "voluntary and intentional, but not necessarily malicious.").

In the case of a contract for services, a concern must perform at least 50 percent of the cost of the contract incurred for personnel with its own employees. 13 CF.R. § 125.6(a)(1). For contract for supplies or products, unless the procurement is from a non-manufacturer of such supplies or products, the concern will perform at least 50 percent of the cost of manufacturing the supplies or products. 13 CF.R. § 125.6(a)(2). However, even when the supplies or products are procured from a non-manufacturer, "any work done by a subcontractor on the services portion of the contract cannot rise to the level of being primary and vital requirements, and therefore cannot be the basis or affiliation as an ostensible subcontractor." Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations, 76 FR 8222-01.

The teaming agreement submitted by Petitioner provided that CounterTrade would be responsible for overall bid and program management, and that CounterTrade would direct, supervise and manage the activities of awards and deliver its performance to the contracting agency through Petitioner. Petitioner stated that it attempted to implement its prime contractor role on certain purchase order 8(a) contracts; however there is no evidence that Petitioner's attempts were successful. Indeed, Petitioner stated that each federal agency dealt with CounterTrade exclusively on all 8(a) contracts.

Although Petitioner claims that it entered into this teaming agreement involuntarily, the evidence provided by Petitioner suggests otherwise. Petitioner stated that it had rejected a previous teaming agreement before negotiating and entering into this current teaming agreement. Petitioner also entered into multiple purchase order subcontracts with CounterTrade after it "reasonably concluded" that it was the only alternative for avoiding contract default Such action was "reasonably believed" by Petitioner to be necessary to avoid default termination. However, while the circumstances surrounding Petitioner's decision to enter into the teaming agreement and the multiple purchase order subcontracts were not ideal, Petitioner's statements fail to suggest that Petitioner's actions were involuntary. Rather, it is clear that Petitioner's actions were the result careful consideration and negotiation.

The SBA also cited the financial agreement outlined in the teaming agreement between Petitioner and the non-disadvantaged entity as a violation of 13 C.F.R. § 124.106(g) and (g)(4), because it gave CounterTrade the ability to control Petitioner. Specifically, the SBA alleged that by contracting to allow CounterTrade up to 99.5 percent of Petitioner's revenue from 8(a) contracts that were subcontracted to CounterTrade, Petitioner became dependent on CounterTrade.

Pursuant to SBA regulation, participants must be controlled by disadvantaged individuals. 13 C.F.R. § 124.101. However, if a business relationship exists between an 8(a) program participant and a non-disadvantaged individual or entity mat causes such dependence that the participant cannot exercise independent business judgment without great economic risk, the non-disadvantaged individual or entity may be found to control or have the power to control the participant. 13 C.F.R. § 124.106(g)(4).

Petitioner does not deny that its dealings with CounterTrade gave the firm significant influence over Petitioner. Indeed, Petitioner stated that it subcontracted with CounterTrade because of financial concerns. After CounterTrade threatened to default on federal-agency contracts, Petitioner's vice president felt he had no choice but to execute the teaming agreement.[3] An exhibit submitted with the appeal petition confirms that in nearly all of Petitioner's 8(a) contracts that were subcontracted to CounterTrade, CounterTrade received 99.5 percent of the award. By virtue of its relationship with CounterTrade, Petitioner was unable to exercise its independently business judgment without the threat of default or even bankruptcy.

III. Conclusion

The appeal petition and its supporting exhibits do not contain facts negating the bases for termination cited by the SBA. Rather, the appeal petition demonstrates that Petitioner failed to perform 50 percent of the work on its 8(a) contracts that were subcontracted to CounterTrade, and that Petitioner was unable to exercise its independent business judgment without great economic risk as a result of CounterTrade's control. Although the appeal petition includes evidence that Petitioner's violations may have been the result of coercion, there is ample evidence that Petitioner's actions were, nevertheless willful, and carried out after careful deliberation. Accordingly, the Court finds that the appeal petition and its supporting exhibits fail to allege facts that, if true, would warrant a reversal or modification of the SBA's decision to terminate Petitioner for the 8(a) program. Accordingly, the SBA's *Motion* is **GRANTED**.

It is hereby **ORDERED** that Petitioner's appeal petition is **DISMISSED.**
It is **FURTHER ORDERED** that Petitioner's *Cross-Motion for Summary Judgment* and Respondent's *Motion to Strike* are **DENDIED** as moot.

J. JEREMIAH MAHONEY
Chief Administrative Law Judge (Acting)

[3] The teaming agreement between Petitioner and CounterTrade provided that Petitioner would receive a minimum gross profit margin of one half percent of the gross amount of any award.