

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

IN THE MATTER OF:

Harris Grant, LLC,

Petitioner

SBA No. BDPE-478

Decided: March 20, 2013

APPEARANCES

Christopher R. Clarke, United States Small Business Administration, 409 Third Street, S.W., Washington, D.C. 20416, for the Small Business Administration

Anthony E. Cooch, Jr., Bean, Kinney & Korman, P.C., 2300 Wilson Blvd., 7<sup>th</sup> Floor, Arlington, VA 22201, for the Petitioner

FINAL DECISION AND ORDER

On January 9, 2013, Harris Grant, LLC (Harris Grant or Petitioner) appealed a determination of the United States Small Business Administration (SBA or Agency) denying Petitioner admission to the 8(a) Business Development Program (the Program).<sup>1</sup>

I. Procedural History

On or about July 14, 2011, Harris Grant applied for admission to the 8(a) Business Development Program. (AR Ex. 9).<sup>2</sup> On April 23, 2012, SBA issued a letter to Harris Mahedavi, President of Harris Grant, denying Petitioner admission to the Program (Denial Letter). (AR Ex. 6).

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<sup>1</sup> The purpose of the 8(a) Business Development Program “is to assist eligible small disadvantaged business concerns compete in the American economy through business development.” 13 C.F.R. § 124.1. To qualify for admission into the Program, an applicant small business must be “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, and which demonstrates potential for success.” 13 C.F.R. § 124.101.

<sup>2</sup> Citations referencing the Administrative Record are as follows: Administrative Record followed by Exhibit Number (AR Ex. at\_\_).

The Denial Letter indicated Harris Grant had business relationships with “non-disadvantaged individuals or entities which cause such dependence that [[Harris Grant] cannot exercise independent business judgment without great economic risk as noted under 13 C.F.R. 124.106.” *Id.* The letter explained that Harris Grant had derived all revenues from Innovative Solutions Group (ISG) since at least 2009, and this financial relationship led SBA to conclude ISG had the power to control Harris Grant. *Id.* Thus, Harris Grant was unable to exercise independent business judgment without great economic risk. *Id.* See 13 C.F.R. § 124.106.

The Denial Letter further explained that current Program policy allows non-disadvantaged individuals to be involved in the management of an applicant business; however, neither said individuals nor their immediate family may receive compensation in excess of that received by the company's disadvantaged Chief Executive Officer or President. *Id.* See 13 C.F.R. § 124.106(a)(2). The letter suggested that Grant Dekker, the non-disadvantaged 49% owner of Harris Grant, received greater compensation than President Harris Mahedavi. *Id.* Last, the Denial Letter explained that Harris Grant may not qualify as a small business. *Id.* See 13 C.F.R. § 124.102.

On June 5, 2012, Petitioner submitted a Request for Reconsideration (Request) pursuant to 13 C.F.R. § 124.205(a). (AR Ex. 5). The Request argued, *inter alia*, that neither ISG nor Grant Dekker had the power to control Harris Grant. *Id.* Additionally, the Request contained a copy of SBA FORM 355, requesting a formal size determination. *Id.* Thereafter, on July 11, 2012, the SBA 8(a) Business Development Program requested a formal size determination of Harris Grant. (AR Ex. 4).

On September 18, 2012, the Agency issued the formal size determination in accordance with 13 C.F.R. Part 121. (AR Ex. 3). SBA determined that while Harris Grant was a small business, the “economic dependency on ISG is considered very high and rises to such a level that would [give] ISG the power to control [Petitioner].” *Id.* SBA further noted that the SBA FORM 355 and tax documents provided revealed that in 2009, 2010, and 2011, respectively, 100%, 100%, and 99% of Petitioner's revenues were derived from ISG. *Id.*

Thereafter, on November 26, 2012, SBA issued a decision denying Harris Grant admission into the Program. (AR Ex. 1). SBA determined Petitioner had failed to overcome one of the three original reasons for the denial. *Id.* Specifically, SBA determined Harris Grant failed to overcome the finding “that business relationships exist with non-disadvantaged individuals or entities resulting in [an] inability to exercise independent business judgment without great economic risk.” *Id.*

The Agency noted that while Petitioner's Request for Reconsideration contained additional information attempting to rebut this issue, this new information was insufficient. *Id.* Although Petitioner proffered a sales report tending to show other sources of revenue, as of June 2012, sixty five percent (65%) of the revenue was still billed to ISG. *Id.* Further, Petitioner did not provide “any additional source documentation such as invoices, contracts and bank deposits to support this report.” *Id.*

Thereafter, on January 9, 2013, Petitioner filed a timely appeal of the decision by

SBA. *See* 13 C.F.R. § 134.202(a). On January 10, 2013, SBA's Office of Hearings and Appeals (OHA) issued a Notice of Assignment, assigning the matter to the United States Coast Guard (USCG) Office of Administrative Law Judges.<sup>3</sup> The Notice of Assignment explained that SBA must file and serve both its response to Petitioner's Appeal Petition and the Administrative Record not later than forty five (45) days after the filing of the Appeal Petition. 13 C.F.R. § 134.206(b).

On January 16, 2013, the matter was assigned to the undersigned Administrative Law Judge (ALJ) for adjudication. On February 25, 2013, SBA filed its Response to Appeal Petition and a copy of the Administrative Record.<sup>4</sup> 13 C.F.R. § 134.406(c)(1). Petitioner did not object as to the completeness of the Record. *See* 13 C.F.R. § 134.406(c)(2). Accordingly, on March 12, 2013, the undersigned issued an Order Closing Administrative Record. *See* 13 C.F.R. § 134.406(c)(2).

## II. Applicable Law

### a. Jurisdiction

OHA and the undersigned have jurisdiction over Petitioner's Appeal pursuant to 13 C.F.R. § 134.102(j)(1).

### b. Standard of Review

Pursuant to 13 C.F.R. § 134.406(b), an ALJ's review is limited to determining whether SBA's determination was arbitrary, capricious, or contrary to law. As long as SBA's determination is reasonable, the ALJ must uphold it on appeal. *Id.* An Agency's decision is unreasonable if it constitutes a clear error of judgment. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

### c. Business Relationships which Cause Dependence

Title 13 C.F.R. § 124.106(g)(4) explains that non-disadvantaged individuals or entities “may be found to control or have the power to control [an applicant]” when “[b]usiness relationships exist with non-disadvantaged individuals or entities which cause such dependence that the applicant or [p] articipant cannot exercise independent judgment without great economic risk.” *See Matter of Artis Builders, Inc.*, SBA No. VET 214 (2011). *See also Marine Construction Services, LLC*, SBA No. VET-216 (2011).

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<sup>3</sup> Pursuant to an Interagency Agreement with SBA, the USCG Office of Administrative Law Judges is providing judicial services to the extent required under the regulations.

<sup>4</sup> The Administrative Record contained three (3) exhibits for which the Agency claimed evidentiary privileges and submitted a *Vaughn* index; unredacted copies were provided to the undersigned. 13 C.F.R. § 134.206(b)(4). The undersigned finds the documents were properly withheld pursuant to the deliberative process privilege. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132(1975).

### III. Petitioner's Argument

Harris Grant argues that a clear error of law occurred with the November 26, 2012 denial of Harris Grant's Request for Reconsideration, suggesting SBA acted arbitrarily, capriciously, and contrary to law in reaching its decision. *See* 13 C.F.R. § 134.406(b). Petitioner noted that SBA denied the Request because Harris Grant has a business relationship with a non-disadvantaged individual or entity. 13 C.F.R. § 124.106(g)(4).

Petitioner argues, *inter alia*, that Harris Grant, a Pennsylvania limited liability company headquartered and authorized to conduct business in Virginia, at all times has been owned by Harris Mahedavi (Harris) and Grant Dekker (Grant). (*See* AR Ex. 5 at 42). Throughout the lifespan of the company, Harris has held a fifty-one percent (51%) ownership interest, and Grant a forty-nine percent (49%) interest. Petitioner proffers that Harris maintains complete control and ownership, in terms of both long-term and day-to-day decision making.

Beginning in 2009, Petitioner entered into a contract with ISG by which Petitioner operated as a subcontractor on various contracts with the U.S. Department of Agriculture and the U.S. Department of Energy. While Harris Grant received substantially all revenues from these subcontracts until 2012, Harris Grant currently earns revenue from sources other than ISG; in fact, revenue from outside sources amounted to approximately thirty-five percent (35%) of Petitioner's total revenue for 2012. Further, since 2009, Petitioner has made efforts to obtain work outside of ISG, and, since June 2012, has received no revenues from ISG.

Petitioner explained that it hires and pays its own employees, and pays for its own office space and operating expenses. Petitioner argues that “receiving substantial revenues from one source of business does not create a business relationship that prevents Petitioner from exercising independent business judgment.” Notably, Harris holds the highest officer position in the limited liability company, works on a full time basis, and is the highest paid member of Harris Grant. Harris also has managerial experience and exercises control over the company in accordance with 8(a) requirements.

Petitioner argues that the applicable regulations define “control” and “power to control” and, applying these definitions, no non-disadvantaged individuals or entities have actual control or the power to control Harris Grant. *See* 13 C.F.R. § 124.106. Although Harris Grant received revenues from work on contracts wherein ISG was the prime contractor, “the fact that [Petitioner] worked with ISG is the only link between the two companies.”

Petitioner further argues that OHA decisions support its position relative to the law. Petitioner cites, *inter alia*, *Matter of Dooleymack Government Contracting, LLC*, SBA No. VET-159 (2009), wherein OHA held that a petitioner was not so dependent on a non-disadvantaged entity such that the business relationship impacted the petitioner's ability to exercise independent judgment. Petitioner also cites *Matter of Marine Construction Services, LLC*, SBA No. VET-216 (2011) and *Matter of Artis Builders Inc.*, SBA No. VET-214 (2011), wherein OHA found business relationships prevented disadvantaged entities from exercising independent business

judgment. Petitioner suggests the latter two cases stand for the proposition that economic dependence requires something beyond mere revenue.

#### IV. Agency's Argument

In the Response to the Appeal Petition, SBA argues, *inter alia*, that Petitioner did not submit sufficient materials in response to the determination that Harris Grant was unable to exercise independent business judgment. (See AR Ex. 1). The Agency argues that although Petitioner provided a Sales by Customer Report, it failed to provide any additional source documentation such as invoices, contracts, and bank deposits. (See AR Ex. 5). SBA asserts that without additional source documents, it could not reasonably determine all the facts “without making unreasonable inferences and assumptions.”

The Agency suggested it was unclear from the evidence submitted whether Harris Grant had actually been paid all the amounts it claimed as revenue; some of the claimed revenue appeared to have been invoiced, but not yet paid. (See AR Ex. 5). Citing *Matter of Cal Art Landscape*, SBA No. MSB-437 (1993), SBA argued it has no duty to correct any such evidentiary deficiencies.

SBA further suggested that Petitioner's Request for Reconsideration erroneously relied on a previous version of the regulations, explaining the Agency's current regulations clearly explain that SBA may find a non-disadvantaged entity has power to control in any of the situations enumerated in 13 C.F.R. § 124.106(g) regardless of its current or former relationship to the applicant.<sup>5</sup> See 76 Fed. Reg. 55701 (October 28, 2009). Notably, some of the cases cited by Petitioner predate the current version of this regulatory provision.

While Petitioner also cited two recent cases, *Matter of Marine Construction Services, LLC*, SBA No. VET-216 (2011) and *Matter of Artis Builders, Inc.*, SBA No. VET-214 (2011), the Agency argued that such decisions are very fact specific. Thus, while *Marine Construction* and *Artis Builders* both involved business concerns that relied on non-disadvantaged entities for revenue and operational/administrative needs, these decisions do not necessarily stand for the proposition that dependence requires something beyond mere revenue.

#### V. Discussion

As discussed, 13 C.F.R. § 124.106(g)(4) explains that non-disadvantaged individuals or entities “may be found to control or have the power to control [an applicant]” when “[b]usiness relationships exist with non-disadvantaged individuals or entities which cause such dependence that the applicant or [p] articipant cannot exercise independent judgment without great economic

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<sup>5</sup> Although the Request for Reconsideration asserted “ISG could not have the power to control [Harris Grant] because ISG is not a stockholder, partner, limited liability member, or officer or director of [Harris Grant],” (AR Ex. 5 at 21), Petitioner did not specifically raise this issue in the January 9, 2013 Appeal Petition. As discussed herein, the determination that ISG has the power to control Harris Grant pursuant to 13 C.F.R. § 124.106(g)(4) was not contrary to law. See 13 C.F.R. § 134.406.

risk.”

Here, the record demonstrates Harris Grant received substantially all revenues from contracts with ISG until 2012; however, in 2012, Harris Grant purportedly earned revenue from additional sources. (See AR Ex. 5 at 22, 265-67). Petitioner's Appeal Petition concedes that “[u]ntil 2012, [Harris Grant] received substantially all revenues from [subcontracts with ISG].” Thus, Harris Grant relied almost exclusively on ISG for revenue. (See AR Ex. 3).

In *Artis Builders*, OHA determined that a corporation that relied on a non-disadvantaged entity for office space, office equipment, and “all or nearly all” of the work performed could not exercise independent business judgment without severe economic risk. *Matter of Artis Builders, Inc.*, SBA No. VET-214 (2011). Similarly, in *Marine Construction*. OHA determined that a new business entity that relied on a non-disadvantaged entity for all financial capital, facilities, and equipment could not exercise independent judgment pursuant to 13 C.F.R. § 124.106(g)(4). *Matter of Marine Construction Services, LLC*, SBA No. VET-216 (2011).

While the disadvantaged entities in *Marine Construction* and *Artis Builders* undoubtedly had more extensive relationships with non-disadvantaged entities than Petitioner, neither case stands for the proposition that such an extensive relationship is requisite to preclude Program eligibility.

In fact, in *Marine Construction*, OHA recognized it has previously upheld determinations where an applicant's economic viability is “shown to be inextricably linked to another.” *Matter of Marine Construction Services, LLC*, SBA No. VET-216 (2011) (citing *Matter of Singleton Enterprises-GMT Mechanical, A Joint Venture*, SBA No. VET-130 (2008), *aff'd* SBA No. VET-133 (2008)). See also *Matter of Chevron Construction Services*, SBA No. VET-183 (2010) (finding that even though a service disabled veteran provided “sweat equity” and made all operational decisions for a business, financial dependence due to capital contribution could nonetheless impede independent business judgment.).<sup>6</sup>

Here, Harris Grant derived essentially all revenue from ISG until 2012; Harris Grant's financial stability was thus wholly reliant on ISG. As such, based on the Administrative Record, it was not unreasonable for SBA to conclude that Petitioner's economic success was inextricably linked with ISG, and thus its independent business judgment compromised. 13 C.F.R. § 124.106(g)(4). See *Matter of Marine Construction Services, LLC*, SBA No. VET-216 (2011).

In *Chevron Construction Services*, a case relied upon by Petitioner, OHA remanded a case for further investigation, opining that a disadvantaged entity's reliance on a non-disadvantaged entity for necessary licenses would inhibit independent business judgment. *Matter of Chevron Construction Services*, SBA No. VET 183 (2010). Here, the reliance arguably transcends licenses; Petitioner is dependent on a non-disadvantaged entity for its entire stream of

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<sup>6</sup> OHA has held that the control requirements for Service-Disabled Veteran-Owned Small Business Concerns are similar to requirements for the 8(a) Business Development Program In the *Matter of Chevron Construction Services, LLC*, SBA No. VET-183 (2010) (citing *Matter of Eason Enterprises OKC LLC et. al.*, SBA No. SDV-102 (2005)).

revenue. The relationship with ISG is thus “crucial to [Harris Grant's] ability to conduct business.” *Matter of Artis Builders, Inc.*, SBA No. VET-214 (2011).

While Petitioner argues that, beginning in 2012, Harris Grant began to earn revenue from sources in addition to ISG, as suggested by the Agency, the documentation and argument provided by Petitioner requires speculation as to this other revenue. (*See* AR Ex. 5).

The Request for Reconsideration asserts that “[c]ustomers have shown intent they would work with [Ppetitioner] again if available through the right contract vehicle.” (AR Ex. 5 at 22). While the Request generally discusses business opportunities undertaken by Petitioner apart from those with ISG, such as work as a subcontractor with Network Solutions Group, the referenced supporting documentation is insufficient. (*See* AR Ex. 5 at 22-23, 58-60, 265-67).

While Petitioner provided a Consulting Invoice List by Customer, the Invoice List is unsupported and largely unexplained; the amount and source of revenue is unclear. (*See* AR Ex. 5 at 58-60, 265-67). Thus, the Agency's determination that it could not reasonably determine all the facts “without making unreasonable inferences and assumptions” was not arbitrary, nor was the Agency's finding that Petitioner could not exercise independent judgment without great economic risk due to its financial dependence on ISG.

Accordingly, the undersigned finds SBA's decision denying Harris Grant admission to the Program was not arbitrary, capricious, or contrary to law. 13 C.F.R. § 134.406(b).

HON. DEAN C. METRY