

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

IN THE MATTER OF:

SPARCcom & Assocs.,

Petitioner

SBA No. BDPT-501

Decided: August 19, 2013

APPEARANCES

Sabrina C. Daly, Esq., United States Small Business Administration, 409 Third Street, SW, 7th Floor, Washington, D.C. 20416, for the U.S. Small Business Administration

George M. Sparks, *pro se*, Owner, SPARCcom & Associates, 2900 Thomas Ave., So. Suite 1610, Minneapolis, MN 55416, for the Petitioner

FINAL DECISION AND ORDER

Summary

The U.S. Small Business Administration (SBA or Agency) terminated Petitioner from the 8(a) Business Development (BD) program for failure to pursue competitive and commercial business or failure in other ways to make reasonable efforts to develop and achieve competitive viability. Petitioner appealed SBA's determination. The Administrative Record demonstrates the Agency's decision was not arbitrary, capricious, or contrary to law because there is no evidence showing Petitioner was pursuing competitive business or making reasonable efforts to achieve competitive viability during 2010 or 2011. Petitioner's appeal is therefore **DENIED** and SBA's determination is **AFFIRMED**.

Background

The purpose of the 8(a) BD program “is to assist eligible small disadvantaged business concerns compete in the American economy through business development.” 13 C.F.R. § 124.1. Participation in the 8(a) BD program is divided into two phases over a nine (9) year program term: a four (4) year developmental stage and a five (5) year transition stage. *See U.S. Small Business Administration Website, 8(a) Business Development Program*, <http://www.sba.gov/content/8a-business-development-0> (last visited August 15, 2013). “To ensure that Participants do not develop an unreasonable reliance on 8(a) awards, and to ease their transition into the competitive marketplace after graduating from the 8(a) BD program, Participants must make

maximum efforts to obtain business outside the 8(a) BD program.” 13 C.F.R. § 124.509(a)(1) (emphasis added). During both program phases “a Participant must make substantial and sustained efforts, including following a reasonable marketing strategy, to attain the targeted dollar levels of non-8(a) revenue established in its business plan.” 13 C.F.R. § 124.509(a)(2) (emphasis added).

“[D]uring the transitional stage of the 8(a) BD program, a Participant must achieve certain targets of non-8(a) contract revenue” which are “expressed as a percentage of total revenue.” 13 C.F.R. § 124.509(b)(1). The regulations further provide an 8(a) BD program Participant may be terminated “where the firm makes no good faith efforts to obtain non-8(a) revenues.” 13 C.F.R. § 124.509(d)(5).

Procedural History

George Sparks owns SPARCcom & Associates (SPARCcom or Petitioner). *See* AR Ex. 7.¹ SPARCcom was initially accepted into SBA's 8(a) BD program in October 27, 2006. *Id.* On January 25, 2012, SBA sent Petitioner a Letter of Intent to Terminate (Intent Letter), stating SBA planned to terminate the firm from the 8(a) BD program for good cause pursuant to 13 C.F.R. § 124.303(a). *See* AR Ex. 3. Specifically, SBA decided to terminate Petitioner because his 2010 Federal tax returns and SBA Annual Review Form 1450 dated January 17, 2012 indicated to SBA that Petitioner was no longer in business or, alternatively, failed to pursue competitive business or develop to achieve competitive viability. *Id.*

On February 21, 2012, Petitioner responded to SBA's Intent Letter claiming SBA did not have good cause to terminate him from the 8(a) BD program. Petitioner also provided several documents to support his position. *See* AR Exs. 6.1 and 6.2. On October 25, 2012, SBA sent a Termination Letter to Petitioner finding good cause for termination remained pursuant to 13 C.F.R. § 124.303(a)(9) for “failure by the concern to pursue competitive and commercial business in accordance with its business plan, or failure in other ways to make reasonable efforts to develop and achieve competitive viability.” *See* AR Ex. 1. On February 26, 2013, Petitioner filed an appeal with the SBA Office of Hearings and Appeals (OHA).

On February 27, 2013, this matter was assigned to the undersigned Administrative Law Judge (ALJ) for adjudication.² On April 4, 2013, SBA filed a Motion to Dismiss for Lack of Jurisdiction which the undersigned denied. On May 30, 2013 SBA moved for reconsideration which the undersigned also denied.³ On July 18, 2013, SBA filed its Response to the Appeal Petition and a certified copy of the Administrative Record pursuant to 13 C.F.R. § 134.406(c)(1). On August 2, 2013, Petitioner filed a Reply to SBA's response along with additional materials

¹ Citations referencing the Administrative Record are as follows: Administrative Record followed by the Exhibit number (AR Ex.)

² Pursuant to an Interagency Agreement with SBA, the USCG Office of the Chief Administrative Law Judge is providing judicial services to the extent required under the regulations.

³ The undersigned's reasoning for denying SBA's motions is set forth in greater detail in the Orders dated April 19, 2013 and June 24, 2013.

and did not object to the completeness of the Administrative Record pursuant to 13 C.F.R. § 134.406(c)(2). The undersigned therefore deems the Administrative Record complete and finds the Record is sufficient to determine whether SBA's determination was arbitrary, capricious, or contrary to law. *See* 13 C.F.R. § 134.406(c)(3).

Petitioner's Argument

Petitioner argues SBA's decision to terminate SPARCcom from the 8(a) BD program was arbitrary, capricious, or contrary to law because the “correspondence I sent with twelve different documents (including a spread sheet with clients and prospective clients in over ten states, plus Canada and sample invoices) I sent [SBA] last January [2012] demonstrating that I am in business and actively pursuing clients for corporate and government contracts” was sufficient to show Petitioner did not violate 13 C.F.R. § 124.303(a)(9). *See Appeal Letter* dated February 26, 2013 (parenthesis in original) (brackets added). In his February 2012 letter to SBA, Petitioner also explained “my firm has generated revenue from sales to businesses in 2006, 2007, 2008 and 2009 however, the revenues reduced in 2010 primarily base [sic] of a sufficient decline in the U.S. economy.” AR Ex. 6.1. In that letter he further argued “SPARCcom & Associates has been enthusiastically pursuing commercial business.” *Id.*

Agency's Argument

SBA argues it thoroughly reviewed Petitioner's submissions but that information did not assuage the Agency's “strong concerns about Petitioner's efforts to maintain a profitable business, achieve competitive viability as well as his efforts to pursue competitive and commercial business.” *Response* dated July 18, 2013 at 8-9. In particular, SBA argues Petitioner's lack of revenue for 2010 and 2011 as well as his minimal revenue (\$2,400.00) in his 2010 tax forms supports its conclusion. Further, Petitioner did not provide SBA with any specific information on the contracts he allegedly bid on during 2010 and 2011. Finally, Petitioner's forecast for the 2012 fiscal year totaled only \$8.00 for both 8(a) and non-8(a) sales. Ultimately, SBA concluded that the documents provided by Petitioner indicated that “Petitioner was making insufficient efforts to maintain competitive viability and as a [sic] such Petitioner was no longer maintaining his eligibility to continue in the 8(a) BD Program.” *Id.*

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 and Scope 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).

Pursuant to 13 C.F.R. § 134.406(a) this proceeding “shall be decided solely on a review of the administrative record.” The administrative record must contain “all documents that are relevant to the determination on appeal before the Administrative Law Judge and upon which the SBA decision-maker, and those SBA officials that recommended either for or against the decision, relied. 13 C.F.R. § 134.406(c)(1). Further, “the Administrative Law Judge may not admit evidence beyond the written administrative record. . . .” *See* 13 C.F.R. § 134.407(a).

In this case, SBA terminated Petitioner from the 8(a) BD program based on records and information submitted to SBA by Petitioner prior to issuing its Termination Letter in October 2012. To the extent Petitioner submitted updated or different materials to me Administrative Law Judge during this proceeding, those submissions are not considered as part of the Administrative Record because they were not before SBA when it made its determination. All of Petitioner's new and updated records do not address the issue of whether SBA's decision to terminate Petitioner from the program was arbitrary, capricious, or contrary to law.

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

“SBA may terminate the participation of a concern in the 8(a) BD program prior to the expiration of the concern's Program Term for good cause.” 13 C.F.R. § 124.303(a). That regulation also provides a non-exhaustive list of what constitutes good cause. *Id.* Pursuant to the regulation, good cause includes “[f]ailure by the concern to pursue competitive and commercial business in accordance with its business plan, or failure in other ways to make reasonable efforts to develop and achieve competitive viability.” 13 C.F.R. § 124.303(a)(9). On appeal, a petitioner “must state, with specific reference to the determination and the record supporting each determination, the reasons why the [termination] is alleged to be arbitrary, capricious, or contrary to law” 13 C.F.R. § 134.402.

Findings of Fact

1. George Sparks is the Owner of SPARCcom & Associates. *See* AR Ex. 7.
2. On October 20, 2006, SBA admitted SPARCcom & Associates (Petitioner) into the 8(a) BD program. *Id.*
3. On October 23, 2006, Mr. Sparks, executed a Participation Agreement on Petitioner's behalf acknowledging all terms and conditions required for continued program participation. *See* AR Ex. 8.
4. Specifically, Petitioner acknowledged it may be terminated for “[f]ailure by the concern to pursue competitive and commercial business in accordance with its business plan, or failure in other ways to make reasonable efforts to develop and achieve competitive viability.” *Id.*
5. As part of SBA's required review, Petitioner submitted George Sparks' 2010 Individual

Federal Tax Returns and the “8(a) Annual Update” Form 1450 dated January 17, 2012. *See* AR Exs. 4 and 5.

6. Based on Petitioner's submissions, SBA sent a Letter of Intent to Terminate on January 24, 2012 notifying SPARCcom it would be terminated from the 8(a) BD program unless it could show reasons justifying SBA's retention of the firm in the program. *See* AR Ex. 3.

7. On February 21, 2012 Petitioner responded to SBA's Intent Letter and provided several documents to support SPARCcom's retention in the 8(a) BD program.

8. On March 19, 2012, SBA forwarded SPARCcom's file from the NJ District Office to SBA headquarters with a recommendation to terminate SPARCcom from the 8(a) BD program. *See* AR Ex. 2.

9. On October 24, 2012, SBA sent a letter terminating SPARCcom from the 8(a) BD program for “failure by the concern to pursue competitive and commercial business in accordance with its business plan, or failure in other ways to make reasonable efforts to develop and achieve competitive viability.” *See* AR Ex. 1.

10. In the Termination Letter, SBA specified that Petitioner's February 2012 response letter “did not include a list of contract opportunities that you pursued within the last two years.” *See* AR Ex. 1.

11. Further, the Termination Letter stated “your IRS 1040 Schedule C and SBA Form 1450 submitted showed that your firm has generated minimal to no revenues for the past two years. In the absence of any revenues and your failure to include a list of contract opportunities in your response letter, it appears that you are not pursuing competitive and commercial business in accordance with your business plan or have failed to make reasonable efforts to develop and achieve viability.” *See* AR Ex. 1.

12. On February 26, 2013, Petitioner appealed SBA's termination claiming the decision was arbitrary and capricious based on “correspondence I sent with twelve different documents (including a spread sheet with clients and prospective clients in over ten states, plus Canada and sample invoices) I sent [SBA] last January demonstrating that I am in business and actively pursuing clients for corporate and government contacts.” *See Appeal Letter* dated February 26, 2013.

13. On July 18, 2013, SBA submitted its Response to Petitioner's Appeal and included a copy of the Administrative Record pursuant to regulation. *See Response* dated July 18, 2013; *see also* AR Exs. 1-8.

14. On August, 2, 2013, Petitioner submitted a Reply to SBA containing several new or updated documents but did not object to the completeness of the Administrative Record.

Analysis

Petitioner's 2010 Income Tax Form and 2011 "8(a) Annual Update" Form 1450 show SPARCcom's lack of revenue during those years. AR Exs. 4 and 5. Further, Petitioner's documents in response to SBA's Intent Letter (which are analyzed in detail below) do not demonstrate specific efforts during 2010 and 2011 to pursue competitive business or make reasonable efforts toward competitive viability.

After receiving SBA's Intent Letter, Petitioner submitted several documents purporting to demonstrate "my past business revenue and present business activity over pass [sic] few years." AR Ex. 6.1. Petitioner submitted his tax returns for both 2007 and 2008. Those documents are not probative on the issue of whether Petitioner was engaged in pursuing competitive business activity or making reasonable steps toward competitive viability in 2010 and 2011. Petitioner also submitted 1) an income statement for three months ending in March 2006; 2) a statement of revenues and operating expenses for the year 2009; and, 3) sample client invoices from 2006. None of these documents addresses Petitioner's business activities in 2010 or 2011.

SPARCcom also provided several undated documents, including: 1) a capability statement; 2) power point presentations; and, 3) an "abbreviated list of last 2 years client prospects." While Petitioner argues these documents demonstrate his business activity during 2010 and 2011, nothing in the documents themselves supports that argument. For example, Petitioner provided the power point presentations but the record contains no evidence if or when he actually made a presentation to a prospective client. On his prospective client list he states in the "comments" section activities that could be considered as "reasonable efforts" to achieve competitive viability but without dates it is impossible to know when those efforts were made. Without any supporting documentation, Petitioner's statements in the client list as to "reasonable efforts" amount to bare claims.

Only two of Petitioner's submissions are within the relevant timeframe: 1) a printout of SPARCcom's website dated August 22, 2011; and, 2) SPARCcom's Certificate of Organization in Minnesota dated September 29, 2011. The website printout demonstrates only that Petitioner had a website as of that date and simply organizing in a different state is not, by itself, a reasonable effort to develop or achieve competitive viability. In these circumstances, the undersigned cannot reasonably conclude the Agency's decision to terminate Petitioner from the 8(a) BD program was arbitrary, capricious, or contrary to law.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Office of Hearings and Appeals and the undersigned have jurisdiction over Petitioner's Appeal.
2. The Administrative Record, as submitted by SBA, is complete.
3. The Administrative Record demonstrates that during 2010 and 2011 SPARCcom & Associates failed to pursue competitive and commercial business in accordance with its business

plan, or failed in other ways to make reasonable efforts to develop and achieve competitive viability in violation of 13 C.F.R. § 124.303(a)(9).

4. SBA's decision to terminate SPARCcom & Associates was not arbitrary, capricious, or contrary to law.

ORDER

IT IS HEREBY ORDERED that Petitioner's Appeal is DENIED and SBA's determination is **AFFIRMED**.

PLEASE TAKE NOTICE that subject to 13 C.F.R. § 134.409(c), this is the Final Decision of the Small Business Administration pursuant to 13 C.F.R. § 134.409(a).

Done and dated August 19, 2013

New York, New York

WALTER J. BRUDZINSKI
Chief Administrative Law Judge
U.S. Coast Guard