

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

IN THE MATTER OF:

Laurus Construction Corporation,

Petitioner

SBA No. BDPT-531

Decided: September 9, 2014

DECISION

On April 15, 2014, Laurus Construction Corporation (“Petitioner”) appealed a determination of the Small Business Administration (“SBA”) to terminate Petitioner's participation in the 8(a) Business Development (“BD”) program. *See* 13 C.F.R. parts 124 and 134. On May 16, 2014, the SBA filed a *Response of the Small Business Administration to the Petition* (“Answer”) submitting that the termination decision was not arbitrary, capricious, or contrary to law, because it was based upon Petitioner's “failure to supply information necessary to establish the continued eligibility of a person SBA reasonably concluded was a 50 (percent) owner and Vice-President Laurus.”

This case is now before this Court pursuant 13 C.F.R. §§ 124.206(a) and 134.102(j)(1) to determine whether the SBA's decision was arbitrary, capricious, or contrary to law.<sup>1</sup>

I. Applicable Law

A. Participation in the 8(a) BD Program.

The 8(a) Business Development program (“8(a) BD program”) was developed to assist eligible small disadvantaged business concerns competing in the American economy through business development. 13 C.F.R. § 124.1. The SBA accepts eligible concerns into the 8(a) BD program for a period of nine years so long as 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 (2005) (citing 13 C.F.R. §§ 124.112(b), 124.6021); *see also Taycom Bus. Solutions. Inc.*, SBA No. BDP-228 (2006).

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<sup>1</sup> 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.

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:

(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). The regulation further provides that a “material breach of any terms and conditions of the 8(a) BD Program Participation Agreement” also constitutes good cause for terminating the participation of a concern. 13 C.F.R. § 124.303(a)(19).

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).

## B. 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 (“[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).

## II. Motion to Strike

Petitioner submitted the following documents in support of its *Appeal Petition*: a letter (“Termination Letter”) dated December 19, 2013; its Articles of Incorporation; two Statements of Information filed with the Secretary of State for the State of California; the results of an investigation conducted by the Office of the Secretary of State for the State of Nevada; a

Dissolution of Marriage Judgment, dated February 14, 2014; and Petitioner's response to the SBA's Letter of Intent to Terminate, dated September 16, 2013. The SBA moves to strike these submissions on the basis that they cannot be considered by the Court.<sup>2</sup>

SBA regulation provides that termination proceedings must be decided “solely on a review of the written administrative record.” 13 C.F.R. §§ 134.401(c) and 134.406(a). However, “the 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).

With the exception of the Termination Letter and Petitioner's Response to the Letter of Intent to Terminate, none of the documents submitted with Petitioner's *Appeal Petition* are included in the *Administrative Record*, which was certified to be complete by the SBA. Petitioner does not proffer that these additional documents were previously submitted to the SBA and erroneously omitted. Absent such a finding, the Court cannot consider these documents that are now being presented as the Court's review must be limited solely to the *Administrative Record*. Accordingly, the SBA's *Motion to Strike* is **GRANTED**.

### III. The Agency's Determination

The SBA's Letter of Intent to Terminate informed Petitioner that the SBA was proposing the termination of Petitioner's participation in the 8(a) BD program for “[a] pattern of failure to make required submissions or responses to SBA in a timely manner.” Specifically, the Letter of Intent to Terminate noted Petitioner's failure to submit a completed Annual Review Update despite previous requests by the Santa Ana District Office for it on April 3, 2013 and August 7, 2013. The SBA recognized that while Petitioner submitted an Annual Review Update, it was missing required documents pertaining to Sharon Chan, who was listed as a 50 percent owner of the concern.

Petitioner was afforded 30 days to respond to the allegations set forth in the Letter of Intent to Terminate, but failed to overcome the basis for the termination. As such, the SBA issued the Termination Letter to Petitioner stating that it was moving forward with Petitioner's termination from the 8(a) BD program. As evidenced by the administrative record, the SBA considered Petitioner's failure to submit a complete Annual Review Update, despite the SBA's numerous requests, when recommending that Petitioner's participation in the 8(a) BD program be terminated.

### IV. 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

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<sup>2</sup> The SBA's *Motion to Strike* notes that two of the documents, the Letter of Termination and Petitioner's response to the Letter of Intent to Terminate are already included in the *Administrative Record*, while the others are not.

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.

It is well established that failure to submit annual review documents as part of the 8(a) BD program, followed by subsequent failures to respond to requests for such documents, constitutes 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 Bus. Solutions, Inc.*, 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 received the first request for the Annual Review Update by letter dated April 3, 2013. The April 3, 2013 letter informed Petitioner of the specific documents and information that must be included in order for the SBA to conduct the annual review. This letter was received by Eric Reyes, who is Petitioner's president and 50 percent owner.

Petitioner submitted its Annual Review Update on June 26, 2013. Notably missing were the completed forms and documents pertaining to Sharon Chan, who with Mr. Reyes are the two disadvantaged owners upon whom Petitioner's eligibility for the 8(a) BD Program was based. Rather than provide the required information for Ms. Chan, Mr. Reyes explained that “her whereabouts [are] currently unknown. We are currently [sic] separated and divorce is pending.”

Still having not received a complete Annual Review Update from Petitioner, on August 7, 2013, the SBA sent an Annual Review Update Reminder and Final Notice (“Final Notice”). The Final Notice advised Mr. Reyes that the Annual Review documents were deficient, and that a failure to submit the missing information within 30 days would be cause for termination. Still, Petitioner did not submit the missing information.

Finally, the SBA sent Petitioner the Letter of Intent to Terminate on September 16, 2013. The Letter of Intent to Terminate afforded Petitioner 30 days to submit a written response to SBA explaining the basis for Petitioner's failure to submit the requested documentation, and justifying the retention of the concern in the 8(a) BD Program. By letter dated October 18, 2013, Mr. Reyes responded explaining that he is in the process of divorcing Ms. Chan, but she “had not been reachable since until May of this year, when he again commenced divorce proceedings.”<sup>3</sup>

On December 19, 2013, the SBA sent Petitioner the Termination Letter informing Petitioner that it was terminated from the 8(a)BD Program for failing to submit all of the Annual Review Update information that had been previously requested. The Termination Letter recognized that Mr. Reyes responded to the Letter of Intent, but that his response was insufficient to overcome the reason cited for termination.

Petitioner appeals the SBA's decision to terminate it from the 8(a) BD Program on the

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<sup>3</sup> While this statement explains Petitioner's basis for failing to submit Ms. Chan's information, it is insufficient to justify Petitioner's retention in the program, because the SBA is unable to confirm the concern's continued eligibility without Ms. Chan's information.

basis that the decision “is based on fraudulent and false information, provided to the SBA by Sharon Chan, and forged documents submitted to the SBA by Sharon Chan.” In support of this claim, Mr. Reyes, submits that Ms. Chan, as agent for Petitioner, listed herself as the point-of-contact, and 50 percent owner of the concern when Laurus Construction Corporation was certified for the 8(a) BD Program.

It is evident in the documents contained within the Administrative Record that the SBA understood Ms. Chan to be a 50 percent owner of the concern, and an individual upon whom eligibility was based. Even Petitioner's documents submitted for the Annual Review Update, and signed by Mr. Reyes, list Ms. Chan as Vice President with 50 percent ownership.

Whether Ms. Chan's status within the company was the result of fraud does not affect the ultimate outcome of this proceeding. A primary purpose of the Annual Review Update is to “[address] the issue of continued program eligibility.” Assuming Ms. Chan's status as 50 percent owner was the result of fraud, the firm's eligibility would certainly be questioned as she is an individual upon whom eligibility was based. Conversely, if Ms. Chan was legitimately a 50 percent disadvantaged owner of the concern, Petitioner would be obligated to provide her information to demonstrate its continued program eligibility.

As noted, *supra*, 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. In order to do so, the SBA relies on complete and accurate Annual Review Update information from program concerns. Petitioner's Annual Review Update package, which lists Ms. Chan as 50 percent owner, was incomplete for failing to include her information. Petitioner's repeated failure to submit Ms. Chan's information—or to otherwise resolve the issue of its continued eligibility in the 8(a) BD Program—precludes the SBA from ensuring that the benefits of the 8(a) BD Program are limited to eligible business concerns. Accordingly, the Court finds the SBA's decision to terminate Petitioner from the 8(a) BD Program to be reasonable and is affirmed.

## V. 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. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

**So ORDERED,**

J. JEREMIAH MAHONEY  
Administrative Law Judge