

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

IN THE MATTER OF:

NOVA Training & Technology Solutions,
LLC

Petitioner

SBA No. BDPT-464

Decided: February 1, 2013

APPEARANCES

Mark S. Halpern, Esq., Carmen M. Finegan, Esq., Halpern & Levy, P.C., 1205 Township Line Road, Drexel Hill, PA 19026, for NOVA Training & Technology Solutions, LLC

William L. Grey, Esq., United States Small Business Administration, 409 Third Street S.W., 7th Floor, Washington, D.C. 20416, for the Small Business Administration

FINAL DECISION AND ORDER

Petitioner NOVA Training & Technology Solutions, LLC (“NOVA” or “Petitioner”) appeals a decision by the Small Business Administration (“SBA” or “Agency”) terminating NOVA from the 8(a) Business Development Program (“Program”).¹ The SBA determined Petitioner failed to maintain full-time day-to-day management and control by disadvantaged individuals and failed to disclose to SBA the extent to which non-disadvantaged persons or firms participated in NOVA's management. Petitioner argued that SBA's determination was not appropriate because its response adequately demonstrated why termination was not justified and the SBA relied upon questionable information provided well after Petitioner provided its response to SBA's Notice of Intent to Terminate. For the reasons given in this Final Decision, I find that the SBA's decision terminating Petitioner from the Program is supported in the record and was made in accordance with applicable law and regulations. Petitioner's appeal is therefore **DENIED**.

I. Factual Background

Petitioner is a subsidiary of the Kake Tribal Corporation (“KTC”), an Alaskan Native

¹ Small Business Act of 1958, § 8(a), as amended, 15 U.S.C. § 637(a); 13 C.F.R. Part 124. The purpose of section 8(a) is to “promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy. . . .” 15 U.S.C. § 631(f)(2)(A); *see also* 13 C.F.R. § 124.

Corporation (“ANC”) as defined under 13 C.F.R. § 124.3. Administrative Record (“AR”) Exh. 12 at 2.² As of September 11, 2010, KTC owned 51% of Petitioner. AR Exh. 11 at 1. The other ownership interests in Petitioner included 45% ownership by Mr. Jeff Berlin and 4% ownership by Alaska Technology Development Group (“ATDG”). *Id.*; *see also* AR Exh. 13 at 2 (Petitioner's Program Application). KTC is located in Kake, Alaska and Petitioner's office is located in Garnet Valley, Pennsylvania. AR Exh. 12. On March 29, 2006, Petitioner was certified to participate in the Program with a Program Term Expiration date of March 29, 2015. ARExh. 12 at 1.

On November 4, 2011, SBA notified NOVA by letter that SBA intended to terminate it from the Program for good cause under 13 C.F.R. § 124.303(a). AR Exh. 9. The reasons for the proposed termination included: (1) NOVA's alleged failure to maintain ownership, full-time day-to-day management and control by disadvantaged individuals pursuant to 13 C.F.R. § 124.303(a)(3) and (2) NOVA's alleged failure to disclose the extent to which non-disadvantaged persons or firms participated in the management of Petitioner's concerns pursuant to 13 C.F.R. § 124.303(a)(5). *Id.*

The Intent to Terminate Letter stated that SBA had uncovered facts that raised questions about the control of the company. The SBA noted that a subcontracting agreement submitted to the SBA to demonstrate NOVA's ability to perform on a contract was with a firm named Fenwick Technologies (“Fenwick”), which was based in Charleston, West Virginia. *Id.* Fenwick's president at the time was Mr. Rich Edwards, who signed the agreement. *Id.* A letter of commitment from the BB&T bank in West Virginia was addressed to Mr. Edwards in his capacity as NOVA's CFO. *Id.*³ The SBA further noted that Fenwick is owned by Mr. Keith Comstock and his brother. *Id.* Mr. Comstock was one of NOVA's original board members and owns 4% of NOVA through ATDG. *Id.*

Additionally, the Intent to Terminate Letter observed that during a meeting with NOVA representatives (Messrs. Jim and Jeff Berlin), NOVA admitted that Fenwick manages NOVA's payroll. *Id.* The SBA concluded that:

With common ownership (Keith Comstock), common management (Rich Edwards), subcontracting agreements, payroll control of both firms by Fenwick, and being in the same industry (information technology), the two firms would likely be found to be affiliated. (Fenwick's DSBS profile lists both Rich Edwards and Keith Comstock as key members of the organization.) From a control standpoint, Keith Comstock has a conflict of interest, because he sits on the board representing the tribe, but as a minority shareholder himself, he also has his

² Petitioner did not request a remand for further record development *See* 13 C.F.R. § 134.406(c)(2). Despite this fact, I made a complete review of the AR. Based on mat review, I determined mat the file is complete so a remand for further record development is not required even if such a request had been made. *See* 13 C.F.R. § 134.406(c)(3).

³ A copy of this October 29, 2010 letter was included as AR Exh. 10.

personal interests in [NOVA], which may be in conflict with the interest of the tribe.

AR Exh.9 at 2.

On November 28, 2011, Mr. Jim Berlin, Petitioner's President, submitted NOVA's response. AR Exh. 6. NOVA claimed not to have violated any applicable Program statutes or regulations. *Id.*

However, the response acknowledged that “someone looking at our situation without knowing the circumstances surrounding the actions we took in the best interests of [NOVA], might wrongfully conclude that there were control or management issues.” *Id.* Mr. Berlin then highlighted three changes being taken “to prevent even the appearance of any impropriety,” which included:

- (1) Mr. Keith Comstock would resign from Petitioner's Board of Directors;
- (2) As of December 1, 2011, Fenwick Technologies will no longer provide any functions related to NOVA's payroll or back-office; and
- (3) Mr. Rich Edwards will become a full time NOVA employee as Chief Operations Officer beginning December 1, 2011⁴

Mr. Berlin further indicated that Mr. Edwards' loan to NOVA “will be paid back at our earliest convenience.” *Id.*

On December 9, 2011, Mr. William G. Murray, a SBA Business Development Specialist, wrote a memorandum to Mr. David Dickson, SBA's District Director for the Philadelphia District Office, concerning the review of NOVA's response. AR Exh. 5. That memorandum indicated that Mr. Jim Berlin and Mr. Keith Comstock participated in a conference call with Mr. Murray and Mr. John Banks of the SBA prior to NOVA's submission of a written response. *Id.* Mr. Murray stated that NOVA was making several changes to its operations and structure to address SBA's concerns, including: (1) Mr. Comstock submitted an electronic mail to NOVA's Chairman of the Board indicating his intent to resign from NOVA's Board of Directors; (2) NOVA had drafted a letter to Fenwick terminating the company's arrangement with Fenwick and requesting all of NOVA's payroll records and other documents related to back office support be returned; and (3) Mr. Edwards would become a full-time employee of NOVA as Chief Operating Officer. *Id.*

⁴ Mr. Berlin attached a letter dated November 28, 2011 to a Ms. Eva Kordusky concerning NOVA's notice that as of December 1, 2011, NOVA would no longer need Fenwick Technologies' payroll and back-office services. *See* AR Exh. 7. Mr. Berlin also attached a November 28, 2011 electronic mail from Mr. Keith Comstock to NOVA's Chairman mat indicated Mr. Comstock “no longer wish[ed]” to serve on the Board and mat he would be “willing to stay on the board briefly as a Kake representative until such time as Kake provides a replacement” *See* AR Exh. 8.

Mr. Murray indicated that an issue of concern was the NOVA/Fenwick relationship because Mr. Comstock owned Fenwick (along with his brother); sat on NOVA's Board of Directors; and owned 4% of NOVA *Id.* Furthermore, Mr. Murray asserted that Mr. Edwards is (or was) Fenwick's president and had been listed as NOVA's CFO on a letter from BB&T Bank when NOVA was requesting financing. *Id.* Finally, Mr. Edwards also provided a personal loan to NOVA in the amount of \$150,000. *Id.*

Mr. Murray also indicated that NOVA provided no documentation to support Mr. Berlin's assertion that it had used firms other than Fenwick Technologies as a subcontractor/partner. *Id.* at 2. Mr. Murray pointed out that NOVA's Board of Directors included five members, three appointed by Kake tribe (Chairman Gordon Jackson, Mr. Keith Comstock, and Ms. Lonnie Cavanaugh) and two others (Mr. Jim Berlin and his brother, Mr. Jeff Berlin). *Id.* Mr. Murray indicated that the “close relationship” between Fenwick and NOVA caused the SBA to doubt that the Kake tribe was truly in control. *Id.* Mr. Murray also questioned the potential conflict between Mr. Comstock, as member of NOVA's Board and partial owner, and his capacity as an owner of Fenwick. *Id.* Mr. Murray raised similar concerns regarding Mr. Edwards' role in both companies and the potential for conflict. *Id.* Mr. Murray concluded that SBA had not received enough information/documentation “to show that the relationship with Fenwick Technologies has been adequately addressed” and therefore he recommended that NOVA be terminated from the Program. *Id.* at 3.⁵

On December 21, 2011, Mr. Banks, a SBA Lead Business Development Specialist, apparently acting in the capacity of SBA's Assistant District Director for the Philadelphia District Office, concurred with Mr. Murray's recommendation. AR Exh. 5 at 4. Specifically, Mr. Banks indicated concerns remained regarding: (1) the financial arrangements of the loan to NOVA; (2) the fact that NOVA's corporate payroll was processed by a non-disadvantaged owned entity; and (3) the appearance that corporate financing may have been influenced by a non-disadvantaged individual with an out of state bank. *Id.* Mr. Banks also pointed out that combining these issues with the fact that NOVA's non-disadvantaged principals “all have ties to the non disadvantaged owned entity” in question led him to concur with the termination recommendation. *Id.*

On January 3, 2012, Ms. Patricia Younce, District Counsel, concurred with the recommendation to terminate NOVA from the Program. AR Exh. 5 at 5. That same day, Mr. David Dickson, SBA's District Director for Philadelphia, approved terminating NOVA from the Program. *Id.*

On June 25, 2012, Ms. Victoria Wolfe, President and CEO of KTC wrote the SBA to express her concerns regarding NOVA's continued participation in the Program. AR 4. The letter specifically stated that KTC “has been unable to obtain financial information or any progress/status reports for the company in 2 years.” *Id.* Furthermore, Ms. Wolfe claimed that

⁵ Mr. Murray acknowledged that SBA had received requests by NOVA for the changes outlined to be made, but had no proof that the changes actually had been made. AR Exh. 5 at 2. Additionally, Mr. Murray had continuing concerns with Mr. Edwards' loan to NOVA, an issue Petitioner seemingly had not addressed to that point. *Id.*

“[w]e feel the non-disadvantaged owners are in control. *Id.* Additionally, Ms. Wolfe asserted that KTC had not been provided with Program updates nor signed off on any annual updates that should have been provided to the SBA. *Id.* In sum, Ms. Wolfe concluded by stating: “We are not privy to what this company has or will be doing [and] [w]e have tried to reach out to the management team on numerous occasions with no avail” *Id.*

On July 13, 2012, Mr. Dickson wrote Ms. Wolfe thanking her for her letter expressing her concerns regarding NOVA and notifying her that SBA had determined that the company had violated several continued eligibility standards for Program participation. AR 3. Mr. Dickson also enclosed a copy of the Letter of Intent to Terminate and NOVA's response. *Id.*

On August 30, 2012, Ms. Vaunia Morrison, SBA Program Analyst concurred with the recommendation from SBA's Philadelphia District Office to terminate Petitioner from the Program AR Exh. 2.

On September 13, 2012, SBA sent Petitioner a Termination Letter pursuant to 13 C.F.R. § 124.304(c). AR Exh. 1. The Termination Letter stated that Petitioner was being terminated from the Program for two reasons: (1) under 13 C.F.R § 124.303(a)(3) (failure of the concern to maintain ownership, full-time day-to-day management, and control by disadvantaged individuals) and (2) under 13 C.F.R § 124.303(a)(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). *Id.* Additionally, the Termination Letter noted that the SBA had received the June 25, 2012 letter from Ms. Wolfe, in which Ms. Wolfe shared her concerns about NOVA and included a statement that non-disadvantaged owners controlled Petitioner. *Id.*

On November 1, 2012, NOVA's counsel submitted its Petition for Appeal. On November 7, 2012, the SBA's Office of Hearing and Appeals (“OHA”) transferred this matter to the United States Coast Guard (“USCG”), Office of Administrative Law Judges pursuant to a Memorandum of Agreement between the SBA, which provides that USCG Administrative Law Judge will perform judicial services to the SBA in accordance with the OPM Administrative Law Judge loan program. On November 20, 2012, this matter was assigned to me as presiding judge for review and disposition.

On December 17, 2012, SBA counsel filed a Response to Petitioner's Appeal, along with a certified copy of the Administrative Record. All the parties' submissions and the documents included in the Administrative Record have been thoroughly reviewed and evaluated in rendering this Decision.

II. Principles of Law

OHA has jurisdiction over Petitioner's Appeal pursuant to 13 C.F.R. § 134.102(j)(i). Petitioner's Appeal was timely filed on November 1, 2012. *See* 13 C.F.R. § 134.202(a). SBA counsel timely filed both a Response to Petitioner's Appeal and the Administrative Record. *See* 13 C.F.R § 134.206.

A. Standard of Review

SBA's determination must be sustained unless a review of the written administrative record demonstrates that the termination decision was arbitrary, capricious, or contrary to law. *See* 13 C.F.R. § 134.406(b). As long as the SBA's decision to terminate Petitioner was reasonable, it must be upheld on appeal. *Id.*

Under the arbitrary and capricious standard, an agency's decision is evaluated in terms of whether it was a reasonable conclusion in light of the facts available in the record and does not involve asking whether the conclusion was the best one, or even the correct one. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984) (“This court's judicial role is limited to determining whether the [agency's] interpretation was made rationally and in good faith—not whether it was right.”); *In re Ace Technical*, SBA No. SDBA-178, at 3 (“[Examination] is not a *de novo* review of the administrative record to decide whether the SBA's ultimate conclusions are correct.”).

B. Requirements for Continuing Program Eligibility

In order to participate in the Program, a business concern must be unconditionally owned and controlled by one or more socially and economically disadvantaged individuals. 13 C.F.R. § 124.101. Special rules apply to those businesses owned by ANCs. *See* 13 C.F.R. § 124.109(a). The rules applicable to tribally-owned concerns at 13 C.F.R. § 124.109(b)-(c) also apply to ANC-owned concerns. *Id.* Neither party indicated that any of these special rules were directly at issue in NOVA's termination from the Program.⁶

C. Requirements for Termination from Program

The SBA may terminate an 8(a) Program participant prior to the completion of its program term for good cause. 13 C.F.R. § 124.303(a). Under the regulations, good cause includes a number of non-exclusive factors. *Id.*; *see also* 13 C.F.R. § 124.303(b) (“Other grounds for terminating a Participant from the 8(a) BD program for cause may exist and may be used by SBA”). Of particular concern here are the two factors the SBA relied upon in making its termination decision. One of the asserted reasons fell under 13 C.F.R. § 124.303(a)(3) (“Failure by the concern for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership, full-time day-to-day management, and control by disadvantaged individuals.”) and the other fell under 13 C.F.R. § 303(a)(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.”).

Prior to terminating a participant from the Program, the SBA must first notify the concern in writing of its intent and “the specific facts and reasons for SBA's findings.” 13 C.F.R. §

⁶ *See, e.g.*, 13 C.F.R. § 124.109(c) (“Control and management (i) The management and daily business operations of a Tribally-owned concern must be controlled by the Tribe.”).

124.304(b). The SBA must also inform the concern that it “has 30 days from the date it receives the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify termination.” *Id.* After the 30-day period for a response has passed, the SBA considers the proposed termination and any response by the concern in determining whether termination is warranted. 13 C.F.R. § 124.304(c). No specific timing requirement is in place for a decision by the SBA following a participant's response, but the SBA is encouraged to “act in a timely manner in processing... termination actions.” *Id.*

On appeal, a petitioner's burden is to “state, with specific reference to the determination and the record supporting such determination, the reasons why the determination is alleged to be arbitrary, capricious or contrary to law.” 13 C.F.R. § 134.402.

III. Petitioner's Appeal

Petitioner argued that it had adequately addressed SBA's concerns through the actions it took in response to the Notice of Intent to Terminate. Furthermore, Petitioner asserted that SBA's termination was founded, at least in part, on information SBA received approximately seven months after NOVA responded to that Notice. Appeal at 2.

Specifically, Petitioner complained that SBA took action based on allegations ““entirely different” from those offered in the Notice. *Id.* The claimed new allegations are those raised in Ms. Wolfe's June 25, 2012 letter, which NOVA read as forming the basis for SBA's decision to terminate NOVA from the Program. *Id.* Petitioner argued that any questions or concerns the SBA had resulting from this letter were never addressed to NOVA. *Id.*

Petitioner then argued that NOVA had never seen Ms. Wolfe's letter and because it was authored more than nine months after SBA's Intent to Terminate Notice, it neither could be related to nor relate back to that Notice. *Id.* at 2-3. Moreover, Petitioner claimed that SBA personnel (Mr. Murray and Mr. Banks) specifically advised NOVA's president on August 17 and 20, 2012, respectively, that the Intent to Terminate Notice was satisfactorily resolved and there were no other concerns about NOVA. *Id.* at 3.

In substantive terms, Petitioner also sought to explain the circumstances around Ms. Wolfe's letter. *Id.* at 3-5. Petitioner alleged that Ms. Wolfe had neither the approval from KTC's board to take any action regarding NOVA, nor send SBA a letter expressing the wishes or opinions of the KTC board. *Id.* at 3. Furthermore, Petitioner claimed that NOVA had yet to be provided a copy of the letter but “had seen other documents authored by Ms. Wolfe which completely misrepresent and misconstrue facts relating to NOVA.” *Id.* at 3-4.

Petitioner further argued that had SBA conducted an adequate investigation into Ms. Wolfe's claims, it would have discovered that KTC had always been in control of NOVA, but despite that control, problems resulting from “KTC's incessant tribal infighting” and failure to appoint new members to NOVA's board per the terms of the company's Operating Agreement led to problems that impeded NOVA's ability to prosper. *Id.* at 4. To counter Ms. Wolfe's claims that KTC did not receive information from NOVA Petitioner attached three emails to its Appeal that appear to show communications between Mr. Berlin and Ms. Wolfe: (1) on May 23, 2011

regarding “Nova update”; (2) on August 31, 2011 regarding “Nova updated activities report”; and (3) on December 8, 2011 regarding “Nova financials as requested”. *See* Appeal Exh. C.⁷

Petitioner also claimed that NOVA had been audited by KTC on three separate occasions, including 2012; that Mr. Berlin appeared before the KTC board in December 2010 and gave the entire KTC board a presentation of financials and business actions and prospects; and that in May 2012, Mr. Berlin met with KTC board chairman Sasha Sobeloff in Juneau, Alaska and reported on NOVA's activities, gave him information and requested to appear at the next KTC board meeting to answer any questions (but was never notified of or invited to any KTC board meeting thereafter). *Id.* at 4-5.

IV. Agency Response

SBA counsel argued that the two bases SBA asserted to terminate Petitioner from the Program represented a decision that was reasonable and not arbitrary, capricious or contrary to law. With respect to the first asserted reason for termination under 13 C.F.R. § 124.303(a)(3), SBA counsel maintained that Petitioner's eligibility for the Program was based on 51% ownership by KTC and that KTC, by its own admission (through Ms. Wolfe's letter), no longer has knowledge of what Petitioner has been or will be doing. Agency Response at 7.

SBA counsel further pointed out that the SBA, while reviewing Petitioner's 8(a) Annual Review in September 2011, noticed several areas of concerns that led SBA to believe that non-disadvantaged individuals were controlling NOVA. *Id.* at 8. These factors included the potential affiliation with Fenwick, the services Fenwick provided NOVA Mr. Edwards' loan to NOVA and financing arrangements, and the common ownership relations between the two companies described above.

SBA counsel then questioned the extent to which NOVA's proposed solutions had actually been implemented, essentially arguing a failure of proof by NOVA (e.g., no proof of Mr. Comstock's resignation, no proof of Fenwick returning Petitioner's payroll records) in its response to the Notice to Terminate. *Id.* at 8-9. Furthermore, SBA counsel indicated that Petitioner's corrective measures did not alleviate SBA's concerns regarding Mr. Edwards' dual role with NOVA and Fenwick and the personal loan he made to Petitioner. *Id.* at 9. SBA counsel argued that Ms. Wolfe's letter merely confirmed SBA's issues concerning control by non-disadvantaged persons. *Id.*

⁷ Agency regulations mandate that the judge “may not admit new evidence beyond the written administrative record nor permit any form of discovery unless he or she first determines that petitioner, upon written submission, has made a substantial showing, based on credible evidence and not mere allegation, that the Agency determination in question may have resulted from bad faith or improper behavior.” 13 C.F.R. § 134.407. Petitioner did not request that these emails be admitted under these rules and, as they are not part of the AR, are rejected as extra-record evidence. Importantly, however, Agency counsel substantively addressed the evidentiary value of these emails. Therefore, despite my ruling, I will assume that they were made part of the record and considered in rendering this Decision. Such inclusion does not change the outcome herein.

As for the second stated basis for termination under 13 C.F.R. § 124.303(a)(5), SBA counsel asserted that Petitioner was obliged to notify SBA in writing of any changes that would adversely affect its Program eligibility, especially changes in control. *Id.* at 10; *see also* 13 C.F.R. § 124.112(a). Given the alleged extent to which Petitioner was controlled by non-disadvantaged persons, which was not disclosed, SBA counsel argued that termination was appropriate.

SBA counsel also stated that Petitioner's claim that two SBA personnel told Mr. Berlin that the problems identified in the Intent to Terminate Notice had been resolved should be disregarded because NOVA failed to substantiate such claims. *Id.* at 10. Additionally, SBA counsel argued that Petitioner's claim that SBA's determination was based on new allegations contained in Ms. Wolfe's letter should also be rejected because the Termination Letter based the termination decision on the same reasons as indicated in the Intent to Terminate Notice with Ms. Wolfe's letter merely serving as confirmation of SBA's pre-existing concerns. *Id.* at 11.

Finally, with respect to the substantive content of Ms. Wolfe's letter and Petitioner's attempts to discredit the same, SBA counsel made two basic points. First, SBA counsel questioned Petitioner's lack of proof concerning Ms. Wolfe's alleged *ultra vires*-like actions and other alleged misrepresentations concerning NOVA. *Id.* Second, SBA counsel addressed the emails contained in Petitioner's Exh. C by arguing the two emails from Mr. Berlin to Ms. Wolfe, did not have the attachments or any responses from Ms. Wolfe. The other email contains a *minimal* response from Ms. Wolfe. *Id.* SBA counsel argued that such emails do not demonstrate that Petitioner was keeping KTC informed. *Id.*

V. Analysis

Facts gathered from SBA's September 2011 annual review of Petitioner's Program eligibility indicated several areas of concern. *See* AR Exh 12. These concerns led to the issuance of the Intent to Terminate Notice. *See* AR Exh 9. Contrary to Petitioner's arguments, these concerns were not fully addressed by NOVA's response to that Intent to Terminate Notice. The AR makes it clear that SBA personnel still had significant concerns despite NOVA's asserted adherence to Program requirements; changes proposed concerning NOVA's board personnel; Mr. Edwards' role; and the intended cessation of using Fenwick to process NOVA's payroll and providing other back-office functions. *See* AR Exh 5.

Indeed, SBA's Termination Letter continued to assert the same bases for termination as indicated in the Intent to Terminate Notice. *See* AR Exh 1. Certainly, Ms. Wolfe's letter was offered as additional supporting evidence confirming SBA's concerns regarding NOVA. *Id.* But the Termination Letter is better read as simply that with respect to Ms. Wolfe's letter. Contrary to Petitioner's arguments, Ms. Wolfe's letter did not provide a separate, independent basis for terminating Petitioner from the Program. Nowhere did SBA link Ms. Wolfe's letter to a previously undisclosed basis for termination. It was not unreasonable for SBA to accord Ms. Wolfe's letter some credibility, as it came from KTC's President/CEO on KTC letterhead. *See* AR Exh. 4.

Even if the Wolfe letter was read as providing a new rationale for the termination decision, the Court could not find any SBA-specific law dealing with due process issues related to such supplementation. *But see In re Accent Services Co., Inc.*, SBA No. BDP-421 (2011) (SBA alleged to have raised new issue in Termination Letter but on appeal, SBA did not proceed on that basis so appropriateness of new issue not addressed). Here, Ms. Wolfe's letter is part of the AR Petitioner received the AR and had the opportunity to request additional record development if it deemed the AR incomplete. *See* 13 C.F.R. § 134.406(c)(2). Furthermore, Petitioner had the opportunity to request additional discovery if it thought SBA had acted in bad faith or engaged in improper behavior. *See* 13 C.F.R. § 134.407(a). Nevertheless, Petitioner substantively argued the credibility to be afforded Ms. Wolfe's letter, which has been considered in rendering this Decision. Even if one completely discounts Ms. Wolfe's letter, the SBA proceeded on an adequate basis for termination following NOVA's submission in response to the Notice of Intent to Terminate. The linkages between Fenwick and NOVA and non-disadvantaged ownership personnel in both companies indicated that control and management were not being adequately maintained by KTC.

I agree with SBA counsel that Petitioner's unsubstantiated claims that SBA had essentially “signed off” on the changes NOVA proposed and that SBA's issues had been resolved do not render SBA's decision unlawful. The AR indicates that as late as December 9, 2011, the SBA personnel Petitioner claims to have told Mr. Berlin that no problems remained with NOVA explicitly expressed that “there are still many questions to be answered regarding the relationship between NOVA TTS and Fenwick Technologies.” AR Exh. 5 at 2. Such expressed concerns thus remained after the alleged exculpatory discussions between Mr. Berlin and Agency personnel in August 2011.

Even assuming that Petitioner addressed, without admitting that control issues existed, the problems SBA identified to the satisfaction of SBA personnel, such corrective measures do not relieve Petitioner of the obligation to have informed SBA the extent to which non-disadvantaged persons were involved in NOVA's control and management. SBA could have, and in fact did, proceed under the regulations to terminate Petitioner from the Program on that basis. *See* 13 C.F.R. § 124.303(a)(5).

The AR demonstrates that SBA considered all of the facts in the record, as well as the law and regulations that govern the decision-making process. The SBA made a reasonable conclusion that termination was warranted and followed the appropriate procedural mechanisms for such termination. SBA's decision is supported by the evidence in the record because of substantiated concerns regarding the control of NOVA by non-disadvantaged persons and NOVA's failure to disclose the same. Petitioner has failed to state why the determination was arbitrary, capricious or contrary to law. *See* 13 C.F.R. § 134.402.

WHEREFORE:

ORDER

IT IS HEREBY ORDERED that Petitioner's Appeal of its termination from the 8(a) Program is DENIED because the Small Business Administration's decision terminating NOVA

Training & Technology Solutions, LLC from the 8(a) Program was NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO LAW. *See* 15 U.S.C. § 637(a)(9)(C) and 13 C.F.R. § 134.406(b).

THE PARTIES ARE HEREBY NOTIFIED that subject to 13 C.F.R. § 134.409(c), this Order is the final decision of the Small Business Administration.

Done and dated on this 1st day of February, 2013 at Alameda, California.

HON. PARLEN L. MCKENNA
Acting Chief Administrative Law Judge
United States Coast Guard