

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

IN THE MATTER OF:

Wichita Tribal Enterprises, LLC,

Petitioner

SBA No. BDPS-523

Decided: June 20, 2014

DECISION AND ORDER

On August 14, 2013, the U.S. Small Business Administration (“SBA”) issued a Notice of Suspension to Wichita Tribal Enterprises, LLC (“Petitioner” or “WTE”). The Notice of Suspension explained that Petitioner was suspended from further participating in the 8(a) Business Development program (“8(a) BD program”) on the basis of Petitioner’s “clear lack of program eligibility” and “conduct indicating a lack of business integrity.”

On September 27, 2013, Petitioner timely appealed the SBA’s decision to suspend Petitioner. In the *Notice of Appeal from Suspension from 8(a) Business Development Program Assistance* (“Appeal Petition”), Petitioner claims the SBA’s decision to suspend Petitioner was based upon “stale and incomplete” evidence, and that “[a] proper review of the administrative record demonstrates that there is not a sufficient basis for WTE’s suspension.”

I. Procedural History

By *Notice and Scheduling Order*, dated October 23, 2013, the SBA was ordered to file a response to the *Appeal Petition*, supported by appropriate factual citation to the Administrative Record. In lieu of a response, the SBA filed a *Motion to Dismiss for Lack of Jurisdiction, or, in the alternative, for Summary Decision* (“Motion for Summary Judgment”), in which the SBA claimed that there was no genuine issue of material fact as to whether adequate evidence existed warranting the Petitioner’s suspension in order to protect the Federal Government’s interests. Petitioner responded by disputing the adequacy of the SBA’s review of the record and alleging that the SBA failed to consider all of the facts in its possession.

On February 12, 2014, the Court issued an *Order Denying the SBA’s Motion to Dismiss for Lack of Jurisdiction, or, in the alternative, for Summary Decision* (“Order Denying Summary Judgment”), wherein the Court determined that there is a dispute as to whether the SBA considered all the information in the record when it determined that suspension was warranted and as to whether adequate evidence exists to support the SBA’s decision to suspend Petitioner. The *Order Denying Summary Judgment* included an instruction to the SBA to file a response to the *Appeal Petition* and supporting documentation by March 26, 2014.

On April 7, 2014, Petitioner filed a *Notice of Default* noting that the SBA failed to file a response to the *Appeal Petition* within the time specified by the Court. By May 22, 2014, the Court still had not received a response to the *Appeal Petition* or to the *Notice of Default* from the SBA. As such, the Court issued an *Order to Show Cause* requiring the SBA to show cause as to why a default judgment in favor of Petitioner should not be granted,

On May 28, 2014, the SBA filed a *Response to Order to Show Cause* requesting an extension of time to file a response to the *Notice of Default*. The basis for the SBA's request was that “[t]he SBA has been in ongoing discussions with representatives of Wichita Tribal Enterprises, LLC (TWE), and is in the process of trying to reach an agreement to fully resolve the matter.” The SBA went on to explain that it is waiting for WTE's responses “to specific questions addressing SBA concerns relating to the participation of WTE in the 8(a) Business Development Program.”

On May 30, 2014, Petitioner moved for the immediate lifting of the 8(a) suspension as the SBA had yet to demonstrate that it had adequate evidence to support the decision to suspend Petitioner. The SBA filed a response to Petitioner's request restating its position in the Notice of Suspension. Upon receipt of Petitioner's *Reply* on June 9, 2014, the Court took the matter under advisement.

II. Applicable Law

In suspension cases, the Associate Administrator for the Office of Business Development (“AA/BD”) may suspend an 8(a) BD program participant when the AA/BD has determined that suspension is “needed to protect the interests of the Federal Government” 13 C.F.R. § 124.305(a). The SBA has the burden to demonstrate that adequate evidence exists to support the decision to suspend a participant. 13 C.F.R. § 124.305(d). Such evidence need not prove that the act or omission actually occurred. 37 C.F.R. § 124.305(d)(2). Rather, the SBA need only prove that the AA/BD had a “reasonable belief that a particular act or omission occurred, and that that act or omission requires suspension to protect the interests of the Government.” *Id.* Suspension is warranted to protect the Government's interests “where information showing a clear lack of program eligibility or conduct indicating business integrity exists, including where the concern or one of its principals submitted false statements to the Federal Government.” 13 C.F.R. § 124.305(a).

The SBA has the burden to show “that adequate evidence exists that protection of the Federal Government's interest requires suspension before OHA or the AA/BD makes a final determination regarding the termination action.” 13 C.F.R. § 124.305(d). Adequate evidence encompasses “information contained in the record before the AA/BD at the time of his or her suspension decision that is sufficient to support the reasonable belief that the Government's interests need to be protected.” 13 C.F.R. § 124.305(d)(1); *Sheela, Inc.* SBA No. BDP-410 (2011). A showing of adequate evidence is similar to the probable cause standard necessary for an arrest, search warrant, or preliminary hearing. *Alliance Steel Construction, Inc.*, SBA No. BDP-186, (2002). However, the standard requires “more than uncorroborated suspicion or accusation.” *Id.*

III. Discussion

In the Notice of Suspension, the SBA claims Petitioner's suspension is warranted due to a clear lack of program eligibility and conduct indicating a lack of business integrity. (Notice of Suspension). First, the SBA determined WTE was ineligible because it is “other than small” due to its affiliation with MRE Consulting Ltd. (“MRE”). MRE is owned by Shane Merz and two other persons who are also partners of Sakita Holdings, LLC a 49% member of WTE. Mr. Merz is a minority manager of WTE who has access to WTE's bank accounts. The SBA also cited a General Services Agreement (“GSA”) between WTE and MRE, though which MRE provides WTE “with the required business infrastructure, system/tools, and the professional expertise to enable WTE to establish a business base and to perform on awarded government-oriented contracts.” The SBA also considered the fact that Sakita had once lent WTE \$250,000 in determining that MRE and WTE are affiliated.

Second, the SBA claims Petitioner engaged in conduct indicating a lack of business integrity. Specifically, the SBA alleges Petitioner submitted “inaccurate or misleading information” in Petitioner's 2011 and 2012 annual reviews and that WTE attempted to evade SBA regulations by appointing Mr. Merz a manager of WTE after Petitioner was certified as an 8(a) participant. Last, the SBA states that it believes WTE is outsourcing the services it provides on contracts to MRE in order to get WTE's contracts completed.

In response, Petitioner claims the SBA relied on outdated and incomplete information in reaching its conclusions regarding Petitioner's eligibility and business integrity. For instance, Petitioner notes that in Spring of 2012, in response to the SBA's inquiries regarding WTE's status, Petitioner submitted 23 pounds of documentation that “squarely addressed each of SBA's concerns.” Petitioner asserts that the SBA misplaced the entire submission and did not review it.

Petitioner also addresses each of the SBA's claims in the Suspension Notice. With regard to the conclusion that Petitioner is clearly ineligible for the 8(a) BD Program because it is “other than small,” Petitioner notes that there has not been a formal size determination and disputes the bases for the SBA's conclusion that WTE and MRE are affiliated. Petitioner also disputes the SBA's allegation that WTE submitted false or misleading statements in order to evade SBA regulations.

It is undisputed that the SBA has the burden to demonstrate that adequate evidence exists to warrant Petitioner's suspension in order to protect the government's interests. 13 C.F.R. § 124.305(d). Such evidence must include the information contained in the record at the time the suspension determination is made.

IV. Conclusion

While the SBA makes compelling allegations for why Petitioner's suspension is warranted, the SBA fails to submit sufficient evidence in support thereof. The Court has twice ordered the SBA to file evidence in support of its claim that Petitioner's suspension is warranted. *See Notice and Scheduling Order*, dated October 23, 2013; *Order Denying Summary Judgment*,

dated February 12, 2014. To date, the only documents filed by the SBA in support of its position are the Letter of Intent to Terminate; the GSA; and a blank Participation Agreement. Said documents are barely sufficient to support a suspicion of Petitioner's "clear lack of eligibility" and "conduct indicating a lack of business integrity." Moreover, the SBA has yet to demonstrate that the decision to suspend Petitioner was based upon all the evidence in the record, which would include Petitioner's 2012 submission that was initially misplaced. In fact, the SBA's requests for additional time to review Petitioner's responses addressing Petitioner's participation in the 8(a) BD Program suggests that further inquiry and consideration is necessary.

For the foregoing reasons, the Court finds that the SBA is in default, and has not met its burden to demonstrate the existence of adequate evidence warranting Petitioner's suspension from the 8(a) BD program.

Accordingly, the SBA's suspension of Petitioner's participation in the 8(a) BD Program must be **LIFTED**.

SO ORDERED.

J. JEREMIAH MAHONEY
Administrative Law Judge