

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

IN THE MATTER OF:

ME Cubed Engineering, LLC,

Petitioner

SBA No. BDPT-493

Decided: May 31, 2013

APPEARANCES

Karen H. Holzen, Esq., United States Small Business Administration, 409 Third Street, S.W., Washington, D.C. 20416, for the Small Business Administration

David A. Rose, Esq., Rose Consulting, 9495 Riverclub Parkway, Duluth, GA 30097, for the Petitioner

FINAL DECISION AND ORDER

On February 27, 2013, ME Cubed Engineering, LLC¹ (ME Cubed or Petitioner) appealed a determination of the United States Small Business Administration (SBA or Agency) terminating Petitioner from the 8(a) Business Development Program (the Program).²

I. Procedural History

ME Cubed was initially accepted into the 8(a) Business Development Program on May 13, 2010. (*See* AR Ex. E).³ On August 28, 2012, SBA sent Petitioner a Letter of Intent to Terminate, indicating SBA planned to terminate the firm from the Program for good cause pursuant to 13 C.F.R. § 124.303(a). (AR Ex. D).

On October 9, 2012, ME Cubed responded to SBA's letter, contending good cause for the

¹ Petitioner is also referred to as “ME %EA3 Engineering”, “M ECUBED ENGINEERING” and “M E Cubed Engineering” throughout the record.

² 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.

³ Citations referencing the Administrative Record are as follows: Administrative Record followed by Exhibit Letter (AR Ex. ____).

termination did not exist and providing evidence in support of its position. (AR Ex. C). Thereafter, on January 11, 2013, SBA sent a Termination Letter to Kevin Champion, President of ME Cubed, finding good cause for termination pursuant to 13 C.F.R. §§ 124.303(a)(1), 124.303(a)(3), 124.303(a)(5), 124.303(a)(15), 124.303(a)(19), and 124.303(a)(20). (AR Ex. A). On February 27, 2013, ME Cubed filed an appeal with the SBA Office of Hearings and Appeals (OHA).

On March 8, 2013, the matter was assigned to the undersigned Administrative Law Judge (ALT) for adjudication.⁴ On April 11, 2013, SBA filed its Response to Appeal Petition and a certified copy of the Administrative Record. 13 C.F.R. § 134.406(c)(1). Petitioner did not object as to the completeness of the Record. 13 C.F.R. § 134.406(c)(2).⁵ Accordingly, on April 23, 2013, the undersigned issued an Order Closing Administrative Record.

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).

⁴ 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.

⁵ However, Petitioner's Appeal, filed prior to receipt of the Administrative Record, states as follows:

[T]he record and decision of the Washington D.C. office fails to even mention consideration of evidence of contracts awarded other than those from Pond and Company, submitted by Mr. Champion in his original response, submitted to the Atlanta District Office . . . for example, and as such is incomplete and Discovery must be opened to review how this occurred pursuant to 13 CFR § 134.407.

To the extent Petitioner intended this statement to serve as a motion requesting evidence beyond the record and/or discovery, it is insufficient. 13 C.F.R. § 134.407(a); 13 C.F.R. § 134.406(c)(2). Further, as discussed herein, the record is sufficient for the undersigned to determine whether SBA's determination was arbitrary, capricious, or contrary to law. 13 C.F.R. § 134.406(e).

C. Termination Pursuant to 13 C.F.R. § 124.303(a)

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. Pursuant to 13 C.F.R. § 124.303(a), SBA may terminate the participation of a business concern in the Program for good cause. The applicable regulations list examples of good cause; however, the regulations specifically explain the list is not exhaustive. 13 C.F.R. § 124.303(a). On appeal, a petitioner “must state, with specific reference to the determination and the record supporting such determination, the reasons why the [termination] is alleged to be arbitrary, capricious, or contrary to law.” 13 C.F.R. § 134.402.

III. Agency's Position

In the January 11, 2013 Termination Letter,⁶ the Agency set forth the reasons for termination as follows:

A. 13 C.F.R. § 124.303(a)(1)- Submission of false information in the concern's 8(a) BD application, regardless of whether correct information would have caused the concern to be denied admission to the program, and regardless of whether correct information was given to SBA in accompanying documents or by other means.

The Agency explained ME Cubed was initially admitted into the Program on May 13, 2010. At the time, Kevin Champion, the sole owner of the company, was purportedly devoted to the company on a full-time basis. During the first year of program participation, a Georgia District Office Business Development Specialist (BDS) attempted to conduct a site visit on two separate occasions. However, upon arrival at the address listed on the 8(a) application, the BDS found no evidence of an office actually existing at that address.

During a June 21, 2011 meeting with the BDS, Mr. Champion indicated he had taken a full-time job at Pond & Company, Inc. (Pond & Company) a month prior to acceptance into the Program. Mr. Champion further informed the BDS he had not yet signed the Program Participation Agreement because he was not at the ME Cubed office full-time, and did not want to lie by signing the form. Thus, Mr. Champion was aware for at least one year that his actions were in violation of SBA regulations, but nevertheless represented himself and his company as a Program participant.

B. 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.

Mr. Champion's 2010 and 2011 Tax Returns and W-2 reveal his full-time employment with Pond & Company. A disadvantaged individual who wishes to engage in outside employment must notify SBA of the nature and anticipated duration of the outside employment

⁶ (AR Ex. A).

and obtain prior written approval of the Associate Administrator for Business Development (AA/BD) or his/her designee. In the instant case, Mr. Champion provided no notification to the AA/BD.

Additionally, Petitioner's response to the Letter of Intent to Terminate failed to list any contract opportunities aside from one contract with Pond & Company. (AR Ex. C). As such, SBA concluded Petitioner was not "pursuing competitive and commercial business in accordance with [it's] business plan or [[had] failed to make reasonable efforts to develop and achieve viability."

C. 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.

SBA determined a strong affiliation and dependency existed between Petitioner and Pond & Company. In response to the Letter of Intent to Terminate, Petitioner provided many documents referencing a "mentor/protégé" relationship with Pond & Company. (AR Ex. C). Based on the subcontracting and subleasing agreements provided, SBA concluded Petitioner would be at great economic risk if Pond & Company decides to discontinue the business relationship.

D. 13 C.F.R. § 124.303(a)(15) Submission by or on behalf of a Participant of false information to SBA, including false certification of compliance with non-8(a) business activity targets under § 124.507 or failure to report changes that adversely affect the program eligibility of an applicant or program participant under § 124.204 and § 124.112, where responsible officials of the 8(a) BD Participant knew or should have known the submission to be false.

13 C.F.R. § 124.303(a)(19) Material breach of any terms and conditions of the 8(a) BD Program Participation Agreement

13 C.F.R. § 124,303(a)(20) Willful violation by a concern, or any of its principals, of any SBA regulation pertaining to material issues.

SBA contends Petitioner underwent a first year review on July 11, 2011. During this time, Mr. Champion provided a completed SBA Form 1010-IND. Question 14 of the form asked Mr. Champion "are you currently employed outside the applicant business concern?" to which he responded "no." However, approximately one year later, Mr. Champion submitted a resignation letter wherein he indicated he had been employed by Pond & Company between April 5, 2010 and March 16, 2012.

Petitioner also provided false information the following year, on or about July 13, 2012, on an SBA Form 1010. Question 7 of the form inquired "does the business concern buy from, sell to, or use the services or facilities of any other business concern, or otherwise conduct business with any other business concern, in which a principal of the applicant business concern has a financial or other interest?" to which Mr. Champion replied "no." However, in response to

the Letter of Intent to Terminate, Petitioner provided a copy of a Mentor/Protégé Sublease Agreement with Pond & Company, signed on March 29, 2012, contradicting this response.

E. Agency's Response to Appeal Petition

In its April 11, 2013 Response to Petitioner's Appeal Petition, the Agency argued its decision to terminate Petitioner from the Program was not arbitrary, capricious, or contrary to law. SBA suggested Petitioner “failed to overcome the grounds for termination set forth in SBA's Letter of Intent to Terminate.”

The Agency noted that while Petitioner argued on appeal SBA did not follow its own procedures in the termination action, Petitioner erroneously cited the outdated version of SBA SOP 80-05-3A; SBA properly followed the current version of the SOP, as evidenced by the record.

Petitioner also argues SBA failed to consider the entire record; however, this argument too is without merit. Specifically, Petitioner contends SBA was aware of Mr. Champion's outside employment, but did not consider this fact in deciding to terminate Petitioner from the Program. While Petitioner correctly asserts that during an orientation session Mr. Champion informed a Specialist he was employed apart from ME Cubed, this does not mandate a different outcome. The BDS recommended Mr. Champion review applicable SBA regulations, and, if appropriate, complete a Voluntary Withdrawal Agreement. Instead, Mr. Champion signed the participation agreement and remained employed with Pond & Company.

While Petitioner argues Mr. Champion inadvertently checked the wrong box, and that such a “scrivener's mistake” should not warrant termination, SBA suggests Petitioner provided false information during both the first annual and second year review. Notably, Petitioner signed both forms, which contained false information, under the penalty of perjury that the answers were true and correct.

IV. Petitioner's Argument

In the February 27, 2013 Appeal, Petitioner argues that “the pre-decisional behavior” of the new BDS in the Atlantic District office was the actual reason for Petitioner's termination from the Program. To this end, Petitioner suggests “an affirmative act, by the Government . . . made it impossible for Mr. Champion to comply with the requirements of the program.” In support of this argument, Petitioner alleges SBA failed to consider contracts awarded to companies other than Pond & Company, requesting the undersigned “sustain the appeal”, and the matter be, “remanded to a neutral forum for reconsideration.”

Petitioner also argues SBA committed procedural error and denied Petitioner due process by failing to follow its own Standard Operating Procedure. In support of this contention, Petitioner included text of “Standard Operating Procedures 80-05-3A” alleging the procedure was not followed at various points throughout the termination process.

Petitioner further alleges SBA failed to consider the entire record. In support of this contention, Petitioner asserts:

[the Specialist] was aware of [Mr. Champion's] status as employed outside his business. . . . this was due to the economy (as many strong companies have suffered) and that he had to work to support his firm. He had not signed his 8(a) agreement at that time because he did not want to submit false information and was directed to sign it and submit a letter to SBA requesting a waiver. . . .

Petitioner also suggests:

[while] a purely Draconian view might allow a Participant to be terminated from the program for inadvertently checking the wrong box, Champion's scrivener mistake does not give rise to any of the previous cases in OHA's previous line of appeal cases. He inadvertently checked the wrong box. Unlike other OHA cases; however, this was not over a matter such as a previous felony conviction. Also, he was not obtaining 8(a) contracts for some nefarious purpose. Application of the regulations so strictly in this case leads to a clearly erroneous result. . . .

Petitioner concludes by contending the termination procedure failed to comport with applicable Standard Operating Procedures, and the flawed review process failed to consider Petitioner's response. Petitioner contends “[t]here is a possibility, while not determinative of the requested relief in this case, that these two issues are related.”

V. Discussion

A. Applicable Law

OHA has held that if the SBA bases termination on multiple reasons, as in the instant case, so long as at least one of the reasons is not arbitrary, capricious, or contrary to law, SBA's decision to terminate must be upheld on appeal. *Matter of Agile Tek Solutions*, SBA No. BDPT-474 (2013) (quoting *JA Harris Trucking, Inc.*, SBA No. BDPT-463 (2013)). In the instant case, SBA cited six (6) reasons why, pursuant to 13 C.F.R. § 124.303(a), Petitioner should be terminated from the Program.

Among the six (6) reasons listed is 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.”

As regulations do not explicitly define what constitutes full-time work, the issue is decided on a case-by-case basis. *Matter of SJH Engineering, P.C.*, SBA No. BDP-412 (2011) (citing *Minority Temp. Agency, Inc.*, SBA No. SDBA-166 (2006)). However, the regulations are nonetheless clear that full time management by disadvantaged individuals is requisite for Program eligibility. 13 C.F.R. § 124.303(a)(3). *See* 13 C.F.R. § 124.106(a)(3) (“[o]ne or more disadvantaged individuals who manage the applicant or Participant must devote full-time to the business during the normal working hours of firms in the same or similar line of

business.”).

Full-time status determinations are rendered by examining: (1) the amount of time devoted to the subject business concern; (2) the amount of time devoted to outside employment and interests; and (3) the potential for conflicts between the subject business concern schedule and the time spent in outside pursuits. *Matter of SJH Engineering, P.C.*, SBA No. BDP-412 (2011) (citing *Oak Hill Rehab. Specialists, Inc.*, SBA No. BDP-154(2001)).

The key inquiry is whether a disadvantaged individual devotes full-time work to the subject business interest; the fact that a disadvantaged individual may have other business interests is not necessarily dispositive. *See Oak Hill Rehab. Specialists, Inc.*, SBA No. BDP-154 (2001). The disadvantaged individual may maintain other business ownerships/affiliations so long as one or more disadvantaged individuals devote full-time work to the business during the normal working hours of firms in the same or similar line of business. 13 C.F.R. § 124.106(a)(3).

B. Analysis

In the instant case, Petitioner concedes in both the Response to Letter of Intent to Terminate and the Appeal that Mr. Champion maintained employment with Pond & Company while ME Cubed was a Program participant. (AR Ex. C). Petitioner's Response to the Letter of Intent to Terminate openly acknowledges this outside employment commenced on April 5, 2010. *Id.* Moreover, Petitioner's Appeal does not dispute that, as a result of this other employment, Mr. Champion failed to devote full-time work to ME Cubed during the period in question.⁷

In a letter addressed to the Atlanta Georgia Area District Office attached to Petitioner's Response to Letter of Intent to Terminate, Mr. Champion explains Petitioner was initially reluctant to accept admission into the Program because “after two years of successfully operating ME %EA3 Engineering, LLC *full-time*, [the] president was forced to take an employee position at a more established engineering firm. . . .” (Emphasis added). (AR Ex. C). *See Oak Hill Rehab.*

⁷ However, Petitioner's Response to the Letter of Intent to Terminate states:

I, Kevin Champion, am the disadvantaged individual of the 8(a) Participant who has maintained ownership, full-time day-to-day management, and control of the 8(a) Participant firm since the firm was established in 2006.

(AR Ex. C). Petitioner then contradicts this statement later in the Response, conceding:

It was never my intent to falsify my status or abandon my firm but the circumstances of the economy and the fact that I had not yet established my firm within the government contracting community required me to work in order to bring in sufficient funding. . . .

Id.

Specialists, Inc., SBA No. BDP 154 (2001).

Petitioner's Appeal does not dispute or allege that Mr. Champion failed to devote full-time work to ME Cubed. Instead, the Appeal argues both that the BDS was informed of Mr. Champion's outside employment, and that his outside employment and failure to manage ME Cubed on a full-time basis was necessitated by the economy. However, Petitioner provides no legal authority, and fails to explain how either of these factors, if assumed true, would render SBA's termination unlawful. 13 C.F.R. § 124.106(a)(3).

Notably, the applicable regulations explain that “[f]ailure by the concern, *for any reason, including the death of the individual upon whom eligibility was based*, to maintain . . . full-time day-to-day management. . . .” is legal ground for termination from the Program. 13 C.F.R. § 124.303(a)(3). (Emphasis added). Thus, SBA's determination that good cause for termination exists pursuant to 13 C.F.R. § 124.303(a)(3) was not arbitrary, capricious, or contrary to law.

As SBA's determination that Petitioner violated 13 C.F.R. § 124.303(a)(3) was reasonable, the undersigned need not review the remaining cited reasons for termination. *Matter of the VBP Group, LLC*, SBA No. BDP-326 (2009) (citing *Matter of Blind Detective Agency*, SBA No. BDP-163 (2001)).

Nevertheless, the undersigned notes Petitioner's remaining arguments as to the other reasons for termination are also without merit. *See* 13 C.F.R. § 134.402. For instance, Petitioner alleges Mr. Champion “inadvertently [checked] the wrong box,” but suggests a “scrivener mistake” should not warrant termination.⁸ However, Petitioner cites no legal authority to support the assertion that Mr. Champion's “scrivener mistake” excuses the submission of false information. *See* 13 C.F.R. § 124.303(a)(15).

Based on the circumstances, it was not unreasonable for SBA to conclude Petitioner submitted false information. Mr. Champion certified, under penalty of perjury, that the information provided was true and accurate, and made two separate assertions of questionable veracity on two separate occasions. Thus, classifying the assertions as mere “scrivener's errors” is unreasonable in light of the circumstances. *See Matter of H Squared Indus., Inc.*, SBA No. BDP-349 (2010) (finding a business owner's assertion that she failed to disclose a prior SBA loan due to forgetfulness unreasonable in light of the circumstances).

⁸ Notably, SBA's January 11, 2013 Termination Letter alleges Petitioner submitted false information on two separate occasions, on two separate SBA Form 1010s. Petitioner's Appeal generally asserts Mr. Champion inadvertently “[checked] the wrong box.” However, it is unclear as to which SBA Form 1010/checked box Petitioner's Appeal refers. Petitioner's Response to the Letter of Intent to Terminate would suggest Petitioner refers to the first incident, on or about July 11, 2011, wherein Mr. Champion indicated he was not employed outside the applicant business. (AR Ex. C). However, with regards to this incident, the Response seemingly argues both that Mr. Champion was erroneously advised by the BDS, and that he made “an unintentional and inadvertent error” by incorrectly filling out the form. *Id.*

Petitioner further alleges that “an affirmative act, by the Government, made it impossible for Mr. Champion to comply with the requirements of the program.” However, it is unclear as to what “affirmative act” Petitioner refers, and it is equally unclear as to how a government act prevented Mr. Champion from complying with the regulatory requirements of the Program, specifically the requirement that a disadvantaged individual devote full-time work to the business entity.

Accordingly, the undersigned finds SBA's decision terminating ME Cubed from the Program was not arbitrary, capricious, or contrary to law. 13 C.F.R. § 134.406(b).

ORDER

WHEREFORE,

IT IS HEREBY ORDERED THAT Petitioner's Appeal is **DENIED** and SBA's Determination is **AFFIRMED**.

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

Done and dated this 31st day of May, 2013 at Galveston, Texas

DEAN C. METRY
Administrative Law Judge