United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Agile Tek Solutions,	SBA No. BDPT-474
Petitioner	Decided: March 12, 2013

DECISION

On September 10, 2012, Agile Tek Solutions ("Petitioner") appealed a determination of the Small Business Administration ("SBA") to terminate Petitioner's participation in the 8(a) Business Development Program ("8(a) BD Program"). *See* 13 C.F.R. parts 124 and 134. On January 2, 2013, the SBA filed a *Brief and Arguments of the United States Small Business Administration* ("Answer") requesting that the Court deny Petitioner's *Appeal Petition*.

On October 11, 2012, the matter was transferred to this Court pursuant to 13 C.F.R. § 134.218(a) to determine whether the SBA's decision was arbitrary, capricious, or contrary to law.[1]

APPLICABLE LAW

Participation in the 8(a) BD Program. The 8(a) BD Program was developed to assist eligible small disadvantaged business concerns competing in the American economy. 13 C.F.R. § 124.1. The SBA accepts eligible concerns into the 8(a) BD Program for a period of nine years, provided the concern maintains its program eligibility. 13 C.F.R. § 124.2. To demonstrate continued eligibility, "participants must annually submit to the SBA a certification of continued eligibility and submit certain documents, including a personal financial statement, tax returns, and fiscal, year-end financial statements." *Fairfield Trucking Co.*, SBA No. BDP-223, at 1 (2005) (citing 13 C.F.R. §§ 124.112(b), 124.602); *see also Tavcom Bus. Solutions, Inc.*, SBA No. BDP-228 (2006).

However, the SBA may 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" is:

[1] Pursuant to an Interagency Agreement in effect beginning October 1, 2012, Administrative Law Judges of the U.S. Department of Housing and Urban Development are authorized to hear cases for the U.S. Small Business Administration.

> (7) [a] pattern of failure to make required submissions or responses to SBA in a timely manner, including a failure to provide required financial statements, requested tax returns, reports, updated business plans, information requested by SBA's Office of Inspector General, or other requested information or data within 30 days of the date of request.

13 C.F.R. § 124.303(a).

Prior to terminating a participant from the 8(a) 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. § 124.304(b). The SBA must also inform the concern that "[the concern] 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).

Standard of Review. The SBA's decision to terminate a concern's participation in the 8(a) BD Program can only be overturned if the reviewing court concludes — after considering the entire administrative record — that the determination was arbitrary, capricious, or contrary to law. 13 C.F.R. § 134.402, 134.406(a)-(b); 5 U.S.C. § 706(A)(2). The reviewing court's task is to decide whether the agency reached a reasonable conclusion in light of the facts available in the administrative record. It does not ask 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."); Ace Technical, SBA No. SDBA-178, at 3 (2008) ("[Examination] is not a *de novo* review of the administrative record to decide whether the SBA's ultimate conclusions are correct."). Any reasonable conclusion must be upheld, even if it differs from the conclusion the reviewing court would have reached. *State Farm*, 463 U.S. at 42-43; *Citizens to Preserve Overton Park. Inc. v. Volpe*, 401 U.S. 402, 416 (1971); 13 C.F.R. § 134.406(b).

MOTIONS AND OBJECTIONS

As a preliminary matter, the Court must address an outstanding objection and motion. On January 17, 2013, Petitioner filed its *Objections of Agile Tex Solutions to the Administrative Record and Claims of Privilege* wherein Petitioner objects to (1) the omission of phone records and e-mails between Petitioner and the SBA; and (2) the SBA's claim of deliberative process privilege in withholding three exhibits from Petitioner.

The Administrative Record must include all documents that are relevant to the Agency's determination that is being appealed and upon which the Agency relied in arriving at its decision. 13 C.F.R. § 134.406(c)(1). Petitioner may object to the absence of a document in the Administrative Record, or a claim of privilege made by the SBA. 13 C.F.R. § 134.406(c)(2). Here, Petitioner objects to both.

First, Petitioner objects to the omission of "telephone records and emails that tend to show that the Company engaged in ongoing communications with the SBA between January 31, 2012 and July 24, 2012." Petitioner alleges "a significant number of phone calls passed between Petitioner's CEO, Tenarus Dewayne Webb, and the SBA in the weeks and months identified by the agency as a period of non-responsiveness on the part of the Company." Petitioner also claims "Agile Tek's attempts to communicate with the SBA were occasionally answered by out of office replies."

SBA regulations state that Petitioner may object to "the absence of a document, previously submitted to, or sent by, SBA, which the petitioner believes was erroneously omitted from the administrative record." 13 C.F.R. § 134.406(c)(2). By order of the Court dated December 3, 2012, Petitioner was advised that "[a]ny objection to an incomplete Administrative Record must include either a copy or a detailed description of any document or other information Petitioner believes is missing and why Petitioner believes the Administrative Record should include it."

Petitioner does not claim that the phone records, if they exist, were previously submitted to, or sent by, the SBA. Although the content of those alleged conversations could constitute information passed between the SBA and Petitioner, there is no evidence that there is a documented record of such conversations. Additionally, the SBA claimed that it did not rely on any phone conversations between its employees and Petitioner when arriving at its decision. Also, Petitioner fails to give a detailed description of the phone records it is seeking. Although Petitioner claims a "significant" number of phone calls between Petitioner and the SBA occurred, Petitioner does not give any of the dates on which these phone calls are alleged to have taken place, nor does Petitioner describe what was discussed other than to state that Petitioner was led to believe it had an extension for filing its Annual Review information.

Petitioner also fails to give a detailed description of the e-mails it claims it exchanged with the SBA that were omitted from the Administrative Record. Although Petitioner submitted a copy of an "out of office" reply that was automatically sent from Jennie Montgomery, an SBA employee, Petitioner submits no other e-mails it alleges were sent to, or by, the SBA. Petitioner does not give the dates or content of the other e-mails it claims were wrongfully omitted from the Administrative Record. The Administrative Record includes seven e-mails that were exchanged between Petitioner and the Agency. The "out of office" auto-reply was not included among those seven e-mails. However, one of the e-mails that was included was a response Ms. Montgomery sent to Petitioner the day after the "out of office" reply was sent. This e-mail included a full response to Petitioner's initial e-mail that originally generated the "out of office" reply. A review of the Administrative Record indicates that it was this response from Ms. Montgomery that the SBA relied upon, not the "out of office" reply.

Petitioner's objection as to the allegedly omitted phone records and e-mails is devoid of evidence that the communications, if they occurred, were sent to or by the SBA. Petitioner knows the content of the communications, whom from the SBA Mr. Webb spoke with, and when the communications took place. However, Petitioner does not give any of these details and instead makes a general allegation that the SBA should be ordered to produce these alleged

records. As Petitioner has failed to provide copies or give adequate details to prove that these documents were sent to or by the SBA, the Court finds the SBA did not erroneously omit the communications. Accordingly, the Court finds the Administrative Record contains the documents relied upon by the SBA in reaching its decision, and is therefore complete.

Second, Petitioner objects to the SBA's claim of deliberative process privilege in withholding exhibits 2, 5, and 12 from the Administrative Record. Petitioner alleges the exhibits were not pre-decisional because they were drafted after a Letter of Intent to Terminate ("Letter of Intent") was sent to Petitioner, and that the SBA should be precluded from completely redacting the exhibits if they contain any factual material.

The deliberative process privilege prevents the disclosure of an agency's internal communications when those communications constitute necessary internal debate about upcoming agency policies or decisions. *See EPA v. Mink*, 410 U.S. 73 (1973); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Jordan v. Dep't. of Justice*, 591 F.2d 753 (D.C. Cir. 1978); Petroleum Information Corp. v. U.S. Dep't. of the Interior, 976 F.2d 1429, 1433 (D.C. Cir. 1992). To fall within this privilege, a document must be both "pre-decisional" and "deliberative." *See Jordan*, 591 F.2d at 774. A document is considered pre-decisional if it was prepared to assist an agency decision-maker in arriving at a decision, rather than to support a decision already made." *Petroleum Information Corp.*, 976 F.2d at 1434 (quoting *Renegotiation Bd. v. Grumman Aircraft*, 421 U.S. 168 (1975)); *Jordan*, 591 F.2d at 774 ("The various rationales for the privilege evanesce once a final policy decision has been reached."). Material is deliberative if it "reflects the give-and-take of the consultative process." *Petroleum Information Corp.*, 976 F.2d at 1434 (quoting *Coastal States Gas Corp. v. U.S. Dep't. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

The Court disagrees with Petitioner's argument that the exhibits were not pre-decisional. Although these exhibits were drafted near or after the date the Letter of Intent was issued, SBA regulations state that the SBA considers the proposed termination and any response to the Letter of Intent *after* the 30-day period for a response has passed. 13 C.F.R. § 124.304(c). Indeed, an *in camera* review of the documents indicates that the SBA took into account the e-mails exchanged between Petitioner and Ms. Montgomery after the Letter of Intent was issued. Therefore, the withheld documents were pre-decisional.

Petitioner also disputes that the withheld documents are entirely deliberative and claims that the SBA should be compelled to redact and produce the withheld documents if they contain factual material. A protected document "must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take of the deliberative process by which the decision itself is made." *Jordan*, 591 F.2d at 774. Even documents that pass this two-part test may still not warrant protection. Courts have long held that any factual material present in these documents must be disclosed, unless those facts are inextricably intertwined with the policy-making or decisional process. *See Mink*, 410 U.S. at 87-91: *U.S. v. Exxon*, 87 F.R.D. 624, 637 (D.D.C. 1980); *Montrose Chemical Corp. of Calif. v. EPA*, 491 F.2d 63 (D.C. Cir. 1974).

The Court's *in camera* review of the documents reveals that Exhibits 5 and 12 contain factual material that could be produced without the SBA waiving its deliberative process privilege. If Petitioner is not privy to the factual material contained in the withheld documents, and relied upon by the SBA in arriving at its determination, the Court would be inclined to order the production of such material. However, that is not the case here. The factual material being withheld is nothing novel and is readily available to Petitioner in other, non-redacted documents in the Administrative Record. Therefore, Petitioner is not prejudiced by the SBA's redaction. Ordering the production of this factual material would merely delay this Decision.[2] Accordingly, Petitioner's objection is **DENIED**.[3]

THE AGENCY'S DETERMINATION

On June 7, 2012, the SBA issued a letter informing Petitioner of its intent to terminate Petitioner from the 8(a) Program based upon Petitioner's "pattern of failure to make required submissions or responses to SBA in a timely manner." The Letter of Intent specifically cited Petitioner's failure to submit its Annual Review update information within 30 days of Petitioner's 8(a) BD Program anniversary date of March 31, 2012. Petitioner was reminded of his obligation to make said submission via written correspondence dated January 31, 2012; February 29, 2012; March 1, 2012; and April 9, 2012.[4] The Letter of Intent also informed Petitioner that its written response to the Letter of Intent was required within 30 days.

On June 13, 2012, Ms. Montgomery contacted Mr. Webb, requesting a field visit ""next Tuesday at 1 PM."[5] In response, Mr. Webb suggested meeting at a different time and asked if he could give Ms. Montgomery Petitioner's Annual Review update information at the meeting. Ms. Montgomery answered in the affirmative and confirmed the appointment for "1:30 on Tuesday, June 29th."[6]

Ms. Montgomery attempted to meet with Mr. Webb on June 19, 2012, but was unsuccessful. On June 20, 2012, Mr. Webb e-mailed Ms. Montgomery explaining that he was not there to meet her on the 19th because he was expecting to meet the following week per Ms. Montgomery's e-mail. He recommended rescheduling the meeting for a date and time that would suit Ms. Montgomery's schedule and stated, "I will have my packet ready to deliver." Ms. Montgomery responded the next day acknowledging that she had included the wrong date in her

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[2] However, under different circumstances, the Court would not hesitate to order the production of these documents. The factual material in exhibits 5 and 12 are not "inextricably intertwined" with the reasoning supporting the recommendation, and could have been produced by simply redacting a handful of sentences of the recommendation.

[3] The SBA's *Motion to Strike* is also **DENIED** as moot.

[4] The April 9, 2012, letter extended the deadline for Petitioner to submit its Annual Review update information to May 9, 2012.

[5] The date of the following Tuesday was June 19, 2012.

[6] June 29, 2012, fell on a Friday.

e-mail, and noting, "since the 29th is not a Tuesday and all my emails were speaking to next Tuesday, I would have hoped that you would [have] requested clarification." She also explained that she was unable to reschedule the visit at that time, and clarified that she only agreed to pick up the Annual Review documents because she believed she would be meeting with him on June 19th. Ms. Montgomery suggested that if Mr. Webb intended to submit the documents as a response to the Letter of Intent, he should do so by the deadline stated in the Letter of Intent.

As of July 25, 2012, well after the 30-day period for a response to the Letter of Intent passed, the SBA still had not received Petitioner's Annual Review update information, or any written response to the allegations set forth in the Letter of Intent. As such, the SBA found that Petitioner failed to "overcome the reason cited for termination" and notified Petitioner that it would be terminated from the 8(a) BD Program within 45 days unless the termination was appealed prior to the stated date.

DISCUSSION

The SBA has an affirmative responsibility under the Small Business Act to ensure that only eligible business concerns are admitted into — and remain in — the 8(a) BD Program. This ensures that public funds are properly administered, and that the benefits of the 8(a) BD Program are limited to those small businesses owned, controlled, and managed by socially and economically disadvantaged individuals. To carry out the public trust, the SBA must enforce 8(a) BD Program requirements.

On appeal, Petitioner claims the SBA's determination was arbitrary, capricious, and contrary to law. Petitioner acknowledges it has yet to submit the requested information, but claims that this failure is due to unforeseen circumstances and events. Petitioner also claims the SBA erred in finding that a pattern existed.

First, Mr. Webb claims a series of events — including the death of a relative, an illness in the family, and his own traffic accident — caused him to be away from work for extended periods of time. It was due to these extended absences that Petitioner was unable to submit its Annual Review information or respond to the Letter of Intent. Petitioner also cites the missed meeting with Ms. Montgomery and claims that based upon a phone conversation between Mr. Webb and the SBA, Mr. Webb was "under the impression" that he would have until August 11, 2012, to complete the Annual Review.

It is well established that a failure to submit annual review documents as part of the 8(a) BD Program, and failure to respond to requests for said documents, constitute a pattern of failure under 13 C.F.R. § 124.303(a)(7) and is good cause for termination. *JA Harris Trucking, Inc.*, SBA No. BDPT-463 (2013); *Taycom*, SBA No. BDP-228 (holding that Petitioner's failure to provide annual review documents in response to two requests and a letter of intent to terminate constituted a pattern of failure). Here, Petitioner failed to submit Annual Review update information despite three reminders and one request for it to do so.[7] Petitioner also never

[7] The Court notes that Petitioner's obligation to submit its Annual Review update information does not arise from a request. Rather, the obligation is mandated by statute.

responded to the Letter of Intent, which required a written response to the allegations within 30 days.

The Court finds Petitioner's failure to respond or make such submissions amounts to a pattern of failure under the regulation. *See JA Harris*, SBA No. BDPT-463, at 4-5; *Anielink, Inc.*, SBA No. BDP-254 (2007) (finding a petitioner's failure to respond to the SBA's two requests for a business plan, and an intent to terminate letter "amount to a pattern of failure to make required submissions or responses to the SBA" despite the fact that the two requests for a business plan were never actually received by the petitioner, who failed to keep the SBA informed of its current address.) Although Mr. Webb claims he was "under the impression" that he had until August 11th to submit Petitioner's Annual Review information, he does not suggest that Petitioner was actually given an extension by the SBA; nor does the Administrative Record include any evidence of such an extension being granted. While the circumstances surrounding Mr. Webb's inability to timely submit Petitioner's Annual Review information or respond to the Letter of Intent are unfortunate, such explanations fail to demonstrate that the SBA's decision was arbitrary, capricious, or contrary to law. *See JA Harris*, SBA No. BDPT-463, at 4-5 (noting the SBA is not required to mitigate the consequences of Petitioner's failure to comply with SBA regulations); *see also Prof'l Buyers Advantage, LLC*, SBA No. BDP-417 (2011) (finding a pattern of failure to make required submissions existed, despite the petitioner's regular telephonic and electronic communications with the SBA, because of petitioner's failure to submit its annual review until at least seven months after the due date).

Second, Petitioner argues that the SBA erred in finding that a pattern existed because the period of time between the SBA's first request for the information and its decision to terminate spanned just 154 days while Petitioner had maintained its eligibility for nearly seven years. In support of its argument, Petitioner notes the "vast majority" of termination decisions "involved multiple supporting grounds and greatly extended timeframes."

SBA regulation deems a pattern of failure to make required submissions or responses in a timely manner to be good cause for termination. 13 C.F.R. § 124.303(a)(7). The regulation continues to explain that such failure includes not providing certain documentation within 30 days of the date of the request. *Id.* As discussed *infra*, the SBA afforded Petitioner at least 30 days to respond to each request. Additionally, the SBA afforded Petitioner the appropriate period of time to respond to the Letter of Intent before issuing its decision.[8] Therefore, there is no evidence that the SBA erred by terminating Petitioner from the 8(a) Program only five months after the first request. *See Taycom*, SBA No. BDP-228 (noting the SBA's duty to "rigorously and reasonably enforce 8(a) Program requirements" and finding a failure to respond to two requests for information and a Letter of Intent amounts to a pattern).

Additionally, Petitioner fails to cite any law that requires termination be based on more than one ground. Conversely, the Court has held that "[i]f the SBA bases the termination on more than one ground, and at least one ground is not arbitrary, capricious, or contrary to law, the

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[8] The decision to terminate Petitioner was made nearly 45 days after the Letter of Intent was received by Petitioner.

SBA's decision to terminate must be upheld." *JA Harris*, SBA No. BDPT-463, at 5; *see also Wholesale Distribution*, SBA BDP-456 (Nov. 27, 2012) (citing *Garza Telecomms., Inc.*, SBA No. MSB-620 (1998) and noting that if at least one ground for declining an 8(a) BD application is reasonable, the decision to decline the application cannot be found arbitrary, capricious, or contrary to law)).

CONCLUSION

Based on the foregoing, the Court finds that the SBA's determination terminating Petitioner from the 8(a) BD Program was not arbitrary, capricious, or contrary to law and it is, therefore, **AFFIRMED**.[9] *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

So **ORDERED**,
ALEXANDER FERNÁNDEZ
Administrative Law Judge

[9] **Notice of Reconsideration Rights**. This *Decision* constitutes a final agency decision that is binding on the parties. 13 C.F.R. § 134.409(a). However, within 20 days after the issuance of this *Decision*, the Court may reconsider this *Decision* upon clear showing of an error of fact or law material to the *Decision*. 13 C.F.R. § 134.409(c).